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The Collective Dimension of Freedom of Religion or Belief in International Law

The Application of Findings to the Case of Turkey

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The Collective Dimension of Freedom of Religion or Belief in International Law – The Application of Findings to the Case of Turkey

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April 2015

Acknowledgements

It's a very refreshing feeling to finally have come to the stage of writing the Acknowledgments - the final part of the thesis. It means that I am almost finished with this immensely big project that has spun over many years.

In the beginning I had a story- a story of injustice. When I first started my research, I began to learn a language and a cluster of norms that would enable me to translate this story into legal questions so that those who hear and speak the human rights law language would be able to understand the story. It is my hope, however, that the story is not completely lost in the jargon as the human story is the reason for this human rights narrative.

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I have benefited greatly from the research seminars held within the framework of the Nordic School in Human Rights Research. In addition the opportunity to study and research at the European University Institute, Florence, has equipped me in my understanding of international law. A significant part of my research however has involved independent and solo work in Turkey: reading cases and interviewing members of various religious or belief communities as well as non-believers. This has been often hard, as I have not had many opportunities to discuss these ideas with colleagues who work in this field. While the thesis perhaps could have been better with such opportunities, I hope that discussions during the defence of the thesis and beyond can help refine ideas further.

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Summary

Pertinent domestic and international developments involving issues related to tensions affecting religious or belief communities have been increasingly occupying the international law agenda. Those who generate and, thus, shape international law jurisprudence are in the process of *seeking* some of the answers to these questions. Thus the need for reconceptualization of the right to freedom of religion or belief continues as demands to the right to freedom of religion or belief challenge the boundaries of religious freedom in national and international law.

This thesis aims to contribute to the process of "re-conceptualization" by exploring the notion of the collective dimension of freedom of religion or belief with a view to advance the protection of the right to freedom of religion or belief. The case of Turkey provides a useful test case where both the domestic legislation can be assessed against international standards, while at the same time lessons can be drawn for the improvement of the standard of international review of the protection of the collective dimension of freedom of religion or belief.

The right to freedom of religion or belief, as enshrined in international human rights documents, is unique in its formulation in that it provides protection for the enjoyment of the rights "in community with others".[1] It cannot be realized in isolation; it crosses categories of human rights with aspects that are individual, aspects that can be effectively realized only in an organized community of individuals and aspects that belong to the field of economic, social and cultural rights such as those related to religious or moral education.[2]

This study centers on two primary questions; first, what is the scope and nature of protection afforded to the collective dimension of freedom of religion or belief in international law, and, secondly, how does the protection of the collective dimension of freedom of religion or belief in Turkey compare and contrast to international standards? Section I explores and examines the notion of the collective dimension of freedom of religion or belief, and the scope of its protection in international law with particular reference to the right to acquire legal personality and autonomy religious/belief communities. In Section II, the case study on Turkey constitutes the applied part of the thesis; here, the protection of the collective dimension is assessed with a view to evaluate the compliance of Turkish legislation and practice with

[1] Found both in the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. doc. A/810, p. 71, 1948 (hereafter, "the Universal Declaration", the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), p. 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 16.12.1966 (entered into force on 23.03.1976) (hereafter the "ICCPR") and the European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Rome, 4 November 1950, U.N.T.S. 213:222, (entered into force on 3.09.1953) (hereafter "ECHR"), and the Declaration on the Elimination of Religious Intolerance and Discrimination, GA Res. 36/55, 36 U.N. GAOR Supp. (No. 51), p. 171, U.N. Doc. A/36/51, 1981 (hereafter "1981 Declaration").

[2] Martin Scheinin, "Article 18", in Gudmundur Alfredsson and Asbjord Eide (eds.) *The Universal Declaration of Human Rights, A Common Standard of Achievement*, (The Hague: Martinus Nijhoff 1999), p. 392.

international norms as well as seeking to identify how the standard of international review of the collective dimension of freedom of religion or belief can be improved.

Sammanfattning

Relevanta nationella och internationella utvecklingar som involverar frågor kring spänningar som påverkar religiösa eller tros samhällen har börjat allt mer att ockupera internationella rättens agenda. De som genererar och därmed utformar internationella rättens rättspraxis försöker att söka några av svaren på dessa frågor. Därmed behovet av re-konceptualisering av rätten till religions- och trosfrihet fortsätter som krav för rätten till religions- och trosfrihet som utmanar gränserna för religionsfriheten i nationell och internationell rätt.

Detta examensarbete syftar till att bidra till processen med "re-konceptualisering" genom att utforska begreppet av kollektiva dimensionen av religions- och trosfriheten i syfte att främja skyddet av rätten för religions- och trosfrihet. Fallet med Turkiet ger ett användbart testfall där både den inhemska lagstiftningen kan bedömas mot internationella standarder, medan samtidigt lärdomar kan dras för att förbättra standarden på internationell granskning av skyddet av den kollektiva dimensionen av religions- och trosfrihet.

Rätten till religions- och trosfrihet, såsom de fastställs i internationella handlingar om mänskliga rättigheter, är unik i sin formulering i det att den ger skydd för åtnjutandet av de rättigheterna "i gemenskap med andra". Det kan inte inses isolerat; den korsar kategorier av mänskliga rättigheter med aspekter som är individuella, aspekter som effektivt kan realiseras endast i en organiserad gemenskap av individer och aspekter som hör till området för ekonomiska, sociala och kulturella rättigheter, tex som rör religiös eller moralisk utbildning. [3]

Denna studie kretsar kring två primära frågor; första, vad är omfattningen och arten av skydd som ges till den kollektiva dimensionen av religions- och trosfrihet i internationell rätt, och för det andra, hur skyddet av den kollektiva dimensionen av religions- och trosfriheten i Turkiet är jämfört och är kontrast till internationella

[3] Martin Scheinin, “Artikel 18”, i Gudmundur Alfredsson och Asbjord Eide (eds.) *Den allmänna förklaringen om mänskliga rättigheter, en gemensam riktlinje*, (The Hague: Martinus Nijhoff 1999), p. 392.

standarder? Avsnitt I utforskar och undersöker begreppet av den kollektiva dimensionen av religions- och trosfriheten, och omfattningen av dess skydd i internationell rätt med särskild hänvisning till rätten att få status som juridisk person samt autonomi religiösa/ tros samhällen. I avsnitt II, fallstudien om Turkiet utgör tillämpad del av examensarbetet; här bedöms skyddet av den kollektiva dimensionen i syfte att utvärdera Turkiets lagstiftning och praxis med internationella standarder samt att försöka identifiera hur standarden på internationell granskning av den kollektiva dimensionen av religions- och trosfriheten kan förbättras.

List of Abbreviations

ECtHR	European Court of Human Rights
HRCttee	Human Rights Committee
UN	United Nations
OSCE	Organization for Security and Cooperation in Europe
ICCPR	International Covenant on Civil and Political Rights
ECHR	The Convention for the Protection of Human Rights and Fundamental Freedoms
CoE	Council of Europe
Diyanet	Presidency of Religious Affairs (Diyanet İşleri Başkanlığı)
DIB	Presidency of Religious Affairs (Diyanet İşleri Başkanlığı)
CM	Committee of Ministers of the Council of Europe
UDHR	Universal Declaration on Human Rights
MERA	Ministry of Education and Religious Affairs
AC	Advisory Council
FCNM	Framework Convention on National Minorities
ASIL	American Society of International Law
CAT	Convention Against Torture
ICCPR	International Covenant on Civil and Political Rights
CEDAW	Convention on Discrimination Against Women
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Rights of All Migrant Workers and Members of the Their Families
CRC	Convention on the Rights of the Child
AYM	Constitutional Court
DKAB	Religious Knowledge and Knowledge of Ethics course
MGK	National Security Council (Milli Güvenlik Kurulu)
ERG	Education Reform Initiative
TESEV	Turkish Foundation on Economic and Social Studies
VGM	Directorate of Foundations
CHP	Republican People's Party
AKP	Justice and Development Party
IPKV	Istanbul Protestant Church Foundation
KKV	Kurtuluş Churches Foundation
YGAV	Seventh Day Adventists Foundation
TDV	Turkish Diyanet Foundation
CCYD	Association for the Construction of the Çankaya Cem House
RUMVADER	Association for the Support of Greek Foundations

Chapter 1

Introduction

1.2 The Significance of the Collective Dimension of Freedom of Religion or Belief

Pertinent domestic and international developments involving issues related to tensions affecting religious or belief communities have been increasingly occupying the international law agenda. As a matter of fact, these issues have been *always* pertinent for suppressed belief communities all over the world, however, together with the challenges of accommodating diverse religious traditions in the West, intensified by a particular security context in which they are perceived, there appears to be greater focus on these issues. Amidst legislation and practices that do not seem to provide adequate solutions to new, and indeed long-standing, demands related to the protection of freedom of religion or belief, international law and adjudicators are ever more given the task of providing answers to how we can live with our differences- in particular those of a religious nature- in peace, while respecting human rights, in particular freedom of religion or belief. Indeed human rights law, in particular provisions pertaining to the right to freedom of religion or belief, may provide some of the answers. Or, perhaps more accurately, those who generate and, thus, shape international law jurisprudence are in the process of *seeking* some of the answers. Freedom of religion or belief is in need of re-conceptualization, yet again, both as a matter of national and international law.[4] The need for re-conceptualization continues as demands pertaining to the right to freedom of religion or belief challenge the boundaries of religious freedom in national as well as international law. This thesis aims to contribute to the process of "re-conceptualization" by exploring the notion of the collective dimension of freedom of religion or belief with a view to advance the protection of the right to freedom of religion or belief. The case of Turkey provides a useful test case where both the domestic legislation can be assessed against international standards, while at the same time lessons can be drawn for

[4] W. Cole Durham Jr. "Perspectives on Religious Liberty: A Comparative Framework" in J.D. van der Vyder and J.Witte Jr. (Eds.) *Religious Human Rights in Global Perspective*, (Martinus Nijhoff Publishers 1996).

the improvement of the standard of international review of the protection of the collective dimension of freedom of religion or belief.

The right to freedom of religion or belief is a fundamental part of the indivisible and interdependent human rights protection scheme. It is "far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others." [5] It is a multi-faceted right that has bearings on many areas of the lives of individuals and groups of believers. For many individuals it is the right to *be* as they chose to be- rooted deeply in the autonomy of the individual. For many religious/belief communities it provides vital guarantees for their survival. The right to freedom of religion or belief, as enshrined in international human rights documents, is unique in its formulation in that it provides protection for the enjoyment of the rights "in community with others".[6] It is a human right that cannot be realized in isolation, indeed, it crosses categories of human rights with aspects that are individual, aspects that can be effectively realized only in an organized community of individuals and aspects that belong to the field of economic, social and cultural rights such as those related to religious or moral education.[7] While freedom of religion or belief can be exercised individually it is generally the case that persons sharing the same belief organize themselves in various ways and thus engage in acts they do "together".

Two important assumptions have served as starting points for this thesis. The first assumption is the recognition of a need to advance the effective international and national protection of the collective dimension of the right to freedom of religion or belief that is firmly grounded on the international provisions protecting the right to freedom of religion or

[5] U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994), General Comment No.22 of the Human Rights Committee on Article 18 para.1.

[6] Found both in the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. doc. A/810, p. 71, 1948 (hereafter, "the Universal Declaration", the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), p. 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 16.12.1966 (entered into force on 23.03.1976) (hereafter the "ICCPR") and the European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Rome, 4 November 1950, U.N.T.S. 213:222, (entered into force on 3.09.1953) (hereafter "ECHR"), and the Declaration on the Elimination of Religious Intolerance and Discrimination, GA Res. 36/55, 36 U.N. GAOR Supp. (No. 51), p. 171, U.N. Doc. A/36/51, 1981 (hereafter "1981 Declaration").

[7] Martin Scheinin, "Article 18", in Gudmundur Alfredsson and Asbjord Eide (eds.) *The Universal Declaration of Human Rights, A Common Standard of Achievement*, (The Hague: Martinus Nijhoff 1999), p. 392.

belief.[8] This assertion does not, however, imply that the individual dimension is sufficiently protected, inferior or less important, nor does it assert that there is a greater need to focus on the collective dimension compared to the individual dimension. On the contrary, there is a need to improve the protection of the right to freedom of religion or belief both in its individual and collective dimensions in very many diverse states as it is reflected in the annual and thematic reports of the UN Special Rapporteur on Freedom of Religion or Belief.[9] The thesis, however, chooses to focus and examine the collective dimension. The second assumption pertains to the case of Turkey; a better understanding and implementation of the collective dimension of freedom of religion or belief would greatly advance the protection of freedom of religion or belief in Turkey. It has been assumed that many unresolved issues outstanding in Turkey which are at the core of the right to freedom of religion or belief could be resolved if applicable international human rights standards would be implemented.

Originally, an ambition for this thesis has been to seek to understand how the Turkish public authorities made decisions concerning the rights that are explored herein. The nature of criteria used by public authorities and the manner in which they balanced interests would have provided crucial insight into these important processes. However, this has proved to be an impossible task due to the reluctance on the part of public administrators to give interviews or when agreed to give an interview, having provided very little and general information. Would it have been possible to enlist their full cooperation the thesis would have provided a more whole picture of the situation.

The important work of Arcot Krishnaswami entitled "Study of Discrimination in the Matter of Religios Rights and Practices" has been an important inspiration for this thesis.[10] Krishnaswami's study presents a broad view of the manifestations of religion or belief and a

[8] General Comment 22, *supra* note 2.
[9] The reports of the UN Special Rapporteur on Freedom of Religion or Belief are full of vivid examples of restrictions of both individual and collective dimensions of freedom of religion or belief. Thematic reports such as on the right to conversion and issues of recognition of religious communities also present the problems and sensitivities surrounding both dimensions. On the right to conversion see Interim Report of the Special Rapporteur on Freedom of Religion or Belief, A/67/303, 13.08.2012. On freedom of religion or belief and recognition issues see A/HRC/19/60, 22.12.2011.
[10] A. Krishnaswami, Study of Discrimination in the Matter of Religious Rights and Practices, U.N. Doc. E/CN.4/Sub.2/200/Rev.1, U.N. Sales No. 60. XIV.2 (1960).

realistic description of the the various forms of tensions at play in relation to states' ensuing obligations.[11] This broad view was a result of a willingness and readiness to be informed by the diverse manifestations of religion or belief of believers following diverse religious or belief traditions from around the world. He recognized the distinct character of the right to freedom of thought, conscience, religion or belief based on the unidentical demands religions or beliefes make of their followers.[12] In particular, however, his early recognition of the importance of the collective aspect of freedom of religion or belief, precisely because interventions and regulations on the part of states are more frequent when manifestations are performed "in community with others" than when they are performed "alone", has concurred with my own observations in the Middle East and Turkey, in particular. This has led me to further explore the scope of the collective dimension of freedom of religion or belief and seek to advance its protection as it appeared to have a key function in advancing the protection of human rights and specifically the right to freedom of religion or belief by way of creating normative demands to correct state practice.

Turkey, at first glace, with its reference to 99% Muslim population may give the impression of a religiously homogenous society.[13] However a slightly closer look reveals that Turkey is a true test case for freedom of religion or belief for individuals and communities with its diverse Muslim denominations and "other" religious/belief groups such as Jews, Christians, the Bahai, the Yezidi, atheists and the unconcerned who exist in a secular State and a predominantly *Sunni*-Muslim society where both are influenced by the *Sunni*-Muslim religious tradition. Turkey has undertaken international human rights obligations applicable to the protection of the collective dimension of freedom of religion or belief as well as having a general constitutional commitment to protect freedom of conscience and worship.[14] Nevertheless, national legislation and practice lags far behind international norms. The

[11] *Ibid*.
[12] *Ibid*.
[13] The reference to 99% Muslim population is widely made by politicians and policy makers however, it has not been possible to confirm this assumption by any public institution. An e-mail inquiry to the General Directorate of Civil Registration and Nationality was answered stating that "statistical information pertaining to the religious affiliation of our public is not kept" Email correspondence with the General Directorate of Civil Registration and Nationality on 25.01.2012.
[14] For an overview of Turkey's international human rights obligations see Chapter 5 of this study. Article 24 of the 1982 Constitution protects freedom of conscience, religion or belief. The Constitution of the Turkish Republic, entry into force on 7.11.1982, for text in English see the translation of Erhan Yaşar, http://www.anayasa.gen.tr/1982Constitution-EYasar.htm , accessed 16.01.2015.

paradoxical arrangements ensuing the unique state-religion affair, such as the constitutional institution of the Diyanet and compulsory Religious Knowledge and Ethic lessons, the narrow scope of freedom of conscience, religion or belief and particular understanding of secularism and nationalism are presented as only some of the challenges. In this complex context the collective dimension of freedom of religion or belief is viewed with suspicion and suffers, specifically because of its *collective* nature. The complexity of the Turkish case presents itself as an exceptionally useful case to test national complience with international norms and the standard of international review.

1.2. Objective, Method and Outline of the Study

This study centers on two primary questions; first, what is the scope and nature of protection afforded to the collective dimension of freedom of religion or belief in international human rights law, and, secondly, how does the protection of the collective dimension of freedom of religion or belief in Turkey compare and contrast to international standards? Thus the study consists of two main sections. Section I explores and examines the notion of the collective dimension of freedom of religion or belief, and the scope of its protection in international law with particular reference to the right to acquire legal personality and autonomy religious/belief communities. In Section II, the case study on Turkey constitutes the applied part of the thesis; here, the protection of the collective dimension of freedom of religion or belief is assessed with a view to evaluate the compliance of Turkish legislation and practice with international norms as well as seeking to identify how the standard of international review of the collective dimension of freedom of religion or belief can be improved.

In Section I, the discussion primarily draws from the applicable international human rights instruments, in particular the ICCPR and the ECHR,[15] and the jurisprudence of the HRCttee and Strasbourg organs and to a certain degree from the work of the UN Special Rapporteur on Freedom of Religion or Belief. Documents of a soft law nature, such as guidelines are also included in the analysis. Secondary resources, such as books, journal writings as well as

[15] Primarily and directly by Article 18 of the ICCPR and Article 9 of the ECHR. For a compilation of UN general provisions relevant to the freedom of religion or belief see the Digest of the Special Rapporteur on freedom of religion or belief, http://www.ohchr.org/EN/Issues/FreedomReligion/Pages/Standards.aspx accessed 16.01.2015.

reports have also been relied upon. The choice of normative sources- the UN protection scheme and the reginoal CoE protection schemes- has been deliberate in order to benefit from and provide a comparative view that this choice will provide. Throughout the study it has become clear that there are considerable diffrences in the conceptions of these adjudicators of the respective systems.

Section II employs the case-study method to study the protection of the collective dimension of freedom of religion or belief in Turkey. The case study method is particularly suitable for this project as it gives the opportunity to study a phenomenon in a real life context, as well as allowing for an in depth and nuanced study of a complex situation. The scope of the study is limited to the exercise of the collective dimension outside the Diyanet İşleri Başkanlığı (The Presidency of Religious Affairs, hereafter, the Diyanet or DİB hereafter) framework. In order to ensure a holistic approach, the thesis does not attempt to examine situations of religious communities individually. Instead the study has a thematic approach and will refer to individual cases to the extent that they are relevant for the thematic consideration. The scope of the investigation is confined to the themes that are explored in the theoretical part of the thesis, namely, the right to acquire legal entity status and the right to freedom in the internal matters of religious/belief communities. The study does not seek to be exhaustive, which is not possible, rather seeks to provide a comprehensive account and examination of the extent of protection of the collective dimension.

The choice of the normative framework, the collective dimension of the right to freedom of religion, as opposed to a minority rights framework, has proved to be strategically effective in the Turkish context. In brief, Turkey adopts a narrow approach (recognizing only Greek, Armenian and Jewish communities as minorities based on a restrictive interpretation of the Lausanne Peace Treaty, 1923) for the definition of minorities.[16] On the other hand, so far as legal commitments are concerned the right to freedom of religion or belief is protected through Turkey's international obligations (in particular the ICCPR and the ECHR) as well as through constitutional and other legislative provisions. Thus, while not underestimating the obligation of protection within the Lausanne framework, a fundamental set of legal

[16] For more on Turkey's application of the Lausanne Peace Treaty see Chapter 5.

obligations under Turkey's national and international legal commitments that provide a potentially effective normative protection in its own right as well as being complementary to the Lausanne protection scheme exists. Moreover, in contrast to Lausanne, the international human right treaties that Turkey is a party to have more comprehensive compliance review mechanism. This approach has had the added advantage of being inclusive of, not only minority communities, but all belief communities, including the majority *Sunni* Muslim community in Turkey. Turkey's legal and political commitments in the sphere of freedom of religion or belief offer critical potential for advancing freedom of religion or belief. The scope of protection provided through the collective dimension of freedom of religion or belief provisions lends itself to an effective legal framework for the protection of acts that many religious/belief communities engage in collectively.

In the case of Turkey, the primary normative sources have included the Turkish legislation and case-law. In order to assess the compatibility of national legislation and practice with international law pertinent to the key aspects of the collective dimension of freedom for religion or belief first of applicable legal framework are described. The case study focuses largely on primary sources such as legal instruments, judgments, administrative body decisions and interview material. Secondary sources, including books, journal articles, reports and newspaper articles have also been used, in particular with reference to historical, political and sociological background. The approach of the Turkish judiciary is submitted through a critical analysis of case law and relevant executive and administrative decisions are included. Yet, the method employed in this study assumes that analysis based on only written national laws will be inadequate to assess domestic compliance with international standards. This assumption is based on observations made during interviews with various religious community representatives who pointed to important administrative processes that determine rules and outcomes relevant for their internal affairs. Some of these administrative processes have not become the subject of legal disputes but the administrative processes and decisions are indicative of applied rules and practice in the field of freedom of religion or belief. For this reason it has been necessary to determine the content and nature of rules that are applied and patterns established through the decisions of public administrators affecting communities or persons' exercising their rights. Finally, it is assumed that the rights holders need to be included in the research on compliance control in

order to acquire knowledge on practice and a genuine understanding on trends and current issues that belief communities face in Turkey.

The interviews that were conducted with representatives of religious/belief communities were not concerned with the collection of quantitative data, instead with gaining insight into relevant issues and the context, thus in depth interview method was employed which is considered a key tool for hearing and understanding in social science.[17] The interviews guided the identification of practice and patterns, applicable rules or lack of rules and the extent to which these meet the needs of the various religious/belief communities and thirdly, problem areas. Finally, they were an effective means of including the perspective of religious/belief communities who provided a primary source and guidance for the research.[18] On the other hand, some methodological challenges were encountered as regards access to information. Interviews that have been conducted and interview requests that have been turned down, demonstrate that confidentiality was a concern for interviewees and potential interviewees. Those who agreed to interviews, at times, showed reluctance to provide specific references (case number, name of institutions etc.) on relevant cases or administrative processes and decisions. The interviews were conducted in Turkish and then the findings were translated as they have been incorporated into this work.

Chapter 2 introduces the notion of the collective dimension of freedom of religion or belief. Key provisions guaranteeing freedom of religion protect the right of individuals to, either alone or *in community with others* and in public and private, to manifest their religion or belief, in worship, teaching, practice and observance. It is argued that the collective dimension of freedom of religion or belief are based, both on the acts that are protected which are either exercised in community with others or those who benefit from protected acts are groups and the diverse forms of collectivities that exercise this right. The state-religion relations that are deeply contextual are highlighted in this context as being challenged by the normative demands created by obligations ensuing from the provisions protecting the collective dimension of freedom of religion or belief. The attempt to identify

[17] Irving Seidman, *Interviewing as Qualitative Research: A Guide for Researchers in Education and Social Sciences*, (New York: Teachers College Press, 2006).
[18] Phillipp Mayring, *Nitel Sosyal Araştırmaya Giriş* [Introduction to Qualitative Social Research], (Adana: Baki Kitapevi, 2000), p. 22.

these normative demands reveals that the latter are less than clear and that the restraint of international adjudicators has an undermining effect on the protection of freedom of religion or belief for all.

When it comes to individuals coming together in the exercise of their right to freedom of religion, the right to acquire legal personality gains a significant role as an enabling and empowering right. Chapter 3 seeks to explore the protection of the right to acquire legal personality for religious or belief communities in relation to relevant human rights law. Firstly, the importance and implications of legal personality on the enjoyment of the right to freedom of religion or belief for religious/belief communities are examined. Secondly, grounds for restrictions and other legal problems that arise in the application of restrictions are analyzed with a view to assess and draw out the potential of international review to curb repressive legislation and practice.

Chapter 4 explores the notion of autonomy -freedom in the internal matters- of religious/belief communities. Considering that autonomy can have a potentially extensive scope, to a great extent, determined by the comprehensiveness of the dogma of the religion or belief in question, a broad approach to autonomy and its manifestations may be employed. So far, autonomy has been generally viewed as restricted to the organizational matters of religious/belief communities and this sphere has been respected. It is argued that if autonomy perspective is included as an interpretive tool in the review of cases or domestic protection of the collective dimension of freedom of religion or belief than states may be asked to accommodate the autonomous features of religious/belief communities have a greater burden to justify restrictions imposed. In the autonomous sphere many different aspects of the community's manifestations of religion or belief are found, both prescribed and motivated by the belief in question such as freedom in dogma and teaching, *inter alia*, establishment of places of worship, teaching of religion or belief, freedom in internal organization. In addition, the use of religious law in certain matters may be a protected form of manifestation of religion or belief in practice in international law is explored.

Section II of the thesis aims to present a case study on the protection of the collective dimension of freedom of religion or belief; the case study on Turkey focuses on two key

aspects of the collective dimension of freedom of religion or belief; the right to acquire legal personality and freedom in the internal affairs of religious/belief groups with particular reference to the right to establish places of worship, the right to teach religion or belief in suitable places, the right to elect and appoint religious leaders and the right to observe days of rest and holidays in accordance with religion or belief.

The Turkish context is introduced in Chapter 5, with a view to provide the demographic and historical background as well as the legal basis for the themes to be examined in the next two chapters. This Chapter critically examines the protection of the right to freedom of religion or belief in the domestic legal framework. Here Turkey's international human rights commitments including its minority protections scheme ensuing the Lausanne Peace Treaty and the Constitutional protection of freedom of religion or belief is presented. In addition to and analysis of the principle of secularism (laiklik), the Presidency of Religious Affairs (the Diyanet) and the compulsory Religious Culture and Ethics lessons which stand out as paradoxical state-religion arrangements. Moreover, the boundaries of the right to freedom of religion or belief, particularly in its individual dimension, are outlined by considering key issues such as coercion to disclose religion or belief, manifestation of religion or belief-religious symbols- in public sphere and conscientious objection to military service. It will be argued that manifestations of religion or belief are, often, restricted based on the aims to protect national security, secularism and upholding nationalism which seem to be in affect ultimately protecting the interests of the state. Moreover, in order to illustrate the changing paradigm pertaining to state-religion relations in Turkey in the context of freedom of religion or belief a complementary historical overview is presented. It is assumed that these are indispensible for our understanding of the relevant legislative, judicial and administrative rules, interpretation of the law and measures pertaining to the collective dimension of freedom of religion or belief and challenges and opportunities therein.

Chapter 6 focuses on the question of to what extent, if any, the right to acquire legal personality is protected in the Turkish legislation and practice. Due to the availibility of relevant case-law it has been possible to engage in extensive analysis of jurisprudence in this part. In Turkey, currently, no religious/belief group may acquire legal personality, as such. The Chapter seeks to examine the Turkish legislation and practice pertaining to acquisition of

legal personality – to the extent that is applicable for belief communities- and make an assessment of compatibility with international standards determined in Chapter 3. Therefore the available forms of legal entity, namely associations and foundations, are critically assessed, particularly regarding their accessibility, suitability and adequecy for religious/belief groups. It will be demonstrated that the denial of the right to acquire legal personality for belief/religious groups, *per se*, and that the existing alternative formulas lag far behind the standards created by relevant international law provisions. Because of the relevance of the historical conceptions and developments pertaining to legal personality of religious/belief communities a complemantary historical account is included.

The legislation and practice pertaining to the right to establish places of worship, the right to teach religion or belief in suitable places, the right to elect and appoint religious leaders and the right to observe days of rest and holidays in accordance with religion or belief are examined in Chapter 7 with a view to critically assess the extent of protection afforded to the freedom of religious/belief groups in their internal matters. To this end, in addition to relevant legislation, administrative practices that illustrate the *rules of practice* and outcomes that indicate the effectiveness of the domestic protection schemes are included in the discussion. Unfortunately, many issues covered in this Chapter have not, yet, been the subject of domestic court cases, therefore, the discussion had to focus on administrative processes. This examination has inevitably included, state involvement in religion through the provision of religious services, in particular places of worship and training of religious personnell and teaching of religion, and implicitly raised questions concerning the ramification of such involvement in the protection of the right to freedom of religion or belief and the duty on the part of the state to observe the principle of neutrality and ensure pluralism.

Finally, some consideration of this thesis' contribution to the accumulated academic research is due. The issue of religious freedom in Turkey has been the subject of limited academic study. The focus of study has been the principle of laicite, as well as sociology of religion. The right to freedom of religion or belief has been discussed with laicite in the center and in a limited way in relation to minority rights and fundamental rights in general. As far as the study of the right to freedom of religion or belief in the legal academia is concerned the

interest has emerged with the study of relevant international norms in this field. The doctoral thesis of Emre Öktem in 2002 has provided the first comprehensive study on the right to freedom of religion or belief in international law.[19] The study of Berke Özenç on the European Convention on Human Rights and Freedom of belief,[20] and Hande Seher Demir's masters thesis dealt with domestic religious freedom issues in the context of ECtHR judgments on Turkey, such as the headscarf issue, the religion section on national identity cards and compulsory Religious Culture and Ethics courses.[21] More recently, a comprehensive overview and analysis of constitutional protection of freedom of religion and the approach taken in judicial assessment has been a valuable contribution to the field.[22] Considering the limited, yet in the recent years, increasing academic study on the right to freedom of religion or belief of Turkey's normative field, this thesis is, yet, another complementary addition to the knowledge and discussions in this field. There is no study that explicitly focuses on the collective dimension of the right to freedom of religion or belief and aims to discuss domestic issues in light of international law and vice versa, discuss international law issues in light of domestic issues. Therefore this thesis makes a substantial contribution to the academic knowledge in Turkey.

Since we do not yet have a coherent and well-developed theory of the 'collective dimension of freedom of religion or belief' or a comprehensive theory of it in legal doctrine" the aim of this thesis has been to promote an understanding of the matter. Thus the thesis offers original comparative insights pertaining to the understandings of the UN Human Rights Committee and the Strasbourg organs – and, to a lesser extent, that of the OSCE – to the scope and protections relating to the collective dimension of freedom of religion or belief. In addition the thesis offers an introduction to the Turkish system of protection of freedom of religion or belief to an international audience.

[19] A. Emre Öktem, *Uluslararası Hukukta İnanç Özgürlüğü* [Freedom of Religion or Belief in International Law], (Liberte 2002).
[20] Berke Özenç *Avrupa İnsan Hakları Sözleşmesi ve İnanç Özgürlüğü* [The European Court of Human Rights and Freedom of Religion or Belief] (Kitap 2006).
[21] Hande Seher Demir, *Avrupa İnsan Hakları Mahkemesi Kararları Işığında Türkiye'de Din ve Vicdan Özgürlüğü* [Freedom of Religion and Conscience in Turkey in Light of the Decisions of the European Court of Human Rights], (Ankara: Adalet 2011).
[22] Hasan Saim Vural, *Türkiye'de Din Özgürlüğüne İlişkin Anayasal Güvence* [Constitutional Protection of Freedom of Religion in Turkey], (Ankara: Seçkin 2013).

Chapter 2

The Notion of the Collective Dimension of Freedom of Religion or Belief

2.1. Introduction

The right to freedom of religion or belief includes interrelated and interdependent individual and collective aspects; without one or the other the understanding and protection of this right would be incomplete. Indeed, the right to freedom of religion or belief crosses between individual and collective categories of human rights; it comprises of individual aspects, where an individual can enjoy the right to having a thought, religion or belief and manifesting it in worship, teaching, practice and observance as well as collective aspects that can only be enjoyed through organized community activity or acts that are enabled through the establishment of institutions.

The term *collective dimension of freedom of religion or belief or religious group rights*, is often referred to in relation to the rights of religious and/or charity institutions,[23] and the possible tensions between a religious group and individuals affiliated with the group in question.[24] Yet, such a constricted understanding based on these categories is bound to lead to a narrow or selective approach to understanding the collective dimension of the right to freedom of religion or belief. The variety of collectivities and the acts that are protected within the scope of the provisions protecting the right to freedom of religion or belief compels a broader and holistic understanding. A broad understanding of the collective dimension would be an important tool for the identification of the various forms of acts and subjects that are protected. In addition, the legal framework created with the relevant religious freedom provisions has the added advantage of demarcating the boundaries of the collective dimension of the right to freedom of religion or belief considering that the exercise of this right may potentially lead to interferences in the rights of others. It is argued that a better understanding of the collective dimension of the right to freedom of religion or belief

[23] Pieter van Dijk, F. von Hoof, A. van Rijn, Leo Zwaak, *Theory and Practice of the European Convention on Human Rights*, (Intersentia, 2006), p. 764.
[24] Anat Scolnikov, *The Right to Religious Freedom in International Law: Between Group Rights and Individual Rights*, (Routledge, 2011).

will contribute to the improvement of the protection of the right to freedom of religion or belief as a whole.

Amidst legislation and practices that do not seem to provide adequate solutions to new (and indeed long-standing) demands related to the protection of freedom of religion or belief, international law and adjudicators are increasingly given the task of providing answers to how we can live with our religious differences- in particular those of a religious nature- in peace, while respecting human rights- in particular freedom of religion or belief. Indeed human rights law, in particular provisions pertaining to the right to freedom of religion or belief, may provide some of the answers. Or, perhaps more accurately, those who produce and thus shape international law jurisprudence may be in the process of seeking some of the answers. In this context, as will be explained below, the protection of the collective dimension of freedom of religion or belief is particularly relevant in providing the standards foreseen in international human rights law that must be protected in domestic legal systems.

This chapter presents the legal basis of the collective dimension of freedom of religion or belief and explores its substantive scope in terms of the acts it protects, the nature of the rights holders and its boundaries. It is argued that, although firmly grounded in the international provisions protecting the right to freedom of religion or belief, more often than not, the collective dimension of freedom of religion is poorly protected, constitutes a challenge to traditional state-religion relations and therefore has a formative effect on the latter and that the improvement of the protection of the collective dimension will greatly advance the protection of the right to freedom of religion or belief. This Chapter constitutes a key part of the thesis as by seeking to clarify the notion of the collective dimension of the right to freedom of religion or belief in international law it attempts to improve our understanding of this right. It is assumed that a better understanding will contribute to advancing its protection.

It is perhaps helpful to already flag up in the beginning that this thesis does not assume that the collective dimension of freedom of religion or belief is more important and should enjoy extra protection than the individual dimension of freedom of religion or

belief or hierarchically superior to the latter. In fact the inter-dependency and inter-connectedness of these complementary dimensions would inevitably make such attempts futile. As it has been underlined in the Introduction Chapter, it is believed that the notion of the collective dimension of freedom of religion or belief is a helpful framework for advancing the right to freedom of religion or belief as a whole.

An assumption of this thesis is that there is reluctance on the part of states to protect the collective dimension, precisely because of the collective nature of the right. This reluctance results in a failure to keep up with the standards foreseen in international law. Krishnaswami insightfullly observed that:

> Intervention by the State to regulate or to limit manifestations of a religion or belief are [sic] more frequent when these manifestations are performed "in community with others" than when they are performed "alone".[25]

It must be ackonowledged, however, that the collective dimension is intrinsic to the protection of the right to freedom of religion or belief and warrants protection as such.

2.2. The Relevance of State-Religion Relation

Since historically and contextually fashioned state-religion relations play a significant role in the nature and degree of protection conferred to the right to freedom of religion or belief, the collective dimension in particular, it is important to highlight it as an important overarching theme in this Chapter. This brief analysis does not change the essential legal question of the Chapter, however, demonstrates the multi-dimensional (*inter alia*, political, historical, policy) nature of the protection of the collective dimension of freedom of religion or belief. Following a presentation of the implications of state-religion relations for the protection of the collective dimension the nature of the normative demands made by international law is outlined below.

The position and role of religion or the role of a particular religion in a state or the role it had in the history of a state have an immense influence on existing structures related to and relations between state and religious communities and attitudes towards newly

[25] A. Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, U.N. Doc. E/CN.4/Sub.2/200/Rev.1, U.N. Sales No. 60. XIV.2 (1960).

emerging religious groups. In his pivotal study Krishnaswami drew attention to the fact that interference by the states to management of religious affairs varies according to the relations between state and religious communities and cautioned against discrimination in situations where the State is separated from religion but in its regulatory role prescribes uniform treatment to religions or beliefs which in fact make different demands to their adherents and attach varying degrees of importance to different manifestations.[26] Indeed, the relationship between religious/belief groups and state does not have a standard form but takes very many different forms in each society.[27] While in some countries there appears to be a somewhat clear separation between religion and State, such as France, according to a world survey, a large number of countries conceive a relationship between the state, its institutions and administration and a current or historically, predominant religion or religions of its citizens where this relationship is quite diverse and reflects constant adaptation.[28] Scheduled Caste status and the individual's religious affiliation in the Indian Constitution,[29] the special status given to the Apostolic Autocephalous Orthodox Church in the Georgian Constitution,[30] the recognition of Islam as the state religion in numerous countries,[31] are only a few examples. It is not difficult to imagine that hardly, in any country, do belief groups enjoy freedom of religion or belief in a substantively equal manner. The variety of religious demographics and different perceptions as to appropriate relationship between religious institutions and State lead some to consider that "it is necessary to consider arguments in favor of freedom of religion or belief that

[26] *Ibid*.
[27] For a survey of different State – religious group relations in the world see, among others, Jeroen Temperman, *State-Religion Relationships and Human Rights Law*, (Martinus Nijhoff Publishers, 2010), Javier Martinez Torron and Cole Durham, *Religion and the Secular State*, (Bringham Young University, 2010) and an earlier study see K. Boyle and J. Sheen (eds.) *Freedom of Religion and Belief A World Report*, (London:Routledge, 1997).
[28] *Ibid*.
[29] Report of the UN Special Rapporteur on Freedom of Religion or Belief, A/HRC/10/8/Add.3., 26.01.2009, para. 27-28.
[30] Article 9, Constitution of Georgia, 1995 (as amended in 2003).
[31] Report of the United States Commission on International Religious Freedom, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Majority Muslim Countries and Other OIC Members*, 2012, p. 8. Accessible at http://www.uscirf.gov/reports-briefs/special-reports/comparative-study-constitutions-oic-countries-2012-update , accessed 16.01.2015.

do not rely on strict separation between Church and State."[32] In contrast, however, others have called for a right to religiously neutral government.[33]

International human rights law provisions relevant for the protection of the right to freedom of religion or belief, mindful of the diverse types of state-religion arrangements, abstain from imposing a particular way of association between state and religion. They do not explicitly identify particular forms of state-religion identification as a condition for compliance with human rights norms, nor do they explicitly condemn particular models of state-religion relations.[34] Temperman argues that this situation should be considered as "realities of international law and international relations".[35] Nevertheless, they do not provide a *carte blanc* to states in this sphere, either. Normative demands created by international human rights law provisions protecting the collective dimension of freedom of religion or belief as well as others, inevitably have implications for state-religion relations. These legal provisions have significant political consequences,[36] and therefore, often, require alteration in the established state-religion relations where these give rise to unjustified interferences in the exercise of the right to freedom of religion or belief.[37] It also follows, then, that the effective protection of the collective dimension of freedom of religion will be a factor that may, through normative demands, shape state-religion relations so as to bring them in line with the requirements of human rights law. The fulfillment of the obligation on the part of the state to ensure pluralism, equality and non-discrimination in the protection of the right to freedom of religion or belief in addition to observing the principles of neutrality and impartiality in the exercise of its regulatory powers, often, compel changes in long-standing state-religion relations. On the other hand, this *influence* is not without problems. The substantive content of state obligations may not be clearly set out and/or understood, international review mechanisms may employ a certain restraint. Such restraint may result in

[32] Carolyn Evans, *Freedom of religion under the European Convention on Human Rights*, (Oxford University Press, 2001), p. 22.
[33] Temperman, *supra* note 5.
[34] *Ibid.*, p.1.
[35] Temperman, *supra* note 5, p. 3.
[36] Ronald M. Dworkin, *Is There a Right to Religious Freedom*, Legal Theory Workshop, UCLA Law School, 02.09.2012.
[37] See the General Comment 22 of the Human Rights Committee on Article 18 of the ICCPR, U.N. Doc. HRI/GEN/1Rev.1 at 35 (1994), para. 9. For an analysis of the General Comment 22 see Bahiyyah G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective Legal Protection* (Martinus Nijhoff, 1996). For a comprehensive human rights analysis of relevant state practice see, *supra* note 5, Temperman.

the failure to address issues that are at the centre of state-religion relation and, yet, result in interferences in human rights, in particular freedom of religion or belief. Political debates and conflicts regarding these issues at both national and international levels can determine the contours of the margin given to states in balancing their relevant human rights obligations and the diverse manifestations of existing state-religion relations, often to the detriment of human rights and disadvantaging minority religious/belief groups. Indeed, a survey of State practice raises concerns that practices such as the establishment of a religion by the State, in fact amount to certain preferences and privileges being given to the followers of that religion and are therefore discriminatory.[38] Bearing in mind that human rights are a one-way street this tension is hardly sustainable.

As a matter of fact, the nature of normative demands created by international law as well as the approach of international adjudicating bodies to cases raising questions about issues that involve privileged or complex arrangements with various religious groups or institutions remains less than evident.

The HRCttee, in its General Comment on Article 18 maintains that,

> "…the fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, should not result in any impairment of the enjoyment of any rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers."[39]

It is clear that the HRCttee is not concerned with laying rules or envisaging an arrangement pertaining to the relations between states and religions, religious communities religious institutions in the context of the right to freedom of religion or belief. However this is realized is up to states. What concerns the Committee is that the enjoyment of the protections for the manifestations that are covered by Article 18 without undue interference is ensured. Undue interference in this context is, *inter alia*, interference that is not prescribed by law, necessary for one of the legitimate grounds for restriction,[40] and that is

[38] E.O. Benito. *Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, Human Rights Study Series No.2, UN Sales No. E. 89. XIV.3, Geneva: United Nations Centre for Human Rights (1989), para. 88.
[39] General Comment 22 of the HRCttee, *supra* note 15, para. 9.
[40] *Sister Immaculate Joseph and the 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka*, 21.10.2005, U.N. Human Rights Committee, No. 1249/2004, para. 7.3.

disproportionate.[41] The criteria for the HRCttee seems to be that everyone enjoys the right to freedom of religion or belief without any discrimination and states are free in their structures or organizations as long as they achieve the former. The HRCttee expressed concern on the paramount role of a given religious institution while considering state reports. For example, in the case of Costa Rica, with respect to Article 18 of the Covenant, the Committee expressed concern over the pre-eminent position accorded to the Roman Catholic Church.[42] Similarly in the case of Iran where there is a state religion the Committee emphasized that recognition of a religion as a state religion should not result in any impairment of the enjoyment of any of the rights under the Covenant, including Articles 18 and 27, nor in any discrimination against adherents of other religions or non-believers, since the right to freedom of religion and belief and the prohibition of discrimination do not depend on the recognition as an official religion or belief.[43] Measures restricting eligibility for government service to members of the predominant religion, or giving economic privileges to such persons, or imposing special restrictions on the practice of other faiths were considered incompatible with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under Article 26.[44]

The UN Special Rapporteur on Freedom of Religion or Belief has also challenged the privileged position given to a certain religion; she voiced concern over abuses that can happen where there is a State or official Religion has been expressed and the unavoidable detrimental effects of 'formal or legal' distinctions between religions have been underscored.

> The notion of an official or State religion must never be exploited at the expense of the rights of minorities and the rights linked to citizenship. Formal or legal distinctions between different kinds of religious or faith-based communities carry the seed of discrimination insofar as such a distinction in their status implies a difference in rights or treatment. Consequently, the Special Rapporteur has voiced her concerns that the legalization of such a distinction between different categories of religion is liable

[41] *Sergei Malakhovsky and Alexander Pikul v. Belarus*, 26.07.2005,U.N. Human Rights Committee, No. 1207/2003, para. 7.4 and 7.6. In this case, the consequences of the restrictions were the impossibility of carrying out activities such as establishing educational institutions and inviting foreign religious dignitaries to visit the country.

[42] U.N. Human Rights Committee, 50th Session, CCPR/C/79/Add.31 para. 9 (*Concluding Observations: Costa Rica*). The HRCttee expressed concern over certain provisions of Costa Rican legislation (*inter alia*, the Ley de Carrera Docente) that confer on the National Episcopal Conference the power to effectively impede the teaching of religions other than Catholicism in public schools and the power to bar those who are not Catholics from teaching religion in the public school curricula.

[43] UN Human Rights Committee, 48th Session, CCPR/C/79/Add.25, para. 22 (*Concluding Observations of the Human Rights Committee: Iran)*.

[44] *Ibid*.

to pave the way for future violations of the right to freedom of religion or for discrimination on the basis of religion or belief.[45]

The ECHR and the jurisprudence of the Strasbourg organs shed further light to the nature of normative demands created by international law. Consistent with the ICCPR regime, the ECHR does not prescribe a certain state-religion or state-religious institutions paradigm, either. The ECtHR has dealt with numerous applications claiming violations of Article 9 that involved issues pertaining to the nature of state-religion relations of the countries concerned. Two, arguably less than consistent, trends appear to be key features of relevant jurisprudence. On the one hand, it is possible to observe a rigorous stance against coercion by the state to adopt a certain religion or to refuse someone to leave a religious institution,[46] and an emphasis on the obligation on the part of the state to observe impartiality and neutrality and ensure pluralism, particularly, when the interference concerns the involvement of the state in the internal organization of a religious community or institution. It has been underscored by the ECtHR that "in exercising its regulatory power in this sphere [religion] and in its relations with the various religions, denominations and beliefs, the State has a duty to remain neutral and impartial."[47]

A certain restraint or reluctance, and as a result reliance on a wide margin or appreciation,[48] continue to raise questions as to the extent and nature of the normative demands created by international law. According to the ECtHR the scope of the margin of appreciation will vary, depending on "the circumstances, the subject-matter and its background",[49] and it always goes hand in hand with European

[45] Report of the UN Special Rapporteur on Freedom of Religion or Belief, UN Doc. A/HRC/6/5, 20.07.2007, p. 13.
[46] *Darby v Sweden*, 23 October 1990,European Court of Human Rights, App. No. 11581/85, para. 45 . See also *Kokkinakis v. Greece*, 25 May 1993, European Court of Human Rights, No. 14307/88, 25 May 1003, para. 46-50; *Manoussakis v Greece*, 29 August 1996 , European Court of Human Rights, No. 18748/91, para. 36.
[47] *Hasan and Chaush v. Bulgaria*, 26 October 2000, European Court of Human Rights, No. 30985/96, para. 78.
[48] On the doctrine of margin of appreciation see, *inter alia*,Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the European Court of Human Rights* (Intersentia 2002) and J. Schokkenbroek, "The Basis, Nature and Application of the Margin of Appreciation Doctrine in the case law of the ECHR", *Human Rights Law Journal* (1998).
[49] *Petrovic v. Austria*, 27 March 1998, European Court of Human Rights, No. 20458/92, para. 38.

supervision.[50] Where a common European standard exists the international scrutiny will be stricter, the absence of such a common standard would lead to granting a margin of appreciation to states. The latter has been used to justify interferences which would seem to be difficult to reconcile with the obligation to observe the principle of neutrality and the prohibition of non-discrimination; having a state church would not necessarily be contrary to the Convention,[51] privileged state funding for a religious institution does not confer other religious institution an entitlement to secure additional funding from the state budget and the refusal to do so would not result in a breach of Article 9,[52] a cross in a classroom of a public school classroom would not necessarily undermine the rights of non-Christians to freedom of religion.[53]

It has been observed that the ECtHR seems to also heavily rely on states' discretion for the differential treatment of religions.[54] Despite diversity of historical and political traditions the ECtHR is appealed to seek "progressively to narrow the margin of appreciation" that is allowed to state parties to enforce different standards that privilege the majority religious groups.[55] Evans and Thomas rightly call for a more searching scrutiny where there is differential treatment between religions when a church-state relations dimension is involved.[56] Where restrictions of manifestations are based on the protection of secularism the ECtHR jurisprudence demonstrates an even broader margin of appreciation for that state concerning its church-state relations in the broad sense.[57]

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[50] *Lautsi v. Italy*, 18 March 2011, European Court of Human Rights (Grand Chamber), No. 30814/06, para. 70, *Leyla Sahin v. Turkey*, 10 October 2005, European Court of Human Rights (Grand Chamber), No. 44774/98 para. 110.
[51] *Darby v. Sweden*, 23 October 1990, European Commission on Human Rights, No. 11581/85.
[52] *Asatruarfelagid v. Iceland*, 08, 07 July 2011, European Court of Human Rights, No. 22897/para. 31-32.
[53] *Lautsi v. Italy*, 18.03. 2011, European Cort of Human Rights (Grand Chamber), Application No. 30814/06. For a critical appraisal of the *Lautsi* case see, *inter alia*, S. Manchini, "The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty", 6 *European Constitutional Law Review* 6 (2010).
[54] C. Evans and Ch. A. Thomas, "Church-State Relations in the European Court of Human Rights", *Brigham Young University Law Review* (2006), p. 699.
[55] Peter G. Danchin and Lisa Forman, "The Evolving Jurisprudence of the European Court of Human Rghts and the Protection of Religious Minorities", in *Protecting the Human Rights of Religious Minorities in Eastern Europe*, Peter Danchin and Elizabeth A. Cole (eds.), (Colombia University Press, 2002), p. 193.
[56] Evans and Thomas, *supra* note 32, p. 723-724.
[57] Kristin Henrard, "A Critical Appraisal of the Margin of Appreciation Let to States Pertaining to "Church-State Relations" under the Jurisprudence of the European Court of Human Rights" in *A Test of Faith?*

It follows from the above that the approach of the HRCttee and the UN Special Rapporteur on Freedom of Religion or Belief demonstrate a greater readiness and willingness to tackle freedom of religion or belief claims that also raise issues of state-religion relations in a way to challenge historically conferred privileges conferred to certain religions or religious institutions. It is important to note that the UN system involves states with a much diverse forms of state-religion or state-religious institutions relations than the Council of Europe states. Thus while the UN deals with a wider spectrum of state-religion relations, therefore a lack of common standards in the countries concerned, it does not rely on a margin of appreciation.

In contrast, the ECtHR's jurisprudence does not reflect a uniform and predictable standard of review. Where the right to freedom of religion or belief overlaps with other rights such as freedom of expression or freedom of association to which the Strasbourg system is profoundly committed, the ECtHR holds states up to their international obligations. On the other hand, there appears to be a certain restraint or insecurity to firmly hold states up to their international obligations where differential treatment of the traditional religions or religious organizations are concerned. A coherent and continued systematic approach is indispensible for ensuring that international norms are respected at the domestic level. When the international adjudicators emphasize the particular circumstances of the case and the margin of appreciation granted to states the higher the risk that national courts will feel the freedom not to strictly follow international jurisprudence. Arguably, we might say that the ECtHR is still in a "searching phase", constantly evolving and being challenged, and has not yet reached the point where it will have a principled and established jurisprudence pertaining to freedom of religion or belief. A greater preparedness to invalidate laws that are discriminatory or are routinely used in a discriminatory manner would be a good step.[58] The unforeseeable standard of international review will, however, not least, reinforce

Religious Diversity and Accommodation in the European Workplace, K. Alidadi, M.C. Foblets, J. Vrielink (Eds.), (Ashgate, 2012) p. 76.

[58] Evans and Thomas s*upra* note 32, p. 724.

the existing power balance on the axis of privileged and non-privileged religious groups.

In conclusion, it is important to note that while on the one hand international law poses normative demands on state-religion relations, the nature of these obligations remain less than clear.

2.3. The Legal Basis and Scope of the Collective Dimension of Freedom of Religion or Belief

2.3.1. Relevant Notions

The notion of the collective dimension of the right to freedom of religion or belief is firmly founded on the international provisions protecting the right to freedom of religion or belief. An examination of the basis of, acts protected by, rights holder of as well as the significance of the collective dimension is presented below.

Conceptions analogous to the "collective dimension of the right to freedom of religion or belief" have always been part of the normative discourse on religious freedom and the protection of religious minorities. The protection of the collective dimension of freedom of religion or belief is deeply embedded in the historical protection of freedom of religion or belief. In the past, the international protection of the right to freedom of religion or belief has been, to a great extent, protected *via* group rights and minority rights,[59] rather than individual rights. As far as international protection of groups- including religious groups- is concerned Lerner divides these into three major periods; (1) non-systematic protection of groups by way of protective clauses in international treaties[60], (2) the minority system established within the League of Nations after WW I, (3) the United Nations period after the WW II.[61] While efforts to

[59] See Yoram Dinstein, "Freedom of Religion and the Protection of Religious Minorities", in Y. Dinstein and M. Tabory (Eds.), *The Protection of Minorities and Human Rights* (Dortrecht: Martinus Nijhoff Publishers, 1992), p. 145-169.

[60] For an overview of various treaty protection schemes in Europe see, M.D. Evans, *Religious Liberty and International Law in Europe*, (Cambridge: Cambridge University Press, 1997), p. 42-82.

[61] Natan Lerner, *Group Rights and Discrimination in International Law*, (Dortrecht: Martinus Nijhoff Publishers, 2002), p. 7.The purpose of this chapter is not to provide a comprehensive description and assessment of "minority, group, collective rights" debate but rather to offer a brief historical overview by highlighting major trends.

insert a provision on religious freedom into the Covenant of the League of Nations had failed, these efforts paved the way to the minority treaties that followed.[62] The minority system established between the two World Wars was based on protective provisions for racial, linguistic and religious minorities.[63] Minority treaties strived for two aims; one, to grant legal equality to individuals belonging to minorities at the same level as the other nationals of the State and the second, to make the preservation of the characteristics, traditions and modalities possible.[64] It should be noted, however, that not all members of the League of Nations were under the system; the scope was mostly limited to Central and Eastern Europe and Turkey where it was thought to be risky for minorities.[65] Hence, this protection scheme was selective, based on concern for certain religious groups in certain countries.[66]

Together with end of the League of Nations and the subsequent establishment of the UN, a new approach to the issue of group rights and their protection developed.[67] A switch occurred, from a group protection system to an individual protection system, as it is reflected in the United Nations Declaration on Human Rights which does not refer to minorities.[68] Interference with rights, based on one's race, religion or ethnic or national origin was to be dealt with on an individual basis through the principles of equality and non-discrimination. Thus minority protection ceased to be the primary means of addressing freedom of religion or belief on the international plane.[69]

Despite a shift towards the individual protection scheme in human rights law the right to freedom of religion or belief maintained its collective dimension. This is based on the two intrinsic collective elements found in the relevant provision. First, the phrase "in community with others" or "together with others" reflecting the way believers often

[62] Evans, s*upra* note 38, p. 83.
[63] Lerner, *supra* note 39, p. 11.
[64] *Ibid*.
[65] For example, Belgium, France, Denmark, Italy were not asked to sign minority treaties. Evans, *supra* note 3, p. 143.
[66] For example while there was a concern to protect non-Muslim communities in Turkey, the Lausanne Peace Treaty was understood to protect Greek Orthodox, Armenian Orthodox and Jewish communities and excluded protection for Assyrian Orthodox communities even though they are also non-Muslim.
[67] Lerner, s*upra* note 39, p. 13
[68] Universal Declaration of Human Rights, GA Res 217A, UN Doc. A/810, 1948, p. 71.
[69] Evans, s*upra* note 38, p. 183.

tend to act together. Secondly, by the nature of the acts that these provisions aim to protect, such as establishing places of worship, training of clergy, that are generally enjoyed collectively. The collective aspect is intrinsic to the right because of the way individuals and religious or belief communities exist, interact and the ways in which they enjoy the right to freedom of religion or belief. Here, it is also good to bear in mind that the notion of the collective dimension of freedom of religion is not an alternative to the terms, religious group and/or religious minority rights rendering such notions unnecessary. The collective dimension of the right to freedom of religion or belief may include aspects that overlap with minority, group, corporate rights and the rights of individuals exercised in community with others. Indeed, minority rights discourse at a political level might be more effective in securing exemptions, special rights for a group.

Numerous scholars acknowledge the collective aspect of the right to freedom of religion or belief. Hammer has used the terms, 'group notion of religion or belief', 'group oriented approach', 'group dimension.'[70] He maintains that a group-oriented approach is important for the human rights system in light of minority communities and other groups and highly beneficial for the individual members of particular groups.[71] Evans employs terms like, 'the religious collective', 'group oriented approach', 'group dimension' and takes the group dimension of freedom of religion to mean, 'where a community of believers are protected as an entity in its own right.'[72] The term has also been used by Durham, although generally in relation to the right to acquire legal entity status for religious/belief groups.[73] Freedom of religion or belief, due to its manifestation aspects has also been called categorically, a collective right.[74]

[70] Leonard M. Hammer, *The International Human Right to Freedom of Conscience- Some Suggestions for its development and application*, (Ashgate, 2001), p. 243- 265.
[71] *Ibid*. p. 244.
[72] Evans, *supra* note 38.
[73] W.Cole Durham,"Facilitating Freedom of Religion or Belief through Religious Association Laws" in *Facilitating Freedom of Religion or Belief: A Deskbook*, T. Lindholm, W.C. Durham and B. G. Tahzib-Lie (Eds.) (Martinus Nijhoff, 2004), p. 355. Durham's focus on the associative aspects of religious freedom has made significant contribution to our understanding of the importance of associative rights for religious groups.
[74] Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, UN Doc. A/HR/2/3, 20.09.2006, p.9.

Even scholars who approach the collective aspect of this right cautiously recognize a *certain* collective dimension; Scolnikov calls it a "communally exercised individual right".[75]

2.3.2. Legal Sources

As far as legal sources are concerned, the collective dimension of freedom of religion or belief is founded quite simply in the relevant provisions protecting freedom of religion or belief. Yet, it is useful to remember that, due to the inter-dependent nature of human rights protection, other rights, *inter alia*, freedom to associate, right to a fair trial (judicial protection), right to property and minority rights are also relevant whenever they relate to the protection of the collective enjoyment of manifestation of freedom of religion or belief. These are complementary rights that facilitate, enhance and complete the protection of the collective dimension of the right to freedom of religion or belief. It has been argued that freedom of conscience and religion is "a particularly clear example of the fact that human rights cannot be isolated from each other but are realized only as a totality",[76] because of the many civil and political as well as economic, social and cultural rights that are relevant. Below, the appraisal of the "notion of the collective dimension" will be based on international legal provisions protecting freedom of religion or belief.

The Universal Declaration on Human Rights (UDHR) in Article 18 stipulates:

> Everyone has the right to freedom of thought, conscience and religion; this right includes… 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.[77]

Two binding instruments, the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) also contain alike provisions. The ICCPR, following the UDHR with minor changes, enshrines the following in Article 18:

[75] Scolnikov, *supra* note 2, p. 99.
[76] Martin Scheinin, "Article 18" in G. Alfredson and A. Eide (Eds.), *The Universal Declaration of Human Rights A Common Standard of Achievement*, (The Hague: Martinus Nijhoff, 1999), p. 380.
[77] The Universal Declaration of Human Rights, Article 18.

> Everyone shall have the right to freedom of thought, conscience and religion…. freedom, individually or *in community with others* and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.[78]

Article 9 of the ECHR adopts the same language:

> Everyone has the right to freedom of thought, conscience and religion; this right includes… freedom, either alone or in community with others… to manifest his religion or belief in worship, teaching, practice and observance.[79]

In these provisions the collective dimension of freedom of religion or belief is founded on two pillars. The first one is the phrase "in community with others" and this is most commonly referred basis for the recognition of the collective dimension.[80] This phrase reflects the way individuals and religious or belief communities exist, interact and the manner in which they manifest the right to freedom of religion or belief. While it may be quite obvious, it is useful to reiterate here that this phrase does not merely obligate states to ensure the right of either an individual or a group to manifest religion or belief but to ensure that religion or belief may be manifested in either way.[81] It is a matter of choice on the part of the believer. As we will explore in detail below the collectivity is not specified, rightly so, as the collectivity varies.

The *acts* that are protected constitute the second pillar for the collective dimension; international provisions protect the right to manifest religion or belief in "worship, teaching, practice and observance". These encompass a non-exhaustive list of acts that have a collective nature; *inter alia*, establishment of places of worship, charitable and educational institutions. Thus, regardless of who exercises the right, the action itself may have a collective aspect. Hence, when one considers the collective dimension, it is not only the rights of religious organizations, this approach would indeed be narrower than the nature of protection afforded in the international provisions protecting the right to freedom of religion or belief.

[78] International Covenant of Civil and Political Rights, Article 18.
[79] European Convention on Human Rights, Article 9.
[80] Van Dijk et al, *supra* note 1, p. 764.
[81] *X. v. the United Kingdom*, 12 March 1981, European Commission on Human Rights, No. 8160/78. The case concerned a Muslim teacher who wanted to take time off from work to perform the Friday prayers at a mosque whereas the UK argued that he had the chance to perform his prayers at school where a room was made available.

The HRCttee provides an elaboration of the protected acts that are enjoyed both individually and "in community with others" in General Comment 22 on Article 18.[82] Here, the HRCttee lists a broad range of acts which constitute manifestations of religion or belief in worship, observance, practice and teaching such as, "ritual or ceremonial acts giving direct expression of belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formula and objects, the display of symbols, and the observance of holidays and days of rest."[83] As for the observance and practice of religion or belief, these may include not only ceremonial acts but also such customs as the observance of dietary regulations and the use of a particular language customarily spoken by a group. The practice and teaching of a religion or belief includes acts integral to the conduct by "religious groups of their basic affairs", such as the "freedom to chose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts and or publications.[84] In addition to a non-exhaustive list of acts that are generally exercised by groups or "in community with others" there is the explicit reference to "acts integral to the conduct by religious groups of their basic affairs" and the "use of a particular language customarily spoken by a group." The latter two further acknowledge the "collective notion" through the reference to the "group".

Apart from the phrase "manifest religion or belief in worship, teaching, observance and practice" found in Article 9 of the ECHR we do not have an explicit "list" of acts protected under the collective dimension of this unique provision the collective dimension has been established by the case-law of the Strasbourg organs. Nor are the precise meanings of the terms worship, teaching, observance and practice defined. The terms worship and observance have been considered to be self-evident, whereas there have been more discussion on the scope of teaching and practice.[85] The first explicit reference to the "collective" dimension was found in the case of *Svya Mychaylivska*

[82] Although the HRCttee is not a judicial body, the General Comment is significant as it comes from a body that provides authoritative interpretation of the ICCPR provisions.
[83] General Comment 22, *supra* note 15, para. 4.
[84] *Ibid*.
[85] Evans, *supra* note 10, p. 107-127.

Parafiya v. Ukraine that dealt with the refusal of the re-registration of the religious association by domestic authorities and the subsequent restriction on the ability of the religious group concerned, that had no legal entity status, to exercise the full range of religious activities and activities normally exercised by registered non-governmental legal entities.[86] While finding a violation of Article 9 read in light of Article 11, the European Court of Human Rights noted that "one of the means of exercising the right to manifest one's religion, especially for a religious community, in its *collective dimension*," is the possibility of ensuring judicial protection of the community, its members and its assets.[87] It is well established in the ECtHR case law that that Article 9 should be interpreted and applied in conjunction with Article 11 on freedom of association, in such a way that religious communities should have the possibility to associate. The ECtHR held that**:**

> Moreover, since religious communities traditionally exist in the form of organized structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.[88]

While not a binding instrument, the 1981 Declaration on the Elimination of All Forms of Discrimination and Intolerance Based on Religion or Belief (the 1981 Declaration henceforth) reflects a substantive acknowledgement of the group or collective dimension of freedom of religion or belief in the enumeration of freedoms that are enjoyed collectively by religious groups.[89] Indeed, the 1981 Declaration, contributes greatly to the understanding of the collective notion through, *inter alia*, the enumeration of the "acts" that freedom of thought, conscience, religion or belief will include, in Article 6:

> (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes.

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[86] *Svya Mychaylivska Parafiya v. Ukraine,* 17 June 2007, European Court of Human Rights, No. 77703/01, para. 123

[87] *Ibid*., para. 117.

[88] *Metropolitan Church of Bessarabia and Others v. Moldova,* 13 December 2001*,* European Court of Human Rights, No. 45701/99, para. 118.

[89] D.J. Sullivan,"Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination", *American Journal of International Law* 88, (1988), p. 488 and 508.

(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 the 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.[90]

The above listed acts are hardly enjoyed individually and they are typical of what religious or belief communities tend to do in community or together. Interestingly, Article 6 does not refer to the subject of the rights, instead, lists acts that are protected. The list is the most extensive enumeration of specific acts found in legal and quasi-legal documents and as such one of the most significant contributions made by the Declaration.[91] Such rights cannot be adequately protected unless the rights of religious communities as such are recognized and ensured beyond the purely individualistic freedoms. These forms of manifestation have been described as "the major concrete components of religious freedom that are to be recognized and guaranteed by the state".[92] Yet, it is important to note that the list is not exhaustive as indicated by the words "*inter alia*" at the beginning of the list. For example, clearly omitted are the rights in the area of religious jurisdiction. Also, the right to teach and learn the sacred language of each religion or right to a burial ceremony in accordance with the religion of a deceased person.[93] These, however, may be protected under manifestation of religion or belief in practice. As pointed out by Lerner, however, "Article 6 of the 1981 Declaration deals with rights at the individual level as well as

[90] Also see, J. Temperman, "25th Anniversary Commemoration of the adoption of the 1981 UN Declaration on the elimination of intolerance and discrimination based on religion or belief: a Report", *Religion and Human Rights* 2, 2007, p. 19-30.
[91] It should be noted that the 1981 Declaration was adopted by the UN General Assembly without a vote. Several disagreements related to sensitive issues that that particularly have implications for the balance of State and religious community relations. See UN Doc. *Yearbook of the United Nations 1981*, p. 880-881.
[92] Kevin Boyle, "Freedom of Religion in International Law", Rehman, J. and Breau, S. (eds) (2007), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (Leiden and Boston: Martinus Nijhoff Publishers, 2009), p. 23.
[93] N. Lerner, "Religious Human Rights Under the United Nations", in *Religious Human Rights in Global Perspective*, J. van der Vyver and J. Witte Jr. (Eds.), (Martinus Nijhoff Publishers 1997), p. 118.

collective rights and rights that can only be exercised by the group as such…. In general, paragraphs (b), (g) and (i) of Article 6 show a degree of acceptance of the rights of the group as an entity."[94] The 1981 Declaration articulates religious freedom in explicit terms beyond the purely individualistic approach.

The nature of protection is also relevant and whether states have positive obligations to protect the collective dimension of freedom of religion or belief have significant implications on the in/effective enjoyment of this right by groups of believers. The obligation to ensure the protection of human rights by states assumes that states will undertake the necessary measures for the effective enjoyment of human rights. The implementation of economic social and cultural rights has been approached with the "obligation to respect", which requires the state's organs and agents not to commit violations themselves; the "obligation to protect", which requires the state to protect the owners of rights against interference by third parties and to punish the perpetrators; and finally the "obligation to implement", which calls for specific positive measures to give full realization and full effect to the right.[95] In the context of freedom of religion or belief the UN Special Rapporteur has referred to proactive state intervention where structural vulnerability of a certain group was concerned.[96]

The European Court of Human Rights has adopted a different approach where states' obligations are divided into two categories; namely, negative obligations and positive obligations.[97] The obligation not to interfere in the enjoyment of rights, the negative aspect, has been considered to be intrinsic to the protection granted by the ECHR. The development of the positive obligations however has been gradual; starting with the

[94] N. Lerner, *Group Rights and Discrimination in International Law,* (Martinus Nijhoff Publishers 2003), p.92.
[95] HRC, General Comment No.31 , '*The Nature of the General Obligation Imposed by the States Parties to the Covenant*', U.N. Doc. CCPR/C/21/Rev.1/Add.13, 2004.
[96] UN Doc., Report of the Special Rapporteur on freedom of religion or belief- Mission to Paraguay, A/HRC/19/60/Add.1, p. 17.
[97] See, inter alia, A.R. Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, Oxford – Portland Oregon, 2004. Cordula Dröge, "Positive Verpflichtungen der Staaten in der Europaischen Menschenrechtskonvention" Summary in Beitrage zum Auslandischen öffentlichen Rech und Völkerrecht, Band 159, (Max Planck Gesellschaft zur Förderung der Wissenschaften, 2003), p. 379-392.

Belgian linguistics case.[98] Since then the ECtHR has developed this jurisprudence constantly expanding the category of positive obligations with the addition of new elements, to the point where virtually all the standard-setting provisions of the Convention now have "a dual aspect in terms of their requirements, one negative and the other positive".[99] Positive state obligations under Article 9 of the ECHR appear to be fairly modest in comparison with the positive obligations attributed to other ECHR provisions.[100]

Generally speaking, states are to ensure that individuals will not be disturbed,[101] or interfered with when manifesting their religion or belief; thus have permissive role. The extent of positive obligations under Article 9, on the other hand, are not always clear, limited and particularly restricted in certain areas such as in the field of employment. States may have to engage in mediation to help factions resolve internal dispute within religious communities.[102] States may be required to permit religious adherents to practice their faith in accordance with dietary requirements, the obligation, however, may be limited to ensuring there is reasonable access to the necessary food, rather than access to production facilities for the ritual preparation of meat.[103] In the public or private work place, however, the employers may not be required to make arrangements for manifestations of religion or belief.[104]

[98] *Belgian Linguistics v. Belgium*, 23.07.1968, European Court of Human Rights, Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64,
[99] Jean-François Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights, Human Rights Handbooks No.7*, (Council of Europe, 2007), p.6.
[100] Mowbray, *supra* note 75.
[101] This protection includes possible interferences by third parties. See *Dubowska and Skup v. Poland*, 18 April 1997, European Commission on Human Rights (Admissibility), Nos. 33490/96 and 34055/96.
[102] *Supreme Holy Council of the Muslim Community v. Bulgaria*, 16 December 2004, European Court of Human Rights, No. 39023/97.
[103] *Cha'are Shalom Ve Tsedek v. France*, 27 July 2000,European Court of Human Rights, No. 27417/95,
[104] Saila Ouald Chaib, "Religious Accommodation in the Workplace: Improving the Legal Reasoning of the European Court of Human Rights", in *A Test of Faith: Religious Diversity and Accommodation in the European Workplace*, K. Alidadi, M.C. Foblets, J. Vrielink (Eds.), (Ashgate 2012), p. 33-59.

The limited nature of positive obligations may result from policy considerations and the ECtHR may see little public interest in the assurance of the effective enjoyment of the right to manifest religion or belief by individuals and religious/belief groups.[105] Considering that a wider margin of appreciation is granted to states in relation to positive obligations and the tendency of the ECtHR to rely on the margin of appreciation in relation to Article 9 in certain matters, it might be argued that European supervision suffers even more when both factors are in play at the same time. However, as a fundamental right that is protected with the ECHR, the necessary positive obligations for the effective protection of the right to freedom of religion or belief must be specifically and firmly drawn through jurisprudence. The effect of the less than rigorous nature of positive obligations concerning freedom of religion on the protection of the collective dimension needs to be further explored.

2.3.3. Who is the Right Holder?

The question of the right holder of the collective dimension of freedom of religion or belief is also a relevant one. Who can avail oneself and/or themselves of the protection provided within the scope of the collective dimension? Is it the individual, is it the naturally existing belief group in a given country, is it a religious legal entity or is it the belief or religion? Who has standing to seek judicial review? How is it relevant in procedural issues? Who is this right significant for? And in what processes is the nature of the right holder important? Are existing mechanisms adequate for the rights holders or is it necessary to develop new mechanism in order to improve the protection of the collective dimension of freedom of religion or belief for each category of right holders? These are the kinds of questions that I will seek to explore in this section.

Surely, *everyone* has the right to freedom of religion or belief. Apart from the *individual*, the international provisions protecting freedom of religion or belief do not

[105] It would be worthwhile to consider positive obligations recognized in the context of Article 10 of the ECHR and compare and contrast these with positive obligations under Article 9. The disparity may be indicative of the difference in importance and meaning given to the two rights within the Convention system. On positive obligations under Article 10 see for example, ECHR Research Report, *Positive obligations on member States under Article 10 to protect journalists and prevent impunity*, December 2011, http://www.echr.coe.int/NR/rdonlyres/16237F92-BCB9-4F12-9B1C-0EF6E3B2CB27/0/RAPPORT_RECHERCHE_Positive_obligations_under_Article_10_EN.pdf.

provide any explicit "subject" or rights holder for this right. In fact, proposals to include "freedom of religious denominations or religious communities to organize themselves, to perform missionary, educational and medical work, to enjoy civil or civic rights, etc." in Article 18 of the ICCPR were not successful.[106] There is no reference to the notion of 'group' found in international law.[107] Yet, as it has been observed above, the intrinsic collective dimension is found in the phrases "in community with others" or "together" which is derivative of the way religious or belief communities naturally exist or operate and the protected acts which are indicative of the *subject* of the right since the acts are performed by a variety of collectivities. Thus the *form* of the *collectivity* may vary; natural religious/belief groups, individuals coming together to form informal groups or indeed a corporate legal entity may be exercising this right. Yet, the nature right holder is usually determined through jurisprudence.

Natural religious/belief groups that have "unifying and spontaneous factors essentially beyond the control of the members of the group",[108] and whose members have not formed a voluntary formal religious organization enjoy a variety of acts protected within the scope of the collective dimension of freedom of religion or belief.[109] An example of a natural religious/belief group would be the Jewish community in a given country. If Saturday, when Jews generally come together for worship, is a public holiday, Jews together may collectively- as well as individually- benefit from the right to observe a special day of worship. It is not necessary to form a legal entity to exercise this right. Indeed, they may enjoy certain rights protected under religious freedom provisions irrespective of whether they have legal personality under domestic law. Where the natural belief or religious group is also recognized as a minority there may be situations where the religious minority group is granted a certain legal personality

[106] Marc J. Bossuyt, *Guide to the "Travoux Préparatories" of the International Covenant on Civil and Political Rights*, (Martinus Nijhoff, 1987), p. 363. Two views are prevalent. On the one hand, it was expressed that religious bodies should have the right to perpetuate their own mode of life and propagate their doctrine and on the other hand, that this might lead to interreligious friction. Interestingly, the possible implications for individuals were not considered.

[107] For the meaning of group rights in international law see Natan Lerner, *Group Rights and Discrimination in International Law*, (Martinus Nijhoff, 1991).

[108] Submission to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, "Definition and Classification of Minorities", UN Doc. E/CN.4/Sub.2/85 (1949), p.4.

[109] Natural religious groups, particularly when scattered over the territory of states do not have the right of peoples to self-determination as protected in Article 1 of the ICCPR.

depending on the domestic legal arrangement.

When believers intentionally come together, informal belief groups may be formed, yet they, perhaps, may not wish or feel the need to establish a legal entity. An example of this is when believers informally assemble for worship or informal teaching or education within the community without establishing a formal educational institution that can provide a certificate or a diploma program. In order to provide the latter the community would, generally, have to establish a legal entity and fulfill certain legal requirements. For the former however, they do not formally associate and establish a legal entity. In such a situation they form a group and perform acts collectively thus enjoy the collective dimension of the right to freedom of religion or belief.

There are also belief groups that come together and formally associate and acquire a legal personality and enjoy their right to freedom of religion or belief through this new corporate entity. A religious community often has to associate in order to actually enjoy certain rights that are protected within the scope of the collective dimension. A right exercised by a belief community, as such, has a corporate dimension since it is through a corporate legal entity, that a belief community exercises the right. In this context the right to acquire legal personality stands out as an enabling right. It has been suggested that the lack of legal personality "eradicates almost every possible form of collective manifestation".[110] Nevertheless, legal personality enables a belief community to assume a separate legal entity status and exercise rights no longer as individuals coming together but as a collective. The corporate legal entity is distinct from the individuals. An example might be the purchase of a place of worship by a religious entity, in this case it is no longer the individual members that hold the ownership but the assumed group.

As a sub-point, whether defining religious groups raises problems in the protection of freedom of religion or belief is a relevant question when considering the collective dimension of freedom of religion or belief. Scolnikov argues that the state would

[110] Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice*, (Cambridge University Press, 2005), p. 291.

inevitably engage in defining religious groups when according them legal status and legal personality and that this would be a problem because in its implementation "the state must accept a certain determination of the group and its representative leadership".[111] Accordingly, in granting religious communities the legal power to perform state functions, the allocation of state budget to religious organizations, registration and freedom of religious association, claims/recognition of religious leadership the question of "inherent" problems of defining religious groups in the context of recognition by the state of religious group rights and thus "possibly breaches" state neutrality.[112] Yet, Scolnikov concludes that the problems of conflicting group claims support the argument that freedom of religion or belief is an individual right but these claims also show that without recognition of groups as claimants, important aspects of religious freedom will be meaningless.[113] It is important to remember that "problems" of definition are frequently faced by state authorities as well as the judiciary when they deal with manifestations of freedom of religion or belief and thus are not unique to the collective aspect of freedom of religion or belief. Whether a certain belief constitutes a belief or religion or whether a certain symbol or practice constitutes a form of manifestation within the meaning of international human rights provisions protecting the right to freedom of religion or belief are some of the examples. Such decisions may amount to decisions pertaining to the determination by the state of the legitimacy of a religion or belief or indeed discrimination based on religious affiliation belief groups or states may fail to observe the principle of impartiality. Whether freedom of religion or belief is an individual right or perceived as a group right is largely irrelevant for problems of definitions. It is the duty of the state to seek impartial treatment and adjudication regardless of whether claims originate from individuals or religious groups whether natural or having a legal entity status.

As far as the individual is concerned, the collective dimension of freedom of religion or belief holds significance for both individuals and groups of believers, regardless of whether they are affiliated with majority and minority religions, and with corporate

[111] *Ibid.*, p.93.
[112] *Ibid*.
[113] *Ibid*.

entities established by belief communities. There are many cases of interference in the right to freedom of religion or belief of members of belief communities which demonstrate the inter-connectedness of the individual and collective dimensions of this right. The reports of the UN Special Rapporteur on Freedom of Religion or Belief are packed with such cases from many parts of the world; the arrest and detention of persons on grounds of belonging to an allegedly illegal religious organization, such as Falun Gong in China,[114] the difficulties experienced by individuals who have converted from Islam to Christianity to change their religious affiliation in legal documents as a result of alleged arbitrary unwillingness on the side of domestic authorities stemming from complex state-religion relations that allow for certain religious rules to influece national law in Egypt,[115] the charging of members of the Methodist Church in Fiji for attending an "unauthorized meeting" under the public emergency regulations, [116] the killing of members of the Ahmadiyyah community resulting from strong societal intolerance complicated by the theologically based prohibition for the Ahmadi to call themselves Muslim in Pakistan.[117]

The individual suffers when the collective identity is not respected or the collective act is not protected. When the collective dimension of the right to freedom of religion or belief is interfered with, this does not only affect the group of believers' enjoyment of their right in 'community with others', but individual believers' enjoyment also suffers. The individual cannot worship in a place of worship when the rights to establish and maintain places of worship or assemble for worship purposes by groups of believers are not protected. Hence the protection of the collective dimension is not only for the enjoyment of the rights as a community but also essential for the individual enjoyment of the right in question. As it has been held by the ECtHR, "Were the organisational life of the [religious] community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable".[118] The

[114] Report of the UN Special Rapporteur on Freedom of Religion or Belief, A/HRC/16/53/Add.1, 14.02.2011, para. 58-60.
[115] *Ibid*., para. 81-98.
[116] *Ibid*., para. 121- 123.
[117] *Ibid*., para. 292-295.
[118] *Hasan and Chaush v. Bulgaria*, 26 October 2000, European Court of Human Rights, No. 30985/96, para. 62.

individual freedom of religion, "may be nullified unless complemented by a collective human right of the religious group to construct the infrastructure making possible the full enjoyment of that freedom by individuals."[119]

The protection of the collective dimension of freedom of religion or belief has implications and is relevant for all the collectivities and individuals described above. And it is important that those tasked with interpreting the right to freedom of religion or belief understand and pay attention to the collectivities involved in the claims under examination. Important elements to consider appear to be that the group in question exercise, or wish to exercise a certain act together or that they are collectively affected by the protection or non-protection of the right to act in a certain way.

2.3.4. Standing

When exploring the issue of the right holder, the question of standing in procedural matters needs to be reviewed as well. Here I will examine the issues of standing for the natural belief group, the individual, religious legal entity, informal group of believers in the context of bringing a complaint for international adjudication.

While a natural religious group may enjoy rights protected within the scope of the collective dimension can the natural group itself bring the claim even if they have not formed a legal entity?[120] So far there is no precedence of such applications to international mechanisms. If a natural belief group does not, at the same time, have a representative body, who could make the application? In a case concerning alleged violations of Article 1 and 27 of the ICCPR while the HRCttee recalled that the Optional Protocol allowed only for the submission of complaints by individuals for individual rights, it held, however, that "no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of

[119] Yoram Distein (ed.), *The Protection of Minorities and Human Rights*, (Dordrecht/London: Martinus Nijhoff, 1992), s. 158.

[120] Perhaps a typical group right is the right of a nation or a people to be self-determining. Such a group is also a natural group, until they form a state or a political entity, a right would be possessed and exercised by nations or peoples as groups, rather than by its members separately. It is distinct from individuals having a right because they are members of a certain group. Yet, the enforceability of such a right under the ICCPR Article 1 is less than clear.

their rights".[121] Hence the group, *qua* group, cannot claim the enforcement of a right, however, individuals can claim the enforcement of a right of a *collective nature*. Within the ECHR protection scheme, natural groups do not have a standing to bring complaints against states parties. Perhaps non-adjudicatory compliance control mechanisms may be the key processes where the collective dimension of freedom of religion or belief may be addressed in the context of the natural belief group.

In the case of the HRCttee, in accordance with the First Optional Protocol to the ICCPR the Committee can receive and consider communications only from individuals. This is why in a number of cases that have dealt with the rights of religious organizations the claims were brought by a number of individuals who were members of religious organizations. From the perspective of religious or belief organizations, the possibility of application to ECtHR as an organization rather then individuals is advantageous, whereas a communication to the HRCTTEE would necessarily mean that individuals take up the responsibility on themselves to carry on with the pursuit of the claim which might cause hesitations where a particular belief group experiences discrimination and persecution.

Although an informal group of believers, they chose not to, or cannot, establish a legal entity, cannot file a complaint in case of interference in the enjoyment of rights as a legal entity, they could file a complaint individually- each separately or together, yet without losing their individual standing. This could be either for interference in the individual enjoyment of the right or for the collective enjoyment of the right.

Whether an established religious organization as a right holder has the right to bring a complaint before Strasbourg organs and the HRCttee varies. The First Optional Protocol of the ICCPR does not foresee standing of a corporate religious group that has a legal entity status.[122] In the HRCttee opinion on the complaint of *Sister Immaculate Joseph and 80 Teaching Sisters et. Al. v. Sri Lanka*, the religious order as a legal entity could not

[121] *Lubicon Lake Band v. Canada*, Human Rights Committee, No. 167/1984, U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990), para. 32.1.
[122] Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entry into force 23 March 1976.

file a communication with the HRCttee, instead, individuals could claim the enforcement of a collective right, namely the right to establish a corporation for charity purposes.[123] In the ECHR framework the recognition of the standing of a religious organization has been gradual. Initially, the European Commission on Human Rights held that religious organizations had no right to bring claims under Article 9.[124]

The rationale was that it was the members of the church and not the church itself that had a right to freedom of religion or belief.[125] The complaint was dismissed because " a corporation being a legal and not a natural person, is incapable of having or exercising the rights mentioned in Article 9, paragraph 1 of the Convention and Article 2 of the First Protocol".[126] This position was however rightly corrected, about a decade later, in the case of *X and the Church of Scientology v. Sweden* relating to the prohibition of advertisements of the 'E-meter'.[127] The Commission explained the reversal of its position by stating that "the Commission is now of the opinion that the… distinction between the Church and its members under the Article 9(1) is essentially artificial".[128] The Church was perceived as applying "on behalf of its members" with a representative capacity.[129] Evans has noted that the right of a Church to bring a claim is derivative, "based on the aggregating of the rights of its member" and that it could not claim a breach of its own rights.[130] Bearing in mind that the entity is established by members, one must take into account the fact that once a legal entity is established by a group of believers the legal entity has a separate identity, or personhood, from the members that established it. Thus is not necessary to aggregate the rights of individual members. The legal entity, as such, can claim the breach of its own rights under Article 9. Indeed, later, the European Commission, has held that religious organizations are rights holders

[123] *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka*, Human Rights Committee, No. 1249/2004, U.N. Doc. CCPR/C/85/D/1249/2004 (2005).
[124] It may be useful to remember that this was about its own rights under Article 9 of the ECHR, an entity could and can claim its own rights under other Articles such as 6 or 1 Protocol Article 1.
[125] *Church of X v. The U.K.*, 17 December 1968 European Commission of Human Rights, 1968 (Admissibility) No. 3798/68
[126] *Ibid.*, p. 314.
[127] *X and the Church of Scientology v. Sweden*, 5 May 1979, European Commission of Human Rights, No. 7805/77, 16.
[128] *Ibid*., p. 70.
[129] *Ibid*.
[130] Evans, *supra* note 10, p. 14.

bring claims in their own right.[131] In subsequent jurisprudence the Court held that only organizations analogous to religious organizations may bring claims under Article 9, however, including "associations with religious and philosophical objects".[132]

The possibility of bringing complaints through a religious organization, instead of an individual or a group of individuals, is significant in a number of contexts. In the case of repressed minority religious groups, where it would be very difficult to challenge the state on an individual basis, the use of the religious organization standing empowers such vulnerable groups.[133] Equally, the possibility to bring individual complaints concerning a right of a collective nature is also important. This would open the way for challenging for example macro public policies that disadvantage a religious group. For example, individuals could seek the enforcement of the right to establish religious schools on par with other groups even if they are themselves not victims of an alleged violation. Allowing churches and similar organizations to apply has enabled belief communities to access European supervision and opened the way for the latter in "a whole new *façade* of freedom of religion and belief which otherwise was destined to be dismissed by the ECHR bodies on the basis of being a technical matter".[134]

Standing, however, is not sufficient to bring broad-scale repression to the Court, there must also be a direct connection between the entity and the acts complaint of which would establish the said entity as a victim. The case of the *Scientology Kirche Deutschland v. Germany* illustrates the situation well.[135] Here the applicants complained exactly of this kind of wide-spread 'administrative practice' of violations against itself and its members; *inter alia*, strategies adopted by the federal Government and the Governments of the Lander with the purpose of reducing the influence of Scientology organizations, in Bavaria schools were ordered to inform pupils about the

[131] *A.R.M. Chappell v. UK*, 14 July 1987, European Commission of Human Rights (Admissibility), No. 12587/86; *Iglesia Bautista El Salvador and Ortega Moratilla v. Spain*, 11 January 1992, European Commission of Human Rights (Admissibility), No. 17522/90.
[132] *Omkarananda and the Divine Light Zentrum v. Switzerland*, 16 March 1981, European Commission of Human Rights (Admissibility), No. 8118/77, 25 DR 105, 1981, para.117.
[133] Evans*, supra note* 10, p. 15.
[134] *Ibid*.
[135] *Scientology Kirche Deutschland v. Germany,* 7 April 1997, European Commission of Human Rights (Admissibility), No. 34614/97.

operating procedures of Scientology, a decree was issued in Stuttgart prohibiting the public distribution of printed materials published by Scientology organizations, the Bavarian Government announced that Scientologists would be banned from civil service.[136] The applicants complained of these and other administrative practices against which there was no effective remedy. They particularly claimed that the administrative practices rendered the remedies which are available in individual cases but were not able to stop the policy or practice or challenge the fundamental political assessment of the Government which lies at the heart of these practices.[137] Finally, the Commission found that domestic remedies were not exhausted and there was no evidence that there were administrative practices in Germany that rendered judicial remedies ineffective hence the application was found to be inadmissible.[138]

Before arriving at this conclusion, the Commission made some observations that are helpful in identifying problems with applications from religious organizations that deal with broad-scale practices directed against them and those affiliated with them. The applicants had to show that they as an association have been the victim of a violation of the Convention. Firstly, in the Commission's opinion the applicant could claim to be a victim only if there was 'sufficiently direct connection' between the applicant and the injury he maintains he suffered. In the case in question the Commission held the view that clearly the association was not the victim of alleged violations but members and only the members, as individuals, could claim to be victims. In addition since the association did not produce the identification of the individuals and instructions from them demonstrating that the association represents them the association lacked *ratione persone* with the provisions of the Convention. Secondly, the Commission observed that the association to a large extent complained of the actions of members of parliament, politicians, commercial companies, other non-governmental organizations and private parties whereas the Convention could be invoked only when

[136] *Ibid*.
[137] *Ibid*.
[138] *Ibid*.

the State party failed to protect rights of the applicant against interferences by private persons.[139]

In countries where religious minorities are not protected in their own right, protection of the collective dimension of freedom of religion or belief holds strategic significance for religious or belief communities. Individually exercised rights and non-discrimination may not ensure effective protection for the belief groups (informal groups or those which have acquired a legal entity status). In such cases, rights protected through the collective dimension, *inter alia*, the right to establish places of worship, the right to acquire legal personality, the right to train clergy, the right to be free in their internal affairs are crucial for the preservation and sustenance of the religious/belief group. This is not to suggest that in such cases minority rights will be redundant and minority protection is not necessary. In any case, minority rights play a key role. This is so, particularly when in a given country there is a dominant population of a particular religious affiliation or when the state becomes the bearer of a role promoting a majority religion *de jure* or *de facto*. Where both frameworks exist, it may be said that both, the collective dimension of freedom or religion or belief and minority rights protection, enhance each other's realization. But in the absence of a minority rights protection scheme, the significance of the effective protection of the collective dimension increases. In addition, where minorities are recognized, the collective dimension of freedom of religion or belief may also play a role in terms of protecting minorities within minorities.

As it has been pointed out above in situations where certain religious or belief groups are repressed or persecuted religious legal entities may challenge legislation or treatment where individuals would be reluctant to do so fearing repercussions.

In sum, it is important to strive to achieve flexibility about the models of legal personality in order to ensure that claims can be brought to international adjudicators. Lauterpacht had noted that "the range of subject of international law is not rigid and

[139] *Ibid*.

immutable, but capable of modifications and developments in accordance with the will of States and requirements of international intercourse".[140]

While the collective dimension of freedom of religion or belief is intrinsic to this right there may be situations where in the exercise of right of collective nature there may be conflict of interests with individual rights.[141] Surely states cannot accept or protect practices that cause violations of individual human rights. It is true that there are religious practices that lead to interference in the individual rights of others. Though such conflicts do not only arise between a group and an individual, as they can also arise between individuals, for example between a parent and a child or among brother and sister or among husband and wife, the possible conflict of interest between a group of believers exercising the collective dimension of freedom of religion or belief and an individual is relevant for the study at hand. The specific conflict may arise between the right of belief groups to be free in their internal affairs and the human rights of individuals that are negatively affected by this freedom. However, we will suffice by saying that there is no hierarchy between the collective dimension of freedom of religion or belief and the rights of an individual, they need to be balanced on a case by case basis.

The question of whether the collective dimension of the right to freedom of religion or belief protects beliefs and/or religions needs to be considered. Whether existing international human rights provisions have implications for the protection of religions or beliefs and whether new international provisions need to be drafted to create obligations for states to "combat defamation of religions" have been contemporary questions of concern. Such considerations may be based on seeking respect for religious diversity and achieve harmony between religions of the world.[142] Such

[140] Quoted by Natan Lerner in "Group Rights and Discrimination in International Law", (Martinus Nijhoff, 1991), p. 37.
[141] Most recently conflicts between religious organizations and employees have been the subject of international legal dispute see, *Siebenhaar v. Germany,* 03 February 2011, European Court of Human Rights,Application No. 18136/02 ; *Obst v. Germany*, 23 September 2012, , European Court of Human Rights,Application No. 425/03 ; *Schüth v. Germany*, 23 September 2010, European Court of Human Rights,Application No. 1620/03 and *Fernandez and Martinez v. Spain*, 15 May 2014, European Court of Human Rights, No. 56030/07, referred to the Grand Chamber on 25 September 2012.
[142] Julian Rivers, *Defamation of Religions and Human Rights*, (Missio, 2008), p. 22.

arguments may also be used at the domestic level where such interests may manifest themselves in blasphemy laws that on the outset seek to ensure social harmony, yet, in effect may give rise to human rights violations.[143] International provisions protecting the right to freedom of religion or belief do certainly not refer to religions or beliefs as right holders. Religions, as such, have also not been the subject of international jurisprudence. But do they lay down obligations for states to protect religions or belief? International jurisprudence has been engaged with this issue to the extent it has assessed whether certain "expressions" may be restricted in relation to the obligation of states to prohibit any advocacy of religious hatred that constituted incitement to discrimination, hostility or violence,[144] obligation to provide legal remedies for unlawful attacks on an individual's honor or reputation, including the connection with his/her religion,[145] and, obligation to ensure peaceful enjoyment of the right to freedom of religion or belief where this may be interfered with because of intensive defamation of a certain religion or religious groups that believers are under the threat of violence from third parties.[146] The latter obligation however does not create a general duty to introduce blasphemy laws, rather it would allow for restrictions on expressions where these constitute actual threat to enjoyment of freedom of religion or belief by others.[147] The HRCttee has noted that,

> Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favor of or

[143] For a representative review of blasphemy laws and their effect on the protection of freedom of religion or belief and other rights see Report by Freedom House, *Policing Belief- The Impact of Blasphemy Laws on Human Rights*, October 2010.
[144] ICCPR, Article 20 (2).
[145] ICCPR, Article 19 and Article 20(2) and ECHR Article 10.
[146] *97 Members of the Gladani Congregation of Jehovah's Witnesses v. Georgia*, 3 May 2007, European Court of Human Rights, No. 71101/01.
[147] This is a highly delicate issue. In *Otto Preminger Institut v. Austria*, the ECtHR found that the state was justified in preventing the distribution of a certain movie that would hurt the feelings of the Catholic majority. *Otto Preminger Institut v. Austria*, 20 September 1994, European Court of Human Right, No. 13470/87. This, arguably objectionable precedent, has been used to justify the existence of laws analogues to blasphemy laws. For example, in the interpretation of the Article 216 of the Turkish Criminal Code provides a sentence for expression that denigrate the religious feelings of certain segment of society the public prosecutor has relied on the ECtHR jurisprudence developed in the *Otto Preminger Institut v. Austria* to argue that it is justified to protect the religious feelings of people. This provision has been used against atheist blogs and websites as well as publications critical of Islam. See Mine Yıldırım, " 'Denigrating religious values' - A way to silence critics of religion?" 15.02.2012, Forum 18, accessible at http://forum18.org/Archive.php?article_id=1667, accessed 16.01.2015.

> against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.[148]

It is also helpful to point out that the collective dimension of freedom of religion or belief is distinct from a certain constitutional or legal status given to a particular religion. The establishment of religion, with its various forms, cannot be considered a political reflection of the collective dimension. However, legal recognition or legal status given to one or more religion in a given state may have implications for the protection of the collective dimension in a negative, inhibiting freedom of religion or belief or a positive manner, facilitating its exercise. Neither does the term imply that religions have or ought to have rights.

The collective dimension of freedom of religion exists and an improved understanding and willingness to address the collective nature of the right underlying the complaint by adjudicating bodies would significantly improve its protection. In addition, to ensure better protection in practice, modifications in existing mechanisms and establishment of new mechanisms may be explored. A step forward may be achieved by granting natural religious groups the right to bring cases and appear before international monitoring mechanisms in relation to claims of violations of rights of a collective nature. Potentially, compliance control mechanisms may provide effective agents of protection.

Following this line of thought, one could envision a greater positive obligation and role of the State, not only as a regulator but as a facilitator of associative life or activities of belief communities thus making acquisition of legal personality or legal entity status as easy as possible, being meticulous about steering clear of discrimination in drawing legislation and implementing it, providing effective safeguards for legal protection that guarantees legality and excludes excessive arbitrary decisions by authorities in their role within the recognition and registration procedures hence in effect freeing this area of any negative prejudice and repression. Some of the belief communities or groups which have been the subject of this

[148] Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34/CRP.2 (2010), para. 48.

chapter may not qualify as minorities but for sure they are smaller groups of persons who form sub-groups of religious minorities who, thanks to the collective aspect of the right to freedom of religion can benefit from rights that have been traditionally imagined for groups that are recognized as minorities. Hence, a conclusion can be made that Article 27 and 1992 Declaration, reinforce the protection of the collective dimension of freedom of religion or belief but does not replace it and there are certainly overlapping aspects of both rights. One way to theorize about their correlation might be to view the minority rights framework as the broader sketch of freedom of religion with group/minority as the reference point of protection and collective aspect of freedom of religion a right with much more flexibility as to right holders. On the other hand, if the collective aspect of freedom of belief is not widely interpreted belief communities might be afforded better and wider protection with making use of provisions that are specifically directed to the protection of religious minorities when dealing with widespread discrimination and repression. Conversely, the right to freedom of religion/belief, unlike minority rights, provides protection also for members of majority groups.

2.4. Compliance Control Mechanisms

Compliance control mechanisms are not confined to the examination of concrete cases, but, have the advantage of enabling a review process of domestic legislation and its application in abstract and provide an assessment of their compatibility of the provisions of domestic legislation and the application of these in light of the relevant international provisions protecting the right to freedom of religion or belief. These mechanism, due to their nature, may have the possibility of addressing broad-scale issues that a court or quasi-judicial body may restrain themselves from dealing with. The improvement of compliance control mechanisms for the protection of the collective dimension of freedom of religion or belief is not one of the main questions this thesis. While bearing this in mind, the potential of compliance control mechanisms for improving such protection will be briefly underscored.[149]

Article 40 (1) of the ICCPR requires the states parties "to submit reports on the measures they have adopted which give effect to the rights recognized [in the ICCPR] and on the

[149] The improvement of the efficiency of compliance control mechanisms for the protection of the collective dimension of freedom of religion or belief would be a subject worthy of another research project.

progress made in the enjoyment of those rights." In addition these reports "shall indicate the factors and difficulties, if any, affecting the implementation" of the Covenant in the reporting countries.[150] As a result of the reporting process the HRCttee adopts Concluding Observations which include an assessment of the state's human rights situation in light of the information provided in the state's report, the answers received to the questions posed by the HRCttee members during the examination of the report, and information from other sources, *inter alia*, NGOs, all analyzed in terms of the country's obligations under the Covenant. Buergenthal argues that "given their formal character and the care with which they are increasingly being drafted by the Committee, the findings set out in concluding observations must be viewed as authoritative pronouncements on whether a particular state has or has not complied with its obligations under the Covenant".[151] This procedure provides the HRCttee with a means to become aware and address broad-scale practices and attitudes toward certain religious or belief groups that may be difficult to make subject of a complaint. It also gives the representatives of religious groups or their institutions to submit reports or even to come to the session to present their case directly to members of the HRCttee. The HRCttee also has a possibility to address laws that are incompatible with obligations of States under Article 18 even in the absence of a complaint from an affected party. In this context the Committee's comment on the treatment of the Bahai in Iran is a case in point, here the Committee expressed concern about he destruction of places of worship or cemeteries and the systematic persecution, harassment and discrimination of the Baha'is, which is in clear contradiction with the provisions of the Covenant.[152] Another example can be found in the comments on the report of the Republic of Moldova where the Committee expressed concern over the "artificial hurdles" for organizations seeking to exercise their religious freedom under Article 18 and commented that the State party should "ensure that its law and policy relating to the registration of religious organizations fully respects" the rights of persons as required by Article 18.[153] The HRCttee can call states to take certain measures to improve the protection of human rights, for example, in the context ambiguous registration

[150] Article 40(2) of the ICCPR.
[151] Thomas Buergenthal, "The U.N. Human Rights Committee", in *Max Planck Yearbook of United Nations Law*, J.A. Frowein and R. Wolfrum (eds.), Vol.5, (Kluwer, 2001), p. 351.
[152] Human Rights Committee, 03.08.1993,CCPR/C/79/Add.25, p.4 (Concluding Observations: Islamic Republic of Iran).
[153] Human Rights Committee, 05.08.2002, CCPR/CO/75/MDA, p.4 (Concluding Observations: Republic of Moldova).

legislation, the Bulgarian authorities were called to "ensure the training of local authorities and law enforcement officials to avoid unnecessary interference with the right to freedom of religion."[154] In response to the problems with registration of religious communities in Mongolia the HRCttee called for the development of "a thorough analysis of the administrative and practical difficulties faced by religious groups to register and therefore conduct their activities, and adopt the modifications that are necessary".[155]

Within the ECHR system, the task of the Committee of Ministers in follow-up of judgments has enormous potential and relevance for eliminating future violations by addressing repressive state legislation and practice related to legal personality, recognition and registration processes. According to Article 46(2) of Protocol No. 11 of the ECHR, once the final judgment of the Court has been transmitted to the Committee of Ministers, the latter invites the State to provide information on the steps taken to pay for just satisfaction and where proper of the individual and general measures taken to prevent new, similar violations.[156] When it is clear that the violation occurred due to a particular domestic legislation the State party must amend existing laws or draft new appropriate legislation. Similarly, where it is not the legislation *per se* but the case law of domestic courts the change in case law may prevent further violations. Perhaps this is another *fora* that needs to be strengthened and rigorously utilized where the Court's judgments recognize that a particular legislation in question is vague or that it has been used against a certain group particularly when the Court finds violation on the ground that the limitation was not prescribed by law.

Bearing the aforementioned in mind, findings of violations of Article 14 in conjunction with Article 9, 11 or 6 seem all the more important to tackle wide-spread general repressive legislation and practice. Violations of Article 14 would give the CM the possibility to pursue this thread and follow-up with measures to seek corrective action by states. Even in cases, where violation is found on other grounds but problems have been noted on the vagueness of legislation or on case law or on its application with reference to particular groups the

[154] Human Rights Committee, 9.08.2011 , CCPR/C/BGR/CO/3, p.7 (Concluding Observations: Bulgaria).
[155] Human Rights Committee, 02.05.2011, CCPR/C/MNG/CO/5, p.6 (Concluding Observations: Mongolia).
[156] Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, entry into force 01.11.1998, accessible at http://conventions.coe.int/Treaty/en/Treaties/Html/155.htm , accessed 16.01.2015.

Committee of Ministers, having become aware of the wider issues and having more flexible means at its disposal in contrast to the Court, could pursue the introduction of general measures by the state in question in order to bring domestic law and practice in line with Convention commitments.

As noted above the Committee of Ministers of the ECHR and reporting mechanism of the ICCPR have the potential to address these issues however, for this potential to be realized the willingness on the part of these bodies to take up these issues with the governments would be indispensible. Thus the HRCttee and Committee of Ministers stand out as key actors in the protection of the collective dimension of freedom of religion or belief, in particular where broad-scale repression is concerned and where the collectivity in question cannot utilize the ECtHR and Optional Protocol of the ICCPR application mechanisms.

In conclusion, a broad and holistic approach to the variety of collectivities, the acts that are protected within the scope of collective dimension of freedom of religion or belief would greatly improve the international and national protection of the right to freedom of religion or belief. Every compliance control process, be it of an adjudicating body or of a body with a mandate of a general review of the domestic protection of human rights, a searching and substantive attention must be given to the collectivities that are the subject of the right to freedom of religion or belief and the acts that are enjoyed in community with others. The shortcomings of existing processes may be overcome through the willingness of these bodies to take this step. In order to do this, naturally, they must consider these aspects as indispensible dimensions of the general protection conferred through the right to freedom of religion or belief. Ultimately, much seems to depend on the conception of and status and content attributed to this fundamental right.

The limited recognition of positive obligations in relation to the right to freedom of religion or belief appears to be a factor directly affecting the enjoyment of this right by individuals and various collectivities. The lack of emphasis on positive obligations

related to the protected acts strengthens the hand of domestic authorities that remain, not least, unconcerned to their obligations under the international provisions protecting the right to freedom of religion or belief. The protection of the collective dimension suffers when reluctance by states to protect it precisely because of its collective dimension is compounded with less than firmly and specifically established positive obligations.
Similarly, the Committee of Ministers and the HRCttee in the reporting process may pick up on repressive legislation or recurring repressive practice and seek corrective action with the various means at their disposal.

The normative demands created by international provisions protecting the collective dimension of freedom of religion constitute a challenge to traditional or entrenched state-religion relations. The fulfillment of state obligations in this respect would have formative effect on these relations. The hesitation in establishing predictable and uniform criteria, particularly by the ECtHR, appears to be a factor that permits the continuation of state legislation and practice that raise serious questions in terms of state neutrality and non-discrimination and equality. Such a discord cannot be sustainable in the long-run for international adjudicators if they are to continue with their key role to advance the protection of human rights, and here the protection of freedom of religion or belief, at the domestic level. Bringing the jurisprudence of ECtHR in line with an approach that would be willing to substantively tackle freedom of religion or belief claims that challenge state-religion arrangements based on consistent and predictable interpretive principles without relying on the margin of appreciation and without being too concerned with policy considerations would be a step in the right direction.

Chapter 3

The Right to Acquire Legal Personality - a Substantive Component of the Right to Freedom of Religion or Belief

3.1. Introduction

Acquisition of legal personality plays a key role in the effective protection of the collective dimension of freedom of religion or belief. In spite of the well-established international legal guarantee on freedom of thought, conscience, religion or belief, many religious/belief communities encounter varying degrees of restrictions when exercising the right to acquire legal personality and various forms of recognition. Religious beliefs may be banned entirely, like in the case of Falun Gang in China,[157] making it an offense to profess a certain religion. Or theological assessments and lack of observance of the principle of neutrality on the part of the state officials and ensuing regulations may trigger violent attacks on a certain community like in the case of the Ahmaddiya community in Indonesia.[158] Religious activity may be allowed only for registered religious communities and the criteria for registration may be difficult to fulfill, like in the case of the religion law in Kyrgyzstan.[159] Sadly, it is possible to enumerate numerous examples here, ranging from non-accommodation of certain aspects of freedom of religion, such as the right to train clergy for religious groups to imposition of conditions that are difficult to meet for acquiring religious

[157] The UN Special Rapporteur on Freedom of Religion or Belief Reports, E/CN.4/2005/61, paras. 37-38; E/CN.4/2006/5/Add.1, para. 109; A/HRC/4/21/Add.1, para. 88; A/HRC/7/10/Add.1, para. 32; A/HRC/10/8/Add.1, para. 22; A/HRC/13/40/Add.1, paras. 71-74.

[158] The UN Special Rapporteur on Freedom of Religion or belief expressed concern over an impending ban of the Ahmadiyya community in Indonesia and the potential risk of violence in this context. Reportedly, the Government advisory board Bakor Pakem (Coordinating Body for the Monitoring of Mystical Beliefs) on 16 April 2008 asserted that the Ahmadiyya faith was deviant to Islam and issued a recommendation that the organization and its activities be banned by the President. The Special Rapporteur emphasized that an official ban of the Ahmadiyya organization would unduly restrict their believers' religious freedom. In addition, she stressed that a ban might increase the risk of attacks on Ahmadiyya followers by vigilante groups. Report of the UN Special Rapporteur on Freedom of Religion or Belief, UN Doc. A/HRC/10/8/Add.1 16.02.2009, p. 16.

[159] The 2009 Law requires all religious communities to re-register with the then SARA (now replaced by the SCRA) by 1 January 2010; bars communities not registered by the SCRA and the Justice Ministry from receiving legal status, for which a SCRA certificate is necessary; and bars those with fewer than 200 members from registering with the SCRA. All the 200 must be adult Kyrgyz citizens. Even assuming that a community has 200 members willing to act as founders – which many do not – the 200 are to supply their full name, full date of birth, home address, place of work and job title and passport number. See Forum 18, "KYRGYZSTAN: Religious freedom survey, December 2009," 17.02.2009, http://www.forum18.org/Archive.php?article_id=1388 , accessed 16.01.2015.

entity status that is necessary in order to engage in certain activities and enjoy certain legal benefits or privileges.[160] All of these macro level regulations also have enormous effects in the lives of individuals and doubtless influence their individual enjoyment of the right to freedom of religion or belief.

This chapter examines the right to acquire legal personality in international human rights law, with particular reference to the right to freedom of religion or belief. First, an overview of the legal and practical significance of possessing legal personality for religious/belief communities is presented. Secondly, the Chapter sets out to embed the right to acquire legal personality of religious or belief communities in human rights law within the UN and CoE human rights protection schemes and explores its substantive scope and the nature of obligations that have been recognized so far. Thirdly, it demonstrates some of the central and recurring limitations imposed by states. It is argued that the right to acquire legal personality holds a crucial significance as an *enabling right* and *empowering right* within the scope of the right to freedom of religion or belief and that precisely for this reason it may be the subject of dispute between states and belief groups. It is also argued that while the strict interpretation of the restriction clauses of the provisions protecting the right to freedom of religion or belief may be a guarantee against arbitrary state legislation and practice there is room for improvement of protection against wide-scale repressive practice. Since I endeavor in this thesis to trace neutrality and obligation on the part of the state to ensure pluralism as an overarching theme, in this chapter the role of state religion relations in the enjoyment of religious/belief communities of their right to freedom of religion and belief in the context of acquisition of legal personality will be highlighted. In relation to the whole thesis this chapter is significant as it explores the right to acquire legal personality as an enabling right and empowering right that is necessary for the engagement in acts and exercise of rights protected within the scope of the right to freedom of religion or belief in its collective dimension.

[160] The Reports of the UN Special Rapporteur on Freedom of Religion or Belief provide countless examples from across the regions of the world. For documents related to the Special Rapporteur's Mandate see http://www.ohchr.org/EN/Issues/FreedomReligion/Pages/FreedomReligionIndex.aspx , accessed 16.01.2015.

3.2. The Significance and Function of Legal Personality as an Enabling Right

The collective dimension of freedom of religion or belief is generally exercised in a highly regulated sphere of interaction between states and groups of believers. Although acts carried out in community with others can vary in different belief systems, they can be comprehensively covered under a broad interpretation of worship, observance, practice and teaching. In national laws many of these activities generally require that the communities first have legal personality or a certain formation as a legally recognizable entity.[161] Some examples of such acts may be founding a religious organization of a certain legal capacity, purchasing buildings for the purpose of worship or other communal activities, maintaining such places, engaging in financial transactions with individuals and institutions within their country and abroad, publishing and disseminating materials related to their belief, providing education for their followers and others by way of establishing schools. This list is certainly not exhaustive and may differ in accordance with the acts a group of believers seek to enjoy based on their dogma and purposes. Since these acts may, generally, necessitate, *inter alia*, accommodation, allocation, regulation, permits, supervision on the part of states, religious or belief communities find themselves in a wide sphere of interaction *vis a vis* the state. This highly regulated and complex sphere of interaction between state with its public administrators and institutions and the religious/belief communities reveals many intricacies that are involved in the international protection of the collective dimension of freedom of religion or belief.

The significance of the right to acquire legal personality is best seen in its *enabling and empowering* function. It is an enabling right; as such, it empowers belief communities to exercise their rights, including those protected within the scope of the collective dimension of freedom of religion or belief. Legal personality is significant for belief groups because it *enables* religious/belief communities to exist and act, not as members, but as one organized body, and engage in the religious or other activities as a composite body. A legal person is a legal entity that exists as a body and is so affected by law.[162] Such an entity remains identifiable as the same entity even when its individual membership changes. By acquiring

[161] Conversely, there are belief groups that reject any kind of official organization and institutional relations with the State like the Mormons.
[162] Ned Beale and Heather Bateman, *Dictionary of Law: Over 8,000 Words Clearly Defined*(A&C Black, 2007).

legal personality, a religious/belief community gains a will of its own that expresses it as a community, a capacity that allows the community to directly acquire rights and assume obligations and the right to sue in court as plaintiffs or defendants. Hence once the community has gained legal personality, it is no longer individuals who own a place of worship or provide humanitarian assistance or run a faith based school but the *community* as such. It is also crucial that the form of legal entity status a belief/religious community may acquire be appropriate and adequate for the nature of belief communities; facilitating the exercise of the right to freedom of religion or belief in worship, observance, practice and teaching with certain benefits.

States, more often than not, regulate public activities of religious communities in relation to the state and private actors with a view to facilitate and/or control these acts. In this context, legal personality is, many times, a pre-requisite and thus an element that may function as a form of restriction in national legal systems, in the collective exercise of the right to manifest one's religion or belief in worship, observance, practice and teaching. For religious organizations of a considerable size legal entity status is vital as a practical matter because otherwise they cannot function effectively and efficiently.[163] Without legal status a belief community cannot directly and in an empowered capacity rent or own property, collect donations, open a bank account, make contracts with employees. Also, the fact that in many systems legal entity status confers credibility, legitimacy, respectability and prestige may be equally important,[164] may be a motivation to acquire a legal entity status. Legal entity status has also been seen important for belief groups in the confrontation of opposing groups and media organizations.[165]

In their regulatory role states enjoy a wide room for determining how religious or belief communities are to acquire legal capacity thus establish the means, capacity and form in which belief communities may engage in direct and indirect relations with states and their institutions. In an endeavor to regulate specific collective acts states may require the

[163] W.C. Durham Jr., "Religious Association Laws" in T. Lindholm, W. C. Durham, Jr., B.G. Tahzib-Lie (Eds.), *supra* note 7, p. 327.
[164] *Ibid*. p. 333
[165] Lance S. Lehnhof, "Freedom of Religious Association: The Right of Religious Organizations to Obtain Legal Entity Status under the European Convention"(*Brigham Young University Law Review*, 2002).

acquisition of legal personality and/or establishment of a certain form of an association. Sometimes these may involve some benefits such as tax exemptions. Or, states may require registration or a form of legal personality pursuing a legitimate aim of ensuring that religious organizations are acting in accordance with law and do not present any danger for a democratic society.

There may be various ways of acquiring legal personality depending on the arrangement in individual states. In many European countries religious or belief groups have the possibility of acquiring a general form of association or one or more forms of associations particularly designed for belief communities.[166] In most European legal systems there are several types of religious organizations all with different criteria that often result in complicated, multi-tiered systems of legal recognition.[167] Most OSCE participating States do not require a religious organization to register, whereas a few require registration as a condition for operating as a religion.[168] There are also situations where a state does not have a clear and foreseeable regulation that religious communities can take into consideration when they set out to acquire legal personality or establish a religious association. The latter arrangement, unfortunately, generally results in discriminatory, arbitrary or non-uniform practice. Since legislation in this area can so readily facilitate or restrict religious freedom, it has been observed that it becomes an important barometer of the general climate of freedom of religion in a country.[169] The 2011 Report of the UN Special Rapporteur on Freedom of Religion or Belief provides a recent and comprehensive account of the obstacles that are

[166] Silvio Ferrari, Paper titled *Registration of Religious Organizations in the European Union Member States*, February 2007, http://www.statoechiese.it/images/stories/papers/200702/ferraris_oslo.pdf , accessed 16.01.2015.
[167] Renata Uitz, *Freedom of Religion*, Belgium: Council of Europe Publishing, 2007, p. 87 Also see, Durham, Cole, Peterson, Nicholas, Sewell, *Introduction to a Comparative Analysis of Religious Association Laws in Post-Communist Europe, Laws on Religion and the State in Post-Communist Europe*, C. Durham and S. Ferrari (Eds.), (Leuven: Peeters, 2005).
[168] See Cole Durham, "Indeed, several have mechanisms through which a religious group can achieve entity status without going through any formal process with the State. … In France, a group can obtain entity status by filing a declaration with the applicable department and publishing it in the Journal Officiel. Not even publication is required for the creation of an entity in Sweden and Switzerland. The Netherlands also recognizes informal associations that can be created by following certain steps. These are simple and can be completed without a notary. Russian law poses some barriers to acquiring entity status, but it is very clear that a group can operate without entity status." C. Durham, "Freedom of Religion or Belief: Laws Affecting the Structuring of Religious Communities", OSCE Review Conference, September 1999 (ODIHR Background Paper 1999/4).
[169] Durham, *supra* note 7, p. 326.

created to the effective protection of freedom of religion or belief when an adequate legal status framework is not put in place.[170]

Indeed, when it comes to the exercise of associative rights of religious or belief communities state practice generally reflects complex historical and political attitudes toward all or certain religious/belief communities particularly as regards their organized activities. Krishnaswami's remarks in his pivotal study on Discrimination in the Matter of Religious Rights and Practices are helpful in depicting the sphere of contention;

> History and contemporary practice show a remarkable difference in the attitude of public authorities towards these two freedoms [freedom to assembly and associate] when they are applied in the field of religion or belief… In many fields freedom of association and the right to organize have been more readily conceded than freedom of assembly. But in the field of religion, freedom of association and the right to organize have often been, and still are, denied or severely curtailed, whereas freedom of assembly in houses of worship has been recognized first, at least for the dominant religion, and later for a number of recognized — or even all — religions or beliefs. This difference is not accidental; public authorities consider that, in fields other than religion, there is less of a threat o public order and security in the existence of permanent organizations than in the congregation in one place of a large number of people. In the religious field, on the other hand, a meeting held for purposes related purely to matters of religion or belief does not generally present a threat to public order and security, *whereas the establishment of a new and permanent organization may be considered dangerous because of the considerable impact which a religion or belief normally has upon its followers.*[171]

It follows from the above review that legal personality is a crucial enabling right for the enjoyment of both individual and collective rights guaranteed under freedom of religion or belief provisions. Indeed, lack of legal personality eradicates almost every possible form of collective manifestation.[172] It is equally clear that states, aware of its *enabling* function, regulate this key sphere of state-religious/belief community interaction rather heavily. While recognizing its enabling function, it is important to remember that legal entity status or registration cannot be a pre-condition for manifestations of religion or belief thus criminalization of non-registered worship is incompatible with states' obligations under international provisions protecting the right to freedom of religion or belief.[173] The significance and therefore that it is highly regulated by states compels strict monitoring of its

[170] Report of the UN Special Rapporteur on Freedom of Religion or Belief, A/HRC/19/60, 22.12.2011, p. 40-58.
[171] A. Krishnaswami, Study of Discrimination in the Matter of Religious Rights and Practices, U.N. Doc. E/CN.4/Sub.2/200/Rev.1, U.N. Sales No. 60. XIV.2 (1960), p. 31. Emphasis mine.
[172] Paul M. Taylor, *Freedom of Religion UN and European Human Rights Law and Practice*, (Cambridge: Cambridge University Press, 2005) p. 291.
[173] Human Rights Committee, 07.04.2010, UN Doc. CCPR/C/UZB/CO/3, p. 6 (Concluding Observations:Uzbekistan).

protection in international and national legal systems. Now let us turn to explore the basis of the right to acquire legal entity status within the relevant freedom of religion or belief protection provisions.

3.3. The Legal Basis of the Right to Acquire Legal Personality

While the right of belief communities to acquire legal personality is not explicitly stated in any of the human rights provisions it is deeply embedded primarily and foremost in the right to freedom of religion or belief. It is most directly linked to the right to freedom of religion or belief depending, however, on the context of each case, other interdependent rights become relevant, *inter alia*, the right to association,[174] the right to court,[175] and prohibition of discrimination. Below, based on the protection of the right to freedom of religion or belief and other relevant human rights as they are protected in the ECHR and the ICCPR, a comparative legal analysis of the right to acquire legal personality is presented.

The right of a religious/belief community to obtain legal personality has been progressively recognized as a part of the protection of the collective dimension of freedom of religion or belief. It follows from the discussion above that, albeit not explicitly mentioned in the relevant legal provisions, legal personality is theoretically and practically an intrinsic part of the right to freedom of thought, conscience and religion. The reason for this is that acquisition of such an adequate form of legal personality may be a precondition or a necessary means for the enjoyment of the right to freedom of religion or belief. In the case of *Metropolitan Church of Besserabia and Other v. Modova*, the ECtHR held because of the absence of recognition a church could not organise itself or operate and lacking legal personality, it could not bring legal proceedings to protect its assets, indispensable for worship, while its members could not meet to carry on religious activities without contravening the domestic legislation.[176] Thus providing non-discriminatory procedures and processes for the acquisition of an adequate form of legal personality for belief communities for the manifestation of belief or religion may be considered a positive obligation for

[174] Article 11 of the ECHR.
[175] Article 6 of the ECHR and Article 14 of the ICCPR.
[176] *Metropolitan Church of Besserabia and Others v. Moldova*, 13 December 2001, European Court of Human Rights, No. 45701/99, para. 129.

states.[177] Indeed, the strongest recognition of states' obligations in this sphere came unequivocally in the Hungarian case where the ECtHR held that "there is a positive obligation incumbent on the State to put in place a system of recognition which facilitates the acquisition of legal personality by religious communities".[178]

The UN Special Rapporteur refers to legal personality as a "*necessary* provision by the state" that is needed by religious or belief communities to be able to take their collective actions.[179] In this context the Vienna Concluding Document of 1989 may also be recalled, it stipulates that the participating States

> will… grant upon the request to communities of believers, practicing or prepared to practice their faith within the constitutional framework of their States, recognition of the status provided for them in their respective countries.[180]

This commitment is significant not least because it recognizes the need to acquire a certain legal personality in order to practice a religion or belief. It does not prescribe a particular form of legal personality thus leaving it open to states and the possibility of diverse arrangements. States undertake a positive obligation to create a legal status through which they can carry out religious activities.

The core freedom of religion or belief provisions stipulated in Article 18 of the UDHR,[181] Article 18 of the ICCPR,[182] and Article 9 of the ECHR constitute the basis of the right to acquire legal personality. For the purposes of our analysis we will take Article 9 (1) of the ECHR:

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[177] On positive obligations see, *inter alia*, A. R. Mowbrai, *The development of positive obligations under the European Convention on Human Rights,* the European Court of Human Rights (Hart 2004).
[178] *Magyar Kereszteny Mennonita Egyhaz and Others v. Hungary*, 8 April 2014, European Court of Human Rights, Nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12, para. 90.
[179] Report of the UN Special Rapporteur on Freedom of Religion or Belief, *supra* note 14, para. 23. Emphasis added.
[180] Principle 16.3, OSCE, *Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Cooperation in Europe*, adopted on 17 January 1989.
[181] Universal Declaration of Human Rights, GA Res 217A, UN Doc. A/810, 1948, p. 71.
[182] International Covenant of Civil and Political Rights, Article 18.

> 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 and private, to manifest his religion or belief, in worship, teaching, practice and observance.[183]

It is important to note that "everyone has" the right to freedom of religion or belief.[184] The provisions do not distinguish between citizens of a country and immigrants, residents, stateless persons, refugees and foreign religious personnel hence retains the element of universality.[185] Hence, in the enjoyment of this right, where for some forms of manifestation of religion or belief a certain legal status or official recognition is required as a precondition, it follows that non-citizens also have this right. While states may desire or tend to place restrictions on the involvement of non-citizens by limiting the scope of religious association laws to citizens or permanent residents,[186] these restrictions must be in line with the permissible limitations clause and not be discriminatory. The ECtHR, dealt with this issue in the case of *The Moscow Branch of Salvation Army v. Russia* where the 'foreign origin' of the applicant was held by authorities as a ground for refusing re-registration.[187] The Russian Religions Act prohibited foreign nationals from being founders of Russian religious organizations.[188] However, the European Court did not find a justification for the difference in treatment of Russian and foreign nationals in regards their ability to exercise the right to freedom of religion through participation in the life of organized religious communities.[189] A number of other grounds related to its foreign origin did not have their base in domestic law, hence the arguments pertaining to the applicant's foreign origin were found neither "relevant and sufficient" nor "prescribed by law".[190] A restriction based on the foreign origin of an individual would need to be justified by national authorities.

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[183] ECHR Article 9. The corresponding Article 18 in the ICCPR is substantially the same except for the absence of the word "change his religion." Rather, it uses the phrase "to have or to adopt a religion." See Article 18 of the ICCPR.

[184] M. D. Evans, *Religious Liberty and International Law in Europe*, (Cambridge University Press, 1997) p. 286. UDHR Art. 18, ICCPR Art. 18 also contains the word "everyone".

[185] Durham, *supra* note 7, p. 351. Also while Article 16 of the ECHR allows states to impose restrictions on the political activity of aliens, no such restrictions are mentioned with regard to the exercise of freedom of religion.

[186] *Ibid*.

[187] *The Moscow Branch of Salvation Army v. Russia*, 05 October 2006, European Court of Human Rights , Application No. 72881/01, paras. 81-86.

[188] *Ibid*.

[189] *Ibid*. para 83.

[190] *Ibid*. para. 86.

As Durham has duly stressed, it is important to remember the phrase "*has* the right*";* this right is not "something bestowed by the state…but something that individuals and religious groups have simply by virtue of their human nature."[191] Such an understanding also supports the argument that freedom of religion is not only a right of recognized or registered communities and states have to maintain a facilitative approach to this process in order to guarantee that everyone can enjoy it. The UN Special Rapporteur recalls applicable international obligations:

> Such an administrative decision [on legal personality] should not be misconceived as an act of mercy, however. Under international law, States are obliged to take an active role in facilitating the full enjoyment of human rights, including freedom of religion or belief. By not providing appropriate legal options that, *de jure* and *de facto*, are accessible to all religious or belief groups interested in obtaining a legal personality status, States would fail to honour their obligations under the human right to freedom of religion or belief.[192]

The question of what constitutes a belief or religion in the context of legal personality is also a pertinent question for at least two reasons. First, in order to qualify for the protection afforded to manifestation of religion or belief, the belief or religion in question has to be considered a "belief or religion" for the purposes of the respective articles. Secondly, states often tend to make judgments on religions or beliefs in the context of granting legal status to belief groups. Both the HRCttee and the European Court have adopted a broad interpretation of religion or belief so as to cover both theistic and atheistic, traditional and non-traditional beliefs.[193] According to Evans the lack of a guiding principle used by the Strasbourg organs in the determination of which religions or belief are protected thus somewhat "made their definition meaningless".[194] Having said that, it is clear that not all ideas or views are unhesitatingly regarded as beliefs. Opinions or views are not protected,[195] under freedom of religion or belief. The ECtHR has held that beliefs must have a "certain

[191] Durham, *supra* note 7, p. 351.
[192] Report of the UN Special Rapporteur, *supra* note 14, para. 43.
[193] Van Dijk, P. and G.J.H. Van Hoof, *Theory and Practice of the European Convention of Human Rights*, (Kluwer, 1998) p. 759-760. The HRCttee, in GC 22 on Article 18 elaborated on which beliefs are protected saying Article 18 "protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community."see General Comment 22 of the Human Rights Committee on Article 18 of the ICCPR, U.N. Doc. HRI/GEN/1Rev.1 at 35 (1994), para. 2.
[194] For a more detailed coverage Evans, *supra* note 28, p. 386- 397 and 392.
[195] These would properly be addressed under freedom to hold opinions.

level of cogency, seriousness, cohesion and importance".[196] The HRCttee, on the other hand, drew the line when it held that a belief consisting primarily or exclusively of the worship and distribution of a narcotic drug cannot be brought under the protection of Article 18.[197]

The HRCttee, in its General Comment on Article 18, has expressed concern over tendencies to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be subject to hostility on the part of the predominant religious community.[198] Same approach has been rigorously utilized in the review of reports on the implementation of the ICCPR where the HRCttee criticized the differential treatment of traditional and non-traditional religious groups in the process of acquisition of legal personality.[199] The HRCttee has drawn attention to 'registration or recognition procedures' that affect the enjoyment of Article 18. With regard to Jordan the Committee expressed concern about the non-recognition of the Bahai religion.[200] Similarly, in Iran where only 3 religions are recognized, non-recognized religions, again particularly the circumstances of the Bahai community are viewed with concern and the state practice incompatible with obligations under Article 18.[201] In these cases evidently the state is making a judgment on the "legitimacy" of a religion or belief whereas it has no such capacity and this is clearly incompatible with Article 18.

Even though the HRCttee does not have comprehensive case-law on the issue, taken together with its General Comment 22, its deliberations on a case might be helpful in understanding its position on neutrality and impartiality of the State in its relations with religious groups. In a case brought before the HRCTTEE, *Sisters of the Holy Cross of the Third*

[196] *Campbell and Cosans v. UK*, 25 February 1982, European Commission on Human Rights, 7511/76, 7743/76, para. 36.

[197] The authors said that they are "members and "plenipotentiaries" of the "Assembly of the Church of the Universe", whose beliefs and practices, according to the authors, necessarily involve the care, cultivation, possession, distribution, maintenance, integrity and worship of the "Sacrament" of the Church. Whereas the authors also refer to this "Sacrament" as "God's tree of life", it is generally known under the designation cannabis sativa or marijuana." *M.A.B., W.A.T. and J.-A.Y.T. v. Canada*, 8 April 1994, Human Rights Committee, No. 570/1993, U.N. Doc. CCPR/C/50/D/570/1993 .

[198] General Comment 22 of the HRCttee, para. 2.

[199] Human Rights Committee, 02 May 2011, UN Doc. CCPR/C/MNG/CO/5, p. 6. (*Concluding Observations: Mongolia)* .

[200] Human Rights Committee, 10 August 1994, UN Doc. CCPR/C/79/Add.35, para. 10 *(Concluding Observations: Jordan)*.

[201] Human Rights Commttee, 3 August 1993, UN Doc. CCPR/C/79/Add.25, para. 16(*Concluding Observations: Iran)*.

Order of Saint Francis v. Sri Lanka, where Sister Immaculate Joseph together with 80 other sisters has applied for incorporation in order to advance their activities in the area of teaching and other charity work, the Committee considered justifiability of restrictions that resulted with the refusal of incorporation status.[202] The Bill establishing the incorporation was objected to and filed in the jurisdiction of the Supreme Court which upheld the objection taking into account several articles of the Sri Lankan Constitution; the non-recognition of a right to propagate a religion, the special provision giving Buddhism the foremost place and the State's duty to protect and foster *Buddha Sasana*.[203] Hence the Supreme Court held that the propagation and spreading of Christianity as expressed in the terms of clause 3 of the Bill, which listed a number or activities such as humanitarian assistance, teaching and spreading of knowledge of Catholic religion, would not be permissible as these would impair the existence of Buddhism.[204] In the proceedings before the HRCttee, it was recognized that the tenet to spread knowledge, to propagate beliefs and provide assistance to others is a central part of many religions hence these aspects are part of an individual's manifestation of religion protected by Article 18 paragraph 1. Hence the Supreme Court's determination of the unconstitutionality of the Bill establishing the incorporation needed to be justified under paragraph 3 of Article 18. The justification for Supreme Court's decision was that the Order's activities would, by means of provision of material and other benefits to vulnerable people, improperly propagate religion. However the HRCttee found that the grounds set forth in the case did not form sufficient grounds to show that these restrictions were necessary on the grounds enumerated in the Covenant.

This case is important in that it involves constitutional protection and support of a certain belief, namely *Buddha Sasana*. The HRCttee, noted that the decision of the Supreme Court provided no justification for the conclusion that the Bill would impair the very existence of Buddhism hence the violation of Article 18 (1). This finding, however, raises the question of whether the HRCttee's decision would be different if there was evidence indicating that actually the activities of the Sisters' incorporation could impair the existence of Buddhism?

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[202] *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka*, 3 November 2005, Human Rights Commttee, No. 1249/2004, U.N. Doc. CCPR/C/85/D 1249/2004 .
[203] *Ibid.*, para. 2.3.
[204] *Ibid*.

Whether, in light of the premise that states should be impartial guarantors of freedom of religion or belief and co-existence of various belief communities, this constitutional clause would have been incompatible with ICCPR calls for further examination and clarification. One belief group may very well, by advancing its teachings and increasing the number of its followers, constitute a threat towards the existence of another belief. This decision of the HRCttee, raises the question of whether at the universal level there is greater respect afforded to 'maintaining' religion as opposed to greater protection provided for propagation of religion and possibility of 'changing' of religion. Such a difference in approach would be reflective of the debate at the UN level on the 'right to change one's religion' and 'the right to maintain one's religion' evident in the preparatory work for the drafting of ICCPR Art. 18.[205]

On the other hand, the ECtHR unequivocally held that "the right to freedom of religion or belief, "excludes any discretion on the part of the State to determine whether religious beliefs or means used to express such beliefs are legitimate".[206] Therefore assessments of legitimacy in the decisions and processes concerning the acquisition of legal personality would not be permissible. The significance of this stance cannot be overestimated for vulnerable groups such as religious minorities or minorities within religious majorities in relation to decisions concerning their associative activities which are questioned by states as a result of being influenced by the dominant religious doctrine.

The ECtHR addressed the issue of legitimacy of belief in the case of *Metropolitan Church of Bessarabia v. Moldova* where the applicants claimed that the authorities' refusal to recognize their church infringed their freedom of religion, since only religions recognized by the government could be practiced in Moldova.[207] While assessing the State's arguments for justifying the restrictions, the European Court referred to its established case-law which recognizes that in a democratic society where several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are

[205] Evans, *supra* note 28, p. 201-202.
[206] *Manoussakis and others v. Greece*, 26 September 1996, European Court of Human Rights, No. 59/1995/565/651, para. 47.
[207] *Metropolitan Church of Bessarabia and others v. Moldova*, *supra* note 20.

respected.[208] Therefore the role of restrictions is viewed as having the purpose of ensuring various groups', coexistence not one of eliminating certain groups so that some groups can exist without experiencing conflict. In ensuring this coexistence the state enjoys a regulatory power in the use of which it has the duty to remain neutral and impartial. The State's role is envisaged as the "neutral and impartial organizer of the exercise of various religions, faiths and beliefs".[209] In addition, this defined role is perceived as "conducive to public order, religious harmony and tolerance in a democratic society".[210] The principle of neutrality requires that any assessment on the part of the state regarding the legitimacy of religious beliefs or ways in which these beliefs are expressed is not acceptable. Consequently, in processes pertaining to acquisition of legal personality or recognition of religious groups states have no room for the assessment of the legitimacy of the religion of the group in question. What is relevant and significant in our context is that "religion or belief" is to be broadly interpreted when states draft and apply rules concerning the acquisition of legal personality, recognition and registration of religious or belief communities and likewise authorities have to be guided not by 'whether a religion or belief is legitimate or not', but by whether it is a 'religion or belief' as understood by the respective treaty provisions. Unfortunately, so far, neither the Court nor the Committee have provided a definition that can serve as a guide for States.[211]

Bearing also in mind the complexities posed by state-religion relations, as it has been underscored in Chapter 2, it may be concluded that the substantive scope given to the respective international provisions so far, considers the assessment of legitimacy of religion or belief incompatible with the ICCPR and the ECHR. On the other hand, while differential treatment of various religious groups may be questioned, as in the case of *Sister Immaculate Joseph v. Sri Lanka*,[212] this does not imply a willingness on the part of adjudicators to require

[208] Ibid., para. 115.
[209] *Ibid*., para 116.
[210] *Refah Partisi (the Welfare Party) and Others v. Turkey*, 13 February 2003, European Court of Human Rights, Grand Chamber, No. 41340/98, 41342/98, 41343/98 and 41344/98, § 91.
[211] See discussion on the definition of religion or belief and how the European Commission on Human Rights has avoided to definition in Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights*, (Oxford University Press, 2001) p. 51-62.
[212] *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka, supra* note 46.

of a neutral state or a state that observes equal distance to the diverse religions found in the country. A certain restraint seems to withhold a more rigorous scrutiny in this sphere.

An important related question pertains to the types of legal personality that the right to freedom of religion or belief extends to. What is the scope of protection and where is the limit drawn? While a comprehensive examination of the various forms of legal entities belief groups may establish is beyond the scope of this paper, it is useful to note a number of key guiding principles. The acts that are protected under the right to freedom of religion or belief provisions in the ECHR and the ICCPR extend to manifestations of religion or belief "in *worship, observance, practice and teaching*."[213] The scope of acts protected under these provisions also determines the scope of the types of legal entity belief groups have a right to establish. Domestic legal entity options must be suitable and adequate for belief groups to engage in acts necessary for manifesting their religion or belief in worship, observance, practice and teaching. The content of these categories is, therefore, important as it will determine the extent of protection. An adequate and appropriate form of legal personality is, practically and theoretically, a requirement for the enjoyment of collective dimension of freedom of religion or belief in virtually all its components. Therefore it is an integral part of the protection. The nexus between legal personality and manifestation of religion or belief lies in the enabling function of the former. The legal question, then, is whether the absence of legal personality or the particular form of it or regulations concerning it, are compatible with the right to manifest one's religion or belief in community with others in its collective dimension. Supervisory bodies assess whether interference in the process of acquisition of legal personality constitutes an unjustified interference in the right to have a belief or religion or to manifest religion or belief. The ECtHR have confirmed that denying legal personality can amount to an interference with the right to freedom of religion as protected in Article 9 of the European Convention on Human Rights,[214] thus the Court first moved toward embracing a right to legal personality, albeit implicitly. However, in 2014, a positive obligation on the part of the states to provide a system of recognition which facilitates the

[213] ECHR, Article 9 and ICCPR Article 18.
[214] *Metropolitan Church of Bessarabia and others v. Moldova, supra* note 20.

acquisition of legal personality by religious communities was recognized explicitly.[215] Further the Court stated that:

> The Court further considers that there is *no right* under Article 11 in conjunction with Article 9 for religious organisations *to have a specific legal status*. Articles 9 and 11 of the Convention only require the State to ensure that religious communities have the possibility of acquiring legal capacity as entities under the civil law; they do not require that a specific public-law status be accorded to them.[216]

The jurisprudence of Strasbourg organs have not provided any description of these categories and what forms of manifestations are protected in each of them. The Commission has said that Article 9 primarily protects personal beliefs and religious creeds and "acts which are intimately linked to these, such as worship and devotion."[217] Here the important criterion has been that the act must be intimately linked to the belief in order to qualify for a form of manifestation in worship. However, in a case involving the wearing of a small cross on a necklace at workplace, the ECtHR appears to have significantly moved away from this strong link that must be established by individuals.[218] The European Court has not considered cases pertaining to associative acts of belief groups solely on the basis of Article 9, instead it relied on either Article 9 interpreted in light of Article 11 or on Article 11 interpreted in light of Article 9. This application may be indicative of a certain narrow view of the acts protected under manifestation of religion or belief in worship, teaching, practice and observance. A broader view of manifestations of religion or belief through associative acts would enable the European Court to decide such cases solely under Article 9. On the other hand, the strong protection of associative rights in the ECHR system may be the reason for the strong protection of the associative rights of belief groups found in this system.

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[215] *Magyar Kereszteny Mennonita Egyhaz and Others v. Hungary*, *supra* note 22.
[216] *Ibid.*, para. 91, emphasis mine.
[217] *C. v. The United Kingdom*, 15 December 1983, European Commission, (Admissibility), No. 10358/83, 37. Accordingly, establishing places of worship, ownership of objects necessary for worship, facilitating religious services in prison have been viewed as included within the right to worship. See among others, *Manoussakis and others v. Greece* at *supra* note 50, *Holy Monasteries v. Greece*, 09 December 1994, European Court of Human Rights, Nos. 13092/87. 13984/88.
[218] *Eweida and Others v. The United Kingdom*, 15 January, 2013, European Court of Human Rights, Nos. 48420/10, 59842/10, 51671/10, 36516/10. The case is also important because" the religious liberty questions were in fact considered by the Court rather than being dismissed as being inapplicable in the workplace. ... The Court specifically repudiated both the necessity test and the doctrine of 'voluntary surrender' of Article 9 rights at work. Andrew Hambler and Ian Leigh, "Religious Symbols, Conscience, and the Rights of Others"in the *Oxford Journal of Law and Religion*, (2014) 3 (1), p. 2-24.

In contrast to the narrow view concerning manifestation of the ECHR system, the HRCttee holds that the freedom to manifest one's religion or belief encompasses "a broad range of acts."[219] The concept of worship extends to ritual and ceremonial acts giving direct expression to belief and practices integral to such acts, including the building of places of worship, the use of ritual formula and objects, the display of symbols and the observance of holidays and days of rest.[220] As for the observance and practice of religion or belief these may include, in the Committee's view, 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 the group.[221] Practice and teaching may also include acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts and publications.[222] These "broad range of acts" constitute the basis of the types of legal entity status that may be protected; belief groups must be able to acquire the type of legal entity status that will make it possible in their domestic settings to engage in the "broad range of acts".

The HRCttee considered a claim pertaining to associative acts of a belief group solely under Article 18 while noting that the claim also raised issues under Article 22.[223] In this respect the HRCttee and the ECtHR differ in their approach. The HRCttee seems to take a broader view of the scope of Article 18 so as to include associative acts of belief groups.

In this context it is important to remember that Article 6(b) of the 1981 Declaration protects the right to "establish and maintain appropriate charitable or humanitarian institutions."[224] Traditionally religious or belief groups engage in benevolent acts towards to poor, sick and vulnerable groups and depending on the domestic laws they may need to establish a certain

[219] General Comment 22, *supra* note 37, para. 4.
[220] *Ibid*.
[221] *Ibid*.
[222] *Ibid*.
[223] *Sergei Malakhovsky and Alexander Pikul v. Belarus*, 26 July 2005, Human Rights Committee, No. 1207/2003, UN Doc. CCPR/C/84/D/1207/2003.
[224] The UN Declaration on the Elimination of All Forms of Discrimination Based on Religion, See UN Doc. *Yearbook of the United Nations 1981*, p. 880-881.

form of association to do this. It would be likely that under the ICCPR this would be decided under Article 18 as it has been in the case of *Sister Immaculate Joseph v. Sri Lanka*.[225] On the other hand, the ECtHR may decide such claims under Article 9 or Article 11 viewing it primarily as a matter of the right to association where Article 9 would provide the context where religious purpose is evident. While the right to establish charitable or humanitarian organizations is not unrestricted given the strong protection of the right to association in the ECHR regime, it would not be wrong to expect that the right of religious or belief groups to establish such institutions would enjoy substantial protection.

Whether based solely on the provision protecting freedom of religion or belief or based on complementary provisions protecting the right to associate, the scope of protection appears to be fairly broad. However, manifestations of religion that seek to establish judicial systems may be where international protection may draw the line. The most relevant case in this respect is the *Refah Partisi v. Turkey*,[226] which dealt with the dissolution of a political party that sought, among others, to establish the *sharia* and a multi-juridical system. Although the case is decided on the right to freedom of association and not the right to freedom of religion or belief, its significance lies in the fact that it reveals the European Court's reservation to the establishment of religious jurisdiction in the context of the right to associate and implicitly in the context of the right to freedom of religion or belief.

Considering the enabling and empowering function of legal personality it is reasonable to attribute a positive obligation to states to provide an adequate form of legal entity possibility.[227] A belief community may need a certain legal entity status in order to engage in acts that manifest their religion or belief. Without legal personality they cannot establish and maintain places of worship,[228] establish charitable or humanitarian institutions,[229] establish an run institutions for the dissemination of relevant publications,[230] cannot establish

[225] *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka , supra* 45.
[226] *Refah Partisi (the Welfare Party) and Others v. Turkey , supra* note 53.
[227] A. R. Mowbrai, The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights (Hart 2004).
[228] 1981 Declaration Article 6(a).
[229] 1981 Declaration, Article 6(b).
[230] 1981 Declaration Article 6(d).

institutions for teaching religion or belief;[231] thus the collective dimension of freedom of religion or belief may be significantly undermined. There may be situations where without a proper legal entity the community may run a risk of interference by the state. Such a risk is also unacceptable, they must be able to expect to carry on with their affairs without the fear of interference. In *The Moscow Branch of Salvation Army v. Russia* the ECtHR took into consideration that the applicant "continuously ran the risk of having its accounts frozen and its assets seized".[232] The Court holds that believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary state intervention.[233] Therefore, situations where authorities do not directly interfere but also do not provide necessary legal status or conditions for a religious community to peacefully enjoy being free from *possible* interference become more alarming particularly when same grounds have been used against others. Where an organization could continue to profess their faith, hold services of worship and ceremonies and guide their followers, nevertheless, where the legal position is affected the refusal to register may lead to a claim to be a victim even if there was no prejudice and damage.[234]

In the context of states' positive obligation to ensure that an adequate form of legal personality is accessible for belief groups who desire to manifest their religion or belief via a legal entity, guidelines developed to ensure compliance with international law by non-adjudicatory bodies are useful in pointing to good practice. According to the OSCE-Venice Commission guidelines, registration should not be mandatory, althoughregistration for acquiring legal personality is considered as appropriate.[235] Similarly, lengthy existence in the State before registration is not deemed appropriate, other burdensome constraints or time delays before obtaining legal personality are questioned, caution against excessive governmental discretion in giving approvals is expressed and requirements for re-registrations are called for questioning, in particular provisions operating retroactively or that fail to protect vested interests. It continues:

[231] 1981 Declaration Article 6 (e) and 6 (g).
[232] *The Moscow Branch of Salvation Army v. Russia*, *supra* 31, para. 73.
[233] *The Moscow Branch of Salvation Army v. Russia*, *supra* note 31, para. 71.
[234] *The Moscow Branch of Salvation Army v. Russia*, *supra* note 31.
[235] OSCE-Venice Commission, *Guidelines for Review of Legislation Pertaining to Religion or Belief*, OSCE ODIHR, 2004, p. 17.

> ...out of deference for the values of freedom of religion or belief, laws governing access to legal personality should be structured in ways that are facilitative of freedom of religion or belief; at a minimum, access to the basic rights associated with legal personality – for example, opening a bank account, renting or acquiring property for a place of worship or for other religious uses, entering into contracts, and the right to sue and be sued – should be available without excessive difficulty. In many legal systems, there are additional legal issues that have substantial impact on religious life that are often linked to acquiring legal personality – for example, obtaining land use or other governmental permits; inviting foreign religious leaders, workers, and volunteers into a country; arranging visits and ministries in hospitals, prisons, and the military; eligibility to establish educational institutions (whether for educating children or for training clergy); eligibility to establish separate religiously motivated charitable organizations...[236]

Recognition or registration requirements imposed by states may constitute a significant administrative/legal obstacle to the enjoyment of the collective aspects of the right to freedom of religion or belief for belief communities. The detrimental effects of registration requirements on the exercise of freedom of religion have been captured in the reports of the UN Special Rapporteur on Freedom of Religion or Belief with scores of examples of unreasonable registration requirements established by states which amount to a complete denial of the possibility to register and consequently the inability of legal exercise of the collective manifestation of religion or belief.[237] The reports note that these requirements are often used by states as a means to limit the right of freedom of religion or members of certain religious communities.

The challenge for legislation pertaining to the acquisition of legal personality remains that it must strike a balance between facilitating the enjoyment of the right to freedom of religion/belief by belief communities and pursuing the legitimate aim of guaranteeing that the actions of these groups do not present any danger for a democratic society and that they do not involve activities directed against the interests of public safety, public order, health, morals or the rights and freedoms of other.[238]

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[236] *Ibid.* p.18. The UN Special Rapporteur has also promoted these guidelines that point toward an accommodating approach. Report of the UN Special Rapporteur on Freedom of Religion or Belief, UN Doc. A/HRC/6/5 20. July 2007, p. 8 para.11 and Report of the Special Rapporteur on freedom of religion or belief, UN Doc. A/HRC/19/60

[237] For instance, in Angola current legislation on registration requires 100,000 signatures in order to legalize a religious community U.N. Doc. HRC/4/21/Add.1- SR Report on Communications to Governments.

[238] *Carmuirea Spirituala a Musulmanilor din Republica Moldova v. Moldova*, 16 June 2005, European Court of Human Rights, Admissibility Decision, No. 12282/02.

3.4. The Restriction Clause of the Right to Freedom of Religion: An Effective Means of Protecting the Right to Acquire Legal Personality?

Often, religious or belief communities that bring their cases to the HRCttee or the ECtHR come with great hopes to find a remedy not only for their specific case but also, to change the legislation or practice that may constitute the basis of general repression of their communities. Indeed, it appears that international review through adjudication by the HRCttee and the ECtHR do have significant potential to curb unjustified use of power. In particular the rigorous application of the requirement that the restrictions be prescribed by law and that grounds for restrictions be relevant and sufficient as well as being proportionate to the aim pursued may be effective interpretive tools to block repressive violations. A rigorous and probing assessment of restrictions is, nevertheless, necessary for these tools and the approach of international adjudicatory bodies prove to be adequate to effectively respond to general repression that are often at the root of restrictions and violations of the right to acquire legal personality. Here the assessment will be based on the consideration of the relevant adjudicatory bodies of restrictions applied by states in cases dealing with the acquisition of legal personality; key elements of the restrictions regime that offer an important potential for improving domestic protection in relation to the right to acquire legal personality. This approach will also help us in understanding common ways of curbing this right by states.

Freedom to manifest one's religion or belief may be subject to limitations only under certain circumstances. The ICCPR Article 18(3) and the ECHR Article 9(2) respectively establish criteria for permissible limitations on manifestation of religion or belief with subtle difference. ECHR stipulates:

> Freedom to manifest one's religion or belief 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.[239]

The differences of the formulation in the two provisions are not substantive; permissible limitations must be, cumulatively, prescribed by law and based on grounds to protect public safety, order, health or morals or fundamental rights and freedoms of others and necessary in a democratic society. Although there is not a vast number of

[239] ECHR Article 9(2).

communications concerning Article 18 that have been dealt with by the HRCttee under the Optional Protocol, it is possible to find the Committee's elaboration on its interpretation of the restrictions clause of Article 18 in its General Comment 22.[240] In addition, the European Commission and Court decisions supply vast material to draw from concerning the application of limitations in general and those related to Article 9 in particular.[241]

Limitations must be prescribed by law and be necessary in a democratic society. The restriction clause enshrined in ICCPR Article 18(3) omits the phrase "necessary in a democratic society."[242] There is also a difference as regards one of the grounds for restrictions, namely, ICCPR allows limitations that are necessary to protect the "fundamental" rights and freedoms of others whereas the ECHR omits the phrase "fundamental" and refers to "rights and freedoms of others". Both of the clauses do not include "national security" as a ground for limitation which indicates that they lay down a more restricted list of grounds for limitations compared to other rights enshrined in the ECHR and the ICCPR.[243] It has been observed that there is not a difference in the manner the Strasbourg organs have applied the restriction clause of Article 9 and those of Articles 8, 10 and 11; the emphasis has been on "whether a restriction is necessary" rather than what interest it relies on.[244] As for the HRCttee it has stressed that Article 18(3) has to be "strictly interpreted".[245]

When the HRCttee and the ECtHR dealt with applications dealing with criteria to register in order to acquire legal entity as a religious/belief community they have not found the existence of certain requirements, as such, incompatible with international human rights law.

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[240] General Comment 22, *supra* note 37, para. 8.

[241] On the limitation clauses of the European Convention of Human Rights see, Jukka Viljanen, *The European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law. A Study of the Limitations Clauses of the European Convention of Human Rights*, (Tampere: Tampereen Yliopisto, 2003). Y. Arai- Takahashi, *The Margin of Appreciation and the Principle of Proportionality*, (2002)

[242] A proposal to include the qualifying phrase "democratic" was not approved by the HRComm. See Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, (N P Engel Second Revised Ed., 2004), p.426. Yet, it appears elsewhere in the ICCPR and in GC No. 27 which spells out the limitations test; "restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant " HRCttee, General Comment 27, UN Doc. CCPR/C/21/Rev.1/Add.9, 02.11.1999, para. 11.

[243] For example in ECHR Articles 8(2), 10(2) and 11(2) and in the ICCPR Articles 19(3), 21 and 22(2) include a longer list of permissible grounds for limitations.

[244] Van Dijk and van Hoof, *supra* note 37, p. 768.

[245] General Comment 22, *supra* note 37, para. 8.

The approach has been to consider the question of whether the criteria, as it has been implemented, constitutes interference in the right to freedom of religion or belief or the right to association or the former in the light of the latter and *vice versa*. Where interference has been found, the assessment has moved on with the three-thronged test to consider, whether the restriction has been prescribed by law, pursued a legitimate aim and whether it was necessary in a democratic society and proportionate to the aim pursued.

The significance of these aforementioned elements that must be taken into account when considering the legitimacy of restrictions cannot be overemphasized for religious groups or belief communities, whose right to freedom of religion or belief can be unduly restricted by laws that are drafted too vaguely or who suffer as a consequence of a general negative attitude in society against them where this can be reflected in the decisions of administrative authorities. Measures stemming from explicit or implicit negative bias against certain belief groups are evident, *inter alia*, in laws lacking precision paving the way for extensive discretionary powers by public authorities. In spite of the fact that prescription by law and discretion of officials are distinct, in terms of their effect they are highly inter-connected. The existence or lack of law and the precision of its formulation determines the nature of its application by domestic authorities. Where there is a lack of legislation or where legislation is too general or vague and therefore lacks specific guidance for those who are affected by it and for those who implement it, conditions conducive for extensive discretion on the part of the officials may be created. In addition, those who are affected by the law in question are left in the dark as to the nature of their rights and obligations.

Related to the "prescribed by law" test is its consequence of extensive discretion that is created for those who apply the law. Conversely, extensive or unfettered discretion can be an indicator that the relevant law does not meet the standard quality of law required. As keenly observed and eloquently depicted by Podoprigora, in actual fact, the most typical violations take place not in the form of legislation but in the form of administrative action which prevents believers from engaging in religious activities that are properly protected both by international human rights law and in most cases in domestic constitutions.[246]

[246] Roman Podoprigora "Freedom of Religion and Belief and Discretionary State Approval of Religious Activity" in T. Lindholm, W. C. Durham, Jr., B.G. Tahzib-Lie (Eds.), *supra* note 7, p. 425.

Religious communities, organizations have to make applications and receive permissions from officials who sit in administrative positions and use their discretion in determination of numerous issues that have considerable effects on the lives of belief communities; these decisions can range from major issues such as recognition or registration decisions to relatively minor decisions on building permits, licenses for clergy, permits for worship places as well as public worship and gatherings for teaching or celebration purposes.[247] Such decisions may be routine or they can be arenas for discrimination and arbitrary practices depending on the "applicable legal standards that govern approvals, the attitudes of relevant governmental officials, the attitudes of the wider populace, the ability of the populace to exert political pressures on decision makers and a variety of other factors."[248]

Since ensuring a fair and non-arbitrary process related to acquisition of legal personality, recognition and registration is important the quality of *legislation* and its *implementation* by public officials is a vital issue for the question at hand, the requirement that restrictions be "prescribed by law" stands out as a key element for the improvement of review of compliance with international norms and deserves further elaboration. When Article 29 of the UDHR was drafted the use of the words "prescribed by law" were proposed to underline the need for "legal form" however in a short while it became evident that it was equally necessary to qualify the nature of laws that states applied.[249] As for 18(3) of the ICCPR, the formulation "prescribed by law", according to Nowak, means that interference must be recorded in legislation or an unwritten norm of common law in such a way as to adequately specify provisions for the enforcement organs.[250] The HRCttee, outlines its views on the limitations of Article 18 in its General Comment 22 paragraph 8 which calls for a strict interpretation of the limitation clause. The Committee holds that "the limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in Article 18".[251] The nature of the cumulative criteria with regard to permissible restrictions is further emphasized by the Committee's views that the limitations may only be applied for those purposes for which they were prescribed and must be directly related and

[247] *Ibid*.
[248] *Ibid*., p. 426.
[249] P. Taylor, *supra* note 16, p. 293.
[250] M. Nowak, *supra* note 86, p. 425.
[251] General Comment 22, *supra* note 37, para. 8.

proportionate to the specific need on which they are predicated.[252] Furthermore, noteworthy is the clarification by the Committee on the meaning of "unlawful" and "arbitrary interference" in relation to the right to privacy.[253] According to the Committee, the term "unlawful" means that no interference can take place except in cases that are envisioned by law, in addition interference that is authorized by states can only take place on the basis of law and this law must comply with the provisions, aims and objectives of the ICCPR. The concept of "arbitrariness" is used with the intention to guarantee that even interference provided by law should be in accordance with the provisions, aims and objectives of the Covenant and reasonable in the particular circumstances.

The HRCttee adopted a probing approach where conditions related to premises may constitute an obstacle to obtaining legal status. In a communication brought before the HRCttee, *S. Malakhovsky and A. Pikil v. Belarus*[254], the applicants sought to register as a religious association, however, their application was denied because they did not fulfill one of the conditions for registration, namely, the requirement to have an approved legal address that satisfied certain health and fire safety standards necessary for the purposes such as religious ceremonies.[255] In Belarus only religious associations are entitled to establish monasteries, religious congregations, religious missions and spiritual institutions or invite foreign clerics to visit the country for the purpose of preaching or conducting other religious activity.[256] Here the HRCttee drew a distinction between conditions for the use of premises for religious activities and conditions for a religious association to be registered to have a legal address that 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 and found that the latter was unnecessary. While making this assessment the Committee also considered such a limitation's impact on the applicants, namely the impossibility of establishing educational institutions and inviting foreign clergy to visit the country and found that the restriction on the applicants' right to

[252] *Ibid*.
[253] HRCttee General Comment No. 16 on Article 17 (Right to Privacy), U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994), para. 3 and 4.
[254] *Sergei Malakhovsky and Alexander Pikul v. Belarus*, *supra* note 66.
[255] *Ibid*., para. 7.4.
[256] *Ibid*.

manifest their religion was disproportionate.[257] Hence the HRCttee found that the limitations imposed in the form of unnecessary and disproportionate requirements amounted to a violation of Article 18 of the ICCPR.

The evidentiary or factual basis of restrictions is also questioned by the HRCttee. In *Sister Immaculate Joseph v. Sri Lanka* where a Christian Order applied for incorporation of association and this was found unconstitutional, the grounds for interference were that the Order's activities *would* through the provision of material and other benefits to vulnerable people, coercively or otherwise improperly propagate religion.[258] The Committee did not refer to the *preventive* character of such a restriction but noted that this assessment lacked any evidentiary or factual basis hence underscored the necessity for evidence substantiating prevention of activities that *would* happen in the future.[259]

Indeed, qualifying the nature of laws has also been a matter of focus for Strasbourg organs as well. It has been established by case law that the requirement for the limitations to be prescribed by law does not mean only a literal conformity with national law, instead, it implies a quality of law that has three essential components.[260] First, the law must be adequately accessible; the individual must have an adequate indication as to which legal rules are applicable in a given situation. Secondly, the law must be formulated in a manner that has sufficient precision so that individuals can foresee the consequences of a given act.[261] It follows that laws of an especially general or vague character that do not lay down restrictions in a defined manner may not be able to pass the "prescribed by law" test. Having said that, it has also been noted that legislation that has a somewhat vague character or that is drafted in a broad manner can be given sufficient precision by the interpretation of domestic courts or agencies that apply the legislation.[262]

[257] *Ibid*., para. 7.4. para. 7.6.
[258] *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka, supra* note 46.
[259] *Ibid.* para. 7.3.
[260] Van Dijk and van Hoof, *supra* note 37, p. 336
[261] *The Sunday Times v. UK,* 26.04.1979, European Court of Human Rights, No. *6538/74*, para. 48.
[262] Evans, *supra* note 55, p. 138, based the ECtHR judgment in *Kokkinakis v. Greece*, 25 May 1993, European Court of Human Rights, No. 14307/88.

The third component required for the quality of law is defined as a corollary of the foreseeability test; to be exact, adequate safeguards against abuses must be extended in a manner that would delineate the extent of the authorities' discretion and define the circumstances in which to be exercised.[263] The requirement that restrictions be prescribed by law has been employed in numerous cases and is rightly accounted to "provide a potent source of restraint upon abuse of power."[264]

The strategic role of the prescribed by law requirement to potentially improve the protection of freedom of religion or belief in the context of interaction in the formal processes where religious groups deal with public authorities is seen in the case of *Manoussakis and others v. Greece.* The real change where the potential is realized, however, has been in the case of *Hasan and Chaush v. Bulgaria*.[265] Even though both of these cases do not directly concern the acquisition of legal personality the findings of the European Court are relevant and informative for the review of processes related to legal personality.

Manoussakis and others v. Greece was initiated with the complaint of 3 Jehovah's Witnesses who were convicted for unauthorized use of a place of worship.[266] A room was rented to be used for all kinds of meetings of Jehovah's Witnesses and in June 1983 an authorization to use the room as a place of worship from the Minister of Education and Religious Affairs (MERA) was requested.[267] By December 1984 the applicants had received five letters from MERA stating that a decision was not reached on their case as more information was being collected.[268] Finally, on March 1986, criminal proceedings were instituted against the applicants where they were accused of establishing and operating a place of worship for religious meetings and ceremonies of followers of Jehovah's Witnesses without authorization

[263] Van Dijk and van Hoof, *supra* note 36, p.337 See also *Olsson v. Sweden,* 24 March 1988, European Court of Human Rights, No. 10465/83, para. 61; *Silver and others v. UK*, 25 March 1983, European Court of Human Rights, Nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 , para. 90; *Malone v. UK*, 2 August 1984, European Court of Human Rights, No. 8691/79, para. 67.
[264] Evans, *supra* note 27, p. 326.
[265] See also the case of *Kokkinakis v. Greece* where the applicant complained of vague laws concerning the prohibition of proselytism. Here, while the Court found that the law itself was vague but concluded that the more precise case law established by courts supplemented it so the applicant could regulate his conduct. See *supra* 106, para. 40.
[266] *Manoussakis and others v. Greece*, *supra* note 50.
[267] *Ibid*.
[268] *Ibid*.

from the recognized ecclesiastical authorities.[269] After establishing that the conviction of the applicants for using the premises without prior authorization was an interference with their exercise of their freedom to manifest their religion in worship and observance, the ECtHR considered whether this interference was prescribed by law.[270] The applicants' complaint was not so much directed towards the treatment they have encountered in the process, namely the abuse of power, but more the 'general policy of obstruction' pursued in relation to Jehovah's Witnesses when they wished to set up a church.[271]

In reaching its conclusion the Court made significant observations; the law in question allowed a far-reaching interference by the political, administrative and ecclesiastical authorities with the exercise of religious freedom, numerous formal conditions conferred a very wide discretion to the police, mayor, due to the absence of a time limit the Minister of Education and Religious Affairs could defer this reply indefinitely, the decree empowered the Minister to asses whether there is a *real need* for the religious community in question.[272] Thus the nature of this law raised serious issues with regard to the requirement that restrictions must be prescribed by law, particularly the quality of law as it has been examined above. The Court observed from the evidence and cases cited by the applicants that the State has tended to use the possibilities afforded to it by the provisions to "impose rigid, or indeed punitive, conditions on practice of religious beliefs by certain non-Orthodox movements, in particular Jehovah's Witnesses".[273] This deliberation provides a thorough criticism of general laws that make extensive discretionary authority by various public officials possible and in fact may be used against unwanted belief communities. However, exactly here where the Court made a very relevant and significant finding which constitutes the crux of the matter, the Court was unable to find a violation. The Court appeared reluctant to deal with this issue under the requirement that limitations imposed had to be "prescribed by law" and moved on with its assessment and found a violation of Article 9 on other grounds. The case was decided on proportionality; the conviction of the applicants had such

[269] *Ibid*., paras. 7-12.
[270] *Ibid*.
[271] *Ibid*., para. 38.
[272] *Ibid*., para. 37.
[273] *Ibid*., para. 48.

a direct affect on the applicants' freedom of religion that it could not be perceived as proportionate to the legitimate aim pursued.[274]

In contrast, in a later case, *Hasan and Chaush v. Bulgaria,* which dealt with interference by the authorities in the organization and leadership of the Muslim community in Bulgaria, the case was decided on the fact that the interference was not prescribed by law.[275] The European Court found a failure by the authorities to remain neutral in the exercise of their powers in relation to the internal organization of the Muslim Community and this failure amounted to interference in the believers' freedom to manifest their religion.[276] The Court found that the relevant law did not provide for a substantive criteria on the basis of which the domestic authorities register religious denominations and changes of their leadership in the situation of internal divisions and conflicting claims for legitimacy and this taken together with lack of adversarial safeguards led the Court to find that the interference was not prescribed by law, arbitrary and based on legal provisions which allowed unfettered discretion to the executive.[277]

According to Taylor, ECtHR criticism of the legal provisions in *Hasan and Chaush v. Bulgaria*, may suggest that there is a willingness on the part of the Court to attack repressive legislation and in the future use the *prescribed by law* condition to condemn state measures that are basically preventive in regulating the practices of religious minorities.[278] Certainly, compared to the European Court's position in *Manoussakis and Others v. Greece*, the Court has come closer to addressing general repressive legislation that is conducive for arbitrary decisions by public authorities through the utilization of the interpretive tools found in the

[274] *Ibid.,* paras. 38-39.
[275] *Hasan and Chaush v. Bulgaria,* 26 October 2000, European Court of Human Rights, No. 30985/96.
[276] *Ibid*., para. 78.
[277] Hasan and Chaush v. Bulgaria, *supra* note 119, para. 85 and 86. Again in *Svyato-Mychalivska Parafiya v. Ukraine* where the change in statute of a religious association constituted the reason for refusing to register the association the European Court has partially relied on the prescribed by law condition again. In its assessment the Court found it necessary to determine whether the authorities based their decisions on 'acceptable assessment of relevant' facts and found that the grounds given for refusing registration were inconsistent and hence arbitrary by the registering authority. In its reasoning the Court considered the "prescribed by law" test and questioned the "forseeability" of the law saying the domestic courts "were clearly prevented from reaching a different finding by the lack of coherence and foreseeability of the legislation" *Svyato-Mychalivska Parafiya v. Ukraine,* 14 June 2007, European Court of Human Rights, No. 77703/01, para. 152.
[278] P. Taylor, *supra* 16, p. 296.

Article 9. In this context, Taylor also warns against potential legal problems that may end up at the European Court as a result of recently adopted anti-sect laws in Europe which lack precision and allow excessive discretion to domestic authorities to dissolve religious organizations.[279] Others have also voiced concern about strict restrictions imposed on cults, sects and other allegedly dangerous formations of religious communities in a number of European countries, but they appear less confident that the European Court will be willing to "ward off such governmental intrusions."[280] So far Jehovah's Witnesses have challenged the relevant law in France with an application to the European Court complaining that they would potentially be a victim of the application of the law. But their application was found inadmissible due to the fact that the law was not invoked against them.[281]

Questioning the evidentiary basis of decisions of public authorities that have not been based on "relevant and sufficient" grounds has also proved to be important tools to curb arbitrary decisions. In the case of *The Moscow Branch of Salvation Army v. Russia,* the grounds applied by domestic authorities in order to refuse the applicants' application for re-registration were, according to the Court, "lacking evidentiary basis and arbitrary" and those pertaining to its alleged "foreign origin" were not "relevant and sufficient", nor "prescribed by law".[282] The domestic public authorities had held that the applicants did not set out their religious affiliation and practices in a precise manner and omitted to describe all of its decisions, regulations and traditions, however the ECtHR found that the Religions Act did not lay down any guidelines on the description of religious affiliation or denomination of an organization.[283] Hence there was no apparent "legal basis for the requirement to describe all "decisions, regulations and traditions."[284] Here the Court placed the "task to elucidate the applicable legal requirements and thus give clear notice how to prepare the documents" with the State.[285]

[279] P. Taylor, *supra* 16, p. 297-298.
[280] R. Uitz, *supra* note 11, p. 178. See Chapter 4 of the same book for a brief survey of constitutional developments and recent legal restrictions imposed on new religious movements in Europe.
[281] *The Christian Federation of Jehovah's Witnesses in France v. France*, 06 October 2001, European Court of Human Rights (Admissibility), No. 53430/99 2001.
[282] *The Moscow Branch of Salvation Army v. Russia*, *supra* note 31, para. 85.
[283] *Ibid.*, para. 89.
[284] Ibid., para. 87-90.
[285] *Ibid.,* para. 90. Similarly in *Church of Scientology Moscow v. Russia*, 24 September 2007, European Court of Human Rights, No. 18147/02.

In addition, the ECtHR clearly underscored the unacceptability of "arbitrary and mere speculations" to deny registration. In its assessment, the Court also took into account that "other religious associations professing the faith of The Salvation Army have successfully obtained re-registration."[286] Thus on both of the above accounts the Court found that Moscow authorities neglected their duty to act in "neutrality and impartiality."[287] The District Court inferred from the applicant's articles of association that the members of the applicant branch would "inevitably break Russian law in the process of executing The Salvation Army's Orders and Regulations and the instructions of the Commanding Officer".[288] Referring to its caselaw from *Refah Partisi* and *Partidul Comunistilor* the ECtHR noted that indeed, an association's program may in certain cases "conceal objectives and intentions different from the ones it proclaims" and in order to verify this the content of the program must be compared with the actions of the association's leaders and the positions they embrace.[289] However in the case at hand there was no such evidence indicating that the members or founders were engaged in other activities than those outlined in the articles of associations, hence the findings of the District Court were found to lack evidentiary basis and was arbitrary.[290] Similarly, in *Metropolitan Church of Besserabia v. Moldova*, the Court dismissed the argument of the Government that, once recognized, the Church "might" constitute a danger to national security and territorial integrity as "mere hypothesis" which in absence of evidence could not justify a refusal to recognize it.[291] Indeed, in spite of the fact that 'national security' does not constitute one of the permissible grounds for interference in manifestation of religion or belief, issues regarding religious communities that have intricate ties and relations with other countries can be highly sensitive political matters that may cause a broad application of restrictions rooted in national security matters. In *Metropolitan Church of Besserabia v. Moldova*, the ECtHR considered the Government's arguments putting forward the activities of the Church in the political sphere with the aim of achieving reunification with Romania as being a threat to national security and territorial integrity.[292]

[286] *Ibid.*, para. 97.
[287] *Ibid*.
[288] *Ibid.,* paras. 93 and 94.
[289] *Ibid.,* para. 94.
[290] *Ibid.,* para. 95.
[291] *Metropolitan Church of Bessarabia and others v. Moldova*, *supra* note 20, para. 125.
[292] *Metropolitan Church of Bessarabia and others v. Moldova*, *supra* note 20, para. 125.

The European Court observed that the Government had not substantiated the alleged political activity.[293] It is interesting that the Court noted, even if the Church were linked to the political activities that allegedly were working towards the reunification of Moldova with Romania, the Government had not maintained that these activities were illegal. Therefore political activity, *per se*, would not necessarily constitute a ground for restriction.

It is clear from the above account that both HRCttee and ECtHR strictly require *evidentiary and factual* basis for preventive interferences. This places the burden on states to substantiate with evidence that their preventive measures were necessary, as opposed to relying on hypothetical possibilities. The result of this requirement for belief communities is that they will not be subjected to practices that are based on perceptions of threat reinforced by the particular sensitivities in individual state by the authorities, which is often the case for belief groups that are seen as marginal.

Restrictions on the right to acquire legal personality must pursue a legitimate aim to protect, 'public safety', 'order', 'health' or 'morals' or the 'fundamental rights and freedoms of others'. Both the United Nations and Strasbourg institutions do not carry out a rigorous exemination when it comes to determining whether a certain restriction is aimed at protecting one of the enlisted grounds.[294] It appears that, for example, states can easily get away with claiming that certain criteria layed out for the acquisition of legal personality is aimed at protecting public order or the rights and freedoms of others and that might be difficult to conclusively refute since it is a sphere where public regulation is generally viewed as normal. Thus adjudicating bodies accept that measures "pursued a legitimate aim" and move on with their assessment of the restrictions.[295]

In order to be legitimate any restriction must be necessary in a democratic society.[296] It, moreover, must be *necessary* in order to protect the *aim* the state claims.

[293] *Ibid.*
[294] Evans, *supra* note 55.
[295] See, *inter alia*, *Buscarini and Others v. San Marino*, 18 February 1999, European Court of Human Rights No. 24645/94, para. 208; *Manoussakis and others v. Greece*, *supra* note 50, para. 387.
[296] See ECHR Article 9(2).

EctHR employes the margin of appreciation doctrine. While the Strasbourg organs have emplpyed the margin of appreciation and thus accommodated states restrictions in Article 9 cases that have been based on controversial issues the right to acquire legal personality of belief groups have been exceptions. I would like to suggest that the reason for this has been the strong protection attributed to the right to associate in the ECHR protection scheme by the Convention organs. When the right to acquire legal personality is viewed in the context of Article 9 interpreted in the light of Article 11 or vice versa, the threshhold for accommodating state restrictions is high. The exception here is presented in the *Refah Partisi v. Turkey case*, which dealt with the dissolution of a political party that sought, among others, to establish the *sharia* and a multi-juridical system.[297] Although the case is decided on the right to freedom of association and not the right to freedom of religion or belief, its significance lies in the fact that it reveals the European Court's limit in relation to the right to associate. Thus demonstrating that when associative rights of religious/belief communities including religious jurisdiction are concerned the margin of appreciation doctrine may apply.

When assessing claims concerning the right to acquire legal personality a strict application of the respective restriction clauses is necessary in order to heighten the standard of review. In particular, the prescribed by law requirement and necessity of restrictions as well as a rigid scrutiny of the evidentiary basis of restrictive measures and proportionality appear to be key interpretive devices to address relevant violations. When a violation in such cases pertaining to recognition or registration of a religious community is found, frequently, the violation may be a result of general repression, bias or discrimination against the community in question. Yet, the capacity and the willingness to deal with broad issues that are related to vague laws creating the possibility for extensive discretion by administrative authorities that may reflect unfavorable attitudes towards certain belief communities may not always be there. While in the *Manoussakis v. Greece* the ECtHR clearly demonstrated unwillingness to decide the case on the inclination on the part of the authorities to restrict religious practice of non-orthodox beliefs in general and Jehovah's Witnesses in particular,[298] in *Hasan and Chaush v. Bulgaria*, the ECtHR showed willingness to confront repressive legislation and practice. Finding of a

[297] *Refah Partisi (the Welfare Party) and Others v. Turkey*, Grand Chamber, 13 February 2003, European Court of Human Rights , Nos. 41340/98, 41342/98, 41343/98 and 41344/98.
[298] *Manoussakis and others v. Greece*, *supra* note 50.

violation based on failure for the restrictions to be prescribed by law could potentially have a better chance to resonate at the domestic level than another ground. Hence the State in question can be challenged to change its law. Surely, for belief communities institutional and attitude problems are of crucial importance and yet more difficult to prove and make a matter of legal proceedings. While improvement in this area would be welcome this may not be without problems even if the Court were willing to take note of wide-scale repressive measures against certain belief communities. It would be important that the applicant be able to demonstrate the scale of measures taken against the belief community. As underscored by Evans since the Court is supposed to be one of the primary organs for protecting human rights in Europe it should be ready to take a wider view of cases such as *Kokkinakis* and *Manoussakis* where it is clear that an oppressive pattern of State behavior has been conducted under the law at hand.[299] As it has been demonstrated in Chapter 2, the consideration of state reports on the implementation of the ICCPR and the enforcement of judgments of the ECtHR by the Committee of Ministers may be means of international review conducive to tackle broad-scale repressive and discriminatory legislation and practice in this area. Where violation of Article 18 of the ICCPR or Article 9 of the ECHR is found extending scrutiny of whether there was a discrimination or not may also be a means of improving standard of international review. This will be briefly examined below.

3.5. The Prohibition of Discrimination

In the process of adjudication, claims concerning discrimination in connection to legal personality, recognition and registration claim may be potentially a significant tool to identify recurring patterns of discrimination and general repression toward certain groups.[300] It is not the purpose here to provide a comprehensive examination of the concept of non-discrimination and its development in international law- an impossible task considering the limitations of this paper. Instead here my purpose is to demonstrate that the inclusion of the consideration of the principle of non-discrimination is the assessment of claims concerning to acquisition of legal entity status can strengthen the claims as well as- where violation is found- lead to the formulation of judgments that may potentially point to measures that

[299] Evans, *supra* note 55, p.141.
[300] Gay Moon & Robin Allen, "Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards a Better Understanding of the Rights, and Their Implications", 6 *EUR. HUM. RTS. L. REV*. 580, 595–96 (2000).

must be taken to seek corrective action by states. It will be, however, seen below that the non-discrimination clauses have not been bring about this potential.

Article 26 of the ICCPR is an autonomous provision protecting against discrimination,[301] thereby extending protections of equality and non-discrimination beyond the rights and freedoms enshrined in the Covenant. The HRCttee underscored the importance of observing the principle of non-discrimination in relation to Article 18(3) in its General Comment 22; "in interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in Articles 2, 3 and 26".[302] In addition, "restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner".[303] States must ensure that "the fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers".[304] In particular, "certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under Article 26".[305] Indeed, the HRCttee has consistently criticized differentiation in the treatment of "traditional" and other religions, in particular when it comes to the official registration of a Church or religious community and the acquisition of legal personality" and deemed these to raise issues both under Article 18 and Article 26.[306] Even though there is ample case-law regarding Article 14 in the jurisprudence of the HRCttee there have not been cases that have specifically dealt with Article 14 in the context of religious or belief organizations. The

[301] M. Nowak, *supra* note 86, p. 604.
[302] General Comment 22, *supra* note 37, para. 8.
[303] *Ibid*.
[304] General Comment 22, *supra* note 37, para. 9.
[305] *Ibid*.
[306] Concluding Observations of the HRCttee Serbia, UN Doc.CCPR/C/SRB/CO/2, 21.05.2011, p. 6.

HRCttee has expressed that Article 14 is "a key element of human rights protection and serves as a procedural means to safeguard the rule of law".[307]

The ECtHR has not been consistent in its utilization of Article 14 in relation to Article 9 in or Article 11 in light of Article 9. In a number of cases where the applicants have raised complaints regarding Article 14 in addition to Article 9, the ECtHR has held that the alleged inequality has been sufficiently taken into account in the assessment that has led to a violation of Article 9 or Article 11 in light of Article 9 and saw no reason for separate examination of the facts from the standpoint of Article 14.[308] In other cases, the ECtHR has simply not seen it necessary to adjudicate under Article 14 even though there have been indications in the consideration of the case under Article 9 that the interference in question may include a discriminatory pattern.[309]

In another case concerning the refusal by domestic authorities of registration as a religion of an organization of Muslims the European Court did not find the requirement of presenting the Government a document setting out the fundamental principles of their religion.[310] The Court held that (the State could not establish the authenticity of the organization seeking recognition as a religion and whether the denomination in question presented a danger for democratic society).[311] Interestingly, when considering Article 14, the European Court did not find substantiation of this claim by not showing (that the requirements of the Religious Denominations Act were applied more strictly to it in comparison with other organizations seeking recognition(.[312] Were the applicants able to present that other groups were not asked same criteria as they, this may have made it possible for the European Court to view this information as a substantiation of the claim under Article 14. It appears that applicants bringing relevant claims under Article 14 may have a better chance if they can provide statistical information and examples demonstrating their differential treatment.

[307] HRCttee, General Comment No. 32.
[308] *The Moscow Branch of Salvation Army v. Russia*, *supra* note 31, para. 101 and *Case of Church of Scientology Moscow v. Russia*, *supra* note 125, para. 101.
[309] *Metropolitan Church of Bessarabia and Others v. Moldova*, *supra* note 20, para. 134.
[310] *Carmuirea Spirituala A Musulmanilor Din Republica Moldova v. Moldova*, *supra* note 82.
[311] *Ibid*.
[312] *Ibid*.

One way of establishing whether there has been discrimination or not may be through the demonstration of statistical information. The fact that the ECtHR has recently shown willingness to consider statistical evidence will strengthen such claims.[313] However, the fact that ECtHR requires "undisputed official statistics" in order to take them into account,[314] may be a factor to harden the proof of discrimination for applications. Where there is strong suspicion that there may be discriminatory practice and when there is no relevant official statistics the Court may as the state to demonstrate, perhaps through statistical information, that there is no discrimination. For example, if the case involves restrictions on acquisition of legal personality where the belief group in questions claims to be denied such status through unsuccessful applications, the state may be asked concerning similar applications by groups belonging to the same religion or belief, whether their applications have been successful, or the total number of applications and the total of successful applications etc. This type of probing and inquisitive assessment may be a means of determining discriminatory patterns against certain religious or belief groups.

In the case of *Religionsgemeinschft der Zeugen Jehovahs and Others v. Austria*, however, the ECtHR was persuaded that the differential treatment of the applicant, based on the allegedly discriminatory criteria required for the recognition as a religious society, amounted to a violation of Article 14 in conjunction with Article 9.[315] Under Austrian law religious societies enjoyed a privileged treatment, yet, *inter alia*, twenty years existence of a religious association was one of the requirements for the recognition of a religious society. The Court held that it could accept such a time period in exceptional circumstances as, for example, a newly established religious groups, but hardly acceptable in regards religious groups with long international existence. It was held that,

> In respect of such a religious group (Jehovah's Witnesses), the authorities should be able to verify whether it fulfils the requirements of the relevant legislation within a considerably shorter period. Further, the example of another religious community cited by the applicants shows that the Austrian

[313] *DH and Others v. Czech Republic*, 13 November 2007, European Court of Human Rights (Grand Chamber), No. 57325/00, para. 188. For more on this case see, Jennifer Devroye, "The Case of D.H. and Others v. the Czech Republic", North Western Journal of International Human Rights, Vol. 7, (Spring 2009) p. 81-101.
[314] *Hoogendijk v. the Netherlands*, 6 January 2005(Admissibility), European Court of Human Rights, No. 58641/00.
[315] *Religionsgemeinschaft Der Zeugen Jehovas and Others v. Austria*, 31 July 2008, European Court of Human Rights, No. 40825/98.

> State did not consider the application on an equal basis of such a waiting period to be an essential instrument for pursuing its policy in that field. [316]

Hence, the Court found that the difference in treatment was not based on any "objective and reasonable justification".[317]

While the case of the *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria* does not resemble to the aforementioned cases concerning registration, they do have commonalities in terms of discriminatory rules. Yet, the ECtHR does not seem to take the route of consistently considering each case substantively under Article 14 in addition to Article 9 or Article 11 in light of Article 9.

Now let us turn to explore other rights that constitute basis for the right to acquire legal personality for religious/belief groups. The right to court and the right to association together also establish "a fairly strong right to entity status".[318]

3.6. The Right to Fair Trial- Judicial Protection

The right to fair trial has important implications for enabling judicial protection of belief communities or organizations and their assets and in this respect it is closely linked to having legal personality. The absence of legal personality of a belief community may amount to and result in, more often than not, an absence of judicial protection of the community's assets which might be essential for manifesting religion or belief and certain religious activities. Article 14 of the ICCPR and Article 6 of the ECHR, respectively protect the right to fair trial in civil and criminal cases. The HRCttee's General Comment No. 32 on Article 14 of the ICCPR holds that the right to fair trial includes the right to a public hearing before an independent and impartial tribunal within reasonable time, the presumption of innocence, and other minimum rights for those charged in a criminal case.[319] As far as belief groups are concerned it is vital that they have legal personality so that they can have judicial protection. Alternately, to benefit from judicial protection they need to have legal entity status, this link demonstrates the empowering function of legal personality.

[316] *Ibid.*, para. 98-99.
[317] *Ibid*.
[318] Durham, *supra* note 12.
[319] HRCttee General Comment 32 on Article 14, UN Doc. CCPR/C/GC/32, 23.08.2007, para. 15 and 25.

The ECtHR holds that Article 6 (1) "secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court", hence embodies a "right to court", "a right to access a court".[320] While this right may be restricted, the restriction may not be such that the very essence of the right is impaired.[321] According to established ECtHR case-law,

> … one of the means of exercising the right to manifest one's religion, especially for a religious community in its collective dimension, is the possibility of ensuring judicial protection of the community, its members and its assets so that Article 9 must be seen not only in the light of Article 11, but also in the light of Article 6.[322]

The link between lack of legal capacity and the resulting restrictions on activities of a church was addressed in *Canea Catholic Church v. Greece* on the basis of Article 6 of the ECHR.[323] The case concerned a very old church that was never established as a legal entity but nevertheless acquired movable and immovable property, concluded contracts and taken part in notarized transactions. The validity of these actions had never been contested, however, the church was denied access to court because it lacked legal personality. In response to the Government's argument that the Church in one way or another could have sought to carry out formalities in order to acquire some form of legal personality, the Court maintained that this was unacceptable as there was nothing to suggest that one day they would be denied access to court.[324] Hence the burden was not on the Church to seek a form of legal personality. This may be significant in establishing that in cases where there is lack of a regulation for procedures related to legal entity of religious communities, or where such regulations are unclear, it is the responsibility of the state to make regulations that are clear and foreseeable so that belief communities can know what is expected of them. Similarly, in the case of *Holy Monasteries v. Greece* the Court found that by depriving the monasteries from the possibility of bringing a complaint in relation to their right to own property, they might take against the Greek State, third parties or Greek Church to courts the law in question impairs the very essence of their "right to court."[325]

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[320] *Golder v. UK*, 21 February 1975, European Court of Human Rights, No. 4451/70, para. 21.
[321] *Canea Catholic Church v. Greece*, 16 December 1997, European Court of Human Rights, No. 25528/94, para. 38.
[322] *Metropolitan Church of Besserabia and Others v. Moldova*, *supra* note 20, para. 118.
[323] *Canea Catholic Church v. Greece*, *supra* note 165, para. 38.
[324] *Ibid*., para. 42.
[325] Having said that, it should be noted that in this case the Court did not find a violation of Article 9 and Article 11 because they were not deprived of the means necessary for pursuing their religious objectives.

3.7. The Right to Freedom of Association

Article 11 (1) of the ECHR stipulates:

> Everyone has the right to freedom of peaceful assembly and to freedom of association with others[…]

When belief communities associate for the purposes of manifesting their religion or belief through acts protected under Article 9 of the ECHR and Article 18 of the ICCPR, *inter alia*, establishing places of worship, teaching and training their own clergy they may establish associations that are also protected respectively by Article 11 (ECHR) and Article 22 (ICCPR). The European Court affirms that "citizens should be able to form a legal entity in order to act collectively in a field of mutual interest" and considers the formation of a legal entity as an important aspect of the right to freedom of association "without which the right would be deprived of any meaning".[326] Thus establishing firmly the nexus between the right to association and legal entity status. Groups of believers can also base their claims to acquire legal entity status on their right to freedom of association. Since belief communities also "act collectively in a field of mutual interest", namely their shared belief, where this requires the acquisition of a legal entity status, it would reasonably follow that the right to freedom of association would protect this claim. Krishnaswami notes that the generality of the terms of the article protecting freedom of association, leaves no doubt that it extends to the sphere of religion or belief.[327] There is no reason for religious associations to be treated less favorably, on the contrary, claims of religious or belief communities have the added protection of the right to freedom of religion or belief. Also if a religious or belief community were to be denied legal entity status as it is required by the right to association, based on their "religious nature" this may give rise to questions on prohibition of discrimination as protected by Article 14 of the ECHR.[328]

When it comes to belief groups the European Court views Articles 9 and 11 as complementary provisions. The fact that the Court feels the need to rely on both Articles implies that it does not view solely Article 9 as a sufficient legal basis for the protection of

[326] *Sidiropoulos v. Greece*, 10 July 1998, European Court of Human Rights, No. 1594/1614, para. 40.
[327] A. Krishnaswami, *supra* 15.
[328] Lance S. Lehnhof, "Freedom of Religious Association: The Right of religious organizations to obtain legal entity status under the European Convention"(*Brigham Young University Law Review*, 2002).

associative acts of belief groups. In *Hasan and Chaush v. Bulgaria*, the Government argued that the organization and leadership of the Muslim community in Bulgaria, needed to be analyzed mainly from the angle of Article 11 protecting freedom of association.[329] Here the European Court took a clear stand saying,

> Where the organization of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference… Were the organizational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.[330]

The Court was of the opinion that this particular case would not be better dealt with solely under Article 11, as suggested by the Government, in their view such an approach would take the applicants' complaints out of their context and disregard their substance.[331] Hence in the Court's view the ideal way to deal with the complaint was to examine it under Article 9 of the Convention as interpreted in light of Article 11. The need to bring in Article 11 indicates that the substantive scope of Article 9, as such, is not viewed as broad to include the associative acts as manifestations of belief or religion.

Regarding complaints raised by belief organizations in relation to legal entity status in the context of re-registration procedures, the European Court held that the complaints raised issues both under Article 11 and Article 9.[332] A refusal by domestic authorities to grant legal status to an association of individuals amounts to an interference of the right to association and where an organization of a religious community is at issue, such refusal also constitutes and interference of the right to freedom of religion or belief.[333] In *The Moscow Branch of Salvation Army v. Russia*, it was a violation of Article 11 read in light of Article 9.[334] It seems that where there are complaints regarding an already established organization established by a religious community then the Court looks at whether there is an interference with Article 11 read in light of Article 9. When there is not yet an organization established then the Court assess whether there has been an interference with Article 9 read in light of Article 11.

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[329] *Hasan and Chaush v. Bulgaria, supra* note 119, para. 61.
[330] *Ibid*., para. 62.
[331] *Ibid.,* para. *65.*
[332] *Case of Church of Scientology Moscow v. Russia*, *supra* note 125, para. 98 and *The Moscow Branch of Salvation Army v. Russia*, *supra* note 31, para. 98.
[333] *The Moscow Branch of Salvation Army v. Russia*, *supra* note 31*, para. 71.*
[334] *The Moscow Branch of Salvation Army v. Russia*, *supra* note 31*, para. 98.*

The HRCttee dealt with complaints in Sisters of the *Holy Cross v. Sri Lanka* under Article 18, dealing with a claim concerning the establishment of a charity institution. Article 22 was not raised by the applicant, nor by the State. However in *S. Malakhovsky and A. Pikul v. Belarus*, a case about re-registration requirements, the HRCttee dealt with the case solely under Article 18, while also noting that it also raised issues under Article 22 so as to merit admissibility.

The associative acts of religious groups that are necessary to carry out their collective acts, however, are not solely protected by Article 9 in the European scheme as there the European Court relies on the protection of Article 9 interpreted in light of Article 11 and the protection of Article 11 in light of Article 9. These acts need to be able to protected solely under Article 9. Belief groups need not raise their complaints related to their associative rights under freedom of association. Nevertheless, this does not preclude that possibility of same issues being raised under the right to freedom of association. While the HRCttee observes that associative acts of belief groups raise issues both under Articles 18 and 22 of the ICCPR, it takes a broad view of the scope of Article 18 so as to base its deliberation solely on Article 18. The difference in the approach of the ECHR and HRCttee reflects a difference in the interpretation of the respective religious freedom clauses in how far they extend to associative acts, the HRCttee certainly seems to have a broader view.

In conclusion, for belief groups, the right to acquire an adequate form of legal personality for the enjoyment of the right to manifest religion or belief is a key enabling and empowering right without which groups of believers generally cannot effectively exercise their right to manifest religion or belief in community with others in worship, teaching, practice and observance; they cannot own or rent property, including places of worship, establish schools and seminaries, engage in charity activity which is integral to very many religions. The process of acquiring legal personality, however, remains a highly regulated legal sphere by states where state-religion relation becomes an important denominator of the nature of this sphere. Conversely, in the exercise of this right, the particular state-religion relationships that have been historically and contextually shaped bring in various privileges or prejudices, cooperation and co-existence between states and religious groups. Normative demands of international obligations constitute a challenge to the ways in which this sphere has been

traditionally regulated; the observance of the principles of neutrality and impartiality in the exercise of the regulatory powers of states is given importance by both the ECtHR and the HRCttee. Yet, when international review mechanisms employ self-restraint, in particular the ECtHR, giving substantive content to relevant international provisions will be delayed and lacking.

The right of a religious/belief community to obtain legal personality has been progressively recognized as a part of the protection of the collective dimension of freedom of religion or belief. Considering that positive obligations ensuing from the right to freedom of religion or belief are less than clearly established in international jurisprudence the recognition of the right to acquire legal personality gives the latter a high rank within the constellation of elements making up together the scope of the right to freedom of religion or belief, particularly in its collective dimension. Since states are required to ensure the effective protection of human rights, including the right to freedom of religion or belief, there is a positive obligation on the part of states to create an accessible and adequate form of legal personality. While the right to acquire legal personality is first and foremost protected within the scope of the right to freedom of religion or belief, other inter-dependent and complementary rights such as the right to association, the right to friar trial and rights of minorities are also relevant.

The ECHR and the ICCPR have demonstrated similarities and differences in the way they have dealt with claims pertaining to legal personality issues. Conceptually, the most striking difference is the basis of the right to legal personality; for the ECHR such claims may be addressed under Article 9 interpreted in the light of Article 11 or where the issues concerns an already established organization Article 11 in light of Article 9. It follows that the ECtHR does not view associative acts of belief groups as a matter that is grounded solely on Article 9, while the latter creating the context in which the right is exercised. The HRCttee, on the other hand, while observing that Article 22 may also be applicable, has dealt with similar cases solely under Article 18, including in its observations on state reports on the implementation of the ICCPR. The different approaches of the two bodies reflect a narrow view of the scope of manifestations on the part of the Strasbourg organs and a broader view of the HRCttee. On the other hand, as regards the ECtHR, the strong protection afforded to

the right to association has lent strong protection, not leaving room for a margin of appreciations to states, to the right to acquire legal personality by believers as long as these are compatible with democracy.

In the adjudication of cases involving acquisition of legal personality, recognition and registration of religious groups both the HRCttee and the Strasbourg organs have underscored that states must be strictly guided by restriction clauses enshrined in the provision regulating freedom of religion; only 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 requirement, for restrictions imposed on the manifestation of religion or belief in the context of the right to acquire legal personality, recognition and registration for religious/belief communities, be "prescribed by law" has immense potential against vague laws and arbitrary actions of domestic authorities at various levels. This is particularly strengthened by the subsequent developments in case law of both ECHR and the HRCttee and the General Comment on the restrictions clause of Article 18 of the HRCttee where they have elaborated on the quality of law. The role of precise, clear, forseeable legislation in this sphere is crucial in order to avoid arbitrary and discretionary practices.

A more effective utilization of the principle of non-discrimination in the assessment of claims concerning the acquisition of legal personality for belief groups will strengthen these claims and result in the construction of judgments that may lead to more specific measures that must be taken by states in order to ensure that similar violations happen again.

While the application of permissible restriction clauses has been an important means of blocking arbitrary practice by states it appears that international compliance review mechanisms may be improved to avert wide-spread repressive legislation and practice. A substantive focus by the adjudicatory bodies to the wider legislative or application issues where this leads to the case being decided on these issues may improve protection. When the cases are decided based on broader issues then the enforcement of the judgments and follow of opinions may have the capability of seeking broader corrective action by states. A foreseeable disadvantage of such an approach may be that states may consider the ECtHR and the HRCttee too "active" and be critical of judgments. However, in the long run such an

approach would greatly increase the effect of international review of individual cases on the improvement of national protection. The weakness however lies in the inability or unwillingness to address wider issues related to how the formulation of laws and their applications affects certain religious/belief groups.

Chapter 4

The Right of Religious/Belief Groups to Freedom in their Internal Affairs

4.1. Introduction

The right to freedom in the internal affairs or autonomy of religious or belief groups constitutes an integral part of the protection of the collective dimension of freedom of religion or belief. Its scope is, however, far from clear. International provisions protecting the right to freedom of religion or belief do not provide an exhaustive list of rights that would provide an all-encompassing list of acts that are protected under the right to autonomy of religious/belief communities. And this is rightly so, considering that issues that may arise under the notion of "autonomy of religious/belief communities" are likely to cover a wide range of acts based on the wide range of beliefs and dogma relevant to their internal affairs.

This Chapter aims to explore the international protection of the right to freedom in the internal matters of religious or belief groups with a view to examine its scope and, possibly, improve the standard of international compliance review. To start with, the notion of autonomy of belief groups and its substantive scope is briefly discussed with reference to the relevant international provisions protecting religious freedom and the jurisprudence of the HRCttee and the Strasbourg organs. Adopting a broad approach that conceptualizes autonomy beyond organizational freedom of religious institutions, key aspects of autonomy are analyzed by taking the acts listed in Article 6 of the 1981 Declaration on the Elimination of Intolerance and Discrimination Based on Religion or Belief as the legal framework of analysis.[335] Paul Taylor has provided a helpful and comprehensive comparative analysis of UN and European standards based on Article 6 of the 1981 Declaration.[336] The same legal framework will be used here while being mindful that there are countless forms of manifestations/acts protected under the religious freedom provisions that may or may not exactly correspond to the categories listed in this framework. Then, following the question of whether a right to form

[335] United Nations Declaration on the Elimination of Intolerance and Discrimination Based on Religion or Belief, G.A. Resolution 36/55, 36 GAOR Supp. (No. 51) at p. 171, UN Doc. A/36/51 (1981).
[336] The width of the discussion for each component varies depending on the available jurisprudence.

and implement religious jurisdiction may also be protected within the scope the right to freedom in the internal matters is investigated. This overview demonstrates that when positive obligations- thus policy considerations- of states are concerned, international adjudicators tend to adopt a narrow interpretation of the scope of the right to freedom of religion or belief, whereas, where negative obligations are concerned, they tend to engage into greater scrutiny. There also appears to be more scrutiny where freedom of religion or belief overlaps with freedom of expression and freedom of association which constitute prominent aspects of international human rights protection schemes. Whether or not and to what extent, viewing rights as also *raising questions under autonomy*, can be viewed as interpretive tool that requires rigorous scrutiny of restrictions is explored as well. In regards to its relation to the whole of the thesis, this Chapter complements the previous Chapter on legal personality by exploring the other aspects of the collective dimension of freedom of religion or belief in a comprehensive- albeit not exhaustive- manner.

4.2. Autonomy/ The Right of a Religious/Belief Community to Freedom in Their Internal Matters

Autonomy of religious or belief communities in constructing their own affairs has been considered one of the crucial features of any meaningful system of freedom of religion or belief.[337] The scope and nature of *autonomy* or *internal affairs* is to a great extent determined by the comprehensiveness of the religion or belief in question. Autonomy may be defined in a narrow fashion to include "the right of self-determination of religious bodies" and their ability to decide freely about "the teaching and offices, the range of their activities and the shape of their structures".[338] Religious autonomy has, however, been defined also as a potentially expansive issue.[339] The community life lived as envisioned by a religion or belief constitutes the basis of the right to autonomy and arguably it is a "specialized and heightened form of the

[337] Roland Minnerath, "The Right to Autonomy in Religious Affairs" in *Facilitating Freedom of Religion or Belief: A Deskbook*, T. Lindholm, W.C. Durham and B. G. Tahzib-Lie (Eds.) (Martinus Nijhof, 2004), p. 291.
[338] W. Cole Durham, "The Right to Autonomy in Religious Affairs" in *Church Autonomy - A Comparative Survey*, Gerhard Robbers (Ed.), (Peter Lang, 2001), p. 5.
[339] Perry Dane, "The Varieties of Religious Autonomy" in Gerhard Robbers (ed.) *Church Autonomy - A Comparative Survey*, (Peter Lang, 2001), p. 117.

right to association".[340] Indeed, taking into account religions that envision and prescribe broad legal systems, autonomy may be defined broadly to include matters of "personal law" such as marriage, divorce and inheritance. Whatever the form and scope of autonomy it will be complex and deeply contextual.[341]

The scope, variety and nature of organizations that are formed by religious/belief groups and their acts are largely governed by the dogma embraced by them. Religious or belief communities, on the one hand, tend to form their own organized structures for a variety of purposes; these may be, *inter alia*, charities or humanitarian institutions, places of worship, educational institutions, publication houses, radio or broadcasting institutions, or similar associations. In addition, they tend to engage in acts, such as assemble and/or worship, provide charity/assistance, teach/train, elect leaders, publish printed material, receive or provide financial contributions, use materials related to their rituals, observe days of rest and holidays and ceremonies in accordance with their religion or belief. The conception of internal affairs as solely "the organizational structure" would imply that other acts they engage in are not included. Such a conception would fail to sufficiently capture the acts that constitute the "internal affairs" of religious/belief groups and their inter-connected nature as manifestations of religion or belief. When assessing claims pertaining to manifestations of religion or belief, the adoption of a broad view of autonomy of religious/belief communities may improve the standard of international review. Were it possible for international adjudicators to see the issues raised in terms of autonomy, in addition to, manifestation of religion or belief, restrictions by states may be probed and scrutinized more thoroughly.

The right to freedom in internal affairs is not explicitly stated in the core freedom of religion or belief articles, rather it follows from the phrase "freedom to manifest religion or belief individually or in community with others in worship, observance, practice or teaching".[342]

[340] W. Cole Durham, "Facilitating Freedom of Religion or Belief through Religious Association Laws" in *Facilitating Freedom of Religion or Belief: A Deskbook*, T. Lindholm, W.C. Durham and B. G. Tahzib-Lie (Eds.) (Martinus Nijhoff, 2004), p. 355.
[341] Durham, *supra* note 4, p.145.
[342] Both Article 9 of the ECHR and Article 18 of the ICCPR.

The HRCttee states explicitly that freedom to manifest one's religion or belief in worship, observance, practice and teaching encompasses a broad range of activities. The terms "worship, observance, practice and teaching" are usually understood as providing protection to all possible manifestations of religion or belief.[343] Later decisions of the Committee also support its position that manifestations listed in paragraph 4 are not meant to be exhaustive. The HRCttee in its General Comment 22 on Article 18 includes a catalog of acts that fall within the sphere of freedom in the management of internal affairs.[344] It is evident that this list is not meant to be exhaustive but illustrative; it was clearly expressed in the drafting discussions; "all ways of manifesting one's religion or belief",[345] are meant to be protected. Although the General Comment does not create a general category as "autonomy in internal organization" it contains the phrase "acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers."[346] Exactly what acts fall into the category of "integral to the basic affairs" would naturally be dependent on the teachings and interpretations of the religious/belief community in question which avails itself of this freedom. There are, however, two key words to the understanding of the scope of protection afforded here. The first one is the word "integral." The ordinary meaning of this word is "necessary or constituent",[347] emphasizing that these acts have to form an essential part of the conduct by religious groups of their basic affairs. It would follow that not all acts that constitute part of the religious groups' internal affairs are protected under Article 18. As it is often the case this determination process proves to be problematic as the believer, the State and the HRCTTEE may have different views on it. During the drafting of the boundaries of admissible acts of religious manifestations it was stated that "the features of a religion or

[343] Among others, A. Krishnaswami, Study of Discrimination in the Matter of Religious Rights and Practices, U.N. Doc. E/CN.4/Sub.2/200/Rev.1, U.N. Sales No. 60. XIV.2 (1960).
[344] General Comment 22 of the Human Rights Committee on Article 18 of the ICCPR, U.N. Doc. HRI/GEN/1Rev.1 at 35 (1994), para. 4.
[345] U.N. Doc. CCPR/C/SR.1166 para. 35. Apparently, it was not possible to list them all. See Bahiyya G. Tahzib, *Freedom of Religion or Belief, Ensuring Effective International Legal Protection*, (Martinus Nijhoff, 1996), p. 322. For the drafting history and observations of General Comment 22 see same book p. 311-375.
[346] HRCttee, General Comment 22, *supra* note 10, para. 8.
[347] Longman Dictionary of Contemporary English, http://www.ldoceonline.com/dictionary/integral, accessed 16.01.2015.

belief are to be ascertained by the adherents of the underlying religion or belief only".[348] Surely such an insider's approach,[349] would be most welcomed by believers.[350]

The second key word is the phrase "basic affairs."[351] The practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs. Again here is a term that is qualifying the acts protected, namely, Article 18 protects only the conduct of *basic* affairs. A number of acts are listed as illustrations of what these might mean; freedom to choose their religious leaders, priests and teachers and acts that are particularly related to teaching such as freedom to establish seminaries or religious schools, freedom to establish places of worship and freedom to prepare and distribute religious texts or publication. It has been suggested generally on the whole of the acts listed in paragraph 4, that the list could have provided the states parties with more guidance as to the substantive content of Article 18 and particularly with regard to the organizational matters of religious groups the following have been proposed for inclusion; freedom to organize and maintain local, regional, national and international associations in connection with one's religion or belief, to participate in their activities.[352]

Whether states take a broad or narrow view of manifestations will always determine the scope of protected acts. Therefore the stance taken by international organs authorized to interpret relevant religious freedom provisions is crucial, as domestic authorities will be required to follow international interpretation. While a comprehensive list may be appreciated it is important to remember that the understanding on what constitutes manifestation of religion or belief will continue to be a crucial element determining the scope of protection. Evans argues that the acts listed in General Comment 22 are limited to "religious rites and customs" and that forms of behavior or activities that may flow from religious beliefs are not covered.

[348] Bahiyya G. Tahzib-Lie, *supra* note 11, p. 321.
[349] Eva Brems, "The Approach of the European Court of Human Rights to Religion", in Die Rechtstellung des Menschen im Völkerrecht, J.C. Mohr(ed.) ,(2003) p. 8.
[350] Similarly, during the elaboration of General Comment No. 22, Human Rights Committee member Rosalyn Higgins was "resolutely opposed the idea that States could have complete latitude to decide what was and what was not a genuine religious belief. The contents of a religion should be defined by the worshippers themselves; as for manifestations, article 18, paragraph 3, existed to prevent them from violating the rights of others" UN Doc. CCPR/C/SR.1166, para. 48.
[351] General Comment 22, *supra* note 10, para. 4.
[352] B. G. Tahzib-Lie, *supra* note 11, p.323.

[353] However, this may not be certain, it may be possible to connect behavior or acts to worship, teaching, practice, or observance, depending on one's conception of worship, teaching, practice and observance. Still, the lists of General Comment 22 and Article 6 of the 1981 Declaration still a fairly broad construction of manifestations, considering that it is illustrative. It is important to underscore the fact that while the latter constitutes an illustrative list of acts that are protected the main criteria is that in order to be protected, an act has to be considered a manifestation of religion or belief in worship, teaching, practice or observance. For example, worship extends to, *inter alia*, assembly for worship and establishing, maintaining and repair of places of worship as well as use articles necessary in worship. Teaching, practice and observance also have substantive content that extend to cover diverse acts. All of the acts under Article 6 of the 1981 Declaration may be qualified as forms of manifestation in worship or teaching or practice or observance and some acts may be covered under more than one category. Therefore it is important not to read to extensively into set categories.

It has to be remembered that forms of manifestations of religion or belief are integrated and interrelated spheres so one should not read too extensively into set categories of rights. For example what, at first glance, may be the right to worship, most of the time includes the rights to establish a place of worship, to acquire legal personality, to use a particular language held sacred, to publish sacred books, produce or import necessary materials used in the act of worship. Article 6 of the 1981 goes farthest in summarizing a broad list of rights. While this list is by no means exhaustive or definitive, it is an indication of the extent of these freedoms,[354] having an illustrative function. Similarly, while Article 9 of the ECHR and Article 18 of the ICCPR do not include lists akin to Article 6, in their relevant jurisprudence as well as the General Comment of the HRCttee on Article 18, they do extend the sphere of protection to many acts covered by the former.

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[353] M.D. Evans, *Religious Liberty and International Law in Europe*, (Cambridge University Press, 1997) p. 216.

[354] Nazila Ghanea, "The 1981 UN Declaration", in Nazila Ghanea (ed.) *The Challenge of Religious Discrimination at the Dawn of the New Millenium*, (Martinus Nijhoff, 2003), p.22. The list of manifestations enshrined in Article 6 does not seem to have as an extensive scope as hoped by some. For the drafting history and struggles over the content of the 1981 Declaration see S. Liskofsky, The United Nations Draft Declaration on the Elimination of All Forms of Religious Intolerance", UNESCO Doc. SS79/CONF.607/10, Annex V., 1980.

The terms "worship, observance, practice and teaching" are not defined in the ECHR and the preparatory documents do not provide any insight into what these categories consist of.[355] Subsequent decisions and judgments of the Strasbourg organs have not provided any description of these categories and what manifestations are protected in each. Worship has been given the highest status of the manifestations listed in Article 9 (1).[356] The Commission has said that Article 9 primarily protects personal beliefs and religious creeds and "acts which are intimately linked to these, such as worship and devotion."[357] Here the important criterion has been that the act has to be intimately linked to the belief in order to qualify as a form of manifestation in worship. As for observance, the Commission and the Court have not given this category of manifestation a separate consideration, yet. Evans, concludes that "observance" seems to have been conflated into a slightly extended notion of worship and that they are considered together as "worship and observance" without a particular distinction.[358] While "teaching" has not been defined either, it has been subject to more detailed discussion. In a number of cases acts such as proselytizing, religious teaching in school curriculum and in religious institutions have been considered under the right to manifest religion or belief in teaching.[359]

The term practice has proved to be the most difficult one to define. The ordinary meaning of this term is, "to do or perform often, customarily, or habitually",[360] which would mean in the context of religion or belief, to act according to the beliefs and customs of a particular religion or belief. It has been pointed out that if one takes a broad view of practice then it would be inevitably understood as covering all acts of "worship, observance and teaching."[361] On the other hand, it can also be construed in a narrow manner, meaning only acts similar to worship.

[355] The text of Article 9 was based on Article 18 of the UDHR with a view to avoid definitions that are inconsistent with those in the UN documents.
[356] Carolyn Evans, *Freedom of religion under the European Convention on Human Rights*, (Oxford University Press, 2001), p.107.
[357] *C. v. The United Kingdom*, 15 December 1983, European Commission on Human Rights, (Admissibility) No. 10358/83. Accordingly, establishing places of worship, ownership of objects necessary for worship, facilitating religious services in prison have been viewed as included within the right to worship.
[358] Evans, *supra* note 22, p.108.
[359] *Inter alia*, *Kokkinakis v. Greece*, 25 May 1993, European Court of Human Rights, No. 14307/88, para.31;
W. Delgado Paez v. Colombia, 12 July 1990, Human Rights Committee, No. 195/1985, UN Doc. CCPR/C/39/D/195/1985, para. 5.7.
[360] Merriam-Webster Dictionary online, http://www.merriam-webster.com/dictionary/practice, accessed 16.01.2015.
[361] M. Evans, *supra* 19, p.305.

The Commission and the Court had drawn the limits of protection in relation to practice by repeatedly stating that "the term practice…does not cover each act which is motivated and influenced by religion or belief."[362] The approach taken by Strasbourg organs had been further narrowed by the "necessary expression" test whereby it is asked whether a certain act is necessary for the fulfillment of the obligations of believers of a certain religion or belief. However, this position appears to have been abandoned with the finding on *Eweida and Others v. the UK* where the ECtHR repudiated the necessity test and accepted that the applicant has a sense of obligation to wear the cross necklace.[363] Obviously, here a crucial question is who determines what is necessary; the individual believer, the Court or even an expert opinion may differ on what exact acts are necessary for the precepts of a certain religion or belief and it makes sense to strongly defer to the believer's view.

More recently, in the Grand Chamber judgment concerning the case of *Fernandez and Martinez v. Spain* the ECtHR, instead of balancing between the collective dimension of freedom of religion and individual human rights, the Court accepted the Spanish courts' categorical balancing to the benefit of church autonomy instead.[364] It will be interesting to see the implications of this evolved position for future cases involving individual rights in relation to employment and rights of religious communities.

The analysis below will follow the paragraphs of Article 6 of the 1981 Declaration. As noted above the Article 6 does not encapsulate all possible forms of acts that belief groups engage within the scope of their internal affairs. For example pilgrimage or membership in a belief or religious community are not included. Still Article 6 is used since it offers a helpful legal framework for the examination of the right of belief communities to freedom in their internal affairs. It is worth remembering that Article 6 does not refer to "individuals" as the right-

[362] Among others, *Arrowsmith v. UK*, 16 May 1977, European Commission of Human Rights, No.7050/75, para. 71; Yanasik *v. Turkey*, 6 January 1993, European Commission of Human Rights, No.14524/89; *Karaduman v. Turkey*, 3 May 1993, European Commission of Human Rights, No. 16278/90; *Valsamis v. Greece*, 18 December 1996, European Court of Human Rights, No.21767/93.
[363] *Eweida and Others v. The United Kingdom*, 15 January, 2013, European Court of Human Rights, Nos. 48420/10, 59842/10, 51671/10, 36516/10.
[364] *Fernandez and Martinez v. Spain*, 12 June 2014, European Court of Human Rights (Grand Chamber), No. 56030/07.

holder or does not refer to the right to "manifest individually or in community others". Instead it refers to "freedoms" that the freedom of thought, conscience, religion or belief includes which are then listed as "acts". And these acts are usually carried out collectively. Moreover, the issue of religious jurisdiction will be examined. The analysis and assessment will be based on the core freedom of religion or belief provisions of the ICCPR and ECHR and the jurisprudence of their respective bodies with interpretive authority. These jurisprudential sources do not provide equally substantive content on each category that is considered below. Therefore in order to gain a better understanding of the relevant legal issues, factual developments, challenges and guidance provided by the UN Special Rapporteur is also included. It should be borne in mind that while there may be differences in the approaches of these respective organs resulting from their function and context the standards set by them should not be contradictory.

OSCE-Venice Commission addressed the issue of autonomy and self determination of religious or belief communities in its Guidelines for Legislative Reviews of Laws Affecting Religion or Belief.[365] It is a helpful tool for understanding the scope of autonomy for religious or belief communities and providing guidance for State action when actions resulting from autonomy conflict with interests of individuals or society. The OSCE-Venice Commission, in line with HRCttee and ECHR acknowledges that States can have varying practices regarding autonomy of religious or belief communities.[366] The Commission, however, places the duty to engage in careful and nuanced weighing of interests where there is a conflict between the interests of religious or belief groups and other societal interest. It elaborates on this weighing of interests by stating that there should be a strong deference towards autonomy except in cases where autonomy is likely to lead to a clear and identifiable harm.[367] The Commission also draws attention to situations where autonomy issues are particularly likely to arise, namely in contexts where religious or belief organizations are engaged in activities such as operating hospitals, schools or businesses and where individuals assert that they discriminate on grounds such as gender or membership in the religion.[368] The competing values of autonomy

[365] OSCE-Venice Commission, *Guidelines for Review of Legislation Pertaining to Religion or Belief*, OSCE ODIHR, 2004, p. 15.
[366] *Ibid*.
[367] *Ibid*.
[368] *Ibid*.

and non-discrimination are particularly worth paying attention to when the employers receive public financing or tax deductions for their activities. These guidelines are important in that they affirm the autonomous character of religious or belief communities and also offer concrete guidance to State interference for situations where conflicts with societal interest may arise. In this context the Commission draws particular attention to discrimination.

4.2.1 To worship or assemble in connection with religion or belief and to establish and maintain places for these purposes

The right to manifest religion or belief includes the right to establish places of worship.[369] The right to worship and assemble for worship and establish and maintain places of worship is widely restricted by near explicit denials to certain belief/religious groups and often through restrictions that appear to be imposed through planning regulations, registration requirements and relevant administrative processes.[370] Worship that takes place "in community with others" and "in public" stands out as an essential element of the manifestation of the right to freedom of religion or belief in its collective dimension; the great majority of religious communities or communities of belief need a place of worship where their members can manifest their faith. Unlike other forms of violations of the right to freedom of religion or belief, attacks or other forms of restriction on places of worship or other religious sites and shrines in many cases violate the right not only of a single individual, but the rights of a group of individuals forming the community that is attached to the place in question.[371] Krishnaswami observed early on that the right to manifest religion or belief in worship is often curtailed through "unreasonable regulations"; by arbitrarily withholding licenses for opening places of worship, or by imposing criteria that is "onerous or difficult to comply with", which in effect "negate" the right to worship.[372] Factual developments, at the global scale, show that these challenges remain, Taylor observed that "in recent years

[369] Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18) UN Doc. CCPR/C/21/Rev.1/Add.4, para. 4. *Vergos v. Greece*, 24 June 2004, European Court of Human Rights, No. 65501/01, para. 32.
[370] For numerous examples from around the world see the annual reports on the communications received by the UN Special Rapporteur and, among others, the Report of the UN Special Rapporteur Summary of cases transmitted to Governments and Replies Received, UN Doc. E/CN.4/2005/61, 15.03.2005, para. 48-52, Report of the Special Rapporteur on Freedom of Religion or Belief Country Visit to Romania, UN Doc. E/CN.4/2004/63/Add.2, 16.12.2003, para. 100-108.
[371] The Report of the UN Special Rapporteur Summary of cases transmitted to Governments and Replies Received, UN Doc. E/CN.4/2005/61, 15.03.2005, para. 48-52.
[372] A. Krishnaswami, *supra* note 9.

registration procedures have taken centre stage in the means by which States constrain the structural aspects of religious practice".[373] Villaroman suggests that the non-compliance results from the 'bare and austere' language of international provisions protecting the right to freedom of religion or belief thus leading to a 'normative gap'.[374] This will be considered below.

The HRCttee has rigorously criticized restrictions on establishing and building places of worship as well as discriminatory treatment of particular religious groups.[375] While considering the implementation of the ICCPR by Iran the HRCttee has expressed concern over a ban on conducting Christian services in Farsi.[376] Considering the Report of Israel the HRCttee expressed concern at frequent disproportionate restrictions on access to places of worship for non-Jews.[377] Similarly the Egyptian government was asked to respond to the alleged obstruction experienced by the Coptic Church in Egypt "in obtaining permits to repair and build places of worship".[378]

The use of registration or acquisition of legal entity status processes for religious/belief groups to restrict the right to establish places of worship has been underscored by the UN Special Rapporteur.[379] The link between legal entity status and the right to establish places of worship is a vital one. The Special Rapporteur explains:

> Legal status enables religious groups to act as juridical persons in the court system; *it entitles religious communities to build places of worship*, exempts religious communities from customs duties, entitles the community to open bank accounts, secures their standing as officially registered denominations and means that such communities can be fully fledged partners with the Government.[380]

[373] Paul M. Taylor, *Freedom of Religion UN and European Human Rights Law and Practice*, (Cambridge University Press, 2005), p. 242.
[374] Noel G. Villaroman, "The Right to Establish and Maintain Places of Worship: The Development of Its Normative Content under International Human Rights Law", in *Religion in Public Spaces*, Silvio Ferrari and Sabrina Pastorelli (Eds.), (Ashgate, 2012) p. 295.
[375] Human Rights Committee , 29.11.2011, UN Doc. CCPR/C/IRN/CO/3 ,p.6. (Concluding Observations: Iran), Human Rights Committee , 18.11.2011, UN Doc. CCPR/C/KWT/CO/2 (Concluding Observations: Kuwait).
[376] Human Rights Committee , 29.11.2011, UN Doc. CCPR/C/IRN/CO/3 ,p.6 (Concluding Observations: Iran).
[377] Human Rights Committee , 03.09.2010, UN Doc. CCPR/C/ISR/CO/3, p.4 (Concluding Observations:Israel).
[378] Report of the UN Special Rapporteur on Freedom of Religion or Belief, UN Doc. E/CN.4/1990/46 (1990), para. 40 and E/CN.4/1992/52 (1992), para. 30.
[379] Report of the UN Special Rapporteur on Angola, UN Doc. A/HRCTTEE/7/10/Add.4, 6 March 2008, para. 18.
[380] *Ibid*. para. 18.

In the case of *S. Malakhovsky and A. Pikul v. Belarus*, that concerned the refusal by the authorities to grant the status of religious association to the applicants, the HRCttee held that the limitations imposed must be "assessed in the light of the consequences which arise for the authors and their religious association".[381] While the case concerned the registration of a religious association and not the establishment of a place of worship the approach taken by the HRCttee is interesting to note. The HRCttee's questions in its assessment, consideration of the necessity of the conditions, consequences for the applications and the proportionality of the restrictions on the right of the applications under Article 18(3) may be interpretive devices that may also be used in regards to places of worship. Inquisitive assessment of the necessity of restrictions shifts the burden of proof for the justification of the imposed restrictions to states and may be useful in detecting discriminatory patterns.

In a number of cases, the Strasbourg organs have held that the refusal to grant authorization or planning permission for places of worship constituted an interference with the right to manifest their religion.[382] On the other hand, the scrutiny of restrictions has not been strong; in *ISKCON and 8 Others v. United Kingdom*, *Johannische Kirche and Peters v. Germany* and *Vergos v. Greece* the proportionality of the interference with the applicants' rights to manifest religion or belief was not considered.[383] Planning regulations were considered to be prescribed by law and to pursue a legitimate policy aim, however, were not considered from the point of view of their suitability for the religious groups in question. The European Commission on Human Rights considered that the restrictions placed on an applicant for a place of worship were necessary for the "protection of the rights and freedoms of others", the residents of a nearby village.[384] It also stressed that "the Commission does not consider that Article 9 of the Convention can be used to circumvent existing planning legislation, provided that in the

[381] *Sergei Malakhovsky and Alexander Pikul v. Belarus*, 26 July 2005, Human Rights Committee, No. 1207/2003, U.N. Doc. CCPR/C/84/D/1207/2003 para. 7.4.
[382] *ISKCON and 8 Others v. United Kingdom*, 08 March 1994, European Court of Human Rights, (Admissibility) No. 20490/92. *Manoussakis and Others v. Greece*, 26 September 1996, European Court of Human Rights, No. 18748/91.
[383] Stephanie E. Berry, "A Tale of Two Instruments", *Netherlands Quarterly of Human Rights*, Vol. 30/1 (2012), p. 23. Through this comparison this article enables us to see the application of law by the ECtHR and the concerns of the Advisory Council on National Minorities in a fresh way so as to reconsider and question the former.
[384] *ISKCON and 8 Others v. United Kingdom*, *supra* note 48.

proceedings under that legislation, adequate weight is given to freedom of religion".[385] In *Vergos v. Greece*, instead of requiring the State to provide a 'pressing social need' to justify the interference with the right, the ECtHR held that the applicant had not sufficiently established the 'social need' for a 'True orthodox Christian' place of worship in his town.[386]

Granting 'the wide margin of appreciation of the Contracting States in planning matters' by the Strasbourg organs,[387] without giving due weight to the consideration of restrictions in question are proportionate to the aim pursued appears to be a factor making it difficult for belief groups to achieve positive response to their applications. In addition, the lack of consideration of whether the planning requirements take into account the specific nature of place of worship requirements of the religious community in question, the consideration of whether there is really a need for a particular place of worship by the Strasbourg organs seems to confer to states a regulating role that does not need to justify restrictions. Were a facilitating role that takes on a positive obligation to create the conditions so that belief groups can establish place of worship had been conferred to states, states would have had a greater burden to justify the restrictions. Likewise, a greater burden to justify restrictions by states would be necessary were the rights to worship and establish places of worship viewed as "internal matters" of religious/belief communities.

The wide margin of appreciation conferred to States in planning matters together with a lack of consideration of proportionality and lack of development and focus on the positive obligations on the part of the states to create the conditions for the effective enjoyment of the right to establish places of worship contribute to non-identification of general repression of certain groups and whether a pattern of discrimination against a religious community exists. In the future the adoption of a more inquisitive review of the proportionality of planning and registration/recognition processes would help identify systematic discrimination. In order to ascertain that systematic discrimination does not exist, the Strasburg organs could as states to present statistical evidence proving that such discrimination does not exist. States may be asked to demonstrate the numbers of applications and the positive and negative results

[385] *Ibid*.
[386] *Vergos v. Greece*, *supra* note 35, para. 14.
[387] *Ibid*.

attained. This would shift the burden of proof to the state to show that legislation and practice are not discriminatory.

In addition, Berry's comparison of the jurisprudence of the Strasbourg organs, to the Advisory Council (AC) on the Framework Convention on National Minorities (FCNM) presents a striking difference; whereas the Strasbourg organs prioritize the planning regulations that are prescribed by law and pursue a legitimate aim, mostly the protection of public order and the rights and freedoms of others,[388] the AC "has focused on obstacles to minority communities gaining permission to build or reconstruct places of worship, as well as access to appropriate burial sites on a non-discriminatory basis".[389] Berry agues that identification by the AC of a widespread denial of the right to establish places of worship to minorities ensures that states are not able to justify such practices on a case-by-case basis.[390] The HRCttee and the UN Special Rapporteur are also in positions to have such a broad approach as the FCNM, they have the advantage of being able to focus on majorities as well. The findings of the afore mentioned bodies could be used to inform the review of individual cases by the ECtHR and the HRCttee. In the process of assessment of claims, the inclusion of certain questions in order to establish whether the applicant group is treated in a discriminatory manner or whether there is systematic denial of the right to establish places of worship would improve the international review of standards. For example, *inter alia*, these questions may be asked; have members of the same community been able to establish places of worship, are same standard of requirements applied to other religious or belief groups, statistical information of successful applications, do the neutral planning regulations take into account the needs of diverse religious communities.

The distinct approaches of Strasbourg organs and the HRCttee reflect that a wide margin of appreciation is conferred to states by the former which makes it difficult to detect discrimination or unnecessary restrictions and an inquisitive assessment on the part of the latter seeking substantiation by states indicating the necessity of the restrictions and a focus on the consequences of such restrictions on the manifestation of religion or belief by

[388] S.E. Berry, *supra* note 49, p.27.
[389] S.E. Berry, *supra* note 49, p. 25.
[390] S.E. Berry, *supra* note 49, p. 26.

applicants. Were the ECtHR adopt the inquisitive approach of the HRCttee the standard of review may be improved.

4.2.2 The right to establish and maintain appropriate charitable or humanitarian institutions

Religious or belief groups have been historically and traditionally involved in establishing and running charitable institutions helping vulnerable groups and humanitarian institution aiming to assist humanity. The Article 18 of the ICCPR and Article 9 of the ECHR do not contain an explicit reference to the right to establish and maintain charitable or humanitarian institutions. The right to acquire legal personality and establish associations has been thoroughly considered in Chapter 3 of this thesis. This right is protected to the extent that it is considered a form of manifestation of religion or belief and/or to the extent it is viewed as an overlapping aspect of the rights to freedom of religion or belief and to association.[391] In the drafting process of Article 18 of the ICCPR it was proposed that freedom of religion should include freedom of religious denominations or communities to organize themselves, to perform missionary, educational and medical work, to enjoy civil or civic rights etc.[392] On the one hand it was stressed that any religious sect or order, as a corporate body should have an inherent right to perpetuate its own mode of life and to propagate its doctrine, on the other hand these proposals were viewed with a degree of concern that missionary activities of one religion might undermine the fundamental faith of another religion and might therefore constitute a source of interreligious misunderstanding or friction.[393] The General Comment 22 of the HRCttee does not refer to the right to establish and maintain charitable and humanitarian institutions. However, it is clear that the HRCttee envisages "a broad range of acts" that are protected under Article 18 and in *Sister Immaculate Joseph and 80 Sisters v. Sri Lanka* the HRCttee referred Article 6 of the 1981 Declaration which provides: "…. the right to freedom of thought, conscience, religion or belief shall include, *inter alia*, the following freedoms: …the right to establish and maintain appropriate charitable or humanitarian

[391] See Chapter 3 of this thesis. Since the right to acquire legal personality has been considered extensively under Chapter 3, here the analysis will be brief.
[392] Marc J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, (Martinus Nijhoff, 1997) p. 363.
[393] *Ibid*. However, no decision was made on these proposals and the article did not contain any provision on rights of religious bodies.

institutions".[394] This is however not an unlimited right both subject to the restrictions clause found in Article 18 and the reference to the phrase "appropriate" found in the provision.

The Strasbourg organs have not directly dealt with a claim where the right to establish and maintain charitable or humanitarian institutions was restricted. However, it is clear that while a narrow understanding of manifestations has been adopted, the associative right of religious/belief groups has been understood and recognized, in part through reliance on the right to associate, be it Article 9 interpreted in light of Article 11 or Article 11 being interpreted in light of Article 9. Were the ECtHR faced with such a claim it is likely that first whether this constitutes an interference in the rights protected under Article 9 or Article 11 would be considered, where an interference is found, followed by the consideration of permissible restrictions. In the assessment of the case of the *Metropolitan Church of Besserabia v. Moldova*, while observing the negative outcomes of not having legal personality, the ECtHR noted the refusal of entry of humanitarian goods sent from abroad to the Church.[395] Taylor, notes this reference as an "inclusion within Article 9 of humanitarian practices if only by implication".[396] Were the main legal question raised by the case interference in the establishment or maintenance of a charity or humanitarian organizations, it is likely that such a right would be recognized by the ECtHR. On the other hand, it is possible to envisage situations where this right would be permissibly restricted for example where the nature of what is proposed as "charity" or "humanitarian" overlaps with public services or functions of the state, or where funds are raised for funding illegitimate acts or in order to escape from taxes.

4.2.3 The right to make, acquire and use to an adequate extent the necessary article and materials related to the rites or customs of a religion or belief

Manifestation of religion or belief in worship, teaching, observance and practice may require the use of various articles and materials ranging from the use of printed material such as holy

[394] *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka*, 21 October 2005, Human Rights Committee, No. 1249/2004, U.N. Doc. CCPR/C/85/D 1249/2004, para. 3.3.
[395] *Metropolitan Church of Bessarabia and others v. Moldova*, 13 December 2001, European Court of Human Rights, No. 45701/99, para. 105.
[396] P. Taylor, *supra* note 39, p. 247.

books and prayer books to ritual wine.[397] The scope of this provision is difficult to determine; it is very much dependent on the dogma and practices of the particular religion or belief in practice. A narrow interpretation of Article 6(c) would limit the application of this provision to materials that are used in the context of a rite, for example, ritual wine may be used in a church building in the act of worship or religious ceremony thus be strictly related to a ritual that may take place in a worship place. Yet, considering the many different religious traditions of the world, such articles and materials may vary in their nature and the context in which they are used. A broad interpretation may accommodate the use of *halal* meat for Muslims which involves the consumption of it in every day life, not only in a ritual in a worship place.

Taylor notes that there may be overlaps between Article 6 (c) and other Articles of the 1981 Declaration,[398] or indeed other forms of manifestation of religion or belief. While it may be possible to include, for example, the protection of the use of religious clothing under Article 6(c), the right to manifest one's belief individually or in community with others in "observance and practice" may be better suited to address such claims.[399] Strasbourg organs and the HRCttee have dealt with claims related to religious dress as manifestations in "observance and practice".[400]

4.2.4 The right to write, issue and disseminate relevant publications in these areas

Publications that are used in religious services such as holy books and other literature as well as other material that may be used in, *inter alia*, worship and teaching a religion or belief to its followers as well as others. From the perspective of the collective dimension of freedom of religion or belief such publications are usually produced taking into account the needs of religious or belief communities and play a significant role in manifesting religion or belief in worship, practice, teaching and observance as well as the preservation and transmission to new generations of a religious group's identity.

[397] A. Krishnaswami, *supra* note 9.
[398] P. Taylor, *supra* note 39, p. 251.
[399] Protected in Article 9 of the ECHR, Article 18 of the ICCPR and Article 1 of the 1981 Declaration.
[400] *Inter alia*, *Eweida and Others v. UK*, 15 January 2013, European Court of Human Rights, Nos. 48420/10, 59842/10, 51671/10 and 36516/10) and *Karaduman v. Turkey*, 1 January 1993, European Commission on Human Rights, No. 16278/90. HRCttee, General Comment 22, Comment No. 22, CCPR/C/21/Rev.1/Add.4 (1993), para. 4.

The Special Rapporteur on Freedom of Religion or Belief extends the protection to the import of such publications.[401] Similarly, the arrest of persons who have received religious material from oversees is questioned.[402] Were such cases assessed by the ECtHR and the HRCttee perhaps a closer examination would look in the case of importation, whether the production of the publications is possible domestically. If the applicants would establish that they need the publications to manifest their religion in worship, teaching, practice or observance then states would be asked to justify restrictions on import in accordance with Articles 9 of the ECHR and Article 18 of the ICCPR.

The right to freedom of expression may be viewed as the more appropriate legal provision applicable to publications of a religious nature. Indeed, Article 10 of the ECHR and Article 19 of the ICCPR would also protect religious expressions in writing and publications. Having said that, the listing of this right within Article 6 of the 1981 Declaration underscores that to write, issue and disseminate relevant publications in these areas is also protected by freedom of religion or belief. Since relevant publications may be used in worship and teaching, naturally, Article 6(d) is connected to both Article 6 (a) and Article 6 (e).

Taylor observes that the HRCttee, when reviewing state reports has followed up on the freedom to write, issue and disseminate religious publications.[403] The inclusion of "dissemination of publications" implies that the provision covers promotion or propaganda of religion or belief. The HRCttee has expressed concern reviewing Turkmenistan's implementation of Article 18 that the State party strictly regulates the number of copies of religious texts that religious organizations may import, and change legislation so that "individuals can import religious texts in quantities they consider appropriate".[404]

[401] Report of the UN Special Rapporteur on Freedom of Religion or Belief, UN Doc. E/CN.4/1989/44 (1989), para. 31.
[402] The Report of the UN Special Rapporteur on Freedom of Religion or Belief Country Visit to Morrocco, UN Doc. E/CN.4/1995/91 (1995), p. 60.
[403] P. Taylor, *supra* note 39, p. 262-263.
[404] Human Rights Committee, 19 April 2012, UN Doc. CCPR/C/TKM/CO/1, (Concluding Observations of the Turkmenistan), p. 5.

As far as the ECHR jurisprudence is concerned there has not been consideration of a case where the right of an individual or religious or belief group to write, issue and disseminate publications has been addressed. If that were the case it is likely that the Strasbourg organs would view this as freedom of expression (Article 10), because its content is best addressed under Article 9.[405] Considering the prominent status of freedom of expression in the Convention system, it is likely that the right to write, issue and disseminate publications would be strongly protected as long as it does not give rise to religious intolerance and what the ECtHR would consider improper proselytism.[406]

4.2.5 To teach a religion or belief in places suitable for these purposes

Forms of teaching can vary to a great extent; *inter alia*, teaching/training of religious personnel, teaching of children, youth and adults of the religious/belief and teaching for proselytism purposes. The teaching of one's congregants, particularly the children and youth, is a key to preserve and transmit the religious dogma, tradition and identity of religious/belief groups and therefore may be considered a key component of the autonomous acts of religious/belief groups. Moreover, state practice regarding religious or philosophical education as well as theological education for training religious personnel is diverse.

Since both the ICCPR and ECHR protect the right to manifest religion or belief in "teaching",[407] it is certainly an explicitly protected form of manifestation. In addition, both instruments include provisions that create obligations for states to respect the rights of parents and legal guardians to raise their children in line with their religious or philosophical beliefs.[408] Children cannot be required to take instruction in religious or philosophical education against their parents' wishes. Compulsory education about religions or worldviews may be permissible however, the religious and ideological concerns of parents on behalf of their children must be

[405] See the case of *Kuznetsov and Others v. Russia*, 11 January 2007, European Court of Human Rights, No. 184/02, here the ECtHR considered that the applicants by doing a Bible study "exercised their rights to freedom of expression and to freedom of peaceful assembly under Articles 10 and 11 of the Convention" yet, since the nature of the assembly was primarily religious the Court first examined this complaint from the standpoint of Article 9, para. 53.
[406] For the jurisprudence of the ECtHR on proselytism see in particular *Kokkinakis v. Greece*, 25 May 1993, European Court of Human Rights, No. 14307/88; *Larissis v. Greece*, 24 February 1998, European Court of Human Rights, No. 23372/94, 26377/95, 26378/94.
[407] Article 18 and Article 9 respectively.
[408] Artcile 18(4) of the ICCPR and Article 2 of Protocol I of the ECHR.

observed and exemptions must be put in place in a non-discriminatory manner. General Comment 22 on Article 18 refers to "freedom to establish seminaries or religious school".

In the review of state reports the HRCttee has expressed concern over reports of prohibition of private religious education at all levels.[409] Although not a straightforward case on the autonomy of religious organizations, in the *W. E. Delgado Paez v. Colombia* case,[410] HRCttee provides an implication on the autonomy the Church enjoys in theological teaching matters in Colombia public schools. In this case the applicant's teaching of religious education class was allegedly interfered with because of his views on liberation theology which differed from that of the Apostolic Prefect of Leticia. While the case has other dimensions as well, the HRCttee maintained that, without violating Art. 18, Colombia can allow the Church authorities to decide who may teach religion and in what manner it should be taught. Although it is not stated as a right of the Church to autonomy in theological matters, in its role as the religion educator in public schools[411], it is stated as a possibility that would not violate Art. 18. When considering teachers' freedom to teach their subjects in accordance with their own views under Art. 19, the right to freedom of expression, the Committee was willing to accept that the requirement of the Church to teach religion in a certain way did not violate Art. 19. It would have been interesting to see how the Committee would balance the autonomy of the religious organization in theological education and the right to freedom of expression of teachers in delivering this teaching.

The OSCE Guidelines elaborate on this in relation to establishment of private schools where parents may educate their children "emphasizing ideological values".[412] States have a sphere of oversight in this context, however. They are permitted to establish neutral criteria for the teaching of standard subjects such as mathematics, history, science and they can regulate teacher certification.[413] Yet non-discrimination rule applies and states are not to discriminate between belief groups, including recognized religious or ideological groups.

[409] Human Rights Committee, 19 April 2012, UN Doc. CCPR/C/TKM/CO/1, (Concluding Observations on Turkmenistan), p. 5.
[410] *William Eduardo Delgado Paez v. Colombia*, 12 July 1990, Human Rights Committee No. 195/1985, U.N. Doc. CCPR/C/39/D195/1985 (1990). The applicant complained that he was subjected to persecution by the Colombian authorities because of his 'progressive ideas in theological and social matters.
[411] Due to a special agreement between Colombia and the Church. *Ibid.*, para. 5.8.
[412] OSCE – Venice Commission Guidelines, *supra* note 31.
[413] *Ibid*.

4.2.6. To solicit and receive voluntary financial and other contributions from individuals and institutions

Contributions received by religious/belief communities from individuals or institutions are often a sensitive issue for states,[414] particularly when religious communities who are viewed with suspicion or those who are connected to religious communities abroad are concerned. The focus of attention for states may easily turn to the implications of such contribution to national security, instead of the contribution in question may help meet the needs of belief groups for the manifestation of religion or belief. This may result in outright prohibition or intensive regulation or monitoring of financial or other contribution, particularly from abroad.

The UN Special Rapporteur expressed his concern over violations of the right to solicit and receive voluntary financial and other contributions, *inter alia*, in relation to Tibet, the Special Rapporteur criticized the requirement that funds donated to Buddhist monasteries could only be deposited in a particular bank account and could not be withdrawn without first securing government approval.[415] In relation to the Lao People's Democratic Republic, the Special Rapporteur expressed concern over the arrest of Christians allegedly for receiving financial donations from overseas sources.[416]

The provision does not specify whether it pertains to reception of national or international contributions. It is reasonable to assume that it covers both, from within the country and from other countries. Religious organizations depend on donations from their members for their existence hence must have the possibility of receiving donations. In addition, for many small or minority religious communities donations from abroad may constitute a life breather, particularly in situations where there is virtually no contribution from the state. Financial assistance from abroad is more likely to be monitored or restricted by states because these

[414] The Soviet Union opposed the inclusion of this provision during drafting fearing that contributions from other countries might be used for political purposes to promote anti-State activities, UN Doc. Escor, 1981, Supp. No. 5, p. 145; E/1981/25; UN Doc. E/CN.4/1475 (1981), quoted by P. Taylor in Freedom of Religion, p. 271.
[415] Report of the Special Rapporteur on Freedom of Religion or Belief, UN Doc. E/CN.4/1988/45 (1988) para. 45.
[416] Report submitted by the Special Rapporteur on Freedom of Religion or Belief, UN Doc. E/CN.4/1999/58 (1999), para. 86 Lao People's Democratic Republic, para. 86.

may be viewed as interference into domestic issues by other states or groups within them. The Special Rapporteur on freedom of religion or belief noted that the right to receive funding is not unlimited, yet, restrictions must be prescribed by law and must be necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others, for example in order to prevent such institutions being misused to advance their cause through violence.[417]

Strasbourg organs or the HRCttee have not dealt with complaints that have directly raised issues with the freedom to solicit and receive financial or other contributions from individuals and institutions. The HRCttee has not raised this issue with states while deliberating state reports on the implementation of Article 18. The latter may be indicative of the status or attention given to this right as remaining at the periphery of the scope of protection afforded to freedom of religion or belief. However, for a meaningful review of the protection of freedom of religion or belief states must be asked to demonstrate that they have an adequate legal framework and facilitating and non-discriminatory practice for the believers, individually and in community with others to "solicit and receive voluntary financial and other contributions from individuals and institutions." For example, the ability of establish a legal entity which can open a bank account, receive and send money transfers without a burdensome bureaucratic procedure and state-monitoring, non-discriminatory benefits or advantages for such collections are a few practicalities that need to be put in place.[418] Where this right is recognized as a core aspect of freedom of religion or belief, international review would require a positive obligation on the part of states to create the legal framework and ensure that any restrictions must be prescribed by law and must pursue a legitimate aim, as enumerated in the relevant provisions and necessary in a democratic society. Based on the jurisprudence concerning the application of restrictions, one may assume that restrictions based on merely hypothetical suspicion on the states with national security or public order concerns in mind cannot be justified under international law. The OSCE-Venice Commission draws attention to the need to observe the principle of non-discrimination when regulating

[417] *Interim* Report of the UN Special Rapporteur on Freedom of Religion or Belief, UN Doc. A/65/207, para. 36.
[418] See for example the case of the *Metropolitan Church of Bessarabia and others v. Moldova*, *supra* note 60. Here the church, not having legal personality, could not seek judicial protection of its assets which included donations.

this right.[419] Also, as a general rule states may provide some limitations, associations should be allowed to raise funds as long as they do not "violate other important public policies".[420]

4.2.7. To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief

The many diverse religious traditions and beliefs of the world and indeed their sub-groups, prescribe a wide variety of internal organizational structures and leadership patterns. While some have central leadership others reject central or hierarchical leadership structures and profess that each believer is capable of interpreting sacred texts or performing rituals. Some have structures that transcend national borders while others have numerous autonomous congregations/communities in a city. Certain religious communities' organizational structures and or leadership are under the authority of the State while others enjoy nearly complete separation. Some communities have detailed rules or procedures about leadership structures and ways in which leaders are elected or appointed while others reject such elaborate procedures as too formal. Whatever their form or lack of form, belief communities organize themselves in a way that is particular to them. All too often the ways or organization in itself is in fact an expression of their beliefs, mostly deeply embedded in their understanding or interpretation of sacred texts or traditions.[421]

"The freedom to choose their religious leaders, priests and teachers" has been viewed as "conduct by religious groups of their basic affairs" in the GC 22 on Article 18 prepared by the HRCttee.[422] This issue has been subject of frequent inquiry when reviewing state reports by the Committee, where the Committee has been critical of state interference in the appointment of religious leaders.[423]

The Special Rapporteur on Freedom of Religion and Belief affirms that the right to freedom of thought, conscience, religion or belief also includes the freedom to train, appoint, elect or

[419] OSCE-Venice Commission Guidelines, *supra* note 31.
[420] *Ibid*.
[421] Minnerath, *supra* note 3.
[422] Para. 4.
[423] UN Doc. A/42/40 (1987), p. 36, para. 137.

designate by succession appropriate leaders. "Undue interferences in the training of religious leaders" that can lead to a "shortage of appropriate leaders" have been viewed with concern.[424] The practice of some states to impinge on the appointment procedure of religious leaders or the requirement approval by the authorities for certain promotions within religious groups has also been reported.[425] For example, concern has been expressed over the "grave interference with the Tibetan Buddhists who have the right to determine their clergy in accordance with their own rites" upon allegations that Nyima, then aged 6, had disappeared three days after being recognized as the eleventh reincarnation of the Panchen Lama by the Dalai Lama.[426]

Krishnaswami observed that in some cases public authorities have to adjudicate between rival elements within a religion, where judges must decide between the conflicting claims by interpreting the provisions of the religious law.[427] This necessarily implies some interference in the management of religious affairs, he pointed out, however, that "the line between legitimate interference and undue pressure is in many cases extremely thin".[428]

ECHR had the opportunity to address the matter of autonomy in internal structure and selection of leadership in a number of cases brought before it. In this regard *Serif v. Greece*,[429] *Hasan and Chaush v. Bulgaria*[430] and *Supreme Holy Council of Muslim Community v. Bulgaria*[431] are particularly important in revealing the Court's view toward autonomy of religious communities and the protection given in Article 9. In *Sherif v. Greece*, a case which dealt with criminal proceedings brought against Serif who allegedly assumed the role of a minister, *mufti*, of 'a known religion', the Court ruled that, in democratic societies, the State need not take measures "to ensure that religious communities remain or are brought under a unified leadership".[432] It should be borne in mind, however, that the Court noted that *Serif* did not

[424] Human Rights Committee, UN Doc. A/HRCTTEE/6/5 para. 16 (Concluding Observations).
[425] *Ibid*.
[426] Report of the Special Rapporteur on Freedom of Religion or Belief, UN Doc. E/CN.4/2006/5/Add.1, paras. 93-95.
[427] Krishnaswami, *supra* note 9.
[428] Krishnaswami, *supra* note 9.
[429] *Serif v. Greece*, 14 December 1999, European Court of Human Rights , No. 38178/97.
[430] *Hasan and Chaush v. Bulgaria*, 30 October 2000, European Court of Human Rights, No. 30985/96.
[431] *Supreme Holy Council of Muslim Community v. Bulgaria,* 16 December 2004, European Court of Human Rights, No. 39023/97.
[432] *Serif v. Greece, supra* note 95, para. 52.

attempt to exercise judicial and administrative functions of an officially recognized *mufti*.[433] This indicates that measures pursuing a legitimate aim may be taken to protect those whose legal relationships might be affected by acts of ministers from deceit. Clearly the Court does not provide a *carte blanche* to all activities within the community for the sake of autonomy but takes into account rights of others. It is also interesting to note, in order to understand the ECtHR's conception of the right to freedom of religion or belief that these cases have been decided solely on Article 9 – not relying on Article 11 in any way- which is indicative of the fact that the right to appoint and select religious leaders is viewed within the ambit of Article 9.

While recognizing that where there is room for autonomy, conflict and tension within the community are unavoidable.[434] In fact, in all three of the cases mentioned above there is rivalry in leadership within religious communities and State interference aimed at eliminating competition in leadership and thus securing a unified leadership. But the ECtHR firmly held that "the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other."[435] The attribution of a strong importance to the protection of the right to autonomy in the appointment of leaders stands out as an aspect of freedom of religion or belief that is given priority to. If there were a ranking of rights that comprise the collective dimension of freedom of religion or belief

The ECtHR holds that "the internal structure of a religious organization and the regulations governing its membership must be seen as a means by which such organizations are able to express their beliefs and maintain their religious traditions".[436] In *Hasan and Chaush v. Bulgaria,*[437] the applicants complained that the authorities interfered with the organizational life of the Muslim community by replacing the legitimate leadership of the community and in refusing recognition of the re-elected leadership.[438] The applicants claimed that the discretionary power of the government to change religious leadership at will in the absence of

[433] *Ibid*.
[434] *Serif v. Greece*, *supra* note 95, para. 53.
[435] *Ibid*.
[436] *Svyato-Mychalivska Parafiya v. Ukraine,* 14 June 2007, European Court of Human Rights, No. 77703/01, para. 150.
[437] *Hasan and Chaush v. Bulgaria , supra* note 96.
[438] *Ibid*., para. 66.

a clear procedure comprising of a system of *ad hoc* letters, had profound consequences ad amounted to replacement of the whole organizational structure of the Muslim community and a complete destruction of normal community life.[439]

In the case of the *Supreme Holy Council of Muslim Community v. Bulgaria*, dealt with the same conflict the European Court considered whether the involvement by domestic authorities in the organizational structure and leadership appointment of the applicant organization violated the rights of the applicants under Article 9.[440] Here the rival groups within the organization had asked the Directorate of Religious Denominations for assistance in holding a unification conference.[441] The Government claimed that this assistance flowed from the authorities' duty under the Constitution to help maintain a climate of tolerance in religious life.[442] While the Court was in agreement with the Government on the existence of such a duty, and noted that "neutral mediation between groups of believers would not in principle amount to State interference with believer's rights under Article 9" cautioned about the sensitivities in this delicate area.[443] Two considerations, however led to finding a violation. First, domestic law required all believers affiliated with a particular religion to form a single structure, headed by a single leadership even if the community were divided, without the possibility for those supporting other leaders to have an independent organizational life and control over part of the community's assets.[444] However, State measures seeking to compel the community or part of it to place itself under a single leadership against its will would constitute an infringement of the freedom of religion.[445] Secondly, even though the initial participation of the Directorate was only neutral mediation the fact that the Directorate insisted on unification even though the applicant organization's leaders decided to withdraw was problematic because the state imposed a particular way to resolve the problem.[446]

Naturally, general restriction grounds, public safety, order, health or morals or the fundamental rights or freedoms of others apply. In addition the ECtHR, acknowledges that a

[439] *Ibid*., paras. 66 and 67.
[440] *Supreme Holy Council of Muslim Community v. Bulgaria, supra* note 96.
[441] *Ibid*., para. 69.
[442] *Ibid*., para. 71.
[443] *Ibid*., para. 80.
[444] *Ibid*., para. 81.
[445] *Serif v. Greece, supra* note, 95, para. 49,52, 53.
[446] *Ibid*. para. 84.

boundary to this autonomy can be drawn with the possible State action when it is necessary to 'reconcile the interests of various religions and religious groups that coexist in a democratic society.'[447] This could be an elaboration of the restriction ground 'fundamental rights or freedoms of others' in the context of specifics of the case although it is not expressly stated. However, still the State's role is basically one that is 'regulatory' in its relations with religions, denominations and beliefs.[448] At times, providing autonomy to religious communities and neutrality of the State are closely connected. The State has the positive duty to remain neutral and impartial in the exercise of its regulatory power.

4.2.8. The right to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief

This provision is a potentially broad in scope because of the many possible forms of manifestations related to worship, practice and observance it can cover; again it is a helpful example of how one should not read too extensively to the set categories as each category may be intimately linked to or extend into other categories. The core religious freedom provisions do not include an explicit reference to the right to observe days of rest and celebrate holidays in accordance with one's religion or belief. Yet, the HRCttee's General Comment 22 explicitly refers to "the observance of holidays and days of rest" as a form of manifestation protected as such under Article 18.[449] The phrase "to observe ceremonies in accordance with the precepts of one's religion or belief" is potentially an expansive issue depending on the dogma of a religion belief. "Ritual and ceremonial acts giving direct expression to the belief" and "use of ritual formulae and objects" are explicitly mentioned in General Comment 22.[450] Thanks to the rich and diverse examples from all over the world captured by the reports of the UN Special Rapporteur it is possible to gain insight into the extent and nature of these manifestations/ceremonial acts The Special Rapporteur, has listed such acts as, *inter alia*,

> …in one country, the religious practice of the circumcision of male children is not permitted; similarly, obstacles are placed in the way of religious traditions such as the celebration of marriage and funeral ceremonies according to the rites of a religion. In another country, certain rites and ceremonies peculiar to tribal religions have been banned. Elsewhere, it is extremely difficult in practice for the followers of a certain religion to bury their dead in accordance with religious ritual. Sometimes a conflict of interest is

[447] *Supreme Holy Council of Muslim Community v. Bulgaria, supra* note 97, para. 93.
[448] *Ibid*.
[449] *Ibid*., para. 4.
[450] *Ibid*.

visible between religious requirements and health requirements, particularly in the case of children. Thus, in one country, the courts decided in certain cases against ritual practices when the latter were believed to constitute a direct danger to children's lives. [451]

In addition, Taylor suggests that the use of religious names could be protected under Article 6 of the 1981 Declaration.[452] "The use of a particular language customarily spoken by a group" that is mentioned in paragraph 4 of the General Comment 22 may also be protected under this provision.

Many religions and beliefs have special days when believers take days of rest or engage in acts of worship in community with others; often, on these days they perform or abstain from performing certain activities according to the requirements of their religion or belief. Community life is generally arranged around observing these days that are significant based on the dogma and traditions of a belief group. Therefore in order to properly observe these days and participate in religious ceremonies believers may need to take these days off from work. Where these days are not included in the national holidays communities and/or members of belief groups have difficulty manifesting their religion or belief in worship, practice and observance. In addition, the observance of religiously significant days is crucial for the preservation of the collective identity of religious groups and the transmission of traditions and values to new generations. It is precisely this cultural aspect that may be often viewed with suspicion by the authorities and combated by them.[453] The UN Special Rapporteur on Freedom of Religion or Belief has expressed concern over conflicts arising when the authorities fail to take account of religious requirements concerning days of rest,[454] and commended legislation granting recognition to the religious holidays of the Christian, Jewish and Muslim communities.[455]

Weekly days of religious holidays and/or days of rest as well as annual religious holidays, generally, tend to be arranged according to the traditions of the majority's religion. Indeed,

[451] E/CN.4/1987/35, para. 57
[452] Taylor, *supra* note 39, p. 279. So far the HRCttee has dealt with such a case under Article 17 (right to privacy) in *A. R. Coeriel and M.A.R. Aurik v. The Netherlands*, Human Rights Committee, No. 453/1991, UN Doc. A/50/40 vol.2 (1999), p. 21.
[453] Report of the UN Special Rapporteur on Freedom of Religion or Belief, E/CN.4/1987/35.
[454] *Ibid*., para. 57.
[455] Report of the UN Special Rapporteur on Freedom of Religion or Belief, E/CN.4/2002/73/Add.1, paras. 29-32 and 125.

one of the most common instances of public authorities giving effect to the practices of the religion of the majority or dominant religious group appears to be in the designation of the holidays and days of rest of the latter group as the official holidays and days of rest.[456] Perhaps this is understandable from a historical perspective and policy considerations, after all, making arrangements for the majority of the population seems practical. This situation inevitably leads to preferences of certain religions or beliefs to others by states and make this right subject to concerns of feasibility as a public policy.[457] Individuals who do not belong to the majority religion are more burdened that the individuals belonging to the majority religion.[458]

Moreover, in order to effectively protect believers right to observe days of rest and celebrate holidays, macro level arrangements of accommodation by states are necessary. Yet, the nature of the obligation on the part of states in this regard is highly unclear. The assumption of early days of UN standard setting that the "right to observe days of rest and holidays and ceremonies in accordance with the precepts of one's religion or belief" does not create an obligation on the part of the states to declare all days of rest and holidays observed by the religions or belief in a given country.[459] The OSCE- Venice Commission Guidelines reflect a less than positive obligation to accommodate stating that "to the extent possible, state laws should reflect the spirit of tolerance and respect for belief". [460] While it seems tempting from a policy perspective to maintain the *status quo* in terms of the national and religious holidays, Temperman argues that still this must be scrutinized as regards the implications for religious minorities and non-religious people.[461] Also, this since an arrangement that only benefits the group of believers of the majority or dominant religion, this treatment must be justified with "objective and reasonable" criteria.[462] In the course of international review, such differentiation may be considered as justifiable based on public order in light of underlying policy considerations. Nevertheless, since the right to "observe days of rest and holidays and

[456] Krishnaswami, *supra* note 9.
[457] For discussions throughout drafting of this provision see UN Doc. A/C.3/36/SR. 35 (1981).
[458] R. Gavison and N. Perez, "Days of Rest in Multicultural Societies: Private, Public, Separate?" in *Law and Religion in Theoretical and Historical Contexts*, P. Cane, C. Evans and Z. Robinson, (Eds.), (Cambridge University Press, 2008), p. 186-213.
[459] Krishnaswami, *supra* note 9.
[460] OSCE-Venice Commission Guidelines, *supra* note 31.
[461] Jeroen Temperman, *State-Religion Relationships and Human Rights Law- Towards a Right to Religiously Neutral Governance*, (Martinus Nijhoff 2010), p. 252.
[462] *Ibid*., Temperman refers to GC 22, para. 13.

ceremonies" is a component of the right to freedom of religion or belief it needs effective protection and this implies more than just a passive non-interference in the right. States must recognize this right and strive for a legal framework that would accommodate ensuing claims. Given the increasingly pluralistic nature of societies, the normative demands of this right are in need to be clarified. Creating obligations for public and private employers to make reasonable accommodation adjustments may be a way to move forward.[463]

Dealing with a limited number of relevant cases, the Strasbourg organs have avoided the question of whether individuals have a right to observe days of rest and religious holidays and the ensuing questions of positive obligation on the part of states to ensure they can effectively exercise this right. Concerning the case of a Muslim teacher whose request to take time off from work in order to attend Friday prayers was refused, the European Commission held that, since he had taken the position accepting the conditions of the employment there was no violation of Article 9.[464] While the European Commission noted that there may be *positive obligations to respect* for the individual's freedom of religion, it avoided the question of whether there was an obligation on states parties to ensure accommodation to ensure that believers may take time off from public and private employment to observe religious holidays if they so wish. In *Konttinen v Finland*, which dealt with a man working at the state railways who joined the Seventh Day Adventist Church for which Saturday is the day of rest, starting with the sunset of Friday.[465] The European Commission found that his dismissal for these unauthorized absences did not raise issues under article 9(1) as these absences were not accepted as manifestations of his religion.[466] In a case originating from Macedonia the applicant who was known to observe Christian holidays but did not work on two Muslim holidays, wanted to benefit from the exemption permitting the observance of Muslim holidays, based on his conversion to Islam.[467] Since he was not able to substantiate his 'sincerity' through objective facts at the national courts the case was taken to the ECtHR. The European Court held that where "the employee seeks to rely on a particular exemption, it is

[463] *Temperman*, *supra* note 127.
[464] *X. v. United Kingdom*, 12 March 1981, European Commission on Human Rights, (Admissibility) No. 8160/78. Also see, *Steadman v. the United Kingdom*, 9 April 1997, European Court of Human Rights, (Admissibility) No. 29107/95, 98-A (1997).
[465] *Konttinen v Finland,* 3 December 1996, European Commission on Human Rights, No. 24949/94.
[466] *Ibid*.
[467] *Kosteski v. former Yugoslav Republic of Macedonia*, 13 April 2006, European Court of Human Rights, No. 55170/00.

not oppressive or in fundamental conflict with freedom of conscience to require some level of substantiation".[468]

Clearly, an imposition of a positive obligation on states and private sector employers to take necessary measures for accommodating requests for observance of religious holidays or days of rest is not foreseen in the Council of Europe context. There seems to be an emphasis on the choice or autonomy of employees in making their contracts.[469] Where such accommodation is already made available in a given state the European Court may supervise this process assessing whether it gives rise to questions concerning Article 9 and prohibition of discrimination.

In conclusion, the right to observe religious holidays and special days of rest seems to have gained greater support at the UN human rights protection scheme whereas at the Council of Europe it has not reached the level of recognition as a right that would require states to take positive steps to accommodate the needs of believers and belief groups in this field. Nevertheless, states have the obligation to facilitate the full enjoyment of the right to freedom of religion or belief in all of its components, including the right to observe days of rest and holidays in accordance with religion or belief. Mere policy considerations cannot account for negation of this right. It should be remembered that once, the designation of the existing days of rest or holidays also had policy consequences. Naturally, it is not an absolute right and restrictions may be considered as in the case of other components of the right to freedom of religion or belief. Relevant international standard setting must recognize this right and perhaps seek modalities of how it can be effectively protected in domestic settings.[470] Reasonable accommodation may be a way to move forward. Also, whilst monitoring the right to freedom of religion or belief, a closer and rigorous assessment of this right as an aspect of the right to freedom of religion or belief in its collective dimension would bring international review closer to advancing its protection. The creation of conditions for belief groups and members of belief communities to enjoy effectively the right to observe special days of rest and holidays in accordance with the precepts of their religion or belief will have the effect of advancing the

[468] *Ibid*., para. 39.
[469] Renate Uitz, *Freedom of Religion*, (Council of Europe Publications, 2007), p. 48.
[470] In fact in numerous countries measures are taken for the realization of this right and eliminate the inequalities between majority / dominant religious groups and others.

recognition and support of diversity within a society and thus bring states closer to ensure pluralism.

4.2.9. To establish and maintain communications with individuals and communities in matters of religion or belief at the national and international levels.

This freedom accommodates the need and tendency of belief communities to cooperate and interact with akin communities within the religious sphere both nationally and internationally.[471] Acts such as "inviting foreign clergy to visit the country or establish monasteries" have been regarded by the HRCttee as activities forming part of the right to manifest one's belief.[472] The reports of the UN Special Rapporteur is filled with examples of restrictions on such communications particularly at the international level.[473] International communication or cooperation is of particular importance for minority religious groups whose existence might be dependent on support from co-religionists abroad in variety of ways. There may be situations where there is organic relationship with groups outside the country because of the trans-border nature of religious organization hence international communication would be indispensible. In most cases, when communication is denied more fundamental rights are denied as a result.[474]

The resistance to or "seemingly not well recognition",[475] of this right particularly at the international level may be explained by its likely overlap or competition with national security concerns or national interests. Foreign "interference" through communication with domestic religious groups, in particular minorities, is generally viewed with suspicion. However, this is an essential right such as the right to worship and restrictions need to be subject to rigorous test based on the relevant human rights provisions.

4.3. Freedom Religious Communities to Apply Religious Law in Spheres Analogous to Civil/Criminal Law and Dispute Settlement

[471] For drafting history see Taylor, *supra* note 39, p. 287.
[472] *Sergei Malakhovsky and A. Pikul v. Belarus*, *supra* note 47, para. 7.2.
[473] See, inter alia, the restrictions on the Ahmadi community in Pakistan, UN Doc. E/CN.4/1996/95/Add.1, paras. 23-24, 45 and 85 and on charges against a Chech priest for his contacts with religious orders E/CN.4/1988/45, para. 48.
[474] For an overview see Taylor, *supra* note 39, p. 288-289.
[475] *Ibid*., p. 289.

Norms derived from religion in a broad sense govern many aspects of life for religious or belief communities and individual believers. Depending on the scope of precepts of the religion or belief in question, rules or laws and conceptions may influence the foods that can and cannot be consumed, the clothes that can and cannot be worn, the manner in which religious authority is structured and appointed as well as the manner in which finances are handled within a religious community and what substances are used in worship rituals. The education of children, community and religious teachers and clergy are also determined by religious norms or rules. Religious norms and values may also shape the conception of the roles of women and men in marriage and society and leadership, the methods of conflict resolution and arbitration, how evils in the form of illnesses, natural disasters or misfortune are dealt with as well as the attitudes towards relations with the state. In addition, explanations provided by religions on fundamental issues of life, form cultures' understandings of many issues which in turn play a role in shaping the common law amongst a community. These may be rules and mechanisms, governing the activity of communal life and are sometimes referred as customary law as opposed to formal law.[476] In some cases religions provide highly complex and detailed rules, analogous to civil and criminal law, concerning regulation of marriage, divorce and inheritance and rules related to conduct in trials and methods of punishment. There are also rules that may not be directly derived from religion but religion can form a basis for legitimizing certain rules and forms of behaviour.

It is clear that implication of laws and rules derived and condoned by religion or law are highly divergent, complex and comprehensive and the dynamics of the establishment, development, modification and elimination of such practices in a given community, society or country vary significantly in each situation and are deeply contextual. Sometimes traditional religion cannot be separated from custom which makes it difficult to determine what is derived from religion and what is derived from tradition.[477] Another complicating factor is that believers, indeed, do not have a monolithic view when it comes to the place of religious law in the perception of their belief. The complexity is further increased by issues that arise when normative rules derived directly or indirectly from religious precepts or value systems have an impact on

[476] Jennifer Corrin Care, 'Between a Rock and a Hard Place', in Amanda Whiting & Carolyn Evans (ed.) *Mixed Blessings: Laws, Religions and Women's Rights in the Asia-Pacific Region*, (Martinus Nijhoff, 2006), p. 105.
[477] *Ibid*., p. 107.

human rights of individuals. The religious law itself, interpretations of it and social custom that is derived from it or justified by reference to the religious law may conflict with human rights.[478] These are some of the forms of illustrative interactions that can be observed when attempting to put use of religious law into a legal framework for study.

Before moving any further, it is necessary to determine the scope of discussion in this section. As illustrated above religious law may be applied in various spheres of life and hence there can be countless variety of implications that this notion may have for human rights. However, here the assessment is limited to the use of religious laws or laws derived or condoned by religion, in situations analogous to civil/criminal law and in dispute settlement by religious or belief communities as a form of manifestation of religion or belief as understood in its individual and collective dimensions. Hence the term religious law in this section means unwritten and written norms that regulate issues similar to those regulated by private law as well as those used in alternative dispute settlements which are derived from the dogma of a religion or belief. The interest of this thesis in use of religious law by religious/belief communities is derived from the general theme of the thesis, the collective dimension of freedom of religion and in autonomy of religious communities as a right flowing from the former. [479] It is observed that when religions are as comprehensive as to include religious law as described above, the use of it by individuals and religious/belief groups becomes a way of manifestation of religion or belief and preservation and development of religion and/or culture.

[478] Donna J. Sullivan, "Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution," *New York University Journal of International Law and Politics*, 24, p. 795.

[479] It should be noted that situations where religious law is the state law are excluded since in my view this does not qualify as a manifestation of religion because it is enforced and not freely chosen and my research specifically focuses on autonomy of religious/belief communities. The writer takes a very critical view on enforcement of religious law by states because it does not pass the "consent test" for manifestation of religion. When a state argues that its law, based on religion, is a form of manifestation of religion or belief the inevitable question is whose manifestation of religion is it? The lack of 'voluntariness' or consent in systems where religious law serves as a disqualifier of manifestation of religion or belief. Obviously there are numerous forms of application of religious laws and I am not proposing that religious law is never a manifestation of religion but neither am I unhesitatingly accepting that religious law is a always a manifestation of religion.

Plural legal orders are, more often than not, viewed in the context of indigenous populations, cultural rights and accommodation of minority cultures and identities.[480] This is understandable since, traditionally, non-state legal orders may rarely be based solely on religious law, instead tend to have diverse sources. This does not, however, eliminate the freedom of religion or belief dimension which this section endeavours to highlight.

Then the question is whether within the international norms protecting the right to freedom of religion or belief protect the right to use religious law by individual believers in community with others. In so far as, religious law provides for rules regulating relations in family and dispute settlement, that for the individual believers embracing the belief or religion in question as such, clearly these would qualify as "practice" when the term is understood as not closely linked to worship but in a broader fashion.

Both ICCPR and ECHR include, in their respective articles, that the right to freedom of religion or belief includes "the freedom, either individually or in community with others and in public or in private, to manifest his religion or belief in worship, observance, *practice* and teaching."[481] While these four categories are exhaustive, the specific acts that constitute protected forms of manifestation under each heading is doubtless a subject of unending debate, particularly as unusual or non-traditional forms of manifestations and traditional manifestations in new settings confront the HRCttee and the European Court.

The discussions on the drafting of the General Comment 22 disclose a strikingly different approach from the one held by Strasbourg organs. The discussions indicate that there seems to be a general agreement that only believers themselves can decide what is and is not a genuine religious belief and as for manifestations Article 18(3) existed to prevent these from violating rights of others.[482] The approach of the HRCttee is to leave the determination of whether an act is a manifestation of religion or belief to the believers and if there is a need to restrict to employ the use of restrictions clause. Krisnaswami also affirms this approach,

[480] For a comprehensive overview of the variety issues related to cultural/religious jurisdictions see Report of the International Council on Human Rights Policy, *When Legal Worlds Overlap- Human Rights, State and Non-State Law*, 2009.
[481] ECHR, Article 9 and ICCPR Article 18, emphasis mine.
[482] For discussions during the drafting of paragraph 4 of General Comment 22 which deals with manifestations of religion or belief see, U.N. Doc. CCPR/C/SR. 1162 and CCPR/C/SR. 1162.

> Bearing in mind that on the one hand the Declaration [UDHR] was prepared with a view to bringing all religions or beliefs within its compass, and on the other hand that the forms of manifestation, and the weight attached to each of them, vary considerably from one religion or belief to another, it may safely be assumed that the intention was to embrace all possible manifestations of religion or belief within the terms "teaching, practice, worship and observance.[483]

There is no explicit or direct reference to whether the use of religious law is a form of manifestation that is protected by the right to manifest religion or belief in community with others. So far the most comprehensive list of manifestations have been compiled in the study prepared by Arcot Krishnaswami where in addition to many manifestations linked to worship, observance and teaching, explicit reference to celebration and dissolution of marriage was made.[484] However, the latter were not included in the core freedom of religion or belief clauses[485] and General Comment 22 of the HRCttee.[486] The reason might be the lack of a uniform practice among states as to whether these are viewed in the realm of regulatory acts of the modern State or that of a religious/belief community. For instance even though not explicitly articulated, disciplinary acts within religious communities may be seen as covered under freedom of religious communities in their internal affairs. An example of this could be "excommunication or shunning" of Jewish Courts.[487]

In spite of the absence of explicit allusion to religious law which governs issues similar to family law and dispute settlement, these can be best categorized as practices in the ordinary sense of the word; "to act according to the beliefs and customs of a particular religion." Obviously, depending on the nature of religion or belief and whether and to what extent such religious law is an integral part of the religion or belief in question. Individual believers may wish, in community with others, to act in accordance with their own beliefs in sphere that may overlap with family law, private law or dispute settlement. Quite apart from the question of

[483] Krishnaswami, *supra* note 9.

[484] Krishnaswami, *supra* note 9. He notes that these are particularly fertile ground for conflicts between the prescriptions of religious law and those of secular law is to be found in questions pertaining to the celebration and dissolution of marriage. These conflicts occur because most religions or beliefs consider these questions to be within their competence, whereas the modern State assumes the right to regulate family relationships on the ground that the family is the basic unit of society.

[485] Article 23 of the ICCPR stipulates the right to marry and does not specifically refer to national law as contrasted to ECHR Article 12. Article 23 lays down the requirement of "free consent" and "equal rights and responsibilities" of spouses as to marriage.

[486] Paragraph 4 mentions "ceremonies" without further detail.

[487] Michael J. Broyde, "Forming Religious Communities and Respecting Dissenter's Rights" in John Witte, Jr. and Johan D. van der Vyver (Eds.) *Religious Human Rights in Global Perspective- Religious Perspectives*, (Martinus Nijhoff, 1996), p. 203-233.

potential problems in relation to human rights law to influence judgment, manifesting religion in practice would cover such acts.

As for the ECHR, the terms "worship, observance, practice and teaching" are not defined in the Convention and the preparatory documents do not provide any insight into what these categories consist of.[488] Subsequent decisions and judgments of the Strasbourg organs have not provided any description of these categories and what manifestations are protected in each. Worship has been given the highest status of the manifestations listed in Article 9 (1).[489] The Commission has said that Article 9 primarily protects personal beliefs and religious creeds and "acts which are intimately linked to these, such as worship and devotion."[490] Here the important criterion has been that the act has to be intimately linked to the belief in order to qualify as a form of manifestation in worship. As for observance, the Commission and the Court have not given this category of manifestation a separate consideration, yet. Evans, concludes that "observance" seems to have been conflated into a slightly extended notion of worship and that they are considered together as "worship and observance" without a particular distinction.[491] While "teaching" has not been defined either, it has been subject to more detailed discussion.

The term practice has proved to be the most difficult one to define. The ordinary meaning of this term in the context of religion is, "to act according to the beliefs and customs of a particular religion."[492] It has been pointed out that if one takes a broad view of practice then it would be inevitably understood as covering all acts of "worship, observance and teaching."[493] On the other hand, it can also be construed in a narrow manner, meaning only acts similar to worship. The Commission and the Court have drawn the limits of protection in relation to practice by repeatedly stating that "the term practice…does not cover each act which is

[488] The text of Article 9 was based on Article 18 of the UDHR with a view to avoid definitions that are inconsistent with those in the UN documents.
[489] Evans, *supra* note 22, p.107.
[490] *C. v. The United Kingdom*, 15 December 1983, European Court of Human Rights, No. 10358/83. Accordingly, establishing places of worship, ownership of objects necessary for worship, facilitating religious services in prison have been viewed as included within the right to worship.
[491] Evans, *supra* note 22, p.108.
[492] Encarta Webster's Dictionary of the English Language, Anne Soukhanov (Ed.), (Bloomsbury Publishing, 2004).
[493] Evans, *supra* note 19, p.305.

motivated and influenced by religion or belief."[494] Similarly many times, the act in question was not specified as belonging to a particular category of manifestation but was rather, viewed as manifestation of religion or belief. This approach has led to focus on whether an act constitutes manifestation of religion or not rather then development of detailed understanding of what each category includes.[495] The approach taken by Strasbourg organs has been further narrowed by the "necessary expression" test whereby it is asked whether a certain act is necessary for the fulfillment of the obligations of believers of a certain religion or belief. This position appears to be changed in the case of the Eweida and Others v. the UK, however, it will be necessary to see future cases in order to ascertain if there has been a permanent change toward adopting a broader approach to manifestations.[496] Obviously, the question is who determines what is necessary; the individual believer, the Court or even an expert opinion may differ on what exact acts are necessary for the precepts of a certain religion or belief. Having said this, where religious communities are granted rights in national systems to act according to their religious law on certain matters, there is nothing in the Convention and its Protocols to prevent from viewing these acts as a manifestation of religion or belief. For instance, as regards marriage Article 12, regulating the right to marry and found a family, states that "Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right". Hence, the Convention here takes note of the possibility that legal systems vary among States Parties; where for instance in some States religious marriage ceremony is attached the legal consequence of matrimony, while in others it is not. [497]

While the approach taken by the European Court may not at first sight look very promising, due to the narrow view it has taken of manifestation of religion or belief as outlined above, this may not necessarily mean a categorically negative answer to our question. ECHR has taken a very open and inclusive approach to the collective dimension of freedom of religion

[494] Among others *Arrowsmith v. UK*, 16 May 1977, European Commission on Human Rights, No.7050/75.
[495] Malcolm Evans, *supra* note 19, see discussion on 304-314.
[496] *Eweida and Others v. the UK*, *supra* note 29.
[497] Van Dijk, P. and G.J.H. Van Hoof, *Theory and Practice of the European Convention of Human Rights*, (Kluwer, 1998) p.844.

particularly in terms of associative rights of religious/belief communities,[498] recognizing their autonomous existence of religious communities and their protection as such, as a prerequisite of pluralistic democracy. Legal pluralism may be a suitable way of furthering freedom of religion of communities belonging to different religions,[499] and cultural rights. As far as religious/belief communities are concerned, the use or application of religious law in matters such as family law or dispute settlement is just another sphere where norms of a religion/belief are implemented. All are derived from their respective dogma, are considered authoritative and individual believers, in community with others, either informally or formally put them into practice in their internal matters.[500]

A possible reason that the European Court may not be willing to conclude that there exists under Article 9 a right to use religious law would be that such an interpretation may be considered by states parties as an undue intervention into their domestic affairs, in particular state-religion relations. Another reason might be that they may not view such manifestation as "closely linked to worship." It may be that the European Court does not view the use of religious law by individual believers as protected under Article 9 but within the ambit of Article 9, similar to its long-standing, however recently changed, approach toward conscientious objection to military service.[501] This would not be without any benefit to religious communities. Where a state facilitates the use of religious law by a group of believers other groups claiming the same right may be protected by the prohibition of discrimination. It is also highly likely that the European Court could, without making a decision on whether it is a

[498] This is analyzed extensively in another chapter of my thesis where I examine legal status and recognition of religions/belief communities. The ECHR, has adopted a strong approach to acknowledge that believers traditionally exist in autonomous communities.

[499] Indeed, it is proposed that legal pluralism is a more acceptable model for secularism in a liberal state. For a discussion on legal pluralism as an appropriate implementation of freedom of religion see, Javid Gadirov, "Freedom of Religion and Legal Pluralism" in M.L.P. Loenen & J.E. Goldschimidt (Eds.) *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia, 2007), p. 81-93. And from a political theory perspective see Ayelet Shachar, *Multicultural Jurisdictions- Cultural Differences and Women's Rights*, (Cambridge University Press, 2001). On legal pluralism see Tie Warwick, *Legal Pluralism- Towards a multicultural conception of law*, (Ashgate, 2003).

[500] This is analogous to application of religious rules in for example the organizational and hierarchical structure of a religious organization only in a different sphere of relations.

[501] The ECHR does not recognize that Article 9 protects the rights to conscientious objection to military service. However views it within the ambit of Article 9 and where the right to conscientious objection is recognized by a State the European Court assumes its supervision by employing prohibition of discrimination. Ref. It may be that the Court views some forms of manifestation as within an "outer circle" of Article 9, suggesting that the protection of these by a member state would be an extra right granted by the latter and not necessarily a requirement of Article 9.

manifestation of religion or belief or not, move to considering restrictions clause, and find the State would be justified in its measures or apply the notion of margin of appreciation by taking into consideration national law.

The most explicit claim on matters relating to religious jurisdiction came with the *Refah Partisi v. Turkey* case,[502] where the applicants alleged in particular that the dissolution of Refah by the Turkish Constitutional Court and the suspension of certain political rights of the other applicants, who were leaders of Refah at the material time, had breached, *inter alia*, Articles 9, 10, 11, 14. The case is interesting in that it provides some insight into the European Court's view on plural legal systems and private law rules of religious inspiration. Although the Court noted that it will not express an opinion in the abstract on the advantages and disadvantages of a plurality of legal systems, in the Court's view, plural legal system, *as proposed by Refah*, was clearly incompatible with the Convention system because Refah's policy was to apply some of *sharia*'s private law rules to a large part of the population, namely Muslims, within the framework of plurality of legal systems.[503] One crucial factor in the Court's view was that such a policy went beyond the private sphere to which Turkish law confines religion. This approach once again indicated the Court was taking the national accommodation of religious freedom as a reference point. In response to the applicants' argument that prohibition of a plurality of private-law systems amounted to discrimination against Muslims who wished to live their private lives in accordance with the precepts of their religion the Court emphasized that manifestation of religion was primarily a matter of individual conscience which is quite different than field of private law.[504]

While the Court's approach in the *Refah Partisi v. Turkey* case is not one that wholeheartedly welcomes legal pluralism with the introduction of *sharia*, it cannot be definitely concluded that the Court could not envision within the framework of the Convention, a pluralist legal system where religious laws can be implemented. It seems it would be subject to the content

[502] *Case of Refah Partisi (Welfare Party) and Others v. Turkey*, 13 February 2003, European Court of Human Rights, (Grand Chamber), Nos. 41340/98, 41342/98, 41343/98 and 41344/98. It should be noted this claim came from a political party and not a religious community. See, Kevin Boyle, "Human Rights, Religion and Democracy: The Refah Party Case", in Essex Human Rights Review 1, No.1 (2004): 1-16, Peter Cumper, "Europe, Islam and Democracy- Balancing Religious and Secular Values" in European Yearbook of Minority Issues, Volume 3 (2003/2004), p. 166-175.
[503] *Refah Partisi (Welfare Party) and Others v. Turkey*, *supra* note 168, para. 119.
[504] *Ibid*., para. 128.

of the religious law proposed, to what extent national legal systems allow it and whether it will be imposed on individuals based on their religious affiliation. Malcolm Evans points out that according to the Court if religious communities are to be welcomed as participants in the public life of the State, it is on the condition that they respect the principles of democracy and human rights; of tolerance and pluralism.[505] And if they threaten either, then the State may or might be obliged to take steps. This in his view gives the State an interventionist and regulatory role rather then a restricted one which is that of facilitation in accordance with Article 9 itself.[506] It has been also suggested that the ECHR has been all too sweeping in order to strike a proper balance in the issue of accepting the exercise of certain regulatory powers of religious entities in relation to their members.[507] Scheinin, views this judgment as an indication that the ECHR clearly excluding, as a matter of principle, the diversification of rights and obligations in a multicultural society according to religious affiliation and through the delegation of certain regulatory authority to religious entities.[508] In my view this is not so certain, ECtHR seems to reject this possibility *as it is proposed by Refah*,[509] and therefore may be open to other propositions. Also, the national legislative arrangements concerning and acceptance of legal plurality may play a role in rejection or openness of the ECtHR.

There seems to be a number of conclusions that one can draw in relation to where the European Court stands in relation to manifestation of religion or belief through the use of religious law or private law rules of religious inspiration, as the Court phrases it. The first one is, that the Court views manifestation of freedom of religion or belief as primarily a matter of individual conscience and is cautious about manifestation in the field of private law. Secondly, the Court sees this aspect of manifestation of religion or belief as a matter of national law and up to the State in question. That if the application of religious laws in matters such as family law are facilitated by a State then the Court not be opposed to this as such but would engage in its regular supervisory role. Thirdly, the Court has a certain view of the *sharia* as static and

[505] M.D. Evans, "Believing in Communities, European Style" in Nazila Ghanea (ed.) *The Challenge of Religious Discrimination at the Dawn of the New Millenium*, (Martinus Nijhoff, 2004), p.152-154.
[506] *Ibid*.
[507] Martin Scheinin, "How to Resolve Conflicts Between Individual and Collective Rights?" in Martin Scheinin and Reetta Toivanen (eds), *Rethinking Non-Discrimination and Minority Rights, Institute for Human Rights*, (Åbo Akademi University Publications, 2004), p. 230.
[508] Instead he proposes a human rights approach that would look at the concrete modalities and safeguards of such a delegation. *Ibid*., p.230.
[509] *Refah Partisi (Welfare Party) and Others v. Turkey, supra* note 169.

prejudicial to public order and the values of democracy. Fourthly, it is important not to lose sight of the fact that, not a religious community but a political party is propagating this idea also plays a role; as a political party may have the possibility of changing the legal system in a manner that can impose the religious law on individuals without their consent.

As a way of summary on the question of whether the use of religious law, in areas such as family law and dispute resolution, is a form of manifestation that is protected by the right to manifest religion or belief in community with others, it follows from the above examination that as regards the European Court, it would depend on whether the Court would adopt a narrow or wide approach to practice of religion or belief. If the Court views practice in a broad manner the use of religious law may be seen within the ambit of Article 9. The second important factor for the Court would be the way State party has regulated this sphere. It is highly likely that the Court would see this within the discretion of the State hence not necessarily within the protection of Article 9 regardless of how it is viewed by the State in question. The major challenge may be that religious law endeavours to regulate same sphere as the State itself namely family law and dispute settlement. Still the closest the European Court comes to protect religious law is in the religious celebration of marriage that has the effect of official marriage.[510]

As regards the universal level, there is not an explicit recognition of the right to apply religious law by believers among themselves and in spite of the fact that the General Comment is silent and there is no jurisprudence, as of yet, to support it, it is likely that the HRCttee, in principle, will consider a claim by a religious community to use religious law within the ambit of protection of Article 18 due to its broad approach to manifestations and reliance on believers' views on these matters and the various legal traditions found at the global level.

If one assumes that the right to manifest religion or belief in practice protects the use religious law the realization of it would certainly require significant obligation on the part of the State. Broadly speaking it is possible envision states' role as one of facilitation and supervision with

[510] The necessary structure and processes would be highly contextual and it is not y purpose here to propose a complete institutional model. The point is that the state has to be willing to make necessary adjustments.

an emphasis on legal safeguards. Facilitation would require that the state assists with the necessary processes and institutional structures[511] and negotiation with the community in question. The second area of engagement by the state would be in its supervisory role as guarantor of human rights. This sphere necessitates that the state takes positive measures in the way of legal and real safeguards that would protect individuals against human rights abuses by fellow group members while at the same time balancing the interests of the collective.

While Krishnaswami provided a very comprehensive catalog of manifestations he also recognized that some of these, such as human sacrifice, self-immolation, mutilation, slavery, prostitution, subversive activities, polygamy and other practices that may clash with the requirements found in Article 29 of UDHR, could be subject to permissible limitations. Where traditional religious practices come into conflict with the basic rights of the individual, it is the former that have to give way. Thus, these limitations by the State on religious practices have increased freedom for Indian society as a whole.[512]

In conclusion, notwithstanding its limitation, the right to freedom of religion or belief in its collective dimension offers substantive protection to the right of belief groups to freedom in their internal affairs- autonomy. Where problems remain, this may not be so much a result of a "normative gap" in the international protection of human rights, than a more complete understanding of and willingness to enforce the implications of the existing norms is urgently needed. A great deal can be learnt from the approaches of the UN HRCttee and the UN Special Rapporteur to learn about the proactive steps that may/need to be taken by states and positive obligations that (may) arise under Article 18 of the ICCPR and Article 9 of the ECHR. Some obligations are more clearly defined than others. The differing approaches of the HRCttee and the Strasbourg organs to the various elements of this right, including the nature of obligations creates inconsistencies and disparities in international standard setting.

[511] Scheinin emphasizes the importance of negotiations with the group and obtaining its consent in the process of drawing the borderline of jurisdictional spheres. Scheinin, *supra* note 173, p. 231.
[512] Krishnaswami, *supra* note 9.

The account above indicates that that some aspects of the collective dimension of freedom of religion or belief are given more attention while others do not receive as much attention in international review. Autonomy of religious/belief communities appears as an area of the collective dimension that needs to be re-interpreted as an interpretive tool in adjudication. It has been suggested that such re-interpretation should seek to employ the term beyond organizational matters. This would then have the effect of changing positive obligations on the part of the states to accommodate the autonomous acts of belief groups. A greater burden to justify restrictions on the part of the states would also be required.

There is a tremendous variety among the legal traditions of the countries of the world on whether to allow or provide space for religious communities to apply their religious law and if allowed as to the extent it is allowed and the form it takes. An important factor seems to be whether, historically or traditionally, a certain sphere is viewed as a sphere regulated by the state which sees an interest in it or as a sphere of religious tradition or manifestation. While in some countries marriage, divorce, custody and guardianship issues have become codified and institutionalized and regulated by the state and is no longer a matter of private concern[513] and others, in societies where customary law has a wide influence , these matters are viewed within the framework of religious affiliation.

It is clear that there is great concern that religiously motivated laws violate particularly women's human rights particularly when freedom of religion is perceived as a group right.[514] While these concerns may be valid these should not be allowed to form a barrier to the right to the right to manifest religion or belief in practice through the use of religious law among individual believers. These concerns are better addressed in the process of finding a resolution between competing interests.

It is very important not to lose sight of the fact that religious communities, like individuals, are not static and that they are highly divergent. When they find themselves in the new

[513] Shaheen Sardar Ali, "Religious Pluralism, Human Rights and Muslim Citizenship in Europe: Some Preliminary Reflections on an Evolving Methodology for Consensus", in M.L.P. Loenen & J.E. Goldschmidt (Eds), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?*, (Intersentia, 2007), p. 75.
[514] Christine Chinkin, "Cultural Relativism and International Law," in Howland, *Religious Fundamentalisms and the Human Rights of Women*, (Palgrave Macmillan, 2001), p. 56.

circumstances they also feel the need to re-evaluate their practices and religious laws are not an exception.[515] Indeed, human rights is a valuable framework for the development of religious traditions.[516] Where there are domestic laws that are in serious contradiction with religious laws, the community in questions may be able to find a modified version of the precept in question. But for this to take place the community first and foremost has to have the capacity, means and forum to engage in the development of its laws and interaction with the State.

In brief, as shown above the right to autonomy of religious or belief communities needs to be understood as an issue beyond organizational freedom in the internal affairs religious organizations. Depending on the content of the dogma, doctrine and traditions of religious or belief groups it can be a significantly expansive issue presenting itself in diverse - sometimes unexpected- spheres. Adjudicators need to be willing to see and use the notion of autonomy of religious or belief communities as an interpretive tool in cases where the collective dimension of freedom of religion or belief can be identified. The discussion above suggests that adjudicators have not applied the notion of autonomy consistently – in particular they have been unwilling to see the collective dimension and implications for the autonomous existence of communities. Where doing so would mean that states would have to take positive measures to accommodate and ensure that third parties accommodate for examples days off from work for religious rituals or celebrations. The cases on worship places, however, revealed

[515] For instance Donald Brown relays the example of the *Fiqh* Council of North America which is a group working on the development of *fiqh* that is culturally relevant in North America. He argues that since there is no *ulema* in North America the development of *fiqh* is unimpeded and this means that an opportunity that has not been presented to Muslims in nearly 1,000 years, at least in the area of family law, is at stake. He further argues that in Canada this opportunity was missed since Premier McGuinty announced rejection of all religious arbitration within Ontario's legal system. See, Donald Brown, A Destruction of Muslim Identity: Ontario's Decision to Stop Shari'a Based Arbitration, *North Carolina Journal of International Law and Commercial Regulation*, Spring 2007, p.495 and 519. Also see A. A. An-Na'im, 'Islam and Human Rights: Beyond the Universality Debate,' ASIL Annual Meeting Proceedings (ASIL Washington, 2000) p. 361.Another example is the Jewish community which for too many years has lived under laws of different states and respond to new circumstances. The Jewish law, *halakhah*, which means entire body of Jewish law, from scripture to the latest rabbinical rulings, at least its application has undergone changes throughout history and different approaches have developed in different wings of the Jewish community with regard to major *halakhic* problems. For a survey of divergent approaches and their development see, David Novak, Halakhah: Structure of Halakhah in *Encyclopedia of Religion*, Ed. Lindsay Jones, Vol. 6. 2nd ed. Detroit: Macmillan Reference USA, 2005. p. 3747-3755.

[516] Hilary Charlesworth, "The Challenges of Human Rights Law for Religious Traditions" in Mark W. Janis and Carolyn Evans (Eds.), *Religion and International Law*, (Martinus Nijhoff, 1999). p.410-412

that burdensome positive obligations are not the only reason for preference to overlook issues that seem on the periphery of the right to freedom of religion or belief. Similar lack of weight given to components of this right can present itself as a result of simply not seeing the autonomy issues involved. This may be based on preference and/or differences of conception.

CHAPTER 5

Introduction to the Case Study on Turkey and the General Turkish Legal Framework Pertaining to the Right to Freedom of Religion or Belief

5.1. Introduction

This section aims to examine and assess the protection of the collective dimension of the right to freedom of religion or belief in Turkey in light of applicable international law standards. Mirroring the structure of the two preceding chapters, the case study reviews the protection of the collective dimension of freedom of religion or belief, in particular the right to acquire legal personality and the right to freedom in the internal affairs of belief groups as it is exercised in the right to establish and maintain places of worship, the right to teach religion or belief in suitable places, the right to train, appoint and elect clergy and the right to observe days of rest and holidays. Indeed, the enjoyment of the right to freedom of religion or belief is closely related to the national legal structures available to individuals and religious communities to exercise the right to freedom of religion or belief without any discrimination.[517]

State-religion relations evolve over the course of history and are shaped by the unique political experiences of nations. This highly contextual relationship plays a significant role on the evolved legal framework pertaining to the protection of the right to freedom of thought, conscience, religion or belief, particularly in its collective dimension. Bearing this in mind, this Chapter seeks to briefly present the historical evolution of state-religion relation in Turkey in order to present a complementary background that is considered necessary to provide the relevant context for the legal questions that will be discussed in the following Chapters. The reason for adopting this somewhat broader framework for the case study is to situate the treatment of the questions of the thesis in the overall climate of arrangement pertaining to religion and protection of freedom of religion or belief, rather then studying them as isolated topics. Key aspects of the arrangement of religion in the Ottoman Empire and in the period of the establishment of the Turkish Republic and a brief account of current trends are presented below. Tracing this progression is critical to understanding the

[517] W. Cole Durham, Jr., *Freedom of Religion or Belief: Laws Affecting the Structuring of Religious Communities*, ODIHR Background Paper 1999/4 Published by the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (1999).

state-religion arrangement that evolved in Turkey. This account may be useful in *explaining* the current practice, sensitivities and particular interpretations of the Turkish judiciary - though it may not necessarily *justify* them. A presentation of a comprehensive account and analysis of the historical formation of state-religion relations in Turkey is, however, beyond the scope of this study. The following account aims to follow the thread of the nature of the general legal paradigm of state-religion relationship, including neutrality of the state, protection of freedom of religion or belief and principle of equality through the Ottoman Empire and the period of the establishment of the Turkish Republic.

Following the brief review of state-religion relations in Turkey, an analytical and critical overview of the general Turkish legal framework for the protection of the right to freedom of religion or belief is presented. The discussion will touch upon key issues, *inter alia*, the Diyanet, compulsory Religious Culture and Knowledge of Ethics (DKAB) courses, coercion to declare one's religious affiliation, manifestations of religious symbols and conscientious objection to military service. Since issues concerning the collective dimension of freedom of religion or belief will be considered in detail in Chapters 6 and 7 this Chapter will focus on general matters. Analysis will be based on the relevant legal resources of applicable international instruments that create legal obligations for Turkey, including the Lausanne Peace Treaty,[518] which creates a special legal regime for non-Muslim minorities, relevant principles and provisions of 1982 Constitution and pertinent legislation.

5.2. Turkey's Religious Demographics

In contrast to the generally presented picture of Turkey as a country with 99% Muslim population,[519] alternative sources, provide additional information that can contribute toward drawing a more complete picture concerning the religious make-up of the population in Turkey, including diversity within the Muslim population. Turkey has an estimated population of 77.6 million people.[520] The General Directorate on Civil Registration and Nationality holds that official statistics on religious demographics are

[518] Lausanne Peace Treaty, 24.07.1923, http://www.mfa.gov.tr/lausanne-peace-treaty.en.mfa accessed 18.04.2014.

[519] It has not been possible to confirm this information with the General Directorate of Civil Registration and Nationality.

[520] As of 2014, according to the statistics provided by the Turkish Statistics Institution, http://www.tuik.gov.tr/HbGetirHTML.do?id=18616 , accessed 29.01.2015.

not kept.[521] Therefore we are depended on other sources. According to the International Religious Freedom Report of 2008 released by the U.S. Department of State there are an approximate of 500,000 Shiite *Caferis*; 10,000 Baha'is; 15,000 Syrian Orthodox (Syriac) Christians; 5,000 Yezidis; 3,300 Jehovah's Witnesses; 3,000 Protestants; and a small, undetermined number of Bulgarian, Chaldean, Nestorian, Georgian, Roman Catholics, and Maronite Christians present in Turkey.[522] Among these minority religious communities there is a significant number of Iraqi asylum seekers, including 3,000 Chaldean Christians.[523]

The practice concerning the official statistics on religious demographics raises diverse questions concerning the right to freedom of religion or belief in Turkey. The population register records religious affiliation;[524] the options available for the religion field in the register are determined by the Ministry of Interior on the basis of, "views of Institutions that provide religious services and Universities and decisions of the Court of Cassation, the Court of Appeals and the Constitutional Court".[525] The believers' views on their religion or belief, as such, are not part of the basis on which decisions

[521] Email correspondence with the General Directorate of Civil Registration and Nationality on 25.01.2012. The kind of religious demographics that are used by states are important. Public policies that have implications for the right to freedom of religion or belief will be different for a country where 99% are assumed to belong to the same belief and where the state recognizes the considerable religious diversity within the society. In very many fields, inter alia, the content of the curricula of the Religious Culture and Ethics (DKAB) classes, activities of the DIB, city planning for places of worship, one can foresee a high risk of not being able to accommodate for the needs of believers affiliated with the various Islamic denominations and non-Muslims and potential discriminations as a result of that. Similarly, information on the number of persons affiliated with various religious denominations is absent in the official statistics concerning Turkey's religious demographics. It may be argued that the lack of denominational information reinforces a unified Muslim identity by disregarding diversity within Islam.

[522] Turkey, International Religious Freedom Report 2008, U. S. Department of State, http://www.state. gov/g/ drl/rls/irf/2008/108476.htm. Herein, International Religious Freedom Report 2008 accessed 16.01.2015.

[523] *Ibid*.

[524] The reason for this is that everyone in Turkey up until 2006 had been obliged to indicate the religious affiliation of a child when registering a newly born child in the public register. The Law on Population Services indicates religion as one of the required fields of information that must be registered in the family register. Article 7. Nüfus Hizmetleri Kanunu (Law on Population Services), No. 5490, 25.04.2006. Official Gazette, No.26153, 29/04/2006. It is possible to request to change the information in this field or to leave it blank through personal declaration. Article 25 (b). In addition, it is important to note that the recording of religious affiliation in national register and ID cards constitutes a basis for potential discrimination. The fact that there is a limited list of religions one can chose from with the exclusion of particular religions embraced by some Turkish citizens in itself is a discriminatory practice that must be justified.

[525] Email correspondence with the General Directorate of Civil Registration and Nationality on 29.07.2011.

are made.[526] The Bahai faith, Jehovah's Witnesses or the Alevi faith are, for example, not on the list of possible options. While it is not the main focus of this study to examine why and how Turkey keeps records on religious affiliation of its citizens, it is important to note that Turkey adopts a selective practice about recording religious affiliation. Turkey disregards denominational differences and does not recognize certain religions, as such.[527] This deliberate practice is an indication of the nature of state-religion relation in Turkey. One result of this practice is that a perception is created that Turkey has a 99% homogenous Muslim society and religious diversity is ignored. The state determines what constitutes a religion or belief. In addition, the purpose and consequences and the voluntary nature of recording of religious identity within the Turkish legal system needs to be further studied.

5.3. Turkey's International and National Obligations in the Area of Human Rights with a Special Focus on Freedom of Religion or Belief

5.3.1. International Human Rights Treaties

Turkey is party to a significant number of universal and regional human rights treaties.[528] Some of these treaties, however, include reservations that restrict certain rights to a significant degree. Within the UN human rights protection scheme, Turkey has ratified the ICCPR thereby undertaking the obligation to protect the right to freedom of thought, conscience, religion or belief in line with Article 18 of the Covenant. Yet, Turkey placed an interpretative declaration on Article 27 of the same Covenant, thus reserved the right to interpret and apply the provision on the protection of ethnic, religious or linguistic minorities in accordance with the related

[526] Considering that that the Institutions that provide religious services must be related to the Diyanet, which is the only Institution providing public religious services, and that there are only Islamic theological faculties in Turkey and that High Courts in Turkey make requests from the Diyanet concerning other religions, it may be argued that the decision concerning the options on religion will be heavily influence by the Sunni-Islamic tradition.

[527] For example the Bahai faith is not recognized as a religion and thus is not an option one can choose.

[528] Convention Against Torture (CAT), International Covenant on Civil and Political Rights (ICCPR), Convention on Discrimination Against Women (CEDAW), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Rights of All Migrant Workers and Members of the Their Families, Convention on the Rights of the Childe (CRC). Turkey has also ratified the Optional Protocol to CEDAW, the Optional Protocol to ICCPR, the Optional Protocol to the CRC on the involvement of children in armed conflict and the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography.

provisions and rules of the Turkish Constitution and the Treaty of Lausanne.[529] Turkey is also party to the ICESCR with reservations to Article 13 (3), right to education, thus refusing to undertake to respect the liberty of parents to choose for their children schools, other than those established by public authorities and the ensure the religious or moral education of their children in conformity with their own convictions and Article 13 (4).[530] Turkey has ratified the CRC with reservations to Article 17, 29 and 30,[531] again reserving the right to interpret and apply the provisions of the said articles according to the letter and spirit of the Turkish Constitution and the Treaty of Lausanne.[532]

Turkey is a founding member of the Council of Europe,[533] as well as a party to two of its fundamental human rights treaties, the European Convention on Human Rights,[534] and the European Social Charter,[535] and other treaties within the human rights protection scheme of the CoE. Turkey has ratified Protocol I of the ECHR, however, placed a reservation on Article 2, that protects the right to education and at the same time creates an obligation on the part of the states to "respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions" on account of Law No. 6366 on the unification of education.[536] Not surprisingly, in line with Turkey's detached stance to minority rights, Turkey is not party to the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of Minorities.

Turkey's reservations or interpretive declarations draw attention to two areas of rights that seem to have certain "sensitivity" domestically. Firstly, in the spheres of religious

[529] Ratified on 23 September 2003. Turkey does not accept inter-state complaint under Article 41. On November 2006 Turkey also ratified the Optional Protocol I to the ICCPR but placed a reservation on Article 5 (2a) thus restricting the receipt of communications of alleged violations that result from acts or omissions that occur within the national boundaries of the Republic of Turkey. The latter reservation must be a precaution against extra-territorial applicability, such as Cyprus and Northern Iraq.
[530] Ratified on 23 September 2003.
[531] Provisions, respectively, dealing with the right to access to information, the right to education and the protection of minorities.
[532] Ratified on 4 April 1995.
[533] Turkey acceded to the Council of Europe on 09.08.1949.
[534] Ratified on 18.05.1954.
[535] Ratified on 24.11.1989.
[536] Ratified 18.05.1954, see Turkey's declaration at http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=009&CM=7&DF=18/04/2012&CL=ENG&VL=1 , accessed 28.01.2015.

education and secondly, the recognition of minority rights, international obligations are avoided. These will be explored further in relevant sections below.

Legally, not only do Turkey's international human rights commitments constitute the principal standard, but they are also recognized, as such, explicitly as having precedence over domestic standards that are found in the Turkish Constitution and other legislation. In 2004, Article 90 of the Turkish Constitution was amended so as to recognize the supremacy of ratified international treaties over domestic legislation in the sphere of human rights. Article 90 reads,

> In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.[537]

The application of this provision by the domestic courts is, however, limited and subject to a wide sphere of discretion granted to the judiciary without much guidance as to the application of this norm.[538]

It is important to note here that numerous ECtHR judgments that have found Turkey to have violated of Article 9 or Protocol 1 Article 2 have not been enforced. These are also illustrative of how Turkey is reluctant to make changes when they resonate deeply on domestically sensitive issues. Some of the key issues that have been decided upon and, yet, remain unenforced concern the Compulsory Religious Culture and Ethics lessons, the *Hasan and Eylem Zengin v. Turkey and Mansur Yalçın and Others v. Turkey*,[539] on the coercion to disclose religious affiliation in national identity cards, the *Sinan Işık v Turkey*,[540] on conscientious objection to military service, *Ercep v.Turkey, Feti Demirtas v. Turkey, Mehmet Tarhan v. Turkey, Halil Savda v. Turkey* and *Osman Murat Ülke v. Turkey*.[541]

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[537] Article 90 of the 1982 Turkish Constitution. On the applican of this provision see Kemal Başlar, "Uluslararası Antlaşmaların Onaylanması, Üstünlüğü ve Anayasal Denetimi Üzerine" [On the Ratification and Superiority of International Treaties], *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni*, Prof. Dr. Sevin Toluner'e Armağan, 24/ 1-2, (2004), Mesut Gülmez, "Anayasa Değişikliği Sonrasında İnsan Hakları Sözleşmelerinin İç Hukuktaki Yeri ve Değeri" [The Place and Value of Human Rights Treaties After the Constitutional Amendment], Türkiye Barolar Birliği Dergisi, Eylül-Ekim 54, 2004.

[538] İbrahim Şahbaz, "Avrupa İnsan Hakları Sözleşmesi'nin Türk Yargı Sistemindeki Yeri" [The Place of the European Convention on Human Rights in the Turkish Juridical System], *Türkiye Barolar Birliği Dergisi*, Eylül/Ekim 54, 2004, p. 216.

[539] Respectively, *Hasan and Eylem Zengin v. Turkey*, 09 October 2007, European Court of Human Rights, No. 1448/04 and *Mansur Yalçın and Others*, 16 September 2014, European Court of Human Rights, No. 21163/11.

[540] *Sinan Isik v. Turkey*, 02 February 2010, European Court of Human Rights, No. 21924/05.

[541] Respectively, *Ercep v. Turkey,* 22 February 2012, European Court of Human Rights, No. 5260/07, *Feti Demirtas v. Turkey*, 17 January 2012, European Court of Human Rights, No. 5260/07, *Mehmet Tarhan v.*

In addition to international legal commitments, Turkey has undertaken political commitments to human rights in general and freedom of religion or belief in particular within the Organization of Security and Cooperation in Europe structure.[542] Since 1975 starting with the Helsinki Final Act the participating members of the OSCE have affirmed their commitment to "respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief" as well as non-discrimination and tolerance as key matters within a comprehensive security approach in the region.[543] Most of all, the 1989 Concluding Document of Vienna, Principle 16 entails detailed, explicit and comprehensive principles for the protection of religious communities, *inter alia*, the right to establish places of worship, freedom in internal organizational matters, receive financial aid, religious education, training of religious personnel.[544] Hence the general statement of respect for freedom of religion or belief is expanded upon with specific references to the scope of the right. As an OSCE participating state, Turkey is committed to upholding the political commitment to the protection of these rights and others that are crucial for the protection of freedom of religion or belief in all of its dimensions. Through these commitments Turkey has also taken upon itself the obligation to implement them with good will thus reinforcing the expectation that international standards, legal and political, in the field of freedom of religion or belief, will be adhered to in Turkey.

For Turkey, a candidate for European Union accession, the Copenhagen political criteria,[545] including human rights, also have significant implications for the protection of freedom of religion or belief. Over the years the European Commission's Turkey progress reports have highlighted a wide range of issues pertaining to the right to

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Turkey, 12 July 2012, European Court of Human Rights, No. 9078/06, *Halil Savda v. Turkey*, 12 June 2012, European Court of Human Rights, *Osman Murat Ülke v. Turkey*, 24 April 2006, European Court of Human Rights, 43965/04.

[542] http://www.mfa.gov.tr/turkiye-ve-avrupa-guvenli-ve-isbirligi-teskilati-_agit_.tr.mfa (last accessed 16.04.2012).

[543] OSCE Human Dimension Commitments, Vol.1, Thematic Compilation, 2nd Edition, OSCE, 2005, Poland, p. xxv-xxvi, 106-110.

[544] *Ibid.*, p. 107.

[545] "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union." Declaration of the European Council in June 1993 of rules that define whether a country is eligible for European Union membership or not, http://europa.eu/legislation_summaries/glossary/accession_criteria_copenhague_en.htm accessed 18.01.2015

freedom of religion or belief in Turkey.[546] The European Commission 2014 Progress Report on Turkey captures the state of affairs concerning freedom of religion or belief in Turkey observing "there is a need for comprehensive reform of legislation on freedom of thought, conscience and religion and application of this legislation, in line with ECtHR rulings, Council of Europe recommendations and EU standards".[547]

5.3.2. Lausanne Peace Treaty

The Lausanne Peace Treaty, besides being the founding document of modern Turkey,[548] is a key Treaty that establishes the minority protection regime for Turkey's non-Muslim communities.[549]

The *problem* of the protection of minorities in Turkey was one of the most sensitive issues in the Lausanne Peace Conference negotiations because there was reluctance on the part of the Turkish government to commit to any obligations for the protection of minorities.[550] Bozkurt observes two paramount concerns underlying Turkey's position. Firstly, the minority protection may be only reciprocal and secondly, minority protection may not be used to attack Turkey's existence and integrity.[551] The reason for this was the century old "East Question", concerning the Western scheme to dismantle the Ottoman Empire.[552] The perception that in the Ottoman Empire non-Muslim minorities, particularly the Christian minority, were instrumental for the interferences of the Western Powers in the internal affairs of the Empire is a crucial point for

[546] See the European Commission's Turkey Progress Reports published in 2011, 2012, 2013, 2014, available on the European Commission's website.

[547] European Commission (2014), Turkey 2014 Progress Report, p.16. http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf accessed 28.01.2015.

[548] The Lausanne Peace Treaty was ratified in domestic law by Law No. 340 and is thus part of national law.

[549] While minority protection scheme in the Lausanne Treaty pertains primarily to non-Muslims, there are certain provisions that give rise to obligations to protect linguistic rights (Article 39/5) for those of Turkish descent who speak a language other than Turkish, equality of all before law (Article 39/2) and prohibition of discrimination based on religion (Article 39/3) for all of Turks. Yet, Turkey does not accept these obligations.

[550] The Congress records prior the Independence War specifically emphasized that political sovereignty and privileges for Christian peoples may not be accepted. Gülnihal Bozkurt refers to this quoted in Gülnihal Bozkurt, *Azınlık İmtiyazları Kapitülasyonlardan Tek Hukuk Sistemine Geçiş* [The Transition from Minority Priviledges Capitulations to a Unified Legal System], (Atatürk Kültür, Dil ve Tarih Yüksek Kurumu, 1998), p. 44-45.

[551] *Ibid.*, p. 45.

[552] Bilal N. Şimşir, Lozan'a Göre Azınlıklar in *80. Yılında 2003 Penceresinden Lozan Sempozyumu* (On its Symposium on 80th Anniversary of Lausanne- from the Window of 2003), (Türk Tarih Kurumu Yayınları XVI. Series No. 100, 2003), p. 171. Also see Halide Edip Adıvar, *Türkiye'de Şark-Garp ve Amerikan Tesirleri* (East-West and American Influences in Turkey), (Can Publications, 2009).

understanding the spirit and philosophy of the implementation of the provisions enshrined in the Lausanne Treaty pertaining to the protection of minorities. The new Turkish Government was determined not to give any "privileges" to non-Muslims.

It is important to understand this historical context and competing interests that were at play in relation to the Lausanne Treaty since these have produced and continue to keep alive at least four factors that have shaped the interpretation and implementation of the minority protection scheme in the Lausanne Treaty to this day. First, the protection of minorities, in particular Christian minorities, has been largely congested into the foreign relations sphere, rather than being essentially a human and minority rights issue. Secondly, the Turkish state, based on historical experiences, has viewed the claims for minority protection in Turkey as a functional tool for foreign powers to interfere in its sovereignty.[553] Thirdly, minority rights have been understood as privileges or exceptions that were conceded unwillingly, instead of legitimate fundamental rights. Finally, the principle of reciprocity has been strictly observed and this has led to a conditional approach based on the expectation that there would be reciprocal protection for Muslims particularly in Western Thrace.

Articles 37-45 of the Lausanne Treaty cover the protection of non-Muslim minorities. The principle place that must be given to the Lausanne protection scheme within the Turkish legal system is explicitly mandated through Article 37 that obliges Turkey to recognize Articles 38-44 as basic law. It also stipulates that there shall not be any laws or regulations or official acts that are contrary to, nor take priority over, the said Lausanne provisions. This explicit prohibition, however, has not stopped Turkey from restricting or preventing non-Muslim minorities from fully enjoying their rights through the creation of incompatible laws, bureaucratic obstacles, arbitrary decisions of public authorities in relevant official processes.[554]

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[553] This can be clearly observed in the correspondence between the Turkish Chief negotiator in Lausanne and the government in Ankara as well as the minutes of the Lausanne Peace Conference. See generally, Bilal N. Şimşir, Lozan Telgrafları (1922-1923) [Lausanne Telegrams (1922-1923)], (Türk Tarih Kurumu Publications, 1990). Seha L. Meray (çeviren), Lozan Barış Konferansı Tutanaklar Belgeler [Lausanne Peace Conference Records Documents], Series 1, Vol. 1, Book 2, Second Edition, (Yapı Kredi Yayınları, 2003), Eyüp Kaptan, *Lozan Konferansı'nda Azınlıklar Sorunu* [The Question of Minorities in the Lausanne Conference], (Harp Akademileri Basım Evi, 2002).

[554] For numerous examples see, among others, Dilek Kurban and Kezman Hatemi, *Bir Yabancılaştırma Hikayesi: Türkiye'de Gayrimüslim Cemaatlerin Vakıf ve Taşınmaz Mülkiyet Sorunu* (A Story of Alienations: The Foundation and Property Problems of Non-Muslim Communities in Turkey), (TESEV, 2009), and Dilek

In contrast to its contemporary minority protection schemes that protected racial, linguistic and religious minorities, the Lausanne Treaty identifies solely non-Muslim minorities as minority right holders.[555] There has been much debate during the negotiations and drafting of the document as to which categories of people will have the protection afforded in the minority protection scheme.[556] The Turkish government denied that there were any ethnic groups in Turkey other than Turks and Kurds and underlined that no group except for the Greeks demanded "these kind of rights".[557] Since Turkish authorities regarded the efforts to include protection of ethnic minorities as a scheme to incite divisiveness through the Kurdish population by foreign powers, Muslim minorities of different ethnic backgrounds were not granted any specific rights. However, there are certain provisions that are applicable to all Turkish citizens.[558] The category of groups that the term 'non-Muslim minorities' identified was not specified.[559] Indeed, there appears to be a lack of coherency in this respect throughout the time of drafting. In practice, the Turkish government extended the protection only to the Armenian Orthodox, Greek Orthodox and Jewish communities, in spite of the fact that these names are not mentioned in the Lausanne Treaty. The rights of other, then existing, non-Muslim groups, such as the Syriac Orthodox and Syriac Chaldean, Latin Catholic, and those of the Bahai faith are not viewed by Turkey as subject to the

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Kurban and Konstantinos Tsitselikis, *Bir Mütekabiliyet Hikayesi: Yunanistan ve Türkiye'de Azınlık Vakıfları* (A Story of Reciprocity: Minority Foundations in Greece and Turkey), (TESEV 2010).

[555] Baskın Oran attributes this "victory" on the part of Turkish authorities, to the fact that they they represented Turkey as the victor of the National Independence War. B. Oran, *Türkiye'de Azınlıklar: Kavramlar, Teori, Lozan, İç Mevzuat, İçtihat, Uygulama* (Minorities in Turkey: Concepts, Theory, Lausanne, National Legislation, Caselaw, practice), (İletişim 2004), p. 64.

[556] Meray, *supra* note 37.

[557] *Ibid*., p. 153.

[558] Article 39 (3) protects all from discrimination based on religion, denomination and belief and paragraph 2 of the same article recognizes equality of all before the law regardless of religious affiliation. Article 39 (4) protects freedom to use any language in private or commercial activities as well as public meetings and publications and Article 39 (5) provides for ensuring facilitation by Turkey for Turkish citizens who speak a language other than Turkish in the use of their own language in courts. Article 38 protects the right of everyone residing in Turkey to enjoy their right to observe the requirements of their religion or denomination in public or private.

[559] During the negotiations at times "Christians and Jews" were used and references were made to churches and church law. Meray, *supra* note 37. However, there was not any reference to Bahai, Assyrian Orthodox community, or any other non-Muslim community. It is important to note that the minority communities were not represented in the negotiations. Instead their case were defended by Allied Powers, however, Greece argued mostly for the rights of the Greek Orthodox community and the US mostly for the rights of Armenians, in particular for the creation of an Armenian homeland in Turkey. Thus negotiations were not striving for a generally applicable minority rights framework for all non-Muslim minorities. And it was understood by the Turkish government as such.

Lausanne protection scheme. For example, Syriac and Chaldean Christians are not able to establish their own schools in accordance with Article 40 of the Lausanne Treaty. The explanation given by the state for this anomaly is that Syriacs had given up these rights after the establishment of the Turkish Republic.[560] Yet, even if there had been any declarations made by religious leaders of this community at the time, certainly they were in no position to make such a decision for the members of the Syriac community. It should be noted that there have been demands by the members of the Syriac community to establish schools, however, these have been denied.[561] In addition, currently, newer non-Muslim groups like the Jehovah's Witnesses or Protestants of Turkish ethnic origin are also not recognized as non-Muslim minorities as protected under the Lausanne Treaty. Hence in practice the Turkish government has been interpreting the term "non-Muslim minorities" restrictively so as to include two ethnic-based Christian communities and the Jewish community. While it may be argued that Turkey's restrictive practice counts as subsequent practice for the application of the Lausanne Treaty, this argument is not sustainable since subsequent practice must first and foremost be in line with the word of the treaty.[562] This restrictive interpretation has, however, not been a matter of any national or international legal dispute so far. Specific rights protected for non-Muslims are listed below:

> - Article 38 (3), guarantees the right of non-Muslims to movement and migrate on par with Turkish nationals.
> - Article 39 (1), ensures that non-Muslims will benefit from all civil and political rights that are granted to Muslims.
> - Article 40 protects the rights to establish, manage and control charity institutions, religious social institutions, schools, teaching and education institutions and use their own language in these freely and freely conduct religious worship services.
> - Article 41 protects the right to education in mother tongue in primary schools where they are intensely populated and to receive funding from the national budget.
> - Article 42 (1) protects the right to settlement of disputes in accordance with traditions and customs in family and private matters.
> - Article 42 (2) sets forth facilitation for the establishment of religious institutions.
> - Article 43 stipulates that they cannot be forced to act *a contrari* to their beliefs and religious precepts and to engage in official acts during their holidays.[563]

[560] Oran suggests that there may be a secret Ministry of Interior Declaration about limiting the application of the Lausanne Treaty to Greeks, Armenians and Jews and because Syriacs were dispersed in the South Eastern part of Turkey they may not have been able to defend their rights. Oran, *supra* note 39, p. 70.
[561] Rahime Sezgin and Murat Uçar, "Syriacs", Aksiyon, 02.03.2002.
[562] Vienna Convention on the Law of Treaties Article 31, full text accessible at http://www.public-international-law.net, accessed 28.01.2015.
[563] Lausanne Treaty Articles 39-43.

Turkey has a positive obligation to create the necessary normative framework in order to make these rights available and accessible to non-Muslim minorities. Beyond negative obligations that require states to avoid interference in the enjoyment of rights, positive obligations require states to take necessary steps in order to make full and effective equality a reality. In particular, Articles 41, 42 and 43 obligate Turkey to take relevant measures in order to ensure effective protection of the rights in questions. However, this has not been the case; for example, the support mentioned in Article 41(1) has not been given, special commissions mentioned in Article 42(2) have not been applied, the obligations derived from Article 42(3) have not been carried out.[564]

Article 42(1) maintains a provision that envisages, in general terms, the continuation of the plural legal system that existed in the Ottoman Empire. While the Turkish government accepted this provision for the time being, there was a strong determination to eventually eliminate any "privileges" pertaining to the jurisdictional sphere of personal and family law of religious minorities. The new Turkish government had plans to adopt a Civil Code that would be applicable to all without any differentiation based on religious affiliation. Later, when the Civil Code was adopted it was said that the non-Muslim minorities renounced their rights to resolve family law matters according to their own traditions and agreed to be subject to the Civil Code that was applicable to all.[565] The reluctance to observe obligations in the sphere of religious jurisdictions may be explained by the perceived tension between neutral law that is applicable to all and special minority arrangements that were seen as incompatible with the principle of equality and the sovereignty of the state. There have not been claims by non-Muslim minorities to exercise their rights in this sphere. It is important to consider the interpretation and utilization of the principle of reciprocity,[566] since it constitutes the basis of Turkey's conditional approach to the protection minority rights. Here, again one has to turn to the underlying spirit that has shaped the approach of the Turkish Republic to the issue of minority protection. A decree related to the minorities issued by the *Misak-i Milli* (National Pact of 1920

[564] Oran, *supra* note 39, p. 72.
[565] *Ibid*.
[566] Article 45 reads "The rights conferred by the provisions of the present Section on the non-Moslem minorities of Turkey will be similarly conferred by Greece on the Moslem minority in her territory."

stating the claims of the Ottoman State) demarcates the extent of protection to be granted to minorities, "minority rights will be embraced by us and secured, with the hope that Muslim people in the neighbouring states would benefit from same rights, within the framework of principles enshrined in treaties concluded between the members of the Alliance and their enemies or partners."[567] The conditional approach based on the expectation that there will be reciprocal protection for Muslims, particularly those in Western Thrace, has been an integral part of the constrictive application of the general minority rights protection scheme. While the Lausanne Treaty establishes a special legal regime for the protection of the Muslim minority in Greece and non-Muslim minorities in Turkey,[568] it was clearly stated in the negotiations by some representatives that the obligations were *parallel obligations* and were not based on realization of obligations by the other country.[569] The reciprocity condition continues to constitute a problem up to this day.[570] Since, in international law generally the subjects of the reciprocity principle are foreigners, it is perceived by some, as an indicator that non-Muslim minorities are seen as foreigners instead of citizens.[571] On the other hand, even if the principle of reciprocity may be accepted, it could only affect the rights of the Greek Orthodox minority in Turkey in relation to the rights of the Muslim population by Greece. Armenian Apostolic and Jewish communities could not be subject to the reciprocity principle since there is not a country that is party to the Lausanne Treaty that undertakes the commitment to protect the rights of a Muslim population reciprocally.

In conclusion, the Lausanne Treaty creates crucial obligations for Turkey toward its non-Muslim citizens thus continues to be a significant legal instrument for the protection of the right to freedom of religion or belief, particularly in its collective

[567] Şimşir, *supra* note 36, p. 172. The Allies objected to the principle of reciprocity. In practice, reciprocity wan only possible between Greece and Turkey since in other Balkan countries such as Romania and Serbia there were no Turkish minorities. Meray, *supra* note 37, 194-196.
[568] Turgut Tarhanlı, *Sorun Lozan Değil* [Lausanne is not a Problem], Radikal 29 November 2005.
[569] Meray, *supra* note 37.
[570] For example the 2008 Law on Foundations includes the principle of reciprocity in its Article 2.
[571] Fethiye Çetin, "Yerli Yabancılar" (Indigenous Aliens) in Ulusal, Ulusalüstü ve Uluslararası Hukukta Azınlık Hakları (Minority Rights in National, SuDIBnational and International Law), (İstanbul Barosu 2002), p. 78. The author supports her argument with a judgment of the Court of Appeals related to legal personality of foundations established by non-Muslim minorities, where the Court specifically refers to the applicants' foundations as "legal entities of non-Turks are prohibited from new ownership of property" Judgment of the Court of Appeals, Second Chamber, 4449E, 4399K 06.07.1971. Hence applies to them the law on provisions applicable to foreign legal entities.

dimension. Yet, the restrictive interpretation and application of the rights remain as serious obstacles before effective protection for non-Muslim minorities.

5.4. Turkish Constitution and the Protection of Freedom of Religion or Belief

The 1982 Turkish Constitution embodies key elements that reflect Turkey's approach toward religion and manifestations of religion. On the one hand, the Turkish state confers the principle of secularism, defined as separation of state and religion, a central and supreme position while at the same time permanently instituting state's involvement in religion through, *inter alia*, the Presidency of Religious Affairs and compulsory religion lessons in schools and interpreting secularism so as to create blanket restrictions on many forms of manifestation of religion or belief. It is important to note that, in addition, a certain form of Turkish nationalism constitutes an overarching and pervasive spirit of interpretation and practice in the above construction both in society and state administration.[572]

5.4.1. Turkish Secularism- Laiklik[573]

The concept of Turkish secularism, *laiklik,* in the Turkish Constitution as a legal principle must be explored and understood for the overall purpose of the study because of its conceptual significance and its powerful functional effect in jurisprudence. The term *laiklik* formally entered the Turkish legal system through its inclusion in the Constitution in 1937.[574] The paramount place and particular meaning given to the principle of secularism in the Turkish Constitution and its particular application by the high courts- in particular the Turkish Constitutional Court,[575] and the

[572] This was also observed by the Special Rapporteur on Freedom of Religion or Belief: "This particular form of nationalism pervades not only State institutions but society as a whole, and generally conveys a message that leaves no room for the Christian minorities." Interim report of the Special Rapporteur of the Commission on Human Rights on the elimination of all forms of intolerance and of discrimination based on religion or belief, the Situation in Turkey, A/55/280/Add.1, 11.08.2000, p. 26.

[573] I will use the term "laiklik" in order to preserve the autonomous meaning of secularism in Turkey. While this principle was adopted from the French term *laïcité* it has a unique meaning in Turkey.

[574] It must be noted that secularism had been part of public discussion since II. Tanzimat. And many measures had been taken to eliminate the influence of religion from state affairs before this principle was explicitly acknowledged in the Constitution. For a relatively recent evaluation see Kalaycıoğlu, Ersin, "Democracy, Islam and secularism in Turkey" in *The Struggle Over Democracy in the Middle East: Regional Politics and External Policies*, Brown, Nathan J. and Shahin, Emad (eds.), Abingdon, Oxon, UK and New York, NY, USA: Routledge, October 2009, 153-186.

[575] According to Article 148 of the Turkish Constitution, the Constitutional Court examines the constitutionality, in respect of both form and substance, of laws, decrees having the force of law, and the Rules of Procedure of the Turkish Grand National Assembly. Constitutional amendments are examined and verified only with regard to their form. The judgments of the Constitutional Court are final.

Council of State[576]- create the general legal framework and the spirit of interpretation concerning cases pertaining to freedom of religion or belief in Turkey. Çağlar observes that the meaning of *laiklik* in Turkey does not include the impartiality of the state, instead, it means, "active or militant secularism and the control of the state over religion."[577]

In the 1982 Turkish Constitution,[578] *laiklik* is directly or indirectly protected through a number of provisions. It is one of the attributes of the Republic,[579] that cannot be changed,[580] and no activity that is contrary to Atatürk's nationalism, principles and reforms that are based on *laiklik* can find protection.[581] The state's fundamental social, economic, political, and legal order cannot be based on religious tenets.[582] Reform laws,[583] most of which are directly or indirectly linked to secularism, are under Constitutional protection and cannot be understood as contradictory to the Constitution.[584] Political parties also have to abide by the principle of *laiklik* or risk closure.[585] Secularism also finds its reflection in the restriction of fundamental rights that cannot be used to establish a state order, or any part of this order, based on religion.[586]

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[576] Administrative courts deal with cases which are brought against the administrative organs because of the implementation of the administrative legislation. The administrative decisions and judgments of courts can be appealed to the Council of State. The Council of State is the last instance for reviewing decisions and judgments given by administrative courts and cases which are not referred by law to other administrative courts.

[577] Bakır Çağlar, "Türkiye'de Laikliğin Büyük Problemi" [The Great Problem of Secularism in Turkey] in *Cogito* No.1, Summer 1994, p. 115.

[578] Article 24(5) of the 1982 Turkish Constitution, available at, www.anayasa.gen.tr/1982constitution.htm , accessed 16.01.2015.

[579] Article 2.

[580] Article 4.

[581] Preamble para. 5

[582] Article 24 (5).

[583] Reform Laws include revolutionary laws adopted in the early years of the Turkish Republic. These are: Tevhid-i Tedrisat Kanunu [Law on the Unification of the Educational System] Law No. 430 of 3 March 1340 (1924) ; Şapka Kanunu [Law on Wearing Hats] Law No. 671 of 25 November 1341 (1925); Tekke ve Zaviyelerin Kapatılmasına İlişkin Kanun [Closure of Dervish Monasteries and Tombs, the Abolition of the Office of Keeper of Tombs and the Abolition and Prohibition of Certain Titles] Law No. 677 of 30 November 1341 (1925); Article 110 of Medeni Kanun [Civil Code] No. 743 of 17 February 1926, Yeni Türk Harflerinin Kabulü ve Tatbiki Hakkında Kanun [Law on the Adoption and Application of the Turkish Alphabet] Law No. 1353 of 1 November 1928, Efendi, Bey, Paşa gibi Lakap ve Ünvanların Kaldırılmasına Dair Kanun, [Law on the Abolition of Titles and Appellations such as Efendi, Bey or Pasa] Law No 2590 of 26 November 1934 ; Bazı Kisvelerin Giyilemeyeceğine Dair Kanun [Law on the Prohibition of the Wearing of Certain Garments] No. 2596 of 3 December 1934.

[584] Article 174.

[585] Article 68.

[586] Article 14/1.

The principle of non-interference in the affairs of religious communities that follows from the notion of separation of state and religion is not envisioned in the Turkish legal framework.[587] This has significant implications for freedom of religion or belief, particularly in its collective dimension for religious/belief groups- as regards their associative rights. This is particularly evident in the substantial restrictions on the autonomy of religious communities as well as the state monopoly on certain religious services/activities, such as those provided by the Presidency of Religious Affairs (Diyanet) and religious education provided by the Ministry of Education and universities. The implications of the failure to observe non-interference in the affairs of religious communities for the collective dimension of freedom of religion or belief are critically analyzed in Chapter 7.

The Turkish Constitutional Court (Anayasa Mahkemesi, hereafter AYM) understands the principle of *laiklik* to mean, firstly, that religion cannot in any way interfere in state affairs and secondly, taking into account historical realities, that the state will reflect an interventionist, restrictive, supervisory, controlling approach toward religious manifestation.[588] The Turkish position is explained by the AYM with reference to the unique circumstances in Turkey, observing that the circumstances and the conditions of each religion necessitate difference in the overall understanding of secularism in different countries.[589] It is explained that the difference lies in the conditions of Christianity and Islam and in particular the existence of a hierarchical clergy structure found in the former in contrast to a lack of clergy class in the latter.[590] This particular situation in Islam makes it impossible to grant independence in internal affairs to those involved in places of worship and religious affairs.[591] Since Islam regulates not only religious belief in the conscience of individuals but also social relations, state affairs

[587] B. Tanör & N. Yüzbaşıoğlu, *1982 Anayasasına Göre Türk Anayasa Hukuku* [Turkish Constitutional Law According to the 1982 Constitution], (Yapı Kredi Publications 2005), p. 89.
[588] B. Dinçkol, *1982 Anayasası Çerçevesinde ve Anayasa Mahkemesi Kararlarında Laiklik* [Secularism Within the Framework of the 1982 Constitution and the Judgments of the Constitutional Court], (Kazancı Kitap 1992), p. 182.
[589] Constitutional Court, E1970/53 and K1971/76, 21.10.1971, *Anayasa Mahkemesi Kararları Dergisi* [Journal of Judgments of the Constitutional Court] (AMKD) No. 10, 52-79.
[590] Such a definition can of course easily be refuted with not least, the various traditions in Christianity, including free churches which are not part of a hierarchical structure.
[591] *Ibid.,* p. 61-62.

and law, it is argued that an unlimited freedom of religion and independent religious associative freedom is dangerous for Turkey.[592]

The AYM has expressed the view that the principle of *laiklik* has a privileged position in the Constitution in relation to other rules or principles found in it.[593] The AYM mandates itself with what Dinçkol refers to 'active' approach toward the protection of the principle of secularism and views it as the 'heart' of the system.[594]

In contrast to, or arguably because of, the strong protection of Turkish secularism, in Turkey's state-religion relations, a reciprocal non-interference principle, or strict separation of state and religion affairs is not envisioned.[595] This is particularly evident in the substantial restriction on the autonomy of religious communities as well as the state monopoly on certain religious services, such as those provided by the Diyanet and religious education provided by the Ministry of Education and the public universities. According to the 1982 Constitution religious education is placed under the supervision and control of the State. Article 24 (3), introducing compulsory Religious Culture and Ethics Knowledge lessons in primary and middle education is a significant change that the Constitution brings in terms of regulating religion. The Milli Güvenlik Kurulu (National Security Council hereafter MGK),[596] acknowledging that religion is a unifying factor in society, advised the drafters of the Constitution that compulsory religious education under state control was appropriate however it needed to be in the form of religious culture.[597] Not surprisingly, the compulsory nature of this education is viewed by many as a feature irreconcilable with the secular nature of the state.[598] Still, *laiklik* is viewed as the safeguard for a framework that is conducive for freedom of conscience.[599] It is implied that for true freedom of religion or belief to exist the state must be *laik*. Hence in the Turkish legal system *laiklik* constitutes the foundation for

[592] *Ibid.*, p. 66.
[593] Constitutional Court, 07.0.1989, E1989/1 and K1989/12, AMKD No.12 (1991), p. 133-165.
[594] B. Dinçkol, *supra* note 72, 178 and 212.
[595] Tanör and Yüzbaşıoğlu, *supra* note 71, p.89.
[596] According to Article 187 of the Constitution the NSC comprises of the Chief of Staff, select members of the Council of Ministers, and the President of the Republic (who is also the Commander-in-chief). The NSC develops the national security policy.
[597] *Cumhuriyet*, 27 June 1987.
[598] Dinçkol, *supra* note 72, p.64. See the case of *Hasan and Eylem Zengin v. Turkey* on the compulsory nature and content of the Religious Culture and Ethics classes and the insufficient exemption possibility in Turkey. Hasan and Eylem Zengin v. Turkey, supra note 23, para. 58-76.
[599] *Ibid.*, p. 208.

freedom of religion or belief. Such involvement in the religious sphere is compatible with efforts to reconcile religion with laiklik.[600]

It is important to note that *laiklik* is not understood as an abstract concept but as a concept that is embodied in the systems of state, law and education.[601] This implies that religion cannot be involved in these key areas that are envisioned as strictly secular and that there is a particular effort to protect secularism within and through these systems. The importance of these key spheres also explains the sweeping measures that were put in place in order to exclude or drive out religious influences from, what was viewed as, the sphere of the state.[602] It may also explain the rules concerning dress codes for public servants and strict application of these rules and key constitutional principles in related cases by the Turkish judiciary.

More recently, since 2012, however, the AYM has an evolved and new jurisprudence on what it calls liberal laiklik according to which "individual preferences and the ensuing lifestyles remain outside the interference of the state, instead, they are under the protection the state".[603] This judgment concerned the controversial change in the education system and the introduction of the optional religion lessons in Islam through legislation. The AYM held that one of the purposes of the secular state is to establish a political order where, while protecting social diversity, individuals of different beliefs can live together in peace.[604] Accordingly, the state will refrain from interfering in the freedom of religion or belief of individuals unless it is necessary.[605] It also implies, in the AYM's view, that the state should remove obstacles to freedom of religion or belief. Despite this, on the outset positive theory of secularism, while applying the principles to the facts of the case the AYM attributes to the state a positive obligation to provide Islamic religious services – for example in school education because the Turkish state holds monopoly over religious education and does not allow private citizens to establish institutions that teach religion.[606] This approach has wide and possibly unforeseeable implications.

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[600] Çağlar, *supra* note 61.
[601] Constitutional Court, 25.10.1983, E2/1983 and K2/1983, AMKD, No. 20, 364
[602] *Supra* note 67.
[603] Constitutional Court, E2012/65, K2012/128, 20.9.2012.
[604] *Ibid*.
[605] *Ibid.*
[606] *Ibid.*

5.4.2. Special Constitutional and Institutional Arrangement –the Diyanet

The constitutional and institutional arrangement concerning the Diyanet constitutes a key issue for the understanding of state religion relation as well as the protection of freedom of religion or belief in Turkey. It is not possible to provide a comprehensive outline of all the implications of the Diyanet, here some of the key issues will be highlighted so as to present the paradoxical aspects of this institution in relation to neutrality of the state and the principle of equality that it must observe. The Diyanet is a multi-dimensional and massive organization,[607] with far reaching activities both at the national and international level.[608] The Presidency of Religious Affairs was established in 1924 as an institution under the Office of the Prime Minister.[609] The 1961 Turkish Constitution instituted the Presidency of Religious Affairs as a constitutional organization within the state administration[610] with the purpose of fulfilling the tasks that are enumerated in a special law concerning the organization. The 1982 Constitution preserves the Presidency of Religious Affairs in Article 136:

[607] In its activity report for 2013 the Diyanet declared its personnel number as 119,845 and its spending as 4.604.649.000 TL (approx. 1,705,425,555 Eur), http://www2.diyanet.gov.tr/StratejiGelistirme/Faaliyet/2013%20Yıllık%20Faaliyet%20Raporu.pdf , accessed 16.01.2015.

[608] As of 1971 the Diyanet began providing religious services to nationals and cognates abroad. The Law 1982 on Some Amendment to Law No. 633 on the Establishment and Duties of the Presidency of Religious Affairs and the Addition of Four Temporary Provisions to This Law in 26.04.1976, in Article 1 made it possible to establish offices abroad and appoint religious workers in order to provide religious services. These services developed in the following years and currently the organization of DIB outside of Turkey is established in countries where Turkish citizens and cognates reside at Turkish Embassies and Consulates with a very broad mandate including enlightening Turkish citizens living abroad on religious matters, planning religious education, follow-up of courses on the Quran and religious knowledge in mosques abroad and work towards efficiency, engage in inter-religious dialogue, follow-up of destructive and divisive missionary activities and assimilation activities directed toward Turkish citizens and collect relevant documents and conduct evaluation and act as necessary in this respect. Follow-up of religious activity outside of Islam in Turkey, analyze these and prepare reports. According to Ruşen Çakır and İrfan Bozdağ, the Diyanet operates through activities that can be defined as 'missionary activity' also in countries where there are no Turkish citizens but intense Muslim population, such as Balkans, Caucasus, Middle Asia and the Baltics. See, R. Çakır- İ. Bozan, Sivil, Şeffaf ve Demokratik bir Diyanet İşleri Başkanlığı Mümkün mü? [A Civil, Transparent and Democratic Presidency of Religious Affairs- Possible?], (TESEV, 2005) p. 93-99.

[609] Diyanet website http://www.diyanet.gov.tr/turkish/dy/Diyanet-Isleri-Baskanligi-AnaMenu-kurulus-ve-tarihi-gelisim-53.aspx. Law No 429 Şerriye ve Evkaf ve Erkan-ı Harbiye Vekaletlerinin İlgasına Dair Kanun [Law on the Abolishment of the Ministries of Sharia, Foundations and War], 2 March 1924.

[610] Debates surrounding the establishment of a religious institution within a secular state present two main views, one relying on a strict separation of state and religion and principle of neutrality of state and thus also envisioning more autonomy for religious groups and less state intervention and the other one relying on Turkey's unique circumstances seeing it as a necessity that the Presidency of Religious Affairs established as a state organization regulating and controlling religious affairs. See İştar Gözaydın, *Diyanet: Türkiye'de Dinin Tanzimi* [The Diyanet: Arrangement of Religion in Turkey], (İletişim, 2009), p. 38-39.

> The Department of Religious Affairs, which is within the general administration, shall exercise its duties prescribed in its particular law, in accordance with the principles of secularism, removed from all political views and ideas, and aiming at national solidarity and integrity.

Consistent with the efforts to protect *laiklik* and try to reconcile religion with it, the Diyanet is to work in line with the principle of *laiklik* removed from all political views and ideas, and aiming to ensure national solidarity and unity.[611] The purpose of the Diyanet is stipulated in its own law, "Carrying out activities related to the beliefs, worship and ethics of the Islamic religion, enlightening the society about religion and administrating worship places".[612]

Ensuring the neutral character of "public service" seems difficult considering that the DIB has been criticized for being involved only with the needs of the Sunni-Muslims.[613] In addition, on the one hand, the DIB is the only religious institution that receives financial state support for all of its activities and personnel, yet on the other hand it is under the control of the state- enjoying limited autonomy.[614] Through this arrangement the Turkish state is involved in and through the religious affairs of a particular Islamic tradition, significantly undermining the principle of impartiality. The constitutional principle of equality must be upheld in public services by state organs, which is difficult to meet with the massive state support in terms of funding and privileges creates significant inequality for those of other beliefs. As for members of non-Muslim communities, the Lausanne Treaty of 1923 prescribes that their communities will provide religious services with their own resources. In addition, Muslim groups that object to the Diyanet's claims of providing services for all Muslims without embracing any particular denomination within Islam, point out that the DIB is unconcerned with their needs and does not provide services for them. According to Kara, the Diyanet has engaged in a struggle against popular religiosity and the religious communities and *tarikats,*[615] that nurture this religiosity and thus weakens the popular religiosity and the embodiment of religion in this region.[616] Thus the question of observing the principle of equality extends beyond making funds available to adopting

[611] Article 136.
[612] Law No. 633 Article 1. Official Gazette No. 12038, 02.07.1965.
[613] Çakır and Bozan, *supra* note 88, 38.
[614] For discussion on various proposals for the transformation of the Diyanet to become an autonomous institution within the state administration see Gözaydın, *supra* note 94, 279- 283.
[615] Religious paths, orders.
[616] İsmail Kara, *Cumhuriyet Türkiyesi'nde bir Mesele olarak İslam* (Islam as an Issue in the Turkish Republic), (Dergah, 2008), p. 79.

an inclusive theology. The Diyanet has a mission that is both theoretical and practical. While on the one hand it manages certain religious affairs, on the other hand, it is tasked with the enlightenment of the society on religion. As rightly pointed out,

> The mission to enlighten people on religion makes it necessary to understand religion and enlighten people in accordance with what one understands. For this reason the Diyanet develops an understanding of religion (jurisprudence) enlightens the people in accordance with this understanding (convey) and provides religious services accordingly.[617]

The understanding of religion is according to DIB is based on the foundational resources of the Islamic religion.[618] Gözaydın notes that the emphasis on 'true religion' has been ever present as a narrative throughout the Republic though there have been changes in state-religion relations.[619] This claim of true interpretation functions also as a point of differentiation from other interpretations of Islam. The DIB is criticized for "closing its doors to different interpretations of Islam", [620] and representing solely the Sunni interpretation of Islam.

Yet, in a controversial decision, the AYM found that the Diyanet and the civil servant status of its personnel are compatible with *laiklik*.[621] The decision was based on the consideration of firstly, the country's experience that an understanding of "uncontrolled religious freedom and independent religious association" is loaded with heavy dangers and, secondly, the nature of Islam which regulates social relations, state affairs and law.[622] Hence the AYM held that there is no doubt that the regulation o the Diyanet in the Constitution and the "civil servant" status of its personnel is a requirement in light of historical reasons, facts and circumstances of the country.[623] This decision has been criticized both for its contradiction with the principle of *laiklik* as well as its inconsistency with legal logic by basing normative results on sociological and historical observations.[624]

Another dimension of the issue concerns the exclusive nature of the existing Diyanet framework which results in the Diyanet being the sole subject of the enjoyment of key freedom of religion or belief rights. On the one hand, Muslims may be the receivers of

[617] Quoted by Gözaydın, *supra* note 94, p. 119.
[618] Diyanet website.
[619] Gözaydın, *supra* note 94, p. 172.
[620] Çakır and Bozan, *supra* note 88, 114-117.
[621] Constitutional Court, E1970/53, K1971/76 , 21.10.1971 AYMD, No. 10, p.67-68.
[622] *Ibid*.
[623] *Ibid*., p. 60-70.
[624] Kemal Gözler, *Türk Anayasa Hukuku* (Turkish Constitutional Law), (Ekin Kitapevi, 2000), p. 137-153.

this "public service", on the other hand, they do not have the legal possibility of engaging in the exercise of certain rights protected in the right to freedom of religion or belief, such as the right to establish places of worship apart from the Diyanet structure. Thus this arrangement results with a system where all Muslims, in practice, are compelled to enjoy certain rights through the Diyanet. Formal religious associative activities for Muslims are quite limited outside of the Diyanet organization and that the latter holds monopoly, in law and fact, over key areas of manifestation of religion or belief. Only Diyanet can open and establish places of worship, mosques, and administer them.[625] Similarly, staff for religious services is provided and supervised and trained by this institution.[626] The Diyanet is also tasked with assuring that the Quran is printed accurately and scrutinizing relevant publication and making decision on whether such publications may be imported from abroad. The only organization that can provide Quran Courses legally and formally is the Diyanet. The Diyanet's mandate and the impossibility of enjoyment of key freedom of religion or belief rights outside the Diyanet framework create a rather restricted system for Muslims in Turkey.

The Diyanet assumes a role for countering religious propaganda that comes from other sources, "Follow-up of publications on religion in and outside of Turkey and decide on what they necessitate and prepare counter publication in line with scientific contestation".[627] Such counter publications include books on Jehovah's Witnesses and Christian missionary activity.[628] Clearly, the Diyanet has assumed an active role in propagating its *scientific* Islam understanding and engaging in counter-propaganda against other movements that find their sources in other religions, philosophies and Islamic understanding. Such a position might be compatible with an independent

[625] Law No. 633 Diyanet İşleri Başkanlığı'nın Kuruluşu ve Görevleri Hakkında Kanun [Law on the Establishment and Duties of the Presidency of Religious Affairs and the Addition of Four Temporary Provisions to This Law], 26.04.1976, *inter alia*, Article 35.

[626] *Ibid*. Article 16.

[627] *Ibid*., Article 5/e.

[628] The book on Jehovah's Witnesses, after pointing out that Jehovah's Witnesses have the opportunity to develop in Turkey as a result of certain weaknesses in national spiritual education and lack of knowledge and makes a list of measures to be taken against Jehovah's Witnesses and Christian missionaries, including, sending to foreign countries religious personnel who are equipped to preach and talk on these issues, measures through the police, law and courts, content in National Education that will serve as warning against harmful movements, informing the public through newspaper and magazines as well as through radio and television. Hikmet Tanyu, *Yehova Şahitleri*, (Elips 2006) p. 143-144. Gözaydın quotes from a document sent by the Diyanet to the Higher Education Council warning against "divisive and destructive actitivities such as Jehovah's Witnesses, Missionary activities, Babism, Bahais, Satanism, Hizbuttahlil, Hizbullah etc." Gözaydın, *supra* note 94, p. 169.

religious organization as a manifestation of freedom in dogma and internal matters, however it is hard to reconcile it with a public-funded, provider of religious public services within a secular state structure that is founded on secularism.

On the other hand, there are a number of issues raising questions about the autonomy of the DIB. It should be noted that the expectation that the DIB complies with criteria concerning equality required of public institutions providing public services creates tension between theological autonomy of the Diyanet as an institution with a religious nature and its role as a public service provider. Similarly, the fact that the Diyanet must "exercise its duties prescribed in its particular law, in accordance with the principles of secularism"[629] creates a restrictive overarching framework in which the Diyanet can produce its dogma and exercise its duties. In terms of appointment of leadership, neither Muslims in Turkey nor the Diyanet organization is involved in this decision, instead the president of the Diyanet is appointed by the Prime Minister. The Diyanet personnel belong to the special category of Religious Services Class, that comprises of public servants who have received religious education at various levels.[630]

Bearing in mind the above issues raised in relation to the particular constitutional and institutional arrangement of the Diyanet, it follows that this institution raises a variety of issues pertaining to the obligation on the part of the states to observe neutrality as well as the right to freedom of religion or belief. While the existence of an organization providing religious services within a state structure may not be incompatible with international standards protecting freedom of religion or belief,[631] the Diyanet, as such, certainly must go through a reform process in order to comply with such standards.

5.4.3. The Protection of Freedom of Religion or Belief- Its Scope and Limits

[629] 1982 Turkish Constitution Article 136.

[630] Law No. 1327 Article 9 of 1970 Amending Law No. 657 on Public Servants Article 36. For the differing views among the High courts on whether all personnel of the DIB can be considered public servants see Gözaydın, *supra* note 94, p. 177-184.

[631] An institution like the Diyanet providing services for the people of the majority must not lead to any impairment of the enjoyment of any rights, including freedom of religion or belief, for members of any religion or belief. See GC 22 of the HRC on Article 18 of the ICCPR para.9 is applicable "The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers."

The general protection of freedom of religion or belief in Turkey is reviewed below. This examination will be based on constitutional and legislative rules and relevant jurisprudence.

The right to freedom of religion or belief is enshrined in Article 24 of the Constitution,

> (1) Everyone has the right to freedom of conscience, religious belief and conviction. Acts of worship, religious services, and ceremonies shall be conducted freely, provided that they do not violate the provisions of Article 14.
> (2) No one shall be compelled to worship, or to participate in religious ceremonies and rites, to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions.
> (3) Education and instruction in religion and ethics shall be conducted under state supervision and control. Instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools. Other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representatives.
> (4) No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political influence, or for even partially basing the fundamental, social, economic, political, and legal order of the state on religious tenets.

The provision guaranteeing the right to freedom of religion or belief in the Turkish Constitution comprises of three key components, apart from its limitation clause.[632]

The first paragraph constitutes the inviolable part of the right to freedom of religion or belief namely the right to freedom of conscience, religion, belief and convictions. This right includes the right not to believe and change one's religion or belief. While the notion of conscience has not been invoked as a separate component, it is usually referred together with religion as "freedom of religion and conscience" which seems to point to the individual's inner sphere made up of deep convictions that may not necessarily be religious. It is however not interpreted as broad as to include the protection against being compelled to act against one's conscience.[633]

The second paragraph is evocative of the understanding of the scope of the protection conferred to manifestations- even though this term is absent in the provision- which is limited to "worship, religious services and ceremonies" in contrast to the protection afforded to the non-exhaustive list of manifestations of religion or belief in "worship, observance, practice and teaching" stipulated in Article 9 of the ECHR. This narrow

[632] The paragraph stipulating the limitation is dealt with under the section on limitations below.
[633] For example, the right to conscientious objection to compulsory military service is not recognized. Mine Yıldırım, "Conscientious Objection to Military Service: International Human Rights Law and the Case of Turkey", *Religion and Human Rights* 5 (2010), p. 65-91.

scope envisioned by the drafters of the 1982 Constitution, somewhat restricting manifestations into places of worship- is in line with restrictions on manifestations of religion in public sphere religious symbols and teaching of religion. Sezer, agreeing with the narrow scope of protection, observes that one has to differentiate between "worship" and "practice", it is only the right to worship that the Constitution guarantees, "practice" that is not worship is not protected.[634] This line of interpretation is difficult to reconcile with the non-exclusive list of manifestations enshrined international provisions protecting the right to manifest one's religion or belief, in particular Article 9 of the ECHR and Article 18 of the ICCPR.[635]

Teaching as a form of manifestation of religion is not expressed as a right instead, it is referred to in the context of the institution of strict state control in Article 24 (3) through the *regulation* concerning compulsory Religious Culture and Knowledge of Ethics classes and other religious instruction which can only be carried out under state control. Through this provision the state takes upon itself the role of teaching religion,[636] - giving it direction, content and function. In addition, all "other" religious teaching or instruction that may be carried out by private individuals or religious groups must take place under state control. This construction exposes the domestic conception of the right to freedom of religion or belief; the right to manifest religion or belief in teaching is an area where state control is deemed strictly necessary to the extent that it is not recognized as a right, instead it is expressed in the form of a regulation thus leading to restrictions.

As captured succinctly by Çağlar, the case law on the right to freedom of religion or belief of the AYM and Council of State in Turkey is constructed on striving to reconcile *laiklik* and freedom of religion or belief.[637] There are several constitutional provisions that function as restriction clauses for the right to freedom of thought, conscience and religion as recognized under Article 24.

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[634] Abdullah Sezer, *"Türkiye'de Din-Vicdan Özgürlüğü ve Din-Devlet İlişkisi"* [Freedom of Religion and Conscience and Religion and State Relation in Turkey] in *Bülent TANÖR Armağanı, 1. Bs., (Legal 2004), p. 561-609.*

[635] Article 9 of the European Convention on Human Rights, Article 18 of the International Covenant on Civil and Political Rights.

[636] The content of DKAB classes are not specified in the Constitution. This was later defined by jurisprudence see the decision of the Council of State, 8th Chamber, E2006/4107, K2007/481, 28.12.2007, E2007/679, K2008/1461, 29.02.2008.

[637] Çağlar, *supra* note 61, p. 113.

The limitation enshrined in Article 24 (5) stating that "no one shall be allowed to exploit or abuse religion or religious feelings or things held sacred by religion" is a special constitutional limitation that is intrinsic to the provision. It is clear from the latter part of the paragraph that the purpose of this provision is to restrict the use of religion to gain personal or political influence as well as to prohibit the "abuse" of religion in order to base the order of the state on religious tenets. The particular position of this restriction clause is interesting. It seems to express caution against actions that may appear like the exercise of the right to manifest one's religion or belief, but in effect may be religious activity that causes personnel gain or exert political influence. It must be noted, however, that "abuse of religious feelings", "things held sacred by religion" are vague terms that may be difficult to reconcile with precision and foreseeablity criteria that is required for legal restrictions.

The general restrictions clause that is applicable to all fundamental rights is found under Article 13. It stipulates that fundamental rights may be restricted, "only by law", without "infringing upon their essence" and restrictions may not be "in conflict with the letter and spirit of the Constitution and the requirements of the democratic order of society and the secular Republic and the principle of proportionality."[638] The "essence of rights" is a somewhat vague notion which has not been defined by the AYM for the right to freedom of thought conscience and religion. Article 13 does not include other "general" restriction grounds thus making Article 24 subject to its own special constitutional restriction clause. Gözler argues that without a general restrictions clause Article 24 cannot be restricted based on for example, the protection of health or public order.[639] Yet, considering the many potential and explicit restriction clauses, including the Preamble, it should not be difficult to find a suitable general restriction clause that can be applied to restrict the right to freedom of thought, conscience and religion.[640]

[638] As amended in October 17, 2001.

[639] Kemal Gözler, Anayasa Değişikliğinin Temel Hak ve Hürriyetler Bakımından Getirdikleri ve Götürdükleri (Pros and Cons of the Constitutional Amendments on Fundamental Rights and Freedoms), *Ankara Barosu Dergisi*, Year 59, No. 2001/4, 53-67.

[640] See also Zühtü Aslan "Temel Hak ve Özgürlüklerin Sınırlanması: Anayasa'nın 13. Maddesi Üzerine Bazı Düşünceler (The Restriction of Fundamental Rights and Freedoms: Some Thoughts on Article 13 of the Constitution), *Anayasa Yargısı*, No.19 2002, 143.

An additional and somewhat vague restriction clause is found in Article 14 stating that "None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights."[641] The requirement of democratic order of society has been used to restrict the state whereas the requirement of secular Republic has been used to restrict fundamental freedom.[642] Interestingly, the same provision goes on to create a restriction on the state and on individuals to destroy fundamental rights and freedoms embodied in the Constitution. Thus creating an obligation both for the state and the individual.

As far as suspension of fundamental rights are concerned even in times of war, mobilization, martial law or in times of emergency, "no one may be compelled to reveal his/her religion, conscience, thought and convictions or be accused because of them.[643]

The unalterable nature of the Reform Laws that are protected under Article 174 of the Constitution may also be viewed as another additional limitation clause with implications for the restriction of the right to manifest one's religion or belief. Reform Laws protected under this provision relate to a number of issues,[644] with direct or indirect connection to the protection of *laiklik*. As a result of this clause, for example, the prohibition on wearing religious garments for clergy of any religion or the prohibition of the use of certain religious leadership titles and the closure of certain places of worship such as dervish lodges may not be challenged on grounds of their unconstitutionality. Thus these laws in question enjoy an absolute protection in the Turkish domestic legal system, making it impossible to object to them in the domestic search for legal remedies.

It is clear from the review above that the right to freedom of thought, religion or belief is subject to a number of restriction clauses with varying degrees of precision and

[641] As amended on October 17, 2001.
[642] Osman Can, Anayasa Değişiklikleri ve Düşünceyi Açıklama Özgürlüğü (Constitutional Amendments and the Freedom to Express Thoughts), *Anayasa Yargısı*, No.19, (2002) 503-532.
[643] Article 15.
[644] *Supra* note 67.

importance. It will not be difficult to presume then, the interpretation and balancing of high courts plays an important role in the determination of permissible restrictions.

(a) Compulsory Religious Culture and Ethics Lessons

In spite of the concurring national and international court decisions that regard current DIBctice in Turkey incompatible with Turkey's human rights commitments under the ECHR, the issue of compulsory religion classes continues to be an unresolved domestic issue. National Security Council (Milli Güvenlik Kurulu, MGK hereafter),[645] acknowledging that religion is a unifying factor in society, advised the drafters of the Constitution that compulsory religious education under state control was appropriate however it needed to be in the form of religious culture.[646] Not surprisingly, the compulsory nature of this education is viewed by many as a practice that is irreconcilable with the *laik* nature of the state.[647] The Constitutional provision on religious education stipulates:

> Education and instruction in religion and ethics shall be conducted under state supervision and control. Instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools. Other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representatives.

As it is clear from the text above, the Turkish Constitution foresees two different kinds of religious instruction and education and creates different legal regimes for each. Firstly, there is a reference to "Religious Culture and Knowledge of Ethics" (DKAB) classes that are deemed compulsory in primary and secondary schools. Secondly, the third sentence refers to "other religious education and instruction" and makes them subject to the individual's own desire and in the case of children, the request of their legal representatives. However, both kinds of religious instruction and education have one common element in that they are both subject to state supervision and control.

The lack of a definition for the DKAB classes in the Constitution leaves it to the judiciary to interpret what kind of lessons these ought to be. It has been observed that the key phrase here is "culture" which seems to indicate that DKAB lessons must provide

[645] According to Article 187 of the Constitution the MGK comprises of the Chief of Staff, select members of the Council of Ministers, and the President of the Republic (who is also the Commander-in-chief). The MGK develops the national security policy.

[646] *Cumhuriyet* Daily , 27 June 1987.

[647] Dinçkol, *supra* note 72, p. 64.

content that is relevant for all and not only for members of a particular religion.[648] Thus it would follow from the text, and such an interpretation would exclude, firstly that the "religious culture" lessons would be compulsory for all- without any exemption- and that they would be compulsory in all primary and secondary schools. In practice, there is a general impression that the DKAB lessons are not about Culture of Religion but on *Sunni* Islam. This is demonstrated by the Ministry of Education curricula,[649] the objections of atheist and Alevi parents,[650] as well as the possibility of exemption for Christian and Jewish students.[651] On the other hand, the majority of the people in Turkey consider the DKAB as religion course yet wish them to continue as compulsory course.[652]

The ECtHR has ruled that the compulsory DKAB lessons in Turkey amount to religious instruction in the case of *Hasan and Eylem Zengin v. Turkey*.[653] The case concerned the request of an Alevi parent for the exemption of his daughter from the compulsory DKAB lessons and the rejection of the Provincial National Education Directorate. The ECtHR held that the "religious culture and ethics" classes cannot be considered to meet the criteria of objectivity and pluralism, and held that there had been a violation of the right to education protected under Article 2 of Protocol No. 1.[654]

In Turkey, the Council of State (*Danıştay*) had also ruled that the books taught in DKAB classes are based on teaching a particular religion and that practices such as doing the *namaz* and memorization of Arabic prayers are part of these lessons.[655] Thus, in light of

[648] Kemal Gözler, "1982 Anayasası'na Göre Din Eğitim ve Öğretimi" (Religious Instruction and Teaching Under the 1982 Constitution), Prof. Dr. Tunçer Karamustafaoğlu'na Armağan, (Adalet Yayınevi, 2010), p. 317-334, www.anayasa.gen.tr/din-egitimi.htm accessed 16.01.2015.

[649] Available in Turkish at www.dkab.org.

[650] "Aile Çocuğun Dışlanmaması için Dava Açmak İstemiyor" (Parents Do not Want to Sue because they Do not want their Children to be Excluded), (22.06.2011), Bianet, http://bianet.org/bianet/insan-haklari/130932-aile-cocugun-dislanmamasi-icin-dava-acmak-istemiyor accessed 15.01.2015.

[651] On 9 July 1990, the Education and Teaching High Council took a decision regarding Religious Culture and Knowledge of Ethics courses and the right of Christian and Jewish students to be exempted from these classes.

[652] According to a survey 82.1% of the people in Turkey think that compulsory religious education should be given in public schools. 85.5% think that worship DIBctices such as ritual ablution and *namaz* should be taught as part of general teaching about Islam. Ali Çarkoğlu and Binnaz ToDIBk, *Religion, Society and Politics in a Changing Turkey*, (TESEV, 2007), p.60

[653] *Hasan and Eylem Zengin v. Turkey*, *supra* note 23. A more recent judgment concurs with this finding, this time also finding that even the revised curricula does not meet the ECHR standard. *Mansur Yalçın and Others*, 16 September 2014, European Court of Human Rights, No. 21163/11.

[654] *Ibid*.

[655] Council of State, 8th Chamber, 28.12.2007, E2006/4107, K2007/481, 29.02.2008, E2007/679 K2008/1461.

its content the Council of State held that they cannot be accepted as teaching on Religious Culture and Knowledge of Ethics but that it is "religious instruction".[656] The Council of State held that according to Article 24 (4) of the Constitution that this kind of religious instruction may only be given subject to the desire of the individual and that rules that make it compulsory without a request from parents for such instruction was in violation of the Constitution as well as the ECHR.[657] Sezer asks the bidding question, "what can be the reason for a secular state to desire to give all of its citizens religious information in a compulsory manner?" and proposes that "compulsory religion" lies behind this practice.[658]

At the time of writing this thesis, the DKAB lessons remain compulsory, yet certain changes have been made in the program and content. According to a report by the ERG (Eğitim Reformu Girişimi- Reform in Education Initiative) changes in the curricula, which amount to interjecting information on Alevi and Caferi traditions, do not change the nature of the lessons as "instruction in a particular religion" thus the compulsory nature of the lessons continues to raise issues with the protection of the right to freedom of religion or belief of the child and the right of parents and legal guardians to bring up children in line with their religious or philosophical views.[659] Unfortunately, following the changes in the curricula the Court of Cassation has changed its jurisprudence on the compulsory DKAB lessons, stating that the lessons are no longer "religious instruction on a particular religion" but "religious culture".[660]

The second kind of religious education is allowed by the Constitution, however, subject to individuals' wishes and must be carried out under state supervision and control. A separate regulation concerning "other religious education" also reinforces the interpretation that the "Religious Culture" classes ought not be "instruction in a certain religion". There is no constitutional restriction concerning neither the content of "other religious education" nor a regulation on the nature of state supervision and control. If such education is provided by public institutions one may assume that state supervision and control is present, however, there is no constitutional rule concerning

[656] *Ibid*.
[657] *Ibid*.
[658] Sezer, *supra* note 118.
[659] Mine Yıldırım, "2011-2012 Öğretim Yılında Uygulanan Din Kültürü ve Ahlak Bilgisi Dersi Programına İlişkin bir Değerlendirme", (Eğitim Reformu Girişimi 2012), p. 12.
[660] Milliyet, "Danıştay'dan Din Dersi Kararı" (Council of State's Decision on Religion Course), 31.08.2012.

how the state supervision and control can be exercised if such education is provided in the family, informal arrangements or in religious establishments. Legal regulation exists concerning "Quran courses", which may be only carried out under the Diyanet.[661] On the other hand, it is not possible for children to receive religious education in an institutional framework, apart from the summer Quran courses that are organized by the DIB. For non-Muslims an option similar to the summer Quran courses does not exist.

(b) Coercion to disclose religion or belief

The prohibition of coercion to declare one's religion or belief is a fundamental component of the right to have a thought, religion or belief.[662] The AYM had the opportunity to address this issue for the first time in an appeal case that concerned the request of three individuals to change the religion that was indicated in their national identity cards.[663] The case was taken to the AYM with the claim that the relevant provisions of the Public Registration Law violate the Constitution, in particular the provisions protecting the right to freedom of religion or belief, the right to freedom of expression, the principle of secularism and the principle of equality. The fundamental question was whether the requirement to register one's religion constitutes coercion to disclose one's convictions and opinions. The AYM did not find a violation and held that the said provisions of the Public Registration Law do not include any elements that constitute coercion to disclose one's belief. The decisive factor for the AYM was that the said provisions did not require the disclosure of religious convictions and opinions, instead "just the religion". The difference between "religious convictions and opinions" on the one hand, and, "just religion" on the other, was not clarified by the AYM. In contrast, the dissenting judges drew attention to the fine that is due for the non-disclosure of religion or belief for population register and identity cards purposes. Thus they held that "there is no doubt that there is coercion".[664] They also found the requirement to register one's religion or belief incompatible with the principle of

[661] Diyanet İşleri Başkanlığı Kur'an Kursları ile Öğrenci Yurt ve Pansiyonlarına ilişkin Yönetmelik [Regulation on the Presidency of Religious Affairs Quran Courses and Dormitories and Hostels], R.G. 23982, 03.03.2000. Upon completion of Grade 5 children can take part in these courses. Article 4(k).
[662] General Comment 22 of the Human Rights Committee on Article 18, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994), para. 5.
[663] Constitutional Court, E1979/9, K1979/44, 27.11.1979.
[664] *Ibid*.

secularism, saying, "for whatever reason and regardless of at what level, the coercion of citizens to disclose religious convictions and opinions means nothing short of an infringement of secularism."[665]

In a relatively more recent case dating to 1995 the Constitutional Court maintained its previously held position on the constitutionality of the requirement in Public Registration Law to register religion in public register.[666] This time the Court elaborated on the difference between "religion" and "religious conviction and opinion" noting that religious conviction and opinion is a broader term including one's religious views on a variety of issues whereas religion amounts only to demographic or personal information. Hence the Court maintained that what was prohibited in Article 24 of the Constitution protecting the right to freedom of religion or belief, was not the "noting of one's religion", instead "the disclosure of one's religious convictions and opinions in a coercive manner". Bearing in mind the possibilities of changing the religion or erasing it through administrative action the Court found that coercive element was non-existent.[667]

The problem of coercion that results from the registration of religious affiliation in identity cards or population register is a problem that could have been solved in the domestic legal system. Nevertheless, the narrow interpretation of the Turkish judiciary caused one such case to be taken to the ECtHR. The Turkish practice concerning the registration of religious affiliation in public register and ID cards was the subject of the *Sinan Işık v. Turkey* case considered by the ECtHR.[668] Here the the European Court found that "when identity cards have a religion box, leaving that box blank inevitably has a specific connotation. Bearers of identity cards which do not contain information concerning religion would stand out, against their will and as a result of interference by the authorities, from those who have an identity card indicating their religious beliefs. Accordingly, the Court considers that the issue of disclosure of one of an individual's

[665] *Ibid*.

[666] Constitutional Court, E1995/17, K1995/16, 21.06.1995. The case involved the referral of a case by the Council of State arguing that the requirement to register "religion" in population register is contrary to the Constitution. The case considered by the Council of State involved a Bahai citizen requesting a change in the religions section of his ID case from Islam to "Bahai".

[667] The dissenting judges held that there was a clear coercive element in the requirement to register one's religion.

[668] *Sinan Işık v. Turkey*, *supra* note 23.

most intimate aspects still arises."[669] Yet, the ECtHR did not hesitate to touch upon the real issue, namely that the breach did not arise from the refusal to indicate the applicant's Alevi faith, rather, the indication of religion on the identity card, as such.[670] Necessary legislative changes in order to prevent similar violations, however, have not been made.

Individuals are under an obligation to take an oath on "God and honour" in the Turkish courts.[671] This provision makes it compulsory for everyone, including non-believers to take an oath by reference to "one's God". This is incompatible with the right to freedom of religion or belief, the secular nature of the state which should be impartial towards believers and non-believers. This provision has thus far not been the subject of consideration by the AYM on its constitutionality.

(c) Manifestation of Religion- Religious Symbols- in the Public Sphere

Public work place- Civil servants and dress code[672] The Turkish Constitution recognizes the right of all Turkish citizens to enter public service and stipulates that no criteria other than the qualifications for the office concerned may be taken into consideration for recruitment into public service.[673] The general provisions of the Law on Public Servants, however, have implications for the restriction of manifestations of religion or belief.[674] As far as public servants working in schools connected to the Ministry of Education are concerned, they are subject to a regulation requiring the head to be uncovered.[675]

[669] *Ibid*. para. 51.
[670] *Ibid*., Para. 52.
[671] Article 339 of the Law No. 1086. Hukuk Usulü Muhakemeleri Kanunu [Law on Legal Procedures], 18.06.1927, R.G. No. 622, 623, 624, 02./03./04./07.1927.
[672] This part is based on article by Mine Yıldırım, "Religion in the Public and Private Turkish Workplace: the Approach of the Turkish Judiciary", in K. Alidadi, M.C. Foblets and J. V. (eds.) *A Test of Faith? Religious Diversity and Accommodation in the European Workplace*, (Ashgate, 2012).
[673] Article 70 of the Turkish Constitution.
[674] Devlet Memurları Kanunu [Law on Public Servants] No. 657, 14.07.1965, R.G., 23.07.1965, No. 12056, Article 6.
[675] Milli Eğitim Bakanlığına ve Diğer Bakanlıklara Bağlı Okullardaki Memurların ve Öğrencilerin Kılık Kıyafetine İlişkin Yönetmelik [Regulation on Attire and Clothing for Officials and Students in Schools Under the Ministry of Education and Other Ministries], No. 8/3349, December 1981, R.G. No. 17537, 07/12/1981.

The dress code of public servants is regulated by the Framework Regulation of October 1982 (the Regulation of October 1982).[676] The purpose of the Regulation of October 1982 is to ensure that public servants have uniformity in terms of clothing and wear modest and contemporary clothes that are in line with the reforms and principles of Atatürk.[677] It is not possible to find a definition in any positive law document of what these terms mean or imply for clothing. This was later determined by jurisprudence. The Turkish judiciary has interpreted secularism functionally so as to exclude not only the headscarf, but also "persons with certain religious affiliations" (dinci), in general, from the public workplace.[678] This was done by attributing manifestations of religion, in particular the headscarf, a meaning and significance that is ideologically incompatible with secularism and by the imposition of heavy sanctions upon persons who use these symbols. The judiciary equated the act of wearing the headscarf in a public workplace with disrupting the order of an institution for ideological or political purposes thus warranting dismissal from work thus transforming the action of wearing the headscarf to a different category.[679] As a result the effect and strength of the prohibition and its sanction has been aggravated.

The broad approach taken by the judiciary raises questions about the predictability and clarity of the application of relevant laws. In the Turkish context, in the assessment of compatibility of a civil servant's actions with the dress code and the principle of secularism, dress outside the public workplace,[680] "sincerity" in abiding by the relevant

[676] Kamu Kurum ve Kuruluşlarında Çalışan Personelin Kılık ve Kıyafetine Dair Yönetmelik [Regulation Pertaining to the Attire of Personnel Employed at Public Institutions] (October 1982 Regulation), R.G. 25.10.1982, 17849.

[677] Article 16 of the October 1982 Regulation. Article 5 The Regulation regulates many aspects of appearance, inter alia, the length and form of hair, moustache, beard, shirts, ties, how much a shirt or blouse can reveal, how loose or tight trousers can be, heels of shoes, nails, make-up etc.

[678] It has been observed that the Turkish judiciary has a strong tendency to protect the state and sanction severely what it perceives as a threat to the state. M. Sancar & E. Ü. Atılgan, *Adalet Biraz Es Geçiliyor* [Justice is Somewhat Overlooked], (TESEV, 2009), p. 124-150.

[679] The case of Züheyla Zeybel set the precedent for this interpretation, 25.01.2001, E2000/1244, K2001/474, Council of State, General Council of Chambers of Administrative Cases. A report by AK-DER claims that during 1998-2002 approximately 5,000 public servants were dismissed and another 10,000 were forced to resign. A Report by AK-DER, *İstatistiki Verilere Göre Türkiye'de Kadınların Genel Konumu ve Başörtüsü Yasağının Cinsiyet Endekslerine Etkileri* [A Statistical Analysis of the Situation of Women in Turkey and the Effect of the Headscarf Ban on Gender Index] (AK-DER, 2008), p. 7.

[680] The judgment of the Council of State demonstrates that the headscarf, even though it was worn outside the workplace, is viewed by the judiciary as a religious manifestation that undermines certain qualities that are expected from teachers, *inter alia*, 'being a good example' and the secular character of the public education. It was specifically mentioned that she did not wear the headscarf at her

regulations,[681] manifestations of religion or belief outside the workplace and affiliations with certain groups and religious worldview,[682] may also be taken into account. It is not possible to find a detailed set of reasons as to exactly how the nexus between, on the one hand, manifestations of religion, such as religious garb and practice outside the workplace and, on the other hand, the threat to secularism is drawn. The assumed connection seems to be based on general perceptions and presuppositions rather than concrete acts of individuals that pose an immediate and material threat to secular nature of public service they are delivering.

The Turkish judiciary does not seem to take into account the right to freedom of religion or belief aspect in its assessment of the permissibility of religious symbols in the public workplace. The right to freedom of religion or belief is protected in the Turkish Constitution, as well as through Turkey's international human rights commitments. The interest of protecting the secular system may be ultimately based on the legitimate aims of protecting public order and the rights of freedoms of others. However, the balancing of competing interests and proportionality are, absent in the reasoning.

Interestingly, the relationship of religious symbols and state neutrality or impartiality and the possible problems in this respect find limited reflection in the jurisprudence. Yet, Demir argues that the ban on religious symbols for public servants is a requirement of the principle of secularism since the neutrality of the public servant will become concrete with her/his outlook and behaviour.[683] Hence the protection of secularism as the paramount interest functions as a trump card or hierarchically superior interest against which other competing interests cannot even be regarded as legitimate interests that require balancing. Religious symbols and/or DIBctices are not assessed as

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workplace. The Case of Aytaç Altındağ, Council of State Judgment, 8th Chamber, E2004/4051, K2005/3366, 26.10.2005.

[681] The wearing of a wig over the headscarf by a teacher was considered as a sign that the applicant was not really sincere in abiding by the applicable dress code. The Case of Kevser Sönmez, Sakarya Second Administrative Court, E2001/14, K2001/2854, 26.12.2001.

[682] The judgment of an administrative court upholding the decision of the Ministry of Education for the transfer of an educational administrator, Mr. Mustafa Ünsal, was based on manifestations of religion or belief such as his religious affiliations or practices outside the workplace. The Case of Mustafa Ünsal, Council of State, 5th Chamber, E1999/4212, K1999/4325.

[683] H. S. Demir, *Avrupa İnsan Hakları Mahkemesi Kararları Işığında Türkiye'de Din ve Vicdan Özgürlüğü* [Freedom of Religion and Conscience in Turkey in Light of the Decisions of the European Court of Human Rights], (Adalet 2011), s. 127.

legally protected manifestations of religion or belief, but as indicators of certain religious affiliations that are viewed as threats to secularism.

Manifestations of religion or belief in Turkish schools- the headscarf The extent of protection afforded to the right to manifest one's religion or belief in Turkish schools needs to be analysed in relation to the rights of teachers, minor and adult students, the state and parents. Due to the constraints of this paper, I will try to evaluate the Turkish legislation and practice in these areas focusing on their common feature, namely the decisive factor which is the understanding of laiklik by the Turkish high courts. Dress code for teachers, be it public or private or, primary or high education, prohibits the use of the headscarf.[684] Until 2014 students in primary or highschool were not allowed to enter schools wearing a headscarf,[685] and only recently, are university students allowed to enter university wearing the headscarf.[686] Schools where religious vocational training takes place have accommodated the wearing of the headscarf since they were founded.[687] School administrations may not display any religious symbols in both public or private schools. State's obligation to respect parent's religious or philosophical beliefs in education becomes an issue usually in the context of parents whose daughters wear the headscarf and are not allowed entry into school.

The common element in all such cases relates to the privileged protection and particular understanding of *laiklik* which finds it difficult to reconcile the use of the headscarf with *laiklik*. The jurisprudence of the Council of State in a case concerning disciplinary measures against a university student who wore the headscarf at university is striking.[688] The Council of State considered the wearing of the headscarf as a symbol that shows a strong objection to the *laik* Republic and demonstrates that the students embrace a state order that is based on religion.[689] The nexus between the act of wearing the headscarf and thus being a threat to the laik state appears to be drawn

[684] *Supra* note 156.

[685] Sabah Daily*, Ortaokul ve lisede başörtüsü serbest* [Headscarf is free in Middle and High Schools], 1 October 2014.

[686] The Head of the Higher Education Council (YÖK) Prof. Y.Z. Özcan announced that instructors in universities may no longer take action against students wearing the headscarf. BBC News, 31.12.201, "Quite End to Turkey's Headscarf Ban", http://www.bbc.co.uk/news/world-europe-11880622 accessed 15.01.2015.

[687] *Supra* note 159, Article 12 stipulates that during courses on the Quran female students may cover their hair with an Islamic veil.

[688] Council of State 8th Chamber, E1983/207, K1984/330, 23.12.1984.

[689] *Ibid*.

with certain assumptions or perceptions that cannot be regarded as legal facts. Also, other "means" of expressing an ideology, whether it is a badge or long beard *etc*., are not treated the same way, thus undermining equality bu singling out the headscarf the only prohibited ideological symbol.[690]

Constitutional amendments initiated by the National Assembly to overcome the restriction on wearing the headscarf by university students were also made ineffective by the relevant AYM judgments. The adoption of Law No. 3511 in 1989,[691] and after its annulment,[692] the adoption of the Law No. 5735 in 2008,[693] also did not lead to a solution. The AYM held that the proposed constitutional amendments had the main aim of un-restricting religious symbols in higher education institutions without eliminating public fears, foreseeing safeguards against abuses and inputting measures necessary for the protection of third party rights.[694] According to the Court, the unlimited use of the religious symbols would create pressure on non-believers and on Muslim females and would also damage state neutrality by opening a pathway for religion to be used for political purposes.[695]

(d) Conscientious Objection to Military Service

The right to conscientious objection to military service is a highly contested right and an indicator that, contrary to common belief, problems pertaining to *laiklik* do not sufficiently explain failures of Turkey's protection of freedom of religion or belief.[696]

Article 72 of the Constitution regulates military service. Article 72 reads:

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[690] Ali Ulusoy, *Kamu Hizmeti İncelemeleri* [Study on Public Service], (Ülke Kitapları, 2004), p. 239.

[691] This Law included an additional Article 16 to Law No. 2547 on Higher Education. Article 16 stipulated that —[w]ithin higher education establishments, classrooms, laboratories, clinics, and policlinics and in corridors it is obligatory to be in modern clothing and looks. The closing of the neck and hair with a cloth or with a turban due to religious reasons is unrestricted.

[692] The Turkish Constitutional Court annulled the Law on grounds that it was contrary to the Preamble and Articles 2, 10, 24, and 174 of the Constitution. Constitutional Court, E1989/1, K1989/12, 07.03.1989.

[693] It read, "No one can be denied, for any reason at all, the right to higher education in cases not openly stipulated by law".

[694] Constitutional Court, E1989/1 K1989/12 07.03.1989; Constitutional Court, E1990/36, K1991/8, 09.04.1991.

[695] *Ibid*.

[696] The part on conscientious objection to military services is partly based on a previously published article, Mine Yıldırım, "Conscientious Objection to Military Service: International Human Rights Law and the Case of Turkey", *Religion and Human Rights*, 5 (2010) p. 65–91.

> National service is the right and duty of every Turk. The manner in which this service shall be performed, or considered as performed, either in the Armed Forces or in public service shall be regulated by law.[697]

The fact that military service is enumerated as *only one of the alternatives* of national service has important implications. It allows the possibility for national service to be performed within the Armed Forces *or* through public service or it can be considered performed under certain circumstances that are prescribed by law. According to Article 1 of the Military Code, military service is obligatory for every male citizen of the Turkish Republic.[698] Military Criminal Code requires that those who have the obligation to perform military service, report to their military unit as soon as they are called up for recruitment.[699] Since there is no legal provision that addresses conscientious objection to military service, the only relevant provisions applied to objectors are those dealing with disobeying orders and desertion. When a person is summoned to perform military service and does not present himself to his unit, in accordance with Article 63 of the Military Criminal Code, criminal responsibility occurs. Each act of disobedience following the first one is reckoned as insistence on disobeying orders.[700] Military duties have a strong precedence over acts motivated by belief; Article 45 of the Military Criminal Code stipulates that the fact that a person has considered an act as necessary according to his conscience or religion does not exempt him from punishment.[701]

Since military service becomes compulsory through national law it is possible to observe a conflict with the provision in the Constitution where it appears to be deemed optional. According to Can, since military service is not an obligatory form of national service and freedom of conviction is protected as a right that cannot even be suspended under a state of emergency, within the constitutional framework there is not a conflict or potential restriction on the recognition of the right to conscientious objection to military service.[702] Furthermore, according to High Court of Appeals Prosecutor Eminağaoğlu, exemption from military service for conscientious objectors is

[697] Article 72 reads: "National service is the right and duty of every Turk. The manner in which this service shall be performed, or considered as performed, either in the Armed Forces or in public service shall be regulated by law."
[698] Askerlik Kanunu [Law on Military Service] No. 1111, 21.6.1927.
[699] Askeri Ceza Kanunu [Military Criminal Code], No. 1632, 22/5/1930.
[700] *Ibid.*
[701] *Ibid.*
[702] Osman Can, "Vicdani Red ve Anayasa" in Özgür Çınar (Eds.)

not in contradiction with the principle of equality since according to Article 14(2) none of the provisions set forth in the Constitution can be interpreted in a way as to provide broader restrictions of rights than those prescribed by the Constitution itself.[703] Consequently, in light of Articles 13, 14, 24, 25 and 72 a right to conscientious objection to military service is compatible with the Turkish Constitution and in fact Article 1 of the Turkish Military Code, and Article 45 of the Military Criminal Code 61 can be considered incompatible with the Constitution's aforementioned provisions.

Conscientious objection to military service is a critical issue bringing the interest of the individual and the interest of the state in dire conflict. The Turkish judiciary has at its disposal key international human rights treaties that Turkey has ratified,[704] and the human rights obligations and a flexible regulation regarding military service found within the Turkish Constitution, however, the judiciary has been unable to draw from these legal sources in order to deal with conscientious objection cases where national security, principle of equality and the right to freedom of religion or belief and other substantive human rights are interpreted in an harmonizing manner that would be in conformity with existing international human rights jurisprudence. Exploring factors influencing judges in the process of reaching a judgment, a study points to *preconceptions* that are shaped by state ideology and perception of the law system as a means of protection of the state rather than a neutral adjudicator of justice.[705]

Naturally, the claim to conscientious objection to military service is a key point where notions of national security, survival of state and the position of the individual versus the state are reference points. Therefore in cases dealing with conscientious objectors, preconceptions of prosecutors and judges certainly play a crucial role and constitute an obstacle to assess these claims a human rights issue.

Nevertheless, two recent Turkish military court decisions concerning conscientious objection claims have shown a partial recognition of the right to conscientious

[703] Ömer Faruk Eminağaoğlu, 'Özgürlük ve Vatan Hizmeti', Radikal, 22 August 2005.
[704] *Inter alia*, the European Convention on Human Rights and the UN International Covenant on Civil and Political Rights.
[705] Mithat Sancar and Eylem Ümit Atılgan, *Adalet biraz es geçiliyor- Demokratikleşme Sürecinde Hakimler ve Savcılar* (Justice is Somewhat Overlooked- Judges and Prosecutors in the Democratization Process), (TESEV 2009), p. 111.

objection to military service as a human right.[706] One concerns a Jehovah's Witness conscientious objector, Baris Görmez, the other a Muslim conscientious objector, Muhammed Serdar Delice. In both cases military courts to some degree relied on the changed jurisprudence of the ECtHR on conscientious objection following the *Bayatyan v. Armenia* case. However, in both cases a key factor was the declared religions of the conscientious objectors.

It will be remembered that Article 90 of the Turkish Constitution states that in cases of conflict between international agreements in the area of fundamental rights and domestic laws, the provisions of international agreements will prevail.[707] This provision was applied in both military court judgments.

Malatya Military Court's Delice decision outlines the Turkish military judiciary's interpretation of the right to conscientious objection to military service.[708] Delice declared his conscientious objection approximately five months after he had been conscripted based on his Islamic and nationalist beliefs.[709] The Malatya Military Court interpreted the ECtHR's approach to the right to conscientious objection as one based on the theological position of a religious group, and excluded the beliefs of the individual. It ruled out an individual rejecting military service according to his own views. Instead, the Military Court relied on the rejection of military service by an intellectual, religious or political group, as such. It referred to the example of Jehovah's Witnesses, stating: "persons who are members of the Jehovah's Witnesses reject military service, because they are part of this group or institution which fundamentally rejects military service".[710]

Based on this understanding, an individual claiming conscientious objection to military service would have to be a member of a religious group considered by a court to be categorically opposed to military service. In the Malatya Military Court's view, Delice belonged to "Islam which is not a belief or ideological movement that rejects the performance of military service".[711]

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[706] For detailed review of these cases see Mine Yıldırım, "Selective Progress on Conscientious Objection", Forum 18, 01.05.2012, http://forum18.org/Archive.php?article_id=1696
[707] *Supra* note 21.
[708] Malatya Military Court , E2012/98, K2012/40 24.02.2012.
[709] *Ibid.*
[710] *Ibid.*
[711] *Ibid.*

This view of Islam was a theological statement by the court. But when Delice wanted to bring in the mufti of Malatya as an expert witness, the court rejected his request. In excluding the mufti, the court cited Law No. 5271- on Criminal Procedure.[712] Article 62 of the latter law states that experts must take an oath saying that they will perform their tasks based on science. The Court stated that "the religious sphere is intrinsically related to beliefs and is dogmatic, hence any view expressed from this field cannot be based on science and includes subjective elements".[713]

This explanation seems to contradict the Court's view that Islam does not reject the performance of military service. On the one hand, the Court maintains that religious views cannot be presented in proceedings by experts, as they are not scientific and include subjective elements. Yet on the other, it bases its decision on its own theological assessment.

According to the Military Court, Delice had Islamic and nationalist views when he was conscripted and he only declared his conscientious objection to military service after he "saw wrongs and deficient aspects of military service for himself and thus declared his conscientious objection".[714] The Court also argued that Delice did not from the beginning of his military service have a "one and undivided purpose" of conscientious objection.[715] The Court thus ignored in relation to conscientious objection a key part of international law's understanding of freedom of religion or belief, which is also found in the ECHR's Article 9 – the right to change beliefs.[716] Under this ruling, a conscientious objector must demonstrate that his objection exists before conscription, and that it is his "one and undivided purpose" - i.e. that he has no other reasons for wanting to leave military service. [717]

Isparta Military Court recognised the right to conscientious objection to military service when it acquitted Jehovah's Witness Baris Görmez on 13 March 2012.[718] He had spent

[712] *Ibid.*
[713] *Ibid.*
[714] *Ibid.*
[715] *Ibid.*
[716] *Ibid.*
[717] Delice has appealed against the ruling, and the High Court of Appeals decision and its reasoning will be awaited with great interest by many in and outside Turkey.
[718] Isparta Military Court, 13.03.2012, Bianet, Yehova Şahidine Vicdani Ret Hakkı, http://www.bianet.org/bianet/ifade-ozgurlugu/136899-yehova-sahidi-ne-vicdani-ret-hakki , 13.03.2012, accessed 16.01.2015.

a total of four years in prison from November 2007 and had been charged with "rejecting wearing of the uniform" and "rejecting orders".[719] As in the Delice case, the Court relied on the changed jurisprudence of the ECtHR.
In the assessment of conscientious objection claims by public authorities, assessments based on theological views must be avoided. Otherwise – as in the Delice case – there is a grave risk of making decisions based on a court's or public authority's purely subjective views, and not based on the evidence of a particular case.

In brief, the above review of the legal guarantees, issues and, at times, paradoxical practices found in the domestic legal system and context present the complexities surrounding state religion relation paradigm and the protection of the right to freedom of religion or belief in Turkey. The asymmetrical arrangements and disproportionate restrictions imposed on the right to freedom of thought, conscience, religion or belief stand in sharp contrast with the normative demands of international standards for the protection of the right to freedom of religion or belief. This is also evident in the numerous ECtHR decisions pertaining to Article 9 that remain not enforced. Manifestations of religion or belief are, often, viewed incompatible with the interests of the state, concretized in protecting national security, laiklik and upholding nationalism. This tension is seldom resolved by a rigorous application of relevant limitation clauses. Instead, the right to manifest religion or belief is given scarce and limited consideration in judicial assessments in contrast to the strong protection of *laiklik*, national security and nationalism.
The recognition of the religiously pluralistic nature of the society in Turkey, compliance with the obligation on the part of the state to observe neutrality and impartiality and the explicit recognition of the right to manifest one's religion or belief in worship, practice, teaching and observance as well as a new conception of *laiklik* that creates a conducive framework for the protection of freedom of religion or belief may be steps to move forward.
In the following Chapters certain components of the collective dimension of freedom of religion or belief will be closely examined.

[719] *Ibid.*

Chapter 6

The Right of Religious/Belief Communities to Acquire Legal Personality in Turkey

6.1. Introduction

In Turkey no religious or belief community can acquire legal personality, *per se*. Yet, as it has been explained in Chapter 3, in the enjoyment of the right to freedom of religion or belief in its collective dimension, whether a belief community can or cannot acquire legal personality becomes a significant factor affecting the enjoyment of this right.[720] The reason for this is that legal personality functions as a crucial *enabling* element and, at times, a precondition for the enjoyment of rights that make up the right to freedom of religion or belief or related rights, *inter alia*, the right to own property, the right to establish a place of worship and representation of a belief community. Conversely, proper enjoyment of the right to freedom of religion or belief in its collective dimension requires an adequate form of legal personality that is suitable to the nature of belief communities. Its key function also constitutes the reason for contention over this right when states wish to restrict the activities of all or certain belief communities.

This Chapter presents an overview of the legislation and legal and administrative practice on legal personality in the context of freedom of religion or belief in Turkey. It will be argued that the existing forms of legal personality fall short of providing an adequate form of legal entity status for belief groups to exercise their right to manifest religion or belief in its collective dimension. It will be further demonstrated that the absence of an adequate legal personality framework for belief communities is incompatible with Turkey's international human rights obligations. For this purpose, first, an overview of key elements of legal personality and the practice in the Ottoman era and Turkish Republic is presented. Turkish legislation and practice on the available forms of legal personality, namely, *vakıfs* (foundations) and associations will be critically examined. These options will be assessed as to their adequacy as legal personality options for belief communities in the exercise of their right to freedom of

[720] See Chapter 3.

religion or belief in line with international human rights law without unjustified state interference. Finally, some observations are made on the elements that an adequate form of legal personality- one that can facilitate the exercise of the collective dimension of freedom of religion or belief in Turkey- should entail.

An effective basic form of legal personality for belief communities must include certain elements, such as an entity status that allows a group of believers to act as if they were a single composite body for certain purposes. It must allow religious/belief communities to exist- if they wish to do so- not as individual members, but as one organized body. Hence once the community has gained legal personality, it is no longer individuals who own a place of worship or provide humanitarian assistance or run a faith-based school but the community as such. While international human rights law provisions do not include an explicit reference to the right to acquire a certain form of legal entity status, the right to legal personality has gained gradual international recognition in international jurisprudence,[721] as well as being acknowledged in documents of soft law nature. OSCE and the Venice Commission have published a specific document including guidelines for states to follow while creating legislation pertaining to legal personality.[722]

6.2. Legal Personality in the Ottoman and Republic Era

6.2.1. Ottoman Era

While it is not the primary goal of this study to provide an in depth account and analysis of associative life of belief communities in the Ottoman era, basic insight into its nature makes a valuable contribution to the understanding of relevant current legal issues. The question of whether there was a provision for legal personality in Islamic Law and during the Ottoman period, becomes a pertinent one because of its particular relevance for the exercise of rights for belief communities that have existed in the Turkish geography before the Turkish Republic was founded. The atypical character of the arrangement in this sphere in the Ottoman era may have provided ample room for

[721] See Chapter 3.
[722] OSCE, *OSCE-Venice Commission Guidelines for the Review of Legislation Pertaining to Religion or Belief*, (OSCE, 2004), p. 12.

arbitrary administrative and, not least, unpredictable judicial decisions that disadvantaged belief communities in the Republic era.

The nature of the notion of legal personality in the Ottoman Empire stands out in its distinctness from the idea of legal personality in Roman Law. Hatemi argues that although it is less clear-cut when compared to Roman Law, it is possible to talk about certain clues indicating that the notion of legal personality was recognized in the Ottoman Empire.[723] Reyna and Zonana, on the other hand, state clearly that there was no legal personality in the Ottoman State.[724] Karaman, argues that while the term "legal personality" may be absent in Islamic Law, the concept is not. He observes that the notion of legal entity is an assumption that Islamic Law accepts, however, in the Ottoman era, there was no need for it to be recognized.[725] The Ottoman *Mecelle* (Civil Code) refers to a village and certain professional institutions, of a religious character, as entities with responsibilities and certain rights.[726]

For the study at hand, it is important to note a key difference between legal personality in Roman Law and the notion of legal personality in Islamic Law. Roman Law, tends to recognize a group of persons as a legal entity and considers property acquired by such a group as owned by the legal entity, whereas Islamic Law, through the *vakıf* institutions, tends to consider that the collection of property as having legal entity status and the group of persons as "those benefiting" from the property.[727] Beneficiaries of the revenues generated by the property, however, do not have any legal personality. The Ottoman *vakıf* formula, therefore, does not provide a form of legal personality that would allow a group of believers to act as a composite entity. It is important to note this key conceptual distinction as the *vakıf* institution is still one of the legal personality options available to members of religious communities.

[723] Hüseyin Hatemi, *Medeni Hukuk Tüzelkişileri* I [Civil Law Legal Entities I], (Istanbul University Publications, 1979), p. 47.
[724] Yuda Reyna and Ester Zonana, *Son Yasal Düzenlemelere Göre Cemaat Vakıfları* [Community Foundations under the Latest Legal Regulations], (Gözlem Publications, 2003), p. 41.
[725] Hayrettin Karaman, *Mukayeseli Islam Hukuku* [Comparative Islamic Law], (Iz Yayıncılık, 1974), p. 206-220.
[726] Hatemi, *supra* note 4, p. 46-47.
[727] Hatemi, *supra* note 4, p.51.

Despite a lack of a legal personality- as understood in Roman Law- in the Ottoman state,[728] the factual situation of religious communities compelled the development of certain improvised formulas. For example, religious communities registered their property under the name of real people, who only appeared in paper as owners but did not claim ownership (*nam-ı müstear*) or under the names of persons who no longer lived, such as saints or respected religious figures (*nam-ı mevhum*).[729] Only in 1912, with the passing of an *interim* law, it became possible to register these properties under the name of the respective communities, thus, according to Reyna and Zonana, recognizing their legal entity status.[730] Still, the *interim* law, does not go as far as formulating a legal entity status. It refers to registering the non-movables that belonged to various Ottoman *millets* in the name of the "corporation" (*müessese*), yet, there was not a clear and complete description of the elements of this "corporation" and its legal nature. Nevertheless, it is possible to observe a certain "limited notion of legal personality". The fact that there were religious communities who *in fact* owned property was recognized for a *certain purpose* and *certain period of time*, namely the registration of property in their name within a certain time frame.[731] Indeed, after the specified time it was no longer possible to register property in the name of the religious communities. While this arrangement is a move towards embracing the notion of legal personality, its nature is far from being complete, lacking elements that would create an adequate form of legal personality with a clear and foreseeable legal basis.

[728] Within the Ottoman context, two factors may possibly explain the absence of legal personality for belief communities. First, in the Ottoman society, generally speaking, association, as distinct from the state was not foreseen and encouraged by the state. Second, the *ummah* (nation) nature of the dominant religious community and its relation with the state created a framework that may have rendered the need for legal. personality on the part of belief communities unnecessary. As far as the development of general legal personality is concerned, Mardin argues that the Ottoman state was unwilling to allow differentiation in society- through the establishment of associations- and thus acquiring autonomy. Mardin, p.93. Together with Westernization and Reorganization in the latter part of the 19th century, however, the beginnings of public legal entity status started to emerge within the *vakıf* institution structure. Mardin argues that the establishment of the Turkish Republic and fundamental changes in law and state structure provided the legal basis for the establishment of public and private legal entities. However he does not consider the suitability of these institutions for religious/belief communities. For an overview of the establishment of various institutions such as universities, public legal entities such as the Radio Television Institution, economic, social and political institutions see Hatemi, *supra* note 4, p. 120-130.

[729] Reyna and Zonana, *supra* note 5, p. 41.

[730] An interim law, entitled Eşhas-ı Hükmiyenin Emvali Gayrimenkuleye Tasarruflarına Mahsus Kanunu Muvakkat [Temporary Law on the Possession of Non-Movables by Legal Persons], was adopted in 1912.

[731] First for six months, then it was extended for another six months.

As far as belief communities are concerned, the legal framework of legal personality, or the lack of it, may suggest that there was an assumption of a customary way of organizing, one that does not function through legal personality. On the one hand, belief communities existed in their traditional ways yet without a legal entity status. On the other hand, their members had the possibility of donating property to establish *vakıf* institutions and/or professional organizations with religious character and thus support their communities or engage in actions similar to contemporary civil society organizations. It may be argued that this situation is a natural result of the *ummah* understanding, that all Muslims form the Muslim people and the state- as an Islamic state- is the ultimate legal entity representing the Muslim people. Secondary institutions that have been formed in the West between the state and the individual did not exist in Islamic societies. Mardin, argues that the connection of *ummah*, the Islamic millet or community, corresponds to the secondary institutions found in the west.[732] For non-Muslim communities the *millet* system may have functioned as a substitute, similar to the *ummah*, each religious community may have been "assumed" to be a composite, represented by their respective religious leaders.

In conclusion, it may be observed that the legal framework for the associative life of belief communities was one that did not include the notion of legal personality found in many contemporary legal systems. The theocratic state constituted the ultimate legal personality for the Muslim *millet*. As for non-Muslim communities, through the recognition of religio-ethnic communities, the *millet,* and the creation of special legal regimes,[733] belief communities were recognized as composite entities. It may be argued that this legal structure resembled a minority protection scheme rather than the granting of a legal entity status to a belief community. In the Ottoman practice, the *vakıf*, stands out as the legal entity, a collection of assets, from which the various belief communities benefited as assumed communities which did not have a *direct legal link* to them. It is important to bear in mind this Ottoman arrangement, which partly

[732] Şerif Mardin, *Türkiye'de Din ve Siyaset* [Religion and Politics in Turkey], 13th Edition, (İletişim, 2007), p. 58.
[733] In the latter part of the 19th century, efforts to regulate the status and internal organization of religious communities resulted in the adoption of several Regulations for a number of millet.

accounts for irregularities, when considering the transition to the modern legal system of the Turkish Republic.

6.2.2. The Republic of Turkey

The Turkish legal system does not provide a clear, consistent and coherent law and practice on the legal status of belief communities. It is not possible for belief communities, as such, to acquire legal personality in Turkey.[734] Yet, it is important to note that there are certain court decisions recognizing that certain belief communities have legal capacity to exercise the right to property or access to court. Despite a lack of special legal entity status for belief communities, in the current Turkish legal system, *members* of belief communities may establish associations, foundations or, possibly, commercial companies in order to gain a certain legal entity status.[735] None of these options, however, provide the possibility of acquisition of legal personality for belief communities, *per se*.

Before one examines the legislation and practice on legal personality, it is worthwhile to consider briefly some of the possible interests that lie behind the pre-emptive legal framework that is designed to bar the very possibility to acquire a direct legal entity status for belief groups. As it has been demonstrated above, while no belief community in the Ottoman Empire had legal personality, the Islamic nature of the state and the *millet* system have allowed certain belief communities to exist as *de facto* composite, organized bodies under their respective religious leaderships. Yet, with the secular modern Republic, this, *quasi*-legal entity status, the *millet* categories were abolished. The modern Republic also barred members of belief communities to establish *vakıfs* or any other association with the purpose of supporting any, including their, religious community.[736] Hence not only, did belief communities not have the possibility of being recognized as quasi-legal entities (*millet* or *ummah*), the possibility of establishing *vakıfs* for the benefit of their communities was also no longer possible.

[734] The Council of Europe Venice Commission, *Opinion on the Legal Status of Religious Communities in Turkey*, 15 March 2010, para. 32.
[735] This list excludes political parties and unions.
[736] Türk Medeni Kanunu [Turkish Civil Code] No. 743, 17 February 1926, Article 74(2) explicitly prohibited the establishment of foundations that pursued the aim of supporting a certain race or community (*cemaat*, meaning religious community).

The underlying conceptions and reasons for this are critical to understanding legal interpretation pertaining to relevant restrictions and the assessment of their justification. An essential reason for these restrictions may be found in the paradigmatic shift that occurred together with the establishment of the modern Turkish Republic. Firstly, in contrast to the *millet* system of the Ottoman Empire, the Turkish Republic set out to establish a system of a nation state based on the principle of a formal equality of citizens with an emphasis on the relationship of the individual and state rather than the *millet*, religious community and the *sultan*. Secondly, the secular ideal of the Turkish Republic and the revolutionary measures taken for the realization of this ideal, were perceived intrinsically in contradiction to the notion of a society based on or organized as units of religious communities.

The third major reason underlying the restrictions of religious association may be found in the national security interest of the Turkish Republic in decreasing the power of religious communities-both Muslim and non-Muslim- in state affairs. Since the secular Republic strived to eliminate the role and influence of religion, in particular Islam, in state affairs it was crucial to drive them out of the state sphere. Oran argues that the clearance of *vakıf* institutions and their transfer to the various ministries of the state sought to diminish the economic power of Muslim *vakıfs*.[737] As far as non-Muslim communities were concerned, it was equally crucial to eliminate their influence in state affairs through other states. The memories of interference of foreign powers in the Ottoman affairs and the role attributed to the cooperation of foreign powers and non-Muslim minorities, in particular the Greek and Armenian minorities, in the decline and occupation of the Empire were still vivid and the founders of the Republic were determined to prevent this from happening again.[738] Thus, it is not surprising that legal personality for belief communities was not created and the weakening of associative abilities of all belief communities was actively sought.

[737] Baskın Oran, *Türkiye'de Azınlıklar: Kavramlar, Lozan, İç Mevzuat, İçtihat, Uygulama* (İletişim, 2004), p. 100.
[738] See Lozan Barış Konferansı / Tutanaklar- Belgeler [Lausane Peace Conference / Records – Documents], translated by Seha Meray, (Yapı Kredi Publications, 2001).

Bearing in mind the above, it is possible to understand the reasons for the lack of legal entity status to belief communities, *per se*. As noted in the Venice Commission opinion, actually, "to the outside legal observer, there is nothing in the constitutional provisions that would explicitly prohibit a legislative reform providing legal personality to religious communities".[739] Yet, it is the context which has been briefly described above that determines the interpretation of the constitutional and other provisions. Turkish particularism in the interpretation of the principle of secularism and the determining factor of national security/public order interests have deemed a strict control over religious activity and restriction of autonomy of belief communities, necessary.

6.3. Current Practice on Legal Personality of Belief Communities

A look at the issue of legal personality of belief communities in modern Turkey reveals an apparent lack of adequate legislative provisions and vagueness as a result of inconsistent and incoherent case-law and administrative practice. The lack of legislation pertaining to legal personality of belief communities rules out the possibility of acquiring legal personality as a religious/belief community. Yet, case-law and administrative practice demonstrate a lack of clarity in respect of whether some belief communities, as such, or in some of the cases their leadership, e.g. Patriarchates or Chief Rabbinate have legal entity status- that which they may have been acquired before the Republic- and if so, the nature of such legal capacity.

Legal personality is an important issue for all belief communities in Turkey, including Muslims and non-Muslims. Muslim communities, *per se*, do not own mosques in Turkey. Mosques are administered by the Diyanet İşleri Başkanlığı (Presidency of Religious Affairs, the Diyanet hereafter) but their ownership varies, such as private persons, associations, foundations, General Directorate of Foundations, village corporate entities and municipalities. The Diyanet provides religious public services for Muslims based on the *Hanefi* school thus it may be argued that these public services make it unnecessary for some Muslim belief communities to seek to organize

[739] The Council of Europe Venice Commission, *supra* note 15, para. 33.

themselves in a way that non-Muslim communities strive to do.[740] However, it is important to bear in mind that regardless of the services provided by the PRA there are Muslims from various Islamic traditions, including the Hanefi school, who wish to manifest their religion or belief in community with others, for example by establishing a mosque or a *cem* house.[741]

Case-law and administrative practice seem to indicate, albeit constantly in an unclear and incomplete manner, the existence of a certain form of legal personality for some non-Muslim belief communities that have existed in the Turkish geography before the establishment of the Republic. The cases below present legal disputes arising from a lack of an adequate legislation pertaining to the structure of various religious formations which manifest themselves in issues related to the right to property in relation to places of worship or properties that provide revenues for the management of their internal affairs. These cases also serve as illuminating examples of how legal personality is directly affecting the right to manifest religion or belief in community with others and the right to property.

The lack of clarity on the matter of legal personality of belief communities or their leadership is apparent in legal and administrative practices. An administrative notification,[742] serves as an example, "… it is observed that the status of legal personality of the owner of the non-moveable, the Chief Rabbinate of Istanbul and its subjects [*tevabii*], is unclear and that it is not a *vakıf*".[743] For the authorities it is obvious that the Chief Rabbinate and its subjects, the Jewish community, are not a *vakıf* or an association. But it is not possible to categorize them legally because there is not a suitable legal category. Interestingly, while the communication refers to the lack of clarity on the legal entity status of the Rabbinate it refers to it as the *owner*. It is also noteworthy that the communication refers to the "Rabbinate of Istanbul and its

[740] For more on the Diyanet see Chapter 5.
[741] Alevi Vakıfları Federasyonu [Federation of Alevi Foundations], *Türkiye'de İnanç Grupları: Sorunlara ve Taleplere Yönelik Yeni bir Çerçeve* [Belief Groups in Turkey: A New Framework for Problems and Demands], (2011).
[742] Given by the General Directorate of Land Titles and Cadastral Records.
[743] Communication of the General Directorate of Land Registry and Cadastro Records, No. 698, 04.06.1998.

subjects" or those who are bound to it, as the owner, thus implying that the whole Jewish community under and through the Chief Rabbi exercise the right to ownership.

The decision in court cases brought by governmental bodies against the Chief Rabbinate imply the recognition of a certain legal and representative capacity of the Chief Rabbinate and are significant for the facilitative *factual* approach they adopt.[744] Some court decisions recognize the legal entity status of the Office of the Chief Rabbi. A first instance court referred to the existence of the Rabbinate as a matter of *fact* and observed that, "its existence cannot be denied".[745] Another court decision concerned the rejection of a claim by the Treasury and the registration of a land title in the name of the Edirne Jewish Community.[746] The decision recognized the representative status of the Turkish Rabbinate- albeit without reference to any particular Regulation or Lausanne Treaty- by saying, "…the Jewish community is one of the known communities in Turkey and is represented by the Rabbinate of Turkey. The Turkish Jewish communities are subject to the Rabbinate of Turkey."[747]
In some cases the pre-Republic legal instruments have served as a basis of recognition of legal personality. The Court of Appeals reasoned thus:

> It has been established by the testimonies of the witnesses that the *sinagog* which is not registered in the land register, is under the *de facto* possession of [*zilliyet*, as distinct from lawful ownership] the Jewish Community. According to the Interim Law on the Possession of Non-Movables by Legal Persons, *communities whose existence is recognized by the state* are permitted to possess non-movables within villages and provinces. The Rabbinate was established through the Regulation of Rabbinate and this Regulation was approved and adopted on 23 *Şevval* 1281 [19 March 1865] and thus the community title of the plaintiff is recognized. Therefore the appeal objection is not justified.[748]

It has been argued that the approach taken by the Court of Appeals, to view the Rabbinate as a position rather than a person and recognize his legal capacity to represent the Jewish community would be a fair solution.[749] While this proposal may solve certain problems of the Jewish community concerning legal recognition of the

[744] Edirne Provincial Administration sued the Rabbinate of Turkey for a cancellation of a land title.
[745] Edirne 2nd Peace Court E2000/277, K2002/304, 30.05.2002.
[746] Edirne 1st Peace Court E1998/469, K1998/715, 22.12.1998. The decision became final by the approval of the Court of Appeals, E2002/4282, K2002/5693, 17.12.2002. The title of the land was obtained by the said community. Reyna and Zonana, *supra* note 5, p. 233.
[747] *Ibid*.
[748] Reyna and Zonana, *supra* note 5, p. 232-233. Emphasis mine.
[749] Reyna and Zonana, *supra* note 5, p. 233.

Rabbinate as a representative body that can act on behalf of the Jewish community, it falls short of providing a general solution to the problem of legal status of belief communities. This is because, first, there is no common agreement on the binding nature of the Ottoman Regulations pertaining to the Rabbinate and Patriarchates. Also, if the sole justification of the legal entity status of an "office" representing a belief community is based on the recognition of the belief community in an Ottoman Regulation or the recognition derived from the Lausanne Treaty, again this would have limited application-excluding communities for whom these legal sources are not applicable. Pre-Republic or Lausanne recognition would not be applicable to non-Muslim communities that did not exist before the Republic, or that were not recognized by way of a Regulation or *millet* system, such as Muslim and Bahai communities. Lausanne justification would exclude non-Muslim communities that are not recognized as protected under Lausanne Treaty even though they are non-Muslim.[750] Such a formula might also have the disadvantage of forcing belief communities to emulate the Jewish community's organizational structure and unite under one leadership.

A relatively recent judgment by the Court of Appeals directly addressed the question of whether the Rabbinate has legal personality and capacity to open a court case.[751] The case concerned the request of the I. Jewish Community to have the *sinagog,* which they have been using for centuries, to register in the land registry in the name of the Jewish community. The State Treasury argued that the Jewish community did not have legal personality and requested the rejection of the case.[752] The Court, on the one hand, contended that the community did not have legal personality and that it was not

[750] On the narrow interpretation of the Lausanne Treaty see Chapter 5.
[751] Court of Appeals 8th Chamber, E2008/3743, K2009/773, 12.2.2009. Despite positive recognition of capacity to own and open a court case, the said sinagog could not be registered in the name of the Jewish community. The fact that the sinagog building was a 1st group cultural heritage property, according to Article 11 of the Law on the Protection of Cultural and Natural Heritage No. 2863 (Changed by Law No. 5663 Article 1) 1st group cultural heritage property may not be acquired through possession. If the building were not in this category the Jewish community could have acquired the building through its possession of the building over many years, even though the title on the deed was blank. This provision must be re-evaluated in light of its implications for the right to freedom of religion or belief, in particular to own places of worship.
[752] *Ibid*.

a community *vakıf* (*cemaat vakfı*).[753] On the other hand, it was observed that since the capacity to acquire property of the applicant community has been recognized through the 1912 temporary Law on the Possession of Non-Movables by Legal Persons,[754] and the Regulation of the Rabbinate, and by the will of the Sultan, there was no question that the applicant community had competence to acquire non-movables and thus has active legal capacity to open a court case.[755] The Court of Appeals explicitly recognized the capacity to acquire property and open a court case thus in effect recognized that the Rabbinate possessed a number of key elements of a legal entity status. This, however, does not indicate that neither the Rabbinate nor the community have a defined legal personality that is sufficiently clear to both the community itself and state authorities.

In contrast, certain decisions pertaining to the Greek Orthodox Patriarchate present a harsh rejection of any representative status or legal capacity. In 1964, the print house in the Patriarchate was closed on grounds that it violated the Lausanne Treaty; the explanation given to the Patriarchate was that "only legal institutions and legal persons can own publishing houses".[756] In a court case concerning a dispute between the Ecumenical Patriarch of the Greek Orthodox Church and a priest of the Bulgarian Church, the Patriarch had to appear before the court as a private person even though the case concerned an action of the Patriarchate. The case concerned the removal of the priest of the Bulgarian Church by the Patriarchate for theological reasons.[757] The Court of Appeals rejected the ecclesiastical authority of the Patriarch over the Bulgarian Church and found that the disciplinary measures exceeded the authority of the Patriarch which was restricted to attend to the religious affairs of Turkish citizens of Greek origin and not Bulgarian or other.[758] In this case the Court explicitly rejected the

[753] 'Cemaat vakfı' meaning community foundation is a *sui generis* foundation type that only certain non-Muslim minorities have a right to administer. This is a new category of foundations that existed under the Ottoman Empire and have been transferred to the modern law system as community foundations following the establishment of the Republic.
[754] *Supra* note 11.
[755] *Supra* note 32.
[756] Elçin Macar, *Cumhuriyet Döneminde İstanbul Rum Patrikhanesi* [Istanbul Greek Patriarchate in the Republic], (İletişim, 2003), p. 202.
[757] Court of Appeals 4th Chamber, E.2005/10694, K.2007/5603. The priest was not naming the Patriarch in his prayers although he was supposed to in the liturgy used in church.
[758] *Ibid*.

argument that the Patriarchate is an entity and relied on the Lausanne *travaux préparatoires* to conclude that the Patriarchate is a "religious institution" that has lost all its privileges that it enjoyed in the Ottoman Empire.[759] It was held that this religious institution had to be considered in light of the Lausanne Treaty Articles 35-45.[760] Yet, the Court failed to draw from Lausanne Article 40, which protects associative rights of non-Muslims in Turkey, that the Patriarchate is protected as a religious institution. In contrast to the cases concerning the Jewish Rabbinate that drew from the recognition in the Ottoman Empire, the Court of Appeals did not take into account any status given to the Patriarchate during the Ottoman period- not even mentioning the Regulation Pertaining to the Greek Patriarchate.[761] Therefore, the differential treatment of the Chief Rabbinate and the Ecumenical Patriarchate by the judiciary regarding recognition of belief communities and their leadership organizations, demonstrates vagueness of the rules resulting in unforeseeable nature of the law and discriminatory application by the judiciary.

The case of a Latin Catholic orders also demonstrates the exiting problems clearly. A large number of properties of the Latin Catholic Church across Turkey have been seized by the state and since these orders do not have legal personality of any kind - they cannot establish community foundations[762]- property cannot be registered in the name of orders or churches.[763] For example, the Dominican Order, have been using their church building and adjacent property since the 15th century.[764] The Dominican Priests owned their monastery building, but, a *vakıf*, not their own, owned the land.[765] The

[759] *Ibid*.
[760] *Ibid*.
[761] A Regulation pertaining to the Greek Patriarchate was adopted in 1862 under the Ottoman Empire, for the text of this Regulation see Murat Bebiroğlu, *Osmanlı Devletinde Gayrimüslim Nizamnameleri* [Regulations of non-Muslim Communities Under the Ottoman State] (Adam, Istanbul), p.83.
[762] They cannot establish community foundations because they did not have *vakıfs* in the Ottoman era and are not subject to protection under the Lausanne Treaty which enables the Armenian Apostolic, Jewish and Greek Orthodox communities to have community foundations.
[763] The Head of the Bishops Conference in Turkey made a statement saying that the acquisition of legal personality is the most important problem for Latin Catholics in Turkey when he met with the Sub-Commission of the Constitutional Reconciliation Commission, see, Milliyet, "Yeni Anayasa Çalışmaları Devam Ediyor" [Work on the New Constitution Goes on], 16.04.2012.
[764] Interview with Fr. Claudio Monge, Dominican Priest, 9 June 2011, Galata, Istanbul. The order has existed in Turkish geography since the 13th century.
[765] *Ibid*. The reason for this is that under the Ottoman Empire the land and a building upon it were separately owned. Land was owned by God- in practice by the state and *vakıf* institutions.

property documents of their various properties show the title either blank or say "Dominican Priests".[766] In a decision concerning a dispute over the annulment of the title, the Istanbul Cadastral Court saw no legal provision or reason for the annulment of the title of property that has the name "Dominican Priests" in the owner section.[767] This decision was based on the acceptance of the title by the Ottoman *Devlet Şura* (High Court of Administration) and the Ottoman *Irade-i Seniye* (Financial Audit Committee).[768] The Court based its decision on the recognition of the title by the Ottoman state.

While the Cadastral Court decision described above is a positive and significant decision, the Dominican Priests experience great difficulty in "convincing" other public authorities of their legal status.[769] Routine procedures, which should be conducted easily, are made burdensome as a result of the non-recognition of the, court recognized, legal personality of "Dominican Priests". For example, the municipality officials do not recognize this legal entity status and ask the question, "Who are the Dominican Priests?".[770] Interestingly, the same authorities recognize the "Dominican Priests" when they claim taxes, "We exist when we need to pay, but we do not exist when we want to exercise our rights", observes Fr. Claudio Monge.[771]

As a result of the vagueness that results from the absence of a well-defined legal basis of their status, the recognition of their legal status is tied closely to the attitude of the governing Party towards their community.[772] Hence the Dominican Priests are confronted with a situation where they will have to engage in a legal battle for each administrative procedure they engage in to prove their legal entity status, or to break away from the "weak" legal entity status they seem to have recognized through case law and try to fit into a legal status that may be recognized by all, such as a foundation or association or claim their ties with the Italian Dominican Priests and assert a foreign

[766] *Supra* note 45.
[767] Istanbul Cadastral Court, E944:74, K944:66, 1974.
[768] *Ibid*.
[769] *Supra* note 45, interview with Claudio Monge.
[770] *Ibid*.
[771] *Ibid*.
[772] The lack of clarity and predictability creates vulnerability according to Fr. Cladio Monge. *Supra* note 45, interview with Claudio Monge.

legal entity status. The association or foundation status will not fit their nature and needs, as will be discussed later, yet, the foreign legal entity status, which Turkey might have to recognize due to bilateral agreements between Turkey and Italy may be a solution. As a result of these complexities, the Dominican priests are required to pay property tax even though their building is a church, thus a worship place, normally qualifying for exemption from property tax.[773]

In the case above, the legal basis for the recognition of certain key elements of legal personality resulted from first, taking a factual approach and secondly, relying on pre-Republic instruments. The factual approach, which considers the actual facts about the belief community and its connection to property and its use of places of worship, appears to be the one that has the potential of solving relevant legal questions in the absence of an appropriate and adequate legal framework of reference. It has the added advantage of being facilitative. The disadvantage of the factual approach is its dependency on the adjudicating judge and its inadequacy to afford a solution for daily business of belief communities where they are expected to have a legal personality, such as making administrative applications at the municipality as a belief community.

The second approach involves relying on legal instruments adopted in the Ottoman Empire that predate the Turkish Republic. This requires the assumption that these instruments are still in force even though they may not be acknowledged, as such, by public authorities. Yet, the question remains whether all provisions of these instruments are still valid, or only those that seem compatible with current legislation. For instance, the Rabbinate Regulation sets forth the formation of a temporal council, dealing with issues such as education and care of elderly community members- in addition to the spiritual council- assuming the responsibility of running the

[773] The practice has been inconsistent also in terms of claiming property tax. There were times when they were exempted and times when they were required to pay property tax. *Supra* note 45, interview with Claudio Monge.

community's worldly affairs.[774] Yet, these communities had to abolish their temporal assemblies.[775]

The judgments concerning non-Muslim religious communities demonstrate the fact that despite a lack of clear and adequate legal framework, in some cases, there is judicial recognition of certain legal personality for certain belief communities and certain religious leadership. This judicial recognition seems to be based on, on the one hand, Ottoman laws, regulations and documents *when* the judiciary chooses to rely on them. On the other hand, the cases where the judiciary relied on the *de facto* existence and possession and use of the belief communities go toward embracing a right to legal personality as a matter of *fact*. Contrasting decisions concerning the Jewish and Greek orthodox community are difficult to reconcile with the principle of equality and prohibition of non-discrimination resulting from ambiguity of law that provides public authorities with unfettered discretion. This situation stands in strong contrast to grounding the protection of freedom of religion or belief in the rule of law, instead of making it subject to state interests in a constantly changing political climate, in particular, international political developments. Inconsistencies concerning the recognition of legal personality by various public authorities appear to be common. Vagueness and inconsistencies in practice create unpredictability about the law and insecurity and vulnerability for belief communities in the exercise of their rights. A significant consequence of non-recognition of legal personality is that religious/belief communities, then, are not entitled to pursue judicial protection of their assets and activities. Finally, it is striking that the right to freedom of religion or belief is not taken into account in any of these cases, instead, the issues are treated exclusively within the sphere of the right to property.

The lack of an adequate form of legal personality stands in contrast to empowered and enabled belief groups that can enjoy the collective dimension of freedom of religion or

[774] Murat Bebiroğlu, Osmanlı Devleti'nde Gayrimüslim Nizamnameleri [Non-Muslim Regulations under the Ottoman State], (Akademi Matbaası, 2008), p. 169.
[775] Rıfat Bali, Devletin Yahudileri ve "Öteki Yahudiler" [State's Jews and "Other Jews"], (İletişim, 2004), p. 92.

belief, including the right to association, to own property and to seek judicial protection for these.

Now, let us consider the *vakıf* (foundations) and assess their adequacy as a legal entity formula.

6.4. *Vakıf* (Foundation) Institutions

Vakıf institutions are one of the available forms of legal entity in Turkey. There are two questions that need to be answered in order to assess their adequacy for the exercise of the collective dimension of the right to freedom of religion or belief. First question relates to their availability to belief communities; can belief communities establish *vakıf* institutions? Second, equally important question, do *vakıf* institutions create a suitable legal entity status for belief communities in the exercise of the collective dimension of the right to freedom of religion or belief? Considering that volumes may be written on *vakıfs*, it is important to circumscribe the focus of this part. Here, I will try to explain the legal nature of *vakıf* institutions- in the Ottoman era- with a view to understand their function and limits in relation to providing legal entity status in the context of religious activity. The Ottoman practice on *vakıfs* is important for today because firstly, the *vakıfs* belonging to non-Muslims (community foundations),[776] were established in the Ottoman era and secondly many facilities designated for Muslim religious activity were created and supported through the Ottoman *vakıf* institutions. The description of changes pertaining to *vakıfs* that took place in the modern Republic era will not be exhaustive instead they will focus on key legal changes and actions that had significant impact on the exercise of the collective dimension of freedom of religion or belief. With this view, attention will be given to the clearance of Muslim *vakıf* institutions, the unique position of community foundations (*cemaat vakfı*) and the legal and administrative practice on new *vakıfs*. Current legal framework on the *vakıf*, inherent legal restrictions on the establishment of *vakıfs* and practice as well as the suitability of *vakıf* institutions for belief communities will be discussed.

[776] Not all non-Muslims, these include Jewish, Armenian Orthodox, Armenian Protestant, some Syriac Foundations, Greek Orthodox foundations.

6.4.1. The Origin and Rational of the *Vakıf* Institutions

Foundations have a long history on Turkish geography with a unique heritage and function throughout Ottoman history and a legacy in the Turkish Republic.[777] In the Islamic tradition the *vakıf*, property set aside for pious endowment, was dedicated to the cause of God and it became the property of God.[778] Thus the *vakıf*, is a privately owned property endowed *permanently* for a charitable purpose and its revenue is spent for this purpose- many consider the *vakıf* as one of the greatest achievements of the Islamic civilization.[779] It has never been the rationale of the *vakıf* institution to provide a legal entity status for belief communities.

In the Ottoman period, until the period of *Tanzimat* (Reorganization), there has been a lack of legal regulation on *vakıf* institutions.[780] Instead, the practice pertaining to *vakıf* institutions has been left to the discretion of judges.[781] Some key components of *vakıf* institutions may, however, be observed for a proper understanding of these institutions for the purposes of the study. Persons affiliated with every *millet* could

[777] Whether the tradition of *vakıf* institutions can be based on any precepts in the Quran or the *Hadith (*Words attributed to the Prophet Mohammed that are considered general rules) seems indeterminate. Hatemi, concludes that it is not possible to find an explicit basis for *vakıf* institutions in the Quran, however, the concept of "sadaka" found in the Hadis has been a more specific basis for the later development of the institution. See Hüseyin Hatemi, *Önceki ve Bugünkü Türk Hukuku'nda Vakıf Kurma Muamelesi* [Establishment of Foundations in the Old and Contemporary Turkish Law], (Istanbul University Publications, 1969), p. 37. Hatemi notes rightly that although the same term, *vakıf*, has been used throughout ages there are differences and even conflicts associated with the term in different legal systems, cultures and times. Thus one has to always be mindful that what is called *vakıf* in a given time may have or may have had different characteristics in another time.

[778] Yaacov Lev, *Charity, Endowments and Charitable Institutions in the Mediaval Islam*, (University Press of Florida, 2005), 53. Generally on foundations see G. Baer, "The Waqf as a prop for the Social System (Sixteenth-Twentieth Centuries)" in Islamic Law and Society 4 (1997), 264-97. H. Gerber, "The Waqf Institution in Early Ottoman Edirne" in *Islamic Studies in Islamic Society: Contributions in Memory of Gabriel Baer*, ed. G. R. Warburg and G.G. Gilbar, 29-47, (Haifa, 1984).

[779] Murat Çizakça, *A History of Philanthropic Foundations*, (Boğaziçi University Press, 2000), p. 1. According to Çizakça, the *vakıf* system has made numerous contributions to the public welfare, as well as having certain aspects that constitute challenges to its proper functioning. On the one hand, the *vakıf* institutions provided scores of services which a modern social state is expected to provide in areas such as, health, education, culture, maintenance of worship places and cultural heritage sites, welfare, etc. On the other hand, it has been observed that the success of *vakıf* system has been closely linked to the state under which they operated and that corruption of *vakıf* officials has been widespread throughout history.

[780] Ahmet Akgündüz, *Islam Hukukunda ve Osmanlı Tatbikatında Vakıf Müessesesi* [The Institution of Foundations in Islamic Law and Ottoman Practice], (1996), p. 92. In the latter period of the Empire a draft code on *vakıf* institutions was formulated, p. 94

[781] Judges were to follow the doctrine of jurists whom they preferred but they would be required to decide in a way that would benefit the *vakıf* institution. *Ibid*, p. 167.

establish *vakıf* institutions. According to Islamic law, the purpose of *vakıf* institutions had to be one that would be a means of fulfilling charity or worship, which was called the requirement of *kurbet*.[782] Both Muslims and non-Muslims could establish *vakıf* institutions to support Islamic institutions.[783]

The non-Muslim community foundations, even in the Ottoman era, maintained a *sui generis* nature. Since neither Muslims nor non-Muslims were allowed to establish *vakıf* institutions to support the building or repair of churches or sinagogs, or to publish and distribute the New Testament or the Jewish Holy Book with the purpose of propagating non-Islamic belief,[784] the non-Muslim community *vakıfs* that exist today have been all established with Sultan's decree. They were not *vakıfs* in a strict sense since they were anonymous institutions that lacked a person that endowed property and a *vakıf* deed.[785] The reason for this was that the propagation of a religion other than Islam could not be justified under Islamic law thus this was not compatible with the *kurbet* requirement.[786] The exceptions to this rule would be special non-Muslim *vakıf* institutions established with a Sultan *ferman* (decree).[787]

[782] Akgündüz, *supra* note 62, p. 234. There have been exceptions in practice. The development of vakıf institutions with the purpose of supporting one's children surely did not comply with the *kurbet* purpose. Nevertheless these kind of vakıf institutions existed until they were abolished in the Republican period.
[783] The state also established *vakıf* institutions (*irşad vakıfları*) for the provision of general public services permanently. Akgündüz, *supra* note 62, p. 525-561.
[784] Dilek Kezban and Hatemi Kurban, *Bir 'Yabancı'laştırma Hikayesi: Türkiye'de Gayrimüslim Cemaatlerin Vakıf ve Taşınmaz Mülkiyet Sorunu* [A Story of Alineation: The Problem of non-Muslim Minorities' Problems Pertaining to Foundations and Unmoveable Property], (TESEV, 2009), p. 14.
[785] Diran Bakar, "Uygulamadan Ayrımcılık Örnekleri" [Practical Examples of Discrimination], in Ulusal, Ulusalüstü ve Uluslararası Hukukta Azınlık Hakları [Minority Rights under National, Supra-National and International Law], p. 263. Also note that in the Law on Eşhas-ı Hükmiyenin Emvali Gayrimenkuleye Tasarruflarına Mahsus Kanunu Muvakkat [Temporary Law on the Possession of Non-Movables by Legal Persons], the term used for these non-Muslim institutions is "Ottoman Charity Institutions" (*Osmanlı Müessesat-ı Hayriyesi*), not *vakıf*. In and index book titled *Evkaf-ı Hristiyan* (Christian Foundations) of the General Directorate of Foundations only 31 non-Muslim *vakıf* institutions are recorded according to Öztürk, Nazif Öztürk, *Azınlık Vakıfları* [Minority Foundations], (Altınküre, 2003), p. 120-123.
[786] Hüseyin Hatemi, "Cemaat Vakıfları Konusunda Düşünceler" [Thoughts About Community Foundations], in Özsunay Armağanı, (Istanbul University Press, 2004), p. 804.
[787] According to Öztürk *vakıf* establishments that are founded without permission or a license and by presenting a *fait accompli,* when possible, depending on the national or foreign political developments. Nazif Öztürk, *Azınlık Vakıfları* [Minority Foundations], (Altınküre, 2003), p. 118.

It is important to note that the state always maintained a tight control over *vakıf* institutions, yet the control was to be carried out by courts.[788] The size of *vakıf* property, substantial amount of land had been endowed for charitable purposes and thus transformed into *vakıf* status.[789] Alleged irregularities in the use of their revenues have led to increased state supervision. The autonomous *vakıf* institutions were centralized through the establishment of a Ministry of *Vakıfs* (*Evkaf*), thus paving the way for state supervision and interference in the *vakıf* affairs.[790] The move was justified on the grounds that the *vakıf* revenues were let to the discretion of dubious trustees.[791] The rationale of state "interest" in *vakıf* affairs has been based also on the protection of the (vakıf) endowment- the supervision that the initial donor's endowment will be duly administered.

It is important to note that the *vakıf* institutions of Ottoman period were not institutional solutions for the collective exercise of the right to freedom of religion, yet, they were a crucial means of maintaining community life through, *inter alia*, educational, charity and health services provided for the benefit of a belief community. The purpose of *vakıfs* was neither to create legal personality for religious communities, nor were they primarily a kind of religious organization- even though they may be established with religious purposes. The requirement of the *kurbet* purpose,[792] constituted a serious challenge before equality because it allowed all religious communities to engage in charitable actions, however, permitted only Muslim communities to establish and maintain worship places or support activities that would propagate their religion. Legally speaking, non-Muslim belief communities could not

[788] Akgündüz, *supra* note 61, p. 167. Accordingly, the approval of the *vakıf* deed by the courts guaranteed immunity for the *vakıf* property unless it was used for purposes contrary to the deed. Nevertheless, there were exceptions to this rule, for example the property would lose immunity, if it were beyond repair, the *vakıf* institution would be dissolved by a judge, if the property no longer provided any benefit, or if the dissolution of *vakıf* institutions by a judge.
[789] Çizakça, *supra* note 60, p. 79.
[790] R.J. Barnes, *An Introduction to Religious Foundations in the Ottoman Empire* (Brill, 1987), p. 68-73.
[791] Çizakça, *supra* note 60, p. 82. However, the centralization process had its own problems, too. The cost involved and not calculated when the original endowment was made, interference in *vakıf* affairs and the dubious practices of the new *vakıf* bureaucrats. The Ottoman state made establishment of new *vakıf* more difficult and finally decreed that the tax revenue from land owned by *vakıf* would be collected by treasury and not the *vakıf* as it had been the case. Consequently, the *vakıf* were left at the hands of the central authority. Çizakçı concludes that the harm caused by an individual trustee is minimal compared to a corrupt high level official can do to the entire centralized system. M. Çizakça 81-85.
[792] Kurban and Hatemi, *supra* note 65.

establish *vakıf* institutions to support the building of their worship places.[793] Also, both Muslim and non-Muslim vakıfs could not acquire new property.[794] The increasing regulation of and supervision over *vakıfs* had serious implications for the autonomy of belief communities. On the other hand, notwithstanding their limitations, their function as subsidiary institutions for the support of a limited range of activities of belief communities has been of vital importance for the sustainability of the latter.

6.4.2. Legal Developments Pertaining to *Vakıf* Institutions in the Turkish Republic

The developments regarding *vakıfs* throughout the Republic era are important because of the impact they had on the associative rights, of members of belief communities, including Muslims and non-Muslims, by significantly depriving them of sources that had been used for the benefit of their members and communities, in particular for the maintenance and use of their worship places, charitable organizations, schools etc. The Turkish Republic continued the process of regulation and supervision of the *vakıf* system that was started by the Ottoman state administration. It is not possible to provide a thorough description and analysis of all legal and administrative developments on *vakıfs* spreading over nearly a century in this chapter.[795] In this section I will examine key developments that continue to impact religious communities today; Muslim foundations that were established before the 1926 Civil Code, non-Muslim community foundations and new foundations.

Regardless of their aim,[796] measures aimed at clearance of pre Republic *vakıfs* had the effect of depriving Muslim *vakıfs* endowed for the support of Muslim religious, educational and charitable institutions and activities. These were eliminated and transferred to the state thus drastically depriving many Muslim communities from

[793] This was overcome by the special *ferman* of the Sultan. See Bakar, *supra* note 66.
[794] Kurban and Hatemi, *supra* note 65, s. 10, quoting Murat Bebiroğlu's article on "Cemaat Vakıfları" [Community Foundations].
[795] For a detailed overview of *vakıfs* before and after the 1926 Turkish Civil Code see Ahmet İşeri, "Vakıflar" [Foundations] in *Ankara Üniversitesi Hukuk Fakültesi Dergisi* (1964), Volume 21, No. 1-4, p. 199-250.
[796] Some argue that the clearance of pre-Republic *vakıfs* was aimed at depriving Muslim communities of their economic power, Others on the other hand argue that it was to Government's duty to take over vakıfs that were to a great extent governed poorly and failed to fulfill their purposes, see İşeri, *supra* note 76, p. 242. Here I will not focus on this debate, instead focus on the effects on Muslim communities associative abilities as well as their resources.

resources and capacity utilized for the realization of religious activity and support and sustenance of their community.[797] For example, the religiously based schools, *medrese* and related vakıf and property were transferred to the Ministry of Education.[798] Some of the other actions aimed at the clearance of *vakıf* institutions include, *inter alia*, the abolition of financial autonomy of *vakıfs* through the declaration of collection of *vakıf* revenues by the Ministry of Finance; the establishment of a Committee for the Abolishment of the *Vakıf* and finally the abolishment of all cash *vakıfs* and the establishment of the Bank of *Avakıf* (Vakıflar Bankası) with the confiscated capital.[799] It has been argued that the interest in the clearance of *vakıfs* was based on a determination to control Islamic brotherhoods that were financed by *vakıfs*.[800] Religious buildings with historical or architectural significance that have been owned by foundations were registered in the name of public entities.[801] Foundations established by Muslims with religious intent have been susceptible to changes in political climate. For example, the closure of *tekke* (dervish lodges) and *zaviye*,[802] led to the inability to use these buildings for their purposes, hence the "inability to fulfil their purpose" allowed the transfer of these assets to the Ministry of Education and City Private Administration.[803]

As far as non-Muslims were concerned, *community foundations*, as they are called today, are non-Muslim minority institutions that were established by the Ottoman Sultan decrees and that have a *sui generis* legal status in the Turkish Republic.[804] The religious basis of community *vakıf* was, on the one hand, considered incompatible with

[797] Hatemi, *supra* note 4.
[798] Nazif Öztürk, *Azınlık Vakıfları* [Minority Foundations], (Altınküre, 2003), p. 45-48 and Çizakça, *supra* note 60, p. 88-89.
[799] *Ibid*, Öztürk, p. 45-48 and Çizakça, p. 88-89.
[800] Çizakçı, *supra* note 60, p. 86.
[801] These were transferred to the General Directorate of Foundations in 1957 under a special law, Aslında Vakıf Olan Tarihi ve Mimari Kıymeti Haiz Eski Eserlerin Vakıflar Umum Müdürlüğüne Devrine Dair Kanun [Law on the Transfer of Works that Have Historical and Architectural Value that are Actually Vakıfs to the General Directorate of Foundations], No. 7044, 10.09.1957.
[802] Tekke ve Zaviyelerle Türbelerin Seddine ve Türbedarlıklar ile Bir Takım Unvanların Men ve İlgasına Dair Kanun [Law on the Closure of Dervish Lodges, Hospices and Shrines and on Abolition and Prohibition of the Use of Certain Titles] No. 677, December 13, 1925.
[803] İşeri, *supra* note 76, p. 245.
[804] Under Article 40 of the Lausanne Peace Treaty Turkey is under the obligation to the rights to establish, manage and control charity institutions, religious social institutions, schools, teaching and education institutions and use their own language in these freely and freely conduct religious worship services.

the secular nature of the Republic, yet, on the other hand, obligations arising from the Lausanne Treaty, forced the Republic to maintain, albeit imperfectly, the community foundations as an exceptional institution within the general *vakıf* framework. The challenge was to create a legal framework that could ensure the circumstances for the compatible co-existence of the autonomous community *vakıf* regime together with and within the modern legal regime. A solution to this fundamental problem is still to be reached. Their *sui generis* nature that does not include all components of *vakıfs* may explain the difficulties these institutions have been subjected to when they found themselves in a position to where they were obliged to fit the *vakıf* framework in the modern Republic.

Community foundations own the buildings and properties of, for example, the Greek Orthodox Church, the Armenian Church, and the Jewish Rabbinate and are run by independent *vakıf* managers.[805] In accordance with the Ottoman Regulations, spiritual and temporal assemblies would be elected in order to administer the affairs of these communities and the *vakıfs* dedicated to the benefit of them.[806] These institutions- which are called *vakıf*- are atypical *vakıfs* because they did not have any person who endowed certain estate for a certain purpose. Thus their anonymous quality sets them apart from regular foundations even today, for example they do not have any founding deeds.[807]

Key features of legal and administrative action or inaction pertaining to community foundations are considered below under four headings; new legal status for community foundations, extensive powers of the VGM and restrictive and discriminatory administrative and judicial practice which fed off of each other leading

[805] Non-Muslim religious communities more recently established in Turkey (Protestant churches, Jehovah's Witnesses, and others) do not have any community *vakıf* in this status. Members of these communities may, under certain circumstances, establish new foundations, yet these would not have the community foundation status.
[806] These regulations would require various commissions to be established, which in turn would manage institutions that were owned by these minorities, e.g. education commission, monastery commission, law commission etc. Until the end of the Ottoman Empire charity institutions belonging to the *millet* were administered and audited by various commissions established by temporal and spiritual assemblies. Bakar, *supra* 66 note, p.265.
[807] Bakar, *supra* note 66, p. 263.

to the deterioration of the capacities of community foundations. These should be considered always bearing in mind that the legal entity of *vakıf*, as opposed to a direct ownership of property by a belief community (if they were to have a legal entity status of their own) is part of a paradigm that creates vulnerability of religious communities to interferences by the state.

It will be seen that, often, legal, and regulations of other kind, and administrative practice impacting community foundations have been primarily viewed and constructed with national security perceptions and concerns situated as the highest interest and have been highly prone to changes in the political climate, in particular international politics. For example, the period of transition from a single-party system to a pluralist democracy in the 1950s some developments in favour of the *vakıf* system took place.[808] Community foundations acquired property through purchasing, donations or inheritance.[809] On the other hand, a change in the international political climate, namely the Cyprus crises between Turkey and Greece, changed the practice for Turkey's non-Muslim minorities. Kurban and Hatemi argue that Turkey has used the Greek minority in Turkey in order to gain an advantage over Greece.[810]

(a) New Legal Status

When provisions on new foundations were made in the 1926 Civil Code, regulations concerning *vakıfs* that were established before the adoption of the Civil Code were postponed to a later date with a view to draft a special law on foundations.[811] The drafting of a special law on foundations had significant implications

[808] The adoption of Law No. 903 in 1967 aimed to modernize the *vakıf* system. Some key provisions opened the way for breathing life into the heritage of the Ottoman *vakıf* system, such as, the possibility for persons, associations and companies to establish *vakıf* institutions, the possibility for *vakıf* institutions to establish companies, a simpler process to establish *vakıf*, the introduction of possibile tax exemptions. Law No. 903 (Türk Kanunu Medenisinin Birinci Kitabının İkinci Babı Üçüncü Faslının Değiştirilmesi, Bu Kanuna Bazı Madde ve Fıkralar Eklenmesi, Bazı Vakıfların Vergi Muafiyetinden Faydalandırılması Hakkında Kanun) was adopted in 13.07.1967, R.G.No. 12655, 24.07.1967. For an account of the process leading up to the adoption of this law and the implications of changes for financial wellbeing of *vakıf* institutions see *supra* note 60, Çizakça, p. 91-107.The new term "tesis" (establishmet) in the Turkish Civil Code was this time replaced with the term "vakıf" under Article 3 of the Law No. 903.
[809] Kurban and Hatemi, *supra* note 65.
[810] *Ibid*.
[811] Article 88 (2).

for, both, old (pre-1926) and new foundations. The Law on Foundations adopted in 1935, standardized the status of *vakıfs* established before the 1926 Civil Code (*old vakıfs*).[812] The community *vakıfs* were categorized as *mülhak vakıf* (vakıfs that have been added later) thus gaining a new legal status. *Mülhak vakıfs* were administered by their own governing bodies however under the *supervision* and control of the VGM.[813] Hence this new status opened the way for interference, and in numerous cases the seizure of *vakıf* management, by the VGM. This new legal entity status, under the legal representation of the VGM, resulted in a limited or restricted legal personality.[814]

(b) The Extensive Powers of the VGM and Restrictive Administrative Practice

The VGM replaced the Ottoman ministry that administered the vakıfs (*Şer'iyye ve Evkaf Vekaleti*) taking the name General Directorate of Foundations in 1924 as the supervisory institution over all foundations.[815] The extensive powers- beyond inspection- conferred to this institution compromised the autonomous nature of *vakıf* administration. As far as community foundations were concerned, it created conditions that were in stark contrast to the rights protecting the autonomous administration of non-Muslim minority institutions in Article 40 of the Lausanne Treaty. In addition, the restrictive regulations and practices directed to the community *vakıfs* may be considered as an indication that the life source of these institutions was being cut in order to cause them to die out slowly- somewhat parallel to the diminishing non-Muslim population.[816] The lack of a Regulation specifying the application of the Law on Foundations has been identified as a key factor in the lack of clarity and predictability of the Law and leading to conditions that were conducive for discretionary decisions of administrative bodies, in particular the VGM.[817]

The VGM's capacity to take over management and properties of community foundations has been gradually increased. In cases where it has not been possible to appoint managers or establish a governing body for ten years these *vakıfs* would be

[812] Vakıflar Kanunu [Law on Foundations] No. 2762, 5 June 1935, R.G. No. 3027, 13 June 1935.
[813] Öztürk, supra note 68, p.45.
[814] Kurban and Hatemi, *supra* note 65, p. 13.
[815] Law No. 429 on Şer'iye ve Evkaf ve Erkanı harbiye-i Umumiye Vekaletlerinin İlgasına Dair Kanun [the Abolishment of the Ministry on Sharia and Foundations], 3.03.1924.
[816] For some examples see Bakar, supra note 66.
[817] Bakar, *supra* note 66.

administered and represented by the VGM by a court decision.[818] Similarly, *vakıfs* that were not able to fulfil their charitable purpose were seized by the VGM and turned into *mazbut vakıf*.[819] This practice gave the *mülhak vakıf* a new status called *mazbut* vakıf (seized vakıfs). [820] Seized *vakıfs* were permanently represented and administered directly by the VGM thus the management and seizure of property would be permanent.[821] The diminishing non-Muslim population in Anatolia meant that many *vakıfs* and their properties were seized by the VGM.[822]

The enormous loss of property of the community *vakıfs,* and as a result, non-Muslim communities benefiting from them, caused by the administrative and legal practice related to the 1936 Declaration stands out as an example demonstrating the administrative and judicial cooperation guided by political climate/will to diminish the capacity of non-Muslim minorities through measures taken related to *vakıfs*. In 1936 all foundations were served notifications requesting them to provide the VGM with a list of their non-movables. The list was necessary in order to regularize the land registry of the Republic. The community foundations, like other foundations provided a list of their property.[823] The VGM requested the community foundations to submit their founding deeds in order to prove their ownership of non-movables in their disposal, fully aware that they were founded by Sultan decrees, thus did not have any founding deeds.[824] The innovative solution found to this problem by the VGM was to reckon the declarations, only a list of non-movables, submitted by the community foundations as their founding deed. In the 1960s, together with changes in the international political climate, due to the Cyprus crisis, these 1936 Declarations were used against the community foundations. The rationale was thus; since these lists did not mention that

[818] Kurban and Hatemi, *supra* note 65.
[819] *Ibid.*
[820] *Mazbut vakıf*, stands for vakıfs that are seized by the VGM.
[821] Kurban and Hatemi, *supra* note 65, p. 17. The Greek Orthodox community is a community that has been damaged by the practice of seizure. As of October 2007, 24 Greek Orthodox community *vakıfs* have been seized by the VGM. The number of property seized through this process in 990. As of February 2008, 24 community *vakıfs* dedicated to the benefit of the Jewish community have been seized by the VGM.
[822] For example, as of 2009, 24 vakıfs of the Greek Orthodox community and 990 properties belonging to these vakıfs have been seized by the VGM. Kurban and Hatemi, *supra* note 65, p.17.
[823] This list was later used as their founding document, see below.
[824] Bakar, *supra* note 66, p. 263.

the respective foundations had the legal capacity to acquire property, the VGM deduced from this that they did not have the legal capacity to acquire ownership, the legal effect of all acquisition of property since 1936 was declared null and void.[825] Clearly, a list of non-movables could not contain a provision stating that the respective *vakıfs* had the right to acquire property. They were asked to provide a list of their property not a description of their purpose and activities. Consequently, property they had acquired through purchase, inheritance or donation throughout the period of 1936-1970s has been seized by the VGM, the Treasury or National Real Estate.[826] It is interesting to note that these properties were registered in the land register in the name of the community *vakıfs* with a document provided by the governorship.[827]

The inadequacy of legal regulations, largely caused by the lack of a Regulation that should have accompanied the Law on Foundations, following amendments of 1949, stipulating the specifics of its application, constituted the basis of various unpredictable and discretionary rules that have been applied and these diminished the control of the management of community foundations, sometimes to the point of losing the foundations and its assets permanently.[828] The lack of legal certainty has made it possible for the *de facto rule-makers,*[829] to make rules that have increased their sphere of influence at the expense of community foundations. For example, over the years there have been times when the rules concerning the election of the governing bodies of community foundations were not prescribed by law. Instead for many years a police order of 1972 constituted the manner in which elections were conducted.[830] These rules resulted in the loss of control over some community foundations and their property. According to this police order, every church parish was considered an election district and community foundation administrators had to reside in the election district where they were elected. In many districts or cities where non-Muslims did not reside any more, for various reasons, including insecurity, discrimination and pressure,

[825] Kurban and Hatemi, *supra* note 65, p. 14.
[826] *Ibid*.
[827] Diran Bakar observed that the governorships would give a document stating that "there is no problem regarding the acquisition of property of the X foundation since it has legal personality" Bakar, *supra* note 66, p. 270.
[828] Bakar, *supra* note 66, p. 267.
[829] Rule maker here refers to public authorities who had the discretionary powers to interpret legislation.
[830] Regulations and Principles on the Elections Concerning Foundations, 1972.

elections could not be held thus the VGM seized the management of these community foundations- effectively taking away resources belonging to community foundations dedicated to the benefit of non-Muslim communities. [831] Another example illustrating the lack of legal certainty and its detrimental consequences, concerns the coordination of various *vakıfs* dedicated to the benefit of the Armenian Apostolic community. In 1954 it was permitted to establish a committee that would administer the various properties belonging to all of these *vakıfs*, in 1960, after the military *coup* the military Governor Refik Tulga ordered the dissolution of this committee.[832] Since then all community foundations have been administered independently thus decreasing the capacity to manage and coordinate foundations for the benefit of the respective ethno-religious community.

Lastly, a secret rule, thus completely unforeseeable, concerns the payment of a contribution fee for the auditing task of the VGM. In 1967 the Law on Foundations No. 903 stipulated that all foundations had to contribute 5% of their income as a contribution towards the "inspection and auditing" expenses.[833] In 1979 a decree ruled that foundations that were established before the entry into force of the Turkish Civil Code would not be liable to pay this contribution.[834] In 1981, Article 1 of the Law on Foundations was changed and this time the community foundations were to pay the contribution, however, the provision said that this contribution may be paid by the general state budget by a Decision of the Committee of Ministers.[835] Bakar, relates that, in the proceedings of a case in 1986 it was disclosed that according to a secret decision of the Committee of Ministers the Greek Orthodox community foundations listed in the Decision were not to pay the contribution, based on reciprocity principle taking into account the practice in Greece.[836] The objection to this Decree on the basis of the principle of equality was rejected and the case dismissed on grounds saying, "It

[831] Bakar, *supra* note 66, p. 270.
[832] Bakar, supra note 66, p. 271.
[833] Bakar, supra note 66, p. 273.
[834] *Ibid*.
[835] *Ibid*.
[836] *Ibid*.

is not against the principle of equality. The Decree was kept confidential in order to avoid polemic".[837]

(c) Restrictive Judicial Practice

As will be seen below, the treatment of non-Muslims as "foreigners" has been an innovative and instrumental legal category that facilitated and legitimized the discriminatory treatment directed against community foundations.[838]

The right of the community *vakıfs* to acquire property was first crippled with administrative practice in the late 1960s and then permanently thwarted by the judgment of the General Council of the High Court of Appeals (GCHA), setting a precedent and establishing subsequent jurisprudence. Documents provided in accordance with the Land Register Law for the registration of non-movables were denied on grounds that the community foundations lacked legal personality.[839] Finally, the High Court of Appeals developed a jurisprudence, which was later embraced by the GCHA, reasoning that unless a *vakıf*'s founding deed permits the acquisition of property it cannot acquire new property.[840] The highly criticized landmark decision by the High Court of Appeals in 1971 was based on the complaint by the *Balıklı Rum Hastanesi Vakfı* (Balıklı Greek Hospital Foundation) challenging the legality of the seizure of their property by the Treasury, requesting the restoration of the said property.[841] The High Court of Appeals unanimously decided that, "The legal entities formed by those who are not Turks are prohibited from acquiring property".[842] Hence an innovative yet explicitly discriminatory legal categorization was created by case-law. Those who had formed non-Muslim community foundations were considered non-Turks thus subject to laws that were applicable to foreigners in the sphere of property rights. It was not until 2002 that the application of this discriminatory jurisprudence was made

[837] Bakar, *supra* note 66, p. 273. Eventually a decree of 1999 all community foundations were exempt from paying the contribution fee.
[838] The term "foreigner" has been used by the Court of Appeals in its decision concerning the legality of the seizure of property belonging to community foundations by the General Directorate of Foundations in accordance with 1936 Declaration.
[839] Bakar, *supra* note 66, Article 2, p. 269.
[840] Judgment of the General Council of the Court of Appeals, 8 May 1974, E971/2-8420 and K974/505.
[841] The Court of Appeals 2nd Chamber, 6 July 1971, E4449, K4399.
[842] *Ibid*.

ineffective by the adoption of Law No. 4771, recognizing explicitly the right of community foundations to acquire new property, albeit with a highly burdensome bureaucratic process.[843]

(d) New Foundations

The Republic's legal arrangement pertaining to new foundations over the years may be characterized as *shifting* depending on the governing party, yet, always closed to the possibility of establishing foundations for the support religious communities. Here we will focus briefly on permissible grounds for the establishment of foundations.[844] The Turkish Civil Code which was adopted in 1926,[845] used the term *tesis,*[846] and not *vakıf* in order to create a sharp distinction between *vakıfs* that existed before the Republic and new *vakıfs*. Article 74 (2) of the Civil Code allowed the establishment of new foundations, however, these could not be contrary to law or national interests, neither could they support a certain political thought, a certain race or community (*cemaat*- religious community).[847] This neutral provision was applicable to both Muslims and non-Muslims. Yet, as far as non-Muslims were concerned, the explicit prohibition on establishing new foundations "to support a certain religious community" was incompatible with specifically Article 40 of the Lausanne Treaty guaranteeing the rights to establish, manage and control charity institutions, religious social institutions, schools, teaching and education institutions.[848]

Practice concerning new foundations that were established with a religious intent demonstrates the permissible boundaries of *vakıf* purpose as far as they concerned religious activity. Interestingly, the new foundations (*tesis*) that were established

[843] Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun [Law on the Amendment on Various Laws] No. 4771, 03.08.2002, R.G. No. 24841, 09.08.2002.
[844] Here we will not focus on the difficulties of management of foundations and the extensive powers of the VGM. The reason for this is that the latter issues will be addressed in the "current practice" section below.
[845] Türk Medeni Kanunu [The Turkish Civil Code] No. 743, 17 February 1926.
[846] *Tesis* means institution. The term "tesis" was replaced with "vakıf" in 13.07.1967 with the adoption of the Law No. 903 Türk Kanunu Medenisi'nin Birinci Kitabının İkinci Babı Üçüncü Faslının Değiştirilmesi, Bu Kanuna Bazı Madde ve Fıkralar Eklenmesi, Bazı Vakıfların Vergi Muafiyetinden Faydalandırılması Hakkında Kanun (Amendment to the Turkish Civil Code).
[847] Article 74 (2) prohibits the establishment of foundations having the aim of supporting members of a certain race or community (original *cemaat*, this word implies "religious community" in Turkish).
[848] Article 40 of the Lausanne Treaty. See Chapter 5 on Turkey's obligations under Lausanne Treaty.

during this time included many that were dedicated to the maintenance of property used for religious purposes or support of religious activity. These are viewed as having the intent of providing for the possibility of worship. Hence, *vakıfs* with the purpose of building *mesjids*, mosques, maintenance of churches and sinagogs, the maintenance of these and the provision for the needs of persons who would work in these places of worship, building of religious schools, providing for the needs of students who would study in these institutions were permissible in the application of the law. Many religious *tesis* were established as new foundations.[849] The only non-Muslim example is the Walter Wiley Foundation which was established in 1962 with the purpose of dedicating the revenues of *tesis* property to the costs of a personnel of a Protestant Church adjacent to the Dutch Consulate, the maintenance of the building and other related costs.[850] It is important to note that the revenues of these foundations are allocated to certain church buildings and costs related to the building and not the benefit of the church community as such.[851] Establishing foundations for the benefit a community was and is still prohibited.

6.4.3. Current Legislation and Practice

Bearing in mind the complex past of the community foundations, it is not surprising that the legal/administrative realm of rules applicable to community foundations is "caotic",[852] and that every new regulation pertaining to them involves multi-dimensional sensitivities. After the failure to adopt Law No. 5555 as a result of the veto of the then President Ahmet Necdet Sezer,[853] the new Foundations Law No.

[849] A Study indicated that 106 religious institutions (*tesis)* established during 1926-1967. Ş. Şenel and Z. Tuyan, "1926-1967 Yılları Arasında Türkiye Cumhuriyeti'nde Kurulan Tesisler (Vakıflar)" [Institutions (Foundations) Established in the Turkish Republic Between the Years 1926-1967) in Akademik Bakış (IBT), Vol. 3, No. 5, (Winter 2009).

[850] *Ibid*.

[851] For example the revenues cannot be used to support the elderly of only members of that community or open an orphanage only for those affiliated with their religion.

[852] Hatemi and Kurban conclude that the legal rules pertaining to foundations, with many different categories developed over the years without a holistic arrangement, do reflect an appearance of chaos. Kurban and Hatemi, *supra* note 65, p. 35.

[853] Vakıflar Kanunu [The Law on Foundations] No. 5555, containing similar provisions to the new Law on Foundations, was partly vetoed and sent back to the Parliament by President Ahmet Necdet Sezer on 29.11.2006. The vetoed provisions mainly concerned the right of foreigners to establish foundations, the right to acquire property for foundations and provisions regulating their international relations and economic activities (Article 12, 14, 16, 25, 26 and 41) on the basis of their contradiction with the Preamble and Articles 2,3 and 5 of the Turkish Constitution. The crux of the rejection of these provisions

5737 that was adopted in 2008 is significant in what it does and does not accomplish.[854] The new Foundations Law, was adopted, amidst strong opposition, within the Third Harmonization Package for the European Union accession, and has significant implications for both community foundations and new foundations.

It is worthwhile to briefly consider the case brought to the Turkish Constitutional Court (Anayasa Mahkemesi, hereafter AYM) by the main opposition party, Cumhuriyet Halk Partisi (the Republican People's Party- CHP) challenging the constitutionality of the new Law on Foundations; it was claimed that it was in contradiction with the secular nature of the Republic and the indivisibility of the state with its people as well as other constitutional provisions, such as the principle of equality.[855] The arguments put forth for and against improving the conditions of community foundations help our understanding of the many dimensions of the bar before the legal personality of belief communities, as such, in Turkey. The approach taken by the Constitutional Court might be indicative of the way forward; this approach overcomes the blanket restrictions on religiously based associations that the Turkish secularism and national interests have been so far interpreted to justify.

The objections of the main opposition party centred around provisions that brought the community foundations to the same category as ordinary foundations in relation to

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was based on the elimination of the exceptional nature and limited capacity of community foundations (*cemaat vakıfları*), claiming that the rigorous supervision established over community foundations and their limited capacity aimed the eradication of the "old foundations established within the Sharia Law order" that was eliminated by the Turkish revolution. He reiterated that Turkey embraced contemporary secular rule of law that was based on citizen-state relationship, rather than on the organization of people according to their religious affiliation, each with its respective religious leader. Veto reasoning of President Ahmet Necdet Sezer, Document sent from the Presidency to the Turkish Grand National Assembly, Doc. No. B.01.0.KKB.01-18/A-10-2006-830 29 / 11 / 2006 http://hyetert.blogspot.com/2006/12/vakflar-kanunu-veto-gerekcesi.html, accessed 16.01.2015. The exceptional structure of the community foundations, which allows associative activity based on religious affiliation and the contrasting Republican tendency to abandon the religion based societal organization demonstrate that the community foundations are viewed as an anomaly within the Republican legal framework. In fact, one explanation of the restrictive practices against the community foundations might be that there has been a will to abolish this anomaly and exception which was accepted reluctantly in the first place, within the Lausanne regime, and was always seen as a concession.

[854] Vakıflar Kanunu [The Law on Foundations] No. 5737, adopted on 20.02.2008, R.G. No. 26800, 27.02.2008.
[855] Constitutional Court, 11.01.2011, E22/2008, K82/2010, 17.06.2010, R.G. No. 27812.

their capacity to enjoy certain rights- that were previously denied. These include, establishing branch offices (Article 25), election of the executive board of community foundations from among the community (Article 6), acquisition of new property (Article 12(1)), possibility of altering "purpose and function" (Article 14), international activities, receiving donations from abroad (Article 25), establishing economic corporations and companies (Article 26).[856] The opposition Party's case emulated the veto reasoning of President Sezer to the previous Law on Foundations, in which he had stressed that granting community foundations capacity that had been denied previously would undermine their exceptional status- remnant of the multi-jurisdictional Ottoman regime- and counter the process of their slow elimination from the secular modern rule of law which is based on equal citizenship as opposed to a society organized on the basis of religious affiliation.[857]

The TCC's assessment of the case stands out most in the way in which it refuses to deal with the objections in relation to national interests and the indivisibility of the state with its nation, secularism and the frequently used principle of reciprocity in the protection of the rights deriving from the Lausanne Treaty and instead focusing on fundamental rights and their wide interpretation. By adopting such an approach the TCC marks an important progress in jurisprudence concerning religious minorities in Turkey.[858] Some important examples, may illustrate this point. It was argued that the election of the executive board for community foundations needed to be rejected on the basis of the principle of reciprocity found in Article 45 of the Lausanne Peace Treaty,[859] in light of the fact that in Greece non-Muslim communities were not allowed to elect the administration of their foundations. Thus according to Article 90 of the Constitution international law (Lausanne Treaty) had to prevail. The evaluation of the AYM is interesting because it finds that Article 90 is relevant for situations where there is an incompatibility among norms pertaining to human rights and in this situation there was no incompatibility. Thus, without dealing with the principle of reciprocity the

[856] *Ibid*.
[857] *Ibid*.
[858] It is difficult to draw conclusions from its approach in this case, on how it would deal with associative rights of other religious communities.
[859] *Supra* note 136.

AYM regarded it as a clear fundamental rights issue that did not require reference to the Lausanne Treaty.

Another vital provision concerned the right of community foundations to acquire new property.[860] The opposition to this right centered on this being a concession to minorities in Turkey and that there was no "public interest" in granting community foundations the right to acquire new property. Strikingly, basing its reasoning on provisions found in Article 35 of the Turkish Constitution and Article 1 of Protocol 1 of the ECHR, protecting the right to property for legal entities, the AYM found that the right to property is a human right and hence that there was "public interest" in correcting the infringement suffered by community foundations over decades.[861] It is highly important that the AYM views the practice of recognizing the 1936 Declaration as "founding deed" and deducing from this that community foundations do not have a capacity to acquire new property because it is not stated in their founding deed, as "no longer relevant". Thus the AYM has rejected decades long judicial practice that resulted in significant loss of property for community foundations depriving these communities from vital resources needed for their survival as well as their religious acts.[862] Again, when dealing with the objection to the possibility for community foundations to alter their "purpose and function" because this would give them the chance to survive and adopt to changing circumstances and thus bring them to the same status as ordinary foundations and that this would constitute a privilege, the AYM decided, that on the contrary it would be compatible with the principle of equality.[863]

The adoption of Turkey's current Law on Foundations has been a move toward bringing in line the protection of the rights of non-Muslim minorities closer to the protection afforded in international human rights treaties, the Treaty of Lausanne and Turkish Constitution.[864] The Law on Foundations protects the right of community foundations, to acquire property, enjoy the right to manage, to exchange property that they have

[860] Law on Foundations, Article 12 (1).
[861] *Supra* note 136.
[862] *Ibid*.
[863] *Ibid*.
[864] *Supra* note 136.

acquired with more beneficial ones and to turn these into cash under certain circumstances. An important gain for community foundations is that they are able to register non-movables that they had declared in the 1936 Declaration in the name of their community foundation. In addition, it has brought a limited solution for the property that has been transferred to the ownership of the State Treasury or VGM by the declaration of null and void the property register of non-movables that were purchased by or donated to community foundations. Also, provided that it is stated in their deed and they notify the VGM, foundations can receive donations from institutions in Turkey and abroad. Foundations may establish commercial companies and be shareholders of companies. No doubt, these rights have breathed life into community foundations and established that community foundations also enjoy the rights that new foundations have.

Despite its improvements the 2008 Law on Foundations fails to address past injustices and retroactive actions that have resulted in significant loss for community foundations. The status of community foundations as *mülhak vakıf,*[865] has not been changed.[866] The regulation pertaining to seized (*mazbut)* foundations stands out in this respect. The VGM had, in the past, seized and placed under its administration foundations that did not have any administrator and that did not have members of community living in its region based on the Law on Foundations No. 2672.[867] The 2008 Law on Foundations closes the door to the recovery of these foundations and the return of their non-movables permanently by stating that "election and appointment of new administrators for these foundations may not be made". For example, in the past 24 sinagog foundations endowed for the benefit of the Jewish community in Turkey and 24 community foundations endowed for the benefit of the Greek Orthodox community were seized by the VGM thus transferring the management or control of these foundations as well as the property belonging to these foundations to the

[865] Öztürk, supra note 68, p.45.
[866] Hatemi views such change necessary for substantial change. The added (mülhak) *vakıf* status of both Muslim and community foundations must change and a regulation that observes equality and advances freedom must be instiuted. Hatemi, supra note 67, p. 806.
[867] Kurban and Hatemi, *supra* note 65.

VGM.[868] Hatemi and Kurban argue that this provision not only does not provide for the restitution of administration and property of seized foundations, but also opens the way for the continuation of unlawful and arbitrary bureaucratic practice.[869]

The inclusion of the principle of reciprocity in the 2008 Law on Foundations has caused substantial reaction from the non-Muslim community. The principle of reciprocity constitutes the basis of Turkey's conditional approach to the protection of minority rights and it is based on the expectation that there will be reciprocal protection for Muslims, particularly those in Western Thrace, has been an integral part of the constrictive application of the general minority rights protection scheme. Article 2 preserves the principle of reciprocity, thus continuing and reinforcing the practice of the Turkish state to treats its citizens as foreign citizens.

In the assessment of the associative rights of non-Muslim minorities in Turkey it is important to note that it is not possible to establish new community foundations. This practice is contrary to Turkey's obligations under Lausanne 40 which provides guarantees for the associative rights of non-Muslims. It is only possible to establish new foundations which are subject to Turkish Civil Code (TCC). Article 101(4) of the TCC stipulates that one cannot establish foundations that aim to support a certain race or community (religious community).[870]

Following the significant, nevertheless inadequate, domestic legal improvements that were mostly adopted within the context of reforms for Turkey's accession to the European Union in the last decade, community foundations have taken their complaints regarding the right of community foundations to the right to property to Strasbourg and had success in cases concerning the seizure of property belonging to community foundations by the Turkish state. In the case of the *Fener Rum Erkek Lisesi Vakfı v. Turkey*, the ECtHR decided that the manner in which the 1936 Declaration was used to restrict the right of the community foundations to property violated the Article

[868] Kurban and Hatemi, *supra* note 65, p.38-40.
[869] *Ibid*.
[870] Türk Medeni Kanunu [Turkish Civil Code] No. 4721, 22.11.2001, R.G. No. 24607, 8.12.2001.

1 of Protocol 1.[871] The case of *Yedikule Surp Pırgiç Ermeni Hastanesi Vakfı v. Turkey*, dealing with the seizure of property that belonged to the foundation resulted with the finding of violation by Turkey, which was followed by a friendly settlement between the parties.[872] This case is significant in being the first case where Turkey returned seized property to a community foundation.

In an effort to take further steps to solve the property problems of the Lausanne minorities, the Legislative Decree ("the Decree" hereafter) was adopted on 28 August to allow community foundations to apply to regain property confiscated from them by the state since 1936, has been applauded by many as a "revolution" however, it is best seen as a further step in the process of trying to solve the property problems of non-Muslim community foundations. [873] The Decree amends the current Law on Foundations (No.5737) by adding a temporary Article 11. Basically, the Decree aims to provide for the restitution of some of the property that was wrongfully taken from non-Muslim community foundations.[874] On the other hand, it is important to note that it is far from creating an overall solution to all the property problems of community foundations. A number of exceptions foreseen in the Decree weaken the restitution process. One of the exceptions in the Decree concerns property that was "nationalised, property confiscated by the state from community foundations and handed back to previous owners from whom the foundations had legally acquired, and is important to note that the Decree does not address the property of community foundations seized by the VGM.

Regardless of their reason,[875] reforms pertaining to community foundations in the last

[871] *Fener Rum Lisesi Vakfı v. Turkey*, 09 January 2007, European Court of Human Rights, No. 34478/97.
[872] *Yedikule Sırp Pırgiç Ermeni Hastanesi Vakfı v. Turkey*, 16 December 2008, European Court of Human Rights, No. 50147/99, 16.
[873] Provisional Article 11 of the Law on Foundations No. 5737, 20.0.2.2008, adopted through Legislative Decree (KHK) No.651, 22.08.2011.
[874] According to the Decree, to qualify for restitution, non-movable property must be registered in the 1936 Declaration of the community foundations of the VGM and the name of the owner recorded in the Land Registry must be blank; or the non-moveable property must be registered in the 1936 Declaration and registered in the name of the State Treasury, the VGM, a municipality or city special administration for reasons other than nationalisation, sale, or exchange.
[875] Hatemi and Kurban argue that the fundamental reasons for the AKP government to demonstrate a political will to start the reform process for vakıfs were the fact that this was a precondition for the

decade have brought the protection afforded to some of the non-Muslim communities in Turkey closer to the protection ensured in international human rights provisions, the Lausanne Treaty and Turkish Constitution. On the other hand, it is difficult to say that legal issues concerning associative abilities of non-Muslim communities have been freed from national security concerns subject to the national and international political context and brought closer to focus on its dimensions as a right to association and a right to collective dimension of freedom of religion or belief.

(a) New Foundations

Legislation pertaining to the establishment and administration of new foundations is relevant for our assessment of the adequacy of new foundations as a functional form of legal personality in the exercise of the collective dimension of freedom of religion or belief. The new Law on Foundations,[876] does not include an explicit prohibition of the establishment of foundations with a religious intent. Yet, Article 101 (4) of the Civil Code, prohibits the establishment of a foundation "contrary to the characteristics of the Republic as defined by the Constitution, Constitutional rules, laws, morals, national integrity and national interest, or with the aim of supporting a distinctive race or *community*".[877] The prohibition of the establishment of foundations dedicated to the support of a belief community is potentially problematic because it may be interpreted in a way to prohibit the establishment of foundations with a religious purpose or dedicated to support the activities of a certain religious community, especially if the purpose of the foundation goes beyond support for a specific building or institution set aside for religious purposes.[878]

There appears to be an inconsistency in the way the administrative authorities and high

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European Union membership process and to take a preventive measure against the applications pending at the ECtHR. Kurban and Hatemi, *supra* note 65, p. 24. On the other hand, the AK Party government's approach to non-Muslim minorities (albeit strictly toward those who are remnants of the Ottoman millets) demonstrates signs of being based on tolerance, somewhat inspired by the Ottoman practice, and this might also explain the reforms or their justification.

[876] *Supra* note 135.

[877] Emphasis mine, community, *cemaat* in Turkish, signifies a religious community.

[878] It will be remembered that this provision is not evoked to close the community foundations established before the Republic since they enjoy a special protection based on Turkey's obligations under the Lausanne Treaty.

courts have dealt with the compatibility of the establishment of foundations dedicated to supporting religious and other activities of members of certain belief communities and Article 101 (4) of the Civil Code. The cases of the Istanbul Protestant Church Foundation (Istanbul Protestan Kilisesi Vakfı-IPKV), Kurtuluş Churches Foundation (Kurtuluş Kiliseleri Vakfı- KKV) and the Seventh Day Adventists Foundation (Yedinci Gün Adventistleri Vakfı-YGAV) illustrate the ambiguity in law and practice and their restriction on the associative abilities of belief communities perfectly. The IPKV,[879] was established by a court decision and its aim as stated in its founding deed is "to meet the religious needs of citizens affiliated with the Protestant faith and foreigners residing in Turkey who are affiliated with the same religion".[880] In the case of the IPKV the VGM appealed the first instance court decision and took the case to the High Court of Appeals, yet the latter upheld the decision concerning the establishment of the foundation.[881] It is not clear from the case report on what basis the VGM opposed the establishment of the foundation.[882] The application of the KKV on the other hand was not successful.[883] The founding deed of the KKV stated in Article 3,

> The main aim of the foundation is to meet the religious needs of citizens affiliated with the Protestant faith and residents in Turkey and those living in Turkey affiliated with the same faith, ensure their educational, social and cultural development within the framework of freedom of religion or belief, and by providing every kind of material and moral support and to provide supportive services to people in need and those affected by natural disasters.[884]

The application was rejected on the basis of the prohibition of Turkish Civil Code Article 74,[885] that prohibits the establishment of a foundation with the purpose of supporting a certain denomination or religious community.[886] The Court referred in its reasoning to an Opinion of the VGM, which underscores that the said foundation's aim was to "meet the religious needs of persons affiliated with the Protestant faith" and

[879] Original name, Istanbul Protestan Kilisesi Vakfı. Beyoğlu 4th Court of Civil Law, E646/1999, K530/1999, 10.11.1999.
[880] IPKV statute.
[881] Court of Appeals, 18th Chamber, E3402/2000, K5989/2000, 29.05.2000.
[882] However, the legal counsel of the IPKV submits that it was Article 74 that was invoked by the VGM in court proceedings. Interview with Murat Cano in 5 November 2011.
[883] Ankara 31st Peace Court, E819/2000, K370/2001, 12.06.2000. The decision of the first instance court was upheld by the Court of Appeals, 18th Chamber, E9599/2001, K10706/2001, 04.01.2002.
[884] *Ibid*. Decision of the Court of Appeals.
[885] At the time of the case, Article 74 of the Turkish Civil Code was the equivalent of Article 104 of the new Turkish Civil Code enshrining the prohibition of establishment of foundations with the purpose of supporting a certain race or religious community.
[886] *Supra* note 164.

that this was prohibited in the Article 74 of the Civil Code.[887] The Court recognized that the freedom of belief of persons is protected by international treaties, however, that these must be exercised in accordance with "legal norms related to public order that reflect the basic philosophy of the state".[888] Interestingly, the Court pointed out that while it is possible to critique Article 74(2) of the Turkish Civil Code in the context of abstract human rights and related regulations, because of the explicit prohibition in law, bearing in mind that the foundation deed states clearly in its Article 3 that its purpose is to meet all kinds of need of persons affiliated to the Protestant faith, it is not possible to approve the establishment of the foundation in light of national legislation.[889] While the Court observes the incompatibility of domestic law with international law, it does not go so far as to invoke Article 90 of the Turkish Constitution,[890] and give primacy to Article 9 or Article 11 of the ECHR and Article 18 or Article 20 of the ICCPR. The High Court of Appeals upheld this decision, observing that while it is possible for members of the Protestant belief who live in Turkey to establish foundations to exercise their rights to freedom of belief and religion, as protected by the Turkish Constitution, by building places of worship, carrying out necessary educational, social and cultural activities within the framework of freedom of religion or belief, the purpose of the KKVF was different, in that "it especially supports members of the Protestant community".[891] The HCA's perception of exercise of freedom of religion or belief presents a focus on facilities which may be used by religious groups. A link or focus on the religious group that may use such facilities appears to be not compatible with Turkish legislation. Yet, nowhere in legislation or jurisprudence is an explanation on the nature of this restriction, its aim, its necessity in a democratic society and whether its consequences of religious groups are proportionate to the aims pursued.

An application by the YGAV was also rejected by the Court based on the same justification as in the case of KKV. It has been observed that the primary concern of the

[887] Opinion of the VGM, No. 688, 14.03.2001.
[888] *Supra* note 164, the decision of the First Instance Court.
[889] *Ibid*.
[890] Article 90 upholds the primacy of international treaties where there is an incompatibility with national law in relation the human rights. See more in Chapter 5.
[891] *Supra* note 164, the decision of the Court of Appeals.

High Courts in KCF and YGAV have been the protection of public order and security.[892] In the Turkish judicial practice, there have been situations where non-judiciary actors have tried to influence the decisions of courts.[893] In the cases of KKV and YGAV missionary activities and Turkey's identification of it as a national threat,[894] may constitute the decisive element. However, since the judgment does not include a discussion of these issues as a basis for restrictions it is not possible here to discuss substantively the validity of this argument. Despite an almost identical founding deed with the IPKV, the YGAV's attempt to establish a foundation was thwarted. This raises the question of whether the decision of the Court is based on conjecture.[895] It will be very interesting to see the proceedings on the case of the YGAV which is now pending with the ECtHR.[896]

A case dealing with an Alevi foundation demonstrates how the High Court of Appeals chose to resolve competing interests. The case deals with an objection to the establishment of the Anatolian Science Culture and Cem Foundation (Anadolu Bilim Kültür ve Cem Vakfı- ABKCV) where the VGM objected to the words "Alevism", "Cem",[897] "Halk semahları",[898] arguing that the purpose of the foundations "to research Alevism in a scientific manner, transmit it to young generations" would lead to support of a certain religious community (the Alevi community).[899] The High Court decided that the removal of the word "Alevi" would weaken the purpose of the foundation and it is

[892] Interview with Murat Cano, legal counsel for the YGAV, 5.11.2011. In the case of YGAV, the VGM and legal counsels from the Prime Minister's Office presented the argument that the establishment of this foundation would be detrimental to public order and public security because of the missionary activities of this group.
[893] Some examples concern briefings given by military personnel to judges in the 28 February process in 1997.
[894] Turkey has identified missionary activities as a national threat in National Security Memorandum adopted by the National Security Council in December 2001 session.
[895] Macar and Gökçatı also argue that in Turkey, freedom of religion or belief issues are never seen as solely as such, but are highly political issues. In particular, in the study about the Future of the Heybeliada Theological Seminary, they argue that the demands for opening the Seminary are always seen steps to divide the integrity of Turkey and a threat to the country's future. See, Elçin Macar and Mehmet Ali Gökaçtı, *Heybeliada Ruhban Okulu'nun Geleceği Üzerine Tartışmalar ve Öneriler* [Discussions and Recommendations on the Future of the Halki Theological School], (TESEV, 2005).
[896] *Altınkaynak and Others v. Turkey*, 22 March 2006 (communicated), European Court of Human Rights, No. 12541/06.
[897] Cem rituals, religious practices performed by adherents of Alevi-Bektaşi, a belief system based on admiration for Ali, the fourth caliph after the prophet Muhammed.
[898] Semahs can be described as a set of mystical and aesthetic body movements in rhythmic harmony.
[899] Court of Appeals, 18th Chamber, E1995/717, K1995/1097, 31.01.1995.

not possible to say that this word, which conveys a fact in the society, expresses anything unlawful. As for the word "cem", since it refers to muted meetings among the Alevi, the Law on the Closure of Dervish Lodges was not applicable.[900] Lastly, the High Court held that the "halk semahı" is known as a cultural activity hence legally speaking there was not problem.[901] It seems that, in order to facilitate the establishment of the foundation, the High Court chose to focus on the cultural dimensions of the foundation's purpose and disregard, even downplay, its religious dimensions, particularly those related to manifestations of religion in worship through *cem* (gathering) for worship purposes. The fact that the establishment of the foundation could not be justified as a right under freedom of religion or belief indicates, among others, the vague and weak protection of the collective dimension of freedom of religion or belief.

In practice, the rule concerning the ban on the establishment of *vakıf* institutions with the purpose of supporting a certain religious community may have its exceptions. The Turkish Diyanet Foundation (Türkiye Diyanet Vakfı - TDV), which is a foundation under the Civil Code, established in 1975 with the purpose of fostering knowledge of Islam, building mosques, and doing charitable work.[902] The purpose of the TDV has not been challenged by courts or administrative authorities. Taking into account that "fostering knowledge of Islam and building mosques" would benefit a certain community, namely Muslims, how is the purpose of the TDV reconciled with the prohibition found in Article 101 (4) of the Turkish Criminal Code which stipulates that one cannot establish foundations that aim to support a certain race or community (religious community)?[903]

Even if members of belief groups manage to establish foundations, for small communities the management of a foundation proves to be burdensome financially and administratively. The reason for this is that managing a foundation requires legal

[900] *Ibid*.
[901] *Ibid*.
[902] With an amendment made in its endowment deed in 1993 this Vakıf re-oriented itself to ministry to Muslims abroad. Türkiye Diyanet Vakfı [Turkish Diyanet Foundation], Activity Report, 1995-1997 (Türkiye Diyanet Vakfı Publications, 1997).
[903] Türkiye Diyanet Vakfı statute.

and accounting know-how as well as financial resources.[904] These include detailed declarations related to finances and activities.[905] Foundations have to conduct internal auditing, or have it done through independent external financial auditors, but in both cases the auditors must have a certificate required by the VGM.[906] For small communities it might not be possible to have skilled persons who can acquire the required certificate for auditing and expensive to hire an external auditor. Taking into account the burdensome administrative requirements involved in managing foundations and the heavy risk of repercussions that may follow, it does not seem possible to manage a foundation without legal counsel and accounting support. These burdensome processes cast doubt on the suitability of foundations as a legal entity formula in the exercise of the collective dimension of freedom of religion or belief.

The oversight of the VGM also constitutes a significant shortcoming of the foundations formula. For years, VGM has been the state agency empowered to take control of foundations that allegedly were not being used for their original purpose or did not have a legally constituted board.[907] Hatemi points out that the VGM "feels obligated to open court cases" for the dissolution of foundations and the removal of the managers of foundations upon receipt of memorandums from security institutions.[908] The VGM the central body dealing with foundations, can apply to the court against this approval.[909]

In conclusion, the suitability and adequacy as well as accesibility of the foundation formula needs to be questioned in the context of the enjoyment of the right to freedom of religion or belief and the right to property. The foundation provides an *indirect* arrangement for property ownership and the financing of related activities

[904] In addition to the initial endowment the running of a foundation also involves costs, including financial fines in cases where foundations fail to fulfill all management tasks required by the VGM.
[905] Vakıflar Yönetmeliği [Regulation on Foundations], Articles 34-38.
[906] *Ibid*. In order to have the certificate by taking a test, which is provided by the VGM one must be a certified accountant or have worked at the VGM as a lawyer, inspector for five years Regulation on Foundations, Article 43.
[907] Nurcan Kaya, *The Right to Association of Groups That Advocate for the Rights of Minorities in Turkey*, Euro Mediterenean Human Rights Network, p. 37.
[908] Hatemi, *supra* note 67, p. 811.
[909] *Supra* note 151, Article 103 of the Turkish Civil Code.

(place of worship, charitable activities, etc). However, there are many obstacles with registering property indirectly, in the name of a foundation when compared to owning it directly,[910] as it has been demonstrated above. While it may be possible to carry out some religious activities through foundations, even as such, the extensive supervision of the VGM gives rise to a situation where the foundation system for religious communities compromises autonomy and makes them vulnerable to interference by the state, such as the confiscation of property. In addition, the management of foundations is a highly burdensome process not compatible with a facilitative approach by states.

(b) Associations

The establishment of an association is another legal entity option that is available for members of belief communities. Still, the possibility for members of belief communities to establish ordinary associations with religious purposes is a relatively recent development. The Law on Associations that was adopted in 2004 in accordance with the 4th Harmonization Package in the context of the European Union Accession process omits the explicit prohibition on establishing associations based on certain religion or denomination that was found in the previous law.[911] The association formula, however, is not an option that is designed particularly as a legal entity through which religious activity may be conducted or with particular reference to the nature and needs of religious communities in the exercise of their right to manifest their religion or belief together. An association is a private law legal person that is formed by real or legal persons for the objective of realizing a certain purpose by bringing together their knowledge and efforts and that is not contrary to law.[912] The current Civil Code and the Law on the Associations do not explicitly bar members of religious communities from establishing associations with religious purposes. There is no explicit prohibition in the Turkish Civil Code analogous to that which applies to foundations in

[910] The Council of Europe Venice Commission, *supra* note 15, para. 37.
[911] The previous Law on Associations No. 2908, O.G. No. 18184 07.10.1983 was a remnant of the 1980 military coup. Article 5 of the said law contains far-reaching restrictions clause which explicitly prohibits the establishment of associations "based on certain religions or denominations or for the purpose of acting on behalf of them".
[912] Dernekler Kanunu [Law on Associations] No. 5253, 04.11.2004, R.G. No. 25649, 23.11.2004, Article 2. Article 56 of the Turkish Civil Code.

Article 101 (4) of the Civil Code. The Turkish Civil Code stipulates that associations "contrary to law and morals may not be established.[913]

In the context of freedom of religion or belief, the association formula has been utilized as a step for the building of worship places; associations are, often, established for the purpose of constructing places of worship. The function of associations as supporters of the construction of worship places other than mosques may have been inspired by the common practice of establishing associations for the construction of mosques.[914] However, there appear to be serious limitations and ambiguities of this formula, which create a lack of clarity and foreseeability as to the application of law. The application of the LA becomes particularly ambiguous in relation to places of worship. The association option has been used by a number of belief communities, such as the Alevi, the Protestant churches and Jehovah's Witnesses. [915] Members of the Protestant community welcomed the possibility of establishing associations since it seems to have opened a route to acquire a *certain* legal entity status as well as providing a first step for the establishment of places of worship.[916]

On the other hand, while the association formula may open the way for carrying out certain activities and thus meet some of the associative needs of these long-established belief communities it is not designed as a form of religious institution or a legal entity status for a belief community. The association formula does not seem suitable for the organizational and institutional set-up of churches such as the Orthodox Patriarchate and the Armenian Patriarchate, or the Chief Rabbinate. The reason for this is they are not individuals coming together to accomplish a certain goal, which is the rational of the ordinary association. They are leaderships of assumed communities, the members of which change all the time- yet the "assumed" community, *per se*, remains. In addition, in light of the ambiguity of the nature of their

[913] Turkish Civil Code Article 56.
[914] It is a common practice to establish associations with the purpose of building mosques, including he collection of money for the funding of the constructions and the project management of the construction. There are numerous examples of "Cami Yaptırma Derneği" (Association for the Building of a Mosque) in Turkey.
[915] See for example, a report by The Association of Protestant Churches, " 'A Threat' or Under Threat? Legal and Social Problems of Protestants in Turkey", 2010.
[916] *Ibid*., p.5.

legal entity status, it is likely that they could not establish an association in any case. It has been observed that some of the churches and communities may not consider it proper to register as ordinary "associations", on par with and under the same regulations and conditions as for example fitness clubs and automobile associations.[917]

There are a number of features of the LA and its Regulation, that raise questions on the level of protection of the right to association as well as the right to manifest religion or belief. These give rise to increased interference by the state in the associative activities of belief communities who opt for the association possibility. The number of real or legal persons that are needed for the establishment of an association is seven and must increase to fifteen by the end of the first year of the association.[918] The minimum number of founding members ranges between 2-5 in European countries.[919] This number may be a restrictive element that is incompatible with Article 18 of the ICCPR and Article 9 in light to Article 11 of the ECHR. The incompatibility becomes more evident when one considers belief communities that are very small and whose members may not wish to disclose their religious affiliation due to fear of discrimination and repression.

The required manner of operation for associations is highly burdensome; *inter alia*, associations have to keep six different books plus three others for taxation and financial auditing purposes,[920] the books must be kept in Turkish,[921] and the books must be approved by the City Directorate of Associations or the notary,[922] the manner in which general assemblies are made are regulated in detail and a copy of the general conclusions declaration must be sent to the highest administrative authority in the city.[923] Associations must provide the civilian authority with a written statement on their national and international activities, personnel, financial situation, property etc. on a yearly basis, then these are audited by the city governorship or the Interior

[917] The Council of Europe Venice Commission, *supra* note 15, para. 43.
[918] Article 2. The number must increase to 15 within the first year.
[919] TÜSEV, Türkiye'de Derneklerin Örgütlenme Özgürlüğü Önündeki Engeller [Obstacles Before the Right to Freedom of Association of Associations in Turkey], (2010), p. 19.
[920] Article 32 of the Regulation.
[921] Article 33 of the Regulation.
[922] Article 36 of the Regulation, such approvals also give rise to high costs.
[923] Articles 13, 14, 15, 16, 17 of the Regulation.

Ministry.[924] Acceptance of donations or aid from outside of Turkey is closely monitored by the state through the requirement of a notification of civilian administration before the receipt of the aid.[925] This process is burdensome on minority associations, including religious groups, which have scarce resources, including human and financial resources as well as necessary know-how.[926] The European Commission Progress report also notes that some of the requirements are subject to controls that do not observe proportionality.[927]

Despite the absence of an explicit prohibition of establishment of associations with a religious intent, the general requirement that the establishment of associations must be in accordance with the law combined with the particular interpretation of the principle of secularism creates a lack of precision and foreseeability of whether associations with religious purposes can be established and if they are established, whether their activities may be found illegal at some point. An example of this was demonstrated in 2005, when Jehovah's Witnesses tried to set up an association with "religious, informational and charitable" purposes.[928] The authorities rejected this on the ground that it was against Article 24 of the Constitution.[929] However a first instance court decided that the stated purpose was not in breach of Article 24, and rejected the claim to close the association.[930] A recent application to set up a foundation which inter alia aimed to carry out some religious and educational activities for Armenians was

[924] Article 83 and 84 of the Regulation.
[925] Article 21 of the Law on Foundations and Articles 18, 19 and 20 of the Regulation. The notification must be accompanied by protocols and other documents exchanged between the association and the aiding organization.
[926] A relatively recent report examining the right to association demonstrates that the burdensome financial and auditing requirements constitute a significant problem for associations established by members of various minority groups. Report of the Euro-Mediterranean Human Rights Network, Freedom through Association, September 2011.
[927] European Commission Turkey Progress Report 2010.
[928] Interview with a representative of the JW community, April 2012.
[929] Article 24 of the Turkish Constitution regulates freedom of religion. The first three paragraphs are on the nature of this freedom, while the last two set down certain restrictions, namely that: (4) Education and instruction in religion and ethics shall be conducted under state supervision and control. Instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools. Other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representatives. (5) No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political influence, or for even partially basing the fundamental, social, economic, political, and legal order of the state on religious tenets.
[930] Bakırköy 9th Peace Court, K2010/225, 24.05.2010.

rejected by the 5th Court of First Instance in Istanbul relying on Article 101/4 of the Civil Code, which forbids setting up foundations that aim to support members of a specific race or community.[931]

The nature of religious activity that can be carried out within the legal structure of an association and in its premises is not clear. This was demonstrated in a case against a private person, E.L.D., in relation to alleged church activity in the Word of Life (Hayat Sözü Derneği - HSD) premises.[932] Allegedly, she had accepted that the premise was used as a "house church" to the policeman who came to the association premises for investigation.[933] During the trial E.L.D. contended that she did not say that she was engaged in "house church activity" and that her activities were in line with the purposes of the Association that were found in its statute, namely, "to meet the needs of believers affiliated with the Christian Protestant faith".[934] The case was dismissed because the defendant refused the allegation that the premises were used as a "house church".[935] Even though the premises were not officially assigned or recognized as a place of worship, some of the activities, apparently, seemed similar to activities that one might expect to see in a church. Yet, it must be noted that a number of Protestant associations have been served notifications and in some cases they have been fined for using their respective association buildings for worship purposes.[936] Yet, an association may be established to built a place of worship, but the designation of such a place as a place of worship requires a different process.

The supervision of associations through the Directorate of Associations under the Ministry of Interior may be considered a component of the association formula that weakens the suitability of this option for belief communities by increasing the vulnerability of belief communities against unjustified state interference and

[931] Batman Çağdaş Daily, "Sasonlu Ermeniler AİHM'e gidiyor" [Armenians from Sason are Going to the EctHR], 09 March 2011. http://www.batmancagdas.com/sasonlu-ermeniler-aihme-gidiyor-h12830.html accessed 16.01.2015.
[932] *Ibid*.
[933] *Ibid*.
[934] *Ibid*.
[935] *Ibid*.
[936] Interview with Umut Şahin, General Secretary of the Association of Protestant Churches, February 2011.

diminishing the autonomy of belief communities. The case of an Alevi association, Association for the Construction of Çankaya Cemevi (Çankaya Cemevi Yaptırma Derneği, CCYD hereafter), illustrates this point; the CCYD which referred to their worship place *cem* house,[937] as a place of worship in its statute has been the subject to a legal dispute.[938] The Ministry of Interior, asked the Directorate of Associations to request the Alevi Association to remove the reference to *cem* houseas a place of worship.[939] The request was based on an opinion of the Presidency of Religious Affairs of the Prime Minister's Office, which asserts that Muslims worship in mosques, thus ruling out the possibility of the reckoning of the *cem* house as a place of worship. The case raises issues on the interference in the internal affairs, not least the building and maintenance of places of worship in accordance with the particular dogma of the belief community and the neutrality of the state. The case has been decided in favor of the association by the Court's rejection of the request for closure,[940] yet in contrast, considering the same case and overturning its decision, the High Court of Appeals referred to the Law No. 677 saying that it closes *tekke* and *zaviye*, however, allows the existence of mosques and *mesjid* and thus decided that the statute of the association is contrary to law. Although the Law No. 677 does not refer to *cem* houses, when considering the legitimacy of referring to *cem* house as a place of worship.[941] The High Court of Appeals also recalled the status of Law No. 677 and has said that none of its provisions may be interpreted in a way to be understood to be incompatible with the provisions of the Constitution.[942] The HCA interprets the Law. No. 677 in a way to mean that no Islamic place of worship other than a mosque or *mesjid* may be established.[943] It does not consider the *cem* house as an equivalent of *tekke* or *zaviye*. The HCA also recalled that no provision of Law No. 677, which seeks to protect secularism, contrary to the Turkish Constitution. The reasoning also recalls that the Diyanet is tasked with the management of places of worship and mosques and *mesjid* may be opened with

[937] Alevi community commonly worship in *cemevi* rather than mosques.
[938] Decision of the Ankara 16th Peace Court, 05.10.2011.
[939] Mine Yildirim, "TURKEY: The right to have places of worship – a trapped right", 2 March 2011, accessible at http://www.forum18.org/Archive.php?article_id=1549 accessed 16.01.2015 .
[940] *Supra* note 219.
[941] Radikal, "Yargıtay Cemevine Kapıyı Kapattı" [Court of Appeals Closes the Dorr to Cemevi], 25.07.2012.
[942] *Ibid*.
[943] Court of Appeals 7th Chamber of the Civil Division, E2012/262 and K2012/3351, 10.05.2012.

the permission of the Diyanet.[944] Thus it is inferred from the permission to operate mosques and mesjid that no Islamic place of worship other than these may be lawful. Thus reference to an "unlawful" place of worship leads the HCA to conclude that the statute of the association is contrary to law and therefore necessitates the dissolution of the association by a court decision.[945] Interestingly, while numerous previous administrative or judicial decision relied on the Diyanet Opinion, in this reasoning HRC does not refer to the Diyanet Opinion to the effect that Muslims worship in mosques. The reason for this may be to strive for a reasoning that is based on legislation instead of a theological opinion thus, perhaps, taking into account public criticism generated by taking into account Opinion of the Diyanet in the decisions of public authorities.

There are significant flaws in the construction of the reasoning by the HRC. The HCA did not consider the question of whether *cem* houses and *tekke* and *zaviye* are identical or not. If they had concluded that *cem* houses are identical to *tekke*, it would not be possible to allow their existence of *cem* houses without amending Law No. 677. The HRC, however, concludes that only "mosques and *mesjid*" are allowed and this is based on the reference in Law No. 677 to allowing mosques and *mesjid* to remain where *tekke* and *zaviye* are used for these purposes. In addition, the Diyanet is given the mandate to operate only mosques and *mesjid*. Since cem houses are not considered as *tekke* these are not prohibited as such. This is also evident in the fact that there are hundreds of cem houses operating in the country and they are not closed or considered illegal.[946] Thus their existence is not contrary to law. The fact that the Diyanet is given the task to administer mosques and mesjid does not necessarily mean that no other Islamic places of worship is allowed. Indeed, it only means that if there are Islamic places of worship other than mosques or *mesjid*, the Diyanet does not have a mandate to operate them. Therefore the decision to consider the reference to *cem* house as a place of worship is not based on law.

[944] Article 35 of the Law No. 633 Diyanet İşleri Başkanlığı'nın Kuruluşu ve Görevleri Hakkında Kanun [The Establishment and Mandate of the Presidency of Religious Affairs), 22.06. 1965.
[945] Article 89 of the Civil Code stipulates that when the purpose of an association becomes contrary to law and morals a court will decide its dissolution.
[946] According to official figures there are 937 cem houses. T24, "CHP'li Aygün, Bilgi Edinme Yasası kapsamında Türkiye'deki cemevlerinin sayısal profilini ortaya çıkardı" [CHP's Aygün used Freedom of Information Law to Find out Cemevis' Quantitative Profile in Turkey], 15 March 2013.

The reasoning does not include any reference to the right to freedom of religion or belief, not does it consider the consequences of the denial of the recognition of the cem houses as places of worship for the association or the Alevi community.

The association option has also been used to a limited extent by the traditional non-Muslim communities that have existed in Turkey before the Republic was established. Members of the Greek Orthodox community have established RUMVADER association which was established with the purpose of coordinating the support for the community foundations dedicated to meet the needs of the Greek Orthodox community.[947] Some members have expressed that there is a certain hesitation on the part of the community to join the association as members based on a fear that there will be government intrusion in their activities.[948]

Consequently, the association does not provide a means for religious or belief groups to acquire legal personality, as such. Overall, however, the association formula appears as a useful *auxiliary* legal entity option that *members* of religious communities may avail themselves from. The burdensome bureaucratic processes it involves, the strict oversight of public authorities, the unclarity of acts that can be performed under the association structure appear as elements that diminish the effectiveness of this formula.

6.5. Assessment of the compatibility of Turkey's legislation and practice with international law

The purpose of this Chapter has been to review Turkish legislation and practice on the right of belief communities to acquire legal personality and make an evaluation of their compatibility with Turkey's international law obligations. International standards related to legal personality of belief communities have been reviewed in Chapter 3 in detail, below is a succinct recollection of the essential framework within which an assessment of the Turkish case will be made.

[947] Interview with a member of the executive board of the RUMVADER, 12 March 2011.
[948] *Ibid*.

The right to acquire legal personality is an integral part of the effective protection of the right to freedom of religion or belief directly linked to the rights to association, judicial protection and property. Article 9 of the ECHR and Article 18 of the ICCPR guarantee believers the right to manifest their religion or belief either alone or in community with others. As the ECtHR held: "religious communities traditionally and universally exist in the form of organized structures".[949] Therefore the organizational aspects of religious communities' activities are inseparable from Article 9. The ECtHR also observed the significance of ensuring the collective dimension of freedom of religion or belief saying, "Were the organizational life of the [religious] community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable".[950] Many acts representing the organizational life of belief communities are listed by the HRC as protected under the right to manifest religion or belief, such as, *inter alia*, worship including ritual and ceremonial acts, the building of places of worship, the display of symbols, and the observance of holidays and days of rest, freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.[951] In the case of the *Metropolitan Church of Bessarabia and Others v. Moldova* it was observed that not being recognized, the Church could not operate, its priests could not conduct divine service, its members could not meet to practice their religion and, not having legal personality and that it was not entitled to judicial protection of its assets.[952] As demonstrated in Chapter 3, more often than not, in domestic legal systems, legal personality is a crucial pre-condition for many activities that belief communities engage in, in the manifestation of their religion or belief as well as a way of direct exercise of rights by belief communities. Therefore, practically speaking, there is a positive obligation on the part of states to create an adequate legal framework for acquiring legal personality. This

[949] *Hasan and Chaush v Bulgaria*, 26 October 2000, European Court of Human Rights, No. 30985/96, para. 62.
[950] *Ibid*.
[951] Human Rights Committee, General Comment 22, Article 18, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994), para.4.
[952] *Metropolitan Church of Besserabia v. Moldova*, 13 December 2001, European Court of Human Rights, No. 45701/99, para. 105.

positive obligation was recognized explicitly the ECtHR' jurisprudence; "there is a positive obligation incumbent on the State to put in place a system of recognition which facilitates the acquisition of legal personality by religious communities".[953] This must be coupled with the absence of arbitrary and undue interference by the state in this process.

The European Court has also relied on the right to association. The ECtHR held in the case of *Hasan and Chaush v. Bulgaria* that,

> Where the organization of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards the associated life against unjustified State interference. Seen in this perspective, the believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention.[954]

The refusal by state authorities to grant legal entity status to an association of individuals amounts to an interference with the right to freedom of association.[955] This is also applicable to religious communities. The Guidelines prepared by the ODIHR and the Venice Commission, although not legally binding, state that restrictions on the right to legal personality for the religious communities are "inconsistent with both the right to association and freedom of religion or belief".[956]

The denial to acquire legal personality results in the impossibility for belief communities to access courts with direct legal capacity and benefit from judicial protection. The ECtHR addressed this problem eloquently by observing that, "one of the means of exercising the right to manifest one's religion, especially for a religious community, in its collective dimension, is the possibility of ensuring judicial protection of the community, its members and its assets, so that Article 9 must be seen not only in the light of Article 11, but also in the light of Article 6".[957] Thus the denial of legal entity status may result in an infringement of Article 6 (1) of the European Convention.

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[953] *Magyar Kereszteny Mennonita Egyhaz and Others v. Hungary*, 8 April 2014, European Court of Human Rights, Nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12, para. 90.
[954] *Hasan and Chaush v Bulgaria*, *supra* note, 230, para. 62.
[955] *Sidiropulous v. Greece*, 10 July 1998, European Court of Human Rights, No. 26695/95.
[956] Venice Commission-OSCE *Guidelines for the Review of Legislation Pertaining to Religion or Belief*, *supra* note 3.
[957] *Metropolitan Church of Besserabia v. Moldova*, *supra* note 233, para. 118.

The denial of legal personality or capacity to own, renders the right to property meaningless for belief communities.

The inhibition in the Turkish legal system that denies belief communities the right to acquire legal personality, as such, results in the infringement of a number of human rights. The denial by Turkey to allow belief communities to acquire legal personality results in the impossibility of belief communities to *directly* exercise certain key aspects of their right to freedom of religion or belief, in particular many aspects of its collective dimension. Thus leading to an interference in the right to manifest their freedom of religion or belief in conjunction with the right to association. A number of examples of recognition of legal personality of belief groups or their representatives in some court cases have been presented above, yet they fail to provide a adequate legal framework. Since belief communities cannot acquire legal personality, they cannot exercise certain key aspects of the right to freedom of religion or belief *directly* and *effectively*. This means that a belief community cannot for example directly purchase or own a place of worship or even open a bank account.

In order to acquire a limited form of legal personality, members of belief communities must establish foundations or associations which provide only indirect access to the enjoyment of fundamental rights. This formula allows some of their members to establish foundations or associations and, indeed may be instrumental in meeting certain needs related to worship, practice and teaching. However, these will not be exercised directly by the belief community as such, i.e. the community will not be the owner of a place of worship. It has been demonstrated above that the foundations formula and the association formula involve significant degree of state supervision and interference as well as risk of discrimination based on religion. These formulas only allow the foundation or association to exercise the right to ownership as entities that are distinct from the belief community itself. Also, it has been explained in the relevant sections above, that the requirements for the maintenance and operation of foundations and associations have been and still are subject to various legislative and administrative measures that entail high risk of arbitrary and unjust interference by the

state. Hence foundations and associations run a high risk of losing control over property. Whereas an appropriate legal entity status particularly drawn up for belief communities must protect the right of belief communities to own property without undue state interference. Moreover, the right to freedom of religion or belief is rarely considered by the Turkish judiciary in the assessment of cases pertaining to associations and foundations even though there are significant implications for FORB.

The Venice Commission's Opinion does not consider the availability of alternative legal entity status as an adequate formula:

> The fact that leaders and members of a religious community can use alternative forms of organizing their religious life different from establishing an association with legal personality does not change the legal situation. The mere fact that the religious community concerned may have certain alternatives available to compensate for the interference resulting from State measures, while it may be relevant in the assessment of proportionality, cannot lead to the conclusion that there was no State interference with the internal organization of the community concerned.[958]

Indeed, the association and foundation formulas may be seen as, only, auxiliary options for religious or belief communities and not as substitutes for an adequate form of legal entity status necessary for the exercise of the collective dimension of freedom of religion or belief.

The general obstacle before acquisition of legal personality as belief communities and the limitations of existing associative possibilities, such as foundations and associations, in the Turkish legal framework constitute interference in the right to manifest one's religion or belief in community with others. The question then is whether such interference may be justified under international provisions protecting freedom of religion or belief. This assessment is bound to be a hypothetical one since the Turkish Government is not in a position to present their arguments for this interference.

The ECtHR considers that states are entitled to verify whether a movement or an association "carries on, ostensible in pursuit of religious aims, activities which are

[958] The Council of Europe Venice Commission, *supra* note 15, para.55.

harmful to the population or public safety."[959] Hence supervision or monitoring of activities of legal entities established by belief group may not be deemed incompatible with the protection of the right to freedom of religion or belief. Nevertheless, a general ban on or denial of acquisition of legal personality by belief groups as such seems incompatible with the protection of the right to freedom of religion or belief and the right to association.[960] Particularly when many peaceful religious groups are subject to infringement on a number of rights as it has been observed in this Chapter. Indeed it is expected that communities of believers should be ready to "practice their faith within the constitutional framework of their states."[961]

On the other hand, Turkey may argue that the denial is justified considering that such association based on religious affiliation may pose a threat to secularism and public order. It may be, indeed, reasonable to foresee a situation where groups of believers organize themselves as a legal entity which is strictly opposed to a secular nature of the state or which seek the creation of divisions in the country based on religious affiliation. In such a case however, Turkey would not be *unguarded* since it is possible to restrict the right to manifest religion or belief and the right to association by law, in pursuit of the protection of public order or the rights and freedom of others in a democratic society in a manner compatible with respective restriction clauses found in relevant provision. It has to be remembered that the purpose of the international provisions on the right to manifest religion or belief is to protect the rights of the individuals rather than the protection of state interests. In cases where state interests mandate the restriction of fundamental human rights these must be in strict compliance with the relevant restriction clauses enshrined in the ECHR and ICCPR. A categorical denial of acquisition of legal personality, particularly when considering the effect such denial has on the rights to freedom of religion or belief, right to association, right to judicial protection and right to property, seems not proportional to the aim pursued. Therefore such denial is not in harmony with the protection scheme the

[959] *Maunussakis and Others v. Greece*, 13 December 2001, European Court of Human Rights, No. 45701/99, para. 40; *Stankov and the United Macedonian Organization Ilinden v. Bulgaria* Nos. 29221/95 and 29225/95 para. 84.
[960] This view is also expressed by the Venice Commission, *supra* note 15, para. 65.
[961] The OSCE Vienna Concluding Document Article 16.3.

international provisions on freedom of religion or belief.

The formulation of a legal entity for belief communities that takes into account the nature of belief communities and their activities will bring Turkey closer to complying with international human rights obligations. In this regard, the Venice Commission recommended that Turkey provides a legal framework that would allow the non-Muslim religious communities, as such, adequate access to court and the right themselves to hold property, without having to do this through the foundation model.[962] Surely this recommendation is valid for any belief community, Muslim and non-Muslim.

6.6. Toward the formulation of a legal entity status for belief communities

The OSCE-Venice Commission guidelines for the assessment of legislation pertaining to religious freedom are applicable for the creation of such a category. Hence if/when Turkey drafts legislation on legal entity status of religious or belief communities these principles should be followed:

> legal In general, out of deference for the values of freedom of religion or belief, laws governing access to personality should be structured in ways that are facilitative of freedom of religion or belief; at a minimum, access to the basic rights associated with legal personality – for example, opening a bank account, renting or acquiring property for a place of worship or for other religious uses, entering into contracts, and the right to sue and be sued – should be available without excessive difficulty.[963]

The possibility and need to establish *supra* bodies with certain functions such as coordination or oversight of legal entities formed by belief communities and/or formed by members of belief communities as well as the nature of such bodies are questions that must be addressed when creating an adequate legal framework for the protection of the collective dimension of freedom of religion or belief. A report prepared by a group of members of the Armenian Apostolic community states the purpose of the recognition of legal personality for minorities:

> The purpose is to ensure that the assets of the community are protected through central

[962] The Council of Europe Venice Commission, *Opinion on the Legal Status of Religious Communities in Turkey*, 15 March 2010, *supra* note 15, para. 71.
[963] OSCE-Venice Commission *Guidelines for the Review of Legislation Pertaining to Religion or Belief*, *supra* note 3.

coordination, planning and inspection, that the fate of institutions are not left alone to the goodwill of independent foundation management, the prevention of waste of resources, and that these are used appropriately in accordance with their purposes.[964]

A draft law proposal prepared by Prof. Hüseyin Hatemi foresees the establishment of certain religious *supra* bodies with certain functions that may create coordination with community foundations.[965]Accordingly, the *supra* bodies include the Istanbul Orthodox Patriarchate, Istanbul Armenian Orthodox Patriarchate, Rabbinate of Turkey and the Syriac Deputy Patriarchate of Turkey.[966]

Whether *supra* bodies will be of religious nature appears as an immediate question to be solved. If religious communities formed religious institutions it would be reasonable to expect that the supra bodies that might be established would be also be of a religious nature. Yet, considering the non-Muslim minorities in Turkey which are also ethnic minorities, in particular, Greeks, Armenians and Jews, they also have a non-religious dimension to their associative activities. These may include hospitals, schools, old-people homes etc. which have evolved to gradually exclude their religious ethos. Community foundations that benefit such community endeavors may well prefer to be organized under a non-religious supra body. Yet, historically the religious heads of their communities have also been the heads of these institutions. In fact as it has been discussed in Chapter 5 The Lausanne Treaty refers to the minority beneficiaries as non-Muslims and not as ethnic groups. This issues remains as an unresolved matter and has been increasingly subject of discussion among the so-called Lausanne minorities. A solution that permits the establishment of non-religious supra bodies that may have oversight and coordination functions over community foundations that provide resources for activities that are not of a strictly –religious nature seems reasonable. Similarly, a legal framework that permits the establishment of *supra* religious bodies,

[964] Non-Muslim Minorities Report, K. Döşemeciyan, M. Bebiroğlu, Yervant Özuzun, February 2011, http://hyetert.blogspot.com/2011/02/musluman-olmayan-azinliklar-raporu-2011.html accessed 16.01.2015.
[965] Hatemi, *supra* note 67, p.812.
[966] As for Turkish citizen who are affiliated with the Catholic denomination, Hatemi's proposal includes the establishment through a special law of a Union of Foundations of the Catholic Community. For Protestant Community Foundations the related supra body will be the State Ministry responsible for the Religious Public Services unless a Union of Protestant Community Foundations, Hatemi, *supra* note 67, p. 815-817.

such as those in Hatemi's proposal above, that may assume an oversight role over community foundations or other institutions that benefit the acts that flow from the work of the religious community would be reasonable and necessary. It must be added immediately that it may not be always easy to draw the line between the work of the religious community and the work of non-religious community. Dialogue within these communities will determine the course that will be taken. What is clear, however, is that the *supra* body and its nature are questions that must be tackled in the process of creating an adequate legal framework.

In sum, the impossibility for belief groups to acquire legal personality, as such, undermines the protection of the right to freedom of religion or belief in Turkey by significantly weakening the rights to associate, assemble, own, worship, establish places of worship and schools and thus also train clergy, which constitute vital components of the right to freedom of religion or belief. It denies belief communities the right to access to court which is the *sine qua non* for effective remedy for all rights violations. It also weakens the position of belief communities *vis a vis* the state by depriving them of a legally recognized status. These manifestations would include actions, *inter alia*, electing / appointing leaders, employing religious personnel, establishing and maintaining worship places, training clergy, including the establishment of relevant schools for this purpose, engaging in charitable work, collecting donations etc.[967] From Turkey's perspective the acquisition of legal personality by belief communities, as such, appears to be incompatible with Turkey's unique circumstances. Yet, a substantiated justification is not presented for this categorical ban. The latter results in the vulnerability of belief communities as they cannot benefit from the empowering and enabling function of legal personality.

Legal entity formulas that are available for belief communities in Turkey provide an inadequate protection of the associative rights of members of belief communities that are protected by the right to freedom of religion belief and the right to association in

[967] Article 6 of the 1981 Declaration.

international human rights law.[968] They provide a certain indirect legal personality, yet, fall short of providing vital elements of effective and direct legal personality; the existing models do not allow for direct ownership by and direct representation of religious communities, particularly in the exercise of the right to access to court. Instead belief groups are obliged to own property or represent themselves in courts through an indirect institution. Such an approach fails to take into account the direct connection to and use of property by communities and the nature of belief communities. On the contrary, the existing forms of legal entity impose structures upon belief communities that do are not compatible with their nature. The available legal personality formulas then are further weakened by the fact that these indirect institutions are under the supervision of General Directorate of Associations and General Directorate of Foundations respectively. The extensive control of these institutions is further politicized by their direct relationship to the Prime Minister's Office and the Ministry of Interior respectively, thus making belief communities that benefit from these models vulnerable to internal and international political conjecture.

The quasi recognition of a certain legal personality by some court decisions and the conjectural decisions of some of the courts related to foundations and associations constitute clear signs of the lack of a clear and predictable law and uniform application of it. In addition, since the association and foundation entities are not designed as religious institutions, as such, belief communities that opt for them, always run the risk of trespassing outside their respective legal frameworks when they act like religious communities. Unclear constitute the source of lack of effective exercise and protection of the right to freedom of religion or belief in its collective dimension and the accompanying discriminatory and unsystematic administrative and judicial practice. The failure to provide an adequate legal standard inevitably results in an extensive sphere of discretion that is created for those who apply the law, both courts and administrative authorities. Such lack of clarity and unpredictability are far from the requirement of prescribed by law condition stipulated in the restrictions clauses of

[968] ICCPR Articles 18 and 22, ECHR Article 9 and 11.

Article 18 of the ICCPR and Article 9 of the ECHR Article 9. The lack of clarity results in practice that is far from uniform and many times discriminatory.

The right to acquire legal personality has not been viewed as a right protected within the scope of the right to freedom of religion or belief. Instead it appears to be viewed on the axis of secularism, national security and interests where national and international political context appear to remain important factors. Turkey's improvement of the foundation and association formulas has been limited and to a great extent depending on the European Union accession process. In order to ensure the protection of the right to acquire legal personality the adoption of rights based approach that views the issue primarily a right that Turkey has an obligation to protect is vital. Any restriction thereof must be duly justified in line with international treaty provisions.

In order to comply with her international human rights obligations Turkey must create an adequate and suitable legal personality entity for belief groups that enables and empowers them to effectively enjoy the right to manifest freedom of religion or belief in worship, teaching, practice and observance. The formulation of such a legal entity status must be informed by the nature of belief groups, their acts, their needs and include the participation of diverse belief groups in the drafting of this status and guided by the implications of international human rights provisions. The challenge in this process will remain to seek a balance between facilitating the enjoyment of the right to freedom of religion/belief by belief communities and pursuing the legitimate aim of guaranteeing that the actions of these groups do not present any danger for a democratic society and that they do not involve activities directed against the interests of public safety, public order, health, morals or the rights and freedoms of other.

Chapter 7
The Right of Religious/Belief Communities in Turkey to Freedom in their Internal Affairs

7.1. Introduction

As it has been discussed in Chapter 4, the right of religious or belief communities to freedom in their internal affairs can be an expansive right depending on the dogma and traditions of individual religions or beliefs. Accordingly, here, the purpose is not to present an exhaustive review of issues that may be raised while considering freedom in the internal affairs. This would indeed be an impossible task because of the potentially countless forms of manfestations in worship, teaching, practice and observance that are also matters of internal affairs.[969] Instead, the focus will be on four key rights that raise issues pertaining to the protection of freedom in the internal affairs in Turkey; the right to establish places of worship, the right to teach religion or belief in places suitable for this purpose, the right to elect and appoint leaders and finally the right to observe days of rest and holidays. Deliberation on these components of the collective dimension of freedom of religion or belief will provide a comprehensive review of the extent of protection conferred to the freedom in the internal affairs of belief groups in Turkey. The discussion and analysis will be based primarily on the consideration of applicable national legislation. Although this study has sought to include jurisprudence in relevant issues, it will be seen that numerous issues that are addressed have not become the subject of legal dispute. Therefore, in order to understand the manner in which legislation has been applied, and *rules of practice* when there is no directly applicable legislation, I have sought to include administrative pratice and the input of belief communities through in-depth interviews.

7.2. Freedom in Internal Affairs

[969] Here I do not follow the framework used in Chapter 4 due to limitation of space.

7.2.1. The Right to Worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes

The protection of the right to worship or assemble in connection with a religion or belief and to establish and maintain places of worship in Turkey serves as a good illustration of the nature of *de jure* and *de facto* restrictions in contrast to what appears to be a general recognition of the right to freedom to worship. There are 85,413 mosques in Turkey,[970] yet they may be only administered by the Diyanet İşleri Başkanlığı (DIB, the Presidency of Religious Affairs; hereafter the Diyanet), which means that a group of Muslims may not establish and maintain their own mosque if they wished to remain outside the Diyanet structure. The Alevi,[971] may establish cultural associations where they assemble for worship, yet these are often denied the status of a place of worship based on the Diyanet's view that "Muslims worship in mosques".[972] While relatively newer religious groups, like the Protestants and Jehovah's Witnesses, are generally tolerated by public authorities when they assemble and worship in premises they consider places of worship, so far very few applications to acquire place of worship status have been successful.[973] Tolerance implies allowing the existence of these worship places as well as the gathering for worship and not pursuing prosecution, however, tolerance does not confer any rights. The Latin Catholic community continues to lose church property—which has been in its possession over the past centuries—as a result of not having legal personality and thus not being able to prove ownership of church property.[974] The Syriac community is still waiting for its application for a place of worship which it has made in 2010 for a second church building for their community which has grown in numbers as a result of immigration from their traditional homeland in South-East Turkey.[975] These are only, some

[970] This is a 2013 figure and is taken from the statistics of the Presidency of Religious Affairs' website, http://www.diyanet.gov.tr/tr/kategori/istatistikler/136 , accessed 16.01.2015.
[971] The Alevi are a Muslim minority which combines Shi'ism with a combination of sufism. For more on the Alevi identity, see David Shankland, *The Alevis in Turkey: The Emergence of a Secular Islamic Tradition* (London and New York: Routledge, 2007) and T. Olsson, E. Ozdalga, C. Raudvere (eds.), *Alevi Identity: Cultural, Religious and Social Perspectives* (London and New York: Routledge, 1998).
[972] Opinion of the Diyanet, A Communication (No. 1773), sent by the Diyanet to the Interior Ministry on 17 December 2004.
[973] See *infra*.
[974] Interview with the representative of the Latin Catholic Church in Turkey Mr. Rinaldo Marmara, date 16 November 2012. An example is the Santa Maria Church in İzmir; since the Church does not have legal personality and thus is not able to own property. Thus all the property of the church has been transfered to the Treasury. İzmirport, 'Hz. İsa'ya Baba İsmini Sordu' [Asked Jesus His Father's Name], 28 June 2013.
[975] Interview with the Chair of the Virgin Mary Chaldean Church Foundation on 25 June 2013.

of the indicators of the problems that are encountered in the exercise of the right to establish and maintain places of worship in Turkey. As duly noted in the European Union 2012 Progress Report on Turkey there is "urgent need to continue vital and substantial reform in the area of freedom of thought, conscience and religion".[976]

Here we will examine the protection of the right to establish and maintain places of worship in the national legal system by looking at three key areas where restrictions appear. These restrictions will be assessed in light of international law standards identified in Chapter 4. The purpose is to both identify the inconsistencies between Turkish legislation and practice and international standards, as well as, to determine, if necessary, how the standard of international review may be improved. Following a presentation of generally applicable legislation the assessment will look at the following: a) Planning regulations, b) Permission of public authority, c) Legal Personality.

Though not explicitly stated, the general protection of the right to worship or assemble in connection with religion or belief and to establish and maintain places for these purposes is found in Article 24 in the Turkish Constitution:

> Everyone has the right to freedom of conscience, religious belief and conviction.
> Acts of worship, religious services, and ceremonies shall be conducted freely, provided that they do not violate the provisions of Article 14.
> No one shall be compelled to worship, or to participate in religious ceremonies and rites, to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions.[977]

Here the emphasis is on "acts of worship" and "religious services and ceremonies", in addition to an explicit protection against coercion to worship. On the other hand, acts inextricably linked to worship, such as establishing and maintaining places of worship are not

[976] European Parliament resolution on the 2012 Progress Report on Turkey (2012/2870(RSP)), para. 34. 09 April 2013, http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2013-0162&language=EN , accessed 16.01.2015.

[977] Article 24 of the Turkish Constitution, para. 1, 2, 3. Article 14 reads "None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights.
No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms embodied in the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution.
The sanctions to be applied against those who perpetrate these activities in conflict with these provisions shall be determined by law."

included. Thus the substantive content of the right to worship is established and shaped through legislation and regulations, decisions of public authorities as well as jurisprudence.

There are a number of legislative regulations that are applicable to the establishment and maintenance of places of worship. In this context, an important legislative change has been introduced by the AK Party Government in 2003 in relation to the harmonization packages for the European Union accession pro- cess which opened the way to establish places of worship other than mosques.[978] Before this date, only mosques and *mesjid* could be established. Through this amendment the word "mosque" in the Law was changed to "place of worship".[979] While the phrase "place of worship" implies a neutral and broad scope of protection, in practice this term has been interpreted narrowly to encompass mosques and *mesjid*, churches and synagogues. As will be briefly explained below, the *cem* houses, where significant group of Alevi community worship, have not been understood by the authorities to be protected under Article 9 of the Public Works Law since they have not been recognized as places of worship. The implications of this significant change in legislation cannot be emphasized enough for religious or belief groups that worship in places of worship other than mosques and *mesjid*, in particular Christians and Jews. For example, in 2002, the places of worship of 23 congregations of Turkish Christians were declared to be in violation of municipal building laws and were notified that these would be shut down if worship acts continued in these premises.[980]

Practice and outcomes, however, demonstrate that the right to establish places of worship fails to be effectively protected in Turkey. The legislative change brought by reforms to harmonize Turkish legislation with EU standards in the field of freedom of religion or belief has not been supported by facilitative regulations, interpretation and practice. Since the legislative change of 2003, less than a handful of non-Muslim places of worship—churches and

[978] İmar Kanunu (Public Works Law), Law No. 3194, 03 May 1985, R.G. No. 18749, 09 May 1985, Additional Provision 2 (amending Article 9), 15 July 2003. Additional Provision 2 reads: "In the devel- opment of zoning plans, the required places of worship shall be desig- nated taking into account the conditions of the planned districts and regions and their future needs. Provided that the permission of the highest civilian administrator is obtained and the zoning legislation is respected, places of worship can be built in the provinces, sub-provinces and towns. Places of worship cannot be allocated for other purposes in violation of the zoning legislation."
[979] *Ibid*., Article 9 of İmar Kanunu (Public Works Law).
[980] Report of the UN Special Rapporteur, UN Doc.A/57/274 (2002), paras. 52, 53 (Turkey).

synagogues—have gained place of worship status,[981] and *cem* houses continue to be denied the recognition of place of worship.[982]

Nevertheless, in practice, religious or belief groups continue to assemble and worship in premises that are not legally recognised as places of worship. While assembly for worship in these premises is not generally interfered with by public authorities, it is important to note there are, financial, legal and social consequences of non-recognition. Financially, recognized places of worship enjoy exemptions from certain taxes, for instance, property tax, electricity and water tax. Belief communities whose buildings do not have a legal place of worship status cannot benefit from these exemptions, and thus have to deal with increased financial burdens. In addition, legal and social recognition is highly important as it confers certain legitimacy and acceptance to religious or belief groups both in the eyes of the public authorities and society in general. This is particularly important for groups that may be new and/or that are seen as marginal. Not having the legal status of worship place, believers who assemble in their place of worship run the risk of interference by public authorities for worship in premises that are not recognized by public authorities as places of worship. More fundamentally, however, the persistent denial of granting of place of worship status—despite formal equality and general protection of freedom of religion or belief- undermines justice and continues to nurture the deeply entrenched inequalities. This gives rise to violations of the right to manifest religion or belief in worship and
discrimination. Therefore the importance of changing the paradigm in which this right is exercised—from tolerance to respect, fulfil and promote the right to freedom of religion or belief—cannot be overemphasized.[983]

[981] Şar Aşmayim Sinagog in Kemerburgaz, İstanbul (2006) and the İstanbul Protestant Church (2006) in Altıntepe.

[982] Even the most recent Alevi opening does not go as far as recognizing the cem houses as place of worship on par with mosques, churches and sinagogs. Instead a new status "belief center" is proposed by the Government, which is categorically refused by the Alevi community. Cumhuriyet, 'Alevi Açılımına Maddi Bakış' [A Material Look to the Alevi Opening], 27 June 2013. See also, Subaşı, N., *Alevi Çalıştayları Nihai Raporu* [Final Report on the Alevi Workshops], (Devlet Bakanlığı, 2010).

[983] By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfill human rights. Briefly, the obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil entails positive action by States to facilitate the enjoyment of basic human rights. For further reading, see the General Comment of the Human Rights Committee on General Comment No. 31: The

a) Suitability of Planning Regulations

For a long time local planning regulations have constituted an important and common constraining factor on the right to establish and maintain places of worship. Authorization and permission for places of worship constitute a key sphere where decisions of public authorities lead to serious constraints. The right to establish places of worship is partly regulated by the Zoning Law (ZL) which stipulates that:

> In the development of zoning plans, the required places of worship shall be designated, taking into account the conditions of the planned districts and regions and their future needs. Provided that the permission of the highest civilian administrator is obtained and the zoning legislation is respected, places of worship can be built in the provinces, sub-provinces and towns. Places for worship cannot be allocated for other purposes in violation of the zoning legislation.[984]

In the process of city planning, municipalities "plan for worship places".[985] Non-Muslim minorities who have applied to municipalities for designation of places of worship report that municipalities tend to designate in the city plans only mosques and are told that there is no designated place for a church for Christians or meeting hall for Jehovah's Witnesses.[986] Outcomes are consistent with this claim; none of the 22 worship halls of the Jehovah's Witnesses are recognized as places of worship and in response to the application by the Jehovah's Witnesses for each to relevant municipalities they received responses saying that "there is no religious premises designated in our city plan other than the existing mosques".[987] Protestants have similar experiences; in response to more than 10 applications, only one of the church communities had success to gain place of worship status for the church building they have been using.[988] The experiences of Protestants and Jehovah's Witnesses are important indicators of the state of the right to establish places of worship in Turkey because these groups are relatively new and in need of acquiring new places of worship. Since municipalities do not take into account the needs of these communities in city planning the communities are left with premises which they use for worship purposes but seem unable to gain place of worship status. Were the municipalities take into account the needs or requests

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Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, HRI/GEN/1/Rev.9 (Vol. I), p. 241.

[984] Additional Provision 2*, supra* note 10.

[985] Regulation ANNEX 2.

[986] Umut Şahin, APC, Representative of Jehovah's Witnesses, 04.01.2013.

[987] *Ibid*., e-mail correspondance with Ahmet Yorulmaz. This response is usually given as a written statement.

[988] Supra note 18, interview with Umut Şahin.

of the people in their areas that worship in places other than mosques, they could designate suitable places and the problem could be easily resolved. The reasons underlying this practice must be the subject of further study.

In addition to zoning plans, until 2013, local municipalities have drafted regulations which lay down the standards pertaining to structure and construction that are required of places of worship. It should be remembered that these regulations were relevant only for worship places other than mosques since the latter must be built in conformity with the standards determined by the Diyanet.[989] The Regulations outlined fairly strict standards which did not seem to take into account the diverse nature, needs and financial capabilities of religious/belief groups. For example, according to the Izmir Greater City Municipality Regulation, a place of worship, in a new planning sector, could not be built on a zoning parcel that is smaller than 2500 metre square.[990] The suitability of standards pertaining to the structure of the places of worship and the nature and needs and indeed the dogma of belief groups pertaining to their places of worship is also relevant for the effective protection of this right. Often belief communities are small in number and they neither need such a large premise nor do they have the financial resources needed for buying such sizeable land.[991] The Jehovah's Witnesses observe that the criteria established by the municipalities are designed for mosques and are not suitable for their meeting halls.[992]

Again, until 2013, there was no guideline as to the nature of the criteria for a place of worship in an area of the city which has not been newly opened for development. This meant that when a religious/belief group seeks to establish a new place of worship in an already developed area there was no standard which these communities could base their application

[989] Izmir Greater City Municipality Public Works Regulation, Article 84, revised on 12 April 2013, accessible in Turkish at https://www.izmir.bel.tr/YuklenenDosyalar/Dokumanlar/23.12.2013%2015_23_45_201304291521_58.pdf , accessed 16.01.2015. See also the Report of the UN Special Rapporteur following his Turkey visit A/55/280/Add.1, para. 160 (country visit to Turkey):
"160. The following recommendations are made to the Turkish authorities with respect to the Christian, Greek Orthodox and Armenian minorities: [...] (d) The Government should guarantee minorities the right to establish and maintain their own places of worship, and should allow them to build such facilities in places where new communities have taken root. Any limitations in this respect, for example urban development regulations, should be consistent with international jurisprudence (see General Comment of the Human Rights Committee), and this means that any non- conforming regulations should be repealed or revised."

[990] *Ibid*.

[991] *Supra* note 18, interview with Umut Şahin.

[992] *Supra* note 18, interview with Ahmet Yorulmaz.

process and which public authorities could refer to when they processed such applications. In the absence of any guidelines, it is difficult to ensure due process and avoid arbitrary decisions.

The experience of the Protestant community in Turkey is a vivid illustration of the power relations that seem to take over the process and compromising a clearly defined due process. In a typical application process members of the community apply to the municipality for either the recognition of their existing premises as a place of worship, where that is not possible, a request is made to the municipality to request to be shown a place where a place of worship may be built.[993] A typical response stipulates that the existing premises do not comply with the Regulation- in the absence of criteria for already developed areas- and there is no available plot which may be used for the construction of a new place of worship other than mosque.[994] The procedural complexities, including vagueness, compels the applicants to always rely on the good-will of the public authorities, thus strengthening the status of public authorities in this power relation *vis a vis* the religious group. The explanation given by a Protestant for unsuccessful applications is typical and reflects the multi-dimensional nature of the problem:

> Local administrations, and in particular municipal governments, concerned with losing votes because people see them as involved in opening churches or letting churches be opened, respond negatively to requests for places of worship. This behaviour reveals the depth of the problem and the need for a multi-pronged solution.[995]

A report published by the Association of Protestant Churches in 2010 underlines that local municipalities have occasionally sought the opinion of the Diyanet in the process of dealing with their applications for a place of worship.[996] It is not clear how systematically public authorities include the Diyanet in processes dealing with applications for places of worship other than mosques and *mesjid*. It is difficult to see the purpose and the legal basis for consulting the Diyanet. Notwithstanding the fact that the opinions of the Diyanet do not have

[993] Association Of Protestant Churches-Committee For Religious Freedom And Legal Affairs, *"A Threat" of Under Threat? Legal and Social Problems of Protestants in Turkey* (Association of Protestant Churches, 2010), pp. 32–35.
[994] *Ibid*. Three places of worship of the Jehovah's Witnnesses have been closed following similar process and in regards to two of the ensuing court cases, having exhausted domestic remedies, applications to the ECtHR have been made. *Supra* note 18, interview with Ahmet Yorulmaz.
[995] Association Of Protestant Churches-Committee For Religious Freedom And Legal Affairs, *supra* note 25, p. 37.
[996] Association Of Protestant Churches-Committee For Religious Freedom And Legal Affairs,*supra* note 25.

a binding nature, the inclusion of a certain religious authority or institution in the decision making process of a public authority raises serious questions, not least in regards with the principle of neutrality. When such decision pertains to a religious/belief community that is not affiliated with that particular religious authority or religious institution that is consulted the incompatibility with international law becomes more obvious. [997]

The continued failure of the process of establishing places of worship other than mosques, the absence of a due process in line with the required respect and fulfilment of obligations ensuing from freedom of religion or belief leaves minority religious communities without power and vulnerable. As a result, communities remain in their premises- without a place of worship status- where the group of believers are only tolerated to continue to worship and assemble. Clearly, such a situation stands in contrast with one where a group of believers – empowered as right holders- follow clear and appropriate guidelines and a due process which they can foresee and that, if followed, will lead to a positive outcome. While these groups are most of the time tolerated, without a place of worship status the risk of interference is ever present. Closure of premises and court cases are not non-existent. Numerous cases are ongoing as a result of closure by public authorities of premises used for worship purposes, churches and meeting halls, without place of worship status.[998] For one such case of the Jehovah's Witnesses, domestic remedies have been exhausted and two applications have been made to the ECtHR.[999]

The municipal regulations pertaining to places of worship have been deserted together with the relevant provision of two regulations published by the Ministry of Environment and Urbanization.[1000] Accordingly the only rules pertaining to the construction of places of worship other than mosques do not deal with the size of the plot of land or the structure of the

[997] The OSCE/ODIHR, OSCE and Venice Commission Guidelines for Review of Legislation Pertaining to Religion or Belief, http://www.osce.org/odihr/13993 , accessed 16.01.2015, p. 17.
[998] *Supra* note 18, interview with Umut Şahin.
[999] *Yehova'nın Şahitlerini Destekleme Derneği and Others v. Turkey and Yehova'nın Şahitlerini Destekleme Derneği v. Turkey,* European Court of Human Rights, Communicated Cases, Nos. 36915/10 and 8606/13 respectively.
[1000] Mekansal Planlar Yapım Yönetmeliği [Regulation on the Construction of Residential Plans], R.G. No. 29030, 14.06.2014 and amendments to the Planlı Alanlar TİP İmar Yönetmeliği [Regulation on the Reconstruction of Planned Spaces], R.G. No. 18916, 02.11.1985.

building. This arrangement is valid as of 2013 therefore there are is no information about its application.

b) The Approval of the Public Authority

Under the Zoning Law in order to acquire a place of worship status the "approval of the highest civilian administrator" is also necessary.[1001] The criteria taken into account in the assessment of applications for approval are, however, not explicitly stipulated. Therefore, religious or belief groups applying to the relevant public authorities do not have access to clear and foreseeable criteria according to which they can make their application or which they can challenge through legal remedies.

The court cases concerning the approval of places of worship are scarce in number. Since most applications of Protestants and Jehovah's Witnesses to the municipalities for the designation of places of worship have not been accommodated, these applications did not come to the stage of being considered by the "highest civilian public authority".[1002] It has been reported that two applications, Diyarbakır Protestant Church and Van Protestant Church, are pending with the respective public authority.[1003] These have not yet been subject to any court proceedings.

The court cases concerning places of worship and the approval of public authorities have so far been related to Alevi worship places, *cem* houses, where the relevant Governorships have denied approval.[1004] Two reasons stand out for the rejection of applications for the recognition of *cem* houses by civilian authorities; the Diyanet opinion and the Law No. 677 concerning the closure of tekke and zaviye.

A Communication (No. 1773), sent by the Diyanet to the Interior Ministry on 17 December 2004, states that:

[1001] İmar Kanunu (Public Works Law), *supra* note 10.
[1002] In practice, as noted above, there have been two successful applications for designation of places of worship. These obtained both designation of place of worship by the respective municipalities and the approval of relevant public authorities.
[1003] E-mail correspondence with the representative of the Association of Protestant Churches on 23 July 2013, on file with the author.
[1004] See for example the case of the Çankaya Cemevi Yaptırma Derneği below.

> It is not possible to consider *cemevi* and other places as places of worship because Alevism, which is a sub-group within Islam, cannot have a place of worship other than mosques or *mesjid* that are common places of worship within Islam.[1005]

The Alevi highly criticize the Diyanet for issuing an Opinion on Alevism and the public authorities for taking this Opinion into account in their decisions concerning the Alevi.[1006]

The second objection centres on the Law on the Obstruction of Dervish Lodges (Tekke) and Shrines (Türbe) and the Prohibition of Abolition of the Position of Caretakers of Shrines and Certain Titles (hereafter "Law No. 677") which has been the basis for the nationwide closure of the tekke,[1007] in 1925.[1008] It is helpful, here to briefly consider this law in order to help the outside observer to understand the sensitivity around this law as well as its function. The Law No. 677 has a special legal status; according to the Turkish Constitution, since it is part of the reform laws that aim to protect secularism, it cannot be amended and cannot be understood to be contrary to the Constitution.[1009] The justification for the law states that firstly, there is a contradiction between the fundamental understanding of the state and the tekke and secondly that the Turkish Republic, which is on the route to becoming a stable state, cannot tolerate these kind of "medieval incidents and institutions".[1010] Article 1 of Law No. 677 declares the closure of all tekke and zaviye and türbe which have been traditional places of worship or centres of religious activity for various Islamic traditions, including the Alevi

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[1005] A Communication (No. 1773), sent by the Diyanet to the Interior Ministry on 17 December 2004. For example, an application for the opening a cem house at the Türkiye Büyük Millet Meclisi (Turkish Grand National Assembly, TBMM) where there is currently only mesjid found, the Presidency of the TBMM rejected the application with reference to the Diyanet Opinion on cem houses. See, "Meclis'te Cemevi Talebine Ret" [Refusal to Cemevi Request at the Assembly], Milliyet, 09.07.2012.

[1006] See for example, EnSonHaberler, "Çamuroğlu: Diyanet Alevilik Üzerinden Fetva Veremez", 12.07.2012, http://www.ensonhaber.com/camuroglu-diyanet-alevilik-uzerine-fetva-veremez-2012-07-12.html , accessed 16.01.2015.

[1007] Tekke are places where sufi thought, understanding and discipline are studied, deepened and presented to the people. Mustafa Kara, Din Hayat Sanat Açısından Tekkeler ve Zaviyeler [Dervish Lodges from the Perspective of Religion, Life, Art], (İstanbul: Dergah Publications, 1999), p. 43.

[1008] Tekke ve Zaviyeler ile Türbelerin Seddine ve Türbedarlar ile Bazı Unvanların Men ve İlgasına Dair Kanun [Law on the Closure of the Dervish Lodges and Shrines] Law No. 677, 30 November 1925.

[1009] Article 174 of the Turkish Constitution.

[1010] The resurgence in the Eastern part of Turkey led by Sheikh Said, seemingly, against the secular reforms seems to have played a major role in the decision for the closure of the tekke. Kara, supra note 38, p. 267. The author is quoting from a book written by a foreign observer, "The great secularization reforms of the 1924 related to the ulema and not the dervish. It became clear however that the most risky resis- tance against the reforms were going to come from the dervish and not the ulema. The ulema who were used to utilize state authority for a long time were not inclined to rise up against the state. The dervish on the other hand were used to independence and resistance. They took advantage of the people's trust and loyalty."

tradition.[1011] The law is not a neutral law in the sense of closing places of worship generally; instead it names the kinds of places of worship it abolishes.[1012]

The Law No 677 has been, at times, critical in relation to the non-recognition of *cem* houses as places of worship. In a case related to the construction of a *cem* house the Çankaya Cemevi Yaptırma Derneği (Cankaya Cem House Building Association, hereafter ÇCYD) has been prosecuted for describing the *cem* house as a place of worship in its statutes. Following the refusal by the ÇCYD of the request from the Interior Ministry to remove the references to *cem* house as a place of worship from its stature,[1013] the Governorship initiated a court case via the Ankara Prosecutor's Office to close the CCBA down.[1014] The first instance court relied on Article 9 of the ECHR and held that the right to freedom of religion or belief includes the right to establish places of worship. The first instance court did not consider the *cem* houses as *tekke* or *zaviye*—which cannot be opened according to Law No. 677.[1015] The explanation for this was that the tekke and zaviye were places which housed the sheik or dervish and that the *cem* houses do not have such a function.[1016] It, however, held the rituals in the *cem* houses may indeed be prohibited by Law No. 677, but these needed to be assessed in light of contemporary legal regulations. The first instance court held that according to Article 9 of the ECHR and taking into account the principle of secularism in the Turkish Constitution the state cannot determine what constitutes "worship or a place of worship" and found that the establishment of cem houses are not contrary to the ECHR or the Turkish Civil Code,[1017] and

[1011] The Memoirs of Hamdullah Suphi, a member of Parliament who openly opposed the closure of the turbe, testify that Mustafa Kemal viewed the closure of türbe (religious shrines) as the elimination of a certain mentality and perhaps also as a temporary measure with a view to open them again in ten years time. Kara, *supra* note 40, p. 280.

[1012] In the following decades many shrines and dervish lodges have been opened as museums. For example the Galata Mevlevihane was closed with the Law No. 677, however, it was opened as a Divan Literature Museum in 1975 and as a Galata Mevlevihane Museum in 2011. Similarly, the Hacı Bektaş Veli Lodge, which continues to be very important for the Alevi Bektashi community was closed with Law No. 677 and opened as a museum in 1964. While the status of museum has contributed to the preservation of these buildings, it has cut the ties of the communities with the buildings and made it impossible to use these buildings for worship purposes.

[1013] The Directorate for Associations of the Ministry of Interior sent a letter to the Ankara Governorship, referring to this Diyanet opinion.on 30 March 2005 Letter No. 1277

[1014] Ankara 16th Peace Court, E. 2010/492, 04 October 2011.

[1015] *Ibid*.

[1016] *Ibid*.

[1017] Türk Medeni Kanunu [Turkish Civil Code] No. 4721, 22 November 2001.

the Law on Associations.[1018] In conclusion, there was no need to dissolve the association because of the reference to cem house as a place of worship in its statute.

In contrast, the Yargıtay (Court of Appeals) overturned the decision of the first instance court and referred to the Law No. 677 saying that it closes *tekke* and *zaviye*, however, allows the existence of mosques and *mesjid*.[1019] It is important to note that the Law No. 677 does not refer to *cem* houses. The Court of Appeals also recalled the status of Law No. 677 and has said that none of its provisions may be interpreted in a way as to be incompatible with the provisions of the Constitution.[1020] It went on arguing that the Law No. 677 excludes the establishment of any Islamic place of worship other than mosque or *mesjid*.[1021] Interestingly, the reasoning does not consider whether the *cem* house is equivalent to *tekke* or *zaviye*, instead, proceeds with the assumption that Law No. 677 only allows mosques and *mesjids*.

The reasoning also recalls that the Diyanet is tasked with the management of places of worship and that these may be opened with the permission of the Diyanet.[1022] Thus it infers from this permission to operate mosques and *mesjid* that no Islamic place of worship other than these may be lawful. Therefore based on the reference to an 'unlawful' place of worship in the association's statute the Court of Appeals concludes that the statute of the association is contrary to law and therefore necessitates the dissolution of the association by a court decision.[1023]

Interestingly, while numerous previous administrative or judicial decisions relied on the Diyanet opinion, in this reasoning the Court of Appeals does not refer to the Diyanet opinion which states that Muslims worship in mosques.[1024] The reason for this may be to strive for a

[1018] Dernekler Kanunu [Law on Associations] No. 5231, 17 July 2004.
[1019] Radikal, 'Yargıtay Cemevine Kapıyı Kapattı' [The Court of Appeals Closed the Door on Cem Houses], 25 July 2012.
[1020] *Ibid*.
[1021] 7th Chamber of the Civil Division of the Court of Appeals, E2012/262, K2012/3351, 10 May 2012.
[1022] In accordance with Article 35 of the Diyanet İşleri Başkanlığı Kuruluş ve Görevleri Hakkında Kanun (Law on the Establishment and Mandate of the Presidency of Religious Affairs) Law No. 633, 22 June1965, Official Gazette No. 12038, 02 July 1965.
[1023] Article 89 of the Civil Code stipulates that when the purpose of an association becomes contrary to law and morals a court will decide for its dissolution. Medeni Kanun (Civil Code), Law No. 4721, 22 November 2001, Official Gazette No. 24627, 08 December 2001.
[1024] For the Diyanet opinion see *supra* note 38.

reasoning that is based on legislation instead of a theological opinion, thus, perhaps, taking into account public criticism generated by taking into account opinion of the Diyanet in the decisions of public authorities.

There are significant flaws in the reasoning by the Court of Appeals. It did not consider the question of whether *cem* houses and *tekke* and *zaviye* are identical or not. If they had concluded that *cem* houses are identical to *tekke* for example, it should not be possible to allow the existence of *cem* houses without amending Law No. 677. Instead, it is concluded that only "mosques and *mesjid*" are allowed and this is based on the reference in Law No. 677 to allowing mosques and mesjid to remain where tekke and zaviye are used for these purposes. In addition, the Diyanet is given the mandate to operate only mosques and mesjid. Since *cem* houses are not considered as tekke these are not prohibited as such. This is also evident in the fact that there are hundreds of *cem* houses operating in the country and they are not closed or considered illegal.[1025] Thus their existence is not contrary to law. The fact that the Diyanet is given the task to administer mosques and mesjid does not necessarily mean that no other Islamic places of worship are allowed to exist. In fact, it would mean that if there are Islamic places of worship other than mosques or mesjid, the Diyanet does not have a mandate to operate them. Therefore the decision of the HCA that regards the reference to *cem* house as a place of worship in the association's statute as unlawful cannot be prescribed by law.

The reasoning of the HCA does not include any reference to the right to freedom of religion or belief, not does it consider the consequences (proportionality) of the denial of the recognition of the *cem* houses as places of worship for the association or the Alevi community.

Paradoxically, despite the strong refusal to grant place of worship status to *cem* houses, according to the Office of the Prime Minister there are 598 *cem* houses is Turkey.[1026] None of them has a place of worship status. This results in the impossibility for members of the Alevi community to avail themselves of the benefits granted to places of worship, as well as denying these Alevi houses of worship the social status and prestige other places of worship enjoy.

[1025] See below.
[1026] Response of the Office of the Prime Minister to a communication of Member of Parliament Doc. No. B.02.0.004./954, 16 July 2012, see Hurriyet Daily, Cemevi Sayısı 598 [Number of Cem Houses 598], 27 July 2012, http://www.hurriyet.com.tr/gundem/21077587.asp , accessed 16.01.2015.

Socially, having a legally-recognised place of worship gives a religious community a high social standing and helps their followers not to be marginalised. The importance of the latter is increased in light of widespread intolerance in the Turkish society towards members of other religions.[1027]

Mosques and *mesjid* are subject to a different regulation based on the requirements of the Presidency of Religious Affairs.[1028] Mosques must be opened with the permission of the Diyanet and are administered by the Diyanet.[1029] In 1998, following political developments of '28 February',[1030] an amendment was made to the Law on the Diyanet to the effect that the administration of any mosque built by real or legal persons, opened for worship whether with or without permission, must be transferred to the Diyanet.[1031] Thus mosques built by private citizens were nationalized according to a report by the Mazlum-Der.[1032] Indeed the Cadastral Law stipulates that buildings that are used for public service will be registered under the name of public institutions and mosques and cemeteries are listed as building used to provide "public services".[1033] Names of other places of worship, such as churches, synagogues or *cem* houses are not mentioned.

[1027] Ali Çarkoğlu and Ersin Kalaycıoğlu, Türkiye'de Dindarlık: Uluslararası bir Karşılaştırma [Religiosity in Turkey: An International Comparison] (İstanbul: Sabancı University Publications, 2009).
[1028] İmar Kanunu (Public Works Law), *supra* note 10.
[1029] Medeni Kanun (Civil Code), *supra* note 55.
[1030] National Security Memorandum on the Measures that Need to be Taken Against Actions Contrary to the Regime and Reactionary Movements. Articles 13 and 9 of the National Security Council Deci- sion No. 406, 28 February 1997. The role played by the military in the making of this memorandum is considered a soft intervention or as popularly named a 'post-modern coup' by the military into the political system. Through this intervention, the Prime Minister Necmettin Erbakan was removed from his position, without dissolving the parliament. The memorandum started a process called the 28 February Process where measures were taken to protect secularism. Other measures include, eight years compulsory primary education, closure of Islamic sects, and closure of illegal Quran courses. Generally on this period see Ali Bayramoğlu, 28 Şubat: Bir Müdahalenin Güncesi [February 28: The Diary of an Interven- tion] (İstanbul: İletişim Publications, 2007) and for the text of the Memorandum and its implications see N. Günay, 'Implementing the 'February 28' Recommendations: A Scorecard', Research Notes No.10, Washington Institute for Near East Policy, May 2001, in particular p.14. For the an overview of the February 28 period and the absence of a space of negotiations and mediations between society and state on unavoidable disagreements related to such public policies see A.A. An-Naim, Islam and the Secular State: Negotiating the Future of Shari'a (Harvard: Harvard University Press, 2008), pp. 206–215.
[1031] Mazlum-Der, 'Türkiye'de Dini Ayrımcılık Raporu' [Report on Religious Discrimination in Tur- key], (İstanbul: Mazlum-Der Publications, 2010), p. 214.
[1032] *Ibid*.
[1033] Article 16 (A) of Kadastro Kanunu [Cadastral Law] the Law No. 3402, 21 June 1987, Official Gazette No. 19512, 09 July 1987.

The perspective of viewing certain manifestations of religion or belief solely as enjoyable through public religious services certainly raises questions when assessing compatibility of national legislation in the light of international standards. The practical outcome of this perspective and ensuing legislative arrangement is that it is not possible to establish a mosque and appoint religious personnel outside of the Diyanet structure. Members of religious communities may collect funds toward the construction of mosques and have them built but they cannot own them even through associations. Such regulation singles out the Diyanet as the sole subject of the exercise of the right to establish places of worship and appoint religious leaders in the context of Sunni-Muslim practice. While there may be demands to establish and maintain mosques outside of the Diyanet structure these demands have not, yet, been subject of court cases, instead, negotiations with political leaders, seeking factual changes have been the processes of engagement by religious minorities.

c) Acquisition of Legal Personality

Apart from the status of the premises as a place of worship, the question of the linkage between legal personality of a belief community and ownership of a place of worship also becomes an important factor for the protection of the right to establish and maintain places of worship. The fact that in Turkey no belief community may acquire legal personality, as such,[1034] negatively affects the enjoyment of and, creates a gap, in the effective protection of the right to establish and maintain places of worship in Turkey. Groups of believers cannot own a place of worship as a composite body through an adequate form of legal personality. The association and foundation formulas,[1035] only create an indirect form of legal entity status

[1034] The Venice Commission recommended that Turkey provides a legal framework that would allow the non-Muslim religious communities, as such, adequate access to court and the right themselves to hold property, without having to do this through the foundation model. "Opinion on the Legal Status of Religious Communities in Turkey and the Right of the Orthodox Patriarchate of Istanbul to Use The Adjective 'Ecumenical'", Venice Commission, Opinion No. 535/2009, 15 March 2010, para. 71.

[1035] An association is a private law legal person that is formed by real or legal persons for the objective of realizing a certain purpose by bringing together their knowledge and efforts and that is not contrary to law. Dernekler Kanunu [Law on Associations] No. 5253, 04 November 2004, Official Gazette No. 25649, 23 November 2004, Article 2. Article 56 of the Turkish Civil Code. While the association formula may open the way for carrying out certain activities and thus meet some of the associative needs of these long-established belief communities it is not designed as a form of religious institution or a legal entity status for a belief community. The association formula does not seem suitable for the organizational and institutional set-up of churches such as the Orthodox Patriarchate and the Armenian Patriarchate, or the Chief Rabbinate. A foundation is an endowment the income of which is dedicated to a certain purpose, yet, Article 101 (4) of the Turkish Civil Code, prohibits the establishment of a foundation "contrary to the characteristics of the Republic as defined by the Constitution, Constitutional rules, laws, morals, national

which is substantially different than the community as such, having direct ownership that bears a resemblance to the ownership of an individual or a corporation. The far-reaching supervision involved in the foundation and association formulas may also place the places of worship at risk as changes in legislation and/ or practice may create conditions that allow the state to confiscate the buildings or exercise control over repairs etc.[1036] The strategic importance of legal personality in the process pertaining to the establishment, maintenance and ownership of places of worship illustrates the nature of vulnerability of belief communities that is created by the denial of legal personality to them. An appalling example is the Latin Catholic Church in Turkey; lacking legal personality of any kind,[1037] the community can neither own property, nor seek judicial review of cases where it has lost possession of property as a result of not having legal personality. The Latin Catholic community has not sought legal remedies and instead seeks to find a political solution to the problem through negotiations between Turkish authorities and the Holy See.[1038]

Legally speaking, gathering for worship in a building that is not legally recognised as such, or calling it a *cem* house, church or a similar name may result in prosecution. A number of churches lacking status as place of worship, but with legal associations, have been formally warned by local police that worship in their buildings is unlawful.[1039] The reason given is that the buildings are not legally recognised as places of worship and therefore they cannot be used for worship purposes. The Government has also shown good-will toward the so-called Lausanne minorities allowing them to assemble for worship in churches that have historic significance for them, such as the Ahtamar Church in Van for the Armenian Apostolic community,[1040] and the Sumela Monastery for the Greek Orthodox community.[1041] While

integrity and national interest, or with the aim of supporting a distinctive race or community". See more in Chapter 6.

[1036] For historical experiences see Dilek Kurban and Kezban Hatemi, Bir Yabancılaştırma Hikayesi: Türkiye'de Gayrimüslim Vakıf ve Taşınmaz Mülkiyet Sorunu, (İstanbul: TESEV Publications, 2009).

[1037] *Supra* note 6, interview with Rinaldo Marmara.

[1038] In the New Constitution drafting process the main request of the Catholic community from the Constitutional Reconciliation Commission has been the recognition of the Catholic Church as a legal person. Milliyet Daily, 'Yeni Anayasa Çalışmaları Devam Ediyor' [Work on New Constitution Contin- ues], 16 April 2012.

[1039] *Supra* note 18, interview with Umut Şahin.

[1040] The Armenian Apostolic community is allowed to hold worship mass once a year at the Akdamar church. The first service was held on 19 September 2010. Haberiniz, 'Ermeniler Akdamar Ayini için Van'a Akın Ediyor' [Armenians Floodding to Van for Akdamar Mass], 09 July 2010.

these may be considered as gestures of a certain tolerance toward assemblies for worship and non-Muslim minorities, it is important to remember that these actions do not go as far as conferring rights and fall short of solving the problems concerning the right to establish places of worship.

As outlined above in Turkey there is indeed a general recognition of the right to assemble for worship and establish and maintain places of worship in the Constitution and it is regulated through applicable legislation. Processes pertaining to building places of worship and acquiring place of worship status ostensibly appear neutral; however, as the input from minority religious groups demonstrates the process does not appear to be designed for worship places other than mosques in mind. This is also evident in the outcomes: the number of successful applications for place of worship status—other than mosques—is scarce. It is difficult to see the justification for this practice. It is clear that the consequences of the process, including planning regulations and authorization from public authorities for belief groups, the right to establish places of worship and acquire legal status as such, is interfered with or risks being interfered with and financial and social benefits ensuing the recognition of a place of worship are denied. The results of these restrictions—the non-recognition as a place of worship—are numerous; inter alia, the risk of interference and inability to benefit from benefits flowing from the recognition as a place of worship. This leads to the result that what should be a routine procedure, recognition of place of worship, seems nearly impossible to obtain. Such restrictions and refusals, rather, must be exceptional, must be justified, and proportionate and necessary in a democratic society.

In conclusion, it follows from the above account that the right to establish and maintain places of worship is restricted in a number of ways which, often, cumulatively create obstacles before the effective enjoyment of this right. It is in the processes involving the municipalities and the governorship where this right is denied. The fixed and burdensome planning regulations drafted by municipalities are, more often than not, suitable to the nature and demands of belief groups in Turkey. In the face of rigid planning regulations freedom of religion or belief and the proportionality of the effect of the denial on belief communities is not considered. The

[1041] Sabah Daily, 'Sümela Manastırı'danki Ayin için Hazırlıklar Başladı' [Preparations Underway for Mass to be Held in Sumela Monastery], 02 August 2012.

process involving the approval of the Governorships lacks transparency and foreseeable criteria. The rejection of the Alevi *cem* houses as place of worship by the public authorities, Governorships, involves an assessment of the legitimacy of a place of worship. The Turkish courts have not, so far, been able to agree on jurisprudence which upholds the view that the right to freedom of religion or belief excludes any assessment by the state of the legitimacy of religious beliefs.86 The fundamental problem of lack of legal personality demonstrates the inter- dependency of the various components of the right to freedom of religion or belief. Not having legal personality, religious communities cannot enjoy the right to own property and seek judicial protection.

The importance of clear, foreseeable and adequate and suitable procedures as well as facilitative administrative processes is clearly illustrated in the Turkish case; indeed it is not an exaggeration to say that the right to establish places of worship is a 'trapped right'. The Turkish case also shows that international compliance control mechanisms need to exercise strict scrutiny when assessing restrictions on the right to establish places of worship. The wide margin or appreciation given to states and the accommodation of the planning regulations will not contribute to upholding the right to establish places of worship domestically in accordance with international human rights law. Thus, subtle forms of discrimination will remain veiled. It is the task of review mechanisms to unveil the less obvious ways of discrimination such as through ostensibly neutral planning regulations and city plans.

7.2.5. To teach a religion or belief in places suitable for these purposes

As it has been discussed in Chapter 4 the right to manifest religion or belief in teaching and more specifically the right "to teach" religion or belief "in places suitable" for these purposes is an important component of the right to freedom of religion or belief. Though both individuals as well as collectivities exercise this right, it is important to note that for the religious or belief group this right plays a key role in the preservation, development and transmission of religious dogma, tradition and identity. Manifestation in teaching may take diverse forms, *inter alia*, the right to teach one's own group about the fundamentals of the faith, the right to teach others about one's faith with a view to proselytise, to teach with the purpose of training clergy, to open

schools as well as extending to engage in acts necessary to fulfil the aforementioned acts such as establishing schools for religious instruction and publishing and disseminating relevant materials. Here the assessment will be restricted to the protection of this right as it is manifested in teaching for the purpose of educating one's congregation and formal teaching aimed at training religious personnel since these two forms are crucial for the protection of the collective identity of a religious or belief group.

Currently, teaching of religion in Turkey is a highly regulated and, a significantly restricted affair and results indicate serious inequalities in the accessibility of this right for diverse religious/belief communities. There is no legislative framework for establishing schools by religious/belief communities with the purpose of educating their followers in their religion or belief. Similarly, schools or seminaries may not be established to train of religious personnel. As a result, no faith based school may be established by any religious/belief community. Bearing in mind these limitations, the state's involvement in teaching religion, solely Islamic and based on the Hanefi tradition, presents a striking contrast. National education curricula which must be adhered by all schools, instates, in practice, compulsory Islamic religious instruction through the Religious Culture and Ethics lessons. Programs of public theological faculties are designed to teach only Islam and as far as training of religious personnel is concerned only accomodate the needs of the Sunni-Muslim community. While the Sunni-Muslim community has the possibility of benefiting from state funded and provided religious instruction services, still, they cannot exercise the right to manifest religion or belief by actively establishing schools or providing formal education to their followers or train religious personnel. Muslim minorities within the majority Muslim population and non-Muslim communities are not able to train religious personnel and teach their followers their religion or belief freely, neither does the state provide any religious training services aimed at meeting the needs of these communities.

It is useful to note and underscore the following concerning the meanings attributed to "religion", "theology" and "Islam" in the context of relevant national legal instruments. References in the Turkish Constitution and legislation pertaining to education to "religion"

usually are taken to mean Islam by public authorities, and Islam is understood in accordance with the teachings on "true Islam" of the Diyanet.[1042] Theological education and theology faculties in universities categorically deal with "Islamic theology". While it is not possible to go into depth about the use of these terms and their implications for the protection of freedom of religion or belief, it is important to know that references to these terms in legislation do not necessarily comprise neutral meanings- such as "religion" referring to all religions or "theology" referring to theology of all religions- and that there is a need to establish what meaning is attributed to each term.

Legislation pertaining to the Turkish national education system and its implications to the right to manifest religion or belief in teaching can not be adequately understood without highlighting the emergence of this system as a reaction to the fragmented and religiously based/influenced education system of the Ottoman Empire. Historically, teaching of religion and training of religious personnel had been viewed as an activity carried out within the realm of religious communities. Together with the numerous reforms following the establishment of the Republic of Turkey, the fragmented old education system was abolished and a new unified national education system was created through the Law No. 430 on the Unification of Education in 1924 which also had the purpose of redefining the role of religion in education.[1043] The Law on the Unification of Education enjoys special protection as a Reform Law and it cannot be interpreted in a way where it is deemed unconstitutional.[1044] Consequently, the *Madrasah*, that had been the religious schools of the Ottoman era, were abolished and in the sphere of religious education, the new law foresaw the establishment of vocational theological schools and theology faculties in universities.[1045]

Not surprisingly, policies on religious instruction have been and continue to be, important means of shaping society for all political parties. Between the years 1927-1949, no religious instruction was permitted in schools and only in 1949 the Ministry of Education allowed a

[1042] See İştar Gözaydın, *Diyanet: Türkiye'de Dinin Tanzimi* [The Diyanet: Arrangement of Religion in Turkey], (İletişim, 2009).
[1043] Law No. 430 of 3 March 1340 (1924) on the Unification of the Educational System.
[1044] Turkish Constitution Article 174.
[1045] *Ibid.* The Law on the Unification of the Education System foresaw the transfer of the madrasa to the Ministry of Education which closed them shortly after via an administrative decision.

course on religion in 4th and 5th grades of primary school.[1046] The course was optional, depending upon a written request from parents, and it was taught outside the regular school hours. Together with the passage to multi-party democracy, a new government (the Demokrat Parti) was established in 1956 and the openness of this party led to the introduction of a religion course into secondary schools, with the possibility of exemptions.[1047] Finally, following the military coup in 1980, the "Religious Culture and Knowledge of Ethics" course became obligatory for all secondary level schools thus constitutionally securing the status of the religion course in all school public and private.[1048] The restrictions on the right to manifest religion or belief in teaching are inevitably and intricately linked to the contextual state-religion relations reflected in the national education policy with its unique goals and sensitivities. The latter has been inadequately guided by human rights obligations. The account above only begins to demonstrate the various political considerations affecting the nature and extent of protection of the right to manifest religion or belief in teaching.

Turkish Civil Code grants the right to "determine the religious education of the child" to the mother and father.[1049] Moreover, any contract that would restrict the rights of the mother and father in this respect is considered null and void.[1050] "Determine", however, does not necessarily amount to the right to raise children in line with one's religious or philosophical beliefs. Indeed, Turkey has placed a reservation to Article 2 of Protocol I of the ECHR which protects the right to education and recognizes that states will respect the right of parents and legal guardians to raise their children in line with their religious or philosophical convictions.[1051] Turkey's reservation states that Article 2 of the Protocol of the European Convention shall not violate the provisions of Law No. 430 on the Unification of Education.[1052]

[1046] Hadi Adanalı, *Religious Education in Schools*, (Ankara University, 2001).
[1047] *Ibid*.
[1048] There are various explanations for the gradual integration of religious education in the curriculum of public schools between the years 1949-1982. These explanations include the need to provide the public with sound religious knowledge; the impact of the second world war, which made the need for religion and morality more sensible; the threat of communism; the erosion of traditional and moral values; and, finally, the threat of terrorism which claimed approximately 20 lives per day before the military coup of 1980.
[1049] Turkish Civil Code Article 341.
[1050] *Ibid*.
[1051] Article 2 of the 1st Protocol of the European Convention on Human Rights.
[1052] CoE, Treaty Office records.

Under the general framework of the secular education system, teaching of religion or belief in Turkey may be carried out only under state supervision according to the Turkish Constitution.[1053] There is no legal framework for the formal teaching of religion or belief outside of state supervision. There exists no school that would provide a formal degree, similar to, for example, the public vocational theological schools or theology faculties where instruction is based on Islam as interpreted by state institutions. State holds monopoly over religious education in primary, middle and high schools. Under the Law on Private Educational Institutions "education institutions identical or similar to one's that provide religious education cannot be opened".[1054] Hence, the practice has been that religious/belief groups teach their religion or belief, *inter alia*, in their places of worship, receive formal education outside the country or establish associations or foundations for the purpose of research and teaching through which teaching may be possible. Yet, these cannot provide degrees comparable to those provided in schools within the Ministry of Education system.

Thus, for individuals or groups who cannot or, prefer not to make use of the public religious training or instruction opportunities, the right to manifest religion or belief in teaching continues to be a denied right. Non-Muslim groups and non-Sunni Islamic groups and, indeed, some Sunni Muslim groups that would wish to provide religious education outside the public education system, suffer the consequences. In an effort to provide for the needs of the communities and transmit religious dogma, in particular with respect to children and youth, religious instruction, often, takes place in the communities' places of worship, albeit without formal accreditation. The view that "beyond the official school system, there is no restriction on private religious instruction",[1055] may fail to represent the factual situation. The constitutional provision stating that "other religious instruction may be carried out under state supervision" may be interpreted in a narrow fashion to mean that "other formal religious instruction" or broadly to mean "any other religious instruction". There have been cases where it has been broadly interpreted. For example, in 2002 Protestant congregations were served notifications that "religious instruction could only be carried out under state

[1053] Turkish Constitution Article 24.
[1054] Özel Öğretim Kurumları Kanunu [Law on Private Educational Institutions] No. 5580, 8 February 2007.
[1055] Öktem, E. and M. Uzun, "IACL: National Report on the Republic of Turkey", in IACL National Reports 2010, International Centre for Law and Religion, p. 713.

supervision".[1056] The nature of the acts of teaching religion by these congregations was to teach their own congregants and those who are interested visiting their churches, which did not have a legal place of worship status. The, less than certain and clear, respect for the right to teach one's religion to one's members results in fear of religious communities that such teaching may be interfered with by the public authorities.[1057] This adds to the vulnerability of religious/belief communities. In order to avoid conflict, there are cases where summer camps or courses that in reality aim to teach children about religion are named "vacation camps" or "clubs" in order avoid potential problems.[1058]

In fact, the existing arrangement "leads" individuals or groups to be the *recipients* of the public services pertaining to teaching of religion. Compulsory Religious Culture and Knowledge of Ethics classes are available for all however, would only benefit certain groups of Muslims and indeed interfere in the right to have a religion or belief of many students and the right of parents to raise their children in line with their religious or philosophical beliefs.[1059] Middle and high school education with Islamic emphasis is available for Muslims,[1060] optional lessons on the Quran and the Life of the Prophet Mohammed have become available in public school

[1056] Interview with the General Secretary of the Association of Protestant Churches Umut Şahin, January 2013.
[1057] For example, the Alevi groups meeting in homes, for many years, had a "watchmen" who would watch the outside of homes where the Alevi would worship and teach their religion fearing that the authorities or a non-Alevi would notice their activity.
[1058] Representatives of a number of religious communities interviewed throughout the course of this thesis have referred to the challenges to organize camps or courses for teaching the youth about their religion and the feeling of being compelled to "name" it something else like "vacation camp", "club" or "cultural seminar". To ensure confidentiality the names of these representatives and their respective communities will not be disclosed here.
[1059] For a comprehensive evaluation of these lessons, including the diverse societal demands concerning these lessons, see a Report by Reform in Education Initiative, "Din ve Eğitim" February 2011, Sabancı University, also available online http://erg.sabanciuniv.edu/sites/erg.sabanciuniv.edu/files/DinVeEgitim.pdf, accessed 16.01.2015. İştar Gözaydın, Türkiye'de Din Kültürü ve Ahlak Bilgisi ders kitaplarına insan hakları merceğiyle bir bakış [A Human Rights Perspective on the Books of the Religious Culture and Knowledge of Ethics Course Books in Turkey] in G. Tüzün, (Der.), Ders kitaplarında insan hakları ıı tarama sonuçları [Resltes of the Human Rights Screening of School Books] (167-193), (İstanbul: Tarih Vakfı, 2009).
[1060] The İmam and Preachers High Schools are established according to Article 4 of the Act of Unification of Education and Article 32 of Basic Law of National Education No. 1739 and they serve both as vocational schools and preparatory schools for higher education. On these vocational theological middle and high-schools (Imam Hatip) and their function and growth see Şerif Mardin, Religion, Society, And Modernity in Turkey, (Syracus University Press, 2001), p. 26-298., Banu Elügür, The Mobilization of Political Islam in Turkey, p. 85-135, İrfan Bozan, Devlet ile Toplum Arasında bir Okul: İmam Hatip Liseleri…bir Kurum: Diyanet İşleri Başkanlığı, (TESEV, 2007).

in 2012-2013 school year.[1061] It is important to note here that the public religious instruction in schools is criticised for being fundamentally based on Sunni Islam and for excluding, other Islamic traditions, *inter alia*, the Alevi tradition.[1062] Religion classes are available at the so-called officially recognized Lausanne non-Muslim minority schools under the supervision of the Ministry of Education.[1063]

Quran courses are available outside of school curricula only through programs administered by the Presidency of Religious Affairs.[1064] This arrangement also contains numerous restrictions. Apart from the Presidency of Religious Affairs, no real or legal persons, including foundations and associations may open such courses.[1065] Some Sunni Muslims also often complain that two hours per week cannot be enough to meet the "need for religion".[1066] It is reported that the age limit for taking part in the Quran courses constitutes an interference considering that in order to train as *hafız* (individuals who memorize the Quran).[1067] Adults may also apply for evening courses on the Quran to be opened.[1068] In the course of these courses, all materials must be found "appropriate" by the Diyanet.[1069] Training on the Quran in mosques is subject to the approval of the administrative authority,[1070] which is indicative of the powers of the public authorities which includes approval of basic religious services.

As noted above, only the Diyanet may organize Quran courses. Numerous associations that have opened Quran courses have been sanctioned, where the cases are decided on opening

[1061] Milliyet Daily, "Kur'an-ı Kerim, liselerde seçmeli ders olarak okutulacak", 5.09.2012, http://egitim.milliyet.com.tr/kur-an-i-kerim-liselerde-secmeli-ders-olarak-okutulacak/lise/haberdetay/05.09.2012/1591791/default.htm , accessed 16.01.2015.
[1062] European Commission, Turkey Progress Report, 2011.
[1063] Nurcan Kaya, *Unutmak mı asimilasyon mu? Türkiye'nin Eğitim Sisteminde Azınlıklar* (Forgotten or Assimilated? Minorities in Turkey's Education System), (Minority Rights Group, 2009).
[1064] Öktem and Uzun, *supra* note 87.
[1065] Diyanet İşleri Başkanlığı Kur'an Kursları ile Öğrenci ve Yurt ve Pansiyon Yönetmeliği [The Presidency of Religious Affairs Regulation on the Quran Courses and Student and Dormitories] Devlet Bakanlığı ve Başbakan Yardımcılığından, Yayımlandığı Resmi Gazete Tarihi: 03/03/2000 Article 7. Article 8 stipulates that only children who have completed primary school may take part in the Quran Courses. And according to Article 16 these courses start in the first week of October and end at the last week of May.
[1066] Adanalı, *supra* note 77.
[1067] Mazlum-Der, 'Türkiye'de Dini Ayrımcılık Raporu', *supra 64*, p. 216.
[1068] Article 32(a).
[1069] Article 26.
[1070] Article 33.

private courses unlawfully.[1071] According to Mazlum-Der, an Islamic human rights organization, even for the legal dormitories connected to legal Quran courses may be closed "upon rumours that actions against Atatürk's principles and reforms, actions towards dividing the undividable unity of the country with its nation, as well as racism" may lead to the closure.[1072] In a case dealing with a child activity centre where children were taught the Quran, the *namaz* ritual as well as religious songs, the Court of Appeals dealt with the case on the basis of using the centre for purposes other than for which it had permission for.[1073] The right to freedom of religion or belief has not been considered in the judicial assessment. In 2013, these rules were relaxed with the annulment of Article 263 of the Turkish Criminal Code, which prescribes imprisonment of individuals who open education institutions that are contrary to law and has been used as the basis of closing unauthorized Quran courses.[1074]

In short, the right to teach religion or belief to a religious or belief group's followers is not ensured and highly restricted – arguably a denied rights. When this state of affairs is viewed in contrast to the enourmous funding and institutional support to state imposed and supplied religious instruction based on the majority's religious tradition

The inability to train religious personnel remains at the forefront of the various issues raised by the obstacles before the right to teach religion or belief. A number of religious communities, such as the Caferi, Jewish and some Christian communities, send potential candidates for religious instruction abroad. Certain Christian communities, on the other hand, have been demanding a solution to the problem of training clergy in formal theological schools, including universities, in Turkey. The Armenian Church is anxious to train more priests and, in 2006, asked the Ministry of Education to allow the establishment of a state university faculty on Christian theology which also includes instruction by the Patriarchate.[1075] In the

[1071] Court of Appeals Criminal 9th Chamber, E1980/4847 and K1980/4952, 12.12.1980. Court of Appeals Criminal 4th Chamber, E2000/6756 and K2000/6043, 27.09.2000.
[1072] Mazlum-Der, *supra* note 64, p. 217.
[1073] Court of Appeals 4th Criminal Chamber, E2003/8828 and K2004/10232, 19.10.2004.
[1074] Norwegian Helsinki Committee, *Monitoring Report on the Right to Freedom of Religion or Belief* January-June 2013, (Norwegian Helsinki Committee, 2013) p. 30.
[1075] USCIRF Reporu 2012, p. 226. Hurriyet, "Mutafyan: Hıristiyan İlahiyat Fakültesi açılsın", 20.04.2002, http://webarsiv.hurriyet.com.tr/2002/04/20/114928.asp , accessed 16.01.2015.

meantime, Armenian Apostolics continue to seek religious training abroad.[1076] In an effort, perhaps, to solve the problems concerning higher education for Christian religious personnel, the Government has been for long considering the possibility of opening a suitable department in the existing faculties of theology which teach Islamic theology. Nevertheless, no substantive step or outcome seems to be in sight. The Department of The Cultural Studies of World Religions established in 1999 in Istanbul University, proposed as an alternative to the Halki Seminary, has been closed in 2011 because the Higher Education Council has failed to allocate faculty and student quota.[1077] Still, trying to solve this problem through the public education system, the Greek Patriarchate insists on the re-opening of the Halki seminary.[1078] As a result of the obstacles before establishing appropriate educational institutions, many religious communities must send their candidates for religious teachers or leaders abroad for religious training, which has many disadvantages like the financial burden on the communities and the reluctance of candidates to return to Turkey after training abroad.[1079]

As far as, the so-called Lausanne minorities are concerned, as in many other aspects of freedom of religion or belief, the right to teach religion, is viewed from the "reciprocity" lens by the Government,[1080] where formulas are developed by the state in a way to ensure similar solutions for the Turkish minority in Greece.[1081] For example, throughout the Republic, religious communities have been denied the right for formal private teaching based on their religious traditions, nevertheless, the Greek Orthodox Halki Seminary (vocational middle school) continued to train religious personnel until 1971 when it was closed ensuing tensions in relations with Greece, thereby significantly undermining rights protected, among others, by

[1076] Hıristiyan Gazete, "Gevorkyan İlahiyat Okulu'na başvurular başladı", 07.2011, http://www.hristiyangazete.com/2011/07/gevorkyan-ilahiyat-okuluna-basvurular-basladi/#.UMmliZi6TFJ , accessed 16.01.2015.
[1077] Milliyet Daily, "Ruhban Okulu'nun alternatifi kapandı" [The Alternative of the Seminary has been Closed], 1.10.2012.
[1078] The seminary was closed in 1971 after the Patriarchate, in order to avoid being administered by the State, chose not to comply with a state requirement to nationalize.
[1079] Report by the Alevi Vakıfları Federasyonu, *Belief Groups in Turkey: A New Framework for Problems and Demands* (2011), p.22.
[1080] On the principle of reciprocity see Chapter 5 of this book.
[1081] For a number of formulas that have not been carried out see, Radikal Daily, Betül Kotan, "38 yıllık bir yılan hikâyesi: Heybeliada Ruhban Okulu" [Long Tale of 38 Years: the Halki Seminary], 10.04.2009.

the Lausanne Treaty.[1082] While the use of the reciprocity principle by Turkey does not change the crux of the issue as a human right, the reciprocity perspective embraced by the state does add another dimension that cannot be ignored when seeking corrective action by the Turkish state.

As far as teaching of religion in university education is concerned, we will try to explain the intricacies of establishing universities and identify the difficulties for religious or belief groups Public and Foundation (non-profit) Universities in Turkey are established by the decision of the Council of Ministers and all university education must be carried out under state supervision.[1083] The Turkish higher education system has a centralized structure and all universities are subject the same law and regulations/rules. State and private universities must be founded through the adoption of law.[1084] Private universities are under the supervision of the Council of Higher Education and their programs must be regularly accredited. The establishment of new faculties are subject to the approval of the content, and that of new departments to the approval of the Council of Higher Education.[1085]

Yet, for example, Islamic religious groups have been able to establish Islamic theology faculties through foundation universities where a community would establish a foundation which would then establish a university with theological faculty.[1086] There is, however, no example of a non-Sunni or non-Muslim private university that has a theological program formed according to the needs of these groups. Despite the absence of a ban on establishing a theological faculty through a foundation university the difficulties and complexities of the bureaucratic process and needs in terms of not least, the financial,[1087] and human resources make it very difficult, if not impossible, for

[1082] For a thorough account of the closing process and following developments see Elçin Macar and Mehmet Ali Gökaçtı, *Heybeliada Ruhban Okulu'nun Geleceğine ilişkin Tartışmalar ve Öneriler* [Discussion and Recommendations Pertaining to the Future of the Heybeliada Theological Seminary] (TESEV, 2005).
[1083] Turkish Constitution Article 130.
[1084] The Higher Education Law No. 2547xxx There were no private universities in Turkey until 1984 and private universities may only be established by non-profit foundations.
[1085] *Ibid*.
[1086] Fatih University is known to be affiliated with the Gülen movement and the Fatih Sultan Mehmet University is affiliated with
[1087] A minimum of 15 million TL (approximately 7 million Euro) is required for the establishment of a foundation that will have the purpose of establishing a university.

most religious groups to establish private theological faculties.[1088] The first private theological faculty was established within Fatih University in 2010 with the decision of the Council of Ministers.[1089] In 2014 the Islamic Research Centre under the 29 Mayıs University, owned by the Diyanet Foundation, has applied to establish the first International Islamic University.[1090]

Bearing in mind that the assessment of the protection of a human right should include indications of the outcomes expected as a result of the protection of the right in question, the non-existence of any high education institution that provides education in minority religions and religious traditions demonstrates that the necessary structural and process related foundation is yet to be established. This shortcoming, when viewed in contrast to the institutional and financial state support evident in the existence of theological faculties established in public universities must have implications for the effective protection of the right to freedom of religion or belief in Turkey. Human rights law is yet to find a way to address these kind of inequalities. Since adjudication generally asks the question "is there an intereference in the right to manifest religion or belief?" the state support of certain religions or religious groups, as such, has not been usually seen as amounting to interference in the right to freedom of religion or belief of other groups.

Teaching of religion or belief is a fundamental component of the right to freedom of thought, conscience, religion or belief. It is expressed explicitly in the core international religious freedom provisions. Everyone has the right to manifest religion or belief, alone or in community with others in worship, *teaching*, observance or practice.[1091] As noted earlier, Turkish Constitution does not explicitly protect the right to manifest one's religion or belief in teaching.[1092] Instead, it *regulates* education and instruction in religion and makes it strictly subject to state supervision and control:

> Education and instruction in religion and ethics shall be conducted under state supervision and control. Instruction in religious culture and moral education shall be compulsory in the curricula of

[1088] Telephone interview with Ali Gül from Ehl-i Beyt İnanc Derneği 17.12.2012.
[1089] Fatih University website http://ilahiyat.fatih.edu.tr/, accessed 17.12.2014.
[1090] Hürriyet Daily, "Diyanet'ten İslam Üniversitesi" [Islamic University from the Diyanet], 1 October 2014.
[1091] Article 9 of the ECHR, Article 18 of the ICCPR.
[1092] See Chapter 5.

> primary and secondary schools. Other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representatives.[1093]

"Other religious instruction" that is under state supervision and control is restricted to formal schooling in the Hanafi Islamic tradition only. Formal religious teaching and training is provided in the theological faculties solely based on the Hanefi Islamic tradition. There is no theological or other faculty that teaches other Islamic tradition or non-Islamic beliefs. In middle and high school level, there are the state-run Imam Hatip schools, which are vocational schools for raising *imams* and *hatips*,[1094] again, these provide teaching based on the Hanafi Islamic tradition. At the middle school level, it is not possible to establish formal schools that provide other religious instruction or training.

The lack of an adequate legal framework which would allow religious communities to establish schools, both to teach their followers and to train religious personnel, makes the right to manifest religion or belief in teaching highly ineffective in Turkey. The failure to solve this problem has a direct consequence on the inability to preserve their identity and community as well because their efficiency in transmitting their dogma and traditions to new generations and their efficiency in training religious leaders and teachers is weakened. Their situation is further weakened because of the enormous state financial and institutional funding provided for the state trained religious personnel- following the Hanafi Islamic tradition.

The lack of a provision in Turkish legislation for the training of religious leaders leaves religious/belief groups to improvise solutions for their communities. The Caferi, who are close to the Shia tradition of Islam, send their clergy to Iran and Irak for theological education in Shia Islam.[1095] Some of the clergy have received adequate education and training to teach others, however, it is not possible for them to establish a school, therefore all training must be in the mosque, where one cannot receive a degree, and/or outside of the country. Some religious communities have established associations with the purpose of research and education of their religion, often training

[1093] Article 24 (3).
[1094] *İmams* and *hatips* are, Islamic religious leader and Quran reader respectively.
[1095] Aksiyon, "Ankara'da Erbain Hazırlığı" (Erbain Preparations in Ankara), 11.01.2011, http://www.aksiyon.com.tr/aksiyon/haber-28443-200-ankarada-erbain-hazirligi.html , accessed 16.01.2015.

here takes place through seminars.[1096] None of these institutions may provide formal degrees comparable to offered by the state institutions.

7.2.7. To train, appoint, elect or designate by succession appropriate leaders called by the requirements and standards of any religion or belief

While the right to train and the right to appoint religious leaders are inter-related, not least because they are in many ways dependent on each other, the right to train leaders and the right to appoint, elect or designate by succession appropriate leaders need to be assessed separately since the former is subject to legislation on education and the latter is regulated based on other laws and, often, by administrative decisions in Turkey. Here our analysis will focus on the right to appoint, elect or designate by succession appropriate leaders called by the requirements and standards of any religion or belief since we have discussed issues pertaining to training of religious leaders in the previous section.

Appointment of religious leaders and their proper functioning as foreseen in respective religious traditions are vitally important for the healthy life of any religious/belief community. While the role of religious leaders in various religious traditions may vary, their role in giving a vision to the community as well as management of, not least, religious functions, are common to most traditions. Generally speaking, the leadership organization in itself is in fact an expression of their beliefs, deeply rooted in their understanding or interpretation of sacred texts or traditions.[1097] This is also true for the titles used by religious leaders. Therefore any interference in this sphere must be rigorously assessed with reference to international human rights standards.

Current legislation and administrative practice in Turkey applicable to the right to appoint, elect and designate religious leaders is far from being uniform, clear and

[1096] *Inter alia*, The Caferi have established "Caferilik İnancını Tanıtma Araştırma ve Eğitim Derneği" (Association for Promoting of and Research and Training in Caferi Faith), CEM Vakfi Alevi-Islam Din Hizmetleri Başkanlığı, Alevi Araştırma Merkezi, Hasat Kilise Hizmetleri Derneği.
[1097] Roland Minnerath "The Right to Autonomy in Religious Affairs" in *Facilitating Freedom of Religion or Belief: A Deskbook*, T. Lindholm, W.C. Durham and B. G. Tahzib-Lie (Eds.), (Martinus Nijhof, 2004), p. 291.

foreseeable. There is no general legislative regulation pertaining to the internal affairs of religious/belief communities in Turkey. Legislation and administrative practice differ based on certain categories of religious leadership; the Presidency of Religious Affairs, religious leaders of the so-called Lausanne religious minorities that are recognized by the Turkish government as protected by the Lausanne Treaty (Jewish, Armenian Apostolic and Greek Orthodox), Muslim communities organized outside the Diyanet framework and non-Muslim religious communities outside the Lausanne framework. Since this thesis focuses on the protection of freedom of religion or belief for groups that seek to exercise the right to freedom of religion or belief outside the PRA structure, legal issues pertaining to the appointment of leaders within the PRA structure will be only briefly described.

General legislation laying down neutral rules for the appointment or election of religious leaders is non-existent in Turkey. Similarly, there are no specific requirements or guidelines for seeking permission or procedures to be followed in the appointment of religious leaders of any religious community. While the lack of general regulation may give the impression that there is complete freedom in the sphere of electing religious leaders, as it will be shown below, with regard to selected communities there is a significant degree of interference, at times amounting to obstruction. In contrast to the absence of general rules in this sphere, the Law No. 677 is explicitly and directly applicable to the prohibition of the use of *certain* Islamic religious leadership titles.[1098] Other Muslim religious leaders within the Diyanet structure, namely the *imam* and *mufti*, are subject to the legislation governing the Diyanet and Public Servants.[1099] The Law No. 677, thus, categorically bans the election or selection of certain religious leaders by making positions with certain capacity and title unlawful. The law is not a neutral law prohibiting the use of all religious titles. Christian and Jewish titles or religious titles found in the Sunni-Islamic tradition are not mentioned in the law. Moreover, the three

[1098] Tekke ve Zaviyelerin Kapatılmasına İlişkin Kanun [Closure of Dervish Monasteries and Tombs, the Abolition of the Office of Keeper of Tombs and the Abolition and Prohibition of Certain Titles] Act No. 677 of 30 November 1341 (1925).

[1099] Law No. 633 Diyanet İşleri Başkanlığı'nın Kuruluşu ve Görevleri Hakkında Kanun (Law on the Establishment and Duties of the Presidency of Religious Affairs and the Addition of Four Temporary Provisions to This Law), 26.04.1976 and Devlet Memurları Kanunu [Law on Public Servants] No. 657, 14.07.1965, Resmi Gazete [Official Gazette] (R.G.), 23.07.1965, No. 12056.

so-called Lausanne religious minorities are subject to an unclear administrative process over which they have little control.

Following Turkey's independence war and the establishment of the Republic in 1923, in the evolved state-religion relation a certain political sensitivity prevailed and this has been reflected in the concrete cases of religious leaders of certain religious communities. For example in 1933, the Syriac Patriarchate in Mardin, could no longer resist the subtle and open pressure of the state and moved to Syria "temporarily" when the community considered the move necessary.[1100] The Alevi-Bektashi centre – *dergah*- was moved to Albania following the closure of *tekke* and *zaviye* through the adoption of the Law No. 677. Similarly, in 1925 Konstantinos who had been elected the Greek Patriarch, was sent by the public authorities to Thesseloniki in Greece. When Greece took the matter to the League of Nations claiming that this act violated the Lausanne Treaty, Turkey threatened to close and send the Patriarchate out of Turkey, Greece withdrew its complaint and the matter was closed by presenting the situation as if Konstantinos had resigned on his own accord.[1101]

Since this thesis deals with the assessment of the right to manifest religion or belief outside the Diyanet structure we will not examine the leadership appointment process in this public body in depth. It is important to note, however, that the religious leadership scheme within the Diyanet structure is highly regulated. The Prime Minister appoints the Head of the PRA.[1102] Officially, he does not represent the Muslim community; he represents the PRA.[1103] The Muslim population that worships in the mosques run by the Diyanet are not involved in the appointment of the *imam*, the *mufti* and the Head of the Diyanet. There have been calls to review and change the selection method of the Head of the PRA toward the participation of the community in the selection process.[1104] These have not yet produced any results.

[1100] Taraf Daily, Ayşe Hür "Mezopotamya'nın Kadim Halkı Süryaniler" [The Ancient People of Mesopotamia- Syriacs], 14 December 2008.
[1101] *Ibid*.
[1102] *Ibid.*
[1103] Article 3 of Law No. 6002.
[1104] Gözaydın, *supra* note 74.

State interference is most evident in the appointment of religious leadership of three non-Muslim religious communities - the Jewish, the Greek Orthodox and the Armenian Apostolic. It will be remembered that Turkey recognizes solely these communities as religious communities subject to the minority protection scheme of the 1923 Lausanne Treaty.[1105] The Lausanne Treaty protects the right to freedom of religion or belief and the right of non-Muslims to run their religious institutions freely, however, does not specify a certain procedure for the election of religious leaders, implicitly leaving this to the communities to decide for themselves in accordance with their traditions.[1106] As will be shown below, the process of selecting leaders for these three communities takes place in the state apparatus' administrative/executive section lacking precise, accessible and foreseeable rules.

According to the Ministry of Interior, Directorate of the Minority Issues Evaluation Section, for example, in the appointment of the Armenian Patriarchate, a certain legal framework exists;

> The affairs and transactions related to minorities are carried out in accordance with Articles 37-45 of the Lausanne Treaty, affairs and transactions concerning our Armenian citizens are carried out in accordance with the ancient precedents and customs of the community.[1107]

This statement, however, raises a number of questions. Among others, who determines what ancient customs are, the state or the community, how is the content of these ancient customs and precedents determined, if it is the community's rules or customs, do they have the right to modify them, what rules will apply if there is a disagreement between the state and the community or within the community on the substance of these rules? The validity of Regulations pertaining to the administration of the *millets* in the Ottoman Empire is far from clear.[1108] While the state administration does not provide a definitive answer on the nature of the validity of these Regulations, its practice indicates that certain elements of the Ottoman practice are continued. The lack of certainty and foreseeability in this context leads to the state being ultimately

[1105] See above.
[1106] Articles 38-44.
[1107] E-mail response to information request from Ministry of Interior, 27 August 2010.
[1108] See more on these Regulations in Chapter 5. The Turkish judiciary's reliance on these texts also varies. See Chapter 6.

the sole actor who determines the applicable legal rules and the minorities in question dependent on the public authorities to determine applicable rules. The dependence of minority communities to the decisions of public authorities aggravates the weak position of these communities *vis a vis* the state.

Notwithstanding the legal vacuum concerning the election of the religious leaders, since the establishment of the Turkish Republic, the Jewish, Greek Orthodox and Armenian Apostolic communities have applied for state permission when electing or appointing their religious leaders. By doing this, the practice established during the Ottoman period has been maintained to a certain degree. Without a legal basis the election process, however, becomes ultimately outside of the control of the religious communities themselves. The main reason for this is that the process of application for state permission in order to elect or appoint the religious leader is not required by any law, yet, *de facto* required by what may be called an *established practice*.

The account of a typical process of electing religious leaders of these three communities will be useful to understand the interferences in the right to appoint, elect or designate religious leaders. The elections of the Chief Rabbi and the two Patriarchs do not follow a pre- determined procedure. Whenever a need for the election of a religious leader arises, permission for that particular election must be obtained and the permission is not valid for any subsequent election. The procedure is defined throughout the process, with changes in criteria as well as reciprocal negotiations, "each election is different".[1109] The draft of the election regulation is prepared by the religious communities; this includes the criteria for candidates and term of service. However, the Ministry of Interior may advise changes, or declare that a certain provision to be incompatible with existing regulations - whether or not this is in the regulations.[1110]

It is very important to note that the communities, in preparing election regulations to

[1109] Interview with the representative of the Jewish community who wished to remain anonymous, November 2010.
[1110] *Ibid*.

submit to the Turkish authorities, are strongly guided by what they think may be acceptable to the state, in the light of their previous experiences.[1111] This is particularly reflected in the criteria for who may be chosen as the leader.[1112] Apart from insisting that all members of leadership bodies are Turkish citizens, the government does not generally interfere at present in the appointments below the level of the head of the religious community. In effect the citizenship criteria functions as a restriction on the eligibility of spiritual leaders from outside of Turkey and strengthens the state's position as against the religious communities and provides a means of facilitating or restricting the right to freedom of religion or belief. For example, in the past the Turkish state has terminated the citizenship of Silifke and Alaşehir metropolits,[1113] or recently, allowed the citizenship applications of non-Turkish clergy.[1114] Generally speaking the religious leader must be a Turkish citizen, at least of 40 years age, have certain religious training, and be trustworthy in the eyes of the Turkish government.[1115] The last condition was a condition required by the Turkish state in all previous elections. However, in the 2009 elections the Istanbul Governorship informed the Election Committee of the Jewish community that this provision must be changed to stipulate that the Chief Rabbi must "have a good reputation in the eyes of the state and society".[1116] Again this change in the requirement does not have a legal basis or precise and foreseeable criteria, it follows from the public authorities discretion.

The experience of the Armenian Apostolic community has been the most recent and vivid illustration that interference in the appointment of leadership is far reaching and effects the functioning of the community. Following the health-related seclusion of the Patriarch elected for life, the question of a successor became an important one for the

[1111] *Ibid*.
[1112] *Ibid*.
[1113] This is characterized as a move in the 1960, following the Cyprus crises, to increase pressure on the Patriarchate. Elçin Macar, *Cumhuriyet Döneminde İstanbul Rum Patrikhanesi* [Istanbul Greek Patriarchate in the Republican Period], p. 203, quoting from Cumhuriyet, 21 April 1964.
[1114] Hurriyet Daily, "Patrik Adaylarına Vatandaşlık Kapıda" [Possible Citizenship Candidates for the Patriarchates], 22.07.2010.
[1115] *Supra* note 141, interview with the representative of the Jewish community.
[1116] *Ibid*.

healthy functioning of the community's religious affairs.[1117] The rules or lack of rules concerning appointment of leaders for the Armenian Apostolic community seems to be far from clear. According to the public authorities the Armenian Patriarchate seems to be subject to an 1863 Regulation,[1118] concluded between the Ottoman administration and the Patriarchate. A new regulation annulling this has not been drafted since the establishment of the modern Turkish Republic, and there are differing views among lawyers as to whether or not the 1863 Regulation is still valid. Also, if it were valid, to what extent the 1863 Regulation is included in the established practice of appointing religious leaders is not certain. This Regulation does not specify a course of action if the Patriarch becomes ill, as it only makes provision for the course of action to be taken if the Patriarch dies or resigns from office.[1119]

Two different factions in the Armenian Apostolic community approached the government separately; one asked the government to allow the selection of a Co-Patriarch, believing that a new Patriarch may only be chosen upon the death of the previous Patriarch,[1120] the other, the Council of Armenians in Turkey, asked for the election to be allowed to select a new Patriarch.[1121] Eventually, the Interior Ministry wrote to the community via the Istanbul Governor's Office, rejecting both the proposals presented from within the Armenian community, arguing that Church regulations did not envisage the possibility of electing a new Patriarch while the incumbent is still alive or a Co-Patriarch.[1122] The Interior Ministry determined that only a Patriarchal Vicar-General (*Patrik Genel Vekili*), could be elected to lead the community until the current Patriarch dies.[1123] The government justified its decision to refuse the election of a Co-Patriarch by stating that such a position is not foreseen in the existing Regulations – interestingly, nor is the appointment of a Patriarchal Vicar

[1117] Mine Yıldırım and Otmar Oering, "TURKEY: Why state interference in the election of Chief Rabbi, Greek Orthodox and Armenian Patriarchs?", F18News 11 August 2010 http://www.forum18.org/archive.php?article_id=1477 ,accessed 16.01.2015.
[1118] Murat Bebiroğlu, "Eş Patrik Seçimi ve Son Gelişmeler" [Election of a Co-Patriarch and Latest Developments], (Hyetert 14 July 2010), http://www.hyetert.com/yazi3.asp?s=3&Id=681&DilId=1 , accessed 16.01.2015.
[1119] Regulation on the Armenian Community.
[1120] Yıldırım and Oering, *supra* note 149.
[1121] Bebiroğlu, *supra* note 150.
[1122] *Ibid*.
[1123] *Ibid*.

General. Bebiroğlu observes that such a position has not existed within the Armenian Orthodox Church since 1709 and it is not in their tradition.[1124] The government thus assumed the role of regulator or arbitrator, and imposed a solution to the problem that was not asked for by the community. The Spiritual Council of the Armenian Apostolic Church elected an Archbishop to the newly-created post of Vicar General.[1125] Thus, not only did the community not select its leader freely it was not even able to determine the title of their religious leader.

Practice in this sphere varies, however. For example, when the current Chief Rabbi was elected in December 2002 for the first time the office of Chief Rabbi was decided *by the community* to be for a seven year term, not a lifetime appointment as it has been previously.[1126] Taking a step that broke with established practice, in 2004 Patriarch Bartholomew had named several foreign citizens to membership of the Holy Synod, without consulting the government.[1127] Amid an outcry by Turkish nationalists, who called for the Patriarch to be expelled from the country, Prime Minister Erdoğan indicated that this was an internal issue for the Church. After years of urging on the part of the Patriarchate and apparently as a result of the August 2009 meeting between Bartholomew and Erdoğan, the government finally agreed that foreign bishops of dioceses under the Ecumenical Patriarchate could apply for Turkish citizenship. Patriarch Bartholomew immediately wrote to the bishops urging them to do so, pointing out that when the election of his successor takes place, "they will have the right to elect and to be elected".[1128]

The title used by the leaders of the so-called Lausanne religious communities has also been interfered with by public authorities. When the Chief Rabbi Haleva's term expired in late 2009, the government refused to allow an election (by direct vote of members of the Jewish community throughout Turkey) to take place, unless the post title was

[1124] *Ibid*.
[1125] *Ibid*.
[1126] *Supra* note 141, interview with the representative of the Jewish community.
[1127] Yıldırım and Oering, *supra* note 149.
[1128] *Ibid*.

changed from “Chief Rabbi of Turkey” to “Chief Rabbi of Turkish Jews”.[1129] After finalising the election criteria the government permitted an election to the post of Chief Rabbi of Turkish Jews, which Haleva won in May 2010.[1130] The Turkish authorities do not officially recognize the Greek Orthodox Patriarch as “ecumenical”, instead insist on calling the Patriarch the "Fener Rum Patriği" (Patriarch of Fener).[1131] Whereas the Patriarchate considers itself “ecumenical”.[1132] The Turkish Court of Cassation has made a legal proclamation on the ecumenical title of the Patriarchate saying, “the Patriarchate is an institution which bears only religious powers as the church of the Greek minority in Turkey”, and that “there is no legal basis for the claim that the Patriarchate is ecumenical”.[1133] The Armenian Patriarchate also has jurisdiction outside Turkey, having jurisdiction over the tiny Armenian community on the Greek island of Crete.[1134] The Turkish Government - as with the Ecumenical Patriarchate - rejects the terminology used by the Armenian Apostolic Church itself for its Patriarch: "Patriarch of Constantinople". Instead, the state refers to him as *Ermeni Patrik* (Armenian Patriarch). The government also tries to reject the Ecumenical Patriarch's wider jurisdiction or authority over Orthodox communities outside the country - including direct jurisdiction over dioceses in eastern Greece.[1135]

In contrast, the practice concerning the small Armenian Protestant community stands out as the exception to the high level of interference in the election of leaders of the so-called Lausanne minorities; they do not experience any interference in the election and/or appointment process of their religious leaders. Religious groups that are not interfered with in the appointment of spiritual leaders include the Latin Catholics, expat communities of the Anglican Church and the German Evangelical congregation - have not faced Turkish government involvement in their choice of leaders. Turkish

[1129] The Jewish Chronicle, “Turkish authorities stall rabbi election”, 4.03.2012, accessible at http://www.thejc.com/node/29072 , accessed 30.12.2014.
[1130] Yıldırım and Oering, *supra* note 149.
[1131] Fener is the name of the district of Istanbul in which the Patriarchate is located.
[1132] This title that has been used by the Patriarch in Constantinople since the 6th century, and which was continued after the city came under Ottoman rule in 1453.
[1133] Court of Cassation, 2005/10694, judgment of 2007, 4th Penal Chamber.
[1134] See the official website of the Armenian Patriarchate, *The Armenian Patriarchate of Constantinopolis*, http://www.armenianchurch-ed.net/our-church/patriarchate-of-constantinople , accessed 01.12.2014.
[1135] Yıldırım and Oering, *supra* note 149.

Protestants, Jehovah's Witnessed and the Bahai. This practice lends support to the notion that Jewish, Greek Orthodox and Armenian Orthodox communities have a special significance that triggers rigorous oversight and interference by the state. Interference in the appointment of Islamic religious leaders varies significantly as illustrated above. The different rules and practice concerning the appointment of leaders of religious groups demonstrate that interference is deemed necessary at varying degrees by the state.

For the so-called Lausanne communities the seal of approval ensuing the complicated process of election of the religious leader appears to retain certain significance in a number of ways. For instance, this process confers the head of the religious community a status, as such, that creates a *de facto* state recognition of him as the representative of the community and ensures no other self-appointed person may claim such a position.[1136] The significance attributed to the *de facto* status contrasts with the *de jure* status that reduces the position of the head of the religious minority to top religious clergy of a certain church in the case of the Greek Orthodox Patriarch. Secondly, arguably, the possible consequences of not applying for permission also force religious communities to follow the *imposed* practice. It is highly unlikely that any of these three ethnic/religious minority groups would challenge this established practice, wanting to avoid the conflict this might create. The possible consequences of not applying for permission might include non-recognition of the religious leader by the state for the purpose of representing their ethnic/religious community and withholding permission to wear religious clothing in places outside of places of worship which is given to one clergy of each religious community by a decision of the Committee of Ministers.[1137] The diverse issues and interests to consider and the delicate balance that the so-called Lausanne minorities have to seek in the process of appointing their religious leaders illustrates the need for particular protection for the right to appoint leaders.

In contrast to a lack of regulation concerning the religious leadership of non-Muslim

[1136] *Supra* note 143, interview with the representative of the Jewish community.
[1137] Article 1, Bazı Kisvelerin Giyilemeyeceğine Dair Kanun [Law Related to Prohibition on Wearing Certain Garments] No. 2596, 3.12.1934, R.G. No. 2879, 13121934.

communities, there is a specific legislation that prohibits the use of certain religious titles as well as the exercise of these capacities that specifically involves certain Islamic traditions. The Law No. 677 has important implications for leadership within certain Islamic traditions. [1138] According to the Constitution Law. No. 677 is considered part of the reform laws category that seek to protect secularism, no constitutional provision may be understood or interpreted in a way to render Law No. 677 unconstitutional.[1139] Article 1 declares the closure of all *tekke* and *zaviye* and *türbe* and explicitly prohibits the use of a variety of Islamic and superstitious titles:

> In all tarikats, the use of titles and attributes like Sheikh, Dervish, Mürit [Disciple], Dedelik [Elder], *sayyid* [descendant of Prophet Mohammed], Çelebi [a title for a leader of dervish order], *Babalık* [Father], Emirate, Naiplik [Regency], Khaliphat, sorcery, breathers on sick people for healing, fortune-telling and soothsaying, and nüshacılık [writing prayers] for the purpose of *murada kavuşturmak*, and the exercise of these services and the wearing of garments for them is prohibited.[1140]

The same Article foresees a prison sentence, not less than three months and a monetary fine not less than 50 Turkish Lira.

These prohibited titles are commonly used to refer to historical religious figures as well as religious leaders of today, yet this explicit prohibition is seldom applied. It has been reported that in practice "when the *dede* administered the *cem*", there was "warning and threat" but no sanctions.[1141] As far as the judicial process is concerned, in a case concerning the act of fortune telling, also prohibited by the Law No. 677, the Court of Appeals held that the purpose of the Law No. 677 was "to protect the society from superstition and protect the people from abuse that these might cause".[1142] Other elements necessary to establish this crime include, that the person must be known as a person who is engaged in these acts and the fact that the person should be engaged in these acts in a routine manner.[1143] On the other hand, reading the Quran and writing a prayer for a person that is ill with the purpose of wishing that he/she gets well is not

[1138] Article 174 of the Turkish Constitution*, supr*a note 41.
[1139] *Ibid.*
[1140] *Supra* note 41, Article 1.
[1141] Interview with lawyer Hasan Gülşan who has extensively worked on Alevi cases, March 2013.
[1142] The General Council of the Court of Appeals E1955/9 and K1955/17, 6.7.1955.
[1143] *Ibid*.

considered "breathing or nüshacılık".[1144] Since such *abuse* could not be established in the case- the fortune telling appeared to be a form of entertainment and the person did not do this activity as a source of income- the person in question was acquitted.[1145] A village imam was convicted for violating the Law No. 677 Article 1(2) for "making *muska*- written charm- and engaging in *üfürükçülük*- breathing on sick people in order to cure them-" and thus profiting/ taking advantage from the village community.[1146] In another case a person was convicted for breathing on persons for the purpose of breaking a spell, yet, whether there was profit or not was not considered.[1147] Yet, "profiting or benefiting" was considered an indispensible element for the crime of "breathing and writing prayers" as well as the fact that the person in question is "known by the title of breather".[1148] On the other hand, a Court of Appeals held that a person charged with using the title "khalifat" and engaging in acts that a khalifat would engage in, like gathering people around him to form a *tarikat* (Islamic brotherhood, literal meaning *the way*), should be found guilty for violating the Law No 677 Article 1(2).[1149]

Interestingly, it appears that individuals who are Alevi *dede* or *mürşid* have not been convicted for violating Law No. 677 despite the widespread existence of this office, albeit informally.[1150] Ersal, in his study on the Veli Baba Sultan Dervish Lodge (Veli Baba Sultan Dergahı), describes a very lively religious community where religious leaders use some of the titles that are prohibited in Article 1 of the Law No. 677.[1151] They do not use the Dervish Lodge, except for religious visits, but continue their religious activities

[1144] *Ibid*.
[1145] *Ibid*.
[1146] The General Council of Court of Appeals E. 1983/7-403 and K.1984/243, 25.06.1984. In another case a fortune teller was accused of both "fortune telling" and "theft" as he took the money from the person whose fortune he was telling. Both crimes were treated seperately and he was convicted of both for fortune telling and theft. E1997/1438 and K1997/1358, 03.02.1997. Where fortune telling is not a subject of complaint and only a matter of entertainment between consenting persons Law. No. 677 Article 1(2) may not be applicable.
[1147] Court of Appeals 7th Criminal Chamber, E1976/3580, K1976/3580, 20.04.1976
[1148] *Ibid*.
[1149] Court of Appeals 7th Criminal Chamber, E2003/12950 and K2003/05182, 31.05.2005. However the objection of the prosecutor on procedural grounds was found admissible hence the case was dismissed.
[1150] A review of Court of Appeals cases did not lead any cases where the use of the *dede* or *mürşit* titles were the subject matter of a case. This was also confirmed by several Alevi lawyers who were interviewed. *Inter alia*, by Hasan Gülşan March 2013 and Namık Sofuoğlu, September 2013.
[1151] Mehmet Ersal, Alevi İnanç- Dede Ocakları Üzerine bir Örneklem: Veli Baba Sultan Ocağı [A Study on the Alevi Belief- Dede Houses: Veli Baba Sultan House], (Alevi-Bektaşi Kültür Enstitüsü Yayınları, 2009).

in homes with various religious leaders, *dede* or *mürşid*, actively administering religious services and rituals. The application of the relevant legal provisions seems to be inconsistent. Ersal observes that there was a position of Watchman in times of "prohibition" who would watch for the gendarmerie while the people and their leaders would hold religious activities in a home but they say this position no longer exists.[1152] For the first time an Alevi customary jurisdiction decision was- albeit indirectly- the subject of a court decision; an Alevi complained of "defamation" because an Alevi customary system the *dede* and other members of the group declared him "düşkün"[1153] and expelled him from the community because of adultery.[1154] The court decided the case on the basis of "defamation" and did not review the case on the use of the *dede* title nor on the customary legal system involved.

The account above illustrates the differing and fragmented *de jure* and *de facto* rules that are applicable to the right to elect and appoint leaders for diverse religious communities in Turkey. Now, we will turn to examine the compatibility of key elements of these practices with standards established by international law, freedom of religion or belief in its collective dimension.

Both the UN and ECHR protection schemes attribute strong protection to the right to appoint leaders for religious groups which demonstrates a conception of the right to freedom of religion or belief that recognizes the importance of this component of the collective dimension for both groups of believers and individuals as well as not seeing state intervention necessary only in exceptional cases. The HRCttee has not considered a communication on this issue, however, in its General Comment on Article 18, held that the right to freedom of religion or belief includes the protection of "acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers".[1155] Whenever states decide to interfere with these "internal" aspects of organization of a religious group, they also interfere

[1152] *Ibid*., p. 89.
[1153] Meaning, "fallen".
[1154] Gazetevatan, "Alevi Hukuk Yargıdan Döndü" [Alevi Customary Law Annuled by the Judiciary], 07.07.2010.
[1155] General Comment 22 of the HRC on Article 18 of the ICCPR, para. 4.

with its "autonomy" of the group in question.

The ECtHR has noted in a number of cases, that the personality of the religious leaders is of importance to the members of the religious community and that participation in the organizational life of the community is a manifestation of one's religion, protected by Article 9 of the Convention.[1156] If there were a scale of acts protected within the scope of freedom of religion or belief, acts pertaining to the internal organization of belief communities would arguably on the part of the scale indicating strong degree of recognition. The Strasbourg organs also attribute strong protection to the international organization of religious communities, and remarkably not necessarily based on the high status of the right to association in the ECHR system, as an issue falling under Article 9 as interpreted in the light of Article 11.[1157]

The requirement for state permission or regulation involved in the process of election and appointment of religious leaders raises issues with regard to the right of religious communities to be free in their internal affairs, particularly one as critical as the right to appoint their own leader in accordance with their own doctrines and traditions. The effect of requirements or in fact, in some cases, prohibition, must be felt at varying degrees in individual religious communities. Yet, it is not difficult to imagine that these regulations or prohibitions would amount to interference in the right to manifest religion or belief in its collective dimension. Such interference must be justified in accordance with international law provisions; prescribed by law, pursuing a legitimate aim to protect public order, health and rights and freedoms of others and necessary in a democratic society. In the cases of the so-called Lausanne minorities, it is hard to find the legal basis for the current practice which seems to be based on "established practice" yet lacking foreseeability and precision. The incompatibility of the practice with the requirement that any restriction must be prescribed by law is also evident in that fact that every election is and has been different. Interestingly, these claims have not been the subject of any legal dispute in the domestic jurisdiction therefore we do not have information on how the judiciary would decide these cases.

[1156] *Hasan and Chaush v Bulgaria*, 26 October 2000, European Court of Human Rights, No. 30985/96.
[1157] *Ibid*., para 62.

Moreover, the fact that each and every election is arbitrarily treated differently puts the religious communities in a highly vulnerable position. The main reason for this is that the government's arbitrary decisions are affected by factors which these religious communities cannot expect or control. The lack of an adequate legal framework that is not compatible with international human rights law may be an indication of mistrust of these minorities. At the core of the changing nature of administrative practice may be that the Turkish state views relations with these three communities as strongly linked to foreign policy matters – not as a matter of the freedom of religion or belief of Turkish residents.[1158] As it has been illustrated in Chapter 6 for decades, these communities have been subject to the changing relationships between Turkey and other countries.

Active interference by Turkey in the right of religious leaders in the use of the title that they consider appropriate in accordance with their religion or belief would constitute an interference with the religious freedom of the community in question. Such restriction must be justified it must be prescribed by law, justified by reference to legitimate requirements and proportional in line with the relevant international provisions protecting the right to freedom of religion or belief. Indeed, it is difficult to see why and when any state would need to interfere in the usage of a title by any religious groups. This implausibility was also observed by the Venice Commission in relation the obstacles before the use of the title "ecumenical" by the Greek Orthodox Patriarch". The Venice Commission Opinion held that "only in exceptional cases it may be justified to deny to a religion the right to choose and use a certain name".[1159] In addition, the opinion notes that it is not possible to see how any of the requirements listed in Article 9 paragraph 2 would possibly be applicable in such a case, as neither public safety or public order nor any of the other concerns can be affected at all, and

[1158] Rıfat Bali, Devletin Yahudileri ve "Öteki Yahudiler" [State's Jews and "Other Jews"], (İletişim, 2004).
[1159] The Venice Commission also held that "an explicit prohibition to use a certain name which forms part of the identity of a religion usually is an interference with and possibly a violation of the rights under Article 9, the use of a different name in the correspondence or at official events etc. may – depending on the particular circumstances – be a mere political question, not a legal issue under the Convention. However, such a policy of "re-naming", first being a matter of political correctness, may reach the level of an interference when it is combined with other measures discriminating the religious group on grounds that are not in line with the ECHR and in particular with Article 14." *Supra* note 29.

certainly not proportionally, by the Patriarchate using its ancient title of "ecumenical"".[1160] The Council of Europe's Venice Commission in March 2010 urged Turkey to recognize the right of the Patriarchate to use the title "ecumenical".[1161] The same arguments could be relevant for the ban on the use of certain titles by the Law No. 677. The implications of the application of the Law No. 677 for the right to manifest religion or belief in the internal organization of a religious community and in particular the use of certain titles and the appointment of religious leader needs to be further explored. In some cases above we have seen that for the crime to occur a certain "advantage" by the use of the title and performance of function was considered necessary by the judiciary, depending on the individual circumstances of the case. Where "taking advantage" would amount to, for example interference in the rights of others or public order or health, state interference could be justified. In order to ensure the right to appoint leaders and use titles in accordance with a religion or belief, legislation could be drafted differently, rather than a categorical ban on the use of certain titles. In fact, certain provisions of civil or criminal code could already be applicable to provide protection against abuses of the use of the title.

7.2.4. To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief

The right to observe days of rest and celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief may be a right with a broad scope depending on the content of the dogma in question. As it has been observed in Chapter 4, in addition to, for example, having a right to taking the holidays off from work, manifestations pertaining to diverse forms of ceremonies in accordance with the religion or belief in question are also within the scope of this right. Here our focus will be limited to the right to take days off from work in order to be able to observe a day of rest or celebrate and observe relevant holidays and ceremonies.

[1160] The OSCE/ODIHR, OSCE and Venice Commission Guidelines for Review of Legislation Pertaining to Religion or Belief, *supra* note 29, para.93.
[1161] *Supra* note 67.

Days that are special in a particular religion or belief are also days when believers generally gather together for, *inter alia*, worship, celebration and special ceremonies. Participation in these events or ceremonies is important, not least, for the preservation and transmission of dogma and identity. Hence whether believers are free from work to gather becomes a crucial precondition of whether such worship can take place or not. On the other hand, accommodation for the needs of various religious communities in this sphere certainly require macro level arrangements by states and raise diverse policy issues. The Alevi community in Turkey have expressed demands for the recognition of the Ashura Day as a national holiday,[1162] yet without any results. The religious holidays of the Bahai, Christians, Jews are not set aside as national holidays, neither do they have a right to take these days off from work or school.

In the public and private sector, accommodation for "time off" to observe religious holidays appear to be strictly in the sphere of administrative decision processes that lack a legal basis that is apparent both for employers and employees. In the recent years, there have been reports that at public universities Christian and Jewish faculty have been allowed administrative leave on Jewish and Christian holidays, provided that these days are deducted from their annual leaves.[1163] Whether Muslims are allowed to take time off to take part in the customary Friday prayers and daily *namaz* is dependent on the employers' discretion; there is no obligation on the part of the employers to accommodate such requests.[1164] Some employees wishing to take time off to perform their daily prayers, have been reportedly threatened with dismissal from their jobs and in job interviews applicants have been asked whether they perform *namaz* or not and those who did were not employed.[1165] On the other hand, it has also been reported that at a university the deans of faculties were given directives by the rector not to schedule lectures at the time of Friday prayers.[1166] When such

[1162] "Aşure'ye Resmi Tatil" (Official Holiday for Ashura), Takvim, http://www.takvim.com.tr/Siyaset/2011/04/01/asureye-resmi-tatil, accessed 16.01.2015.
[1163] Interview with faculty member who preferred to remain anonymous, January 2013.
[1164] Mazlum-Der Human Rights Report 2011, http://istanbul.mazlumder.org/webimage/turkiye_raporu_24tem.pdf , accessed 1.12.2014.
[1165] Yeni Akit, "Fabrikada Namaz Yasağı", 29.09.2011, such cases are rarely prosecuted.
[1166] Bianet, "YTÜ Rektörü: Cumaları Namaz Saatine Ders Koymayın Dedim" (Rector of Yıldız Teknik Üniversitesi: I told them not to schedule lessons at the time of Friday prayers), 16.01.2013, http://www.bianet.org/bianet/egitim/143601-ytu-rektoru-cumalari-namaz-saatine-ders-koymayin-dedim , accessed 16.01.2015 .

accommodation is wholly left to the discretion of the authorities, it is difficult to establish a non-discriminatory practice that would accommodate the right to observe days of rest or holidays for all regardless of religion or religious tradition. It is not difficult, then, to expect that the rights of any religious group will be effectively protected.

Official religious holidays in Turkey include the Islamic -Ramadan and Sacrifice- Holidays.[1167] Sunday is the weekly holiday, and, in contrast to many Muslim countries, Friday is not a day of rest in Turkey.[1168] Individuals affiliated with religions or beliefs that celebrate holidays other than or in addition to these the officially recognized Ramadan and Sacrifice holidays must use from their annual leave days in order to be able to observe their days of rest or holidays. A right to take time off from work to observe periods of prayer at particular times of the day and to observe a religious holiday is not legally recognized.

Neither public nor private employers are legally required to make *reasonable accommodations* for employees' religious observances. Rules concerning taking time off from work for times of prayer or observing religious holidays are determined explicitly or implicitly by private companies through company culture and image, professional chambers and the legislation that affects the intersection of public and private. Labour Law protects against religious discrimination.[1169] But anti-discrimination legislation in Turkey is weak and existing legal remedies are rarely accessible.[1170] The possibility to effectively benefit from the available legal protection against religious discrimination is significantly diminished by the lack of information among employees, the difficulty of proving that the discrimination was based on religion and

[1167] Ulusal Bayram ve Genel Tatiller Hakkında Kanun [Law on National Holidays and General Vacations], Law No. 2429 17.03.1981, R.G. 17282, 19.03.1981. Article 2(B).
[1168] The change of weekly holiday from Friday to Sunday has been introduced as one of the Reforms of the modern Turkish Republic. Law No. 2739 Ulusal Bayram ve Genel Tatiller Hakkında Kanun [Law on National Holidays and General Holidays], Article 3, 27/5/1935.
[1169] Other prohibited grounds are language, race, gender, political opinion, philosophical beliefs, religion and denomination and similar grounds Article 5 of Labor Law, 22.05.2033 İş Kanunu [Labor Law] No. 4857, R.G. 0/06/2003 No. 25134. For an analysis of protection against discrimination based on religion in Turkish Labour Law see N. Sural, "Islamic Outfits in the Workplace in Turkey, a Muslim Majority Country", *Comparative Labour Law and Policy Journal*, Spring (2009), 569-596.
[1170] Following democratization steps taken in 2009 the Turkish Government has promised to adopt a comprehensive anti-discrimination law that would also establish a Council on Combatting Discrimination and Equality with the capacity to receive complaints. The relevant draft law had been pending at the Turkish Grand National Assembly and no steps had been taken since 2010. At the time of finalizing this thesis, December 2014, the Government has still not adopted a comprehensive anti-discrimination legislation.

the general powerlessness felt by those affected, e.g. religious minorities, women and students, in light of the power dynamics involved in the available complaint procedures.

Recognition of special holidays or days of rest and ceremonies in accordance with the precepts of one's religion or belief in Turkey seems to be at the periphery of the right to freedom of religion or belief. There is a lack of court cases pertaining to the right to observe periods of prayer at particular times during the day and the refusal to permit individuals to take time off to observe religious holidays. This may be an indication of the fact that the right to freedom of religion or belief is not understood in a way to include a right for the recognition of special religious holidays or days of rest or days for special ceremonies or, perhaps that believers have internalized this lack of accommodation and do not have hope that legal remedies will achieve results. Hypothetically, if non-accommodation for observance of special days of rest or religious holidays were the subject of court cases, in light of high courts' decisions reflective of the Turkish judiciary's approaches to secularism, we may expect that the denial of such requests will be accepted by courts on grounds of "having a politically and religiously neutral workplace" as a legitimate aim.[1171]

It is useful to recall international standards for the right to observe days of rest and celebrate holidays in accordance with one's religion or belief. The core religious freedom provisions do not include an explicit reference to this right. Yet, the HRCTTEE's GC 22 explicitly refers to "the observance of holidays and days of rest" as a form of manifestation protected as such under Article 18.[1172] In country visits, the UN Special Rapporteur has noted accommodations for religious holidays with satisfaction whenever such legislative steps were taken.[1173] On the other hand, as it has been demonstrated in Chapter 4, the jurisprudence of the Strasbourg organs concerning claims pertaining to requests to take time off from work for daily prayers is to the effect that it does not attribute a positive obligation on the part of states to accommodate times of prayer or days of rest.[1174]

[1171] N. Sural, "Islamic Outfits in the Workplace in Turkey, a Muslim Majority Country", Comparative Labour Law and Policy Journal, Spring (2009), 569-596.
[1172] Human Rigth Committee, General Comment 22 on Article 18 of the ICCPR, para. 4.
[1173] E/CN.4/2002/73/Add.1, paras. 29-32 and 125 (country visit to Argentina), para. 125 and E/CN.4/1996/95/Add.1, paras. 48-49 (country visit to Pakistan), para. 49.
[1174] Concerning the case of a Muslim teacher whose request to take time off from work in order to attend Friday prayers was refused, the European Commission held that, since he had taken the position

As far as international standard setting is concerned, indeed, a positive obligation to grant believers time off from work, either to observe their days of rest or to participate in religious ceremonies or celebrations is far from established. Perhaps, accommodations made for individuals or groups who wish to take days off in order to participate in holidays or special days set aside for special ceremonies or recognition of holidays of religious minorities are seen more as "steps or measures that could be encouraged" in multi-cultural societies, less so as a right that creates positive obligations for states and that can be enforced. Indeed, this right remains at the periphery of the right to freedom of religion or belief as it is protected in international law.

The legislation and practice in Turkey does not protect a right to take time off from work to observe days of rest or to participate in religious ceremonies, worship or celebrations. In is respect, Turkey's stance appears to be consistent with the weak international protection afforded to this right.

Indeed the Turkish case is a useful example of how less than clear standard setting at the international level may lead and/or contribute to weak and ineffective compliance review at the domestic level. Key factors contributing to this situation are the lack of clear obligations of states, including the scope and nature of obligations, and the seemingly inconsistent standard setting at the universal and regional level. Whereas in compliance review at the UN level states are expected to respect the right to observe days of rest or holidays in accordance with religion or belief, Strasbourg organs have clearly tended to accommodate states' practice not to create positive obligations to respect the same right.

In conclusion, the key components of the right to freedom in the internal affairs of religious/belief groups examined above illustrate the harsh restrictions on the right to freedom of religion or belief in its collective dimension. Despite a general protection of freedom of religion of belief in the Turkish legislation and occasional legislative

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accepting the conditions of the employment there was no violation of Article 9. *X. v. the UK*, 12 March 1981, European Commission on Human Rights (Admissibility), No. 8160/78.

improvements, *results or outcomes* show that that there is a serious failure to respect and protect the right to freedom of religion or belief in Turkey. This calls to mind the assertion- which has been made in the racial discrimination context- that there might be a need for paradigmatic change otherwise "the system merely swallows of the small improvement one has made and everything remains the same".[1175]

In numerous cases pertaining to the right to freedom of religion or belief, the judiciary does not refer to the relevant Constitutional or international provisions to which it can actually refer, however, deals with the claims with reference to legislative provisions that deal with other fields of law, such as Public Works Law or Civil Code, and does not *see* the religious freedom issues that are raised. Alternately, it could be argued that the provisions that are chosen by the judiciary in the construction of the reasoning are aimed at producing a certain outcome; to overlook the implications of the right to freedom of religion or belief.

In the exercise of the right to establish places of worship it is possible to identify a pattern of wide discretion left to public authorities in the determination and application of regulations and plans that are instrumental in the effective protection of this right. The right to manifest religion or belief in teaching is by far the most restricted right with the state holding a tight monopoly in the field of religious education. The inconsistent and arbitrary practice pertaining to the election and appointment of religious leaders indicates that despite strong international protection of the right to freedom in the internal organization of religious communities Turkey choses not to take corrective action. Finally, the right to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief remains at the periphery of the right to freedom of religion or belief at the national level as it is at the international level. Whether a component of freedom of religion or belief enjoys a robust international protection or not is not the only factor determining Turkey's performance on the issue. However, it determines the standard

[1175] Delgado and Stefancic, "Critical Race Theory: An Introduction", (NYU Press) p. 57.

setting that can be advocated at the national level as well as the nature of legal remedies that religious or belief groups can seek.

Chapter 8
Conclusion

"Silence speaks loudest."

The subject of this thesis is the collective dimension of freedom of religion or belief in international human rights law. The purpose of the thesis has been to explore the notion of the collective dimension of freedom of religion or belief with a view to seek ways to improve the protection of the right to freedom of religion or belief in international law.

To this end, in Section I, the thesis has sought to explore the substantive scope of the collective dimension and the manner in which it has been interpreted by relevant international law adjudicators and to identify to what extent- if any- the international standard of compliance review may be improved when dealing with national protection systems. A comprehensive theory of the collective dimension of freedom of religion or belief in international law has not been developed so far in legal doctrine and it is hoped that a substantial contribution of this thesis is that which it makes to our understanding of the notion of the collective dimension. International human rights standards applicable to the protection of the rights to acquire legal personality and to freedom in the internal affairs of religious/belief have been examined in order to understand the nature of protection and identify challenges and ways to move forward.

Section II of the thesis has critically assessed the protection of the collective dimension of freedom of religion or belief in Turkey based on the standards identified in Section I. The case study on Turkey is valuable and useful in, not least, two ways; first, the study provides a comprehensive, albeit not exhaustive, normative assessment on the protection of freedom of religion or belief in Turkey thus making a contribution to the academic literature, secondly, the case study helps to identify gaps in international standard of review.

As far as legal sources are concerned, the discussions in Section I have been based primarily on the ICCPR and the jurisprudence of the HRCttee and the ECHR and the jurisprudence of the Strasbourg organs. When relevant, other sources of soft law nature have also been relied upon, such as the work of the UN Special Rapporteur and, to a lesser extent, the relevant OSCE guidelines. This deliberate comparative approach has enabled the study to, on the one hand, draw from global and regional systems when seeking to understand the notion of the collective dimension of FoRB, on the other hand, to identify and critically assess similarities and differences in the approaches of these protection schemes.

A central assumption of this thesis has been that the international protection of the collective dimension of the right to freedom of religion or belief would provide a solid substantive normative basis and protection for the claims pertaining to the right to freedom of religion or belief that have a collective nature. Throughout the study this assumption has been tested in concrete cases that have been addressed, principally, based on the standards established by human rights instruments and the respective jurisprudence of the HRCttee and the European bodies. It would seem that the central assumption of the thesis presents itself as an ideal to strive for, instead of an already established matter. It appears that the scope and nature of obligations, the understanding and willingness to address the collective nature of claims as well as to tackle broad-scale, often repressive, policies and legislation behind restrictions, and, as far as the European context is concerned, the wide margin of discretion granted to states remain as challenges that must be overcome in order to advance the effectiveness of the protection that is already enshrined in the relevant religious freedom provisions. Notwithstanding these shortcomings, the normative basis of the collective dimension both at the global and European regional levels create a potentially comprehensive basis for the normative protection of acts and diverse forms of collectivities involved in the exercise of the collective dimension of freedom of religion or belief as discussed in Chapter 2.

Important assumptions with regard to the Turkish case have been that a better understanding of the international obligations pertaining to the right to FoRB in its

collective dimension and improved international review mechanisms are necessary to improve the protection of FoRB in its collective dimension in Turkey. Yet, it apears that a "better understanding" and "good international review mechanisms" would not necessarily result in the effective protection of this right. A particularly good test of this pertains to the restrictions on the claims of religious/belief communities and individuals belonging to the communities pertaining to legal personality and the rights to establish associations and foundations. With regard to the latter rights, international positive obligations are clearly defined and strong, these obligations are apparent to the Turkish judiciary as they allude to them in numerous cases yet, the *willingness* to apply these standards ensuing the obligations appears to be the key factor that is missing. This does not however mean that "better understanding" and "good international review mechanisms" of no use. On the contrary, these hold important functions in pointing to the standard that must be strived for and lay the foundations for legal claims brought by those who wish the exercise the right to freedom of religion or belief in its collective dimension.

In Chapter 2 we began by exploring the notion of the collective dimension of freedom of religion or belief with a view to examine its legal basis and determine its scope, nature of obligations as well as boundaries. While the thesis has demonstrated the importance of the collective dimension of freedom of religion or belief for both, various forms of groups of believers and individuals, it has also become clear that we do not yet have a coherent and well-developed theory of "the collective dimension of freedom of religion or belief". The latter term is viewed with suspicion, at times, particularly when it is perceived to mean "the right of a religion or belief", "on the axis of individual and collective rights, a hierarchically supreme right that leads to unjustifiable restrictions on the rights and freedoms of others", or even "a particular constitutional arrangement defining strong entanglement of state with a certain religion". Or, often, it is given a limited recognition as solely the rights of religious institutions. It has been an aim of the thesis to distinguish the scope of the right as well as the subject- the who- of the right in order to better understand its scope and boundaries. The thesis does not constitute an exhaustive theory of the collective dimension of freedom of religion or belief, yet, by exploring questions pertaining to the

substantive content of the right, the study has shown that the collective dimension of freedom of religion or belief is not solely limited to "the rights of religious institutions", that it protects all acts/manifestations of freedom of religion or belief that have a collective dimension. The study has also demonstrated that the collectivities as rights holders may vary, including natural groups, religious/belief groups that have acquired legal personality, and individuals who come together to exercise an act informally. The key for international adjudication appears to be the ability to see and the willingness to address the collective nature of claims pertaining to the collective dimension of freedom of religion or belief cases. This remains a challenge. Indeed, a greater understanding, recognition and enforcement of the scope of the collective dimension of freedom of religion or belief will significantly contribute to advancing the protection of freedom of religion or belief through international law.

Despite their limitations, international human rights norms pertaining to freedom of religion or belief potentially provide a solid substantive basis for the right to acquire an adequate form of legal personality for belief groups. The key *enabling* and *empowering* role of legal personality, in the protection of the collective dimension of freedom of religion or belief has been illustrated in Chapters 3 and 6. The recognition of the right to acquire legal personality as an essential component of the collective dimension of freedom of religion or belief may be further strengthened with the substantive focus by international review mechanisms. This study has shown that this inquiry should not, however, be limited to the question of the mere availability of a legal personality option for belief groups, instead it should be qualified by exploring the directness of the linkage between the belief groups and legal entity in question as well as the acts that become possible once legal entity status is obtained. Moreover, the adequacy and suitability of the existing legal entity statuses for belief communities' enjoyment of the right to manifest religion or belief in worship, teaching, observance and practice as well as the accessibility of the legal entity status in question for belief communities in a non-discriminatory manner and state supervision involves must be critically examined. As the Turkish case has shown, the mere existence and availability of certain legal entity formulas do not sufficiently amount to fulfilling the positive obligation to provide legal personality for belief groups to exercise the right to freedom of religion or belief in its

collective dimension. The potential of rigorous and probing application of the restriction clauses has become evident in the review and analysis of particularly the relevant case-law pertaining to legal personality matters. This potential must be realized by adjudicators by taking on a more *active* role; evaluation of the grounds for including probing, scrutiny, requesting and relying on statistical information as well as asking for comparative information from states that can help identify patterns of discrimination.

Focus on the collective nature of acts and diverse forms of collectivities has also led to a broader view of the meaning of the freedom in the "internal affairs"- autonomy- of religious/belief communities, as opposed to understanding internal affairs solely with reference to "internal organization". As it has been illustrated in Chapter 4 autonomy can be an expansive issue depending on the dogma of the belief group in question. A comprehensive, yet not exhaustive, review of various forms of manifestations, inter alia, the right to establish places of worship, train and appoint clergy, to teach religion or belief, the right to observe days of rest, has revealed that international protection varies, not least, in terms of the identification of positive obligations as well as the assessment of restriction clauses as applied to these rights. In addition to the generally recognized forms of the aforementioned manifestations, in Chapter 4 I have also argued that a right to use religious law can also be deduced from the provisions protecting the right to manifest religion or belief in practice.

The comparative approach adopted in the study has aimed to demonstrate the similarities and differences of the standard setting by the Strasbourg organs and the HRCttee in their respective jurisprudence on the right to FoRB. The comparative review in this thesis confirms the finding of Paul Taylor that that the European Court has shown an evident willingness to allow states a wide discretion through broad interpretation of limitation clauses, distinct from the more consistent approach taken by the HRCttee.[1176] The ECtHR has interpreted the scope of manifestations of religion or belief in a narrow fashion and has relied on other rights, such as the right to

[1176] Paul Taylor, p. 343 and 350.

freedom of association and right to fair trial (right to judicial protection), when assessing claims that at the same time raise issues pertaining to FoRB and other human rights. While this may be reflective of the conception of the nature and scope of the right to freedom of religion or belief of the European Court, on a positive note, since the jurisprudence of the ECtHR is solid and coherent this has resulted in stronger protection of the right to manifest religion or belief. In contrast, the HRCttee has demonstrated a consistent and coherent conception of freedom of religion or belief, embracing a broad conception of manifestations as outlined in GC 22 and did not feel the need to rely on other rights, such as the right to association, when claims pertaining to associative rights of religious/belief groups were addressed. Notably, states have not been granted a margin of appreciation when the HRCttee assessed justification of restrictions on the right to manifest religion or belief, including the collective dimension where sensitive state-religion relations added complicating dimensions. It is interesting that considering that the HRCttee deals with diverse arrangements of state-religion relations it would seem that this exposure has not led to granting a wide margin of appreciation where it is not possible to identify a "common global standard", instead the international scrutiny remained same regardless of whether the latter existed or not. It might be argued that it is precisely this exposure to global variations of forms of manifestations and diverse state-religion arrangements that led the HRCttee to both appreciate different forms of manifestations as well as consistently apply restrictions clause. It should be borne in mind, however, that so far the ECtHR has had to deal with more and more complex questions involving balancing of interests based on FoRB than the HRCttee.

The Turkish case study has illustrated that, often, restrictions of FoRB in its collective dimension involve underlying factors derived from the certain state-religion relation constructions as well as certain sensitivities- in the Turkish case, such as nationalism and minority issues- which seem to be considered as "given" and "legitimate" grounds for restrictions by national authorities, including the judiciary. These grounds for restrictions are rarely assessed with scrutiny at the domestic level as the analysis of relevant jurisprudence has shown. Yet, when states are given a margin of appreciation in such cases, indeed, international review suffers and victims suffer as a result.

Therefore, for effective international review, it is vital to bring out the potential within relevant restriction provisions and exercise rigorous examination of the latter.

The, at times, distinct conceptions of the HRCttee and the Strasbourg organs on the scope of the right to freedom of religion or belief and the nature of ensuing obligations appear as a factor weakening the standard of international review. It is important to maintain universal human rights standards without differences in the substantive content of the right to freedom of religion or belief.

Overall, the Turkish case study has illustrated the need to change the paradigm in which the right to freedom of religion or belief in its collective dimension is exercised, from tolerance to respect, fulfil and promote of the right to freedom of religion or belief. The substantial need to urgently improve the understanding of the scope of freedom of religion or belief in its collective dimension in Turkey and corresponding standard setting and implementation has become evident throughout the study. International obligations pertaining to the collective dimension of freedom of religion or belief are effectively utilized in standard setting and adjudication, despite significant human rights consequences for all groups of believers, including non-believers.

In Turkey, the right to freedom of religion or belief has a narrow scope; the strongest protection appears to be afforded to the protection against coercion to believe or worship in a particular way- yet, not extending to the recognition of the right to conscientious objection to military service-, a passive recognition of the right to worship- not effectively extending to related acts-, and a significant degree of regulation of other aspects of the right to manifest religion or belief. The collective dimension of freedom of religion or belief is highly restricted, arguably, precisely because of the collective nature of the rights –claims- it protects. While Turkey appears distant to the protection of the exercise of the collective dimension, it, at the same time, assumes *selected* roles with implications on the collective dimension where the Turkish state functions as the provider of public religious services. This arrangement often leaves the state as the sole holder of control –monopoly- over certain forms of manifestation. Certain elements of the collective dimension that groups of believers

would together exercise, are taken over by the state which functions as, *inter alia*, a public service provider, facilitator, funder. Moreover, in the process of providing these "services" the relevant state institutions function as shapers of religious dogma and tradition. This state involvement presents itself in varying degrees, for example, with absolute monopoly over the management of mosques and Islamic religious instruction through Quran courses; the legal framework does not allow any private acts in these spheres, including Muslims and non-Muslims. On the other hand, there exists the possibility, albeit highly restricted, for the selection of religious leaders and establishment of places of worship. Yet, the case-study has shown that the processes that religious/belief groups engage in while exercising these rights leave a large sphere of discretion to the public authorities; far from ensuring a legal framework that effectively protects these rights. The outcomes may be taken as indications of patterns of discrimination in the exercise of these rights. Teaching of religion stands out by far as the most restricted component of the collective dimension of the right to freedom of religion or belief. The extent of obstruction of this right becomes particularly grave when viewed in contrast to the state's engagement in teaching of religion based on the Sunni-Muslim tradition. Indeed, the collective dimension of FoRB in Turkey has a narrow scope that delivers little possibilities for religious/belief groups.

In contrast to a general commitment to the protection of freedom of religion or belief, the lack of coherent and solid basis for freedom of religion or belief in its collective dimension becomes strikingly concrete in relation to specific components of this right. Legislation pertaining to various components of the collective dimension of freedom of religion or belief is dispersed in different laws, such as Cadastral Law, Public Works Law, or Civil Code. While such fragmentation is not necessarily a hindrance to the protection of FoRB, the fact that when considering claims, the public authorities, including the judiciary, do rarely consider the issues raised in relation to FoRB, presents a significant setback. In this context silence about the right to freedom of religion or belief speaks loudest. This lack of consideration is also reflective of the conception pertaining to FoRB. Such conception appears to fail to draw connections with concrete cases of FoRB, albeit not formulated with direct link to FoRB, with the general protection of FoRB in the Constitution and international instruments to which Turkey is

a party. Indeed, the lack of utilization of the Turkish Constitutional provisions and international norms pertaining to the right to freedom of religion or belief by the Turkish judiciary is particularly striking. Thus, claims brought by stakeholders end up being situated as weak claims in the constructions of reasoning where numerous aspects of FoRB are perceived as merely "acts" that are in contradiction to secularism or national security and not acts that are protected under various FoRB provisions. Arguably, such normative terms actually disguise 'state interest' which appears to be the underlying interest in applied restrictions.

Strikingly, the study has shown that the judiciary often fails to consider the right to freedom of religion or belief as protected in international law in its assessment of cases that directly raise questions pertaining to this right. The reason for this silence is unclear and there could be numerous explanations. The general findings pertaining to the Turkish judiciary, which indicate that it is influenced by a perception of "threat and danger",[1177] and that "political climate" is important in the judiciary, are certainly compatible with and explain the findings concerning the Turkish case-study, particularly of Chapter 6. Yet, taking into account the historical and political context that this thesis has sought to provide along with the legal issues it explored, it is possible to foresee that were the judiciary to apply and interpret FoRB in line with international standards, it is likely that ensuing decisions will be politically controversial given the underlying sensitivities behind the restrictions in the first place. Thus, in order for substantial improvement of the right to FoRB in its collective dimension in Turkey, an exceptionally independent and willing judiciary that is ready to understand and address FoRB in assessing relevant claims, as such, and public authorities who are willing to enforce ensuing decisions are indispensible. Alternatively, broad changes in the political context in the long run, may make it possible to change the approach of the judiciary and other public authorities to issues concerning FoRB in its collective dimension.

[1177] Mithat Sancar, *Adalet Bazen Es Geçiliyor* [Justice is Sometimes Overlooked], (TESEV, 2009), p. 142 and p. 143.

In the Turkish context, the denial of legal personality to religious/belief groups, as such, stands out as a key issue that presents itself as a challenge to the Turkish conception of the right to freedom of religion or belief in its collective dimension. The implications of this denial and the inadequacy of alternative formulas, in the form of associations and foundations, have been illustrated in Chapter 6. The notion that legal personality of religious/belief communities is categorically incompatible with Turkey's *laik* (secular) nation(-alist) state model must be informed by and harmonized with a new conception of freedom of religion or belief that respects the elements of the latter established by international law instruments. International review mechanisms and national and international human rights bodies are compelled to seek corrective action on the part of the state so that the positive obligation on the part of states to create an adequate form of legal personality may be realized in Turkey.

Chapter 7, focusing on four key components of freedom in the internal affairs, *inter alia*, establish places of worship, freedom to teach, observe days of rest and holidays in accordance with religion or belief, has presented the complexities involved in the protection of the right to freedom of religion or belief in its collective dimension in Turkey. Again, despite a general constitutional commitment to the protection of freedom of religion or belief, the concrete cases that were examined indicate the importance of scrutiny of administrative processes and the outcomes. The case of the right to establish places of worship and the right to appoint religious leaders, indeed, appear to be "lost in administration" through the wide discretion granted to public authorities and what ostensibly seems like neutral criteria. Any meaningful assessment of the state of the right to freedom of religion or belief ought to include an assessment of outcomes – information on to what extent diverse religious/belief groups can exercise rights. The importance of this has become evident in the Turkish case study, in particular with reference the right to establish places of worship and teach religion or belief.

What does the future hold for the protection of the collective dimension of freedom of religion or belief in Turkey? It would seem that a willingness to better understand the implications of Turkey's human rights obligations under international law as well as to

implement them with courage could substantially improve the standard of protection the right to freedom of religion or belief. As long as rightful claims pertaining to the enjoyment of the latter are viewed as incompatible with, *inter alia*, certain understandings of nation-state, laiklik (secularism), an underlying assumption that Turkey's particularities mandate a public interest to regulate and restrict public manifestations of religion or belief control a coherent and well founded conception and an ensuing legislative and administrative practice upholding international standards seems difficult to achieve. In this process, the main actor of change is the Government which is also the primary actor responsible for Turkey's human rights obligations. The continuing process of change in Turkey, upcoming new Constitution for Turkey, engagement of civil society institutions in the change as well as global and regional international mechanisms involved in the review of Turkey's implementation of international law hold significant opportunities for influencing change to bring the protection of the right to freedom of religion or belief closer to adhere to international law standards. Since if human rights law is not made an active part of the process of change, in terms of setting the standard and being given due consideration in drafting and applying legislation, it will have very limited transformative power in Turkey. Human rights standards are to play the role of "conscience"[1178] – saying what ought to be-, while it is the "will" of the decision makers that is key to change. In the process of eradication of the conditions that result in a failed system of protection, human rights law can contribute, although surely it cannot by itself provide the cure, significantly. In this context, the state's role in religion is in need of being re-formulated- it must continuously evolve- embracing impartiality and neutrality, ensuring pluralism and respecting equal rights and equal access to rights, withdrawal from the religious sphere by respecting the right to freedom in the internal affairs of religious/belief groups as it has been broadly described here.

One of the aims of this thesis has been to explore and identify ways in which the standard of international review could be improved based on the Turkish case study and the latter has shown some areas in which improvements can be sought. At least

[1178] Therefore it is of extreme importance that internationally upheld standards are coherent.

three areas for possible improvement may be identified. First, the little and selective attention given to the right to freedom of religion or belief in the assessment of claims pertaining to the latter, should lead international adjudicators to rely on the national authorities, including the judiciary, to review and assess the application of restrictions clause with utmost scrutiny and showing restrain to rely on the margin of appreciation of national authorities. This assessment must include focus on administrative processes and outcomes. Secondly, it appears that a coherent and precise approach to the scope and nature of obligations pertaining to the collective dimension of would be a factor that could strengthen domestic protection efforts therefore international standard setting could further be improved. Finally, international mechanisms tasked with international review of domestic protection schemes would be more effective if they sought to improve their capacities to increase their ability to address and tackle general repressive legislation and practices and establish means for follow-up and implementation. The Turkish case has demonstrated that many issues do not become the subject of court cases thus compliance control mechanisms other than those dealing with individual complaints gain greater importance in the cases of countries where the situation is similar to Turkey.

Regarding limitations of the thesis, the fact that a number of possible sources could not be included needs to be stated. It would be useful to underscore again that originally this study aimed to include the decision making processes of public authorities- who implement relevant laws and regulation- in the themes explored in this thesis. However the reluctance on the part of public authorities to participate in the study has not made this possible. A better understanding of the criteria employed by public authorities through the information presented by the latter, would have made the identification of gaps and problems as well as patterns in the protection of the collective dimension more complete. The inclusion of statistical analysis pertaining to affected groups would also have contributed to drawing a fuller picture as well as illustrating diverse dimensions of processes and outcomes in the enjoyment of the collective dimension of freedom of religion or belief. While such statistical analysis is lacking, I have made effort to include the perspectives of affected groups through in-depth interviews with the representatives of religious/belief groups.

As far as future research is concerned, an in depth and multi-disciplinary examination of the effects of financial or other state support to certain religion/s or certain religious institutions in state on the protection and enjoyment of the right to freedom of religion or belief of that and other religions or beliefs and what elements are necessary for such support to raise issues pertaining to impartiality and neutrality and prohibition of discrimination in relation to the right to freedom of religion or belief would surely contribute to our understanding of the latter. A study on the decision-making processes of public authorities related to the exercise of the collective dimension of freedom of religion or belief would contribute to our understanding of the protection of freedom of religion or belief. Studies involving statistical data pertaining to outcomes of the exercise of FoRB by various religious or belief groups in Turkey would make comparative assessments possible.

This study has shown the importance of a the collective dimension of freedom of religion or belief for the protection of the right to freedom of religion or belief as well as the shortcomings, such as the lack of a coherent approach to recognize the collective nature of claims at the global and regional levels of human rights protection schemes, the lack of positive obligations as well as, at times, tendency to accommodate state restrictions, of international law jurisprudence in the protection of this right. It has also highlighted the implications of historically evolved of state-religion relations on the protection of, in particular, the collective dimension of freedom of religion or belief and the normative demands created by the latter and the challenge faced by international law adjudicators to present effective way of engagement that would advance the protection of the right to freedom of religion or belief.

Moreover, the thesis has shown the paradoxical state of affairs concerning the protection of freedom of religion or belief in Turkey, in particular in its collective dimension. On the one hand the general protection of freedom of religion or belief as a constitutional right exists, yet, on the other hand lack of effective protection of basic

components of the right in practice. A willingness to incorporate a coherent understanding of the implications of the right to freedom of religion or belief in legislation and practice will greatly contribute to advancing the protection of the right to FoRB in Turkey. Such an understanding that may constitute the cornerstone of standard may lead to harmonizing the understandings of national interest, laiklik and nationalism- which have been and continue to be- underlying reasons of many restrictions- with human rights standards. While Turkey's involvement in religion does not change the crux of the issues pertaining to the extensive interferences in the manifestations of religion, it surely adds new complicating dimensions to it that cannot be ignored.

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