The European Court of Human Rights

Old and new findings on freedom of religion and belief

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Abstract

Freedom of religion and belief is one of the oldest and at the same time most disputed Human Rights. As their legal protection is most elaborated in Europe by its court and other Human Rights bodies meticulously take into account its findings, this article recalls some old findings of the court, but also discusses the latest judgments until July 2013.

Keywords Proselytism, definition, registration, mocking religions, religious objection, trade unions in religions.

Freedom of religion and belief stands out as a right in the basket of Human Rights. It has increasingly come under attack in recent years. While the debate is heating up, it is important to recall several basic findings concerning this right and to present some recent developments.

1. Significance of freedom of religion and belief (FORB) for human rights

FORB is one of the oldest Human Rights. Despite this fact, it has always been one of the most debated ones[2]. The original aim of FORB is to protect minorities, and this has always to be kept in mind, for this is a very helpful guideline in today's discussions about the scope of protection of this Human Right.

It is a comprehensive right in the respect that it protects having a belief ("forum internum"), acting according to ones' beliefs ("forum externum"), acting in community with others ("the collective dimension") and last but not least, it touches upon several other Human Rights – a fact the European Court of Human Rights takes into account as it ruled in many cases that FORB has to be interpreted "in the light of another Right of the Convention" as will be shown later. Concluding on

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[2] Malcolm D. Evans, 1997. *Religious liberty and international law in Europe*. CUP, Cambridge, 6ff.

its significance, it is correct to say that no Human Right suits better for serving as litmus test for the protection of all Human Rights than FORB.[3]

2. How it all started in Europe

The first case dealing centrally with the question of FORB in Europe as well as with the question of proselytizing has been a case started by Jehovah's Witnesses.[4]

> Minos Kokkinakis was a 74 year old man, who from the age of 17 professed his faith as Jehovah's Witness. During his lifetime, he had been imprisoned (or detained in times of war) more than 60 times. A talk with a neighbour brought him to the European Court of Human Rights. The applicant and his wife had talked about their faith with an orthodox cantor`s spouse living in the neighbourhood. Though she did not convert, all national courts dealing with the case convicted him of proselytism, for he had "taken advantage of the woman's lack of experience, low level of intelligence and simpleness." His prison term of four months was changed to a fine of 400 drachmas per day.

Without repeating all details of the case, I would like to mention some essential points. The case very clearly shows that FORB cases in Strasbourg are generally started by minority religions. And interestingly enough, many times it is not a Christian minority starting the case. Christian majority religion can even be the offender, like the Greek-Orthodox church in this case. The keyword here is proselytism: the main question was to what extent the Convention allows sharing one's faith, as this is penalized in Greek national law.[5]

The protection of FORB in Europe is guaranteed by Article 9 of the European Convention of Human Rights from 4 November 1950.[6] As a blessing in disguise, the Court used the Kokkinakis case to frame a general statement on the importance and value of FORB in the concert of Human Rights and more generally in society. This

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[3] Consequently, it has been called serving "as lynchpin of human progress and thriving societies", Allan D. Hertzke, 20113. Advancing the First Freedom in the 21st century, in: A.D. Hertzke (ed.), *The future of religious freedom – Global challenges*, OUP, Oxford, 26. It is also frequently called a "canary in the coalmine".

[4] ECtHR, Judgment of 25 May 1993, No. 14307/88, Kokkinakis vs Greece, Series A No. 260 A, p. 18. All judgments and decisions of the Court can easily be found at the Court's website, using the HUDOC database: http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#.

[5] Though the terminology might change, this question is vividly debated around the world nowadays, too, be it anti-conversion laws in several states of India (and discussed in Bhutan and Sri Lanka), be it the question of changing religion ("apostasy") in the Muslim World.

[6] The text can be found here: http://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487_pointer.

statement has been repeated again and again in subsequent judgments until today. Every time, the court apparently seems to find it important to recall its basic finding:

As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.[7]

This is the guiding theme and has also to be taken into account when it comes to justifying limitations. Despite this clear statement, it should also be noted that European findings on Human Rights in general and on FORB in particular are closely monitored around the world and the court's findings are easily misunderstood or misused. One example can be found in the history of the Kokkinakis decision itself. The court had not ruled out the possibility of what it called "improper proselytism," but did not define it – it was not relevant for the case in question.[8] Sri Lanka relied on exactly this technical term when it was drafting its law on unethical conversions in 2004, though the draft did not become law in the end.[9] Looking for justifications, the thinking behind seems to have been: "If even this renowned Human Rights court says that there is something like unethical conversions, the law will find less criticism." Other regional Human Rights courts and domestic courts look to Strasbourg as well.[10] Therefore it is justified to focus on European findings in this presentation.[11]

3. Some "old" findings

In this presentation's framework it is not possible to give an all-encompassing outline on all judgments dealing with FORB. Some reminders for today's discussions are given, leaving necessarily some gaps.[12]

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7 ECHR, Kokkinakis vs Greece, as quoted, par. 31.

8 ECHR, Kokkinakis vs Greece, as quoted, par. 48.

9 Country Report Sri Lanka 2005, UN Special Rapporteur of freedom of religion and belief, E/CN.4/2006/5/Add. 3, par. 70.

10 Cançado Trindade, EuGRZ 2004, p. 157 ff., Michael Kirby, "The Australian Debt to the European Court of Human Rights", Liber amicorum Luzius Wildhaber 2007, p. 391 ff.

11 Of course one should not neglect the work of UN instruments, namely the Special Rapporteurs, the Human Rights Committee under the Additional Protocol of the CCPR and the Human Rights Council. Africa has started its own regional system of Human Rights protection whereas Asia is still limping behind. The Islamic World does not lack Human Rights declarations, though these are seriously jeopardized by Sharia reservations and devalued by a lack of enforcement.

12 For an all-encompassing overview concerning the Strasbourg court`s judgments on FORB refer to Ottenberg, Der Schutz der Religionsfreiheit im internationalen Recht, PhD thesis Saarbrücken University

3.1 Definition of religion

First of all, it seems important to recall how the Court defines "religion" or rather, how it refrains from doing so. Until today, there is no legal definition of what qualifies as religion in the court's view. Even when the court could have done so because of the particularities of the case, it kept silent. The judgment "Mouvement raëlien Suisse vs Switzerland"[13] could have been dealt with from a FORB perspective, but the court decided to try it under the question of freedom of expression.[14] The decision not to give a definition on what qualifies as religion may be deemed as wise. It is a decision taken decades ago and in fact was "inherited" from the now historical European Commission on Human Rights.[15] The latter decided to introduce some guidelines, but apart from that to include all kinds of religions. Among others, the druid[16] religion qualified as religion in a decision as early as 1987 and enjoyed protection under Article 9.[17] Those broad guidelines include a "certain identifiable seriousness" as well as a "coherent view on fundamental problems." Adherents to a certain religion or worldview should at least be able to explain what they believe in. This is not to say that they be able to give a course on apologetics, but at least the most fundamental and basic questions should be answered. The request of someone adhering to the "Wicca" religion, demanding a special treatment while imprisoned, without giving any further explanation, did not qualify.[18] This debate is not outdated as the recently popped up "religion of the flying spaghetti monster" shows.[19]

3.2 Registration issues

Whereas it is accepted by international law that the state may demand the registration of a religion, this requirement may not be used to limit the possibility and ability of believers to meet for religious purposes.[20]

2009, Nomos Verlag, Baden-Baden. This thesis covers more than 200 judgments and decisions until October 2008. The newer judgments are monitored by the author and are on file with him.

13 Judgment of the Grand Chamber from 13 July 2012, No. 16354/06.

14 Decided by a narrow margin of 9 to 8 that the Swiss government had infringed upon this freedom.

15 Which due to a major change in the convention`s protection system ceased to exist in 1998.

16 Which is a religion that emanated from 18th century United Kingdom, counted among the "neopagan" religions. One of its centres is Stonehenge.

17 European Commission on Human Rights, Decision of 12 July 1987, No 12587/86, Chappell vs United Kingdom, DR 53, p. 241, par. 1.

18 European Commission of Human Rights, Decision of 4 October 1977, No 7291/75, X vs United Kingdom, DR 11, p. 55 ff.

19 Whether these "Pastafarians" really would qualify as religion remains to be seen, reportedly this "church" plans to take Poland to court on the issue of recognition, The Telegraph, 19 March 2013, http://www.telegraph.co.uk/news/worldnews/europe/poland/9940397/Church-of-the-Flying-Spaghetti-Monster-vow-to-take-Poland-to-European-court.hml.

20 ECHR, Masaev vs Moldova, Judgment of 12 May 2009, No. 6303/05.

> A Muslim group was fined as having met as members of an "illegal religious group" by Moldovan authorities. Muslims are a minority religion in this country. The domestic decisions had been criticized by national courts without amending them.

Again, FORB protects a religious minority. The court clarified that registration is no prerequisite for a meeting for religious purposes.[21] Due to the fall of the Berlin Wall in 1989, many religious groups in Central and Eastern Europe re-organised, broke apart and struggled to find a new relationship with the state due to their leadership's collaboration with communist rulers as well as new-drawn borders. The court had countless opportunities to give guidelines on registration and (self) organisation of religions.[22] Leading cases for these questions are Hasan and Chaush vs Bulgaria[23] and Metropolitan Church of Bessarabia and others vs Moldova.[24] The court kept on repeating that in those cases domestic authorities have to apply strict neutrality and impartiality. All decisions have to be made in a non-discriminatory way, both in process and result.

When Moscow authorities decided not to register the local branch of the Salvation Army due to public safety reasons – as they were seen as a "para-military troop" – and despite the fact that other local branches in Russia had been registered successfully, these standards were not met.[25] A short time later, Jehovah's Witnesses finally faced non-registration due to public safety and health issues after at least five attempts and several years spent on the process. The court reiterated that state authorities bear the full burden of proof and that limitations have to be construed strictly for convincing and compelling reasons.[26] If the state decides to grant access to state funds and/or religious services in schools, hospitals, prisons or other social facilities, these rules have to be applied as well.[27]

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[21] A message which still has to be heard in many countries around the globe, such as Central Asia, Russia or – recently – Vietnam, where a new very restrictive registration law was introduced. See http://www.opendoorsusa.org/News/2013/March/Two-steps-back.

[22] Orthodox Church (Metropolit Innokentiy) and others vs Bulgaria, Judgment of 22 January 2009, No. 412/03 and 35677/04; Mirolubovs and others vs Latvia, Judgment of 15 September 2009, No. 798/05; Greek-Catholic Parochy Sâmbala Bihor vs Romania, Judgment of 12 January 2010, No. 48107/99; Fusu Arcadie and others vs Moldova, Judgment of 17 July 2012, No. 22218/06.

[23] ECHR, GC, Judgment of 26 October 2000, No. 30985/96. This judgment, dealing with the leadership of the Muslim community, also shows the complexity of such cases, which provoked a second judgment: Supreme Holy Council of the Muslim Community vs Bulgaria, Judgment of 16 December 2004, No. 39023/97.

[24] ECHR, Judgment of 13 December 2001, No. 45701/99.

[25] ECHR, Moscow Branch of Salvation Army vs Russia, Judgment of 5 October 2006, No. 72881/01.

[26] ECHR, Jehovah`s Witnesses of Moscow vs Russia, Judgment of 10 June 2010, No. 302/02.

[27] ECHR, Savez Crkava „Riječ Života" and others vs Croatia, Judgment of 9 December 2010, No. 7798/08; the applicants were Protestant Churches.

Those cases do not only come from Eastern Europe. Austria faced similar questions in 1998 when it introduced a law on registration of religions which stated that for acquiring a recognized status the religion had to be active in the country for ten years and represent a number of 2% of the country's population. At this time, that meant around 16 000 people, a threshold virtually no minority religious community was able to cross.[28] Taking into account the fact that the applicant already had waited for more than 20 years, the court discarded the time rule as not justified and refrained from judging on the important question whether such a high threshold would also qualify as an infringement of FORB.[29] Finally, fears of terror and questions of national security are accepted as valid justifications for limiting FORB. But again the state bears the full burden of proof and cannot detain relevant documents for security reasons only.[30]

3.3 On mocking religions

Another debate relates to the question of mocking religions. What is acceptable and where are the limits? The court set two guidelines: the state's duty is to remain neutral and to respect religious convictions. Framed differently, the state should protect religious peace. The leading case was decided in the 1990's.[31]

> Several presentations of a film dealing with censorship in 19th century due to religious reasons ("showing the absurdities of Christian faith") were cancelled after the Catholic Church of Tyrolia had intervened and criminal procedures against the organizer were started. After a private presentation to the Austrian court, the film was banned and after a separate process destroyed.

The Strasbourg court stated that freedom of expression has to be interpreted in the light of FORB. Whereas critics considered this a mere protection of religious feelings, the court reiterated its position and even enforced it by saying that the state has a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profanatory.[32] Bearing in mind how important the court esteems freedom of expression, this approach of balancing different interests is surprising. In dealing with cases concerning freedom of expression, the court keeps on repeating one paragraph as is its habit with FORB.[33] The relevant paragraph says:

Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of

[28] ECHR, Jehovah's Witnesses in Austria vs Austria, Judgment of 31 July 2008, No. 40825/98.
[29] ECHR, Jehovah's Witnesses in Austria vs Austria, as quoted, par. 79.
[30] ECHR, Nolan and K vs Russia, Judgment of 12 February 2009, No. 2512/04.
[31] ECHR, Otto-Preminger-Institut vs Austria, Judgment of 23 August 1994, No. 13470/87.
[32] ECHR, Wingrove vs United Kingdom, Judgment of 25 November 1996, No. 17419/90, par. 52.
[33] See footnote 13 above.

indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society." This means, amongst other things, that every "formality," "condition," "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.[34]

In all these cases, finding a balance between the different interests involved requires that the state has what the court calls a "certain margin of appreciation." Not surprisingly, these decisions have been heavily discussed. Whereas there may be good reasons to follow the court's findings in the respective cases, a general problem should not be overlooked: in both cases, the court protected the majority religion without even noticing, let alone reflecting it. Bearing in mind that FORB in most cases means protecting minorities, the court's approach is not without problems. What happens if a religious minority offends the religious feelings of the majority? This remains to be seen.

Recalling that the court serves as a standard-setting institution, these judgments are not unproblematic, either. Many countries tend to argue that laws are justified to protect the majority religion and the feelings of adherents. Minority rights tend to be neglected. Therefore, the court's approach is dangerous. In a comparable case, the Inter-American Court of Human Rights ruled not to decide on the question whether the Convention protects religious feelings. It rather said that pre-censorship is not allowed under the Convention's scope.[35]

4. Some "new" findings

4.1 New efforts on registration

Recognizing that a direct limitation of registration faces strict requirements by the Strasbourg court, countries seek new ways of limiting religions. Austria and France tried to limit religious organisations using tax law. Be it that religious organisations were treated as commercial entities, be it that they were convicted to refund "undue tax exemptions," the court reiterated its guidelines and applied them to indirect limitations as well,[36] resulting in the state's obligation to pay back high tax fees.

4.2 Religious workers

In several cases, the court decided that working for a religious organisation may have a price.

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[34] ECHR, Handyside vs United Kingdom, Judgment of 7 December 1976, No. 5493/72, par. 49.

[35] IACtHR, Judgment of 5 February 2001, Olmedo Bustos and others vs Chile, Series C 73.

[36] ECHR, Jehovah's Witnesses in Austria vs Austria, Judgment of 25 September 2012, No. 27540/05; ECHR, Three judgments concerning "aumisme", a Hindu sub-group, Association Culturelle du Temple Pyramide vs France, Judgments of 31 January 2013, No. 50471/07 and others.

> The applicant[37] served as lecturer of philosophy at a Catholic University in Milan/Italy. His annual contracts had to be prolonged by bishopric approval according to a concordat. Due to his deviating views, the bishop denied approval. Subsequent court proceedings approved this.

The court did not decide on a violation of FORB, but focused its findings on freedom of expression in connection with the right of fair trial. As the applicant never learned what exactly he was accused of, the court saw rights as violated. It stated that neither domestic courts nor the Strasbourg court are allowed to deal with the question if the applicant's opinions deviate from official religious teachings, but are called to check the process. As the latter was flawed according to Convention standards, the court found a violation.[38]

In two other cases the court had to deal with applicants working for religious organisations, though not in a teaching position.

> In the first case[39], the applicant was an organist serving in a Catholic church as musician. When his marriage broke apart, he got divorced, therefore his contract was terminated.
> In the second case,[40] the applicant worked in a kindergarten run by a Protestant church. Though nominally Catholic, it later turned out that she in fact was a member of the Unification Church. Therefore her contract was terminated.

In the first case, the court ruled a violation of FORB as it held that an organist work's scope is simply making music and not being incorporated to the religious teachings. This may be a valid reasoning, though two aspects should be noted: firstly, one should note that the court's reasoning follows a very narrow understanding of belief and the religious organisation's need and right to define its belief itself. Secondly, by distinguishing different levels of religious teaching, the court runs into questions of classification.[41] According to the court's approach, the second case was solved easily, as the applicant was a kindergarten worker who teaches children and serves as a role model.

In a recent case,[42] the court affirmed its concept of dealing with this kind of questions once more.

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[37] ECHR, Lombardi Vallauri vs Italy, Judgment of 20 October 2009, No. 39128/05.

[38] ECHR, Lombardi Vallauri vs Italy, as quoted, par. 55.

[39] ECHR, Schüth vs Germany, Judgment of 23 September 2010, No. 1620/03.

[40] ECHR, Siebenhaar vs Germany, Judgment of 3 February 2011, No. 18136/02.

[41] In a Christian school, there will be teachers on religious subjects who easily qualify as someone having a direct bond to the teaching. But what about the teacher of English language, what about the sports teacher? And how to deal with the school's caretakers and canteen workers?

[42] ECHR, Fernández Martinez vs Spain, Judgment of 15 May 2012, No. 56030/07 (pending before the

> The applicant was a Catholic priest, ordained in 1961 and applied for dispensation of his celibacy in 1984. He married one year later and fathered five children. Since 1991, he taught Catholic religion at a state-run school on a one-year contract basis, renewable by bishopric approval. In 1996, he started giving interviews on behalf of a "movement for optional celibacy," arguing for more democracy in the church, as well as against the church`s positions on abortion, divorce, contraception and sexuality in general. In 1997, the Vatican granted him dispensation from celibacy, informing him that this grant meant a termination of all religious teaching unless the local bishop decides otherwise. The bishop of Cartagena decided not to grant a further approval, so his working contract was terminated.

The court firstly distinguished this case from the cases quoted above by the fact that the applicant was no layman, but a professional. Therefore, the court stated, he bears a higher risk by deviating from the religion's official views.[43] As the Vatican additionally informed him of potential consequences of his decision, he knew the results for his professional work. As there is a special bond of trust between a minister and his religion, the latter has a wider margin of appreciation to decide how to react. If it decides that the minister broke the bond of trust, it is allowed to terminate the contract. The reasoning applies even more if a minister teaches minors, who are easier to influence.[44] This decision fits well in the court's general approach,[45] though it remains to be seen if it will be upheld by the Grand Chamber, where the applicant appealed.

4.3 On wearing religious attires and having religious views

Recently, four judgments of the court made headlines worldwide. As the court decided to deliver only one judgment, the four cases shall be briefly summarized here.[46]

> The first applicant, Ms Eweida, was working as desk officer for British Airways ground crew. Being of Coptic origin, she was wearing a cross on a necklace. When BA issued company rules banning all religious attires, Ms Eweida first agreed. Later she decided to continue wearing her cross and after refusing to take it off or to be

Grand Chamber since 24 September 2012, hearing held on 30 January 2013).

43 ECHR, Fernández Martinez, as quoted, par. 83.

44 ECHR, Fernández Martinez, as quoted, par. 85+87.

45 It fits a decision made by the European Commission of Human Rights, dealing with a doctor working for a Catholic Hospital, opting publically against the Catholic view on abortion, Commission, Rommelfanger vs Germany, Decision of 6 September 1989, No. 12242/86, DR 62, p. 151.

46 ECHR, Eweida and others vs United Kingdom, Judgment of 15 January 2013, No. 48420/10 and others.

based in the back office, was sent home. Due to heavy public criticism, a short time later BA amended its company rules, so the wearing of a cross was possible again.
The second applicant, Ms Chaplin, worked as a nurse in a geriatric ward and had worn a cross on a necklace since 1971. Her employer's policy was that due to security and infection reasons no free-swinging jewellery was allowed. When new uniforms with V-shaped necks were introduced, she was asked to take her cross off and after refusing, was offered the option of wearing a brooch. When she refused again, she was removed to a non-nursing position which was later made redundant.
The third applicant, Ms Ladele, worked as a registrar at the London Borough of Islington. Her employer followed a strict policy on equality. When she had worked there for several years, the employer decided to designate all registrars for civil partnerships. As this did not comply with her religious convictions, she first managed to shift duties when civil partnerships had to be registered, but soon two colleagues complained. A disciplinary hearing did not find a solution, the proposal being that she registers the civil partnerships while ceremonies are conducted by a colleague. Her contract was terminated.
The fourth applicant, Mr McFarlane, worked as a therapist for a private counselling company. The rules of the professional association demanded strict neutrality towards the clients. His duties included counselling to same-sex couples and though he had concerns because of his religious convictions, he did so. He started and finished a post-graduate study which did not resolve his doubts. In several talks with his supervisor, he aired his doubts, but announced that his views would be evolving. The supervisor decided to warn the company's managers that the applicant "either is confused or lying." This assessment led to his dismissal for "gross misconduct."

Concerning the first applicant, the court reiterated that the state has a margin of appreciation in deciding where to strike a balance between FORB and other rights. In wearing religious attire and acting according to one's beliefs the court demands a "certain level of cogency, cohesion and importance."[47] Stressing the state's duty to remain neutral and impartial, the court demands that acting according to a religious conviction has to be "intimately linked, not only inspired by faith."[48] Consequently, the court ruled that the state did not strike a fair balance because the cross was discreet and did not distract from her professional appearance.[49] Therefore, it considered FORB had been violated.

[47] ECHR, Eweida, as quoted, par. 81.
[48] ECHR, Eweida, as quoted, par. 82.
[49] ECHR, Eweida, as quoted, par. 94.

Whereas this finding correlates with the general approach the court takes in these questions, a dangerous by-argument should be highlighted. The court reasoned that the very fact that BA amended its company rules shortly after its publication shows that no fair balance was found. Though this reasoning is coherent, it does not add to the understanding of FORB according to the Convention and can even be misleading as such an amendment could easily be made a prerequisite for judging on the question of a fair balance.[50]

The result proved correct, which is also the case with the judgment concerning Ms Chaplin. The court decided that limiting the freedom to act according to a religious belief for reasons of public health and considerations of safety can be valid. As those rules were neutral – Sikhs and Muslims were not allowed to wear special garments of religious attire, if they were also seen as dangerous – the court decided that the limitation of FORB was justified.[51] Given that acting according to a religious belief and conviction also includes testifying about this faith, it is difficult to see why the alternative offered to the applicant of wearing a brooch was not acceptable to her. If there are reasons for limiting the testimony in a certain manner, this is within the state's margin of appreciation.

The court accepted the state's wide margin of appreciation in Ms Ladele's case, ruling that it struck a fair balance and the termination of contract was proportionate, especially taking into account that the state's aim to protect the rights of others was also guaranteed by the Convention.[52] But this reasoning of the court has to be questioned for the following reasons: firstly, civil partnerships are still not accepted in all member states, so they enjoy a wide margin of appreciation. This very fact should have made the court cautious as the views on this issue are still evolving and other opinions deserve protection as well. At minimum, the court should have been more careful in its reasoning. Secondly, the applicant never imposed her worldview on any of her clients. Her situation can be compared to that of a conscientious objector and should have been taken into account accordingly.[53] And thirdly, she started to work in her special task as marriage registrar before the policy changed or this was even foreseeable. The court demands adaption to all possible changes, notwithstanding the employee's conscience. This neglects FORB and takes it out of the picture rather than striking a fair balance as it demands that every personal conviction has to step behind general societal developments.[54] This approach tends

[50] Especially given the court`s lighthouse function as referred to above.

[51] ECHR, Eweida, as quoted, par. 98.

[52] ECHR, Eweida, as quoted, par. 106.

[53] This is the reasoning in a dissenting opinion by judges Vučinić and de Gaetano. The introduction of "religious objection" might raise new questions, though.

[54] Therefore, the reasoning by the third intervening party, the National Secular Society, freedom to re-

to neglect the "forum externum" at least, though it is part of a broader trend. One scholar recently hinted to that "resistance to sexual orientation equality (less so abortion) is already treated by many as if it were morally indistinguishable from racism."[55] The judgment certainly does not contribute to protect FORB in this respect.[56]

Compared to the McFarlane case, one could argue that conscientious reservations should be able to develop in the course of time, but it can be distinguished from Ladele by the fact that Mr McFarlane knew what his duties would comprise when he started his employment whilst Ms Ladele did not. In that respect, the McFarlane case is rather comparable to cases like Rommelfanger: if someone starts to work knowing about certain moral preconditions or teachings of his or her employer, one can stipulate an agreement to abide by these decisions. The appeal for referral to the Grand Chamber was rejected in May 2013.[57]

4.4 On establishing trade unions

A recent case[58] clarifies the scope of the right to self-organize a religious organisation.

> The applicant was the trade union translated "The Good Shepherd," founded in April 2008 by 32 orthodox priests and three lay members, contradicting a rule of the Romanian Orthodox Church's Statute according to which priests are not allowed to participate in any association and to stand domestic or international trial without bishopric consent. The domestic courts finally denied registration, a chamber of ECHR found Article 11 (right of association) as violated by a vote of 5:2.

Whereas the Grand Chamber quotes several international treaties of ILO, EU and CoE, it reiterates the state's wide margin of appreciation in social and political issues.[59] The majority vote[60] also accepts that the denial of registration was necessary

sign is the ultimate guarantee of freedom of conscience which may be seen as a consequence of the court's finding. The Strasbourg institutions had ruled accordingly until now only when applicants deviated from their religious employer's teachings – and put up additional qualifications, see Rommelfanger and Fernández Martinez, as quoted.

55 Gerard V. Bradley, Emerging challenges to religious freedom in America and other English-speaking countries, in: Allen D. Hertzke (ed.), as quoted, 215 ff (230).

56 Roger Trigg, "Canary in the coal mine: Mounting religious restrictions in Europe," http://berkleycenter.georgetown.edu/rfp/essays/canary-in-the-coal-mine-mounting-religious-restrictions-in-europe; undated.

57 ECHR Press Release ECR 161 (2013) of 28 May 2013.

58 ECHR, Sindicatul "Pastorul cel Bun" vs Romania, Judgment of the Grand Chamber of 9 July 2013, No. 2330/09.

59 ECHR, Sindicatul, as quoted, par. 133.

60 The vote was 11:6.

in a democratic society. The question if the matter in dispute is a real challenge to the religious community's autonomy and not a mere allegation has to be answered by domestic courts while the state has to remain neutral and impartial in its approach.[61] As there is no common approach within the member states concerning the representation of employees in religious organisations, the court grants a wider margin of appreciation for national authorities in this respect.[62]

Again, the court leaves a potential loophole especially for international observers, in saying that it is possible to distinguish religious affairs and activities of a "mere financial nature."[63] This remained an obiter dictum in this case, but leaves the possibility to restrict religious self-organisation. In a concurring opinion this is highlighted by stating that the clergy is neither working in a normal reciprocal employment, nor for the bishop or the church.[64] One even could say that a clergyman works for the deity in following his calling.

5. What else?

Of course, there is a lot more to discover and to learn from the Strasbourg Court.[65] When dealing with FORB, one should always keep in mind that other rights can be affected as well. For example, parents as well as children have a right to education, including religious education according to the court,[66] which stresses impartiality in order to avoid indoctrination.[67]

Finally, there may be relevant European judgments beyond Strasbourg. The court of the European Union, the European Court of Justice, recently gave a judgment concerning asylum seekers in Europe.[68] It used to be normal practice in several European countries including Germany that converts seeking asylum for religious reasons were sent back by reasoning that converts would still be free to live their newly-won faith along the lines of "forum internum." This reasoning, also known – a bit cynically – as "margin of religious subsistence," did not protect FORB as guaranteed in international documents.[69] The Luxembourg court decided against

[61] ECHR, Sindicatul, as quoted, par. 159, 165.
[62] ECHR, Sindicatul, as quoted, par. 171.
[63] ECHR, Sindicatul, as quoted, par. 144.
[64] ECHR, Sindicatul, concurring opinion of judge Wojtyczek, par. 6.
[65] ECHR, Lautsi vs Italy, Judgment of the Grand Chamber of 18 March 2011, No. 30814/06, the Grand Chamber voted 15:2 against a violation. ECHR, Leyla Şahin vs Turkey, Judgment of the Grand Chamber of 10 November 2005, No. 44774/98, the Grand Chamber voted 16:1 against a violation.
[66] ECHR, Folgerø and others vs Norway, Judgment of the Grand Chamber of 29 June 2007, No. 15472/02.
[67] ECHR, Hasan and Eylem Zengin vs Turkey, Judgment of 9 October 2007, No. 1448/04.
[68] ECJ, X and Y vs Germany, Judgment of 5 September 2012, C-71/11 and C-99/11; its cases can be easily accessed online: http://curia.europa.eu/jcms/jcms/j_6/.
[69] This was a rather theoretical thought that converts are not in danger in countries such as Iran, Pakistan

this practice as the level of protection of asylum for religious reasons has to reach the full-fledged international guarantee of FORB.

6. Conclusion

The German judge for the European Court of Human Rights was quoted in one of her first interviews after being appointed in 2010: "Freedom of religion will be one of the most important topics of the court."[70] Until now, she seems to be right.

or even Turkey, provided they stay quiet about their faith.

[70] Judge Professor Angelika Nußberger, quoted in the German newspaper "Tagesspiegel," issue of 24 June 2010.