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"Weighing religious beliefs on the scale of justice: The judge as an arbitrator of trust"

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INTRODUCTION

Throughout the ages, and in most societies, impartiality has been regarded as the essence of the administration of justice. Judges ought to be impartial, moral and objective. All parties involved in a trial must have the assurance that no bias, explicit or implicit[1], will result in injustice towards them. It is essential for a judge to maintain, in court, a demeanor which gives to the parties the certainty that their case will be heard and determined on its merits and not according to some personal predisposition on the part of the judge. However, judges are also humans with a formulated character, personality and background. They may have different ideas about law and justice, be inspired by conflicting philosophies. Yet, whatever personal views judges may hold, they must decide every case in line with the correct or proper interpretation of the applicable law, by using the same principles for similar cases. They are also bound to evaluate every case's facts and apply to them the law with the utmost objectivity, morality and parrhesia[2].

A significant factor that can affect a person's morality and, more importantly, objectivity, is, among others, religion. Religions are closely connected to morality, since all of them include moral values. Judges must rely on their own sense of morality when they perform their judicial functions. Consequently, since morality is affected by religion, religion could play a significant role in judicial decision making. Most of the times a judge's religious values are in line with the law. For instance, according to the Bible, killing somebody is considered a sin. Respectively, by legal aspect, this act is considered a crime. Nevertheless, there are some grey areas that moral values connected to religion may contradict law e.g. the matter of abortion. Thus, in this kind of cases, a judge's

[1] *Asha Amin*, Implicit Bias in the Courtroom and the Need for reform, 30 Geo. J. Legal Ethics 575 (2017)

[2] "Parrhesia": The term *parrhesia* first appears in Greek literature in Euripides and can be found in ancient Greek texts throughout the end of the fourth century and during fifth century B.C. The term is borrowed from the Greek παρρησία *parrhēsía* (πᾶν "all" and ῥῆσις "utterance, speech") meaning literally "to speak everything" and by extension "to speak freely", "to speak boldly", or "boldness". It implies not only freedom of speech, but the obligation to speak the truth for the common good, even at personal risk. (Sources: Foucault, Michel (Oct–Nov 1983), Discourse and Truth: the Problematization of Parrhesia (six lectures), The University of California at Berkeley. παρρησία. Liddell, Henry George; Scott, Robert; A Greek–English Lexicon at the Perseus Project)

religious views regarding a specific issue may differ from its corresponding law. Moreover, the issue gets even more complex when a judge externalizes his/her religious beliefs. On the one hand, the freedom of conscience, thought and religion is established in a variety of statutory provisions internationally, irrespective of whether a state is secular or not[3]. On the other hand, judges have the obligation not only to be impartial, but also to seem impartial[4]. The latter one derives from article 6 of ECHR, which establishes the right to a fair trial.

The issue has significant importance nowadays, since European societies tend to be increasingly multicultural. Immigration flows from Africa and Asia constitute a principal factor for cultural diversity. Cultural multiplicity entails, among others, different religious beliefs. Issues pursuant to the wearing of the Islamic "burqa" or other forms of Islamic dress have attracted significant attention in the media over the last years. Consequently, discussion about the restriction of judges' manifestation of religious beliefs during the performance of their judicial duties or in extra-judicial activities becomes critical. Similarly, other religion-related matters have already begun to be subject to debate. Moreover, litigants' demands about not to be tried in a courtroom with a religious symbol on the wall will possibly increase due to multiculturalism.

One might expect judges, due to the nature and the importance of the judiciary, to be able to ignore extralegal factors such as their religious beliefs. But it's not that simple. Is it possible for judges' religious views to influence their decision-making? An emphasis on judge's religion presupposes the existence of a relationship between the particular religion that a judge practices and the judge's decisions. This assumption cannot be primarily excluded, since judges decide not only on legal matters, but they also have to evaluate and determine factual matters, as well as interpret the law. So, a series of questions arise: Is it acceptable for a judge to pray in the courtroom? Could a judge wear a religious symbol in the courtroom? Could a judge participate in a religious group?

[3] Such as the European Convention on Human Rights (Article 9), the EU Charter of Fundamental Rights (Article 10), the International Covenant on Civil and Political Rights (Article 18) and the Universal Declaration of Human Rights (Article 18)

[4] *Sietske Dijkstra*, The Freedom of the Judge to Express his Personal Opinions and Convictions under the ECHR, Utrecht Law Review, Vol. 13, Issue 1, (2017)

This paper will try to answer these questions by examining to what extent judges should be able to express their personal opinions and convictions during the exercise of their judicial duties inside the courthouse as well as in extra-judicial activities.

1) LIMITS ON THE FREEDOM TO MANIFEST ONE'S RELIGION

Legislation often attempts to define 'religion' or related terms, such as 'sects', 'cults', 'traditional religion', etc. Pursuant to the "Guidelines for Legislative Reviews of Laws affecting Religion or Belief"[5], there is no generally accepted definition of religion in international law and many states have had difficulties in defining the aforementioned terms. It has been argued that such terms cannot be defined in a legal sense, because of the inherent ambiguity of the concept of religion. Additionally, international standards speak of 'religion or belief'. The 'belief' aspect typically pertains to deeply hold conscientious beliefs that are fundamental about the human condition and the world. Thus, even atheism and agnosticism are generally held to be equally entitled to protection of religious beliefs, it is very common for legislation not to protect adequately (or to not refer to at all) to rights of non-believers[6].

Pursuant to the European Court of Human Rights (herein "the ECtHR" or "the Court"), not only is it not possible to discern throughout Europe a uniform conception of the significance of religion in society[7], but also the meaning or the impact of a public expression of a religious belief will vary over time and depending on context[8]. Rules pertaining to religion will consequently vary across different countries according to national traditions, the secular nature of the state and the requirements imposed by the need to protect the rights and freedoms of others and maintain public order[9].

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[5] As adopted by the European Commission for Democracy through Law (the Venice Commission) at its 59th plenary session (Venice, 18 and 19 June 2004, CDL-AD (2004) 028)

[6] Cases of *İzzettin Doğan and Others v. Turkey* [GC], no. 62649/10, § 55, ECHR 2016 and *Sinan Işık v. Turkey*, no. 21924/05, § 20, ECHR 2010

[7] *Otto-Preminger-Institut v. Austria,* 20 September 1994, § 50, Series A no. 295-A.

[8] See, among other authorities, *Dahlab v. Switzerland* (dec.), no. 42393/98, § 104, ECHR 2001-V

[9] *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 109, ECHR 2005-XI and mutatis mutandis *Wingrove v. the United Kingdom*, 25 November 1996, § 58, Reports of Judgments and Decisions 1996-V

In several cases, the ECtHR reiterates that, as enshrined in Article 9 ECHR, freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the convention[10]. Although the right to freedom of thought, conscience and religion is absolute, freedom to manifest one's religion or beliefs may be subject to restrictions. It is true that article 9 ECHR does not protect every act motivated or inspired by a religion or belief and does not always guarantee the right to behave in the public sphere in a manner which is dictated by one's religion or beliefs[11]. Especially in democratic societies, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected[12] [13]. What is more, in order to 'protect the rights and freedoms of others', states have to restrict some other rights or freedoms established in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a 'democratic society'[14].

The ECtHR also reiterates that it is important to emphasize the fundamentally subsidiary role of the Convention mechanism. The national authorities have direct democratic legitimation and are, as the ECtHR has held on many occasions, in principle, better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight[15]. This is the case where questions concerning the relationship between state and religions are

[10] Cases of *Kokkinakis v. Greece*, 25 May 1993, § 31, Series A no. 260-A, *Buscarini and Others v. San Marino* [GC], no. 24645/94, § 34, ECHR 1999-I, *Hamidović v. Bosnia and Herzegovina*, no. 57792/15, § 36, ECHR 2017, *Dahlab v. Switzerland*, supra note 8, § 104 and *S.A.S. v. France* [GC], no. 43835/11, § 124, ECHR 2014 (extracts)

[11] *Arrowsmith v. the United Kingdom*, Decision of 16 May 1977, Application no. 7050/75, § 5, *Kalaç v. Turkey*, 1 July 1997, § 27, Reports of Judgments and Decisions 1997-IV, *S.A.S. v. France*, supra note 10, § 125, *Leyla Şahin v. Turkey*, supra note 9, § 105, and *Hamidović v. Bosnia and Herzegovina* , supra note 10, § 41

[12] This follows both from Article 9 (2) and from the State's positive obligations under Article 1 ECHR to secure to everyone, within its jurisdiction, the rights and freedoms defined therein. Especially, Article 9 (2) lays down three conditions that need to be met whenever each time a restriction is imposed on one's freedom of religion, i.e. if this restriction is prescribed by law, it serves a legitimate aim and is necessary in a democratic society

[13] *Kokkinakis v. Greece*, supra note 10, § 33, *Leyla Şahin v. Turkey*, supra note 9, § 105 - 106, *Dahlab v. Switzerland*, supra note 8

[14] Among others *Chassagnou and Others v. France* [GC], nos. 25088/94 and 2 others, § 113, ECHR 1999-III. See also *Leyla Şahin v. Turkey*, supra note 9, § 108

[15] See for example Maurice v. France [GC], no. 11810/03, § 117, ECHR 2005-IX.

particularly at stake[16]. As regards Article 9 ECHR, the state should thus, in principle, be afforded a wide margin of appreciation in deciding whether- and to what extent and form- a limitation of the right to manifest one's religion or beliefs is 'necessary', as it will depend on a specific domestic context[17].

However, the abovementioned margin of appreciation goes hand in hand with a European supervision embracing both the law and the decisions applying it. The Court's task in exercising its supervisory jurisdiction is not to replace the competent national authorities, but rather review under the Convention whether the decisions they delivered are pursuant to their power of appreciation. It is the Court's duty to examine the interference in the light of the case as a whole and determine whether the measures taken at national level were justified in principle – that is, whether they are proportionate to the legitimate aim pursued and the reasons adduced to justify them appear "relevant and sufficient"[18].

2) RELIGION IN THE COURTROOM

(a) A judge manifesting religious beliefs while on bench

Since religious freedom is primarily a matter of individual conscience, it seems undeniable that every judge has the right in a democratic society to hold specific religious beliefs. However, the question that arises is whether judges have the right to manifest their religion and exercise their religious beliefs or openly express their religious views while carrying out their judicial functions.

First of all, it's important to point out that the Court considers judges to belong to a broader category of civil servants[19], although it admits that the judiciary is not part of the ordinary civil service[20]. As the Court observes, judges have specific responsibilities in

[16] *Wingrove v. the United Kingdom*, supra note 9, § 58; see also *Leyla Şahin v. Turkey*, supra note 9, § 109

[17] Among others *Manoussakis and Others v. Greece*, 26 September 1996, § 44, Reports of Judgments and Decisions 1996-IV and *Leyla Şahin v. Turkey*, supra note 9, § 109

[18] Among others *Manoussakis and Others v. Greece*, supra note 9, § 44, *Leyla Şahin v. Turkey*, supra note 9, § 110, *S.A.S. v. France* , supra note 10, § 129-131, *Hamidović v. Bosnia and Herzegovina*, supra note 10, § 38

[19] *Wille v. Liechtenstein* [GC], no. 28396/95, § 62, ECHR 1999-VII

[20] *Pitkevich v. Russia* (dec.), no. 47936/99, 8 February 2001, p. 12

the field of administration of justice, in which states exercise sovereign powers. Consequently, judges participate directly in the exercise of powers conferred by public law and perform duties designed to safeguard the general interests of the state[21] and maintain the rule of law and the impartiality of the judiciary.

As far as civil servants are concerned, the Court held that, although it is legitimate for a state to impose on civil servants, on account of their status, a duty to refrain from any ostentation in the expression of their religious beliefs in public, civil servants are individuals and, as such, qualify for the protection of Article 9 of the Convention. It therefore falls to the Court, having regard to the circumstances of each case, in order to determine whether a fair balance has been struck between the fundamental right of the individual to freedom of religion and the legitimate interest of a democratic state in ensuring that its public service properly furthers the purposes enumerated in Article 9 § 2. The Court concluded that this is particularly important in case of restrictions on the freedom of a judge to express religious beliefs in connection with the performance of his functions, after giving on judges the prominent place among state organs in a democratic society[22].

In *Pitkevich v. Russia*, the applicant was a judge and a member of the Living Faith Church (herein "Church"), which is part of the Russian Union of Evangelical Christian Churches. Under the conduct of disciplinary proceedings, the applicant was dismissed from the judiciary on the grounds that she had breached the domestic statutory provisions that laid down certain duties to judges and she had impaired the authority of judiciary by pursuing religious activities in the interest of the Church. In particular, it was established that the applicant had recruited several colleagues and third persons as members of the Church, that she had unsuccessfully attempted to enroll a number of other persons, that she had prayed publicly during court hearings, that she had promised certain parties to proceed a favorable outcome of their cases if they joined the Church, and that those activities had resulted in delayed cases and a number of challenges against the applicant. Subsequently, she appealed before the domestic Supreme Court. The last one decided that these activities gave rise to doubts as to impartiality and independence of the Court. After

[21] *Pitkevich v. Russia,* supra note 10, p. 8

[22] *Pitkevich v. Russia,* supra note 10. See also, mutatis mutandis, *Vogt v. Germany*, 26 September 1995, § 53, Series A no. 323 and also *Rekvényi v. Hungary* [GC], no. 25390/94, § 43, ECHR 1999-III

exhausting the domestic remedies, Mrs. Pitkevich complained before the ECtHR that her dismissal breached Article 9, 10 and 14 of the Convention. The Court noted that the applicant was not precluded from engaging in activities of the Church. Nonetheless, the Court observed that the applicant was dismissed for her specific activities while performing her judicial function, which were found to be incompatible with the requirements for judicial office. In this regard, there has been an interference with the applicant's freedom of religion and expression under Articles 9 and 10 of the Convention. The Court ruled that this interference was proportionate to the legitimate aims that pursue to maintain integrity of the judicial authority and protect the rule of law, and the reasons adduced by the authorities were sufficient and relevant.

Moreover, the Court argued that when a judge expresses a religious view during the performance of his/her duties, concerning the morality of the parties, this might justify an appearance of bias, unless the opinion was necessary to resolve the case and substantiate the judgment. In addition, the Court set out that activities as the aforementioned call into question the impartiality of a judge and impair the judicial authorities. It is worth mentioning that the applicant was not dismissed on the basis of her expressing religious views in private nor of her belonging to the Church, but by reason of her specific activities in question during her employment and for the relevant and sufficient reasons set out above.

According to the General Comment adopted by the Human Rights Committee of the ICCPR "the observance and practice of religion or belief may include not only ceremonial acts, but also the wearing of distinctive clothing or head coverings"[23]. The wearing of a crucifix, a headscarf, a niqaab, a burqa or other religious clothing may indicate allegiance to a particular faith and a desire to behave according to the principles set out by that faith. Such garments may even constitute a "powerful" religious symbol – that is to say, a sign that is immediately visible to others and provides a clear indication that the person displaying it follows a particular religion[24]. Therefore, what is in issue in

[23] CCPR/C/21/Rev.1/Add.4, par. 4, 27 September 1993

[24] In *Ebrahimian v. France*, no. 64846/11, § 47, ECHR 2015 the Court noted that the wearing of a veil was an undisputed expression of the applicant's adherence to the Muslim faith and held that it has no reason to doubt that the wearing of this veil amounted to a "manifestation" of a sincere religious belief, which by extension is protected by Article 9 ECHR

this instance is the wearing of religious symbols by judges in the course of their professional duties.

Firstly, it should be taken into account that in a democratic society, in which different religions coexist within the same population, people of various religious beliefs, belonging to several religious groups, appear before courts. The Court recognized, in particular, that in cases in which the participants belonged to a religious group opposing the concept of a secular state and recognizing primarily God's law, the presiding judge has a difficult task of ensuring the integrity of the trial[25]. However, in such circumstances, the role of the authorities is not to remove the cause of tension by eliminating pluralism, but to ensure that that the competing groups tolerate each other[26]. Secondly, in a secular and neutral state, judges in their capacity as public authorities have duty of impartiality, neutrality and discretion, as mentioned above. This duty requires judges to ensure fair treatment and mutual tolerance between opposing groups. A judge can strive for both the essence and the appearance of pluralism and impartiality by not manifesting religious beliefs through displaying religious symbols and clothing, while exercising the judicial authority[27], and this is conducive to public order, religious harmony and tolerance in a democratic society.

As far as measures prohibiting civil servants from wearing religious symbols in the performance of their duties are concerned, the Court is of the opinion, according to its case law, that these measures constitute an interference with the right to manifest their freedom under Article 9 (1) ECHR. However, they are considered justified in principle and proportionate to the legitimate aim pursued of protecting the rights and freedoms of others, public safety and public order (see cases Dahlab[28], Kurtulmuş[29], Ebrahimian[30] etc.)

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[25] *Hamidović v. Bosnia and Herzegovina*, supra note 10, § 39

[26] Among others *Leyla Şahin v. Turkey*, supra note 9, § 107

[27] See, mutatis mutandis, *Hamidović v. Bosnia and Herzegovina*, supra note 10, § 40

[28] In *Dahlab v. Switzerland*, supra note 8, Mrs. Dahlab (supra note 8) was appointed as a primary – schoolteacher. On 23 August 1996, the domestic Directorate General for Primarily Education prohibited the applicant from wearing a headscarf in the performance of her professional duties. After exhausting the domestic remedies, the applicant complained before the Court that this ban infringed her freedom to manifest her religion, as guaranteed by Article 9 ECHR. The Court held that the domestic Courts weighed the protection of the legitimate aim of ensuring the neutrality of the state education system against the freedom to manifest one's religion. It accepted that it cannot be denied outright that the wearing of a

The Court has accepted that states may rely on the principles of state secularism and neutrality to justify restrictions on the wearing of religious symbols by civil servants, due to the latter's status as public employees, which distinguishes them from ordinary citizens[31]. It also notes that rules on dress apply equally to all public servants, irrespective of their functions or religious beliefs. Especially, since public servants act as representatives of the state when they perform their duties, the rules require their appearance to be neutral in order to preserve the principle of secularism and its corollary and the principle of neutrality in public services. The rules on dressing may require, for example, public servants to refrain from wearing a head covering on work premises[32].

At this point, it is crucial to highlight that an item worn as a religious symbol may be distinguished from a piece of jewelry worn merely for decorative reasons, for example

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headscarf might have some kind of proselytizing effect with very young children who are more easily influenced, seeing that it appears to be imposed on women by a precept which is laid down in the Quran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.

[29] In *Kurtulmuş v. Turkey* (dec.), no. 65500/01, ECHR 2006-II, the applicant was an associate professor at the Faculty of Economics of the University of Istanbul. Several disciplinary procedures were brought against her for wearing the Islamic headscarf when teaching and for not complying with the rules on dress for public servants. After exhausting the domestic remedies, the applicant complained before the Court that her right to manifest her religion freely, guaranteed by Article 9 ECHR, had been violated. The Court ruled that the measures prohibiting her wearing of a headscarf were justified by imperatives pertaining to the principle of neutrality in the public service and, in particular in the State education system, and to the principle of secularism.

[30] In *Ebrahimian v. France,* supra note 24, the applicant was recruited on a three-month fixed-term contract, extended for one year until 31-12-2000, as a social assistant in the psychiatric unit of a public hospital administered by the City of Paris. On 11th of December 2000, the hospital did not renew the applicant's contract, due to her refusal to remove her veil. The domestic Administrative Court held that this decision had been compatible with the principles of secularism and neutrality in public services. According to the domestic court, the aforementioned principles preclude those employees from being entitled to manifest their religious beliefs in the exercise of their duties especially through external sartorial expression. After exhausting the domestic remedies, the applicant complained before the Court that the refusal to renew her contract as a social assistant had been contrary to her freedom to manifest her religion. The Court observed that the fact of wearing her veil was perceived as an ostentatious manifestation of her religion, incompatible in this case with the neutral environment required in a public service. The Court accepted that the State, which employs the applicant in a public hospital where she is in contact with patients, is entitled to require that she refrain from manifesting her religious beliefs when carrying out her duties in order to guarantee equality of treatment for the individuals concerned. From this perspective, the neutrality of the public hospital service may be regarded as linked to the attitude of its staff, and requires that patients cannot harbor any doubts as to the impartiality of those treating them.

[31] *Ebrahimian v. France,* supra note 24, § 64

[32] *Kurtulmuş v. Turkey* supra note 29, *Ebrahimian v. France* supra note 24, § 57

in a shape of a cross. The Court noticed that it cannot be said that every act which is in some way inspired, motivated or influenced by a belief constitutes a "manifestation" of this belief. In order to fall within the scope of meaning of "manifestation" in accordance with article 9 ECHR, the act in question must be intimately linked to the religion or belief[33]. The existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In most cases, the wearing of a visible cross is motivated by someone's desire to bear witness to his/her Christian faith. In *Eweida and Others v. the United Kingdom*, despite the fact that the applicant was not a public servant but a private employee who wore a cross at the workplace, the Court ruled that the applicant's cross was discreet and cannot have detracted her attention from her professional appearance[34].

Subsequently, it should be mentioned that there is a tendency in some European countries, such as France, Belgium and the Netherlands, to ban the burqa from being worn in public. Despite the legality or not of an overall burqa ban is not under examination at present, it could be generally said that such bans have great difficulty in satisfying the fundamental right norms guaranteed in the Convention. On the other hand, specific bans narrowly tailored for a particular situation are generally regarded as uncontroversial, for example bans at banks or during the identity checks at airports[35]. In this context, the question that arises is whether bans on wearing religious symbols in the courtroom are justified in principle and whether a judge has the right to impose such prohibitions based on his/her inherent power to regulate the conduct of the trial proceedings to ensure that no abuse of the Court occurs.

In The Queen v. D case[36], in relation to the wearing of niqaab and a burqa by a defendant during proceedings in Crown Court, the British judge ruled that the defendant is free to wear the niqaab during trial, except while giving evidence, in order to ensure the ability of the jury to see her face for the purposes of evaluating her testimony.

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[33] *Eweida and Others v. the United Kingdom*, nos. 48420/10 and 3 others, § 82, ECHR 2013 (extracts)

[34] *Eweida and Others v. the United Kingdom*, supra note 33, § 94

[35] *Gerhard Van der Schyff and Adriaan Overbeeke,* Exercising religious freedom in the public space: a comparative and European Convention analysis of general burqa bans, European Constitutional Law Review (2011)

[36] www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/The+Queen+-v-+D+(R).pdf

In *Hamidović v. Bosnia and Herzegovina*[37], the applicant was a member of the local group advocating the Wahhabi/Salafi version of Islam. In the context of a trial, where a person belonged to the same local group was accused for terrorist attack, the applicant was summoned to appear in the courtroom as a witness, but refused to remove his skullcap, notwithstanding the order from the presiding judge of the trial to do so. Then, the judge expelled him from the courtroom and convicted him of contempt of court, according to the domestic Code of Criminal Procedure. After the applicant brought an action before the domestic court, the last one pointed out that, in public institutions, it is not acceptable to display religious affiliation through clothing or religious symbols, and that the Court is obliged to support and promote values that bring people closer not those that separate them. In 2015, the High Judicial and Prosecutorial Council of Bosnia and Herzegovina ("the HJPC") made an analysis in which stated that judges, prosecutors and court officers in Bosnia and Herzegovina are forbidden from wearing such symbols in the course of their duties. While that prohibition does not apply to other persons, such as parties and witnesses, they may be ordered to remove a religious symbol in a courtroom if this is considered justified by the judge in a given case, taking into consideration the right to freedom of religion and equal access to justice, the organization of the proceedings and the need to maintain the authority of the judiciary. The applicant complained before the Court that his punishment infringed his freedom to manifest his religion, as established by Article 9 of the Convention. The Court recognized the inherent power of the trial judge to regulate the conduct of proceedings so as to ensure the protection of the rights and freedoms of others and the need to promote tolerance in a post–conflict society. However, under the circumstances of the case, the Court concluded that the applicant's punishment for contempt of court on the sole ground of his refusal to remove his skullcap was not necessary in a democratic society, since there was no indication that the applicant was not willing to testify or that he had a disrespectful attitude, and so, that in the present case the domestic authorities exceeded the wide margin of appreciation afforded to them.

In conclusion, it should be said that in democratic societies citizens are not normally not under any obligation to be or appear neutral. Indeed, there may be cases

[37] Supra note 10

when it is justified to order a witness to remove religious clothes, in order to be properly identified. However, the Court emphasized that the authorities must not neglect the specific features of different religions. So, in case of a refusal of removing religious clothes, the court may use its inherent powers to do whatever it can to alleviate any discomfort, by allowing, for example, the use of screens, witness or defendant to give evidence by live link, an officer or other reliable witness to examine the defendant's or witness' face in private, and to give positive evidence of identification in an open court. Freedom to manifest one's religion is a fundamental right: not only because a healthy democratic society needs to tolerate and sustain pluralism and diversity, but also due to the fact that for certain individuals who have made religion a central tenet of their lives, any attempt to inhibit their ability to communicate their beliefs with others[38] would be interpreted as restriction of their religious freedoms.

(b) Religious symbols in the courtroom

Recently, in January 2018, a judge in the Bavarian town of Miesbach has ordered a crucifix to be removed from the courtroom during the trial of a 21-year-old Afghan asylum-seeker accused of making death threats against another Afghan who converted to Christianity. It must be noted that the Afghan defendant said he did not mind being tried with the crucifix[39] being publicly displayed in the courtroom. The judge's action received great interest and was perceived negatively by a significant portion of the German people.

In spite of the significance of the issue, the case law of ECtHR has not dealt till today with cases regarding the display of religious symbols in the European courtrooms. It has, however, addressed the issue of the presence of religious symbols in schools, in the Lautsi case.

Mrs. Soile Lautsi, complained against the School Council of a public school in Italy, where her children were students, about the presence in all state schoolrooms of a crucifix on the wall. Her complaint was made on the ground that the display of religious symbols in the classroom infringed the principle of secularism, so, she asked for their

[38]See, mutatis mutandis, *Eweida and Others v. the United Kingdom*, supra note 33, § 94, *Hamidović v. Bosnia and Herzegovina*, supra note 10, § 40-41, the Queen v. D case, supra note 10.
[39] https://www.rt.com/news/416930-bavaria-cross-courtroom-removed-muslim/

removal. Her request was refused and then Lautsi applied to the pertinent domestic Court. After exhausting all domestic legal remedies, Lautsi appealed to ECtHR. On November the 3rd, 2009, the Court finally decided unanimously that the exposure of crucifixes in Italian public schools was contrary to Article 2 of Protocol No. 1 and Article 9 ECHR and it violated the religious freedom of children and the right of parents to educate their children according to their convictions. The Court held, among others, that "it should be pointed out that States have the responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups. That concerns both relations between believers and non-believers and relations between the adherents of various religions, faiths and beliefs."[40].

The decision received great attention and reactions of various kinds by the Italian public opinion, politicians, state officials, even the Greek Orthodox Church. The opponents of the ruling were emphasizing on the role of Christianity in the formation of the European identity. Nevertheless, the Italian government lodged an appeal to the Grand Chamber of the Court, which decided on 18th of March of 2011, by fifteen votes to two, that the compulsory display of crucifixes in Italian State-school classrooms did not breach Article 2 of the first Protocol to the European Convention on Human Rights no separate issue arose under Article 9. Despite the fact that "the crucifix is above all a religious symbol"[41], the Court held that "the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the State"[42].

The issue of public display of religious symbols constitutes, without a doubt, a complex issue that becomes even more difficult to tackle due to its inherent interconnectivity with politics and the relation between a State and the Church. As the European societies continue to become increasingly multicultural, we assume that the ECtHR will soon be called to rule on the matter of presence of religious symbols in the courtrooms. At that point of time, the Court will have to find a balance between the conflicting interests, i.e. the right to freedom of conscience, thought and religion (Article 9 ECHR) and the right to a fair trial (Article 6 ECHR).

[40] *Lautsi v. Italy,* no. 30814/06, § 55, 3 November 2009
[41] *Lautsi and Others v. Italy* [GC], no. 30814/06, § 66, ECHR 2011
[42] *Lautsi and Others v. Italy* [GC] supra note 41, § 68

3) THE EXPRESSION OF A JUDGE'S RELIGIOUS BELIEFS OUTSIDE THE COURTROOM

As it has already been analyzed, special characteristics of judges' profession can lead to rather extensive restrictions of their freedom of religion as granted by Article 9 ECHR and of expression, as laid down in Article 10, while performing their judicial duties. However, when it comes to the freedom of expression of judges' religious views in their personal life outside the courtroom, the same conclusions cannot be drawn without further consideration.

The ECtHR, as already stated, for the purposes of freedom of religion and expression, considers judges as civil servants[43], even though it substantially differentiates them[44]. As for the restrictions a state can impose on a civil servant's freedoms and by extension on a judge, the ECtHR first examines whether the interference meets the three conditions as set in Articles 9 (2) and 10 (2), i.e. if it is prescribed by law[45], it serves a legitimate aim and is necessary in a democratic society. In this context, if a civil servant's impartiality is considered a legitimate aim for a restriction[46], all the more reason an interference is tolerated when a judge's authority and impartiality is likely to be questioned. Furthermore, for a restriction to be necessary, the state needs to prove that a fair balance has been struck between one's fundamental right to freedom of expression and/or religion and the legitimate aim of the authorities, which in this case is impartiality[47]. In order for these conditions to be met concerning freedom of expression of civil servants in general, the ECtHR accepts a "certain" margin of appreciation (see *Vogt v. Germany*[48] and *Ahmet v. United Kingdom*[49]), whereas the same "certain" margin

[43] In *Wille v. Lichtenstein* (supra note 19, § 62), the Court granted the same protection to civil servants under Article 10 as any other individual and included judges to the broader category of them

[44] *Pitkevich v. Russia,* supra note 20, § 2

[45] The term "law" has a broader meaning including various forms of regulation as long as they are sufficiently accessible and the obligations and consequences under it are sufficiently foreseeable

[46] *Sietske Dijkstra,* supra note 4, p. 7, see also cases *Özpınar v. Turkey, no. 20999/04, § 71, 19 October 2010*, *Vogt v. Germany* supra note 4, §51, *Kurtulmuş v. Turkey* supra note 29

[47] *Wille v. Lichtenstein*, supra note 19, § 62, Baka v. Hungary [GC], no. 20261/12, § 162, ECHR 2016

[48] *Vogt v. Germany*, supra note 4, § 52-53

[49] *Ahmed and Others v. the United Kingdom*, 2 September 1998, § 61, Reports of Judgments and Decisions 1998-VI

has been implemented specifically on judges in *Wille v. Lichtenstein*[50] and *Pitkevich v. Russia*[51]. According to the aforementioned case law, though, a judge and a civil servant alike being a depository of public authority should show restraint in all cases where his/her authority and impartiality are likely to be questioned. For that reason, even if states have a "certain" margin of appreciation for judges too, the starting point should be the restriction for them as well. Given that, the Court weighs certain circumstances in several cases such as the consequences of the exercise of the freedom for the judicial office[52], the consequences of the interference for the judge[53], the motive of a judge[54], the appropriateness of the expression[55] and a fair procedure at a national level[56]. On the other hand, this margin of appreciation can be narrowed down in several cases, even for judges. It is notable that in *Baka v. Hungary*[57], the Court accepted a narrower margin of appreciation when a judge expressed his opinion for an issue of great public interest. Moreover, the ECtHR, judging on similar matters with regards to the freedom of expression, in *Leyla Şahin v. Turkey, Dogru v. France* and *Lautsi v. Italy,* held that the state's room to regulate religion in public institutions is covered by a generous margin of appreciation. On the contrary, this means that where a space's connection with the state is more remote, the smaller the margin of appreciation should become.[58]. In that sense, a judge outside the courtroom in his/her private life is freer to manifest his/her religion in worship, practice and observance than he/she is on the bench while performing judicial duties.

It is, therefore, obvious that for any form of expression of religious beliefs to be prohibited outside the courtroom and not in the context of the judge's judicial duties, it should have a direct consequence on the judicial office or the impartiality of the

[50] *Wille v. Lichtenstein*, supra note 19, § 62

[51] *Pitkevich v. Russia,* supra note 20

[52] *Wille v. Lichtenstein*, supra note 19, § 44, *Pitkevich v. Russia*, supra note 20, *Albayrak v. Turkey*, no. 38406/97, § 42, 31 January 2008

[53] *Kudeshkina v. Russia,* no. 29492/05, § 98, 26 February 2009, *Di Giovanni v. Italy*, no. 51160/06, 9 July 2013

[54] *Kudeshnika v. Russia*, supra note 53, § 95, *Kayasu v. Turkey*, nos. 64119/00 and 76292/01, § 101, 13 November 2008.

[55] *Wille v. Lichtenstein,* supra note 19, § 44, *Kayasu v. Turkey*, supra note 54, § 98

[56] *Kudeshnika v. Russia* supra note 53, § 97, *Baka v. Hungary,* supra note 53, § 89

[57] *Baka v. Hungary,* supra note 53, § 171

[58] *Gerhard Van der Schyff and Adriaan Overbeeke,* supra note 35, p. 10

judiciary. If not, as stated in *Albayrak v. Turkey*[59] and *Wille v. Lichtenstein*[60], judges should be free to express themselves and by extent to manifest their religious beliefs in worship, teaching, practice and observance, under Article 9 ECHR.

However, a judge's religious views depending on how prominently and strongly are expressed, might still raise questions about his/her impartiality. For instance, a very religious judge that expresses his/her spirituality by attending services, wearing religious symbols, participating in religious feats etc. might be perceived by a possible litigant as impartial and biased, under specific circumstances.

It is of course undeniable that in the event of subjective bias[61], that is when a judge's prejudice on the basis of religious beliefs is profound and expressed, his/her disqualification is inevitable. Within this context, a judge's pecuniary interest in a financial case should also lead to his/her recusal[62]. Nevertheless, both those allegations are either rare or difficult to prove. The most common case is when a certain judge, that has specific views such as religious beliefs and he/she is known for these, happens to hear a case of a litigant that has either similar or contrary beliefs. For example, when a judge known to be pious and a fierce follower of a religion is called to try a case where litigants of another religion are involved. Of course, each judge's personal views inevitably affect his/her decision making, since implicit bias[63] is present in all cases. The question is, though, whether a judge's religious beliefs and the fact that he/she manifests them is sufficient to question his/her impartiality The answer should be negative[64], however, when an explicitly religious judge tries a case revolving around a religious element, it is only normal for his/her impartiality to face the risk of being questioned. A possible solution to the aforementioned question could be the principle of "apparent" or "apprehensive" bias that has been developed in common law jurisdictions. It is based on

[59] *Albayrak v. Turkey,* supra note 19, § 42

[60] *Wille v. Lichtenstein*, supra note 19, § 44

[61] *Finín O'Brien,* Nemo Iudex in Causa Sua: Aspects of the No-Bias Rule of Constitutional Justice in Courts and Administrative Bodies, Irish Journal of Legal Studies, Vol. 2 (2), p. 29

[62] After *R. v. Bow Street Metropolitan Stipendiary Magistrates, Ex p. Pinochet Ugarte (No.2),* [2000] 1 A.C. 119 case, though, the principle of automatic disqualification was extended to non-pecuniary interests as well. See *Finín O'Brien*, supra note 61, p. 35, *Tom Bingham,* The business of judging- Selected essays and speeches: 1985-1999 (2000), Oxford University Press, p. 74 et seq., case *R. v. Gough* [1993] A.C. 646

[63] For implicit bias see *Asha Amin*, supra note 1

[64] *Seer Technologies v. Abbas (No. 1)* [2001] EWHC Ch., Times, March 16, 2000

the idea that justice should not only be done but also seen to be done[65]. In order to prove the existence of apparent bias, English courts[66] initially used the *Gough* test according to which "there must be real danger, in the view of the court, that the judge was biased"[67]. More recently, though, this principle was modified by *Porter v. Magill*[68] case to "the fair-minded and informed observer having considered the facts, would conclude that there was a real possibility that the tribunal was biased". According to the latter, for a judge to be disqualified even if no actual bias exists, the possibility of it should rise to a level of significant likelihood, where there is an unacceptable probability that the average judge will harbor actual bias[69]. In other words, apparent bias is when a reasonable, fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias because of some particular proven circumstance to the matters decided.

The application of the abovementioned test of apparent bias appears to be a satisfactory solution. After all, the principle that "justice should not only be done but also seen to be done" has been endorsed by both the ECtHR[70] and other international courts[71]. It covers so all the cases where subjective bias and automatic disqualification rules are not applicable. A broad perception of it, though, could lead to unreasonable results and unfounded recusal of judges. The test of appearances, that was originally developed to facilitate litigants trying to prove a biased and impartial judge, should always have a factual basis. More specifically, an apparent bias allegation should always be founded on the surrounding facts and circumstances of a given case and not on the mere fact that a judge holds a view or a belief, expressed in his/her personal life exclusively, let alone on

[65] *R. v. Bow Street Metropolitan Stipendiary Magistrates, Ex p. Pinochet Ugarte (No.2)*, supra note 62

[66] For other common law jurisdictions see *Finín O'Brien*, supra note 61, p. 40-42

[67] *Finín O'Brien*, supra note 61, p. 40-41

[68] [2001] U.K.H.L. 67; [2002] 2 A.C. 357

[69] Actual bias exists where a judge harbors a predisposition or prejudice for or against a litigant or litigant's case based on matters extraneous to the evidence and the law. See *Raymond J. McKoski*, Giving up Appearances: Judicial Disqualification and the Apprehension of Bias, 4 Brit. J. Am. Legal Stud. 35 (2015), p. 49

[70] *Mitrov v. the former Yugoslav Republic of Macedonia,* no. 45959/09, § 48, 2 June 2016, *Morice v. France* [GC], no. 29369/10, § 78, ECHR 2015, *Sramek v. Austria*, 22 October 1984, § 42, Series A no. 84

[71] *Yuval Shany and Sigall Horovitz,* Judicial independence in the Hague and Freetown: a tale of two cities (2008), Leiden Journal of International Law and *Gleider I. Hernandez,* Impartiality and bias at the International Court of Justice (2012), Cambridge Journal of International and Comparative Law

public perceptions[72]. It should also be examined in a certain society, at a certain time and place; an activity that in a certain state is questionable and thus, able to raise apprehensive bias issues, is not necessarily equally viewed in another. A very clear example of this is a judge's membership of the freemasonry. In *Salaman v. the United Kingdom*[73] case, the ECtHR considered that solely a judge's membership of the British freemasonry is not adequate to question his/her impartiality in the event that a witness or party in a case is also a freemason but also that a judge would regard his oath on taking judicial office as taking precedence over other social commitments or obligations. Whether or not a problem arises, for example, due to a judge's personal acquaintance with a fellow freemason, depends on the circumstances of the case. On the other hand, in *Maestri v. Italy*[74] and *N.F. v. Italy*[75] cases, dissenting opinions of the Court held that membership of the Italian freemasonry is evidently incompatible with the judicial office and Article 6(1) ECHR.

Furthermore, the impartiality of a judge, as seen from the point of view of a litigant, is required by Article 6(1) ECHR. According to settled case law, a tribunal should be independent and impartial, meaning that an absence of prejudice or bias is necessary. This conclusion is reached after applying both subjective and objective criteria[76]. The subjective test, as already explained, is met when a judge has no personal prejudice or bias in a given case. On the other hand, the objective test demands that the tribunal itself and, amongst others, its composition exclude any legitimate doubt about a judge's impartiality. Within this context, the test of apparent bias could be useful. A judge, who is undoubtedly free to hold any religion and manifest it in his/her private life, should not be disqualified merely on that basis. There are several factors that need to be taken into consideration; the nature of the case being the most prominent. A case that does not revolve around a religious issue should not impede a judge from hearing it. On

[72] *Helow v. Advocate General for Scotland* [2007], Court of Session (Inner House, Extra Division), *Finín O'Brien*, supra note 61, p. 30 et seq., *Raymond J. McKoski*, supra note 69, p. 51, *Asha Amin*, supra note 1, p. 580

[73] (dec.), no. 43505/98, 15 June 2000 and *Kiiskinen v. Finland* (dec.), no. 26323/95, ECHR 1999-V (extracts)

[74] *Maestri v. Italy* [GC], no. 39748/98, ECHR 2004-I

[75] N.F. v. Italy, no. 37119/97, ECHR 2001-IX

[76] For instance Piersack v. Belgium, 1 October 1982, Series A no. 53, *Volkov v. Ukraine* , no. 8794/04, 17 January 2006, *Kyprianou v. Cyprus* [GC], no. 73797/01, ECHR 2005-XIII

the other hand, a religion related case might possibly lead to a disqualification. Further on, it needs to be examined how expressly religious the judge is. If, for example, the judge simply attends services regularly, this should not suffice, but if he/she is an active member of the local parish, has expressed openly opinions on religious issues, participates in religious associations etc. and the case in concern is related to religion, in that case the apparent bias test can only lead to disqualification.

CONCLUSION

In conclusion, the question as to what extent should judges be able to express their religious beliefs and convictions during the performance of their duties as well as outside the courtroom cannot be addressed by an absolute answer.

Since religion is part of every individual's personality, we cannot preclude judges from manifesting their religious views outside the courtroom. In their personal lives judges can go to church, wear a cross, participate in a religious group. However, it is not unlike that the expression of religious views outside the scope of judicial duties could affect their appearance inside the courtroom. The broader or more intense the expression of their religious beliefs is in their extra-judicial activities, the more likely it would be for a judge to be "accused" of lack of objectivity, especially in cases connected somehow with a religion. However, this is not an adequate disqualification criterion. The assumption of impartiality must not be exclusively grounded on the mere fact that a judge holds a view, expressed in his/her personal life, but it must be also accompanied by concrete facts and circumstances of a given case. Furthermore, as for the expression of religious views inside the courthouse, the answer is more complex. The findings of ECHR judgments regarding similar restrictions on civil servants could also potentially apply to judges. In fact, due to the particular nature of judiciary, the restrictions could be even broader.

Judges should avoid wearing religious symbols in the courtroom, and in any case these symbols should be either invisible or discreet, at least in cases including a religious element. This necessity seems more apparent in secular states. This Paper concludes with

the hope that judges understand the importance of their duties and the respective potential consequences to citizens and especially that "on the consciences of the judges depends the justice of the Court's decisions"[77].

[77] Speech made by President Guerrero at the Inaugural Sitting of the International Court of Justice, on 18 April 1946, I.C.J Yearbook, 1946-1947, p.38