

**Rethinking Legal Limitations to Articles 8-11 of The European Convention on Human Rights Through Dworkin’s Eyes**

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# DEDICATION

*This thesis is dedicated*

***to the memory of my grandmother, Melek Kirmaci***

*who passed away in January 2019*

# ABSTRACT

This thesis makes use of insights from Dworkin’s theory of law to analyse the European Court of Human Rights’ case-law on specific moral issues. By analysing the relevant case-law on the subject of public morals, this thesis aims to identify interpretive patterns in the Court’s reasoning in ‘hard cases’ (cases raising sensitive moral and ethical issues). Based on this analysis of the Court’s case-law on moral issues, the thesis aims to discuss whether the Court is interested in the moral values underlying human rights to determine the content of the Convention rights. Importantly, such values depend on substantive moral arguments rather than member states’ common interpretation of those values.

On this view, the content of the Convention rights depends on principles of political morality. This means that the content of the Convention rights can be interpreted without reference to the will of political majorities across the Council of Europe. This thesis thus aims to show that Dworkin’s legal interpretivism can help the European Court of Human Rights in providing substantive moral reasons concerning the purpose and moral value of the Convention rights. This thesis proposes that the European Court of Human Rights can benefit a better understanding of the moral values underlying the Convention rights. Therefore, this thesis aims to discuss how the Court could make use of insights from Dworkin’s legal interpretivism to establish the objective content of the Convention rights.

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TABLE OF CONTENTS

[DEDICATION 2](#_Toc38040652)

[ABSTRACT 3](#_Toc38040653)

[ACKNOWLEDGEMENTS 4](#_Toc38040654)

[LIST OF ABBREVIATIONS 8](#_Toc38040655)

[Chapter One INTRODUCTION 9](#_Toc38040656)

[1) The Moral Reading of The European Convention on Human Rights 9](#_Toc38040657)

[2) Dworkin in the European Context 10](#_Toc38040658)

[3) The European Context/Literature 15](#_Toc38040659)

[4) From Consensus to the Moral Reading 21](#_Toc38040660)

[5) Outline of the Thesis 26](#_Toc38040661)

[Chapter Two DWORKIN'S LEGAL INTERPRETIVISM AS A THEORETICAL LENS 30](#_Toc38040662)

[1) Introduction 30](#_Toc38040663)

[2) Justification of Four Moral Issues and the Case-Law of the ECtHR 31](#_Toc38040664)

[3) Dworkin’s Approach to Legal Interpretation: Interpretivism 34](#_Toc38040665)

[4) Dworkin’s Approach to Rights: Rights as Trumps 36](#_Toc38040666)

[5) Dworkin’s Approach to Constitutional Interpretation: The Moral Reading 45](#_Toc38040667)

[5.1) Is the Moral Reading Compatible with the ECHR? 53](#_Toc38040668)

[5.1.1) The Implications of the Moral Reading 53](#_Toc38040669)

[5.1.2) The Abstract Language of the Convention 55](#_Toc38040670)

[5.1.3) The Court’s Interpretive Practice 58](#_Toc38040671)

[6) The Legitimacy of the Moral Reading in the context of the ECHR: The VCLT 62](#_Toc38040672)

[6.1) The Moral Reading as a Purposive Approach: The Object and Purpose of the Convention 65](#_Toc38040673)

[7) Conclusion 71](#_Toc38040674)

[Chapter Three A DWORKINIAN READING OF THE ECtHR’S CASE-LAW ON ABORTION 74](#_Toc38040675)

[1) Introduction 74](#_Toc38040676)

[2) The Abortion Jurisprudence under the Convention 77](#_Toc38040677)

[2.1) The Legal Status of the Foetus under the Convention: A Neutral Stance? 77](#_Toc38040678)

[2.2) Does a Foetus Have an Absolute Protection under Article 2? 80](#_Toc38040679)

[3) A Moral Reading of Article 8: The Case of *Tysiac v Poland* and its Legacy 86](#_Toc38040680)

[3.1) Facts and Decision 87](#_Toc38040681)

[3.2) The Language of the Convention: The Meaning of Private Life 90](#_Toc38040682)

[3.3) The Object and Purpose of the Convention: The Principle of Practical and Effective Rights 95](#_Toc38040683)

[4) Dworkin’s Argument on Abortion 99](#_Toc38040684)

[4.1) Conscientious Objection: The Systemic Denial of Women’s Right to Access Legal Abortion 101](#_Toc38040685)

[4.2) Is Religion a Legitimate Basis to Refuse Legal Abortion? 103](#_Toc38040686)

[5) Conclusion 108](#_Toc38040687)

[Chapter Four A DWORKINIAN READING OF THE ECtHR’S CASE-LAW ON ADOPTION BY LGBT INDIVIDUALS AND COUPLES 111](#_Toc38040688)

[1) Introduction 111](#_Toc38040689)

[2) Individual Adoption Cases: *Fretté v France* 113](#_Toc38040690)

[2.2) Analysis of the Judgment 114](#_Toc38040691)

[2.2.1) Admissibility 114](#_Toc38040692)

[2.2.2) Prejudice or Evidence? 118](#_Toc38040693)

[*3)* *E.B. v France* 125](#_Toc38040694)

[3.1) Analysis of the Judgment: From Consensus to Moral Reasoning 125](#_Toc38040695)

[4) Second-Parent Adoption Cases: *Gas and Dubois v. France* 129](#_Toc38040696)

[4.1)Admissibility and the Ambit of the ECHR Rights 130](#_Toc38040697)

[4.2) Integrity 132](#_Toc38040698)

[4.3) Fit and Justification 134](#_Toc38040699)

[*5)* *X and Others v. Austria* 138](#_Toc38040700)

[5.1) Is Discriminatory Treatment Justified? 139](#_Toc38040701)

[5.2) Does Narrow Consensus Matter? 141](#_Toc38040702)

[6) Conclusion 143](#_Toc38040703)

[Chapter Five THE WEARING OF RELIGIOUS SYMBOLS AND CLOTHING IN PUBLIC 145](#_Toc38040704)

[1) Introduction 145](#_Toc38040705)

[2) Religious Freedom in the European Convention on Human Rights 148](#_Toc38040706)

[2.1) The Legal Framework 148](#_Toc38040707)

[2.2) Case-Law on the Wearing of Religious Clothing and Symbols in Public Sphere: *Dahlab, Şahin, Lautsi and S.A.S* 151](#_Toc38040708)

[3) Gender Equality and Headscarves 154](#_Toc38040709)

[4) Intolerance, Secularism, and Neutrality: *Dahlab, Şahin and Lautsi* 167](#_Toc38040710)

[4.1) The Grand Chamber Reasoning in *Lautsi*: Active Symbol vs Passive Symbol 174](#_Toc38040711)

[5) Conclusion 178](#_Toc38040712)

[Chapter Six TAKING FREEDOM OF EXPRESSION SERIOUSLY 181](#_Toc38040713)

[1) Introduction 181](#_Toc38040714)

[2) The Court’s Construction of a ‘Right Not to Be Insulted in One’s Religious Feelings’: *Otto-Preminger-Institut V. Austria* And Its Legacy 184](#_Toc38040715)

[3) A Right not to be Offended in One’s Religious Feelings: Policy based or Principle? 190](#_Toc38040716)

[4) Gratuitous Offense and Public Debate in a Democratic Society 196](#_Toc38040717)

[5) Rights Trump Feelings 205](#_Toc38040718)

[5.1) Should Religious Feelings Be Granted Particular Protection? 209](#_Toc38040719)

[6) Conclusion 212](#_Toc38040720)

[Chapter Seven CONCLUSION 214](#_Toc38040721)

[1) Literature and Findings 217](#_Toc38040722)

[2) From Consensus to the Moral Reading 224](#_Toc38040723)

[BIBLIOGRAPHY 231](#_Toc38040724)

[1) Primary Sources 231](#_Toc38040725)

[1.1) Cases 231](#_Toc38040726)

[1.2) International Treaties 233](#_Toc38040727)

[1.3) Regional Treaties 233](#_Toc38040728)

[1.4) International Official Reports and Cases 234](#_Toc38040729)

[2) Secondary Sources 234](#_Toc38040730)

[2.1) Books 234](#_Toc38040731)

[2.2) Book Chapters 237](#_Toc38040732)

[2.3) Journal Articles 240](#_Toc38040733)

[2.4) Internet Sources 247](#_Toc38040734)

# LIST OF ABBREVIATIONS

ACHPR African Commission on Human and People’s Rights

ECHR European Convention on Human Rights

ECtHR European Court of Human Rights

HRC Human Rights Council

IACHR Inter-American Commission on Human Rights

OHCHR Office of the High Commissioner for Human Rights

UNHR Universal Declaration of Human Rights

#  Chapter One INTRODUCTION

## The Moral Reading of The European Convention on Human Rights

Human rights can be defined as basic moral guarantees that all individuals in all countries have simply because they are people.[[1]](#footnote-2) These rights are considered to be universal in the sense that all people, anywhere in the world, have and should enjoy them.[[2]](#footnote-3) As affirmed by James Nickel, this global aspiration implies that different characteristics, such as nationality, race, sex, and religion, should be considered as irrelevant in assessing whether an individual has certain fundamental rights.[[3]](#footnote-4) This implies one of the distinctive features of human rights is that they are international rights held by all individuals. It is, therefore, plausible to assume that the protection of human rights can be considered as a legitimate purpose of international concern and action.[[4]](#footnote-5)

The European Convention on Human Rights and Fundamental Freedoms (hereinafter, referred to as ‘the Convention’ or ‘the ECHR’) is the longest standing international human rights convention, which established the first international judicial body for the protection of human rights, the European Court of Human Rights (hereinafter referred to as ‘the Court’ or ‘the ECtHR’). Since the Court’s work started in February 1959, it had delivered more than 21,600 judgements by the end of 2018.[[5]](#footnote-6) It is worth highlighting that the Court can be considered as the world’s leading authority in the field of human rights law. The reason for this is that its judgements are recognised as a source of reference, not only for national judicial bodies within the states of the Council of Europe, but also for other national and international judicial systems.[[6]](#footnote-7) In fact, the ECHR system has been defined as ‘the most effective system of international protection of human rights in existence’.[[7]](#footnote-8)

This thesis makes use of insights from Dworkin’s legal theory (also known as ‘legal interpretivism’) to analyse the Court’s case-law on certain moral issues. The thesis has two main objectives: First, it aims to identify interpretive patterns in the Court’s reasoning in ‘hard cases’.[[8]](#footnote-9) This means that the thesis aims to explore the extent to which the Court is interested in the moral values underlying human rights to determine the content of the Convention rights. Importantly, such values depend on substantive moral considerations rather than member states’ common understandings of those values. Second, the thesis aims to show that Dworkin’s legal interpretivism can assist the ECtHR in discovering the objective moral truth regarding the content of the Convention rights, consequently this thesis proposes that the Court can benefit from a better understanding of the moral values underlying the ECHR rights. Dworkin’s interpretivism can help the Court provide substantive normative reasons regarding the purpose and moral value of the ECHR rights. In fact, one of the fundamental aims of this thesis is to discuss how the Court could make use of insights from Dworkin’s legal interpretivism to uphold its commitment to objective moral truth regarding the content of the Convention rights.

## Dworkin in the European Context

The use of Dworkin’s legal interpretivism to study the field of human rights in the European context of human rights law, such as the ECtHR, can be justified for several reasons. Dworkin’s theory of law has achieved a significant standing in the philosophical theory of human rights for its distinctive anti-utilitarian character.[[9]](#footnote-10) One of the distinctive characteristics of Dworkin’s theory of law is that it includes moral judgements within legal arguments.[[10]](#footnote-11) On this view, law is considered as a social practice, which should be understood in the light of its moral point.[[11]](#footnote-12) A Dworkinian reading of the case-law of the ECtHR can shed new light on the moral values underpinning and justifying the Convention rights. The important point to note is that the Court’s interpretive ethic supports the view that the moral values underpinning the ECHR rights are objective.[[12]](#footnote-13)

It is important to note that Dworkin’s legal theory developed considerably throughout his career, and that it is still the subject of much scholarly discussion and disagreement.[[13]](#footnote-14) As a result, there is no commonly accepted single best description or interpretation of what Dworkinian thought stands for. Nevertheless, it might be true to say that in *Law’s Empire*,[[14]](#footnote-15) Dworkin provided his most consistent and comprehensive theory of law.[[15]](#footnote-16) According to Dworkin, the point of law can be best encapsulated as follows:

Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.[[16]](#footnote-17)

This research will adopt Dworkin’s legal interpretivism, premised on the proposition that law is an interpretive concept, a distinct kind of concept whose correct interpretation depends ‘neither on fixed criteria nor on an instance-identifying decision procedure’, but, rather, on the normative moral principles that best justify a particular society’s legal practices in which that concept is used. [[17]](#footnote-18) Dworkin’s legal interpretivism can be understood as a general theory of legal interpretation, which judges can use to guide their interpretive practices.[[18]](#footnote-19) In the words of Dworkin:

Judges should decide hard cases by interpreting the political structure of their community in the following, perhaps special way: by trying to find the best justification they can find, in principles of political morality, for the structure as a whole.[[19]](#footnote-20)

On this view, the content of the law should be identified by the abstract moral principles that offer the best interpretation of institutional history.[[20]](#footnote-21) Thus, the correct legal interpretation is the one that makes the law the moral best it can be.[[21]](#footnote-22)

Dworkin, in *Freedom’s Law,* offers his theory of constitutional interpretation, which he calls ‘the moral reading of the Constitution’.[[22]](#footnote-23) According to Dworkin, the moral reading of the Constitution means that:

government must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designated in the document, such as the freedoms of speech and religion.[[23]](#footnote-24)

As this reveals, Dworkin’s constitutional philosophy lies in his conception of treating people as equals, which means that people, as human beings, have equal moral status irrespective of the way they live their life. This shows that one of the distinctive characteristics of Dworkin’s theory of law is that it includes moral judgements within legal argument.[[24]](#footnote-25) According to Dimitrios Kyritsis, one of Dworkin’s important contributions to constitutional theory is the idea that many of the rights protected in constitutional documents stand for moral principles.[[25]](#footnote-26) In sum, his legal theory requires an understanding of the idea of the ‘interpretive concept’ and its attachment with moral values.

Moreover, according to Dworkin, people should have equal moral status regardless of the way they choose to live their lives. Dworkin’s contribution is that he offers a distinct conception of equality that can be summarised as follows: The state must treat people with equal concern and respect regardless of people’s conception of good life.[[26]](#footnote-27) It fails to do so if it promotes a specific conception of good life, since, in doing so, it distributes benefits and burdens between individuals on an unequal basis. The case of the outright prohibition of a certain conception of the good life is just the most extreme example of such an unequal treatment.

Similarly, Anthony Reeves defined the notion of ‘equal concern and respect’ as follows:

political entitlements ought to be arranged so as to give equal regard to each person’s ability to determine for herself how to live a worthwhile life. Politically established opportunities, goods, and protections from interference ought to enable each person to independently endeavour to live well by her own judgment and do so without distinction based in a view of a person’s worth or a life’s merit.[[27]](#footnote-28)

On this view, a particular conception of the ‘good life’ must not be promoted by the states (in line with the external preferences of political majorities).[[28]](#footnote-29) This suggests that individuals deserve to be treated by their state with equal concern and respect. This concept of equality can be read in light of Dworkin’s constitutional philosophy.[[29]](#footnote-30) The reason for this is that, according to Dworkin’s constitutional theory, there is a close relationship between the idea of integrity and the ideal of equality.

Furthermore, in Dworkin’s view, a collective goal is not a sufficient justification for denying individual rights so that ‘individual rights are political trumps held by individuals’.[[30]](#footnote-31) This means that individual rights should be protected against the demands of the general interest. This is because, as a requirement of moral equality, any particular conception of good life as public morality should not be forced by the public authorities. Nevertheless, it is worth noting that individual rights, according to Dworkin, may be subject to certain restrictions only when there is a ‘clear and present’ danger to the lives of others.[[31]](#footnote-32) On this view, individual rights are absolute, but for the exceptional situations in which they can be restricted.

Various critics believe Dworkin’s theory of law is entirely inapplicable to the ECHR.[[32]](#footnote-33) According to Andrew Legg, for instance, Dworkin’s legal theory offers ‘an unrealistic and undesirable theory of interpretation of the ECHR’.[[33]](#footnote-34) George Letsas, however, adapted and defended Dworkin’s approach to constitutional interpretation in the context of the ECHR.[[34]](#footnote-35) According to Letsas, the Court’s use of evolutive interpretation[[35]](#footnote-36) can be understood as it is more interested in evolution towards the objective moral truth regarding the content of the Convention rights.

## The European Context/Literature

Looking at the ECtHR’s case-law, one can identify two main interpretive approaches: Evolutive (or dynamic) and consensus.[[36]](#footnote-37) The concept of European consensus can be defined as a general agreement within the states of the Council of Europe regarding the content of the Convention rights.[[37]](#footnote-38) This approach consists in interpreting and applying Convention rights based on ‘a rough requirement of identification of shared understandings and practices across contracting states’.[[38]](#footnote-39) It can be considered as a tool of interpretation of the Convention that the Court uses in its reasoning. According to Dzehtsiarou, the reason for the application of the concept of European consensus is that ‘the meaning of some Convention terms can be linked to their common usage by the contracting states’.[[39]](#footnote-40) With this view, European consensus provides a particular solution to a complex human rights issue if such a solution is accepted by the majority of the contracting states. This approach suggests that the content of the Convention rights should be determined based on the contracting states’ common understandings, rather than the moral values that underlie human rights.

However, there are two main interlinked problems with the consensus approach adopted by the Court in morality cases. First, matters concerning public morals have been left to the discretion of contracting parties by reference to the margin of appreciation doctrine.[[40]](#footnote-41) Second, the doctrine lacks a consistent application in the case-law of the ECtHR. According to a standardised definition used by many human rights scholars, the doctrine of margin of appreciation refers to ‘the room for manoeuvre the judicial institutions at Strasbourg are prepared to accord national authorities in fulfilling their Convention obligations’.[[41]](#footnote-42)

In fact, the doctrine of the margin of appreciation can be considered as a ‘natural product of the principle of subsidiarity’.[[42]](#footnote-43) Importantly, the doctrine of the margin of appreciation has been developed to strike a balance between ‘national application of human rights and the uniform application of Convention system’.[[43]](#footnote-44) The doctrine may be an important tool to provide flexibility and attentiveness to the implementation of convention rights by contracting states which have different legal and cultural traditions. From this perspective, the doctrine can be seen as a device that has been used to show deference to contracting parties’ sovereignty, thus it may be considered as a necessary tool in the enforcement of the Convention.[[44]](#footnote-45)

In this vein, the Court acknowledged that ‘the issues raised here related to the protection of morals in the sense that protection of morals entailed the safeguarding of the moral standards of society as a whole’.[[45]](#footnote-46) This means the protection of morals refers to the protection of public morals in the context of the ECHR. Nevertheless, a definition of public morals has been provided neither by the Convention nor the Court.[[46]](#footnote-47) Instead, the Court explicitly recognised that there is no common understanding of morality among contracting states, thereby contracting states should be allowed to exercise the discretion to strike a fair balance between individual rights and public morality.[[47]](#footnote-48) This is because, according to the Court, ‘by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion.’[[48]](#footnote-49) This means that in matters concerning public morals, the margin of appreciation should be given the contracting states, mainly because national authorities’ level of competence and expertise is significantly higher than the ECtHR. Consequently, the doctrine of margin of appreciation has been invoked as a method of interpretation of ‘public morals’ under Articles 8-11 of the Convention.[[49]](#footnote-50)

The literature on the doctrine of the margin of appreciation can be divided into two major groups: On the one hand, some scholars support such doctrine on the basis of the following arguments: ‘Institutional competence/better placed’,[[50]](#footnote-51) ‘state sovereignty/flexibility’,[[51]](#footnote-52) and ‘cultural diversity’.[[52]](#footnote-53) On the other hand, a criticism that consistently appears within much of the literature on the margin of appreciation is that the doctrine remains inconsistent and lacks coherent application in the case law of the ECtHR.[[53]](#footnote-54) This lack of consistency in the Court’s judgements may cause legal uncertainty and a lack of clarity in the law. Therefore, the legitimacy of the margin of appreciation doctrine has been subject to controversy since its application in public morality cases.[[54]](#footnote-55)

In this respect, it is worth mentioning three landmark judgments of the Court to demonstrate the Court’s case law on abortion, religious clothing, and LGBT rights is inconsistent in the way of understanding public morals.[[55]](#footnote-56) Importantly, these cases concerned a couple of controversial moral issues regarding private life, freedom of expression, and freedom of religion. This means there is a lack of clarity in the Court’s approach on the matters of abortion, religious clothing, and sexual orientation, which has produced considerable legal uncertainty.[[56]](#footnote-57)

In the landmark case of *Dudgeon,* the fundamental issue was whether homosexuality could be criminalised in Northern Ireland.[[57]](#footnote-58) The Court first accepted that national authorities, in exercising their discretion, could legitimately take into account moralistic preferences of the citizens of Northern Ireland. However, according to the Court, the moral attitudes of the citizens of Northern Ireland towards male homosexuality ‘cannot of itself be decisive as to the necessity for the interference with the applicant’s private life.’[[58]](#footnote-59) The Court stated that:

as compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States.’[[59]](#footnote-60)

The Court ignored moralistic preferences of the majority of Northern Ireland only because there was a common understanding in favour of homosexuality among contracting States. In other words, the existence of European consensus regarding homosexuality was considered more important than the moral sentiments of the citizens of Northern Ireland in the assessment of the width of the margin of appreciation. Consequently, in this case the Court granted a narrow margin of appreciation, finding that the legislation in force amounted to a violation.[[60]](#footnote-61)

However, this approach has been applied differently in A, *B and C v. Ireland.[[61]](#footnote-62)* The Court confirmed there was European consensus in favour of abortion among contracting parties and Irish law was against the consensus.[[62]](#footnote-63) Nevertheless,the relevant consensus has not been considered as a key factor in assessing the width of the margin. Indeed, in that case, the relevant European consensus in favour of the right to abortion was overruled by the moralistic preferences of the majority of Irish people. The Court’s approach has been found contrary to its case law, hence it is reported as ‘a real and dangerous new departure in the Court’s case-law’.[[63]](#footnote-64)

Moreover, *in Lautsi and Others v. Italy*, although a very limited number of contracting states have legal provisions regarding the presence of religious symbols in State schools, the Court found there was no European consensus in that matter.[[64]](#footnote-65) More precisely, the issue of the display of crucifixes in a classroom has not been regulated by most of the Member States of the Council of Europe, so a wide margin of appreciation was granted to Italy by the Court.[[65]](#footnote-66) The Court said that because of a lack of European consensus on the issue of the presence of religious symbols in State schools, the matter fell within the margin of appreciation of the respondent state. A question then arises as if a specific issue has not been regulated by the contracting states, how does the Court find whether there is consensus among contracting states?[[66]](#footnote-67)

As mentioned above, one major drawback of this doctrine is its unclear and inconsistent application by the ECtHR, which negatively affects its predictability.[[67]](#footnote-68) As a consequence, the Court’s case law on abortion, sexual orientation, and religious clothing has been criticised for being vague and failing to set out clear criteria for applying the doctrine of ‘margin of appreciation’. The reason for this is that the Strasbourg organs have created neither principled criteria nor standards for its application within the context of public morality cases.[[68]](#footnote-69) Similarly, Thor Bjorgvinsson, one of the Court’s former judges, criticises the Court’s application of the margin of appreciation doctrine as follows:

[…] by increasing its reliance on the margin of appreciation and referring more to the democratic process in the Member States, in other words by beginning to try to appease the Court’s most prolific critics, be they political or judicial on a national level, the Court runs the risk of losing its moral capital.[[69]](#footnote-70)

Since there is much uncertainty and inconsistency when it comes to balancing ‘morals’ with individual rights, it is thus important to provide a coherent and principled interpretation of the case law on the basis of a theory that can explain and justify the controversial normative phenomena.[[70]](#footnote-71)

## From Consensus to the Moral Reading

The moral reading of the ECHR associated with Dworkin’s constitutional philosophy, and supported by George Letsas, can be considered as independently plausible theory of interpretation of the Convention. Letsas points out that the ECtHR’s interpretive practice, especially in recent years, appears to be interested in the moral truth regarding the Convention rights.[[71]](#footnote-72) In particular, until the late 1990s, as observed by Letsas, the Court allowed a wide margin of appreciation to the respondent state in cases where there was no consensus among States Parties. He explains that

the new Court has moved away from placing decisive weight on the absence of consensus amongst contracting states and from treating it as the ultimate limit on how far it can evolve the meaning and scope of Convention rights. The new Court treats the ECHR as a living instrument by looking for common values and emerging consensus in international law. In doing so, it often raises the human rights standard above what most contracting states currently offer.[[72]](#footnote-73)

Subsequently, Letsas formulates the moral reading of the Convention as follows:

The Court is more interested in the moral value the Convention rights serve and what arguments best support it rather than on whether such arguments are widely shared across the Council of Europe.[[73]](#footnote-74)

Following Letsas, this thesis calls the Court’s evolutive interpretation as the moral reading of the Convention. On this account, the moral truth of the Convention rights is meant to defend each individual’s conception of the good life against the moralistic preferences of the majority (external preferences). The upshot is that, under the moral reading of the ECtHR, the Convention rights protect the right of each person to pursue the conception of good life that she or he prefers against the moralistic views of the majority.

However, the moral reading of the Convention has not been unanimously accepted by academics. For instance, Dzehtsiarou finds Letsas’ argument unconvincing, stating that Letsas’ claim does not find enough support in the Court’s case-law, as it is supported by reference to merely five cases.[[74]](#footnote-75) This thesis thus aims to engage and contribute to this discussion by analysing the Court’s case-law on certain moral issues through a Dworkinian lens. This engagement is extremely important, because the lack of legal certainty regarding the interpretation of the Convention can undermine the legitimacy of the ECtHR. In recent years, importantly, the Court has faced a crisis of legitimacy.[[75]](#footnote-76) Since this thesis is aimed at identifying interpretive patterns in the Court’s reasoning, this will allow us to test the Court’s use of evolutive interpretation, understood as the moral reading of the Convention, in ‘hard cases’. Taking into account the above picture, this thesis comes to fill an existing gap in the literature.

Evolutive interpretation can be considered to be a tool of interpretation that provides the Court with the necessary degree of flexibility to update the ECHR protection in line with modern developments. Letsas pointed out that the Court used evolutive interpretation to create the Convention rights’ autonomy.[[76]](#footnote-77) Importantly, this autonomy relies on substantive moral considerations and not on contracting states’ shared understandings.[[77]](#footnote-78) For this reason, it is plausible to read the Court’s evolutive interpretation, as it is interested in evolution towards the objective moral truth regarding the content of the Convention rights. Thus, the Court’s evolutive interpretation can be understood as a form of moral reading of the Convention.

This evolutive approach was affirmed by the Court for the first time in its judgement in *Tyrer*.[[78]](#footnote-79) In this case, the Court addressed the issue of whether the practice of corporal punishment in schools was compatible with the Convention. It stated that the European Convention was a ‘living instrument’ that must be interpreted according to present-day conditions.[[79]](#footnote-80)

Moreover, the Court itself in the *Goodwin* case reaffirmed this dynamic approach, by stating that:

It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement.[[80]](#footnote-81)

According to Letsas, there has been a significant shift in the Court’s use of the doctrine of evolutive interpretation in a way that it seems to be more interested in evolution towards the objective moral truth regarding the content of the Convention rights. Importantly, the consensus approach of the ECtHR should not be understood as contradicting evolutive/dynamic interpretation. However, the consensus argument can restrict evolutive interpretation based on the public opinion of the majority of the contracting states. In other words, this restriction can be justified by a vague reference to the practices of the majority of contracting states.

It should be noted that while this thesis follows Letsas’ understanding of the moral reading of the Convention, it differs from his work on several grounds. First, this thesis gives a thematic analysis of the Court’s case law under Articles 8-10 of the Convention. In doing so, it focuses on the limitations placed in the second paragraphs of Articles 8 to 10 of the ECHR. As is the case with a number of human rights treaties, most of the rights conferred by the Convention are not absolute.[[81]](#footnote-82) According to Steven Greer, these restrictions fall under four main categories.[[82]](#footnote-83) The first category concerns ‘express definitional exclusions’.[[83]](#footnote-84) Secondly, ‘some provisions include statements of the relatively limited circumstances in which a given right does not apply’.[[84]](#footnote-85) Thirdly, a person who has special legal status may not be entitled to exercise certain rights.[[85]](#footnote-86) The fourth category is to do with the need to protect both public and private interests as a justification for state interference with individual rights. Articles 8-11 of the ECHR fall into this fourth category. With regard to this, they are structured as follows: The first paragraph defines the right and the second paragraph sets out the permissible restrictions.[[86]](#footnote-87)

Although there are no significant differences between the second paragraphs of Articles 8-11, two broad categories are posited: ‘Public interests’ and ‘private interests’. Public interests refer to ‘national security’, ‘the economic well-being of the country’, ‘territorial integrity’, the maintenance of ‘public safety’, the ‘protection of health or morals’, and the ‘prevention of disorder or crime’, while, ‘private interests’ concern ‘the protection of the rights, freedoms, and reputations of others’. Within this context, this study focuses on the protection of morals as a ground for justifying a limitation to the rights protected by Articles 8-10 ECHR.

This study will seek to answer the following research question: How can ‘hard cases’ involving limitations to the rights protected by Articles 8-10 ECHR on the grounds of public morals be approached from the vantage point of the moral reading of the ECHR? Since it is not possible to cover every case involving issues of public morals, four specific cases have been chosen to serve as paradigmatic exemplars of “hard cases”:

1. Do people have the right to an abortion under Article 8 ECHR?
2. Do same-sex individuals and couples have the right to adopt a child under Article 8 ECHR?
3. Is there a human right to wear religious symbols in public under Article 9 ECHR?
4. Is there a right not to be offended in one’s religious feelings?

In this context, this study will focus on those moral issues, discussing how the Court has interpreted such cases within its jurisdiction. This examination is made through the methodological lens provided by Dworkin’s legal Interpretivism.

In particular, this research explores in detail the argument that individual rights protected under Articles 8-10 ECHR should not be restricted in the name of protecting public morality. This is, at once, a controversial and important topic thesis. On the one hand, it is controversial simply because the text of the Convention makes it explicit that the ‘protection of morals’ is a legitimate aim that can justify the restriction of particular rights and freedoms granted by the ECHR. More precisely, the term ‘public morality’ by itself seems to afford a legal basis for state restriction against individuals. On the other hand, it is an important topic thesis, because limitation clauses have been used to curtail the freedom of individuals on the sole ground that, in certain Member States, majorities happen to have beliefs about certain forms of life being mistaken, inferior, or degrading. Therefore, the adoption of Dworkin’s notion of equality may help to not only make better sense of the normative phenomena, but ultimately better protect and uphold individual rights and liberties within the context of the ECHR.[[87]](#footnote-88)

Second, as mentioned above, the thesis is intended to focus on some of the most controversial cases that the ECtHR has dealt with over the years. It is aimed at critically engaging with the Court’s use of the evolutive interpretation of the Convention, and Dworkin’s legal interpretivism is the theoretical lens chosen to perform this duty. This is extremely important, because the Court’s use of evolutive interpretation has not been sufficiently tested in ‘hard cases’. This means that while this thesis uses what Letsas calls the moral reading as a theoretical lens, the thesis applies it to some of the most controversial issues including abortion, LGBT rights, and blasphemy. This will allow us to test Dworkin’s legal interpretivism to discuss some of the most controversial moral issues that the interpretation of the European Convention on Human Rights raises. This thesis, thus, will offer a thematic exposition, which seeks to identify interpretive patterns in the Court’s reasoning in ‘hard cases’. In this way, it follows on the enquiry by Letsas, but differs by providing a thematic exposition.

Since Dworkin’s legal interpretivism relies on the moral foundations of human rights, this research aims not to propose a radical reform to the Court’s practice, but tries to provide, in a systematic and analytic manner, a reasoned legal and philosophical account of moral issues under the Convention. One of the primary aims of this thesis is to demonstrate that the ECtHR can make use of insights from Dworkin’s legal interpretivism to further approach its commitment to the objective moral truth of the ECHR rights.[[88]](#footnote-89)

## Outline of the Thesis

Chapter 2 will present the methodology of the thesis, which undertakes a critical reading of the ECHR through a lens provided by Dworkin’s legal interpretivism. This chapter will establish the main elements of Dworkin’s interpretivism that will be used throughout the thesis. This methodological approach, at least for the purposes of this thesis, consists of two main elements of Dworkin’s theory of law: Dworkin’s theory of rights and the moral reading. Thus, throughout the thesis, I will make use of different elements of Dworkin’s legal interpretivism in different ways.

It will provide what Dworkin calls ‘the moral reading’ as a theoretical lens to read the Court’s case-law on certain moral issues, including abortion, adoption by LGBT individuals, blasphemy, and the wearing of religious symbols and clothing in public. The main goal of the chapter will be to illustrate that Dworkin’s moral reading has a legitimate basis under the Convention, and a capacity to provide an approach to make sense of the Court’s use of evolutive interpretation.

Chapter 3 will offer a Dworkinian reading of the Court’s case-law on abortion. While there is a consensus in favour of abortion across Europe, it is still difficult to argue that the issue of abortion has been agreed upon at a European level for two reasons.[[89]](#footnote-90) First, since the Strasbourg organs refused to take an explicit position on the question of when life begins, the status of the foetus remains a controversial issue under the Convention.[[90]](#footnote-91) For instance, the Court’s so-called ‘neutral’ stance on the question of when life begins has been criticised for failing to perform its judicial duty. This means the ECHR jurisprudence on abortion has been criticised for its lack of clarity. Second, the Court’s evolutive interpretation of the Convention in abortion-related cases has been criticised for ‘over-reaching’ its authority under Article 8 of the ECHR.[[91]](#footnote-92) According to Jackob Cornides, for instance, the *Tysiac* decision should be considered as ‘an attempt to promulgate a full-fledged ‘right to abortion’ not openly, but through the backdoor’.[[92]](#footnote-93) In *Tysiac*, one of the judges said in his dissenting opinion that: ‘…I would never have thought that the Convention would go so far, and I find it frightening’.[[93]](#footnote-94) This shows that the issue of the legitimacy of the Court’s jurisprudence on abortion has become a lively topic.

With regard to the first point, Dworkin’s argument on abortion can shed new light on the issue of whether the unborn foetus should be considered to be protected by Article 2 of the ECHR. A Dworkinian reading of the Court’s case-law on abortion will allow us to see that the unborn foetus is not considered as a ‘person’ directly protected under Article 2. With regard to the second point, a Dworkinian reading of the case law on abortion is not just a good fit with what the Court says but can actually provide substantive reasons to rebut such claims of overreach.[[94]](#footnote-95)

Chapter 4 will analyse the Court’s case-law on religious freedom under Article 9 ECHR, with specific emphasis on displaying religious symbols in the public sphere. The importance of freedom of religion has been emphasised on a number of occasions by the Court. In particular, it held that freedom of thought, conscience, and religion is ‘one of the most vital elements that go to make up the identity of believers and their conception of life’.[[95]](#footnote-96) However, some of the Court’s decisions can be criticised for their majoritarian reasoning (based on the hostile preferences of political majorities), and there are specific areas, such as the regulation of the wearing of religious symbols and clothing in public, which remain highly controversial. Indeed, the Court’s reasoning in such cases can be found extremely problematic on the basis that it failed to provide any substantive normative justifications regarding the content of the Convention rights.[[96]](#footnote-97) Rather, by resorting to common understandings of contracting states, the Court employed European consensus as a means to justify its decisions. As a result, in this context, the Court tended to uphold the contracting states’ majoritarian practices and preferences to legitimize its decisions.

This chapter will use Dworkin’s theory of rights as a theoretical lens to read the Court’s case law on freedom of religion under Article 9 of the Convention. It seems highly interesting to analyse the Court’s approach in such cases through the lens of Dworkin for two reasons. First, Dworkin’s rights ‘as trumps’ model has been misinterpreted and found problematic in the context of the ECHR. The aim of this chapter is thus to clarify and contextualise the anti-majoritarian aspect of Dworkin’s theory of rights under the Convention. Second, Dworkin’s theory of rights provides a substantive moral point to the question of how to determine the content of the Convention rights. His expression ‘rights of rights as trumps’ calls attention to the significant role of rights as anti-majoritarian devices to protect individuals and minorities from the hostile preferences of majorities.

This is highly important in this context, because the conflict between the right to freedom of religion and women’s rights to equality is considered as a controversial issue under the Convention.[[97]](#footnote-98) For instance, according to Christine Chinkin, this tension between freedom of religion and gender equality principles is common in states where ‘there are significant minorities of a different religious persuasion from that of the majority population’.[[98]](#footnote-99) This chapter will critically examine the treatment of gender equality by the Court in the Islamic clothing cases through the lens of Dworkin. This critical examination will allow us to see the importance of the anti-majoritarian character of human rights.

Chapter 5 will explore the jurisprudence of the ECtHR in respect of freedom of expression and blasphemy through the lens of Dworkin’s theory of rights. In particular, it will focus on the Court’s normative claim that Article 9 of the Convention includes a right not to be insulted in one’s religious feelings by others.[[99]](#footnote-100) This claim has been recognised by the Court in its reasoning in a number of cases and, by doing so, the Court has kept considering the religious feelings of believers as a valid reason for states to restrict speech. As a result, this has become a rather controversial reasoning in the Court’s case-law. This chapter will end with a Dworkinian claim that, in a liberal democracy, it is difficult to make sense of a ‘right’ not to be insulted in one’s religious feelings by others. In reaching this conclusion, this chapter will make use of insights from Dworkin’s well-known distinction between principles and policies.[[100]](#footnote-101)

Chapter 6 will analyse the Court’s case-law regarding parenting rights of LGBT individuals and couples through a lens provided by Dworkin’s theory of law. Within the context of the Convention, especially in recent years, the question concerning the recognition of the rights of same-sex individuals and couples has attracted significant attention. In particular, parenting rights of LGBT individuals and couples have been considered as one of the most recurrent themes in the ECtHR’s jurisprudence on LGBT rights.[[101]](#footnote-102) This chapter will make use of insights from Dworkin’s legal interpretivism to analyse the Court’s case-law regarding parenting rights of LGBT individuals and couples.

# Chapter Two DWORKIN'S LEGAL INTERPRETIVISM AS A THEORETICAL LENS

States have given the Court jurisdiction to protect whatever human rights people in fact have, and not what human rights domestic authorities or public opinion think people have.[[102]](#footnote-103)

## Introduction

The thesis undertakes a reading of the European Convention on Human Rights through a lens provided by Ronald Dworkin’s legal theory (also known as ‘legal interpretivism’).[[103]](#footnote-104) The methodology used in this thesis is Dworkin’s legal interpretivism. At least for the purposes of this thesis, this methodological approach consists of two elements of Dworkin’s theory: Dworkin’s theory of constitutional interpretation (the moral reading) and Dworkin’s theory of rights as trumps.[[104]](#footnote-105) To clarify, while Dworkin’s legal interpretivism and his account of rights might be considered as two different concepts, it is still possible to read his theory of rights in the light of his legal interpretivism.[[105]](#footnote-106) In doing so, this chapter combines Dworkin’s understanding of rights with the moral reading.[[106]](#footnote-107) The central purpose of this chapter is to consider how this thesis will make use of different insights from Dworkin’s legal interpretivism to analyse the Court’s case-law on certain moral issues, including abortion, adoption by LGBT individuals, blasphemy, and the wearing of religious symbols and clothing in public.

This chapter is divided into 6 main sections. Section 2 provides a clearer justification of my selection of the four moral policy questions addressed by each of chapters (3 to 7). It also explains the main rationale behind the cases I am analysing in each of chapters (3 to 7). Section 3 summarises Dworkin’s approach to legal interpretivism. Section 4 examines Dworkin’s approach to rights. It is worth noting that the Court’s case-law on the wearing of religious clothing and symbols in public places and on the issue of blasphemy is analysed through the lens of Dworkin’s theory of rights. The interest of Dworkin’s theory of rights is in critiquing the Court’s majoritarian approach in the above contexts. Section 5 focuses on Dworkin’s approach to constitutional interpretation and shows the similarities between the interpretation of the Convention and the interpretation of a constitutional document. A reason for this is that the interpretation of the ECHR poses similar problems to constitutional interpretation. This means that the ECtHR has to address many questions of interpretation and application of fundamental rights, which constitutional courts on the domestic level deal with. Therefore, section 5 develops the claim that Dworkin’s moral reading could be compatible with the Convention. Then, section 6 will discuss the legitimacy of the moral reading under the Convention. Lastly, conclusions are drawn in section 7.

## Justification of Four Moral Issues and the Case-Law of the ECtHR

As mentioned in the introduction of the thesis, Chapter 3 will make use of insights from Dworkin’s theory to analyse the status of abortion under the Convention. This analysis can be justified for a several reasons. First, although Dworkin’s account of abortion debate has been discussed in the different contexts, it has not been sufficiently studied in the context of the ECHR. Indeed, his understanding of abortion debate can be useful to explain and analyse the Court’s approach to abortion related cases. According to Dworkin, the key question in the abortion debate is not ‘a metaphysical question about the concept of personhood or a theological question about whether a foetus has a soul, but a legal question about the correct interpretation of the Constitution’.[[107]](#footnote-108) He then presents an interpretive approach that can be used to provide new insights to the issue of whether the foetus can be recognised as a person in the eyes of law. Therefore, Dworkin’s argument on abortion and his approach to constitutional interpretation can provide a fresh reading of the Court’s case-law on abortion.

Second, the debate on abortion is still controversial under the Convention system. The reason is twofold. First, as will be discussed in chapter 3, the Strasbourg organs refused to take an explicit position on the question of when life begins. For this reason, it has been argued that the Court has provided an insufficient answer to the question of whether the foetus has a right to life under Article 2 ECHR.[[108]](#footnote-109) In other words, the ECHR jurisprudence on abortion has been criticised for its lack of clarity. Thus, the status of the foetus remains a highly contentious topic under the Convention. This chapter aims at filling this gap and at shedding light on this controversial question.

Second, the Court has been criticised for extending the protective scope of Article 8 to abortion related issues under the Convention. This means that the Court’s evolutive reading of the Convention rights in abortion-related cases has been criticised for ‘over-reaching’ its authority under Article 8 of the ECHR. As said by one of the Judges, “the Court’s decision in the instant case favours ‘abortion on demand’…I would never have thought that the Convention would go so far, and I find it frightening”.[[109]](#footnote-110) Therefore, the question of the legitimacy of the Court’s jurisprudence on abortion has become a lively topic. However, this important question remains largely unexplored. Using Dworkin’s moral reading as a theoretical lens, this chapter aims at filling this gap.

Chapter 4 will discuss the Court’s case-law on concerning parenting rights of LGBT individuals and couples through a lens provided by Dworkin’s theory of law. This discussion can be justified for a couple of reasons. First, especially in recent years, the question concerning the recognition of the rights of same-sex couples has attracted significant attention in the context of the ECHR. For instance, parenting rights of LGBT individuals and couples have been considered as one of the most recurrent themes in the ECtHR’s jurisprudence on LGBT rights. In particular, as said by Gonzalez-Salzberg, the issue of parenting rights and adoption has also been central to the Court’s jurisprudence on sexuality.[[110]](#footnote-111) Second, since the ECtHR’s decisions are bindings on state parties, the Court has played a significant role in promoting lesbian, gay, bisexual and transgender (LGBT) human rights in Europe. Third, as argued by Paul Johnson, the ECtHR’s jurisprudence on sexuality has an extra-legal importance since it provides an authoritative and powerful discursive resource that can be mobilised by LGBT individuals to challenge homophobic social understandings in contemporary societies.[[111]](#footnote-112)

Although research in the field has made important contributions to the Court’s jurisprudence on sexuality, the Court’s case-law on regarding parenting rights of LGBT members has not been analysed from Dworkin’s legal interpretivism. The use of his legal interpretivism, with its emphasis on equal concern and respect for all, as a theoretical tool for research in the field remains unexplored. In particular, the Court’s case-law on this issue has not been discussed from the point of the moral truth regarding the content of the Convention rights. This chapter thus will make use of insights from Dworkin’s legal interpretivism to provide a new discussion to address a knowledge gap in the literature.

Chapter 5 will discuss the Court’s case-law on religious freedom under Article 9 ECHR, with specific emphasis on displaying religious symbols in the public sphere. The issue of religious symbols in the public sphere in the context of the ECHR is particularly important for a number of reasons. First, due to the religious and national diversity within the states of the Council of Europe, cases on religious manifestation before the ECtHR often express complex situations with controversial legal and political consequences.[[112]](#footnote-113) Second, several inconsistencies exist within the Court case-law on displaying religious symbols in the public sphere. Such inconsistencies exist due to the incoherent interpretations of certain religious symbols by the ECtHR. Third, while the importance of freedom of religion has been underlined on several occasions by the Strasbourg Court, paradoxically, some of the Court’s decisions might be criticised for their majoritarian reasoning. In particular, with regard to the approach of the ECtHR toward Islamic headscarf cases can be found highly problematic on the basis that it relied on the hostile preferences of political majorities.

Dworkin’s theory of rights places special emphasis on resisting majoritarian approaches to rights, which can be seen in some of the rulings of the Court, which dealt with the issue of religious symbols in public sphere. The interest of Dworkin’s theory of rights would be in critiquing those majoritarian approaches, unveiling their hidden majoritarian understanding of certain religion symbols.

Chapter 6 will analyse the jurisprudence of the ECtHR in respect of freedom of expression and blasphemy thorough the lens of Dworkin’s theory of rights. This analysis is important for several reasons. First, the conflict between the right to freedom of religion and the right to freedom of expression has been considered as one of the most controversial issues under the Convention. Second, the Court has constructed a right not to be insulted in one’s religious feelings through its case-law. This means that the Court has recognised the protection of the religious feelings of believers as a legitimate basis for the restriction of freedom of expression under the Convention. Since this has become a controversial legal basis within the Court’s case-law, the chapter will discuss whether the expression of views can be restricted only because other people consider those opinions to be offensive.

There are two main rationales behind the cases selected to analyse in each of the substantive chapters (3 to 7). First, in analysing the cases, I have tried to cover all cases on abortion and cases regarding the adoption by LGBT individuals and couples (Chapters 3 and 4). Second, in Chapters 5 and 6, I have focussed on the cases of the Grand Chamber. The reason is that since the case-law of the ECtHR on religious manifestation and on blasphemy cannot be covered, I focussed on the decisions and judgements of the Grand Chamber in those chapters. The purpose of this research has been to make use of Dworkin’s theory of law as a methodological approach to analyse the above case-law of the ECtHR.

## Dworkin’s Approach to Legal Interpretation: Interpretivism

According to Dworkin, the process of adjudication is an interpretive process, rather than a mechanical one.[[113]](#footnote-114) This means that law is considered as an interpretive practice, and that judges should understand the law with a certain kind of interpretive attitude.[[114]](#footnote-115) In reaching this understanding of law, Dworkin makes an analogy between an artistic interpretation and a legal interpretation and claims that both have a collaborative character. Collaborative interpretation, according to Dworkin, accepts that: ‘the object of interpretation has an author or creator and that the author has begun a project that the interpreter tries to advance’.[[115]](#footnote-116)

Similarly, in the context of law, in the words of Dworkin:

a judge takes himself to aim at the same goal –justice- as the statesmen who made the law he interprets. Even when he sees his role as entirely subordinate to theirs, the subordination is, in his view, itself justified by the overall goal of justice he shares with them.[[116]](#footnote-117)

On this view, since certain moral principles play a key role in determining the legal content, the truth of legal propositions should be established by engaging in moral reasoning. In the interpretation of law, as Dworkin remarks, correct interpretation should both ‘fit and justify’ its object.[[117]](#footnote-118) Dworkin’s theory of legal interpretation is then a matter of interaction between purpose and object.

In fact, Dworkin’s legal theory, at the most abstract level, begins with the moral principles of justice and freedom.[[118]](#footnote-119) His theory of law, according to Guest, stems from direct moral proposals, of universal application, regarding the moral principles of equality and freedom.[[119]](#footnote-120) Dworkin’s legal interpretivism actually supports his moral and political philosophy (and vice versa), which aims at discovering the objective moral truth and expresses the idea that there is one-right answer to most evaluative questions.[[120]](#footnote-121) In short, adherence to Dworkin’s interpretivism depends on two principles of political morality: the principle of equality and the principle of integrity. These two principles actually lead to a metaethical position, namely: the objectivity of moral truth.

Moreover, Dworkin’s account of legal interpretation is built around the concept of principled consistency (the principle of integrity) which, on Dworkin’s view, should be considered as a distinct political ideal.[[121]](#footnote-122) Dworkin explains this ideal as follows: ‘we insist that the state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are’.[[122]](#footnote-123) Based on this, judges should assume that the law is constructed by a coherent set of moral principles regarding justice and fairness, which should be applied in every case. By doing so, each individual’s situation is fair and just according to the same set of standards.[[123]](#footnote-124) Dworkin concludes:

Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community.[[124]](#footnote-125)

This approach, according to Dworkin, can be considered as it provides the ground for the legal structure as a single, coherent set of laws and practices.[[125]](#footnote-126)

To summarise, this section briefly presented Dworkin’s interpretive theory of law that considers law as an interpretive concept. On this view, the content of legal rights and duties should be identified by principles of political morality that explain and justify past political history.[[126]](#footnote-127) The following section will engage with Dworkins’ theory of rights.

## Dworkin’s Approach to Rights: Rights as Trumps

It can be said that Dworkin’s theory of rights has been highly influential among political and legal philosophers.[[127]](#footnote-128) According to Kai Moller, for instance, there is probably no conceptualisation of rights more popular than Dworkin’s theory of rights as ‘trumps’.[[128]](#footnote-129) In addition, Dworkin is portrayed as a ‘champion’ of judicial activism.[[129]](#footnote-130) Nevertheless, Dworkin’s expression that rights as trumps has been misinterpreted,[[130]](#footnote-131) and found problematic in the context of the ECHR.[[131]](#footnote-132) The aim of this section is to establish a theoretical framework through the lens of Dworkin. Thus, it is the aim of this section to clarify and contextualize this strong aspect of Dworkin’s theory of rights.

Since Dworkin’s theory of law has evolved throughout his career, there is a considerable difference between his most recent major writings and his earlier writings.[[132]](#footnote-133) Moller notes that Dworkin’s final account of rights ‘is superior to the earlier ones in that it focuses squarely on the important issues relation to the foundational values of human dignity and liberty and equality’.[[133]](#footnote-134) Similarly, Letsas points out that in Dworkin’s later work on theory of equality, ‘is not derived from an egalitarian objection to utilitarianism but from what he calls the principle of special responsibility’.[[134]](#footnote-135) The principle of personal responsibility derives from Dworkin’s two principles of dignity which implies that ‘so far as choices are to be made about the kind of life a person lives, within whatever range of choice is permitted by resource and culture, he is responsible for making those choices himself’.[[135]](#footnote-136) This means that Dworkin has adopted the concept of human dignity as a central moral notion in his later works, hence the idea of the dignity of persons plays a key role in his legal theory.[[136]](#footnote-137)

Dworkin, begins by saying that ‘rights are best understood as ‘trumps’ over some background justification for political decisions that states a goal for the community as a whole’.[[137]](#footnote-138) This, however, cannot imply that individual rights such as the right to freedom of religion, always ‘trump’ all other interests which clash with them.[[138]](#footnote-139) As Waldron clarifies, Dworkin’s theory of rights is based on ‘a conception of limits on the kinds of reason that the state can appropriately invoke in order to justify its action’.[[139]](#footnote-140) This means that Dworkin’s account of rights as trumps should be considered as a theory which *blocks* political actions based on certain kinds of majoritarian justifications. Therefore, his conception of rights is known as a ‘reason-blocking’ theory.[[140]](#footnote-141)

With this clarification in mind, the notion of ‘rights as trumps’ should be understood only as a label of this conception. His theory of rights provides which justifications do not constitute legitimate reasons for depriving someone of a liberty.[[141]](#footnote-142) For instance, assuming that the majority disapproves of pornography or homosexuality this is not a legitimate reason for prohibiting these activities.[[142]](#footnote-143) In other words, pornography and LGBT rights cannot be restricted based on the majoritarian conception of the ‘good’ life. This is because, Dworkin says, individual rights do not protect fundamental interests, they rather block reasons based on corrupted utilitarian justifications or majoritarian (or external) preferences. Such justifications are blocked because they fail to protect the fundamental right of individuals to equal concern and respect, which lies at the basis of Dworkin’s theory of rights.[[143]](#footnote-144)

Moreover, Dworkin makes a conceptual distinction between legal and political rights and, by doing so, he provides a constitutional framework for political rights.[[144]](#footnote-145) As Moller clarifies, Dworkin uses ‘political’ rights to refer to ‘moral’ rights that should be protected as constitutional rights.[[145]](#footnote-146) Dworkin explains: ‘the moral rights we have in mind are special because they are rights not against other people as individuals but against governments, and I shall therefore refer to these special moral rights as political rights’.[[146]](#footnote-147) In Dworkin’s sense, then, political rights have a special force and role, and thereby ought to be understood to what most constitutional theorists call ‘constitutional’ rights. In this context, political rights are those (moral) rights that are not clearly outlined in a specific constitution, rather those rights require a constitutional protection. In Dworkin’s own words, his account of political rights can be encapsulated through the following passage:

Most legitimate acts of any government involve trade-offs of different people’s interests; these acts benefit some citizens and disadvantage others in order to improve the community’s wellbeing on the whole…If it really is best for everyone overall to build the airport near my house rather than yours, I have no legitimate complaint against that decision. But certain interests of particular people are so important that it would be wrong—morally wrong—for the community to sacrifice those interests just to secure an overall benefit. Political rights mark off and protect these particularly important interests. A political right, we may say, is a trump over the kind of trade-off argument that normally justifies political action.[[147]](#footnote-148)

While the usefulness of the term ‘trumps’ can be criticised because of its vague character, such statement offers an insight into Dworkin’s notion of rights as trumps. As a preliminary matter, Dworkin makes a hierarchical distinction between fundamental and trivial interests. In other words, when Dworkin characterises interests and rights, he accepts that certain interests are more fundamental than others because they protect more fundamental values, and therefore, such interests require a specific (constitutional) protection. For this reason, it would be wrong ‘for the community to sacrifice those interests just to secure an overall benefit’. According to Dworkin then these specific key interests, are given special weight, should be protected by political rights. This entails that a political right is a ‘trump’ over the kind of trade-off argument that normally justifies political action’.[[148]](#footnote-149)

This is, however, not to suggest that Dworkin uses the term ‘trumps’ to mean that individual interests must always be protected against the general interests.[[149]](#footnote-150) In *Taking Rights Seriously*, for instance, Dworkin writes: ‘I have no political right to drive up Lexington Avenue. If the government chooses to make Lexington Avenue one-way down town, it is a sufficient justification that this would be in the general interest’.[[150]](#footnote-151) In Dworkin’s late work, *Is Democracy Possible Here?* he notes: ‘If it really is best for everyone overall to build the airport near my house rather than yours, I have no legitimate complaint against that decision’.[[151]](#footnote-152) This means that his theory of rights as trumps, properly understood recognises that individual interests, not rights, cannot always override the public interest. This leads to the conclusion that rights as trumps are to function to exclude certain communal attempts to restrict one’s freedom to choose his or her own conception of the good life.[[152]](#footnote-153)

The ‘trumping’ force of rights, as Waldron explains, ‘is not a way of rendering certain individual interests as such impervious to considerations of the general good’.[[153]](#footnote-154) Rather, this metaphor of trumps blocks reasons which are based on corrupted utilitarian or majoritarian arguments.[[154]](#footnote-155) For instance, Dworkin in *Law’s Empire* notes that people have rights ‘securing each person’s independence from other people’s prejudices and dislikes’.[[155]](#footnote-156) This implies that a woman has a right to an abortion not only because she has an interest in controlling her body but also because restrictions on abortion are based on people’s religious-based bias.[[156]](#footnote-157) Therefore, Dworkin uses the term ‘trumps’ as an objection to utilitarian and majoritarian justifications for state policy or action. Dworkin explains as follows:

I wish now to propose the following general theory of rights. The concept of an individual rights, in the strong anti-utilitarian sense I distinguished earlier, is a response to the philosophical defects of a utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not. It allows us to enjoy the institutions of political democracy, which enforce overall or unrefined utilitarianism, and yet protect the fundamental rights of citizens to equal concern and respect by prohibiting decisions that seem, antecedently, to have been reached by virtue of external components of the preferences democracy reveals.[[157]](#footnote-158)

Human Rights, according to Dworkin’s theory, are ‘special and very important kinds of political rights’.[[158]](#footnote-159) They have special importance because they protect some individual interests, which are so vital and their normative force is not exhausted by their incorporation in the utilitarian calculation of the general interest.[[159]](#footnote-160) In Kyritsis’ words: ‘their normative power is in part independent of their contribution to the good of the community as a whole’.[[160]](#footnote-161) They have normative independence because they protect both the fundamental rights of citizens to equal concern and respect and the responsibility each individual has to identify and create value in their own lives. These political rights, hence, ought to serve as trumps against ‘the kind of trade-off argument that normally justifies political action’.

At this point, the question remains as to whether, or to what extent, do people have political rights? Dworkin provides the following explanation:

Someone who claims a political right makes a very strong claim: that government cannot properly do what might be in the community’s overall best interests. He must show why the individual interests he cites are so important that they justify that strong claim. If we accept the two principles of human dignity that I described in the last chapter, we can look to those principles for that justification. We can insist that people have political rights to whatever protection is necessary to respect the equal importance of their lives and their sovereign responsibility to identify and create value in their own lives.[[161]](#footnote-162)

According to Dworkin, then, people have a fundamental political right against the state; namely, a right to be treated with dignity. The upshot is that the protection of human dignity is considered as a legitimate reason to block a policy, which seeks to maximise the society’s overall best interests. In other words, the interference with a person’s dignity cannot be justified for the sake of maximising the community’s overall best interests. While the concept of human dignity is itself opaque and difficult to define, for Dworkin, it consists of two main principles: the principle of intrinsic value and the principle of personal autonomy.

The principle of intrinsic value, as Dworkin notes, ‘declares the intrinsic and equal importance of every human life’.[[162]](#footnote-163) This principle holds that ‘each human life has a special kind of objective value. It has value as potentiality; once a human life has begun, it matters how it goes’.[[163]](#footnote-164) This implies that the value of human life is independent because ‘the success or failure of any human life is important in itself’.[[164]](#footnote-165) Genocide and discrimination, for instance, can be seen as the most obvious examples of violations of this principle simply because both acts rest on the conviction that some human lives less or more valuable than others.

According to the principle of personal responsibility, each individual ‘has a special responsibility for realising the success of his own life, a responsibility that includes exercising his judgment about what kind of life would be successful for him’.[[165]](#footnote-166) This means that each person has a personal responsibility to decide the values which define either success or failure in his or her own lives. This tends to suggest that every individual construct and pursue his or her own conception of the good life. The law, therefore, should not be used, by people, ‘to forbid anyone to lead the life he wants, or punish him for doing so, just on the ground that his ethical convictions are, as they believe profoundly wrong’.[[166]](#footnote-167) This principle, then, entails that no one can dictate one’s conception of the good life, thus individuals should be free to determine what a good life is. For example, imposing a person to adopt a ‘public lifestyle’ or the state’s official religion would infringe the individual person’s responsibility to pursue the happiness of his or her own life and would hence violate the second dimension of human dignity.

These two principles -the principle of intrinsic value and the principle of personal responsibility- define the basis and conditions of Dworkin’s account of human dignity.[[167]](#footnote-168) Dignity, as interpreted by Dworkin, has two dimensions.[[168]](#footnote-169) First, a society should treat its members’ lives as equally objectively important. Second, the society must respect its members’ personal responsibility for defining what counts as a good life or success in their own life. These principles of human dignity provide the moral foundations of Dworkin’s argument for political rights.[[169]](#footnote-170) Dworkin states:

Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.[[170]](#footnote-171)

He argues that citizens have moral rights and obligations with regard to one another, and political rights against the state. This entails that both of these rights ought to be recognised in positive law, by doing so they can be enforced ‘upon the demand of individual citizens through courts’.[[171]](#footnote-172) In Dworkin’s view, therefore, a right is a sort of judicially enforceable political trump that blocks majoritarian justifications for state action.[[172]](#footnote-173) On this account, human rights are designed for the implementation of counter-majoritarian measures.[[173]](#footnote-174)

It should be pointed out that Dworkin’s account of human dignity, equality and liberty has a distinctive significance as compared with other political thoughts.[[174]](#footnote-175) Letsas, for example, believes that Dworkin’s theory of law suggests a very distinctive account of the values of liberty and equality. It may be helpful to clarify what Dworkin means by the word ‘freedom’. He uses the word ‘liberty’ to describe ‘the set of rights that government should establish and enforce to protect people’s personal ethical responsibility properly understood’.[[175]](#footnote-176) However, Dworkin uses the word ‘freedom’ in a more neutral way, ‘so that any time the government prevents someone from acting as he might wish, it limits his freedom’.[[176]](#footnote-177) On this view, while freedom is not considered as a political value, liberty is deemed as a political value.

In Dworkin’s view, the values of liberty and equality do not necessarily conflict because they are not distinct political values that are in competition, therefore such political values can be construed in the light of each other. Rather than a zero sum game, for Dworkin, equality and liberty can be consistent with one another. Judge Tulkens, in the Şahin case, referred to this issue and said, ‘In a democratic society, I believe that it is necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other.[[177]](#footnote-178)

According to Moller, Dworkin’s account of human dignity makes a contribution to the familiar liberal proposition that ‘every person should be treated as free and equal’ on the basis that ‘equality is best understood as being about the equal and objective importance of every life and that freedom is concerned with every person’s individual responsibility to identify value in his or her own life’.[[178]](#footnote-179) On this interpretation, equality means that each individual has an equally important life regardless of their different interpretation of the meaning of the good life. This account of equality entails that each person should be able to define freely the value in his or her own life. Therefore, Dworkin’s theory of equality namely the right of moral independence is not derived from his counter-argument to utilitarianism but from what he calls the principle of personal responsibility.[[179]](#footnote-180)

At this point, however, a question arises as to how the personal responsibility of individuals can be protected? Dworkin says that it entails two restrictions on the state. First, there are certain fundamental decisions which individuals should be free to make, namely ‘choices in religion and in personal commitments of intimacy and to ethical, moral, and political ideals’.[[180]](#footnote-181) On this view, respect for human dignity simply requires that individuals should be free to make such decisions. This argument derives from the idea that:

 ‘Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived.[[181]](#footnote-182)

Accordingly, a good life is understood as pursuing success according to one’s independently defined values.[[182]](#footnote-183) Hence, according to Dworkin’s account of human dignity, paternalism is not acceptable.

Second, a state policy should not favour one religion over another. This entails that a policy or the relevant law must remain neutral and impartial towards different religions and beliefs. Ringelheim points out that the state obligation to be religiously neutral comes from three notions: freedom, equality, and pluralism.[[183]](#footnote-184) According to Dworkin, a neutral government must remain impartial ‘on the question of the good life, or of what gives value to life’. Indeed, his theory of rights, by virtue of its egalitarian principles, explicitly demands ‘individualistic interpretation of all basic rights, including religious freedom’.[[184]](#footnote-185)

To summarise, this section discussed Dworkin’s theory of rights. This understanding of individual rights will be used as a theoretical lens to analyse the Court’s case-law in the following chapters. The following section develops the argument that Dworkin’s approach to constitutional interpretation (the moral reading) could be compatible under the Convention system. When introducing Dworkin’s approach to constitutional interpretation, it is helpful to keep in mind two ideas. First, his approach to constitutional interpretation which he also refers to as the moral reading, has been specifically chosen for the purposes of the ECHR because the reading of the Convention poses similar problems to constitutional interpretation.[[185]](#footnote-186) This means that the Court should answer many problems of interpretation and application of the fundamental rights of individual human beings that are addressed by national constitutional courts.[[186]](#footnote-187) Indeed, the Court itself seems to have accepted that the Convention system has constitutional characteristics, when in the *Loizidou* case it recognised that: the Convention is ‘a constitutional instrument of European Public Order’.[[187]](#footnote-188)

Second, the idea that constitutions of a certain sort are to be read morally and Dworkin’s way of reading a constitution morally are in fact, two different approaches.[[188]](#footnote-189) This means that it is necessary to distinguish between the idea of a moral reading of a constitution and Dworkin’s understanding of reading a constitution morally.[[189]](#footnote-190) Hence, when this thesis refers to the ‘moral reading’ it should be understood in line with how Dworkin’s theory defines it rather than any other interpretation.[[190]](#footnote-191) To clarify this point, this section draws on resources from Dworkin’s constitutional philosophy and introduces what he calls the moral reading of the Constitution.

## Dworkin’s Approach to Constitutional Interpretation: The Moral Reading

Dworkin introduces the moral reading of the US Constitution as follows: ‘I should make plain first, however, that there is nothing revolutionary about the moral reading in practice. So far as American lawyers and judges follow any coherent strategy of interpreting the Constitution at all, they already use the moral reading, as I hope this book will make plain’.[[191]](#footnote-192) The Moral reading, associated with Dworkin’s approach to constitutional interpretation, supports a broader interpretation of the Convention. In other words, Dworkin’s moral reading as a theory of interpretation supports an evolutive reading of the Convention rights. In Dworkin’s view, the moral reading begins with the fact that the US constitution and most contemporary constitutions have provisions which contain abstract moral clauses, such as ‘rights’ or ‘equal protection’.[[192]](#footnote-193) It is possible to argue that Dworkin’s approach to constitutional interpretation may apply not only to the United States Constitution, but also to similarly formulated and drafted constitutions.

Ronald Dworkin, in *Freedom’s Law*,[[193]](#footnote-194) offers his theory of constitutional interpretation and applies it to some of the most controversial constitutional matters including abortion, gay rights and pornography. Dworkin defines the moral reading as ‘a particular way of reading and enforcing a political constitution,’[[194]](#footnote-195) hence such reading ‘brings political morality into the heart of constitutional law’.[[195]](#footnote-196) He then builds his argument for a moral reading of the Constitution in the premise that the Constitution ‘invokes moral principles about political decency and justice’ and judges should consider cases on the basis of how such moral principles of the Constitution are best understood.[[196]](#footnote-197) In Dworkin’s words:

Our constitutional system rests on a particular moral theory, namely, that men [persons] have moral rights against the state. The difficult clauses of the Bill of Rights, like the due process and equal protection clauses, must be understood as appealing to moral concepts rather than laying down particular conceptions; therefore a court that undertakes the burden of applying these clauses fully as law must be an activist court, in the sense that it must be prepared to frame and answer questions of political morality.[[197]](#footnote-198)

According to Dworkin, the question of which rights are protected by the Constitution is a substantive moral question that should be justified on the basis of political morality.[[198]](#footnote-199) This suggests that under the moral reading, the task of judges is to ‘identify the general principles behind our constitutional rights and apply them to particular cases’.[[199]](#footnote-200) For Dworkin, then, legal reasoning cannot be separated from moral or political argument. This then requires judges to find the best justification for their decisions in principles of political morality, such as justice, equality and the rule of law.[[200]](#footnote-201) Indeed, Dworkin reads the US Constitution as embodying two main principles, namely, the principle of equality and the principle of integrity.[[201]](#footnote-202) These two principles, in Dworkinian terms, derive from a fundamental right to equal concern and respect. As Raz notes, Dworkin considers political morality as resting on one fundamental right of everyone to equal concern and respect.[[202]](#footnote-203) Thus, for Dworkin, the only reasonable interpretation of the abstract moral language of the US constitution is an egalitarian, which endorses the notion that each individual be treated with equal consideration and respect.

According to the moral reading, the Court should interpret and apply the abstract moral language of the Convention on the understanding that it invokes moral principles about justice and decency.[[203]](#footnote-204) Dworkin notes that when specific constitutional clauses express moral principles, they ‘must be applied through the exercise of moral judgement’.[[204]](#footnote-205) Under the moral reading of the ECHR, the primary role of judges is to find the objective moral truth about the content of Convention rights. Crucially, instead of accepting member states’ conceptions of the ECHR rights, such an approach relies on the moral foundations of human rights, i.e. the moral principles that underpin human rights. This means that the content of the Convention rights should be protected against the majoritarian preferences. Therefore, on the moral reading, the ultimate purpose of the Convention is to provide people with a set of universal moral rights that contradicts their society, and most importantly, one that contradicts the majoritarian will of their society.[[205]](#footnote-206)

When characterised in this very general way, the moral reading has three main grounds: the abstract language of the Constitution, the intentions of the drafters and constitutional integrity. Firstly, a Constitution’s abstract moral clauses ‘must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government’s power’.[[206]](#footnote-207) This means that certain provisions of the US Constitution -and most modern constitutions- are written in abstract language, allowing broad and moral interpretations. In line with this reading of the Constitution, judges must decide cases on the basis of how an abstract moral principle is best understood:

Most contemporary constitutions declare individual rights against the government in very broad and abstract language…The moral reading proposes that we all -judges, lawyers, citizens- interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice…So when some novel or controversial constitutional issues arise – about whether for instance, the First Amendment permits laws against pornography – people who form an opinion must decide how an abstract moral principle is best understood.[[207]](#footnote-208)

Dworkin defends his moral reading by relying on the abstract moral language of the US Constitution. According to Dworkin, the text of the US Constitution, and similarly drafted constitutions, contain abstract moral terms, such as ‘rights’, ‘due process’, and ‘equal protection’. This suggests that the free speech clause of the First Amendment of the US Constitution, the due process clause of the Fifth Amendment, the equal protection and due process clauses of the Fourteenth Amendment, should all be understood as abstract moral principles, in which judges must interpret and apply these abstract clauses ‘on the understanding that they invoke moral principles about political decency and justice’.[[208]](#footnote-209) Therefore, the abstract language of the relevant constitutional provisions requires a moral reasoning that must also be consistent with legal precedent.

Secondly, as already indicated, in Dworkin’s approach, history has considerable importance in deciding what the Constitution means. This is because, Dworkin says, ‘we must know something about the circumstances in which a person spoke to have any good idea of what he meant to say in speaking as he did’.[[209]](#footnote-210) Importantly, on the moral reading, history is relevant but only in a specific way. In Dworkin’s words, ‘we turn to history to answer the question of what they [the framers] intended to say’.[[210]](#footnote-211) Equally important, history in this context is meant to include past case-law, which also should be taken into account as part of the history.

In fact, Dworkin makes a distinction between an abstract and a concrete intention on the part of the Constitution’s framers.[[211]](#footnote-212) Since the Constitutional language embodies abstract moral principles, it represents the abstract intentions of the framers. Those abstract intentions, Dworkin says, are more fundamental than any concrete intentions that the framers might have had. Ultimately, the choice between these two different intentions has to turn on considerations of political morality and not historical analysis.

History, according to the moral reading, suggests that the framers did intend their abstract expressions to lay down moral principles rather than specific historical conceptions or detailed rules. This means that the Constitution’s abstract phrases regarding free speech, liberty and equality should not be understood as ‘coded messages or shorthand statements of very concrete, detailed historical agreements’.[[212]](#footnote-213) The framers’ intentions then, as the abstract moral expressions suggest, must be interpreted as general moral convictions of principle instead of narrow ideas regarding specific issues.

Under the moral reading, then, either drafters’ semantic intentions or the text plays a considerable role in the interpretation process. With respect to the Equal Protection Clauses, for instance, Dworkin explains that the best understanding of the drafters’ semantic intentions is that they actually ‘intended to lay down a general principle of political morality which (it had become clear by 1954) condemns racial segregation’.[[213]](#footnote-214) Constitutional texts, then, embody abstract concepts, and judges should make fresh judgements of moral and political theory in order to best understand those concepts.[[214]](#footnote-215)

At this point, an important caveat should be underscored. The framers’ intentions, under the moral reading, should not be understood as a matter of purely historical inquiry. In the context of the ECHR system, judges interpreting the Convention are at the same time engaged in a distinct kind of moral reasoning, which calls for attention to the objective moral truth, rather than history or text, regarding the content of the ECHR. This suggests that judges should not consider the Convention through the lens of history, rather, they must invoke moral principles about justice. To clarify, ‘history’ should be understood as the drafting process, rather than past case-law, which is taken into account under the moral reading of the ECHR. On this basis, the moral reading relies on the belief in the existence of an objective moral truth.

The upshot is that the interpretation of the Constitution’s abstract moral clauses should not be limited to what the framers drafted. Dworkin explains:

If we are to accept the thesis that the Constitution is limited to what the framers intended it to be, then we must understand their intentions as large and abstract convictions of principle, not narrow opinions about particular responsibility to judges than Bork’s repeated claims about judicial restraint suggest. For then any description of original intention is a conclusion that must be justified not by history alone, but by some very different form of argument.[[215]](#footnote-216)

Importantly, Dworkin develops his argument for a moral reading on the premise that constitutional interpretation ought to be faithful to the normative concepts of the drafters. Most importantly, in the context of the ECHR, such normative concepts of the drafters should be identified in light of the object and purpose of the Convention. Since the ECHR is an international human rights treaty that is specifically designed to protect individuals’ human rights, its interpretation should be justified by the moral foundations of human rights. Letsas summarises this point:

any theory of interpretation of the ECHR (or any international treaty) must at some stage stand outside the drafters’ intentions and provide a normative justification based on values of political morality. (…) We cannot know whether (and the extent to which) drafters’ intentions are relevant unless we settle first on the object and purpose of the treaty.[[216]](#footnote-217)

Thirdly, the requirement of constitutional integrity comes into play.[[217]](#footnote-218) According to the requirement of constitutional integrity, judges are not allowed to read their own personal convictions into the constitution. They are under an obligation, under the moral reading, to read the constitution as a whole in light of ‘the dominant lines of past constitutional interpretation by other judges’.[[218]](#footnote-219) Dworkin maintains that:

Judges may not read their own convictions into the Constitution. They may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges. They must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality, and they must take care to see that what they contribute fits with the rest.[[219]](#footnote-220)

Therefore, judges are not given absolute power by the moral reading. Rather, their judicial power is restricted by integrity, so that judges are not able to impose their own moral convictions on the rest of society. The moral reading, as Dworkin stressed, should be understood as a theory about what the Constitution means instead of a theory about ‘whose view of what it means must be accepted by the rest of us’.[[220]](#footnote-221) Hence, according to Dworkin, constitutional interpretation ought to be faithful not only to the normative concepts of the drafters but it must also be consistent with past interpretations.

What this entails is that judges have a legal responsibility to identify the best moral conception of the underlying concepts, instead of reproducing the conceptions of the drafters.[[221]](#footnote-222) Importantly, they should try to make this coherent with past interpretations as much as they can. In other words, future interpretations have to conform to past interpretations.[[222]](#footnote-223) This means that while judges should make creative decisions, such decisions should also be consistent with the legal precedent (the decisions made in the past). The reason for this is that the principle of treating people as equals requires that the law must speak with a single voice. In fact, this is where the principle of integrity comes into play since it demands judges to assume that legal rights and duties were all created ‘by a single author -the community personified- expressing a coherent conception of justice and fairness’.[[223]](#footnote-224) Hence, the principle of integrity actually constrains judges via precedent to a community’s history. In the words of Dworkin:

anyone who accepts law as integrity must accept that the actual political history of his community will sometimes check his other political convictions in his overall interpretive judgement. If he does not . . . then he cannot claim in good faith to be interpreting his legal practice at all.[[224]](#footnote-225)

As already indicated, under the moral reading, there is a close relationship between the idea of integrity and the ideal of equality. Dworkin explains this connection as follows:

We insist on integrity because we believe that internal compromises would deny what is often called ‘equality before the law’ and sometimes ‘formal equality’. It has become fashionable to say that this kind of equality is unimportant because it offers little protection against tyranny. This denigration assumes, however, that formal equality is only a matter of enforcing the rules, whatever they are, that have been laid down in legislation…[[225]](#footnote-226)

Dworkin’s theory of law as integrity, however, demands fidelity not only to the legal rules but also to the moral principles of fairness and justice. Dworkin thus establishes a further link between the fundamental principle of moral equality and justice, fairness and integrity and, by doing so, he connects integrity with justice and fairness.[[226]](#footnote-227) He explains: ‘integrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation’.[[227]](#footnote-228)

In fact, Dworkin says that the moral reading is already being used by US judges, since they follow a coherent set of principles as a method of interpreting the Constitution. In this regard, the moral reading is considered as an established feature of the US constitutional practice. Dworkin, therefore, notes that ‘the moral reading is not revolutionary in practice’.[[228]](#footnote-229) However, it would be revolutionary for a judge explicitly to express the moral reading as his or her method of constitutional adjudication. The moral reading, as Dworkin notes, should be considered as a strategy to constitutional interpretation which is thoroughly embedded in constitutional practice.

This section has discussed what Dworkin means by ‘the moral reading’ and what it entails.[[229]](#footnote-230) As discussed above, the moral reading begins with the fact that some constitutional provisions, which are drafted in abstract moral language, are ‘moral principles that must be applied through the exercise of moral judgement’.[[230]](#footnote-231) One should, however, accept that the ECHR is not a constitutional document, rather it is an international treaty that was drafted by sovereign states. Nevertheless, the crucial feature to bear in mind is that the abstract moral language of the ECHR itself allows for an evolutive reading of the Convention rights.[[231]](#footnote-232) The next section thus discusses the applicability of the moral reading as a theory of interpretation under the Convention.

### 5.1) Is the Moral Reading Compatible with the ECHR?

#### 5.1.1) The Implications of the Moral Reading

It should be noted that since Dworkin’s approach for the moral reading is built in the context of the US constitution, the application of his approach to the supranational arena of the ECtHR might have several implications for the challenges it poses. First, because the Convention is an international treaty, not a constitution, its implementation is dependent on state consent. This has important implications for the function of the ECtHR. For instance, the Court can face the danger of losing its authority if it reaches decisions, which are unpopular in the majority of member states.[[232]](#footnote-233) Because of such a danger, the Court’s decisions can be ignored altogether, or some member states might withdraw from the Convention. The ECtHR thus, especially in public morality cases, might prefer to ‘follow a strategy of deference to states in order to minimize costs of deciding on a politically sensitive issue’.[[233]](#footnote-234)

However, according to Benvenisti, the above concern is based on an overstated fear.[[234]](#footnote-235) As Letsas puts it, the ECtHR has earned respect and gained recognition at both national and international level. Indeed, the case-law of the ECtHR can be considered as a source of jurisprudential inspiration not only for the national courts in Europe but also for many states worldwide.[[235]](#footnote-236) Since its judgements are a source of reference for courts in Europe and beyond, the Court can overcome its deferential approach.

Nevertheless, since the Convention is an international treaty, the idea of deference might be particularly important within the context of public morality cases. The reason is that because such cases are highly controversial, a judicial decision against state legislation can be deemed by its opponents as an illegitimate interpretation of judicial activism, imposing judges’ moral preferences on democratically elected domestic legislatures.[[236]](#footnote-237) For instance, Cornides argues: “instead of saying that they want to impose new laws (like abortion on demand or gay marriage) on society, they pretend that international law obliges them to do so, and that the new laws they are making represent the true original sense of the relevant Conventions”.[[237]](#footnote-238) Indeed, given the cultural and moral diversity among the Member States of the Council of Europe cases on public morality before the ECtHR often express complex situations with political and legal consequences.[[238]](#footnote-239) Therefore, it might be understandable that a moral judgement, which provides normative justifications concerning the moral value of human rights, has not been explicitly recognised in the context of the ECtHR’s case-law.

However, this implication poses the challenges for my research and findings, as this research aims to identify interpretive patterns in the Court’s reasoning in cases raising sensitive moral issues. The analysis of the reasoning of the ECtHR in some of its decisions demonstrates the Court’s ability and willingness to decide on controversial moral issues without deferring the Contracting States. Nonetheless, the Court systematically avoids providing any substantive normative reasons concerning the moral value of the Convention rights. Therefore, while it is possible to read some of the Court’s reasonings in line with Dworkinian model, it remains difficult to generalise my findings.

Since the overall findings of this thesis cannot be generalised, the findings of each chapter are relative to their own respective context. For instance, as will be discussed in Chapter 3, the findings of the abortion chapter can be understood in light of Dworkin’s moral reading perspective. This means that the Court’s interpretive practice in abortion related cases can be understood as the Court is interested in moral truth regarding the content of the Convention rights. In contrast, as will be discussed in Chapters 5 and 6, the Court’s deferential approach can be seen in its case-law regarding religious manifestation. This means that while the Court takes a less deferential approach in the abortion context, it takes a more deferential approach in the context of Article 9 of the Convention.

Beyond its legal (political) implications in the context of the ECHR, the Dworkin’s moral reading is an important approach for theoretically oriented human rights scholars. As discussed above, Dworkin has advocated the moral reading on three main grounds: the abstract language of the Constitution, the abstract intentions of the drafters, and constitutional integrity. Constitutional interpretation, under the moral reading, then, must begin with what the drafters said. In order to understand the context in which the text of the Constitution was written, ‘we turn to history to answer the question of what they intended to say… history is therefore plainly relevant’.[[239]](#footnote-240) Finally, the moral reading demands that judges, in deciding a constitutional case, must apply the relevant principles consistently and their judgements must ‘fit’ the dominant reasoning of past constitutional adjudication. Therefore, in the context of the ECHR, the moral reading must begin with what the drafters of the Convention said and the context in which they speak.

#### 5.1.2) The Abstract Language of the Convention

Dworkin presents his argument for a moral reading of the Constitution on the basis that such a reading is suggested by the abstract moral language of the US Constitution. Dworkin considers, for instance, the ‘right’ of free speech as ‘exceedingly abstract moral language’.[[240]](#footnote-241) In Dworkin’s words: ‘The First amendment refers to the right of free speech, for example, the Fifth Amendment refers to the process that is due to citizens, and the Fourteenth to protection that is equal’.[[241]](#footnote-242) Such clauses, according to the moral reading, should be understood as abstract moral principles, which must be interpreted through the exercise of a moral judgement. In other words, the Constitution embodies abstract moral principles that ‘can only be applied to concrete cases through fresh moral judgements’.[[242]](#footnote-243) Judges, therefore, instinctively have to make fresh moral judgements when they decide concrete controversies.

Importantly, this means that one should not interpret a constitutional issue about how an individual’s privacy can be protected without addressing the question of what the moral notion of ‘private life’ entails. In a nutshell, contemporary constitutional texts declare individual rights, such as the right of free speech or the right of respect for private life, against the government in very broad and abstract language. According to the moral reading, the generality and abstractness of the language entails a broad interpretation rather than a narrow one.[[243]](#footnote-244)

In the context of the ECHR, the abstract moral language of the Convention, then, should be understood as referring to general and abstract principles rather than to constricted and detailed rules or opinions about a specific issue. On this basis, for example, the right to freedom of expression under Article 10 of the ECHR can be considered as one framed in abstract moral language. Since Convention rights have been abstractly formulated, their interpretation should be grounded on principles of political morality. This requires judges to find the best moral justification for their decisions in light of principles of political morality. According to Dworkin then, a legal interpretation should aim at making the law coherent as a whole.

One can say that the ECHR defines most individual rights in very broad and abstract language. Indeed, one of the significant features of the Convention’s rights is that most of them were written in a way that allows for a broad interpretation of the protection it contains.[[244]](#footnote-245) For instance, Article 8(1) ECHR provides that: ‘Everyone has the right to respect for his private and family life, his home and his correspondence’. As the language suggests, under the moral reading, the notion of ‘private life’ should be interpreted broadly by the ECtHR.

Moreover, many provisions of the ECHR are written in broad and abstract language, allowing expansive interpretations. Paul Mahoney, the former judge of the ECtHR, noted that ‘the open textured language and the structure of the Convention leave the Court significant opportunities for choice in interpretation; and in exercising that choice, particularly when faced with change circumstance and attitudes in society, the Court makes new law’.[[245]](#footnote-246) Similarly, Rudolf Bernhardt, the former President and Vice-President of the ECtHR, said that ‘the ECHR can be more usefully compared to a national constitutional court. It has to decide cases in which people are asking for a judgement against their own state’.[[246]](#footnote-247) This means that the Convention rights are, indeed, subject to change and evolve in their understanding according to present day conditions. Therefore, based on the structure of the Convention and abstractly formulated ECHR rights, this dynamic aspect of the judicial review plays a key role not only in the US Constitution, but also under the system of the Convention.

In the context of the ECHR, the abstract moral language of the Convention, then, should be understood as general and abstract principles rather than narrow and detailed rules or opinions about a specific issue. Since the Convention rights have been abstractly formulated, their interpretation should be grounded on principles of political morality. As discussed above, Dworkin has grounded his constitutional interpretation on the ‘right to equal concern and respect’, and the concept of ‘law as integrity’[[247]](#footnote-248) This entails that constitutional interpretation ought to be faithful not only to the normative concepts of the drafters but it must also be consistent with past interpretations

#### 5.1.3) The Court’s Interpretive Practice

One should accept that the ECHR is not a constitutional document; rather, it is an international treaty which was drafted by sovereign states. Nevertheless, it has been argued that the ECtHR has gained a constitutional character and that, hence, the Court can be considered as a European constitutional court.[[248]](#footnote-249) In Alec Sweet’s words: the ECtHR is a ‘transnational constitutional court whose authority, jurisprudence, law-making capacities, and impact on legal and political systems deserves to be compared to that of even the most powerful national constitutional courts’.[[249]](#footnote-250) In fact, the argument that the ECHR can be thought as a constitutional document has been supported by the Court itself.[[250]](#footnote-251) The Court has stressed the Convention’s role as a ‘constitutional instrument of European public order’ in the context of human rights.[[251]](#footnote-252)

As mentioned in the introduction of the thesis, looking at the ECtHR’s case law, one can identify two main interpretive approaches: moral truth and consensus.[[252]](#footnote-253) The moral reading of the Convention, according to Tsarapatsanis, can be considered as ‘one of the most forceful sources of criticism of the consensus approach’.[[253]](#footnote-254) Instead of exploring the historical intentions of the drafters, the moral reading as a theory of interpretation takes the object and purpose of the Convention as its starting point. While the historical intentions of the drafters are partly relevant for the interpretation process, the search for the objective moral truth concerning the Convention rights is the core aim under the moral reading of the ECHR.

According to Letsas, the Court’s general approach to legal interpretation is based on rejecting textualism and intentionalism, which are different strains of originalism in constitutional interpretation, as a method of interpretation of the Convention.[[254]](#footnote-255) In simplified terms, originalism holds the view that the semantic content of the constitution is fixed at the time of framing and that its legal content depends to a large degree on its semantic content. This means in the context of the ECHR that the Convention rights should be understood, as originalist approaches to interpretation advocate, in terms of the intentions of the drafters in 1950.[[255]](#footnote-256)

However, the Court in its case-law confirmed that the Convention is a ‘living instrument’, which should be interpreted ‘in the light of present-day conditions’.[[256]](#footnote-257) The proposition that the Convention is a ‘living instrument’ is the banner under which the
Strasbourg Court has assumed power to decide what they consider to be required by
‘European public order’.[[257]](#footnote-258) This means that the Court treats the Convention rights as something that is subject to evolution in their meaning over time.[[258]](#footnote-259) In other words, what constitutes ‘private life’, for instance, has to be interpreted in the light of present-day conditions that have developed from modern societal changes. As Van Dijk and Van Hoof have observed:

The Standards of the Convention are not regarded as static, but as reflective of social changes. This evaluative approach towards interpretation of the Convention implies that the Commission and the Court take into account contemporary realities and attitudes, not the situation prevailing at the time of drafting of the Convention on 1940-50.[[259]](#footnote-260)

On this basis, it is fair to say that the Court created its own ‘labels’ for the interpretative methods which it uses, namely ‘living instrument’ or ‘autonomous concepts’.[[260]](#footnote-261) These interpretative techniques rely on the same view that in interpreting the Convention, they reject originalism as a method of interpretation. Letsas calls this Strasbourg’s interpretive ethic, which can be characterised as both ‘anti-textualism’ and ‘anti-originalism’ that coheres with Dworkin’s approach to constitutional interpretation.[[261]](#footnote-262)

Moreover, the Court’s interpretive practice indicates that drafters’ historical intentions have a limited role when it comes to the Court’s evolutive interpretation of the Convention. The Court, for instance, has read into the Convention rights that are not clearly mentioned in the text of the Convention, such as the right of access to court.[[262]](#footnote-263) In addition, the Court has recognised rights that the drafters of the Convention could not have thought to protect, namely the right to vote in EU elections.[[263]](#footnote-264) As rightly observed by Luzius Wildhaber, who was the first President of the ECtHR, the Convention ‘has shown a capacity to evolve in the light of social and technological developments that its drafters, however farsighted, could never have imagined… it is capable of growing with society; and in this respect its formulations have proved their worth over five decades’.[[264]](#footnote-265) It therefore seems plausible to assume that the ECtHR is more concerned with the evolution of what it regards to be the moral truth of the Convention rights rather than commonly accepted values and standards in the member States of the Council of Europe.[[265]](#footnote-266)

Most importantly, in some cases, the Court has recognised rights, which the drafters had originally intended not to guarantee under the Convention, namely the right not to join a trade union.[[266]](#footnote-267) In the case of *Young, James and Webster v United Kingdom,* for instance, the Court concluded that the relevant domestic legislation that permitted dismissal for refusal to join a trade union was in breach of Article 11 of the Convention. The Government, however, contended that this right had been intentionally excluded from the scope of the Convention. In order to prove this, the Government provided the following passage in the *Travaux préparatoires*:

On account of the difficulties raised by the ‘closed-shop system’ in certain countries, the Conference in this connection considered that it was undesirable to introduce into the Convention a rule under which ‘no one may be compelled to belong to an association’ which features in [Article 20 par. 2 of] the United Nations Universal Declaration.[[267]](#footnote-268)

Similarly, three dissenting judges argued as follows:

It clearly emerges from this element of the drafting history that the States Parties to the Convention could not agree to assume any international obligation in the matter, but found that it should be subject to national regulation only. The States Parties to the Convention must be considered to have agreed not to include the negative aspect, and no canon of interpretation can be adduced in support of extending the scope of the Article (art. 11) to a matter which deliberately has been left out and reserved for regulation according to national law and traditions of each State Party to the Convention.[[268]](#footnote-269)

According to the Court, however, such a compulsion ‘strikes at the very substance of the freedom’ protected by Article 11 of the Convention, and for this reason it constituted an interference with the applicants’ Article 11 rights.

It is possible to say that the case-law of the Court, taken as a whole, does support an evolutive reading of the Convention rights. Thus, the moral reading as an evolutive approach can not only be compatible with the Court’s approach to legal interpretation but also essential to discover the moral truth regarding the content of the Convention rights. Importantly, it is not only that the moral reading as a theory of interpretation seems legitimate under the Convention, it is actually necessary in order to identify the moral truth of the ECHR rights.

To summarise the argument so far, this chapter has attempted to demonstrate that Dworkin’s approach to constitutional interpretation -the moral reading of the Constitution- could be compatible with the Convention on two main grounds: the abstract moral language of the Convention and the Court’s interpretive practice. At this point, however, there is one key question that should be asked with regard to the legitimacy of the moral reading in the context of the ECHR. This question is particularly important because the Convention is an international treaty, not a constitution, and for this reason, its implementation is dependent on state consent. For instance, the Court’s treatment of the Convention as a living instrument has been criticised by Noel Malcom for expanding the scope of the Convention rights. In the words of Malcolm:

The Convention was a treaty, entered into in good faith by governments who were committing themselves to the terms of that particular document. The interpretation of such documents may be open to some ongoing change, as we shall see; but to extend the scope of the protected rights to things that were clearly not envisaged or intended by the signatories, or to add entire new rights that were not on the original list, is to drift into illegality, and thereby to jeopardise the legal authority of the whole enterprise.[[269]](#footnote-270)

As to the matter of interpretation of the Convention, the Court itself has emphasised on many occasions that ‘the Convention must be interpreted in harmony with other
rules of international law of which it forms a part’.[[270]](#footnote-271) This means that the Court should take into account the relevant rules of public international law in interpreting the Convention. Therefore, international law might shed light on the relation between an evolutive reading of the Convention rights and the Court’s legitimacy over States Parties. It will be argued that an evolutive reading, understood as the moral reading of the Convention, can be compatible with the Vienna Convention, and therefore it coheres with international law.[[271]](#footnote-272) The next section thus examines the issue of the Court’s legitimacy in relation to its evolutive interpretation of the Convention rights.

## The Legitimacy of the Moral Reading in the context of the ECHR: The VCLT

The role of the ECtHR judges is to interpret and apply the ECHR. Since the Convention is an international treaty, the primary sources for the Court are the rules of international law on the interpretation of treaties.[[272]](#footnote-273) In other words, the Convention is subject to the rules of international law on the interpretation of treaties, codified in the Vienna Convention. In the *Golder* case, for instance, the Court stated that the relevant provisions of the Vienna Convention should be applied to the interpretation of the ECHR. In the Court’s own words: ‘it [the Court] should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties’.[[273]](#footnote-274) Similarly, in the case of *Loizidou v Turkey*, the Court reiterated its position that ‘the Convention must be interpreted in the light of rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties’.[[274]](#footnote-275) The Court thus made clear that the Convention is subject on treaty interpretation contained in Articles 31-33 of the Vienna Convention on the Law of Treaties 1969 (VCLT).

Articles 31-32 are worded as follows:

*Article 31 General Rule of Interpretation*

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be
given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.

*Article 32 Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: a. Leaves the meaning ambiguous or obscure; or b. Leads to a result which is manifestly absurd or unreasonable.[[275]](#footnote-276)

As the citation reveals, Article 31 of the VCLT offers a method of interpretation rather than specific rules. According to the general rule of Article 31(1), treaties must be interpreted in good faith, based on the ordinary meaning of their terms in context and in light of their object and purpose. This general method of treaty interpretation, as Letsas points out, is abstract enough to allow for different interpretative strategies.[[276]](#footnote-277) This means, amongst other things, that such an abstract and broad framework established by the VCLT rules of interpretation permits a variety of interpretive approaches, including a moral reading of the ECHR.

According to the general principle under Article 31 VCLT, treaty interpretation should begin with the text of a treaty within its context and the treaty’s object and purpose must shed light on its meaning. As a matter of international law, the ordinary meaning of the terms in a treaty must be seen as one of the central elements that should be taken into account in interpreting an international treaty such as ECHR. This general rule, then, emphasises three sources -the treaty’s terms, the context of those terms, and the treaty’s object and purpose- that interpreters must use in order to unravel the meaning of a treaty.

Similarly, under the moral reading of the Convention, the Court should take into account the text of the convention, the intentions of the drafters, and the constitutional integrity. The moral reading, in other words, denies neither the text nor drafters’ intentions as important elements in interpreting the Convention. The rules of the Vienna Convention, according to the International Law Commission, codify ‘the means of interpretation admissible for ascertaining the intention of the parties’.[[277]](#footnote-278) On this basis, the intention of the parties should be understood as the common intention rather than an intention held by one the party only. [[278]](#footnote-279) Judge Schwebel, for instance, makes this point as follows:

The intention of the parties’, in law, refers to the common intention of both parties. It does not refer to the singular intention of each party which is unshared by the other. To speak of ‘the’ intention of ‘the parties’ as meaning diverse intentions of each party would be oxymoronic.[[279]](#footnote-280)

In a similar vein, the notion of the intention of the parties, according to the ILC, refers ‘to the intention of the parties as determined through the application of the various means of interpretation which are recognised in articles 31 and 32’.[[280]](#footnote-281) For this reason, it is ‘not a separately identifiable original will, and the travaux préparatoires are not the primary basis for determining the presumed intention of the parties’.[[281]](#footnote-282)

At this point, however, a crucial question regarding the ECtHR’s approach to the drafters’ intention and the interpretation of the Convention has been posed by Rudolf Bernhardt:

Must these conventions and their clauses be interpreted and applied as understood at the time of the conclusion of the relevant treaty, or is it the treaty a ‘living instrument’ which can change its meaning in accordance with developments in State and society?[[282]](#footnote-283)

This question is indeed at the heart of the dispute between originalism and anti-originalism approaches to the interpretation of treaties. Dworkin in A Matter of Principle answers that question by stating that ‘we must distinguish between different levels of abstraction at which we might describe that intention’.[[283]](#footnote-284) This means that the drafters might be motivated by many different intentions, which can have different significance for the purpose of the interpretation. This understanding of an intentionalist approach to treaty interpretation suggests a distinction between ‘abstract’ and ‘concrete’ intentions.[[284]](#footnote-285)

Dworkin, in the US constitutional context, argues that ‘abstract’ intentions should be regarded as more fundamental than ‘concrete’ intentions, and for this reason an abstract intention must be considered as essentially relevant over a concrete intention when interpreting the intentions of drafters of the US constitution. In the context of the ECHR, the drafters’ intentions may come in for various purposes at different levels of abstraction:

Drafters in 1950 had an *abstract* intention to promote and safeguard human rights in
Europe but they also had a more *concrete* intention about which situations,
in their view, human rights cover.[[285]](#footnote-286)

### 6.1) The Moral Reading as a Purposive Approach: The Object and Purpose of the Convention

As noted above, according to public international law, international treaties between States should be interpreted in accordance with Articles 31 to 33 of the Vienna Convention on the Law of Treaties (hereinafter referred to as ‘the VCLT’ or ‘the Vienna Convention’). Since the ECHR is an international treaty, its interpretation must be guided by the rules of the Vienna Convention. It is possible to say that the VCLT has played a distinctive role in shaping the interpretation methods used by the Strasbourg organs.[[286]](#footnote-287) In the context of international law, the words ‘evolutionary interpretation’ are taken to refer to ‘situations in which an international court or Tribunal concludes that a treaty term is capable of evolving, that is not fixed once and for all, so that allowance is made for, among other things, developments in international law’.[[287]](#footnote-288)

The method of evolutive interpretation has been conceptualised as a subcategory of the object and purpose interpretation under the VCLT.[[288]](#footnote-289) Such an evolutive approach, in other words, has been considered as a significant element of defining the object and purpose of a treaty. According to the International Court of Justice, for instance, generic terms ‘must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied, and not necessarily their original meaning’.[[289]](#footnote-290) In addition, when it comes to the interpretation of the Convention in the light of international law, the *Golder v United Kingdom case [[290]](#footnote-291)* can be seen as one of the most important cases in the history of the ECHR for two reasons.[[291]](#footnote-292)

To begin with, it contains the first and the most detailed discussion of the rules of interpretation contained in the Vienna Convention on the Law of Treaties. It has established the general framework for the ECtHR’s references to international relevant norms. Second, in its judgment, the Court clarified its stance on the interpretation of the Convention. It should be noted that before *Golder*,the Court had not taken a clear position regarding the interpretation of the ECHR: the Court’s ‘living instrument’ approach first appeared in the *Tyrer* case in 1978,[[292]](#footnote-293) the doctrine of autonomous concept was introduced in the *Engel* case in 1976,[[293]](#footnote-294) the principle of effectiveness or judicial effective protection in this context was first used in the *Airey* case in 1978.[[294]](#footnote-295) Thus, the Court in *Golder* had to clarify its stance on what ought to be the general theory of interpretation of the Convention.

On this occasion, the ECtHR had to decide whether the right to access to a court, not explicitly mentioned in the text, was protected by Article 6 of the Convention. This question, in the context of US Constitutional law, is at the heart of the dispute between originalist and non-originalist approaches. The Court made explicit reference to Articles 31-33 of the VCLT and held that such articles provide generally accepted principles of international law, which essentially should be taken into account for the interpretation of the Convention. In its judgement, the Court first discussed the language of Article 6 ECHR and whether it guarantees the right of access to court under the Convention. According to the Court’s findings, the language of Article 6 ECHR was neutral to reach a specific conclusion. It then went on to explore the ‘object and purpose’ of the Convention, by referring to Article 31(2) of the VCLT. Resorting to the Preamble to the Convention, the Court said that:

As stated in Article 31 para. 2 of the Vienna Convention, the preamble to a treaty forms an integral part of the context. Furthermore, the preamble is generally very useful for the determination of the "object" and "purpose" of the instrument to be construed.[[295]](#footnote-296)

Within this step, the Court identified the object and purpose of the Convention as refers to the ‘common heritage of political traditions, ideals, freedom, and the rule of law’ of European Countries.[[296]](#footnote-297) It concluded that the right of access constitutes an element ‘which is inherent in the right stated by Article para 1’.[[297]](#footnote-298)

In fact, the crucial part of the judgement is contained in para 36:

Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 …This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 (art. 6-1) read in its context and having regard to the object and purpose of the Convention, a law making treaty… and to general principles of law. The Court thus reaches the conclusion, without needing to resort to "supplementary means of interpretation" as envisaged at Article 32 of the Vienna Convention, that Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. [[298]](#footnote-299)

Importantly, as Rudolf Bernhardt rightly observes, the judgement neither defines the Convention as a ‘living instrument’ nor does it invoke any evolutive reading of the Convention rights.[[299]](#footnote-300) Rather, according to Bernhardt, such judgement ‘deduces the broader interpretation from the object and purpose of the Convention’.[[300]](#footnote-301) Letsas explains:

any theory of interpretation for the ECHR (or any international treaty) must at some stage stand outside drafters’ intentions and provide a normative justification based on values of political morality… We cannot know whether (and the extent to which) drafters’ intentions are relevant unless we settle first on the object and purpose of the treaty.[[301]](#footnote-302)

In the present case, then, the Court relied on teleological approach in order to shed light on the meaning of Article 6 (1) of the Convention. Instead of looking at the historical intentions of the drafters, the Court identified the object and purpose of the Convention based on values of political morality, namely the rule of law. In doing so, it established a link between the object and purpose of the Convention and its use of evolutive interpretation. Therefore, evolutive interpretation, understood as the moral reading of the Convention can be justified under the Vienna Convention.

Most importantly, the Court clarified in that case that there was no need to resort to supplementary means of interpretation under Article 32 VCLT. According to Letsas, the Court took the view that the object and purpose of the Convention contains ‘the ideal of the rule of law which leaves no ambiguity (which triggers resort to supplementary means under Article 32) as to whether it contains a right of access to court’.[[302]](#footnote-303) This shows that the Court’s approach to the interpretation of the Convention is a purposive approach, drawn from the rules in the Vienna Convention. [[303]](#footnote-304) The Court thus made clear that lack of an explicit provision in the text of the Convention cannot prevent the Court from recognising an unenumerated[[304]](#footnote-305) right.[[305]](#footnote-306) What emerges strongly from *Golder* is that the Court must take into consideration ‘the object and purpose’ of the Convention as a decisive factor in interpreting the Convention. According to the Court, then, the object and purpose of a treaty should be considered as one of the fundamental sources of any application of Articles 31-33 VCLT. Thus, in interpreting the ECHR, the object and purpose of the Convention has a key role.

It has to be stressed that the Court’s treatment of the Convention as a living instrument does not imply that the Court is expanding the scope of the Convention rights beyond that agreed by the drafters. The point, rather, is that the Court’s use of evolutive interpretation, understood as the moral reading of the Convention, should be considered as a process of moral discovery. Letsas explains:

the Court is not expanding or inflating the scope of the ECHR rights by treating the Convention as a living instrument; rather, it discovers what these human rights always meant to protect.[[306]](#footnote-307)

It can be said that human rights treaties have been particularly designed to provide not only theoretical but also an effective protection of the individual. This effective protection, according to Bernhardt, can only be reached ‘if the interpretation takes account of changing conditions in State and society’.[[307]](#footnote-308) Bernhardt then suggests a direct link between evolutive reading of the Convention rights and the principle of the effectiveness. In fact, the Court first established its ‘principle of the effectiveness’ of the Convention rights in the case of *Airey v Ireland*: ‘the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.’[[308]](#footnote-309) This principle has given birth to other evolutive interpretation approaches, such the ‘living instrument’ approach and the ‘autonomous concept’ approach.[[309]](#footnote-310) The Court’s ‘practical and effective’ approach of interpreting the Convention can be read as its willingness to find the truth about the Convention rights. In other words, ‘practical and effective’ in this context implies a willingness to discover the objective moral truth regarding the content of the Convention rights.

Indeed, the Court placed significant emphasis on ‘the Convention’s special character as a human rights treaty’ and as an ‘instrument of European public order for the protection of individual human being’.[[310]](#footnote-311) This suggests that a distinction should be drawn between traditional international treaties, which are based on sovereign equality and the principle of reciprocity and human rights treaties. This special character of the Convention, as a human rights treaty, has been explained by the Court as follows:

Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement’.[[311]](#footnote-312)

In doing so, the Court itself has drawn a distinction between traditional international treaties that are based on sovereign equality and human rights treaties. This special character of the ECHR system can be understood as the Court’s responsibility of providing the Convention’s effectiveness in its interpretation and application of it.[[312]](#footnote-313)

Moreover, in a series of cases, the Court has had to depart from traditional international law in order to support the Convention’s effectiveness as entailed by its distinct character.[[313]](#footnote-314) In its own words, the Court stated that ‘the object and purpose of the Convention ... requires that its provisions be interpreted and applied so as to make its safeguards practical and effective’.[[314]](#footnote-315) It also affirmed that ‘any interpretation of the rights and freedoms guaranteed has to be consistent with ‘the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society’.[[315]](#footnote-316)

This section has discussed the legitimacy of Dworkin’s moral reading with the ECHR. As rightly observed by Letsas, the ECtHR’s interpretive practice seems to be interested in the moral truth regarding the Convention rights. This approach is even more significant in light of the fact that the Court’s practice, especially in recent years, has showed its willingness to engage in evolution towards the objective moral truth of the ECHR rights, which essentially depends on substantive moral considerations. Most importantly, as discussed in the introduction to the thesis, this engagement relies on the moral objectivity and the moral values that underline human rights. This section has thus argued that the moral reading as an evolutive approach is not only compatible with the Court’s approach to legal interpretation but is also essential to discover the moral truth regarding the content of the Convention rights. Importantly, it is not only that the moral reading as a theory of interpretation seems legitimate under the Convention, it is actually necessary to identify the moral truth of the ECHR rights.

This approach fits with the rules of treaty interpretation as codified in Article 31(1) of the VCLT, which recognises the ‘object and purpose’ of treaties as an essential part of the method of treaty interpretation.[[316]](#footnote-317) The Court has held repeatedly that the Convention ‘must be interpreted in harmony with other rules of international law of which it forms part’.[[317]](#footnote-318) On this basis, Dworkin’s moral reading, as a theory of constitutional interpretation, could be seen as compatible with the Vienna Convention. Hence, Dworkin’s legal interpretivism does not stand in opposition to the applicable rules from international law.

## Conclusion

This chapter presented the methodology of the thesis. This methodology, as discussed throughout the chapter, consists of two elements of Dworkin’s legal interpretivism: Dworkin’s moral reading and his theory of rights. Since this thesis applies Dworkin’s legal interpretivism to the European Convention on Human Rights, this chapter established a Dworkinian lens to analyse the case-law of the European Court of Human Rights.[[318]](#footnote-319) According to Dworkin, the meaning of a statute is never ‘fixed once and for all’ rather belongs to a ‘continuing story’, and its interpretation ‘therefore changes as the story develops’.[[319]](#footnote-320) As discussed above, the ECHR contains human rights protections that are abstractly formulated general terms, such as ‘private and family life’, ‘freedom of expression’, ‘freedom of thought, conscience and religion’, and so on. These concepts, according to Rudolf Bernhardt, are capable of different interpretations. It is worth noting that the Court has held repeatedly that the Convention is a living instrument, which should be interpreted in light of present-day conditions. Since its landmark judgement in *Tyrer v United Kingdom*, the Court has used an effective and evolutive method in interpreting the Convention.

According to Letsas, the Court’s use of evolutive interpretation can be understood as ‘it is more interested in the moral value the Convention rights serve and what arguments best support it rather than on whether such arguments are widely shared’ by the domestic legislation of the states belonging to the Council of Europe. [[320]](#footnote-321) In order to discuss such a claim, this chapter combined Dworkin’s theory of rights with the moral reading. By doing so, this chapter established a Dworkinian interpretivism as a theoretical lens to analyse the Court’s case-law. The Court’s approach towards the moral truth regarding the content of ECHR rights can be called as the moral reading of the Convention.[[321]](#footnote-322) Under the moral reading of the Convention, judges are entitled to set aside majority preferences in favour of an anti-majoritarian and, more specifically, a liberal egalitarian reading of Convention rights.[[322]](#footnote-323) This approach entails that the Convention rights ought to be considered as a shield to protect individuals and minorities from abuse of power by the majorities.[[323]](#footnote-324) For instance, the Court in *Alekseyev v Russia* held that the pride marches might offend the moral values of the majority in Moscow. However, it considered that this was not a sufficient reason for banning those events. In the Court’s own words: ‘it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority’.[[324]](#footnote-325)

This seems to disclose the Court’s willingness to protect minority rights and to promote an egalitarian approach to its decision process. The moral reading of the Convention as an interpretive strategy can be considered as an appropriate standard for ensuring that human rights can fulfil their primary purpose. Through a Dworkinian lens, the following chapters shall interpret the European Convention on Human Rights by analysing relevant case-law of the European Court of Human Rights.

# Chapter Three A DWORKINIAN READING OF THE ECtHR’S CASE-LAW ON ABORTION

## Introduction

This chapter will make use of insights from Dworkin’s legal interpretivism to analyse the status of abortion under the Convention system. Abortion is both an important legal issue, and a crucial philosophical topic, which should be discussed in a reasoned manner in light of legal philosophy. To some extent, public opinion is deeply divided in different ways over the issue of abortion. Such divisiveness can be seen clearly in the United States,[[325]](#footnote-326) whereas there is a consensus in favour of abortion across Europe.[[326]](#footnote-327) For instance, the ECtHR found that there was ‘indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law’.[[327]](#footnote-328) Nevertheless, it remains difficult to draw a conclusion that the issue of abortion has been agreed upon at a European level.

Indeed, the debate on abortion is still controversial under the Convention system for two main reasons. First, the status of the foetus remains unknown under the Convention. The reason for this is that the Court refused to take a clear stance on the abstract question of when life begins. In the Court’s own words: ‘it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for purposes of the Article of the Convention’.[[328]](#footnote-329) Consequently, the Court seemed to avoid reaching a clear conclusion on the right to life of the foetus under the Convention. Various critics, however, think that the Court’s neutral position on the question of the foetus’s status is deeply problematic.[[329]](#footnote-330) For instance, it is argued that the Court has failed to explicitly state whether the foetus may enjoy for protection under Article 2 ECHR. Therefore, the ECHR jurisprudence on abortion has been criticised for its lack of clarity.

Second, the Court has been criticised on the basis of its so-called ‘far-reaching’ interpretations under Article 8 of the Convention. In other words, the Court’s approach in abortion-related cases has been criticised for over-reaching its authority. In particular, it has been argued that the Court’s decision in *Tysiac* constitutes ‘an attempt to promulgate a full-fledged ‘Right to Abortion’ –not openly, but through the backdoor’.[[330]](#footnote-331) In addition, one of the Judges, Javier Borrego Borrego, said in his dissenting Opinion that: ‘To my regret, I cannot agree with the opinion of the majority in this case… I consider that the Court’s decision in the instant case favours ‘abortion on demand’… I would never have thought that the Convention would go so far, and I find it frightening’.[[331]](#footnote-332) This means that the Court has been criticised for extending the protective scope of Article 8 to abortion related issues.

This chapter will be divided into five sections. The second section will critically evaluate the question of the status of the foetus under the European Convention on Human Rights. According to Goldman, the Court has adopted a ‘neutral stance’ on the question of the foetal right to life under Article 2 ECHR.[[332]](#footnote-333) Goldman claims that the Court deliberately avoided taking responsibility to address the key issue at hand, and by doing so, it failed to perform its judicial duty.[[333]](#footnote-334) Consequently, the ECHR jurisprudence on abortion has been criticised for its lack of clarity.

In this context, one could respond to these criticisms by distinguishing between the moral status of the foetus and the legal status of the foetus in the abortion debate. Based on this distinction, the second section will argue that the Convention does not include prenatal life within its scope of absolute protection under Article 2. The absolute nature of the right to life can be understood in the sense that it is ‘non-derogable’: it cannot be denied even in ‘time of war or other public emergency threatening the life of the nation’ (except for deaths resulting from lawful acts of war).[[334]](#footnote-335) In reaching the conclusion that Article 2 ECHR does not recognise a right to life of the foetus under the Convention, the section adopts Dworkin’s theory of constitutional interpretation.

The third section will engage with the Court’s approach for deciding cases under Article 8 (the right to respect for private and family life), as this provision has been the one most frequently used by individuals bringing cases to the ECHR bodies concerning abortion rights. A Dworkinian reading of the case-law on abortion can offer not only a more compelling explanation of the Court’s protection of abortion rights under Article 8 but can also provide substantive reasons to rebut such claims of overreach. The third section, therefore, moves on to an application of Dworkin’s moral reading to a particular case. In doing so, it will discuss the Court’s judgement in *Tysiac* in light of what Dworkin calls ‘the moral reading’ and explains how this moral reading would be of use to analyse the ECHR.

The fourth section will examine the issue of conscientious objection invoked by health professionals in the abortion context. It will examine more closely the nature of the abortion disagreement, in the context of the ECHR, through the lens of Dworkin. Such examination will be made through the lens of Dworkin, who provides an untraditional view about the abortion discussion. Hence, Dworkin’s account of abortion may provide a fresh reading of the abortion debate under the Convention system. This chapter thus provides a Dworkinian reading of the Court’s case-law on abortion, and in doing so, it will be contributing to this discussion by presenting Dworkin’s revisionist account of the abortion debate. Finally, conclusions will be drawn in section five. It takes a Dworkinian approach to examining and analysing the juridical attitude of the Strasbourg Court towards abortion. It addresses the following question: How the abortion jurisprudence at Strasbourg can be understood in light of Dworkin’s moral reading?

## The Abortion Jurisprudence under the Convention

It should be clarified that there are two periods of case law under the ECHR on access to abortion. The modern abortion jurisprudence under Article 8 of the ECHR has its origins in decisions of the European Commission.[[335]](#footnote-336) The European Commission of Human Rights and the ECtHR have addressed the issue of the right to life of the unborn foetus and a right to an abortion under Articles 2 and 8 of the ECHR. Therefore, the ECHR jurisprudence on abortion has mainly revolved around whether the foetus is recognised by Article 2 ECHR, and whether restrictions on access to abortion constitute a violation of Article 8 ECHR.

The next section will analyse the earliest jurisprudence under the ECHR on access to abortion, focusing on the issue of whether the unborn foetus is protected by Article 2. It will frame the abortion issue within the conflict between two individual rights under the ECHR system: the right to life of the foetus and the right to respect for private life of the woman.[[336]](#footnote-337) I will argue that in striking this balance, the woman’s interest in deciding on her body and her life has been primarily protected against the foetus’s rights and interests by the Strasbourg Organs.

### 2.1) The Legal Status of the Foetus under the Convention: A Neutral Stance?

It has been argued that the Court has provided an insufficient answer to the question of whether the foetus has a right to life under Article 2 ECHR.[[337]](#footnote-338) In *Vo v France*, for instance, the Court noted that ‘the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention’.[[338]](#footnote-339) This approach has been criticised on a variety of separate concurring and dissenting opinions. Five of the seventeen judges took the view that the Court should have reached a conclusion that Article 2 was inapplicable;[[339]](#footnote-340) two noted that the Court should have made it clear that Article 2 was applicable;[[340]](#footnote-341) three said that the Court should have concluded that Article 2 had been violated.[[341]](#footnote-342) The Court intentionally refused to provide an explicit answer to the question of the status of foetus under Article 2. This section aims to clarify the Court’s stance on the question of the foetus under Article 2 ECHR.

Dworkin’s account of the abortion debate could be useful to explain and justify the Court’s approach to abortion related cases. According to Dworkin, people disagree about abortion mainly because they appear to disagree about whether a foetus should be recognised as a person ‘with a right to life from the moment of its conception, or becomes a person at some point in pregnancy or does not become one until birth’.[[342]](#footnote-343) As Judith Thomson points out, drawing a line at one point to declare that ‘before this point the thing is not a person, after this point it is a person’ is no more than an arbitrary choice, which has no legal basis.[[343]](#footnote-344) However, in Dworkin’s own words ‘… we cannot understand the moral argument now raging around the world - between individuals, within and between religious groups, as conducted by feminist groups, or in the politics of several nations - if we see it as centred on the issue of whether a foetus is a person’.[[344]](#footnote-345) This account of the abortion debate is, according to Dworkin, misleading not only because it provides no solution for governments but also because it fails adequately to explain why liberal and conservatives viewpoints disagree over the abortion issue.

According to Dworkin’s line of reasoning, ‘the key question in the debate over *Roe v Wade* was not a metaphysical question about the concept of personhood or a theological question about whether a foetus has a soul, but a legal question about the correct interpretation of the Constitution’.[[345]](#footnote-346) Following on from this, he argues that the crucial issue is the question whether the foetus is a ‘constitutional person, that is, a person whose rights and interests must be ranked equally important with those of other people in the scheme of individual rights the Constitution establishes’.[[346]](#footnote-347) This means that Dworkin deliberately avoids providing a decisive answer to the moral question of the abortion debate, rather he provides an interpretive approach, which can be used to resolve the issue of whether the foetus can be recognised as a person in the eyes of the law. By doing so, Dworkin provides a practical legal approach to moral dilemmas that arise in the abortion debate.

In order to clarify the stance taken by the Court on the question of whether the foetus is protected by Art 2 ECHR, it may be necessary to distinguish between the moral status and the legal status of the foetus under the Convention. This means that the issue of when life begins is a different than the question of whether a foetus is protected under Article 2 ECHR. In a number of cases challenging domestic laws on abortion on the grounds of Article 2 ECHR, the ECHR bodies have deferred to national legislation to strike their own balance between the foetus and the pregnant woman. In other words, the Strasbourg Organs refused to deal with the moral question of when life begins mainly because there is no common understanding among the Member States of the Council of Europe as to when life begins. In adopting this approach, the Court invoked the judge-made margin of appreciation doctrine;[[347]](#footnote-348) ‘the issue of when life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere’.[[348]](#footnote-349) Thus, the Court showed its unwillingness to deal with the moral question of when life begins.

The legal question, then, remains whether or to what extent Article 2 provides an *absolute* protection for the unborn foetus under the Convention. A passage from Dworkin’s *Life’s Dominion* offers a good starting point:

If they really thought that a foetus is a person with protected rights and interests. It is morally and legally impermissible for any third party, such as a doctor, to murder one innocent person even to save the life of another.[[349]](#footnote-350)

This can mean, in the context of the ECHR, that if a foetus is considered as a person for the purpose of Article 2, the States Parties to the Convention are obligated to protect the life of the foetus even at the expense of the woman’s life.

### 2.2) Does a Foetus Have an Absolute Protection under Article 2?

The text of Article 2 of the Convention is as follows:

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

As the citation reveals, Article 2 ECHR actually provides textual exceptions to the right to life only when it is ‘absolutely necessary’. The Court clarified this point in the *McCann and Others v the UK* judgement.[[350]](#footnote-351) According to the Court, the term ‘absolutely necessary’ indicates that ‘a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 of the Convention’.[[351]](#footnote-352) Hence, it can be said that Article 2 provides a higher protection than Articles 8 to 11 of the Convention.

At this point, however, it should be clarified that the right to life in Article of the Convention is not absolute in the same sense, since the text of Article 2 ECHR provides textual exceptions to the right to life. In addition, the Court has emphasised that Article 2 of the Convention should not be interpreted as guaranteeing to every person an absolute level of protection in any occasion where human life is in endangered.[[352]](#footnote-353) Nevertheless, the right to life under Article 2 is, according to Greer, in an analogous position in this regard. A reason for this is that the ‘strictly necessary’ clause has not been interpreted by the Court to include a margin of state discretion. Greer explains:

The Court has not interpreted the “strictly necessary” clause to include a margin of state discretion in any of the three principal decisions on this provision either, in spite of “the fact that the domestic authorities may claim to be closer to the events at issue”. This is capable of being justified in terms of the principles of effective protection and autonomous interpretation which, in this context, suggest the need to avoid what would otherwise be the incongruity of permitting national variation in respect of the right to life but insisting on uniformity in respect of the lesser right to protection from degrading treatment.[[353]](#footnote-354)

Importantly, the doctrine of margin of appreciation has never been invoked in respect of Article 2.[[354]](#footnote-355) In fact, while there are no legal limits to its application under the Convention, the Court has not invoked it when it comes to the assessment of the certain rights enshrined in Articles 2-4 ECHR. In Janneke Gerards’ words: ‘this is logical for most cases on Article 2 and 3, since these provisions have an absolute nature and therefore do not allow for reasonableness review, nor for any deference to be paid to the national authorities’.[[355]](#footnote-356)

More importantly, both the Commission and the ECtHR have allowed a wide margin of appreciation to the Contracting States when it comes to the status of the foetus within their domestic jurisdictions. This means that the Contracting Parties were allowed to settle the status of the foetus, whether it is a legal person whose right to life should be protected by the law. Therefore, while a foetus and a person might have the same legal status at domestic level, they do not have the same legal status under the Convention.

In a series of cases, both the Commission and the Court have been called to examine the question of whether the foetus has a right to life as contained in Article 2 ECHR. For instance, in *Paton v UK*, the Commission examined an application by a man complaining that his wife had been permitted to have an abortion, under the British Abortion Act 1967, on medical grounds. The Commission concluded that Article 2 ECHR and its protection did not cover the foetus, and in doing so it refused to extend rights to the foetus for the purpose of Article 2 ECHR.

The rationale of the Commission was that ‘if Article 2 were held to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of pregnancy would involve a serious risk to the life of the pregnant woman’.[[356]](#footnote-357) In adopting this approach, the Commission reasoned that if the life of the foetus had an absolute protection under Article 2, then, abortion would not be allowed under any circumstances. Hence, the abortion of a ten-week-old foetus to protect a woman’s mental and physical health, was not considered a violation of Article 2 by the Commission.[[357]](#footnote-358)

In the case of *H v Norway*, an abortion was performed on *non-medical grounds* against the expectant father’s wishes. The Commission considered that the abortion of a 14-week foetus was not in breach of Article 2 on the grounds that pregnancy, birth and looking after a baby might place the woman in a difficult situation of life.[[358]](#footnote-359) It may be important to note that the decision in *H v Norway*, is broader and goes beyond the *Paton* case for two reasons. First, the abortion was later in the pregnancy, and second, it was justified for social reasons rather than health and medical reasons. The woman’s choice to have an abortion was found more important than the right to life of the foetus. This approach can be considered as an important step forward to justify abortion under Article 8 of the Convention.

It can be said that the Commission has consistently refused to acknowledge the right to life, recognised by the Convention, as an absolute right for a foetus. According to Fenwick, in *X v UK and H v Norway*, the Commission took the view that Article 2 can be applied only to persons who are already born.[[359]](#footnote-360) As Eva Brems indicates, these decisions have demonstrated a ‘reluctance’ to entitle the foetus to Article 2 protection.[[360]](#footnote-361) As a result, the Commission construed that Article 2 of the Convention does not include an absolute right to life of a foetus.

In *Boso*, the Court found that an abortion that was carried out under Italian law did not violate Article 2. The Court explained that:

the relevant Italian legislation authorises abortion within the first twelve weeks of a pregnancy if there is a risk to the woman’s physical or mental health. Beyond that point, an abortion may be carried out only where continuation of the pregnancy or childbirth would put the woman’s life at risk, or where it has been established that the child will be born with a condition of such gravity as to endanger the woman’s physical or mental health. It follows that an abortion may be carried out to protect the woman’s health.[[361]](#footnote-362)

This is because, according to the Court, a fair balance had been struck between the interests of the women and the foetus. As the Court noted that the life of the foetus is explicitly limited by the woman’s rights and interests. Since abortion for either health[[362]](#footnote-363) or social reasons[[363]](#footnote-364) has been held not to be contrary to Article 2 of the ECHR, it seems to suggest that any right to life that the foetus poses is not absolute.[[364]](#footnote-365) Therefore, it can be said that the women’s interests have been regarded as being of a higher value than the unborn life of the foetus. This conclusion, however, should be understood in the context of this case, or putting it differently, it does not necessarily mean that there is a specific hierarchy of values under the Convention.

In *Boso*, the applicant was married, and his wife decided to have an abortion despite his opposition. The applicant’s wife argued that she had acted in accordance with section 5 of law no. 194 of 1978. According to the relevant law, she, by herself, had the right to decide whether to carry an abortion. The Court noted that:

Any interpretation of a potential father’s rights under Article 8 of the Convention when the mother intends to have an abortion should above all take into account her rights, as she is the person primarily concerned by the pregnancy and its continuation or termination.[[365]](#footnote-366)

In fact, according to the relevant Italian law: a woman is allowed to have an abortion before the twelfth week ‘…where continuation of the pregnancy, childbirth or motherhood might endanger her physical or mental health, in view of her state of health, her economic, social or family circumstances’.[[366]](#footnote-367) Importantly, the Court concluded that the abortion in the instant case was performed in accordance with Italian law. The Court, indeed, confirmed that an abortion can be carried out not only to protect the woman’s health but also to respect the woman’s economic, social or family circumstances. In other words, the interests of the pregnant woman were considered equally important as the right to life of the foetus. Hence, a conclusion can be drawn from *Boso v. Italy* that when the interests of two future parents at stake, a pregnant woman’s right of procreative autonomy prevails over the interests of the potential father.

The decision of the ECtHR in *Vo v France* provides a useful insight into the position of the Court regarding the question of the foetus in the abortion debate under the Convention. In the case of *Vo. v France*, the question was whether an unborn child should be regarded as a person for the purpose of Article 2 of the ECHR.[[367]](#footnote-368) The applicant, who received substandard medical care during her pregnancy, went to hospital, but because of an error of a doctor, her pregnancy had to be terminated. This case was about whether, beyond cases where an abortion had been requested by the pregnant woman, harming a foetus ought to be rendered as a criminal offence according to Article 2 of the Convention. The Court in reiterating its position stated that ‘the unborn child is not regarded as a ‘person’ directly protected by Article 2 of the Convention and that if the unborn do have a ‘right’ to ‘life’, it is implicitly limited by the woman’s rights and interests.’[[368]](#footnote-369)

In this instance, the Court explicitly declined to consider whether the foetus enjoys the protection of the right to life under Article 2 of the Convention. While the Court showed its unwillingness to revisit the question of when human life begins, the decision clarifies the legal status of the foetus under the Convention. This means that the Court deliberately refused to engage in discussions regarding the question of when human life begins. The Court has, then, committed itself to the opinion that the right to life of the foetus is not protected under Article 2 ECHR.

In fact, there are only four rights in the Convention which can be considered as absolute in the sense that their infringement can never be justified under the Convention, even in the case of a state of emergency: the right not to be tortured under Article 3; the right not to be held in slavery or servitude under Article 4; the right not to be convicted for conduct which was not against the law at the time it occurred and the right not to have a heavier penalty imposed for a conviction than the one applicable at the time the crime was committed under Article 7 of the Convention.[[369]](#footnote-370) This is important because defining the scope of the absolute rights and obligations under the Convention does not rely on any national discretion. Hence, the absolute rights allow no discretion since they cannot be absolute if their application subject to different interpretations by the States Parties.

This suggests that if the foetus really did have a right to life, then neither the ECtHR nor the Commission would have been free to adopt a neutral stance. Both the Commission and the Court deliberately refused to recognise a right to life of the foetus for the purpose of Article 2 ECHR, otherwise if the foetus was entitled to the same life as anyone else, then the Contracting States could not have been granted a certain degree of discretion. Thus, if a foetus had rights under the ECHR, they would carry the same legal force as those of the pregnant woman.

However, a foetus and a person do not have the same legal status in the context of the ECHR. From the cases mentioned above, a foetus has not been considered to be a person directly protected by Article 2 of the Convention. It is reasonable to argue that a right to life of the foetus has been protected neither by the Commission nor by the Court so far. This does not mean that a foetus cannot enjoy any protection under the Convention. The Court in *Vo*, for instance, stated that ‘the Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child’.[[370]](#footnote-371) While the foetus might be deemed to have rights under the Convention, an equal right to life as that born human beings have not recognised by the Strasbourg Organs, and thus Article 2 does not include an unborn foetus. In a nutshell, in order to be protected under Article 2, the foetus must be born. Hence, a foetus is not considered as a legal person under the Convention, otherwise it would be difficult to justify an abortion.

If, the foetus is not a legal person, then, a pregnant woman has a right to decide what happens in her body or, in other words, any reasonable balancing of Articles 2 and 8 comes out in favour of the recognition of some form of right to abortion. In this regard, applicants in cases concerning the issue of abortion have invoked not only Article 2, but also Article 8, that protects private and family life. In the *Evans* case the Grand Chamber affirmed that respect for private life ‘incorporates the right to respect for both the decisions to become and not to become a parent’.[[371]](#footnote-372) The Court tends to assess abortion cases, which are brought by women challenging restrictions on their access to abortion, from the perspective of private life under the Article 8 of the Convention.

As this section has highlighted, a foetus is not a person with rights of its own under the ECHR. This means that the woman’s interest in deciding on her body and life has been primarily ensured by the Strasbourg Court against the rights of the foetus and the partner.[[372]](#footnote-373) There are a number of cases in which applicants have raised the question whether limitations on access to abortion constitute a violation of Art 8 ECHR. Indeed, the majority of the Court’s decisions regarding reproductive rights rely on Article 8 of the Convention.[[373]](#footnote-374)

## A Moral Reading of Article 8: The Case of *Tysiac v Poland* and its Legacy

The *Tysiac* ruling has a significant importance for three main reasons. First, it can be seen as a representative case in the abortion context under the Convention.[[374]](#footnote-375) A reason for this is that it clarifies the juridical attitude of the ECtHR towards abortion under Article 8 ECHR.[[375]](#footnote-376) Second, it affirms that ‘women’s right to access legal abortion may not be illusory’.[[376]](#footnote-377) This means that once states permit abortion under some circumstances, they cannot in practice put obstacles in the way. Third, the Court decided for the first time that Article 8 ECHR procedural obligations require Poland ‘to provide a comprehensive legal framework regulating disputes between pregnant women and doctors as to the need to terminate a pregnancy in cases of threat to a woman’s health’.[[377]](#footnote-378) Within this step, the Court recognised for the first time that Contracting States have an obligation to create mechanisms for obtaining an abortion where it is legally available. It is therefore argued that this decision makes a serious contribution to the abortion jurisprudence, hence it is considered as a ‘major symbolic victory’ in the context of Polish women’s rights.[[378]](#footnote-379)

However, Cornides notes, in his provocative article, that ‘the ECtHR simply has failed to find a link between the facts and the law’ and argued that the decision should be considered as ‘an attempt to promulgate a full-fledged ‘right to abortion’- not openly but through the back door’.[[379]](#footnote-380) He concluded that ‘it is difficult to believe that this is the meaning the authors of the Convention attributed to Article 8 when they drafted it in 1950’.[[380]](#footnote-381) In addition to this, one of the Judges, Javier Borrego Borrego, said in his dissenting Opinion that: ‘To my regret, I cannot agree with the opinion of the majority in this case… I consider that the Court’s decision in the instant case favours ‘abortion on demand’… I would never have thought that the Convention would go so far, and I find it frightening’.[[381]](#footnote-382) Considering the above picture, this section analysis the Court’s landmark judgement in *Tysiac*. In order to do this, this section uses Dworkin’s moral reading as a theoretical lens to read the Court’s judgement.

### 3.1) Facts and Decision

The applicant, Alicja Tysiac, was a Polish woman who had suffered from severe myopia since 1977. She already had two children, both born by Caesarean, and the applicant became pregnant for the third time in 2000. She was examined by three ophthalmologists, and all of them stated that ‘due to pathological changes in the applicant’s retina, the pregnancy and delivery constituted a risk to her eyesight’.[[382]](#footnote-383) They concluded that there would be a serious risk to her eyesight if she carried the pregnancy to term. As a result, the applicant was challenging the availability of medical termination of pregnancy due to the risk of further damage to her eyes.

However, despite the applicant’s request, they refused to issue a certificate for the pregnancy authorising termination on therapeutic grounds, stating that the retina might detach itself as a result of pregnancy, but this was not certain. Seeking further advice, the applicant, subsequently, achieved to obtain a certificate stating that, given her two previous deliveries by caesarean section, the pregnancy constituted a threat to the applicant’s health as there was a risk of rupture of the uterus. During her second month of pregnancy her eyesight was examined, and declined further. Subsequently, she had an appointment with gynaecologist, Dr R.D with a view to obtaining the termination of her pregnancy. Dr R.D examined the applicant visually *and for a period of less than five minutes, but did not examine her ophthalmological records*, and noted that there were no grounds for therapeutic termination of the pregnancy and concluded that the applicant should give birth by caesarean section. Thus, her pregnancy was not terminated.

Following the delivery of her third child by caesarean, the applicant’s eyesight seriously deteriorated.[[383]](#footnote-384) According to a medical certificate issued by an ophthalmologist, on 14 March 2001, such deterioration had been caused by recent haemorrhages in her retina. The applicant was also informed by the ophthalmologist, that the changes to her retina were at an advanced stage, and there was no possibility of repair by surgical intervention, subsequently, the applicant faced the risk of blindness. Consequently, on 13 September 2001, the disability panel informed the applicant to be considered as disabled and held that she required constant care and a daily basis assistance. The applicant filed a suit against Dr. R.D., claiming that she had been prevented by him from having her pregnancy terminated on a medical ground.

The Court considered to assess this case by examining the respondent state’s positive obligations with respect to Article 8.[[384]](#footnote-385) The Court found that the Polish legal framework failed to provide a comprehensive and effective mechanism to distinguish between cases where there is agreement, between the pregnant woman and her doctors or between the doctors themselves, and cases where there is no agreement. In other words, there was no procedural safeguard and framework to address and resolve such disagreement.

 A need for such safeguards becomes all the more relevant in a situation where a disagreement arises as to whether the preconditions for a legal abortion are satisfied in a given case, either between the pregnant woman and her doctors, or between the doctors themselves. In the Court’s view, in such situations the applicable legal provisions must, first and foremost, ensure clarity of the pregnant woman’s legal position.[[385]](#footnote-386)

Such safeguard must contain: i) an independent body of review ii) a guarantee that the woman’s views will be considered iii) decisions issued in writing iv) decision-making within a time period that is reasonable under the circumstances. Having said that, in the Tysiac case, there was disagreement between the applicant and her doctors, and as a result of such disagreement, a situation of prolonged uncertainty had been created for the applicant. Due to the lack of clarity of the pregnant woman’s legal position, the Court concluded that the state failed to fulfil its positive obligation to protect the applicant.

It has to be stressed that the Court recognised for the first time that Contracting States have an obligation to create mechanisms for resolving disagreements between medical practitioners and women with respect to procurement of a legally allowed abortion. While the Court was satisfied that legal abortion was already allowed under specific circumstances by Polish law, it created a positive obligation on the State to ensure that women can access legal abortion. As Joanna Erdman has observed, in *Tysiac*, the Court neither addressed whether the applicant was entitled to an abortion under the relevant Polish law, nor whether the Convention itself recognises any right to abortion.[[386]](#footnote-387) Rather, the Court imposed a positive obligation on the state to secure effective respect for the private life of any pregnant woman who is entitled to have a legal abortion. How, then, can this be read in light of Dworkin’s moral reading?

As discussed in the methodology chapter, Dworkin introduces the moral reading of the US Constitution as follows: ‘I should make plain first, however, that there is nothing revolutionary about the moral reading in practice. So far as American lawyers and judges follow any coherent strategy of interpreting the Constitution at all, they already use the moral reading, as I hope this book will make plain’.[[387]](#footnote-388) Dworkin then argues that judges ‘instinctively’ have to make ‘fresh’ moral judgements when they decide concrete controversies. A reason for this is that the Constitution embodies abstract moral principles that ‘can only be applied to concrete cases through fresh moral judgements’.[[388]](#footnote-389)

Dworkin then advocates the moral reading on three main grounds: the abstract language of the Constitution, the intentions of the drafters, and the constitutional integrity. Constitution interpretation, under the moral reading, then, must begin in what the drafters said. In order to understand the context in which the text of the Constitution written, ‘we turn to history to answer the question of what they intended to say… history is therefore plainly relevant’.*[[389]](#footnote-390)* Finally, the moral reading demands that judges, in deciding a constitutional case, must apply the relevant principles consistently and their judgements must ‘fit’ the dominant reasoning of past constitutional adjudication.

### 3.2) The Language of the Convention: The Meaning of Private Life

In Dworkin’s view, as discussed in the methodology chapter, the US constitution, and most contemporary constitutions, have provisions which contain abstract moral clauses, namely ‘rights’ or ‘equal protection’.[[390]](#footnote-391) Dworkin considers, for instance, the ‘right’ of free speech as ‘exceedingly abstract moral language’.[[391]](#footnote-392) In the words of Dworkin: “The First amendment refers to the ‘right’ of free speech, for example, the Fifth Amendment refers to the process that is ‘due’ to citizens, and the Fourteenth to protection that is ‘equal’.”[[392]](#footnote-393) Such clauses, according to the moral reading, should be understood as abstract moral principles, which must be interpreted through the exercise of a moral judgement. This means that one should not interpret a constitutional issue about how an individual’s privacy can be protected without addressing the question of what the moral notion of ‘private life’ entails. In summary, contemporary constitutional texts declare individual rights, such as the right of free speech or the right of respect for private life, against the government in very broad and abstract language. According to the moral reading, the generality and abstractness of the language suggests that interpreters should base their decisions on the best interpretation of the abstract concepts and not defer to the specific conceptions that drafters happened to have.*[[393]](#footnote-394)*

One should accept that the ECHR is not a constitutional document, rather it is an international treaty which was drafted by sovereign states. Yet, many provisions of the ECHR are written in broad and abstract language, allowing interpretations that aim at the objective moral truth about the content of the ECHR rights. Paul Mahoney, the former judge of the ECtHR, noted that ‘the open textured language and the structure of the Convention leave the Court significant opportunities for choice in interpretation; and in exercising that choice, particularly when faced with change circumstance and attitudes in society, the Court makes new law’.[[394]](#footnote-395) Similarly, Rudolf Bernhardt, the former President and Vice-President of the ECtHR, said that ‘the ECHR can be more usefully compared to a national constitutional court. It has to decide cases in which people are asking for a judgement against their own state’.[[395]](#footnote-396) This means that the Convention rights are, indeed, subject to change and evolve in their understanding according to present day conditions. Therefore, this dynamic aspect of the judicial review plays a key role not only in the US Constitution, but also under the Convention system.[[396]](#footnote-397)

As Van Dijk and Van Hoof have observed:

The Standards of the Convention are not regarded as static, but as reflective of social changes. This evaluative approach towards interpretation of the Convention implies that the Commission and the Court take into account contemporary realities and attitudes, not the situation prevailing at the time of drafting of the Convention on 1940-50.[[397]](#footnote-398)

One can say that the ECHR defines individual rights in very broad and abstract language. Indeed, one of the significant features of the Convention’s rights is that most of them were written in a way a broad interpretation of the protection it contains.[[398]](#footnote-399) For instance, Article 8(1) ECHR provides that: ‘Everyone has the right to respect for his private and family life, his home and his correspondence’. As the language suggests, under the moral reading, the notion of ‘private life’ should be interpreted in the best possible way in light of the moral value that underpins the abstract concept.

In *Tysiac*, the Government first disputed that pregnancy and its interruption did not pertain uniquely to the sphere of the applicant’s private life under Article 8. The Government supported this by referring to the Commission decision, *in Bruggemann and Scheuten v Federal Republic of Germany*, which stated that: ‘pregnancy cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant, her private life becomes closely connected with the developing foetus’.[[399]](#footnote-400) In addition, the Commission took the view that there had been no violation of Article 8 of the ECHR since ‘not every regulation of the termination of unwanted pregnancies constitutes an interference with the right to respect for the private life of the mother. Article 8 (1) cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother’.[[400]](#footnote-401) By relying on this understanding of the concept of private life as to the applicability of Article 8 of the Convention in *Tysiac*, the Government implied that pregnancy cannot be thought as belonging solely and exclusively to the sphere of private life.[[401]](#footnote-402) This originalist position seems based on the assumption that as the Convention does not mention it, the regulation of pregnancy does not amount to an interference with the applicant’s rights protected by Article 8, and therefore does not have to be justified under Article 8 (2). This originalist interpretation of Article 8 of the Convention, the right to a private and family life, has been supported by Lord Sumption:

This [Article 8] perfectly straightforward provision was originally devised as a protection against the surveillance state by totalitarian governments. But in the hands of the Strasbourg court it has been extended to cover the legal status of illegitimate children, immigration and deportation, extradition, aspects of criminal sentencing, abortion, homosexuality, assisted suicide, child abduction, the law of landlord and tenant, (…). None of these extensions are warranted by the express language of the Convention, nor in most cases are they necessary implications.[[402]](#footnote-403)

The Court, however, made clear that the legal status of abortion falls within the right to respect for private life under Article 8.[[403]](#footnote-404) While the relationship between the right to privacy and personal autonomy has been subject of debate under the Convention, the Court explicitly stated that ‘private life’ is a broad and abstract term, which contains the right to personal autonomy, including a person’s physical and psychological integrity.[[404]](#footnote-405) In adopting this approach, the Court reasoned that ‘private life includes a person’s physical and psychological integrity and that the State is also under a positive obligation to secure to its citizens their right to effective respect for this integrity’.[[405]](#footnote-406) This means that the Court placed significant emphasis on the physical integrity of the applicant under Article 8:

While the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must – in case of a therapeutic abortion – also be assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be.[[406]](#footnote-407)

It is possible to say from this passage that the positive obligations arising from the right to physical integrity were considered in an abortion context under the Convention. What this judgement makes clear is that Article 8 of the ECHR, with respect to abortion, entails positive obligations on the states to protect the physical integrity of individuals within their jurisdictions. The Court’s position on this is that a broader reading of Article 8 ECHR is crucial in order to guarantee the physical integrity of the applicant. Thus, the Court concluded that the regulation of abortion constitutes an interference with the right to respect for one’s private life as protected by Article 8 ECHR.

This understanding of the notion of private life could be interpreted as a significant shift in the Court’s case law.[[407]](#footnote-408) A reason for this is that in *Bruggeman and Scheuten v Germany*, the Commission took the view that ‘Art. 8(1) cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother’.[[408]](#footnote-409) According to the Commission, since private life in Article 8(1) does not always cover pregnancy, not every regulation of pregnancy constitutes an interference with the right to respect the private life of the mother.[[409]](#footnote-410) The Commission has been criticised for not taking a strong and a clear position on pregnancy being a matter of private life.[[410]](#footnote-411)

Significantly, as one of the Judges, J.E.S Fawcett, pointed out in his dissenting opinion:

I do not agree with the reasoning or conclusion of the Commission on Art. 8 which is in opinion to be applied to the facts before us in the following way: ‘Private life’ in Art. 8(1) must in my view cover pregnancy, its commencement and its termination: indeed, it would be hard to envisage more essentially private elements in life. Pregnancy, its commencement and its termination, as so viewed is still part of private and family life, calling for respect under Art. 8(1).[[411]](#footnote-412)

However, as a consequence of the Court’s findings regarding the notion of private life in *Tysiac*, it has now explicitly abandoned the approach taken by the Commission. In other words, with respect to the scope of Article 8 in relation to abortion, a shifting moment in the case law was in *Tysiac* when the Court concluded that the Convention imposed positive obligations on the state to ensure the physical integrity of individuals. This means, amongst other things, that the regulation of abortion constitutes an Interference with private life, and thus it has to be justified under Article 8(2). In adopting this jurisprudential shift, the Court placed significant emphasis on the object and purpose of the Convention. The Court therefore took into account that rights should be ‘practical and effective not theoretically and illusory’[[412]](#footnote-413) under the Convention and based its decision on the principle of ‘practical and effective rights’.[[413]](#footnote-414)

### 3.3) The Object and Purpose of the Convention: The Principle of Practical and Effective Rights[[414]](#footnote-415)

Since the ECHR is an international treaty, it is subject to the rules of interpretation of treaties set out in the Vienna Convention on the Law of Treaties (VCLT), which codifies ‘the means of interpretation admissible for ascertaining the intention of the parties’. This intention of parties, however, is not based entirely on the intention of an individual party.[[415]](#footnote-416) In the words of Judge Stephen Schwebel:

The intention of the parties’, in law, refers to the common intention of both parties. It does not refer to the singular intention of each party which is unshared by the other. To speak of ‘the’ intention of ‘the parties’ as meaning diverse intentions of each party would be oxymoronic.[[416]](#footnote-417)

In the context of the ECHR, the common intention of the parties can be identified in light of the ECHR’s object and purpose.

Similarly, according to the moral reading, the Convention is to some extent restricted to what the drafters intended it to be, and their intentions should be understood as broad and abstract convictions of principle, rather than narrow views about specific issues. In Dworkin’s view, the moral reading is the most faithful interpretation of the constitutional text. According to the moral reading, the faithful interpretation of the Convention depends on the ECHR’s object and purpose. The scope of the constitutional right, under the moral readings, is recognised as a dynamic quality ‘because it is not fixed by reference to conceptions which prevailed at the time of their formulations’.[[417]](#footnote-418) This suggests that the moral reading entails an evolutive interpretation, which can be compatible with the Court’s general method to legal interpretation, namely ‘the living instrument’ approach.[[418]](#footnote-419) The Court’s use of the living instrument method therefore favours an evolutive approach over one that is either purely intentionalist or textualist.

The Court noted first of all that the primary purpose of Article 8 ECHR is to protect the individual against arbitrary interference by public authorities. It went on to say that ‘there may also be positive obligations inherent in an effective ‘respect’ for private life’.[[419]](#footnote-420) The Court then elaborated on the nature of these positive obligations, which may, according to the Court, involve ‘the adoption of measures designed to secure respect for private life…including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals’ rights and the implementation, where appropriate, of specific measures’.[[420]](#footnote-421) In fact, this is well-established case law on Article 8. In other words, the Court relied on its well-established case law to provide the existence of a positive obligation to safeguard the applicant’s right to respect for her private life. That is to say that the crucial question, in the present case, to be answered was not the existence of positive obligations as such. Rather, it is the question of whether the Polish State has done enough to comply with its positive obligations *in the context of abortion*.[[421]](#footnote-422)

The following quotation shows explicitly the Court’s main approach in the present case:

Having regard to the circumstances of the case as a whole, it cannot therefore be said that, by putting in place legal remedies which make it possible to establish liability on the part of medical staff, the Polish State complied with the positive obligations to safeguard the applicant’s right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion.[[422]](#footnote-423)

Indeed, within this step, the Court framed the issue as whether Polish authorities failed to comply with their positive obligations to protect the applicant’s right to respect for her private life with regard to abortion under Article 8 ECHR.

Moreover, in the case of a positive obligation in this context, the Court has accepted that the notion of ‘respect’ is not clear. It reasoned that ‘having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion’s requirements will vary considerably from case to case’. Nevertheless, the Court highlighted that the rule of law as one of the core principles of a democratic society is inherent in all the Articles of the ECHR.[[423]](#footnote-424) This fundamental principle, according to the Court, must provide a certain degree of protection against the arbitrary interferences by public authorities with the rights protected by the ECHR. In the present case, since the Court attached a particular importance to the idea that ‘the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective’[[424]](#footnote-425), the requirements of the rule of law must then provide practical and effective protections with regard to the issue of abortion. That is to say that the Court based its broad interpretation of Article 8 of the ECHR on the reference to the principle of the rule of law. The Court therefore showed its willingness to invoke the moral principles about political decency and justice.

The Court, finally, noted that ‘while Article 8 contains no explicit procedural requirements, it is importantfor the effective enjoyment of the rights guaranteed by this provision thatthe relevant decision-making process is fair and such as to afford duerespect to the interests safeguarded by it’.[[425]](#footnote-426) While the Court acknowledged that the text of Article 8 includes no procedural obligations, it recognised that the effective enjoyment of the right to respect for private life, *in regards to abortion*, may require positive obligations for the state. This recognition, according to Mary Donnelly, presents ‘a better foundation for the law in respect of autonomy than the traditional legal approach to autonomy as simply matter of non-interference’. [[426]](#footnote-427) Indeed, the Court confirmed that there is a link between the fairness of the relevant decision-making process, and the effective enjoyment of the rights guaranteed by Article 8. Additionally, it should be pointed out that such link has been established based on the principles of ‘fairness’ and ‘rule of law’.

One can say that the Court implicitly engaged in moral reasoning to interpret the Convention in light of its object and purpose rather than its original meaning. This is because the starting point for the Court’s analysis was to emphasis the primary purpose of Article 8. The Court noted that ‘the essential object of Article 8 is to protect the individual against interference by public authorities’.[[427]](#footnote-428) In its reasoning, the Court, first, found a close connection between the object and purpose of Article 8 and the effective enjoyment of the rights safeguarded by this provision.[[428]](#footnote-429) Second, the Court took into account the object and purpose of the Convention by reiterating that ‘the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective’. Therefore, the effective respect for the applicant’s private life and her physical integrity, in the context of abortion, remain central to the Court’s reasoning in the *Tysiac* case. In light of this reasoning, it appears the court has placed essential importance on the ‘object and purpose’ as a method of interpretation. Hence, the positive obligation, recognised in *Tysiac* to secure effective access to abortion under Article 8, can be justified in light of what Dworkin calls ‘the moral reading’.

One can say that the Convention evolves through the interpretation of the Court. With regard to abortion, as discussed above, the ECHR jurisprudence recognises that legislation regulating the interruption of pregnancy touches upon the sphere of private life, hence it falls under the scope of Article 8.[[429]](#footnote-430) In addition to this, the Court has also recognised that the effective enjoyment of the right to respect for private life, in regard to abortion, may require positive obligations for the state.[[430]](#footnote-431) These recognitions are grounded based on the abstract principles such as the rule of law, and therefore they illustrate that the moral reading has already been used by judges of the ECtHR. A reason for this is that instead of searching to the historical intentions to identify the object and purpose of the Convention, the Court identified these elements in light of the abstract moral principles, the rule of law. Therefore, the moral reading has a capacity to provide a theory -a set of moral lenses- in order to make sense of the evaluative interpretation of the ECtHR. As explained in the methodology chapter, Dworkin’s legal interpretivism, then, may provide a comprehensive theoretical framework for the understanding of the ECHR.

It has to be stressed that women’s ability in obtaining safe and legal abortion is restricted not only in law but also in practice. This may pose a serious threat to women’s reproductive rights in practice. Additionally, this can be considered as a deliberate attempt to deny women’s access to abortion services in Poland where legislations for legal abortion already exist. In two recent judgements, the ECtHR specifically addressed the issue of conscientious objection and access to abortion services. The first time, the ECtHR has ruled that states have a positive obligation to regulate the use of conscientious objection in a reproductive health and access to care. Thus, the Court wants to ensure that the conscientious objection of doctors does not in practice prevent women’s right of access to safe and legal abortion in Poland. The next section therefore discusses the issue of conscientious objection invoked by health professionals in the abortion context

## Dworkin’s Argument on Abortion

Dworkin’s moral disagreement argument concerning abortion, developed in *Life’s Dominion*,[[431]](#footnote-432) is presented in that work as the lens for the framework of his substantive argument. The framework of Dworkin’s substantive argument on abortion runs as follows: the real disagreement over the morality of abortion derives from different interpretations about the intrinsic value of human life. Dworkin argued that people’s opinions about the intrinsic value of human life essentially derive from their religious convictions, and therefore the moral debate about abortion arises from religious disagreements. Thus, according to Dworkin, the moral debate over abortion is about how to respect the intrinsic value of human life.

Importantly, this allows Dworkin to propose a solution to this debate by recourse to second-order political principles of state neutrality. Dworkin proposes that since the disagreement over the morality of abortion is about how to respect the intrinsic value of human life, the state should be neutral in its treatment of individuals holding different understandings of the intrinsic value of human life. The idea of state neutrality should be understood as holding that the justifications of state acts ought to be neutral with respect to the different controversial views. It will be the task of the last section to examine more closely the nature of the abortion disagreement, in the context of the ECHR, through the lens of Dworkin.

As mentioned above, Dworkin argued that people’s opinions on abortion, essentially derive from their religious convictions, and therefore the debate about abortion arises from religious disagreements.[[432]](#footnote-433) Subsequently, he explains that the crucial issue in the abortion debate is that whether and to what extent contracting states are allowed to impose on everyone an official interpretation of the inherent value of life. People’s belief about such value should be understood, as Dworkin argues, ‘as essentially religious belief’.[[433]](#footnote-434) He explains that people’s religious convictions play a key role in defining their personality, and ‘people of self-respect must insist on deciding such issues for themselves, and a fully legitimate political society will therefore not impose any single view collectively upon them’.[[434]](#footnote-435) Dworkin thus asserts that this is what really lies at the heart of the abortion debate.

A number of cases in Strasbourg have raised the question whether the freedom of conscience of medical professionals, in the professional context, can be considered as a legitimate ground to refuse certain services.[[435]](#footnote-436) In other words, whether patients can be prevented from obtaining access to safe abortion services, to which they are allowed under the applicable law, on grounds of conscience. It is worth noting that in *Tysiac v Poland, RR v Poland and P. and S. v Poland*, the applicants, to a large extent, fell within a recognised national exception within which abortion was legally available. In two of these cases, *RR v Poland* and *P. and S. v Poland*, the ECtHR discussed a systematic denial of women’s reproductive autonomy and health services on the grounds of the freedom of conscience of medical professionals. These two cases, while slightly different, both address the regulation of the practice of conscientious objection in a reproductive health care setting. This section, therefore, aims to shed new light on the Court’s approach regarding conscientious objection to abortion.

### 4.1) Conscientious Objection: The Systemic Denial of Women’s Right to Access Legal Abortion

On 26 May 2011, the ECtHR delivered its landmark judgement in *R.R. v Poland*. The Court held that there had been violations of Article 3 (right to be free from inhuman and degrading treatment), and Article 8 (right to respect for private and family life). It reasoned that Polish domestic law did not contain any effective mechanism, which would have enabled the applicant to decide whether to seek a lawful abortion. The facts of *R.R. v Poland* is as follows: a pregnant woman who was suspected of having a severe genetic abnormality in the foetus, wanted access to prenatal testing during her pregnancy.[[436]](#footnote-437) She told the doctor that if the suspicion proved to be true, she wished to have a termination of pregnancy. Although the relevant information services were legal and available under Polish Law, the applicant was ‘denied adequate and timely medical care in the form of prenatal genetic examinations’ by doctors.[[437]](#footnote-438) When she subsequently got her test results – which confirmed that the foetus had serious congenital defects which may adversely affect the development of the child- it was too late to have a lawful abortion according to Polish law. Subsequently, she was forced to give birth to a girl with turner syndrome. The Court considered the case under Article 3 and 8 of the Convention, and consequently, found violations of both of these provisions.

It has to be stressed that the relevant information services were legally available under Polish law. However, *RR’s* demand for prenatal examination was refused by doctors due to the fact she was considering abortion. For instance, the applicant was informed that the hospital categorically refused to perform abortions and that ‘no abortions had ever been performed there for the last 150 years’.[[438]](#footnote-439) Indeed, the medical professional explicitly denied the woman any health services and invoked the conscience clause in which, according to the Polish Medical Profession Act, doctors are permitted to decline to carry out a medical service on grounds of conscientious objection.[[439]](#footnote-440) Given these statements, one can assume that the applicant’s demand to the access of a diagnostic service was refused by doctors in the name of religious convictions.[[440]](#footnote-441)

The 2012 decision of *P. and S. v Poland* provides important findings to clarify the Court’s position in this context. In *P. and S. v Poland*, the applicants were a daughter and her mother.[[441]](#footnote-442) The first applicant, P., was raped at the age of fourteen and became pregnant. Since her pregnancy resulted from rape, she had a right to a lawful abortion under Polish law. However, on contacting three different hospitals, the applicants were given contradictory and inaccurate information concerning the procedural requirements of obtaining a lawful abortion. In fact, she and her mother were manipulated and harassed by doctors, members of anti-abortion organisations, and Catholic priests. In addition, doctors invoked conscientious objection without referring the applicant to another hospital. In this respect, the Court made the following observations:

after that communiqué the first applicant was contacted by various third parties who sent numerous text messages to her urging her to abandon her intention to have an abortion. The doctors at the Warsaw hospital informed the applicants that a lot of pressure had been put on the hospital with a view to discouraging it from carrying out the abortion. That hospital had received numerous e-mails from persons criticising the applicants for their intention to have recourse to an abortion. In the evening of 4 June 2008 an unidentified woman went to the first applicant’s room and tried to convince her to continue with the pregnancy. When the applicants were leaving that hospital on 5 June 2008 they were accosted by anti-abortion activists.[[442]](#footnote-443)

Eventually, the applicant was permitted by the Ministry of Health to obtain an abortion in a hospital approximately 500 kilometres away from their home. While the abortion was lawful, it was carried out in a clandestine manner. The first applicant, for instance, was not officially registered as a patient and she was provided no information on post-abortion care. Consequently, both applicants complained to the ECtHR of a violation of their rights to respect for their private and family life.

The Court first addressed the issue of conscientious objection, which played a pivotal role in the degrading treatment of the applicants.[[443]](#footnote-444) In this regard, the Court reaffirmed its stance from *R.R.* that where a State allows for legal abortion ‘it must not structure its legal framework in a way which would limit real possibilities to obtain an abortion’. In the case of *P. and S.* v Poland, the Court went even further and stated that ‘effective access to reliable information on the conditions for the availability of lawful abortion, and the relevant procedures to be followed, is directly relevant for the exercise of personal autonomy’.[[444]](#footnote-445) Consequently, the Court found that there had been a violation of Article 8 of the Convention.

### 4.2) Is Religion a Legitimate Basis to Refuse Legal Abortion?

Referring to Article 9 of the Convention, the Polish Government held in both cases that doctors maintained a right to refuse abortion services on the grounds of conscience.[[445]](#footnote-446) A reason for this is that under Polish law, section 39 of the Medical Profession Act, a doctor is allowed to refuse to carry out an abortion, invoking his or her objections on the basis of conscience. The Government made it clear that one of the main reasons for doctors to reject to provide abortion services is that of conscientious objection. In doing so, the Government also acknowledged that the applicants’ requests for the relevant services were refused due to religiously based conscientious objection by doctors. In both cases, the Polish Government took the view that doctors and health professionals have a right to refuse to carry out abortions not only under Polish law, but also under Article 9 of the Convention.

However, the Court in both cases rejected the Government’s argument. It stated that Article 9 of the Convention does not guarantee ‘each and every act or form of behaviour motivated or inspired by a religion or a belief’.[[446]](#footnote-447) This means that Article 9 of the Convention provides a limited protection in this context. Most importantly, the Court for the first time imposed a positive obligation on the Contracting States to organise their health systems in the context of abortion. In the Court’s own words: ‘States are obliged to organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to service to which they are entitled under the applicable legislation’.[[447]](#footnote-448) This means that Contracting Parties have an obligation under the Convention to regulate healthcare systems so that the freedom of conscience does not prevent a pregnant woman from obtaining legal reproductive rights via their national health care services. This is important because for the first time the Court recognised that Contracting States are obligated to regulate healthcare systems in order to ensure women’s access to safe and legal abortion services.

In fact, the Court acknowledged this point in the case of *Pichon and Sajous v France*,[[448]](#footnote-449) in which it was asked to consider the impact of Article 9 on conscientious objection in the abortion context.[[449]](#footnote-450) In this case the applicants, two pharmacists, argued that their freedom to manifest their religion had been breached as a consequence of their conviction by French authorities for refusing to sell contraceptives to three female customers. The applicants acknowledged that their conduct was motivated by religious reasons and argued that they had a right under Article 9 to refuse to supply contraceptives because of their religious beliefs was inadmissible.

However, the Court rejected the Applicants’ claim, stating that:

as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere.[[450]](#footnote-451)

The Court refused to acknowledge the right to conscientious objection and concluded that there was no interference with the applicant’s rights under Article 9 of the Convention. This means that the right to freedom of religion, as protected under the Convention, can be restricted for the protection of the rights of others, namely women’s reproductive rights. To clarify, this does not suggest that selling an abortive pill is the same thing as performing abortion. Nevertheless, it is possible to identify a common guiding principle that emerges in the Court’s reasoning in this context. The Court explicitly tended to base these decisions on the idea that women’s right to access to reproductive health care, and in particular to abortion services cannot be denied by the health care professionals’ objections on the ground of conscience.[[451]](#footnote-452)

This conclusion is significant for two main reasons. Firstly, in this context, conscientious objection to abortion might be considered as a manifestation of religion or belief. The right to manifest this freedom, then, can be subject to limitations in the abortion context. While the right to hold a belief and the right to manifest it can be subject to restrictions based on the text of the Convention itself, the Court’s conclusion on the primacy of secular professionalism over personal religious beliefs in the abortion context could be interpreted as an important step for women’s reproductive rights.[[452]](#footnote-453) This is important because for the first time the Court attached particular importance to the primacy of secular professionalism in the context of reproductive health care

Secondly, the Court highlighted that the applicants could not give priority to their religious belief over their professional obligations as long as ‘the sale of contraceptive is legal and occurs on medical prescription nowhere other than in a pharmacy’.[[453]](#footnote-454) Put simply, Article 9 does not guarantee all acts motivated by religion and, in particular, medical professionals cannot dictate their religious belief on a woman, who is entitled to a legal abortion, as a justification for their refusal to carry out an abortion. In the context of abortion, this tends to suggest that when states allow abortion services under certain conditions, they might also restrict Article 9 protections.[[454]](#footnote-455)

It should be highlighted that the Court did not approach the Polish cases -*R.R and P. and S.*- as a balancing exercise of conflicting individual rights, i.e. the applicants’ reproductive rights versus the doctors’ right to conscientious objection, but rather emphasised the respondent State’s positive obligations in terms of access to a lawful abortion arising under Article 8 of the ECHR. The Court in *P. and S. v Poland* identified the problem as follows: ‘the unwillingness of numerous doctors to provide a referral for abortion or to carry out the lawful abortion as such constituted evidence of the State’s failure to enforce its own laws and to regulate the practice of conscientious objection’.[[455]](#footnote-456) This also means that the main issue in the Polish cases does stem from neither the individual actions of the health care professionals nor individual doctors, or, put differently, it was not one specific act of interference that was at issue in the Polish cases. The problem, rather, lies in a general obstructive attitude of the State authorities and the unwillingness of numerous health care professionals to provide abortion services.[[456]](#footnote-457)

In fact, Poland is one of the few European countries with a restrictive abortion law under the Convention system. In Poland, many women who are legally allowed to have abortions face serious difficulties in obtaining such services. This is because, a legal abortion has been made practically inaccessible by the unwillingness of the doctors to carry it out.[[457]](#footnote-458) The main reason for this is that the legislature in Poland has been heavily influenced by the Catholic Church.[[458]](#footnote-459) This means that Christianity and the Catholic Church have a key role in the history of Poland’s abortion regime.[[459]](#footnote-460) For instance, in May 2014, more than 3,000 people, most of them medical professionals, signed a ‘Declaration of Faith’ arguing that ‘the primacy of religious over state law and saying they consider abortion and other reproductive services to be against their faith’.[[460]](#footnote-461) More precisely, in Poland, women often have severely limited access to legal abortion services because of the lack of proper regulation of conscientious objection. In other words, the lack of effective implementation of existing abortion laws is a major issue in Poland. As a result, there is a gap between the theoretical right to a lawful abortion and the reality of its practical implementation.[[461]](#footnote-462)

Dworkin notes that:

A state may not curtail liberty, in order to protect an intrinsic value, when the effect on one group of citizens would be special and grave, when the community is seriously divided about what respect for that value requires, and when people’s opinions about the nature of that value reflect essentially religious convictions that are fundamental to moral personality.[[462]](#footnote-463)

It is possible to see that in Poland, there is a strong link between the systematic refusal of doctors to perform legal abortions and their religious motivation.[[463]](#footnote-464) This issue has also been stated by the UN Special Rapporteur on the Right to Health as follows: ‘Healthcare providers’ conscientious objection to involvement in certain health-related procedures is grounded in the right to freedom of religion, conscience and thought’. Similarly, according to the Court’s findings, doctors’ denial of legal abortion services may stem from their religious feelings.

Indeed, in the Polish cases, *Tysiac v Poland, RR v Poland, and P. and S. v Poland*, the main preoccupation of the Court was how existing legal provisions had been affected in practice. In particular, the Court’s specific concerns were the practical difficulties for women in obtaining abortion services where there were legally available. In other words, the Court focused on the practicality and availability of lawful abortion and imposed a positive obligation on the State to take the necessary measures to enable a pregnant woman to effectively exercise her right of access to legal abortion. This, firstly, demonstrates the Court’s willingness to provide and ensure that legal abortion is accessible when it has been legalised by the state, and secondly, but equally as important, that Article 8 has already been interpreted in a very wide and extensive manner.[[464]](#footnote-465)

Taking into account the above arguments, the Court’s conclusions in the Polish cases should be understood as a response to the systemic or structural problems of Poland’s health care and legal system. In the Court’s own words: ‘The State had failed to take appropriate measures to address the systemic and deliberate violations which had breached the applicants’ right to respect for their private life’.[[465]](#footnote-466) That is to say, the Court found that doctors’ denial of legal abortion services based on their moral and religious objections has a significant role in the continued violations regarding reproductive rights in Poland. In addition, the UN Special Rapporteur on the Right to Health stated that ‘women in Poland face numerous obstacles in accessing abortion services even if they are legally entitled to an abortion’.[[466]](#footnote-467) Even in those rare occasions where abortion can be legally obtained, it seems that it is rarely performed. Therefore, Polish authorities have often failed when it comes to providing and making abortion accessible and practical.

## Conclusion

This chapter explored the court’s jurisprudence concerning abortion through the lens of Dworkin. It is possible to say that the question of when life begins is a controversial issue, on which the Court has intentionally taken an equivocal approach. This means that the Strasbourg Organs’ decisions does not provide a direct answer to the question of whether the foetus is a person for the purpose of Article 2 of the Convention. Goldman, for instance, has accused the Court of being insufficiently clear to the question of whether the foetus might enjoy protection under Article 2 ECHR.[[467]](#footnote-468)

However, I found evidence that neither the European Commission on Human Rights nor the Court has recognised the foetus as a person under the Convention. While the Court did not take a clear position on when the right to life begins, my findings suggest that the foetus has not been protected as a person for the purpose of Article 2 of the ECHR. For this reason, I believe that this chapter makes an important contribution to the question of whether the foetus is a person under the system of the European Convention on Human Rights. In reaching this conclusion, this section adopted Dworkin’s strategy of constitutional interpretation to examine whether a foetus is recognised as a person and protected by Article 2 ECHR. The main contribution of this chapter is, in this regard, that it shows that Dworkin’s strategy of constitutional interpretation can be a powerful tool for providing an alternative reading of the ECtHR’s case-law on abortion. This might open the door to the possibility of future research.

While, the Contracting States are allowed not to legalise abortion under the Convention System, the Court has recognised that states are obligated to create an accessible framework to provide practical and safe abortion in the cases where abortion is legal. In *Tysiac v Poland*, the Court noted that ‘once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it’.[[468]](#footnote-469) This means that Contracting Parties have an obligation under the Convention to regulate healthcare systems so that freedom of conscience does not prevent a pregnant woman from obtaining legal reproductive health care services. In short, it can be said that once a Contracting State has decided that abortion is legal under certain conditions, the availability and practicability must be guaranteed on such grounds by the state. This finding implies that in certain circumstances, a woman’s right to terminate a pregnancy has been recognised under Article 8 ECHR.

This finding should be understood in the light of the Court’s effectiveness principle that ‘it should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective’.[[469]](#footnote-470) The findings of this chapter help us to interpret how the Court reads the common or abstract intentions of the drafters of the Convention.[[470]](#footnote-471) They showed that that the Court reasoned its use of evolutive interpretation in light of the object and purpose of the Convention rather than looking to the historical intentions of the drafters.[[471]](#footnote-472) Hence, the Court took the view that rights need to be understood beyond the theoretical level and must be exercised in practice.

Indeed, it can be observed that the Convention rights have been interpreted by the Court as subject to evolution in their understanding over time.[[472]](#footnote-473) A Dworkinean reading of the Court’s case-law on abortion indicates that the Court has extended the protective scope of Article 8 to abortion related cases, and that the Court might show less deference to national authorities in cases where women, who are entitled to legal abortion, cannot obtain abortions when their health is at risk.[[473]](#footnote-474)

The moral reading can be considered as an interpretative tool for understanding abstractly drafted ECHR’s provisions such as ‘the right to respect for private and family life’.[[474]](#footnote-475) For instance, what constitutes ‘private life’ under Article 8 ECHR should evolve in line with social developments. This evolutive interpretation method can be seen as the plausible conclusion from the object and purpose of the Convention: in order to guarantee individual rights ‘as practical and effective, rather than theoretical and illusory protections’. Rudolf Bernhardt explains the point this way: ‘…an evolutive interpretation must be possible since it normally corresponds to the object and purpose of the treaty.’[[475]](#footnote-476) Although, a moral judgement has not been explicitly recognised in the context of the ECtHR’s case-law, it remains possible to read the Court’s reasoning in line with a Dworkinian model.

# Chapter Four A DWORKINIAN READING OF THE ECtHR’S CASE-LAW ON ADOPTION BY LGBT INDIVIDUALS AND COUPLES

## Introduction

This chapter examines the European Court of Human Rights’ approach towards adoption by LGBT individuals and couples through a lens provided by Dworkin’s legal interpretivism. In particular, it will make use of insights from Dworkin’s legal interpretivism to analyse the Court’s case-law regarding parenting rights of LGBT individuals and couples. As discussed in the methodology chapter, his legal interpretivism requires in understanding the notion of the ‘interpretive concept’[[476]](#footnote-477) and its attachment with moral values, and in assessing the moral weight of integrity.[[477]](#footnote-478) Dworkin’s legal interpretivism, with its emphasis on equal concern and respect for all, might provide a stronger basis for recognising of LGBT rights.

In the context of the ECHR system, the question regarding the recognition of the rights of same-sex couples has attracted significant attention.[[478]](#footnote-479) In particular, parenting rights of LGBT individuals and couples can be considered as one of the most recurrent themes in the Court’s jurisprudence on LGBT rights.[[479]](#footnote-480) The issue of adoption by LGBT individuals has been addressed by the ECtHR in a number of cases. In the case of *X and others v. Austria*, the Court pointed out that there are three different types of adoption: ‘firstly, a person may wish to adopt on his or her own (individual adoption). Secondly, one partner in a same-sex couple may wish to adopt the other partner’s child, (second-parent adoption). Finally, a same-sex couple may wish to adopt a child (joint adoption)’.[[480]](#footnote-481)

According to the Court then, there are three types of adoption: individual adoption, second-parent adoption and joint adoption.[[481]](#footnote-482) So far, the Court has had to deal with two cases regarding individual adoption by LGBT individuals (*Fretté* and *EB*) and with two cases concerning second-parent adoption by LGBT couples (*Gas and Dubois* and *X and others*). While the first part of the chapter will focus on adoption by LGBT individuals, the second part will focus on adoption by LGBT couples.

The first part of this chapter analyses two decisions by the ECtHR on providing authorisation to adopt to same-sex individuals. It has been argued that *E.B v France* overturned *Fretté v France*, holding that refusing to grant adoption licences to same-sex couples, only because of their sexual orientation, is against the Convention.[[482]](#footnote-483) In *Fretté,* the Court held that the difference in treatment did not amount to discrimination under the Convention, as it was necessary for the best interests of the potential adoptive children. In *E.B.,* however, the Court established that if contracting states permit single people to adopt, adoption applications cannot be rejected for individual applicants on the grounds of their sexual orientation.

The second part of the chapter critically examines the Court’s approach towards parenting rights of LGBT couples and points to the lack of consistency in the Court’s judgments. This critical examination will be performed through the methodological lens provided by Dworkin’s legal interpretivism as integrity. Dworkin’s own legal interpretivism -law as integrity- considers integrity as a distinctive political value. Dworkin’s account of integrity can be understood as something over and above consistency.[[483]](#footnote-484) This concept of law as integrity, according to Dworkin, requires ‘judges to treat our present system of public standards as expressing and respecting a coherent set of principles’.[[484]](#footnote-485) It is worth noting that there is a relationship between the idea of integrity and the ideal of equality. Equality demands that all individuals be provided the needed fundamental freedoms to live the life they think best for themselves.

## Individual Adoption Cases: *Fretté v France*

In the case of *Fretté v France*, Mr. *Fretté*, a homosexual man, applied for authorisation to adopt a child. While French domestic law allows single males to adopt, his application was dismissed by the highest administrative court in France, on the grounds that his choice of lifestyle ‘could pose substantial risk to the child’s development’. Subsequently, the applicant brought his case before the ECtHR and argued that the rejection of his application for authorisation to adopt had been based solely on his sexual orientation. For this reason, he alleged that the decision to dismiss his request for authorisation to adopt a child amounted to arbitrary interference with his private and family life, within the meaning of Article 8 of the ECHR. Therefore, the ECtHR examined the case under Article 14 taken in conjunction with Article 8 ECHR.

In determining whether the French Government had an objective and reasonable justification for the difference in treatment in the present case, the ECtHR first found that the French authorities had pursued a legitimate aim, namely the protection of the health and rights of children.[[485]](#footnote-486) The Court said that there could be no doubt that protecting the health and rights of children were an acceptable legitimate aim.[[486]](#footnote-487) Second, on the question of proportionality, the Court found that a proportionate relationship between the aim pursued and the methods used existed for two reasons. First, the Court observed that the scientific community ‘is divided over the possible consequences of a child being adopted by one or more homosexual parents’.[[487]](#footnote-488) Second, the Court noted that ‘there are wide differences in national and international opinion’ on the issue of whether same-sex couples should be allowed to adopt.[[488]](#footnote-489) Subsequently, the Court remarked on the absence of a common European approach among Contracting States on the relevant issue. Based on these factors, the Court held that a wide margin of appreciation must be allowed to the government in deciding the best interest of the child.

It has to be highlighted that *Fretté v France* was a split decision (four votes to three).[[489]](#footnote-490) The four judges in the majority reached the same conclusion by different justifications. Three concurring judges noted the view that there was no breach of the Convention but on different grounds than the majority. Although Judge Costa concluded that there had been no violation of the Convention, he found it difficult to assess in ‘*abstracto*’ whether the rejection of the French authorities was discriminatory. In short, the Court concluded that ‘if account is taken of the broad margin of appreciation to be left to States in this area and the need to protect children’s best interests to achieve the desired balance, the refusal to authorise adoption did not infringe the principle of proportionality’.[[490]](#footnote-491) Consequently, the Court has found, by a narrow majority, that there had been no violation of Articles 8 and 14 of the ECHR.

### 2.2) Analysis of the Judgment

#### 2.2.1) Admissibility

According to the Court’s case-law, Article 14 cannot be applied unless the facts at issue fall within the ambit of one or more of the provisions of the ECHR. Article 14 is an ‘autonomous’ provision because, as the Court stressed, it can be violated even where the substantive provision relied upon to invoke 14 has not been violated.[[491]](#footnote-492) Before going on to examine how the Court considered this issue in the present case, it is worth briefly demonstrating the jurisprudence of the ECtHR concerning Article 14, that is expressed as follows:

The enjoyment of the rights and freedoms set forth in this European Convention on Human Rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

 According to the Court, Article 14 complements the other substantive provisions of the ECHR.[[492]](#footnote-493) This means that it can only be applied in combination with another right or freedom protected in the Convention and its Protocols. Hence, Article 14 must be pleaded in combination with another Convention right. Yet, the application of Article 14 does not necessarily require a violation of one of the Convention’s rights and freedoms. This autonomous character, for the first time, was recognised by the Commission in the *Belgian Linguistic* Case. The Commission held that:

While it is true that this guarantee has no independent existence in the sense that under the terms of Article 14 it relates solely to “rights and freedoms set forth in the Convention”, a measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature.[[493]](#footnote-494)

While the Strasbourg Court’s approach in dealing with complaints under Article 14 has developed over the years, an example of its recent methodology can be found in the *Kafkaris* case.

The Court reiterates that Article 14 of the Convention has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols. However, the application of Article 14 does not presuppose a breach of one or more of such provisions, and to this extent it is autonomous… A measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature… Accordingly, for Article 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols.[[494]](#footnote-495)

There are two key elements to this interpretation. Firstly, Article 14 comes into play when it is taken together with another Article of the Convention. Secondly, its application does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. This suggests that in order to invoke Article 14, the applicant must build the case that their allegation falls within the ambit of the rights concerned.[[495]](#footnote-496)

In the present case, although the applicant acknowledged that the respect for private and family life did not include the right of any unmarried person to adopt a child, he argued that the rejection of authorisation to adopt had violated his right to respect for his private life without discrimination on the grounds of his sexual orientation.[[496]](#footnote-497) A reason for this is that the refusal of authorisation to adopt had been based on his sexual orientation *alone*.[[497]](#footnote-498) It has to be borne in mind that according to the Court’s case-law, sexual orientation is ‘a most intimate part of an individual’s private life’.[[498]](#footnote-499) The applicant, therefore, maintained that any difference in treatment based on sexual orientation amounted to interference with his private life because ‘it required him to choose between denying his sexual orientation or being penalised, unlike anybody else’.[[499]](#footnote-500)

The Government, however, argued that the decision to reject his application was not due to his sexual orientation alone. According to the Government:

While there was no doubt that the expression ‘choices of lifestyle’ did include sexual orientation, it did not refer to that aspect alone but also covered other factors that tended to indicate that the applicant was not equipped to offer a child a suitable home from a psychological, childrearing and family perspective.[[500]](#footnote-501)

Firstly, the Government while noting that ‘there was no doubt that the expression ‘choice of lifestyle’ did include sexual orientation’ maintained that the rejection was not taken solely on the basis of his sexual orientation.[[501]](#footnote-502) This means that the Government established a link between the applicant’s choice of lifestyle and his sexual orientation. In making this connection, the Government accepted, among other things, that the applicant’s sexual orientation had been a determining factor in refusing his application.

Secondly, the Government argued that Article 8 ECHR ‘did not safeguard aspirations, yet to be fulfilled, to found a family’ and therefore the right to adopt ‘was not included as such among the rights guaranteed by the Convention’.[[502]](#footnote-503) In the Government’s opinion, the Convention does not protect either the right to adopt or the right to found a family. The Government concluded on that basis that the issue did not fall within the scope of the Convention, and therefore Article 8 was not applicable in the instant case.

The Court first accepted the argument that adoption does not fall within the scope of the right to respect for private and family life under Article 8 ECHR. Secondly, it found that the right to respect for family life ‘does not safeguard the mere desire to found a family’.[[503]](#footnote-504) Nevertheless, the Court took into account that French domestic law allows all single persons to adopt children, and that the adoption process includes ‘all the investigations required to ascertain what kind of home the applicant is likely to offer the children from a psychological, child-rearing and family perspective’.[[504]](#footnote-505) Therefore, the Court went on to examine whether, as the applicant argued, his avowed homosexuality had a decisive influence on the rejection by the French authorities.

Subsequently, the Court observed that:

The reason given by the French administrative and judicial authorities for their decision was the applicant's “choice of lifestyle”, and that they never made any express reference to his homosexuality. As the case file shows, however, that criterion implicitly yet undeniably made the applicant's homosexuality the decisive factor.[[505]](#footnote-506)

The Court noted that in order to invoke Article 14, it is enough for the facts of the case to fall within the scope of one or more of the provisions of the ECHR. The Court, while noting that ‘the Convention does not guarantee a right to adopt as such,’ concluded that Article 14 was implicated because ‘the list set out in this provision is illustrative and not exhaustive’.[[506]](#footnote-507) According to the Court, then, ‘there was a difference in treatment based on the applicant’s sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention’.[[507]](#footnote-508) The Court thus concluded that since the applicant’s homosexuality had been a determining factor in rejecting his application, Article 14 of the Convention, taken in conjunction with Article 8, was applicable.

On the one hand, three concurring judges noted that since the Convention does not guarantee a right to adopt, article 14 could not be applied to the case. For instance, Judge Costa (joined by judges Jungwiert and Traja) said that Article 14 ECHR was inapplicable in the instant case because the facts of the case do not fall within the scope of Article 8 ECHR.[[508]](#footnote-509) Costa argued that the decision of the French authorities to refuse a single person the authorisation to adopt a child did not interfere with applicant’s right of respect for private and family life under Article 8 ECHR. He explained, ‘there is no right to [adopt] children and the Convention does not safeguard the desire to found a family, there was in my view no interference by the State in Mr *Fretté*s private or family life’.[[509]](#footnote-510) In Judge Costa’s view, there was no interference with the applicant’s private life, and therefore Article 14 could not be applied to the case, and he concluded that there had been no violation of the ECHR.

On the other hand, with regard to the scope of application of Article 14, Judges Bratza, Fuhraman and Tulkens made two points. First, they said that while Article 8 of the ECHR does not guarantee a right to adoption, ‘Article 14 covers not only the enjoyment of the rights that States are obligated to safeguard under the Convention but also those rights and freedoms that fall within the ambit of a substantive provision of the Convention and that a State has chosen to guarantee’. Second, they stated that although Article 14 ECHR is a non-autonomous right of the Convention, its application does not necessarily require a breach of one of the substantive Convention rights. In order to invoke 14, it is sufficient for the facts of the case to fall ‘within the ambit’ of another Convention right. The majority[[510]](#footnote-511) of the Court found that the complaint fell within the scope of Article 14 in conjunction with Article 8, and therefore the Court went on to examine whether this differential treatment amounted to discrimination under the Convention. In doing so, the Court reinforced the idea that homosexuality is recognised within one’s private sphere under the Convention.[[511]](#footnote-512)

#### 2.2.2) Prejudice or Evidence?

Dworkin, in *Freedom’s Law,* writes:

Superstitions about homosexuality have been exposed and disapproved, many states have repealed laws making homosexual acts criminal, and those laws that remain are very widely regarded as now based on nothing but prejudice.[[512]](#footnote-513)

According to Dworkin, discriminatory laws are ‘inegalitarian’ not because they infringe interests which are particularly important but because it is impermissible to accept prejudice as ‘among the interests or preferences government should seek to satisfy’.[[513]](#footnote-514) This means that discriminatory laws or measures can only be justified if they are not based on prejudiced beliefs at all. Accordingly, an explicit absence of a ‘prejudice-free justification’ makes a law or measure discriminatory. On the contrary, as discussed below, the case of *Frett*é *v France*, established that it is permissible to discriminate against an individual for single adoption on the grounds of his sexual orientation.

In *Fretté*, the Government failed to explain why the applicant had been found unequipped to provide a child a suitable home from ‘a psychological, childrearing and family perspective’.[[514]](#footnote-515) The Government should have provided reasonable evidence (if it existed) to “demonstrate that the applicant’s ‘choice of lifestyle’, his homosexuality, would pose any serious threat to a child’s interests. As for the ground of the child’s interest on which the Government mainly relied, it failed to demonstrate how a child’s interest could be protected by excluding an unmarried homosexual person from adopting the child. This lack of explanation reveals that homosexuality itself has been perceived as a threat to the child’s interests and, therefore seen by the Government as an obstacle to offering a child a suitable home.[[515]](#footnote-516)

On the contrary, three judges, Sir Nicolas Bratza, Fuhrmann and Tulkens noted that ‘In the instant case, prior authorisation to adopt, which may be requested by any single person, was refused to the applicant solely because of his ‘choice of lifestyle’ and not because this choice would pose any actual threat to a child's interests’.[[516]](#footnote-517) Hence, the Government explicitly accepted that the applicant’s sexual orientation, namely his homosexuality had been an important determining factor in refusing his application. Subsequently, the Court reiterated that:

A difference in treatment is discriminatory for the purposes of Article 14 if it ‘has no objective and reasonable justification’, that is if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship or proportionality between the means employed and the aim sought to be realised’.[[517]](#footnote-518)

While the Court ruled that the applicant’s homosexuality was the decisive factor in determining his rejection from the adoption process, it found that the difference in treatment did not amount to discrimination, as it pursued a legitimate and necessary aim. In reaching this conclusion, the Court relied mainly on the fact that there is no consensus on the matter in the Council of Europe member States. The Court explained:

It is indisputable that there is no common ground on the question. Although most of the Contracting States do not expressly prohibit homosexuals from adopting where single persons may adopt, it is not possible to find in the legal and social orders of the Contracting States uniform principles on these social issues on which opinions within a democratic society may reasonably differ widely. The Court considers it quite natural that the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole, should enjoy a wide margin of appreciation when they are asked to make rulings on such matters.[[518]](#footnote-519)

Moreover, the Court went on to consider that the scientific community, namely experts on childhood, psychiatrists and psychologists, was divided over the possible consequences of a child being adopted by a homosexual individual. The Court then focused on the concept of ‘the best interest of the child’ and subsequently accepted the argument of the French government about a lack of scientific consensus over the possible effects on children of being raised by LGBT parents. The Court noted that:

Particular importance must be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent… The scientific community – particularly experts on childhood, psychiatrists and psychologists – is divided over the possible consequences of a child being adopted by one or more homosexual parents.[[519]](#footnote-520)

For this reason, the Court granted France a wide margin of appreciation on the grounds that there was no European consensus on the subject.[[520]](#footnote-521) What this shows, according to Gonzalez-Salzberg, is that the Court used unspecified scientific research in order to question parenting abilities of a homosexual parent.[[521]](#footnote-522) In the words of Gonzalez-Salzberg, ‘even though it did not have any evidence of the dangerous character of ‘homosexual parents’, it used this lack of evidence to raise suspicions about the potentially dangerous homosexual’.[[522]](#footnote-523) Although the Court held that the applicant’s homosexuality was the decisive factor in refusing his application, it ruled that because of the absence of a European consensus on this issue, there was no violation of Article 8 and 14 ECHR. Indeed, this lack of consensus in the scientific community was taken as the main premise by the Court in finding no violation of the Convention.[[523]](#footnote-524) This means that the inconclusive scientific evidence concerning possible consequences of adoption by homosexuals has been considered as adequate reason to exclude homosexuals as prospective adoption parents by the ECtHR.[[524]](#footnote-525)

In short, in finding the scientific evidence to be inconclusive, the Court seemed to imply that the French authorities had excluded homosexuals on the basis of majoritarian prejudice alone. Therefore, the Court might have validated the use of prejudices of third parties as a legitimate foundation on which to refuse the applicant’s claim.

According to Dworkin, however, ‘a political and economic system that allows prejudice to destroy some people’s lives does not treat all members of the community with equal concern’.[[525]](#footnote-526) Another way of putting this point is to say that the exercise of prejudice should not contravene the fundamental ideal of equality, namely: the right to equal concern and respect. In brief, a state then owes every citizen equal concern and respect.[[526]](#footnote-527) However, the Court’s decision in *Fretté* can be considered as a violation of the fundamental principle of equality since it fails to treat all members of the society with equal concern.

Dworkin explains: ‘we must find some other way, compatible with the other goals and constraints of equality of resources, to place victims in a position as close as possible to that which they would occupy if prejudice did not exist’.[[527]](#footnote-528) This suggests that states should regulate the law in such a way that it aims to protect people ‘who are the objects of systematic prejudice from suffering any serious or pervasive disadvantage from that prejudice’.[[528]](#footnote-529) This means that states need to ensure that minorities enjoy the fundamental right to equality in the eyes of the law. It is possible on this basis to conclude that national authorities should not restrict liberty on the grounds that ‘one citizens’ conception of the good life of one group is nobler or superior to another’s’. Therefore, discriminating against homosexual activity as being against the majority’s beliefs/views/morals would violate the fundamental principle of equality.

Furthermore, the Court held that ‘the difference in treatment stemmed from the *doubts that prevailed*, in view of what was currently known about the subject, about the development of a child brought up by a homosexual’.[[529]](#footnote-530) Two questions can be raised concerning these issues. Firstly, where the doubts stem from? Secondly, on what basis, such doubts constitute legitimate and sufficient grounds for the ECtHR. An immediate question arises as to what extent liberty can be restricted only because of the ‘doubts that prevailed’ or because the majority disapproves of their ‘choice of lifestyle’?

With regard to the first point, the Court validated the State’s understanding that the difference in treatment stemmed from public condemnation of parenting by same-sex couples. Since such condemnation reflects majoritarian prejudices and false stereotypes against homosexual individuals, the Court failed to protect fundamental egalitarian principles of human rights.[[530]](#footnote-531) In the present case, according to the Court, it is legitimate ‘for a state to impose a disadvantage on a particular group just to express the majority’s moral contempt for that group’s practices, even when no other proper purpose, such as protecting an economic or security interest, is served’.[[531]](#footnote-532) Judges Sir Bratza, Fuhrmann and Tulken, in their dissenting opinion concluded that the judgment is ‘liable to take to protection of fundamental human rights backwards…At a time when all the countries of the Council of Europe are engaged in a determined attempt to counter all forms of prejudice and discrimination, we regret that we cannot agree with the majority’.[[532]](#footnote-533)

With regard to the latter point, the Court accepted the Government’s argument that the difference in treatment stemmed from ‘a desire to protect the rights and freedoms of the child who might have been adopted’. If this is true, the inescapable conclusion is that the children’s best interest can only be protected by excluding homosexuals to adopt children. However, in the instant case, neither the ECtHR nor the Government demonstrated that the protection of the child’s interests required the exclusion of unmarried homosexuals from adoption, which is open to any unmarried heterosexual in France. For instance, the Government Commissioner pointed out that:

This case does not turn on its own facts because the documents in the case file leave me in no doubt that in many respects Mr F. has a genuine aptitude for bringing up children. The only thing that prompted the authorities to refuse authorisation was the fact that Mr F. was a homosexual and therefore that he did not provide sufficient guarantees that he would offer a child a suitable home from a psychological, child-rearing and family point of view. However, nothing in the case file suggest in any way that Mr F. leads a dissolute life and neither is there any reference in it to any specific circumstance that might pose a threat to the child’s interest. Accepting the lawfulness of the refusal of authorisation in the instant case would implicitly but necessarily doom to failure all application for authorisation to adopt by homosexuals.[[533]](#footnote-534)

Judge Costa, however, (joined by judges Jungwiert and Traja) said that ‘the rejection of Mr Fretté’s application for authorisation was not *in itself* a violation of his private life or of his status as a single man without children’.[[534]](#footnote-535) One objection is that the issue before the Court in this case is not a privilege of adoption. In other words, the present case does not merely concern the question of whether the applicant’s adoption request should have been provided in the circumstances of the case. As Letsas points out, the applicant’s argument was not based on the grounds that a single homosexual person had the right to adopt. Indeed, the applicant acknowledged that the Convention did not include the right of any unmarried person to adopt a child. Rather, the applicant complained that he was victim of discrimination on the basis of his sexual orientation, namely his homosexuality.

The applicant maintained, in what appears to be a Dworkinian vein, that he had a right which ‘the government should not deprive him of the opportunity to adopt, on the sole basis that the majority is prejudiced against his way of life’.[[535]](#footnote-536) Therefore, his complaint was a ‘reason-blocking’ one.[[536]](#footnote-537) The Court’s reasoning for this decision seems to be that public condemnation is sufficient, in and of itself, to justify an obvious sex-discrimination.

 Letsas writes:

In cases where there is known to be societal prejudice against a group, the government has a duty to examine whether, in the circumstances of each case, there was a justified basis on which to restrict liberty. Call this the ‘reason blocking feature’ of certain rights. These rights are best formulated as a ‘that’ clause: persons have a right that their interests do not suffer solely on the basis that the majority is prejudiced against their way of life. In order to determine whether a reason-blocking right has been infringed, we have to look at the circumstances of each case, and at whether there was some justified basis (i.e. other than the impressible one of majoritarian prejudice) for restricting liberty.[[537]](#footnote-538)

Dworkin maintains that government fails to treat citizens with equal concern and respect whenever it limits individual liberty on the grounds that one citizen’s conception of the good life is better than another’s. Therefore, it can be concluded that it is unfair to count the majority’s moral convictions concerning how other people should live as a legitimate grounds for restrictions on individual liberties.

The next section assesses a landmark judgment by the ECtHR (*E.B. v. France*) which upheld the complaint of a lesbian woman who argued that her application for authorisation to adopt a child had been rejected by French authorities on the basis of her sexual orientation, namely her homosexuality. The Court established that if Contracting States permit single persons to adopt, adoption licences cannot be disapproved for individual applicants on the grounds of their sexual orientation.[[538]](#footnote-539)

## *E.B. v France*

In *E.B. v France*, the applicant, a lesbian, complained that the relevant French authorities had refused her application to adopt a child on the grounds that her lifestyle was considered to be inappropriate. According to the Government, the applicant had been rejected authorisation to adopt on two main grounds.[[539]](#footnote-540) First, the absence of a paternal role model. This meant that the applicant was unable to provide a child with a male paternal role model. Second, the applicant’s homosexual partner was not adequately committed to the adoption process. While the ECtHR considered that these two reasons were legitimate in principle, it held that considerations of the applicant’s sexual orientation by the French authorities had been a ‘contaminating’ factor in reaching the decision to reject her application.[[540]](#footnote-541)

The Court held that the applicant suffered a difference in treatment on the grounds of her sexual orientation and, therefore, went on to assess whether such difference in treatment had an objective and reasonable justification. Contrary to the Court’s decision in *Fretté*, which allowed the State a wide margin of appreciation, in *E.B.* the Court said that ‘where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8’.[[541]](#footnote-542) Since the applicant’s homosexuality had been a determining factor in refusing her application, the Court concluded that there had been a violation of Article 14 in conjunction with Article 8 ECHR.

### 3.1) Analysis of the Judgment: From Consensus to Moral Reasoning

*E.B v France* can be seen as a landmark judgment for three main reasons. Firstly, as Letsas points out that it ‘reaffirms a fundamental liberal-egalitarian principle that should govern human rights adjudication, namely that no-one should suffer a disadvantage or be deprived of a liberty or opportunity because of one’s choice of lifestyle, or because others think of him or her as less than an equal’.[[542]](#footnote-543) In upholding the applicant’s claim that she had a right not to be discriminated against on the basis of her choice of lifestyle, the Court has disqualified, as legitimate justifications, certain reasons on the grounds that they reflect ‘prejudice’ or ‘hostility’.

Secondly, such a decision shows that the Court may be retreating from ‘its arguably over-heavy reliance on the use of the margin of appreciation and the idea of consensus’.[[543]](#footnote-544) It should be noted that in a number of cases the ECtHR has explicitly upheld moralistic measures which limit liberty in order to protect public morals, on the basis that there is no uniform conception of public morality in Europe.[[544]](#footnote-545) Unlike in *Fretté* however, the Court made no reference to the doctrine of margin of appreciation and to the lack of common ground in the contracting states on adoption by homosexuals. It can be argued that in *E.B.* the Grand Chamber decided to establish a common value on an issue where ‘widespread prejudice was likely to prevent a consensus from arising among Member States’.[[545]](#footnote-546) The decision indicates the Court’s unwillingness to invoke the margin of appreciation doctrine where the difference in treatment is based solely on the applicant’s sexual orientation, implying the existence of a prejudice against homosexuals. Hence, the Court’s approach in *E.B.*, given the lack of reference to the margin of appreciation, may be considered a ‘positive development that should be welcomed and that will hopefully be applied by the Court across the board in the future’.[[546]](#footnote-547)

Thirdly, with regard to the admissibility of the applications, the Court took the view that the facts of the case undoubtedly fell within the ambit of Article 8 of the ECHR. Thus, the Court made it clear that the findings of *Fretté* case regarding the admissibility and merits were affirmed by the Grand Chamber in the case of *E.B. v. France*.This can be considered as a significant development because in *Fretté* there was a strong disagreement as to whether the facts of the case fell within the scope of Article 14 of the Convention. For instance, in *Fretté*, three concurring judges stated that since the Convention does not guarantee a right to adopt, Article 14 could not be applied to the case. On the contrary, in the case of *E.B. v France*, the Court found unanimously that the application was admissible. A reason for this is that the Court in *E.B.* took a separate vote on whether the case fell within the scope of Article 8 ECHR and foundunanimously that the application was admissible.[[547]](#footnote-548)

The unanimous decision of the Court to proceed with the Article 14 claim in *E.B.* is an explicit example of its willingness to address the subject of widespread prejudice against homosexuality. In adopting this approach, according to Nikolaidis, the Court ‘went beyond the letter of the law in order to take a stand against the moral condemnation of homosexuality’.[[548]](#footnote-549) Therefore, one may interpret *E.B. v France* as confirming the proposition that allegations which challenge the compatibility of domestic adoption laws, are always admissible ‘ratione materiae’ under the Convention.[[549]](#footnote-550)

Moreover, in the case of *E.B.*, the Court asked the State to provide particularly weighty reasons to justify a difference in treatment. Letsas makes this point:

According to the Court’s reasoning the burden should be on the state to provide particularly weighty reasons that call for differential treatment… The lack of consensus among the scientific community about the possible negative effects on adopted children, means that the benefits to the well-being of children are speculative and that lack of evidence should therefore count in favour of, rather than against, allowing homosexuals to adopt.[[550]](#footnote-551)

As it was argued, the position of the Court has shifted dramatically. In *Fretté,* it found that the sexual orientation of an individual, namely his homosexuality, was considered legitimate grounds to reject authorisation to adopt. In the case of *E.B.,* however, restricting the applicant’s right to adopt based on her sexual orientation was found to constitute a violation of Article 14 taken in conjunction with Article 8 of the Convention. Charilaos Nikolaidis writes: ‘the Court actually completed a cycle of jurisprudential innovation which it had started six years earlier. In doing so, the decision in *Fretté* was practically affirmed as to the question of applicability of Article 14 and reversed as to the level of scrutiny applied’.[[551]](#footnote-552) This shift, according to Letsas, can be justified on the grounds of a general approach regarding the scope of the Convention rights.[[552]](#footnote-553)

Importantly, since the Court made no reference to the margin of appreciation and to the lack of consensus, such a shift can only be justified based on the moral truth regarding the content of the ECHR rights.[[553]](#footnote-554) In other words, the Court’s reasoning in *E.B* can be interpreted as its willingness to shield individuals from the hostile preferences of majorities. This approach, unsurprisingly, reflects the Dworkinian principle that all persons have equal moral worth. Dworkin has frequently underlined the significance of equality as the key aspect of a liberal society. In other words, the basic core of liberalism, according to Dworkin, has always been equality. He notes:

Since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or more powerful group.[[554]](#footnote-555)

Therefore, *E.B.,* can be considered a welcome development in recognising that every person has an equal moral status, and is to be treated as an equal.

It can be argued that the ECtHR has played a key role in promoting equality for lesbian, gay, bisexual and transgender (LGBT) people.[[555]](#footnote-556) For instance, as discussed above, the Court demonstrated great willingness to assess questions concerning adoption-related issues. However, it has been argued that the Court frequently fails to provide consistent and compatible statements in cases regarding discrimination based on sexual orientation.[[556]](#footnote-557) In a series of cases, as rightly observed by Gonzalez-Salzberg, the Court has noted that a distinction based merely on sexual orientation should be considered discriminatory in itself.[[557]](#footnote-558) In the Court’s own words: ‘if the reasons advanced for a diﬀerence in treatment were based solely on the applicant’s sexual orientation, this would amount to discrimination under the Convention’.[[558]](#footnote-559) Importantly, this clearly means that it is unacceptable to refuse an application solely on the grounds of the applicant’s sexual orientation.

Against this line of reasoning, the Court has resorted to the lack of European consensus to allow differential treatment based on sexual orientation. In adopting this approach, the Court has held that

There remain issues where no European consensus has been reached, such as granting permission to same-sex couples to adopt a child … and the right to marry, and the Court has confirmed the domestic authorities’ wide margin of appreciation in respect of those issues.[[559]](#footnote-560)

As mentioned in the introduction chapter, so far, the ECtHR has dealt with two types of adoption by LGBT individuals: individual adoption and second-parent adoption. The next section examines two cases with respect to second-parent adoption by same-sex couples. It focuses on the continuing evolution of the Convention regarding second-parent adoption by same-sex couples. This examination is performed through the lens of Dworkin’s theory of ‘law as integrity’.

## Second-Parent Adoption Cases: *Gas and Dubois v. France*

The applicants in *Gas and Dubois* were a same-sex cohabiting couple who had entered into a civil partnership (pacte civil de solidarite) under French law. In this case, two applicants bound by civil partnership had had a child through assisted reproduction, but only the biological mother was registered as legal parent of the child.[[560]](#footnote-561) The first applicant, Ms Valerie Gas, applied to the Nanterre *tribunal de grande instance* for a simple adoption order in respect of the second applicant’s daughter. This situation has been described as ‘second-parent adoption’ in the context of the ECHR. The application, however, was rejected on the grounds that under French law only married couples were permitted to share parental responsibilities in the event of simple adoption orders. Subsequently, the applicants submitted to the ECtHR that such rejection violated their rights under Articles 8 and 14 of the Convention. Hence, the case concerned the rejection of the first applicant’s application for a simple adoption order in respect of the second applicant’s biological child. Despite the ground-breaking judgment of *E.B. v France* four years earlier, the ECtHR in *Gas and Dubois* found no violation of Articles 14 and 8.

### 4.1)Admissibility and the Ambit of the ECHR Rights

The French Government first emphasised that the applicant’s complaint was inadmissible simply because the Convention does not protect a right to adopt, and hence the complaint did not fall within the scope of Article 8 ECHR. The Government therefore submitted that the applicants could not argue discrimination in respect of the enjoyment of such a right, since Article 14 had no independent existence. Secondly, the Government argued that Article 365 of the Civil Code did not give rise to any discrimination based on sexual orientation, since it applied to all unmarried couples, regardless of their sexual orientation.

In the present case, the applicants claimed that the refusal of the first applicant’s request to adopt her partner’s child was based on their sexual orientation, since the relevant French law restricted same-sex couples, but not married couples, from obtaining a simple-adoption order. As to the fact that marriage was not available to same-sex couples under Article 144 of the Civil Code in France, the applicants alleged that they had been subjected to discrimination based on their sexual orientation. In reaching this conclusion, the applicants pointed out that an analogy can be established between their family circumstances and married couples, given that the applicants were recognised as a family by the Court.

 The Court, while noting that Article 14 has no independent existence and complements the other substantive rights of the ECHR, found the applicants’ complaint admissible because ‘sexual orientation falls within the personal sphere protected by Article 8’.[[561]](#footnote-562) This means that Article 14 was triggered by the Court, because of its interpretation of Article 8.[[562]](#footnote-563) The Court subsequently observed that an ‘examination of the applicants’ specific case leads to the conclusion that they have a ‘family life’ within the meaning of Article 8 of the Convention’.[[563]](#footnote-564) In doing so, the Court recognised that the applicants’ household, consisting of a same-sex cohabiting couple and the child, constituted a family within the purpose of Article 8 of the ECHR, thus the facts of the case fell within the scope of Article 8.[[564]](#footnote-565) Such recognition can be considered significant because it was the first time that the Court had explicitly approved that relationships between same-sex couples and a child constituted a family within the meaning of Article 8 of the ECHR. This recognition led to the conclusion that differential treatment of ‘heterosexual and homosexual partnership is no longer justified under Article 14 ECHR’.[[565]](#footnote-566)

Indeed, the recent recognition of a ‘family life’ between same-sex partners was provided in *Schalk and Kopf v Austria*:

The Court notes that… a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then, a considerable number of member States have afforded legal recognition to same-sex couples. Certain provisions of European Union law also reflect a growing tendency to include same-sex couples in the notion of “family” … In view of this evolution, the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.[[566]](#footnote-567)

It is noteworthy that the Court in the case of *Schalk and Kopf* took into account that there is an emerging European consensus towards the legal recognition of same-sex couples. Therefore, the argument given for this legal recognition was the positive developments in member States towards granting same-sex partners legal recognition for their relationships.

In the present case, the Court went further by recognising that relationships between same-sex couples and a child constituted ‘family life’ within the meaning of Article 8 of the Convention. In *Gas and Dubois*, the Court referred to the applicant’s specific case, because the applicant had raised the child since she was born and was actively and jointly involved in the child’s upbringing, and concluded that they have a ‘family life’ within the meaning of Article 8 ECHR. By not taking such a majoritarian stance, the Court explicitly demonstrated its willingness to address and protect the rights of minority groups. Declaring admissible *Gas and Dubos* under Article 8 ECHR, with no reference to European consensus, can be seen as a sign of the Court’s evolution of Article 8 and its intention to expand the rights of same-sex partners in the area of parenting rights.[[567]](#footnote-568)

### 4.2) Integrity

In *Law’s Empire*, Dworkin suggested a more systematic and fully developed theory of the law, which he called ‘law as integrity’.[[568]](#footnote-569) While Dworkin often used the phrase, ‘law as integrity’ in the book, he did not give an explicit definition of the phrase.[[569]](#footnote-570) Yet, his notion of ‘law as integrity’ can be grasped by assuming it refers to ‘a person of integrity’.[[570]](#footnote-571) According to this characterisation, a person should obey a consistent set of principles; the person must not resort to a principle when such principle favours him or her and then ignore the same principle when it works against her. This suggests that law should be interpreted as a whole in accordance with a coherent set of principles.

Integrity, according to Dimitrios Kyritsis, can be considered as a moral basis for the interpretive requirement, which judges identify the principles that fit and justify past decisions.[[571]](#footnote-572)

It is worth noting that there is a relationship between the idea of integrity and the ideal of equality. The idea of treating people as equals, according to Dworkin, requires that the law must speak with a single voice. In order to achieve this, judges ought to construct a coherent set of principles. In doing so, the law can be seen as the product of a single moral vision.

With regard to admissibility, while the lack of reference to European consensus in *Gas and Dubois* is a significant development that should be welcomed, the Court’s judgment is problematic for two main reasons. Firstly, according to the Court, while there was a difference in treatment based on the applicant’s sexual orientation, this differential treatment did not amount to discrimination under the Convention. The reason for this is that the applicants could not be considered to be in an analogous situation to those treated better on the grounds that different-sex couples who had entered into same civil partnerships, as the applicants did, were also forbidden from obtaining a simple adoption order. The Court noted that:

Any couple in a comparable legal situation by virtue of having entered into a civil partnership would likewise have their application for a simple-adoption order refused…It does not therefore observe any difference in treatment based on the applicants’ sexual orientation.[[572]](#footnote-573)

This means that the Court took into account the rights provided under civil partnerships related to second-parent adoption as a basis of comparison.[[573]](#footnote-574) One objection is that a different-sex couple could bypass such prohibitions by changing their legal status through marriage, whereas it was impossible for the applicants to marry under French law. Therefore, the Court only reiterated its ruling in *Schalk and Kopf v Austria*, which reasoned that member states were not obligated to provide access to marriage to same-sex couples.[[574]](#footnote-575)

Secondly, the Court held that Contracting States enjoy a wide margin of appreciation in examining whether and to what extent differential treatment can be justified ‘when it comes to general measures of economic or social strategy’.[[575]](#footnote-576) It should be noted, however, that this is an explicit departure from the approach undertaken in the case of *E.B. v France,* in which the Court engaged in critical scrutiny of the allegations made by the French government in respect of the best interests of children.[[576]](#footnote-577) In *E.B.,* the Court made no reference to the margin of appreciation and to the lack of consensus, and by doing so it closely scrutinised the decision by the French authorities to present objective and reasonable justification for the discrimination. In the words of Paul Johnson: ‘*EB* v *France* demonstrates that the Court is willing to engage in a critical review of claimsabout the best interests of children that often seek to ‘mask’ heteronormativityand homophobia.’[[577]](#footnote-578)In the present case, on the contrary, the Court failed to engage in a critical examination of the claims made by the national authorities with regard to the discrimination at issue.

The judgment in *E.B v France* is significant for LGBT rights as it demonstrates a clear and positive evolution of the ECtHR’s jurisprudence in relation to the right to equality and freedom from discrimination guaranteed by Article 14 of the ECHR. However, the Court’s judgment in *Gas and Dubois v France* is also evidenceof continued inconsistencies in the Court’s approach to matters of sexual orientation equality. What also seems problematic with the ruling in *Gas and Dubois*, is that the Court invoked the margin of appreciation as a ‘conclusory label’ to legitimise its judgment. As Johnson points out, ‘by using the margin of appreciation to bypass an elucidation of its own moral reasoning, the Court invites the charge of its inconsistency’.[[578]](#footnote-579) The judgment in *Gas and Dubois* thus undermines the integrity of the Court’s judicial methodology.

### 4.3) Fit and Justification

Dworkin divides ‘integrity’ into two practical principles. The first is the principle of integrity in ‘legislation’ that asks those who make law by legislation to keep that law ‘coherent in principle’.[[579]](#footnote-580) The second is the principle of integrity in ‘adjudication’, which asks ‘those responsible for deciding what the law is to see and enforce it as coherent in that way’.[[580]](#footnote-581) The second principle, integrity in adjudication, justifies ‘how and why the past must be allowed some special power of its own in court’. According to Dworkin, the principle of integrity in adjudication explains that ‘judges must conceive the body of law they administer as a whole rather than as a set of discrete decisions that they are free to make or amend one by one, with nothing but a strategic interest in the rest’.[[581]](#footnote-582) Dworkin’s model of law as integrity thus suggests that a judge must obey a consistent set of principles.

Dworkin considers integrity in both adjudication and legislation as holding distinctive political value. His theory of constitutional adjudication suggests a distinction between two ‘dimensions’ of interpretation: the dimension of fit and the dimension justification.[[582]](#footnote-583) According to this view, constitutional interpretation should involve ‘fit’ and ‘justification’. This requires that judges justify legal arguments by demonstrating that ‘principles that support those claims also offer the best justification of more general legal practice in the doctrinal area in which the case arises’.[[583]](#footnote-584) The best justification is, according to Dworkin, the one that ‘fits the legal practice better, and puts it in a better light’.[[584]](#footnote-585) This means that judges should search for the constitutional interpretation that ‘best fits and justifies the constitutional document and underlying constitutional order’.[[585]](#footnote-586)

It is possible to say that democracy is a fundamental feature of European public order.[[586]](#footnote-587) The Court has emphasised on many occasions that ‘pluralism, tolerance and broadmindedness are hallmarks of democratic society’.[[587]](#footnote-588) In particular, in *Informationsverein Lentia and Others v. Austria*, the Court defined the State as the ‘ultimate guarantor of the principle of pluralism’, and held that there can be no democracy without pluralism.[[588]](#footnote-589) This means that the Court interprets pluralism as one of the fundamental elements of a democratic society. Given that pluralism is characterised by the Court as a key element of and a condition for a democratic society, the concept of democracy is not narrowly understood in the context of the ECHR.

In addition, there is a line of cases which suggest that the Court has established a direct link between pluralism and the rights of minorities.[[589]](#footnote-590) For instance, in the case of *Gorzelik and Others v Poland*, the Court stated that a pluralist and genuine democracy is particularly important for persons belonging to minorities.[[590]](#footnote-591) This understanding of democracy is deeply connected with the protection of minorities from the tyranny of the majority. In the Court’s own words:

For pluralism is also built on genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs and artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion.[[591]](#footnote-592)

As the citation reveals, the Court established a clear connection between the concept of pluralism and the rights of minorities. In doing so, the Court has constructed a concept of pluralism in order to protect and guarantee minority rights against the majority rule.

In fact, the ECtHR acknowledged this point in the case of *Young, James and Webster v. the United Kingdom*: ‘…democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position’.[[592]](#footnote-593) In addition to this, the Court in its case-law has confirmed that ‘not only is democracy a fundamental feature of the European public order but the Convention was designed to promote and maintain the ideals and values of a democratic society’.[[593]](#footnote-594) In doing so, it establishes a clear link between the Convention and the concept of democracy. This raises the question of what the meaning of ‘democracy’ is in the context of ECtHR case-law.

Since its Handyside decision in 1976, the Court has held that the right to freedom of expression under Article 10 offers protection “…not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of 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’”.[[594]](#footnote-595) This means that the Court has emphasised the importance of pluralism, which is considered as an essential condition of a democratic society. As to freedom of association, for instance, the Court stressed that a public demonstration ‘may annoy or give offence to person opposed to the ideas or claims that it is seeking to promote’.[[595]](#footnote-596) As discussed above, pluralism, tolerance and broadmindedness are, according to the Court, hallmarks of a democratic society. Overall, the case-law of the ECtHR shows the significant role of the concept of pluralism in its understanding of democracy.

Furthermore, in the case of *Chapman v the United Kingdom*, the Court went on to examine the question of the lifestyle of a Roma family. In its judgment, the Grand Chamber held that ‘although the fact of belonging to a minority with a traditional lifestyle different from that of the majority does not confer an immunity from general laws… some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework’.[[596]](#footnote-597) The Court has emphasised repeatedly the importance of pluralism, which is recognised as a key condition of a democratic society. The Court thus considered one of the key features of democracy to be ‘the possibility it offers of resolving a country’s problems through dialogue’. According to the Court, therefore, the essential foundation of democracy lies in its possibility to enable minorities to engage in political activity rather than excluding them.

As discussed above, under the Convention, democracy is primarily a matter of ‘equal citizenship’ instead of majority rule. This conception presupposes democratic conditions which are the conditions of moral membership in a political community. Such a community can count no one as a moral member unless ‘it gives that person a part in any collective decision a stake in it, and independence from it’.[[597]](#footnote-598) This concept of democracy better fits and justifies the history and practice of the ECHR.

Dworkin explains: [In hard cases, the judge] ‘must choose between eligible interpretations by asking which shows the community's structure of institutions and decisions its public standards as a whole-in a better light from the standpoint of political morality’.[[598]](#footnote-599) Dworkin’s concept of law as integrity can be understood as an intrinsic political value, which requires judges to make law morally coherent. This means that judges can identify the right answer in hard cases by deciding whether the proposition advocated by the respondent state or by the applicant suggests a better fit or coheres better with the history and practice of the ECHR. This suggests that if the Court wants to stick its commitment to democratic values and to the moral truth about the content of the ECHR rights, the European consensus approach should be abandoned.[[599]](#footnote-600)

## *X and Others v. Austria*

In 2013, the Grand Chamber of the ECtHR issued a controversial judgment regarding a complaint about discrimination on the basis of sexual orientation in second-parent adoption.[[600]](#footnote-601) *X. and Others v Austria* revolved around second-parent adoption by a same-sex couple: the first and third applicants are two Austrian women who lived in a stable same-sex relationship, and the second applicant is the third applicant’s son. In *X. and Others v Austria* three applicants, a female same sex couple and the biological child of one of the partners, alleged that they had been discriminated against in comparison with different-sex couples, since second-parent adoption was legally impossible for a same-sex couple. Therefore, the applicants argued that their legal exclusion from second-parent adoption constituted discrimination contrary to Articles 14 and 8 of the Convention.

### 5.1) Is Discriminatory Treatment Justified?

With regard to whether a difference in treatment was justified, the Court made two comparisons. Firstly, it compared the situation of the applicants with that of a married different-sex couple. In making this comparison, the Court referred to its ruling in *Gas and Dubois*, where it had noted that the situation of a same-sex couple could not be thought to be similar to that of a married couple. It then took the view that the present case should be primarily distinguished from *Gas and Dubois*, since the legal background of the case was different. Hence, the Court said that:

The present case is therefore to be distinguished from Gas andDubois… in which the Court found that there was no difference in treatment based on sexual orientation between an unmarried different-sex couple and a same-sex couple as, under French law, second-parent adoption was not open to either of them.[[601]](#footnote-602)

Since second-parent adoption was allowed for married couples under Austrian law, the Court distinguished the present case from *Gas and Dubois*. According to Gonzalez-Salzberg, the Court took the view that it was not discriminatory to treat the applicants ‘detrimentally’ only because they did not pass the ‘analogous situation’ test.[[602]](#footnote-603) Nevertheless, in the present case, the Court accepted the applicants’ circumstance to be comparable to that of an unmarried different-sex couple in which one partner wished to adopt the other partner’s child. Subsequently, the Court framed the issue as follows:

Although the present case may be seen against the background of the wider debate on same-sex couples’ parental rights, the Court is not called upon to rule on the issue of second-parent adoption by same-sex couples as such, let alone on the question of adoption by same-sex couples in general. What it has to decide is a narrowly defined issue of alleged discrimination between unmarried different-sex couples and same-sex couples in respect of second-parent adoption.[[603]](#footnote-604)

This passage can be interpreted as a sign that the Court avoided directly addressing the issue of second-parent adoption by same-sex couples under the Convention.[[604]](#footnote-605) Indeed, this approach prevented the Court finding the privileged treatment of married couples discriminatory. Yet, the Court made it clear that Austrian adoption law led to a distinction between unmarried different-sex and same-sex couples in respect of second-parent adoption.

The Court observed that the applicants were in a ‘relatively similar situation’ to an unmarried different-sex couple ‘in which one partner wished to adopt the other partner’s child’.[[605]](#footnote-606) This means that under Austrian law as it stands, there is an explicit distinction between unmarried different-sex and same-sex couples in respect of second-parent adoption.[[606]](#footnote-607) Based on this obvious distinction, the Court distinguished the facts of the present case from those in *Gas and Dubois* case, in which the main issue was not a direct discrimination between same-sex couples and different-sex couples, since French law permitted only married couples to share parental rights regardless of their sexual orientation. In this case, however, the key issue was that same-sex couples were discriminated against when compared to both married and unmarried different-sex couples. Subsequently, the Court went on to examine whether there was a difference in treatment based on the applicant’s sexual orientation.

The Court first noted that Austria had no obligation to provide for a right to second-parent adoptions for unmarried couples under Article 8 of the Convention. Nonetheless, the Court decided that since Austrian law permits second-parent adoption for different-sex couples, the burden was on the Government to demonstrate that there was a legitimate aim and proportionate reason for rejecting to extend the right to same-sex couples. The Court, then dealt with the Government’s arguments that Austrian adoption law was aimed at ‘recreating the circumstances of a biological family’,[[607]](#footnote-608) that the margin of appreciation ought to be wide ‘in the sphere of adoption laws’,[[608]](#footnote-609) and finally that ‘no European consensus exists’ on the question of same-sex couples’[[609]](#footnote-610) access to second-parent adoption.

These arguments, however, were dismissed by the Court on the grounds that the Government failed to ‘adduce particularly weighty and convincing reasons to show that excluding second-parent adoption in a same-sex couple… was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child’.[[610]](#footnote-611) This reasoning is significant because in *Fretté*, the lack of scientific studies regarding the ‘possible’ negative consequences for adopted children, has led the Court to conclude that the broad margin of appreciation is to be left to States in this area.[[611]](#footnote-612) On the contrary, in *X and Others* the Court held that the burden of proof rested on the state to provide evidence to suggest that a family with two parents of the same sex could not adequately provide for a child’s needs. Consequently, the Court found that there had been a violation of Article 14 of the Convention taken in conjunction with Article 8.

However, it is worth highlighting that the Court has not recognised a right to second-parent adoption by same-sex couples under the Convention. Rather, it found discrimination in the way the topic of second-parent adoption was regulated by Austrian abortion law. According to Gonzalez-Salzberg, the Court made it clear that ‘the discriminatory character of the legislation was only due to the fact that unmarried different-sex couples were treated more favourably than same-sex couples, since it did not consider discriminatory the privileged treatment of married couples and, consequently, of their children’. This means that the discriminatory character of Austrian adoption law was only due to the fact that there was an obvious distinction between unmarried different-sex and same-sex couples in respect of second-parent adoption. Therefore, the Court’s finding of discrimination was based on the fact that, while second-parent adoption is permitted for different-sex couples, it was impossible for same-sex couples under Austrian law.

### 5.2) Does Narrow Consensus Matter?

Dworkin argues that any conception of democracy that demands ‘deference to temporary majorities in matters of individual right is…brutal and alien, and many other nations with firm democratic traditions now reject it as fake’.[[612]](#footnote-613) It is noteworthy that in order to respond to the Government’s claim that no European consensus exists, the Court engaged extensively in a comparative analysis. For instance, the Court explicitly made reference to a study by the Council of Europe’s Commissioner for Human Rights, which demonstrated diverse findings on the issue of second-parent adoption by same-sex couples among Council of Europe member states.[[613]](#footnote-614)

According to the study, ten member states permit second-parent adoption to same-sex couples, while 35 member states do not give access to second-parent adoption for same-sex couples. In addition, only six member states allow second-parent adoption by unmarried different-sex and unmarried same-sex couples. It can be seen that a vast majority of the forty-seven Council of Europe member States do not allow same-sex couples to have a second-parent adoption, which clearly indicates that there is no European consensus on the issue. Consequently, the Court held that:

Only those ten Council of Europe member States which allow second-parent adoption in unmarried couples may be regarded as a basis for comparison… the narrowness of this sample is such that no conclusions can be drawn as to the existence of a possible consensus among Council of Europe member States.[[614]](#footnote-615)

Following a comparative analysis, the Court held that the lack of consensus was not decisive in reaching a decision in the case. This is important for two reasons. First, the Court established that lack of consensus does not logically and automatically lead to the conclusion that wider margin of appreciation should be granted to the state.[[615]](#footnote-616) Second, since no conclusion was found as to the existence of a possible consensus, the Court’s reasoning can be justified based on the moral truth regarding the content of the ECHR rights.

The *X and Others* case, therefore, represents an important judgment and attempt by the Court to confirm its evolutive interpretation. The reason for this is thatthe Court for the first time found a violation of the Convention when a same-sex couple was refused access to second-parent adoption. In doing so, the Court ‘puts on notice other States with similar legislation that adoption must be handled in a non-discriminatory way’.[[616]](#footnote-617) This means that the Court indirectly extends its protection for which no textual protection is provided by the Convention.

## Conclusion

This chapter has examined the continuing evolution of the Convention regarding adoption by LGBT individuals and couples through a lens provided by Dworkin’s legal interpretivism. In light of previous decision in the area of adoption by LGBT individuals and couples, this chapter showed that the Convention has been used by the Court as a living instrument which needs to be reinterpreted in the light of present-day conditions.[[617]](#footnote-618) In the case of *E.B.,* the Court made a significant ruling by upholding the applicant’s complaint that the rejection of her application for authorisation to adopt was based on her sexual orientation and, therefore, amounted to discrimination under the Convention. As this chapter showed, the Court in *E.B.* made it explicit that states cannot discriminate merely on the grounds of sexual orientation.

The Court, more importantly, reached this conclusion without resorting to a comparative analysis. According to Letsas, such a decision is significant because it ‘reaffirms a fundamental liberal-egalitarian principle that should govern human rights adjudication, namely that no-one should suffer a disadvantage or be deprived of a liberty or opportunity because of one’s choice of lifestyle, or because others think of him or her as less than an equal.’[[618]](#footnote-619) In addition to this, this chapter has showed that the reasoning of the Court in *E.B.,* which led it to provide the state a narrow margin of appreciation, was moral reasoning. Hence, the findings of the chapter suggest that such a decision constitutes not only an important step forward in the fight for equality for LGBT individuals and families, but it also provides strong support for a moral reading of the Convention.

It is worth mentioning that for a long time both the former European Commission and the ECtHR have repeatedly held that same-sex relationships do not constitute ‘family life’ within the meaning of Article 8 of the ECHR. However, as discussed above*,* in *Gas and Dubois*,the Court, for the first time, recognised that relationships between same-sex couples and a child constituted ‘family life’ within the meaning of Article 8 of the Convention*.* As this chapter demonstrated, this was significant not only because it was the first time that the Court had recognised that relationships between same sex couples and a child could/should be deemed a ‘family life’ but also because the Court did not wait for a common European approach to have been established. By not taking such a majoritarian stance, the Court demonstrated its willingness to address and protect the rights of minority groups. With these findings, I hope to have contributed to shedding light on the Court’s ability to decide on controversial moral issues without deferring the Contracting States.

# Chapter Five THE WEARING OF RELIGIOUS SYMBOLS AND CLOTHING IN PUBLIC

Wearing the headscarf is considered on the contrary to be synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women. However…What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to.[[619]](#footnote-620)

## Introduction

Freedom of religion is a fundamental right guaranteed not only in the ECHR but also in many other national, regional and international instruments.[[620]](#footnote-621) In the context of the ECHR system, the importance of freedom of religion has been underlined on a number of occasions by the ECtHR.[[621]](#footnote-622) For instance, the case-law of the Court has established that freedom of thought, conscience and religion is ‘one of the most vital elements that go to make up the identity of believers and their conception of life’.[[622]](#footnote-623) However, some of the Court’s decisions can be criticised for their weak reasoning, and there are several areas, such as the regulation of the wearing of religious symbols and clothing in public sphere, which remain controversial.[[623]](#footnote-624) This chapter seeks to analyse the Court’s case-law on religious freedom in the public sphere.

The aim of this chapter is not to add directly to the substance of that controversy. Rather, the present chapter uses Dworkin’s legal interpretivism as a theoretical lens to read the Court’s case-law on freedom of religion. This chapter is aimed at critically engaging with the issue of religious symbols and clothing in the public place within the case-law of the ECtHR and Dworkin’s legal interpretivism is the theoretical lens chosen to perform this task.

In banning religious clothing, such as the Islamic headscarf, the Contracting States often argue that while this restriction limits women’s freedom and their choices, this is actually good for their liberation. As pointed out by Judge Tulkens, ‘wearing the headscarf is considered to be synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women’.[[624]](#footnote-625) Indeed, States imposing restrictions on the wearing of religious dress profess to advocate them on different grounds, including neutrality,[[625]](#footnote-626) secularism,[[626]](#footnote-627) and gender equality[[627]](#footnote-628) as well as the human dignity of women.[[628]](#footnote-629) States ‘somehow’ have established a link between the protection of the dignity of women and the prohibition of the wearing of the headscarf. Consequently, in this context, bans were seen as a solution to the threats against to the dignity of women. This approach will critically be examined through the methodological lens provided by Dworkin’s legal interpretivism.

Dworkin finds the foundations of the right to freedom of religion in the key value of ethical independence.[[629]](#footnote-630) He points out that there is a fundamental right to ethical independence in moral issues that protects people’s responsibility to define and find value in their lives.[[630]](#footnote-631) This means that the right of religious freedom protects the principle of personal responsibility which holds that ‘each person has a special responsibility for realizing the success of his own life, a responsibility that includes exercising his judgment about what kind of life would be successful for him’.[[631]](#footnote-632) Such principle requires a tolerant secular state in which people are allowed to choose their religion and follow its practice. Dworkin’s account suggests that people should be allowed to take personal moral responsibility for their religious convictions. Therefore, for Dworkin, religious freedom is based on human dignity and personal moral responsibility.[[632]](#footnote-633)

Jill Marshall draws attention to the point that the main aim and ‘very essence’ of the ECHR ‘is respect for human dignity and human freedom’.[[633]](#footnote-634) In Goodwin v. UK, the ECtHR has made it clear that:

the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including their right to establish details of their identity as individual human beings.[[634]](#footnote-635)

While the concept of personal autonomy is interpreted as an important element of human dignity, it has been considered as a missing element in the Court’s decisions in the context of freedom of religion.[[635]](#footnote-636)

This chapter is divided into four main sections. The second section provides a legal framework in which religion is protected by Article 9 ECHR. It then presents the ECtHR’s case-law on Article 9 ECHR, with a specific emphasis on displaying religious symbols in public places.

According to the ECtHR’ case-law, the tension between women’s equality and freedom of religion can be considered as one of the most controversial issues under the Convention.[[636]](#footnote-637) The third chapter provides an examination of the principle of gender equality in the Islamic clothing cases.

The fourth section discusses the issue of the separation of religion and state. Freedom of religion, as enshrined in Article 9 of the ECHR, imposes that states must be religiously neutral. This does not mean that states might not have official religions. Rather, in the Court’s own words: ‘the obligation under Article 9 of the Convention incumbent on the State’s authorities to remain neutral in the exercise of their powers in this domain’.[[637]](#footnote-638) This suggests that the Court attached particular importance to the need for state neutrality in the exercise of power in this context.[[638]](#footnote-639) According to the Court then, states have a duty to remain neutral and impartial in exercising its discretion in the context of Article 9 of the Convention. This means that there is a strong correlation between the notions of state neutrality and religious freedom in the context of the ECHR. The purpose of this section is to compare and contrast these two concepts -secularism and neutrality- by engaging in analyses of the Court’s decision in the cases of Dahlab, Şahin and Lautsi.

## Religious Freedom in the European Convention on Human Rights

### 2.1) The Legal Framework

Freedom of religion is enshrined in the ECHR under Article 9 that provides the basic legal framework for freedom of religion. Article 9 of the ECHR provides that:

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

 (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law, and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[[639]](#footnote-640)

One can say that there are two elements to Article 9 ECHR. First, the right to hold and change religious belief has absolute protection. This means that the private freedom of thought, conscience and religion is an absolute right which does not allow any limitation (the forum internum). As the structure of Article 9 makes it clear that one’s inner religious freedom or belief cannot be limited by the state. Hence, privately held beliefs are ‘untouchable’ which means it cannot be interfered with by the state.[[640]](#footnote-641)

Second, the manifestation of religion or belief can be subject to limitations under paragraph 2 of the Article (forum externum). This implies that under Article 9(2), Contracting States are allowed to impose restrictions on such manifestations of religion or belief. A reason for this is that Article 9 requires a proper balance to be established between the rights of individual and competing common goals. In the words of Malcom Evans: ‘the claim that an activity is a bona fide manifestation of religion or belief is not a ‘trump’ card: it is merely a factor to be taken into account when balancing up conflicting interest’.[[641]](#footnote-642) In order to strike such balance, as Article 9 allows, freedom to manifest one’s religion can be subject to limitations. For instance, the Strasbourg Institutions recognised that in democratic societies, in which different religions coexist, ‘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 respected’.[[642]](#footnote-643) Yet, such restrictions must pursue a legitimate aim, be ‘prescribed by law’, and be ‘necessary in a democratic society’.[[643]](#footnote-644)

The importance of freedom of religion has been underlined on a number of occasions by the Court. According to the Court’s case-law, freedom of thought, conscience and religion is ‘one of the most vital elements that go to make up the identity of believers and their conception of life’.[[644]](#footnote-645) The Court accepted that freedom of thought, conscience and religions as enshrined in Article 9 ECHR is one of the foundations of a ‘democratic society’ and such freedom is also considered as a ‘precious asset for atheist, agnostics, sceptics and the unconcerned’.[[645]](#footnote-646)

However, the issue of religious symbols and clothing in the public place has become a source of legal and political contention within Europe over recent years.[[646]](#footnote-647)The ECHR jurisprudence on religious dress and symbols, as Ronan McCrea writes, has ‘granted priority to the right of states to define their own relationship to religion, to defend the public sphere and state institutions from religion, or, conversely, to promote certain denominations through state institutions’.[[647]](#footnote-648) This means that in relation to the regulation of religious manifestations in the public sphere, the Contracting States have been allowed a wide margin of appreciation.[[648]](#footnote-649)

Importantly, exercising such discretion, the Contracting States are subject to limitations. For instance, in Refah Partisi v. Turkey, the ECtHR implicitly defined the duty of the state as ‘the neutral and impartial organiser of the exercise of various religions, faiths and beliefs’.[[649]](#footnote-650) In order to perform the state’s duty of neutrality and impartiality, the state must abstain from assessing ‘the legitimacy of religious belief’.[[650]](#footnote-651)

Over the years, some European countries like Switzerland, Turkey, Italy and France have legislated restrictions on wearing Islamic clothing, putting forward different arguments such as: i) ensuring state’s religious neutrality in the state-school; ii) promoting gender equality; iii) upholding state secularism at the state-university; iv) guaranteeing the conditions of ‘living together’. In this context, the next section revolves around four cases and provides an in-depth analysis into the case-law. First, it provides a short introduction of the four most controversial cases. Second, it discusses the way in which the ECtHR has dismissed the choices of women who were denied the right to wear headscarves in educational institutions.

Such discussion is made through the lens of Dworkin’s legal interpretivism. As discussed in the methodology chapter, for Dworkin, the principle of dignity plays an important role in his legal interpretivism. According to Dworkin, the concept of human dignity consists of two principles: the principle of intrinsic value and the principle of personal responsibility. The upshot is that the state’s role should not be that of superimposing a specific conception of the good life, rather that of providing the ethical independence of all individuals and the chance for people to define and pursue their own ideal of well-being. Religious freedom, as Dworkin argues, should be understood as protecting individuals’ ethical independence. This argument derives from the principle of personal responsibility which can only be properly achieved through recognising everyone’s personal responsibility in defining and pursing the value of his or her life. Next section, after a short introduction of the four cases, elaborates to what extent the principle of personal responsibility of women has been protected by the ECtHR.

### 2.2) Case-Law on the Wearing of Religious Clothing and Symbols in Public Sphere: *Dahlab, Şahin, Lautsi and S.A.S*

In Dahlab v. Switzerland, the applicant was a primary school teacher, who abandoned the Catholic faith and converted to Islam and began wearing a headscarf to school.[[651]](#footnote-652) It is noteworthy that she was permitted to wear the headscarf in class for three years and had never received any complaints about the headscarf from her colleagues, her pupils or their parents. This point has been emphasised by Carolyn Evans: ‘a woman with an otherwise spotless employment record who had spent years wearing Islamic clothing to which no-one objected had been effectively sacked because of her religion. But the issue was so clear that it did not even deserve a full and proper consideration by the Court’.[[652]](#footnote-653) However, after a school inspector informed the Director General of Primary Education that Ms. Dahlab wore an Islamic headscarf consequently the applicant was prevented from wearing an Islamic headscarf in class.

While the Court convinced that there had been an interference with Article 9(1) of the Convention, ruled that there had been no violation of Article 9. In reaching this conclusion, the Court relied on the margin of appreciation doctrine to conclude that the Swiss Federal Court’s arguments for upholding the restriction on wearing the headscarf were relevant, sufficient, and proportionate to the stated legitimate aims. The Court, therefore, held that such an interference was necessary in a democratic society.

In the case of *Leyla Şahin v. Turkey* of 29 June 2004*,* the applicant was a Muslim student at the University of Istanbul.[[653]](#footnote-654) On 23 February 1998 the Vice-Chancellor of Istanbul University issued a circular, which stated:

By virtue of the Constitution, the law and regulations, and in accordance with the case-law of the Supreme Administrative Court and the European Commission of Human Rights and the resolutions adopted by the university administrative boards, students whose ‘heads are covered’ (who wear the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials.[[654]](#footnote-655)

Following a circular issued by the Vice-Chancellor banning the wearing the Islamic headscarf, the applicant was refused access to a written examination because she was wearing the headscarf. Subsequently, she was denied admission to a lecture, again for the same reason. Consequently, she argued that the circular prohibiting wearing the Islamic headscarf amounted to a violation of her rights under Article 9 ECHR.

The ECtHR accepted that there had been an interference with the applicant’s right to manifest her religion, yet ruled that there had been no violation of Article 9. The ECtHR examined two key questions in reaching its conclusion: (1) whether the prohibition on the right to wear the Islamic headscarf in universities constituted an interference with the right of Leyla Şahin to manifest her religion; (2) if so, whether such restriction is necessary in a democratic society within the meaning of Article 9 (2).

With respect to the first question, the ECtHR acknowledged that the headscarf ban had constituted an interference with the applicant’s freedom to exercise her religious conviction under Article 9. Indeed, the Court did not examine whether the applicant’s choice to wear a headscarf carried out a religious task. This means that the Court did not focus on whether or not the Islamic headscarf is a requirement of Islam. Rather, it relied on the assumption that the restriction in issue interferes with the applicant’s right to freedom to manifest her religion:

Accordingly, her decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief and, without deciding whether such decisions are in every case taken to fulfil a religious duty, the Court proceeds on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant’s right to manifest her religion.[[655]](#footnote-656)

Once the ECtHR recognised such governmental interference, it then went on to consider whether the interference was prescribed by law, pursued a legitimate aim and was ‘necessary in a democratic society’. Once again, in its judgement, the Court invoked margin of appreciation and held that the banning of the wearing of the Islamic headscarf at the University of Istanbul did not violate Article 9 ECHR.

The case of *Lautsi v. Italy* arose from a complaint lodged by a parent against the presence of a crucifix in the state-school classrooms.[[656]](#footnote-657) Following the rejection by the school’s governors to comply with her demand, the applicant brought administrative proceedings. The Administrative Court dismissed the application and advocated that ‘although the crucifix was undeniably a religious symbol’, it should also be considered ‘a symbol of a value system underpinning the Italian Constitution’.[[657]](#footnote-658) The applicant claimed that the display of a crucifix in the state-school classroom attended by her children was contrary to the principle of secularism by which she wished to raise her children. This was because, as the applicant explained, the presence of the crucifix is a sign which implies that the state supports one religion over others. She also added that ‘in a State governed by the rule of law, no-one should perceive the State to be closer to one religious denomination than another, especially persons who were more vulnerable on account of their youth’.[[658]](#footnote-659) Therefore, relying on Article 2 of Protocol No.1 (right to education)[[659]](#footnote-660) and Article 9, the applicant argued that the presence of a religious symbol constituted an interference incompatible with the ECHR.

However, the Grand Chamber recognised a wide freedom for Italian authorities to decide whether crucifixes should be present in state-school classrooms.[[660]](#footnote-661) In doing so, the Grand Chamber reversed the decision of the Chamber. The Grand Chamber decided, by 15 votes to 2, that there had been no violation of the Convention, on the grounds that the Italian authorities had acted ‘within the limits of the margin of appreciation’ granted to the state.[[661]](#footnote-662) In reaching such conclusion, the Grand Chamber accepted that national authorities are better placed to examine whether crucifixes should be present in state-school classrooms. This means the Grand Chamber’s ruling relied on the margin of appreciation doctrine. On the one hand, the Grand Chamber decision was considered as a victory either for the Italian Government or for the Vatican. On the other hand, such decision has attracted a large amount of criticism focusing on different angles of the decision.[[662]](#footnote-663)

In the most recent case *S.A.S v. France*, the applicant, a Muslim woman who wears the burqa, complained against French Law no 2010-1192 of 11 October 2010, which bans the wearing of clothing designed to conceal one’s face in public places. She alleged that such prohibition was incompatible with Articles 3, 8, 9, 10, 11 and 14 of the ECHR. The ECtHR, however, dispensed with the claim of violation of Articles 3, 10, and 11 and went on to examine the claim with respect to Articles 8, 9, and 14.

The Grand Chamber decided the case by providing a wide margin of appreciation to France and by consequently not finding of a violation of Article 8, 9, and 14. In reaching this conclusion, the Court recognised ‘living together’ as a legitimate ground which could justify restrictions on qualified ECHR rights. Hence, ‘living together’ has been recognised as a legitimate dimension of the ‘rights of others’ under Articles 8(2), 9(2), and 10(2) ECHR.

This section presented the Court’s case-law on the wearing of religious clothing and symbols in public sphere. The next section critically assesses the treatment of gender equality by the ECtHR in Dahlab, Şahin and S.A.S.

## Gender Equality and Headscarves

The tension between women’s equality and religious freedom is considered as one of the most controversial debates in this context.[[663]](#footnote-664) In *Dahlab* and *Şahin*, gender equality was invoked in order to restrict individual choices by, for instance, arguing that the wearing of the Islamic headscarf is an obstacle to the liberation of women.[[664]](#footnote-665) With regard to the principle of gender equality, the ECtHR made an assertion that the Islamic headscarf ‘appears to be imposed on women by a precept which is laid down in the Koran and which is hard to square with the principle of gender equality’.[[665]](#footnote-666) Hence, bans on the wearing of Islamic headscarves are often thought to be compulsory for the promotion of gender equality.[[666]](#footnote-667) Therefore, the Court seems to have taken a paternalistic approach towards women.[[667]](#footnote-668)

This approach, however, can be seen as violating the principle of individual responsibility by denying women’s individual autonomy. The reason for this is that such a paternalist approach ignores the many different reasons why Muslim women choose to wear headscarves or veils, so that it denies an essential feature of responsibility for their own life. This means that denying one’s personal responsibility and ability to adopt a freely chosen religion to practice can be considered as violating his or her human dignity.

As Dworkin notes, a restriction or a policy may violate dignity ‘by usurping an individual’s responsibility for his [or for her] own ethical values’.[[668]](#footnote-669) For instance, forcing people to wear seatbelts does not violate people’s ethical independence simply because such policy is not motivated by a belief in the superiority of some view.[[669]](#footnote-670) According to Dworkin, as Steven Guest emphasised, there is no violation of ethical independence ‘where the matter is not foundational, or the government does not assume any ‘ethical’ justification’.[[670]](#footnote-671)

According to Dworkin, the choice to follow a certain religious practice and manifest it through clothing reflects the autonomous decision of the individuals. On this account, women’s autonomy can be legally recognised when the concepts of human dignity and personal responsibility are considered as ‘empowering and self-determining rather than constraining and paternalistic’.[[671]](#footnote-672) However, the personal autonomy of individual women has been considered as the missing element in the Court’s decisions.[[672]](#footnote-673) In Dahlab, for instance, the Court justified its decision as follows:

 it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran 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.[[673]](#footnote-674)

This reasoning can be summarised on three grounds.[[674]](#footnote-675) The first is that the wearing of the Islamic headscarf may ‘somehow’ have a proselytising effect; the second is that the headscarf is incompatible with the principle of gender equality; the third is that it is incompatible with respect for others and tolerance. This understanding of the Islamic headscarf has been used in later decisions of the ECtHR to justify restrictions on wearing the headscarf in state institutions. However, it should be noted that none of those points were properly supported by either concrete evidence or facts.[[675]](#footnote-676) Yet, such decision had a significant importance because its legal reasoning was used in *Şahin*. Indeed, such arguments -gender equality and tolerance- were considered, without much consideration, as the main grounds for the Court’s conclusion in *Şahin*. This means that the Grand Chamber in *Şahin* relied on the judgement in Dahlab with specific respect to gender equality and tolerance.

In *Şahin,* according to the Court, the prohibition was based on two principles: secularism and gender equality. On this basis, the wearing of the Islamic headscarf was found incompatible with the principle of gender equality. What emerges strongly from *Şahin* is that the Court reinforced that the wearing of an Islamic headscarf was incompatible ‘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’.[[676]](#footnote-677) In doing so, the Court established a link between the symbolic meaning of the Islamic headscarf and anti-democratic values in the Turkish context. This is because the Court accepted that the Islamic headscarf was ‘somehow’ inconsistent with the value of equality, the principle of secularism and democracy. This approach, however, was strongly criticised by Judge Tulkens in her dissenting opinion:

It is not the Court’s role to make an appraisal of this type – in this instance a unilateral and negative one – of a religion or religious practice, just as it is not its role to determine in a general and abstract way the signification of wearing the headscarf or to impose its viewpoint on the applicant.[[677]](#footnote-678)

As both Dahlab and *Şahin* demonstrate, the prohibitions on religious symbols in state-school were justified in the name of gender equality. However, such paternalistic justification should not be accepted as a legitimate reason since it violates the principle of human dignity. A reason for this is that the paternalistic goal of restricting people from living ethically worthless lives does not constitute as legitimate under the principle of personal responsibility.[[678]](#footnote-679) Thus, according to this principle, banning the Islamic headscarf because of paternalistic disapproval would widely be considered as simply unacceptable and an unjustifiable intrusion in the personal life of the right-holder.[[679]](#footnote-680)

Nevertheless, the Court’s decision in *Şahin* can be explained on the basis of the need to protect secularism and democracy from extremist movements in Turkey. The Court noted that ‘it is the threat posed by extremist political movements seeking to impose on society as a whole their religious symbols and conception of a society founded on religious precepts’.[[680]](#footnote-681) In the Court’s view, manifesting one’s religion by peacefully wearing a headscarf can be restricted in order to prevent ‘radical Islamism’. Although there was no legal proof of the applicant having a political agenda, what comes out from this decision is an implicit suggestion of a correlation between the Islamic headscarf and militant forms of Islam.[[681]](#footnote-682) This means that the Court considered that all women who wear the headscarf are potentially fundamentalist, and therefore they pose a threat to preserve pluralism in the society. In her dissenting opinion, Judge Tulkens emphasised this point:

Merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and “extremists” who seek to impose the headscarf as they do other religious symbols.[[682]](#footnote-683)

Indeed, such an approach implies that the ECtHR’s judgement seems driven ‘by the fear of Islamic Fundamentalism…’[[683]](#footnote-684) For instance, in *Refah Partisi* (the Welfare Party) and Others, the Court said that:

In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under Article 9(2) of the Convention.[[684]](#footnote-685)

In favour of the Court’s position, one could plead that the ECtHR explicitly recognised the importance of the principle of gender equality. Such principle is described as ‘one of the key principles underlying the Convention’ and ‘a goal to be achieved by member states of the Council of Europe’.[[685]](#footnote-686) To some extent, it is understandable that the Court was concerned about the principle of gender equality in the Turkish context. Such concern, according to the Court, derives from the presumption that:

when examining the question of the Islamic headscarf in the Turkish context, it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it.[[686]](#footnote-687)

This passage represents the Court’s position with regard to gender equality and the Islamic headscarf in the Turkish context. In such a context, wearing the Islamic headscarf was considered in contradiction to the principle of equality between man and woman. According to the Court, then, the headscarf is seen as a serious obstacle to the liberation of women in Turkey. The prohibition on wearing the headscarf is considered as providing equality between women and men. Thus, the ECtHR seems to have accepted Turkey’s assertion that the headscarf ban advances gender equality.

However, no argument has been put forward as to how prohibiting students to wear the Islamic headscarf is a necessary condition for gender equality in Turkey. According to Vakulenko, in both cases ‘the headscarf was attributed a highly abstract and essentialised meaning of a religious item extremely detrimental to gender equality’.[[687]](#footnote-688) Ratna Kapur points out that *Şahin* and *Dahlab* cases are ‘an example of how equality remains its own stumbling block to the realisation of equality’.[[688]](#footnote-689) Therefore, it can be said that the principle of gender equality, without adequate analysis, does not provide a legal basis for restricting a woman from following a freely adopted religious practice.[[689]](#footnote-690)

As Ivana Radacic argues, the principles of equality and secularism have been interpreted in a paternalistic manner.[[690]](#footnote-691) Such a paternalistic approach, however, can be seen as violating the principle of personal responsibility by denying the individual the ability to define and pursue her own judgement about the value of wearing the Islamic headscarf. In *Dahlab* and *Şahin*, the decisions of the Court relied on two stereotypes of Muslim women as the main grounds for the decisions. The Court, in both cases, made the assumption that the wearing of a headscarf by itself is incompatible with the principle of gender equality. The Court reasoned that it seems to be ‘imposed on women by a precept which is laid down in the Koran’.[[691]](#footnote-692) Evan draws attention to the wording used by the Court in *Dahlab*. She notes that the way in which the word ‘imposed’ is used here is unnecessary.[[692]](#footnote-693) In the words of Carolyn Evans:

Most religious obligations are 'imposed' on adherents to some extent and the Court does not normally refer to the obligations in such negative terms. It is not clear why wearing headscarves is any more imposed on women by the *Qur’an,* than abstinence from pork or alcohol is imposed on all Muslims, or than obeying the Ten Commandments is imposed on Jews and Christians.[[693]](#footnote-694)

It has to be born in mind that there is an explicit disagreement among Islamic scholars as to whether the wearing of the Islamic headscarf is a mandatory religious duty.[[694]](#footnote-695) However, the concept of gender equality in Islam, and its relationship with the Islamic headscarf did not receive serious consideration by the Court in either case. In both cases, according to Evans, the Court relied on the Western understanding of Islam: ‘…the *Qur'an* and Islam are oppressive to women and there is no need to be more specific or to go into any detail about this because it is a self-evident, shared understanding of Islam’.[[695]](#footnote-696) Sharon Todd notes that: ‘the point is that this connection between lack of equality and the wearing of religious symbols is only ever made in the light Muslim practices. The argument is never marshalled to defend Jewish or Sikh boy’s equality’.[[696]](#footnote-697) This means that the Islamic headscarf is perceived by the ECtHR as a ‘powerful’ symbol of gender inequality.

It is difficult to understand why the Islamic headscarf has to necessarily symbolise gender inequality. In both cases, the Court did not provide a plausible reason as to why the wearing of the headscarf cannot be compatible with gender equality. Rather, the Court simply said that it was ‘…difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and…equality and non-discrimination.’[[697]](#footnote-698)An immediate question arises as to why it is difficult or where such difficulty lies. Or as Ellen Wiles notes: ‘is the headscarf solely or invariably a symbol of female submission and inferiority in Islam, or is its meaning more complex and divergent, particularly in contemporary European societies?’[[698]](#footnote-699) It seems that the Court, without engaging with the complexity of the issue, took a simplistic assumption about Muslim women.

In fact, the Court in *Şahin* relied only on the decision in *Dahlab* with respect to the Islamic headscarf and gender equality. In *Dahlab*, the headscarf was interpreted as a ‘powerful religious symbol’ in a way that ‘appeared to be imposed on women by a precept which is laid down in the Koran and which…was hard to square with the principle of gender equality’. This does not mean more than that merely wearing the Islamic headscarf is an obstacle to the realisation of the gender equality. The Court’s reasoning for this approach seems to be that the Islamic headscarf is inherently oppressive and inimical to gender equality, and therefore it should be banned. What has been missing until now is the voice of Muslim women who wear the headscarf as an autonomous choice.

It can also be argued that Dworkin’s account of dignity blocks paternalistic policies which may restrict the autonomy and liberty of individuals without their consent. In this context, gender equality is invoked to restrict individual choices by, for instance, claiming that the wearing of the headscarf is incompatible with the ideals of equality. However, it is difficult to find concrete evidence in either *Şahin* or *Dahlab* that the wearing of the Islamic headscarf was anything other than the choice of those women. In each, the Court found an artificial conflict between the Islamic faith and women’s right to equality which had not been adequately examined. Therefore, in *Şahin* and *Dahlab* the Court paternalistically denied the applicant’s right to personal autonomy.[[699]](#footnote-700)

It should be pointed out, however, that the Court’s assumption ignores the many different reasons why women wear headscarves. As Judge Tulkens pointed out in her powerful dissenting opinion:

What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to…In this connection, I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted. Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. “Paternalism” of this sort runs counter to the case-law of the Court, which has developed a real right to personal autonomy on the basis of Article 8.[[700]](#footnote-701)

The first impression given by the case law of the Court is that the Islamic headscarf has been recognised as being associated with the subordination of women. In other words, in both cases, the restrictions on wearing the Islamic headscarf were justified in the name of gender equality. Such presumption ignores the fact that a woman may wear the Islamic headscarf in accordance with her religious faith, culture or personal convictions. What emerges strongly from *Şahin and Dahlab* is that wearing the headscarf as a personal choice was simply absent from the Court’s rulings. Thus, the Court justified its decisions based on preconceived opinions about Muslim women.

From the cases mentioned above, it can be concluded that the Court took a paternalistic approach toward Muslim women.[[701]](#footnote-702) Such approach derives from the idea that ‘the person interfered with will be better off or protected from harm’.[[702]](#footnote-703) In this context, ‘banning [the headscarf] means imposing one set of standards and denies these women freedom as autonomous persons in their own right: seemingly in the name of gender
equality’.[[703]](#footnote-704) The Court took the view that these adult women do not know what is good for them, so that they should be forced not to wear the Islamic headscarf. This sort of paternalistic approach, as Judge Tulkens emphasised, is contrary to the case law of the ECtHR which has developed a real right to personal autonomy. Such approach, therefore, can be seen as a denial of the woman’s right to personal autonomy in the context of the ECHR. Dworkin writes:

some laws can be justified only on deep paternalistic assumptions the majority knows better than some individuals where value in their lives is to be found and that it is entitled to force those individuals to find it there… These laws are offensive to liberty and must be condemned as affronts to people’s personal responsibility for their own lives’.[[704]](#footnote-705)

According to Dworkin’s account of human dignity and liberty, the Court’s paternalistic approach violates the woman’s right to liberty by deciding for her something that she has the right to decide for herself. In this context, the notion of dignity should be understood as a claim for independence from state in matters of ethical choice.[[705]](#footnote-706) It is a fundamental aspect of Dworkin’s theory that a good life is understood as defining success according to one’s independently defined and chosen values. For Dworkin, therefore, the concept of human dignity provides the legitimate ground for religious freedom.[[706]](#footnote-707) However, the Court in *Şahin* and *Dahlab* failed to recognise women’s personal responsibility for realising the value of their life, hence violated the dignity of women.

In the case of *S.A.S v. France*, however, the ECtHR took the view that a State Party cannot invoke gender equality in order to restrict a religious practice which is defended by women.[[707]](#footnote-708) Unlike the decisions of *Şahin* and *Dahlab*, the Court in *S.A.S* was not convinced by the Government’s argument as it concerned respect for equality between men and women. While gender equality, as a justification for the ban, has been adamantly put forward by the French government, the Court made it clear that:

a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.[[708]](#footnote-709)

In doing so, the Court explicitly departed from its heavily criticised position regarding the practice of wearing religious clothing by Muslim women. This can be considered as one of the most significant aspects of the judgement because it shows a serious shift in the ECtHR’s position towards gender equality compared to previous judgements such as *Dahlab v. Switzerland* and *Şahin v. Turkey*, where the ECtHR held wearing the Islamic headscarf difficult to reconcile with ‘tolerance, respect for others and the principle of gender equality’.[[709]](#footnote-710)

Whereas, in *S.A.S*., the Court held that there is no evidence that women who wear the Islamic veil display disrespect to others. The Court said that ‘it does not have any evidence capable of leading it to consider that women who wear the full-face veil seek to express a form of contempt against those they encounter or otherwise to offend against the dignity of others’.[[710]](#footnote-711) Unlike Dahlab and *Şahin* cases, the Court in S.A.S. v. France took a more reasonable approach towards religious clothing and gender equality and autonomy.

In *S.A.S*.,the Government argued that the ban was compatible with the Convention since it pursued two legitimate aims: such as public safety and ‘respect for the minimum set of values of an open and democratic society’. In respect to the second aim, the Government referred to three key values: the principle of gender equality, respect for human dignity, and respect for the minimum requirements of life in society. In the Government’s submission, therefore, the principle of gender equality was one of the main reasons for upholding the ban.

The Government reasoned that ‘the wearing of the full-face veil by certain women shocked the majority of the French population because it infringed the principle of gender equality as generally accepted in France’.[[711]](#footnote-712) According to the Government, then, the wearing of the full-face veil is perceived as a symbol of gender inequality and oppression of women. In doing so, the Government, in fact, defines a religious dress -the Islamic veil- based on the majority’s presumption. Such presumption, not surprisingly, based on a stereotypical view of Islam and of Muslim women which fails to accept the variety reasons why women wear headscarves and such veils.[[712]](#footnote-713)

However, in S.A.S., such characterisation was not accepted by the ECtHR because the clothing in question was seen as the expression of a cultural identity which ‘contributes to the pluralism that is inherent in democracy’.[[713]](#footnote-714) This means that the Court found a link between the Islamic dress and Muslim women’s identity and such identity was considered as an inherent part of the pluralistic society. In other words, the Court for the first time acknowledged that Muslim women see the Islamic veil as a way of expressing their cultural identity. On the question of gender equality, finally, the Court explicitly refused the interpretations of the Islamic symbols as ‘a symbol of a form of subservience’. Thus the decision made an important positive step towards protecting religious freedom as an individual right rooted in individual autonomy.

One might argue that the justifications for religious freedom can be divided into two main groups such as instrumental and deontological.[[714]](#footnote-715) One of the main deontological justifications put forward by Dworkin for freedom of religion centre on the concepts of human dignity and personal responsibility which can only be ensured by the recognition of personal autonomy.[[715]](#footnote-716) Dworkin explains:

Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived.[[716]](#footnote-717)

In this regard, the basis for the right to religious freedom is respect for the individual’s conception of the good life. In the context of religious symbols and clothing in the public sphere, the choice to follow a specific religious practice and manifest it through clothing reflects the autonomous decision of the individual.[[717]](#footnote-718) Marshall summarises this point:

each person is recognised as unique and ought to be able to live his or her life. Self-respect in this context – viewing oneself as worthy of the same status and entitlements as every other person regardless of what you choose to wear - should surely be foundational in any liberal democracy.[[718]](#footnote-719)

This means that the woman claiming the right to wear the Islamic headscarf is exercising her personal autonomy.[[719]](#footnote-720)

This approach has been suggested as the basis for human dignity, hence it can be seen as a philosophical underpinning for the right to religious freedom. Since the basis for the right to religious freedom is respect for the individual autonomy, paternalism is unacceptable under the principle of personal responsibility. As discussed above, however, Dahlab and *Şahin* denied the fact that restricting the wearing of headscarves by the state ‘is just as paternalistic and patriarchal as putting pressure on women to wear these garments’.[[720]](#footnote-721) Thus, such approach does not qualify as legitimate under the principle of personal responsibility.

According to an instrumental justification, religious freedom has been understood to refer to the tolerance of different opinions concerning religion. From this perspective, such religious toleration is seen as necessary to maintain social order and prevent conflicts between people from different belief systems. For instance, one of the main arguments for religious toleration was advanced by John Locke:

It is not the diversity of opinions (which cannot be avoided), but the refusal of toleration to those that are of different opinions (which might have been granted) that has produced all the bustles and wars that have been in the Christian world, on account of religion.[[721]](#footnote-722)

It could be argued that the central concept of this argument is the idea of equality. Indeed, this approach reflects on the idea that while the meaning of life may be different for each individual, each human life is equally important. Therefore, as Dworkin explains: government [state] ‘must not only treat people with concern and respect, but with equal concern and respect… It must not constrain liberty on the ground that one citizen’s conception of the good life of one group is nobler or superior to another’s.’[[722]](#footnote-723)

Ronald Thiemann notes that the truth behind the separation of church and state comes from the principle of state neutrality.[[723]](#footnote-724) Such principle implies that government should not prefer one conception of the good over another. Thus, government can be neutral as long as it remains morally neutral. This, then, means that a state is neutral as long as it does not interfere with the individual conceptions of the good life.[[724]](#footnote-725) According to this understanding of neutrality, each individual should be allowed to find his or her own good life. This is because, each individual has a different conception of the good life and in order to implement their conceptions of the good life, the state must remain neutral in religious matters.

It could be argued that one of the main principles established by the Court is that of state’s obligation of neutrality.[[725]](#footnote-726) The Court for the first time, in *Hasan and Chaush v. Bulgaria,* ruled that states have an obligation to be neutral in religious issues.[[726]](#footnote-727) It stated that ‘facts demonstrating a failure by the authorities to remain neutral in the exercise of their powers in this domain must lead to the conclusion that the State interfered with the believers' freedom to manifest their religion within the meaning of Article 9 of the Convention’.[[727]](#footnote-728) This means that the principle of religious neutrality has been recognised by the Court. As Julie Ringelheim has observed the Court, in a 2000 judgment, clearly established that religious freedom entails that states have a duty to be neutral in religious matters.[[728]](#footnote-729) State neutrality remains as a core principle of the Court’s case-law in religious matters. Therefore, next section aims to shed light on how the ECtHR has constructed the concept of states’ denominational neutrality.

## Intolerance, Secularism, and Neutrality: *Dahlab, Şahin and Lautsi*

It should be noted that the European Court of Human Rights endorsed the findings of the judgement of the domestic court in the Dahlab case, so that it might be necessary to resort to the judgement of the Federal Court. According to the Federal Court in Dahlab, freedom of religion is understood as requiring ‘the State to observe denominational and religious neutrality’ which implied that ‘in all official dealings it must refrain from any denominatial or religious considerations that might jeopardise the freedom of citizens in a pluralistic society… In that respect, the principle of secularism seeks both to preserve individual freedom of religion and to maintain religious harmony in a spirit of tolerance”.[[729]](#footnote-730) Given the applicant’s role and status, the Federal Court also noted that this neutrality is particularly important in State schools simply because teachers are representatives of the State, ‘it is therefore especially important that they should discharge their duties… while remaining denominationally neutral’.[[730]](#footnote-731) The Federal Court’s reasoning for this approach seems to be that the applicant’s freedom of religion and belief must be balanced against the public interest in the principle of denominational neutrality.

According to the ECtHR, pupils and parents may be influenced or offended by the teacher’s faith. However, as the Federal Court explicitly noted that ‘admittedly, there have been no complaints from parents or pupils to date’.[[731]](#footnote-732) In a similar vein, there was no evidence that the applicant wanted to promote her religious belief in the classroom. For instance, even the Federal Court acknowledged that the applicant only wanted to wear the Islamic headscarf ‘in order to obey a religious precept…’[[732]](#footnote-733) Nevertheless, merely the wearing of the Islamic headscarf was considered as a threat to the peace at schools. The Federal Court explained:

her pupils are therefore young children who are particularly impressionable. Admittedly, she is not accused of proselytising or even of talking to her pupils about her beliefs. However, the appellant can scarcely avoid the questions which her pupils have not missed the opportunity to ask. It is therefore difficult for her to reply without stating her beliefs. Furthermore, religious harmony ultimately remains fragile in spite of everything, and the appellant’s attitude is likely to provoke reactions, or even conflict, which are to be avoided.[[733]](#footnote-734)

As the citation reveals, there is a clear suggestion in the Federal Court’s judgement of an association between the Islamic headscarf and provocative actions which can lead to conflict. It has to be stressed that the Federal Court’s arguments have been essentially accepted by the ECtHR. Carolyn Evans points out that, first of all, it must be accepted that ‘the evidence of direct proselytising by Ms. Dahlab was non-existent’.[[734]](#footnote-735) While there was no evidence to suggest that the applicant intended to convert her pupils to Islam, the ECtHR held that ‘it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect’.[[735]](#footnote-736) Such language, according to Nehal Bhuta, is the ‘marker of an absence of evidence, and effectively reverses the burden of demonstrating the necessity of the rights restrictive measures’.[[736]](#footnote-737) Therefore, the ‘evidence’ of proselytising was solely based on the wearing of the Islamic headscarf.

In reaching its conclusion the Court reasoned that the headscarf was a ‘powerful religious symbol’ and that teachers may have a serious influence on their pupils.[[737]](#footnote-738) In that connection, the Court found that “the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran” therefore it is difficult “to reconcile the wearing 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”.[[738]](#footnote-739) In the light of those considerations, the Court concluded that the measure banning the applicant wearing the Islamic headscarf in class was ‘necessary in a democratic society’.

There are two key elements to this reasoning. First, the Islamic headscarf is considered as a ‘powerful religious symbol’ that may have a negative influence on pupils. Second, the headscarf is characterised as a symbol of gender inequality, which cannot be compatible with respect for others. These arguments presented by the Court might be subject to different criticisms on the basis of Dworkin’s defence of state neutrality.

Dworkin begins by saying that ‘government must be neutral on what might be called questions of the good life’.[[739]](#footnote-740) Adding further specification to this claim, Dworkin argues that ‘political decisions must be independent of any conception of the good life or what gives value to life’.[[740]](#footnote-741) This position assumes that political decisions should be ‘independent’ of ideas of the ‘good’ and justifications of such decisions should be neutral.[[741]](#footnote-742) A reason for this is that each individual follows a complex conception of the good life or what makes value to life. Individuals, then, should be free in their personal private life to act as they choose. This implies that government ought to be neutral to the different interpretations of the good life as adopted by its citizens.

Neutrality, then, entails that government should take no position with regard to the various ideas of the good life. It has to be stressed that the concept of equality is at the core of Dworkin’s theory. Fundamental to this neutrality based on equality is an essential condition for a state to treat its citizens as equals. This means that the Dworkinian notion of neutrality seems to have a principle of equality at its heart.[[742]](#footnote-743) This is because he draws attention to the idea that there is a connection between the concept of neutrality and equality. Indeed, he establishes a link between the ideal of state neutrality and the ideal of equality. Therefore, once the Islamic headscarf is associated with gender inequality and intolerance to the others by the State, this can easily be shown to violate the principle of state neutrality in Dworkin’s sense.

The Court’s reasoning in *Şahin* can be found less convincing for a couple of reasons. The Turkish government argued that in order to protect human rights and democracy within the state, the principle of secularism must be essentially preserved. The Court accepted this ill-defined argument and added that the principle of secularism, as interpreted by Turkey’s Constitutional Court, was undoubtedly one of the key principles of the Turkish State, ‘which are in harmony with the rule of law and respect for human rights’.[[743]](#footnote-744) Hence, according to the Court, upholding this principle is crucial to protect the democratic system in Turkey. However, no argument has been put forward as to how prohibiting students to wear the Islamic headscarf is necessary for the protection of the democratic system in Turkey.

It can be argued that the ECtHR was too deferential to the Turkish Government’s interpretation that the headscarf ban is necessary to defend the principle of secularism.[[744]](#footnote-745) The Turkish Government advocated that the prohibition of wearing an Islamic headscarf in the state school was necessary to maintain the constitutional values of secularism. The government, then, referred to the case-law of the Turkish Constitutional Court, which had held that ‘secularism in Turkey, as the guarantor of democratic values, was the meeting point of liberty and equality’.[[745]](#footnote-746) In addition to this, the Constitutional Court added that ‘freedom to manifest one’s religion could be restricted in order to defend those values and principles’.[[746]](#footnote-747) According to the ECtHR:

This notion of secularism to be consistent with the values underpinning the Convention. It finds that upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey.[[747]](#footnote-748)

While the ECtHR correctly emphasised the importance of the concept and practice of secularism in the Turkish context, it failed to adequately assess Turkey’s interpretation of secularism. Such problem lies in how the ECtHR itself interpreted secularism in the instant case. In making a judgement about what is secular, the ECtHR relied upon adherence to the state’s domestic interpretations of secularism.[[748]](#footnote-749) The consequence of this is that “any action Turkey takes to limit religious freedom in the name of secularism must be in harmony with human rights, since secularism -as an element of democracy- is itself in harmony with human rights.”[[749]](#footnote-750) The Court accepted that this understanding of secularism was compatible with the values underpinning the Convention. Therefore, it can be said that the ECtHR’s necessity test began with the presumption that the wearing of the Islamic headscarf is incompatible with secularism. The immediate question, then, becomes how is banning of religious dress in state universities might help to preserve secularism?

However, the ECtHR neither analysed secularism in this context nor critically evaluated why the headscarf constituted a threat to the principle of secularism. In other words, secularism has not been defined by the ECtHR. Rather, deferring to the Turkish Constitutional Court’s interpretation of secularism, the ECtHR hold that ‘this notion of secularism to be consistent with the values underpinning the Convention,’ and convinced that upholding secularism is ‘necessary to protect the democratic system in Turkey.’[[750]](#footnote-751) This implies that the ECtHR reiterated the Turkish Constitutional Court’s Interpretation of secularism and acknowledged it at face value. The rulings in both cases -*Dahlab* and *Şahin* - were held to maintain the neutrality of the state. However, the legal basis of the headscarf’s incompatibility with secularism has remained largely absent in the ECtHR’s rulings.

Furthermore, in *Dahlab*,the applicant was not permitted to wear her headscarf in public school as a necessity of the principle of neutrality applicable at the Canton of Geneva. According to the Swiss authorities, such prohibition was necessary in order to uphold the secular nature of state institution:

the Federal Court took into account the very nature of the profession of State school teachers, who were both participants in the exercise of education authority and representative of the State, and in doing so weighed the protection of the legitimate aim of ensuring the neutrality of the State education system against the freedom to manifest one’s religion.[[751]](#footnote-752)

The essence of this argument is that state school teachers are considered as representatives of the State, and therefore, they should tolerate proportionate limitations on their freedom of religion to maintain the right of State school pupils ‘to be taught in a context of denominational neutrality’.[[752]](#footnote-753) Malcom Evans criticises this understanding of neutrality: ‘the call for ‘impartiality’ and ‘neutrality’ has increasingly been taken to mean that the State must present itself, through its servants, in a neutral fashion, where neutrality means non-religious, and the mere presence of the religion is seen as a threat to the perception of neutrality’.[[753]](#footnote-754)

It has to be stressed that the Court in *Şahin* makes no distinction between teachers and students as it does in *Dahlab*,which concerned a state-school teacher as a representative of the State. However, in *Şahin*, while the applicant was a student, the Court failed to distinguish the facts of the cases. Consequently, the judgements in both cases were held to preserve the neutrality of the state. Heiner Bielefeldt, the Special Rapporteur on freedom of religion or belief, provides an overview of the issue of religious symbols in the school context:

a teacher wearing religious symbols in the class may have an undue impact on students, depending on the general behaviour of the teacher, the age of students and other factors. In addition, it may be difficult to reconcile the compulsory display of a religious symbol in all classrooms with the State’s duty to uphold confessional neutrality in public education in order to include students of different religions or beliefs on the basis of equality and non-discrimination.[[754]](#footnote-755)

In *Lautsi v. Italy* the main issue was the permissibility of the display of crucifixes in state-school classrooms. The applicant argued that the presence of crucifixes in state-school classroom was incompatible with her freedom of religion, as protected by Article 9 ECHR. The Grand Chamber of the ECtHR ruled that the display of the crucifix on the classroom walls of Italian state school is compatible with freedom of thought, conscience and religion (Article 9 ECHR) under ECHR. While secularism is not clearly embodied in the Constitution, the Italian Constitutional Court admitted that secularism is to be considered as one of the main principles of the Italian legal system.[[755]](#footnote-756) However, it should be stressed that in Italy secularism does not mean neutrality, rather it means ‘a positive or welcoming attitude towards all religions communities’.[[756]](#footnote-757)

According to the Chamber, ‘the symbol of the crucifix has a number of meanings among which the religious meaning is predominant’.[[757]](#footnote-758) Quoting the *Dahlab v Switzerland* decision,[[758]](#footnote-759) the Chamber argued that the crucifix can be considered as a ‘powerful external symbol’, so that the display of it can be interpreted by pupils as a religious sign.[[759]](#footnote-760)

The Court reasoned that crucifixes, in the context of public education, were perceived as an integral part of the school environment, thus they were considered as ‘powerful external symbols’. In doing so, the Court interpreted the crucifix as a ‘powerful’ religious symbol, namely ‘a sign that is immediately visible to others and provides a clear indication that the person concerned belongs to a particular religion’.[[760]](#footnote-761) This means that it is impossible to ignore the crucifix, whose religious meaning is predominant.[[761]](#footnote-762) This implies that the presence of the crucifix may have an influence on pupils in a way that they have been educated ‘in a school environment marked by a particular religion’.[[762]](#footnote-763) The Court found that such a powerful religious symbol can have an emotional influence on pupils who belong to religious minorities, and hence they may be ‘emotionally disturbing’.[[763]](#footnote-764)

Moreover, the Chamber pointed out that, the state has an obligation to uphold ‘confessional neutrality’ in state-school classrooms.[[764]](#footnote-765) This means that the state is bound to provide religious neutrality in public education, where school attendance is compulsory. According to the Court’s case-law, contracting states are restricted to impose beliefs ‘in places where persons were dependent on it or in places where they were particularly vulnerable, emphasising that the schooling of children was a particularly sensitive area in that respect’.[[765]](#footnote-766) In a neutral state, in Dimitrios Kyritsis’ words: ‘citizens can legitimately expect that state will not use the school environment to champion any parochial position on religious matters’.[[766]](#footnote-767) However, the Grand Chamber failed to explain how the display in state-school classrooms of a crucifix could serve the preservation of educational pluralism that is one of the essential conditions for the maintenance of democratic society under the Convention.

In addition to that, the Court further held that parents had the right to educate their children according to their convictions and children had the right to decide whether to believe or not believe. The Court concluded that:

The compulsory display of a symbol of a particular faith in the exercise of public authority in relation to specific situations subject to governmental supervision, particularly in classrooms, restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe. It is of the opinion that the practice infringes those rights because the restrictions are incompatible with the State’s duty to respect neutrality in the exercise of public authority, particularly in the field of education.[[767]](#footnote-768)

Consequently, the Court unanimously concluded that there had been a violation of Article 2 of Protocol no 1 taken together with Article 9 ECHR. However, the Grand Chamber overturned the Second Chamber’s decision and concluded that the presence of the crucifix is compatible with the right of parents to have their children educated compatibly based on their own philosophical and religious convictions.

### 4.1) The Grand Chamber Reasoning in *Lautsi*: Active Symbol vs Passive Symbol

The Grand Chamber explicitly refused the characterisation made in the previous decision that the crucifix should be seen as a ‘powerful’ external symbol, as firstly recognised in Dahlab. In Dahlab, the Islamic headscarf of a teacher had been recognised as a powerful external symbol, and therefore it had been banned. The prohibition on wearing an Islamic headscarf was justified in order to ‘protect the religious beliefs of the pupils and their parents and to apply the principle of denominational neutrality in schools enshrined in domestic law’.[[768]](#footnote-769) In this context, the Court specifically took into account that pupils were between the age of four and eight, ‘an age at which children wonder about many things and are also more easily influenced than older pupils’.[[769]](#footnote-770) Therefore, referring to the Dahlab case the Chamber found that the crucifix should be considered as a ‘powerful external symbol’.

However, such analogy was rejected by the Grand Chamber, without giving adequate reasoning.[[770]](#footnote-771) In Dahlab, the Court identified specific principles regarding the relationship between religion and children. In particular, the Court had consideration for the ‘tender age of the children’, aged between four and eight, therefore, in the Court’s view they need special protection.[[771]](#footnote-772)

Contrary to the Chamber’s decision, the Grand Chamber said that that there was no evidence to support that the presence of a religious symbol on the classroom walls had an influence on pupils. In other words, the Grand Chamber disagreed with the Chamber on the basis that: “there is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonable be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed”.[[772]](#footnote-773) Accordingly, the Grand Chamber demanded that concrete evidence ought to be submitted, to the Court, to prove that a religious symbol had an emotional impact. This point has also been supported by Judge Power: “given the critical role of “evidence” in any Court proceedings, the Grand Chamber has correctly noted that there was no evidence opened to the Court to indicate any influence which the presence of a religious symbol may have on school pupils”.[[773]](#footnote-774) Therefore, the applicant is asked to adduce evidence to show any negative influence of the state-sponsored crucifix on her children.

It has to be born in mind that in *Dahlab*, there was not any evidence that the Islamic headscarf had any influence on pupils. In addition to that, the applicant had never been accused of ‘proselytising’. Nevertheless, in ruling on Dahlab, the Court relied on a speculative argument which suggests:

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children… it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect.[[774]](#footnote-775)

This means that the presence of a religious symbol, associated with a teacher, at a State school was sufficient grounds for the ECtHR to ban it in the classroom. In Dahlab, the nature of the religious symbols and its impact on young pupils were specifically taken into account by the ECtHR. In *Şahin* and Dahlab, for instance, the Islamic headscarf was perceived as a threat to secularism and the neutrality of public space, and therefore it should be kept at a distance from the state.[[775]](#footnote-776)

However, the Grand Chamber in *Lautsi*, considered that the crucifix lacks impact and influence on pupils. In reaching this understanding, the Grand Chamber reasoned that ‘a crucifix on a wall is an essentially passive symbol and this point is of importance in the Court’s view, particularly having regard to the principle of neutrality’.[[776]](#footnote-777) The upshot is that the crucifix was interpreted as a ‘passive’ symbol by the Grand Chamber. In other words, while the Islamic headscarf is a powerful external symbol, the crucifix is a passive symbol.[[777]](#footnote-778) One may think that the principle of neutrality can be invoked to restrict minority symbols, but cannot be invoked to prohibit majority symbols.[[778]](#footnote-779) In the words of Lorenzo Zucca: ‘some symbols are more neutral than others’.[[779]](#footnote-780)

Furthermore, in Dahlab, the ECtHR defined the Islamic headscarf as a ‘powerful religious symbol’ and recognised that the wearing of a headscarf ‘might have some kind of proselytising effect’.[[780]](#footnote-781) In reaching this conclusion, the Court clarified that ‘a powerful religious symbol – that is to say, a sign that is immediately visible to others and provides a clear indication that the person concerned belongs to a particular religion’.[[781]](#footnote-782) In *Lautsi*, the Chamber considered the crucifix as a powerful symbol because ‘it is impossible not to notice crucifixes in the classrooms. In the context of public education they are necessarily perceived as an integral part of the school environment and may therefore be considered “powerful external symbols”’.[[782]](#footnote-783) However, the Grand Chamber failed to provide a clear definition of what a passive symbol is.

As the ECtHR has repeatedly made clear, the state ‘in fulfilling the functions assumed by it in regard to education and teaching’ must guarantee that ‘information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner’.[[783]](#footnote-784) This entails that the state is bound to maintain neutrality toward religion in the school environment.[[784]](#footnote-785) In *Lautsi*, the Grand Chamber held that the organisation of the school environment and content of education fell within the competence of the contracting states unless these teachings do not constitute to indoctrination of pupils. The Grand Chamber emphasised that the ECtHR shows respect to the contracting states’ decision in relation to education and teaching as long as such decisions ‘do not lead to a form of indoctrination’. The immediate question, then, becomes what does the display of a religious symbol on classroom walls mean in this context?

First of all, it is difficult to accept that the presence of the crucifix is ‘neutral’.[[785]](#footnote-786) Even the Grand Chamber recognised that ‘the crucifix is above all a religious symbol’. It should be admitted that the crucifix is an explicit symbol of the dominant religion in Italy. As Susanna Mancini writes:

the crucifix, despite the judges' effort, does not become a purely cultural symbol but rather a "semi-secular" symbol that very effectively represents the "new" and "healthy" forms of the alliance between religion and state power… But this "cultural" or "diffused" Christianity that supposedly pervades the Constitution produces an unacceptable discriminatory effect in that non-believers are excluded from the religious meaning of the cross.[[786]](#footnote-787)

A neutral state, as Dworkin notes, should treat all its citizens ‘as free, or as independent, or with equal dignity’.[[787]](#footnote-788) What does, then, this imply? Dworkin’s conception of neutrality entails that the state is required to treat each individual with equal concern and respect. This is because, all individuals have equal moral worth, so that the state must treat each individual as a moral equal. This implies that the liberty to determine and pursue one’s own conception of the good life is entailed by the idea of equal respect.[[788]](#footnote-789) A neutral state, then, does not promote a particular way of life or conception of the good life. Therefore, the state can be neutral as long as it treats its citizens as equal.

 Dworkin explains: ‘since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or more powerful group’.[[789]](#footnote-790) If the government were to favour a particular conception of the good life, this would illustrate a failure to show equal respect and concern for all of its citizens. This entails that state neutrality is required by the ‘equal concern and respect’ principle. It can be concluded that in Lautsi, the state failed to show equal concern and respect for all its citizens.

Unlike the Chamber in the first *Lautsi* decision, the issue of state neutrality and impartiality have been abandoned by the Grand Chamber.[[790]](#footnote-791) This means that the state-school classroom as a public sphere is not bound to be religiously neutral provided that this does not imply to indoctrination.[[791]](#footnote-792) Julie Ringelheim points out that the way the Court applied the concept of state neutrality in religious matters throughout its case-law has been subject to criticism.[[792]](#footnote-793) In particular, the Court has failed to hold a consistent approach in its interpretation to state religious neutrality in public institutions. Therefore, the Grand Chamber decision in *Lautsi* demonstrates the inconsistency with *Dahlab.*

## Conclusion

The issue of religious dresses has been the subject of deep controversy in Europe over the years.[[793]](#footnote-794) This chapter analysed the case-law of the Court as it relates to the restrictions on the wearing of religious clothing and symbols in public places. This chapter first provided a legal framework in which religion is guaranteed under Article 9 ECHR. It then critically engaged with the ECtHR’s case-law on Article 9 ECHR, with a specific emphasis on displaying religious symbols in public spheres.

This chapter has showed that the ECtHR had consistently held that the restrictions on the Islamic headscarf were compatible with the Convention.[[794]](#footnote-795)In *Dahlab* and *Sahin,* gender equality was invoked in order to restrict individual choices by, for example, arguing that the wearing of the headscarf is an obstacle to the liberation of women. This chapter has made explicit that restrictions on the wearing of Islamic headscarves are often thought to be compulsory for the promotion of gender equality. While a headscarf ban has been justified as a solution to gender inequality, the ECtHR, in two cases, failed to give adequate weight to the personal autonomy of the applicants. Dworkin’s theory of personal responsibility helped us to reveal that the Court ignored individual’s responsibility and ability to adopt a freely chosen religious practice. The findings of this chapter suggest that such failure, from a Dworkinean approach, can be seen as violating the principle of personal responsibility.

 In the case of *S.A.S v. France*,where the French Government invoked the same gender equality argument, the Court refused to accept it as a legitimate aim. The Court noted that it ‘is aware that the clothing in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy’.[[795]](#footnote-796) This means that the Court established a link between the Islamic dress and Muslim women’s identity and such identity was considered as an inherent part of the pluralistic society. This can be interpreted as one of the most important aspects of the judgement since it shows a serious shift in the ECtHR position towards gender equality compared to previous judgements such as *Dahlab* and *Şahin*. As this chapter showed, the Court recognised the applicant’s personal autonomy and refrained from attributing a negative meaning to the Islamic headscarf. This finding suggests that the decision made an important positive step towards protecting religious freedom as an individual right rooted in individual autonomy.

Finally, this chapter has discussed to what extent the principle of religious neutrality can be considered as compatible with the compulsory display of crucifixes in classrooms of state-schools. In the case of *Lautsi v. Italy*, the main issue was the permissibility of the display of crucifixes in state-school classroom. While the Court held that the display of the crucifix on the classroom walls of the state school is compatible with the Convention, this chapter has showed that the issue of neutrality and impartiality have been abandoned by the Court. This finding also suggests that such ruling is inconsistent with the Court’s previous decisions in *Dahlab* and *Şahin*.

# Chapter Six TAKING FREEDOM OF EXPRESSION SERIOUSLY[[796]](#footnote-797)

‘In a democracy no one, however powerful or impotent, can have a right not to be insulted or offended’.[[797]](#footnote-798)

## Introduction

This chapter discusses the jurisprudence of the European Court of Human Rights in respect of freedom of expression and blasphemy through the lens of Dworkin’s theory of rights. The first part of the chapter will focus on how the Court has recognised the protection of the religious feelings of believers as a legitimate ground for the limitation of freedom of expression under Article 10 in conjunction with Article 9 ECHR. It will also explore how the Court has constructed a right not to be insulted in one’s religious feelings through its case-law. In fact, the chapter’s focus will be on the Court’s normative claim that there is a right not to be insulted in one’s religious feelings, since this has become a rather controversial stance in the Court’s case-law.

The chapter will then turn its attention to whether the expression of views can be limited merely because other people deem those opinions to be offensive. It will complement this examination through Dworkin’s famous distinction between principles and policies.[[798]](#footnote-799) According to Dworkin, arguments of principles and arguments of policy are two distinct types of justifications of political decisions. Such justifications can be distinguished as either principle based or policy based, according to how they function within legal reasoning. In his own words: ‘arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal’.[[799]](#footnote-800) This distinction provides a guideline for discovering which rights a particular legal system supposes men and women to have. Based on this distinction, which rights individuals have can be identified by ‘looking for arguments that would justify claims having appropriate distributional character’.[[800]](#footnote-801) On this view, arguments of policy cannot justify judicial decisions.[[801]](#footnote-802) Based on this, this chapter will make use of Dworkin’s theory of rights to examine the Court’s assertion that there is a right not to be insulted in one’s religious feelings under Article 9 of the Convention.

As a starting point, freedom of expression is recognised as a fundamental right by many national and international legal documents.[[802]](#footnote-803) The ECtHR protects freedom of expression under Article 10 of the Convention. It should be noted that the ‘expression’ protected under Article 10 is not limited to words, written or spoken. Rather, all forms of expression are included;[[803]](#footnote-804) namely paintings,[[804]](#footnote-805) books,[[805]](#footnote-806) cartoons,[[806]](#footnote-807) films,[[807]](#footnote-808) video-recordings[[808]](#footnote-809) and the Internet.[[809]](#footnote-810) Besides this, in the judgement of *Oberschlick v Austria*, the Court recognised that Article 10 protects ‘not only the substance of the ideas and information expressed, but also the form in which they are conveyed’.[[810]](#footnote-811) This indicates the Court’s willingness to provide a greater degree of protection for freedom of speech under Article 10 of the Convention, which defines freedom of expression in a comprehensive way.

Article 10 provides as follows:

 1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

 2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[[811]](#footnote-812)

On the one hand, the Court has repeatedly held that freedom of expression as protected by Article 10 covers not only ‘information or ideas that are favourably received or regarded as inoffensive…but also to those that offend, shock or disturb.’[[812]](#footnote-813) This interpretation of freedom of expression is even more significant in light of the Court’s judgement in *Otto-Preminger-Instutut*:

Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism.[[813]](#footnote-814)

These cases support the argument that individuals should tolerate critical public expressions about their religious beliefs, even if such critical opinions may be deemed by some as offensive to their religious feelings.[[814]](#footnote-815)

On the other hand, the Court recognised that Article 9 of the ECHR covers a ‘right not to be insulted in one’s religious feelings’.[[815]](#footnote-816) The reason for this, as the Court acknowledged in the case of *Otto-Preminger-Institut v Austria*, is that the respect for the religious convictions of people as protected by Article 9 ‘can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration’.[[816]](#footnote-817) Against this line of reasoning, it is plausible to ask whether the Convention guarantees a right to protection of religious feelings under Article 9, or, put differently: do people have a legal right to have their religious feelings protected under the Convention?

## The Court’s Construction of a ‘Right Not to Be Insulted in One’s Religious Feelings’: *Otto-Preminger-Institut V. Austria* And Its Legacy

There exists a series of cases from the 1990s and 2000s involving legal limitations placed on freedom of expression in different contexts for the protection of the religious feelings of believers. The first case that set the course for the ECtHR’s approach to issues involving freedom of expression causing offence against the religious feelings of believers was *Otto-Preminger-Institut v Austria*.[[817]](#footnote-818) One of the problems of this approach is that the Strasbourg Court’s earlier case-law came very close to creating a right not to be insulted by others in the sphere of morals.[[818]](#footnote-819) This section thus focuses on the normative claim that Article 9 includes a right not to be offended in one’s religious beliefs by others. This claim has somehow been recognised by the ECtHR in its legal reasoning in *Otto-Preminger-Institut v Austria,* *Wingrove v the UK* and *I.A. v Turkey*.

The applicant, Otto-Preminger-Institut fur audiovisuelle Mediengestaltung, was a non-profit association and operating a cinema called ‘Cinematograph’, which sought to promote creativity, communication and entertainment through the audio-visual media.[[819]](#footnote-820) In 1985, the applicant association announced a series of six public showings of the film *Das Liebeskonzil* (Council in Heaven).[[820]](#footnote-821) The announcement was made in an information bulletin distributed by the applicant association to its 2.700 members and in different display windows in Innsbruck, Austria.[[821]](#footnote-822) The film was introduced as follows:

Trivial imagery and absurdities of the Christian creed are targeted in a caricatural
mode and the relationship between religious beliefs and worldly mechanisms of
oppression is investigated.[[822]](#footnote-823)

The film was based on a play written by Oskar Panizza, which portrayed God, Jesus and the Virgin Mary in a critical way. They agreed to team up with the devil to punish mankind for its immorality. Soon after the film had been shown at a private session, the public prosecutor, at the request of the Innsbruck diocese of the Roman Catholic Church, brought criminal proceedings against the cinema’s manager. Besides this, the public showings announced by the applicant association, the first of which had been planned for the next day, could not take place. Subsequently, the movie was seized and forfeited by the Austrian authorities. Consequently, the applicant association complained of a violation of their freedom of expression under Article 10 of the Convention.

The Austrian Government claimed that the seizure and forfeiture of the film were aimed to protect the rights of others, particularly the right to respect for *one’s religious feelings*.[[823]](#footnote-824) According to the Government, the national authorities’ action had the legitimate aim of ‘the protection of the rights of others’, namely the right to respect for one’s religious feelings.[[824]](#footnote-825)

The Court noted first of all that the seizure and the forfeiture of the film interfered with the applicant’s right to freedom of expression as guaranteed by Article 10.[[825]](#footnote-826) The Court then moved to examine whether the interferences with the applicant’s right to freedom of expression had a ‘legitimate aim’ under Article 10(2) ECHR and whether they were necessary in a democratic society. Subsequently, the Court controversially engaged in ‘weighing up the conflicting interest’, namely the applicant’s right to freedom of expression protected under Article 10 ECHR and the religious feelings of believers supposedly protected under Article 9 ECHR. Consequently, the Court said that the interferences aimed to ‘protect the right of citizens not to be insulted in their religious feelings’ and hence a legitimate ground under Article 10(2) ECHR.[[826]](#footnote-827) The Court concluded, by a majority of six votes to three, that there had been no violation of Article 10 as regards either the seizure or the forfeiture of the film.

In the later case of *Wingrove v the United Kingdom*, the applicant, Mr Nigel Wingrove, was a film director.[[827]](#footnote-828) He wrote the script for and directed a short video called ‘Visions of Ecstasy’, derived from the life and writings of St Teresa of Avila. The film, directed by the applicant, characterises St. Teresa of Avila experiencing ecstatic visions of Jesus Christ and portrays the crucified Christ in acts of a sexual nature with her.[[828]](#footnote-829) The applicant submitted the film to the British Board of Film Classification (the Board) for a classification certificate. His application, however, was rejected by the Board in the following terms:

The video work submitted by you depicts the mingling of religious ecstasy and sexual passion, a matter which may be of legitimate concern to the artist. It becomes subject to the law of blasphemy, however, if the manner of its presentation is bound to give rise to outrage at the unacceptable treatment of a sacred subject… it is the Board’s view, and that of its legal advisers, that a reasonable jury properly directed would find that the work infringes the criminal law of blasphemy.[[829]](#footnote-830)

The applicant then complained that the refusal by the British Board of Film Classification to grant a distribution certificate for his video work Visions of Ecstasy amounted to a violation of freedom of expression under Article 10 ECHR.[[830]](#footnote-831) He first claimed that the British Blasphemy laws were so uncertain, and for this reason it was ‘inordinately difficult’ to foresee whether the film would constitute an offence under the relevant national law.[[831]](#footnote-832) The definition in English law of the offence of blasphemy was formulated as follows:

Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language.[[832]](#footnote-833)

The Government contested the applicant’s assertion that the relevant uncertainty does not necessarily make the British Blasphemy laws ‘inaccessible and unforeseeable’.[[833]](#footnote-834) The Government reasoned that different national tribunals might reach different outcomes even when interpreting the same legal material to the same facts.

In dealing with the expression ‘prescribed by law’ in Article 10(2), the Court established in its judgement in the *Sunday Times* case that such expression should be interpreted as involving two essential requirements:

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[[834]](#footnote-835)

Moreover, in its judgement in *Wingrove v the United Kingdom*, the Court recognised that ‘the offence of blasphemy cannot by its very nature lend itself to precise legal definition’.[[835]](#footnote-836) This recognition suggests that national authorities should be allowed a wide discretion in examining whether the facts of a specific case fall within the recognised definition of the offence. In doing so, the Court provided a wide margin of appreciation to the British authorities, as being in a better position to assess what counts as offensive to religious sensibilities under English law. Hence, the Court held that the applicant could have reasonably foreseen that the content of the video could fall within the ambit of the offence of blasphemy.

The applicant next contested the Government’s claim that the video was denied a certificate for distribution in order to ‘protect the right of citizens not to be offended in their religious feelings’.[[836]](#footnote-837) According to the applicant, the so-called legitimate aim of protecting the right of citizens not to be offended in their religious feelings does not cover ‘a hypothetical right held by some Christians to avoid disturbance at the prospect of other people’s viewing the video work without being shocked’.[[837]](#footnote-838)

The Court, however, observed that the purpose of the interference was to protect against the treatment of a religious subject in such a way ‘as to be calculated (that is, bound, not intended) to outrage those who have an understanding of sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented’.[[838]](#footnote-839) Such an aim has been found ‘fully consonant with the aim of the protections afforded by Article 9 to religious freedom’ by the Court.[[839]](#footnote-840) The Court held that the English law of blasphemy, which was the legal basis for the refusal, pursued a legitimate aim, namely to protect the rights of individuals not to be offended in their religious feelings. The Court again acknowledged that the term ‘rights of others’ may refer a right to the protection of religious feelings. Consequently, the protection of religious believers’ feelings has been deemed as a legitimate aim for restricting fundamental rights, namely the freedom of speech, under the Convention.

Similarly, in the case of *I.A v Turkey* the ECtHR reached the conclusion that the Turkish authorities did not violate the freedom of expression by convicting a book publisher for publishing a book which the national authorities deemed to express views against ‘God, the Religion, the Prophet and the Holy Book’.[[840]](#footnote-841) The applicant was the owner and managing director of Berfin, a publishing company. He published a novel by Abdullah Riza Erguven called ‘*Yasak Tumceler*’ (‘The Forbidden Phrases’), which conveyed the author’s opinions on philosophical and theological issues in a novelistic style. Based on the public prosecutor’s indictment, the applicant was charged under Article 175 of the Turkish Criminal Code for blasphemy against ‘God, the Religion, the Prophet and the Holy Book’ for publishing the book in question. Such indictment was based on a specifically requested expert report, drawn up by the dean of Marmara University Faculty of Theology at that time.

The applicant then questioned the impartiality of the expert report and demanded a second opinion, claiming that since the book was a novel, it should have been examined by literary specialists. Subsequently, a second report was submitted by three law professors, but its correctness was also disputed by the applicant, who said that it was a copy of the first report. He also argued that the book was neither blasphemous nor insulting within the meaning of Article 175(3) of the Criminal code and that it merely stated the philosophical views of the author. The applicant was, however, convicted and sentenced to two years imprisonment by the Court of First Instance.[[841]](#footnote-842) In convicting the applicant, the Court of First Instance referred to the second expert report and cited the following paragraph from the novel:

Look at the triangle of fear, inequality and inconsistency in the Koran; it reminds me of an earthworm. God says that all the words are those of his messenger. Some of these words, moreover, were inspired in a surge of exultation, in Aisha's arms. ... God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual relations with a dead person or a live animal.[[842]](#footnote-843)

In light of the above factors, both parties acknowledged that the applicant’s conviction constituted interference with his right to freedom of expression under Article 10(1). Therefore, the case turned on the fundamental question as to whether the interference was necessary in a democratic society. The Court subsequently found that the measures interfering with the applicant’s freedom of expression intended to offer protection against offensive attacks on issues deemed as sacred by Muslims. The Court, by invoking the concept of the margin of appreciation, concluded that the Turkish authorities had not overstepped this margin and confirmed that the given justifications for the impugned limitations were ‘relevant and sufficient’.[[843]](#footnote-844)

In the context of blasphemy and freedom of expression, the ECtHR recognised the protection of religious feelings of believers as a legitimate ground for the limitation of freedom of expression under Article 10, in conjunction with Article 9 ECHR. Through these cases (*Otto-Preminger-Institut*, *Wingrove*, and *I.A*) the Court has developed a normative claim that there is a right not to be insulted in one’s religious feelings as a key argument when balancing the respective rights that are engaged by the interplay between Article 9 and Article 10 ECHR.[[844]](#footnote-845) The Court recognised that a State can legitimately prohibit the publication of critical portrayals of objects of religious veneration in the name of respect for the religious feelings of believers. It is important to note that the scope of the protection afforded of the rights of others covers the right of citizens not to be insulted in their religious feelings. In doing so, the Court indeed recognised a ‘right’, namely a right not to be insulted in one’s religious feelings. The next section critically evaluates the normative claim that there is a right not to be offended in one’s religious convictions in a democratic society through the lens of Dworkin’s theory of rights.

## A Right not to be Offended in One’s Religious Feelings: Policy based or Principle?

According to Aileen McHarg, there is an inherent conflict between human rights and public interests.[[845]](#footnote-846) In particular, this conflict has consistently proved to be one of the most difficult and important issues to be dealt with by the judges of the ECtHR in the context of the ECHR.[[846]](#footnote-847) This tension can be best encapsulated as to whether priority should be provided to individual rights or to public interest goals. Indeed, as a preliminary matter, who decides how to balance individual rights with public interest in this context? Aileen McHarg summarises this point:

To some extent, this uncertainty can be attributed to conflicting pressures on the Strasbourg institutions. As part of a supranational legal order, they have a difficult balance to strike between protecting and promoting common European human rights standards, on the one hand, and deference to national decision-making on the other, respect for democracy also being part of the Council of Europe idea.[[847]](#footnote-848)

It can be argued that this inherent tension derives from different interpretations of the term ‘rights’, and therefore it is important to clarify what we mean by the term ‘rights’.[[848]](#footnote-849) According to utilitarianism, for instance, disputes between the rights of the individual and public interests do not cause a certain problem. Utilitarianism holds that actions are ‘right’ or ‘wrong’ depends on their consequences. In its simplest form, an act is morally right as long as it produces ‘the greatest amount of happiness for the greatest number of people’, and therefore the happiness or the goodness, ought to be measured in terms of the number of people being satisfied.[[849]](#footnote-850) To sum up, whatever is being evaluated, utilitarianism suggests choosing the one which will produce the best overall results.

However, Dworkin explores the nature of rights by drawing a distinction between arguments of principle and arguments of policy.[[850]](#footnote-851) In his essay *The Model of Rules I*,[[851]](#footnote-852) Dworkin introduces his principle-policy distinction:

I call a ‘policy’ that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community. I call a ‘principle’ a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimensions of morality.[[852]](#footnote-853)

According to the distinction, principles are standards to be observed since they are requirements of some dimensions of morality, such as justice or fairness. Policies, on the other hand, shed light on collective goals, or put differently, they identify desirable economic, political, or social situations to be achieved.[[853]](#footnote-854) In Dworkin’s approach to rights, then, principles occupy a central position in the sense that while policies describe goals, principles describe rights.[[854]](#footnote-855)

In identifying what rights people might have, Dworkin provides a further distinction between arguments of principle and arguments of policy:

Arguments of principle are arguments intended to establish an individual right. Arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals…Freedom of speech is a right, not a goal, because citizens are entitled to that freedom as a matter of political morality, and that increased munitions manufacture is a goal, not a right, because it contributes to collective welfare.[[855]](#footnote-856)

According to Dworkin, then, arguments of principle and arguments of policy are the two distinct types of justification of political decisions.[[856]](#footnote-857) These justifications should be distinguished as either principle based or policy based, according to how they function within legal reasoning.[[857]](#footnote-858)

This distinction, however, does not aim to illustrate which rights people actually have. Rather, it provides a guideline for identifying which rights ‘a particular political theory supposes men and women to have’.[[858]](#footnote-859) Indeed, the distinction supplies an approach, which suggests that what rights individuals have can be discovered by ‘looking for arguments that would justify claims having the appropriate distributional character’.[[859]](#footnote-860) When a court recognises a ‘right’, its justification must be based on what Dworkin calls a ‘principle’. A reason for this is that only principles are capable of supporting claims of individual rights.

In the leading judgment of *Otto-Preminger-Institut v. Austria*, the Court attached particular importance to the fact that ‘the overwhelming majority’ of the potential viewers in the Tyrolean region of the Austria, where the proposed film was to be showed, were Roman Catholics. For instance, the Court noted that:

the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.[[860]](#footnote-861)

According to the Court, the margin of appreciation accorded to national authorities had not been overstepped by the Austrian authorities since they ‘acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious belief in an unwarranted and offensive manner’.[[861]](#footnote-862) In doing so, the Court explicitly accepted that the necessity for the restriction was particularly pressing only because the ‘overwhelming majority’ of Tyroleans were Roman Catholic. This tends to suggest that different interpretations of religion inconsistent with the majority belief can easily be banned in order to protect members of a religious majority. Thus, such a restriction of freedom of expression for the protection of religious sensibilities is, not surprisingly, more likely to protect the majority religion.

In the case of *Wingrove v the United Kingdom*, as the Court clearly stated, the criminal law of blasphemy protected only ‘the Christian religion and, more specifically, the established Church of England’, the majority religion.[[862]](#footnote-863) This, according to the Court, was confirmed by the Divisional Court in 1991:

We have no doubt that as the law now stands it does not extend to religions other
than Christianity ... ... We think it right to say that, were it open to us to extend the law to cover religions other than Christianity, we should refrain from doing so.[[863]](#footnote-864)

The Court, then, observed that the arguments relied on by the British authorities to justify the measures interfering with the applicant’s freedom of expression are based on a provision of the criminal law of blasphemy. This means that the offence of blasphemy at issue aimed only at protecting the majoritarian religious values and sensibilities in the territory concerned. Given these statements, one can assume that the only purpose of the interference was to protect the majoritarian faith alone instead of other beliefs. Consequently, the national authorities’ refusal to grant a classification certificate was justified, under Article 10 para. 2 (art. 10-2), by the necessity to protect the feelings of the majority.

In a similar vein, in *I.A v Turkey*, the Court showed its willingness to provide the states a wide margin of appreciation when it held that there had been a pressing social need for a ban on a book (a novel), which had been interpreted as gratuitously offensive to the faith of the majority of the population. In adopting this approach, the Court noted that ‘the measure taken in respect of the statements in issue was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims.’ According to the Court, then, any censorship or interference on freedom of expression from the state corresponds to a ‘pressing social need’ as long as they intend to provide protection against critical views on issues deemed as sacred by the majority. This means that any interference can easily be justified by a ‘pressing social need’, as long as it protects majority’s preferences.

In all three cases, as mentioned above, the restrictions were imposed on the right to freedom of expression in order to protect religious sensibilities of the majority. In other words, none of these restrictions imposed by the Contracting States were aimed at protecting the feelings of religious minorities. As rightly observed by Tom Lewis:

In all three cases, the restrictions were imposed on artistic works in order to protect religious feelings. However, in not one of them was it the feelings of marginalized and vulnerable religious minorities that were the object of the state’s protective attentions. Rather, in each case it was the feelings of the majority that the state sought to protect.[[864]](#footnote-865)

This observation clearly indicates that the arguments accepted by the Court to justify the restrictions of the applicants’ freedom of expression are based on the majoritarian conception of public interests. Similarly, three dissenting judges correctly disputed that ‘there is no point in guaranteeing this freedom only as long as it is used in accordance with accepted opinion’.[[865]](#footnote-866) In other words, in each case the public authorities aimed at protecting the feelings of the majority, which resulted from the recognition that people have a right not to be offended. Thus, the right not to be offended in one’s religious feelings should be understood as an argument of policy, instead of an argument of principle.

In the eyes of Dworkin however, it is difficult to make sense of such a right since it is based on majoritarian policy considerations rather than principle. In Dworkinian terms, policy arguments take into account only the collective goals of a community and they represent the community as a whole. Policy arguments, therefore, aim to justify legal decisions according to the collective goals of a community by relying on the assumption that such decisions protect particular collective goal of the community as a whole.[[866]](#footnote-867) However, there are some individual interests, which are so vital and their normative force cannot be exhausted by their incorporation in the utilitarian calculation of the common good.[[867]](#footnote-868) In the words of Dimitrios Kyritsis: ‘their normative power is in part independent of their contribution to the good of the community as a whole’.[[868]](#footnote-869)

As discussed above, for Dworkin, principles describe individual rights, and policies describe collective goals.[[869]](#footnote-870) In order to develop such an account, Dworkin explains:

A political right is an individuated political aim. An individual has a right to some opportunity or resources or liberty if it counts in favour of a political decision that the decision is likely to advance or protect the state of affairs in which he enjoys the rights, even when no other political aim is served and some political aim is disserved thereby, and counts against that decision that it will retard or endanger that state of affairs, even when some other political aim is thereby served. A goal is a non-individuated political aim, that is, a state of affairs whose specification does not in this way call for any particular opportunity or resource or liberty for particular individuals.[[870]](#footnote-871)

In Dworkinian terms then, a political right is an ‘individuated’ political aim, whereas a collective goal is a ‘nonindividuated’ political aim. This means that a political right can be identified by an individuated political aim. Political rights are then, individual claims, which are grounded in principled reasons rather than on majoritarian reasons. In other words, a claim can be considered as a ‘right’ as long as it is justified by arguments of principle rather than arguments of policy. However, as Dimitrios Kyritsis clarifies, Dworkin’s distinction does not suggest that individual rights have necessarily absolute nature in the sense that arguments based on them trump all other competing considerations.[[871]](#footnote-872) In brief, arguments of principle are based on individual rights, arguments of policy are based on collective goals. Since Dworkin’s approach to rights is based upon to some dimensions of morality, such as justice or fairness, rather than an appeal to the moral theory of utilitarianism, a person’s rights, on this conception, should be distinguished from community’s goals.

The Court, however, failed to make such a distinction. As discussed above, neither in *Otto-Preminger-Institut* nor in *Wingrove* did the Court provide any principle-based arguments to justify restrictions on freedom of expression. In adopting this approach, the Court took into account only policy considerations. This approach is problematic for two reasons. First, once respect for people’s religious feelings is recognised by the Court as a right under the Convention, then a balance should be struck between free speech and freedom of religion. Another way of putting this point is to say that if one does not recognise a right not to be offended in one’s religious feelings as a part of freedom of religion under Article 9, then this does not require a balancing of conflicting equal rights under the Convention. For instance, in their joint dissenting opinion to *Otto-Priminger- Institut*, Judges Palm, Pekkanen and Makarczyk noted:

The Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others.[[872]](#footnote-873)

This implies that there is no conflict between the right to freedom of expression and the right to protection of religious feelings, since Article 9 does not cover a right to protection of one’s religious feelings against criticism. Indeed, any supposed justifications for limiting free expression based on the protection of individual feelings is subject to the objection that there is no legal basis for any right to protection of religious feelings in the context of the European Convention on Human Rights.[[873]](#footnote-874) This leads to the conclusion that freedom of religion cannot be conceptualised as a right not to be offended in one’s religious feelings under the Convention.

Second, all three cases have been framed by the Court as a conflict between the concept of majority rule and individual rights. As a result, in Tahir Mahmood’s words: ‘this process results in the majority’s hidden dislike for religious minorities’.[[874]](#footnote-875) In *Otto-Preminger-Institut*, for instance, ordering the seizure and subsequently the forfeiture of the film was justified by the Austrian courts on the ground that the film had been deemed as an abusive attack on the Roman Catholic religion ‘*according to the conception of the Tyrolean public*’.[[875]](#footnote-876) This majoritarian conception has been accepted by the ECtHR: ‘the content of the film cannot be said to be incapable of grounding the conclusions arrived at by the Austrian courts’.[[876]](#footnote-877) Similarly, in *I.A*., the Court confirmed the criminal conviction of a publisher for publishing a book which contained, according to the religion of the majority of the population, ‘an offensive attack on the prophet of Islam’ only because ‘believers may legitimately feel themselves to be the object of unwarranted and offensive attacks’. Consequently, the Court recognised in these cases that Article 9 ECHR includes a ‘right not to be insulted in one’s religious feelings’.

## Gratuitous Offense and Public Debate in a Democratic Society

Dworkin has grouped the justifications for freedom of speech into two main categories, namely the *instrumental* and the *constitutive* approaches.[[877]](#footnote-878) The former considers free speech as important instrumentally ‘not because people have any intrinsic moral right to say what they wish’ but because permitting them to do so will produce better results for the rest of society.[[878]](#footnote-879) This means that freedom of speech is important only because it serves the general interest, which can be achieved through the ‘marketplace of ideas’.[[879]](#footnote-880) Introduced by John Milton[[880]](#footnote-881) and further developed by John Stuart Mill,[[881]](#footnote-882) the marketplace of ideas argument refers to the free trade in ideas. Both argued that the truth will eventually emerge in the marketplace of ideas and accordingly, it is used as a justification for the freedom of expression.[[882]](#footnote-883) Therefore, free speech is seen as a useful tool that helps to shape political discussions and views by shedding light on political and legal debates.

The instrumental approach derives its validity from the argument that politics is more likely to discover truth and produce better policies if political discussion is free and unrestricted.[[883]](#footnote-884) For instance, it might be the case that a state is more likely to be less corrupt if it ‘lacks the power to punish criticism’.[[884]](#footnote-885) Freedom of speech, then, has a key value in a democratic society since it helps to hold governments accountable for their policies. Thus, freedom of expression is of a political value which is ‘indispensable to the operation of democratic form of government’.[[885]](#footnote-886)

However, does this mean that democracy is an end on itself or is it rather a means of achieving moral values?The core of Dworkin’s interpretation of democracy is ‘political equality’. Dworkin is of the view that the main purpose of genuine democracy is not purely to facilitate ‘majoritarianism’ through majority rule, but rather to treat ‘all members of the community, as individuals, with equal concern and respect’.[[886]](#footnote-887) He explains:

A genuine political community must therefore be a community of independent moral agents. It must not dictate what its citizens think about matters of political or moral or ethical judgment, but must, on the contrary, provide circumstances that encourage them to arrive at beliefs on these matters through their own reflective and finally individual conviction.[[887]](#footnote-888)

This means that the most fundamental aim of democracy is not only to facilitate majoritarianism, but rather to provide political equality. This suggests that Dworkin is in agreement with the definition of democracy as ‘government by the people as equals’.[[888]](#footnote-889) It should be highlighted that Dworkin’s justification for freedom of expression is based on equality, rather than on liberty. On a Dworkinian argument, therefore, the right to ‘free speech’ asserts an equality-based right, not a liberty-based right. He then offers the constitutive justification of freedom of speech, based on the moral responsibility of individuals. Therefore, individuals, as morally responsible agents, should be equally free to hear and share opinions.

In the case of *Otto-Preminger-Institut v Austria*, the Court attached particular importance to the idea that the exercise of the freedom of expression carries ‘duties and responsibilities’ with it.[[889]](#footnote-890) It is important to note that while this idea follows from the wording of paragraph 2 of Article 10, the Court indeed placed significant emphasis on those duties and responsibilities in this context. These special duties and responsibilities, according to the Court, can legitimately include ‘an obligation to avoid as far as possible expressions that are *gratuitously offensive to others and thus an infringement of their rights*, and which therefore *do not contribute to any form of public debate capable of furthering progress in human affairs*’.[[890]](#footnote-891) This means that states have an option to restrict freedom of expression simply because some people find it offensive.

This might imply, in the context of this case, that restrictions of fundamental human rights such as freedom of expression can be not only acceptable but also mandatory for the protection of the religious feelings of believers in the name of the protection of the rights of others. In doing so, the Court confirmed that the aim of protecting the religious feelings of believers from offensive speech is a legitimate aim for banning free speech under Article 10(2). The immediate question, then, becomes could the term ‘offensive’ be considered as adequately explicit to meet the requirement of Article 10(2) of the Convention that the interferences must pursue a legitimate aim.

Moreover, the Court went on to note that ‘the respect for the religious feelings of believers as guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration’.[[891]](#footnote-892) In adopting this approach, the Court reasoned that the Austrian authorities had a duty to protect ‘the right of citizens not to be insulted in their religious feelings’ by the public expression of opinions of others.[[892]](#footnote-893) The question, however, arises: do contracting states have a duty to protect the religious feelings of people under Article 9 ECHR? The Court’s reasoning for this approach seems to be that the right to free expression can be limited simply because other people may find it offensive or disrespectful.

Furthermore, the Court stated that a Contracting State could legitimately regard it as necessary to ban the imparting of information and ideas to guarantee the religious feelings of believers.[[893]](#footnote-894) A reason for this is that extreme ways of opposing or denying religious belief ‘can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them’.[[894]](#footnote-895) The Court concluded that the seizure and forfeiture of the film aimed to ‘protect the right of citizens not to be insulted in their religious feelings’,[[895]](#footnote-896) and hence pursued a legitimate aim, namely ‘the protection of the rights of others’[[896]](#footnote-897) under Article 10(2) ECHR.

This means, amongst other things, that the Court upheld the seizure and forfeiture of a film on the ground that the film, according to the Court, was ‘gratuitously offensive’ to the religious feelings of others. This clearly indicates that the applicant enjoyed no protection under Article 10 ECHR only because the expression was gratuitously offensive, and for this reason, it could not ‘contribute to any form of public debate capable of furthering progress in human affairs’.[[897]](#footnote-898) Given these statements, one can easily assume that the Court takes the consequentialist approach that freedom of expression has value for, in Dworkinian terms, instrumental reasons.

According to Dworkin, if freedom of speech is a fundamental right, ‘this must be so not in virtue of instrumental arguments, like Mill’s which suppose that liberty is important because of its consequences’.[[898]](#footnote-899) Dworkin points out that freedom of speech is essential to responsible moral agency, and that the respect for individual moral agency is a necessary precondition for a healthy democracy. This means that individuals as morally responsible agents should be given equal opportunity to contribute and participate in the political process. Key to understanding Dworkin’s argument concerning the importance of the right to freedom of expression is that the protection of this right is considered not only as a means *instrumentally* for realising democratic society, but also as an end itself, which calls on the liberal principle of equality.[[899]](#footnote-900) He explains:

A majority decision is not fair unless everyone has had a fair opportunity to express his or her attitudes or opinions or fears or tastes or presuppositions or prejudices or ideals, not just in the hope of influencing others (though that hope is crucially important), but also just to confirm his or her standing as a responsible agent in, rather than a passive victim of, collective action.[[900]](#footnote-901)

In *Wingrove*, the Court held that the respondent 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’.[[901]](#footnote-902) In adopting this approach, the Court referred to the case of Otto-Preminger-Institut, where it held that Article 10 includes obligations which ‘may… avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights’.[[902]](#footnote-903) In this way, the Court has established a link between gratuitously offensive expressions and the potential infringement on an individual’s right to freedom of religion. According to Tom Lewis, for instance, the Court itself seems to have affirmed that ‘gratuitously offensive expression must be an infringement of others’ rights’.[[903]](#footnote-904) It is, however, difficult to see how individuals’ right to freedom of religion can be infringed by such expressions.

In *I.A.,* the Court, on the one hand, reiterated its well-established principle that freedom of expression is applicable not only to opinions or views which are considered inoffensive, but also to ‘those that *offend, shock or disturb* the State or any sector of population’.[[904]](#footnote-905) The main point of this last sentence suggests that tolerance, as an essential element of pluralistic society, has vital significance in democratic societies. In doing so, the Court re-emphasised the fundamental importance of the concept of religious pluralism in democratic society. In other words, the concept of pluralism has been defined as a characteristic of and a pre-condition for a democratic society. Indeed, pluralism, tolerance and broadmindedness have been considered as hallmarks of a democratic society since the well-known *Handyside* case.[[905]](#footnote-906) This indicates that it cannot be taken for granted that freedom of expression can be limited when a view is offensive for a particular group, such as a religious community.[[906]](#footnote-907)

The Court, on the other hand, said that the exercise of the right to freedom of expression comes with special duties and responsibilities, namely ‘a duty to avoid expressions that are gratuitously offensive to others and profane’.[[907]](#footnote-908) As a result, the Court held, in the context of religious beliefs, that ‘as a matter of principle it may be considered necessary to punish improper attacks on objects of religious veneration’.[[908]](#footnote-909) In the instant case, for instance, the Court further held that:

the present case concerns not only comments that offend or shock, or a “provocative” opinion, but also an abusive attack on the Prophet of Islam. Notwithstanding the fact that there is a certain tolerance of criticism of religious doctrine within Turkish society, which is deeply attached to the principle of secularity, believers may legitimately feel themselves to be the object of unwarranted and offensive attacks through the following passages: “Some of these words were, moreover, inspired in a surge of exultation, in Aisha's arms. ... God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual intercourse with a dead person or a live animal.[[909]](#footnote-910)

Based on this, the Court took the view that the measures interfering with the applicant’s right to freedom of expression under Article 10 were aimed at providing protection against offensive attacks on issues considered as sacred by Muslims.[[910]](#footnote-911) For this reason, the Court held that the applicant’s conviction had met a pressing social need. The Turkish authorities convicted the applicant and sentenced him to two years’ imprisonment, which was commuted to a fine, so that the applicant was subsequently ordered to pay the fine of 3.291.000 Turkish lira (equivalent at the time to 16 US dollars). As regards to proportionality, the Court held that ‘the domestic courts did not decide to seize the book, and accordingly considers that the insignificant fine imposed was proportionate to the aims pursued.’[[911]](#footnote-912)

Thus, it could be concluded that the Court in *I.A.* framed the issue too narrowly as to whether the 16-dollar fine was a proportionate limitation of the applicant’s freedom of expression under Article 10.

George Letsas, speaking of proportionality, puts the matter this way:

But if nobody had a legal right not to be offended by that book, then there should not have been, as a matter of principle, any limitation of the applicant’s right on that basis. What if the fine was only 16 dollars? For what the human right to free speech can afford, it was 16 dollars too many.[[912]](#footnote-913)

Indeed, the root of the problem lies in the Court’s assumption that because speech is ‘gratuitously offensive’, it ‘therefore does not contribute to any form of public debate capable of furthering progress in human affairs.’[[913]](#footnote-914) This shows that the Court placed significant emphasis on the instrumental justifications for free expression. The Court, indeed, provides an instrumental reason why it should grant freedom of political speech such a unique and privileged position among other rights protected by the Convention. In *Wingrove*, for instance, the Court explicitly noted that:

Whereas there is little scope under Article 10 para. 2 of the Convention for restrictions on political speech or on debate of questions of public interest a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.[[914]](#footnote-915)

This approach, however, ignores a constitutive link between freedom of expression and human dignity. It is reasonable to argue that moral independence is a pre-condition of a genuine democracy, and that freedom of speech is an essential instrument in facilitating such democracy. This means that freedom of expression is indispensable to the functioning of democratic institutions. For Dworkin, however, freedom of speech is inherently important, rather than instrumentally, because it is an essential element of human dignity. It is important to note that Dworkin does not argue that instrumental justifications for freedom of speech are invalid. Instead, he insists that they are inadequate to demonstrate the fundamental importance of the protection of freedom of expression. A reason for this is that according to varies instrumental views, free speech is important only because it offers significant benefits to the public.

This governmental responsibility has, Dworkin says, two dimensions:

First, morally responsible people insist on making up their own minds about what is good or bad in life or in politics, or what is true or false in matters of justice or faith. Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions. We retain our dignity, as individuals, only by insisting that no one -no official and no majority- has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it.[[915]](#footnote-916)

This suggests that responsible moral agents should be allowed to make up their own minds about which conception of life is good or bad or which religion or belief is true or false. Freedom of speech then helps to protect the people’s ability, as morally responsible individuals, to make up their own minds. The justification of moral responsibility prevents the state from limiting speech ‘from us on the ground that we are not fit to hear and consider it’.[[916]](#footnote-917) On this account, moral autonomy is insulted whenever a state attempts to prevent individuals from hearing things which they find offensive or dangerous. Besides this, individuals have another moral responsibility:

A responsibility not only to form convictions of one’s own, but to express these to others, out of respect and concern for them, and out of a compelling desire that truth be known, justice serviced, and the good secured.[[917]](#footnote-918)

Dworkin’s constitutive justification suggests that the protection of freedom of speech is not desirable only to reach a particular outcome, but also that such freedom is desirable for its own intrinsic moral value, namely contributing towards human dignity. For Dworkin, then, freedom of speech is a key element of the individual’s moral responsibility, and hence it is intrinsically important for self-fulfilment of individuals. The upshot is that the notion of human dignity has been used as a basis to justify the protection of freedom of expression by Dworkin.

He further holds that the constitutive justification of freedom of expression provides a broader protection than instrumental justification for all forms of expression. As rightly observed by Jonelle DePetro:

Instrumental Justifications concentrate mainly on political speech. This is problematic because if the point of protecting free speech is the protection of democracy or democratic processes, the safeguard for art, literature, or science will not be forthcoming unless they can be shown to bear on politics. Instrumental justifications are seen as inadequate because certain protections which we might intuitively judge necessary would not be justified by them.[[918]](#footnote-919)

According to the constitutive approach, however, freedom of expression should be respected not only because it serves another political goal or policy, but because it is also central to human dignity. Dworkin summarises this point as follows: ‘we retain our dignity, as individuals, only by insisting that no one –no official and no majority- has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it’.[[919]](#footnote-920) On this account, constitutional rights preserve and maintain the capability of individuals to live their lives based on their own values. This means that the constitutional right to freedom of expression is crucially important to assure the power of the people to govern themselves. The constitutive approach is, therefore, based on the value of personal autonomy.[[920]](#footnote-921) This argument emphasises the idea that individual moral agents have the right to hear what others wish to express.[[921]](#footnote-922)

##  Rights Trump Feelings

In the Introduction to *Taking Rights Seriously*, Dworkin characterises individual rights as ‘political trumps held by individuals’.[[922]](#footnote-923) The upshot is that individuals have some moral rights against the state. This means that his conceptualisation of ‘rights as trumps’ can be understood as moral rights, which are constitutionally protected against the state, instead of ordinary legal rights that are protected by an ordinary law, such as common law.[[923]](#footnote-924) It has to be stressed that not all constitutional rights, Dworkin says, represent those moral rights, but ‘those Constitutional rights that we call fundamental like the right of free speech, are supposed to represent against the Government in the strong sense; that is the point of the boast that our legal system respects the fundamental rights of citizens.[[924]](#footnote-925)

Dworkin, for instance, says that the theory of rights as trumps ‘marks the distinctive concept of an individual right against the State which is the hearth, for example, of constitutional theory in the United States’.[[925]](#footnote-926) He then provides the general definition of political rights as follows:

Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do or not a sufficient justification for imposing some loss or injury on them.[[926]](#footnote-927)

This characterisation of individual rights, as Dworkin acknowledges, does not explicitly illustrate what rights people have, if they have any.[[927]](#footnote-928) According to the characterisation, however, to say that someone has a right to free speech is to say that it is wrong for the state to ‘deny it to him even though it would be in the general interest to do so’.[[928]](#footnote-929) This means that a right exists in virtue of its opposition to particular collective utilitarian goals, as long as the justification for that goal is insufficient.[[929]](#footnote-930) Put differently, utilitarian conceptions of collective goals are considered inadequate justifications to deny individual rights. In order to develop such an account, Dworkin provides the following example:

Though the New York City government needs a justification for forbidding motorists to drive up Lexington Avenue, it is sufficient justification if the proper officials believe…that the gain to the many will outweigh the inconvenience to the few. When individual citizens are said to have rights against the Government, however, like the right of free speech, that must mean that this sort of justification is not enough. Otherwise the claim would not argue that individuals have special protection against the law when their rights are in play…’[[930]](#footnote-931)

This means that individual rights are considered to be moral constraints on what public authorities can or cannot do to individuals. On this conception, rights are a way of blocking the state from trading off individuals’ most fundamental interests against the public interest, that focuses on the greatest amount of good for the greatest number.[[931]](#footnote-932) In contrast to the public interest, rights give precedence to the main interests of individuals, even at the expense of the general interest.[[932]](#footnote-933) This can be formulated as follows: a person has a right to X (where X, according to Dworkin, is some opportunity or resource or liberty) even if denying that person’s right to X would promote to the general interest. Yowell, for instance, refers to this formulation as ‘the shielded-interest theory’ since it considers rights as ‘forming a protective barrier around certain individual interests’.[[933]](#footnote-934)

As Yowell suggests, Dworkin’s characterisation of rights as trumps can be reformulated as follows: ‘Rights trump a collective goal that lacks sufficient justification’.[[934]](#footnote-935) In this context, a collective goal can be understood in terms of utilitarianism. Dworkin, for instance, in the introduction to *Taking Rights Seriously* explicitly notes that ‘parasitic on the dominant idea of utilitarianism, which is the idea of a collective goal of the community as a whole’.[[935]](#footnote-936)

It can be argued that there are considerable similarities between Dworkin’s approach to rights and the balancing test employed by the ECtHR.[[936]](#footnote-937) According to his theory of rights, a state may legitimately limit a person’s freedom of speech in order to prevent great damage to others. Dworkin, for instance, notes that the state can ‘stop a man from exercising his right to speak when there is a clear and substantial risk that his speech will do great damage to the person orproperty of others, and no other means of preventing this are at hand, as in thecase of the man shouting 'Fire!' in a crowded theatre’.[[937]](#footnote-938) This indicates that Dworkin does confirm plausible limitations of the exercise of free speech.

In Otto-Preminger-Institut, the Court went on the explain that:

The issue before the Court involves weighing up the conflicting interests of the exercise of two fundamental freedoms guaranteed under the Convention, namely the right of the applicant association to impart to the public controversial views and, by implication, the right of interested persons to take cognisance of such views, on the one hand, and the right of other persons to proper respect for their freedom of thought, conscience and religion, on the other hand.[[938]](#footnote-939)

This passage indicates that the Court interpreted the case as a ‘clash’ between freedom of expression and freedom of religion. Put differently, the Court has interpreted this to mean that whenever speech insults religious convictions, a human rights clash necessarily arises between freedom of expression and freedom of religion.[[939]](#footnote-940) The Court’s reasoning for this approach seems to be that the purpose of protecting the religious feelings of believers is not only a legitimate aim for banning free speech under Article 10(2), but also part of the right to religious freedom under Article 9 ECHR.[[940]](#footnote-941) This means that the protection of religious believers’ feelings derived from the fundamental right to freedom of religion in Article 9. This interpretation and protection of Article 9, however, were disputed by three dissenting judges.

The Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others.[[941]](#footnote-942)

In the present case, the Court framed the issue as ‘the weighing up the conflicting interests of the exercise of two fundamental freedoms’, and in doing so, established an artificial conflict between freedom of expression and freedom of religion. In light of this, when it came to balance the two fundamental rights, the Court immediately deferred to the decision of the Austrian authorities, which were in a ‘better place’ than the international judge to assess what is offensive to the Roman Catholics, and what counts as necessary measures to protect their religious feelings.[[942]](#footnote-943) In the context of this case, the logic of the Court was fundamentally that people have a right not to be insulted in their religious feelings only because offence of this kind prevents the right to practice a religion as guaranteed under Article 9 of the ECHR.[[943]](#footnote-944) In adopting this approach, the Court reasoned that the Austrian authorities’ purpose was to protect ‘the right of citizens not to be insulted in their religious feelings by the public expression of views other persons.’[[944]](#footnote-945) This so called ‘right’, according to the Court, was deemed more important than the right to freedom of expression.

According to Dworkin, however, the only plausible justification for overriding rights can be made if the public authorities show ‘a clear and substantial risk’ that exercise of the right ‘will do great damage to the person or property of others’.[[945]](#footnote-946) It should be noted that although the Austrian authorities did not receive any complaints, the film was seized and forfeited by the national authorities before it had been screened. This clearly shows that the Austrian authorities failed to provide valid evidence that the ban was indeed necessary in a democratic society. Stijn Smet, for instance, makes this argument: ‘the ban was thus based on mere speculation on the part of the Austrian authorities about the film’s supposed impact on the religious feelings of others’.[[946]](#footnote-947) The ban was, then, based on speculative reasons rather than evidence. If there is no substantive evidence which supports the ban, then, there is neither actual conflict between freedom of expression and freedom of religion nor reasonable justification for the ban.

This shows that rights should be understood as ‘trumps’ against collective justifications, namely utilitarian goals or wealth-maximising goals. For instance, the right to freedom of expression as the fundamental right of the individuals takes precedence over non-right objectives.[[947]](#footnote-948) On this basis, if someone has a right to ridicule, this means that ‘it is for some reason wrong for officials to act in violation of that right even if they believe that the community as a whole would be better off if they did’.[[948]](#footnote-949) On this conception, individual rights protect fundamental human values from majoritarian justifications. A right, for instance, can be considered as fundamental if it is necessary to protect an individual’s ‘dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence’.[[949]](#footnote-950) The Court, in this context, failed to protect fundamental human values from majoritarian preferences.

### 5.1) Should Religious Feelings Be Granted Particular Protection?

A passage from Ronald Dworkin’s *The Right to Ridicule* offers a reasonable starting point:

No religion can be permitted to legislate for everyone about what can or cannot be drawn any more than it can legislate about what may or may not be eaten. No one's religious convictions can be thought to trump the freedom that makes democracy possible.[[950]](#footnote-951)

Dworkin points out that it is unreasonable for religious belief to be uniquely granted protection from criticism in a genuine democratic society.[[951]](#footnote-952) Indeed, it can be argued that there is no conflict between the right to freedom of expression and the right not to be offended in one’s own religious feelings simply because the latter is not a right, in the context of the ECHR, legally speaking. Zucca, for instance, says that if there is a right not to be offended by other people’s opinions, this should apply to any feelings, not only religious ones.[[952]](#footnote-953) In other words, is there anything special about religious feelings which requires an ‘ad hoc’ protection?[[953]](#footnote-954) The Court, however, failed to present a valid reason for religion’s special protection. Indeed, it is a difficult task to demonstrate why, as a matter of principle, religious feelings must receive different treatment.

In *Otto-Preminger*, the Court made a number of significant remarks in relation to freedom of expression which offends religious feelings.[[954]](#footnote-955) The Court, for instance, explicitly stated that freedom of thought, conscience and religion, which is protected under Article 9 of the Convention, cannot protect believers from all criticism.[[955]](#footnote-956) In adopting this approach, the Court noted that: ‘those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from criticism’.[[956]](#footnote-957) The basic point of this last sentence suggests that religious believers cannot expect their religion to be free from all criticism. Rather, as the Court pointed out, they ‘must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith’.[[957]](#footnote-958) Hence, the protection of freedom of religion or belief cannot be used by people to restrain others from expressing opinions which may run counter to their own or which they deem offensive.[[958]](#footnote-959)

Dworkin builds his theory of rights as trumps on the basis of the concept of equal concern and respect. He then makes a normative claim that the right to treatment as an equal should be taken to be the fundamental value under the liberal theory of equality.[[959]](#footnote-960) According to Dworkin, the state should be ‘neutral on what might be neutral on what might be called the question of the good life and thus political decisions must be, so far as possible, independent of any particular conception of the good life, or of what gives value to life’.[[960]](#footnote-961) Therefore, Dworkin defines individual rights in terms of exclusion of utilitarian justifications, which are opposed to his theory of equality. In a liberal democracy, according to Dworkin, genuine freedom of expression demands the protection of all manner of speech, including ridicule.

Ridicule is, according to Dworkin, a ‘distinct kind of expression’ and its ‘substance cannot be repackaged’ without altering its intended meaning.[[961]](#footnote-962) This means that ridicule, as a certain kind of expression, has a specific characteristic, in which its ‘substance’ cannot be separated from its ‘rhetorical form’ without expressing something completely different from what was actually intended. Understanding ridicule as a specific form of expression naturally entails that freedom of speech should include the right to ridicule. The right to ridicule, then, can be considered as a corollary of the right to free speech.[[962]](#footnote-963)

As Dworkin points out, it is irrational for some convictions, namely religious feelings to be afforded special protection from ridicule or criticism in a democratic society.[[963]](#footnote-964) This suggests that freedom of speech is too important not to be limited only because of the sensitivities of religious believers. The Court has failed to justify why a State should grant people’s religious feelings such a privileged position among other feelings.

## Conclusion

In this chapter, the Court’s case-law on the right to freedom of expression in relation to blasphemy has been discussed. Article 10 of the Convention guarantees freedom of expression, which is widely accepted as fundamental for the proper and legitimate functioning of a liberal democratic society. it is crucial to note that whilst Article 9 ECHR explicitly states that ‘Everyone has the right to freedom of thought, conscience and religion’, it does not refer to ‘respect’ or ‘feelings’ under this provision. This chapter has argued that in a liberal democracy there is no right to be protected from gratuitous offence. The chapter, in other words, has showed that it is difficult to make sense of such a right since it is based on majoritarian policy consideration rather than principle. This finding implies that the Court has failed to provide adequate justification for why a State should provide individual’s religious feelings such a privileged position among other feelings:

it is illegitimate for governments to impose a collective or official decision on dissenting individuals, using the coercive powers of the state, unless that decision has been taken in a manner that respects each individual’s status as a free and equal member of the community.[[964]](#footnote-965)

The *I.A* decision provides an excellent opportunity to appreciate the importance of Dworkin’s theory of rights. In that case the Court took the view that a 16 dollar fine was proportionate to the limitation of the applicant’s right to impart his views on religious theory to the public through a book which contained blasphemous expressions. As this chapter has demonstrated, the Court’s reasoning for this approach seems to be that human rights are simply quantities of freedom.[[965]](#footnote-966) On Dworkin’s view, however, the fact that:

 If we have a right to basic liberties not because they are cases in which the commodity of liberty is somehow especially at stake, but because an assault on basic liberties injures us or demeans us in some way that goes beyond its impact on liberty, then what we have a right to is not liberty at all, but to the values or interests or standing that this particular constraint defeats.[[966]](#footnote-967)

This means that human rights are meant to protect some fundamental values of people as individual moral agents. On a Dworkinian argument, freedom of speech does not simply protect individual liberty from state interference, rather it protects an individual’s right to be treated with dignity. Free speech is considered as an inherent right that is rooted in human dignity and individual autonomy of human beings.[[967]](#footnote-968) Subsequently, Dworkin defines an individual’s right to be treated with dignity as ‘the right that others acknowledge his genuine critical interests: that they acknowledge that he is the kind of creature, and has the moral standing, such that it is intrinsically, objectively important how his life goes’.[[968]](#footnote-969) Dworkin, therefore, considers the right to freedom of expression as a derivative right of human dignity, and for this reason the protection of human dignity requires the recognition of freedom of speech. On this basis, freedom of speech is valued as a constituent element of human dignity rather than merely as an instrument for democracy or as an instrument of truth.[[969]](#footnote-970)

Upon addressing the issue of whether the freedom of expression, as guaranteed in Article 10, includes the right to publicly criticise the religious conviction of others, the chapter has showed that the Court has no clear approach. Based on this finding, it comes as no surprise that the Court has granted states a wide discretion in deciding how to regulate the issue of blasphemy laws and free speech, resulting in a line of cases relying strongly on the doctrine of the margin of appreciation under the ECHR. Most importantly, Dworkinian’s framework has shown that whilst free speech is undoubtedly imperative to human dignity, there remains much to be said about the Court’s attitudes towards the balancing of free speech with that of religious feelings, whether this includes an intent to ridicule or otherwise. One key finding has been that the division of rules and principles not only iterates the value of free speech when it comes to religious beliefs, but that Dworkin’s contentions over individual rights are fundamental to the moral values that are intrinsic to human dignity, effectively a contradiction to the judicial decisions presented before us.

# Chapter Seven CONCLUSION

The purpose of this thesis has been to make use of Dworkin’s theory of law as a methodological approach to analyse certain areas of the case-law of the European Court of Human Rights. The analysis proceeded to the examination of whether the Court’s interpretive practice can be understood as it seems to aim at discovering the moral truth regarding the content of the Convention rights. This thesis has argued that the ECtHR can make use of insights from Dworkin’s theory of law in order to further understand its commitment to objective moral truth regarding the content of Convention rights.

It is possible to say that Dworkin’s theory of law (legal interpretivism) and particularly his theory of rights have attracted a great deal of attention in the field of human rights law.[[970]](#footnote-971) Throughout the thesis, I have made use of the essential elements of Dworkin’s theory of law in different ways. Chapter 2 provided the methodology of the thesis. His theory of constitutional interpretation (the moral reading) can be understood in the light of his interpretivist approach. Based on this understanding, legal interpretivism covers all the different Dworkinian insights this thesis used in different chapters. While Dworkin’s arguments for his view of legal interpretation are built in the context of the US constitution, his ideas are also capable of providing an alternative reading of the ECtHR’s case-law. Broadly accepting Dworkin’s characterisation of the US Constitution and following Letsas, this thesis calls attention to the moral reading of the Convention as an interpretive method, which aims at discovering the objective moral truth concerning the content of Convention rights.

However, a number of academics working in the field of public international law have expressed their scepticism as to the applicability of Dworkin’s theory of law to international human rights law.[[971]](#footnote-972) Some of them even believe that that Dworkin’s theory of law is inappropriate for the purposes of the ECHR. In particular, Beckett has claimed that Dworkin offers a theory of adjudication, which is inappropriate to public international law.[[972]](#footnote-973) In addition to this, Andrew Legg has argued that Dworkin’s theory provides an unrealistic and undesirable theory of interpretation of the ECHR.[[973]](#footnote-974)

 On the contrary, Dworkin’s views on constitutional adjudication have been specifically chosen for the purposes of the ECHR because the concept of constitutional interpretation and the interpretation of the Convention pose similar problems. The fundamental questions that the ECtHR is facing are characteristic and common to most national constitutional courts.[[974]](#footnote-975) In the words of Janneke Gerard: ‘the ECtHR has to answer many questions of interpretation and application of fundamental rights that are also answered by constitutional courts on the domestic level’.[[975]](#footnote-976) As Gerard rightly points out, the parallel between the ECtHR and a constitutional court can be conveniently drawn.[[976]](#footnote-977) In the words of Gonzalez-Salzberg, ‘the role of the Court could be seen as having many similarities to that of a constitutional court of domestic jurisdiction’.[[977]](#footnote-978) Thus, as discussed in the second chapter of the thesis, Dworkin’s legal interpretivism could be appropriate for interpreting the Convention.

 Interestingly, in 1986, the parallel between the interpretation and application of the ECHR and the interpretation of the US Constitution was already emphasised by the Vice-President of the former European Commission on Human Rights. In the words of Jochen Frowein: ‘[a]s a matter of fact, the system has been so effective in the last decade that the European Court of Human Rights has for all practical purposes become Western Europe's constitutional court. Its case law and practice resembles that of the U.S. Supreme Court’.[[978]](#footnote-979) In light of the above consideration, Chapter 2 focused on the applicability of Dworkin’s legal interpretivism as a theory of interpretation for the Convention. The chapter argued that Dworkin’s approach to constitutional interpretation could be appropriate for interpreting the Convention on two main grounds: the abstract moral language of the Convention and the Court’s interpretive practice.

In his book on *A Theory of Interpretation of the ECHR*, Letsas argued that the main purpose of Convention rights is to protect individuals from the hostile/moralistic external preferences of the majority.[[979]](#footnote-980) In the words of Letsas:

we have rights not to be deprived of some liberty or opportunity on the basis of certain impermissible considerations: that our plan of life is impoverished or immoral; that we are despised by the majority; that our views shock and offend others; that we should be forced to lead a particular kind of life; that our life is worth less than the life of others; that the majority will secure a marginal or speculative benefit by restricting important liberties.[[980]](#footnote-981)

As discussed throughout the thesis, Dworkin’s theory of rights suggests that individual rights render a specific group of reasons (hostile external preferences) impermissible as a basis for state intervention. This approach in this context entails a liberal egalitarian theory of the ECHR rights, which supports an anti-utilitarian and anti-majoritarian reading regarding the content of those rights.[[981]](#footnote-982) According to Letsas, the abstract moral language of the Convention supports such a reading.

However, it is possible to argue that Letsas provided a perhaps limited analysis of what is meant by the abstract moral language of the Convention and how such language itself allows for the moral reading. This is important because when Dworkin presented the idea of the moral reading, he mainly focused on the language of the Constitution: ‘Most contemporary constitutions declare individual rights against the government in very broad and abstract language’.[[982]](#footnote-983) He then explained that judges should interpret and apply ‘these abstract clauses on the understanding that they invoke moral principles about political decency and justice’.[[983]](#footnote-984) Under the moral reading, the text of the Convention should be read as an abstraction of the moral principles that underpin human rights. It is reasonable to say that the moral reading begins from the language used by the Constitution. Therefore, Chapter 2 explored how the abstract moral language of the ECHR itself allows for such a reading.

It also offered a discussion of the Court’s evolutive interpretation, understood as the moral reading of the Convention, in the light of international law. As an interpretive strategy, Dworkin’s theory can be considered an appropriate standard for ensuring that human rights can fulfil their primary purpose. At least, endorsement of the moral reading might be considered as a possible and pragmatic recourse in order to truly protect individual human rights under the system of the European Convention of Human Rights.

## Literature and Findings

Chapter 3 discussed the attitude of the Strasbourg Organs towards abortion. In particular, it provided a Dworkinian reading of the Court’s case-law on abortion, focusing on aspects of the moral interpretation of its decisions under Article 8 of the Convention. The chapter discussed how the Court has addressed a potentially sensitive issue, such as the right to abortion, in an incremental manner, imposing positive obligations upon states. The chapter first engaged with the Court’s so-called ‘neutral’ position on the abstract question of when life begins. This engagement is important for literature in the field for several reasons.

First, it has been argued that the Court has provided an inadequate answer to the question of whether the foetus has a right to life under Article 2 of the Convention.[[984]](#footnote-985) In other words, the Court’s so called neutral position on the question of when life begins has been criticised by various scholars, such as Jacob Pichon, Tanya Goldman and Katherine O’Donovan. Such literature has also argued that the Court’s neutral position on the question of the foetus’s status is highly problematic for its lack of clarity and for its failure to perform its judicial duty.

However, this chapter has showed that the Convention does not include prenatal life within its scope of protection under Article 2 ECHR. It has found that the woman’s interest in deciding on her body and her life has been primarily protected against the foetus’s rights and interests by the Strasbourg Organs. In doing so, the chapter has framed the abortion issue within the conflict of interests between the pregnant woman and the foetus. One key finding has been that any reasonable balancing of Articles 2 and 8 comes out in favour of the recognition of some form of right to abortion (but not necessarily abortion on demand) under the Convention.

Indeed, especially in recent years, the Court tends to examine abortion cases from the perspective of private life under Article 8 of the Convention. Since the *Bruggeman* decision, it has been clear that pregnancy and the termination of pregnancy are issues that fall within the scope of the right to respect for private life under Article 8 ECHR. This means that Article 8 has been interpreted broadly, and the ‘analysis of the rights protected has highlighted values ranging from privacy and personal autonomy to dignity and moral integrity’.[[985]](#footnote-986) David Feldman, for instance, defined Article 8 ECHR as one of the most dynamically interpreted provisions of the Convention.[[986]](#footnote-987)

However, various scholars have claimed that the ECtHR has been too ‘activist’ in developing its jurisprudence on abortion. This means that the Court has been criticised by some of the literature on the interpretation of the ECHR on the grounds of its so-called ‘far reaching’ interpretations under Article 8 of the Convention. Because the Court’s decisions are binding on state parties, principles and methods of interpretation of the Convention are significantly important. In other words, since Court’s decisions have implications for the more than 800 million people living within the jurisdiction of the ECtHR, the interpretation of the ECHR is very important in this regard. In addition to this, the lack of legal certainty and the lack of predictability concerning the interpretation of the Convention might undermine the legitimacy of the ECtHR. Therefore, the main aims of the chapter were to analyse the juridical attitude of the ECtHR towards abortion under the ECHR, as well as to demonstrate that a Dworkinian reading of the case-law on abortion can provide substantive moral reasons to rebut such claims of overreach. Such a reading of the case-law on abortion has been missing in the existing literature in the field. Hence, such an approach reveals important patters underlying court decision making in this context.

Under the moral reading of the Convention, judges of the Court ‘justify legal claims by showing that principles that support those claims also offer the best justification of more general legal practice in the doctrinal area in which the case arises’.[[987]](#footnote-988) The best justification is, under the moral reading of the ECHR, the one that ‘fits the legal practice better, and puts it in a better light’.[[988]](#footnote-989) For Dworkin, legal principles are those principles that provide the best explanation and justification of the settled law in the jurisdiction. This chapter has showed that close analysis of the Court’s ruling in *Tysiac v Poland* reveals that the roles played by the principle of practical and effective rights and the principle of the rule of law were pivotal in its reasoning. This finding clearly distinguished the chapter’s approach from that of most of the academics in this context, which tends to suggest that the grounds for the positive obligation recognised by the Court in *Tysiac* are abstract moral principles.

Chapter 4 examined the Court’s approach towards adoption by LGBT individuals and couples. This examination is performed through a lens provided by Dworkin’s legal interpretivism. As discussed throughout the chapter, the issue of adoption by LGBT individuals and couples has been addressed in a number of cases. Regarding LGBT individual adoption, the Court first addressed in the *Fretté* case. It held that the difference in treatment did not amount to a violation under the Convention because, according to the Court, it was necessary for the best interest of the potential adoptive child. In reaching this conclusion, the Court allowed a wide margin of appreciation and used uncertain scientific evidence in order to assess the ability of a homosexual parent to raise a child.[[989]](#footnote-990)

However, six years after the decision in *Fretté*, the Court did not invoke the margin of appreciation. The Court, contrary to the reasoning in *Fretté*, asked the state to provide particularly weighty grounds to justify a difference in treatment. Indeed, the Court took the view that when sexual orientation was at stake the burden of proof rested on the state. This dramatic shift can be considered as the Court’s willingness to protect minorities from the hostile preferences of majorities. This chapter then has argued that the Court’s reasoning in *E.B* can be read in line with the Dworkinian principle that all persons have equal moral worth.

This discussion is important for literature in the field for at least two reasons. First, especially in recent years, the issue regarding the recognition of the rights of same-sex individuals and couples has attracted great attention under the Convention. More specifically, parenting rights of LGBT individuals and couples have been thought as one of the most important subjects in the ECtHR jurisprudence on LGBT rights. Since this issue has become a lively topic, a Dworkinian reading of the Courts’ case-law on LGBT rights contributes to the literature in the field.

Second, although research in the field has made important contributions,[[990]](#footnote-991) the continuing evolution of the Convention concerning adoption by LGBT individuals and couples has not been examined through the lens of Dworkin’s legal interpretivism. This examination has provided two interesting findings. First, the chapter has showed that the Court, in *Fretté*, might have validated the use prejudices as of third parties as a legitimate basis on which to refuse the applicant’s claim. Since this reasoning reflects majoritarian prejudices against homosexual individuals, the Court followed a majoritarian approach. Given that human rights have an anti-majoritarian dimension, the Court failed to protect sexual minority rights under the Convention.

As Dworkin puts it, ‘it is exactly that the minority must suffer because others find the lives they propose to lead disgusting, which seems no more justifiable, in a society committed to treating people as equals than the proposition we earlier considered and rejected, as incompatible with equality, that some people must suffer disadvantage under the law because others do not like them’.[[991]](#footnote-992) The chapter has made explicit that discriminating against homosexual activity as being against the majority’s morals would violate the fundamental principle of equality, namely; the right to equal concern and respect. In this regard, one of my findings has to do with the importance of moral the moral truth regarding the content of the Convention rights.

Chapter 5 discussed the Court’s case-law on Article 9 ECHR, focusing on the display of religious symbols in public places through the lens of Dworkin’s theory of rights. The issue of religious symbols in the public sphere has become a source of legal and political dispute under the Convention System.[[992]](#footnote-993) On the one hand, the Court in its case-law has confirmed that freedom of thought, conscience and religion is ‘one of the most vital elements that go to make up the identity of believers and their conception of life’.[[993]](#footnote-994) On the other hand, when it comes to the regulation of the wearing of religious symbols and clothing in the public sphere, some of the Court’s decisions raise serious concerns regarding the Court’s ability to establish the objective content of the Convention rights.

Such concerns, as this chapter has made explicit, raise important question about the Court’s unwillingness to provide any substantive normative reasons regarding the moral value of the Convention rights. In reaching this conclusion, this chapter used Dworkin’s theory of rights. The purpose of this chapter has been to make use of Dworkin’s theory of rights as a methodological approach, as such an approach reveals important patterns underlying court decision making in the particular context of religious symbols and clothing in the public sphere. Making use of Dworkin’s theory of human rights, the chapter showed how the Court’s decisions have actually tended to reflect the values and preferences of political majorities.

This is important for literature in the field (and in the context of the ECHR) because Dworkin’s theory of rights ‘as trumps’ has been misinterpreted and found inappropriate for the purposes of the ECHR. Andrew Legg, for instance, has argued that Dworkin’s theory of human rights provides an unrealistic and undesirable theory of interpretation of the ECHR. However, this chapter has showed how the Strasbourg jurisprudence can make use of insights from Dworkin’s theory of rights. The chapter drew attention to how the Court accepted the contracting states’ majoritarian current beliefs as the legitimate basis for the denial of the right to wear headscarves in educational institutions. The chapter thus offered a critical discussion of the Court’s majoritarian tendencies in the particular context of religious symbols and clothing in the public sphere through the lens of Dworkin’s theory of rights.

I believe the main contribution of this chapter is that it shows that Dworkin’s theory of human rights can be a powerful tool for revealing the Court’s majoritarian stance in this context. My claim at the end of the chapter was that Dworkin’s theory of human rights can provide the Court with an alternative approach for overcoming its majoritarian stance, which undermines its ability to discover the objective moral truth regarding the content of the Convention rights.

Chapter 6 discussed the jurisprudence of the ECtHR in respect of freedom of expression and blasphemy, with special emphasis on the Court’s construction of a right not to be insulted in one’s religious feelings through the lens of Dworkin’s theory of rights. On the one hand, the Court stated that: ‘those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism’.[[994]](#footnote-995) On the other hand, the Court has validated the claim that contracting states might sanction the public expression of opinions that offend religious feelings of believers.

This chapter showed that the direction of the European Court of Human Rights, when dealing with the tension between blasphemy and free speech is somewhat vague and remains an issue of contention.[[995]](#footnote-996) It should be emphasised that Article 9 ECHR only states, ‘Everyone has the right to freedom of thought, conscience and religion’, and says neither ‘respect’ nor ‘feelings’. The chapter has made explicit that the Court has, not surprisingly, allowed states a wide discretion in deciding how to regulate the issue of blasphemy laws and free speech in the context of the ECHR. In this context, thus, there is a line of cases which suggests that the Court relied strongly on the doctrine of the margin of appreciation.

In fact, the Court’s position on this topic has been jeopardised by the assumption that there is a right not to be insulted in one’s religious feelings. Therefore, the focus was on the religious feelings of believers, as this is the main ground in which the Court has validated states’ restriction of one’s freedom of expression based on the majoritarian conception of public interests. Following the discussion about how the Court constructed the protection of religious feelings of believers as a legitimate ground for the limitations of freedom of expression, the chapter challenged such a construction in light of Dworkin’s approach to rights. Because the chapter has taken Dworkin’s approach to rights, it provides a fresh reading of the blasphemy debate under the Convention. Such a reading is important for literature in the field for several reasons.

 First, making use of insights from Dworkin’s approach to rights and, in particular, from his famous distinction between arguments of principle and arguments of policy, this chapter contributes to the literature in the field. The chapter showed that it is difficult to make sense of the Court’s construction of a right not to be insulted in one’s religious feelings since it is purely based on majoritarian policy considerations instead of principle-based. Although some of the existing research challenged against the Court’s construction of such a right, this chapter provides a detailed analysis of how individuals rights can be defined. Second, the chapter contributes to the literature by raising concerns as to the dangers of using policy-based arguments, grounded on the majoritarian conception of public interests, as the legal basis for the denial of free speech.

On this view, arguments of principle are considered as appropriate for the judiciary, whereas arguments of policy are regarded as appropriate for the legislature.[[996]](#footnote-997) Policy decisions, according to Dworkin, should be made ‘through the operation of some political process designed to produce an accurate expression of the different interests that should be taken into account’.[[997]](#footnote-998) Therefore, as the distinction suggests, judicial decisions should be justified by arguments of principle rather than policy.

Importantly, this distinction is motivated by the necessity to provide a principle-based justification for the use of collective power against individuals (the use of state coercion and force in enforcing judgements).[[998]](#footnote-999) In the words of Dworkin: ‘our concept of law is furnished by rough agreement across the field of further controversy that law provides a justification *in principle* for official coercion’.[[999]](#footnote-1000) A conception of law, in this account, should explain ‘how what it takes to be law provides a general justification for the exercise of coercive power by the state, a justification that holds except in special cases when some competing argument is specially powerful’.[[1000]](#footnote-1001) This approach is, according to Stavropoulos, based on the idea that ‘it is wrong for government to exercise its power to coerce if such an exercise is not allowed by law’.[[1001]](#footnote-1002) On this view, the law is meant to be used as a constraint on state’s judicial power and action.

It is possible on this basis to conclude that the best interpretation of legal practices should provide a moral justification for the use of state coercion, and only principles are capable of providing such a justification. On this view, therefore, it is considered wrong for states to exercise their judicial power if such an exercise is based on arguments of policy. As Dworkin puts it: ‘it would be wrong to sacrifice the rights of an innocent man in the name of some new duty created after the event; it does, therefore, seem wrong to take property from one individual and hand it to another in order just to improve overall economic efficiency’.[[1002]](#footnote-1003)

## From Consensus to the Moral Reading

According to the Court’s case-law, as discussed in the introduction of the thesis, one can identify two major interpretive approaches: Dynamic (or Evolutive) and consensus. The approach of European consensus has been defined as a general agreement within the states of the Council of Europe concerning the content of the Convention rights. This consensus approach suggests that the content of the convention rights ought to be determined based on the contracting states’ shared understandings, rather than the moral values that underlie human rights.

However, dynamic (or evolutive) approach has been used by the Court to create the Convention rights’ autonomy. Crucially, this autonomy relies on substantive moral values and not on the contracting states’ common understandings. It is then reasonable to read the Court’s dynamic interpretation as it is interested in evolution towards the objective moral truth concerning the content of the Convention rights. Therefore, as Letsas has pointed out, the Court’s dynamic approach can be interpreted as a form of moral reading of the Convention.

In the context of the European Convention on Human Rights, the moral reading of the Convention is characterised by Tsarapatsanis as an ‘independently plausible and sophisticated theory of interpretation of the ECHR’.[[1003]](#footnote-1004) Such a theory, as mentioned above, relies on the moral principles that underpin human rights, not on member states’ common understandings of the Convention rights. As Letsas rightly observes, the Court’s extensive use of evolutive interpretation suggests that the Court is more interested in evolution towards the objective moral truth of the Convention rights, ‘not in evolution towards some commonly accepted standard, regardless of its content’.[[1004]](#footnote-1005)

However, the moral reading of the ECHR has not been unanimously accepted by scholars in the field. For instance, Dzehtsiarou find Letsas’ argument problematic stating that Letsas’ interpretation does not find adequate evidence in the Court’s case-law as it is supported by reference to merely five cases. This thesis therefore has engaged and contributed to this discussion by analysing the Court’s case-law on certain moral issues through Dworkinian lens. This engagement is important for literature in the field for several reasons.

First, as a result of this engagement, this thesis has found that the Court’s dynamic interpretation can be understood as it is interested in evolution towards objective moral values concerning the content of the Convention rights in the abortion context as well as in the context of adoption by LGBT individuals and couples. This finding, to some extent, supports Letsas’s argument that the ECtHR interpretive practice has favoured the moral reading of the Convention rights. In the context of freedom of religion, however, the Court’s deferential stance cannot be compatible with the moral reading of the ECHR. Therefore, while the Court’s case-law on certain areas supports the idea of the moral reading of the Convention, it is difficult to argue that it consistently interprets the content of the ECHR rights based on the moral values underlying human rights.

Second, this thesis has showed that the moral reading can justify the Court’s use of evolutive interpretation and its interpretive practice, which rejects textualism and intentionalism, on the basis of the moral foundations of human rights.[[1005]](#footnote-1006) Most importantly, the moral reading as an interpretation theory might shed light on the moral truth of ECHR rights. Hence, it is not only helpful to identify the moral truth of the Convention rights but also is necessary to get the moral objectivity and universality of those rights. With these findings, I hope to have contributed to shedding light on an important aspect of the interpretation of the ECHR. More particularly, contributing to the literature on the methods of interpretation used by the ECtHR, the thesis provides an alternative reading of the Court’s case-law.

Third, because this thesis has aimed at identifying interpretive patters in the Court’s reasoning, this allowed us to test the Court’s use of dynamic interpretation in hard cases. A Dworkinean reading of the Court’s case-law on certain moral issues has a capacity to reveal significant patterns underlying court decision making. This thesis has demonstrated that although Dworkin’s arguments for his view of moral reading are built in the context of US constitution, his ideas are also capable of providing an alternative reading of the ECtHR’s case-law.

However, the idea of international judges deciding controversial issues that affect domestic legislatures has been criticised by scholars, such as Jonathan Sumption, Andrew Legg and Lord Hoffmann.[[1006]](#footnote-1007) According to Robert Spano, such criticisms can usefully be divided into two general groups. The first revolves around the idea that since the ECtHR is an international court, it ‘should not second-guess domestic policy choices and judicial rulings in the national application of human rights’.[[1007]](#footnote-1008) In addition to this, the Court has also been criticised for expanding the scope of the Convention by implying additional rights and positive obligations into it, which had not been agreed by the contracting states in 1950.[[1008]](#footnote-1009)

On the contrary, according to Letsas:

By ‘expanding’ the scope of the Convention rights, the Court simply applies existing law. Any so-called ‘expansive’ interpretation of a Convention right is legitimate so long as it
is a good-faith application of a principle that the Court has consistently applied and recognised in its case law.

Moreover, on a close analysis of the case-law, the evolutive approach adopted by the Court to interpreting the Convention seems to be fully in line with the Vienna Convention rules. In fact, this discussion is about how the ECtHR should interpret the Convention rights and how far the Court can or should depart from the original understanding of those rights. The first kind of criticism comes from the principle of subsidiarity, which holds that where the case raises sensitive and moral issues the Court should defer to the contracting states’ judgements as they are better placed to examine the local circumstances. The reason for this, according to Lord Hoffmann, is that human rights can be considered as universal at the level of abstraction.[[1009]](#footnote-1010) They are, however, ‘national at the level of application’.[[1010]](#footnote-1011) In his own words:

At the level of application, however, the messy detail of concrete problems, the human rights which these abstractions have generated are national. Their application requires trade-offs and compromises, exercises of judgment which can be made only in the context of a given society and its legal system.[[1011]](#footnote-1012)

This argument suggests that since the ECtHR is an international court, it is not an appropriate body to decide whether the contracting states have provided the human rights protection that the Convention guarantees. Critics thus complained that the Court fails to adopt a much more deferential stance towards the decisions of the domestic authorities. However, as discussed throughout the thesis, this deferential understanding of human rights has been subjected to strong criticism from Dworkin’s theory of rights. For instance, Letsas forcefully argues that deference to the domestic authorities on the grounds of consensus violates the liberal principles of human rights. By resorting to consensus, the Court understands the moralistic preferences of the majority as being synonymous with public morals, and therefore constituting a legitimate aim. It is important to highlight that consensus in each contracting state is bound to contain external preferences of political majorities. As discussed in Chapter 5, this is exactly the approach in which the Court seems to have adopted in its jurisprudence on the wearing of religious symbols in public.[[1012]](#footnote-1013)

However, as Dworkin notes:

I cannot imagine what arguments might be thought to show that legislative decisions about rights are inherently more likely to be correct than judicial decisions…the technique of examining a claim of right for speculative consistency is a technique far more developed in judges than in legislators.[[1013]](#footnote-1014)

On this view, an individual right is considered as an individuated claim, which by nature, should take precedence over claims deriving from the general interest.[[1014]](#footnote-1015) The moral basis of this understanding of individual rights is a normative claim that the state must treat people with equal concern and respect irrespective of the conception of good life they happen to endorse.[[1015]](#footnote-1016)

The second kind of criticism argues that the Court has been too ‘activist’ in developing its jurisprudence on human Rights. In particular, the Court has been criticised for expanding the scope of Convention rights beyond ‘interpretation, and well beyond the language, object or purpose of the instrument [the Convention]’. The paradigmatic example of this kind of criticism is the opinion of Judge Javier Borrego Borrego in *Tysiac v Poland,* which was discussed in Chapter 3. In his own words: ‘I consider that the Court’s decision in the instant case favours ‘abortion on demand’… I would never have thought that the Convention would go so far, and I find it frightening’. Similarly, Lord Sumption criticises the Court’s interpretation of Article 8 ECHR as follows:

The text of Article 8 protects private and family life, the privacy of the home and of personal correspondence. This perfectly straightforward provision was originally devised as a protection against the surveillance state by totalitarian governments. But in the hands of the Strasbourg court it has been extended to cover the legal status of illegitimate children, immigration and deportation, extradition, aspects of criminal sentencing, abortion, homosexuality, assisted suicide, child abduction, the law of landlord and tenant, and a great deal else besides. None of these extensions are warranted by the express language of the Convention, nor in most cases are they necessary implications.[[1016]](#footnote-1017)

This criticism, according to Spano, can be grounded in a doctrine tied to some extent to the original expectations of the Contracting States.[[1017]](#footnote-1018)

On the contrary, as affirmed by Christian Djeffal, the Court has a long tradition of interpreting the Convention ‘evolutively’.[[1018]](#footnote-1019) As discussed in chapter 2, the Court’s interpretive ethic is based on rejecting textualism and intentionalism as methods of interpretation of the Convention. The most evident example of this ethic can be seen within the Court’s jurisprudence on abortion. As discussed in Chapter 3, the Court seems to have chosen incrementalism in imposing positive obligations on the contracting states to create an accessible framework to provide practical and safe abortion in the cases where abortion is legal.[[1019]](#footnote-1020) Although a moral interpretation has not been explicitly acknowledged in the context of the ECtHR case-law on abortion, it remains possible to read its line of reasoning as moral reasoning. Indeed, the ECtHR has played a key role in protecting the rights of moral minorities across Europe.

It is fair to conclude that the Court has shown its ability to issue binding decisions on controversial moral issues. As a result, the Court has gained increased respect and recognition at both national and international levels. If the Court can overcome its fear regarding the potential consequences of addressing morally sensitive human rights questions, this will be an important step in the right direction. For this reason, it is essential to highlight that the Court might provide a more in-depth analysis of the moral purpose of the human rights involved, as well as the substantive reasons regarding the moral value of the Convention rights. This universal understanding of the concept of human rights will allow the Court to defer less to the states of the Council of Europe to develop the protections of the ECHR progressively and universally. Dworkin’s theory of law can help the Court’s aim of universality when dealing with the protection of the rights of minorities in restrictive regimes. The interest of Dworkin’s theory would be in critiquing such regimes, to reveal their majoritarian conception of the notion of individual rights.

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8. Hard cases are those cases in which the result is not clearly dictated by statute or precedent. Ronald Dworkin, ‘Hard Cases’ (1975) 88 *Harvard Law Review Association* 1057, at 1060; Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 81; Ronald Dworkin, *A Matter Of Principle* (Harvard University Press, 1985) chapter 1 and chapter 5; Ronald Dworkin, *Law’s Empire* (Harvard University Press, 1986) 353 and 354; Ronald Dworkin, *Freedom’s Law* (Oxford University Press, 1996) 11. Dimitrios Kyritsis clarifies that according to Dworkin the difference between easy and hard cases is merely epistemic, not deep or metaphysical. See Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford University Press, 2017) 71. [↑](#footnote-ref-9)
9. George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 111. See also Dimitrios Kyritsis, Shared Authority: Courts and Legislatures in Legal Theory (Hart Publishing, 2014) chapter 1. [↑](#footnote-ref-10)
10. Stephen Guest, ‘Justice, Law and Ronald Dworkin: Jurisprudence at the end of the Century’ (1998) 51 *Current Legal Problems* 335, at 343. See also Dimitrios Kyritsis, ‘Is Moralised Jurisprudence Redundant?’ in Kenneth E Himma, Miodrag Jovanovic and Bojan Spaic (eds), *Unpacking Normativity: Conceptual, Normative, and Descriptive Issues* (Hart Publishing, 2018) 3-15. [↑](#footnote-ref-11)
11. Kyritsis, Shared Authority: Courts and Legislatures in Legal Theory (n 9) 19. [↑](#footnote-ref-12)
12. George Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (2010) 21 *European Journal of International Law* 509, at 528. George Letsas, ‘The ECHR as a living instrument: Its meaning and legitimacy’ in Andreas Follesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press, 2013) 106-141. [↑](#footnote-ref-13)
13. Richard H Pildes, ‘Dworkin’s Two Conceptions of Rights’ (2000) 29 *Journal of Legal Studies* 309. Jeremy Waldron, ‘Pildes on Dworkin’s Theory of Rights’ (2000) 29  *Journal of Legal Studies* 301; Nicos Stavropoulos, ‘Legal Interpretivism’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer Edition, 2014). [↑](#footnote-ref-14)
14. Dworkin, *Law’s Empire* (n 8). [↑](#footnote-ref-15)
15. According to Dimitrios Kyritsis, *Law’s Empire* contains the most sustained and comprehensive exposition of Dworkin’s theory of law. See Kyritsis, Shared Authority: Courts and Legislatures in Legal Theory (n 9) 56 [↑](#footnote-ref-16)
16. Dworkin, *Law’s Empire* (n 8) 93. [↑](#footnote-ref-17)
17. David Plunkett and Timothy Sundell, ‘Dworkin’s Interpretivism and the Pragmatics of Legal Disputes’ (2013) 19 *Legal Theory* 242, at 242. [↑](#footnote-ref-18)
18. Stavropoulos, ‘Legal Interpretivism’ (n 13). For a critical discussion of Dworkin’s conception of legal interpretation see Kyritsis, Shared Authority: Courts and Legislatures in Legal Theory (n 9) chapter 3. [↑](#footnote-ref-19)
19. Ronald Dworkin, ‘Natural Law Revisited’ (1982) 34 *University of Florida Law Review* 165, at 168. [↑](#footnote-ref-20)
20. Kyritsis, Shared Authority: Courts and Legislatures in Legal Theory (n 9) 11. [↑](#footnote-ref-21)
21. Ibid 12. See also Kenneth Einar Himma, ‘Philosophy of Law’ in James Fieser and Bradley Dowden (eds), *The* *Internet Encyclopedia of Philosophy*, availableat <https://www.iep.utm.edu/law-phil/> (accessed 14 June) 2019).  [↑](#footnote-ref-22)
22. Dworkin, *Freedom’s Law* (n 8) 2. [↑](#footnote-ref-23)
23. ibid 8. [↑](#footnote-ref-24)
24. Guest, ‘Justice, Law and Ronald Dworkin: Jurisprudence at the end of the Century’ (n 10) 343. [↑](#footnote-ref-25)
25. Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (n 8)182. [↑](#footnote-ref-26)
26. Dworkin, *Taking Rights Seriously* (n 8) 180. [↑](#footnote-ref-27)
27. Anthony R Reeves, ‘Ronald Dworkin’s Theory of Rights’ in Sally Scholz (ed), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer, 2018) 1, at 3. [↑](#footnote-ref-28)
28. In Dworkin’s own words: ‘since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or more powerful group’. See Dworkin, *A Matter of Principle* (n 8) 191; [↑](#footnote-ref-29)
29. See Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (n 8) chapter 8. [↑](#footnote-ref-30)
30. Dworkin, *Taking Rights Seriously* (n 8) xi. [↑](#footnote-ref-31)
31. ibid 195. [↑](#footnote-ref-32)
32. Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford University Press, 2012) 51; Carmen Draghici, ‘The Strasbourg Court between European and Local Consensus: Anti-Democratic or Guardian of Democratic Process?’ (2017) *European Public Law* 11, at 14. [↑](#footnote-ref-33)
33. Legg, ibid 52. [↑](#footnote-ref-34)
34. George Letsas*, A Theory of Interpretation of the European Convention on Human Rights* (n 9); Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (n 12); Letsas, ‘The ECHR as a living instrument: Its meaning and legitimacy’ (n 12) 106-141. [↑](#footnote-ref-35)
35. Following Letsas, this thesis uses the terms ‘evolutive interpretation’ and ‘living-instrument approach’ interchangeably. Another synonym in this context is the term ‘dynamic interpretation’. See Letsas, ‘The ECHR as a living instrument: Its meaning and legitimacy’ (n 12) 106-141, at 108. [↑](#footnote-ref-36)
36. On the ‘moral reading’ of the ECHR and its compatibility with the so called ‘consensus approach’ of the ECtHR see Dimitrios Tsarapatsanis, ‘The Consensus Approach of the European Court of Human Rights as a rational response to complexity’ in Jamie Murray, Thomas E Webb and Steven Wheatley (eds), *Complexity Theory and Law* (Routledge, 2018) 111-128; George Letsas, ‘The Truth in Autonomous Concepts: How to Interpret the ECHR’ (2004) 15 *European Journal of International Law* 279-305; Aileen McHarg, ‘Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights’ (1999) *62 Modern Law Review* 671-696; Laurence R Helfer, ‘Consensus, Coherence and the European Convention on Human Rights’ (1993) 26 *Cornell International Law Journal* 133-165. [↑](#footnote-ref-37)
37. Kanstantsin Dzehtsiarou, ‘European Consensus and the Evolutive Interpretation of the European Convention on Human Rights’ (2011) 12 *German Law Journal* 1730, at 1733. [↑](#footnote-ref-38)
38. Tsarapatsanis, ‘The Consensus Approach of the European Court of Human Rights as a rational response to complexity’ (n 36) 114. [↑](#footnote-ref-39)
39. Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press, 2015) 1. [↑](#footnote-ref-40)
40. Steven Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Council of Europe Publishing, 1997) 25. [↑](#footnote-ref-41)
41. Howard C Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Publisher, 1996) 13; Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe Publishing, 2000) 5. [↑](#footnote-ref-42)
42. Eva Brems, ‘The Margin of Appreciation Doctrine in the case-law of the European Court of Human Rights (1996) 56 *Zeitschrift Fur Auslandisches Offentliches Recht Und Volkerrecht* 240 at 304; Letsas*, A Theory of Interpretation of the European Convention on Human Rights* (n 9) 90. [↑](#footnote-ref-43)
43. Onder Bakircioglu, ‘The Application of the Margin of Appreciation Doctrine in Freedom of Expression And Public Morality Cases’ (2007) 8 *German Law Journal* 711, at 717. [↑](#footnote-ref-44)
44. Legg, *The Margin Of Appreciation In International Human Rights Law* (n 32) 17. [↑](#footnote-ref-45)
45. Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *The European Convention on Human Rights* 6th edn (Oxford University Press, 2014) 321. [↑](#footnote-ref-46)
46. Roberto Perrone, ‘Public Morals and the European Convention on Human Rights' (2014) 47 *Israel Law Review* 361, at 363. [↑](#footnote-ref-47)
47. The Court has constantly said that ‘it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals…’ See *Handyside v United Kingdom*, Series A no 24, 7 December 1976, para 52. [↑](#footnote-ref-48)
48. ibid para 48. [↑](#footnote-ref-49)
49. For a conceptual clarification of the Doctrine, see Legg, *The Margin of Appreciation in International Human Rights Law* (n 32); For a critical examination of the doctrine, see Dean Spielmann, ‘Whither the Margin of Appreciation?’ (2014) 67 *Current Legal Problems* 49-65. [↑](#footnote-ref-50)
50. Dimitrios Tsarapatsanis, ‘The Margin of Appreciation Doctrine: A Low-Level Institutional View’ (2015) 35 *Legal Studies* 675-697. [↑](#footnote-ref-51)
51. Dominic McGoldrick, ‘A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee' (2015) 65 *International and Comparative Law Quarterly* 21-65. [↑](#footnote-ref-52)
52. Aaron Ostrovsky, ‘What’s So Funny about Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals’ (2005) 1 *Hanse Law Review* 47-64. [↑](#footnote-ref-53)
53. Dean Spielmann, ‘Allowing the Right Margin: The European Court Of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?’ (2017) 14 *Cambridge Yearbook of European Legal Studies* 381-418; Letsas, *A Theory Of Interpretation Of The European Convention On Human Rights* (n 9); Jeffrey Brauch, ‘The Margin Of Appreciation And The Jurisprudence Of The European Court Of Human Rights: Threat To The Rule Of Law’ (2005) 11 *Columbia Journal of European Law* 113-151. [↑](#footnote-ref-54)
54. The concept of the protection of morals has been deemed as referring sexual morality in the context of ECHR. This is because the leading cases regarding public morals such as *Handyside v UK* and *Dudgeon v UK* were related to sexual morality. Alongside these cases, however, there are many decisions which have link to the protection of morals without referring the erotic matter. See Bakircioglu, ‘The Application Of The Margin Of Appreciation Doctrine In Freedom Of Expression And Public Morality Cases’ (n 43). [↑](#footnote-ref-55)
55. *Dudgeon v United Kingdom*, Series A no 45, 22 October 1981; *A B and C v Ireland* (GC), Application no 25579/05, ECHR 2010; *Lautsi and Others v Italy* (GC), Application no 30814/06, ECHR 2011. [↑](#footnote-ref-56)
56. On this point, one important problem is that in the absence of a rigorous, consistent, and systematic interpretation of the limitation clauses, any state interference based on the moralistic preferences of a majority can be deemed to meet one of the legitimate aims under the term ‘public morals’. As rightly observed by Christopher Nowlin, the Court ‘has upheld domestic laws or law enforcement practices that have restricted citizens’ freedom of expression or right to privacy under the Convention, in the name of protecting morality’. See Christopher Nowlin, ‘The Protection Of Morals Under The European Convention For The Protection Of Human Rights And Fundamental Freedoms’ (2002) 24 *Human Rights Quarterly* 264, at 264. [↑](#footnote-ref-57)
57. *Dudgeon v United Kingdom* (n 55). [↑](#footnote-ref-58)
58. ibid para 59. [↑](#footnote-ref-59)
59. ibid para 60. [↑](#footnote-ref-60)
60. It is worth mentioning that if the law of the contracting state considerable different from European consensus, it does not necessarily mean that the state in question breaches the Convention. [↑](#footnote-ref-61)
61. *A, B and C v Ireland* (n 55). [↑](#footnote-ref-62)
62. In the words of the Court: ‘…a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law’. ibid para 235. [↑](#footnote-ref-63)
63. A dissenting group of judges noted that: ‘We believe that this will be one of the rare times in the Court’s case-law that Strasbourg considers that such consensus does not narrow the broad margin of appreciation of the State concerned… it is the first time that the Court has disregarded the existence of a European consensus on the basis of “profound moral views”. Even assuming that these profound moral views are still well embedded in the conscience of the majority of Irish people, to consider that this can override the European consensus, which tends in a completely different direction, is a real and dangerous new departure in the Court’s case-law’. See ibid, the partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvela, Malinverni and Poalelungi para 6. [↑](#footnote-ref-64)
64. *Lautsi and Others v Italy* (n 55). [↑](#footnote-ref-65)
65. It is important to note that the presence of religious symbols in State school is neither prohibited nor allowed by most of the member states’ law. The Court clearly stated that ‘in the great majority of member States of the Council of Europe the question of the presence of religious symbols in State schools is not governed by any specific regulations’. ibid para 26. [↑](#footnote-ref-66)
66. The dissenting judges highlighted that ‘in the vast majority of the member states the question is not specifically regulated. On that basis I find it difficult, in such circumstances, to draw definite conclusions regarding a European consensus’. ibid, dissenting opinion of Judge Malinverni joined by Judge Kalaydjieva. [↑](#footnote-ref-67)
67. Kratochvil also emphasises the unpredictable nature of the doctrine as follows: ‘the width of the margin is not always indicative of the strictness of the scrutiny applied. Moreover, the width of the margin is often not identified at all’. See Jan Kratochvíl, ‘The Inflation of the Margin of Appreciation by the European Court of Human Rights’ (2011) 29/3 *Netherlands Quarterly of Human Rights* 324, at 330. [↑](#footnote-ref-68)
68. On this point, one important problem is that in the absence of a rigorous, consistent and systematic interpretation of the limitation clauses, any state interference based on the moralistic preferences of a majority can be deemed to meet one of the legitimate aims under the term ‘public morals’. According to Christopher Jon Nowlin, ‘ECtHR has upheld domestic laws or law enforcement practices that have restricted citizens’ freedom of expression or right to privacy under the Convention, in the name of protecting morality’. See Nowlin,

‘The Protection of Morals under the European Convention for the Protection of Human Rights and Fundamental Freedoms’ (n 56) 264. [↑](#footnote-ref-69)
69. Rolv Rysssdall, ‘The Coming Age of the European Convention on Human Rights’ (1996) 1 *European Human Rights Law Review* 18, at 22. [↑](#footnote-ref-70)
70. For instance, as Benvenisti said ‘inconsistent applications in seemingly similar cases due to different margins allowed by the court might raise concerns about judicial double standards’. See Eyal Benvenisti, ‘Margin Of Appreciation, Consensus And Universal Standards’ (1999) 31 *New York University Journal of International Law and Politics* 843, at 844. [↑](#footnote-ref-71)
71. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 9) chapter 3; Letsas, ‘The ECHR as a living instrument: Its meaning and legitimacy’ (n 12). [↑](#footnote-ref-72)
72. Letsas, ‘The ECHR as a living instrument: Its meaning and legitimacy’ (n 12) 122. [↑](#footnote-ref-73)
73. Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (n 12) 528. [↑](#footnote-ref-74)
74. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (n 39) 45. [↑](#footnote-ref-75)
75. ibid Chapter 6. [↑](#footnote-ref-76)
76. Letsas, ‘The Truth in Autonomous Concepts: How to Interpret the ECHR’ (n 36).

See Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (n 12) 524. [↑](#footnote-ref-77)
77. Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (n 12) 528. [↑](#footnote-ref-78)
78. *Tyrer v United Kingdom*, Series A no 26, 25 April 1978. [↑](#footnote-ref-79)
79. ibid para 31. [↑](#footnote-ref-80)
80. *Christine Goodwin v United Kingdom* (GC), Application no 28957/95 ECHR 2002-VI, para 74. [↑](#footnote-ref-81)
81. According to Article 15 of the Convention, all rights apart from absolute rights can be suspended in ‘time of war or other public emergency threatening the life of nation’ provided this is ‘strictly required by the exigencies of the situations’.

The only absolute rights of the ECHR are the following: the right to life (Article 2); the right not to be subjected to torture or to inhuman or degrading treatment or punishment (Article 3); the right not to be held in slavery or servitude (Article 4, Paragraph 1); the right not to be convicted for conduct which was not an offence under national or international law at the time it occurred (Article 7, Paragraph 1). [↑](#footnote-ref-82)
82. Greer, *the Exceptions to Articles 8 to 11 of the European Convention on Human Rights* (n 40) 5. [↑](#footnote-ref-83)
83. Article 4.3 lists different types of obligatory work, which are not considered as ‘forced or compulsory labour’ such as compulsory military service. [↑](#footnote-ref-84)
84. The right to Liberty under Article 5 is not infringed by, amongst other things, ‘the lawful detention of a person after conviction by a competent court’. [↑](#footnote-ref-85)
85. For instance, Article 16 reads as follows: ‘Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens’. [↑](#footnote-ref-86)
86. For example, Article 8 of the Convention reads: 1) ‘Everyone has the right to respect for his private and family life, his home and his correspondence. 2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’. [↑](#footnote-ref-87)
87. George Letsas, ‘The Truth in Autonomous Concepts: How to Interpret the ECHR’ (n 36). [↑](#footnote-ref-88)
88. George Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (n 12). [↑](#footnote-ref-89)
89. In the Court’s own words: ‘there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion…’ See *A, B and C v Ireland* (n 55) para 235. [↑](#footnote-ref-90)
90. See Tanya Goldman, ‘Vo v. France and Fetal Rights: The Decision not to Decide’ (2005) 18 *Harvard Human Rights Journal* 277, at 279. [↑](#footnote-ref-91)
91. In Lord Sumption’s own words: ‘this [Article 8] perfectly straightforward provision was originally devised as a protection against the surveillance state by totalitarian governments. But in the hands of the Strasbourg court it has been extended to cover the legal status of illegitimate children, immigration, and deportation, extradition, aspects of criminal sentencing, abortion, homosexuality, assisted suicide, child abduction, the law of landlord and tenant, (…). None of these extensions are warranted by the express language of the Convention, nor in most cases are they necessary implications. See Lord Sumption, ‘The Limits of Law’ in NW Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and The Limits of Law* (Hart Publishing, 2016) 15-27. [↑](#footnote-ref-92)
92. Jakop Cornides, ‘Human Rights Pitted Against Man’ (2008) 12 *The International Journal of Human Rights* 107, at 126. [↑](#footnote-ref-93)
93. *Tysiac v Poland*, Application no 5410/03, 20 March 2007, dissenting opinion of Judge Borrego Borrego, para 15. [↑](#footnote-ref-94)
94. See Chapter 2. [↑](#footnote-ref-95)
95. *Kokkinakis v Greece* Series A no 260, 25 May 1993, para 31; *Leyla Sahin v Turkey* (GC), Application no 44774/98, 10 November 2005, para 104. [↑](#footnote-ref-96)
96. Tsarapatsanis, ‘The Consensus Approach of the European Court of Human Rights as a rational response to complexity’ (n 36) 116. [↑](#footnote-ref-97)
97. Cochav E Levy, ‘Women’s Rights and Religion – The Missing Element in the Jurisprudence of the European Court of Human Rights’ (2014) 35 *University of Pennsylvania Journal of International Law* 1175. See also Jill Marshall, ‘Freedom of Religion Expression and Gender Equality: *Sahin v Turkey*’ (2006) 69 *Modern Law Review* 452 [↑](#footnote-ref-98)
98. Christine Chinkin, ‘Women’s Human Rights and Religion: How do they Co-exist?’ in Javaid Rehman and Susan Breau (eds), *Religion, Human Rights and International Law* (Nijhoff, 2007) 56. [↑](#footnote-ref-99)
99. *Otto-Preminger-Institut v Austria*, Series A no 295-A, 20 September 1994, para 48; *Wingrove v United Kingdom*, Reports of Judgements and Decisions 1996-V, 25 November 1996; para 47. [↑](#footnote-ref-100)
100. For a critical discussion on Dworkin’s distinction between principles and policies see Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (n 8) chapter 3. [↑](#footnote-ref-101)
101. Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (n 2) 94. See also Pietro Pustorino, ‘Same-sex couples before the ECtHR: The Right to Marriage’ in Daniele Gallo, Luca Paladini and Pietro Pustorino (eds), *Same-Sex Couples before National Supranational and International Jurisdictions* (Springer, 2014) Part 2 Section 1. [↑](#footnote-ref-102)
102. George Letsas, ‘The ECHR as a living instrument: Its meaning and legitimacy’ in A Follesdal, B Peters and G Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press, 2013) 106-141, at 124. [↑](#footnote-ref-103)
103. Nicos Stavropoulos, ‘Legal Interpretivism’ in Edward N Zalta (eds), The Stanford Encyclopedia of Philosophy (Stanford University, Summer 2014 edition); Dimitrios Kyritsis, Shared Authority: Courts and Legislatures in Legal Theory (Hart Publishing, 2014) Chapter 1 and chapter 3. See also Stephen Guest, ‘How to Criticize Ronald Dworkin’s Theory of Law’ (2009) 69 *Analysis* 352. [↑](#footnote-ref-104)
104. The book provides a systematic and coherent account of Dworkin’s argument to what he calls ‘the moral reading’ of the Constitution. See Ronald Dworkin, *Freedom’s Law* (Oxford University Press, 1996). For Dworkin’s theory of rights see Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977). To clarify, I shall use Dworkin’s theory of constitutional interpretation and the moral reading interchangeable. [↑](#footnote-ref-105)
105. For instance, Letsas discusses Dworkin’s theory of human rights in the light of Dworkin’s interpretivist approach. See George Letsas, ‘Dworkin on Human Rights’ (2015) 6 *International Journal of Legal and Political Thought* 327. [↑](#footnote-ref-106)
106. For example, Dimitrios Kyritsis combines the moral reading with Dworkin’s understanding of rights. See Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford University Press, 2017) 183. Moreover, as affirmed by Dimitrios Kyritsis, the instruction Dworkin provides of what judges should do in hard cases is no different from his general theory of interpretation. See Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford University Press, 2017) 71 [↑](#footnote-ref-107)
107. Ronald Dworkin, *Freedom’s Law* (Oxford University Press, 1996) 46. [↑](#footnote-ref-108)
108. Pichon, ‘Does the Unborn Child Have a Right to Life? The Insufficient Answer of the European Court of Human Rights in the Judgment Vo v. France’ (n 5) 436. [↑](#footnote-ref-109)
109. *Tysiac v Poland*, Application no 5410/03, 20 March 2007, dissenting opinion of Judge Borrego Borrego, para 15. [↑](#footnote-ref-110)
110. Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (Hart Publishing, 2019). [↑](#footnote-ref-111)
111. Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2012). [↑](#footnote-ref-112)
112. Pablo Castillo-Ortiz, Amal Ali and Navajyoti Samanta, ‘Gender, intersectionality, and religious manifestation before the European Court of Human Rights’ (2019) 18 *Journal of Human Rights* 76-91. [↑](#footnote-ref-113)
113. Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985); Ronald Dworkin, *Law’s Empire* (Harvard University Press, 1986). [↑](#footnote-ref-114)
114. Kyritsis, Shared Authority: Courts and Legislatures in Legal Theory (n 2) 58 and 59. [↑](#footnote-ref-115)
115. Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 135 [↑](#footnote-ref-116)
116. ibid 136 [↑](#footnote-ref-117)
117. Dworkin, *Law’s Empire* (n 6); See Kyritsis, Shared Authority: Courts and Legislatures in Legal Theory (n 2) Chapter 3. See also Stavropoulos, ‘Legal Interpretivism’ (n 2). [↑](#footnote-ref-118)
118. Guest, ‘How to Criticise Ronald Dworkin’s Theory of Law’ (n 2) 353. See also Dimitrios Kyritsis, ‘Is Moralised Jurisprudence Redundant’ in Kenneth E Himma, Miodrag Jovanovic and Bojan Spaic (eds), Unpacking Normativity: Conceptual, Normative and Descriptive issues (Hart Publishing, 2018) 3-15. [↑](#footnote-ref-119)
119. Guest, ‘How to Criticise Ronald Dworkin’s Theory of Law’ (n 2) 354. [↑](#footnote-ref-120)
120. Dworkin, *Law’s Empire* (n 6) Chapter 2; See Stavropoulos, ‘Legal Interpretivism’ (n 2). [↑](#footnote-ref-121)
121. Dworkin, ibid Chapter 6; Kyritsis, Shared Authority: Courts and Legislatures in Legal Theory (n 2) Chapter 4. See also Stavropoulos, ibid. [↑](#footnote-ref-122)
122. Dworkin, ibid 166. [↑](#footnote-ref-123)
123. Dworkin, ibid 243; See also T R S Allan, ‘Dworkin and Dicey: The Rule of Law As Integrity’ (1988) 8 *Oxford Journal of Legal Studies* 226-277. [↑](#footnote-ref-124)
124. Dworkin, ibid 255. [↑](#footnote-ref-125)
125. See Ronald Dworkin, ‘Natural Law Revisited’ (1982) *University of Florida Law Review* 165. [↑](#footnote-ref-126)
126. Kyritsis, Shared Authority: Courts and Legislatures in Legal Theory (n 2) 14 and 16. [↑](#footnote-ref-127)
127. George Letsas*, A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007) Chapter 5; Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (n 5) Chapter 3 and chapter 8. Roger Cotterrell, ‘Liberalism’s Empire: Reflections on Ronald Dworkin’s Legal Philosophy’ (1987) 12 *American Bar Foundation Research Journal* 509. [↑](#footnote-ref-128)
128. Kai Moller, ‘Dworkin’s Theory of Rights in the Age of Proportionality’ (2018) 12 *Law and Ethics of Human Rights* 281, at 282. [↑](#footnote-ref-129)
129. Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (n 5) 182. [↑](#footnote-ref-130)
130. See Jeremy Waldron, ‘Pildes on Dworkin’s Theory of Rights’ (2000) 29 *Journal of Legal Studies* 301. For a critical discussion on Dworkin’s theory of rights see Richard H Pildes, ‘Why Rights are not Trumps: Social Meaning, Expressive Harms, and Constitutionalism’ (1998) 27 *Journal of Legal Studies* 725. [↑](#footnote-ref-131)
131. Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford University Press, 2012) 51. [↑](#footnote-ref-132)
132. Moller, ‘Dworkin’s Theory of Rights in the Age of Proportionality’ (n 21). [↑](#footnote-ref-133)
133. ibid 284. [↑](#footnote-ref-134)
134. Letsas*, A Theory of Interpretation of the European Convention on Human Rights* (n 20) 116. [↑](#footnote-ref-135)
135. Ronald Dworkin, *Sovereign Virtue* (Harvard University Press, 2002) 6. [↑](#footnote-ref-136)
136. This concept of human dignity will be used in chapter 5. [↑](#footnote-ref-137)
137. Dworkin, *A Matter Of Principle* (n 6) 359; Dworkin, *Taking Rights Seriously* (n 3) 91. [↑](#footnote-ref-138)
138. See Moller, ‘Dworkin’s Theory of Rights in the Age of Proportionality’ (n 21). [↑](#footnote-ref-139)
139. Waldron, ‘Pildes on Dworkin’s Theory of Rights’ (n 23) 307. [↑](#footnote-ref-140)
140. Letsas*, A Theory of Interpretation of the European Convention on Human Rights* (n 20) Chapter 5. [↑](#footnote-ref-141)
141. George Letsas, ‘Rescuing Proportionality’ in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press, 2015) 316-340, at 329. [↑](#footnote-ref-142)
142. ibid 329. [↑](#footnote-ref-143)
143. Laurens Lavrysen, ‘Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights’ in Eva Brems and Yves Haeck (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer, 2014) 69-129 at 91. [↑](#footnote-ref-144)
144. Ronald Dworkin, *Is Democracy Possible Here?* (Princeton University Press, 2008); Kyritsis, Shared Authority: Courts and Legislatures in Legal Theory (n 2) 101-107. [↑](#footnote-ref-145)
145. Moller, ‘Dworkin’s Theory of Rights in the Age of Proportionality’ (n 21). [↑](#footnote-ref-146)
146. Dworkin, *Is Democracy Possible Here?* (n 37) 31. [↑](#footnote-ref-147)
147. ibid 31. [↑](#footnote-ref-148)
148. ibid 31. [↑](#footnote-ref-149)
149. See Letsas*, A Theory of Interpretation of the European Convention on Human Rights* (n 20) Chapter 5. [↑](#footnote-ref-150)
150. Dworkin, *Taking Rights Seriously* (n 3) 269. [↑](#footnote-ref-151)
151. Dworkin, *Is Democracy Possible Here?* (n 37) 21. [↑](#footnote-ref-152)
152. Sionaidh Douglas Scott, *Legal Theory Today Law after Modernity* (Hart Publishing, 2013) 296 and 297. [↑](#footnote-ref-153)
153. Waldron, ‘Pildes on Dworkin’s Theory of Rights’ (n 23) 303. [↑](#footnote-ref-154)
154. ibid 307. [↑](#footnote-ref-155)
155. Dworkin, *Law’s Empire* (n 6) 307. [↑](#footnote-ref-156)
156. See Ronald Dworkin, *Life’s Dominion* (Vintage Books, 1995). [↑](#footnote-ref-157)
157. Dworkin, *Taking Rights Seriously* (n 3) 277. [↑](#footnote-ref-158)
158. Dworkin, *Is Democracy Possible Here?* (n 37) 33. [↑](#footnote-ref-159)
159. Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (n 5) 68. [↑](#footnote-ref-160)
160. ibid 68. [↑](#footnote-ref-161)
161. Dworkin, *Is Democracy Possible Here?* (n 37) 32. [↑](#footnote-ref-162)
162. ibid 37. [↑](#footnote-ref-163)
163. ibid 10. [↑](#footnote-ref-164)
164. ibid 9. [↑](#footnote-ref-165)
165. ibid 10. [↑](#footnote-ref-166)
166. Dworkin, *Sovereign Virtue* (n 28) 283. [↑](#footnote-ref-167)
167. Dworkin, *Is Democracy Possible Here?* (n 37) 37. [↑](#footnote-ref-168)
168. Dworkin, *Is Democracy Possible Here?* (n 37) 9. See also John Tasioulas, ‘Towards a Philosophy of Human Rights’ (2012) 65 *Current Legal Problems* 1, at 19. [↑](#footnote-ref-169)
169. Paul Yowell, ‘A Critical Examination of Dworkin’s Theory of Rights’ (2007) 52 *American Journal of Jurisprudence* 93, at 127. [↑](#footnote-ref-170)
170. Ronald Dworkin, *Taking Rights Seriously* (n 3) xi. [↑](#footnote-ref-171)
171. Dworkin, *A Matter of Principle* (n 6) 11. [↑](#footnote-ref-172)
172. Donald H Regan, ‘Glosses on Dworkin: Rights, Principles, and Policies’ (1978) 76 *Michigan Law Review* 1213, at 1214. [↑](#footnote-ref-173)
173. David P Forsythe, *Encyclopaedia of Human Rights* (Oxford University Press, 2009) 384. [↑](#footnote-ref-174)
174. Letsas*, A Theory of Interpretation of the European Convention on Human Rights* (n 20) 111; Moller, ‘Dworkin’s Theory of Rights in the Age of Proportionality’ (n 21). [↑](#footnote-ref-175)
175. Dworkin, *Is Democracy Possible Here?* (n 37) 67. [↑](#footnote-ref-176)
176. ibid 67. [↑](#footnote-ref-177)
177. *Leyla Şahin v Turkey* (GC), Application no 44774/98, ECHR 2005-XI, para 104. [↑](#footnote-ref-178)
178. Moller, ‘Dworkin’s Theory of Rights in the Age of Proportionality’ (n 21) 286. [↑](#footnote-ref-179)
179. Letsas*, A Theory of Interpretation of the European Convention on Human Rights* (n 20) 116. [↑](#footnote-ref-180)
180. Dworkin, *Justice for Hedgehogs* (n 8) 368. [↑](#footnote-ref-181)
181. Dworkin, *Taking Rights Seriously* (n 3) 272. [↑](#footnote-ref-182)
182. See Frances Kamm, ‘What Ethical Responsibility Cannot Justify: A Discussion of Ronald Dworkin’s *Justice for Hedgehogs’* (2010) 90 *Boston University Law Review* 691, [↑](#footnote-ref-183)
183. Julie Ringelheim, ‘State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach’ (2017) 6 *Oxford Journal of Law and Religion* 24, at 28. [↑](#footnote-ref-184)
184. Anat Scolnicov, *The right to religious freedom in international law* (Routledge, 2011) 37. [↑](#footnote-ref-185)
185. To clarify, the Moral Reading is a term that Ronald Dworkin used to present his theory of legal interpretivism in the context of the U.S. Constitution. [↑](#footnote-ref-186)
186. Janneke Gerards, ‘Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights’ (2018) 18 *Human Rights Law Review* 495, at 512. [↑](#footnote-ref-187)
187. *Loizidou v Turkey*,Series A no 310, 23 March 1995, para 75; See also *Al-Skeini and others v United Kingdom* (GC), Application no 55721/07, ECHR 2011, para 141. [↑](#footnote-ref-188)
188. Connie S Rosati, ‘The Moral Reading of Constitutions’ in Wil Waluchow and Stefan Sciaraffa (eds), *The Legacy of Ronald Dworkin* (Oxford University Press, 2016) 323-351, at 324. [↑](#footnote-ref-189)
189. ibid 324. [↑](#footnote-ref-190)
190. For a critical analysis of the moral reading see Raoul Berger, ‘Ronald Dworkin’s *The Moral Reading of the Constitution*: A Critique’ (1997) 72 *Indiana Law Journal* 1099; Michael W McConnell, ‘The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s Moral Reading of the Constitution’ (1997) 65 *Fordham Law Review* 1269. [↑](#footnote-ref-191)
191. Ronald Dworkin, *Freedom's Law* (n 3) 2. [↑](#footnote-ref-192)
192. ibid 7. [↑](#footnote-ref-193)
193. ibid. [↑](#footnote-ref-194)
194. Dworkin, *Freedom’s Law* (n 3) 2. [↑](#footnote-ref-195)
195. ibid 2. [↑](#footnote-ref-196)
196. ibid 2. [↑](#footnote-ref-197)
197. Dworkin, *Taking Rights Seriously* (n 3) 147. [↑](#footnote-ref-198)
198. Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (n 5) 183. [↑](#footnote-ref-199)
199. ibid 182. [↑](#footnote-ref-200)
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201. Roberto Gargarella, ‘The Constitution and Justice’, in Michael Rosenfeld and Andras Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 336-350, at 344; For a useful discussion of Dworkin’s theory of equality and liberty in the context of the ECHR, see Letsas, *A theory of Interpretation of the European Convention on Human Rights* (n 20) Chapter 5. [↑](#footnote-ref-202)
202. Joseph Raz, *The Morality of Freedom* (Oxford University of Press, 1986) Chapter 9. [↑](#footnote-ref-203)
203. Dworkin, *Freedom’s Law* (n 3) 7. [↑](#footnote-ref-204)
204. ibid 6; See also Rosati, ‘The Moral Reading of Constitutions’ (n 81) 6. [↑](#footnote-ref-205)
205. Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (n 5) 183. [↑](#footnote-ref-206)
206. Dworkin, *Freedom’s Law* (n 3) 7. [↑](#footnote-ref-207)
207. ibid 2. [↑](#footnote-ref-208)
208. ibid 2. [↑](#footnote-ref-209)
209. ibid 8. [↑](#footnote-ref-210)
210. ibid 10. [↑](#footnote-ref-211)
211. Dworkin, *A Matter of Principle* (n 6) 48; See also Keith E Whittington ‘Dworkin’s ‘Originalism’: The Role of Intentions in Constitutional Interpretation’ (2000) 62 *Review of Politics* 197, at 229. [↑](#footnote-ref-212)
212. Dworkin, *Life’s Dominion* (n 49) 128. [↑](#footnote-ref-213)
213. Ronald Dworkin, ‘Comment’ in Antonin Scalia (ed), *A Matter of Interpretation* (Princeton University Press, 1997) 115-129, at 119. [↑](#footnote-ref-214)
214. James E Fleming, *Fidelity to Our Imperfect Constitution* (Oxford University Press, 2015) 73. [↑](#footnote-ref-215)
215. Dworkin, *Freedom’s Law* (n 3) 269. [↑](#footnote-ref-216)
216. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 20) 71. [↑](#footnote-ref-217)
217. Dworkin, *Freedom’s Law* (n 3) 8; On the chain novel see Dworkin, *Law’s Empire* (n 6) Chapter 7. [↑](#footnote-ref-218)
218. Dworkin, *Freedom’s Law* (n 3) 10. [↑](#footnote-ref-219)
219. ibid 10. [↑](#footnote-ref-220)
220. ibid 12. [↑](#footnote-ref-221)
221. David O Brink, ‘Originalism and Constructive Interpretation’ in Wil Waluchow and Stefan Sciaraffa (eds), *The Legacy of Ronald Dworkin* (Oxford University Press, 2016) 273-298, at 281. [↑](#footnote-ref-222)
222. ibid 292. [↑](#footnote-ref-223)
223. Dworkin, *Law’s Empire* (n 6) 225. [↑](#footnote-ref-224)
224. ibid 255. [↑](#footnote-ref-225)
225. ibid 185. [↑](#footnote-ref-226)
226. Stephen Guest, ‘Integrity, equality, and justice’ (2005) 59 *Revue Internationale de Philosophie* 335, at 339. [↑](#footnote-ref-227)
227. Dworkin, *Law’s Empire* (n 6) 219. [↑](#footnote-ref-228)
228. Dworkin, *Freedom’s Law* (n 3) 2. [↑](#footnote-ref-229)
229. ibid. [↑](#footnote-ref-230)
230. ibid 6. [↑](#footnote-ref-231)
231. Letsas*, A Theory of Interpretation of the European Convention on Human Rights* (n 20); Dimitrios Tsarapatsanis, ‘The Consensus Approach of the European Court of Human Rights as a rational response to complexity’ in Jamie Murray, Thomas E Webb and Steven Wheatley (eds), *Complexity Theory and Law* (Routledge, 2018) 111-128, at 114. [↑](#footnote-ref-232)
232. George Letsas*, A Theory of Interpretation of the European Convention on Human Rights* (n 20) Chapter 6. [↑](#footnote-ref-233)
233. Pablo Castillo-Ortiz, Amal Ali and Navajyoti Samanta, ‘Gender, intersectionality, and religious manifestation before the European Court of Human Rights’ (2019) 18 *Journal of Human Rights* 76, at 87. [↑](#footnote-ref-234)
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237. Jacop Cornides, ‘Human Rights Pitted Against Man’ (2008) 12 *The International Journal of Human Rights* 107, at 128. [↑](#footnote-ref-238)
238. Pablo Castillo-Ortiz, Amal Ali and Navajyoti Samanta, ‘Gender, intersectionality, and religious manifestation before the European Court of Human Rights’ (2019) 18 *Journal of Human Rights* 76, at 77. [↑](#footnote-ref-239)
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249. Alec Stone Sweet, ‘On the Constitutionalism of the Convention: The European Court of Human Rights as a Constitutional Court’ (2009) 80 *Revue Trimestrielle des Droits de l’Homme* 923, at 936 [↑](#footnote-ref-250)
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251. *Loizidou v Turkey* (n 80) para 75. [↑](#footnote-ref-252)
252. George Letsas, ‘The Truth in Autonomous Concepts: How to Interpret the ECHR’ (EJIL 2004). [↑](#footnote-ref-253)
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254. Letsas*, A Theory of Interpretation of the European Convention on Human Rights* (n 20) Chapter 3; Letsas, ‘The ECHR as a living instrument: Its meaning and legitimacy’ (n1) 118; See also Paul Brest, ‘The Misconceived Quest for the Original Understanding’ (1980) *Boston University Law Review* 204. [↑](#footnote-ref-255)
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258. Geir Ulfstein, ‘Evolutive Interpretation in the light of Other International Instruments: Law and Legitimacy’ in Anne Van Aaken and Lulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press, 2018) Chapter 4; Stefan Theil, ‘Is the Living Instrument Approach of the ECtHR Compatible with the ECHR and International Law?’ (2017) 23 *European Public Law* 587, at 614; Rudolf Bernhardt, ‘Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights’ (1999) 42 *German Year Book of International Law* 11. [↑](#footnote-ref-259)
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266. *Young, James and Webster v United Kingdom*, Series A no 44, 13 August 1981. [↑](#footnote-ref-267)
267. ibid para 51. [↑](#footnote-ref-268)
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269. Noel Malcolm, *Human Rights and Political Wrongs A new Approach to Human Rights Law* (Policy Exchange, 2017) 64. [↑](#footnote-ref-270)
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273. *Golder v United Kingdom* (n 148) para 29. [↑](#footnote-ref-274)
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277. See Yearbook of the International Law Commission 1966, Vol I, Part 2, 219. [↑](#footnote-ref-278)
278. Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press, 2014) Chapter 3. [↑](#footnote-ref-279)
279. ibid 60. [↑](#footnote-ref-280)
280. Report of the International Law Commission on the Work of its Sixty-Fifth Session (2013), General Assembly Official Records, Supplement No. 10 (A/68/10), p 27. [↑](#footnote-ref-281)
281. ibid 27. [↑](#footnote-ref-282)
282. Bernhardt, ‘Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights’ (n 144) 15. [↑](#footnote-ref-283)
283. Dworkin, *A Matter of Principle* (n 6) 48. [↑](#footnote-ref-284)
284. In fact, Dworkin’s distinction between abstract and specific intentions is familiar with international law see Letsas*, A Theory of Interpretation of the European Convention on Human Rights* (n 20) Chapter 3. [↑](#footnote-ref-285)
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290. *Golder v United Kingdom* (n 148). [↑](#footnote-ref-291)
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293. *Engel and others v Netherlands*, Series A no 22, 8 June 1976. [↑](#footnote-ref-294)
294. *Airey v Ireland*, Series A no 32, 9 October 1979. [↑](#footnote-ref-295)
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297. *Golder v United Kingdom* (n 148) para 36. [↑](#footnote-ref-298)
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299. Bernhardt, ‘Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights’ (n 144) 18. [↑](#footnote-ref-300)
300. ibid 18. [↑](#footnote-ref-301)
301. Letsas*, A Theory of Interpretation of the European Convention on Human Rights* (n 20) 72. [↑](#footnote-ref-302)
302. ibid 63. [↑](#footnote-ref-303)
303. Rainey, Wicks and Ovey, *The European Convention on Human Rights* (n 158) 65. [↑](#footnote-ref-304)
304. Dworkin makes a distinction between enumerated and unenumerated rights see Dworkin, *Life’s Dominion* (n 49) 129. [↑](#footnote-ref-305)
305. Letsas*, A Theory of Interpretation of the European Convention on Human Rights* (n 20) 62, 63 and 64. [↑](#footnote-ref-306)
306. Letsas, ‘The ECHR as a living instrument: Its meaning and legitimacy’ (n 1) 122. [↑](#footnote-ref-307)
307. Bernhardt, ‘Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights’ (n 144) 23. [↑](#footnote-ref-308)
308. *Airey v Ireland* (n 180) para 24. [↑](#footnote-ref-309)
309. See Başak Çali, ‘Specialised Rules of Treaty Interpretation: Human Rights’ in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press, 2013) 525-551. [↑](#footnote-ref-310)
310. *Loizidou v Turkey* (Preliminary Objections), Series A no 310, 23 March 1995, para 75. [↑](#footnote-ref-311)
311. *Ireland v United Kingdom*, Series A no 25, 18 January 1978, para 239. [↑](#footnote-ref-312)
312. Loizidou Luzius Wildhaber, ‘The European Convention on Human Rights and International Law’ (2007) 56 *International and Comparative Law Quarterly* 217, at 220. [↑](#footnote-ref-313)
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315. *Soering v United Kingdom*, Series A no 161, 7 July 1989, para 87. [↑](#footnote-ref-316)
316. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 20). [↑](#footnote-ref-317)
317. *Hassan v United Kingdom* (n 156) para 102; *Al-Adsani v United Kingdom* (n 156) para 55. [↑](#footnote-ref-318)
318. It is worth mentioning that Dworkin’s theory of law has been cited in the Court’s case law. See *G.I.E.M. S.R.L. and Others v Italy* (GC)*,* Application nos. 1828/06, 34163/07 and 19029/11, ECHR 2018, concurring opinion of Judge Motoc, para 12; *Nait-Liman v Switzerland,* Application no 51357/07, ECHR 2018, dissenting opinion of Judge Dedov, para 4; *Khamtokhu and Aksenchik v Russia* Application nos. 60367/08 and 961/11, ECHR 2017, concurring opinion of Judge Turkovic, para 3; *Jaloud v Netherlands* Application no 47708/08, ECHR 2014, concurring opinion of Judge Motoc, para 1; *Centre for Legal Resources on Behalf of Valentin Campeanu v Romania* (GC), Application no 47848/08, ECHR 2014, concurring opinion of Judge Pinto De Albuquerque, para 16; *Streletz, Kessler and Krenz v Germany*,Application nos 34044/96, 35532/97 and 44801/98, ECHR 2001, concurring opinion of Judge Levits, para 14. [↑](#footnote-ref-319)
319. Dworkin, *Law’s Empire* (n 6) 348; See Steven Knapp and Walter Benn Michaels, ‘Intention, Identity and the Constitution: A response to David Hoy’ in Gregory Leyh (eds), *Legal Hermeneutics: History, Theory, and Practice* (University of California Press, 1992); See also Jeffrey Goldsworthy, ‘Dworkin as an Originalist’ (University of Minnesota Law School Constitutional Commentary, 2000); See also Stanley Fish, ‘Intentions is all there is: A Critical Analysis of Ahoran Barak’s Purposive Interpretation in Law’ (2008) 29 *Cardozo Law Review* 1109. [↑](#footnote-ref-320)
320. Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (n 147) 528. [↑](#footnote-ref-321)
321. ibid 528. [↑](#footnote-ref-322)
322. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 20) Chapters 4, 5 and 6. [↑](#footnote-ref-323)
323. In a similar vein, the Court has consistently held that ‘democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position’. See *Young, James and Webster v United Kingdom* (n 152) para 63; *Sorensen and Rasmussen v Denmark*, Applications nos 52562/99 and 52620/99, ECHR 2006 para 58. [↑](#footnote-ref-324)
324. *Alekseyev v Russia*, Application nos 4916/07, 25924/08 and 14599/09, 21 October 2010, para 81. [↑](#footnote-ref-325)
325. As stated by Elisa Andaya and Joanna Mishtal: ‘A woman’s right to legal abortion in the United is now facing its greatest social and legislative challenges since its 1973 legalization in the landmark *Roe v Wade* decision’. See Elisa Andaya and Joanna Mishtal, ‘The Erosion of Rights to Abortion Care in the United States: A Call for a Renewed Anthropological Engagement with the Politics of Abortion’ (2016) 31 *Medical Anthropology Quarterly* 40, at 40. [↑](#footnote-ref-326)
326. See Christina Zampas and Jaime M Gher, ‘Abortion as a Human Right-International and Regional Standards’ (2008) 8 *Human Rights Law Review* 249. [↑](#footnote-ref-327)
327. *A B and C v Ireland* (GC), Application no 25579/05, ECHR 2010, para 235. [↑](#footnote-ref-328)
328. *Vo v France* (GC), Application no 53924/00, ECHR 2004, para 80. [↑](#footnote-ref-329)
329. Tanya Goldman, ‘Vo v. France and Fetal Rights: The Decision not to Decide’ (2005) 18 *Harvard Human Rights Journal* 277; Jacob Pichon, ‘Does the Unborn Child Have a Right to Life? The Insufficient Answer of the European Court of Human Rights in the Judgment Vo v. France’ (2006) 7 *German Law Journal* 433. [↑](#footnote-ref-330)
330. Jakob Cornides, ‘Human Rights Pitted Against Man’ (2008) 12 *The International Journal of Human Rights* 107, at 126. [↑](#footnote-ref-331)
331. *Tysiac v Poland*, Application no 5410/03, 20 March 2007, dissenting opinion of Judge Borrego Borrego, para 15. [↑](#footnote-ref-332)
332. Goldman, ‘Vo v. France and Fetal Rights: The Decision not to Decide’ (n 5) 282. [↑](#footnote-ref-333)
333. ibid 282. [↑](#footnote-ref-334)
334. For instance, Janneka Gerards states that: ‘This is logical for most cases on Articles 2 and 3, since these provisions have an absolute nature and therefore do not allow for reasonableness review, nor for any deference to be paid to the national authorities’. See Janneke Gerards, ‘Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights’ (2018) 18 *Human Rights Law Review* 495, 501. See Kai Moller, ‘The Right to life Between Absolute and Proportional Protection’ (2010) 13 *LSE Legal Studies Working Paper* 1; See also Aly Mokhtar, ‘Human Rights obligations v. derogations: article 15 of the European convention on human rights’ (2004) 8 *International Journal of Human Rights* 65. [↑](#footnote-ref-335)
335. Daniel Fenwick, ‘The modern abortion jurisprudence under Article 8 of the European Convention on Human Rights’ (2012) 12 *Medical Law International* 249, at 255. [↑](#footnote-ref-336)
336. Chiara Cosentino, ‘Safe and Legal Abortion: An Emerging Human Right? The Long-Lasting Dispute with State Sovereignty in ECHR Jurisprudence’ (2015) 15 *Human Rights Law Review* 569, at571. [↑](#footnote-ref-337)
337. Pichon, ‘Does the Unborn Child Have a Right to Life? The Insufficient Answer of the European Court of Human Rights in the Judgment Vo v. France’ (n 5) 436. [↑](#footnote-ref-338)
338. *Vo v France* (n 4) para 80. For a short case comment on *Vo*, see Katherine O’Donovan, ‘Taking a Neutral Stance on the Legal Protection of the Foetus’ (2005) 14 *Medical Law Review* 115; For a detailed examination on *Vo*, see Barbara Hewson, ‘Dancing on the Head of a PIN? Foetal Life and the European Convention’ (2005) 13 *Feminist Legal Studies* 363. [↑](#footnote-ref-339)
339. *Vo v France* (n 4), separate opinion of Judge Rozakis joined by Judges Caflisch, Fischbach, Lorenzen and Thomassen. [↑](#footnote-ref-340)
340. ibid, separate opinion of Judge Costa joined by Judge Traja. [↑](#footnote-ref-341)
341. ibid, dissenting opinion of Judge Ress, dissenting opinion of Judge Mularoni joined by Judge Straznicka. [↑](#footnote-ref-342)
342. Ronald Dworkin, *Life’s Dominion* (Vintage Books, 1997) 30. [↑](#footnote-ref-343)
343. Judith Jarvis Thomson, ‘A Defense of Abortion’ (1971) 1 *Philosophy and Public Affairs* 47, at 47. [↑](#footnote-ref-344)
344. Dworkin, *Life’s Dominion* (n 18) 67. [↑](#footnote-ref-345)
345. Ronald Dworkin, *Freedom’s Law* (Oxford University Press, 1996) 46. [↑](#footnote-ref-346)
346. ibid 46. [↑](#footnote-ref-347)
347. Dimitrios Tsarapatsanis, ‘The Margin of Appreciation as an Underenforcement Doctrine’ in Petr Agha (ed), *Human Rights Between Law and Politics* (Hart Publishing, 2017) 71-88, at 71. [↑](#footnote-ref-348)
348. *Vo v France* (n 4) para 37. [↑](#footnote-ref-349)
349. Dworkin, *Life’s Dominion* (n 18) 94. [↑](#footnote-ref-350)
350. *McCann and others v United Kingdom* (GC), Application no 18984/91, 27 September 1995. [↑](#footnote-ref-351)
351. ibid para 149. [↑](#footnote-ref-352)
352. *Molie v Romania*, Application no 13754/02, 1 September 2009, para 44; *Koseva v Bulgaria*, Application no 64147/02, 22 June 2010; Gökdemir *v Turkey*, Application no 66309/09, 19 May 2015, para 17. [↑](#footnote-ref-353)
353. Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, (Council of Europe Publishing, 2000) 27. [↑](#footnote-ref-354)
354. ibid 6. [↑](#footnote-ref-355)
355. Gerards, ‘Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights’ (n 10) 501. [↑](#footnote-ref-356)
356. *Paton v UK*, Reports of Judgements and Decisions 1980, 13 May 1980, para 19. [↑](#footnote-ref-357)
357. ibid. [↑](#footnote-ref-358)
358. *H v Norway*, Reports of Judgements and Decisions 1982, 19 May 1992. [↑](#footnote-ref-359)
359. Helen Fenwick, *Civil liberties and human rights* (Routledge-Cavendish, 2007) 734. [↑](#footnote-ref-360)
360. Eva Brems, *Diversity and European human rights* (Cambridge University Press, 2013) 102. [↑](#footnote-ref-361)
361. *Boso v Italy*, Application no 50490/99, ECHR 2002-VII, para 1. [↑](#footnote-ref-362)
362. *Paton v UK* (n 32). [↑](#footnote-ref-363)
363. *H v Norway* (n 34). [↑](#footnote-ref-364)
364. A H Robertson and J G Merrills, *Human rights in Europe* (Manchester University Press, 1993) 34. [↑](#footnote-ref-365)
365. *Boso v Italy* (n 37) para 2. [↑](#footnote-ref-366)
366. ibid. [↑](#footnote-ref-367)
367. *Vo v France* (n 4). [↑](#footnote-ref-368)
368. ibid para 80. [↑](#footnote-ref-369)
369. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (n 29) chapter 3. [↑](#footnote-ref-370)
370. *Vo v France* (n 4) para 80. [↑](#footnote-ref-371)
371. *Evans v United Kingdom*, Application no 6339/05, 10 April 2007, para 71. [↑](#footnote-ref-372)
372. Cosentino, ‘Safe and Legal Abortion: An Emerging Human Right? The Long-Lasting Dispute with State Sovereignty in ECHR Jurisprudence’ (n 12) 572. [↑](#footnote-ref-373)
373. Elizabeth J Ireland, ‘Do not Abort the Mission: An Analysis of the European Court of Human Rights Case of R.R. v. Poland’, (2013) 38 *North Carolina Journal of International Law and Commercial Regulation* 651, at 671. [↑](#footnote-ref-374)
374. See Fenwick, ‘The Modern Abortion Jurisprudence under Article 8 of the European Convention on Human Rights’ (n 11). [↑](#footnote-ref-375)
375. See Cosentino, ‘Safe and Legal Abortion: An Emerging Human Right? The Long-Lasting Dispute with State Sovereignty in ECHR Jurisprudence’ (n 12). [↑](#footnote-ref-376)
376. Zampas and Gher, ‘Abortion as a Human Right-International and Regional Standards’ (n 2) 279; See also *Tysiac v Poland* (n 7) para 113. [↑](#footnote-ref-377)
377. *Tysiac v Poland* (n 7) para 113. [↑](#footnote-ref-378)
378. Nicolette Priaulx, ‘Testing the Margin of Appreciation: Therapeutic Abortion, Reproductive 'Rights' and the Intriguing Case of Tysiąc v. Poland’ (2008) 15 *European Journal of Health Law* 361, at 363; See also Magda Grabowska and Joanna Regulska, ‘Redefining Well-Being through Actions: Women’s Activism and the Polish State’ in Alison Woodward, Jean-Michael Bonvin and Merce Renom (eds), *Transforming Gendered Well-Being in Europe: The Impact of Social Movements* (Routledge, 2016) 142. [↑](#footnote-ref-379)
379. Cornices, ‘Human Rights Pitted Against Man’ (n 6) 126. [↑](#footnote-ref-380)
380. ibid 126. [↑](#footnote-ref-381)
381. *Tysiac v Poland* (n 7), dissenting opinion of Judge Borrego Borrego, para 15. [↑](#footnote-ref-382)
382. ibid, para 9. [↑](#footnote-ref-383)
383. She was only able to see from a distance of three metres with her left eye and five metres with her right eye, whereas before the pregnancy she had been able to see objects from a distance of six metres. A reabsorbing vascular occlusion was found in her right eye and further degeneration of the retinal spot was established in the left eye. See *Tysiac v Poland* (n 7) para 16 [↑](#footnote-ref-384)
384. ibid para 108. [↑](#footnote-ref-385)
385. ibid para 116. [↑](#footnote-ref-386)
386. See Joanna N Erdman, ‘Procedural abortion rights: Ireland and the European Court of Human Rights’ (2014) 22 *Reproductive Health Matters* 22, at 23. [↑](#footnote-ref-387)
387. Dworkin, *Freedom's Law* (n 21) 2. [↑](#footnote-ref-388)
388. ibid 3. [↑](#footnote-ref-389)
389. ibid 10. [↑](#footnote-ref-390)
390. ibid 7. [↑](#footnote-ref-391)
391. ibid 7. [↑](#footnote-ref-392)
392. ibid 7. [↑](#footnote-ref-393)
393. Gregory Bassham, ‘Freedom's Politics: A Review Essay of Ronald Dworkin's Freedom's Law: The Moral Reading of the American Constitution’ (2014) 72 *Notre Dame Law Review* 1235, at 1239. [↑](#footnote-ref-394)
394. Paul Mahoney, ‘Marvellous Richness of Diversity or Invidious Cultural Relativism’ (1998) 19 *Human Rights Law Journal* 1, at 2. See also George Letsas, ‘The Truth in Autonomous Concepts: How to Interpret the ECHR’ (2004) 15 *European Journal of International Law* 279, at 280. [↑](#footnote-ref-395)
395. Kai P Purchase and Emanuele Rebasti, ‘Judge's Empire? Interview with Rudolf Bernhardt’ (2007) 1 *European Journal of Legal Studies* 1, at 2. [↑](#footnote-ref-396)
396. It should be noted that the methods of interpretation of international treaties is discussed in the methodology chapter. [↑](#footnote-ref-397)
397. Pieter van Dijk and others, *Theory and practice of the European Convention on Human Rights*, 3th edn, (Kluwer, 1998) 77. [↑](#footnote-ref-398)
398. Maša Marochini, ‘The Interpretation of the European Convention on Human Rights’ (2014) 51 *Faculty of Law in Split Publication* 63, at 67. [↑](#footnote-ref-399)
399. *Tysiac v Poland* (n 7) para 68. [↑](#footnote-ref-400)
400. *Bruggemann and Scheuten v Federal Republic of Germany*, Reports of Judgements and Decisions 1977-VII, 12 July 1977, para 61. [↑](#footnote-ref-401)
401. See Rosamund Scott, ‘Risk, Reasons and Rights: The European Convention on Human Rights and English Abortion Law’ (2015) 24 *Medical Law Review* 1. [↑](#footnote-ref-402)
402. Lord Sumption, ‘The Limits of Law’ in Richard Ekins, Paul Yowell and NW Barber (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing, 2016) 7. [↑](#footnote-ref-403)
403. *Tysiac v Poland* (n 7) para105. [↑](#footnote-ref-404)
404. ibid para 107. [↑](#footnote-ref-405)
405. ibid para 107. [↑](#footnote-ref-406)
406. ibid para 107. [↑](#footnote-ref-407)
407. Scott, ‘Risk, Reasons and Rights: The European Convention on Human Rights and English Abortion Law’ (n 77) 5. [↑](#footnote-ref-408)
408. *Bruggemann and Scheuten v Federal Republic of Germany* (n 76) para 61. [↑](#footnote-ref-409)
409. ibid. [↑](#footnote-ref-410)
410. See Jill Marshall, *Personal Freedom Through Human Rights Law?* (Martinus Nijhoff, 2009) Chapter 10. [↑](#footnote-ref-411)
411. *Bruggemann and Scheuten v Federal Republic of Germany* (n 76) para 1. [↑](#footnote-ref-412)
412. *Airey v Ireland*, Series A no 41, 9 October 1979, para 26; *Artico v Italy*, Series A no 37, 13 May 1980, para 33. [↑](#footnote-ref-413)
413. *Tysiac v Poland* (n 7) para 113. [↑](#footnote-ref-414)
414. Whilst this section employs the teleological method, the general account of treaty interpretation is discussed further in the methodology chapter. The teleological approach is only one of three methods of interpretation established by the Vienna Convention. See Richard Gardiner, *Treaty Interpretation*, 2nd edn (Oxford University Press) Chapter 5. [↑](#footnote-ref-415)
415. Stefan Theil, ‘Is the ‘Living Instrument’ Approach of the European Court of Human Rights Compatible with the ECHR and International Law’ (2017) 23 *European Public Law* 587, at 594. [↑](#footnote-ref-416)
416. Dissenting Opinion of Judge Schwebel in *Maritime Delimitation and Territorial Questions* (1994) ICJ Rep 6, at 27; See Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press, 2014) 60. [↑](#footnote-ref-417)
417. Ian Cram, *A Virtue Less Cloistered* (Hart Publishing, 2002) 69. [↑](#footnote-ref-418)
418. George Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (2010) 21 *European Journal of International Law* 509, at 536. [↑](#footnote-ref-419)
419. *Tysiac v Poland* (n 7) para 110. [↑](#footnote-ref-420)
420. ibid para 110. See also Mary Donnelly, *Healthcare Decision-Making and the Law Autonomy Capacity and the Limits of Liberalism* (Cambridge University Press, 2010) 79. [↑](#footnote-ref-421)
421. *Tysiac v Poland* (n 7) para 128 [↑](#footnote-ref-422)
422. ibid para 128. [↑](#footnote-ref-423)
423. ibid para 112. [↑](#footnote-ref-424)
424. ibid para 113. [↑](#footnote-ref-425)
425. Having said that the applicant submitted that ‘as a result of the State’s failure to put in place at least some rudimentary decision-making procedure, the process in her case had not been fair’. See ibid, para 113. [↑](#footnote-ref-426)
426. Donnelly, *Healthcare Decision-Making and the Law Autonomy Capacity and the Limits of Liberalism* (n 96) 79. [↑](#footnote-ref-427)
427. *Tysiac v Poland* (n 7) para 109. [↑](#footnote-ref-428)
428. ibid para 113. [↑](#footnote-ref-429)
429. *Bruggemann and Scheuten v Federal Republic of Germany* (n 76). [↑](#footnote-ref-430)
430. *Tysiac v Poland* (n 7) para 107. [↑](#footnote-ref-431)
431. Dworkin, *Life’s Dominion* (n 18). [↑](#footnote-ref-432)
432. ibid chapter 2 and chapter 3. [↑](#footnote-ref-433)
433. ibid 155. [↑](#footnote-ref-434)
434. Ronald Dworkin, ‘Ronald Dworkin Replies’ in Justine Burley (ed), *Dworkin and His Critics with Replies by Dworkin* (Blackwell Publishing, 2004) 372. [↑](#footnote-ref-435)
435. *RR v Poland*,Application no 27617/04, 26 May 2011; *P and S v Poland*, Application no 57375/08, 30 October 2012. [↑](#footnote-ref-436)
436. *RR v Poland* (n 111). [↑](#footnote-ref-437)
437. ibid para 176. [↑](#footnote-ref-438)
438. ibid para 20. [↑](#footnote-ref-439)
439. ibid para 73. [↑](#footnote-ref-440)
440. MacGuigan correctly notes that: ‘…legislation permitting abortion – or, what has the same effect, an absence of legislation prohibiting abortion – does not directly infringe any conscience. Those who believe abortion to be wrong are allowed by the law to live their own beliefs’. See Mark MacGuigan, *Abortion, Conscience & Democracy* (Hounslow Press, 1994) 101. [↑](#footnote-ref-441)
441. *P and S v Poland* (n 111). [↑](#footnote-ref-442)
442. ibid para 130. [↑](#footnote-ref-443)
443. ibid para 159. [↑](#footnote-ref-444)
444. ibid para 111. [↑](#footnote-ref-445)
445. *RR v Poland* (n 111) para 206; *P and S v Poland* (n 111) para 106. [↑](#footnote-ref-446)
446. *RR v Poland* (n 111) para 206; *P and S v Poland* (n 111) para 106. [↑](#footnote-ref-447)
447. *RR v Poland* (n 111) para 206. [↑](#footnote-ref-448)
448. *Pichon and Sajous v France*, Reports of Judgements and Decisions 2001-X, 2 October 2001. [↑](#footnote-ref-449)
449. See Mark Campbell, ‘Conscientious Objection, Health Care and Article 9 of the European Convention on Human Rights’ (2011) 11 *Medical Law International* 284. See also Adriana Lamackova, ‘Conscientious Objection in Reproductive Health Care: Analysis of Pichon and Sajous v. France’ (2008) 15 *European Journal of Health Law* 7. [↑](#footnote-ref-450)
450. *Pichon and Sajous v France* (n 124). [↑](#footnote-ref-451)
451. Katrine Thomasen, ‘New ECSR decision on conscience-based refusals protects women’s right to access abortion’ (2015), available at https://strasbourgobservers.com/2015/08/04/new-ecsr-decision-on-conscience-based-refusals-protects-womens-right-to-access-abortion/ (accessed 10 June 2019). [↑](#footnote-ref-452)
452. Lamackova, ‘Conscientious Objection in Reproductive Health Care: Analysis of Pichon and Sajous v. France’ (n 125) 8. [↑](#footnote-ref-453)
453. *Pichon and Sajous v France* (n 124). [↑](#footnote-ref-454)
454. In this respect, the Court’s decision in *A, B and C v Ireland* is discussed in the Introduction of the thesis. [↑](#footnote-ref-455)
455. *P and S v Poland* (n 111) para 81. [↑](#footnote-ref-456)
456. See Zampas and Gher, ‘Abortion as a Human Right-International and Regional Standards’ (n 2). [↑](#footnote-ref-457)
457. See Alicia Czerwinski, ‘Sex, Politics and Religion: The Clash between Poland and the European Union Over Abortion’ (2004) 32 *Denver Journal International Law and Policy* 653. See also Zampas and Gher, ‘Abortion as a Human Right-International and Regional Standards’ (n 2). [↑](#footnote-ref-458)
458. Joanna Z Mishtal, ‘Matters of ‘Conscience’:’ (2009) 23 *Medical Anthropology Quarterly* 161, at 163. See also Czerwinski, ‘Sex, Politics and Religion: The Clash between Poland and the European Union Over Abortion’ (n 133) 655. [↑](#footnote-ref-459)
459. Czerwinski, ‘Sex, Politics and Religion: The Clash between Poland and the European Union Over Abortion’ (n 133) 656. [↑](#footnote-ref-460)
460. Hillary Margolis, ‘Dispatches: Abortion and the ‘Conscience Clause’ in Poland’ (2014), available at https://www.hrw.org/news/2014/10/22/dispatches-abortion-and-conscience-clause-poland (accessed 10 May 2019). [↑](#footnote-ref-461)
461. See Daniel Fenwick, ‘’Abortion Jurisprudence’ at Strasbourg: deferential, avoidant and normatively neutral?’ (2014) 34 *Legal Studies* 214. See also Mishtal, ‘Matters of ‘Conscience’:’ (n 134). [↑](#footnote-ref-462)
462. Dworkin, *Life’s Dominion* (n 18) 157. [↑](#footnote-ref-463)
463. Czerwinski, ‘Sex, Politics and Religion: The Clash between Poland and the European Union Over Abortion’ (n 133). [↑](#footnote-ref-464)
464. Bart van der Sloot, ‘Privacy as Personality Right: Why the ECtHR’s Focus on Ulterior Interests Might Prove Indispensable in the Age of “Big Data”’ (2015) 31 *Utrecht Journal of International and European Law* 25, at 27 and 28. [↑](#footnote-ref-465)
465. *P and S v Poland* (n 111) para 82. [↑](#footnote-ref-466)
466. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.Add.3\_AEV.pdf (accessed 15 May 2019). [↑](#footnote-ref-467)
467. Goldman, ‘Vo v. France and Fetal Rights: The Decision not to Decide’ (n 5) 282. [↑](#footnote-ref-468)
468. *Tysiac v Poland* (n 7) para 116. [↑](#footnote-ref-469)
469. ibid para 113. [↑](#footnote-ref-470)
470. However, this does not mean that the Court draws a distinction between abstract and concrete intentions. [↑](#footnote-ref-471)
471. *Golder v United Kingdom*, Series A no 18, 21 February 1975. [↑](#footnote-ref-472)
472. Theil, ‘Is the Living Instrument Approach of the ECtHR Compatible with the ECHR and International Law?’ (n 91) 614. [↑](#footnote-ref-473)
473. Zampas and Gher, ‘Abortion as a Human Right-International and Regional Standards’ (n 2) 276. [↑](#footnote-ref-474)
474. Ian Cram, *A virtue Less Cloistered* (n 93) 69. [↑](#footnote-ref-475)
475. Rudolf Bernhardt, ‘Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights’ (1999) 42 *German Year Book of International Law* 11, at 23. [↑](#footnote-ref-476)
476. Nicos Stavropoulos, ‘Legal Interpretivism’ in Edward N Zalta (ed), The Stanford Encyclopedia of Philosophy (Summer Edition, 2014). See Dimitrios Kyritsis, Shared Authority: Courts and Legislatures in Legal Theory (Hart Publishing, 2014) Chapter 3. [↑](#footnote-ref-477)
477. Stephen Guest, ‘How to Criticise Ronald Dworkin’s Theory of Law’ (2009) 69 *Analysis Review* 352, at 352 and 354. For a critical discussion on Dworkin’s theory of integrity see Kyritsis, *Shared Authority: Courts and Legislatures in Legal Theory* (n 1) 97-104. [↑](#footnote-ref-478)
478. Damian A Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (Hart Publishing, 2019) Chapter 4 and 5. [↑](#footnote-ref-479)
479. ibid 94; See Francesco Crisafulli, ‘Same-Sex Couples’ Rights (Other than the Right to Marry) Before the ECtHR’ in Daniele Gallo, Luca Paladini and Pietro Pustorino (eds), *Same-Sex Couples before National Supranational and International Jurisdictions* (Springer 2014). [↑](#footnote-ref-480)
480. *X and others v Austria* (GC), Application no 19010/07, 19 February 2013, para 100. [↑](#footnote-ref-481)
481. ibid, para 100. [↑](#footnote-ref-482)
482. See Linda Hart, ‘Individual Adoption by Non-Heterosexuals and the Order of Family Life in the European Court of Human Rights’ (2009) 36 *Journal of Law and Society* 536. [↑](#footnote-ref-483)
483. Steven Guest, *Ronald Dworkin*,3th edn (Stanford University Press, 2015) 101. See also Kyritsis, Shared Authority: Courts and Legislatures in Legal Theory (n 1) chapter 4. [↑](#footnote-ref-484)
484. Ronald Dworkin, *Law’s Empire* (Harvard University Press, 1986) 271. [↑](#footnote-ref-485)
485. *Fretté v France*,Application no 36515/97, ECHR 2002-I, para 38. [↑](#footnote-ref-486)
486. ibid para 38. [↑](#footnote-ref-487)
487. ibid para 42. [↑](#footnote-ref-488)
488. ibid para 42. [↑](#footnote-ref-489)
489. For a critical analysis of *Fretté*, see George Letsas, ‘No Human Right to Adopt? Gay and Lesbian Adoption Under the ECHR’ (2008) 1 *UCL Human Rights Review* 134. [↑](#footnote-ref-490)
490. *Fretté v France* (n 10) para 42. [↑](#footnote-ref-491)
491. Rory O’Connell, ‘Cinderella Comes to the Ball: Article 14 and the right to non-discrimination in the ECHR’ (2009) 29 *Legal Studies* 211, at 215. [↑](#footnote-ref-492)
492. *Rasmussen v Denmark*, Series A no 87, 28 November 1984, para 29. [↑](#footnote-ref-493)
493. *National Union of Belgian Police v Belgium*, Series A no 19, 27 October 1975, para 20. [↑](#footnote-ref-494)
494. *Kafkaris v Cyprus*, Reports of Judgements and Decisions 2008, 12 February 2008, para 159. [↑](#footnote-ref-495)
495. Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (n 3) 98; Ben Emmerson, Andrew Ashworth and Alison Macdonald, *Human Rights And Criminal Justice* (Sweet & Maxwell, 2012) 144. [↑](#footnote-ref-496)
496. *Fretté v France* (no 10) para 28. [↑](#footnote-ref-497)
497. *Fretté v France* (no 10) para 32, (emphasises added). [↑](#footnote-ref-498)
498. *Smith and Grady v United Kingdom*, Application nos 33985/96 and 33986/96, ECHR 1999-VI, para 89. [↑](#footnote-ref-499)
499. *Fretté v France* (n 10) para 28. [↑](#footnote-ref-500)
500. ibid para 29. [↑](#footnote-ref-501)
501. ibid para 29. [↑](#footnote-ref-502)
502. ibid para 29. [↑](#footnote-ref-503)
503. ibid para 32. [↑](#footnote-ref-504)
504. ibid para 19. [↑](#footnote-ref-505)
505. ibid para 32. [↑](#footnote-ref-506)
506. ibid para 32. [↑](#footnote-ref-507)
507. ibid para 32. [↑](#footnote-ref-508)
508. ibid, partly concuring opinion of Judge Costa joined by Judges Jungwiert and Traja, para 2. It is worth highlighting that according to the Court’s case-law, Article 14 cannot be applicable unless the facts at issue fall with the ambit of one or more of the provisions of the ECHR. [↑](#footnote-ref-509)
509. *Fretté v France* (n 10), partly concuring opinion of Judge Costa joined by Judges Jungwiert and Traja, para 1. [↑](#footnote-ref-510)
510. Ibid. The fourth judge, P Kuris, took the view that article 14 ECHR was applicable in this case but the differential treatment in question was not discriminatory. [↑](#footnote-ref-511)
511. Carmelo Danisi, ‘How far can the European Court of Human Rights go in the fight against discrimination? Defining new standards in its non-discrimination jurisprudence’ (2011) 9 *International Journal of Constitutional Law* 793, at 803. [↑](#footnote-ref-512)
512. Ronald Dworkin, *Freedom’s Law* (Harvard University Press, 1996) 271. [↑](#footnote-ref-513)
513. Ronald Dworkin, *A matter of Principle* (Harvard University Press, 1985) 66. [↑](#footnote-ref-514)
514. *Fretté v France* (n 10). [↑](#footnote-ref-515)
515. Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (n 3) Chapter 5. [↑](#footnote-ref-516)
516. *Fretté v France* (n 10), joint partly dissenting opinion of Judge Sir Bratza and Judges Fuhrmann and Tulkens, para 1. [↑](#footnote-ref-517)
517. ibid para 34. [↑](#footnote-ref-518)
518. ibid para 41. [↑](#footnote-ref-519)
519. ibid para 42. [↑](#footnote-ref-520)
520. Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (n 3) Chapter 5. [↑](#footnote-ref-521)
521. ibid 147. [↑](#footnote-ref-522)
522. ibid 148. [↑](#footnote-ref-523)
523. Hart, ‘Individual Adoption by Non-Heterosexuals and the Order of Family Life in the European Court of Human Rights’ (n 7) 540. [↑](#footnote-ref-524)
524. Aagje Ieven, ‘Privacy Rights as Human Rights: No Limits?’ in Erik Claes, Wouter Devroe and Bert Keirsbilck (eds), *Facing the Limits of the Law* (Springer, 2009) 315-332, at 319. [↑](#footnote-ref-525)
525. Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2002) 161. [↑](#footnote-ref-526)
526. Dimitrios Kyritsis, Where Our Protection Lies: Separation of Powers and Constitutional Review ( Oxford University Press, 2017) 123 [↑](#footnote-ref-527)
527. Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (n 50) 161 [↑](#footnote-ref-528)
528. Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 273. [↑](#footnote-ref-529)
529. *Fretté v France* (n 10) para 36. [↑](#footnote-ref-530)
530. See Letsas, ‘No Human Right to Adopt? Gay and Lesbian Adoption Under the ECHR’ (n 14). [↑](#footnote-ref-531)
531. Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (n 50) 464. [↑](#footnote-ref-532)
532. *Fretté v France* (n 10), joint partly dissenting opinion of Judge Sir Bratza and Judges Fuhrmann and Tulkens, para 2. [↑](#footnote-ref-533)
533. ibid para 15. [↑](#footnote-ref-534)
534. Ibid, partly concurring opinion of Judge Costa joined by Judges Jungwiert and Traja, para 1. [↑](#footnote-ref-535)
535. George Letsas, *A Theory Of Interpretation Of The European Convention On Human Rights* (Oxford University Press 2007) Chapter 6. [↑](#footnote-ref-536)
536. ibid 101 and 102. [↑](#footnote-ref-537)
537. George Letsas, ‘The Scope and Balancing Rights: diagnostic or constitutive’ in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights* (Cambridge University Press, 2013) 50. [↑](#footnote-ref-538)
538. *EB v France* (GC), Application no 43546/02, 22 January 2008. [↑](#footnote-ref-539)
539. ibid [↑](#footnote-ref-540)
540. ibid para 80. [↑](#footnote-ref-541)
541. ibid para 91. [↑](#footnote-ref-542)
542. Letsas, ‘No Human Right to Adopt? Gay and Lesbian Adoption Under the ECHR’ (n 14) 149. [↑](#footnote-ref-543)
543. ibid 149. [↑](#footnote-ref-544)
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548. Nikolaidis, *The Right to Equality in European Human Rights Law* (n 70) 186. [↑](#footnote-ref-549)
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551. Nikolaidis, *The Right to Equality in European Human Rights Law* (n 70) 62. [↑](#footnote-ref-552)
552. See George Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (2010) 21 *European Journal of International Law* 509. [↑](#footnote-ref-553)
553. See Damian A Gonzalez-Salzberg, ‘The Making of the Court’s Homosexual: A Queer Reading of the European Court of Human Rights’ Case Law on Same-Sex Sexuality’ (2014) 65 *Northern Ireland Legal Quarterly* 371, at 379. [↑](#footnote-ref-554)
554. Dworkin, *A Matter Of Principle* (n 38) 191. [↑](#footnote-ref-555)
555. Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (n 3); Gonzalez-Salzberg, ‘The Making of the Court’s Homosexual: A Queer Reading of the European Court of Human Rights’ Case Law on Same-Sex Sexuality’ (n 78); Damian A Gonzales-Salzberg, ‘An Improved Protection for the (Mentally ILL) Trans Parent: A Queer Reading of *AP, Gar*ç*on and Nicot v France*’ (2018) 81 *Modern Law Review* 526; Paul Johnson, ‘Heteronormativity and the European Court of Human Rights’ (2012) 23 *Law and Critique* 43. [↑](#footnote-ref-556)
556. Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (n 3) 101. [↑](#footnote-ref-557)
557. Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (n 3) 101. [↑](#footnote-ref-558)
558. *X and others v Austria* (n 5) para 99; *Kozak v Poland*,Application no 13102/02, 2 March 2010, para 92; *EB v France* (n 63) para 93. [↑](#footnote-ref-559)
559. *Alekseyev v Russia*, Application nos 4916/07, 25924/08 and 14599/09, 21 October 2010, para 83. For a critical analysis of this case see Paul Johnson ‘Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the European Court of Human Rights: Alekseyev v Russia’ (2011) 11 *Human Rights Law Review* 578. [↑](#footnote-ref-560)
560. Gonzalez-Salzberg, ‘The Making of the Court’s Homosexual: A Queer Reading of the European Court of Human Rights’ Case Law on Same-Sex Sexuality’ (n 78) 381. [↑](#footnote-ref-561)
561. *Gas and Dubois v France*,Application no 25951/07, ECHR 2012, para 37. [↑](#footnote-ref-562)
562. Paul Johnson, ‘Adoption Homosexuality and the European Convention on Human Rights: *Gas and Dubois v France*’ (2012) 75 *Modern Law Review* 1136, at 1140. [↑](#footnote-ref-563)
563. *Gas and Dubois v France* (n 86) para 37. [↑](#footnote-ref-564)
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578. Paul Johnson, *Homosexuality and the European Court on Human Rights* (Routledge, 2012) Part 2. [↑](#footnote-ref-579)
579. Dworkin, *Law’s Empire* (n 9) 167. For a critical discussion on Dworkin’s concepts of fit and justification see Kyritsis, *Shared Authority: Courts and Legislatures in Legal Theory* (n 1) Chapter 3. [↑](#footnote-ref-580)
580. Dworkin, *Law’s Empire* (n 9) 167. [↑](#footnote-ref-581)
581. ibid 167. [↑](#footnote-ref-582)
582. See Ronald Dworkin, ‘”Natural” Law Revisited’ (1982) 34 *University of Florida Law Review* 165, See also Stavropoulos, ‘Legal Interpretivism’ (n 1). [↑](#footnote-ref-583)
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584. ibid 356. [↑](#footnote-ref-585)
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588. *Informationsverein Lentia and Others v Austria*,Application nos. 13914/88, 15041/89, 15717/89 and 17207/90, 24 November 1993, para 38. [↑](#footnote-ref-589)
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597. Dworkin, *Freedom’s Law* (no 37) 24. See T R S Allan, *The Sovereignty of Law: Freedom Constitution and Common Law* (Oxford University Press, 2013) 329. See also Corey L Brettschneider, *Governmental Powers: Cases and Readings in Constitutional Law and American Democracy* (Wolters Kluwer Law, 2014) 79. [↑](#footnote-ref-598)
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599. George Letsas, ‘The ECHR as a living instrument: Its meaning and legitimacy’ in A. Follesdal, B. Peters and G. Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press, 2013) 106-141, at 124. See also Dimitrios Tsarapatsanis, ‘The Consensus Approach of the European Court of Human Rights as a rational response to complexity’ in Jamie Murray, Thomas E Webb and Steven Wheatley (eds), *Complexity Theory and Law* (Routledge, 2018) 111-128, at 117. [↑](#footnote-ref-600)
600. *X and others v Austria* (n 5). [↑](#footnote-ref-601)
601. *X and others v Austria* (n 5) para 131. [↑](#footnote-ref-602)
602. Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights* (n 3) 152. [↑](#footnote-ref-603)
603. *X and others v Austria* (n 5) para 134. [↑](#footnote-ref-604)
604. See Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights* (n 3) 152, 153 and 154. [↑](#footnote-ref-605)
605. *X and others v Austria* (n 5) para 112. [↑](#footnote-ref-606)
606. ibid para 116. [↑](#footnote-ref-607)
607. ibid para 137. [↑](#footnote-ref-608)
608. ibid para 147. [↑](#footnote-ref-609)
609. ibid para 149. [↑](#footnote-ref-610)
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611. *Fretté v France* (n 10) para 43. [↑](#footnote-ref-612)
612. Dworkin, *Freedom’s Law* (n 37) 71. [↑](#footnote-ref-613)
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615. For a critical discussion on this see Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press, 2015). [↑](#footnote-ref-616)
616. *X and others v Austria* (n 5). [↑](#footnote-ref-617)
617. See Paul Johnson, ‘An Essentially Private Manifestation of Human Personality’: Constructions of Homosexuality in the European Court of Human Rights’ (2010) 10 *Human Rights Law Review* 67 [↑](#footnote-ref-618)
618. Letsas, ‘No Human Right to Adopt? Gay and Lesbian Adoption under the ECHR’ (n 14) 149. [↑](#footnote-ref-619)
619. *Leyla Şahin v Turkey* (GC), Application no 44774/98, ECHR 2005-XI, dissenting opinion of Judge Tulkens, para 11. [↑](#footnote-ref-620)
620. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), Art 18; The Organisation of American States Treaty Series (OAS Treaty Series), art 12; African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter), Article 8; Convention for the protection of Human Rights and Fundamentals Freedom (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (‘European Convention on Human Rights’), article 9. [↑](#footnote-ref-621)
621. *Kokkinakis v Greece*, Series A no 260-A, 25 May 1993, para 31; *Leyla Şahin v Turkey* (n 1) para 104. [↑](#footnote-ref-622)
622. *Kokkinakis v Greece* (n 3) para 31; *Leyla Şahin v Turkey* (n 1) para 104. [↑](#footnote-ref-623)
623. See Jill Marshall, ‘The legal recognition of personality: full-face veils and permissible choices’ (2014) 10 *International Journal of Law in Context* 64. [↑](#footnote-ref-624)
624. *Leyla Şahin v Turkey* (n 1), dissenting opinion of Judge Tulkens, para 11. [↑](#footnote-ref-625)
625. *Dahlab v Switzerland*, Reports of Judgments and Decisions 2001-V, 15 February 2001. [↑](#footnote-ref-626)
626. *Leyla Şahin v Turkey* (n 1) para 104. [↑](#footnote-ref-627)
627. *Dahlab v Switzerland* (n 7); *Leyla Şahin v Turkey* (n 1). [↑](#footnote-ref-628)
628. According to French Legislation, for instance, ‘to compel a woman, regardless of her age, to conceal her face is an affront to her dignity. It also contravenes the principle of gender equality’ See *SAS v France* (GC), Application no 43835/11, 1 July 2014. [↑](#footnote-ref-629)
629. Ronald Dworkin, *Religion Without God* (Harvard University Press, 2013); See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) chapter 12. See also Ronald Dworkin, *A Matter of Principle* (Oxford University Press, 2001) chapter 3 and chapter 6. [↑](#footnote-ref-630)
630. ibid. See also Cecile Laborde, ‘Dworkin’s Freedom of Religion Without God’ (2014) 94 *Boston University Law Review* 1255. [↑](#footnote-ref-631)
631. Ronald Dworkin, *Is Democracy Possible Here?* (Princeton University Press, 2008) 10. [↑](#footnote-ref-632)
632. ibid chapter 3; Dworkin, *Religion Without God* (n 11). For a critical discussion on Dworkin’s argument on religion see Rafael Domingo, ‘Religion for Hedgehogs? An Argument against the Dworkinian Approach to Religious Freedom’ (2012) 2 *Oxford Journal of Law and Religion* 371. [↑](#footnote-ref-633)
633. Marshall, ‘The legal recognition of personality: full-face veils and permissible choices’ (n 5) 64; See *Pretty v UK*, Reports of Judgments and Decisions 2002-III, 29 April 2002, para 65. [↑](#footnote-ref-634)
634. *Christine Goodwin v UK* (GC), Application no 28957/95, ECHR 2002-VI, para 90. [↑](#footnote-ref-635)
635. Cochav E Levy, ‘Women’s Rights and Religion – The Missing Element in the Jurisprudence of the European Court of Human Rights’ (2014) 35 *University of Pennsylvania Journal of International Law* 1175, at 1203. [↑](#footnote-ref-636)
636. ibid 1175. [↑](#footnote-ref-637)
637. *Religionsgemeinschaft Der Zeugen Jehovas and others v Austria*, Application no 40825/95, 31 July 2008, para 92. [↑](#footnote-ref-638)
638. For a critical discussion regarding state neutrality on religious matters in public see Dimitrios Kyritsis and Stavros Tsakyrakis, ‘Neutrality in the classroom’ (2013) 11 *International Journal of Constitutional Law* 200. [↑](#footnote-ref-639)
639. Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (‘European Convention on Human Rights’), Article 9. [↑](#footnote-ref-640)
640. Tom Lewis, ‘What not to wear: Religious Rights, the European Court, and the Margin of Appreciation’ (2007) 56 *International and Comparative Law Quarterly* 395, at 400. [↑](#footnote-ref-641)
641. Malcolm D Evans, ‘Believing in Communities, European Style’ in Nazila Ghananea-Hercock (ed) *The Challenge of Religious Discrimination at the Dawn of the Millennium* (Springer, 2004) 141. [↑](#footnote-ref-642)
642. *Kokkinakis v Greece* (n 3) para 33. [↑](#footnote-ref-643)
643. David J Harris and others, *Law of the European Convention on Human Rights*, 3nd edn (Oxford University Press, 2014) 605; Alastair R Mowbray, *Cases and materials on the European Convention on Human Rights* (Oxford University Press, 2012) 617. [↑](#footnote-ref-644)
644. *Kokkinakis v Greece* (n 3) para 31. [↑](#footnote-ref-645)
645. *Leyla Şahin v Turkey* (n 1) para 104. [↑](#footnote-ref-646)
646. See Isabella Rorive, ‘Religious Symbols in the Public Space: In Search of a European Answer’ (2009) 30 *Cardozo Law Review* 2669. [↑](#footnote-ref-647)
647. Ronan McCrea, *Religion and the Public Order of the European Union* (Oxford University Press, 2010) 121. [↑](#footnote-ref-648)
648. In sum, the doctrine of margin of appreciation entails that sensitive issues should be handled by the states as the local authorities are better placed to assess such issues than Strasbourg institutions. See Dimitrios Tsarapatsanis, ‘The Margin of Appreciation Doctrine: A Low-Level Institutional View’ (2015) 35 *Legal Studies* 675. [↑](#footnote-ref-649)
649. *Refah Partisi (The Welfare Party) and others v Turkey* (GC), Application nos 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II, para 91. [↑](#footnote-ref-650)
650. ibid para 91. [↑](#footnote-ref-651)
651. *Dahlab v Switzerland* (n 7). [↑](#footnote-ref-652)
652. Carolyn Evans, ‘The Islamic Scarf‘in the European Court of Human Rights’ (2006) 7 *Melbourne Journal of International Law* 52, at 60. [↑](#footnote-ref-653)
653. *Leyla Şahin v Turkey* (n 1). [↑](#footnote-ref-654)
654. ibid para 16. [↑](#footnote-ref-655)
655. ibid para 78. [↑](#footnote-ref-656)
656. *Lautsi v Italy* (n 38). [↑](#footnote-ref-657)
657. *Lautsi and others v Italy* (GC), Application no 30814/06, 18 March 2011, para 25. [↑](#footnote-ref-658)
658. *Lautsi v Italy* (n 38) para 31. [↑](#footnote-ref-659)
659. Article 2 of Protocol No. 1 provides: No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. [↑](#footnote-ref-660)
660. *Lautsi and others v Italy* (n 39) para 61. [↑](#footnote-ref-661)
661. ibid para 76. [↑](#footnote-ref-662)
662. Kyritsis and Tsakyrakis, ‘Neutrality in the classroom’ (n 20); Eugenio Velasco Ibarra, ‘Why Appearances Matter. State Endorsement of Religious Symbols in State Schools in Europe After *Lautsi*’ (2014) 3 *UCL Journal of Law and Jurisprudence* 262; Lorenzo Zucca, ‘Lautsi: A Commentary on a decision by the ECtHR Grand Chamber’ (2013) 11 *International Journal of Constitutional Law* 218; Susanna Mancini, ‘The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty’ (2010) 6 *European Constitutional Law Review* 6; Paolo Ronchi, ‘Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber ruling in *Lautsi v Italy*’ (2011) 3 *Ecclesiastical Law Journal* 287. [↑](#footnote-ref-663)
663. Levy, ‘Women’s Rights and Religion – The Missing Element in the Jurisprudence of the European Court of Human Rights’ (n 17) 1222. [↑](#footnote-ref-664)
664. Jill Marshall, ‘Freedom of Religion Expression and Gender Equality: *Sahin v Turkey*’ (2006) 69 *Modern Law Review* 452. [↑](#footnote-ref-665)
665. *Dahlab v Switzerland* (n 7); *Leyla Şahin v Turkey* (n 1). [↑](#footnote-ref-666)
666. See Howard Erica, ‘Banning Islamic veils: is gender equality a valid argument?’ (2012) 12 *International Journal of Discrimination and the Law* 147. [↑](#footnote-ref-667)
667. See Kyritsis and Tsakyrakis, ‘Neutrality in the classroom’ (n 20) 210 and 217. [↑](#footnote-ref-668)
668. Dworkin, *Is Democracy Possible Here?* (n 13) 71. [↑](#footnote-ref-669)
669. See Kyritsis and Tsakyrakis, ‘Neutrality in the classroom’ (n 20) 210. [↑](#footnote-ref-670)
670. Stephen Guest, *Ronald Dworkin* (Stanford University Press, 2013) 176. [↑](#footnote-ref-671)
671. Marshall, ‘The legal recognition of personality: full-face veils and permissible choices’ (n 5) 64. [↑](#footnote-ref-672)
672. See Levy, ‘Women’s Rights and Religion – The Missing Element in the Jurisprudence of the European Court of Human Rights’ (n 17). See also Marshall, ‘The legal recognition of personality: full-face veils and permissible choices’ (n 5). [↑](#footnote-ref-673)
673. *Dahlab v Switzerland* (n 7) para 1. [↑](#footnote-ref-674)
674. Evans, ‘The Islamic Scarf‘in the European Court of Human Rights’ (n 34) 62. [↑](#footnote-ref-675)
675. Hilal Elver, *The headscarf Controversy: Secularism and Freedom of Religion* (Oxford University Press, 2012) Chapter 4. [↑](#footnote-ref-676)
676. *Dahlab v Switzerland* (n 7) para 1; *Leyla Şahin v Turkey* (n 1), dissenting opinion of Judge Tulkens, para 111. [↑](#footnote-ref-677)
677. *Leyla Şahin v Turkey* (n 1), dissenting opinion of Judge Tulkens, para 12. [↑](#footnote-ref-678)
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679. ibid. [↑](#footnote-ref-680)
680. *Leyla Şahin v Turkey* (n 1) para 115. [↑](#footnote-ref-681)
681. Peter Cumper and Tom Levis, ‘Taking Religious Seriously Human Rights and Hijab in Europe Some Problems of Adjudication’ (2008) 34 *Journal of Law and Religion* 599, at 609. [↑](#footnote-ref-682)
682. *Leyla Şahin v Turkey* (n 1), dissenting opinion of Judge Tulkens, para 10. [↑](#footnote-ref-683)
683. Baljit Kooner, ‘The Veil of Ignorance: A Critical Analysis of the French Ban on Religious Symbol in the Context of the Application of Article 9 of the ECHR’ (2008) 12 *Mountbatten Journal of Legal Studies* 23, at 40. [↑](#footnote-ref-684)
684. *Refah Partisi (The Welfare Party) and others v Turkey* (n 31) para 95. [↑](#footnote-ref-685)
685. *Leyla Şahin v Turkey* (n 1) para 115. [↑](#footnote-ref-686)
686. ibid para 115. [↑](#footnote-ref-687)
687. Anastasia Vakulenko, ‘’Islamic Headscarves’ and the European Convention on Human Rights: an Intersectional Perspective’ (2007) 16 *Social and Legal Studies* 183, at 192. [↑](#footnote-ref-688)
688. Ratna Kapur, ‘Un-Veiling Equality: Disciplining the ‘Other’ Woman Through Human Rights Discourse’ in Anver M Emon, Mark Ellis and Benjamin Glahn (eds), *Islamic law and International Human Rights Law* (Oxford University Press, 2015) 288. [↑](#footnote-ref-689)
689. Jill Marshall ‘Freedom of Religious Expression and Gender Equality: Sahin v Turkey’ (2006) 69 *Modern Law Review* 452, at 459 and 460. [↑](#footnote-ref-690)
690. Ivana Radacic, ‘The Ban on Veils in Education Institutions: Jurisprudence of the European Court of Human Rights’ (2008) 4 *Croatian Yearbook of European Law and Policy* 267, at 281. [↑](#footnote-ref-691)
691. *Dahlab v Switzerland* (n 7). [↑](#footnote-ref-692)
692. Evans, ‘The Islamic Scarf‘in the European Court of Human Rights’ (n 34) 65. [↑](#footnote-ref-693)
693. ibid 65. [↑](#footnote-ref-694)
694. See Ellen Wiles, ‘Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality’ (2007) 41 *Law and Society Review* 699. [↑](#footnote-ref-695)
695. Evans, ‘The Islamic Scarf‘in the European Court of Human Rights’ (n 34) 65. [↑](#footnote-ref-696)
696. Sharon Todd, *Toward an Imperfect Education* (Routledge, 2016) 92. [↑](#footnote-ref-697)
697. *Dahlab v Switzerland* (n 7); *Leyla Şahin v Turkey* (n 1). [↑](#footnote-ref-698)
698. Wiles, ‘Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality’ (n 76) 719. [↑](#footnote-ref-699)
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700. *Leyla Şahin v Turkey* (n 1); *Dahlab v Switzerland* (n 7). [↑](#footnote-ref-701)
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704. Dworkin, *Is Democracy Possible Here?* (n 13) 73. [↑](#footnote-ref-705)
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707. *SAS v France* (n 10). [↑](#footnote-ref-708)
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709. *Leyla Şahin v Turkey* (n 1) para 111. [↑](#footnote-ref-710)
710. *SAS v France* (n 10) para 121. [↑](#footnote-ref-711)
711. ibid para 114. [↑](#footnote-ref-712)
712. Howard, ‘Banning Islamic Veils: is gender equality a valid argument?’ (n 48) 158. [↑](#footnote-ref-713)
713. *SAS v France* (n 10) para 120. [↑](#footnote-ref-714)
714. Lewis, ‘What not to wear: Religious Rights, the European Court, and the Margin of Appreciation’ (n 22) 401. [↑](#footnote-ref-715)
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716. Dworkin, *Taking Rights Seriously* (n 11) 272. [↑](#footnote-ref-717)
717. Lewis, ‘What not to wear: Religious Rights, the European Court, and the Margin of Appreciation’ (n 22) 402. [↑](#footnote-ref-718)
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720. Howard, ‘Banning Islamic veils: is gender equality a valid argument?’ (n 48) 160. [↑](#footnote-ref-721)
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725. See Julie Ringelheim, ‘State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach’ (2017) 6 *Oxford Journal of Law and Religion* 24. See also Kyritsis and Tsakyrakis, ‘Neutrality in the classroom’ (n 20). [↑](#footnote-ref-726)
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731. ibid. [↑](#footnote-ref-732)
732. ibid. [↑](#footnote-ref-733)
733. ibid. [↑](#footnote-ref-734)
734. Evans, ‘The Islamic Scarf‘in the European Court of Human Rights’ (n 34) 62. [↑](#footnote-ref-735)
735. *Dahlab v Switzerland* (n 7). [↑](#footnote-ref-736)
736. ibid. [↑](#footnote-ref-737)
737. ibid. [↑](#footnote-ref-738)
738. ibid. [↑](#footnote-ref-739)
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759. *Lautsi v Italy* (n 38) para 54. [↑](#footnote-ref-760)
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765. *Lautsi and others v Italy* (n 39) para 31. [↑](#footnote-ref-766)
766. Kyritsis and Tsakyrakis, ‘Neutrality in the classroom’ (n 20) 211. [↑](#footnote-ref-767)
767. *Lautsi and others v Italy* (n 39) para 32. [↑](#footnote-ref-768)
768. *Dahlab v Switzerland* (n 7). [↑](#footnote-ref-769)
769. ibid. [↑](#footnote-ref-770)
770. See Zucca, ‘Lautsi: A Commentary on a decision by the ECtHR Grand Chamber’ (n 44). [↑](#footnote-ref-771)
771. *Dahlab v Switzerland* (n 7). [↑](#footnote-ref-772)
772. *Lautsi and others v Italy* (n 39) para 66. [↑](#footnote-ref-773)
773. ibid, concurring opinion of Judge Power. [↑](#footnote-ref-774)
774. *Dahlab v Switzerland* (n 7). [↑](#footnote-ref-775)
775. *Leyla Şahin v Turkey* (n 1). [↑](#footnote-ref-776)
776. *Lautsi and others v Italy* (n 39) para 72. [↑](#footnote-ref-777)
777. Zucca, ‘Lautsi: A Commentary on a decision by the ECtHR Grand Chamber’ (n 44) 220. [↑](#footnote-ref-778)
778. ibid. [↑](#footnote-ref-779)
779. ibid 221. [↑](#footnote-ref-780)
780. *Dahlab v Switzerland* (n 7). [↑](#footnote-ref-781)
781. ibid. [↑](#footnote-ref-782)
782. *Lautsi v Italy* (n 38) para 54. [↑](#footnote-ref-783)
783. *Folgerø and others v Norway* (GC), Application no 15472/02, ECHR 2007-III, para 84. [↑](#footnote-ref-784)
784. See Kyritsis and Tsakyrakis, ‘Neutrality in the classroom’ (n 20). [↑](#footnote-ref-785)
785. See Zucca, ‘Lautsi: A Commentary on a decision by the ECtHR Grand Chamber’ (n 44) 220 and 221. [↑](#footnote-ref-786)
786. Susanna Mancini, ‘The Power of Symbols and Symbols As Power: Secularism and Religion as Guarantors of Cultural Convergence’ (2009) 30 *Cardozo Law Review* 2629, at 2639. [↑](#footnote-ref-787)
787. Dworkin, *A Matter of Principle* (n 11) 66. [↑](#footnote-ref-788)
788. Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2013) 63. [↑](#footnote-ref-789)
789. Dworkin, *A Matter of Principle* (n 11) 191. [↑](#footnote-ref-790)
790. Jeroen Temperman, *The Lautsi Papers* (Martinus Nijhoff, 2012). [↑](#footnote-ref-791)
791. Esther D Reed, *Theology for International Law* (Bloomsbury Publishing, 2013) 293. [↑](#footnote-ref-792)
792. See Ringelheim, ‘State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach’ (n 107) 26. [↑](#footnote-ref-793)
793. Lewis, ‘What not to wear: Religious Rights, the European Court, and the Margin of Appreciation’ (n 22). [↑](#footnote-ref-794)
794. *Karaduman v Turkey*, Application no 16278/90, Commission decision of May 3, 1993, DR 74; *Dahlab v Switzerland* (n 7); *Leyla Şahin v Turkey* (n 1). [↑](#footnote-ref-795)
795. *SAS v France* (n 10) para 120. [↑](#footnote-ref-796)
796. A dissenting group of judgesstated that: “freedom of expression, ‘a fundamental feature of a democratic society’, is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population. This quotation from *Handyside v. the United Kingdom* has frequently been reproduced in the case-law of the European Commission and Court of Human Rights. We consider that these words should not become an incantatory or ritual phrase but should be taken seriously and should inspire the solutions reached by our Court”. See *İA v Turkey*, Application no 42571/98, ECHR 2005-VIII, joint dissenting opinion of Judges Costa, Cabral Barreto and Jungwiert, para 1. [↑](#footnote-ref-797)
797. Ronald Dworkin, ‘The Right to Ridicule’ (2006) 53 *New York Review of Books*  [↑](#footnote-ref-798)
798. Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 82; Ronald Dworkin, *Freedom’s Law* (Oxford University Press, 1996) chapter 2; Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) chapter 3 and chapter 6; Ronald Dworkin, ‘Foreword’ in Ivan Hare, James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press, 2010); Ronald Dworkin, ‘Is there a Right to Pornography?’ (1981) 1 *Oxford Journal of Legal Studies* 177. For a critical examination of Dworkin’s distinction between principle and policy see Dimitrios Kyritsis, ‘Principles, Policies and the Power of Courts’ (2007) 20 *Canadian Journal of Law and Jurisprudence* 379. For a critical discussion of Dworkin’s theory of rights see Paul Yowell, ‘A Critical Examination of Dworkin’s Theory of Rights’ (2007) 52 *American Journal of Jurisprudence* 93. [↑](#footnote-ref-799)
799. Dworkin, *Taking Rights Seriously* (n 3) 82. [↑](#footnote-ref-800)
800. Ronald Dworkin, ‘Hard Cases’ (1975) 88 *Harvard Law Review* 1057, at 1067. [↑](#footnote-ref-801)
801. For an alternative understanding of Dworkin’s principle-policy distinction see Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford University Press, 2017) 77. [↑](#footnote-ref-802)
802. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Art 19; Human Rights Act 1998, s1; The Organisation of American States Treaty Series (OAS Treaty Series) Art 13; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 10; African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) Art 9. [↑](#footnote-ref-803)
803. Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *The European Convention on Human Rights* 6th edn, (Oxford University Press, 2014) 436. [↑](#footnote-ref-804)
804. *Muller and others v Switzerland*, Series A no 133, 24 May 1988. [↑](#footnote-ref-805)
805. *Handyside v UK*, Series A no 24, 7 December 1976. [↑](#footnote-ref-806)
806. *Leroy v France,* Application no 36109/03, 2 October 2008. [↑](#footnote-ref-807)
807. *Otto-Preminger-Institut v Austria*, Series A no 295-A, 20 September 1994. [↑](#footnote-ref-808)
808. *Monnat v Switzerland*, Reports of Judgements and Decisions 2006-X, 21 September 2006. [↑](#footnote-ref-809)
809. *Perrin v UK*, Reports of Judgements and Decisions 2005-XI, 18 October 2005. [↑](#footnote-ref-810)
810. *Oberschlick v Austria*, Series A no 204, 23 May 1991, para 57; *Thoma v Luxemburg*, Reports of Judgements and Decisions 2001-III, 29 March 2001, para 45. [↑](#footnote-ref-811)
811. Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (‘European Convention on Human Rights’) Article 10. [↑](#footnote-ref-812)
812. *Handyside v United Kingdom* (n 10) para49. [↑](#footnote-ref-813)
813. *Otto-Preminger-Institut v Austria* (n 12) para 47. [↑](#footnote-ref-814)
814. ibid; *Handyside v United Kingdom* (n 10). [↑](#footnote-ref-815)
815. *Otto-Preminger-Institut v Austria* (n 12); *Wingrove v United Kingdom*, Reports of Judgements and Decisions 1996-V, 25 November 1996; *İA v Turkey* (n 1). [↑](#footnote-ref-816)
816. *Otto-Preminger-Institut v Austria* (n 12) para 47. [↑](#footnote-ref-817)
817. ibid. [↑](#footnote-ref-818)
818. Rainey, Wicks and Ovey, *The European Convention on Human Rights* (n 8) 457. [↑](#footnote-ref-819)
819. *Otto-Preminger-Institut v Austria* (n 12). [↑](#footnote-ref-820)
820. ibid para 10 [↑](#footnote-ref-821)
821. The bulletin stated that, based on Tyrolean Cinemas Act, persons under seventeen years of age were forbidden from seeing the film. See *Otto-Preminger-Institut v Austria* (n 12) para 10. [↑](#footnote-ref-822)
822. ibid. [↑](#footnote-ref-823)
823. ibid para 48 (emphasises added). [↑](#footnote-ref-824)
824. ibid para 46. [↑](#footnote-ref-825)
825. ibid para 43. [↑](#footnote-ref-826)
826. ibid para 48. [↑](#footnote-ref-827)
827. *Wingrove v United Kingdom* (n 20). [↑](#footnote-ref-828)
828. ibid para 8. [↑](#footnote-ref-829)
829. ibid para 13. [↑](#footnote-ref-830)
830. Ibid para 32. [↑](#footnote-ref-831)
831. ibid para 37. [↑](#footnote-ref-832)
832. ibid para 27. [↑](#footnote-ref-833)
833. ibid para 38. [↑](#footnote-ref-834)
834. *Sunday Times v United Kingdom*, Series A no 30, 26 April 1979, para 49. [↑](#footnote-ref-835)
835. *Wingrove v United Kingdom* (n 20) para 42. [↑](#footnote-ref-836)
836. ibid para 45. [↑](#footnote-ref-837)
837. ibid para 45. [↑](#footnote-ref-838)
838. ibid para 48. [↑](#footnote-ref-839)
839. ibid para 48. [↑](#footnote-ref-840)
840. *İA v Turkey* (n 1) para 6. [↑](#footnote-ref-841)
841. Subsequently, the Court of First Instance commuted the prison sentence to a fine (equivalent at the time to 16 United States dollars). ibid para 13. [↑](#footnote-ref-842)
842. ibid para 13. [↑](#footnote-ref-843)
843. *İA v Turkey* (n 1) para 31. [↑](#footnote-ref-844)
844. See, Malcolm D Evans ‘The Freedom of Religion or Belief and the Freedom of Expression’ (2009) 4 *Religion and Human Rights* 197. [↑](#footnote-ref-845)
845. Aileen McHarg, ‘Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights’ (1999) 62 *Modern Law Review* 671, at 683. [↑](#footnote-ref-846)
846. ibid [↑](#footnote-ref-847)
847. ibid 673. [↑](#footnote-ref-848)
848. ibid 672. [↑](#footnote-ref-849)
849. Julia Driver, ‘The History of Utilitarianism’ in Edward N Zalta (ed) The Stanford Encyclopedia of Philosophy (Winter Edition, 2014). [↑](#footnote-ref-850)
850. Dworkin, *Taking Rights Seriously* (n 3) Chapter 2 and Chapter 4. See also Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (n 6) 66-76. [↑](#footnote-ref-851)
851. Ronald Dworkin, ‘The Model of Rules’ (1967) 35 *University of Chicago Law Review* 14, at 23. [↑](#footnote-ref-852)
852. ibid 23. [↑](#footnote-ref-853)
853. Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (n 6) 68. [↑](#footnote-ref-854)
854. Stephen Guest, *Ronald Dworkin* (Stanford University Press, 2013) 90. See also Raymond Wacks, *Philosophy of Law* (Oxford University Press, 2006) 46. [↑](#footnote-ref-855)
855. Dworkin, *Taking Rights Seriously* (n 3) 90. [↑](#footnote-ref-856)
856. ibid 82. [↑](#footnote-ref-857)
857. Raymond Wacks, *Human Rights and Moral Reasoning* (Gregorian and Biblical Press, 2009) 195. [↑](#footnote-ref-858)
858. Dworkin, *Taking Rights Seriously* (n 3) 91. [↑](#footnote-ref-859)
859. ibid 91. [↑](#footnote-ref-860)
860. *Otto-Preminger-Institut v Austria* (n 12) para 56. [↑](#footnote-ref-861)
861. ibid para 56. [↑](#footnote-ref-862)
862. *Wingrove v United Kingdom* (n 20) para 28. [↑](#footnote-ref-863)
863. ibid para 28. [↑](#footnote-ref-864)
864. Tom Lewis, ‘At the Deep End of the Pool’ in Jeroen Temperman and Andras Koltay (eds), *Blasphemy and Freedom of Expression* (Cambridge University Press, 2017) 259-293, at 279. [↑](#footnote-ref-865)
865. *Otto-Preminger-Institut v Austria* (n 12), joint dissenting opinion of Judges Palm, Pekkanen and Makarczyk, para 3. [↑](#footnote-ref-866)
866. Dworkin, *Taking Rights Seriously* (n 3) 82. [↑](#footnote-ref-867)
867. Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (n 6) 68. [↑](#footnote-ref-868)
868. ibid 68. [↑](#footnote-ref-869)
869. Guest, *Ronald Dworkin* (n 59) 90. [↑](#footnote-ref-870)
870. Dworkin, *Taking Rights Seriously* (n 3) 116. [↑](#footnote-ref-871)
871. Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (n 6) 67. [↑](#footnote-ref-872)
872. *Otto-Preminger-Institut v Austria* (n 12) para 6. [↑](#footnote-ref-873)
873. This controversial protection of religious feelings was reaffirmed in *Wingrove v United Kingdom*. See *Wingrove v United Kingdom* (n 20) paras 58, 61 and 64. [↑](#footnote-ref-874)
874. Tahir Mahmood, ‘Religion in contemporary legal systems’ (2011) 2011 *Brigham Young University Law Review* 605, at 609. [↑](#footnote-ref-875)
875. *Otto-Preminger-Institut v Austria* (n 12) para 56. [↑](#footnote-ref-876)
876. ibid para 56. [↑](#footnote-ref-877)
877. Dworkin, *Freedom’s Law* (n 3) chapter 2. [↑](#footnote-ref-878)
878. ibid 200. [↑](#footnote-ref-879)
879. In his powerful dissent to *Abrams v United States*, Justice Oliver Holmes noted that ‘the best test of truth is the power of thought to get itself accepted in the competition of the market’. See *Abrams and others v United States*, 250 US 616 (1999), dissenting opinion of Justice Holmes. See Lorenz Langer, *Religious Offence and Human Rights* (Cambridge University Press, 204) 281. For a critical discussion on this topic, see Stanley Ingber, ‘The Marketplace of Ideas: A Legitimizing Myth’ (1984) 1984 *Duke Law Journal*, 1. [↑](#footnote-ref-880)
880. In the words of John Milton: ‘though all the winds of doctrine were let loose to play upon earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter’. John Milton ‘Areopagitica*’* in Sir Richard C Jebb (ed), *Areopagitica, with a Commentary by Sir Richard C Jebb and with Supplementary Material* (Cambridge University Press, 1918) 58; Richard Danbury ‘Where Should Speech Be Free? Placing Liberal Theories of Free Speech in a Wider Context’ in Monroe Price and Nicole Stremlau (eds), *Speech and Society: Comparative Perspectives* (Cambridge University Press, 2018) 171-191, at 176 and 177. [↑](#footnote-ref-881)
881. Mill begins by saying that: ‘The time, it is to be hoped, is gone by, when any defence would be necessary of the “liberty of the press” as one of the securities against corrupt or tyrannical government. No argument, we may suppose, can now be needed, against permitting a legislature or an executive, not identified in interest with the people, to prescribe opinions to them, and determine what doctrines or what arguments they shall be allowed to hear.’ John Stuart Mill, ‘On Liberty’ inJohn Gray (ed), *John Stuart Mill On Liberty and Other Essays*, 3nd edn (Oxford University Press, 2008) 20; David van Mill, ‘Freedom of Speech’ in Winter 2017 (eds), *The Stanford of Encyclopedia of Philosophy*;Irene M Ten Cate, ‘Speech, Truth, and Freedom: An Examination of John Stuart Mill’s and Justice Oliver Wendell Holmes’s Free Speech Defenses’ (2013) 22 *Yale Journal of Law and the Humanities* 35 [↑](#footnote-ref-882)
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890. ibid para 49. [↑](#footnote-ref-891)
891. ibid para 47. [↑](#footnote-ref-892)
892. ibid para 48. [↑](#footnote-ref-893)
893. ibid para 47. [↑](#footnote-ref-894)
894. ibid para 47. [↑](#footnote-ref-895)
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896. ibid para 48. [↑](#footnote-ref-897)
897. ibid para 49. [↑](#footnote-ref-898)
898. Dworkin, ‘Foreword’ (n 3) vii. [↑](#footnote-ref-899)
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