Human Rights Law Review, 2016, 16, 483–510
doi: 10.1093/hrlr/ngw020
Advance Access Publication Date: 1 August 2016
Article

OXFORD

Procedural Fairness as a Vehicle for Inclusion in the Freedom of Religion Jurisprudence of the Strasbourg Court

Saïla Ouald Chaib*

ABSTRACT

The increasing religious diversity in western Europe poses challenges for courts, including the European Court of Human Rights ('the Court'), whose jurisprudence on the right to freedom of religion has been widely criticized for being too restrictive, unprotective and non-inclusive. This criticism mainly refers to the substantive aspect of the Court's case law. Indeed when dealing with the question how the religious diversity can be best dealt with from a human rights perspective, the first focus of the Court should relate to the substantive inclusion of this diversity. However, in a diversity context it is inherently impossible to substantively accommodate all religious claims and needs. Building on the social psychology notion of procedural fairness, this article will show how, despite the impossibility of always providing applicants with favourable inclusive outcomes in their case, the Court can, and should always, ensure that it communicates inclusion at a procedural level. It does so through an in-depth analysis of the Court's Article 9 case law delivered from 1999 until today.

KEYWORDS: freedom of religion, procedural justice, religious diversity, European Court of Human Rights

'Justice means making sure that this never happens again. Making sure that Muslims are respected, are protected, are cared for and are not left to live in fear.'

—Dr Suzanne Barakat[1]

* Associated Postdoctoral Researcher, Human Rights Centre, University of Ghent (saila.oualdchaib@hotmail.com).

1 Suzanne Barakat is the sister of one of three Muslim students shot and killed near the University of North Carolina campus in Chapel Hill in February 2015. The two other victims were her sister-in-law and the sister of her sister-in-law. Questioned live on air by a news host as to what justice would entail for her following the killing of her family members, this was the first reply of Suzanne Barakat: see 'Chapel Hill victim's sister: American sniper 'dehumanises' Muslims' *Al Arabiya News*, 14 February 2015, available at: english.alarabiya.net/en/media/digital/2015/02/14/Chapel-Hill-victim-sister-American-Sniper-dehumanizes-Muslims-.html [last accessed 20 May 2016].

1. INTRODUCTION

The religious landscape in western Europe is becoming increasingly diverse. Meanwhile, secularism gains more and more importance[2] and anti-Muslim sentiments are on the rise.[3] In this context, debates on the right to freedom of religion are never far away. These debates sometimes tend to be animated, polarizing and ill-informed.[4] As the supranational human rights body in Europe, the European Court of Human Rights ('the (Strasbourg) Court') is inevitably confronted with these societal debates, the most recent example being the question of the French face veil ban.[5] In diverse societies with differing views and interests, conflicts are generally unavoidable, including conflicts related to religion. The question is, however, how to approach such conflicts in a way that preserves social cohesion and inclusion for all. This article looks at the role of the European Court of Human Rights in this respect.

The first perspective from which conflicts involving religious issues can and should be approached is a substantive one, focused on reconciling conflict through provisions of the European Convention on Human Rights, such as Article 9 (religious freedom).[6] Yet inclusion through the finding of substantive solutions will in practice not always be possible. What is always possible, though, is to approach those who turn to the Court in search of protection in an egalitarian and inclusive way, acknowledging their membership and their equal status in society and avoiding their alienation and marginalization. This procedural perspective on inclusion is not intended to substitute for a substantive perspective on inclusion; it is instead complementary and it is always applicable, regardless of whether favourable or non-favourable outcomes are reached.

This article aims at an in-depth examination of the case law of the European Court of Human Rights on Article 9[7] from a procedural inclusion perspective, rather than from the more common substantive perspective. It starts from the assumption that treating people in a respectful and unbiased way, regardless of their background and the religion they profess, is inherently inclusive. In fact, as will be explained, this is confirmed by social psychology research on 'procedural fairness', which shows that in their contact with legal authorities people not only care about the outcome they receive in their case, but also accord significant importance to the way this outcome is reached.[8]

This article will in a first—theoretical—part list the main findings of social psychology research on procedural fairness and will explain how these findings are particularly relevant in the context of religious diversity and freedom of religion adjudication. In a second—normative—part, it will set out how the factors that

2 Davie, 'Understanding Religion in Europe: A Continually Evolving Mosaic' in Cumper and Lewis (eds), *Religion, Rights and Secular Society* (2012) 251 at 267.

3 Hammarberg, *Human Rights in Europe: No Ground for Complacency* (2011) at 3.

4 Davie, supra n 2.

5 *S.A.S. v France* Application No 43835/11, Merits, 1 July 2014.

6 For example, through the application of the concept of reasonable accommodation: see Bribosia, Ringelheim and Rorive, 'Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?' (2010) 17 *Maastricht Journal of European and Comparative Law* 137.

7 See below at 'Methodology' at section 4 for an overview of the methodology used.

8 See, for example, one of the most influential works in the field of procedural justice research, Tyler, *Why People Obey the Law* (2006).

determine procedural fairness perceptions, namely neutrality, respect, trustworthiness and participation, can be applied to the freedom of religion case law of the Court. In the third—both analytical and normative—part, it will examine the Court's case law from a procedural fairness perspective, uncovering procedural fairness flaws and making suggestions for improvement. This part will also explain the interdisciplinary methodological approach used for the analysis of the case law.

2. TOWARDS MORE INCLUSION THROUGH FREEDOM OF RELIGION CASE LAW: A PROCEDURAL FAIRNESS PERSPECTIVE

A. Procedural Fairness: A Short Introduction

The Court's case law under Article 9 has been widely examined, debated and criticized as regards its substance. The Court has been criticized for not according sufficient importance to Article 9 in its adjudication and for having too restrictive an approach to the application of the right to freedom of religion in individual claims.[9] The Court has also been accused of holding anti-Muslim bias.[10] As a result, many authors plead for wider protection and more inclusiveness in the Court's freedom of religion case law.

While in general I join this plea for inclusion, in this article I explore how the Court can also play an inclusive role through procedural fairness. Rather than offering a critique of the substantive aspects of the Court's reasoning relating to the level of protection the Court offers under Article 9, I look at how the Court through its judgments approaches religious applicants and religious claims irrespective of the level of protection offered. For example, when the Court questions whether an interference takes place with the freedom of religion of a practicing lawyer who complains about the fact that the hearing of case is scheduled on a religious holiday, the Court is not only limiting the protection of the applicant's freedom of religion, but it also shows a lack of genuine consideration of the applicant's concern. In this study I will argue that that in itself is problematic from the point of view of inclusion.

This article is inspired by the social psychology findings concerning procedural fairness.[11] The research in this field shows that people care significantly about the way they and their cases are treated by courts. This concern is shown to be even more important than their concern with the outcome of their case.[12] In the context of courts, Tom Tyler, a leading scholar in the field of procedural fairness research, discerns four main criteria determining people's perceptions of procedural

9 For example, Martínez-Torrón, 'The (Un)protection of Individual Religious Identity in the Strasbourg Case Law' (2012) 1 *Oxford Journal of Law and Religion* 1 at 6; Ferrari, 'The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative' in Temperman (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (2012) 13 at 23.

10 Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights' (2011) 32 *Michigan Journal of International Law* 663 at 741.

11 Tyler, 'Procedural Justice and the Courts' (2007) 44 *Court Review: The Journal of the American Judges Association* 26.

12 Ibid. at 26; Tyler, 'What is Procedural Justice? Criteria used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 *Law and Society Review* 103 at 121; Gangl, 'Procedural Justice Theory and Evaluations of the Lawmaking Process' (2003) 25 *Political Behavior* 119 at 120 (with reference to Hibbing and Theiss-Morse, 'Process Preferences and American Politics: What the People Want Government to Be' (2001) 95 *The American Political Science Review* 95 at 145–53.

fairness.[13] A first criterion is 'participation', also frequently called 'voice', referring to the ability of individuals to express their side of the story and having their views considered. A second element is 'neutrality', meaning that individuals expect to be treated in an unbiased and neutral way. A third criterion is 'respect' which refers to the need to respect people's dignity and having respect for their rights. Finally, the fourth element concerns 'trustworthiness', meaning that authorities are expected to care about people's concerns and to strive to be just.[14]

A central finding of procedural fairness research is that people's perception of procedural fairness shapes their views about the legitimacy of the courts[15] and influences acceptance of and compliance with decisions.[16] Also important is the reason why people value procedural fairness. Initially it was assumed that people were concerned about procedural fairness for reasons related to the outcome of the case.[17] However, Tyler and Lind show that relational rather than instrumental reasons underlie people's procedural fairness concerns. People value procedural fairness because of the message of inclusion it communicates. Research also shows that the procedural fairness findings are universally applicable, irrespective of ethnic background.[18] Treating people in a respectful, equal and caring way communicates that they are valued members of the group and this message influences people's feelings of self-worth.[19] Therefore, applying procedural fairness is particularly important in a religiously diverse context in order to foster the inclusion for all and to strive for social cohesion despite possible conflicting views.

B. Procedural Fairness in a Religiously Diverse Context

Applying high procedural fairness standards in all cases and to all applicants the Court is confronted with is important, not least because procedural fairness standards are part of the value system the Court represents.[20]

However, there are several additional reasons why in cases concerning freedom of religion these findings are particularly relevant. First of all, freedom of religion claims often concern applicants belonging to minority groups. Since minorities are generally less trusting in authorities than people belonging to majority groups,[21] applying high procedural fairness standards can help to avoid the alienation of minorities from the

13 Tyler (2007), supra n 12; Tyler, 'Social Justice: Outcome and Procedure' (2000) 35 *International Journal of Psychology* 117.

14 These criteria will be discussed into more detail in the next section.

15 Tyler (2006), supra n 8 at 270.

16 Ibid.

17 Blader and Tyler, 'A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process' (2003) 29 *Personality and Social Psychology Bulletin* 747 at 748.

18 Tyler and Huo, *Trust in the Law* (2002) at 152; Burke and Leben, 'Procedural Fairness: A Key Ingredient in Public Satisfaction' (2007) *White Paper for the American Judges Association* 1 at 18; Tyler, 'Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?' (2001) 19 *Behavioral Sciences and The Law* 215 at 217.

19 Lind and Tyler, *The Social Psychology of Procedural Justice* (1988).

20 Brems and Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35 *Human Rights Quarterly* 176 at 185.

21 Tyler (2006) supra n 8 at. 270; Tyler and Huo, supra n 18 at 142–6; Tyler (2001), supra n 18 at 217; Levi, Sacks and Tyler, 'Conceptualizing Legitimacy, Measuring Legitimating Beliefs' (2009) 53 *American Behavioral Scientist* 354 at 369.

Court.[22] Securing the Court's legitimacy and avoiding alienation is all the more important when it comes to more vulnerable groups such as religious minorities, because of the corrective function the Court should have in protecting 'the rights of minority members against abuses of majority rule by the dominant group'.[23]

Moreover, in the context of sensitive and polarizing debates on religion in western Europe, the Court can act as a beacon of justice and peace, bringing back neutrality and accuracy to the debate.[24] An example of this can be found in the recent case of *SAS v France*.[25] Although the judgment has been (rightly) criticized on a substantive level, among other things for not finding a violation, the Court should receive credit for the respectful way it dealt with the (controversial) subject of the face veil.[26]

Additionally, by applying good procedural fairness standards in its own case law, the Court communicates that people are considered valued members of society. This is particularly important in Article 9 cases since a segment of the claims made under this article concerns claims of inclusion. Religious accommodation claims, for example, express a need for full inclusion in society, through work and education, while at the same time being able to express one's religious identity. Although religious accommodation is not always possible for practical reasons, the least the Court can do is to seriously examine the possibilities and to do so in a respectful and neutral way.

These arguments are particularly important because of the broader impact of the Court's decisions. They not only impact on the individual applicants in a case, but also affect other people or groups of people who identify with the applicant and/or his or her claim. A striking illustration can be found in the letter of Fazilet Partisi[27] to the Court, in which they announce the withdrawal of their case because they had lost confidence in the Court after its decisions in *Leyla Sahin* and *Refah Partisi*. Fazilet Partisi argued, among other things, that the Court was biased against Muslims and did not show respect towards them.

In sum, these elements show that procedural fairness is an important aspect to take into account in the Court's adjudication, especially when people belonging to minority groups are involved. In what follows, I will elaborate further on the specific components of procedural fairness criteria, and how they can be translated to freedom of religion case law.

22 See also Brems and Lavrysen, supra n 20 at 184.

23 Ibid. at 184, with references to *Young, James and Webster v United Kingdom* Application No 7601/76 and 7806/77, Merits, 13 August 1981 at para 63; *Koky v Slovakia* Application No 13624/03, Merits, 12 June 2012.

24 For a discussion on the debate on the face veil bans in France and Belgium, see Brems, Vrielink and Ouald Chaib, 'Uncovering French and Belgian Face Covering Bans' (2014) 2 *Journal of Law, Religion and State* 69.

25 Application No 43835/11, Merits, 1 July 2014.

26 See Ouald Chaib and Peroni, 'S.A.S. v France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil', *Strasbourg Observers-Blog,* 3 July 2014, commenting on developments in the case law of the European Court of Human Rights, available at: strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/ [last accessed on 30 May 2016].

27 *Fazilet Partisi and Kutan v Turkey* Application No 1444/02, Admissibility, 27 April 2006.

3. NORMATIVE APPLICATION OF PROCEDURAL FAIRNESS CRITERIA IN FREEDOM OF RELIGION CASE LAW

Tom Tyler developed a procedural fairness framework specifically for the context of courts based on four procedural fairness criteria.[28] This model is applied to the case law of the Strasbourg Court in the work of Brems and Lavrysen.[29] In this section, I will further develop this framework specifically in the context of the Court's freedom of religion case law.

A. Voice[30]

Voice refers to the importance that applicants accord to being able to participate in a case through the expression of their views and arguments,[31] irrespective of whether or not their voice will impact the outcome of their case.[32] However, expressing one's voice is not sufficient in itself; it needs to go hand in hand with genuine consideration by the courts.[33]

Although applicants' personal contact with the Strasbourg Court is limited,[34] the Court can ensure this procedural fairness aspect by representing the facts of the case and the applicant's arguments in an accurate way in its decisions.[35] In the context of freedom of religion case law, this includes an accurate representation of the applicant's religious background and of his or her religious claim.

Since it is also important that the Court genuinely considers the arguments made by the applicants, the Court should be transparent in its judgments about its reasoning and the way the arguments are taken into account.[36] In this regard, mere standard formulations such as 'having regard to all the evidence in its possession, and in so far as it has jurisdiction to examine the allegations, has not found any appearance of a breach of the rights and freedoms guaranteed by the Convention or its Protocols'[37] are clearly insufficient if the Court is to take the applicant and his or her rights seriously.

B. Neutrality

Judges are also expected to be honest, impartial, independent and objective[38] and to 'make decisions based upon rules and not personal opinions'.[39] In the freedom of

28 Tyler (2007), supra n 11.
29 Brems and Lavrysen, supra n 20.
30 Also called 'representation' or 'participation': see Tyler (1988), supra n 12 at 104–5; Tyler (2000), supra n 13 at 121.
31 Tyler (2007), supra n 11 at 30.
32 However, this element will matter even more when people feel they have an impact on the outcome: see Tyler (2000), supra n 13 at 121; Hollander-Blumoff, 'The Psychology of Procedural Justice in the Federal Courts' (2011) 63 *Hastings Law Journal* 127 at 136 with references.
33 Burke and Leben, supra n 18 at 11–12; Tyler (2007), supra n 11 at 30; Tyler (2006) supra n 8 at 149 and 276.
34 For an application of procedural justice criteria to a court's context where applicants have direct contact with the judges, see Greacen, 'Social Science Research on "Procedural Justice": What are the Implications for Judges and Courts?'(2008) 47 *Judges' Journal* 41.
35 Brems and Lavrysen, supra n 20 at 186.
36 Ibid.
37 *Glinski v Poland* Application No 59739/08, Admissibility, 11 February 2014; *Kin v Ukraine* Application No 19451/04, Admissibility, at para 2.
38 Tyler (2000), supra n 13 at 122; Tyler (2006), supra n 8 at 164.
39 Tyler (2007), supra n 11 at 30. See also Tyler (2000), supra n 13 at 122.

religion case law, neutrality involves a representation of the religious aspects of the case without expressing value judgments, prejudices or generalizations about the applicant's convictions. This also means that the Court should stay away from theological assessments.[40] As criticized by many authors, the Court clearly fails to do so in cases such as *Leyla Sahin*[41] and *Refah Partizi*,[42] where it makes problematic and biased statements about Islam.[43] A more recent example can be found in *Jehovah's Witnesses*, where the Court observes 'on a general note' that

> the rites and rituals of many religions may harm believers' well-being, such as, for example, the practice of fasting, which is particularly long and strict in Orthodox Christianity, or circumcision practiced on Jewish or Muslim male babies.[44]

Comparisons of this kind should obviously be avoided. Not only are these evaluations or statements redundant, but they also stigmatise other religious practices which are not even at issue in the case.

An additional element of neutrality is consistency. This includes consistency across people and cases[45] and consistency across time.[46] When the Court breaks away from a consistent line of case law, it should at least be transparent and motivate that decision.[47] Comparing the cases of *Lautsi* and *Dahlab*, some problematic aspects of inconsistency come to the surface. In *Lautsi* for example, the Court states that 'it cannot be asserted' that a crucifix on a classroom wall 'does or does not have an effect on young persons' because there is no evidence that it 'may have an influence on pupils'. In this case the Court refers to the crucifix as a 'passive symbol'.[48] Compare this with *Dahlab*, where the Court, referring to the headscarf as a 'powerful external symbol,' states:

> [I]t 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.[49]

40 See Harris et al., *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights*, 3rd edn (2014) at 603–4. See also Brems and Lavrysen, supra n 20 at 186–7.

41 Application No 44774/98, Merits and Just Satisfaction, 10 November 2005.

42 *Refah Partisi The Welfare Party and Others v Turkey* Application Nos 41340/98 et al., Merits, 13 February 2003.

43 For example, Danchin, supra n 11.

44 *Jehovah's Witnesses of Moscow and Others v Russia*, Application No 302/02, Merits, 10 June 2010, at para 144.

45 Tyler (2007), supra n 11 at 30.

46 Brems and Lavrysen, supra n 20 at 181.

47 Ibid. at 186–7, where the authors note that even though the Court is not 'strictly bound by its own precedents, it has adopted the practice of providing a detailed justification for an explicit change of direction compared to previous case law'. See an excellent example in the context of Article 9 in the case of *Bayatyan v Armenia*, Application No 23459/03, Merits, 7 July 2011.

48 *Lautsi and Others v Italy* Application No 30814/06, Merits, 18 March 2011, at para 66 (emphasis added).

49 *Dahlab v Switzerland* Application No 42393/98, Admissibility, 15 February 2001 (emphasis added).

In the case of *Lautsi* the Court requires evidence that the crucifix has an impact on children, while in *Dahlab* a theological interpretation suffices for it to make strong statements on the wearing of the headscarf. Also, in the first case the Court speaks about possible *influence* or *effect* on pupils, while in *Dahlab* the Court immediately speaks of a *proselytizing effect* of the headscarf. The distinction made between a 'passive' versus a 'powerful external symbol' certainly does not suffice to explain these different nuances in the reasoning.

Finally, another aspect of neutrality is the equal treatment of the parties. This applies not only across cases, as argued above, but also within a case. This is particularly important in the Court's adjudication since the defendant party is a State. The Court should therefore be attentive that the claimant's arguments are sufficiently weighed against the State's arguments.

C. Respect

While both voice and neutrality are linked to the quality of decision making, respect is related to the interpersonal aspect of the decision-making process.[50] People want to feel that their concerns and rights are taken seriously and they want to be treated with dignity and respect as individuals and as members of society.[51] A minimum of respect would be to acknowledge an applicant's religious concerns. This does not mean that the Court should necessarily agree with the applicants' religious views or practices, but, following Heiner Bielefeld, the current Special Rapporteur on freedom of religion, a starting point would be to have 'respect for human beings as potential holders of deep, existential convictions'.[52] This is particularly important for unfamiliar religious needs or claims that might seem 'frivolous' from an outsider's perspective. The Court should in any event treat claims with respect, realizing that, as Tyler observes, 'people come to court about issues that are important to them, irrespective of the strength of their legal case'.[53] Additionally to showing respect for the applicant believer, it is also important that the Court takes the applicant's rights seriously. Yet, as Carolyn Evans argues, in practice, the applicants' individual right to freedom of religion tend to easily be compromised when a conflict with other interests arise.[54] Like any other human right protected by the Convention, freedom of religion should receive appropriate consideration in every individual case.[55]

50 Tyler (2006) supra n 8 at 164; Tyler (2000), supra n 14 at 122.

51 Tyler (2000), supra n 13 at 122; Tyler (2007), supra n 11 at 30; Tyler (2006) supra n 8 at 149.

52 Bielefeldt, 'Misperceptions of Freedom of Religion or Belief' (2013) 35 *Human Rights Quarterly* 33 at 47.

53 Tyler (2007), supra n 11 at 31.

54 Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture' (2010–2011) 26 *Journal of Law and Religion* 321 at 341.

55 In the context of freedom of religion in the workplace, for example, it is clear that the Court treats cases under Article 9 differently from cases under other Articles such as Article 10, while the issues at stake appear to be very similar: see Ouald Chaib, 'Religious Accommodation in the Workplace: Improving the Legal Reasoning of the European Court of Human Rights' in Alidadi, Foblets and Vrielink (eds), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace* (2012) 33.

D. Trustworthiness

The question whether or not an authority can be considered trustworthy is the central element influencing people's perception of procedural fairness.[56] People want to feel that judges care about their concerns, that they are 'trying to do what is right for everyone involved'[57] and that they are making an effort to be fair.[58] The element of trustworthiness is clearly intertwined with the other criteria. Voice in itself is not enough; authorities must also show that the voice is generally considered. An authority that is manifestly biased and non-neutral will have a hard time showing its trustworthiness.[59] Moreover, when authorities do not show respect for people's rights and concerns, this is hard to square with characteristics such as sincerely caring.

This criterion requires the capacity of empathy from judges[60] through an ability to act in the interests of the parties, taking their concerns at heart. Even when judges are not able to give a favourable outcome to one of the parties, they can still communicate that the concerns have been viewed, listened to and taken into account. An example of such an approach can be found in the case of *Pretty v United Kingdom*. Although the Court concludes that the applicant's claim concerning assisted suicide does not fall within the protection of Article 9, it observes at the same time that it 'does not doubt the firmness of the applicant's views',[61] which clearly shows respect towards the applicant's concerns.

In the next part, I extensively explore the Article 9 case law of the Court from a procedural fairness angle, using the previous four criteria as a guideline. Before going to the results of my analysis, I will first explain the methodology followed.

4. AN IN-DEPTH INTERDISCIPLINARY ANALYSIS OF FREEDOM OF RELIGION JURISPRUDENCE

A. Methodology

In this article, an interdisciplinary approach is not only included at the level of the theoretical framework which, as seen above, is influenced by social psychology research, but inter-disciplinarity also plays an important role at the level of the analytical methods used. This section will explain how the case law analysis for this article was undertaken, first by showing how the case law was selected and then by uncovering the main principles and techniques employed in the case law analysis.

(i) Selection of cases

The corpus of case law that has been analysed for this article includes those cases brought before the European Court of Human Rights under Article 9 of the ECHR

56 Tyler (2007), supra n 11 at 30; Tyler (2000), supra n 13 at 122.
57 Ibid.
58 Tyler (1988), supra n 12 at 129.
59 Hollander-Blumoff, supra n 32 at 136.
60 Corso, 'Should Empathy Play Any Role in the Interpretation of Constitutional Rights?' (2014) 27 *Ratio Juris* at 94–115. See also Tulkens, 'The European Convention on Human Rights and Church-State Relations: Pluralism v Pluralism' (2009) 30 *Cardozo Law Review* 30.
61 Application No 2346/02, Merits, 29 April 2002, at para 82.

from November 1998 to July 2014.[62] Both judgments and inadmissibility decisions[63] are included. In a first selection round, the cases declared inadmissible on procedural grounds such as non-exhaustion of domestic remedies or inadmissibility *ratione temporis*, were eliminated. Also the cases struck out of the list are left out. After the first elimination round, 442 cases were retained for a deeper analysis.[64]

(ii) Method of analysis

The analysis of the case law took place in two stages. In the first stage the case law was explored in an inductive way, inspired by 'grounded theory', a common method of qualitative analysis in the social sciences. In a second stage, the results were analysed specifically from a procedural fairness angle.

Central to grounded theory is the inductive approach, involving a bottom-up mindset where the theory emerges from the data[65] instead of starting from a hypothesis and then deductively turning to the data in search of illustrations or confirmations of the hypothesis.[66] The analysis is shaped through the process of coding.[67] This is a deconstructing process[68] in which key points are identified in the data and where segments of the data (in my case the Court's judgments and decisions) are categorized under several themes and subthemes that are formed and refined during the analysis.[69] For example, under the general theme of 'reasoning', one of the codes is '*Alternative*' and this code comprises several sub-codes such as '*Applicant had an alternative*' and '*Applicant could have found an alternative*'. These codes were not defined before the start of the analysis, but were created during the coding process where it was observed how the Court used the concept of 'alternative' in diverse ways in its reasoning.[70] The categorization of the case law already consists of analysis in itself, but the analysis also requires constant reflection and comparison during the process of coding.[71]

62 As the starting point, I chose 1 November 1998, the date on which the present Court commenced operation and where the dual system with the European Commission of Human Rights and the Court came to an end. The research for this article closed on 1 July 2014, the day on which judgment in the case of *S.A.S. v France*, supra n 5, was delivered.

63 This also includes the decisions of partial admissibility/inadmissibility, where the inadmissibility refers to the Article 9 claim.

64 The selection of cases is based on the Hudoc database. For Article 9, Hudoc generates 428 results in English and 425 results in French. Although many cases appear in both languages, this is not the case for all of them. Therefore, both languages are considered.

65 Initially, the theory was developed by Glaser and Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (2009) and has been refined by other authors, such as Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis* (2006) and Miles, Huberman and Saldaña, *Qualitative Data Analysis: A Methods Sourcebook* (2013).

66 Bernard, *Research Methods in Anthropology: Qualitative and Quantitative Approaches* (2006) at 493.

67 For this I used the qualitative analysis software program 'Nvivo'.

68 Mortelmans, *Kwalitatieve analyse met Nvivo* (2011) at 27.

69 For example, Saldana, *The Coding Manual for Qualitative Researchers* (2012) at 8; Charmaz, supra n 65.

70 See '*Religious applicant weighing less in the Court's scale*' section where these codes were used.

71 Researchers are encouraged to write these reflections down. This process in called 'memoing'. For example, Bazeley, *Qualitative Data Analysis: Practical Strategies* (2013) at 36.

The case law was approached[72] with the following questions: how is the Court approaching the applicant believer? How is the Court approaching the religious aspects of the case? How is the Court interpreting freedom of religion? Only in a second phase of the analysis was an explicit examination of the material was undertaken from the perspective of the procedural fairness criteria, on the basis of the codes and the reflections written down during the coding process.[73] In this stage it was explored where procedural flaws could be found and, accordingly, how the judgments might have been improved.

The combination of both the extensive selection of cases, which were examined in chronological order, and the openness of the method used, allowed the researcher to have a broader overview and gain a deeper understanding of the Court's Article 9 case law, as opposed to the approach of a selective reading of case law as a function of certain arguments. It was also helpful to detect procedural fairness flaws that are less obviously noticeable with a selective reading of the cases. With an examination of the case law limited by a procedural fairness focus, for example looking for signs of bias or disrespect, some of the observations made in the analysis below would probably not have seen the light.

Moreover, as the following analysis of the Article 9 case law will show, the procedural fairness criteria often appear in combination when procedural fairness flaws occur. Therefore, in what follows I choose to present my analysis on three levels. First, I explore the Court's decisions not to examine Article 9 claims ('Non-examination of Article 9 claims' section). Second, I look at how the Court approaches the applicant believer and his or her practice ('The Court's approach towards the religious believer' section). Third, I look more deeply into the reasoning of cases where the Court does proceed to the examination of Article 9 claims ('Religious applicant weighing less in the Court's scale' section).

B. Freedom of Religion Jurisprudence Viewed through a Procedural Fairness Lens

(i) Non-examination of Article 9 claims

The perception of procedural fairness depends, among other considerations, on people's expectation that they will be respected, meaning that their rights and claims will be taken seriously. An interesting question that then arises is how this relates to the situation in which the Court does not examine an applicant's Article 9 claim. In this part, I will explore the different situations in which the Court does not examine Article 9 claims from a procedural fairness perspective.

Two main types of situation can be discerned in which the Court decides not to examine an applicant's Article 9 claim on its merits. The first occurs at the start of

72 Some grounded theory experts submit that grounded theory requires that the researcher should approach the data with a 'pure' start. However, several researchers accept that grounded theory can also be conducted with a general framework or research question in mind. Charmaz formulates it as follows: 'There is a difference between an open mind and an empty head.' In my methodology I follow the latter approach. See, for example, Miles, Huberman and Saldaña, *Qualitative Data Analysis: A Methods Sourcebook* (2013) at 26–7; Charmaz, supra n 65.

73 However, during the first stage analysis when I came across obvious procedural justice flaws in the case law, I had already marked them in a separate category called [procedural justice].

the examination of a case (examination under another article alone) and the second after one part of the case has already been examined (no separate examination needed).

To start with, often the Court decides to examine a case only under another Convention article, even though Article 9 was also invoked. Mostly this has to do with the fact that the issue at stake does not fall within the scope of Article 9, but rather that of another Article such as Article 10 or Article 11. This is a purely technical matter which is not necessarily problematic in itself.

However, it becomes more complicated when the claim made by the applicant also contains an aspect related to religion. In the case of *Yildrim v Turkey*, for example, the applicant, the parent of a stillborn child, claimed that the refusal of the hospital to hand over the corpse of the baby for burial according to his religious rites violated both Articles 8 and 9. The Court decided to 'examine these complaints solely from the standpoint of Article 8 of the Convention'.[74] Putting aside the fact that the Court did not motivate why it would only examine the case in light of Article 8, it cannot be denied that burial rites are an important aspect of religious experience.[75] This can also be deduced from the case, in which the applicant not only asked to be united with his daughter, but also stressed that he wanted to bury her according to religious rites. Simply not examining the Article 9 claim neither acknowledged nor showed respect for this aspect of the applicant's concerns. The Court did the opposite, though, in *Hasan and Chaush v Bulgaria*, concerning the interference of the state in the appointment of a religious organization's leader. The Court stated that it does not consider that the case is better dealt with solely under Article 11 of the Convention, as suggested by the Government. Such an approach would take the applicants' complaints out of their context and disregard their substance.[76]

In other cases, the Court decides that no separate examination is needed when other articles have already been examined. Often it is concluded that the examination under Article 9 would lead to similar reasoning.[77] However, in some cases the Article 9 claim is different from the claims under other articles and still the Court does not examine it separately. In *Riera Blume v Spain*,[78] for example, a case concerning the deprivation of liberty and 'deprogramming' of members of a sect, the Court decided not to examine the case separately, observing that the applicants' detention was at the core of the complaints under consideration. Having held that it was arbitrary, and hence unlawful for the purposes of Article 5(1) of the Convention, the Court did not consider it necessary to undertake a separate examination of the case under Article 9.[79]

74 *Yildirim v Turkey* Application No 25327/02, Admissibility, 11 September 2007.

75 See, for example, the case of *Pannulo and Forte v France* Application No 37794/97, Admissibility, 23 November 1999, in which the Court recognizes the religious aspect of burial rites.

76 Application No 30985/96, Merits and just Satisfaction, 26 October 2000, at para 65.

77 For example, *Ulke v Turkey* Application No 39437/98, Merits and Just Satisfaction, 24 January 2006, at para 68; *Jedlickova v Czech Republic* Application No 32415/06 and 32216/07, Admissibility, 3 June 2008 at para 3.

78 *Riera Blume and Others v Spain* Application No 37680/97, Merits and Just Satisfaction, 14 October 1999.

79 Ibid. at para 38.

Another striking illustration is the case of *Kavakci v Turkey*.[80] This case contained several complaints, among which were an Article 9 complaint about not being allowed to wear a headscarf in parliament while having been democratically elected, and a complaint under Article 3 of Protocol 1 about the limitation of the applicant's political rights. Finding a violation under the second complaint, the Court decided not to examine the Article 9 complaint, even though this was a major issue for the applicant.[81]

Not examining complaints for the sole reason that a violation has been found under another (unrelated) article can be considered problematic from a procedural fairness perspective, since it leaves the applicants' concerns unanswered and communicates that this part of the complaint is less important. Although in the end the applicants may have won their case, it is not unthinkable, in light of the procedural fairness finding that outcome is not the only element that matters, that the unwillingness to examine some important aspects of the claim leaves the applicant with an unfulfilling victory.

(ii) The Court's approach towards the religious believer

One of the first things people notice when reading a case is who the applicant is and what he or she is complaining about. In freedom of religion cases this includes the applicant's religious background and practice. As the Court's description of these elements will shape the reader's first impression of the case, it is therefore important that the Court keeps procedural fairness in mind when describing these aspects of the case. In this section, I will argue that from a procedural fairness perspective the Court should remain as neutral as possible and should take the applicant's voice into account when describing the applicant and his or her religious practice.

Naming the religious applicant A detailed analysis of the case law reveals that the Court describes the applicant's religious background or affiliation in multiple ways.

A first prominent distinction can be observed in the perspective from which the Court describes this religious background. Often, the Court announces it as a simple fact in an abstract informative way, from an outsider's perspective, for example that the applicants 'are Christian'.[82] Sometimes, however, the Court incorporates an applicant's perspective. Examples are 'the applicant submits that he is a Christian'[83] and '[t]he applicant, who considers himself a member of the Muslim Turkish minority'.[84] In principle, these different approaches are not problematic in themselves. However, when distinct formulations are used in different cases, this may raise an issue of neutrality across cases. Consider, for example, the three following sentences:

A. the applicant is a Buddhist
B. the applicant considers himself a Buddhist
C. the applicant submits that he is a Buddhist

80 Application No 71907/01, Merits and Just Satisfaction, 5 April 2007.
81 See a detailed analysis of this case in Ouald Chaib, supra n 55.
82 *Z. and T. v United Kingdom* Application No 27034/05, Admissibility, 28 February 2006.
83 *Patrikeyev v Russia* Application No 68493/01, Admissibility, 21 September 2004.
84 For example, *Ouzoun v Greece* Application No 6 63976/00, Admissibility, 6 February 2003.

Read on their own, all three formulations seem convenient and neutral. But when read together, they can come across differently. Sentence A (outsider perspective) confirms the applicant's religious affiliation confidently, while B and C (applicant's perspective) reflect more reluctance, as if there is doubt about the applicant's religious conviction.

This perception can be avoided if one of the formulas is consistently used. Although both approaches are adequate and neutral when used consistently, in my view, literally including the applicant's self-identification through his or her own voice, as in C, brings additional benefits. The approach of sentence C guarantees that the formulation used by the Court is an exact reflection of the applicant's voice, which guarantees the Court's neutrality in the matter.

A second interesting finding concerns the way the applicant is positioned in relation to his or her religious group or community. The applicant believer is sometimes described with reference to his or her community, for example as a 'member of the Jehovah's Witnesses in Austria',[85] while at other times, the applicant is represented as an individual believer, for example '[t]he applicants are Jehovah's Witnesses'.[86] Here also both formulations can be considered acceptable as long as they reflect the applicant's voice accurately in how he described him in relation to the religious community. In fact, some people consider themselves to be believers without necessarily identifying themselves with a community, or what Grace Davie calls 'believing without belonging'.[87] Besides ensuring an accurate representation of the applicant's voice, the use of an insider formulation is also a helpful tool for ensuring the Court's neutrality in personal religious conviction matters. Examples of this approach can be found in the case of *Sinan Isik v Turkey*, where the Court notes that the applicant 'stated that he was a member of the Alevi religious community'.[88]

A third noteworthy observation concerns the use of particular adjectives, such as *practicing* and *active* when describing the applicant believer, or the use of expressions such as *deeply* or *strong* to describe the way he believes. For example:

> Mr Harry Hammond . . . was an evangelical Christian . . .. His religious beliefs were deeply held and he had a desire to convert others to his way of thinking.[89]

And:

> The first applicant . . . is a practising Coptic Christian.[90]

It is not clear whether these expressions were used by the applicants in their submissions or whether they were added by the Court.[91]

85 *Bayatyan v Armenia* Application No 23459/03, Merits and Just Satisfaction, 7 July 2011, at para 111.

86 *Kuznetsov and Others v Russia*, Application No 184/02, 9 September 2004, at para 7.

87 Davie, 'From Believing without Belonging to Vicarious Religion. Understanding the Patterns of Religion in Modern Europe' in Pollack and Olson (eds), *The Role of Religion in Modern Societies* (2008).

88 Application No 21924/05, Merits, 2 February 2010, at para 39.

89 *Fairfield and Others v United Kingdom* Application No 24790/04, Admissibility, 8 March 2005.

90 *Eweida and Others v United Kingdom* Applications Nos 48420/10 et al., Merits, 15 January 2013, at para 9.

91 In the first case mentioned above, the Court introduced the applicant by mentioning that '[t]he facts of the case, as submitted by the applicants, may be summarised as follows'. In this sense it suggests that the

Obviously, when these are not the applicants' words the Court cannot, just by deduction, add its interpretation to the case, since the level of practice or whether someone holds strong beliefs is a subjective matter which is difficult to objectively assess. Some may, for example, practice regularly and others only occasionally.[92]

Even if the presentation of the facts is based on the submission, the additional question arises whether the Court consistently mentions the reference to, for example, 'practicing' in all cases where the applicant defines himself as such in his application. If the Court only selectively refers to whether or not an applicant is practicing (when mentioned by the applicant) the Court risks creating a perception of bias.[93] It cannot be denied that information about a (positive) level of practice or the fact that the applicant's beliefs are deeply held impacts the impression about the applicant in a positive way, which can be problematic where practice is inconsistent. If, however, the Court consistently reproduces this kind of description when mentioned by applicants, there is less of a problem. Nonetheless, to avoid any doubt about the neutrality of the Court and to ensure an accurate representation of the applicant's voice, it should preferably be clear from the judgment that these descriptions come from the applicant. The easiest way to achieve this is through a phrase such as 'the applicant states that he is a practicing Christian'.

Naming the applicant's religious practice The Court has repeated time and again that Article 9 'does not protect every act motivated or inspired by a religion or belief'.[94] Nevertheless, the criteria it uses to determine what it considers a manifestation of religion are not very clear.[95] For a long time the criterion seemed to be that an applicant should prove that a certain practice was required by his religion,[96] but in other cases the Court applied a subjective approach in which the applicant's experience was centrally placed.[97] In more recent cases, the Court has broadened its viewpoint by only requiring an intimate link to the religion or belief.[98]

In this part I will identify how the Court defines religious practices, in particular focusing on the perspective from which it does that, and I will analyse from a procedural fairness angle what are the benefits and pitfalls of the different approaches.

applicant formulated the facts in this way, although one cannot be certain since it is the Court which 'summarises'. In the second example, nothing about who formulated the facts is mentioned.

92 Cipriani, 'What can the Social Sciences Teach Us About the Relationships Between Cultural Identity, Religious Identity, and Religious Freedom?' in Glendon and Hans (eds), *Universal Rights in a World of Diversity The Case of Religious Freedom* (2011) 477 at 479, with reference to Davie, *Religion in Britain Since 1945: Believing Without Belonging* (1994).

93 Remarkably, the majority of cases where a reference is made to 'practicing' concern Christians (I conducted a search with the terms practicing and its equivalent in French, *pratiquant*), the results showed one case concerning a Muslim, two cases concerning Sikhs, one Buddhist and eight cases concerning Christians (one Catholic, the four applicants in *Eweida*, two Jehovah's Witnesses, two Orthodox Christians, one belonging to another Church and one identified in general as a Christian).

94 See, for example, *S.A.S. v France*, supra n 5 at para 125.

95 Rorive, 'Religious Symbols in the Public Space: In Search of a European Answer' (2009) 30 *Cardozo Law Review* 2674.

96 Ibid.; Evans, *Freedom of Religion Under the European Convention on Human Rights* (2001) at 115.

97 Rorive, ibid. at 2674.

98 *S.A.S. v France*, supra n 5 at para 55; *Eweida and Others v United Kingdom*, supra n at para 81.

In its representation of the manifestation of religion, the Court distinctively uses an insider and an outsider perspective.

With the insider or subjective approach, the Court puts the applicant's voice at the forefront. It is the applicant's view that determines whether a certain behaviour is a manifestation of religion. In *Ahmet Arslan v Turkey*,[99] for example, a case concerning people wearing religious apparel in the public space, the Court stated that 'the applicants were members of a religious group named Aczimendi and they considered that their religion required them to dress in this way'.[100] As such, the Court showed respect for the applicants' agency in defining their own religious practice and through this formulation reflected the applicant's voice in the judgment. Moreover, this approach takes away the risk of not being neutral since by repeating how a certain practice is considered by an applicant, the Court does not venture into theological issues and avoids expressing value judgments on the particular practice.

Although this approach at first sight seems procedurally fair, an important qualification needs to be expressed. An insider approach will only truly guarantee neutrality when used consistently across cases. When we look, for example, at cases concerning the wearing of religious apparel, it is interesting to see that all cases involving Muslims use the insider approach when defining the religious practice.[101] In *Kurtulmus v Turkey*, for example, the Court stated that it 'will proceed on the basis that the rules . . . constituted interference with her right to manifest her religion, as she considered that Muslim women have a religious duty to wear the Islamic headscarf'.[102] This reasoning was inspired by the judgment in *Leyla Sahin v Turkey*, in which the Court found that the applicant's 'decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief' because she 'said that, by wearing the headscarf, she was obeying a religious precept' and the Court did not want to make statements about 'whether such decisions are in every case taken to fulfill a religious duty'.[103] Although the applicants' agency is given a prominent place in these judgments, the formulation used communicates, as Evans argues, a certain reluctance to acknowledge 'the value and religious importance' of the wearing of a headscarf,[104] as if the Court is not entirely convinced it is required by Islam.[105] This finding is even more apparent when compared to cases concerning the Sikh turban, in which the Court considers wearing a turban to be a manifestation of religion since 'the Sikh religion indeed imposes on [male Sikhs] the wearing of a turban in all circumstances'.[106] Seen in this light, the insider approach used in some cases does not

99 Application No 23462/94, Merits and Just Satisfaction, 8 July 1999.

100 Ibid. at para 35 (translated from French by the author).

101 These cases concerned application numbers 42393/98, 44774/98, 8165/03, 26625/02, 65500/01, 9907/02, 41296/04, 37829/05, 71907/01, 15585/06, 27058/05, 31645/04, 43563/08, 14308/08, 18527/08, 29134/08 and 23462/94.

102 Application No 65500/01, Admissibility, 24 January 2006.

103 *Leyla Sahin v Turkey*, supra n 41.

104 Evans, 'The "Islamic Scarf" in the European Court of Human Rights' (2006) 7 *Melbourne Journal of International Law* 52 at 55–6.

105 See also Krivenko, 'The Islamic Veil and its Discontents: How Do They Undermine Gender Equality' (2012) 7 *Religion and Human Rights* 11 at 18–19, where the author notes that 'the ECtHR takes part in the debate on the veil instead of adopting a neutral and objective attitude'.

106 *Ranjit Singh v France* Application No 30 27561/08, Admissibility, 30 June 2009.

necessarily guarantee neutrality, especially because of the inconsistent approach of the Court.

Nor, however, is the outsider approach unproblematic. When an outsider approach is used, the applicant's voice is not included when describing a manifestation of religion. The most obvious example is the one concerning the Sikh turban already mentioned above.[107] Another illustration can be found in *Kuznetsov and Others v Russia* where the Court stated:

> It is undeniable that the collective study and discussion of religious texts by the members of the religious group of Jehovah's Witnesses was a recognised form of manifestation of their religion in worship and teaching.[108]

Although the claims made by the applicants in these cases are individual ones, the Court makes general statements about what a religion requires or recognizes as a manifestation. Not only is the lack of participation problematic from a procedural fairness perspective, but also the fact that by making this kind of generalizing statement the Court enters into the theological field.[109] This approach inherently contains a risk of excluding practices that are less well known, whether from less familiar religions or from minority or dissident voices within religions, and it neglects the diversity of interpretation that is present within them.[110] Potential future applicants who represent minority voices within a religion might feel less inclined to go to a Court that interprets their religion in terms of the majority interpretation.

The problematic nature of this approach becomes clearer in cases in which the Court, from an outsider perspective, decides that a certain practice is *not* required by a religion. In *Jones v United Kingdom*,[111] for example, a father complained about the fact that he was not allowed to incorporate a photograph in the stone on his child's grave. The Court rejected the claim '*ratione materiae*' stating:

> [I]t is irrelevant for this purpose that the church of which the applicant is a member permitted such photographs, for *it cannot be argued* that the applicant's beliefs *required a photograph* on the memorial or that *he could not properly pursue his religion* and worship without permission for such a photograph being given.[112]

Here the Court not only made a statement about what the applicant's belief required, it also decided for the applicant whether or not he could 'properly pursue'

107 The same approach can be found in *Jasvir Singh v France* Application No 25463/08, Admissibility, 30 June 2009; *Phull v France* Application No 35753/03, Admissibility, 11 January 2005. Yet in *Mann Singh v France* Application No 24479/07, Admissibility, 13 November 2008, the Court uses an insider approach.

108 Application No 184/02, Merits, 9 September 2004, at para 57.

109 Harris et al., supra n 40.

110 See also Evans, supra n 96 at 125; Edge, 'The European Court of Human Rights and Religious Rights' (1998) 47 *International and Comparative Law Quarterly* 680 at 687.

111 Application No 42639/04, Admissibility, 13 September 2005.

112 Ibid. (emphasis added).

his religion without that particular practice. Hence, in this case the Court clearly failed the representation and neutrality test and did not show respect for the applicant's claim.

Another illustration can be found in *Kovalkovs v Latvia*,[113] a case concerning a prisoner following the Hare Krishna movement, where the Court considered that

> restricting the list of items permitted for storage in prison cells by excluding items (such as incense sticks) *which are not essential for manifesting a prisoner's religion* is a proportionate response to the necessity to protect the rights and freedoms of others.[114]

It was also decided for the applicant what elements were essential for manifesting his religion. However, the Court's conclusion was based on an expert opinion gained from a religious authority within the Hare Krishna movement.[115]

Expert evidence might make the Court's reasoning more objective, since it is not the Court that makes the theological assessments. However, basing the assessment solely on the advice of a religious organization might not solve the problem of possible exclusion of minority voices.[116] There might be divergent interpretations within one religion and the authorities' interpretation would logically be the dominant one. Hence, the choice of one particular authority might inherently contain bias.

From this analysis it follows that, from a procedural fairness perspective, an insider approach, if used consistently, should be favoured. As argued by Evans, this approach is to be favoured over the Court determining what is or is not required by a religion, especially so as to guarantee neutrality towards minority voices.[117] In its recent *S.A.S.* judgment, the Court applied this to the wearing of the face veil in stating, referring to the principles set in *Eweida*: 'It cannot therefore be required of the applicant either to prove that she is a practising Muslim or to show that it is her faith which obliges her to wear the full-face veil. Her statements suffice in this connection.'[118]

(iii) Religious applicant weighing less in the Court's scale

While the previous section focused on the approach of the Court towards the religious background and practices of the applicant, this section will go more deeply into the Court's reasoning and aims at uncovering more structural problematic aspects from a procedural fairness perspective. First, it will show how the Court sometimes fails to recognize the issue at stake and, secondly, it will examine procedural fairness flaws at the level of balancing.

113 Application No 35021/05, Merits, 31 January 2012.
114 Ibid. at para 68.
115 In particular the Directorate of Religious Affairs by members of the Rīga Vaishnavist congregation.
116 *Cha'are Shalom Ve Tsedek v France* Application No 27417/95, Merits, 27 June 2000.
117 Evans, supra n 96 at 125.
118 *S.A.S. v France*, supra n 5 at para 56.

Non-acknowledgment of applicant's religious concerns People want to be taken seriously. Therefore, they expect judges to show care for their personal concerns[119] and to genuinely consider their arguments. This involves in the first place a full recognition of the issue at stake. However, the Court regularly fails to do so, as I will reveal in this part.

'It does not concern the applicant's religion or religious practice'. In multiple cases, the Court states that it is not the applicant's religion or religious belief that forms the basis of certain restrictive measures, but broader principles such as secularism, the protection of public order, and the rights of others, or even the conduct of the applicant him/herself. For example, in *Dahlab v Switzerland*,[120] a case concerning a prohibition on teachers wearing a headscarf, the Court stated that the decision in issue was based on 'the requirements of protecting the rights and freedoms of others and preserving public order and safety' and not on any objections to the applicant's religious beliefs.[121] Similarly, in *Kurtulmus v Turkey*,[122] this time concerning a veiled university professor who was prohibited from teaching, the Court found that secularism was 'the paramount consideration underpinning the rules'[123] and not 'objections to the way a person dresses as a result of his or her religious beliefs'.[124]

The Court seems to be missing the point here, since the question at stake is not whether the state has objections to the applicants' religion or religious practice, but the limitation the regulations place upon the applicants' right. Hence, by focusing on the motives of the authorities, the Court is shifting attention away from the applicants' concerns. At the same time, the Court is also denying or at least minimizing the issue at stake, since the applicants are in fact undeniably limited because of their religious clothing. This could be compared to saying that someone is not fired because of her political conviction, but because of the neutrality rules of her employer. Both concern the same issue, and only the perspective from which the issue is described is different. This kind of reasoning contains a lack of recognition of the applicant's concern and does not give the impression that the Court is considering all the interests at stake equally.

A striking illustration can also be found in a case concerning the discharge of a military officer. The Court similarly reasoned that the decision was based not on the applicant's religious beliefs and opinions, nor on the fact that his wife or relatives wore an Islamic scarf, nor on the manner in which he performed his religious duties, but on his conduct and activities in breach of military discipline and the principle of secularism.[125]

119 Tyler and Mitchell, 'Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights' (1993) 43 *Duke Law Journal* 703 at 786.

120 Supra n 49 at 13.

121 Ibid. See also *Dogru v France* Application No 27058/05, Merits, 4 December 2008; *Kervanci v France* Application No 31645/04, Merits, 14 December 2008, at para 76; *Bayrak v France* Application No 14308/08, Admissibility, 30 June 2009; *Aktas v France* Application No 43563/08, Admissibility, Admissibility, 30 June 2009; *Gamaleddyn v France* Application No 18527/08, Admissibility, 30 June 2009; *Jasvir Singh v France*, supra n 107 and *Ranjit Singh v France*, supra n 106.

122 Supra n 102.

123 Ibid.

124 Ibid.

125 *Acarca v Turkey* Application No 45823/99, Admissibility, 3 October 2002 at A.2.

At the same time the State implicitly acknowledged that these elements were in fact part of the reasons leading to the applicant's discharge.[126] This raises questions about the seriousness with which the Court approached this (and other similar) cases.[127]

In other cases the Court even puts the responsibility for the rights restrictive measures on the applicant. In *Dogru v France*,[128] for example, the Court accepted that the expulsion of girls from school for wearing a headscarf was merely the consequence of the applicant's refusal to comply with the rules applicable on the school premises—of which she had been properly informed—and not of her religious convictions, as she alleged.[129]

Here also the Court did not acknowledge what the real issue at stake was and, even worse, blamed the applicant for the limitations on her own rights, while it was exactly about this limitation that she had complained.[130] This kind of reasoning can hardly be perceived as procedurally fair; it shows a lack of acknowledgement and understanding of an applicant's concerns and interests and does not give the impression that his or her rights are taken seriously. Moreover, the main perspective adopted here is that of the authorities implementing the rules rather than that of the applicant whose rights are limited because of the rules.

'The applicant can practice his religion in an alternative way'. The Court sometimes refers in its reasoning to the existence of alternative ways of manifesting one's religion. The proposed alternatives can, however, not always be considered real alternatives. In a first kind of reasoning the Court proposes (what I call) *'fake alternatives' to manifesting religion*. Two categories of fake alternatives to manifesting religion can be discerned.

A first category of fake alternatives to manifesting religion can be found in the Court's reference to *non-comparable alternatives*. When applicants have at their disposal alternatives for manifesting their religion, it is reasonable that the Court takes them into account in its analysis. However, the Court should be careful that the suggested alternatives are at least comparable to the way the applicant has to or wants to manifest his religion.

Take, for example, the case of *Austrianu v Romania*,[131] in which the applicant complained about the confiscation of religious cassettes and a cassette player in prison. The prison authorities admitted only to confiscating the player and claimed to have offered Austrianu the opportunity to listen to his cassettes on a player provided by the prison. Because of this proposed solution, the Court found no

126 The State literally argued that these elements had not been taken as the sole basis for his discharge from the army: see ibid. at A.1.a.

127 See infra for a more detailed analysis of the cases against Turkey concerning discharges from the army.

128 Supra n 121.

129 Ibid. This reasoning is comparable with cases concerning religious accommodation claims in the workplace where the Commission reasoned that employees who were not hired or fired because they asked for work schedules adapted to their religious needs were not fired because of their religion, but because of breach of contract. For example, *X v United Kingdom* Application No 8160/78, Admissibility, 12 March 1981.

130 See an opposite example in *Pitkevitch v Russia* Application No 47936/99, Admissibility, 8 February 2001, at para 2, where the Court noted 'that the applicant was dismissed for her specific activities while performing her judicial functions, whereby she expressed her religious views. In this regard there has been an interference with the applicant's freedom of religion'.

131 Application No 16117/02, Merits and Just Satisfaction, 12 February 2013.

appearance of a violation and also noted that the applicant 'had been allowed to attend religious seminars, and . . . could read religious books'.[132] It is perfectly understandable that the Court referred to the available alternative cassette player; the second part of the reasoning is, however, problematic.[133] The Court seems to have suggested that these religious practices can be considered substitutes for listening to the cassettes, especially since the applicant did not complain about not being able to attend religious seminars or read religious books.[134] The Court was deciding for the applicant how he could practice his religion and was, moreover, comparing non-comparable alternatives.

Another illustration of the reference to non-comparable alternatives can be found in *Indelicato v Italy*,[135] in which a detainee falling under a strict detention regime complained about not being allowed to attend Mass. The Court reasoned that since the applicant could follow the Mass from his prison cell (by hearing it), 'he was not deprived of the possibility to practice his religion'.[136] It is perfectly defensible that prisoners' rights can be limited for security reasons; the problematic aspect of this reasoning is, however, that the Court gave the impression that listening to the Mass from a cell was a fully comparable alternative to attending the Mass in person, which is an embellished representation of reality. The fact that the Court considered this non-comparable alternative as proof that the applicant was not prevented from practicing his religion showed very little sensitivity towards his concerns and in fact denied the real issue at stake.

In a second category, the Court suggests that the applicant turn to an alternative way of manifesting his or her religion, either by adapting to the restrictive context or by moving the manifestation to another context. This is the case when the Court argues that an applicant is *free either inside or outside the limits imposed* to manifest his religion. A first illustration can be found in the reasoning that people are free within some limits to practice their religion. This reasoning can be found in numerous cases against Turkey concerning the discharge of military officers[137] and also in *Leyla Sahin v Turkey*, where the Court stated that it is common ground that practicing Muslim students in Turkish universities are free, within the limits imposed by the constraints of educational organization, to manifest their religion in accordance with habitual forms of Muslim observance.[138]

This approach did not show a genuine understanding of the applicant in the *Leyla Sahin* case, especially because the limits imposed were exactly what she was complaining of as they infringed her rights. It is needless also to explain that 'being free within the limits imposed' contains a contradiction. Moreover, by stating that Sahin

132 Ibid. at para 105.

133 Peroni, 'Deconstructing "Legal" Religion in Strasbourg' (2014) 3 *Oxford Journal of Law and Religion* 235 at 243.

134 Supra n 131 at para 98.

135 Application No 31143/96, Admissibility, 6 July 2000.

136 Ibid. (translation by the author).

137 In these cases, the Court consistently states that 'it is not disputed that members of the armed forces (army officers and non-commissioned officers) can perform their religious duties within the limits imposed by the requirements of military life': see *Aksoy v Turkey* Application No 45376/99, Admissibility, 3 October 2002. See infra for further discussion of these cases.

138 Supra n 41.

could manifest her religion 'in accordance with habitual forms of Muslim observance', the Court was crossing the neutrality line. The Court was not only saying what the applicant could do as a practice (habitual forms of observance), it indirectly also said that wearing a headscarf did not constitute a habitual form of Muslim observance, which brought the Court into the theological domain.

In a case against France, *Pichon and Sajous v France*,[139] concerning religious pharmacists who refused to sell anti-contraceptive medicines, the Court applied similar reasoning:

> [T]he 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.[140]

Here also the Court limited the context in which the applicants could exercise their religion, only this time the Court said that they were free 'outside' the limits imposed on their work context to practice their religion.

Although the conclusion of the Court is perfectly defensible, it could have reached it in a more procedurally fair way, in the first place with more respect towards the applicants' convictions and at least acknowledging their concerns. The way the Court formulated its argument seems as if it did not perceive the interference with the applicants' freedom of religion.[141] The Court's statement that they could 'manifest those beliefs in many ways outside the professional sphere' is painfully ignorant, first, because this would imply that freedom of religion does not apply to the professional sphere, which is not correct if the applicant's right was to be taken seriously, and second, because the alternative suggested here by the Court did not show understanding of the applicants' religious praxis or that their arguments had been truly listened to.

Both cases deal with religion as a set of independent rules from which one can easily cherry-pick the rules one wants to follow and not as a way of life applicable in and outside the private sphere.[142] If the claims of the applicants had been listened to carefully, the Court should have been able to take in the following inescapable message: when removing her headscarf at the university entrance, Sahin would also have had to put aside her religious principles, while Pichon and Sajou would have struggled with leaving their principles aside whenever they put their lab coats on. Acknowledgment of these concerns is, however, missing in the Court's decisions.

Next to proposing fake alternatives to manifesting religion, problematic reasoning can also be found where the Court proposes fake alternatives to *securing the freedom of religion*. Religious accommodation claims in daily life settings such as work or

139 Application No 49853/99, Admissibility, 2 October 2001.

140 Ibid.

141 Henrard, 'A Critical Appraisal of the Margin of Appreciation Left to States pertaining to "church-state relations" under the Jurisprudence of the European Court of Human Rights' in Alidadi, Foblets and Vrielink (eds), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace* (2012) at 59.

142 Danchin, supra n 10 at 13.

school often uncover a dilemma where people are compelled to choose between exercising their religion and being able to participate fully in daily life activity.[143]

This dilemma, if truly understood, is not always fully recognized by the Court, as in *Sessa v Italy*.[144] This case concerned a Jewish practicing lawyer requesting an adjournment of the hearing of his client, which was scheduled on a Jewish religious holiday. After the domestic court declined his request, he chose to celebrate his religious holiday and to not attend the hearing. This choice led to the Court's argument that 'first, it is not contested that the applicant was able to fulfill his religious duties',[145] insinuating that no interference with his right took place. Next, the Court stated that the applicant could have fulfilled his professional duties by finding a replacement for the hearing. There are two things going on in this reasoning. First, the Court represented the fact that the applicant celebrated his holiday as a fully free choice, while the applicant was complaining precisely about being compelled to make professional sacrifices if he wanted to fully practice his religion. Second, the Court referred to finding a replacement as a logical alternative, while having to look for alternatives was precisely part of the applicant's complaint. Hence, the Court denied or at least did not show insight into the underlying issue at stake.

The same denial can be found in French cases concerning bans on the wearing of religious signs in schools, in which the Court found that 'the applicants' religious convictions were fully taken into account' since they were able to continue their schooling through distance learning education.[146] Here also the Court overlooked the fact that the applicants followed distance education because they were compelled to do so if they wanted to practice their religion. This is exactly the issue they brought under the Court's scrutiny. The fact that the applicants proposed an alternative through the wearing of an adapted form of head covering was, however, not taken into account and left to the appreciation of the state.

Homeschooling and finding someone to replace you at work seems to be the alternative the Court favours, while, because of the sacrifices they involve, they cannot really be considered alternatives for the enjoyment of the applicants' rights. A procedurally fair assessment should at least involve a genuine and deep balancing between all parties' interests instead of *a priori* undermining the claim by denying the issue at stake. This is a matter of the four procedural fairness criteria. It involves a genuine consideration of the applicants' voices, equal treatment of all parties and respect and care for the applicants' claims and rights. As will be disclosed in the next part, however, the Court regularly falls short with respect to this balancing principle.

No balancing At the centre of people's perception of fairness lies the question whether authorities are trustworthy.[147] People assess whether judges make a genuine effort to be fair in their case and to what extent they take the several interests into account. Balancing can therefore be considered an important determinant of

143 See also Seglow, 'Theories of Religious Exemptions' in Calder and Ceva (eds), *Diversity in Europe. Dilemmas of Differential Treatment in Theory and Practice* (2011) 52 at 55.

144 Application No 28790/08, Merits and Just Satisfaction, 3 April 2012.

145 Ibid. (translation from French by the author).

146 Supra n 106 and n 107.

147 Supra 'Trustworthiness' section.

perceptions of the trustworthiness of the Court. In fact, balancing is inherently contained in the proportionality analysis prescribed by Article 9. In this section, I will explore from a procedural fairness perspective three examples of how the Court fails in this balancing exercise. A first example refers to cases in which the Court does not motivate or explain its decision. In a second kind of reasoning, it will be criticized how the Court limits itself to reproducing the perspective of the State and as such neglecting the interests of the applicant. A third problematic kind of reasoning refers to cases in which the Court goes no further in its reasoning than to refer to previous case law.

No motivation In several cases, the Court finds no appearance of a violation and concludes that the claim is manifestly ill-founded. This occurred, for example, in *E.M. and Others v Romania*,[148] where the relatives of a deceased man complained that, because doctors had concealed his medical problems, he had been prevented from seeing a priest before his death and from obtaining a blessing of his civil marriage with his wife. The Court declared this Article 9 claim inadmissible, stating that in the light of all the material in its possession, and in so far as the matters complained of are within its competence, it finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.[149]

No additional motivation was provided, even though, on first sight, this claim contained an Article 9 aspect. The fact that the Court did not even explain why it considered the claim manifestly ill-founded did not show much respect for the applicants. Did the Court even examine the claim? The standard formulation used here suggests the opposite. Or did it consider it sufficient to examine the case under their main Article 2 complaint concerning the death of their relative as such? Or did the Court have legitimate reasons to come to this conclusion? If so, what were these reasons? Transparent motivation would give a better procedural fairness impression, namely that the claim was genuinely taken into account, especially when a religion related claim is made in the case.

The same line of reasoning can also be found in cases concerning religious claims by prisoners, especially in cases where prisoners ask to see a priest or to attend a religious service in prison.[150] This kind of claim is clearly taken less seriously than other prisoners' accommodation claims, such as those concerning dietary requirements,[151] where the Court undertakes a thorough balancing exercise of the several interests at stake which is in strong contrast with the unmotivated (non-)reasoning that 'no

148 Application No 20192/07, Admissibility, 12 June 2012.

149 Ibid. at para 47. The case is declared admissible under Article 2 only.

150 *Pylnev v Russia* Application No 3038/03, Admissibility, 9 February 2010; *Sevastyanov v Russia* Application No 75911/01, Admissibility, 14 October 2010; *Lawniczak v Poland* Application No 22857/07, Admissibility, 23 October 2012; *Enache v Romania* Application No 16986/12, Admissibility, 5 February 2013; *Glinski v Poland* Application No 59739/08, Admissibility, 11 February 2014.

151 *Vartic v Romania (No 2)* Application No 14150/08, Merits and Just Satisfaction, 17 December 2013; *Jakóbski v Poland* Application No 18429/06, Merits and Just Satisfaction, 7 December 2010.

appearance of a violation can be found'.[152] Although the prison context may legitimately require a limitation of people's rights, the Court should at least examine whether these limitations are legitimate in a particular case, or at the very least explain why in the Court's view there is no appearance of a violation. The opposite does not give the impression that the Court cares about these claims.

Reproducing the perspective of the state No balancing takes place either in cases where the Court in its reasoning mainly relies on the perspective and argumentation of one party, *in casu*, the state. Between 2001 and 2004, the Court issued a series of decisions concerning Turkish military officers' discharge from the army because of their convictions.[153] They allegedly held fundamentalist ideologies and some of their wives were wearing a headscarf, which was apparently a problem for the military authorities. It is striking to see how lightly the Court went over all these cases. In more than 60 cases, the Court used the same reasoning no matter what the facts or the applicants' arguments were. In its reasoning, the Court consistently referred to the decision taken by the 'commission of nine military officials', to the restrictive context of the army, and to the fact that the applicants had by their own free will joined the military. The Court did not require proof of the allegations made by the authorities even though sometimes they were strongly refuted with proof by the applicants.[154] Neither did it make an effort to examine whether the reasons invoked for the discharge were compatible with the Convention; instead, the Court blindly trusted the contested decisions made by the military bodies.

Another illustration of this one-sided approach can be found in the famous cases concerning the prohibition of religious signs in France, in which the Court borrowed the state's lens of secularism, through which it examined the cases. In my opinion, this can most problematically be observed in *Dogru* and *Kervanci*.[155] Although these cases concerned not general school bans on the wearing of religious signs, but bans on wearing them in sport classes, mainly because of safety reasons, as argued by the state, the Court extensively relied on the principle of secularism in order to legitimize

152 For example, *Enache v Romania* Application No 16986/12, Admissibility, 5 February 2013; *Glinski v Poland*, supra n 150; *Pylnev v Russia*, supra n 150. See *a contrario Kuznetsov and Others v Russia*, Application No 184/02, Merits, 9 September 2004, where the Court accepted an interference (nevertheless it was found not to be prescribed by law).

153 One case with application No 31876/96 issued on 11 September 2001; 15 cases with application numbers 37960/97; 32322/96; 35081/97; 36196/97; 32359/96; 36198/97; 36200/97; 38603/97; 35069/97; 32443/96; 31990/96; 36594/97; 36595/97; 38601/97 and 38592/97 on 9 October 2001; nine cases with application numbers 36193/97; 38918/97; 32323/96; 34537/97; 38920/97; 35829/97; 35976/97; 35856/97; 38930/97 on 5 March 2002; one case with Application No. 39071/97 on 4 May 2002; three cases with application numbers 38385/97; 39068/97; 39070/97 on 4 June 2002; eight cases with application numbers 39443/98; 39334/98; 39332/98; 39333/98; 39323/98; 39336/98; 39337/98 and 39331/98 issued on 9 July 2002; 16 cases with application numbers 45823/99; 45376/99; 48718/99; 45631/99; 45373/99; 45378/99, 42788/98, 47503/99, 46643/99, 42137/98, 45627/99, 44199/98, 45555/99, 39682/98, 39826/98, 47500/99 issued on 3 October 2002; one case with application number 45624/99 issued on 6 February 2003; and one case with application number 47491/99 issued on 8 July 2004.

154 See, for example, *H.K. v Turkey* Application No 32443/96, Admissibility, 9 October 2001; *Demir v Turkey* Application No 32323/96, Admissibility, 5 March 2002.

155 Supra n 121.

those restrictions. The applicants' side was not considered and their arguments, among which were a willingness to find alternatives, were not taken into account, as if the decision had already been taken before the case had been really well considered.

Referral to previous case law In other cases, a lack of balancing can be found in the fact that the Court limits its reasoning to a reference to previous case law. Consider, for example, the case of *Karaduman v Turkey*,[156] in which a teacher from an Imam Hatip school was compelled to remove her headscarf during class. The Court's decision consisted of a reference to earlier cases, such as *Dahlab v Switzerland*[157] (concerning a primary school teacher in Switzerland) and *Kurtulmus v Turkey*[158] (a University professor in Turkey), but did not take into account that Mrs Karaduman was a teacher of religion in a school with a religious philosophy. As such, the factual differences should have led to different considerations in a proportionality analysis, namely the fact that the circumstances for a religious class teacher are different from those for a general teacher. Nevertheless, the Court did not take any of the arguments, concerns and rights of the applicant into account.

The same can be argued concerning cases in which religious signs were seen as a security problem. In *Phull v France*,[159] a case concerning the security check at airports, the Court only referred to *X. v United Kingdom*,[160] a case involving a Sikh complaining about the obligation to wear a motor helmet. Yet, while the rule underpinning the restriction on wearing a helmet aimed at protecting the life and health of individual motorcyclists, the security check at airports had a broader aim of public safety. Also, Mr Phull made very specific arguments, such as the proposal of alternatives to the removal of the turban at the security gate, which were not taken into account.[161]

A more recent example is the case of *Franklinbeentjes and Cefluluz da Floresta v The Netherlands*.[162] Here, the Court was confronted with a complaint about the confiscation of forbidden products containing drugs, which were used for religious rituals by members of a religious group. Instead of balancing the several interests at stake, the Court mentioned the legislation which forbade keeping such products and referred to earlier case law where health was accepted as one of the legitimate aims able to limit the freedom of religion. Although it is very understandable that these products are forbidden and confiscated, the Court could at least have acknowledged the limitation of the applicants' rights, next to explaining why the confiscation did not violate the Convention. Instead, the Court chose to ignore the applicants' side in the case and no balancing took place.

156 Application No 41296/04, Admissibility, 3 April 2007.
157 Supra n 49 at 13.
158 Supra n 102.
159 Application No 35753/03, Admissibility, 11 January 2005.
160 Supra n 129.
161 Ouald Chaib, 'Suku Phull v France rewritten from a Procedural Justice perspective' in Brems (ed.), *Diversity and European Human Rights* (2013) 218.
162 Application No 28167/07, Admissibility, 6 May 2014.

It is not uncommon that the Court refers to previous case law, for example, to reiterate its general principles; even more, this is a sign of consistency across time. However, this reference should not be considered a substitute for reasoning in another case which has its own particularities. Every individual claim should be taken seriously, which also implies that it merits its own assessment by the Court.

5. CONCLUSION

This article aimed to explore procedural fairness as a standard of inclusion in the freedom of religion case law of the Strasbourg Court. It did so by building a normative bridge between social psychology research and human rights law through the application of the concept of procedural fairness to Article 9 case law of the Strasbourg Court. As the psychology research convincingly shows, doing justice is not only about reaching good and fair decisions at a substantive level, it is also about doing so in a way that treats people fairly.

In my extensive study of the Article 9 case law, I uncovered procedural fairness flaws and made suggestions for improvement at three levels. First, I argued that the decision not to examine Article 9 claims can sometimes in itself be problematic from a procedural fairness perspective when it does not show sufficient care and respect for the applicants' rights and concerns. Secondly, I demonstrated how some aspects of the Court's approach towards religious applicants and their practices can fall short in accurately representing applicants' convictions. I also demonstrated how the Court is taking risks at the level of neutrality when using generalizing statements or when approaching these elements in an inconsistent way. Thirdly, I explained how a lack of balancing and a lack of recognition of the issue at stake, and of the interests and concerns of applicants, create an impression of untrustworthiness.

Based on the procedural fairness framework, I advocated for including the applicants' perspective more often in the jurisprudence. In the first place, in order to be considered trustworthy the Court should refrain from approaching cases 'one-sidedly' from the perspective of the State and instead also recognize the applicants' claims and concerns and genuinely balance them accordingly with the States' interests. I further argued that the Court should avoid describing applicants and their practices from an outsider perspective. I also suggested that when the Court literally reflects an applicant's voice in its judgment, the Court should remove doubt about possible bias and avoid the risk of making theological assessments. However, in order to guarantee neutrality, I strongly recommended consistency in the first place, whether an outsider or an applicant's perspective is chosen. Finally, I stressed the importance of motivation and transparency. It is only through transparency in the judgment that applicants can evaluate whether their voice has been heard accurately, that their arguments have been taken into account and that the Court has genuinely made an effort to be fair in the case. Also, when the Court decides not to examine a certain claim under Article 9—in particular when a religion related claim is involved—it is essential to explain the motivation for so doing in order to show that the Court has taken applicants' rights and concerns seriously. Only then will applicants feel respected, not only as applicants but also as human beings.

In sum, this article argues in favour of more inclusion of applicant believers' perspectives in order to improve the level of procedural fairness in the Strasbourg Court's freedom of religion adjudication. This would not only have an impact upon the applicant in the particular case, but might potentially have a broader societal impact, as social psychology research also shows. Through the use of a more inclusive approach in its Article 9 judgments on a procedural fairness level, the Court has an opportunity to contribute to inclusion and social cohesion. In today's diverse Europe with its sensitive debates about religion, the Court, as a supranational human rights body, can adopt the exemplary role of a beacon of justice, neutrality and respect. This is an opportunity the Court should not miss.

ACKNOWLEDGEMENT

This study was made possible by funding from the European Research Council for the project 'Strengthening the European Court of Human Rights: More Accountability Through Better Legal Reasoning'.