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Freedom of Religion or Belief and Freedom of Association: Intersecting Rights in the Jurisprudence of the European Convention Mechanisms

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1 Introduction

The European Convention on Human Rights (ECHR) and most other international human rights instruments are, fundamentally, perceived as offering protection to the rights of the individual. At the same time, several human rights obligations entail a collective dimension. Article 11 of the ECHR, which protects freedom of assembly and association, is illustrative of this,[1] as is Article 9 concerning the freedom of religion or belief.[2] The latter protects the right of everyone 'either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.'[3]

There are other markers of collective interests in the ECHR that states are obligated to protect. As such, the State may restrict manifestations of religion when such limitations 'are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others'.[4] Clearly, the *public*'s safety, order, health or morals envisages or requires

[1] The provision reads: '11.1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. this Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.' Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), Council of Europe Treaty Series No. 5, Art. 9 (adopted 4 November 1950, entered into force on 3 September 1953, text as amended by Protocols No. 11 and No. 14), Art. 11 (Hereafter, ECHR).

[2] In this chapter, the term 'freedom of religion' is used as a shorthand for a freedom that includes the belief aspect.

[3] ECHR, Art. 9.

[4] The legitimate aims that can be pursued to restrict freedom of association and assembly differ from those enumerated in the second paragraph of the freedom of religion clause. In addition to the protection of public order, health or morals, and the protection of the rights and freedoms of others, the State may legitimately restrict art. 11 rights in pursuance of national security and the prevention of crimes. ECHR, Art. 11(2).

the State to protect collective goals; moreover, 'the rights and freedoms of others' may take the form of an individual's own interests, but they may also be those of a group of individuals or of a legal entity such as a church, or other religious or belief-based organisation.

In the light of this, tensions between individual and collective interests, whether religious or philosophical, can be foreseen. Such a binary reading however does not depict faithfully the range of tensions that exist in practice, and, indeed, the way these tensions play out before the European Court of Human Rights (ECtHR) and the now defunct European Commission of Human Rights (ECommHR).[5] Whilst the admissibility criteria under the ECHR as interpreted by the Convention mechanisms provide that Article 9 complaints may be brought by individuals, groups of individuals or legal entities with 'religious or philosophical purposes'[6] against the State only, the State itself may be a surrogate, depending on the case, for any one of these forms of interest. In other words, an 'applicant v. Respondent State' complaint relating to Article 9 may reflect a conflict between an individual, a group, or legal entity, respectively and the State pursuing a broad range of public interests; it may also reflect a conflict between individuals, between individuals and collectivities (such as unincorporated groups or legal entities), or between collectivities themselves.

The aim of this chapter is to map those conflicts where either a group or a legal entity is involved in Article 9 jurisprudence in order to explore the intersection between freedom of religion and freedom association in such cases. In developing the analysis, the chapter finds inspiration in the intersectionality framework pioneered by Kimberly Crenshaw, which challenges the single-category mind-set of anti-discrimination law.[7] Intersectionality, as applied in gender, sexualities and post-colonial studies, describes the interaction of different identities such as gender, race, ethnicity, class, and sexuality: 'Instead of merely summarizing the effects of one, two or three oppressive categories, adherents to the concept of intersectionality stress the interwoven nature of these categories and how they can mutually strengthen or weaken each other'.[8]

In this chapter, our interest lies with the processes exposed by intersectionality – that is, the interaction between categories and the effects of such interaction – but *not* in relation to the above-mentioned identities. Instead, the chapter adapts (as opposed to adopts) the concept

[5] Protocol 11 to the ECHR altered the human rights machinery by abolishing the ECommHR and allowing direct access to the ECtHR; Protocol 11, E.T.S. 155, entered into force 1 November 1998.
[6] See discussion *infra* at section 2 of this chapter.
[7] See, for example, K. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist politics', *University of Chicago Legal Forum* (1989), 139-167.
[8] G. Winker, and N. Degele, 'Intersectionality as Multi-level Analysis: Dealing with Social Inequality', 18 *European Journal of Women's Studies* 1 (2011), p. 51.

of intersectionality towards the interaction of rights.[9] Specifically, the chapter explores how the interaction between freedom of religion and freedom of association plays out in the jurisprudence of the Strasbourg mechanisms. Intersectionality allows us to test whether the interaction of these rights has the potential to enhance the protection of religious collectivities, and consider whether, in doing so, it weakens the claims of individuals or groups of individuals of which they are comprised.

Structurally, the paper is divided into four parts. Following this introduction, the second part will examine the jurisprudential developments concerning the recognition of religious and belief communities as rights-holders under Article 9. Establishing the capacity of legal religious entities to hold and claim religious rights under the Convention, leads us to an exploration, in the third part of the chapter, of church v. State relations. The focus here will be on the interplay between Articles 9 and 11 when there is an assertion of a right to religious autonomy and the examination of the effects of this intersection in various contexts. Fourthly, in exploring conflicts between individuals and groups of individuals, respectively, and churches, the chapter aims to expose the role that intersectionality plays in asserting the interests of the latter over the former.

2 The Church as an Article 9 Rights-holder

The individualistic fashion in which most rights are phrased in human rights instruments reinforces the perception, alluded to in the introduction to this paper, that the rights-holder of a human right is the individual human person alone or in community with others. Article 9 of the ECHR is no exception. As Theo van Boven put it, 'it is the individual human person, whilst part of social or cultural relations of a community nature, who is the beneficiary of rights'.[10] Undoubtedly, a group of individuals acting together as an unincorporated entity can acquire rights and therefore invoke breaches of such rights under Article 9 of the ECHR.[11]

[9] An application of intersectionality to 'categories' of human rights, as opposed to oppressive categories or identities, has been previously undertaken in I. Cismas, 'The Intersection of Economic, Social, and Cultural Rights and Civil and Political Rights' in E. Riedel, G. Giacca, and C. Golay (eds), *Economic, Social, and Cultural Rights in International Law. Contemporary Issues and Challenges*, (Oxford: Oxford University Press, 2014), pp. 448-472.

[10] T. van Boven, 'Categories of Rights', in D. Moeckli, S. Shah and S. Sivakumaran (eds.) *International Human Rights Law* (2nd edition, Oxford: Oxford University Press, 2014), p. 146.

[11] The admissibility criteria in Art. 34 of the ECHR stipulate that the ECtHR 'may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.'

However, whether a religious legal entity can also hold and claim rights under Article 9 has been, particularly in the early Strasbourg jurisprudence, far from clear.

In order to portray the evolution the Strasbourg case law has made over time in the present regard, reference can be made to an early decision (1968) in which the ECommHR had denied the right of the Church of Scientology to bring a claim under the Convention concerning alleged breaches of Article 9.[12] It held that the Church of Scientology as a corporation was a non-governmental organization – thus meeting one of the two criteria under the Convention for having standing to bring a claim.[13] However, as 'a legal, and not a natural person' it was 'incapable of having or exercising the rights mentioned in Article 9',[14] and therefore it failed to meet the victim requirement in – the then – Article 25.[15]

It is interesting to note that the applicant church did not invoke Article 11 and therefore did not request that Article 9 be read in light of the right to freedom of association. Nor did the Commission consider such a reading *ex officio.*[16] Hindsight allows us to speculate whether the intersection of these rights would have resulted in a different outcome. What was at stake here were restrictions on the associative life of the church, given that the 'government has undertaken an explicit campaign to limit the effectiveness of a religious group rather than to restrict the rights of individual members'.[17] As Carolyn Evans notes, in such cases it is the church that would have been the 'appropriate and effective body to enforce the provisions relating to freedom of religion.'[18]

In 1979, in *X and Church of Scientology* v. *Sweden*, the Commission revisited and reversed its position:

> When a church body lodges an application under the Convention, it does so in reality, on behalf of its members. It should therefore be accepted that a church body is capable of possessing and exercising the rights contained in Article 9(1) in its own capacity as a representative of its members … Accordingly, the Church of Scientology, as a non-

[12] *Church of X* v. *the United Kingdom*, European Commission on Human Rights, 7 December 1968, No. 3798/68, pp. 4–5.
[13] *Ibid*., pp. 6-8.
[14] *Ibid*.
[15] See *supra* note 4. The standing requirements have been retained in the current Article 34, which has superseded Article 25.
[16] Note that in this case, the Commission had considered an alleged violation of Art. 2, Protocol 1 e*x officio*.
[17] C. Evans, *Freedom of Religion under the European Convention on Human Rights*, (Oxford: Oxford University Press, 2001), pp. 12-13. See also *Church of X* v. *the United Kingdom*, p. 3.
[18] *Ibid*., p. 13.

governmental organisation, can properly be considered to be an applicant within the meaning of Article 25(1) of the Convention.[19]

In reversing its earlier finding, the ECommHR did not rely on Article 11, but drew on Article 10 of the ECHR which had also been invoked by the applicant.[20] The reasoning of the Commission is somewhat inconsistent. One would assume that if a church has the right to freedom of religion or belief in its own capacity, this cannot at the same time be dependent on it representing its members. Indeed, if (perfect) representation were to be required, a church would only be able to exercise Article 9 rights when (all) members of a church agreed on the specific issue in question – and ironically, this could amount to an interference with a church's right to religious autonomy.

The phrasing of this 1979 decision may be reflective of the Commission's initial uneasiness in foregoing an individualistic approach to human rights. Even if the representation link is omitted – as indeed it has been in subsequent Strasbourg case law[21] – the individual's right to manifest her religion collectively with others remains the nucleus of church autonomy. Simply put, the right of a church to manifest religion is derived from the right of individuals to collectively manifest their religion. In the absence of this link back to the individual –not in the sense of being a representation of interests, but as the source of the derivation of the right – 'the non-human nature of a legal entity that prevents it from exercising the right to life, for example, would similarly prevent a church from manifesting religion or a humanist organization from exercising beliefs … To admit today that a church has *its own* right to manifest religion is not to deny that the collective right of individuals lies at the origin of the church's right.'[22] In a similar vain, Evans has described the church's Article 9 rights as resulting from the 'aggregating of the rights' of individuals to manifest

[19] *X and Church of Scientology* v. *Sweden*, European Commission on Human Rights, 5 May 1979, No. 7805/77, p. 70.
[20] 'This interpretation is in part supported from the first paragraph of Article 10 which, through its reference to "enterprises", foresees that a non-governmental organisation like the applicant Church is capable of having and exercising the right to freedom of expression.' *Ibid*., p. 70.
[21] *Finska församlingen i Stockholm and Teuvo Hautaniemi* v. *Sweden*, Decision of 11 April 1996, ECommHR, Application No. 24019/94, ECommHRDeicisions and Reports, vol. 62; *Holy Monasteries* v. *Greece*, judgment of 9 December 1994, Application Nos. 13092/87 and 13984/88. See also discussion in I. Cismas, *Religious Actors and International Law* (Oxford: Oxford University Press, 2014), pp. 99-101 and *infra* at section 3 of this chapter.
[22] Cismas, *supra* note 20, p. 101. It should equally be noted that churches or organizations akin to churches are the sole legal entities recognized by the ECtHR as being able to manifest religion and bring an Article 9 claim. For further insights see M. D. Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press), pp. 288-290.

religion.[23] There is, it should be noted, a subtle difference between aggregation and derivation – aggregation presupposes the summation of the interests of several individuals, which as a result may be given greater weight in a balancing test where the counterpart is a single individual or a smaller group of individuals. Whether resulting from derivation or aggregation of individual rights, the right of a church to religious freedom will ultimately reflect collective or social interests. When read in the light of Article 11 – a right strongly embodying a collective dimension – is freedom of religion, when held by a church, in effect a 'super-right'? This is a point to which we shall return in section 4 of this chapter.

3 Church v. State Conflicts

Cases related to the internal administration of a church as well as the (re)registration and recognition of a church by the State have given rise to the bulk of jurisprudence concerning the intersection of Articles 9 and 11. Applicants have sought to assert that protection should be afforded to the church by the State as against both State authorities and other actors in matters of internal government, administration and organization as well as the enjoyment of specific benefits (such as donations and subsidies), which the conferral of church status may bring about.

3.1 The Intersection of *Articles 9 and 11 as a Central Element in Church Autonomy and Registration Cases*

Whilst the church had already been recognized at the end of the 1970s as a rights-holder under Article 9, it was only subsequently that the concept of church autonomy gained traction in the jurisprudence of the ECtHR. In the landmark case *Hasan and Chaush* v. *Bulgaria*, the State authorities had replaced the leadership of the Bulgarian Muslim community. In finding that there had been a violation of Article 9, the Court held 'that the leadership of the faction led by Mr Hasan were unable to mount an effective challenge to the unlawful State interference in the internal affairs of the religious community and to assert its right to organisational autonomy, as protected by Article 9 of the Convention'.[24]

Interestingly, the Government's claim had focused on Article 11; arguing that 'not

[23] Evans, *supra* note 16, p. 14.
[24] *Hasan and Chaush* v. *Bulgaria*, Application No. 30985/96, judgment of 26 October 2000, para. 104.

every act motivated by religious belief could constitute a manifestation of religion, within the meaning of Article 9.'[25] The Court disagreed, holding that dealing with the case 'solely under Article 11 of the Convention, as suggested by the Government … would take the applicants' complaints out of their context and disregard their substance.'[26] As such, whilst considering that no separate issue arose under Article 11, freedom of association had, in this case, played a supportive role in relation to Article 9. In effect, the ECtHR anchored church autonomy in Article 9, read in the light of Article 11:

> Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. Seen in this perspective, the believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.[27]

The Court's reading of Article 9 'in the light of Article 11' empowers the right to freedom of religion or belief by religious or belief organisations. Importantly, this intersectional reading reveals a conceptualization of the relationship between members of a religious organization and the organization itself which is markedly different from that of the 1979 decision in *X and Church of Scientology* v. *Sweden*. By omitting the representation link which features in that earlier decision ('the church body is capable of possessing and exercising the rights contained in Article 9(1) in its own capacity as a representative of its members'),[28] it solves the problem of how a church might exercise Article 9 rights whilst not perfectly reflecting the position of its membership. Indeed, Article 11 jurisprudence has long held that it is not necessary for an association to represent its members – even less that it be a perfect representation – for it to be

[25] Bulgaria noted that the Convention mechanisms generally examined an application invoking Article 9 and other Articles 'under the other provisions relied on'. *Ibid*., para. 57.
[26] *Ibid*., para. 65.
[27] *Hasan and Chaush* v. *Bulgaria*, para. 62.
[28] *Church of Scientology* v. *Sweden*, Application No. 7805/77, Decision of 5 May 1979, p. 70.

able to exercise and claim rights under the Convention.

A series of (re)registration and recognition cases then drew on *Hasan and Chaush* and continued to anchor church autonomy in Article 9, with Article 11 employed to strengthen the associative dimension of religious freedom. For example, the Court found, inter alia, a violation of Article 9 read in light of Article 11 because: the Moldovan Government had denied recognition to the Metropolitan Church of Bessarabia;[29] Russia had refused re-registration to the Church of Scientology of Moscow[30] and to register the Church of Scientology of St. Petersburg;[31] Russia had dissolved the religious community of the Jehovah's Witnesses of Moscow and refused it re-registration;[32] Russia had dissolved the Biblical Center of the Chuvash Republic;[33] Austria had failed to grant in a timely manner legal personality to the Religionsgemeinschaft der Zeugen Jehovas and subsequently conferred legal personality of a more limited scope vis-à-vis other religious communities;[34] and Bulgaria had rejected the official recognition of an Indian religious movement[35] and refused the registration of the Ahmadiyya Muslim Community.[36]In a scathing judgment in the *Moscow Branch of the Salvation Army* v. *Russia,* the Court inversed the relation between Article 9 and 11, and read the latter in the light of the former.[37] The case concerned the refusal to register the Moscow Branch of the Salvation Army as a legal person. There is little explicit insight into why the Court chose to see freedom of religion as being the supportive right and consider the case mainly from the perspective of Article 11. However, the facts provide some indications. The Russian courts had considered the Salvation Army to be an organization of a 'paramilitary nature'.[38] This would in turn suggest that the interference was pursued in the interest of national security and the prevention of crimes – legitimate aims listed under Article 11(2), but not however under art. 9(2). As such, the Court approached the case from the perspective of Article 11 in connection with Article 9 in order to be able to consider the substance of these arguments, but nevertheless found there to be a violation of these rights.

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[29] *Metropolitan Church of Bessarabia and Others* v. *Moldova*, Application No. 45701/99, judgment of 13 December 2001.
[30] *Church of Scientology Moscow* v. *Russia*, Application No. 18147/02, judgment of 5 April 2007. See also *Kimlya and Others v. Russia*, Application Nos. 76836/01 and 32782/03, judgment of 1 October 2009.
[31] *Church of Scientology of St. Petersburg and Others* v. *Russia*, Application No. 47191/06, judgment of 2 October 2014.
[32] *Jehovah's Witnesses of Moscow* v. *Russia,* Application No. 302/02, judgment of 10 June 2010.
[33] *Biblical Center of the Chuvash Republic* v. *Russia*, Application No. 33203/08, judgment of 12 June 2014.
[34] *Religionsgemeinschaft der Zeugen Jehovas and Others* v. *Austria*, Application No. 40825/98, judgment of 31 July 2008.
[35] *Genov* v. *Bulgaria*, 23 March 2017, European Court of Human Rights, No. 40524/08.
[36] *Metodiev et autres* c. *Bulgarie*, 15 June 2017, European Court of Human Rights, No. 58088/08.
[37] *Moscow Branch of the Salvation Army* v. *Russia*, 5 October 2006, European Court of Human Rights, No. 72881/01, paras. 75 and 98.
[38] *Ibid*., paras. 15, 17, 91.

3.2 *Articles 11 and 9 Intersection as the Basis of a Church's Right to Fiscal Privilege?*

A similar reversal of the relation between Article 9 and 11 can be observed in *Magyar Keresztény Mennonita Egyház and Others* v. *Hungary*.[39] This case revolved around new Hungarian legislation that sought, according to the Government, to prevent entities from claiming to pursue religious goals when they were 'only striving for financial benefits' associated with church status.[40] Nine religious communities claimed that their loss of status as recognized churches – which resulted in their losing revenue from personal income tax donations and state subsidies – and the discretionary nature of the re-registration process amounted to 'a violation of their right to freedom of religion and was discriminatory, under Article 11, read in conjunction with Articles 9 and 14 of the Convention.'[41] The Court reinforced its established case law according to which Articles 9 and 11 do not require the State to accord a specific legal status to religious communities. Rather, the Court took the view that these groups should have the possibility of acquiring legal capacity under civil law – which the applicants possessed.[42] At the same time, the Court appears to have employed intersectionality to boost the collective dimension of freedom of religion:

> [R]eligious associations are not merely instruments for pursuing individual religious ends. In profound ways, they provide context within which individual self-determination unfolds and serves pluralism in society. The protection granted to freedom of association for believers enables individuals to follow collective decisions to carry out common projects dictated by shared beliefs.[43]

The Court first assessed a legitimate aim which the Government had not explicitly invoked. Whereas the Government had sought to justify its interference with the enjoyment of the right under Article 9(2) (rights and freedom of others and protection of public order), the ECtHR also considered, and accepted, 'the legitimate of aim of preventing disorder and crime, for the purposes of Article 11(2), notably by attempting to combat fraudulent activities.'[44] Despite

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[39] *Magyar Keresztény Mennonita Egyház and Others* v. *Hungary*, Application Nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12), judgment of 8 April 2014.
[40] *Ibid*., paras. 62, 86.
[41] *Ibid*., para. 3.
[42] *Ibid*., para. 91.
[43] *Ibid*., para. 93.
[44] *Ibid*., para. 86.

the generosity shown by the Court on this point, it went on to find that Hungary's interference with the Article 11 and 9 rights of the applicants did not correspond to a 'pressing social need'.[45] In reaching this conclusion, it took into account – in what appears to have been an embrace of socio-legal methodology – that the loss of church status may result in 'a situation of perceived inferiority which goes to the freedom to manifest one's religion'[46] and 'may amplify prejudices against the adherents of such, often smaller communities, especially in case of religions with new or unusual teachings.'[47]

For many positivist lawyers this analytical construction may seem forced; others might see it as 'wholly unsubstantiated and largely speculative'.[48] Still, others will note that the ECtHR's 'sensitivity to the negative impact of governmental disapproval of certain religious groups' and its 'attention on the broader societal impact of state regulation on attitudes towards religious communities and believers, and the risk state regulation entails, [are] clearly not novel'.[49] Be that as it may, the *Magyar* case emphasizes that – whilst representation of the members' interests is not a condition for a religious organization to exercise and claim rights under Article 9 – there is a strong link between a religious legal entity and its members, particularly when taking into account the concerns of the members at the state action taken in relation to the organisation. Beyond this, it is clear that the intersection between Articles 11 and 9 has had an effect on the normative understanding of the collective dimension of freedom of religion and has given a boost to its protection.

It is precisely because of the Court's focus on this intersection between Articles 11 and 9 in *Magyar* that the judgment has been met with criticism. Carl Gardner argues that the Court has 'short-circuited its own jurisprudence'.[50] Drawing on the dissenting opinion of Judge Spano, joined by Judge Raimondi, he argues that the crux of the *Magyar* case was not de-registration – as was the case in many of the Russian cases, notably *Moscow Branch of the Salvation Army* – but a 'reclassification for the purposes of receiving state benefit'.[51] In other

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[45] *Ibid*., para. 115.
[46] *Ibid*., para. 94. See also A. Jusic, 'Constitutional Changes and the Incremental Reductions of Collective Religious Freedom in Hungary', 10 *Vienna Journal on International Constitutional Law* (2016), 199-219, at pp. 214-215.
[47] *Magyar Keresztény Mennonita Egyház and Others* v. *Hungary*, para. 92.
[48] Jusic, *supra* note 46, p. 215.
[49] R. Uitz, 'Violation of Religion Rights in Hungary judgment', *ECHR Blog*, 11 August 2014, <http://echrblog.blogspot.ch/2014/08/violation-of-religion-rights-in-hungary.html>
[50] C. Gardner, 'A Road Cut through the Law to Get after Orbán?', 3 *Oxford Journal of Law and Religion* (2014), p. 510.
[51] As a result the applicants were no longer incorporated churches but organisations performing religious activities. Only the former, enjoy fiscal privileges according to the 2011 Church Act. *Ibid*.; Dissenting Opinion of Judge Spano, joined by Judge Raimondi, *Magyar Keresztény Mennonita Egyház and Others* v. *Hungary*,

words, it is essentially a case concerning the loss of fiscal privileges, not the loss of legal entity status that allows religious organizations to pursue religious objects.

In its judgment in *Church of Jesus Christ of Latter-day Saints* v. *the United Kingdom*, a fiscal privileges case that preceded the *Magyar* case by only one month, the Court took a different course of action. It had assessed the proportionality of the interference resulting from the refusal to accord a statutory tax exemption to the applicant 'only on the basis of whether there had been discrimination in the enjoyment of religious freedom rights pursuant to Article 14 read together with Article 9'; this in turn had allowed the ECtHR to afford a larger margin of appreciation to the Respondent State.[52] The concern is that by preferring the Articles 9 and 11 intersectional approach in a fiscal privileges case, as opposed to the discrimination law approach (Articles 14 and 9), the Court 'enlarges the scope of Article 9, taken alone and in conjunction with Article 11, as regards associative religious activity, to an extent that conforms neither to the text or purpose of these provisions nor to their development in the case-law'.[53] The preference for the intersectional approach in Magyar, it can be argued, is difficult to understand absent a consideration of the specific Hungarian context.

3.3 *Context Matters*

As is the case with the intersection of identities, rights intersectionality is 'time and context contingent, rather than fixed and ahistorical'[54] and it is evident that in the church v. States conflicts mentioned above context mattered. Much of the jurisprudence on registration and recognition concerns States from the former communist bloc and religious associations that were not the church of the majority population.

In Moldova, Russia and Bulgaria, for example, the Orthodox religion, the religion of the majority of the population, resurfaced strongly after the fall of atheistic communism. Today, the entanglement of religion with the State remains complex with strong (informal)

Application Nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12), judgment of 8 April 2014, para. 4.

[52] Gardner, *supra* note 49; See also *Church of Jesus Christ of Latter-day Saints* v. *the United Kingdom*, European Court of Human Rights, 4 March 2014, No. 7552/0. Gardner further distinguishes *Magyar* from *Association Les Témoins de Jéhovah* c. *France* – the latter tax case was decided under Article 9 because the fiscal penalties to which the applicant had been subjected threatened its continued existence as a religious association. No similar threat has been noted in Magyar. Ibid.

[53] Dissenting Opinion of Judge Spano, joined by Judge Raimondi, *supra* note 49, para. 5.

[54] See W. Hulko, 'The Time- and Context-contingent Nature of Intersectionality and Interlocking Oppressions', 24 *Affilia: Journal of Women and Social Work* (2009), pp. 44-55.

linkages between the political class and the dominant Orthodox churches.[55] Giovanni Barberini notes that 'as a general rule these former Communist countries adopt a line of defence, at times hostile, that particularly manifests itself in the procedures for legal recognition … New religions are considered to be unknown subjects and interlocutors and therefore also potential factors of destabilization, strangers to the culture and to the tradition of the nation, within a democratic system still fragile and not experienced in pluralism.'[56] The intersectionality of Articles 9 and 11 has been employed in the jurisprudence of the ECtHR to facilitate the protection of religious collectivities and in particular to strengthen the protection of newer or non-dominant religious communities. As such, 'the ECtHR has prompted an inclusive transformation of the concept of church autonomy: the privilege of self-administration, traditionally granted to a specific church by virtue of historic a affinities with the State, has become the right of all religious organizations'.[57] This stream of case law protecting the collective dimension of religious freedom is very much anchored in the *Kokkinakis* dictum:

> freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.[58]

Returning to the *Magyar* case, we can observe that (over)contextualised reasoning can present pitfalls. In Hungary, Prime Minister Viktor Orban allegedly initiated the 2011 legislation which stripped many smaller and minority churches of church status as 'part of an overall push to control and stymie independent institutions that pose a potential threat to his rule.'[59] 'There must be a suspicion', Gardner notes, 'that this decision is influenced by the particular circumstances obtaining in Hungary, and the general concern about the state of human rights

[55] See e.g., R. C. Blitt, 'Russia's Orthodox Foreign Policy: The Growing Influence of the Russian Orthodox Church in Shaping Russia's Policies Abroad', 33 *University of Pennsylvania Journal of International Law* (2011), p. 365.
[56] G. Barberini, 'Religious Freedom in the Process of Democratization of Central and Eastern European States', in S. Ferrari, C. W. Durham and E. A. Sewell (eds.), *Law and Religion in Post-Communist Europe* (Leuven: Peeters, 2003), p. 19.
[57] Cismas, *supra* note 20, pp. 123-124.
[58] *Kokkinakis v. Greece*, Application No. 14307/88, judgment of 25 May 1993, para. 31.
[59] L. Bayer, 'Orbán's "war of attrition" against churches', *Politico*, 11 July 2016, <http://www.politico.eu/Article/orbans-war-of-attrition-against-churches/>

and the rule of law' in this country.[60] Given that less intrusive measures could have been envisaged to ensure the legitimate aims invoked by the Hungarian Government,[61] it is possible that the Court could have found in favour of the applicants had it performed the assessment of the interference under Article 14 and 9. Be that as it may, the problem remains: by employing intersectionality and 'seeing the issues in a case like this as involving inference with freedom of association and religion**,** the Court has made established churches' acquired rights to tax advantages harder for even the most liberal and democratic regime to review.'[62]

4 Individual/Group v Church Conflicts

As outlined in the introduction, in an Article 9 complaint a respondent state may represent the interests of a church. This happens when the State authorities restrict the rights of an individual or group of individuals in pursuance of the legitimate aim of 'protecting the rights and freedoms' of the church, specifically its religious autonomy. It is this type of conflicts to which we turn in this part of the chapter. The aim here is to analyse the role that Article 9 and 11 intersectionality plays in the balancing test undertaken by the ECtHR in such cases. One question guides the analysis: Does intersectionality strengthen the position of the church vis-à-vis the individual or group of individuals?

This question presumes that church autonomy is a qualified right – were it to be absolute there would be little to balance. Elsewhere we have posited that church autonomy, being derived from the individual's right to collectively manifest their beliefs (the second limb of Articles 9(1) and 11(1) qualified by Articles 9(2) and 11(2)), is not absolute.[63] Even so, the church's right to religious autonomy has received a high degree of protection in the jurisprudence of the Court, as illustrated by the dictum:

> but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.[64]

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[60] Gardner, *supra* note 49.
[61] See *supra* note 39.
[62] Gardner, *supra* note 49.
[63] Cismas, *supra* note 20, pp. 124-125.
[64] *Hasan and Chaush* v. *Bulgaria*, para. 78; *Svyato-Mykhaylivska Parafiya* v. *Ukraine* , judgment of 14 June 2007, para. 13.

Indeed, conflicts between individuals or groups of individuals and religious organisations provide examples of such 'very exceptional cases'. This analysis will therefore examine the development in the case law of limitations to religious autonomy and the role that Article 9 and 11 intersectionality has played in this context.

4.1 *'Entry' Restrictions*

One type of limitation to church autonomy that the ECtHR has endorsed are what can be termed as 'entry' restrictions. These can be described as a set of administrative measures that allow States to control the recognition and registration of the legal status of a church or religious organization. States are entitled to require religious bodies that wish to register and be recognized as specific religious legal entities to provide 'a document setting out the fundamental principles of their religion'.[65] This should allow the authorities to assess whether an association that was set up 'ostensibly in pursuit of religious aims' acts in accordance with legal provisions; that it represents no danger to a democratic society; and that its activity is not directed against the interests of public safety, public order, health, morals, or the rights and freedoms of others.[66] Entry restrictions acknowledge that there may be tensions between the interests of a putative church or religious organization, on the one hand, and, on the other, the interests of the state in preserving preserve democracy, guard public safety, order, health, morals – each of which can be reframed as individuals' interests to which the state is merely giving expression – and to protect the rights and freedoms of individuals. Thus entry requirements allow for such potential conflicts between the church and the state as a proxy of individual interests to be navigated. Indeed, States have a positive obligation to ensure that such conflicts are prevented and that the rights and freedoms of individuals are secured.[67] In the *Refah Partisi* case, the Court clarified that:

> such a power of preventive intervention on the State's part is also consistent with Contracting Parties' positive obligations under Article 1 of the Convention to secure the rights and freedoms of persons within their jurisdiction. Those obligations relate

[65] *Cârmuirea Spirituală a Musulmanilor din Republica Moldova* v. *Moldova*, European Court of Human Rights, 14 June 2005, No. 12282/02, pp. 4-5.
[66] *Metropolitan Church of Bessarabia and Others* v. *Moldova*, Application No. 45701/99, judgment of 13 December 2001, para. 113.
[67] See *Gorzelik and Others* v. *Poland*, European Court of Human Rights, 17 February 2004, No. 44158/98, para. 94 and *Refah Partisi (the Welfare Party) and Others* v. *Turkey*, European Court of Human Rights, 13 February 2003, *nos. 41340/98, 41342/98, 41343/98* and *41344/98*, para. 103.

> not only to any interference that may result from acts or omissions imputable to agents of the State or occurring in public establishments but also to interference imputable to private individuals within non-State entities.[68]

Registration case law cautions that these restrictions are themselves to be restrictively construed in order to ensure the pluralism on which a democratic society is based.[69] Clearly, Article 9 and 11 intersectionality has the effect of narrowing the State's options when seeking to restrict access to legal status for the church or religious organizations:

> The State's power to protect its institutions and citizens from associations that might jeopardise them must be used sparingly, as exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. Any interference must correspond to a "pressing social need"; thus, the notion "necessary" does not have the flexibility of such expressions as "useful" or "desirable".[70]

This dictum has relevance for the Court's assessment of the proportionality of a State's interference with Articles 9 and 11. The onus is on the government to demonstrate that the aims that it has pursued could not be addressed through less intrusive or restrictive means than the barring of access to the such legal. In the *Magyar* case, the ECtHR indicated that the Hungarian government had failed to avail itself of possible alternatives and had instead opted for de-registration en masse through the 2011 Church Act. Judicial control, the Court indicated, could have presented an alternative approach, as would the 'dissolution of Churches proven to be of an abusive character'.[71] Both of these options suggested by the Court make it clear that 'entry' restrictions have a 'life beyond entry'; in other words, State authorities have the right – and indeed, as mentioned above, the obligation – to ensure that the

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[68] *Refah Partisi (the Welfare Party) and Others* v. *Turkey*, para. 103.

[69] 'For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively'. *Moscow Branch of the Salvation Army* v. *Russia*, 5 October 2006, European Court of Human Rights, No. 72881/01, para. 61. See also *Gorzelik and Others* v. *Poland*, European Court of Human Rights, 17 February 2004, No. 44158/98, para. 92.

[70] *Magyar Keresztény Mennonita Egyház and Others* v. *Hungary*, para. 79; *Moscow Branch of the Salvation Army* v. *Russia*, para. 62, both referencing *Gorzelik and Others* v. *Poland*, paras. 94 and 95.

[71] *Magyar Keresztény Mennonita Egyház and Others* v. *Hungary*, para. 96.

activities of churches continue to be conducive to public order, public safety, public order, health, morals, or the rights and freedoms of others. The manner in which States can ensure such compliance will be further examined in the following sections.

As suggested by Gardner with respect to the *Magyar* case, intersectionality of Article 9 and 11 has also resulted in a narrower margin of appreciation being granted to the state when compared to that afforded in discrimination law assessments under Articles 14 and 9.[72] A similar observation can be made in relation to pure church registration cases – if we admit that *Magyar* may not be one.[73]

4.2 *The 'Exit' Option (the 'principle of voluntariness')*

The ECommHR introduced the 'principle of voluntariness'[74] in early cases involving conflicts between employees and members of a church and the church itself.[75] This assumes that the possibility of leaving the church would be a sufficient guarantee for the protection of rights of an individual under the Convention.[76] For example, in *X* v. *Denmark*, the Commission held that since the applicant had chosen to join the church and serve as its minister, the principle of voluntariness justified the church's wide discretion in respect of him.[77] The ECommHR held, 'freedom of thought, conscience or religion is exercised at the moment [individuals] accept or refuse employment as clergymen, and their right to leave the church guarantees their freedom of religion in case they oppose its teachings'.[78] Ian Leigh pointed out that viewing the exit option as the sole restriction on a church's autonomy undervalues 'what may be the high costs' for those individuals choosing to make use of it;[79] for example, to name just two drastic consequences: loss of employment and the loss of opportunity to continue to be a part of a shared spiritual community. It is not an overstatement to claim that the exit option has the effect of minimizing the enjoyment of individual rights, in this case the individual's right to

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[72] Gardner, *supra* note 49.
[73] See discussion in Section 3.2 *supra*.
[74] The term is employed by I. Leigh, 'Balancing Religious Autonomy and Other Human Rights under the European Convention', 1 *Oxford Journal of Law and Religion* (2012), p. 116.
[75] In addition to *X and Denmark* discussed here, see also *Finska församlingen i Stockholm and Teuvo Hautaniemi* v. *Sweden*, European Commission on Human Rights, 11 April 1996, No. 24019/94, Decisions and Reports, vol. 62.
[76] See the chapter by Lucy Vickers in this volume.
[77] Specifically, in this case the Church of Denmark requested the minister to abandon the practice of requiring parents to attend five religious lessons before their children could be baptised. *X* v. *Denmark*, European Commission on Human Rights, 8 March 1976, No. 7374/76, p. 158.
[78] *Ibid*.
[79] Leigh, *supra* note 72, p. 116.

religious freedom whilst maximizing the autonomy and freedoms of the religious organisation.

When affording a very high degree of protection to the church's autonomy and minimalist protection to the individual's rights (in the form of the exit option), the ECommHR did not draw on the intersectionality between Articles 9 and 11.[80] The Commission's decision reflected the 'traditional European jurisdictional approach to religious autonomy' prevalent at the time in church employment cases – the approach which saw domestic courts declining to review decisions of churches and the processes underpinning them, because of the religious autonomy which these organizations enjoyed.[81] In recent years the ECtHR has itself championed the abandonment of this approach; yet it is submitted that Article 9 and 11 intersectionality has come to play a similar (although not identical) role by ensuring that State interference with a church's autonomy occurs only in exceptional cases.

Before elaborating on this further, it is important to note at this stage that the State retains a positive obligation even under this minimalist exit approach. To illustrate, should this option be exercised by a group of individuals who seek to break away from a church in order to set up their own church, the State is under an obligation to ensure that they are not prevented from doing so. Steps which may need to be taken include the registration of the putative church's statute and the granting of legal status, provided they fulfil the relevant legal criteria.[82]

4.3 *Procedural and Substantive Limitations*

The recent jurisprudence of the ECtHR rejects the traditional European jurisdictional approach to religious autonomy: where conflicts arise between the rights of individuals and the right of religious organizations to autonomy, the state must have in place a system of judicial supervision that secures both procedurally and substantively the rights of all.[83] In case law concerning Articles 6, 8, 9, 10 and 11, the Convention mechanisms have set limits to church autonomy. It is noteworthy that one cannot identify a linear evolution in limiting church autonomy: from the exit option – the least intrusive form of restriction – to procedural

[80] This is unsurprising: it was only some 20 years later that the Court came to develop a fuller understanding of Church autonomy anchored in Articles 9 and 11 of the Convention. See section 3.1 *supra*.
[81] C. Evans and A. Hood, 'Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights', *Oxford Journal of Law and Religion* (2012), 1–27, at 15.
[82] See, for example, *Svyato-Mykhaylivska Para ya* v. *Ukraine*, 14 June 2007, No. 77703/01.
[83] Cismas, *supra* note 20, p. 133 *et seq*.

and substantive limitations that require heightened judicial scrutiny –, and finally to the assessment of the legitimacy of the religious beliefs of an organization – the most invasive approach.

For example, in *Maximilian Rommelfanger* v. *Germany*, the ECommHR regarded the autonomy of the Catholic Church as qualified, whilst also acknowledging that the organization could not function effectively without its being able to impose certain duties of loyalty on its employees reflecting its values and convictions. However, this duty of loyalty, when imposed by the church through a contract, could not be unreasonable and 'strike at the very substance of the freedom of expression'.[84] Already in 1986, the Commission expected the Respondent State to ensure that procedural safeguards were in place and that a substantive assessment of the competing interests of the individual and the church be performed.[85] Ten years later, in the *Hautaniemi* v. *Sweden* case, the Commission reverted to the exit option as the sole restriction on the autonomy of the Church of Sweden[86] – in a laconic decision, it failed *itself* to inquire whether the State's duty to ensure procedural and substantial guarantees has been fulfilled. In 2009, in *Lombardi Vallauri* v. *Italy,* the ECtHR articulated once more the procedural limits to church autonomy. States, the Court held, have a positive obligation to ensure that procedural guarantees aimed at securing the human rights of individuals exist in cases where religious organizations exercise their right to self-administration. Given the refusal of the Italian courts to hear the case, the applicant's procedural guarantees had been effectively nullified.[87] In 2014, in the *Fernandez Martinez* v. *Spain* case, whilst ultimately relying on the exit option, the Court also verified whether procedural guarantees were available and whether the rights of both the church and the applicant were substantively balanced against each other.[88]

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[84] See *Maximilian Rommelfanger* v. *Federal Republic of Germany*, European Commission on Human Rights, 26 June 1986, No. 12242/86, Decisions and Reports, vol. 62, p. 161. See further *ibid*., p. 131-2.

[85] 'It is true that particular weight was finally given to the views of the church concerning the duties of loyalty of church employees. According to the Federal Constitutional Court this was necessary in order to safeguard the constitutional right of the church to regulate its internal affairs. Nevertheless the Federal Constitutional Court held that there were limits to the right of the church to impose its views on its employees. In particular the State courts were competent to ensure that no unreasonable demands of loyalty were made.' *Ibid*.

[86] *Finska församlingen i Stockholm and Teuvo Hautaniemi* v. *Sweden*, Application No. 24019/94, Decision of 11 April 1996, ECommHR, Deicisions and Reports, Vol. 62.

[87] *Lombardi Vallauri* c. *Italie*, European Court of Human Rights, 20 October 2009, No. 39128/05, paras. 50-54; See also Cismas, *supra* note 20, pp. 136-137.

[88] See *Fernandez Martinez* v. *Spain*, European Court of Human Rights, 12 June 2014, No. 56030/07. See also *Obst* c. *Allemagne*, European Court of Human Rights, 23 September 2010; *Schüth* v. *Germany*, European Court of Human Rights, 23 September 2010, No. 1620/03; *Siebenhaar* c. *Allemagne*, European Court of Human Rights, 3 February 2011, No. 18136/02; *Sindicatul 'Păstorul cel Bun'* v. *Romania*, European Court of Human Rights, 9 July 2013, No 2330/09.

It becomes clear that domestic courts which seek to solve conflicts between individuals and religious organisations by relying on the exit option alone, without performing an assessment of whether an individual or group of individuals enjoyed procedural safeguards and their rights have been duly weighed against those of the church, will fail the standards set by recent European jurisprudence. It is submitted that the Commission's assessment in *Hautaniemi* would fall short of the current standards which the Court requires domestic judicial instances to uphold.

The acknowledgment of church autonomy as a vital yet limited right cannot be understood absent its particular context. This context has been constructed by the ECtHR itself through the jurisprudential elaboration of positive obligations, which attach to virtually all Convention rights. It would have been highly unusual for the Court not to consider the positive obligations of States to secure the rights of individuals and groups of individuals in situations of their being in conflict with a religious organization – and these obligations in turn reveal the scope of the limitations to the right to autonomy of religious organizations, and their human rights duties.[89] At the same time, it must be acknowledged that the threshold for State interference remains very high in such cases, which may result in an imbalance between the level of protection afforded to the two parties and which in practice favours the organisation at the expense of the individual. The intersectionality of Articles 9 and 11, acting as a signifier of the collective nature of church autonomy, appears to play a certain role in the creation of this imbalance, alongside other factors.

In *Obst, Schüth, Siebenhaar, Sindicatul 'Păstorul cel Bun'* (Grand Chamber) and *Fernandez Martinez* (Grand Chamber), the Court constructs its reasoning along similar lines: first, it reasserts the grounding of church autonomy in Articles 9 and 11 and the centrality of the 'autonomous existence of religious communities … for pluralism in a democratic society'; second, it observes that as a result of this , church autonomy admits of little to no State interference; it then acknowledges that the relationship between the State and religions is context-specific to each State.[90] As a result of this three-pronged reasoning, the Court's default conclusion seems to be that the margin of appreciation afforded to the state in cases of conflict between individuals and religious organisations (where the state acts as proxy for the latter) is wide. In each of the cited cases – except *Sindicatul 'Păstorul cel Bun'* – the margin is further buttressed by the Court's assertion that what is at stake is a balancing between

[89] See Cismas, *supra* note 20, ch. 3 and in particular, pp. 119-120.

[90] For an excellent analysis of the varieties of State-church relations in Europe and beyond, see generally J. Temperman, *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance*, (Leiden: Martinus Nijhoff Publishers, 2010).

'individual and general interests'.[91] In other words, the Court equates the interest of the church with that of the general public – and without further elaboration in the judgments themselves it is difficult to see why the church's interest in securing its right to self-administration *can* be reframed as the interest of the general public whilst the interests of individuals in securing their right to privacy, for instance, appears not to be amenable to such reframing. One can therefore only speculate whether it is the collective dimension of church autonomy – reinforced by the intersection between Articles 9 and 11 – which facilitates the transferral or projection of what essentially is the interest of a collectivity onto the general public.[92] As such, it appears that the individual is at a disadvantage in such cases, *because* she is an individual. However, . *Schüth* provides evidence that this disadvantage can be countered:[93]

> As the case concerned a dismissal following a decision by the applicant concerning his private and family life, which attracts the protection of the Convention, the Court considers that a more detailed examination was required when weighing the competing rights and interests at stake … *particularly as in this case the applicant's individual right was weighed against a collective right*.[94]

On our reading, the Court in *Schüth* suggests that because what was at stake was a conflict between an individual right and a collective right, the potential favouring of the interests of the religious organisation because of its collective nature, a more extensive assessment by German courts was necessary in order to counter-balance such a tendency.

5 Conclusion

[91] *Obst*, para. 41; *Schüth*, para. 55; *Siebenhaar*, para. 38; *Fernandez Martinez* [GC], para. 114. The Court's practice has been to afford a wide margin of appreciation where individual and collective interests colluded. See *Evans* v. *the United Kingdom*, European Court of Human Rights, 10 April 2007, No. 6339/05, para. 77.
[92] Interestingly, the Grand Chamber in *Sindicatul 'Păstorul cel Bun'* avoids the juxtaposition individual v. public interest. At stake was the collective right of a group of individuals to form a trade union and the right of the church to autonomy (to reiterate a right with a strong collective dimension). Based on the above "theory" of transferral, the Court should have regarded the conflict between the putative trade union and the Romanian Orthodox Church as one between the interests of the general public and those of the general public. Instead, it regarded that conflict as one between 'private interests'. *Sindicatul 'Păstorul cel Bun'* [GC], para. 160.
[93] This appears to be the case when the church in its exercise of self-administration nullifies or 'affects the very heart of the right' of the individual. *Schüth*, para. 71. This in this author's opinion was the case in *Sindicatul 'Păstorul cel Bun'* as per the Chamber and contrary to the 11-6 split Grand Chamber. See discussion in Cismas, *supra* note 20, pp. 139-140.
[94] *Schüth*, para. 69 (emphasis added).

As Roscoe Pound noted in 1949, '[w]hen it comes to weighing or valuing claims or demands, we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest we may decide the question in advance of our very way of putting it'.[95] Pound posited that in balancing different claims – whether conflicting or overlapping – it is possible to reframe them as individual interests or as social interests and weigh them on the same plane to avoid bias.[96]

Intersectionality between Articles 9 and 11 in disputes between religious organisations and the state can be seen as an artifice that has helped judges to craft the weighing of interests on the same plane: the collective interest of the organisation against the interest of the state in safeguarding public order, health or morals, or the rights and freedoms of others. This has resulted in acclaimed jurisprudence which has sought to strengthen the protection of newer or non-dominant religious communities in newly democratic countries or in contexts where they are struggling against authoritarian tendencies. In doing so, it has achieved a transformation of the concept of church autonomy from being the privilege of the few to being the right of the diverse many.

The same intersectionality has had a different effect in the case of disputes between individuals/groups of individuals and religious organisations. The assumption of the Court appears to be that the collective interest of the church can be equated to that of the public. The result has been that the default position has become that the organisation's interests weigh more than that of the individual. Beyond striking an uneasy note given the lessons of European history and of the human rights movement, Pound explains why this is a problematic way in which to approach any such legal conflict: it suggests that there is a potential bias which impartial courts should seek to avoid. Surely, the ECtHR would object if domestic courts, in their assessments of conflicts of interests between individuals and religious organisations started from the premise that the church's interests are more valuable merely because they entail a collective dimension. It should, then, reconsider its own thinking in this regard.

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[95] R. Pound, 'A Survey of Social Interests', 57 *Harvard Law Review* (1943), p. 2.
[96] *Ibid*., p. 3.