

Freedom of Religion and Gender Equality: Inclusive or Exclusive?

Alison Stuart*

This article critically analyses European jurisprudence to ascertain the extent to which the right to freedom of religion has been interpreted as a right of religion to internal autonomy. It asserts that women are being denied an effective right to freedom of religion insofar as they are unable to directly influence the content or structure of their religion. It argues that to fulfil women's equal right to freedom of religion, women's power and position within religion must be equivalent to men's. The article therefore asserts that an intrinsic part of States' obligation to secure the right to freedom of religion is the facilitation of gender equality within religion. The article ends by proposing proportionate and appropriate methods to facilitate gender equality within religion.

[W]omen, half the human race, have been invisible within churches and religions dominated by men. Women's modes of practice and organisation may be, as with other minorities, invisible and ignored.¹

1. Introduction

Women are half of the human race and yet the issue of women's equality has still to be definitively addressed in relation to their right to religion and belief. It is ironic that while human rights instruments proclaim that everyone is equal, the attainment of this fundamental truth is hampered by traditional,

*Lecturer in Law, School of Law, The Robert Gordon University (a.stuart@rgu.ac.uk). The author would like to thank Rebecca Wallace, Margaret Downie, Sarah Christie and Gerrard Ipenburg for their invaluable comments and feedback.

1 Boyle and Sheen (eds), *Freedom of Religion: A World Report* (London: Routledge, 1997) 1.

and often limited, interpretations of human rights. The limitations placed on the attainment of women's equality, by the current judicial and political understanding of the right to freedom of religion, is an apt example of this. It is recognised in international and regional fora that 'women's rights are often curtailed or violated in the name of religion.'² States are continually reminded of their obligations to 'fully protect... women against all violations of their rights based on or attributed to religion.'³ While it is true that 'religion is one of the chief perpetrators of women's subjugation, inequality, lower social status, lack of equal treatment and protection, and internalised notions of inferiority',⁴ it should not be forgotten that women also have a right to religion and belief. The right to freedom of religion and belief is invariably phrased as being in opposition to women's rights and equality; this is, however, an overly simplistic and counterproductive stance. Religious institutions play a vital role in the cultivation and realisation of all rights, not merely religious rights.⁵ Being male dominated, religious institutions generally limit women's role within a religion, both in their doctrine and ability to be office holders, *vis à vis* men. This inequality needs to be addressed within human rights law and domestic legal systems and politics. If one simply sees religion and women's rights as clashing and mutually exclusive, there is a danger that gender equality will not be fully realised and an important part of women's lives left unacknowledged, unprotected and unfulfilled.

Human rights research in the area of gender equality and religion has tended to concentrate on the treatment of women in religious States or under religious personal laws. Whilst this is of pivotal importance, the negative influence that gender discrimination within religion has on gender equality as a whole has not yet been accepted as a worldwide phenomenon, present in every country. A woman's equal right to her spiritual and religious beliefs, and her role within her religion, has yet to be addressed. Gender discrimination is prevalent in the vast majority of institutionalised religions, where it is left undisturbed or tackled by States regardless of their stated commitment to gender equality within their society and the world at large. It is important to reiterate the legal obligation under international and regional human rights law that every State has to facilitate gender equality within their jurisdiction, regardless of where this discrimination is occurring. To ensure that 'Western'

- 2 Council of Europe (CE), Parliamentary Assembly Res. 1464 (2005) on Women and Religion in Europe, 15 September 2005, Doc. 10670 at para. 2.
- 3 *Ibid.* at para. 7.1. See also Human Rights Committee, General Comment No. 28: Equality of rights between men and women (Article 3), 29 March 2000, CCPR/C/21/Rev.1/Add.10: 8 IHRR 303 (2001) at para. 5.
- 4 Rao, 'Speaking/Seeking a Common Language: Women, the Hindu Right, and Human Rights in India', in Gustafson and Juviler (eds), *Religion and Human Rights: Competing Claims?* (New York: M.E. Sharpe, 1999) 118.
- 5 Witte and Vyver (eds), *Religious Human Rights in Global Perspective: Religious Perspective* (The Hague: Kluwer Law International, 1996) at xxxiv.

States recognise the necessity and the legal obligation incumbent on them to deal with such gender discrimination, this article concentrates on the legal gender equality obligations, created by the European Convention for the Protection of Human Rights and Fundamental Freedoms (the 'Convention'), on Council of Europe Member States. The same arguments could, however, be made in relation to all States with respect to their fundamental legal obligations to ensure gender equality, as outlined in the human rights conventions they have ratified and international, regional and domestic jurisprudence.⁶ Whereas the struggle for gender equality within religion may be harder to pursue in some States, the legal obligation to 'promote' such gender equality is still binding on each State, as demonstrated later in this article.

Women and men have an individual and equal right to freedom of religion. If this right is interpreted and commonly understood as the right to practise one's religion, within the context of a recognised religion, and women are excluded from influencing the content and being a part of the power structure within that religion then, in effect, not only is their fundamental right to equality being violated but also their right to religion. While women may have the right to join or leave a religion, if only men dictate the content of that religion, they are disenfranchised within the religion that gives meaning to their lives. Given the influence that religion has on the lives of not only believers but society as a whole, this disenfranchisement has serious repercussions for gender equality.

This article seeks to critically analyse the European Court of Human Rights ('European Court') and domestic jurisprudence to ascertain the extent to which the right to freedom of religion has been interpreted as a right of religious communities to internal autonomy, free from state regulation. It is asserted, within the body of this article, that as institutionalised religions are patriarchal, and women are unable to directly influence the content or structure of the religion they belong to, women have been effectively denied their right to freedom of religion. The article argues that women's power and position within religion should be equivalent to men's to ensure the equal operation of Article 9 of the Convention between the sexes, in conjunction with Article 14. It therefore states that an intrinsic part of a State's obligation to secure women's equal right to freedom of religion is the facilitation of gender equality within religion. The right to freedom of religion is not an absolute right; it is subject to certain limitations in relation to public safety, order, health, morals or the fundamental rights of others.⁷ Whilst the European Court has allowed churches to assert their own right to freedom of religion, as the body charged with ensuring the fulfilment of human rights without

6 For a full explanation of this point, see Stuart, 'Without Distinction: A Defining Principle', in Brems (ed.), *Conflict between Fundamental Rights* (Antwerp: Intersentia, 2008) 101.

7 Article 9(2), Convention.

distinction, it is submitted that States have a fundamental duty to limit the institutional right to freedom of religion by reference to the equal right of women to thought, conscience and religion and gender equality. The difficulty inherent in this approach is recognised and the article concludes by suggesting proportionate and appropriate methods by which a State can facilitate gender equality within religion.

2. The Right to Freedom of Religion within the Council of Europe

Within Article 9 of the Convention, the right to freedom of thought, conscience and religion is phrased as a right given to all human beings; everyone has the right to freedom of thought, conscience and religion. This is the same in every other international instrument dealing with this right.⁸ Looking, however, at European jurisprudence it appears that the individual right to freedom of religion has been interpreted and understood, in the main, as the right of a religious institution to exist and have internal autonomy. While it is accepted that there is an individual right to freedom of religion, the protection afforded to the individual right is limited and, to a huge extent, dependant on the stance of the particular State involved. As can be seen by the European Court's judgment in *Sahin v Turkey*,⁹ the Court, under the principle of subsidiarity, allows a State to place restrictions as long as they do not 'entirely negate the freedom to manifest one's religion or belief'.¹⁰

The main focus of the European Court's protection, under Article 9, appears to be the prevention of discrimination on the basis of religion and the protection of a religious community's right to autonomy in order to ensure societal peace. The encapsulation of the substantive, as opposed to non-discrimination, element of right to freedom of religion as an institutional right might not appear problematic at first glance. To the extent that religions, and more particularly hierarchical and institutionalised religions, are patriarchal, women have been excluded from this sphere of influence and discriminated against. State policy of non-interference in religious affairs, arising out of the judicial interpretation of Article 9 and the liberal notion of public/private divide, has thereby effectively resulted in women being effectively denied their Article 9 right of religion.

8 For example, Article 18, Universal Declaration of Human Rights 1948, GA Res. 217A (III), A/810 (UDHR); Article 18, International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR); and Article 1, United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981, 25 November 1981, A/RES/36/55.

9 41 EHRR 8.

10 *Ibid.* at para. 102 (italics added).

Although the right to thought, conscience and religion is phrased as an individual human right, the European Court has held that a Church or ecclesiastical body may exercise the rights guaranteed by Article 9 of the Convention, on behalf of its adherents.¹¹ This allowance of a religion to be a holder of Article 9 rights is predicated on the assumption that an individual's religious life is dependant on the health of the religious community they belong to.¹² This view is demonstrated in the European Court's judgment in *Hasan and Chaush v Bulgaria*,¹³ where the Court stated:

Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in light of Article 11, which safeguards associative life against unjustified State interference. Seen in this perspective, the believer's 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.¹⁴

In this judgment, and others, the European Court explicitly links pluralism and peace and public order within a State with the autonomous existence of religious communities. Accordingly, it delineates the limits of State interferences within a religion by reference to the goal of religious plurality or, in other words, non-discrimination on the basis of religion. Taking plurality as its primary aim, the European Court has recognised, within Article 9, that the right to religion includes the right to internal religious autonomy and the consequential non-interference in religious affairs by States.

When deciding whether a State has violated an Article 9 right the European Court will subject the State's reasons and measures limiting the manifestation of religion or beliefs to the test set out within Article 9(2). Article 9(2) states that the '[f]reedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order,

11 *Cha'are Shalom Ve Tsedek v France* 2000-VII at para. 72.

12 Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997) 325.

13 2000-XI; 34 EHRR 55.

14 *Ibid.* at para. 62.

health or morals, or the protection of the rights and freedoms of others'. In determining whether a limitation falls within the allowable exception the European Court determines, within the 'necessary to' part of the equation, whether the State has a legitimate aim and if the means used to achieve that aim are proportionate. The depth of critical analysis the Court will exert on the State's stated legitimate aim(s) and proportionality of methods will depend on the extent of the margin of appreciation it feels should be given to States in relation to the competing interests at play.¹⁵ The European Court feels that '[b]y reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions.'¹⁶ In determining the proportionality of a State's measure, a certain degree of latitude is therefore given to the State's assessment and balancing of competing interests due to their inferred special knowledge of the domestic situation.

'The scope of the margin of appreciation will vary according to the circumstances, the subject matter and the background'¹⁷ of the case. Where the issue at stake is a 'delicate' one, such as the protection of morals, and there is no common European consensus, the margin of appreciation given by the European Court is wide. The margin is also wide where a 'state is required to strike a balance between competing private and public interests or Convention rights'.¹⁸ The margin of appreciation is, however, restricted when an important facet of a person's identity¹⁹ or any feature that the Court sees as essential to the concept of a democratic society, is at stake.

As the European Court expressly stated in *Manoussakis and Others v Greece*,²⁰ which concerned a limitation upon the holding of religious meetings by Jehovah's Witnesses, in 'delimiting the extent of the margin of appreciation [in this context, the Court had to] have regard to what [was] at stake, namely the need to secure true religious pluralism, an inherent feature of the notion of a democratic society'.²¹ In this case the European Court elaborated that considerable weight must be attached to the need to secure religious pluralism when it comes to determining, pursuant to Article 9(2), whether the restriction was proportionate to the legitimate aim pursued. The Court concluded by stating that it would subject the justification of the State to a very strict scrutiny in relation to determining this point. It duly did so and held, in this case, that the means were disproportionate to the aim pursued. This doctrine

15 The margin of appreciation is a device by which the Court allows a State a certain amount of leeway in their handling of human rights issues.

16 *Frette v France* 2002-I; 38 EHRR 21 at para. 41.

17 *Ibid.* at para. 40.

18 *Evans v United Kingdom* 46 EHRR 34 at para. 77.

19 *Dudgeon v United Kingdom* A 45 (1981); 4 EHRR 149.

20 1996-IV; 23 EHRR 387.

21 *Ibid.* at para. 44.

of strict scrutiny has, however, only been applied in relation to assuring plurality of religion; it has not been utilised in determining limitations on an individual's right to manifest their religious beliefs.

The European Court has explicitly stated that Article 9 does not protect every act motivated by religion or belief.²² Indeed the Court has adopted the 'necessity' test created by the former European Commission of Human Rights, arising out of the *Arrowsmith* case,²³ whereby an applicant has to show that their actions were necessary to/required by their religion to gain Article 9 protection.²⁴ When determining the outcome of this test the European Court, and formerly the Commission, has tended to substitute its own understanding of what 'practice' is required by certain religions for that of the applicant and not to take the applicant's feelings, in relation to this, on board. In their determinations they have displayed a certain bias towards practices of more established religions and not showed any deference to the depth of individual beliefs held. This attitude was apparent in *Valsamis v Greece*,²⁵ where the European Court held that there was nothing in the State action, i.e. the school parade, which would disturb the applicant's pacifist views. This was in direct conflict with the applicant's stated view that the taking part in a parade celebrating military action was against their religious pacifist views.

The fact that the Court tends to avoid deciding on the validity of the practices derived from more 'mainstream' religious beliefs, and thereby avoid controversy, is evident in its judgment in *Sahin v Turkey*.²⁶ In that case, the applicant, a medical student attending Istanbul University, was denied entry to one of her exams due to her wearing a headscarf. Her denial of access followed the issuing of a circular, by the University, which stated that people wearing headscarves or beards must not be admitted to lectures, courses or tutorials. The European Court took the applicant's statement that she was wearing the headscarf to obey a religious precept at face value and proceeded on the assumption that the regulations in issue constituted an interference with the applicant's right to manifest her religion.²⁷ Turkey argued that a restriction of the wearing of a headscarf was necessary to protect against the religious primacy of one religion and the gender equality of women. In light of the State's aim of protecting religious plurality, the principle of secularism in its constitution, public order and the rights and freedoms of others, together with the fact that there was no common European view on the matter, the Court found the interference complained of came within Turkey's margin of appreciation; the aim was justified and the means proportionate.

22 *Kosteski v "The Former Yugoslav Republic of Macedonia"* 45 EHRR 31.

23 *Arrowsmith v United Kingdom* (1977) 8 DR 123; 3 EHRR 218.

24 For example, in *X v United Kingdom* (1981) 22 DR 27; and *X v Austria* (1981) 26 DR 89.

25 1996-VI; 24 EHRR 294.

26 *Supra* n. 9.

27 *Ibid.* at para. 71.

The European Court has repeatedly referred to gender equality when allowing limitations on the manifestations on the Islamic religion. Although the concept of gender equality is mentioned as an afterthought in their *Sahin* judgment, it does appear that the Court sees the Islam religion as *per se* incompatible with gender equality and democratic values.²⁸ This is problematic as women's choice, and therefore their religious choice, is inherent within the concept of gender equality. It could be argued, using the *Sahin* judgment and its earlier 'headscarf' judgment, *Dahlab v Switzerland*,²⁹ that the European Court values an alleged State assertion of protection of gender equality above the protection of religious manifestations. It should be noted, however, that this is a protective, as opposed to an empowering, ruling for women; it portrays women as victims, as opposed to agents of their own free will, and, to that extent, actually works against the concept of gender equality. The European Court's stance presumes, in the name of gender equality, that women cannot choose for themselves how they dress, which is a highly debatable approach. It is submitted that the European Court is not valuing gender equality in these judgments but merely deferring to the State's view. It would be interesting to see what approach the European Court would take in relation to a woman claiming a breach of her right to freedom of religion and gender equality, in relation to the exemption from non-discrimination given in many domestic employment laws to the hiring of priests. As stated later in this article, the author imagines that the power of the relevant religious institutions and the consequent State 'societal peace' argument would hold sway, as opposed to gender equality, in that instance. It is therefore not gender equality, unfortunately, but the stance of the State that determines the outcome of such a clash, regardless of the so-called weight the Court attaches to gender equality.

The European Court's decision in *Sahin* allows States a very wide margin of appreciation in relation to restricting the allowable manifestations of religion. Although the Court did place some boundaries on the ability of States to impose limitations on an individual's right to religion, the boundaries it set were wide, namely, that 'regulations must never entail a breach of the principle of pluralism, conflict with other rights enshrined in the Convention, or entirely negate the freedom to manifest one's religion or belief'.³⁰ Judge Tulken's dissenting opinion in *Sahin* demonstrates a much more balanced and logical approach to the issues at play and highlights the abdication of the European Court's supervisory role in this case. In reality, applying the majority judgment in the *Sahin* case, if a State can point to a legitimate aim that justifies a restriction to a person's manifestation of religion and can show that it assessed the impact

28 *Refah Partisi (The Welfare Party) and Others v Turkey* 37 EHRR 1.

29 2001-V.

30 *Sahin v Turkey*, supra n. 9 at para. 102.

that the restriction would have on that person's right then, provided the measure retains some proportionality, the restriction will be seen as justified. While an individual's right to freedom of religion may be restricted in this manner, religious communities are, however, protected from such intrusions into the way they operate.

Although States currently have a limited right to interfere with the internal affairs of 'State' or established churches within their jurisdiction,³¹ non-established religions are given the right to autonomy in their internal decision making and structure. This can be seen in the case of *Hasan and Chaush v Bulgaria*.³² In this case, the Bulgarian State interfered with and replaced the leadership of the Bulgarian Muslim community. The European Court stated very clearly that

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. State action favouring one leader of a divided religious community or undertaken with the purpose of forcing the community to come together under a single leadership against its own wishes would likewise constitute an interference with freedom of religion. In democratic societies the State does not need to take measures to ensure that religious communities are brought under a unified leadership.³³

This 'non-interference by a State in a religious community' stance taken by the European Court, and the former Commission, has had a huge impact on the individual's right to freedom of religion. It has, in effect, meant that when an individual becomes part of a religion they are deemed to voluntarily give up their personal right to freedom of conscience and belief.³⁴ In *X v Denmark*,³⁵ the European Commission stated that a 'priest's' 'individual freedom of thought, conscience or religion is exercised at the moment they accept or refuse employment as clergymen, and their right to leave the church guarantees their freedom of religion in case they oppose its teachings'.³⁶ It followed this sentiment by stating that 'the church is not obliged to provide religious freedom to its servants and members'.³⁷ Members of a religion therefore have no right to

31 *Knudson v Norway* (1985) DR 247.

32 *Supra* n. 13.

33 *Ibid.* at para. 78.

34 *X v Denmark* (1976) 5 DR 144; *Karlsson v Sweden* Application 12356/86, Decision of 8 September 1988; and *Knudson v Norway*, *supra* n. 31. Interestingly enough the European Court's stance has in fact meant that the leadership of religious communities can ignore 'dissenters' within their religion thereby paving the way for 'unity' of beliefs within a religious community.

35 *Ibid.*

36 *Ibid.* at 158.

37 *Ibid.*

manifest their own individual religious views, different from those dictated by the leaders of the religion, within that religion. There is therefore no right to freedom of conscience and belief, expression or equality within a religion. A religious community has the right to ignore the wishes and rights of their adherents without interference by the law. Effectively, this means that once an individual is part of a certain religion, their only option is to accept the creed, rules and internal workings of that religion, or leave. As Sunder elucidates, this approach therefore results in a legally authorised exile for those who openly disagree with the group's traditional or patriarchal views.³⁸ The liberty-versus-equality paradigm has therefore paved the way for the rise of a new right to exclude an individual, not from an association's membership, but rather, from an association's meaning.³⁹

This 'put up and shut up' or leave policy is problematic. The allowance of this policy is rooted in the liberal concept that an autonomous individual makes choices on rational grounds; this is, however, only a concept and not one borne out in reality. The concept does not make allowance for the fact that individuals are members of various groups and rarely fully independent from their surroundings. It does not take account of the complex relationship between a believer and their religion. The question of choice is contextual. Many individuals are born into a religion and a religious community; membership therefore becomes part of those individuals' identity before the concept of choice is introduced. Even where the choice of religion comes later it is difficult, if not nigh on impossible, for some individuals, particularly when their life revolves around a religious community or family, to 'cut' that religion out of their sense of identity and conception of life. To many members of a religion their religion is the foundation of their sense of self, the source of truth and salvation. Although they may disagree with certain tenets of their church, it is an important part of their identity. To leave, as a result of discriminatory/patriarchal practices and structures, could seriously affect their spiritual well-being.⁴⁰ Leaving is also impractical where a person has little or no social, economic or personal independence from the religious group.⁴¹ This is especially pertinent for women who, due to their status and position within society, are more likely to be dependant upon their family and religious community. In Europe, this is more likely to be an issue within minority religions or

38 Sunder, 'Cultural Dissent', (2001) 54 *Stanford Law Review* 495 at 542.

39 Ibid.

40 For an example of how religious women want to stay within a religion regardless of its discriminatory practises but wish that it would become more internally 'equal', see Preston, 'Women in Traditional Religions: Refusing to Let Patriarchy (or Feminism) Separate us from the Source of Our Liberation', (2003) 22 *Mississippi College Law Review* 185.

41 Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001) 129. See also Coomaraswamy, 'Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women', (2002) 34 *George Washington International Law Review* 483.

immigrant communities. Some religions use the threat of exclusion to prevent dissent and bring dissenters back in line. The purpose of the Jewish device of shunning or excommunication, for example, has been said to 'serve notice. . . that this conduct is unacceptable and also, secondarily, to encourage the violator to return to the community'⁴² and, presumably in this context, obey the discriminatory rules. In a closed and tightly knit community, exclusion from that community, due to a desire not to be bound by patriarchal rules, can be a severe penalty and one which many women do not wish to pay. The issue at the heart of this article is not that women wish, necessarily, to leave their religion but rather that they wish to be treated equally and have a say in the content and structure of that religion.

The European human rights system is not alone in its treatment of religious communities as autonomous entities. Human rights jurisprudence and international policy continues to define religion as a sovereign, extra-legal, jurisdiction in which inequality is not only accepted but expected.⁴³ This may be due to the fact that religion and human rights could be seen to be competing ideologies. To the extent that religious precepts are seen as divine law, human rights and religion will clash. States that have a religious foundation, or religions themselves, are bound to argue that there is a natural law order that supersedes human rights and, in the event of a conflict, religion prevails.⁴⁴ The fact, however, remains that States create the law that is abided by in their jurisdictions. The Council of Europe States, and indeed all States through membership of the United Nations (UN), have chosen the human rights model and as such it is submitted that claims of religion are to be dealt with within this model and not as a competing ideology.

3. Status of Women within Religion

Religious institutions are, on the whole, male-dominated patriarchal institutions that continue to perpetrate discrimination against women. Although women make up the majority of believers, they do not hold positions of real power within most major religions.⁴⁵ It is encouraging that many Christian religions are coming around to the idea of women as ministers of the faith.

42 Broyde, 'Forming Religious Communities and Respecting Dissenter's Rights: A Jewish Tradition for a Modern Society', in Witte and Vyver, *supra* n. 5 at 211.

43 Sunder, 'Piercing the Veil', (2003) 112 *Yale Law Journal* 1399 at 1401.

44 Coomaraswamy, 'Different but Free: Cultural Relativism and Women's Rights as Human Rights', in Howland (ed), *Religious Fundamentalisms and the Human Rights of Women* (New York: Macmillan, 1999) 82.

45 In all the major religions, there are more women than men and more women in evangelical groups than mainstream religious groups, see Boyle and Sheen (eds), *supra* n. 1 at 57. In fact studies consistently show that women, on a whole, are more religious than men, see for conclusions on the findings of the world value surveys, Stark, 'Physiology and Faith: Addressing the 'Universal' Gender Difference in Religious Commitment', (2002) 41 *Journal for the Scientific Study of Religion* 495.

The Church of Scotland has ordained women as ministers since 1968, while the Church of England has ordained women as ministers since 1992. While some religions are starting to show small signs of growth and acceptance of true gender equality, the pace of change is, however, slow. Even when religions have accepted that women may be ministers, gender discrimination and the sidelining of women still occurs. In 2005, approximately a quarter of diocesan-licensed ministers in the Church of England were women. Women, however, only accounted for a sixth of those in full-time stipendiary posts, while making up half of those in part-time and voluntary positions.⁴⁶ It is also notable that women are not being selected to serve in large, growing or high-profile churches.⁴⁷ This discrimination strengthens the further we delve into the power structure. Although the Church of England has drafted a law allowing women to become Bishops, the General Synod has agreed to resubmit the draft law for amendments. It is entirely possible that the law will be rejected in its final form, seriously hindering the ability of women to become Bishops within the Church of England.⁴⁸ It is somewhat ironic that the Supreme Governor of the Church of England is the Queen: a woman.

Only a few of the main religions accept that women can be official interpreters of their sacred texts and an official intermediary between God and the faithful. Up until very recently, women were denied an education in the holy texts of Islam and Judaism and, in many States, still are. Where only men are the authoritative interpreters of religious texts, women cannot contribute to any development of progressive, gender-equal, interpretations. There has been no female Grand sheik of Al-Azhar,⁴⁹ no women mufti and no women ayatollah. Women therefore lack the institutional credentials and prestigious titles that can lend authority to men's pronouncements on behalf of Islam.⁵⁰ This is the current position in the majority of religions. Most religions also claim that only men possess the ability necessary to communicate with and be God's representative on the Earth. A considerable number of Christian denominations do not allow women to be ministers of religion; Orthodox Judaism and most branches of Islam likewise prevent such roles for women. Even in religions where female priests are permitted, they only exist in small numbers

46 Voas, 'Ordained but Disdained: Women's Work in the Church of England', (2007) 48 *Modern Believing*, available at: <http://www.modchurchunion.org/Publications/ModernBelieving/Oct07/48.4%20Voas.doc> [last accessed 8 March 2010].

47 Ibid.

48 See Butt, 'Church of England will not see first female bishop until 2014', *Guardian*, 11 February 2009.

49 The Al-Azhar in Cairo is regarded as the pre-eminent centre of theological learning and, therefore, interpretation of the Sunni Muslim faith. The Grand Sheik is the leader of the Al-Azhar. He is perceived as the foremost religious legal expert in the Sunni sect. He advises States on religious matters and oversees an extensive network of educational institutes, worldwide.

50 Mayer, 'Islamic law and Human Rights: Conundrums and Equivocations', in Gustafson and Juviler, *supra* n. 4 at 184.

and within certain denominations.⁵¹ Certain religions have even rescinded their former policy of allowing women ministers.⁵²

Religions are not, generally, democratic organisations; as women are not in positions of power their voices and views go unheard. Women are therefore not able to influence the content of their religion or shape their role within it. Although many religions are increasingly paying lip service to the concept of gender equality, they do so within the limited concept of complementary roles for men and women and deny the applicability of substantive gender equality.⁵³ The older assertion of the natural inferiority of women has now been replaced by the anthropological model of mutual complementarity.⁵⁴ In this model, men and women have separate normative roles, with human beings only finding perfection within this duality. However, while the roles are seen as mutually complementary, men and women are equal only in terms of dignity. In reality the specific characteristics attributed, and roles given to each gender, result in male dominance. The justifications for discrimination have changed but the end point of male superiority has not.

Male patriarchal attitudes are prevalent and protected within religion. This causes problems not only for those disenfranchised women within a religion but also for women's status and equality in society as a whole. The precepts and attitudes of religion pervade society. There is no wall separating the public and private life and thoughts of an individual. While many States might pride themselves on being secular or neutral as regards religion, the values of the dominant religions are part and parcel of and underpin the culture of a State. Religion and culture are intertwined. One influences the other. In a well-functioning society they walk hand in hand embodying the same values and 'good practices'. Advances or changes in values may initially begin in one but eventually become part of the other too. Discriminatory attitudes in one sphere therefore impact negatively in the other. The power of religion over the lives of women has had, and continues to have, a formative influence on their roles in group and collective identities, in family and the community.⁵⁵ Women's lesser status in religion compounds their inferior status within society as a whole.

51 See the 'gender' section in the country reports within Boyle and Sheen, *supra* n. 1.

52 For example, the Continuing Presbyterian Church, *ibid.* at 75.

53 See the Apostolic Letter, *Mulieris Dignitatem: On the Dignity and Vocation of Women* (1998), in relation to the Catholic Church's stance on this. See also Mayer, *supra* n. 50 at 125–7, which gives examples of influential Muslim views on the 'natural' different roles of men and women; Fawzy, 'Muslim Personal Status Law in Egypt: The current situation and possibilities of reform through internal initiatives', in Welchman (ed), *Women's Rights & Islamic Family Law: Perspectives on Reform* (London: Zed Books Ltd, 2004) 24.

54 Eyden, 'The Creation of Womanhood: A Hierarchical Construction', available at: <http://www.womenpriests.org/theology/eyden3.asp> [last accessed 8 March 2010].

55 Sheen, 'Women's Rights to Freedom of Religion or Belief', in Lindholm, Durham and Tahliz-Lie (eds), *Facilitating Freedom of Religion: A Desk Book* (The Hague: Martinus Nijhoff Publishers, 2004) 515.

4. Struggle for Gender Equality within Religion

Women and men, both inside and outside religion, have struggled to put gender equality on the religious agenda. There has been a mixed reaction to their efforts, with the leadership of many religions proving resistant to change. Most strands of Islam are unwilling, as yet, to engage with the process of obtaining gender equality. Although Judaism is more receptive to the concept of gender equality, its more Orthodox strands are impervious to change in this area. One can take the Roman Catholic religion as an example of religion's reluctance to accept and implement gender equality.

Although in the 1970s there were signs that the Catholic Church might be close to accepting women as priests, this move towards gender equality was firmly quashed by the Vatican.⁵⁶ The movement for female ordination and dissent within the Church grew regardless. Pope John Paul II, in an attempt to quell this growing tide of support for female ordination, invoked the concept of divine androcentrism. He presented as a definite core doctrine of the Catholic Church the view that women cannot be ordained as priests.⁵⁷ When this failed to eradicate support for female ordination, the Vatican instituted a requirement that all priests and theologians must take an oath of loyalty obliging them to support certain definitive doctrinal pronouncements, one of which is the non-ordination of women.⁵⁸ The priesthood and authoritative interpreters of God's will within the Catholic Church have been effectively silenced and gender equality prevented by the imposition of authority by the ruling elite. Although this example relates to the Catholic Church, most religions are undemocratic and unrepresentative in relation to the actual 'societal' views and beliefs of their adherents.

It could be debated whether religious women wish to be 'rescued' from misogynist attitudes within their religion and the extent to which this is so. Certainly, this question could be derived from cases such as *Sahin*, where the female believer, in question, wished to abide by a religious practice that the State and others viewed as discriminatory. It could be argued that it is the individual believer's choice whether they abide by such discriminatory practices, i.e. that equality means the ability to choose what you believe in and practise and, from an individual perspective, this surely must be correct. This does,

56 At the request of the bishop's synod in 1971, Pope Paul VI set up a special commission to study the function of women in society, although not to discuss women ministers, and a biblical commission to look at the question from a scriptural angle. The final report was favourable to female ordination, with the majority finding that the Church could ordain women. In response the report was quashed and withheld from publication. Pope Paul VI in fact went against the main tenet of the report and sanctioned a doctrinal document against women's ordination: *Inter Insigniores*. This document did little to suppress the growing tide of opinion in favour of female ordination.

57 The Pope proclaimed this in his thesis *Ordinatio Sacerdotalis: On Reserving Priestly Ordinance to Men Alone* (1994).

58 This can be found in the *Ad Tuendam Fidem* (1998).

however, beg the question, what is 'free' choice. As stated by Preston, '[i]t is understandable and legitimate for a woman to want to fit in with other adherents of their faith. In addition a woman may value and respect the wishes of her parents, husband, children or others to conform to the cultural norms.' To what extent is a woman given a free choice in whether she abides by a discriminatory religious practice, where there is no alternative in how they demonstrate that they are a 'good' adherent of their faith?

Many could point to the rigorous defence of male-only priests by a number of women, including a UK prominent politician, Ann Widdecombe,⁵⁹ as indication that some religious women do not wish to have a secular version of gender equality thrust upon them. This is no doubt true. Equality, however, is not a merely secular concept but one at the heart of all religions. Ms Widdecombe, when leaving the Church of England over its ordination of women, accused the Church of 'promoting political correctness above the very clear teachings of Scripture'.⁶⁰ To what extent, however, are the 'Scriptures clear' and equality merely 'political correctness'? The 'male' interpretation of the bible, and other sacred books, is the official interpretation and taught as such.

A process of socialisation takes place in every community where the members are taught and internalise a set of complex rules and religious 'understandings'. Institutionalised religions tend to promote unthinking obedience to the creed and rules they set. Where a person is taught that there is only one 'right' interpretation of the Scriptures, and only by accepting that can you be of that religion, to what extent is it really possible to question what is seen as unquestionable, i.e. the superiority of men in religion and God being made in man's image?⁶¹ As McClain comments, in relation to her understanding of Rawls theories, how voluntary is an acceptance of a religious 'norm' if the adherents have been socialised into accepting it and there is little practical alternative?⁶² Surely it is only when there are competing legitimate religious interpretations that a real choice is possible? As the organisation Women Living Under Muslim Laws argues, it is only when women start assuming the right to define for themselves the parameters of their own identity and stop accepting unconditionally and without question what is presented as the 'correct' religion that they will be able to effectively challenge the corpus of laws and gender constructs thrust upon them. This does not mean

59 Ann Widdecombe left the Church of England in 1992 due to its allowance of women to become clergy.

60 BBC, '1992: Church of England votes for women priests', available at: <http://news.bbc.co.uk/onthisday/hi/dates/stories/november/11/newsid.2518000/2518183.stm> [last accessed 9 March 2010].

61 Shaheed, 'Constructing Identities: Culture, Women's Agency and the Muslim World', (2001) 23–34 *Women Living Under Muslim Laws Dossier*, available at: <http://www.wluml.org/node/342> [last accessed 9 March 2010].

62 McClain, 'Negotiating Gender and (Free and Equal) Citizenship: The Place of Associations', (2004) 72 *Fordham Law Review* 1569 at 1583.

that all women must feel the same way or hold the same views within a religion. It merely means that each man and woman should be able to choose what they believe in and not prevent others from exercising their equal religious rights, in relation to themselves. Not every religious woman will want to be a Minister of the faith, or influence the content of their religion, but every woman, like every man, should be given the choice to do so.

Religions are not a mass of people with one viewpoint or belief that their leaders espouse. They are a collection of different thoughts and beliefs, the holders of which all identify themselves as 'being of that religion'. What 'being of that religion' means, however, differs for each individual; human beliefs are individualised, as are human rights. Looking at religious beliefs in this context, the law's current approach to the right to freedom of religion is highly problematic.

5. Practical Effect of the Current Legal Approach to the Right to Freedom of Religion

The harsh choice of 'take it or leave it', in relation to membership of religion, means in effect that women have to choose between their religion and community or equality. Individuals do not, however, merely have one badge of identity but many, each enriching that person's life. Women often do not wish to leave their religious community to gain equality; they wish to be recognised as fully functioning and equal members of their religious community. States have a responsibility to respect and ensure that women have this right. Religious women do not wish to damage their religious institution, in fact when it is criticised externally they will protect it. What they do desire is the opportunity to use, to the full extent, their capabilities to nurture and enrich their religion.⁶³ They cannot fully do this in their present disempowered state.

The judicial tendency, of not just the European Court but most domestic jurisdictions,⁶⁴ to carve the religious sphere out of the operation of judicial scrutiny is hindering the process of gender equality and is at the heart of why women do not currently have a right to freedom of religion. States and judicial authorities are implicitly allowing religions to continue to discriminate against women and deny their female believers an equal say in deciding the identity, content and structure of that religion. The liberal stance of neutrality and non-interference towards religion is not neutral; it merely allows the power balance to remain heavily tilted towards male dominance within religion.

63 See Greenberg, 'Feminism, Jewish Orthodoxy, and Human Rights: Strange Bedfellows?', in Gustafson and Juviler (eds), supra n. 4 at 140, in relation to this protective instinct.

64 See Hill, 'Judicial Approaches to Religious Disputes', in O'dair and Lewis (eds), *Law And Religion: Current Legal Issues* (Oxford: Oxford University Press, 2001) 409; Minnerath, 'The Right to Autonomy in Religious Affairs', in Lindholm, Durham and Tahliz-Lie (eds), supra n. 55 at 291; and Evans, supra n. 12 at Chapter 11, for details of domestic jurisprudence in this area.

6. The 'Liberal' Stance of Legal Neutrality towards Religion

The catchword used to justify legal neutrality in relation to religion is 'plurality'. A plurality of ideas is also seen by liberals as necessary for the actual evolution of society. Part of the premise behind religions being given internal autonomy is to ensure a plurality of ideas and therefore liberty within society. Academics such as Galston explicitly recommend pursuing a policy of maximum feasible accommodation in relation to religion. They expressly state that patriarchal gender relations should be allowed to persist to enable the maximisation of liberty.⁶⁵ In some academic writings there is suggestion that human rights, particularly gender equality, might stifle liberty.⁶⁶ It is interesting however that, although liberty is presented as the favoured end point for society as a whole, liberty, in this context, is implicitly a purely male right. This viewpoint accepts that the views of women, half the human race, can be ignored and suppressed.

Much of what is behind this championing of 'liberty' against claims of gender equality is actually the defence of legally sanctioned male-believer privilege. There is little realisation, within this reasoning, that non-interference and maximum feasible accommodation can actually prevent the proliferation of ideas and the evolution of religion. As Sunder states, the liberty-versus-equality paradigm results in a legally authorised exile for those members of the group who openly disagree with the group's traditional views. In effect it gives exclusive rights to the leaders of religion to define the religions creed and views and silence or exclude those who disagree.⁶⁷ By buying into the vision of 'an organised religious community based on identical or at least substantially similar views,'⁶⁸ States and judicial authorities cede the ultimate power to decide the creeds and internal workings of the religion to the leaders of a religion. They cede this power to religious leaders without any consideration of whether the religious authorities consult with or actually represent the views of their members. State power is used here in the service of religious leaders to impose patriarchal and hierarchical norms, for those leaders' benefit, at the expense of the basic right to equality of the community's female members.⁶⁹

65 Galston, 'Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory', (1999) 40 *William and Mary Law Review* 869 at 875; and Ahdar, 'Religious Group Autonomy, Gay Ordination, and Human Rights Law', in O'dair and Lewis (eds), *ibid.* at 276.

66 Ahdar, *ibid.* at 276.

67 Sunder, *supra* n. 43 at 515.

68 *X v Denmark*, *supra* n. 39 at 158.

69 See Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community, and Women's Equality* (unpublished) quoted in MacClain, *supra* n. 62 at 1591.

7. States' Legal Obligations in Relation to Gender Equality

The current legal approach to the right to freedom of religion effectively denies women an equal say in the composition and content of their religion. It is hereby asserted that such an approach violates the legal obligation States and the international community have to ensure gender equality and a woman's equal right to freedom of religion. States have a duty of due diligence to prevent, punish, investigate and/or redress the harm caused by gender inequality or any violation of a woman's human rights by the acts of private persons or entities.⁷⁰ This concept of due diligence was first, judicially, espoused in the Inter-American Court of Human Rights judgment in *Velasquez-Rodriguez v Honduras*.⁷¹ The European Court has adopted this concept within its own jurisprudence as can be clearly seen, in relation to gender equality, in *Opuz v Turkey*.⁷² In this case the European Court considered the obligation of States to 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women' as set out in Article 2(f) of the Convention on the Elimination of all Forms of Discrimination Against Women 1979 (CEDAW)⁷³ in relation to the phenomenon of violence against women. It also referred to Article 2(e) of CEDAW, which explicitly places a duty on States to eliminate discrimination by any person, organisation or enterprise. A State's obligation to ensure religious beliefs, customs and practices are modified to prevent discrimination has been reiterated within the CEDAW Committee and Human Rights Committee jurisprudence⁷⁴ and General Comments, and in UN and Council of Europe resolutions.⁷⁵

Article 1 of the European Convention on Human Rights states that the Contracting Parties must secure to everyone within their jurisdiction the right and freedoms defined in the Convention. Article 14 elucidates that these rights and freedoms must be enjoyed without discrimination on the basis of

70 Human Rights Committee, General Comment No. 31: The nature of the general legal obligation on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13; 11 IHRR 905 (2004) at para. 8.

71 IACTHR Series C 4 (1988) at para. 172.

72 50 EHRR 28.

73 1249 UNTS 13.

74 CEDAW Committee, Concluding Observations regarding Algeria, 4 May 1999, A/54/38 at paras 70 and 71; CEDAW Committee, Concluding Observations regarding India, 17 August 2000, A/55/38 (2000) at para. 60; CEDAW Committee, Concluding Observations regarding Bangladesh, CEDAW/C/SR.654 at para. 62; *G.D. and S.F. v France* (12/2007), Admissibility Decision, CEDAW/C/44/D/12/2007 (2007); and Human Rights Committee, Concluding Observations regarding Morocco, 1 November 1999, CCPR/C/79/Add.113 at para. 12; Human Rights Committee, Concluding Observations regarding Kuwait, 27 July 2000, CCPR/CO/69/KWT at paras 452–97; and Human Rights Committee, General Comment No. 28, supra n. 3 at para. 21.

75 UNCHR Res. 2005/40, 19 April 2005, E/CN.4/RES/2005/40 and CE Res. 1464, supra n. 2, both attest that States should take all appropriate measures to counter intolerance and gender discrimination based on religion or belief.

sex. This therefore means that the right to freedom of religion and belief in Article 9(1) of the Convention must be guaranteed and protected in law and in practice for both men and women, on the same terms and without discrimination. The present political and legal stance of neutrality and non-interference in relation to religion, therefore, has to change in light of this legal obligation. If religious institutions or beliefs are internally discriminating against or causing discrimination against women, then States are obliged to take action to prevent any such discrimination. Although it is appreciated that the spiritual beliefs of another can be integral to their very person, claims of religion, which impact on the basic rights of others, must be subjected to critical analysis.

While it may be acceptable to argue over the precise content of a human right, it is clear that, regardless of the actual specifics, each human right must be ensured without distinction as to sex, or indeed any of the other 'protected grounds'.⁷⁶ This means that, in order to fulfil the non-distinction condition, the content of the rights themselves must be non-discriminatory. Following on from this reasoning, all human rights, including the right to freedom of religion, should be interpreted in light of the non-distinction norm. The right to freedom of religion therefore must be looked at through the prism of gender equality.⁷⁷ Women's right to freedom of religion is equal to that of men. Although States can and should allow religions internal autonomy, they still have a supervisory role to play in order to guarantee that gender equality is being ensured within religion and religious communities. This is not as fundamental a change as it may appear to be. Liberal theory, which underpins the State's neutral stance in the private sphere, already allows for the fulfilment of gender equality within religion. Rawls' 'principles of justice' guarantee the 'basic rights and liberties' of individuals within the 'social world' and thereby religion. In fact, Rawls actually states that 'because churches . . . are associations within the basic structure, they must adjust to the requirements that this structure imposes in order to establish background justice'.⁷⁸ On this view, the autonomy of such associations is restricted by reference to 'basic equal liberties . . . and fair equality of opportunity' and the basic rights and liberties of an individual are guaranteed.⁷⁹ Liberal theory therefore already embraces the idea that religious autonomy does not include the right to discriminate on the basis of sex.

76 The author would like to reiterate that although she is making an argument on the basis of gender equality, the premise that she is putting forward is applicable across the 'protected grounds' such as race, colour, language, etc. The content of all human rights must be interpreted in light of this entire duty regarding non-discrimination. This includes sexual orientation, transgender status and disability.

77 Stuart, *supra* n. 6 at 101.

78 Rawls, *Political Liberalism* (New York: Columbia University Press, 1996) at 261.

79 *Ibid.*

Once it is accepted that religious autonomy does not include the right to discriminate on the basis of sex, the next question to be posed is how can gender equality be ensured within the right to freedom of religion and therefore within religions themselves? This is obviously a very difficult question to answer and must to be approached with sensitivity, but is not one that can simply be ignored.

8. Methods for Instituting Change within Religion

It is true that '[b]y its very nature, and in order to influence effectively the moral convictions and daily behaviour of those who subscribe to it, religious belief must be voluntarily adopted and maintained'.⁸⁰ Change has to come from within for it to make a real difference, whether the change is being made by a person or an organisation. In order for women to be truly equal within a religion, those within that religion must therefore accept the concept of gender equality, with all of its resultant implications. Both An-Na'im⁸¹ and Coomarasamy⁸² are correct in insisting that change within a religion can only really occur through internal dialogue. At present however, although the Council of Europe States have accepted that women and men are equal, those in positions of authority within religion are unwilling to initiate a process of dialogue and change towards gender equality. Religious authorities tend to be a self-perpetuating male elite over which the religious community usually has little control. Currently they are resisting reform;⁸³ reform is not in their interest. An upheaval of gender hierarchy would shake the core of not only religious doctrinal symbolism of androcentric gender models⁸⁴ but also the power relations they support. Seen in this light, gender equality is a dangerous premise that would involve fundamental changes to the structure, composition and official views of most religions. This thereby threatens the position and power base of the current elite. It is therefore unsurprising that religions do not acknowledge the right of women to be a part of their religion on an equal basis to men; those in positions of power are reliant on the subordination of women to retain that power. Internal change is unlikely to occur in these circumstances without outside State pressure and 'interference' or huge ructions from within the religion. Where those in power within a religion are reluctant

80 An-Na'im, 'Islamic Foundations of Religious Human Rights', in Witte and Vyver (eds), *supra* n. 5 at 339.

81 An-Na'im (ed.), *Cross Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1991).

82 Coomaraswamy, *supra* n. 44.

83 Freeman, 'Is the Jewish Get any Business of the State', in O'dair and Lewis (eds), *supra* n. 64 at 372.

84 Borresen, 'Religion Confronting Women's Human Rights', in Lindholm, Durham and Tahliz-Lie, *supra* n. 55 at 552.

to initiate change, States must step forward and play their part in encouraging and supporting those religions in this process of change towards gender equality.⁸⁵ Religious institutions and leaders need to be encouraged to embrace their golden rule of 'doing unto others as you would have done unto yourself'⁸⁶ and bringing into fruition the fundamental precept of equality that lies at the heart of each religion.⁸⁷ As stated by Stephen Barton:

In the sphere of gender relations. . . the great irony is that the Christian ideals of freedom, reconciliation and equality are being discovered and practiced more outside the church than within it.⁸⁸

9. Instituting Change through Education

States can help facilitate religious change, thereby satisfying their international and regional legal obligation to 'ensure' non-discrimination in the operation of human rights, in a number of different ways; one of which is through education. Religious education is key to equality within religion as it is key to equality within society as a whole. Notions of inferiority and inequality are taught. If, instead, one teaches gender equality the battle is almost won. Religious education takes place in families, schools, communities and within the 'church' itself. Although the State traditionally only has direct influence over education within schools, this is a good starting point.

At present there is considerable variety in the approaches taken by States to education in the field of religion and conviction.⁸⁹ The UN Special Rapporteur's survey and report on religious education⁹⁰ recommended that religious education should include education on a range of religions and be

- 85 It has been suggested that given the difficulties and slow pace of cultural change, gender equality can only really occur through a progressive realisation of rights. While the law states differently and women may wish that it were otherwise, this approach, in reality, is probably correct in relation to changes in both culture and religion: see Coomaraswamy, *supra* n. 44 at 509.
- 86 This 'Golden Rule' can be found in the Declaration Towards a Global Ethic, and the attached Principles of a Global Ethic, as signed in 1993, in the Second World Parliament of Religions, by the vast majority of religious representatives. The Declaration and Principles can be found at: <http://www.religioustolerance.org/parliame.htm> and <http://www.religioustolerance.org/parlrtl1.htm> [last accessed 8 March 2010]. For more information, see Tahzib, *Freedom of Religion or Belief: Ensuring Effective Legal Protection* (The Hague: Kluwer Law International, 1996) 18.
- 87 See Arat, 'Women's Rights in Islam: Revisiting Quranic Rights', in Pollis and Schwab (eds), *Human Rights: New Perspectives, New Realities* (Boulder: Lynne Rienner Publishers, 2000) 69, in relation to the fact that equality lies at the heart of the Koran.
- 88 Barton, 'Impatient for Justice: Five Reasons Why the Church of England Should Ordain Women to the Priesthood', (1989) 92 *Theology* 403.
- 89 Plesner, 'Promoting Tolerance through Religious Education', in Lindholm, Durham and Tahliz-Lie, *supra* n. 55 at 796.
- 90 Special Rapporteur on religious intolerance, Professor Abdelfattah Amor, Racial Discrimination, Religious Intolerance and Education, 3 May 2001, A/CONF.189/PC.2/22.

focused on the aims of tolerance, non-discrimination and respect for human rights. This is not simply a recommendation; the duty of non-discrimination in Article 14 of the Convention is equally applicable in relation to the right of education contained within Article 2 of Protocol No. 1 to the Convention. Council of Europe Member States therefore have a legal duty to ensure that religious education teaching is in conformity with gender-equality principles, as pointed out in the Council of Europe Resolution 1464.⁹¹ This Resolution elaborates on the content of this State duty by explicitly stating that States should fight against religiously motivated stereotypes of male and female roles from an early age, including within schools.⁹² Article 10 of CEDAW, specifically requires States to eliminate any stereotyped concept of the roles of men and women at all levels and in all forms of education by, in particular, the revision of textbooks and school programmes and the adaptation of teaching methods. In order to promote religious tolerance and equality, in all its strands, religious education should be a part of mainstream education. Textbooks need to advocate a gender-equal perspective and help to foster a person's critical evaluation skills. Teachers should also be properly trained to teach religious education in a tolerant and non-discriminatory way taking human rights, and in particular gender equality, into account.

It is clear that the development of an individual's critical thinking is a key educational goal.⁹³ The development and application of critical thinking and evaluation within religious education is crucial for the attainment of gender equality and the strengthening of individual belief. It is only when women start assuming the right to define for themselves the parameters of their own identity and stop accepting unconditionally and without question what is presented to them as the 'right' role or religious interpretation that they can effectively challenge and change the beliefs and practices hemming them in.⁹⁴ This is true also for men; gender equality is also their right. A shift in roles can only occur with support from both genders. It is by critically analysing religious gender stereotypes and interpretations of sacred texts that gender discrimination can be identified and rectified. Major religions have such a broad repository of positions and beliefs that they can legitimise any course of action. Islam has been said to be

like any religion, a reservoir of values, symbols and ideas from which it is possible to derive a contemporary politics and social code: the answer as to why this or that interpretation was put upon Islam resides therefore

91 CE Res. 1464, *supra* n. 2 at para. 7.5; and Articles 5 and 10 CEDAW.

92 CE Res. 1464, *ibid.* at para. 6.

93 For the position in Europe, see Plesner, *supra* n. 88 at 803.

94 Shaheed, 'Controlled or Autonomous: Identity and the Experience of the Network Women Living Under Muslim Laws', (1994) 5 *Women Living Under Muslim Laws Occasional Paper*, available at: <http://www.wluml.org/node/421> [last accessed 10 March 2010].

not in the religion and its texts itself, but in the contemporary needs of those articulating Islamic politics.⁹⁵

It is possible, within each religion, to come up with interpretations that support equality and tolerance, as shown by the cross-cutting acceptance of the 'Golden Rule', i.e. treat everyone as you yourself would wish to be treated, which has equality and tolerance at its very heart.⁹⁶ Interpretations or misinterpretations, which appear to discriminate against women, provide a good pedagogic opportunity to challenge given notions, biases and stereotypes in religion. The use of comparative examples enriches the interpretative exercise. It can be demonstrated by historical example that religious views and interpretations change with the times; religious views in relation to slavery and racial discrimination can be instructive case studies. Religious education must also ensure that women's perspectives are not lacking from religious viewpoints and that religious and cultural heritage is drawn from experiences and role models of both women and men.⁹⁷ There is evidence of women being influential in the teaching and preaching of the early churches. These historical facts can prove to be an eye opener in relation to religion's current stance on women and their religious ability.⁹⁸

What is taught as religious education is a very sensitive matter. Parents have a right to ensure teaching of their children is done 'in conformity with their own religious and philosophical convictions'.⁹⁹ The teaching of religion is also seen to fall within the right to freedom of religion and belief given to religions.¹⁰⁰ This means that although States are obliged to ensure that religion is taught in a gender equal fashion, they have to implement this obligation in a manner sensitive to the views of parents and religion. It has been shown that the best models of religious education are those that integrate

95 Halliday, *Nation and Religion in the Middle East* (London: Saqi Books, 2000).

96 *Supra* n. 85.

97 The role of religious education in the pursuit of tolerance and non-discrimination study prepared under the guidance of Professor Abdelfattah Amor, Special Rapporteur of the Commission on Human Rights on the question of religious intolerance, International Consultative Conference on School Education in Relation with Freedom of Religion and Belief, Tolerance and Non-discrimination (Madrid, 23–25 November 2001).

98 Boyle and Sheen (eds), *supra* n. 1, in relation to Japan, where it can be seen that, although women actually started up various Shinto sects, once these religions became institutionalised, women were pushed out of positions of authority. For the same reoccurrence regarding Buddhism, see Thurman, 'Human Rights and Human Responsibilities: Buddhist Views on Individualism and Altruism', in Bloom, Martin and Proudfoot (eds), *Religious Diversity & Human Rights* (New York: Columbia University Press, 1999) 87.

99 Article 2, Protocol No. 1 to the European Convention of Human Rights 1952. See also Article 5, Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, GA Res. 36/55, 25 November 1981, A/RES/36/55.

100 Article 6, Declaration on the Elimination of Discrimination Based on Belief, *ibid.*; Human Rights Committee, General Comment No. 22: Right to freedom of thought, conscience and religion (Article 18), 30 July 1993, HRI/GEN/1/Rev.1; 1–2 IHRR 30 (1994) at para. 4.

consultation into the whole teaching process.¹⁰¹ This is not to say that the States must bow to pressure from parents and religious leaders and allow gender discrimination to be taught under the pretext of religion, but that they must merely allow everyone to have their view listened and responded to. A full and constructive consultative process can help to illuminate a path through this potential minefield. It should be highlighted to parents and religions, when initiating such consultation, that the goal is to strengthen and develop a student's spirituality and to ensure the continued relevance and legitimacy of religion and belief in today's world.

10. Instituting Change through Support and Funding for Research and Surveys on Gender Equality within Religion

The States' goal must be to encourage internal change within religion towards gender equality in line with their legal obligations. As stated earlier, those in authority within religion can be reluctant to initiate this process. While the use of education is one way to create a movement and internal pressure for change, States can also facilitate this by providing the requisite space and support to alternative, gender-equal, religious views, thereby allowing them to grow and influence the official stance of the various religions. Alongside this, the State can initiate and fund research and surveys designed to highlight the desire for gender equality among church members and the dissatisfaction current discrimination causes. Such research and surveys should concentrate on the current religious and societal views of 'the faithful'. Recent surveys have demonstrated that there is a huge discrepancy between the views of Catholics on such 'societal' views as female ordination, contraception and the married status of priests and the official stance of the Catholic Church.¹⁰² Such discrepancies are not limited to the Catholic Church; an increasing number of religious people feel that religion should not interfere in the personal choices an individual makes.¹⁰³ Even those who wish religious law to

101 Eidsvag, Lindholm and Sween, 'The Emergence of Interfaith Dialogue: The Norwegian Experience: Promoting Tolerance through Religious Education', in Lindholm, Durham and Tahliz-Lie (eds), *supra* n. 55 at 807.

102 Wijngaards, 'Christian Autonomy and the Church', available at: <http://www.womenpriests.org/ministry/wijng.02.asp> [last accessed 9 March 2010].

103 Wijngaards, *ibid.*, discusses the steady shift in European attitudes towards more personal autonomy and freedom seen within the Gallup research known as 'The European Values Systems' studies in 1981 and 1990 and also comparable studies in the USA and Australia, which show that the majority of believers now feel that the locus of religious authority lies within themselves.

apply to their personal lives feel that such law should be gender equal.¹⁰⁴ Using the results of such research, States can draw to religious leaders' attention the growing disparity between their religion's official views and the views of its members in relation to gender equality.

In earlier times, there was consensus within religion that previous religious legal decisions should be kept under constant review to ensure they retained their relevancy and legitimacy.¹⁰⁵ This early practice should be remembered and resurrected. When religion is out of step with societal values and is unwilling to start the process of change, or change is occurring at too slow a pace, it starts to lose its legitimacy. All the 'founders' of the main religions recognised this fact.¹⁰⁶ If a religion loses its legitimacy, it loses its members and position of power within society. Where a religion feels that this is happening it is generally willing to change to 'capture' its market share of believers once more.

11. Encouragement for Religions to Enter into Internal Consultation

With firm evidence of a disparity between the views of those claiming to represent a religion and the members of that religion, the State would be in a good position to convince those leaders to enter into an internal consultation process with all their members. The State could also encourage the adoption of good practice across religions by organising, funding and publicising an inter-religious conference on gender equality. This would at the very least put the topic on the religious agenda and in the public eye. In order to mobilise the whole of society to campaign for gender equality within religion, the State could also initiate, fund and publish reports that study the impact that gender discrimination within religion has on women and society as a whole. This would help to open people's eyes to the negative consequences of religious discriminatory views and practices and create a climate more conducive to religious change. Religions are reactive; they react to social practices and new

104 Hammami, 'Attitudes Towards Legal Reform of Personal Status Law in Palestine', in Welchman, *supra* n. 53 at 134 onwards. The results of the field study are particularly interesting as it shows that although Palestinians automatically want to be governed by Shari'a law, they wish it to be gender neutral.

105 An-Na'im, *supra* n. 80 at 345.

106 Mohammed, Buddha and Christ all appear to have assimilated the 'good' local customs and practices into their religion and ensured their teachings gained legitimacy by only changing the local culture where it clashed with the basic precepts of their religion. Although it is asserted that they wished to alleviate the discrimination of women, they accepted that they were unable to make great advances in this area due to resistance to the idea of gender equality within the local cultures. It is somewhat ironic that while these great religious 'leaders' attempted to reduce discrimination against women, the religions that grew from them now use such 'emancipating' acts as justification to deny women equality. See Thurman, *supra* n. 98 at 97, for details about Buddha being unable to challenge the patriarchal attitudes of his time directly. In relation to the Prophet Mohammed, see Mayer, *supra* n. 50 at 98 onwards.

social realities. State and societal pressure can therefore prompt and facilitate a change in official religious views.

In order to underpin such a change in official religious views, States should also proactively encourage religions to initiate, draft and publish independent feasibility studies in relation to gender-equal interpretations of sacred texts and so on to support true gender equality within religion and the acceptance of women's cultic ability. One of the main ways in which gender equality can be effectively realised within religion is by women being an integral part of the leadership structure and having the authority to interpret, define and implement the religious creed. Law has a role to play in relation to this aspect of religious change and creating the requisite pressure to 'encourage' religious change.

12. Use of Equality Law as an Instrument for Change

At present many States have legislation prohibiting sex discrimination within employment and the provision of services. This legislation, however, specifically allows for sex discrimination to occur in relation to the non-employment of women or provision of services to women within an organised religion, where this occurs in order to comply with the doctrines of that religion or avoid conflict with the strongly held convictions of a significant amount of the religion's followers.¹⁰⁷ There are also similar provisions in relation to sexual orientation.¹⁰⁸ There is no procedure within either the legislation itself or legal jurisprudence to determine whether such discrimination is 'justified' by reference to a religion's doctrine or members' views. The State simply takes the assertions of the religious leaders at face value. It is asserted that a more sophisticated mechanism for determining the doctrines of that religion or whether a conviction is strongly held by a significant amount of the religion's followers should be instituted, while this exemption is still in place. It is accepted that courts are very wary of becoming embroiled in religiously sensitive disputes and straying over the well-recognised State/church divide. This is evident in the English High Court's decision in *Wachmann*.¹⁰⁹ However, while United Kingdom courts are still reluctant to interfere within religiously sensitive disputes, this stance is gradually changing; United Kingdom courts are now willing to treat ministers of religion as employees of the Church and coming

107 See, for example, Sections 19 and 35 of the UK Sex Discrimination Act 1975; Section 32 of the Australian Capital Territories Discrimination Act 1991; and Article 28 of the New Zealand Human Rights Act 1993.

108 See, for example, Regulation 7(2) of the UK Employment Equality (Sexual Orientation) Regulations 2003. The arguments outlined in this article could easily be used in relation to this protected category too.

109 *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1993] 2 All ER 249.

within the employment law ambit.¹¹⁰ This, however, obviously only occurs where that religion accepts women, as ministers, in the first instance. In a recent United Kingdom case,¹¹¹ the Supreme Court was asked to adjudicate on whether the admissions policy of a Jewish religious school, using Matrilineal descent as the key criteria, was direct discrimination and thereby contravened Section 1 of the United Kingdom Race Relations Act 1976. In their handling of this legal issue, although the Supreme Court found that the admissions policy did directly discriminate, it paid extreme deference to the right of religions to determine their own membership and was almost apologetic in their judgment in being forced to stray into perceived 'religious territory'. Regardless of how uncomfortable the courts are in straying into what they currently perceive as 'religious territory', it should, nevertheless, be emphasised that the courts are an arm of the State and as such they still are legally obliged to do so under current State equality obligations.

It should be realised that however strong a government's desire to refrain from directly interfering in the management of religious affairs, circumstances can compel it to take a stand on matters of faith, ritual and doctrine.¹¹² The fact that the discrimination in relation to the non-appointment of women within religious posts is mandated by the religious creed or beliefs does not detract from the State's duty to ensure gender equality and the equal right of women to freedom of religion. The right to freedom of conscience and belief has to be ensured equally to men and women; the right does not therefore cover gender-discriminatory manifestations. In order for a manifestation of belief to be protected under the right to freedom of religion, it must pass the non-distinction test. If a practice is gender discriminatory then it should not, therefore, fall within the protection of human rights law. Technically speaking, States cannot therefore exempt religions from the exercise of equality laws.

Where there is reluctance on the part of religious leaders to move towards gender equality, which is evident at present, then the mere threat of removing these exemptions can prove to be an effective method of prompting internal change within religion. This can be seen by reference to the New Zealand 'Gay Clergy' debate. In New Zealand the tabling of the New Zealand Human Rights Act, and the prospect of expensive lawsuits from licensed homosexuals who wish to become pastors, prompted religious authorities to engage on a

110 The House of Lords decision in *Percy v Church of Scotland Board of National Mission* [2005] UKHL 73, allowed the UK Sex Discrimination Act 1975 to be applicable to ministers of religion. The UK Employment Appeals Tribunal decision in *New Testament Church of God v Reverend S Stewart* [2007] IRLR 178, went further and specifically stated that ministers of religion could be employees of the church.

111 *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and Others* [2009] UKSC 15.

112 Sub-Commission on Prevention of Discrimination and Protection of Minorities, Special Rapporteur, Arcot Krishnaswami, Study of Discrimination in the Matter of Religious Rights and Practices, E/CN.4/Sub.2/200/Rev.1 (1960).

consultative process on the issue of gay ordination in order to decide the church's stance on this matter. In this case the mere prospect of 'State intrusion' into the employment relationships within the church had the positive effect of encouraging religions to embark on a consultative approach to update their self-definition.¹¹³

There is a lesson to be learned here: proposed changes in the law can lead to a 'voluntary' change in religious rules and doctrine. Although the law can be used to facilitate changes in culture this must, however, be done sensitively and only to a limited extent. Changes in law should reflect a burgeoning support for those changes in society. If the law imposes changes that garner insufficient support within society then civil disobedience, rebellion and a backlash against the imposed changes can ensue. Where change is unavoidable, religious interpretations can be found to support that change.¹¹⁴ Once the State has ascertained through consultation, surveys and research that society is agreeable to gender equality within religions, it can then move to abolish the current legislative gender equality exemptions for religion. By announcing their intention to amend gender equality legislation and remove the religious exemption, States can encourage religions to start an internal consultative process and re-think their official views on gender equality and female ordination. By insisting on equality within religious hiring procedures, the State is not interfering with the internal workings of a religion, any more than it does in any other hiring situation. It is not telling a religion whom to hire or dictating what the personal attributes or beliefs of their clergy should be, merely that each application for ordination/employment should be dealt with on an individual basis regardless of that individual's gender. This means that the 'post' should, similarly to any other role, be given to the person best suited intellectually and spiritually for the post. The employment decision should be based on whether an individual possesses the necessary personal attributes, skills and experience for the post, not predicated upon their gender.

13. Potential Legal Action by Religions under the Right to Freedom of Religion

It is idealistic to believe that all religions would simply accept this new stance of the State. Lobbying and social pressure would be applied upon the State, by organised religions, to reverse such a policy. There would also no doubt be

113 See Ahdar, *supra* n. 65 at 275, for more information and a different viewpoint on the matter.

114 This can be seen most commonly in relation to economic strictures but also in relation to racial equality. Where some religions and religious interpretations historically supported racial discrimination, the change in societal views and law prompted a change in religious creeds. It should, however, be noted that some religions, notably the Quakers, were the backbone in the prohibition of slavery movement and are active in combating discrimination and lobbying for fairer laws.

legal action taken by religions, under 'their' right to freedom of religion, to prevent the religious exemptions from neutral equality laws being revoked. As stated earlier, there has been little jurisprudence on the right to freedom of conscience and belief and the content of the right is therefore somewhat hazy. The jurisprudence of the European Court and Commission, however, suggests that States would be given a wide margin of appreciation in relation to their actions regarding a sensitive matter such as this, where there is no common consensus among Council of Europe States.¹¹⁵ In this hypothetical situation, an applicant, under a right to religion claim, would have to prove that the State had violated their right to freedom of religion by not providing an exemption to gender-equality legislation. The European Court has, so far, only extended the protection of Article 9 to those individuals who have been directly discriminated against, i.e. where the law or State action is aimed directly at the restriction of the manifestation and so on of that religion.¹¹⁶ Where the legislation that is allegedly violating an individual's or institution's right to freedom of religion is generally applicable and 'neutral',¹¹⁷ the European Court has tended to deny that any issue under Article 9 has arisen.¹¹⁸ It is clear that gender-equality employment legislation, directed at all employers within a State, is 'neutral'. The petitioner would therefore have a very steep upward battle to persuade the European Court that their right to freedom of religion had been violated. Although the European Court has found a violation of Article 9 where States have interfered directly with the appointment of ministers of non-established churches,¹¹⁹ in the present case the State would simply be acting to prevent gender discrimination being a factor in the hiring of an individual. It is not specifying or interfering in the employment process past the application of natural justice and equality rules. In this instance, the European Court would, in all probability, find that the State had not interfered with the applicant's right to freedom of religion. In the unlikely event that the Court did find that the State had interfered with the petitioner's right to freedom of religion, it is, however, obvious that equality legislation would clear the 'prescribed by law' hurdle and pursues the legitimate aim of attaining gender equality. It is only in relation to the proportionality aspect of the current 'necessary in a democratic society' test that there may be some element of doubt.

115 See, for example, *Frette v France*, supra n. 16 at para. 40; and *Petrovic v Austria* 1998-II; 33 EHRR 14.

116 See *Kokkinakis v Greece* A260-A (1993); 7 EHRR 397; and *Dahlab v Switzerland*, supra n. 29, for examples of how the European Court deals with 'direct' discrimination against religion.

117 The term 'neutral' in the way it is used here means that the law in question is not directed at one religious group and not, on the face of it, religiously discriminatory.

118 *Valsamis v Greece*, supra n. 25; and *Efstratiou v Greece* 1996-VI; 24 EHRR 298.

119 See *Serif v Greece* 31 EHRR 20; and *Hasan & Chaush v Bulgaria* supra n. 13.

Judging from the past decisions in this area, the European Court is reluctant to find a neutral law disproportionate and force a State to create exceptions to the general rule.¹²⁰ Human rights law does, however, allow a State to create exceptions to the general rule where it feels that such exceptions are necessary to ensure human rights or fulfil a societal need. Should a woman, who wishes to be a minister of religion, take an action against a State for allowing organised religion an exception to the general employment equality laws, it is highly unlikely she would win her case within any domestic, international or religion judicial arena. States are given a wide margin of appreciation where there is a lack of common State consensus. Although it is stated that there should be weighty reasons to justify interference with the right to gender equality,¹²¹ States have been allowed to limit the ambit of gender equality where there is an objective and reasonable justification for the limitation.¹²² Looking at past case law, it is pretty clear that if the State framed its limitation of gender equality, in this context, in terms of needing to give due deference to a religion's right to freedom of religion and internal autonomy, the European Court, at least, would accept this as a valid justification and reject the woman's claim.¹²³ The ball, as ever, lies in the State's court.

14. Conclusions

Article 9 of the Convention states that everyone has the right to freedom of thought, conscience and belief. At present, however, it is clear that women do not have an equal right to religion. It is said: 'To be able to search for an understanding of the ultimate meaning of life in one's own way is among the most important aspects of a life that is truly human.'¹²⁴ If we accept this as a truism, then it is of utmost importance that we work towards the attainment of this right for women. Although theoretically women have an equal right to freedom of religion, and make up the majority of believers, they have been effectively denied their equal right to religion through the operation of patriarchal religious creeds and power structures. While equality is one of the

120 For a case in point, see *ISKCON v Secretary of State for the Environment* 18 EHRR CD 133.

121 *Petrovic v Austria*, supra n. 114.

122 *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v Belgium* A 6 (1968); 1 EHRR 252.

123 The European Court, like every human rights judicial body, takes the concept of subsidiarity very seriously. It feels that '[b]y reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions'. See *Frette v France*, supra n. 16. The Court's decisions, especially in relation to religion, usually rest on the premise of ensuring societal peace, as seen in *Otto Preminger v Austria* A 295-A (1994); 19 EHRR 34. Taking this into consideration it is likely that the European Court would accept the State's viewpoint and reject the gender-equality claim.

124 Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000) 179.

cornerstone beliefs of every religion, gender discrimination pervades religious structure, creed and practices. Due to a lack of authority and power within religion, women are powerless to effect change towards gender equality within their own religion. Currently, State policies and laws are complicit in the discrimination of women by and within religion. The right to freedom of religion has been judicially interpreted in such a way as to give religious leaders the ability to silence internal dissent and insulate their 'religion' from change. By ceding the individual human right to freedom of conscience and belief to patriarchal religious institutions, pursuing a policy of non-interference in relation to religion and accepting as inevitable and unchangeable the clash between women rights and religion, the world has effectively denied women the freedom of conscience and belief. This denial has had and continues to have a crucial impact on gender equality as a whole.

States have an international obligation to change discriminatory religious attitudes and allow women an equal right within religion. The State is not powerless in relation to religion. Although change must come from within, the State can help to facilitate positive change in religion towards gender equality. Religious views are not static; they are reactive to social change. The State needs to create an environment conducive to religious change towards gender equality. It can do this by ripening views favourable to gender equality, both within and outside the religion, through education and the raising of awareness by the publication of surveys and research. Once a critical mass of people within society and religion recognises the need for and supports gender equality within religion, the pressure on religion to engage upon an internal process of change, towards gender equality, can be increased by careful use of the law. The retraction of religious exemptions to gender-equality laws could prove to be such a trigger point and one that is acceptable within the current international regional human rights systems. Religions can change in their views; they simply sometimes require a reason to change. It is incumbent on States to provide just such a reason.