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I Religious Freedom in the US

In the U.S. Constitution, the First Amendment states in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…"[3] Legally, these two clauses have been interpreted to contain two different meanings and protections. The Establishment Clause seeks to allow religious institutions to "define themselves, their doctrines, and their practices."[4] It essentially protects institutions from "intrusion from the state."[5] The Free Exercise clause, however, seeks to protect individual religious freedom, "prohibiting government action that singles out and imposes discriminatory burdens on individuals," particularly those of minority sects.[6]

State v. Individual Claims

Throughout the last two decades a small debate erupted over how free exercise of religion would be interpreted and protected by the Court. The debate began in *Sherbert v. Verner,* a case of "small dimensions, though profoundly important"[7] where the Appellant had been discharged from her job, thereby losing her benefits, because it was against her "conscientious scruples" to "take Saturday work."[8]

The Court conducted a two part legal test, asking first, if the law burdens (even indirectly) the free exercise of religion and second, if there is a "compelling state interest" which justifies the infringement on the free exercise of her beliefs. The majority opined that "the Free Exercise Clause stands tightly closed against any governmental regulation of religious

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[3] US Const. amend. I.
[4] Patrick Garry, *Distorting the Establishment Clause Into an Individual Dissenter's Rights*, 7 CHARLESTON L. REV. 661, 663 (2013) citing Richard W. Garnett, *Religious Freedom, Church Autonomy, and Constitutionalism*, 57 DRAKE L. REV. 901, 907 (2009).
[5] Idem.
[6] Idem.
[7] *Sherbert v. Verner*, 374 U.S. 398, 400, 411 (1963).
[8] Ibid at 401.

beliefs."[9] In Justice Stewart's concurring opinion, he reaffirmed this principle, articulating that the Constitution "commands the positive protection by the government of religious freedom – not only for a minority, however small—not only for the majority, however large –but for each of us."[10] The Government may not "compel affirmation of a repugnant belief" nor can it "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities."[11]

The Court held in favour of the Appellant and stated that based on this test, the disqualification of employment benefits did impact her free exercise of religion and there was no compelling state interest which justified the infringement.[12] The Court elaborated that the ruling in the lower courts essentially forced the appellant to choose between following her religion and forgoing her benefits or on the other hand, abandoning her faith in order to accept work.[13] This is the "harm" that is considered by the Court when it makes a determination of what the government cannot do to an individual in violation of their "religious scruples."[14]

In the dissenting opinion, one uncovers the tension within the Free Exercise debate within the Court. The debate centers on "neutrality" of the state. Justices Harlan and White argued that the purpose of the statute which provided unemployment benefits was created out of a legislative need during hard economic times. As a result, South Carolina has uniformly and consistently applied this law regardless of anyone's situation.[15] Therefore, the Justices found that in this case, the majority allowed the State to carve out an exemption for religious reasons when such a situation arises.[16] This then calls into question the neutrality of the Constitution and therefore gives religion "special treatment."[17]

In *Employment Division v. Smith*, the Respondents were fired from their jobs at a Drug Rehabilitation Clinic because they had ingested peyote for sacramental purposes during a ceremony at the Native American Church.[18] The Oregon law in question prohibited possession of a "controlled substance."[19] Justice Scalia cited to the *Sherbert* case and stated that "free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."[20] However, the Court elaborated that an individual's religious beliefs do not excuse them from compliance with "an otherwise valid

[9] Ibid at 403.
[10] Ibid at 417.
[11] Ibid at 403.
[12] Ibid at 410.
[13] Ibid at 405.
[14] Ibid at 413 (Douglas, J., concurring).
[15] Ibid at 419 (Harlan and White, JJ., dissenting).
[16] Ibid at 421.
[17] Ibid at 423.
[18] *Employment Division v. Smith*, 494 U.S. 872, 874 (1990).
[19] Idem
[20] Ibid at 877, citing *Sherbert v. Verner,* supra note 7, 374 U.S. at 402.

law prohibiting conduct that the State is free to regulate."[21] The Court came up with the "incidental effect" test which meant that if a free exercise claim is made against a law that is generally applied and has an "incidental effect" on religion, the claim would lose.[22] The Court found in favour of Oregon's interest in regulating drugs since the law applied equally to everyone.

However in the dissenting opinion, Justices Blackmun, Brennan, and Marshall, pointedly argued that the sincerity of the beliefs of the Respondents in this matter was not of issue before the Court.[23] So to determine if there is a compelling state interest it cannot be "abstract" or "symbolic" further, Oregon never sought to prosecute users of peyote.[24] Therefore, the majority decision "effectuates a wholesale overturning of settled law concerning the Religion Clauses."[25] The Justices also noted that if the State is able to prosecute the Native Americans for this act of worship, "they, like the Amish, may be forced to migrate to some other more tolerant religion."[26] The dissenting opinion concluded that however "unorthodox" the religious claims of the Native Americans may be, the "Court must scrupulously apply its free exercise analysis" to their religious claims.[27]

The casual observer can gleam from the *Sherbet* and *Smith* opinions, two extremely different interpretations of the Free Exercise Clause. In 2006, in stark contrast to *Smith,* the Court decided the fate of a Christian Spiritist sect in *Gonzales v. O.Centro Espirita Beneficente Uniao Do Vegetal.* The O Centro Espirita Beneficente Uniao do Vegetal (UDV) receives communion through "hoasca," a sacramental tea which contains hallucinogens. The Government conceded that the Controlled Substances Act did in fact burden the sincere religious beliefs of the UDV, but the Government argued that it was justified based on public health and safety. Chief Justice Roberts articulated in a unanimous decision that a "case by case" consideration is feasible to generally applicable rules.[28] The Court found in favour of the UDV.

Finally, in 2012, in a case of first impression, Chief Justice Roberts delivered the unanimous opinion. In *Hosana-Tabor Evangelical Lutheran Church and School v. EEOC* the Court held that the ministerial exception prevents a state from legislating employment claims between a religious institution and its ministers.[29] Chief Justice Roberts stated that requiring a church to accept or retain an "unwanted minister" interferes with the "internal governance of the church" and by imposing an unwanted minister, the state violates the Free Exercise Clause which "protects a religious group's right to shape its own faith and mission through its

[21] Ibid at 879.
[22] Steven Goldberg, *Cutter and the Preferred Position of the Free Exercise Clause*, 14 WM. & MARY BILL RTS. J. 1403 (2006).
[23] Ibid at 920.
[24] Ibid at 912.
[25] *Employment Division v. Smith*, 494 U.S. 872, 909 (1990).
[26] Ibid at 921, citing *Wisconsin v. Yoder,* 406 U.S. 205, 218 (1972).
[27] Ibid at 922.
[28] Ibid.
[29] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694 (2012).

appointments."[30] The Court held that the ministerial exception bars such a suit. The Court concluded that while employment discrimination statutes are important, "so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."[31]

The Supreme Court v. Congress

A question arises whether the Supreme Court has overstepped their role in the area of Free Exercise. During the latter part of the 1990's there was an extensive debate between Congress and the Court regarding this particular issue. After the decision in *Smith,* which was a departure from its jurisprudence in *Sherbert,* political parties and minorities groups expressed extreme dissatisfaction with the Court.[32] Congress responded to the Court's decision by codifying the "strict scrutiny" test in 1993, which is known as the Religious Freedom Restoration Act (RFRA).[33] The RFRA applied to both the federal and state governments. It did not take long before RFRA was challenged and in 1997, the Court decided in *City of Boerne v. Flores* that RFRA was unconstitutional. The Court determined that the RFRA was an excessive use of power by Congress and it was deemed unconstitutional at the state level, but RFRA remains applicable at the federal level.[34] After the *Boerne* decision, Congress then enacted the Religious Liberty Protection Act (RLPA) of 1998. The RLPA was "intended to be a fairly broad protection of religious freedom" so that the government could not "substantially burden religious exercise."[35] The idea of the RLPA was short lived as it did not pass as law. Instead Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) which is intended "to protect the free exercise of religion from unnecessary governmental interference." RLUIPA has two components: The first is intended to safeguard the religious freedoms of prisoners and other institutionalized persons. The second portion addresses land disputes intended for religious purposes.[36] Congress again reiterated the use of the "strict scrutiny" test. Congressional motivation in passing the RLUIPA was "not to create a new right, but to enforce the right to assemble for worship or other religious exercise under the Free Exercise Clause."[37] The Court found RLUIPA constitutional in the *Cutter v. Wilkinson* case.

[30] Ibid.
[31] Ibid.
[32] Michael P. Farris and Jordan Lorence, *Employment Division v. Smith and the Need for the Religious Freedom Restoration Act*, 6 REGENT U. L. REV. 65 (1995).
[33] 42 U.S.C. §21B.
[34] Goldberg, supra note 22, at 1406.
[35] Christine M. Peluso, *Congressional Intent v. Judicial Reality: The Practical Effects of the Religious Land Use and Institutionalized Persons Act of 2000*, 6 RUTGERS J.L. & RELIG. 1, 5 (2004).
[36] Bram Alden, *Reconsidering RLUIPA: Do Religious Land Use Protections Really Benefit Religious Land Users?*, 57 UCLA L. Rev. 1779, 1781 (2010).
[37] Peluso, supra note 35, at 9.

The Supreme Court and *Dignitatis Humanae*

Although the *Smith* decision is a point of departure from previous free exercise cases, the *Sherbert* and the dissenting opinion in *Smith* seem to highlight the same ideals found within *Dignitatis Humanae*. The state is not seen as a "referee or judge among quarrelling religions, but rather as the promoter of the legal framework protecting religious freedom of both individuals and communities from undue interventions."[38] In *Hosana Tabor* another idea of the *Dignitatis Humanae* is reinforced. "Religious communities have the right not to be hindered either by legal measures or by administrative action on the part of the government, in the selection, training, appointment, and transferal of their own ministers."[39] The Court's judgments seem to echo this sentiment.

The Individual and Objection

A conscientious objector is defined as a "person who refuses to serve in the armed forces or bear arms on moral or religious grounds."[40] The first reported case was in the year 295, Maximilianus, who was 21, was the son of a Roman army veteran and was called up to the legions. However, he reportedly told the Proconsul in Numidia that because of his religious convictions he could not serve as a soldier. He persisted in his refusal and was executed. He was subsequently canonized as Saint Maximilian.[41] There was a series of cases which carved out the parameters regarding this particular issue. In *United State v. Seeger,*[42] the Court held that Congress's use of "Supreme Being" was intended to incorporate all forms of religious beliefs. In *Welsh v. the United States,* the Court sustained the broad interpretation so that it could further "neutrality," to include beliefs which come from, "purely moral, ethical, or philosophical sources."[43] After the decision in *Gillette v. United States,* the Supreme Court came up with a complete legal test to determine whether a conscientious objection exists. The objector must show that a) they are conscientiously opposed to war in any form b) their opposition is based on religious training or belief and c) his objection is sincere.[44] Although the U.S. Supreme Court cases seem to be extremely broad, in practice, a soldier proving such a status often finds a lengthy application process and a difficult burden of proof to overcome.[45]

[38] Mathias Nebel, *Introduction to Texts*, WHICH PATH TO RELIGIOUS FREEDOM? Caritas in Veritate Foundation Working Paper II, p. 39.
[39] *Dignitatis Humanae* 50.
[40] Merriam Webster Dictionary
[41] United Nations Office of the High Commissioner, *Conscientious Objection to Military Service* (2012), citing Peter Brock, PACIFISM IN EUROPE TO 1914 (1972), p. 13.
[42] *United States v. Seeger*, 380 U.S. 163 (1965).
[43] *Welsh v. United States*, 398 U.S. 333 (1970).
[44] *Clay v. United States*, 403 U.S. 698 (1971).
[45] PBS, "Backgrounder: Soldiers at War" 16 Oct 2008. Available at: http://www.pbs.org/pov/soldiersofconscience/special_background.php (accessed 21 Jan 2014).

International Religious Freedom as applied to the US Cases

In the most recent Report issued by the Special Rapporteur on Religious Freedom and Belief, his statement underscores some of the same ideas that have surfaced within US Supreme Court decisions. As demonstrated in *Seeger* and *Welsh* the definition of religion has been painted with a broad brush. The Rapporteur similarly has called attention to this idea:

"as the Human Rights Committee has pointed out in its general comment No. 22 (1993), freedom of religion or belief applies to a broad variety of convictions and conviction-based practices, beyond any predefined lists of "classical" religions. In the words of the Committee: "Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions."[46]

The Rapporteur also discussed in his report the Rabat Plan of Action. The Plan "places great emphasis on the need to uphold a climate of free communication and public discourse based on freedom of expression, freedom of religion or belief and various other freedoms. It establishes a high threshold for imposing limitations on freedom of expression, for identifying incitement to hatred and for the application of article 20 of the International Covenant on Civil and Political Rights."[47] In U.S. jurisprudence, the Supreme Court has continued to uphold the balance between freedom of religion and freedom of expression, although it has been contentious amongst the Justices.

In *Virginia v. Black,* the Supreme Court[48] determined that Virginia state's "cross burning" criminal statute, which made burning a cross in public a felony, was unconstitutional because it violated the Freedom of Speech clause in the First Amendment. In the 5-4 decision, Justice O'Conner explained the historical significance of cross burning, in particular by the KKK which has normally been used to send a message of its ideology.[49] In this case, the majority held, "[i]t may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings…The First Amendment does not permit such a shortcut."[50]

Another example of the Rabat Plan in action within U.S. jurisprudence is the recently decided case of *Synder v. Phelps.*[51] The Westboro Baptist Church often picketed at military funerals to express their opposition to homosexuality both within and outside the military.[52]

[46] Human Rights Council, "Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefedlt" 25th session, 26 Dec 2013, A/HRC/25/58, para 35, p. 9
[47] Ibid para 58, p. 16.
[48] This particular decision was still under the Rehnquist court.
[49] *Virginia v. Black,* 538 U.S. 343 (2003).
[50] Ibid.
[51] *Snyder v. Phelps*, 131 U.S. 1207 (2011).
[52] Ibid 6.

The Court determined that Westboro's speech was a matter of "public" concern from evaluating the "content, form, and context" of the speech.[53] The Court held that the Westboro Church had a "right to be where they were" and the "outrageousness" of the message did not matter.[54]

II Freedom of Religion in Europe

The highest judicial body in Europe with authority to hear claims of violations of religious freedom is the European Court of Human Rights (ECHR). Its authority derives from the European Convention on Human Rights, a treaty signed by all 47 member states of the Council of Europe. The Convention has three provisions which address religious freedom:

> *Article 9 –* ***Freedom of thought, conscience and religion***
>
> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
>
> *Article 14 –* ***Prohibition of discrimination***
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> *Article 2 of Protocol I –* ***Right to education***
>
> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching *in conformity with their own religious and philosophical convictions* (emphasis added).

While Article 14 and Article 2 of Protocol I both touch upon important aspects of religious freedom, but it is Article 9 which most directly concerns religious freedom and which today commands the most attention in regards to the status of religious freedom today in Europe. Article 9 makes a very clear and important distinction between two levels of religious freedom, the *forum internum* (belief) and the *forum externum* (action).

[53] Ibid at 7–12.
[54] Ibid.

Forum internum vs. Forum externum

Forum internum is protected under Article 9(1), and is ostensibly an absolute.[55] Even so, the jurisprudence of the ECHR does not clearly demonstrate whether this paragraph applies only to individuals, or also to groups or religious institutions which have a right to profess and maintain a comprehensive religious tradition free of State interference. [56]

Forum externum, or the manifestation of religious belief, under Article 9(2) is applied only relative to other rights which the ECHR seeks to protect. It is therefore under this second paragraph that most disputes arise. In considering whether a State has *permissibly* restricted the exercise of rights and freedoms guaranteed by Article 9, the Court requires that State interference

1) Be prescribed by law;
2) Pursue a legitimate aim; and
3) Be necessary in a democratic society.[57]

In the estimation of the ECHR, these criteria work to avoid arbitrariness in State action and uphold what they deem to be the European values of a democratic society: pluralism, tolerance, and broadmindedness. The general principles of interpretation of these concepts have been developed by the ECHR with reference to Articles 8 (Right to respect for private and family life), 10 (Freedom of expression) and 11 (Freedom of assembly and association)—rather than with reference to Article 9—the second paragraphs of those Articles follow a similar pattern and use analogous concepts. This is due in part to the fact that the ECHR only began regularly accepting Article 9 cases shortly after the fall of Communism and the admission of former Eastern bloc nations into the Council of Europe, with the 1993 *Kokkinakis* case. By the time the Court began to judge on the merits of applications based on religious freedom, they opted to draw upon established doctrines on the permissible limitations on the freedoms protected in Articles 8, 10, and 11.[58] In this way, the ECHR seems to put religious freedom on par with, rather than prior to, these other freedoms. This may contrast with *Dignitatis Humanae*, which begins with "this demand for freedom in human society chiefly regards the quest for the values proper to the human spirit. It regards, in the first place, the free exercise of religion in society."[59]

The ECHR has also drawn a distinction between *manifestation* and *motivation*, interpreting "practice" in Article 9(1) not to include each and every act motivated or influenced by a

[55] Javier Martinez-Torron, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, 19 EMORY INT'L L. REV. 587, 590 (2005).
[56] The *Sindicatul* case currently pending before the ECHR, weighing the trade union rights of priests pitted against the rights of the Romanian Orthodox Church to control the priesthood role within its church, may provide some clarity on this question.
[57] Jean-François Renucci, *Article 9 of the European Convention on Human Rights: Freedom of Thought, Conscience, and Religion* (2005). Human Rights Files, No. 20. Council of Europe, p. 43.
[58] Martinez-Torron, supra note 55, at 594.
[59] *Dignitatis Humanae* 1.

religion or belief. [60] Such a narrow interpretation can be used to interpret the circumstances of a particular case as outside the purview of Article 9(1), which in turn means that the alleged infringement upon religious freedom at issue would not be subject to the limitations found in Article 9(2). In other words, it is this distinction which can be and has been used to limit the protection of Article 9 for cases where someone follows the dictates of his conscience in ordinary life, particularly when his behaviour does not strictly consist of religious teaching or correspond to specific ceremonial practices.

State 'Neutrality'

The principle of State 'neutrality', particularly in State-administered education, has been cited in several cases where differing understandings of religious freedom collide. The 2001 case of *Dahlab v. Switzerland* is one example of this conflict, where a Muslim schoolteacher in Geneva was barred from wearing a headscarf in the classroom. The Court denied Dahlab's Article 9(2) appeal, reasoning that "the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children" justified such a pursuit of "the legitimate aim of ensuring the neutrality of the State primary-education system."[61]

This same principle of neutrality was again applied in the well-known *Lautsi v. Italy* case of 2010. Mrs Soile Lautsi, a Finnish and Italian citizen, filed suit on behalf of her two minor sons against the School Council of a public school in Padua. Mrs Lautsi argued that the compulsory display of crucifixes in the school's classrooms *inter alia* violated her and her children's right to freedom of thought, conscience and religion protected in Article 9(1). The Second Chamber of the ECHR ruled in 2009 in Lautsi's favour, reasoning that the compulsory display of crucifixes clashed with the individuals' "secular convictions" and was "emotionally disturbing for pupils of non-Christian religions or those who professed no religion."[62] This "negative right" deserved special protection if it was the State which expressed a belief and dissenters were placed in a situation from which they could not extract themselves if not by making disproportionate efforts and sacrifices. The Grand Chamber of the ECHR reviewed the ruling of the Second Chamber in 2010, reversing the earlier ruling and allowing the display of crucifixes in Italian public schools to continue. The Grand Chamber did not necessarily contradict the neutrality or dissenters' rights elements of the reasoning in the earlier ruling. Rather, it found that the display of crucifixes was an "essentially passive symbol" which was not "deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities."[63] Whether this was a genuine development in legal reasoning by the Court or merely a pragmatic response to the political outcry stemming from the earlier ruling is not clear.

[60] Martinez-Torron, supra note 55, at 595.
[61] *Dahlab v. Switzerland*, no. 42393/98, ECHR 2001-V.
[62] *Lautsi v. Italy*, no. 30814/06, §31, ECHR 2011.
[63] Ibid at §72.

Right of Expression of Religious Faith

The ECHR has also considered cases of the rights of individuals to express their faith or act according to their conscience in public and in the workplace. In the 2004 case of *Şahin v. Turkey*, a Muslim female university student sought to be allowed to wear the hijab on campus, in accordance with the dictates of her faith, in violation of Turkish law barring such religious symbols in public schools. Because the policy was prescribed by law (i.e. not arbitrarily directed solely at Muslims) and ostensibly to promote public order, the Court granted Turkey a "margin of appreciation" for barring Ms Şahin from passively expressing her faith in public in this manner.[64]

The 2013 case of *Eweida and others v. UK* gained much media attention, focused primarily on the titled applicant Nadia Eweida, a British Airways flight attendant placed on unpaid leave when she refused to comply with company uniform policy and cover up her cross necklace. An important element to the ruling pertaining to Eweida's claims was the Court finding that the right of resignation as a guarantor of religious freedom was not sufficient. In other words, an employee's right to simply quit her job does not negate an employer's interference with her religious freedom. The Court reasoned that "the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate."[65]

While the ECHR found in Eweida's favour, the other three cases which the Court heard together with hers merit additional attention. All three of these applicants had their claims rejected by the Court. One applicant, Shirley Chaplin, had claims factually similar to Eweida's which nonetheless were rejected by the Court. However, two applicants' cases were significantly distinct from Eweida's case in that they dealt with conflicts between sexual orientation-based non-discrimination policies and Christian employees whose consciences would not allow them to endorse or promote certain sexual behaviour. Gary MacFarlane, a sex therapist, was sacked by his employer for refusing to give sexual counselling to same sex couples. Lillian Ladele, a civil registrar in the London borough of Islington, was disciplined for her unwillingness to register same sex civil partnerships.

In both of these cases, the Court reasoned that the UK court rulings fell within the ECHR's "margin of appreciation" in balancing the rights and interests of same sex persons protected by the non-discrimination policies at issue with the rights of conscience for McFarlane and Ladele. The dissenting judges, writing forcefully in opposition to the Court's judgment against Ms Ladele, stated that the case "was not so much one of freedom of religious belief as one of freedom of conscience – that is, that no one should be forced to act against one's conscience or be penalised for refusing to act against one's conscience."[66] This case represents the conflict between non-discrimination laws such as the UK's and the right of

[64] *Şahin v. Turkey*, no. 44774/98, ECHR 2005-XI.
[65] *Eweida and others v. UK*, nos. 48420/10; 36516/10; 51671/10; 59842/10, §83, ECHR 2013.
[66] *Eweida* (Vučinić and De Gaetano, JJ., dissenting), §2.

individuals like Ms Ladele to stand on religious conviction or conscience, an issue that may again come before the ECHR, as well as potentially at the European Court of Justice in Luxembourg.

Comparing the US and European Courts

There are two substantive differences between the two courts that may be of some relevance to the issue of the justiciability of religious freedom. The first is the extent of their powers of judicial review. The landmark US Supreme Court case *Marbury v. Madison*, wherein Chief Justice Marshall famously declared that "it is emphatically the province of the judiciary to say what the law is," set the US federal courts up as reviewers of the constitutionality of legislation. This means that a plaintiff bringing suit may ask not only for relief as applies to her individual situation, but for the Court to declare the underlying law itself unconstitutional and in need of revision. On the other hand, the ECHR cannot compel a Member State to withdraw or amend an offending law, but merely to compel the Member State to cease the activity which violates the rights of the plaintiff. Of course, the practical effects of this difference are limited, as compelling that the violating activity stop will often necessitate a change to the underlying law. Nevertheless, it represents a limitation on the power of the ECHR.

Second is the role of precedent, or the common law. While the ECHR does take into account all sources of "law", to include case law, the US Supreme Court has a centuries-long tradition of heavily relying on precedent. The US Supreme Court has the ability to reverse its own precedent, but time has shown that it does so extremely reluctantly and rarely.[67] The ECHR, however, has a much shorter history, and it is not yet clear how readily it may contradict its own rulings. Although case law and institutional inertia play a role, it is not yet clear how strong this impulse is on the ECHR as compared to the US Supreme Court. This may mean more cause for optimism with regards to the ECHR and future cases pertaining to religious freedom, despite the precedent of cases which give a disturbingly limited interpretation of religious freedom, such as the *Eweida* and *Şahin* cases.

Finally, there is a symbolic difference between the two systems in that, in line with the understanding in *Dignitatis Humanae* of religious freedom as the fundamental right, the US Constitution places religious freedom in the first clause of the First Amendment, whereas the European Convention on Human Rights places this freedom in Article 9. Religious liberty must be understood and respected as the very first freedom, the freedom to pursue truth, the freedom from which all others flow.

[67] *Plessy v. Ferguson* (1896) is perhaps the best-known example of the US Supreme Court recognizing an error and reversing, while *The Slaughterhouse Cases* (1873) is perhaps the best-known example of the Court's refusal to reverse itself even while it acknowledges the poor reasoning of the earlier case.