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Atheists, Agnostics, Skeptics, and the Unconcerned

Why the European Court is Inconsistent in its Case Law and Violates Article 9 ECHR

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Abstract

In 1993 (*Kokkinakis v. Greece*), the European Court of Human Rights in Strasbourg ruled that under Article 9, "atheists, agnostics, skeptics, and the unconcerned" are protected; but to make that protection effective, the Court requires those views to meet the requirements of "cogency, seriousness, cohesion, and importance." In 2021 (*De Wilde v. the Netherlands*), the Court ruled that the pastafarians (adherents to the Church of the Flying Spaghetti Monster) failed to meet these requirements. This article analyzes the two verdicts, pointing out the relevance for the protection of religious and non-religious minorities.

Keywords: Freedom of thought, conscience, and religion; secularism; European Court in Strasbourg; protection of religious and nonreligious minorities.

Introduction

The purpose of this article is to analyze an essential passage from a judgment of the ECtHR (European Court of Human Rights) concerning the rights of what is commonly referred to as "non-believers," or, more precisely, a group referred to in the case law of the Court as "atheists, agnostics, skeptics, and the unconcerned." The ruling at issue is *Kokkinakis v. Greece* (1993). The case was brought to the Court because the plaintiff, Minos Kokkinakis, felt limited in his rights under Article 9 ECHR because of the Greek state's ban on proselytizing. The ECtHR sided with Kokkinakis. The proselytizing ban was seen as an unjustified restriction on the religious freedom of Kokkinakis, a follower of the Jehovah's

Witnesses. But in addition to *Kokkinakis*'s rejection of the proselytizing ban, *Kokkinakis* is significant for another reason. This is the focus of this essay. It had never been so clearly expressed that the freedom of thought, conscience, and religion, as enshrined in Article 9 ECHR, also includes the freedom of what are called the atheists, agnostics, skeptics, and the unconcerned. In other words, the apostates (those who have fallen away) are given a face, or identity under European human rights law. I will show in this article that this identity results from the interpretation the Court gives to what I will call the "apostasy clause" that is included in Article 9 ECHR. Their views are no longer qualified negatively, as "non-believers," but positively. The purpose of this article is to describe how the emancipation of the unbelievers was accomplished and how it relates to the text of Article 9 ECHR. This article further shows the challenges the Court faces in a consistent application of that clause. That there is much work to be done appears from another important piece of case law from the Court, i.e., the recent case of *De Wilde v. the Netherlands* (2021). It would have been obvious when the Court would have continued the line started with *Kokkinakis,* i.e., securing religious freedom for all. But unfortunately, the Court did not do so. As I will show, this is inconsistent. In doing so, the Court in 2021 is inconsistent with its case law because it disregards the rights of the atheists, agnostics, skeptics, and the unconcerned for which it—quite rightly—had asked attention in the *Kokkinakis* case in 1993.

Article 18 UDHR, Article 9 ECHR, and Article 18 ICCPR

Let us start with the foundational texts on freedom of religion in international human rights law, noting in particular that religion gets protection under the law. In 1948 the United Nations launched the Universal Declaration of Human Rights. Article 18 declares:

> 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 teaching, practice, worship and observance.

This provision of 1948, then only a statement of intentions, was later enshrined in real, legally binding documents as, e.g., the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), better known as the European Convention on Human Rights, and in the International Covenant on Civil and Political Rights (1966).

Article 9 of the European Convention on Human Rights has two sections; both are important concerning the protection of freedom of religion. The first section runs as follows:

> 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, and to manifest his religion or belief, in worship, teaching, practice and observance.

Two observations regarding this article seem to be a helpful start to our reflections. First, an observation on the word "religion." Like "thought" and "conscience," religion enjoys special protection. Thus, it seems crucial that clarity exists in law (and if such clarity is absent, clarity arises) as to what religion entails (Boyan 1968; Bergunder 2014; Sullivan 2020; Stark 1974; Smart 1989).

A second observation is that the articles from the Universal Declaration, but also the European Convention, realize not only a freedom to adopt a religion for citizens, but also the freedom to *change religion* and thereby distance oneself from a particular religion (Forte 1994; Green 2016; Kirby 2008; Doomen and Van Schaik 2021; Alston 1967; Herrenberg 2022). In addition to the ECHR, the ICCPR also contains a provision on freedom of religion. Article 18.1 of the International Covenant on Civil and Political Rights (1966) reads as follows:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

The Meaning of Religious Freedom and the Apostasy Clause

So far, I have only presented the legal basis for religious freedom, or, more extensively, freedom of thought, conscience, and religion. Now I want to delve more deeply into the meaning of this freedom. There is a crucial point concerning the extent of this freedom. And this point has, so far, been neglected by human rights scholars.

British scholar Norman Doe, Professor of Law and Director of the Centre for Law and Religion at Cardiff University Law School, for instance, summarizes the tenor of these articles as follows: "Article 18 of the Universal Declaration of Human Rights 1948 provides for religious freedom and limitations on its exercise, and is almost identical to Article 9 ECHR, as is Article 18 of the International Covenant on Civil and Political Rights 1966" (2011, 20).

In my view, Doe overlooks an essential difference between the way Article 9 ECHR is worded and Article 18 ICCPR (Laes 2011; Van Schaik 2022; Herrenberg 2022). The difference in wording in the articles points to an essential dimension of freedom of thought, conscience, and religion, as shaped in the post-war human rights declarations, i.e., the apostasy clause. To begin with, let us take a closer look at Article 9 ECHR.

The Three Dimensions of Article 9 ECHR

As Doe rightly points out, Article 9 ECHR and Article 18 UDHR are fundamentally consistent with each other. In 1948 the United Nations launched the Universal Declaration of Human Rights. The European Convention on Human Rights repeats the same words of Article 18 UDHR in its Article 9. Article 9 thus protects what we know as "religious freedom," a fundamental right with a long history (Ruffini 1912; Jellinek 1927; Bussey 2019). The ECHR does not present a single right, but a composite of rights. One could also say a composite of overlapping freedoms. The first to be mentioned is freedom of thought, the second freedom of conscience, and the third is freedom of religion. Together, these three are characterized as the freedom of thought, conscience, and religion.

Conscience and religion are related matters (Bury 1913). Perhaps one could say that this exemplifies a particular view of religion, as it points out that religion (at least in the interpretation of it by the Court) does not seem to be motivated by religiosity, which has nothing to do with morality nor with conscience. More importantly, we can distinguish three

critical dimensions to the freedom of religion, as protected by the ECHR. Two of those are well known, and one is generally neglected.

The Universality Principle. First is the universal proclamation of freedom of thought, conscience, and religion. The word "everyone" indicates that this freedom belongs to every human being. "Everyone has the right to freedom of thought, conscience and religion" means that this freedom is not just for people in certain situations, in certain countries, in certain cultures, or of certain racial or sexual identities: freedom of religion is a universal right. One might call this the "universality principle." It is inherent in human rights: human rights apply to everyone, regardless of race, culture, nationality, or gender (Renteln 1990; Tesón 1985).

Is this something special? Not in the sense that universality is due to *all* human rights, not only to religious freedom (Charvet and Kaczynska 2008, 58; Forsythe 2000, 55; Neier 2012, 57). Human rights, by their very nature, are universal. In positive law, this universality principle came to the fore after the Second World War in the UDHR (1948) and other rights proclamations (Johnson 1987; Roosevelt 1941; Wells 1940). Since the intellectual foundations were developed during and before the Second World War, the universality principle could only be affected in post-war human rights declarations.

The universality principle was not unchallenged, though. American cultural anthropologists called attention to cultural rights and group rights in 1947, rejecting what they saw as a one-sided orientation to individual rights (American Anthropological Association 1947). This rejection in the form of what came to be known as "cultural relativism" (Rachels and Rachels 2015), would nevertheless remain a minority view among the drafters of the postwar human rights declarations. The pretense of universality remained the starting point.

Freedom to Manifest Religion. There is a second point encountered in the text of Article 9 ECHR. The second element recognized in the wording of the freedom of thought, conscience, and religion, indicates that one does not have to *keep his thoughts or his religion to himself*. One may genuinely live their freedom and freedom of thought does not have to remain policed, as it states. Religion must be allowed to manifest itself. One may find this in the last part of the text when reference is made to the "freedom, either alone or in community with others and in public or private, and to manifest his religion or belief, in worship, teaching, practice and observance." It means that the believer may say which religion he prefers. But the believer may also manifest his faith in other ways. He may also, for instance, teach that religion. He may show through ritual acts that he is attracted to a particular religion. The pastafarians do that by putting a colander on their heads (Henderson 2006; Venema 2018). The Jehovah's Witnesses do this by going door to door, testifying to their faith. There are many ways in which believers can manifest their belief.

Is that manifestation of faith unlimited? The answer is in the negative. Paragraph 2 of Article 9 of the ECHR (as well as the second paragraph of the other articles of the Convention) indicates how freedoms may be restricted. Although this is the primary focus of most commentary in the current literature, this is not what concerns me in this article. In this article, I want to focus on a third, somewhat neglected dimension of the freedom of thought, conscience, and religion.

The Third Dimension of Religious Freedom: The Apostasy Clause

So far, the point made here is entirely uncontroversial and has received the attention of scholarly commentators. As guaranteed in the ECHR and other human rights declarations, handbooks on religious freedom deal extensively with the previous two dimensions of Article 9 ECHR (e.g., Doe 2011; Sandberg 2011).

In law and religion textbooks, one typically finds two things. First, philosophical reflection on the universality principle. This ties in with the first sentence of Article 9 ECHR. Second, these manuals comment on how the Court interprets the freedom to manifest one's religion. In other words, it is about the history of *interpretation* of the right formulated in the first paragraph of the ECHR.

What generally receives no, or at least minor, attention in those handbooks is what I would call the "third dimension" of Article 9 ECHR. That is the apostasy clause. This third dimension emerges in the sentence: "this right includes freedom to change his religion or belief." In other words, in the freedom of religion is also read the freedom to change that religion. But what exactly does that mean, the right to change your religion? In any case, one may presume, the right to change one religion (the religion one had received from one's parents) for another religion (a religion of one's own choice). It also seems that it is suggested one can change from religion received from one's parents to a non-believer, or a complete rejection of all religions. Thus, the freedom to become an atheist.

The latter has been a huge taboo in the history of religion. Almost all religions, and monotheistic religions in particular, have banned apostasy (Cohn 2000; Ibn Warraq 2003; Zwemer 1924; Halbertal and Margalit 1992). This ban is a prohibition against falling away from the faith. And apostate, like heretic (Tibi and Hasche 2014.) and blasphemer (Levy 1993), had (and has) a very negative meaning in the history of monotheistic religions. As it is the case with a "renegade" in Marxist-Leninist ideology (Acton 1955; Onfray 2013; Politzer 1975), a non-believer is someone who has turned his back on the good faith, the true faith, or the *vera religione,* a term coined by St. Augustine, considered to be the only religion worth protection (Schlieter 2018, 38). Haim H. Cohn, the author of one of the most extensive overviews of apostasy in all three monotheist faiths, starts his "The Law of Religious Dissidents: A Comparative Historical Survey" with the sentence "The three monotheistic religions, Judaism, Christianity and Islam—the subject of this survey—have several distinctive marks in common: they postulate the belief in and worship of one God; they each have holy scriptures and other canonical texts and vest authoritative interpretations or applications thereof with binding force; each designates a class of officials or functionaries to preserve and propagate the faith; each seeks to imbue its religious, ethical and legal norms into the daily lives of individuals and communities; and none suffers dissidents from within" (2000, 40; see Hasan 2021).

The Disappearance of the Apostasy Clause

That brings us back to the two crucial legal documents protecting freedom of religion in the contemporary world: the ECHR and the ICCPR. In the ECHR, the apostasy clause is clearly formulated. What of the ICCPR? If we compare Article 18.1 of the International Covenant on Civil and Political Rights (1966) with the text of the ECHR, it becomes clear that the apostasy clause has vanished completely (Laes 2011; Van Schaik 2022). The words "this

right includes freedom to change his religion or belief" (ECHR) are nowhere to be seen in the ICCPR. In the ICCPR, just as in Article 9 ECHR, the universality requirement for human rights is found in the word "Everyone." The second dimension, the freedom to manifest religion, is also present with the terms "to manifest his religion or belief in worship, observance practice and teaching." But where has the third dimension gone? What happened to the apostasy clause? Where does Article 18 ICPPR establish the right to apostasy explicitly? Where is the right to *change* one's faith?

The only hope for a guarantee on the possibility of change of faith that Article 18 ICPPR seems to offer is implicit. One might read into "to adopt"; that in the right "to adopt" a religion lies, as a matter of course, the right to leave that religion. But the history of religion teaches us that, at least historically, this is by no means self-evident. For most of the history of religion, a big taboo rests on change of faith and apostasy, and even this practice has often been punished with heavy sanctions (Cohn 2000). Sanctions moreover that find a basis in the Old Testament, the New Testament, and the Quran. It seems that adoption of this revolutionary text from the 1950s Council of Europe could not be repeated by the United Nations. The reasons for this are obvious: apostasy was (and still is) a colossal taboo, especially in the Arab world (Baker 2018). Atheists and non-believers exist in the Arab world, just as they do in the West, but the sanctions are very severe (Whitaker 2014). This was noted in 1948 during the creation of the UDHR, but the critics, mainly Saudi Arabia, were overruled. That could not be repeated in 1966. The Arab oil states had simply become too powerful. Therefore, a greatly weakened text was chosen in 1966 in the ICCPR (Van Schaik 2022). The apostasy clause (formed from the bolder text of the Council of Europe) could not be repeated on the world-scale of the United Nations.

The Further Development of the Apostasy Clause by the European Court in Strasbourg

Due to the developments outlined above, the effect of the apostasy clause will primarily be a matter for the European Court of Human Rights in Strasbourg. More can be expected from the Strasbourg Court than from the bodies charged with interpreting the ICCPR for the reasons mentioned above. How did the apostasy clause fare in the hands of the Strasbourg Court?

The Court made an important ruling in the case of *Kokkinakis v. Greece* (1993). That case dealt with the question of whether a Greek ban on proselytizing violated a Jehovah's Witness right to practice his religion. The Court ruled that this would be the case. The stipulation in the Greek Constitution of maintaining a special relationship between the Greek state and the Greek Orthodox Church intrinsically stipulated that proselytizing for religions other than Greek Orthodox should not take place. Due to this restriction, the Greek state violated the rights of Mr. Minos Kokkinakis (1909–1999). He wanted to testify for the Church of the Jehovah's Witnesses. By prohibiting proselytizing for religions other than Greek Orthodoxy, the Greek state violated the second dimension of Article 9 ECHR (i.e., the right to manifest your belief). This verdict is not surprising. Judge De Meyer provides the most explicit rejection of the Greek state's prohibition of proselytism with his concurring opinion; De Meyer said: "Proselytism, defined as 'zeal in spreading the faith,' cannot be punishable as such: it is a way—perfectly legitimate in itself—of 'manifesting [one's] religion" (*Kokkinakis* 1993, Concurring opinion De Meyer).

But much more interesting for the topic of this article is something that the ECtHR said about the third element of Article 9 ECtHR, namely the apostasy clause. Here we find the passage in which the ECHR takes a position on this question:

> As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it (*Kokkinakis* 1993, para 31).

These words terminate any speculation about the extent of the apostasy clause. Does the apostasy clause only protect the freedom of those who want to change from one religion to another religion? Or also the freedom of those who want to reject religion altogether?

It is conceivable to defend that the last part of the "freedom of thought, conscience, and religion" triad of freedoms, namely the freedom of religion, only protects one that moves from one religious position to another religious position. A Catholic may then become a Protestant, or a Muslim, or a Hindu. But it does not fall under the protection of "the freedom of religion," for example, for a Catholic to switch to the Church of the Flying Spaghetti Monster or any other unrecognized religion. The freedom of a Catholic to convert to the Church of the Flying Spaghetti Monster is, however, protected under Article 9, but based on the first two elements of the triad. That is, based on freedom of thought and freedom of conscience.

Does that make any difference, however? Legally, certainly not. The freedom for a Catholic to become a Pastafarian would still be protected under Article 9. The same can be said (*mutatis mutandis*) about the freedom to leave a theistic position and thus become a-theist (Cliteur 2009). Those who have the ambition to leave the theist position find protection under Article 9 ECHR, but not under the protection of the last part of the triad (religion)—only under the first two elements (thought and conscience). But, again, this makes no practical difference whatsoever. The freedom to choose atheism remains protected under Article 9 ECHR. The atheist does not have to resort to Article 10 ECHR (freedom of expression) to find protection for his freedom, but he can rely on Article 9.

It is therefore understandable, in light of the above analysis, that in the *Kokkinakis* case the Court affirmed the significance of what are generally seen as secular positions of faith. Article 9 is, as the Court affirms, "a precious asset for atheists, agnostics, skeptics, and the unconcerned."

The freedom of religion, or more precisely, the freedom of thought, conscience, and religion, also protects the rejection of *all faiths*. From 1993 onwards, the right to be an atheist was clearly affirmed. Article 9 ECHR protects the interests and rights of believers who want to stay within the religious mold and the interests and rights of those who want to break free. Four categories of stakeholders are then explicitly mentioned by the ECtHR:

1. Atheists,
2. Agnostics,
3. Skeptics, and
4. The Unconcerned.

The *Kokkinakis* case was an enormously important step in the emancipation of fundamental unbelief; for European citizens, whose governments had joined the ECHR, it was clear from 1993 that their philosophical position found explicit protection under Article 9 ECHR. So not only as an opinion that enjoys protection under the freedom of expression (Article 10 ECHR: "Everyone has the right to freedom of expression"), but also under the freedom of conscience, thought, and religion.

Why These Four Positions Mentioned? (And Not Others)

The question remains: why does the ECtHR mention these four positions? Would other positions have been conceivable? Why not humanism, secularism, freethought, relativism, open-mindedness, anarchism, spiritualism, liberalism, materialism, or any other secular position one can think of? Why special attention to just these four? Incidentally, these issues are often brought up as related to each other. The Australian historian Bill Cooke presents a *Dictionary of Atheism, Skepticism & Humanism* (2006), apparently assuming that these are related issues. Georges Minois in *Dictionnaire des athées, agnostiques, sceptiques et autres mécréants* (2012) comes close to the view expressed in *Kokkinakis*, as three of the issues addressed in his dictionary also appear in *Kokkinakis*. Only the "unconcerned" with *Kokkinakis,* are the "mercreants" (*infidels*) with Minois.

Anyone who studies the history of atheism, agnosticism, and skepticism will also notice that sometimes *atheism* (Bradlaugh 1864; Goldman 1916; Copan 2020; Van den Berg 2013) is seen as the umbrella term for the "atheists, agnostics, skeptics, and the unconcerned," from which the other parts are reconstructed. This seems to be the case with "the new atheism" (Amarasingam 2010; Stenger 2009). For others, *agnosticism* forms the basis (Huxley 1889; Stephen 1898). And still, others launch *skepticism* as the overarching roof under which all secular views of life can find a place (Womersley 1997; Popkin and Stroll 2002).

I will leave aside the question of which of the four manifestations of apostasy to be legally protected by the European Court has precedence. Other important questions are raised following the Courts' important recognition of the secularist position in 1993. Analogous to the way the Court operates in the case of religion, one should also highlight whether the "apostatic position" (i) has some internal coherence and (ii) whether it *must have* such coherence to be protected?

I will leave the first question unanswered for the moment and focus on the second: are there any requirements for the ECtHR to accept a specific view or set of views as "religious"? Does the ECtHR perhaps have a definition of religion?

The Coherence Requirements of Article 9 ECHR

The Court has emphasized time and again that "religion" must meet specific requirements to find protection under Article 9 ECHR. And it has also indicated what these requirements are. However, no exhaustive definition of religion has been given. The conditions set by the Court to speak of "religion" are therefore *necessary*, not *sufficient*, conditions for religion. What are they? I will let the Court speak for itself in *Eweida v. UK* (2013, para 81)

> The right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance (see

> Bayatyan v. Armenia [GC], no. 23459/03, § 110, ECHR 2011; Leela Förderkreis e.V. and Others v. Germany, no. 58911/00, § 80, 6 November 2008; Jakóbski v. Poland, no. 18429/06, § 44, 7 December 2010).

Thus, Article 9 ECHR does not protect just any arbitrary position that the complainants see as religious or presented or perceived, but only views characterized by: 1. Cogency, 2. Seriousness, 3. Cohesion, and 4. Importance.

Let's take as an example Christianity. Christianity gets protection under Article 9 ECHR. Christianity meets the criteria mentioned. The essence of the Christian creed is expressed in The Apostles' Creed, which runs as follows:

> I believe in God, the Father almighty,
> creator of heaven and earth.
>
> I believe in Jesus Christ, his only Son, our Lord,
> who was conceived by the Holy Spirit
> and born of the virgin Mary.
> He suffered under Pontius Pilate,
> was crucified, died, and was buried;
> he descended to hell.
> The third day he rose again from the dead.
> He ascended to heaven
> and is seated at the right hand of God the Father almighty.
> From there he will come to judge the living and the dead.
>
> I believe in the Holy Spirit,
> the holy catholic church,
> the communion of saints,
> the forgiveness of sins,
> the resurrection of the body,
> and the life everlasting. Amen

"The Apostles' Creed," dating to the fifth century is, according to the ECtHR and mainstream interpretation, a set of views, each of them having a cogency, seriousness, cohesion, and importance that, e.g., the *Gospel of the Flying Spaghetti Monster* (Henderson 2006) is lacking.

But how do atheists, agnostics, skeptics, and the unconcerned look at the matter? It does not seem too cynical to respond that Christianity, Judaism, or Islam from a secular perspective do not seem to meet the coherence-criteria at all, and this is precisely the reason why the atheists, agnostics, and skeptics defected from the traditional creeds. After all, why would someone fall away from the faith? Sometimes it is because someone wants to switch from one religion to another. The Protestant's religious freedom allows him to leave Catholicism behind (Von Hartmann 1874; McGrath 2007).

But how should we imagine the coherence requirements concerning the radical apostate? That is, the apostate who wants to exchange the faith position of the religious believer for that of the atheist, agnostic, skeptic, or the "unconcerned"? For instance, because of "God's problem" (Ehrman 2008), the problem with God's perfect goodness and God's almightiness

and having a hard time reconciling these juxtaposing images of God with the apparent evil in this world (Hick 1966). Alfred Caldecott writes: "There is before the mind of man the conception of a Supreme Being: Necessary or Self-Existing, Infinite and Eternal, Personal or spiritual, Perfect in Goodness and Beauty, Immanent in the Universe and yet infinitely Transcending it" (1901, 1). For atheists, Caldecott's "before the mind of man" is a contradictory idea; it lacks cogency and cohesion. And, according to some, *also* seriousness and importance. According to American philosopher Richard Rorty, Thomas Jefferson set the tone for American liberal politics with his remark, "it does me no injury for my neighbor to say that there are twenty Gods or no God" (Rorty 1991, 257; Jefferson 1984, 285). Not infrequently, the atheist is what he is because he believes that the religious belief positions do not meet the requirements of cogency, seriousness, cohesion, and importance. Anyone asking Richard Dawkins whether religious belief meets the needs of cogency, seriousness, cohesion, and importance will be told that they perforce do not (Dawkins 2006, 2019; Anderson 2007). His atheist position is linked to what can be called a scientist position (Sorell 1991; Passmore 1978). In doing so, we could then describe scientism as the belief that only science can provide us with coherent, serious, and essential knowledge and that all non-empirical knowledge claims of religion must be emphatically rejected. In this sense at least, "the New Atheism" is scientistic in the indicated sense, but the coherence claims present us with two further questions.

The Coherence Demands and Religion

The first question is whether the coherence requirements are a happy choice to limit the proliferation of claims by groups who all want their philosophy of life to be recognized as religious and thus protected under Article 9 ECHR. The Court seemingly wants to brake on the rampant use of the term "religion," one may assume. The freedom of expression must then protect the views that are not recognized as religious. This was the case, for example, with pastafarianism. Pastafarianism, professed by adherents of the Church of the Flying Spaghetti Monster, received no thumbs-up from the ECtHR in 2021 when they applied for recognition as a religion. The ECHR, following the Dutch judicial authorities, ruled that pastafarianism is not a religion. Why not? Because the pastafarians did not meet the coherence requirements.

Wearing Religious Headgear on Government Documents to Identify Citizens

Let us take a closer look at the pastafaries case. The plaintiff in *De Wilde v. the Netherlands* (2021) is Ms. Hermina Geertruida de Wilde (born 1985). She was assisted by university lecturer D. Venema, a legal historian, constitutional law scholar, and legal philosopher currently associated with the Open University in Heerlen (Venema 2018; Venema and Alm 2022).

The complainant considers herself to be a "pastafarian." This means that, as a follower of the Church of the Flying Spaghetti Monster, she has the religious duty to wear a colander on her head. This colander is usually used to pour off the spaghetti. Still, the followers of the church named after the Flying Spaghetti Monster consider wearing the colander a vital symbol of their religion (*De Wilde* 2021, para 3).

The complainant came into conflict with the Dutch government when she applied for a new driver's license and for a new identity card. For these government documents to be valid,

a passport photo is required, and on that passport photo—in principle—the person depicted may not be equipped with things that make the person's identification more complicated, such as sunglasses or headgear. However, an exception is made for followers of religions. For example, the headscarf is allowed on the passport photo. So why not the colander as well? Does not this amount to discrimination against a particular group of believers, the pastafarians? Does not this imply discrimination based on religion, a practice that generally can find no mercy according to the law?

This issue placed the Dutch state authorities before a precarious problem. The state—not only the Dutch state but all states in which religious freedom is recognized as an essential principle—is supposed to acknowledge and recognize religions equally; a state may not practice discrimination based on faith. This makes the question of what positions are presented and experienced as religious by believers a matter for the state. The government will have to answer the question of which religions it gives recognition through legal means (and thus protected by the right to religious freedom) and with which religions it does not. The Dutch government took the position that pastafarianism cannot count as a religion and the Church of the Flying Spaghetti Monster cannot count as a church.

By the government agency in charge of implementing the Passport Implementation Regulations, the complainant was told: "The 'Church of the Flying Spaghetti Monster' is not a church or philosophical conviction. There is no appearance of activities of this organization that can be considered either the exercise or manifestation of a coherent philosophy or conviction of life that permeates [a person's] entire outlook on life, is connected to [that person's] moral conscience and according to which [that person] organizes his or her life, nor as directed towards any religious experience" (*De Wilde* 2021, para 5). In other words, the pastafarians did not meet the coherence requirements, according to the Dutch legal authorities. Pastafarianism did not get the official recognition of a religion; the European Court did not quash that stance.

Even worse for the plaintiff (besides having her status as a religious believer denied), was the Dutch authorities' assertion that there was not a "coherent philosophy or conviction of life" in pastafarianism, a view that was supported by the ECtHR. Unfortunately for the plaintiff, pastafarianism did not get recognition under the apostasy clause either.

The Coherence Requirements and Distance from Religion

Unfortunately, in *De Wilde v. the Netherlands*, the apostasy clause has not received the attention it deserves. Henderson wrote his gospel in 2006. This was during the height of the debate initiated by the New Atheists. The general public usually narrows the movement down to a dogmatic, aggressive, and sometimes allegedly intolerant stance toward the spiritual hopes of believers. But this does the movement an injustice. The new atheism is about much more than atheism in the narrow sense of the word. The books of the atheists Dawkins (2006), Hitchens (2007), Harris (2004), Grayling (2007), and others (2007) are also about freedom of expression, the legitimacy and necessity of religious criticism, secularism, the relationship of the state to religious diversity, the legitimacy of satire, including satire relating to religious doctrines, and many other issues. It seems enlightening to consider the Gospel of the Flying Spaghetti Monster in that light as well, and then it is evident that the religiously critical gospel

at issue here should at least be seen as protected by the "freedom to change his religion or belief," as Article 9 ECHR presents apostasy as equivalent to religion.

Moreover, the Gospel of Henderson as a manifestation of apostasy of religion in the traditional-Christian or traditional-monotheistic sense of the word exhibits a high degree of "cogency, seriousness, cohesion and importance" (*De Wilde* 2021, para 18). The Dutch authorities that adjudicated the case, and the ECHR that joined those Dutch authorities, made the mistake of limiting themselves to the question of whether pastafarianism qualifies as a "serious religion." However, they should have also asked the question of whether it can be seen as a "serious renunciation of religion."

The seriousness and importance of the apostatic stance taken in *The Gospel of the Flying Spaghetti Monster* is certainly not jeopardized by the patent irony and parody that this gospel manifests. Voltaire uses parody and irony as well in his *Dictionnaire Philosophique* (1764), or his *Examen important de Milord Bolingbroke ou le tombeau du fanatisme* (1736), and no one would argue that the great saint of the Enlightenment would lack the qualifications to have his worldview protected under the apostasy clause of Article 9 ECHR. One may challenge the verdict of the Dutch authorities, supported by the ECtHR, under the idea of parody and satire being incompatible with seriousness and importance as characteristics of religion. Blaise Pascal's *Provincial Letters* (1954), one of the most serious contributions to a most serious religious discussion in seventeenth century France, was decisively satirical, as his commentator, Krailsheimer did not fail to notice: "They represent the satirical genre at its best," he writes about the *Provincial Letters*, "and aroused the admiration even of the great master of the craft, Voltaire." They are "extremely funny and extremely moving" (Pascal 1982, 8).

Now that judicial authorities, at least in *De Wilde v. the Netherlands*, have taken the position that pastafarianism does not enjoy protection under Article 9 ECHR, this is bad news for both religious minority positions and the protection of rights for atheists, agnostics, skeptics, and the unconcerned. One religion, the religion of the majority, is favored over another; just as happened in Greece until the Kokkinakis case (1993).

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