

‘PERSONAL AUTONOMY’ AND ‘DEMOCRATIC SOCIETY’ AT THE EUROPEAN COURT OF HUMAN RIGHTS: FRIENDS OR FOES?

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Abstract – In this contribution, we first argue that the ECtHR has come to develop a salient dualist reasoning under Articles 8-11. Although the ECtHR has held that all those articles serve the overarching ideal of ‘democratic society’, its right-based reasoning can be differentiated. On the one hand, the ECtHR has focused on the free circulation of ideas and opinions – in particular, those held on issues of public interest – in its treatment of the freedoms of expression (Article 10) and assembly and association (Article 11). The more those views are subject to prohibition, the more the margin of appreciation is reduced. On the other hand, the ECtHR has focused on the notion of ‘personal autonomy’ to adjust its margin of appreciation under Articles 8-9. The more personal autonomy is endangered, the more it reinforces the scrutiny in the assessment of reasons for an interference. Secondly, we argue that such dualist approach stands in need of clarification. Could individuals reasonably express and develop their views on issues of public interest without assuming their autonomy? Conversely, can the ECtHR assert that freedom of religion pertaining to the *forum internum* – typically, religious beliefs – has no relevance in the expression of personal views on issues of public interest? By contrast to most views in the literature, our argument does not rely on a prior normative theory of the virtues of a ‘legal system’ – such as legal certainty, coherence and harmony – that generally target the ambiguous use of the margin of appreciation doctrine, or on a prior normative theory of the values that ECtHR should protect. Rather, our argument relies on the conceptual vagueness that follows from the ECtHR’s differential reasoning. The current application of the margin of appreciation implies that there are not only different ‘localised system of values’ among State Parties, but that there are different ‘localised democratic societies’.

A. INTRODUCTION

The European Court of Human Rights (hereafter, ‘the Court’) is a supranational and authoritative judicial organ in charge of determining what the forty-seven signatory states owe to individuals living under their jurisdictions as a matter of European Convention on Human Rights (hereafter, ‘ECHR’) law. While the law of the ECHR is shaped by an exceptionally accomplished judicial organ, the Court does not have the power to strike down a piece of domestic legislation. Nonetheless, according

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to Article 32 ECHR, it holds the ultimate say over the interpretation, and therefore the scope, of ECHR rights.

In this article, we analyse and critically appraise the reasoning of the Court under Articles 8-11. First, we argue that the Court has developed a dualist reasoning under those Articles. On the one hand, the Court has employed ‘personal autonomy’ to adjust the margin of appreciation under Articles 8 – 9. The more personal autonomy is endangered, the more it reinforces the scrutiny in the assessment of reasons for an interference. On the other hand, the Court has focused on the free circulation of ideas and opinions – in particular, those held on issues of public interest – in its treatment of the freedoms to expression (Article 10) and association and assembly (Article 11). The more those views are subject to prohibition, the more the margin of appreciation is reduced. As we shall explain, such a protection is justified upon the need to maintain ‘pluralism’ in European democratic societies.

Second, we argue that such a dualist approach stands in need of clarification and justification. More precisely, we use normative theory (moral and political theory) to illuminate the problematic use of ‘personal autonomy’ in the reasoning of the Court. ‘Personal autonomy’ does not only figure among the most indeterminate concepts of the Court’s case law. It is also agreed that the concept of autonomy could justify the protection of all (ECHR) rights in an abstract sense. The basic Kantian capacity for self-legislation may be used to play this overarching justificatory role. This framework is also salient in the emerging field of normative human rights theory. In a recent article, Valentini argues that human rights are necessary and sufficient conditions for a reasonable implementation of the right to freedom, understood in a Kantian sense.¹ If this deontological premise holds, then the fact of circumscribing ‘personal autonomy’ just to some ECHR rights in some circumstances leaves other rights, as well as the concept itself, at pains. The routine of Court exercising its *surveillance* amounts to allocating portions of autonomy *vis-à-vis* the state. An abstract moral right to autonomy cannot provide the kind of action-guiding reasons that rights are expected to generate.

Moreover, the role of autonomy is salient in the Court’s emphasis on the ECHR rights that best serve ‘democratic society’. The higher protection

¹ Laura Valentini, ‘Human Rights, Freedom, and Political Authority’ (2012) 40 *Political Theory* 573.

of the expression of views on issues of public interest under Articles 10 – 11 is justified by the need for recognition and cohesion in society and therefore depends on the equal right to have one's views heard in respect of those issues. Such an emphasis cannot hold without a strong commitment to autonomy *vis-à-vis* the state that normative democratic theory terms 'equality of political status'. This basic political equality in turn justifies democratic rule and the right to regular, free and fair elections (Article 3 of Protocol 1) that the Court firmly connects to Articles 10 – 11. Leaving autonomy aside here would not only contradict its own emphasis on 'pluralism' and the 'right to be informed' – as reinforcing the need of an options set to reflect upon – but it would also contradict the concept of democratic rule, roughly defined as the autonomy of the people *qua* political equals. Conversely, can the Court assert that freedom of religion pertaining to the *forum internum* – typically religious beliefs – has no relevance in the expression of personal views on issues of public interest? It is difficult to hold that one's passionate political beliefs do not involve the special intensity that religious beliefs have, that religious beliefs have no impact on political opinions, or that it is for the Court to decide on those matters. In other words, not only the overarching justificatory role of autonomy for (human) rights, but also its specification through 'democratic society', reinforces the need for clarification and justification of the current use of the concept in the case law.

B. THE DUALIST REASONING OF THE COURT UNDER ARTICLES 8 – 11

A quick look at application of the restriction standards of Articles 8 – 11 reveals the heterogeneity of the Court's reasoning. There is, of course, the standard of 'democratic society' in the three-pronged test that the Court applies when it finds an interference. The uniform application of the test originates in the almost identical structure and content of the second paragraph of Articles 8-11. To briefly recall them: the first step of the test reviews whether the interference under scrutiny has been 'prescribed by law' or 'in accordance with law'.² In the Court's view, the standard is two-pronged. First, the legal norm in question must be accessible to the individual – the *publicity* or *accessibility* of law requirement.³ Second, the

² For a recent case, see e.g. *Avilkina and Others v Russia*, App no 1585/09 (ECHR, 6 June 2013), para 35-37.

³ See e.g. *Sunday Times v the United Kingdom*, App no 6538/74 (ECHR, 26 April 1979), para 49; *Lithgow v the United Kingdom*, App no 9006/80 (ECHR, 8 July 1986), para 110.

legal norm must be formulated with precision as to its meaning and scope – the *foreseeability* of the law requirement.⁴

The second step reviews whether the interference pursued a ‘legitimate aim’ as specified in the second paragraph of Articles 8-11: the protection of public safety, public order, health or morals, or the protection of the rights and freedoms of others, etc. The Court only rarely finds a violation at this stage. This is explained by the recurrent conflation of the second step with the third and far more important step of ‘democratic necessity’ – that is, whether the interference was ‘necessary in a democratic society’ or whether there was a ‘pressing social need’ for it – in which the Court turns to a proper assessment of the justificatory grounds provided by the State Party. The assessment of the legitimate aim can itself trigger the margin of appreciation doctrine, such as in the case of *Vona v Hungary*⁵ concerning a restriction of Article 10. This third step is by far the most evaluative and decisive step of the assessment process and the most controversial as well. As Fabre-Alibert puts it, what has to be understood by ‘necessity in a democratic society’ is far from being clear⁶, and thus constitutes the flip-side of the coin: the margin of appreciation. The Court has unhelpfully specified that ‘democratic necessity’ implies that the interference must be “relevant and sufficient”⁷ and “convincingly established”⁸ and that it must be “convincing and compelling”⁹, with the public interest “narrowly interpreted”.¹⁰ A rights and case-based analysis is needed to shed light on the normative choices of the Court and identify the dualistic elements.

1. Article 8

⁴ *Malone v the United Kingdom*, App no 8691/79 (ECHR, 2 August 1984), para 66; *Silver and others v the United Kingdom*, App no 5947/72, (ECHR, 25 March 1983), para 88.

⁵ See e.g. *Vona v Hungary*, App no 35943/10 (ECHR, 9 July 2013), para 69.

⁶ Véronique Fabre-Alibert, ‘La notion de « société démocratique » dans la jurisprudence de la Cour européenne des droits de l’homme’ (1998) *Revue trimestrielle des droits de l’homme* 35, 465.

⁷ *Handyside v United Kingdom*, App no 5493/72 (ECHR, 7 December 1976), para 50; *Dudgeon v the United Kingdom*, App no 7525/76 (ECHR, 24 February 1983), para 54; *Barthold v Germany*, App no 8734/79 (ECHR, 23 March 1985), para 55.

⁸ *Autronic v Switzerland*, App no 12726/87 (ECHR, 22 May 1990), para 61; *Weber v Switzerland*, App no 3688/04 (ECHR, 26 July 2007), para 47.

⁹ *Freedom and Democracy Party (ÖZDEP) v Turkey*, App no 23885/94 (ECHR, 8 December 1999), para 44.

¹⁰ *Klass v Germany*, App no 5029/71 (ECHR, 6 September 1978), para 42; *Sunday Times v the United Kingdom* (n 2), para 65.

In light of the case law, the right to respect for private and family life as enshrined in Article 8 constitutes a broad concept, which encompasses *inter alia* the right to personal autonomy and personal development.¹¹ The Court has held that:

“private life extends to aspects relating to personal identity, such as a person's name or picture, and furthermore includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life”.¹²

In the Court's view, the concept of 'private life' is a broad term not susceptible to exhaustive definition. However, the Court does hold that, in order for Article 8 to come into play, it requires a certain level of serious interference, in a manner causing prejudice to personal enjoyment of the right to respect for private life.¹³ In determining the scope of private life, the Court insists, on the one hand, on the need to have in mind the notions of personal autonomy and human dignity.¹⁴ It is to be noted, however, that it “will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the 'family life' rather than the 'private life' aspect”.¹⁵ This means that the interference with privacy and family life does not necessarily affect personal autonomy. More generally, personal autonomy has been used in the contexts of life ending, sexual life, procreation and personal identity.¹⁶ The link therefore covers the typical area of protection of Article 8, namely 'physical and psychological integrity', in the vocabulary of the Court.

On the other hand, the Court has also argued that personal autonomy underlies all the guarantees of Article 8. In *Pretty v the United Kingdom*, the Court indicates that “although no previous case has established as such any

¹¹ *Pretty v the United Kingdom*, App no 2346/02 (ECHR, 29 April 2002), para 61; *Gross v Switzerland*, App no 67810/10 (ECHR, 14 May 2013), para 58.

¹² *Pfeifer v Austria*, App no 24733/04 (ECHR, 17 February 2011), para 33.

¹³ Among others see *Axel Springer AG v Germany*, App no 39954/08 (ECHR, 7 February 2012), para 83.

¹⁴ *Avram and others v Moldova*, App no 41588/05 (ECHR, 5 July 2011), para 36.

¹⁵ *Üner v the Netherlands*, App no 46410/99 (ECHR, 18 October 2006), para 59.

¹⁶ *Marckx v Belgium*, App no 6833/74 (ECHR, 13 June 1979); *A, B and C v Ireland* App no 25579/05 (ECHR, 16 December 2010).

right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees”.¹⁷ This is surprising, for when personal autonomy does actually play a normative role in the reasoning, only a restricted area of personal choice is concerned. This is the case when the Court holds that a person may exercise a choice to die by declining to consent to medical treatment which might prolong life. In other cases, such as *Tysic v Poland*, the Court falls back on abstract concepts, in reiterating “that ‘private life’ is a broad term, encompassing, *inter alia*, aspects of an individual’s physical and social identity, including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world”.¹⁸ In other words, while the concept seems operative in that the provisions (private life) are part of it, the Court does not offer a clear and independent specification of the concept.

The same vagueness can be observed in the scrutiny exercised by the Court when personal autonomy is concerned. What emerges from the *Lashin v Russia* case, which related to the interests of a mentally incapacitated patient, is that:

“the extent of the State’s margin of appreciation in this context depends on two major factors. First, where the measure under examination has such a drastic effect on the applicant’s personal autonomy as in the present case, the Court is prepared to subject the reasoning of the domestic authorities to a somewhat stricter scrutiny. Second, the Court will pay special attention to the quality of the domestic procedure. Whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8”.¹⁹

In other words, the more personal autonomy is affected, the stricter the scrutiny is. It is acknowledged that “the importance of the notion of personal autonomy to Article 8 and the need for a practical and effective interpretation of private life demand that, when a person’s personal autonomy is already restricted, greater scrutiny be given to measures which

¹⁷ *Pretty v the United Kingdom* (n 10), para 61.

¹⁸ *Tysic v Poland*, App no 5410/03 (ECHR, 20 March 2007), para 107.

¹⁹ *Lashin v Russia*, App no 33117/02 (ECHR, 22 January 2013), para 81.

remove the little personal autonomy that is left”.²⁰ However, such a scrutiny may play a minor role in the Court’s assessment of the margin of appreciation. For instance, in the *Molka v Poland* decision the Court held that “the margin of appreciation is even wider as the issue at stake involves the provision of adequate access for the disabled to polling stations, which must necessarily be assessed in the context of the allocation of limited State resources”.²¹

With regard to Article 8 taken together with Article 14, it is well established that “the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference of treatment”.²² The case *X and Others v Austria* concerned a complaint by two women living in a stable homosexual relationship about the Austrian courts’ refusal to grant one of the partners the right to adopt the son of the other partner without severing the mother’s legal ties with the child. As long as sexual orientation is a concept covered by Article 14, and goes to the core of personal autonomy, the Court stated that “where a difference of treatment is based on sex or sexual orientation the State’s margin of appreciation is narrow”.²³ Effectively, what this means is that the combination of Articles 8-14 does not significantly influence the discretionary power, which remains narrow, and this differs from the combination with Article 9.

The above analysis shows that, despite the broad scope of the private life recognised in the case law, the Court does not offer wide-ranging protection. This is especially the case when Article 8 conflicts with Article 10. For instance, in *Lingens v Austria*, acknowledging that politicians too have a right to the protection of their reputation, the Court argued that this protection must be balanced with the need for open debate in a democratic society.²⁴ Here again, the Court’s reasoning focuses on the crucial role of the press in a democratic society, whilst attaching less importance to personal autonomy under Article 8.

2. Article 9

²⁰ *Munjaz v the United Kingdom*, App no 2913/06 (ECHR, 17 July 2012), para 80.

²¹ *Molka v Poland* decision App no 56550/00 (ECHR, 11 April 2006).

²² *Burden v the United Kingdom*, App no 13378/05 (ECHR, 29 April 2008), para 60.

²³ *X and Others v Austria*, App no 19010/07 (ECHR, 19 February 2013), para 99.

²⁴ *Lingens v Austria*, App no 9815/82 (ECHR, 8 July 1986), para 42.

The first paragraph of Article 9 proclaims freedom of thought, conscience and religion. The second paragraph largely replicates the formula used for balancing interests that is also comprised in the restriction clauses of Article 8, 10 and 11. We might thus expect that the reasoning of the Court will be fully congruent with the grounds advanced in relation to Articles 10 and 11. As for other articles, the abstract wording of the Article required the Court to specify the interest(s) that it protects. The ‘general principle’ asserted by the Court regarding the role of the freedom of thought, conscience and religion in serving ‘democratic society’ is found most clearly in *Kokkinakis v Greece*:

“as enshrined in Article 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, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it”.²⁵

Pluralism therefore plays a central justificatory role here too. ‘Democratic society’, the Court argues, cannot hold without a plurality of religious beliefs as it cannot hold without a plurality of political ideas and opinions. Yet, the case law of the Court on Article 9 displays some particularisms and this is precisely where the dualism arises. It is congruent with the continuum of core interests protected by the Court under Article 10 – 11, but only to a limited extent.

More precisely, the cases brought before the Court and the interests protected do not amount to a similar level of scrutiny and are not justified along the same lines. This is concretely translated by the loose definition of the core of the interests protected by the rights, the quasi-absence of positive duties generated, as well as a wider margin of appreciation devoted to State Parties on a significant set of cases where the Court examines the conception of morals within the State Party in question. This is not to say that the Court is not protecting Article 9 on independent grounds. ‘Personal identity’, ‘conception of life’ or ‘dignity’, as in the *Kokkinakis* case, are instances of those. In the absence of convincing arguments given by the respondent State Party, the Court does not scrutinize whether the wearing of religious

²⁵ *Kokkinakis v Greece*, App no 14307/88 (ECHR, 25 May 1993), para 31; *Eweida and others v the United Kingdom*, App no 48420/10 (ECHR, 15 January 2013), para 79.

symbols, for instance, should be valued on other grounds than those. There are typical cases of violations of Article 9 in which the Court finds a violation just by discarding the list of possible restriction clauses one after the other.²⁶ The clearest case perhaps concerns curtailing access to places of worship and restricting the ability of adherent participants in religious observances.²⁷ Yet those justificatory grounds better instantiate the liberal standard of *state neutrality* vis-à-vis individuals and may be distinguished from the emphasis on pluralism and its positive dimension. This is precisely the justificatory ground advanced by the respondent State Party in *Dahlab v Switzerland*²⁸, reiterated in the recent case of *Bayatyan v Armenia*:

“The Court has frequently emphasised the State’s role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. The State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed”.²⁹

In other words, Article 9 serves mainly an *individual* end, while Articles 10 – 11 (and Article 3 of Protocol 1) serve a purpose that is *political*, in that it pertains to need for debate on issues of public interest. This is all the more true since a clear distinction is made between the former and the latter with regard to the restriction clauses:

“the fundamental nature of the rights guaranteed in Article 9 para. 1 is also reflected in the wording of the paragraph providing for limitations on them. Unlike the second paragraphs of Articles 8, 10 and 11 which cover all the rights mentioned in the first paragraphs of Articles 8, 10 and 11 ECHR, that of Article 9 refers only to "freedom to manifest one’s religion or belief". In so doing, it recognises that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected”.³⁰

²⁶ See e.g. *Ahmet Arslan et autres c Turquie*, App no 41135/98 (ECHR, 23 February 2010), paras 46-52.

²⁷ *Cyprus v Turkey* App no 25781/94 (ECHR, 10 May 2001).

²⁸ *Dahlab v Switzerland* App no 42393/98 (ECHR, 15 February 2001).

²⁹ *Bayatyan v Armenia*, App no 23459/03 (ECHR, 7 July 2011), para 120.

³⁰ *Kokkinakis v Greece* (n 24), para 33.

It is difficult to explain such an asymmetry – in terms of margin of appreciation and justificatory grounds – without emphasizing the respective normative weight of those rights in the search for ‘democratic society’. True, the emphasis of the Court on pluralism, both on political ideas and religious faith, is anchored in the same justificatory pattern; it is deemed foundational to democratic society. The protection of pluralism in religious faith is conducive to social cohesion, in the Court’s view. As the Court held in *Erçep v Turkey*:

“Thus, respect on the part of the State towards the beliefs of a minor religious group, such as the one to which the applicant belongs, by providing its members with the opportunity to serve society as dictated by their conscience, is likely to ensure pluralism in the cohesion and the stability and to promote religious harmony and tolerance within society”.³¹

However, those latter articles rather pertain to the free circulation and representation of political ideas and opinions on issues of public interest. By contrast, Article 9 remains tied to personal beliefs and conscience – in particular, those that have to do with religious faith. The Court made the distinction between ‘opinions’ or ‘ideas’ and ‘beliefs’ explicit in *Campbell and Cosans v the United Kingdom*:

“In its ordinary meaning the word ‘convictions’, taken on its own, is not synonymous with the words ‘opinions’ and ‘ideas’, such as are utilised in Article 10 of the Convention, which guarantees freedom of expression; it is more akin to the term ‘beliefs’ (in the French text: ‘convictions’) appearing in Article 9 - which guarantees freedom of thought, conscience and religion - and denotes views that attain a certain level of cogency, seriousness, cohesion and importance”.³²

As Evans points out, “the Court and Commission have adopted relatively narrow definitions of each of the terms, particularly the potentially

³¹ *Erçep v Turkey*, App no 43965/04 (ECHR, 22 November 2011), para 62. Translated from French: « Ainsi, une situation où l’Etat respecte les convictions d’un groupe religieux minoritaire, comme celui auquel appartient le requérant, en donnant à ses membres la possibilité de servir la société conformément aux exigences de leur conscience, est de nature à assurer le pluralisme dans la cohésion et la stabilité et à promouvoir l’harmonie religieuse et la tolérance au sein de la société ».

³² *Campbell and Cosans v the United Kingdom*, App no 3578/05 (ECHR, 25 February 1982), para 36.

open-ended term ‘practice’”.³³ Protection of personal thought, conscience and belief clearly implies the right to hold and change those beliefs of one’s own accord. As a result, there must be a manifestation of a personal thought, conscience or belief of some kind in the public or private sphere.³⁴ Moreover, the freedom implies the right to manifest a belief³⁵ or not to manifest a belief³⁶ as well as the freedom not to disclose a belief to the state – if however the right-holder can prove that the religious belief and its implications are really her own.³⁷ The Commission is explicit in *Van Den Dungen v the Netherlands* when it uses the term of ‘*forum internum*’ as the sphere of personal autonomy to be protected:

“the Commission recalls that Article 9 of the Convention primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*. In addition, it protects acts which are intimately linked to these attitudes, such as acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognised form”.³⁸

In *Kokkinakis v Greece*, the Court emphasised the crucial contribution of freedom of religion, conscience and religion in the making of one’s identity and conception of life:

“it is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it”.³⁹

In this case, there is a continuum in the justificatory grounds advanced by the Court between the freedoms of thought, conscience, religion, expression, association and assembly. The continuum is provided by the unifying requirement of pluralism in European society. But the reasoning of the Court reveals a *discontinuity* between Article 9 and other Articles and therefore

³³ Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 103.

³⁴ *Arrowsmith v the United Kingdom*, App no 7050/75 (EuComm, 16 May 1977), paras 71-72.

³⁵ *Buscarini and Others v San Marino*, App no 24645/94 (ECHR, 18 February 1999), para 39.

³⁶ *Kokkinakis v Greece* (n 24), para 31

³⁷ *Kosteski v “the former Yugoslav Republic of Macedonia”*, App no 55170/00 (ECHR, 13 April 2006), para 39.

³⁸ *Van Den Dungen v the Netherlands* App no 22838/93 (EuComm, 22 February 1995).

³⁹ *Kokkinakis v Greece* (n 24), para 31.

questions the interests that those rights respectively serve or may serve. While the Court had to deal with distinctively political beliefs such as in the case of pacifism⁴⁰ or communism⁴¹ and treated their prohibitions as alleged violations of Articles 10 and 11, the vast majority of cases scrutinised by the Court concerns the holding of religious beliefs and the limits of the manifestation of those beliefs. As indicated above, Article 9 does not protect any kind of belief or any kind of manifestation of the belief. It can therefore be said that it determines the scope of the rights without however specifying the core interest that the right protects. In the seminal case of *Pretty v United Kingdom*, which pertains to the belief in assisted suicide, the Court held that:

“the Court does not doubt the firmness of the applicant's views concerning assisted suicide but would observe that not all opinions or convictions constitute beliefs in the sense protected by Article 9 s1 of the Convention. Her claims do not involve a form of manifestation of a religion or belief, through worship, teaching, practice or observance as described in the second sentence of the first paragraph. As found by the Commission, the term ‘practice’ as employed in Article 9 s1 does not cover each act which is motivated or influenced by a religion or belief”.⁴²

In other words, although the terms contained in the Article are wide, the reasoning of the Court indicates a narrow approach focused on the intensity and stringency of personal thoughts and beliefs – those typically associated with religious faith and worship. In the same vein, the Court does not protect a group’s cultural identity⁴³, the disposal of human remains after death⁴⁴ or the distribution of anti-abortion material⁴⁵ within the scope of Article 9. This is where the prevalent interest protected by Article 9 can be identified. Personal beliefs falling within Article 9 must attain a certain level of cogency, seriousness, cohesion and importance and the belief must reflect a ‘weighty and substantial aspect of human life and behaviour’. This stringency significantly reduces the margin of appreciation devoted to State Parties. This is precisely where the dualist reasoning arises. Such a twofold approach cannot be justified only by reference to the fact that the exercise of the freedom of thought can consist in an *internal* exercise or *external*

⁴⁰ *Arrowsmith v the United Kingdom* (n 33).

⁴¹ *Acik v Turkey*, App no 31451/03 (ECHR, 13 January 2009).

⁴² *Pretty v the United Kingdom* (n 10), para 82.

⁴³ *Sidiropoulos v Greece*, App no 26695/95 (ECHR, 10 July 1998).

⁴⁴ *Belgian Linguistic Case*, App no 1474/62 (ECHR, 23 July 1968).

⁴⁵ *Knudsen v Norway*, App no 11045/84 (ECHR, 8 March 1985).

exercise. It is difficult to distinguish 'personal autonomy' as applying only to those mental states if the ground to attribute the margin of appreciation depends on the presence of such 'cogency' or 'seriousness'.

3. Article 10

The right to freedom of expression, guaranteed by Article 10, clearly holds a prominent status in the pursuit of 'democratic society' as the Court held in its seminal judgment in *Handyside v United Kingdom*. It is "one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man (...)".⁴⁶ The *normative force* of the freedom of expression is therefore *derived* from democracy as it permits the development of individuals. This is a point recently confirmed in *Szima v Hungary*, where the Court held that freedom of expression is "one of the basic conditions for its progress and for each individual's self-fulfilment".⁴⁷

More importantly, the Court has connected freedom of expression to the *pluralism* that *should* animate a democratic society. As repeatedly asserted, "democracy *thrives* on freedom of expression".⁴⁸ Reviewing the role of the press in *Handyside v United Kingdom*, the Court emphasised that the exercise of the freedom of expression contributes to debates on political matters and issues of public interest. In other words, the normative force originates in the *content* of the views to be expressed – those views that pertain to an issue of public interest. Pluralism is therefore of paramount importance in the Court's specification of the *scope* of the right to freedom of expression and central to its underlying conception of 'democratic society'. There is a clear *instrumental* connection between the former and the latter. As the Court held in *Handyside v United Kingdom*,

"it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the *demands* of that pluralism,

⁴⁶ *Handyside v United Kingdom* (n 6), para 49.

⁴⁷ *Szima v Hungary*, App no 29723/11 (ECHR, 9 October 2012), para 25; see also *Animal Defenders International v the United Kingdom*, App no 48876/08 (ECHR, 22 April 2013), para 100.

⁴⁸ *ÖZDEP v Turkey* (n 8), para 44.

tolerance and broadmindedness without which there is no ‘democratic society’”.⁴⁹

Clearly, pluralism is neatly tied to the expression of political ideas and opinions in the Court’s view. This has been a constant position of the Court from the *Handyside* case in 1969 until today. In *Porubova v Russia*, the Court “reiterates this connection that under Article 10 s2 of the Convention very strong reasons are required to justify restrictions on political speech or debates on questions of public interest”.⁵⁰ Why is political pluralism important in the Court’s view? The Court has specified what it takes to be the predominant reasons not only for protecting, but also actively promoting political pluralism. Most importantly, the Court has specified the *object* to be protected: ideas and opinions on issues of public interest. Secondly, it has specified the conditions in which those ideas and opinions should be expressed, that is, that they should be presented within an arena of *informed, public and plural debate*.

The Court makes explicit that one’s views on issues of public interest should be *informed* by the public, transparent and adversarial discussion of views on issues of public interest. The Court has made this point clear in *Piermont v France*: “a person opposed to official ideas and positions must be able to find a place in the political arena”.⁵¹ In *Erdoğdu and İnce v Turkey*, the Court found a violation of Article 10 on the ground that the interview of a sociologist pertaining to the analysis of the political situation in South-East Turkey cannot be conceived as exacerbating the Kurdish nationalist sentiment in the region. As the Court held,

“domestic authorities in the instant case failed to have sufficient regard to the public’s right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them”.⁵²

The prevalent justification is therefore that views on issues of public interest should be informed and confronted within the public arena – with particular emphasis on the actions of elected governments. As the Court held

⁴⁹ *Handyside v United Kingdom* (n 6), para 49. See also *Jersild v Denmark*, App no 15890/89 (ECHR, 23 September 1994), para 37.

⁵⁰ *Porubova v Russia*, App no 8237/03 (ECHR, 8 October 2009), para 42.

⁵¹ *Piermont v France*, App no 15773/89 (ECHR, 27 April 1995), para 76.

⁵² *Erdoğdu and İnce v Turkey*, App no 25067/94 (ECHR, 8 July 1999), para 51. For a recent case, see *Çamyar and Berktaş v Turkey*, App no 41959/02 (ECHR, 15 February 2011), paras 37-38.B

in *Yazar v Turkey*, “in a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion”.⁵³ Not only does the search for political pluralism help the Court develop and specify the content of the reasons that justify various ECHR rights, but this specification in turn determines prominent right-holders, such as the press in the case of Article 10 or political parties in the case of Article 11. This identification leads the Court to scrutinise the content of their views, expressed with a high degree of rigour.

Moreover, when the Court has to examine an ECHR right that conflicts with Article 10, such as the right to reputation under Article 8, the Court clearly focuses its assessment on Article 10, despite the *recognition* of the conflict of rights. It reasserts the normative breadth of the right to freedom of expression but does not specify the breadth of the conflicting right. This is most clear in cases involving the defamation of politicians. Indeed, it is settled case-law that,

“in cases concerning debates or questions of general public interest, the extent of acceptable criticism is greater in respect of politicians or other public figures than in respect of private individuals: the former, unlike the latter, have voluntarily exposed themselves to a close scrutiny of their actions by both journalists and the general public and must therefore show a greater degree of tolerance”.⁵⁴

4. Article 11

The reasoning of the Court on Article 11 clearly lacks an independent normative basis. It is to a significant extent reduced to the grounds specified for Article 10. A clear instance of this is when the applicant claims that both Articles were violated, with the Court assessing just the merits of the case under Article 10. This is the case for instance in *Steel and Others v United Kingdom*: “the Court does not find that this complaint raises any issues not already examined in the context of Article 10. For this reason it is unnecessary to consider it”.⁵⁵ In *Vogt v Germany*, the Court specified that “the protection of personal opinions, secured by Article 10, is one of the

⁵³ *Yazar v Turkey*, App no 51483/99 (ECHR, 7 October 2004), para 59.

⁵⁴ *Petrenco v Moldova*, App no 20928/05 (ECHR, 30 March 2010), para 55; *Petrina v. Romania*, App no 78060/01 (ECHR, 14 October 2008), para 40.

⁵⁵ *Steel and Others v United Kingdom*, App no 24838/94 (ECHR, 23 September 1998), para 113.

objectives of the freedoms of assembly and association as enshrined in Article 11”.⁵⁶ When the Court makes explicit the distinctive roles that each right plays, the continuum is salient. In a nutshell, the Court clearly takes association to be *a collective form of expression*. The leitmotiv of the Court is the following:

“The Court reiterates that notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy (...)”.⁵⁷

Once the essentially political purpose of Article 11 is established, the Court focuses its closest assessment and enlarges the scope of application on the political forms of association – those associations whose aim is to express views on issues of public interest. Still, in *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, in which the Court reviewed the activities of an organisation fostering the recognition of the Macedonian minority in Bulgaria, the Court specified the stringent interest behind the freedom of association and the link to freedom of expression:

“such a link is particularly relevant where – as here – the authorities’ intervention against an assembly or an association was, at least in part, in reaction to views held or statements made by participants or members”.⁵⁸

In others words, given the proximity of Article 11 and Article 10 in the interests they protect, the Court tends to enlarge the scope of application of Article 11 to a similar extent. In *Güneri and others v Turkey*, the Court brought the instrumental link between Article 11 and democracy even closer – without however making explicit the claim that freedom of assembly is *derived* from democracy:

“The Court reiterates that the freedom of assembly and the right to express one’s views through it are among the paramount values of a democratic society. The essence of democracy is its capacity to

⁵⁶ *Vogt v Germany*, App no 17851/91 (ECHR, 2 September 1996), para 64.

⁵⁷ *United Macedonian Organisation Ilinden and Others v Bulgaria*, App no 59491/00 (ECHR, 19 January 2006), para 27.

⁵⁸ *ibid*, para 85.

resolve problems through open debate. Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be – disserve democracy and often even endanger it. In a democratic society based on the rule of law, political ideas which challenge the existing order and whose realisation is advocated by peaceful means must be offered a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means”.⁵⁹

It follows from the above that as long as the freedom of expression mainly consists in expressing a view on an issue of public interest, the Court considers the role of the personal autonomy under Article 11 ECHR solely as an interpretative tool, which does not affect the extent of the margin of appreciation granted. In this regard, the Court stated in *Sørensen and Rasmussen v Denmark* that :

“The notion of personal autonomy is an important principle underlying the interpretation of the Convention guarantees. This notion must therefore be seen as an essential corollary of the individual’s freedom of choice implicit in Article 11 and confirmation of the importance of the negative aspect of that provision”.⁶⁰

⁵⁹ *Güneri and Others v Turkey*, App no 42853/98 (ECHR, 12 July 2005), para 76. Translated from French: « La Cour rappelle que la liberté de réunion et le droit d’exprimer ses vues à travers cette liberté font partie des valeurs fondamentales d’une société démocratique. L’essence de la démocratie tient à sa capacité à résoudre des problèmes par un débat ouvert. Des mesures radicales de nature préventive visant à supprimer la liberté de réunion et d’expression en dehors des cas d’incitation à la violence ou de rejet des principes démocratiques – aussi choquants et inacceptables que peuvent sembler certains points de vue ou termes utilisés aux yeux des autorités, et aussi illégitimes les exigences en question puissent-elles être – desservent la démocratie, voire, souvent, la mettent en péril. Dans une société démocratique fondée sur la prééminence du droit, les idées politiques qui contestent l’ordre établi et dont la réalisation est défendue par des moyens pacifiques, doivent se voir offrir une possibilité convenable de s’exprimer à travers l’exercice de la liberté de réunion ainsi que par d’autres moyens légaux ».

⁶⁰ *Sørensen and Rasmussen v Denmark*, App no 52562/99 (ECHR, 11 January 2006), para 54; see also *Vörður Ólafsson v Iceland*, App no 20161/06 (ECHR, 27 April 2010), para 46.

C. THE TROUBLE WITH “PERSONAL AUTONOMY”

1. Rights and Autonomy

In this section, we turn to our critical appraisal of the Court’s dualist reasoning through normative theorising. We argue that the dualist approach stands in need of clarification and justification. The first step of our argument was that the concept of rights is normatively connected to the one of autonomy, in the abstract sense that rights serve or are owed to individuals *qua* autonomous agents. While right-holders disagree over the reasons why they value such a space of freedom, how they make use of it, and what its scope is, right-holders have an overarching interest in those rights that may be captured by the concept of autonomy. The wording of ECHR rights (except ‘institutional’ rights, such as the right to elections under Article 3 of Protocol 1) suggests that they aim to secure an individual space against state intervention.

It is therefore the *content* of ECHR rights that may be *justified* by the concept of autonomy vis-à-vis the state. It does not entail that rights are *sufficient* for autonomy – one may think of the independent value of the rule of law as a necessary condition for autonomy – or that the status of ECHR rights *qua* rights is justified by autonomy. As Raz argues, valuing autonomy – or the interest(s) of the right-holder more generally – cannot be sufficient to establish a right to it: “by that argument if the love of my children is the most important thing then I have a right to it”.⁶¹ Also, the claim does not entail that the *duties* correlated to those rights are necessarily justified by an abstract concept of autonomy. As we shall explain, since human rights are thick and abstract norms, legal reasoning – in particular, when the Court applies restriction standards – tends towards a specification rather than an abstraction of the concept of autonomy. Legal reasoning cannot rely on an abstract moral claim to generate the action-guiding reasons that litigants expect.

The overarching justificatory role of autonomy is best seen by addressing its definition in moral and political theory together with moral psychology. Most importantly, we must distinguish between, on the one hand, autonomy *qua* ‘capacity of the will’ that captures the human ability to reflect on the adequacy of one’s own reasons for action to make those reasons one’s own, and autonomy *qua* moral principle, on the other hand,

⁶¹ Joseph Raz, ‘Human Rights Without Foundations’, in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010), 325.

that addresses the moral, non-instrumental reasons to refrain from interfering with the autonomy of others. Of course, in our case-study the second component is specified by the primary duty-holder of human rights norms, that is, the modern state. The state has reasons to refrain from interfering with its subjects on the basis of their capacity for autonomy and therefore conceives those subjects as possessing moral autonomy.

The first and internal component originates in Kant and focuses on the inherent capacity for self-rule.⁶² This component has been developed in moral theory and moral psychology and addresses the non-substantive conditions needed for reflective and critical capacities not to be subverted.⁶³ Note that we also find a similar component in the emerging field of normative human rights theory as in Griffin's account of 'personhood': "we value our status as human beings especially high, often more highly than even our happiness. This status centres on our being agents – deliberating, assessing, choosing, and acting to make what we see as a good life for ourselves".⁶⁴ In Griffin's view, 'personhood' justifies most of the human rights that we find in conventional lists of international law. The crucial element here is that the agent is able to identify with its own choices and therefore autonomy fully includes the deliberative process (absorb, process, remember, etc.). Moral theorists such as Frankfurt have emphasised that autonomy requires *second-order* identification with *first-order* desires or value-judgments.⁶⁵ One immediate implication here is that the exercise of autonomy must be independent from manipulation by others. Manipulation alters or perverts one's capacity to reflect upon the reasons available to the extent that the reason selected is not truly one's own.

This first component of autonomy is salient in the reasoning of the Court and most notably under Article 9, as freedom of thought and religion is held to be one of the "most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned (...)".⁶⁶ We may also

⁶² Cf. Immanuel Kant, *Groundwork of the Metaphysics of Morals*, (Mary J. Gregor ed, CUP 1998), Section III.

⁶³ See the contributions in John Christman (ed), *The Inner Citadel: Essays on Individual Autonomy* (OUP 1989). See also the contributions in John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism: New Essays* (CUP 2005).

⁶⁴ James Griffin, *On Human Rights* (OUP 2008), 32.

⁶⁵ See HG Frankfurt, 'Freedom of the Will and the Concept of a Person' (1971) 68 *The Journal of Philosophy* 5.

⁶⁶ *Kokkinakis v Greece* (n 24), para 31; *Eweida and others v the United Kingdom*, App no 48420/10 (ECHR, 15 January 2013), para 79.

mention the Court's determination of the scope of Article 8 and the need to protect "the development, without outside interference, of the personality of each individual in his relations with other human beings. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life".⁶⁷ This first component is also implicit in the Court's reasoning under Article 10 through the wider protection of political opinions. One of the Court's leitmotifs reiterated in the recent *Szima v Hungary* is that freedom of expression is central to democratic society – "one of the basic conditions for its progress and for each individual's self-fulfilment".⁶⁸ The same point is valid for Article 11, as outlined above. In *Vogt v Germany*, the Court held that "the protection of personal opinions, secured by Article 10, is one of the objectives of the freedoms of assembly and association as enshrined in Article 11".⁶⁹

By contrast, the second, external component of autonomy posits a moral and substantive obligation towards others and justifies taking action on its behalf to protect one from external interference. Liberals require giving justification for interfering with one's freedom. Although it constitutes a strong requirement, "consent is significant from the standpoint of external freedom because it can make otherwise wrongful acts rightful".⁷⁰ The responsiveness to such reasons is central to the implications of the specifically Kantian concept of autonomy. Most recently, Valentini has argued that human rights reflect the right to freedom understood in a Kantian sense and does not distinguish the rights that serve autonomy from those that do not: "each person must possess a well-demarcated sphere of agency (a certain 'quantity' of freedom), defined by her rights, in which she is robustly protected from external interference".⁷¹ One may go on to draw the stronger conclusion that the exercise of autonomy is inherently valuable. As Raz puts it, "it is hard to conceive of an argument that possession of a capacity is valuable even though its exercise of it devoid of value".⁷² Another disputable

⁶⁷ *Pfeifer v Austria*, App no 24733/04 (ECHR, 17 February 2011), para 33.

⁶⁸ *Szima v Hungary*, App no 29723/11 (ECHR, 9 October 2012), para 25; see also *Animal Defenders International v United Kingdom*, App no 48876/08 (ECHR, 22 April 2013), para 100.

⁶⁹ *Vogt v Germany*, App no 17851/91 (ECHR, 2 September 1996), para 64.

⁷⁰ Arthur Ripstein, 'Authority and Coercion' (2004) 32 *Philosophy & Public Affairs* 2.

⁷¹ Valentini (n 1), 579.

⁷² Joseph Raz, *The Morality of Freedom* (OUP 1988), 372. Note that some political theorists have challenged this assumption on the claim that one may choose not to value the ideal of a *self-authored life*. See GF Gaus, 'The Place of Autonomy Within Liberalism', in John Christman and Joel Anderson (eds), *Autonomy and the Challenges of Liberalism: New Essays* (CUP 2005), 295–296.

implication pertains to the need for a set of options among which the autonomous agent exercises the capacity for self-legislation. Raz for instance argues “all that has to be accepted is that to be autonomous a person must not only be given a choice but he must be given an adequate range of choices”.⁷³ The range of options cannot but come from the ‘external’ so that a person lives autonomously “if he lives in a certain environment, an environment which respects the condition of independence and furnishes him with an adequate range of options”.⁷⁴ The emphasis of the Court on the “public’s right to be informed of a different perspective on the situation (...)”⁷⁵ under Article 10 and the positive obligations that follow from it suggests the importance of a set of options.

The overall point here is that the protection of (ECHR) rights is predicated on a non-instrumental reason: the abstract right to autonomy. As Valentini puts it, “human rights are those protections that any state must provide for its citizens if it is to make a *reasonable claim* to respect their right to freedom”.⁷⁶ As a result, autonomy *qua* capacity and *qua* moral principle plays an overarching justificatory role for (ECHR) rights in general and Articles 8 – 11 in particular. We believe that the routine of adjudication of the Court facing an ever-growing number of situations, asks for a *specification* of the kind of autonomy protected in given circumstances and that examining the restrictions of ECHR rights is the best way to understand the Court’s concept of autonomy. It therefore follows that associating ‘personal autonomy’ only to a particular range of deliberative and cognitive states – typically those involving the *forum internum* – and making the case either subject to a stricter scrutiny or the margin of appreciation contingent upon this unspecified concept is precarious. There is no reason to assign the concept to a particular situation at the cost of relegating others arbitrarily. As a result, the Court needs to explain the circumscribed role that ‘personal autonomy’ has played until today in the case law – in particular in face of an isolated claim that it is an ‘underlying principle’ of the ECHR. As Letsas puts it, “we cannot inflate the concept of human rights so much that it covers the whole realm of justice. Human rights would then lose their distinctive moral force”.⁷⁷ The same goes for ‘personal autonomy’.

⁷³ Raz (n 71), 373.

⁷⁴ *ibid*, 391.

⁷⁵ *Erdoğdu and Ince v Turkey*, App no 25067/94 (ECHR, 8 July 1999), para 52.

⁷⁶ Valentini (n 1), 582.

⁷⁷ George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2009), 129.

2. Autonomy, Human Rights and Democracy

The first step of our argument is that, given the overarching justificatory role autonomy plays for the content of ECHR rights, we may expect the Court to specify this role through adjudication in general and restriction standards in particular. The second step is that the Court has in fact specified autonomy through the application of restriction standards under Articles 8 – 11 and through the third clause of ‘democratic society’ more specifically. Here, we bring normative theorising not from an independent or ideal perspective, but from within the balancing of the Court in the case law under those provisions.

As we have explained in the second section of the article, the ECtHR is strongly attached to the expression of views on issues of public interest. This standard is decisive in the balancing on Articles 8 – 11 and its presence significantly reduces the margin of appreciation. In this regard we should also mention the interdependence, in the Court’s view, of Article 3 of Protocol 1, protecting the right to regular, free and fair elections with Article 10 (freedom of expression) and Article 11 (freedom of association) on the one hand, and of Article 2 of Protocol 1 ensuring access to education, with Article 9 (freedom of thought) on the other hand. It transpires from the case law that the Court is not only protecting individuals from state interference as the classical requirement of state neutrality. It is therefore openly promoting a conception of ‘democracy’ and ‘democratic society’. In our view, such promotion distinguishes the prevalent conception of autonomy developed by the Court. It filters the reasons that enlarge or restrict the scope of Articles 8 – 11.

Two premises from normative democratic theory are needed to clarify this part of the argument. The first is that the justification of democracy or ‘democratic society’ cannot hold without the presumption of autonomy, as defined above. The justification of democracy implies a deontological premise of the equal right to have a say on issues of public interest. Note that accepting this premise is independent from the ultimate standard for justifying the *bindingness* of majority voting. One may invoke *deep disagreement*, as by Christiano⁷⁸ or Waldron⁷⁹, or invoke a deliberative view

⁷⁸ See Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits*, (2nd edn OUP 2010), ch 3.

⁷⁹ See Jeremy Waldron, *Law and Disagreement* (OUP 1999).

of democracy involving an *endorsement constraint*, as per Cohen.⁸⁰ In other words, while the justification of democracy may not rely on autonomy for its binding force, the respect of equal political status in deliberation prior to vote requires the basic conditions for autonomy (capacity, independence and set of options) outlined above. Early democratic theorists, such as Dahl, endorse the 'presumption of autonomy': "to accept the idea of personal autonomy among adults, then, is to establish a *presumption* that in making individual or collective choices each adult ought to be treated – for purposes of making decisions – as the proper judge of his or her own interests".⁸¹ More recent theorists of democracy, such as Christiano, assume a conception of the person as "authorities in the realm of value".⁸²

The second premise concerns the justificatory link between human rights and democracy recently defended in human rights theory. While Griffin represents the *foundationalist* approach to human rights, one may find a *political* and *democratic* approach that depends on a qualified concept of autonomy. The central idea here is that human rights protect the interests of individuals by virtue of their equal political status *qua* members of a political community. Besson suggests that the concept of equal political status is the "point of passage"⁸³ from a general and fundamental interest to a human right. Moreover, following Christiano, respecting (human) rights makes sure that individuals are treated as equals *publicly*. As Besson explains, "public or political equality implies that people can see that they are treated as equals by others and this takes the form of its recognition by the law and institutions (...)".⁸⁴ The insistence of the Court on the views of minorities being heard is here central.⁸⁵

This not only allows us to envision that autonomy, human rights, and democracy may reinforce each other – a claim that would ask for a more elaborate defence, of course. It can also illuminate the Court's higher protection of the expression of views on issues of public interest as justified

⁸⁰ See e.g. Joshua Cohen, 'Procedure and Substance in Deliberative Democracy', in Thomas Christiano (ed), *Philosophy and Democracy: An Anthology* (OUP 2003).

⁸¹ Robert A Dahl, *Democracy and Its Critics* (Yale University Press 1989), 100.

⁸² Christiano (n 77), 15.

⁸³ Samantha Besson, 'Human Rights and Democracy in a Global Context: Decoupling and Recoupling' (2011) *Ethics & Global Politics* 19.

⁸⁴ Samantha Besson, 'The Egalitarian Dimension of Human Rights' (2012) *Archiv Für Sozial- Und Rechtsphilosophie Beiheft* 19.

⁸⁵ *Young, James and Webster v United Kingdom*, App no. 7601/76 (ECHR, 18 August 1981).

upon the need for recognition and cohesion in society and therefore their equal right to have their views heard on those issues.

In other words, our conclusive argument here is that the Court has specified the concept of autonomy through the application of restriction standards and the appeal to a substantive conception of ‘democratic society’, in which autonomy *qua* political equality is central for the legitimacy of political decision-making by State Parties. As our analysis of the case law has shown, such a standard is systematically used to demarcate the margin of appreciation. An interesting recent case is the Court’s assessment of the prohibition of a gay parade in Russia in *Alekseyev v Russia*.⁸⁶ The Court made clear that, while the issue of sexual minorities is still subject to a consensualist approach, the very fact of exercising the right to campaign for their right cannot be. A wider concept of autonomy could justify the protection of gay rights, but the specified concept of autonomy *via* ‘democratic society’ cannot. Autonomy *qua* political equality is reinforced as far as the core democratic rights are concerned. In our view, this is a clear instance of the specification of the abstract right to autonomy through adjudication and restriction standards.

D. CONCLUSION

The overall conclusion that emerges is that the Court needs to clarify and justify its use of the concept of ‘personal autonomy’. We have reached this conclusion through the interrelation of case analysis and normative theorising. We believe, on the methodological level, that both cannot be firmly distinguished in order to both illuminate and critically appraise the reasoning of the Court under Articles 8 – 11. ‘Personal autonomy’ and ‘democratic society’ – as human rights norms in general – are just too thick and indeterminate concepts to be apprehended without a grip on both the very localised practice of the Court and the conceptual and normative explorations of moral and political theorists.

The first step of our argument was descriptive and analytical. We have furnished an overview of the case law on Articles 8 – 11 and identified a salient dualist approach. Most importantly, we have argued that personal autonomy plays a very circumscribed role – most clearly under Article 8 – without being independently defined. The Court’s distinction between *forum internum* and *forum externum* is similarly analysed. While the former is

⁸⁶ *Alekseyev v Russia*, App no 14599/09 (ECHR, 21 October 2010).

viewed as a 'friend' of democratic society requirements, in that the Court exercises a strict scrutiny to ensure its respect, the latter is viewed as a 'foe' since the discretion given to national authorities. More generally, while one may say that the Court was tempted to derive a 'right' to personal autonomy under Article 8, it appears that such a right was decisive only in a very limited number of cases, and when it was, it surprisingly determined the margin of appreciation.

The second step of the argument consisted in viewing the reasoning of the Court through the prism of both moral and political theory and, within those fields, of recent contributions to human rights theory. We have argued that it is difficult to delimit the normative role of autonomy, or use it as a restriction ground, given its overarching justificatory power. We have also suggested that autonomy, human rights and democracy are connected through the decisive clause of 'democratic society'. The Court's own emphasis on the provisions that serve 'democratic society', and the relatively thin margin of appreciation, cannot hold without a strong commitment to a qualified concept of autonomy, that is, the right to have an equal say on issues of public interest. 'Personal autonomy' and 'democratic society' cannot be friends and foes at the same time – the Court must assume that autonomy and the human person that is granted such a status is itself a dualist concept.