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Identities and Identifications: Politicized Uses of Collective Identities

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Identity and belonging at the European Court of Human Rights

> "We became aware of the existence of a right to have rights…and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation."
>
> *Hannah Arendt, The Origins of Totalitarianism*

> "The Convention protects the community of men; man in our times has a need to preserve his identity, to refuse the total transparency of society, to maintain the privacy of his personality."
>
> *Malone v. The United Kingdom, 2 August 1984, concurring opinion of Judge Pettiti*

ABSTRACT

Identity has been studied by human rights scholars in relation to specific themes ranging from gender to religion, but a comprehensive analysis of the conception of identity in case law is lacking from human rights literature. This paper addresses this gap by analyzing all cases where the Court uses the terms 'identity' or 'identité' until 1 September 2017 (n=2,939). Subsequently, these cases were narrowed down, categorized, linked to each other and coherently presented. The result is a new, systematic and empirically replicable overview of the use of identity in the Court's case law. A substantive analysis of the judgments reveals that different categories of identity can be distinguished in the case law, while it also brings to light internal contradictions between these categories. For instance, while in some contexts, e.g. ethnic identity and the identity of children, the Court takes a sensitive approach to the affective implications of identity-based grievances, the Court appears more reluctant to do so for other identity categories, e.g. religious and collective identity. A preliminary assessment of the case law suggests a double conclusion: on the one hand, identity provides a strong instrument for the Court to place greater responsibilities on and reduce the margin of appreciation of states, and on the other hand, the ambiguities relating to the term identity prove a fascinating forum for witnessing the indeterminacy of human rights law and how the Court attempts to thread a way through these tricky debates. Further study will relate the findings to existing theoretical debates (on identity, on indeterminacy) and assess if the current analysis demands a rethinking of these debates.

INTRODUCTION

The shift to the populist right in the United States and Europe has caused questions of belonging and identity to dominate political and public debates. As identity is politicized everywhere, it is imperative that human rights law, as a central moral and political reference point, has a thorough understanding of identity. Not only do human rights regulate how institutions engage with identity issues, they also shape public attitudes toward these issues and are themselves a major reference point for people's identities. Thus, the way human rights deal with questions of identity has a major impact on society.

In the context of the European Court of Human Rights (Court), the foremost human rights forum in Europe, legal scholars have analyzed the use of identity in relation to specific contexts: religious freedom[1], end of life matters[2], (changing) names[3], publication rights[4] and gender identity.[5] Conclusions of such studies are often highly disapproving of the way identity is used: "Concepts of identity, subjectivity, community and rights have become disassociated from the call for justice and inclusion and have entered a state of recurring crisis and exclusion."[6] However, a comprehensive analysis of the notion of identity in the case law of the Court is as of yet lacking from legal literature to justify making such far-reaching statements about the use of identity in human rights law and to connect the different contexts in which identity is used.

This is the first study to conduct a comprehensive analysis of the conception of identity in the case law of the Court. In order to address the gap in the literature, this study analyzes all cases where the Court uses the terms 'identity' or 'identité', adding up to 2,939 cases until 1 September 2017. This comprehensive body of case law allows for a new, systematic and empirically replicable analysis of the use of identity in the Court's case law. By providing a comprehensive overview of the Court's understanding of identity, this paper aims to clarify the conception of identity in the case law and identify important similarities and differences – and in effect consistencies and inconsistencies – when the Court employs identity in different contexts.

The following chapters give an overview of the use of identity by the Court. There are many different contexts, such as sexuality or ethnicity, in which the Court mentions identity. Most of these fall under Article 8 of the Convention, which guarantees the right to private life (chapters 1 and 2). But other Articles are also invoked in relation to identity: identity is raised in the context of religious freedom guaranteed under Article 9 (chapter 3) and collective identity is often invoked under Article 11, which protects the freedom of association (chapter 4).

CHAPTER 1: INDIVIDUAL IDENTITY

1.1 Sexual and gender identity

The first ever case where the Court faced an identity-based complaint concerned a transsexual applicant on the refusal to change his identity documents to correspond to his new sexual identity. The applicant stated violation of Article 8 because "the law obliged him to use documents which did not reflect his real identity."[7] The Court decided that the domestic remedies had not been exhausted as the complaints under the Convention were not raised in the national proceedings, and did not engage further with identity. In a partly concurring opinion, however, Judge Ganshof remarked that a man or woman who is unable to obtain recognition of his or her sexual identity, an aspect of status which is inseparable from his or her person, will be unable to play his or her full role in society. According to Judge Ganshof, "the right to such recognition is a general principle of law."[8] Hence, though the case of Van Oosterwijck fell to a preliminary objection, it immediately set the discussion of sexual identity within the frame of the right to private life under Article 8.

In early cases on sexual identity, the Court's logic was motivated by scientific, biological evidence. The Court held that scientific evidence did not show that gender reassignment surgery results in the acquisition of all the biological characteristics of the other sex.[9] As such, altering the sex in the administration of persons after reassignment surgery could constitute a falsification of the facts.[10] This scientific conception of sexual identity continued in another case brought against the United Kingdom. Both the applicant and government got wedged in extended arguments about the latest scientific findings on sexual identity, with the government referring to an article in *Nature* to further their case.[11] The inconclusiveness of this discussion compelled the Court to decide no violation of Article 8. In a dissenting opinion, Judge Casadevall argued that settling conclusively the discussion on transsexualism was a very difficult thing to require applicants to do: "the applicants (…) daily find themselves in a situation which, taken as a whole, is not compatible with their right to identity and to respect for their private life."[12] In another dissenting opinion to the same case, Judge Van Dijk oversteps the entire scientific debate claiming that "the identity that corresponds best to one's innermost feelings" should be respected.[13]

The landmark cases of Christine Goodwin v. The United Kingdom and I. v. The United Kingdom on 11 July 2002 promoted Judge Van Dijk's dissenting view on identity to the Court majority's view.[14] In a turn of vision, the Court held that "it is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals."[15] According to the Court, the non-recognition of the applicants' identity by the law made them suffer from stress and alienation and placed transsexuals in a position where they may experience feelings of vulnerability, humiliation and anxiety. Hence, the Court found a breach of Article 8 of the Convention:

> "Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings (see, inter alia, Pretty v. the United Kingdom, no. 2346/02, judgment of 29 April 2002, § 62, and Mikulić v. Croatia, no. 53176/99, judgment of 7 February 2002, § 53, both to be published in ECHR 2002-...)."[16]

In this passage, a clear connection is set by the Court between identity, personal autonomy and the individual private sphere. Note the reference to the Pretty and Mikulić judgments, both also decided in 2002. As will be discussed further down the chapter, these were landmark cases in their respective identity categories and together these four Court judgments in a space of six months in 2002 became definitive of case law regarding identity. In terms of the conception of identity in this consideration, also note how the Court expresses the right as one to 'establish details' of identity. Hence, the terminology here is one of confirming a detail of one's sexual identity, rather than the more constructivist terminology found in other contexts. The Court also specifies they can establish those details 'as individual human beings', thus emphasizing the individual nature of identity.

1.2 Familial identity: descendance, fatherhood and motherhood

Case law on claims of descendance, in particular paternity claims, is another influential category in shaping the Court's conception of identity with regard to the right to private life. Many cases mentioning identity under Article 8 refer to a standard consideration that was first formulated in the case of Mikulić v. Croatia on 7 February 2002:

> "Private life, in the Court's view, includes a person's physical and psychological integrity and can sometimes embrace aspects of an individual's physical and social identity."[17]

The applicant was a child looking to establish the fatherhood of a man who kept evading the scheduled DNA tests.[18] The domestic courts ruled that evading the DNA tests was not sufficient to establish the man's fatherhood. The applicant complained that the courts had left her uncertain about her personal identity. The Court agrees and notes that the applicant has a vital interest to "uncover the truth about an important aspect of [her] personal identity"[19] and that the authorities failed to strike a fair balance between the right of the applicant to have the uncertainty as to her personal identity eliminated and those of her supposed father's. Thus, the right to identity gave the applicant a forceful claim to demand increased efforts by the authorities to establish paternity.

As with the case law on sexual identity, a recurring theme in these cases is the relation of identity to an essence or 'truth'. In Mikulić v. Croatia, the Court speaks of a vital interest to 'uncover the truth' about personal identity. Similarly, in Odièvre v. France, the Court speaks of the necessity to 'discover the truth' about one's identity in relation to the right to obtain information about family history. In their dissenting opinion, the seven judges adopted the same discourse when referring to establishing fatherhood as the "essence of a person's identity." [20] In their opinion, the right to identity is an essential condition of the right to autonomy and development and, therefore, is within the inner core of the right to respect of one's private life.

Another observation about these cases, though more so in Mikulić than Odièvre, is the Court's attentiveness to the uncertainty that the applicant experienced due to the problems with determining her identity.[21] The attention to the psychological experience of identity-related uncertainty was especially pertinent in the case of Jäggi v. Switzerland. The applicant, who is aged 67, was refused a DNA test on a deceased man to established whether he was his biological father. The Court holds, firstly, that the current age of the applicant and the fact that he had been able to develop his personality without knowing his biological father, does not mean that he does not still have an interest in gaining certainty on his identity. In fact, the Court finds that the applicant tried his entire life to obtain certainty on his identity and that this "implies mental and psychological suffering, even if this has not been medically attested."[22] On the basis of the confusion and suffering inflicted on the applicant, the Court finds a violation of Article 8. Weighing the psychological implications of identity harms is an important addition made by the Court in this context.

1.3 Children's identity: the development of the self

The Court has a specific way of dealing with identity when it comes to children that is characterized by an approach to identity primarily as a process. From the earliest cases regarding children and identity, the discourse of the Court is, in contrast to the cases on sexual identity and parentage, not concerned with the 'truth' or 'essence' of identity. Rather, identity is emphasized in relation to the "formative years" of childhood[23] and the Court stresses the importance of a "stable development of the child's identity."[24] The conception of identity in the context of children embraces a dynamic, in-process aspect of identity that appears distinctive from how the Court uses the term in other contexts.

The conception of identity as a process was central in the Court's judgment in Aune v. Norway. The case revolved around a child that had been placed in foster care by the authorities. The applicant, who was the child's biological mother, wished to regain some of her parental responsibilities. The Court dealt with a complex of issues, taking account of the child's (foster and biological) family ties, vulnerability, belonging and emotional security: "All these elements had to be integrated into his identity."[25] As such, the child's identity is seen as connected to a range of other complex aspects of the child's psychological

state. The stable development of the child's identity took priority over the applicant's interests, so the Court found no violation of Article 8.

While identity is generally more often raised by applicants to support an argument, in the case of children the development of identity is also raised relatively frequently by governments to justify policy decisions.[26] In Folgerø and others v. Norway, a number of humanist applicants complained that their children in primary school were not granted exemption from a subject teaching Christianity, religion and philosophy. The curriculum's stated aim was to sustain "the individual pupil's sense of identity." The government argued that it is in the interest of the children to "develop and strengthen their own identity and in widening their horizons" by teaching the cultural and religious components of society.[27] The argument made no impact, as the Court's conclusion does not consider the identity of the children and finds a violation of the right to education (Article 2 of Protocol 1 of the Convention) stating that the curriculum is clearly skewed to teaching Christianity.[28] Such cases show instances where identity is raised by the government in support of an argument. When governments do this, they usually adopt an approach to identity that is similar to the one the Court has held in several cases, namely emphasizing that children's identity is something dynamic and still in the process of being shaped and strengthened.

1.4 Personal identity: reputation, name and image

The Court has clustered a diverse but connected category of cases under the phrase 'personal identity'. It is used in cases where a person's reputation, name or image is at stake. The Court has developed a general consideration with regard to personal identity, mentioning reputation, name and/or image: "As to the applicability of Article 8, the Court reiterates that "private life" extends to aspects relating to personal identity, such as a person's name or picture (…)"[29] The landmark case in which the Court first connected personal identity to the publication of a person's photograph is Von Hannover v. Germany. The applicant, Princess Caroline von Hannover, sister of the Prince of Monaco, complained about the publication of photographs of her private life in German tabloids. The German Bundesverfassungsgericht accepted her complaint with regard to the photographs where she appeared with her children, but denied that the other photographs where unconstitutional because they were taken in a public space and there is a legitimate public interest to be informed about public figures.[30] The Court states: "The Court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name (…), or a person's picture (…)."[31] The Court finds that these interests were not fairly balanced against the freedom of expression and therefore there is a violation of Article 8.

Three remarks can be made about the conceptual development in the case law of including the protection of reputation under the banner of personal identity. Firstly, the inclusion of an individual's image under the protection of personal identity is a settled matter and has been reiterated in recent judgments.[32] Secondly, while the Court sees a connection between one's reputation and identity, questions about the scope of the protection of reputation under the header of personal identity are still developing[33]. Thirdly, what is absent in most cases is a consideration of how the personal identity of the applicant was in fact affected. Most cases remain stuck on a theoretical level in the sense that a connection between the publication and the applicant's identity is, probably correctly, assumed. But a discussion of the real-life implications of the situation on the person's identity, as we have seen in other cases examined in this chapter, is often missing. Such a discussion might contribute to a better understanding of what the term identity means for the Court in these cases and create more clarity and consistency as to which factors the Court considers when it uses the term.[34]

There is an important line of cases in which the Court specifically comments on the relation between a person's name and their personal identity. As opposed to publication of one's image or name, these cases concern the choice or change of name. These cases explicitly take into account identity-related

grievances in the choice or change of one's name. In the case of Henry Kismoun v. France, the applicant was the son of a French mother and Algerian father. After the mother abandoned the applicant at early age, his father took him to Algeria where he named him Chérif Kismoun. When he was older, the applicant learned he was registered in France as 'Christian Henry' and not 'Chérif Kismoun'. The applicant sought to change his name in the French register, but his request was denied. Before the Court, the applicant complained that the refusal to change his name was an infringement on the identity that he had constructed in his early life in Algeria.[35] He stressed that he was shaped under *this* identity which connects him to the only parent who raised him and which he thought to be his in France as well. Thus, he argued that what was of crucial importance to his identity was the name, which he also wanted to pass on to his own children: "Le requérant explique qu'il voulait très concrètement, à travers sa demande de changement de nom, retrouver «son» identité et récupérer «son» nom et le transmettre à ses enfants."[36] In its assessment, the Court acknowledges that the applicant requested the recognition of his identity built in Algeria, his name being a key element of his identity. The fact that the authorities did not examine the specific identity-related motives that the applicant put forward but only stated that the request did not meet the required legitimate interests means that the decision-making process was not sufficient to guarantee the applicant's rights. Therefore, the Court finds that the authorities should have at least responded to the applicant's identity claims and finds a violation of Article 8. Hence, the jurisprudence on names demonstrates that a claim based on identity by the applicant can be guiding in the balancing of interests and demands special attention by the state. In contrast to the cases on publication, the cases on the choice and change of names show the Court engaging with identity in a more substantive manner rather than merely in relation to scope. The Court considers how denying the choice of name might influence the applicant's lived experience and requires domestic authorities to take identity-based arguments in relation to name into account.

1.5 Ethnic identity: self-worth and self-confidence

The category ethnic identity is one of the most mentioned in the Court's case law.[37] The Court has established that a person's ethnic identity is an interest protected under Article 8. Along with children's and social identity, it is also the category that shows the Court at its most attentive for how norms and decisions can shape people's identity. Where the Court connected children's identity to a stable and formative development and emphasized the importance of social ties for constructing one's social identity, it has connected ethnic identity to a person's feelings of self-worth and self-confidence.

The development of the notion of ethnic identity under Article 8 took place in connection to travelers in the United Kingdom who were denied to live in their caravan. In a string of five cases , the Court stressed that the disputed measures affected the applicant's identity:

> "The Court considers that the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. (…) Measures affecting the applicant's stationing of her caravans (…) affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition."[38]

Hence, the ethnic identity of the applicant was an interest to be taken into consideration. Note that the Court refers to the activity as an 'integral' part of the ethnic identity of the applicant. Moreover, the Court speaks of the applicant's ability to 'maintain' her identity, rather than 'construct', which is the term used when the Court speaks of professional identity (discussed in the next chapter on social identity).

In more recent judgments on ethnic identity, the emphasis of the Court has been on the implications for the individual when their ethnic identity is infringed. The case of Aksu v. Turkey concerned the publication of a book and a dictionary that contained defamatory remarks on Roma people. The Court reiterates that ethnic identity is an element of identity protected under Article 8 and adds an important consideration addressing the effects of a violation on both the concerned group and individual: "(…) any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group."[39] The Court thus adds a psychological link between identity and feelings of self-worth and self-confidence that can be harmed in case of a violation. In another case the Court also notes that abuses and threats were directed against the inhabitants on account of their belonging to an ethnic minority "necessarily affecting the feelings of self-worth and self-confidence of members of the group."[40] Therefore, along with children's and social identity, which will be discussed below, this is where the Court has allowed the most psychologizing into its considerations on identity and a person's broader wellbeing.

1.6 Identity in the medical context

This paragraph discusses cases that mention identity in a medical context. It covers a diverse range of cases that raise complex questions regarding human beings, legal personality and identity. The case of Bensaid v. The United Kingdom is the first where the Court mentions a 'right to identity'. It concerns the expulsion of a schizophrenic applicant to Algeria where he would possibly lack appropriate care. The Court says that the applicant's mental health is connected to his 'right to identity': "Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world (…)."[41] There was no explicit reference by the Court to a 'right to identity' before this case. The Court does not elaborate how broadly it interprets this right, except that mental stability is a novel aspect that is now related to identity. Moreover, the Court does not expand on how the applicant's (mental) identity would be affected by the expulsion order. Rather, the Court finds that it is not substantiated that he would suffer inhuman treatment and therefore the authorities did not violate Article 8. The well-known case of Pretty v. The United Kingdom, on the lawfulness of the UK's prohibition on assisted suicide, also concerns identity in a medical context. The Court, rather than affirming Bensaid's 'right to identity', adopts the more moderate formulation from Mikulić v. Croatia that Article 8 "can sometimes embrace aspects of an individual's physical and social identity."[42] Thus, the Court extends the scope of Article 8 to include identity, although specifics on how the end of life matter is related to identity are not discussed.[43]

An important addition to the case law on identity concerns the margin of appreciation. The case law in the medical context first provided the standard consideration on the relation between identity and the margin of appreciation. Identity has been held explicitly by the Court to reduce the margin afforded to states: "Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted."[44] The consideration was first used in the case of Evans v. The United Kingdom on the storage of fertilized eggs for IVF. The cited consideration has been repeated in 45 cases and there are a further 29 cases where the Court refers to identity in relation to the scope of the margin. It took rather long for a standard consideration to develop on the margin with regard to identity (the Evans case dates from 10 April 2007) despite the fact that many important elements of the jurisprudence on identity, most notably the landmark judgments given in 2002, had already formed. Before the Evans case, though identity was mentioned in some deliberations on the margin, there was no settled approach used by the Court. The standard consideration in the Evans case finally established identity as an element that generally narrows a state's margin of appreciation. Since then the consideration has appeared in various contexts since the Evans case, for instance sexuality[45], children[46] or

professional identity.[47] However, it is important to note that the standard consideration only appears under Article 8. Note that the standard consideration speaks of 'an *individual's* (…) identity' and not identity in general. Hence, the role of identity in the Court's deliberations on the margin is mainly reserved to Article 8 cases and identity hardly plays a role in establishing the scope of the margin for other articles.[48]

It was another case in the medical context, Parrillo v. Italy, that compelled a reconsideration of the role of identity with regard to the margin. The case concerned the donation for research purposes of embryos conceived by IVF.[49] Regarding the margin of appreciation, the Court held, on the one hand, that the case concerned an important facet of identity which restricted the margin, but on the other hand, also accepts that the case raises sensitive moral or ethical issues which means the margin will be wider. Judge Pinto de Albuquerque finds this highly paradoxical: "Again, this makes no sense to me. Issues related to the individual's existence or identity, namely to the beginning and end of human life, are *per se* heavily influenced by ethical and moral considerations."[50] The judge's remark raises a crucial question: what if identity and the ethical-moral collide? Are not all matters related to 'important facets' of a person's identity also ethical-moral in nature? One way to respond to the judge's conundrum is to look at the Court's practice on the margin in other identity cases. In the 45 cases where the Court uses the standard consideration on identity and the margin of appreciation from the Evans case, there are 11 cases where the margin is actually narrowed. In 25 cases the Court affords a wide margin and in 14 of those cases the ethical-moral nature of the issue is in part or entirely the reason for affording a wide margin.[51] Hence, statistically speaking, it seems that there is a considerable number of cases where the ethical-moral nature of the identity issue stands in the way of narrowing the margin. Hence, it seems that Judge Pinto de Albuquerque is correct that there is considerable overlap, as well as conflict, between identity and ethical-moral issues. However, there are also cases where identity was a reason for narrowing the scope as well as cases where the state is afforded a wide margin for other reasons than the identity issue being of ethical-moral nature (for instance a lack of consensus among member states). Therefore, the practice of the margin of appreciation complicates the picture due to the many other factors that are involved in these deliberations. The Court ultimately determines if the ethical-moral nature of the identity issue outweighs the fact that identity is at stake or if another factor also needs to be accounted for.

CHAPTER 2: SOCIAL IDENTITY

This chapter discusses case law where the Court mentions 'social identity'. Social identity is a phrase developed in the Court's case law under Article 8. The use of this phrase indicates an important development, namely an increased sensitivity of the Court for the attachments that individuals build with their social surroundings, which shape their identity and which can be affected by legal decisions. Social identity appears prominently in two categories of cases: migration and profession. In both instances, social identity is employed to broaden the applicability of Article 8 beyond the 'inner circle' of private life to include interests as citizenship and employment which are not mentioned explicitly as rights in the Convention.

2.1 Migration and citizenship

The case law on migration shows how the Court's concept of identity can travel from one identity category to another and be expanded in the new identity category. Recall the consideration in the important case of Mikulić v. Croatia on 7 February 2002 on establishing fatherhood, in which the Court refers to an 'individual's physical and social identity': "Private life, in the Court's view, includes a person's physical and psychological integrity and can sometimes embrace aspects of an individual's

physical and social identity."[52] The reference to social identity in the Mikulić case forms the basis for a ground-breaking consideration in the migration case of Üner v. The Netherlands. In this case, the Court held that in expulsion procedures states are under an obligation to consider the 'social ties' between migrants, the host community and the country of destination. The Court explains that the reason for this criterion is to take into account the roots that a migrant grows in a country over time, thus making this attachment an important part of their social identity.[53] Here the Court takes an important step toward describing how one's identity is intricately tied with an expulsion decision and might in some cases be considered as a legally relevant aspect. The Court's particular description of these social ties as growing stronger with the host country and simultaneously weaker with the country of origin has been criticized for wrongly assuming that belonging to the migrant's home and host country is zero-sum.[54]

The notion of social identity has also been pivotal in the Court's deliberations over whether citizenship is an interest that is protected under Article 8. The Court has ruled that there is no right to citizenship as such in the ECHR, but if a decision on citizenship impacts a person's social identity it can enter the scope of Article 8. The Court held this most recently in the case of Ramadan v. Malta, concerning the revocation of the applicant's citizenship on the ground that his previous marriage was simulated. Remarkably, the Court held that while the decision might have made the applicant stateless, the applicant need not fear deportation because he is not deportable anywhere as he has no nationality.[55] However, irrespective of its remarkable stance on statelessness, the Court mentions that citizenship can fall within the scope of the concept of private life, as this concept embraces aspects of social identity.[56] Yet, besides making this general consideration explicit, there is no substantive use of it in the case. The dissenting opinion by Judge Pinto de Albuquerque makes the argument that state citizenship is a core element of a person's identity. For the judge, it is "high time for the Court to recognise explicitly that State citizenship belongs to the core of someone's identity, which is protected by Article 8 of the Convention."[57] As to the Court's claim that the applicant has no fear of being deported, the judge argues that 'the quintessential question of a person's identity' should not be decided on the basis of uncertain future risks, but on the current social ties of the applicant.

2.2 Professional identity

Social identity has also been mentioned by the Court in cases related to a person's profession. The Court holds that a person's professional life is intertwined with their social identity and may therefore require protection under Article 8. The clearest expression of this idea occurs in the case of Fernández Martínez v. Spain, concerning a priest whose contract as a religious teacher was not renewed after he revealed he was married. The Court notes that while no right to employment as such can be derived from Article 8, decisions on a person's employment may affect their social identity.[58] Similar to citizenship, the Court employs social identity to broaden the applicability of Article 8 to include issues of employment which are not mentioned explicitly in the Convention. The Court ultimately finds no violation of Article 8 given the freedom of contract and the autonomy of the church to set its principles.

The Court's conceptualization of identity in this category and in Fernández Martínez in particular is novel in two ways. Firstly, the Court mentions that identity is 'constructed'. If a decision on a person's professional life impacts the 'manner' in which they construct their identity – implicit is that there are different manners in which persons construct their identity – then Article 8 is applicable. The Court has not used this language in other categories or has seemingly actively avoided using it, as mentioned earlier in relation to children's identity.[59] The Court's statement that identity is constructed here may be particular to this category, as a profession or career is perceived more as a matter of choice than in other categories such as sexuality, ethnicity or childness. This reinforces the idea that the Court selectively and intentionally picks its words with respect to how it frames identity, which leads to differences in the

conception of identity in different contexts. Secondly, the Court says social identity is constructed 'by developing relationships with others'. This is a rather sophisticated account of identity as shaped *through* others, taking into consideration the social processes involved in identity building.

Therefore, the Court's use of identity in the professional context is rather unique. As with migration cases, however, social identity is limited to establishing the scope of Article 8 and no subsequent mentions in the substantive part of judgments are found. Moreover, the Court does not consider in the substantive part how the applicants' social identities, for instance through their relationships and ties, are impacted by the decision on their professional life. The question therefore remains what it is about the person's social identity that the Court thinks is affected: Is it their changed position in society as a result of a dismissal? Is it their inability to preserve ties with their co-workers? Or is it a sense of humiliation caused by the decision? The Court's use of identity beyond establishing the applicability of Article 8 is minimal and the way the disputed act affected social identity is unclear, as was the case for judgments concerning personal identity and reputation. This means that while the scope of protection is broadened by social identity, there is little substantive consideration of how this interest is implicated by the disputed act.

CHAPTER 3: RELIGIOUS IDENTITY

This chapter discusses cases where identity is mentioned in the context of religion. Most of these mentions appear in relation to Article 9, which guarantees the right to freedom of religion. The standard consideration by the Court involving religious identity goes:

> "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."[60]

This consideration first appeared in Kokkinakis v. Greece and was adopted in this or similar form in 38 other cases. Firstly, note that the Court makes a subtle distinction between the 'religious dimension' of the freedoms under Article 9 and these freedoms as assets for non-believers. It is in particular under the religious dimension and hence for believers that the Court relates Article 9 to identity. In other words, religious freedoms are linked to identity especially for believers. Secondly, the Court insists that religious freedom is 'one of the most vital elements' that 'go to make up the identity' of believers. This phrasing of 'elements' making up one's identity is similar to the view given in earlier case law, for instance S. and Marper v. The United Kingdom, where the Court lists various features that it considers elements of a person's identity: sexual orientation, name, familial ties and ethnicity. The Court sees identity as made out of building blocks, some of which can be more important for some people than others; in the case of religion, the freedom of religion being a vital element for the identity of believers and less so for non-believers.

Within the judgment, the standard consideration appears where the Court establishes the scope of Article 9. There are usually no further references to identity in the rest of the judgment. As has been demonstrated, this is also the case with several other identity categories – most clearly the cases on reputation, migration and profession – where identity was mentioned in establishing the scope, but further substantive discussion of how an applicant's identity is affected was absent. In the context of religion, the well-known case of Leyla Şahin v. Turkey exemplifies the lack of engagement with identity. The Court rules that Turkey did not violate the applicant's religious freedom by banning her from university for

wearing a headscarf.[61] Other than its standard consideration on religious identity, the Court does not include identity in the balancing of interests nor does it expand on what the implications to the applicant's identity might have been. For instance, it does not consider the effects on self-worth and self-confidence as it does with regard to ethnic identity. Nor does it look at how the ban affected the lived experience of the applicant, as the Court did in cases concerning sexual identity. Another possibility, the implications on the applicant's social ties with her religious community, is also not considered. This points to a comparatively shallow conceptualization of religious identity despite the Court labelling it a 'vital' element for believers.

A specific line of cases that requires examination in the context of religious identity relates to dress and appearance. In the central case of S.A.S. v. France, concerning a ban on wearing the burqa in public, the Court showed considerable engagement with the identity issues raised by the applicant. Under Article 9, the applicant argued that wearing the burqa denoted her emancipation, self-assertion and participation in society and that a ban disregards the position and motivation of women who voluntarily wear the burqa. In its assessment, the Court reaffirms that the freedom of religion is one of the most vital elements of the believer's identity. It finds that women who voluntarily chose to wear a burqa face "a complex dilemma" and the ban may have the effect of isolating them and restricting their autonomy. Therefore, the Court holds that it is "understandable that the women concerned may perceive the ban as a threat to their identity."[62] The applicant's complaint under Article 8 was also based for an important part on identity. She argued that wearing the burqa "was an important part of her social and cultural identity."[63] On this point, the Court holds that the expression of a cultural identity contributes to the pluralism that is inherent in democracy and deems it relevant that there is no evidence that women who wear the burqa have contempt for those they encounter.[64] Nevertheless, these interests are outweighed by the values of communication and living together raised by the government and the Court finds no violation of Article 9 or 8. Therefore, rather than neglecting the applicant's concerns the Court finds that a person's identity raises an important interest that needs to be balanced and makes explicit that an implication of the ban might be the social isolation of women concerned.

CHAPTER 4: COLLECTIVE IDENTITY

This chapter focusses on mentions of identity by the Court in relation to collectives. These mentions appear in cases concerning Article 11, which guarantees the freedom of association, but also a range of other articles. The chapter is divided in two categories: national identity and ethnic identity.

4.1 National identity

A relatively common defense by governments against human rights complaints is to bring up their national identity. In the Italian cases of *Lautsi*, the state's national identity takes an explicit and prominent role. Christian tradition is acknowledged as the national Italian cultural identity. The cases concern the requirement in Italian law that crucifixes should be displayed in classrooms of state schools. The government maintained that crucifixes are an "identity-linked symbol" for the Italian people. Together with several intervening governments, it was argued that the presence of religious symbols in the public space was widely tolerated in non-secular European states as part of national identity.[65] The governments' reasoning did not focus on the identity of children, as the government did in Folgerø and others v. Norway, but placed much weight instead on cultural identity and the state's authority to decide over such matters on its territory. On 3 November 2009, the Court held that Italy failed to uphold confessional neutrality in public education in violation of Article 2 of Protocol No. 1 (right to education).[66] The case

was referred to the Grand Chamber, which overturns the Chamber's ruling and finds no violation. It holds that the decision whether or not to perpetuate a 'tradition' should be left to the state.[67] The ultimately successful reliance on national identity in the case is made all the more interesting by the fact that it is expressly presented as Italian 'cultural' identity and not a national religious identity. If the government's argument would be based on preserving its national religious identity, the question remains if there would be equal willingness to accept that it was not a form of indoctrination but an expression of unity. In fact, Italy's openness toward headscarves at schools, Ramadan festivities and non-Christian religious education are a sign for the Court that Italy's national identity is not obstructing other manifestations of religion.

In addition to cases where the state raises its national identity, there are cases where states invoke their national identity against an identity-based argument raised by the applicant: Oliari and others v. Italy (recognition same-sex couples conflicts with Italy's community identity), Ünal Tekeli v. Turkey (wife not adopting husband's surname defies Turkish national tradition of family unity) and Johansson v. Finland (baby name infringes on Finnish linguistic identity). In these cases, the Court is asked to weigh conflicting identity-based arguments against each other. The Court has a different approach to handling this question in each of the cases:

(i) In Oliari, the Court refers to a survey by the Italian Institute for Statistics to argue that Italians are changing their stance toward same-sex couples, and thus rejects the government's depiction of Italian cultural identity.[68]
(ii) In Ünal Tekeli, the Court finds that the tradition of family unity is based on unequal gender norms irreconcilable with the Convention.[69]
(iii) In Johansson, the Court holds there is no evidence that the choice of name really influences Finnish identity, and thus lays a high burden of proof on the state.[70]

Therefore, the Court has a different approach to weighing conflicting identities between individual applicants and the state. As the three cases suggest, there is no systematic approach by the Court regarding the extent to which it tests the state's alleged national identity. Whereas in Lautsi the Court more readily accepts the Christian tradition of Italy, in Oliari the Court invokes a national survey to seemingly empirically 'disprove' Italy's claimed national identity.

This inconsistency can be attributed to two causes related to the conceptualization of identity. First, there is a question of who the source of national identity is (*authority*). Is national identity what the state says it is or what the majority of the public – perhaps through a survey – says it is? The Court decides which one is leading for its own interpretation of the state's national identity. The Court's interpretation of the national identity is subsequently also influenced by its own human rights framework. This is evident in Ünal Tekeli, where the Court reads gender inequality into the family tradition claimed by the Turkish government. The difficult question whether the Court is the one to interpret the national identity (Oliari and Ünal Tekeli) or only to set a high burden of proof (Johansson) remains ambivalent. In either case, the Court appears to set a higher threshold in terms of burden of proof on national identity claims by states than identity claims made by individuals. The second factor contributing to the inconsistency is that the case law contains different elements with regard to what constitutes the substance of national identity (*substance*). It can be a cultural tradition (Lautsi), legal tradition (Ünal Tekeli) or community sensitivity (Oliari). This means that the substance of national identity is yet unclear in the case law. Both states and the Court can therefore raise national identity while meaning different things. As a result, when the Court requires the state in the Johansson case to empirically, that is in observable terms, demonstrate that its identity was affected by the choice of name, the question is what the Court is asking the government to demonstrate exactly.

These questions of authority and substance are what connects the national identity case law with broader issues also essential to other identity categories. The Court faces similar question on sexual and ethnic identity, where it struggles with a balance between subjective and objective indicators of what the person claims their identity is. And the question what is included in the substance of identity – in the Court's terminology, the 'elements' making up the building blocks of identity – is also left open in the case law so that different elements can be added as the case law evolves.

4.2 Ethnic identity

Ethnicity is an element of identity, both for individuals and groups, mentioned relatively often in the case law. This section discusses ethnic identity in cases relating to articles other than Article 8, which involved cases on individuals' ethnic identity and have been discussed separately. The cases in this section often involve Article 10 or 11 and concern expressions or associations related to a particular ethnic identity.

The first Article 11 case where the Court engages with ethnic identity is Gorzelik and others v. Poland concerning the refusal to register an association formed to protect the ethnic rights of Silesians in Poland. The authorities claimed that while the sense of belonging of Silesians is strong, this does not make them a national minority. The Court does not enter, in the Gorzelik judgment, into the discussion about the extent to which subjective feelings do or should play a role in determining a person's recognized identity. However, the Court does state that ethnic identity is of particular importance for Article 11: "While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations (…) seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy."[71] The consideration connects the recognition of ethnic identity to a range of values. It emphasizes the importance of associations that 'seek' an ethnic identity (in French *recherche*), which implies that such an identity is not necessarily already fully formed as such. Belonging to such associations is essential for democratic mobilization according to the Court. While such associations might pursue varying or conflicting objectives particular to their identities, a central discussion in contemporary debates about identity politics, the Court insists that 'genuine recognition' of these identities is essential for social cohesion.

Therefore, the case law establishes that the recognition of varied ethnic identities is essential for democracy, cohesion and preserving minority rights. Compared to the case law on ethnic identity under Article 8, the judgments discussed in this section tend to have a different focus on the role of identity. Under Article 8, ethnic identity is related to feelings of self-worth and self-confidence and focuses on the substantive wellbeing of the person considered. The psychological element of identity is not an issue in this section. In this section, the focus is on the role of ethnic identity in relation to democracy and the Court links the recognition of ethnic identity to a range of values of democracy and cohesion. These references are, however, limited to general considerations by the Court. For instance, the standard consideration from Gorzelik has been reiterated in twelve other cases, but whether and how the ethnic identity of the specific persons or associations involved was impacted, is not a matter of discussion in the further assessment by the Court. Therefore, ethnic identity is given an important role in relation to democracy and social cohesion, but its significance often remains at an abstract level in the case law.

CONCLUSION

In this paper, I presented a conceptual analysis of the term identity in the European Court of Human Rights' case law by analyzing all cases that contain the word identity or identité instead of – as usually

happens – limiting the analysis to a small number of stand-out cases. This made it possible to lay down a comprehensive view of the Court's use of identity, the categories or contexts where the term appears and the Court's reasoning when it mentions identity. By way of conclusion, six developments and inconsistencies in the case law are discussed.

First, the Court's use of identity occurs most often, and is most fully developed, under the right to private life of Article 8. The Court recognizes, mostly under Article 8, different 'elements' that make up the building blocks of identity, such as sexual orientation, name, familial ties and ethnicity. Secondly, identity provides a strong instrument for the Court to place greater responsibilities on and reduce the margin of appreciation of states. The Court consistently considers issues relating to identity as legitimate grievances under the Convention. Identity has also been held explicitly to reduce the margin of appreciation afforded to states. Thirdly, the Court has clarified the (psychological) implications of an infringement on identity for some categories, but not for others. For instance, the Court takes into account the anxiety the person experienced and the "distressing uncertainty vis-à-vis (…) his true identity." However, the Court is reluctant to expand on the substantive implications in other categories, even where it reiterates the importance of identity. This gap is most evident in cases on reputation, citizenship, profession, parents in family cases and religious identity. Fourthly, the Court assumes the existence of a 'true' identity in some categories, while in others identity is seen as a process. These categories demonstrate that rather than having one approach, the Court sometimes conceptualizes identity as an essential part of a person and sometimes as a dynamic process. Fifth, the subjective or objective nature of identity poses a constant puzzle in the Court's conception of identity. The case law raises the question of a scientific, objective conception of identity against a subjective identity that takes account of feelings beyond the applicant's apparent identity. Sixth, instances where the Court is faced with two identity-claims in the same case demonstrate the indeterminacy of dealing with identity in a legal conflict. As the analysis of these cases has suggested, there is no systematic approach by the Court on how it weighs conflicting identities between individual applicants and the state.

This paper began with two authoritative quotations that put identity and belonging central to human rights. Even though the Convention does not mention identity, the Court has consistently considered identity an integral part of its protective system. Yet, in contrast to the quotations which focus on community, the lens of the Court is set more conclusively on the individual. Also, questions of subjectivity, feelings and authenticity pose a constant challenge in the Court's conception of identity. Moving forward, theoretical excavations on identity and belonging are necessary in order to better analyze and understand the challenges in the Court's conception of identity that have been uncovered in this paper.

Biography

Yussef is currently researching the notion of identity and belonging in human rights law, combining legal and theoretical methodology. His research interests include human rights, social theory, (psychological) citizenship, sense of belonging, and the role of affect in democracy. Yussef holds a cum laude LLM in Constitutional and Administrative Law and MA in Philosophy of Law (Amsterdam) and an MSc in Comparative Social Policy (Oxford). Before the EUI, Yussef was a junior lecturer at Vrije Universiteit Amsterdam and worked with the Dutch State Attorney. His latest article is entitled 'Human Rights and the Excess of Identity: A Legal and Theoretical Inquiry into the Notion of Identity in Strasbourg Case Law' in *Social & Legal Studies*.

NOTES

[1] Nieminen, K. (2015) 'Disobedient subjects – constructing the subject, the state and religion in the European Court of Human Rights', *Social Identities*, vol. 21 (4), pp. 312-327.
[2] Soirila, U. (2015) 'Smothered to (un)death: on identity and the European court of human rights as an administrator of human life', *Social Identities*, vol. 21 (4), pp. 345-358.
[3] Gross, A.M. (1996) 'Rights and Normalization: A Critical Study of European Human Rights Case Law on the Choice and Change of Names', *Harvard Human Rights Journal*, vol. 9, pp. 269-284; Tirosh, Y. (2010) 'A Name of One's Own: Gender and Symbolic Legal Personhood in the European Court of Human Rights', *Harvard Journal of Law & Gender*, vol. 33, pp. 247-307.
[4] Marshall, J. (2014) *Human rights law and personal identity*, London: Routledge.
[5] E.g. Johnson, P. (2013) *Homosexuality and the European Court of Human Rights*, London: Routledge.
[6] Gozdecka, D.A. (2015) 'Identity, Subjectivity and the Access to the Community of Rights', *Social Identities*, vol. 21 (4), p. 306.
[7] ECtHR 6 November 1980, No. 7654/76 (Van Oosterwijck v. Belgium), para. 22.
[8] Ibid., partly concurring opinion of Judge Ganshof Van Der Meersch.
[9] Ibid., para. 40.
[10] ECtHR 17 October 1986, No. 9532/81 (Rees v. The United Kingdom), para. 42.
[11] ECtHR [GC] 30 July 1998, Nos. 22985/93; 23390/94 (Sheffield and Horsham v. The United Kingdom).
[12] Ibid., partly dissenting opinion of Judge Casadevall.
[13] Ibid., dissenting opinion of Judge Van Dijk.
[14] ECtHR [GC] 11 July 2002, No. 28957/95 (Christine Goodwin v. The United Kingdom) and ECtHR [GC] 11 July 2002, No. 25680/94 (I. v. The United Kingdom).
[15] ECtHR [GC] 11 July 2002, No. 28957/95 (Christine Goodwin v. The United Kingdom), para., 82.
[16] Ibid., para. 90.
[17] ECtHR 7 February 2002, No. 53176/99 (Mikulić v. Croatia), para. 53.
[18] The following account is partly taken from my earlier article on this subject: Al Tamimi, Y. (2017) 'Human Rights and the Excess of Identity: A Legal and Theoretical Inquiry into the Notion of Identity in Strasbourg Case Law', *Social & Legal Studies*, DOI: 10.1177/ 0964663917722598.
[19] ECtHR 7 February 2002, No. 53176/99 (Mikulić v. Croatia), para. 64.
[20] ECtHR [GC] 13 February 2003, No. 42326/98 (Odièvre v. France).
[21] See similar considerations by the Court in ECtHR 26 June 2014, No. 65192/11 (Mennesson v. France); ECtHR 26 June 2014, No. 65941/11 (Labassee v. France); ECtHR 7 March 2017, No. 52629/11 (R.L. and others v. Denmark); ECtHR 12 January 2006, No. 26111/02 (Mizzi v. Malta); ECtHR 17 July 2007, No. 3150/05 (Jevremovic v. Serbia); ECtHR 20 December 2007, No. 23890/02 (Phinikaridou v. Cyprus).
[22] ECtHR 13 July 2006, No. 58757/00 (Jäggi v. Switzerland), para. 40. See a similar case in ECtHR 25 September 2012, No. 33783/09 (Godelli v. Italy).
[23] ECtHR 7 July 1989, No. 10454/83 (Gaskin v. The United Kingdom), para. 39.
[24] ECtHR 7 August 1996, No. 17383/90 (Johansen v. Norway), para. 75.
[25] ECtHR 28 October 2010, No. 52502/07 (Aune v. Norway), para. 70.
[26] Besides the Folgerø case, other examples of such cases are S.H. and others v. Austria and A.H. and others v. Russia.
[27] ECtHR [GC] 29 June 2007, No. 15472/02 (Folgerø and others v. Norway), para. 77.
[28] Ibid., paras. 95, 96 and 100.
[29] ECtHR 15 November 2007, No. 12556/03 (Pfeifer v. Austria), para. 33.
[30] ECtHR 24 June 2004, No. 59320/00 (Von Hannover v. Germany), para. 25.
[31] Ibid., para. 50.
[32] See ECtHR [GC] 7 February 2012, Nos. 40660/08 60641/08 (Von Hannover v. Germany (No. 2)), ECtHR 4 December 2012, No. 59631/09 (Verlagsgruppe News Gmbh and Bobi v. Austria), ECtHR 18 April 2013, No. 7075/10 (Ageyevy v. Russia), ECtHR 19 September 2013, No. 8772/10 (Von Hannover v. Germany (No. 3)).
[33] See the discussion between the majority and Judge Jočienė in the Karako v. Hungary case; ECtHR 28 April 2009, No. 39311/05 (Karako v. Hungary).
[34] Typical for the absence of such a discussion is that the Court's addition of 'honor' next to reputation in the case of A. v. Norway and subsequent cases did not result in any substantive impact on the Court's assessment in such cases; see ECtHR 9 April 2009, No. 28070/06 (A. v. Norway), para. 63.

[35] ECtHR 5 December 2013, No. 32265/10 (Henry Kismoun v. France), para. 18.
[36] Ibid., para. 20.
[37] Due to the large number of ethnicity cases and considerable differences in substance, the cases are divided in two groups: (1) those mentioning ethnic identity under Article 8 (private life) and (2) those mentioning ethnic identity under Article 11 (freedom of association) and others. The first group of cases is discussed in this paragraph, the second group is examined under collective identities further down below.
[38] ECtHR [GC] 18 January 2001, No. 27238/95 (Chapman v. The United Kingdom), para. 73; ECtHR [GC] 18 January 2001, No. 24882/94 (Beard v. The United Kingdom); ECtHR [GC] 18 January 2001, No. 24876/94 (Coster v. The United Kingdom); ECtHR [GC] 18 January 2001, No. 25154/94 (Jane Smith v. The United Kingdom); ECtHR [GC] 18 January 2001, No. 25289/94 (Lee v. The United Kingdom).
[39] ECtHR [GC] 15 March 2012, Nos. 4149/04, 41029/04 (Aksu v. Turkey), para. 58.
[40] ECtHR 17 January 2017, No. 10851/13 (Király and Dömötör v. Hungary), para. 43.
[41] ECtHR 6 February 2001, No. 44599/98 (Bensaid v. The United Kingdom), para. 47.
[42] ECtHR 29 April 2002, No. 2346/02 (Pretty v. The United Kingdom), para. 61
[43] In the similar case of Haas v. Switzerland, the Court reiterates the consideration on identity from Pretty but does not elaborate it in the judgment; ECtHR 20 January 2011, No. 31322/07 (Haas v. Switzerland). See also e.g. ECtHR 20 March 2007, no. 5410/03 (Tysiąc v. Poland); ECtHR 7 May 2009, No. 3451/05 (Kalacheva v. Russia); ECtHR 14 December 2010, No. 67545/09 (Ternovszky v. Hungary); ECtHR 8 November 2011, No. 18968/07 (V.C. v. Slovakia); ECtHR 19 July 2012, No. 497/09 (Koch v. Germany); ECtHR 3 October 2013, no. 552/10 (I.B. v. Greece).
[44] ECtHR [GC] 10 April 2007, No. 6339/05 (Evans v. The United Kingdom), para. 77.
[45] ECtHR [GC] 16 July 2014, No. 37359/09 (Hämäläinen v. Finland).
[46] ECtHR 26 June 2014, No. 65192/11 (Mennesson v. France).
[47] ECtHR [GC] 12 June 2014, No. 56030/07 (Fernández Martínez v. Spain).
[48] An important and well-known exception is the Lautsi case, which is extensively discussed later, where considerations on Italy's cultural identity and the margin of appreciation were discussed together by the Court.
[49] ECtHR [GC] 27 August 2015, No. 46470/11 (Parrillo v. Italy), para. 158.
[50] Ibid., concurring opinion of Judge Pinto de Albuquerque, para. 34 (italics in original).
[51] In 9 cases, the Court neither explicitly narrows or affords a wide margin.
[52] ECtHR 7 February 2002, No. 53176/99 (Mikulić v. Croatia), para. 53.
[53] ECtHR [GC] 18 October 2006, No. 46410/99 (Üner v. The Netherlands), para. 58.
[54] Costello, C. (2015) *The Human Rights of Migrants and Refugees in European Law*, Oxford: Oxford University Press, p. 128.
[55] ECtHR 21 June 2016, No. 76136/12 (Ramadan v. Malta), para. 90.
[56] Ibid., para. 62.
[57] Ibid., dissenting opinion of Judge Pinto de Albuquerque, para. 24.
[58] ECtHR 15 May 2012, No. 56030/07 (Fernández Martínez v. Spain), para. 57 and ECtHR [GC] 12 June 2014, No. 56030/07 (Fernández Martínez v. Spain), para. 110.
[59] See ECtHR 5 December 2013, No. 32265/10 (Henry Kismoun v. France), para. 18.
[60] ECtHR 25 May 1993, No. 14307/88 (Kokkinakis v. Greece), para. 31.
[61] ECtHR [GC] 10 November 2005, No. 44774/98 (Leyla Şahin v. Turkey).
[62] ECtHR (GC) 1 July 2014, no. 43835/11 (S.A.S. v. France), para. 146.
[63] Ibid., para. 79.
[64] Ibid., para. 120.
[65] ECtHR [GC] 18 March 2011, no. 30814/06 (Lautsi and others v. Italy), para. 47.
[66] ECtHR 3 November 2009, no. 30814/06 (Lautsi v. Italy).
[67] ECtHR [GC] 18 March 2011, no. 30814/06 (Lautsi and others v. Italy), para. 66.
[68] ECtHR 21 July 2015, No. 18766/11, 36030/11 (Oliari and others v. Italy).
[69] ECtHR 16 November 2004, No. 29865/96 (Ünal Tekeli v. Turkey).
[70] ECtHR 6 September 2007, No. 10163/02 (Johansson v. Finland)
[71] ECtHR [GC] 17 February 2004, No. 44158/98 (Gorzelik and others v. Poland), para. 92.