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# **ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

**Freedom of thought, conscience and religion**

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## **Article 9 of the European Convention on Human Rights**

### *Article 9*

#### **Freedom of thought, conscience and religion**

- 1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- 2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

## INTRODUCTION

[1] Freedom of thought, conscience and religion is a fundamental right, enshrined not only in the European Convention on Human Rights but also in many national, international and European instruments. It is a basic right that is extremely important.

[2] *In France* the first instrument concerning freedom of religion was the Edict of Nantes, issued by Henri IV on 13 April 1598 against a background of wars of religion and the massacres to which they gave rise (Vassy in 1562 and, above all, the Saint Bartholomew's Day Massacre in 1572).

Two centuries later, on the other side of the Atlantic, freedom of religion was enshrined in the June 1776 Virginia Bill of Rights, a document that was to underlie the drafting of the United States Declaration of Independence of 4 July 1776. The same freedom was subsequently established by the French Revolution. Under Article 10 of the 1789 Declaration of the Rights of Man no one was to be disquieted on account of his opinions, including his religious views, provided their manifestation did not disturb the public order established by law. Article 2 enshrines the principle of non-discrimination and states that anyone can exercise all the rights and freedoms proclaimed in the Declaration of the Rights of Man without any discrimination, such as on grounds of religion. The free pursuit of religion is more specifically enshrined in Article 7 of the 1793 Declaration of the Rights of Man.

At present the majority of states have established freedom of thought, conscience and religion, usually in their constitutions.

[3] *At the international level* freedom of thought, conscience and religion is naturally one of the fundamental rights established by the United Nations. Thus, under Article 18 of the International Covenant on Civil and

Political Rights, everyone has the right to freedom of thought, conscience and religion. This right includes the freedom to have or to adopt a religion or belief of one's choice, and freedom, either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance, practice and teaching. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. Finally, Article 18 specifies that the states parties to the Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. Article 26 of the Convention lays down the general principle of non-discrimination, which includes religion.

The principle of religious freedom appears in various provisions,<sup>1</sup> including the International Convention on the Rights of the Child, which clearly enshrines this principle in Article 14. Similarly, Article 12 of the American Convention on Human Rights states that everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others. Lastly, Article 12 of the American Convention specifies that parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

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1 J.-F. Flauss (ed.), *La protection internationale de la liberté religieuse/International Protection of Religious Freedom*, Bruylant, 2002.

[4] *As regards Europe*, the most important provision enshrining freedom of thought, conscience and religion is undoubtedly Article 9 of the European Convention on Human Rights. Under this article, everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change one's religion or belief and freedom, either alone or in community with others and in public or private, to manifest one's religion or belief, in worship, teaching, practice and observance (paragraph 1). Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others (paragraph 2).

The Charter of Fundamental Rights of the European Union, signed on 7 April 2000 at the Nice summit, also protects freedom of thought, conscience and religion in the same terms (Article 10). For the time being this text has no binding legal force for member states. This will doubtless change shortly, especially with the future European Constitution, but in any case the provisions of the European Convention on Human Rights will remain the standard European reference for freedom of thought, conscience and religion.

Indeed, Article 9 is, and will continue to be, the main provision where freedom of thought is concerned. Whereas the second paragraph of the article provides for certain limitations, the first paragraph stresses the principle of freedom. This is a fundamental freedom. Doubtless, difficulties may arise, but the European Convention on Human Rights is meant to protect this freedom very effectively. The importance of freedom of thought, conscience and religion has been emphasised, *inter alia*, by the European judges. Generally speaking, it is considered to be one of the foundations of democratic society;<sup>2</sup> more specifically, the judges regard

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2 ECtHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 31: AFDI, 1994, p. 658, comments V. Coussirat-Coustère; JDI, 1994, p. 790, comments E. Decaux and P. Tavernier; RSC, 1994, p. 362, comments R. Koering-Joulin; RTDH, 1994, p. 144, comments F. Rigaux; RUDH, 1993, p. 1, comments F. Sudre *et al.* Cf. N. Valticos, "Le premier arrêt de la Cour européenne des Droits de l'Homme en matière de liberté de religion. L'affaire *Kokkinakis c. Grèce*", in



religious freedom as one of the vital elements that go to make up the identity of believers and their conception of life.<sup>3</sup> In reality the European Court of Human Rights has elevated freedom of religion to a substantive right under the Convention,<sup>4</sup> first indirectly<sup>5</sup> and then more directly.<sup>6</sup>

The qualitative importance of Article 9 of the Convention has always been considerable, but over the past few years its quantitative importance has been steadily increasing:<sup>7</sup> it can now no longer be said, as formerly, that cases connected with this article are relatively marginal.<sup>8</sup> It is worth noting

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*Mélanges G. C. Vlachos, Sakkoulas/Bruylant, 1995, p. 551-567. Cf also: S. Karagiannis, "Les minorités religieuses et la Convention européenne des Droits de l'Homme", L'Observateur des Nations Unies, 1997, No. 3, p. 83; I. Rouvière-Perrier, "Les témoins de Jéhovah devant la Cour européenne des Droits de l'Homme", Les Petites Affiches, 17 November 1993, No. 138, p. 24 et seq.; H. Surrel, "La liberté religieuse devant la Cour européenne des droits de l'homme", RFDA, 1995, pp. 573-581.*

[Note to reader:

A list of abbreviations used in the footnotes is to be found at the back of this publication]

- 3 ECtHR, 20 September 1994, *Otto-Preminger-Institut v. Austria*, Series A, No. 295-A: JDI, 1995, p. 772, comments P. Tavernier. Cf. G. Haarscher, "Le blasphémateur et le raciste", RTDH, 1995, p. 417; S. Peyrou-Pistouley, "L'affaire Otto Preminger Institut : La liberté d'expression vue de Strasbourg, censure ou laxisme", RFDA, 1995, p. 1189; P. Wachsmann, "La religion contre la liberté d'expression : sur un arrêt regrettable de la Cour européenne des droits de l'homme", RTDH, 1994, p. 441; F. Rigaux, "La liberté d'expression et ses limites", RTDH, 1995, p. 401.
- 4 G. Gonzalez, *La Convention européenne des Droits de l'Homme et la liberté des religions*, Economica, 1997, p. 42.
- 5 *Kokkinakis, op. cit.*; ECtHR, 23 June 1993, *Hoffmann v. Austria*, Series A, No. 255-C: JDI, 1994, p. 778, comments E. Decaux and P. Tavernier; RSC, 1994, p. 362, comments R. Koering-Joulin. Cf G. Junosza-Zdrojewski, "La Cour européenne des Droits de l'Homme et les activités des sectes", GP, 15-19 July 1994, p. 41 et seq.; J. Morange, "Liberté religieuse et garde d'enfants", RTDH, 1994, p. 414 et seq.
- 6 *Otto-Preminger-Institut, op. cit.*; ECtHR, 26 September 1996, *Manoussakis and Others v. Greece*, Reports 1996-IV: AFDI, 1996, p. 749, comments V. Coussirat-Coustère; JDI, 1997, p. 248, comments E. Decaux and P. Tavernier; RSC, 1997, p. 466, comments R. Koering-Joulin; JCP 197-I-4000, Nos. 6-7, comments F. Sudre. *Add.* G. Gonzalez, "Les entraves à l'ouverture de 'maisons de prière' en Grèce", RTDH, 1997, p. 536.
- 7 C. Birsan, "Le juge européen, la liberté de pensée et de conscience" in Massis et Pettiti (eds.), *La liberté religieuse et la Convention européenne des droits de l'homme*, Droit et Justice, No. 58, 2004, p. 45 et seq. (p. 50).
- 8 G. Cohen-Jonathan, *La Convention européenne des Droits de l'Homme*, Economica, 1989, p. 482.

that the European Court of Human Rights mostly deals with individual applications, since state applications concerning violations of Article 9 are extremely rare.<sup>9</sup>

In actual fact, the freedoms guaranteed by Article 9 of the Convention are twofold: internal and external.<sup>10</sup> “Internal” freedom can only be unconditional, since it concerns deep-seated ideas and convictions formed within an individual’s conscience which cannot, in themselves, disturb public order and consequently cannot be limited by state authorities. “External” freedom, on the other hand, despite its considerable importance, can only be relative. This relativity is logical inasmuch as, because the freedom in question is the freedom to manifest one’s beliefs, public order may be affected or even threatened. Consequently, although the freedom to hold beliefs and convictions can only be unconditional (Chapter I), the freedom to manifest them can only be relative (Chapter II).

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9 In *Cyprus v. Turkey*, the Court ruled that restrictions placed on the freedom of movement of Greek Cypriots during the period under consideration had considerably curtailed their ability to observe their religious beliefs, in particular their access to places of worship outside their villages and their participation in other aspects of religious life: ECtHR, 10 May 2001, *Cyprus v. Turkey*, Reports 2001-IV, § 245.

10 This distinction has been underscored by J. Velu and R. Ergec, *La Convention européenne des Droits de l’Homme*, Bruylant, 1990, p. 584.

## **I. ABSOLUTE FREEDOM TO HOLD BELIEFS AND CONVICTIONS**

[5] *The desirability of establishing this freedom*

A solemn declaration of this freedom may seem unnecessary and is undoubtedly a truism, but, as has been wisely remarked, “the fact that thoughts are free before being expressed does not mean that protection of this freedom is unnecessary”,<sup>11</sup> if only to protect free choice effectively. It is therefore expedient to determine the extent of the protection established by Article 9 of the European Convention on Human Rights (Section A) and its strength (Section B).

### **A. Extent of protection**

[6] *Unconditionality of this freedom*

The freedom to hold beliefs and convictions is unconditional; the only limitation – specified in Article 9 itself – concerns the way in which this freedom is exercised. As reiterated in the *Kokkinakis* judgment: “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 those Articles, 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

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11 J.A. Frowein, “Article 9 § 1” in L.-E. Pettiti, E. Decaux and P.-H. Imbert (eds.), *La Convention européenne des Droits de l’Homme*, Economica, 2nd ed., 1999, pp. 353-360 (p. 354).

groups and ensure that everyone's beliefs are respected.”<sup>12</sup> This unconditionality will be considered from two angles: rights (Point 1 below) and persons protected (Point 2 below).

## 1. Rights protected

[7] *Freedom of thought, belief and religion: a broad approach*

Although Article 9 of the Convention admittedly concerns freedom of religion in particular, it provides a much wider safeguard, applying to all personal, political, philosophical,<sup>13</sup> moral and, of course, religious beliefs and convictions. As has been observed, this article encompasses philosophical ideas and conceptions of all kinds, with specific reference to an individual's religious conceptions and his own way of perceiving his social and private life.<sup>14</sup> Thus, as a philosophy, pacifism falls within the ambit of Article 9 of the Convention, since a pacifist attitude may be regarded as a “conviction”: however, it cannot be used to legitimise everything.<sup>15</sup>

Personal beliefs or convictions are more than just opinions. They are views that have attained a certain level of cogency, seriousness, cohesion and importance.<sup>16</sup> They must have an identifiable formal content,<sup>17</sup> which in

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12 ECtHR, 25 May 1993, *Kokkinakis v. Greece*, *op. cit.*, § 33; 13 December 2001; *Metropolitan Church of Bessarabia and Others v. Moldova*, Reports 2001-XII, § 114f: JDI 2002, p. 313, comments E. Decaux and P. Tavernier, AJDA 2002, p. 503, comments J.F. Flauss.

13 ECmHR, 12 October 1978, *Arrowsmith v. the United Kingdom*, Appl. No. 7050/75, 19 DR 5. The concept of philosophical belief is taken in the broad sense, since it encompasses an individual's conception of life and, more specifically, of man's behaviour in society: G. Cohen-Jonathan, “Convention européenne des Droits de l'Homme, Droits garantis, Libertés de la pensée”, JC, Fascicule 6522, No. 60.

14 C. Birsan, “Le juge européen, la liberté de pensée et de conscience”, *op. cit.*, p. 47. For philosophical conceptions cf. ECtHR, 13 August 1981, *Young, James and Webster v. the United Kingdom*, Series A, No. 44: CDE, 1982, p. 226, comments G. Cohen-Jonathan; AFDI, 1982, p. 499, comments R. Pelloux; JDI, 1982, p. 220, comments P. Rolland.

15 See [23] and [27] below.

16 ECtHR, 25 February 1982, *Campbell and Cosans v. the United Kingdom*, Series A, No. 48, § 36: CDE, 1986, p. 230, comments G. Cohen-Jonathan; JDI, 1985, p. 191, comments P. Rolland and P. Tavernier.

practice may lead to uncertainty: thus ideas relating to personal integrity are protected by Article 9<sup>18</sup> but not cultural or language preferences.<sup>19</sup> A belief is different from a personal motivation (however strong) inasmuch as it must be possible to construe it as the expression of a coherent view of basic issues.<sup>20</sup> The expression “philosophical convictions” must be interpreted with regard to the Convention as a whole, including Article 17 therefore: in other words, the expression denotes convictions which are worthy of respect in a democratic society and which are not incompatible with human dignity.<sup>21</sup>

### **a. Freedom of thought and conscience**

#### *[8] Freedom of thought*

With regard to freedom of thought, we may learn a great deal from the case-law of the former Commission. Thus an application from a person maintaining that his sentence for belonging to the Communist Party of Turkey was a violation of his freedom of thought was declared admissible.<sup>22</sup> The choice of children’s forenames by their parents also comes within the ambit of this freedom.<sup>23</sup>

On the other hand, an obligation to become a member of a professional body does not infringe freedom of thought: more specifically, the Commission has held that obligatory membership of their body did not infringe this freedom for architects, who were still able to express their

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17 ECmHR, 15 May 1980, *T. McFeeley v. the United Kingdom*, 20 DR 44.

18 ECmHR, 12 October 1978, *Pat Arrowsmith v. the United Kingdom*, *op.cit.*

19 ECtHR, 23 July 1968, *Belgian 'language' case*, Series A, No. 6; V. Berger, *Jurisprudence de la Cour européenne des Droits de l'Homme*, Sirey, 9th ed., 2004, p. 503 and bibliography.

20 ECmHR, 1 December 1981, *X v. FRG*, 24 DR 141. Cf. also: P. Rolland, “Ordre public et pratiques religieuses”, in J.-F. Flauss (ed.), *La protection internationale de la liberté religieuse/International Protection of Religious Freedom*, *op. cit.*, pp. 231-271 (p. 245).

21 *Campbell and Cosans* judgment, *op. cit.*, § 36. On this point, cf. M. de Salvia, “Liberté de religion, esprit de tolérance et laïcité”, in *Libertés, justice, tolérance : Mélanges en hommage au Doyen Gérard Cohen-Jonathan*, Bruylant, 2004, pp. 591 et seq. (p. 595).

22 ECmHR, 11 October 1991, *Hazar and Others v. Turkey*, 72 DR 200.

23 ECmHR, 2 July 1997, *Salonen v. Finland*, 90 DR 60.

own ideas.<sup>24</sup> A similar solution was adopted for an applicant sentenced to fines and imprisonment for contempt of court: this was not deemed to be interference with the right to respect for his freedom of thought.<sup>25</sup>

### [9] *Freedom of conscience*

Legal theory, more than case-law, has sought to clarify the concept of freedom of conscience. One writer has described conscience as “a more sophisticated and structured product than an individual’s thought”.<sup>26</sup> Ultimately freedom of conscience would appear to lie halfway between freedom of opinion and freedom of worship or rather at the point where they intersect.<sup>27</sup>

Although there is little of it, the case-law does provide useful clarification on freedom of conscience, especially in the specific context of conscientious objection. The latter may take various forms, but occurs mainly with regard to military service. The position of the Strasbourg institutions is clear: the European Convention does not guarantee any right to conscientious objection.<sup>28</sup> If a state accepts conscientious objection, substituting civilian service for military service, conscientious objectors cannot allege an infringement of Article 4 of the Convention, which prohibits forced or compulsory labour: alternative civilian service is not covered by this provision.<sup>29</sup> It is nevertheless true that problems remain,<sup>30</sup>

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24 ECmHR, 8 September 1989, *Revert and Legallais v. France*, 62 DR 309.

25 ECmHR, 3 December 1993, *Putz v. Austria*, 76 DR 51.

26 C. Birsan, “Le juge européen, la liberté de pensée et de conscience”, *op. cit.*, p. 52.

27 J. Robert, *Liberté de conscience, pluralisme et tolérance*, Introductory Report, Proceedings of the seminar organised by the Secretariat General of the Council of Europe and the F.M. van Asbeck Centre for Human Rights Studies, November 1992, Council of Europe Publishing, 1993, p. 25.

28 ECmHR, 5 July 1977, *X v. FRG*, 9 DR 196, p. 324; 7 March 1977, *Conscientious objectors v. Denmark*, 9 DR 117. – Add: ECmHR, 9 May 1984, *A. v. Switzerland*, 38 DR 219; 7 March 1996, *Raninen v. Finland*, 84 DR 17.

29 *X v. FRG*, *op. cit.* Cf. Res. 337 (1967) of the Consultative Assembly of the Council of Europe, Rec. 816 (1977) of the Parliamentary Assembly of the Council of Europe, and Rec. R (87) 8 of the Committee of Ministers regarding conscientious objection to compulsory military service, setting out the right to conscientious objection subject to the obligation to perform alternative service.

but states are free not to recognise conscientious objection and to impose sanctions on those who refuse to perform military service.<sup>31</sup> However, the Parliamentary Assembly of the Council of Europe recommends that the right to conscientious objection to military service be incorporated into the European Convention on Human Rights and that member states take the necessary steps to ensure respect for this right.<sup>32</sup>

The Court has pointed out that mention of the consciousness of belonging to a minority and the preservation and development of a minority's culture cannot be said to constitute a threat to "democratic society".<sup>33</sup>

## **b. Freedom of religion**

### [10] *Freedom of religion*

The Convention's institutions do not have the authority to define religion, but the latter must be considered in a non-restrictive sense. Religious beliefs cannot be limited to the "main" religions. However, the alleged religion must still be identifiable,<sup>34</sup> although if applicants' wish to describe their belief as a religion this is considered favourably in the case of unjustified interference by the state.<sup>35</sup> Cases involving majority religions are

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30 G. Gonzalez, *La Convention européenne des Droits de l'Homme et la Liberté des religions*, *op. cit.*, p. 127; A. Garay and P. Goni, "Les Témoins de Jéhovah face au service national en France: des prisonniers d'opinion ?", RTDH, 1994, p. 359 *et seq.* (p. 364 *et seq.*); J. Duffar, *L'objection de conscience en droit français*, RDP, 1991, p. 657; P. Sabliere, *Le statut de l'objection de conscience en France*, thesis, Paris, 1971.

31 *X v. FRG*, *op.cit.*; 9 May 1984, *A v. Switzerland*, *op. cit.*; 14 October 1985, *Jorgen Johansen v. Norway*, 44 DR 66.

32 Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, report by D. Marty, *Exercise of the right of conscientious objection to military service in Council of Europe member states*, Doc. 8809 revised, 4 May 2001.

33 ECtHR, 10 July 1998, *Sidiropoulos and Others v. Greece*, Reports 1998-IV, § 41: AFDI, 1999, p. 747, comments V. Coussirat-Coustère; JDI, 1999, p. 249, comments E. Decaux and P. Tavernier; JTDE, 1999, p. 31, comments P. Lambert.

34 Although entry of a prisoner's religion in the prison register entails the granting of certain facilities, the religion must, at least in individual cases, be identifiable: ECmHR, 4 October 1977, *X v. the United Kingdom*, 11 DR 55.

35 G. Gonzalez, *La Convention européenne des Droits de l'Homme et la Liberté des religions*, *op. cit.*, p. 53.

relatively few, since their tenets are well-known and relations with the state have stabilised.<sup>36</sup> The question is more difficult, however, with minority religions and new religious bodies.<sup>37</sup>

### [11] *The question of sects*

In the absence of any precise definition of religion, the problem of sects will inevitably come up,<sup>38</sup> raising legitimate concerns, especially regarding children.<sup>39</sup> The European Parliament has passed a resolution on a common approach by member states towards various infringements of the law by new organisations operating under the protection afforded to religious bodies.<sup>40</sup> A general distrust of sects is undoubtedly emerging: the question was not really mentioned during the preparatory work for the European Convention, since the problem had not actually arisen at the time. At present, the institutions of the Convention hold that all religious bodies

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36 Usually these are cases relating simply to internal discipline and relations with employees (ECmHR, 8 September 1988, *Jan Ake Karlsson v. Sweden*, 57 DR 176), although sometimes the matter may be more serious: ECtHR, 9 December 1994, *The Holy Monasteries v. Greece*, Series A, No. 301-A (transfer of ownership to the state). Cf. also cases relating to schools: ECmHR, 6 January 1993, *Yanasik v. Turkey*, No. 14524/89.

37 G. Gonzalez, *La Convention européenne des Droits de l'Homme et la liberté des religions*, op. cit., p. 54 and references.

38 Cf. Vivien Report, *Les sectes en France*, La Documentation Française, 1983. Add.: L. E. Pettiti, "Liberté de religion, textes internationaux et Convention européenne des droits de l'homme", *Mélanges Velu*, Bruylant, 1992, p. 1835; J. Vernet, "Quelques questions pertinentes que l'on se pose à propos des sectes", in *Les sectes et l'Eglise catholique*, Cerf, 1986; J.-B. d'Onorio, "Les sectes en droit public", JCP, 1988-I-3336; J. Robert, "La liberté de religion, de pensée et de croyance", in R. Cabrillac, M.-A. Frison-Roche and T. Revet (eds.), *Libertés et droits fondamentaux*, Dalloz, 9th ed., 2003, p.353 et seq.; A. Dorsner-Dolivet, "Loi sur les sectes", D. 2002, reports, p. 1086 et seq.

39 M. Huyette, "Les sectes et la protection judiciaire des mineurs", D. 1996, reports, p. 271 et seq. Cf. also Civ. I, 22 February 2000, D. 2001 J. p. 398, comments by C. Courtin, who clearly demonstrates that the child's interest constitutes not only a legitimate ground for parents to exercise their fundamental rights and freedoms but also a criterion for judicial authorities in taking action to combat sectarian excesses. However, cf. Crim., 17 October 2001, D. 2002 J. p. 751, comments M. Huyette (acquittal of parents: the child enrolled in a Sahaja Yoga school was not at risk).

40 OJEC, 2 July 1984, C 172/41.



and their followers enjoy equal safeguards under the Convention.<sup>41</sup> The term “sect” was never actually used by the Commission.<sup>42</sup>

The question is a delicate one: apart from the highly problematical distinction between a religion and a sect,<sup>43</sup> the principle of secularism<sup>44</sup> means that the state must refrain from intervening in matters of individual conscience. Since the act of faith, by its nature, is a matter for the greatest freedom, “sectarian” beliefs are therefore protected.<sup>45</sup> However, precautions must be taken, in particular to protect the interests of children and the vulnerable. To this end a national sect-monitoring centre has been set up with the object of notifying the public authorities of the existence and activities of various religious movements; information campaigns on the dangers of sects have also been conducted by the authorities.<sup>46</sup> The French law of 12 June 2001 to strengthen preventive and punitive action against sectarian movements infringing human rights and fundamental freedoms<sup>47</sup> raised a number of questions, including its compatibility with the European Convention on Human Rights: an expert paper concluded that the provisions of this law were compatible with the Convention, although some uncertainties were noted, in particular a lack of precision in

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41 G. Gonzalez, *La Convention européenne des Droits de l'Homme et la liberté des religions*, *op. cit.*, p. 81 and references.

42 The Commission referred to religious or philosophical associations, religious bodies or simply associations.

43 One of the distinguishing criteria might be whether or not the right to leave the body in question is recognised.

44 For France this principle is enshrined in Article 2 of the Constitution. Cf. in particular: J. Rivéro, “La notion juridique de la laïcité”, D. 1949, reports, p. 137 *et seq.*

45 A. Sériaux, L. Sermet and D. Viriot-Barrial, *Droits et libertés fondamentaux*, Ellipses, 1998, p. 53.

46 The question arose as to whether such campaigns were contrary to the principle of freedom of worship, and the French decision was in the negative: Conseil d'Etat, 17 February 1992, *Paris Church of Scientology*, GP 1992-2, p. 146.

47 Law No. 2001-504 of 12 June 2001 to strengthen preventive and punitive action against sectarian movements infringing human rights and fundamental freedoms, JO, 13 June 2001, p. 9337.

certain concepts.<sup>48</sup> Considering this problem, the European Court of Human Rights noted, in the case of the *Christian Federation of Jehovah's Witnesses in France*,<sup>49</sup> that the aim of the French law was to strengthen preventive and punitive action against sectarian movements infringing human rights and fundamental freedoms. While stating that it was not its task to rule on legislation *in abstracto* and that it could not therefore express a view as to the compatibility of the provisions of the new legislation with the Convention,<sup>50</sup> the Court nevertheless provided some valuable pointers. Admittedly, this law provides for the possibility of dissolving sects – a term which it does not define – but such a measure can be ordered only by the courts and when certain conditions are satisfied, in particular where there have been final convictions of the sect concerned or of those in control of it for one or more of an exhaustively listed set of offences – a situation in which the applicant association should not normally have any reason to fear finding itself. Impugning Parliament's motives in passing this legislation, when it was concerned to settle a burning social issue, does not amount to proof that the applicant association was likely to run any risk. Moreover, it would be inconsistent for the latter to rely on the fact that it is not a movement that infringes freedoms and at the same time to claim that it is, at least potentially, a victim of the application that may be made of this law. Accordingly, the applicant association cannot claim to be a victim within the meaning of Article 34 of the Convention, and its application must be declared inadmissible in its entirety.

Admittedly, the Parliamentary Assembly of the Council of Europe in its Recommendation 1178 (1992) on sects and new religious movements, considered that major legislation on sects was undesirable on the grounds that such legislation might well interfere with freedom of conscience and religion, and, in its Recommendation 1412 (1999), invited member states

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48 J. Voyame, expert paper, Appendix II, Doc. 9612, Parliamentary Assembly of the Council of Europe, 31 October 2002.

49 ECtHR, 6 November 2001, *Christian Federation of Jehovah's Witnesses in France v. France*, Reports 2001-XI, p. 13f.

50 ECtHR, 25 February 1997, *Findlay v. the United Kingdom*, Reports 1997-I, § 67.

to use normal procedures of criminal and civil law against illegal practices carried out in the name of groups of a religious, esoteric or spiritual nature. Nevertheless, the Parliamentary Assembly subsequently judged that the French law of 2001 for the most part simply reiterated existing provisions in various codes, acknowledging that even if it had been possible to achieve the same objective by recourse to existing provisions, a state could pass an act which had the advantage of grouping together all the provisions necessary to achieve that objective.<sup>51</sup>

## 2. Persons protected

### [12] *Natural persons and legal persons*

As regards the persons afforded protection by Article 9 of the Convention, a distinction must be drawn between freedom of thought and conscience on the one hand and freedom of religion on the other, since the situation of natural persons and that of associations or other legal persons is not the same.

### [13] *Individuals*

Natural persons are, as a matter of course, entitled to all the freedoms guaranteed by Article 9. In this respect there cannot be the least distinction, since this could only be discriminatory.

The right to hold personal convictions and religious beliefs is universal and must be understood in the broad sense. This means that it applies not only to believers but also to atheists, agnostics and the entirely unconcerned.<sup>52</sup> Article 9 is undoubtedly a "precious asset" for the latter, as the Court has reiterated,<sup>53</sup> since the pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.<sup>54</sup>

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51 Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Freedom of religion and religious minorities in France*, Report, Doc. 9612, 31 October 2002, § 46.

52 *Kokkinakis, op. cit.*, § 31.

53 ECtHR, 18 February 1999, *Buscarini and Others v. San Marino*, Reports 1999-I, § 34.

54 ECtHR, 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, *op. cit.*, § 114.

Certainly most of the rights recognised in Article 9 have an unquestionably individual character. However, the fact remains that some of these rights may have a collective dimension. Consequently, we may wonder whether it might not be advisable to go beyond a purely individualistic approach.

#### [14] *Groups*

It has become essential to extend Article 9 protection to groups of individuals, since it was not possible to take account of the collective dimension of some of the rights enshrined there at the time. However, this has not been accepted unreservedly: groups can cite only freedom of religion rather than all the freedoms of Article 9. The former Commission ruled clearly to this effect, and this case-law is still relevant: freedom of conscience cannot be exercised by a collective body.<sup>55</sup> Similarly, in the Commission's opinion, a corporate profit-making body can neither enjoy nor rely on the rights defined in Article 9.1.<sup>56</sup>

When accepting that a church or its ecclesiastical body may, as such, exercise on behalf of its members the rights guaranteed by Article 9, the Court and former Commission expressly refer to freedom of religion and freedom to manifest a religion.<sup>57</sup> This partial guarantee is legitimate. However, it is equally obvious that "collective rights must never supplant

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55 ECmHR, 12 October 1998, *Verein Kontakt-Information-Therapie v. Austria*, 57 DR 81.

56 ECmHR, 27 February 1979, *X v. Switzerland*, 16 DR 85. More recently, the Commission has specified that a corporate profit-making body can neither enjoy nor rely on the rights guaranteed by Article 9: ECmHR, 15 April 1996, *Kustannus Oy Vapaa Ajatteliija AB and Sundström v. Finland*, 85 DR 29.

57 ECmHR, 3 September 1996, and ECtHR judgment, 16 December 1997, *Canea Catholic Church v. Greece*, Reports 1997-VIII, §§ 39 and 31: JDI, 1998, p. 237, comments E. Decaux and P. Tavernier; JTDE, 1998, p. 36, comments P. Lambert; RUDH, 1998, p. 81, comments F. Sudre; ECtHR (Grand Chamber), 27 June 2000, *Cha'are Shalom Ve Tsedek v. France*, Reports 2000-VII, § 72: JDI, 2001, p. 209, comments E. Decaux and P. Tavernier; RTDH, 2001, p. 195, comments J.F. Flauss; *Cahiers du CREDHO*, 2001, No. 7, p. 103, comments, P. Rolland; RDP, 2001, p. 685, comments F. Sudre. Cf. also ECtHR, 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, *op. cit.*, § 101.

personal rights”.<sup>58</sup> Thus an individual cannot be compelled to belong to a group or remain a member if this is contrary to his convictions.

## **B. Strength of protection**

### *[15] Protection issues*

The freedom safeguarded by Article 9 of the European Convention on Human Rights is particularly great: not only does this article clearly affirm the principle of free choice (Section 1 below) but it also substantially extends the limits of the right guaranteed, since religious feelings are also protected (Section 2 below).

#### **1. Affirmation of free choice**

##### *[16] Respect for beliefs and convictions*

Every individual must have the freedom to choose and to change his mind, just as he must also be able to manifest his convictions freely, either alone or in community with others, in public or in private.<sup>59</sup> All indoctrination, especially at school, is prohibited,<sup>60</sup> constituting an unacceptable infringement of freedom of consent.

In the specific case of religion, freedom of choice is important. Admittedly, individuals do not choose their original religion, since this is generally the responsibility of their parents or legal guardians. Freedom to choose one's religion implies the idea of being able to change it – in other words, to be converted. But consent must still be freely given, thus of course prohibiting any indoctrination. However, the European Court has acknowledged that

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58 See G. Cohen-Jonathan, “Convention européenne des Droits de l'Homme, Libertés de la pensée”, *JC, op. cit.*, No. 65 at end.

59 He must thus be able to observe his beliefs whatever the circumstances, including in prison (ECmHR, 5 March 1976, *X v. the United Kingdom*, 5 DR 8) or at work (ECmHR, 12 March 1981, *X v. the United Kingdom*, 22 DR 27). See below for freedom to manifest one's beliefs or convictions: [20] *et seq.*

60 ECtHR, 7 December 1976, *Kjeldsen, Busk Madsen and Petersen v. Denmark*, Series A, No. 23: CDE, 1978, p. 359, comments G. Cohen-Jonathan; AFDI, 1977, p. 489, comments R. Pelloux; JDI, 1978, p. 702, comments P. Rolland.

religious freedom includes in principle the right to try to convince one's neighbour.<sup>61</sup> That being the case, we may ask whether this does not in fact legitimise proselytising.<sup>62</sup> However, this is doubtful given not only the undesirable consequences of accepting it, but also the wording of Court judgments, which is nonetheless cautious, as the right to convince is accepted "in principle", which, conversely, allows limitations. The question is a delicate one,<sup>63</sup> yet there is no doubt that Article 9 cannot protect improper behaviour, marked, for example, by unacceptable pressure or actual harassment.

It is important to point out that freedom consists not only in holding convictions but also in not holding them or not disclosing them. Public disclosure by others of religious practice is definitely contrary to the European Convention and cannot be vindicated by any freedom of conscience or religion; it is a violation of Article 9 and could also constitute a breach of Article 8, which protects privacy.<sup>64</sup>

On this principle of free choice it is not possible to compel a person to participate against his will in the activities of a religious community of which he is not actually a member.<sup>65</sup>

#### [17] *State neutrality*

Guaranteeing freedom of thought, conscience and religion assumes state neutrality in this regard.<sup>66</sup> Respect for different beliefs and convictions is a

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61 *Kokkinakis, op. cit.* Cf. also: P. Minnerath, "Les relations Eglise-Etat et la liberté de conscience. La position de l'Eglise catholique", *Conscience et Liberté*, 1990, No. 39, p. 116; A. Garay, "Liberté religieuse et prosélytisme : l'expérience européenne", RTDH 1994, p. 7.

62 On the specific case of proselytising, see below: [46] *et seq.*

63 Cf. F. Rigaux, "L'incrimination du prosélytisme face à la liberté d'expression", RTDH, 1994, p. 144; H. Surrel, "La liberté religieuse devant la Cour européenne des Droits de l'Homme", RFDA, 1995, pp. 573-581.

64 See French case-law to this effect: Civ. I, 6 March 2001, D. 2002 J. p. 248 *et seq.*, comments C. Dauvert.

65 ECmHR, report adopted on 9 May 1989, *Darby v. Sweden*, § 51. *Add.*: ECtHR, 23 October 1990, *Darby v. Sweden*, Series A, No. 187: RTDH, 1992, p. 181, comments J.-F. Flauss (requirement to pay a special tax to an established Church).

basic obligation for a state, which must accept that individuals may freely adopt convictions and, in some cases, change their minds subsequently and which must take care to avoid any interference with the exercise of the right guaranteed by Article 9. The right to freedom of religion excludes any discretion on the part of the state to determine whether religious beliefs or the means used to express such beliefs are legitimate.<sup>67</sup>

Of course a principle, however strong, may suffer exceptions. Thus according to the Convention institutions, states are not obliged to recognise conscientious objection.<sup>68</sup> More generally, certain obligations associated with life in society cannot be evaded in the name of freedom of belief or conviction, in particular the obligation to pay duties and taxes, since this obligation, which is of a general nature, does not in itself have any specific impact on conscience;<sup>69</sup> moreover, Article 1 of the First Additional Protocol recognises a state's right to levy taxes. In short, Article 9 of the Convention protects individual conscience but not necessarily any type of public behaviour dictated by convictions: this is why it does not allow general legislation to be evaded.

Can a state impose certain practices associated with a religion? This question arose in a member state where members of parliament were required to take an oath on the Gospels:<sup>70</sup> the Court decided that there had been a violation of Article 9, since the imposition of this oath was tantamount to requiring elected representatives of the people to swear allegiance to a particular religion.<sup>71</sup> Similarly, but in different circumstances, can a state impose a uniform on prisoners? The answer is affirmative, since

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66 For example a state cannot bind a citizen to a particular ideology or religion (J. A. Frowein, "Article 9 § 1", in L. E. Pettiti, E. Decaux and P. H. Imbert (eds.), *La Convention européenne des Droits de l'Homme*, *op. cit.*, pp. 353-360 (p. 354)) any more than it can make advantages or disadvantages conditional on membership of a religious community (ECtHR, 23 June 1993, *Hoffmann v. Austria*, *op. cit.*, § 36).

67 ECtHR, 26 September 1996, *Manoussakis and Others v. Greece*, *op. cit.*, § 47.

68 See [9] above.

69 J. A. Frowein, "Article 9 § 1", *op. cit.*, p. 355 and references.

70 ECtHR, 18 February 1999, *Buscarini and Others v. San Marino*, *op. cit.*

71 ECtHR, 18 February 1999, *Buscarini and Others v. San Marino*, *op. cit.*, § 39.

the former Commission has already stated that it is not possible to infer from the provisions of Article 9 of the Convention the right of prisoners to wear their own clothes.<sup>72</sup>

## 2. Protection of religious feelings

### [18] *Anti-religious opinions*

The expression of anti-religious opinions can take various forms: denigration, abuse, blasphemous remarks, etc. This is "religious defamation",<sup>73</sup> which, without necessarily being the same as blasphemy,<sup>74</sup> undoubtedly constitutes a serious attack on a believer's religious feelings.

### [19] *Is protection of religious feelings an element of religious freedom?*

This raises the question of recognising a right to protection of religious feelings as an element of religious freedom. The scope of Article 9 of the Convention is actually very broad, so that such a right appears to be guaranteed by this article. Admittedly, the European Court has stated that believers must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. But as the *Otto-Preminger-Institut* judgment makes clear, it is nevertheless the case that the manner in which religious beliefs are opposed or denied is a matter which may engage the responsibility of the state, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs: undoubtedly in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.<sup>75</sup>

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72 ECmHR, 6 March 1982, *X v. the United Kingdom*, 48 DR 253.

73 J.-F. Flauss, "La diffamation religieuse", in J.-F. Flauss (ed.), *La protection internationale de la liberté religieuse/International Protection of Religious Freedom*, Bruylant, 2002, pp. 273-300.

74 Blasphemy is language grossly insulting to a divinity or religion.

75 ECtHR, 20 September 1994, *Otto-Preminger-Institut v. Austria*, *op. cit.*, § 47.



Moreover, even in the *Kokkinakis* judgment,<sup>76</sup> the Court held, in the context of Article 9, that a state might consider it necessary to take measures to repress certain forms of conduct, including the imparting of information and ideas, judged incompatible with respect for the freedom of thought, conscience and religion of others.<sup>77</sup> Consequently, the European judges accepted, in the *Otto-Preminger-Institut* judgment, that respect for the religious feelings of believers as guaranteed in Article 9 had been violated by provocative portrayals of objects of religious veneration; and such portrayals could be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society.<sup>78</sup> In the same judgment, the European judges held that the measures complained of were based on an article of the Austrian Penal Code intended to suppress behaviour directed against objects of religious veneration that was likely to cause “justified indignation”; their purpose was therefore to protect the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons, so that they were not disproportionate to the legitimate aim pursued, which was the protection of the rights of others.<sup>79</sup>

As has been rightly observed, it seems that measures to combat religious defamation are a means of enhancing religious freedom and promoting human rights.<sup>80</sup>

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76 *Op. cit.*, § 48.

77 ECtHR, 25 May 1993, *Kokkinakis v. Greece*, *op. cit.*, § 48.

78 ECtHR, 20 September 1994, *Otto-Preminger-Institut v. Austria*, *op. cit.*, § 47.

79 ECtHR, 20 September 1994, *Otto-Preminger-Institut v. Austria*, *op. cit.*, § 48. It should be noted that this relates to Article 10 of the Convention.

80 J.-F. Flauss, “La diffamation religieuse”, *op. cit.*, p. 294 *et seq.*

## II. RELATIVE FREEDOM TO MANIFEST BELIEFS AND CONVICTIONS

[20] *The relativity of freedom*

While religious freedom is primarily a matter of individual conscience, it also implies freedom to “manifest [one’s] religion” alone and in private or in community with others, in public and within the circle of those whose faith one shares. Bearing witness in words and deeds is bound up with the existence of religious convictions. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion;<sup>81</sup> it further presupposes the right to be able to observe one’s beliefs whatever the circumstances, including in prison<sup>82</sup> and at work.<sup>83</sup> These principles apply not only to freedom of religion but also, more generally, to all beliefs and convictions.

Freedom to manifest one’s beliefs and convictions is extremely important, but it is not unlimited since public order could be affected. Consequently, this freedom has been firmly established (Section A below), but this does not preclude – if necessary and under certain circumstances – some restrictions (Section B below).

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81 ECtHR, 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, *op. cit.*, § 114. See also the following judgments: *Kokkinakis v. Greece*, 25 May 1993, *op. cit.*, § 31, *Buscarini and Others v. San Marino*, *op. cit.*, § 34, Reports 1999-I.

82 ECmHR, 5 March 1976, *X v. the United Kingdom*, 5 DR 8.

83 ECmHR, 12 March 1981, *X v. the United Kingdom*, 22 DR 27

## **A. Enshrinement of the right to manifest one's beliefs and convictions**

[21] *Freedom to manifest one's beliefs and convictions*

Freedom of religion cannot be restricted to individual conscience and presupposes the freedom to manifest one's religious beliefs. The fact remains that it is not always easy to draw a line between individual conscience and its manifestation. Admittedly, Article 9.1 of the Convention lists the various forms in which a conviction may be manifested, but this does not resolve all the difficulties. Thus the European Court has been led to specify that participation in the life of the community is a manifestation of one's religion protected by Article 9, adding that, were the organisational life of the community not protected by this article, all other aspects of the individual's freedom of religion would become vulnerable.<sup>84</sup>

The right to manifest one's beliefs and convictions has been firmly enshrined in paragraph 1 of Article 9, whether taken alone (Point 1 below) or in conjunction with other rights guaranteed by the Convention (Point 2 below).

### **1. Article 9.1 of the Convention taken alone**

[22] *Article 9.1 of the Convention*

The wording guarantees the right to manifest one's religion or beliefs, more specifically mentioning the freedom of every individual "either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance". Moreover, the right to freedom of religion implies a duty on the part of the authorities to remain neutral, since it is not their role to determine whether religious beliefs or the means used to express such beliefs are legitimate or to interfere with the leadership of a religious community:<sup>85</sup> if this neutrality

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84 ECtHR (Grand Chamber), 26 October 2000, *Hasan and Chaush v. Bulgaria*, Reports 2001-XI, § 62: JDI, 2001, p. 211, comments E. Decaux and P. Tavernier; JCP, 2001-I-191, No. 37, comments F. Sudre; RTDH, 2001, p. 185 *et seq.*, comments J.-F. Flauss.

85 ECtHR (Grand Chamber), 26 October 2000, *Hasan and Chaush v. Bulgaria*, *op. cit.*

is necessary for the freedom to hold convictions<sup>86</sup> it is also essential, albeit in a lesser degree, for the freedom to manifest these convictions.

[23] *Clarification from the former Commission*

In this connection, although ordinary manifestations of religious belief such as worship and observance raise no serious difficulties,<sup>87</sup> others are more controversial, whether in the case of teaching or of certain types of practice. The Commission has held that when the actions of individuals do not actually express the belief concerned, even when they are motivated or influenced by it, they cannot be protected by Article 9. An act must be a *direct* manifestation of a belief.

In this connection, the *Arrowsmith* case<sup>88</sup> is indicative of the European institutions' prudence and pragmatism. Although pacifism as a philosophy of life falls within the ambit of Article 9, since a pacifist attitude is a "belief" within the meaning of this article,<sup>89</sup> an act motivated by this belief is not automatically protected by this provision: distributing pamphlets to British soldiers on the point of departing for Northern Ireland and asking them to refuse to go there is not – unlike general statements advocating non-violence and pacifism – a normal and recognised manifestation of a belief. Of course, the attitude in question is definitely influenced by

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86 See [17] above.

87 Nevertheless, a problem of interpretation has emerged regarding the phrase in Article 9 that sets out the possibility of practising one's religion "either alone or in community with others": after some hesitation, the Commission stated that the two alternatives "either alone or in community with others" could be regarded not as mutually exclusive or as leaving a choice to the authorities but only as recognising that religion could be practised in either form: ECmHR, *X v. the United Kingdom*, 12 March 1981, 22 DR 27. In this case it was decided that in view of the organisational requirements of the education system, the authorities were not interfering with the teacher's freedom of religion by refusing to adjust his timetable to allow him to practise his religion when he had accepted his appointment without voicing any reservations in this respect.

88 ECmHR, 12 October 1978, *Pat Arrowsmith*, *op. cit.*, § 71.

89 See [7] above.

pacifism, but because it is directed towards a particular group of people and with a specific aim it does not fall within the ambit of Article 9.<sup>90</sup>

Other examples further reveal the attitude of the former European Commission. Compulsory vaccination, if applied to everyone irrespective of their beliefs, does not constitute interference with the exercise of freedoms guaranteed by Article 9 of the Convention.<sup>91</sup> Freedom to manifest one's convictions does not extend to manifestations of a commercial nature, even if they are connected with a religious belief.<sup>92</sup>

#### [24] *Clarification from the Court*

Like the former Commission, the Court has outlined the relevant principles, in the case of *Pichon and Sajous*, in which pharmacists had refused to sell contraceptive pills because of their religious convictions.<sup>93</sup> The Court pointed out that the main sphere protected by Article 9 was that of personal convictions and religious beliefs, in other words what were sometimes referred to as matters of individual conscience. It also protected acts that were closely linked to these matters such as acts of worship or devotion forming part of the practice of a religion or a belief in a generally accepted form. The Court has also stated that Article 9 lists a number of forms which manifestation of one's religion or belief might take, namely worship, teaching, practice and observance.<sup>94</sup> The European judges thus made it clear that in safeguarding this personal domain, Article 9 of the Convention did not always guarantee the right to behave in public in a manner governed by a belief: the word "practice" used in Article 9.1 did

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90 For the same solution in similar circumstances, cf. EcmHR, 6 July 1987, *Le Cour Grandmaison and Fritz v. France*, 53 DR 150 (pacifists distributing leaflets encouraging soldiers to disobey orders).

91 EcmHR, 15 January 1998, *Boffa and Others v. San Marino*, 92 DR 27; 20 August 1993, *B.B. v. Switzerland*, 75 DR 223.

92 EcmHR, 5 May 1979, *Pastor X and the Church of Scientology v. Sweden*, 16 DR 68.

93 ECtHR, 2 October 2001, *Pichon and Sajous v. France*, Reports 2001-X (admissibility decision).

94 ECtHR, 1 July 1997, *Kalaç v. Turkey*, Reports 1999-IV, § 27: JDI, 1998, p. 204, comments E. Decaux and P. Tavernier; RUDH, 1998, p. 81, comments F. Sudre; JTDE, 1998, p. 36, comments P. Lambert. Cf. also ECtHR, 27 June 2000, *Cha'are Shalom Ve Tsedek v. France*, *op. cit.*, § 73.

not denote each and every act or form of behaviour motivated or inspired by a religion or a belief; the pharmacists' conviction by the national courts thus did not constitute interference with the exercise of the rights guaranteed by Article 9, especially as they could manifest their beliefs in many ways outside the professional sphere.

Similarly, in the *Kalaç* case,<sup>95</sup> the compulsory retirement of a judge advocate whose conduct and attitude revealed unlawful fundamentalist opinions did not amount to interference with the right guaranteed by Article 9 of the Convention since it was not prompted by the way the applicant manifested his religion. Finally, the Court has reiterated in the *Pretty* case<sup>96</sup> that not all opinions or convictions constitute beliefs in the sense protected by Article 9, even if they are deep-seated, and that the term "practice" as employed in this article does not cover every act motivated or influenced by a religion or belief. It has also stated that although ritual slaughter is a "rite" covered by the freedom to manifest one's religion within the meaning of Article 9, this article does not extend to the right to take part in person in the performance of ritual slaughter.<sup>97</sup>

## 2. Article 9.1 and other rights guaranteed by the Convention

### [25] *Interaction*

When freedom of thought, conscience and religion is manifested there will inevitably be some interaction with other rights guaranteed by the European Convention on Human Rights and its additional protocols in the form of either complementarity or conflict.

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95 *Op. cit.*

96 ECtHR, 29 April 2002, *Pretty v. the United Kingdom*, Reports 2002-III, § 82: JDI, 2003, p. 535, comments E. Decaux and P. Tavernier; RTDH, 2003, p. 71, comments De Schutter; GP, 14-15 August 2002, p. 1, comments A. Garay; JCP, 2003-II-10062, comments C. Girault; JTDE, 2003, p. 45, comments P. Lambert. Cf. also P. Pédrot, RDSS, 2002, p. 475.

97 ECtHR (Grand Chamber), 27 June 2000, *Cha'are Shalom Ve Tsedek v. France*, *op. cit.*

## a. Complementarity

### [26] *The actual nature of complementarity*

Article 9 of the Convention is a general provision and therefore some very specific situations associated with deep-seated convictions have not been expressly anticipated. Certain additional protocols to the Convention have thus been provided to supplement the protection afforded by Article 9. In other cases representative of this complementarity, a violation of Article 9 in conjunction with other articles of the Convention may be raised, in particular with Article 14, which prohibits discrimination.<sup>98</sup>

It should first be pointed out, moreover, that one way of exercising the right to manifest religion, especially for a religious community as a collective body, is the possibility of ensuring legal protection of the community, its members and its property, so that Article 9 must also be considered in the light of Article 6.<sup>99</sup>

### [27] *Article 2 of the First Additional Protocol: education and parents' beliefs*

Article 2 of the First Additional Protocol specifies that the state shall respect the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions. The scope of this provision is broad: it covers all methods of knowledge transmission and every type of educational structure including, moreover, those outside the school system.<sup>100</sup> In relation to education and teaching, the state must respect the right of parents to ensure such education and teaching in accordance with their own religious and philosophical convictions. The importance of the right to education, a fundamental right, is considerable:

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98 Other combined violations are conceivable, in particular regarding Article 13, but they are less important. However, see ECtHR, 18 December 1996, *Valsamis v. Greece*, Reports 1996-VI, § 49.

99 See, *mutatis mutandis*, the judgments in *Sidiropoulos and Others v. Greece*, 10 July 1998, *op. cit.*, § 40, and *Canea Catholic Church v. Greece*, 16 December 1997, *op. cit.*, § 33 and §§ 40-41, and opinion of ECmHR, §§ 48-49.

100 P.-M. Dupuy and L. Boisson de Charzounes, "Article 2", in L. E. Pettiti, E. Decaux and P. H. Imbert (eds.), *La Convention européenne des Droits de l'Homme*, *op. cit.*, p. 999.

European judges have dwelt on the fact that respect for parents' convictions in this field is essential;<sup>101</sup> the latter's religious and philosophical convictions must be respected as regards the right to education,<sup>102</sup> especially as safeguarding the possibility of pluralism in education is essential for the preservation of a democratic society.<sup>103</sup>

Freedom of choice for parents is a necessity. Obviously this freedom cannot be unlimited, and therefore if a conflict arises between the parents' convictions and the interests of the children, especially regarding their fundamental right to education, the latter must take precedence.<sup>104</sup> This is perfectly legitimate, albeit sometimes difficult, since it is not always easy to determine the conflicting interests. But parents must be able to choose their children's school, whether state or private.<sup>105</sup> In private schools, although religious and philosophical teaching is entirely independent, the state may lay down certain conditions relating, for example, to teachers' qualifications, the teaching of certain subjects or the school's internal organisation. Parents' convictions must be respected in state education. Respect for pluralism in education forbids any indoctrination,<sup>106</sup> since knowledge must be conveyed in an objective, critical and pluralistic manner.<sup>107</sup>

As regards home education, the European Court has ruled that Article 2 does not guarantee parents an absolute right to have their children educated in accordance with their convictions but rather guarantees them

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101 ECtHR, 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, *op. cit.*, § 50.

102 ECtHR, 25 March 1993, *Costello-Roberts v. the United Kingdom*, Series A, No. 247-C, § 27: RUDH, 1993, p. 219, comments P. Weckel; JDI, 1994, p. 775, comments E. Decaux and P. Tavernier; RSC, 1994, p. 362, comments R. Koering-Joulin; RUDH, 1993, p. 217, comments F. Sudre *et al.*

103 *Kjeldsen Busk Madsen and Pedersen v. Denmark*, *op. cit.*, § 50.

104 ECmHR, 8 September 1993, *Bernard v. Luxembourg*, 75 DR 57.

105 However, states are not therefore obliged to provide full funding for private schools or to establish specific structures in order to respect parents' convictions: ECmHR, 5 December 1990, *Graeme v. the United Kingdom*, 64 DR 158.

106 See [16] above.

107 *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, *op. cit.*, § 53.



a right to *respect* for those convictions.<sup>108</sup> If the state were not free to prohibit home education, it would lose all state control over the children's education and this would then prevent it from ensuring that these children were integrated in the community.<sup>109</sup> At all events, although adjustments must be possible in individual circumstances, the state must be able to ensure this integration.

One of the most difficult questions currently arising relates to whether or not children have the option of being exempted from certain classes or activities that may offend their parents' convictions. On the one hand, exemption from sex education classes creates problems. Although the European judges did not accept the applicants' argument contesting the compulsory nature of this class under Article 2 of the Protocol, they nevertheless urged the competent authorities to ensure that the parents' religious and philosophical convictions were not disregarded;<sup>110</sup> this does reflect a certain degree of confusion. On the other hand, exemption from some activities, in particular sports, can raise problems, especially with regard to female Muslim pupils and the wearing of Islamic headscarves. This problem arises in France, for example, where a law now prohibits the wearing in state primary and secondary schools of symbols or attire by which pupils overtly manifest a religious affiliation.<sup>111</sup> Similar problems can arise in connection with school attendance, and protection of the child's right to education takes precedence if it clashes with the parents' convictions; it was on these grounds that the European judges justified their refusal of an exemption from attending school on Saturdays requested by parents who were members of the Seventh-Day Adventist Church.<sup>112</sup> In a similar case relating to pacifist convictions (the *Valsamis* case), the Court ruled that a pupil's one-day suspension from school for

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108 Application No. 10233/83, 37 DR 108.

109 L. Wildhaber, "Dans quelle mesure le droit à l'éducation a-t-il subi une évolution?", *op. cit.*, p. 159.

110 ECtHR, *Kjeldsen, Burk Madsen and Pedersen v. Denmark*, *op. cit.*

111 See [44] below.

112 ECtHR, 27 April 1999, *Martins Casimiro and Cerveira Ferreira v. Luxembourg*, No. 44888/98 (inadmissibility decision).

having refused to take part in a parade on a national holiday was not a breach of Article 9 of the Convention. The parents submitted that pacifism was a fundamental tenet of their religion and forbade any conduct associated with war, even indirectly, but the Court held that the obligation to take part in the school parade was not such as to offend their religious convictions; the impugned measure therefore did not amount to an interference with the pupil's right to freedom of religion either.<sup>113</sup>

We may also wonder what the situation is with regard to minority languages. At present, special attention is being paid to minority rights in Europe, and one important demand made by these minorities is the right to use their own languages, particularly at school,<sup>114</sup> on account of certain convictions. As things stand, Article 2 of the First Protocol cannot be used as the basis for such a demand: the European Court, which has accepted the right to be educated in the national language or in one of the national languages, has nevertheless ruled out the right of parents to have education conducted in a language other than that of the country in question.<sup>115</sup>

#### [28] *Violation of Article 9 in conjunction with Article 14 of the Convention*

This issue arose in *Thlimmenos* in connection with a refusal to appoint the applicant to a civil service post on the ground of a former conviction for having refused to wear military uniform because of his religious convictions. What was at issue was not the distinction made by domestic law between convicted persons and others for access to a profession but the lack of distinction between convicted persons whatever their offences, and the fact that no account was taken of the applicant's offence being of a special nature because of the religious motivation. The judges therefore

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113 ECtHR, 18 December 1996, *Valsamis v. Greece*, *op. cit.*, § 37. Cf. also ECtHR, 18 December 1986, *Johnston and Others v. Ireland*, Series A, No. 112, § 63; 18 December 1996, *Efstathiou v. Greece*, Reports 1996-VI.

114 P. Kovacs, "La protection des langues des minorités ou la nouvelle approche de la protection des minorités ?", RGDI, 1993-1, pp. 411-418.

115 *Belgian 'language' case*, "B. Interpretation adopted by the Court", *op. cit.*, §§ 3 and 6.

considered that Article 14 had been violated in conjunction with Article 9, since the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention was also violated when states without an objective and reasonable justification failed to treat differently persons whose situations were significantly different.<sup>116</sup>

But a similar problem may appear within the same religious community in the case of discrimination between a majority movement and a minority movement. The *Cha'are Shalom ve Tsedek* judgment offers a significant example: in this case, the applicant association – whose arguments were endorsed by the Commission – submitted that by refusing it the approval necessary for it to authorise its own ritual slaughterers to perform ritual slaughter in accordance with the religious prescriptions of its members, and by granting such approval to the Jewish Consistorial Association of Paris (ACIP) alone, the French authorities had infringed in a discriminatory way its right to manifest its religion through observance of the rites of the Jewish religion.<sup>117</sup> The Court nevertheless held that there was no violation of Article 9 in conjunction with Article 14 of the Convention, since in the light of its findings – which had led it to conclude that there had been no interference with the applicant association's freedom to manifest its religion – the difference of treatment which had resulted from the measure was limited in scope. The Court further stated that the impugned measure pursued a legitimate aim, that there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised, and that, lastly, such difference of treatment as there had been therefore had an objective and reasonable justification within the meaning of the Court's consistent case-law.<sup>118</sup> However, it should not be concluded from this judgment that the majority opinion always triumphs: the Court itself has already stated that democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which

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116 ECtHR, 6 April 2000, *Thlimmenos v. Greece*, Reports 2000-IV, § 44.

117 ECtHR (Grand Chamber), 27 June 2000, *Cha'are Shalom ve Tsedek v. France*, *op. cit.*, § 58.

118 ECtHR (Grand Chamber), 27 June 2000, *Cha'are Shalom ve Tsedek v. France*, *op. cit.*, § 87.

ensures the fair and proper treatment of minorities whilst avoiding any abuse of a dominant position.<sup>119</sup>

## **b. Conflict**

### *[29] Conflict of rights and marginalisation of Article 9*

In many cases regarding freedom to manifest beliefs Article 9 is not always relied on alone, since applicants also allege violation of other articles of the Convention. Depending on the circumstances, the Convention institutions may consider the complaints separately,<sup>120</sup> but they may also opt for another solution which leads to Article 9 being set aside: the Court – unlike the former Commission in most cases – attributes greater importance to other articles of the Convention relied on by applicants without considering alleged violations of Article 9. Of course this may seem legitimate if an applicant has already obtained satisfaction from the Court on another basis, but the fact remains that when Article 9 happens to be in competition, if not in conflict, with other rights protected by the Convention, the judges' choice is often to its detriment.

### *[30] Choice of Article 5 of the Convention to the detriment of Article 9*

In the case of *Tsirlis and Kouloumpas*,<sup>121</sup> ministers of religion (Jehovah's Witnesses) applied to be exempted from military service under Section 6 of the Greek law of 1988 on ministers of religion. Charged with insubordination, they were detained pending trial. The Court found that Article 5.1 of the Convention had been violated, since this detention was arbitrary and had no basis under domestic law. However, the European judges did not accept the applicants' arguments concerning infringement of their freedom of religion, namely the fact that they were unable to perform their duties as ministers of religion during their period of detention together with the discriminatory application of the law providing for exemption from military service for ministers of known religions. Having found that the applicants' detention was arbitrary and hence unlawful for

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119 ECtHR, 18 December 1996, *Valsamis v. Greece*, *op. cit.*, § 27.

120 Cf, for example, the *Arrowsmith* and *Pretty* cases, *op. cit.*

121 ECtHR, 29 May 1997, *Tsirlis and Kouloumpas*, Reports 1997-III.

the purposes of Article 5.1 of the Convention, the Court – unlike the former Commission – did not consider it necessary to examine the same facts from the angle of Article 9, taken either alone or in conjunction with Article 14 of the Convention.<sup>122</sup> Admittedly the applicants' detention pending an administrative decision on their applications for exemption was the central issue in the complaints under consideration. This was also so in the *Riera Blume* case<sup>123</sup> and the Court adopted the same solution.

[31] *Choice of Article 6 of the Convention to the detriment of Article 9*

In the *Canea Catholic Church* case, the Court – once again at variance with the former Commission – found that a breach of Article 6 taken together with Article 14 did not allow it to consider the question of a possible breach of Article 9. Yet the argument of the applicant church was relevant: it maintained that the refusal to acknowledge that it had legal personality so that it could take legal proceedings to protect its property, even if such property was not directly used for religious purposes, infringed its freedom of religion and deprived it of any possibility of applying to the courts in the event of arbitrary dispossession of its property or expropriation. Under Article 14 of the Convention taken together with the other articles already mentioned, it argued that it had suffered discrimination on the ground of religion. But despite the relevance of the arguments raised, the Court held that it was not necessary to rule on the complaints based on these articles.<sup>124</sup>

[32] *Choice of Article 8 of the Convention to the detriment of Article 9*

The *Hoffmann* case is indicative of the preference given to Article 8 over Article 9 of the Convention. Here the applicant complained that the Austrian Supreme Court had awarded parental rights over the children to their father in preference to herself because she was a member of the religious community of Jehovah's Witnesses. Since the applicant had obtained satisfaction under Article 8, the Court considered – in agreement

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122 ECtHR, 29 May 1997, *Tsirlis and Kouloumpas*, *op. cit.*, § 70.

123 ECtHR, 14 October 1999, *Riera Blume and Others v. Spain*, Reports 1999-VII, § 38.

124 ECtHR, 16 December 1997, *Canea Catholic Church v. Greece*, *op. cit.*, § 50.

with the Commission in this particular case – that no separate issue arose under Article 9 either taken alone or read in conjunction with Article 14, since the factual circumstances relied on as the basis of this complaint were the same as those which were at the root of the complaint under Article 8 taken in conjunction with Article 14, of which a violation had been found.<sup>125</sup>

[33] *Choice of Article 10 of the Convention to the detriment of Article 9*

Convicted for having published a book criticising Turkey's 'official ideology', the applicants in the case of *Baskaya and Okçuoglu* cited violations of Articles 9 and 10 of the Convention. They held that in convicting and sentencing them the authorities had unjustifiably interfered with their right to freedom of thought and their right to freedom of expression under Articles 9 and 10 of the Convention respectively. The Court, like the Commission, considered that the facts of the applicants' complaint should be considered under Article 10.<sup>126</sup> This solution was in accordance with European case-law, since the Court had already stated in the *Incal* case – in which the applicant also complained of an infringement of his right to freedom of thought, guaranteed by Article 9 of the Convention – that this complaint was subsumed by the complaint under Article 10 and that it was not necessary to examine it separately.<sup>127</sup>

In its *Feldek* judgment the Court considered that the impugned measure had constituted an interference with the applicant's exercise of his freedom of expression, which it had already examined under Article 10 of the Convention, and that no separate issue arose in relation to Article 9 in this respect.<sup>128</sup> The former Commission had already stated that a conviction for

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125 ECtHR, 23 May 1993, *Hoffmann v. Austria*, *op. cit.*, § 38. Cf. similarly ECtHR, 16 December 2003, *Palau-Martinez v. France*, D. 2004 IR, p. 108, § 46.

126 ECtHR, 8 July 1999, *Baskaya and Okçuoglu v. Turkey*, Reports 1999-IV, § 44.

127 ECtHR, 9 June 1998, *Incal v. Turkey*, Reports 1998-IV, § 60.

128 ECtHR, 12 July 2001, *Feldek v. Slovakia*, Reports 2001-VIII, § 92.

incitement to racial hatred must be considered under Article 10 rather than Article 9.<sup>129</sup>

[34] *Choice of Article 11 of the Convention to the detriment of Article 9*

When Article 9 of the Convention is raised together with Article 11, the latter is usually chosen by the European judges, who consequently refuse to consider the case under Article 9. In the *Chassagnou* judgment the applicants submitted that the right guaranteed by Article 9 could not be reduced to the right to shut oneself away inside one's own house or on one's own property without being able to express and give an outward material form to one's moral stance. The fact, therefore, that they were obliged to tolerate hunting on their land in accordance with the law,<sup>130</sup> although they themselves were opposed to hunting, constituted in their opinion an infringement of their freedom of thought. Like the Commission, the Court considered that in the light of the conclusions it had reached with regard to Article 1 of Protocol No. 1 and Article 11 of the Convention, taken both separately and in conjunction with Article 14, it was not necessary to conduct a separate examination of the case from the standpoint of Article 9.<sup>131</sup>

Similar solutions have been adopted in other cases, with Article 11 prevailing not only over Article 9 but also over other articles of the Convention. In the *Sidiropoulos* case, in connection with the refusal of the courts to register an association suspected of undermining the country's territorial integrity, the applicants asserted that the reason why the establishment of their association had been prohibited lay in the origin and consciousness of some of its founders and also in the fact that they had publicly expressed the opinion that they belonged to a minority. They therefore cited a breach not only of Article 11 but also of Articles 9, 10 and 14 of the Convention. The Court noted, as the Commission had done, that this complaint related to the same facts as the ones based on Article

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129 ECmHR, 6 September 1995, *Remer v. Germany*, 82 DR 117. Cf. also C. Birsan, "Le juge européen, la liberté de pensée et de conscience", *op. cit.*, p. 61.

130 Section 1, Law No. 64-696 of 10 July 1964, now Article L.222-2 of the French Rural Code.

131 ECtHR, 29 April 1999, *Chassagnou and Others v. France*, Reports 1999-III, § 125.

11, which had been violated because the refusal to register the applicants' association was disproportionate to the objectives pursued; consequently, it did not deem it necessary to consider the alleged violations of Articles 9, 10 and 14 of the Convention.<sup>132</sup> In another similar case the Court delivered the same ruling: since the applicants also maintained that there had been breaches of Articles 9, 10, 14 and 18 of the Convention but their complaints related to the same facts, the Court considered it unnecessary to examine them separately.<sup>133</sup> The Grand Chamber has recently adopted the same line.<sup>134</sup>

In the *Maestri* case the applicant, a judge, alleged that the imposition of a sanction on him for being a freemason amounted to a violation of Articles 9, 10 and 11 of the Convention: the Court then considered that the applicant's complaints fell more particularly within the scope of Article 11 of the Convention, and it accordingly considered them under that provision only.<sup>135</sup>

It is interesting to note that in cases of conflict between Articles 9 and 11 the former Commission and the Court have usually adopted the same position. The fact remains that even if Article 11 prevails as *lex specialis* it must nevertheless be interpreted in the light of Article 9.<sup>136</sup> In some cases,

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132 ECtHR, 10 July 1998, *Sidiropoulos and Others v. Greece*, *op. cit.*, § 52.

133 ECtHR, 25 May 1998, *Socialist Party and Others v. Turkey*, Reports 1998-III, § 55. Cf. also ECtHR, 8 December 1999, *Freedom and Democracy Party v. Turkey*, Reports 1999-VIII, § 49: "The applicant party also alleged a violation of Articles 9, 10 and 14 of the Convention. As its complaints relate to the same matters as those considered under Article 11, the Court does not consider it necessary to examine them separately"; 31 July 2001, *Refah Partisi (Welfare Party) and Others v. Turkey*, Applications Nos. 41340/98, *etc.*, § 85: "The applicants further alleged the violation of Articles 9, 10, 14, 17 and 18 of the Convention. As their complaints concern the same facts as those examined under Article 11, the Court considers that it is not necessary to examine them separately"; 2 August 2001, *N.F. v. Italy*, Reports 2001-IX, § 40.

134 ECtHR (Grand Chamber), 13 February 2003, *Refah Partisi (The Welfare Party) and Others V. Turkey*, Reports 2003-II, § 137: "The applicants further alleged the violation of Articles 9, 10, 14, 17 and 18 of the Convention. As their complaints concern the same facts as those examined under Article 11, the Court considers that it is not necessary to examine them separately."

135 ECtHR (Grand Chamber), 17 February 2004, *Maestri v. Italy*, No. 39748/98, § 24.

136 ECmHR, 6 April 1995, *Rai, Allmond & Negotiate Now v. the United Kingdom*, 82 DR 117.



however, Article 9 of the Convention must be used even if application of Article 11 might seem appropriate: this is the case when the organisation of a religious community is at issue.<sup>137</sup>

## **B. Restrictions on the right to manifest one's beliefs and convictions**

### *[35] European pragmatism*

Human rights derogations are part and parcel of human rights and also affect not only freedom of thought, conscience and religion – which can only be unconditional – but also the freedom to *manifest* this freedom. In fact, generally speaking, there are two categories of derogation:<sup>138</sup> derogations which are permanent and derogations which are temporary.<sup>139</sup> However, we shall not dwell on temporary derogations because of they are out of the ordinary: Article 15.1 of the European Convention on Human Rights states that in time of war or other public emergency threatening the life of the nation, states may take measures derogating from their obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law.

Permanent derogations, on the other hand, will engage our attention here, since they raise the question of freedom to manifest one's beliefs. We shall therefore consider state interference, first in general, paying particular attention to the right safeguarded by Article 9 (Section 1 below), and then more specifically, highlighting certain individual cases (Section 2 below).

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137 ECtHR, 26 October 2000, *Hasan and Chaush*, *op. cit.*, §§ 61-65.

138 Cf, however, other interpretations which distinguish, on the one hand, between derogations and restrictions (F. Sudre, *Droit international et européen des droits de l'homme*, PUF, Droit fondamental, 1999, p. 138 *et seq.*) and, on the other hand, between derogations, restrictions and exceptions (M. Delmas-Marty, *Raisonner la raison d'Etat*, PUF, Les voies du droit, 1989). SUDRE F., *Droit international et européen des droits de l'homme*,

139 J.-F. Renucci, *Droit européen des droits de l'homme*, *op. cit.*, p. 321 *et seq.*

## 1. State interference: general rules

### [36] *State interference*

Since most of the rights safeguarded by the European Convention are conditional rights, restrictions are therefore possible. Apart from a “hard core” of human rights, all the rights guaranteed by the European Convention are conditional rights, which means that state interference is possible.

Generally speaking, the interference in question must be the act of a state.<sup>140</sup> However, the European judges treat as interference any *inter partes* intervention by a court if this intervention challenges a *de facto* situation safeguarded by the Convention<sup>141</sup> or if it gives effect to a law that conflicts with the Convention.<sup>142</sup> Interference will usually be an affirmative act, but it may also take the form of failure to comply with a positive obligation. Although impeding exercise of a right undoubtedly constitutes interference,<sup>143</sup> such is not the case when the rules in question allow individuals genuine opportunities to exercise their rights.<sup>144</sup> These restrictions shall not be applied for any purpose other than those for which they have been prescribed:<sup>145</sup> as regards interference with basic safeguards,

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140 It must be attributable to state institutions or to officers of the state acting in their official capacity: ECtHR, 23 November 1993, *A v. France*, Series A, No. 277-B, § 36. But a measure taken pursuant to rules that do not fall within the ambit of the Convention does not constitute interference: V. Coussirat-Coustère, “Article 8 § 2” in L. E. Pettiti, E. Decaux and P. H. Imbert (eds.), *La Convention européenne des Droits de l’Homme*, *op. cit.*, p. 329. The author thus observes that the loyalty required of applicants for public service jobs concerns access to the public service, which is not guaranteed by the Convention, rather than freedom of opinion; cf. ECtHR, 28 August 1986, *Glaserapp v. Germany*, Series A, No. 104, § 50 *et seq.*; 26 March 1987, *Leander v. Sweden*, Series A, No. 116, § 72.

141 ECtHR, 23 June 1993, *Hoffmann v. Austria*, *op. cit.*, § 29.

142 ECtHR, 20 April 1993, *Sibson v. the United Kingdom*, Series A, No. 258-A, § 27.

143 ECtHR, 21 February 1975, *Golder v. the United Kingdom*, Series A, No. 18, § 43.

144 V. Coussirat-Coustère, “Article 8 § 2”, *op. cit.*, p. 331 and references.

145 ECHR Article 18 is applicable here.

these various restrictions must be interpreted in the narrow sense.<sup>146</sup> But the fact nevertheless remains that because certain rights are not unconditional, regulation is possible.

In the specific case of freedom to manifest freedom of thought, belief or religion, the Court acknowledges that states have a certain margin of appreciation in determining whether and to what extent interference is necessary, but this goes hand in hand with European supervision of both the legislation and the decisions enforcing it. State interference is therefore legitimate, but precautions must be taken in order to avoid any risk of arbitrary intervention: this is why interference is subject to conditions and strict supervision.

### **a. Conditions of interference**

#### *[37] Three conditions*

A state may restrict the exercise of rights and freedoms guaranteed by the European Convention provided that three conditions are met: the interference must be prescribed by law, pursue a legitimate aim and be necessary in a democratic society. The first two conditions do not raise serious problems, whereas the third is much more difficult, especially as regards freedom to manifest freedom of thought, conscience and religion.

#### *[38] Interference must be prescribed by law*

States are allowed considerable room for manoeuvre. This is legitimate inasmuch as national authorities must be able to judge the circumstances warranting restrictions on guaranteed rights.<sup>147</sup>

The concept of 'law' is construed broadly by European judges: it is taken to mean all existing law, whether statutes, regulations or case-law, including international conventions applying in the domestic system.<sup>148</sup> This broad

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146 ECtHR, 21 February 1975, *Golder v. the United Kingdom*, *op. cit.*, § 44; 26 April 1979, *Sunday Times v. the United Kingdom*, Series A, No. 30, § 55; 26 November 1991, *Observer and Guardian v. the United Kingdom*, Series A, No. 216, § 56 *et seq.*

147 J.-F. Renucci, *Droit européen des droits de l'homme*, *op. cit.*, p. 329.

148 Regulations are instruments adopted on the basis of a statute (Application No. 7308/75, 16 DR 32). Case-law plays a major role not only in common-law countries but also in

interpretation has been necessary, since it is important not to exaggerate the distinction between common-law countries and continental countries:<sup>149</sup> the “law” must therefore be understood in its substantive and non-formal sense.

For the public, the law must be accessible and foreseeable in its effects. The judges of the European Court of Human Rights have to assess this “quality”,<sup>150</sup> paying particular attention to whether the law clearly and precisely defines the conditions and forms of any limitation on basic safeguards; this precaution is necessary in order to avoid arbitrariness.<sup>151</sup> Admittedly, the law’s preciseness will vary according to the field,<sup>152</sup> but beyond these qualifications, which are legitimate, the principle is unquestionable.<sup>153</sup> The legislation must thus be easy of access, as well as clear and precise. In these circumstances the accessibility and foreseeability

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continental countries (cf. in particular ECtHR, 24 April 1990, *Kruslin v. France*, Series A, No. 176-A, § 29). For international conventions, cf. ECtHR, 28 March 1990, *Groppera Radio AG and Others v. Switzerland*, Series A, No. 173, § 68.

149 F. Sudre, *Droit international et européen des droits de l'homme*, *op. cit.*, p. 107. ECtHR, 24 April 1990, *Kruslin v. France*, *op. cit.* Thus an administrative decision may justify interference (ECtHR, 22 February 1992, *Andersson v. Sweden*, Series A, No. 226, § 84). A rule adopted by a professional body under its independent rule-making power by parliamentary delegation is also held to be a “law” (ECtHR, 25 March 1985, *Barthold v. Germany*, Series A, No. 90, § 46).

150 ECtHR, 26 April 1979, *Sunday Times v. the United Kingdom*, *op. cit.*, § 49 *et seq.*

151 ECtHR, 24 March 1988, *Olsson v. Sweden*, Series A, No. 130 § 61f.; *Kruslin v. France*, *op. cit.*, § 36. *Add.* ECtHR, 22 September 1994, *Hentrich v. France*, Series A, No. 296-A, § 42, stating that the tax authority’s right of pre-emption (French General Tax Code, Article 668), as applied by the courts, did not sufficiently satisfy the requirements of precision and foreseeability implied by the concept of law. Cf. also ECtHR, 22 November 1995, *SW v. the United Kingdom*, Series A, No. 335-B, § 36, on how the development of criminal law in common-law countries through judicial law-making should “reasonably be foreseen”.

152 The technicality of certain fields prevents absolute precision (compare, for example, telecommunications and competition: ECtHR, 20 November 1989, *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, Series A, No. 165, § 30; 28 March 1990, *Groppera Radio AG v. Switzerland*, *op. cit.*, § 68). Conversely, a certain lack of precision is necessary in the case of evolving concepts (such as morality).

153 J.-F. Renucci, *Droit européen des droits de l'homme*, *op. cit.*, p. 329.

criteria will be satisfied.<sup>154</sup> The law must therefore be formulated with sufficient precision to enable the individual to regulate his conduct – if need be with appropriate advice.<sup>155</sup>

The *Metropolitan Church of Bessarabia* judgment has provided useful clarification in this respect,<sup>156</sup> stating that for domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention: in matters affecting fundamental rights it would be contrary to the rule of law – one of the basic principles of a democratic society enshrined in the Convention – for a legal discretion granted to the executive to be expressed in terms of an unfettered power; consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.<sup>157</sup> In fact, the level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.<sup>158</sup>

The European Court has found, moreover, that if the relevant law does not set forth any substantive criteria for registering religious denominations and changes of their leadership, interference with the internal organisation of the Muslim community and the applicants' freedom of religion is not "prescribed by law" in that it is arbitrary and is based on legal provisions

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154 ECtHR, 26 April 1991, *Ezelin v. France*, Series A, No. 202, § 45; 30 March 1989, *Chappell v. the United Kingdom*, Series A, No. 152, § 56.

155 ECtHR, 26 April 1979, *Sunday Times v. the United Kingdom*, *op. cit.*, § 49; 24 February 1998, *Larissis and Others v. Greece*, Reports 1998-I, § 40. Cf. also *Hashman and Harrup v. the United Kingdom* [Grand Chamber], Reports 1999-VIII, § 31, and *Rotaru v. Romania* [GC], Reports 2000-V, § 52.

156 ECtHR, 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, *op. cit.*, § 109.

157 *Hasan and Chaush v. Bulgaria*, *op. cit.*, Reports 2000-XI, § 84.

158 Judgments in *Hashman and Harrup*, *op. cit.*, § 31, and *Groppera Radio AG and Others v. Switzerland*, 28 March 1990, *op. cit.*, § 68.

which allow the executive unfettered discretion; in these circumstances it does not meet the required standards of clarity and foreseeability.<sup>159</sup>

[39] *Interference must have a legitimate aim*

The legitimate aims of interference are specified in certain articles of the European Convention on Human Rights.<sup>160</sup> The list, which is acknowledged to be restrictive, covers public interests<sup>161</sup> and private interests.<sup>162</sup> Despite its restrictive nature, states have considerable room for manoeuvre.

It is clear that restrictions on rights guaranteed by the European Convention on Human Rights must be adopted in the interests of public and social life as well as the rights of other people within society.<sup>163</sup> Article 9.2 of the Convention in particular refers solely to public safety, the protection of public order, health and morals, and the protection of the rights and freedoms of others.<sup>164</sup>

In the judgment in *Metropolitan Church of Bessarabia and Others* the European judges rightly stressed that the Court considered that states were entitled to verify whether a movement or association carried on, ostensibly in pursuit of religious aims, activities which were harmful to the population or to public safety.<sup>165</sup>

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159 ECtHR, 26 October 2000, *Hasan and Chaush v. Bulgaria*, *op. cit.*, § 86.

160 Cf. in particular ECHR Articles 8 to 11.

161 Security, safety, public order, territorial integrity, prevention of disorder or crime, economic well-being of the country, protection of health or morals, disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary.

162 Protection of the reputation and rights of others.

163 F. Sudre, *Droit international et européen des droits de l'homme*, *op. cit.*, p. 108.

164 V. Coussirat-Coustère, "Article 9 § 2", in L. E. Pettiti, E. Decaux and P. H. Imbert (eds.), *La Convention européenne des Droits de l'Homme*, *op. cit.*, p. 361. Cf. ECmHR, 12 July 1978, *X v. the United Kingdom*, 14 DR 234 (a Sikh's refusal to wear a safety helmet instead of his turban); 19 March 1981, *Omkaranda and Divine Light Zentrum v. Switzerland*, 25 DR 105.

165 ECtHR, 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, *op. cit.*, § 113. Cf. also judgments in *Manoussakis and Others*, *op. cit.*, § 40, and *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Reports 2001-IX, § 84.

[40] *Interference must be necessary in a democratic society*

This is a vague concept which inevitably gives rise to problems of interpretation. Since this condition is more than just a reminder of the rule of law<sup>166</sup> it has been necessary to refine it. Having accepted almost automatically that the democratic society cited by the Convention applied to member states of the Council of Europe,<sup>167</sup> the European institutions have stated that typical features of such a society are pluralism, tolerance and broadmindedness.<sup>168</sup>

For interference to be “necessary” in a democratic society it must meet a pressing social need whilst remaining proportionate to the legitimate aim pursued:<sup>169</sup> this means that interference must be based on just reasons which are both relevant and sufficient.<sup>170</sup> The need must be determined *in concreto*.<sup>171</sup> Democratic necessity is a complex concept, which seems to break down into three subcriteria: the need for the measure taken, the connection and proportionality between the measure and the legitimate aim cited and, lastly, the measure's consistency with the democratic spirit.<sup>172</sup> In fact, the necessity of a measure restricting rights must be weighed in relation to its indispensability, which is not open to question, and its acceptability, which is obviously not sufficient. The restriction must be proportionate to the aim pursued, proportionality being the achievement of a fair balance between the various conflicting interests.<sup>173</sup>

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166 P. Vegleris, “Valeur et signification de la clause ‘dans une société démocratique’ dans la CEDH”, RDI, 1968, Vol. I, p. 227 *et seq.*

167 ECmHR, 30 September 1975, *Handyside v. the United Kingdom*, Report, p. 34 *et seq.* Admittedly, only states considered to be democratic can become members of the Council of Europe.

168 ECtHR, 7 December 1976, *Handyside v. the United Kingdom*, Series A, No. 24, § 49 *et seq.*

169 *Sunday Times v. the United Kingdom*, *op. cit.*, § 63 *et seq.*; ECtHR, 24 November 1986, *Gillow v. the United Kingdom*, Series A, No. 109, § 55.

170 ECtHR, 22 October 1981, *Dudgeon v. the United Kingdom*, Series A, No. 45, § 51 *et seq.*

171 Cf. specific examples cited by V. Coussirat-Coustère, *op. cit.*, p. 337 *et seq.*

172 See M. Delmas-Marty, “Légalité pénale et prééminence du droit”, in *Mélanges Vitu*, Cujas, 1989, p. 151 *et seq.*, spec. p. 163.

173 Cf. in particular the cases of *Handyside*, *op. cit.*, § 49, and *Dudgeon*, *op. cit.* § 60. The question has sometimes given rise to sharp controversy: cf. case of *Otto-Preminger-Institut*, *op. cit.*,

Its consistency with the democratic spirit implies a certain tolerance and broadmindedness.<sup>174</sup>

The judges have had to clarify what is “necessary in a democratic society” in the specific context of freedom of thought, conscience and religion. In particular, they have stated that in a democratic society 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.<sup>175</sup> However, the state has a duty to remain neutral and impartial here, since what is at stake is the preservation of pluralism and the proper functioning of democracy, which must resolve a country’s problems through dialogue, without recourse to violence, even when they are irksome:<sup>176</sup> the role of the authorities is not to remove the cause of tension by eliminating pluralism but to ensure that the competing groups tolerate each other.<sup>177</sup> The Court further observed in its judgement in *Metropolitan Church of Bessarabia and Others* that in principle the right to freedom of religion excludes assessment by the state of the legitimacy of religious beliefs or the ways in which those beliefs are expressed: state measures favouring a particular leader or specific organs of a divided religious community or seeking to compel the community or part of it to place itself, against its will, under a single leadership, would also constitute an infringement of the freedom of religion.<sup>178</sup> In the same judgment, the Court considered that

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where the Court held that the forfeiture of a film satirising the tenets of the Catholic religion might be a necessary restriction in a democratic society to protect the rights of others. Cf. in particular comments by P. Wachsmann, “La religion contre la liberté d’expression: sur un arrêt regrettable de la Cour européenne des droits de l’homme”, *op. cit.*, p. 441 *et seq.*

174 J.-F. Renucci, *Droit européen des droits de l’homme*, *op. cit.*, p. 331.

175 ECtHR, 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, *op. cit.*, § 115. Cf. also *Kokkinakis* judgment, *op. cit.*, § 33.

176 ECtHR, 30 January 1998, *United Communist Party of Turkey and Others v. Turkey*, Reports 1998-I, p. 25, § 57.

177 ECtHR, 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, *op. cit.*, § 116. Cf. also ECtHR, 14 December 1999, *Serif v. Greece*, Reports 1999-IX, § 53.

178 ECtHR, 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, *op. cit.*, § 117. Cf. also ECtHR, 14 December 1999, *Serif v. Greece*, *op. cit.*, § 52, where the Court



the refusal to recognise the applicant Church had such consequences for freedom of religion that it could not be regarded as proportionate to the legitimate aim pursued or, accordingly, as necessary in a democratic society: there was consequently a violation of Article 9 of the Convention.<sup>179</sup>

## **b. Supervision of interference**

[41] *The actual nature of European supervision in general*

European supervision is intended to prevent states from overstepping the limits set by the Court to their power of interference: it is necessary in order to avoid any risk of arbitrary action. But since such supervision is confined to the overstepping of these limits this means that states are allowed room for manoeuvre. The explanation lies in the fact that national authorities, because they are directly in touch with the reality of the situation, are in the best position to decide on any restrictions on rights and freedoms. The European judges exercise supervision over state interference. This supervision is as necessary as the state's room for manoeuvre, since, as the Court has pointed out, contracting states have a margin of appreciation in assessing the need for interference, but it goes hand in hand with European supervision, which will vary in scope depending on the case.<sup>180</sup>

European supervision, which was purely procedural at the outset,<sup>181</sup> has evolved. On the one hand, this supervision has extended to the existence of sufficient reason for state interference.<sup>182</sup> On the other, European judges now concern themselves with the grounds for and proportionality of

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held that, in democratic societies, the state did not need to take measures to ensure that religious communities remained or were brought under a unified leadership.

179 ECtHR, 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, *op. cit.*, § 130.

180 J. MacDonald, "The margin of appreciation in the jurisprudence of the European Convention on Human Rights", in *Collected Courses of the Academy of European Law*, Vol. 1, Book 2, Nijhoff, 1990, p. 160 *et seq.*

181 Application No. 514/59, Yearbook III, p. 196.

182 ECtHR, 18 June 1971, *De Wilde, Ooms and Versyp v. Belgium*, Series A, No. 12, § 93.

interference.<sup>183</sup> In any case, supervision by the European authorities now embraces not only the “legislation” allowing interference but also the court decisions applying it.<sup>184</sup> In exercising their supervision, European judges will thus determine states’ discretion in relation to the circumstances and resources of domestic authorities, which means that this supervision comes close to an assessment of expediency.<sup>185</sup> In fact, the Court must ascertain whether the reasons adduced by national authorities are relevant and sufficient<sup>186</sup> whilst determining whether the interference is proportionate to the aim pursued. This means that states must ensure a balance between public interests and private interests.

[42] *Supervision of interference in the specific case of freedom of religion*

In the specific case of freedom to manifest beliefs, the Court's task is to ascertain whether the measures taken at national level are justified in principle and proportionate. In order to determine the scope of the margin of appreciation in each case the Court must take into account what is at stake, namely the need to maintain true religious pluralism, which is inherent in the concept of a democratic society.<sup>187</sup> Similarly, a good deal of weight must be given to that need when determining, as paragraph 2 of Article 9 requires, whether the restriction is proportionate to the legitimate aim pursued.<sup>188</sup> The restrictions imposed on the freedom to manifest religion call for very strict scrutiny by the Court.<sup>189</sup> In exercising its supervisory jurisdiction, the Court must consider the interference complained of on the basis of the case as a whole.<sup>190</sup>

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183 V. Coussirat-Coustère, *op. cit.*, p. 339 and references.

184 ECtHR, 8 July 1986, *Lingens v. Austria*, Series A, No. 103, § 39.

185 F. Sudre, *Droit international et européen des droits de l'homme*, *op. cit.*, p. 109; cf. ECtHR, 25 March 1983, *Silver and Others v. the United Kingdom*, Series A, No. 61.

186 ECtHR, 24 March 1988, *Olsson v. Sweden*, Series A, No. 250, § 68.

187 ECtHR, 25 May 1993, *Kokkinakis v. Greece*, *op. cit.*, § 31; 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, *op. cit.*, § 119.

188 See, *mutatis mutandis*, among other authorities, *Wingrove v. United Kingdom*, judgment of 25 November 1996, Reports 1996-V, p. 1956, § 53.

189 ECtHR, 26 September 1996, *Manoussakis v. Greece*, *op. cit.*, § 44.

190 *Kokkinakis* judgment, *op. cit.*, § 47.

## 2. State interference: individual cases

### a. Places of worship

[43] *System of authorisations*

The *Manoussakis* case<sup>191</sup> is indicative of the problems that may arise regarding compatibility with the provisions of Article 9 of the Convention when prior authorisation is required for places of worship. For the European Court, the applicants' conviction by the court for having used the premises that they had rented without the prior authorisation required under Law No. 1363/1938 was therefore an interference with the exercise of their "freedom ..., to manifest [their] religion ..., in worship ... and observance". Such interference breached Article 9 unless it was "prescribed by law", pursued one or more of the legitimate aims referred to in paragraph 2, and was "necessary in a democratic society" to attain such aims.<sup>192</sup> Clearly this interference was prescribed by a law and pursued a legitimate aim, namely the protection of public order. However, with regard to its being "necessary in a democratic society", there is room for doubt. Thus the Court noted that both the public prosecutor's office and the domestic court had relied expressly on the lack of the bishop's authorisation as well as the lack of an authorisation from the Minister of Education and Religious Affairs. The latter, in response to five requests from the applicants, had replied that he was examining their file, but the applicants had received no express decision. Moreover, at the hearing a representative of the Government himself had described the Minister's conduct as unfair and attributed it to the difficulty that the latter might have had in giving legally valid reasons for an express decision refusing the authorisation or to his fear that he might provide the applicants with grounds for appealing to the Supreme Administrative Court to challenge an express administrative decision. In these circumstances the Court was of the opinion that the Government could not rely on the applicants' failure to comply with a legal formality to justify their conviction; consequently it held that the impugned conviction had had such a direct effect on the

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191 ECtHR, 26 September 1996, *Manoussakis and Others v. Greece*, *op. cit.*

192 *Manoussakis*, *op. cit.*, § 36.

applicants' freedom of religion that it could not be regarded as proportionate to the legitimate aim pursued, nor, accordingly, as necessary in a democratic society. There had thus been a violation of Article 9.<sup>193</sup>

The European judges have had occasion to specify that when the exercise of the right to freedom of religion or one of its aspects is subject, under domestic law, to a system of prior authorisation, intervention in the procedure for granting authorisation by a recognised ecclesiastical authority cannot be reconciled with the requirements of Article 9.2.<sup>194</sup> But in the *Vergos* case, the Court reiterated that it had already examined the compatibility with Article 9 of the Convention of the statutory provisions of Greek national law making construction of a place of worship subject to prior authorisation by local government. Thus in the *Manoussakis* case the Court concluded that Article 9 had been violated because it found that the Greek authorities had tended to use the possibilities afforded by the relevant law to impose rigid, or indeed prohibitive, conditions on the practice of religious beliefs by certain non-Orthodox movements, in particular by hindering the construction of places of worship by Jehovah's Witnesses. However, the *Vergos* case is different despite appearances: for the purpose of exercising his freedom of worship the applicant requested a derogation from the pre-established planning regulations of the town where he lived, and the key question was whether Article 9 of the Convention was compatible with existing legal provisions concerning the criteria for modifying a land-use plan for the purposes of constructing a public building, as interpreted by the Greek administrative courts. Taking into account, amongst other things, the contracting states' margin of appreciation in matters of town and country planning,<sup>195</sup> the Court held that the measure concerned was justified in principle and proportionate to the aim pursued. Article 9 was therefore not violated in the present case.<sup>196</sup>

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193 *Manoussakis*, *op. cit.*, §§ 51-53.

194 ECtHR, 24 June 2004, *Vergos v. Greece*, No. 65501/01, § 34. See, *mutatis mutandis*, *Pentidis and Others v. Greece*, 9 June 1997, Reports 1997-III.

195 Cf. ECtHR, 25 September 1996, *Buckley v. the United Kingdom*, Reports 1996-IV, §§ 74-75.

196 ECtHR, 24 June 2004, *Vergos v. Greece*, *op. cit.*, §§ 37-41.

## b. Signs of religious affiliation

### [44] *The case of France*

Over the past few years the question of signs of religious affiliation, especially in schools, has come to the fore in France. The *Conseil d'Etat* originally intervened, stating that freedom of religion did not allow pupils to display signs of religious affiliation which by their nature, the conditions in which they were worn individually or collectively, or their conspicuousness or character of protest, might constitute an act of pressure, provocation, proselytism or propaganda, might interfere with the dignity or freedom of a pupil or other members of the school community, or might jeopardise their health or safety. However, this "legal compromise" did not solve all the problems<sup>197</sup> and eventually a law was passed stating that "in state primary and secondary schools the wearing of symbols or attire by which pupils overtly manifest a religious affiliation is prohibited".<sup>198</sup> The situation in France has not, at least for the time being, given rise to any appeals to the European Court of Human Rights, unlike the situation in Turkey.

### [45] *The case of Turkey: the Leyla Şahin judgment*

A ban on wearing Islamic headscarves in a Turkish university led to a case being referred to the European Court of Human Rights: the *Leyla Şahin*

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197 Conseil d'Etat, 27 November 1989. On this point, see in particular: N. Deffains, "Le principe de la laïcité de l'enseignement public à l'épreuve du foulard islamique", RTDH, 1998, pp. 203-250; J. Rivéro, "Laïcité scolaire et signe d'appartenance religieuse, l'avis du Conseil d'Etat en date du 27 novembre 1989", RFDA, 1990, p. 1 *et seq.* It is certain that as long as a clear and well-defined position has not been firmly established, problems will remain; sooner or later it will be necessary to determine the concept of secularism unambiguously and accept all the consequences. See also C. Durand-Princeborgne, "Le port de signes extérieurs de convictions religieuses à l'école : une jurisprudence affirmée... une jurisprudence contestée", RFDA, 1997 p. 151. *Add.* Conseil d'Etat, 20 October 1999, *Ait Ahmad*, D. 2000 J. p. 251: conclusions, R. Libehaber, AJDA, 2000, p. 165. Cf. Z. Anseur, "Le couple laïcité-liberté religieuse: de l'union à la rupture ?", RTDH, 2001, pp. 77-94.

198 Law No. 2004-228 of 15 March 2004, pursuant to the principle of secularism, on the wearing in state primary and secondary schools of symbols or attire manifesting a religious affiliation.

case.<sup>199</sup> The appellant submitted that the ban on wearing the Islamic headscarf in higher education institutions constituted an unjustified interference with her right to freedom of religion, and, in particular, her right to manifest her religion, guaranteed by Article 9 of the Convention. There was a basis for the interference in Turkish law (circular of 23 February 1998), and it pursued legitimate aims, namely protecting the rights and freedoms of others and maintaining order. Was it “necessary in a democratic society”? The question arose, and the Court noted that, in the cases of *Karaduman*<sup>200</sup> and *Dahlab*,<sup>201</sup> the Convention institutions found that in a democratic society the state was entitled to place restrictions on the wearing of the Islamic headscarf if it was incompatible with the pursued aim of protecting the rights and freedoms of others, public order and public safety. In the *Dahlab* case, in which the applicant was a schoolteacher in charge of a class of small children, it stressed among other matters the impact that the “powerful external symbol” conveyed by her wearing a headscarf could have and questioned whether it might have some kind of proselytising effect,<sup>202</sup> seeing that it appeared to be imposed on women by a precept laid down in the Koran that was hard to reconcile with the principle of gender equality.<sup>203</sup> The Court also stated that the principle of secularism in Turkey was undoubtedly one of the fundamental principles of the state, which were in harmony with the rule of law and respect for human rights, whilst emphasising the subsidiary nature of the Convention machinery, since the national authorities were in principle better placed than a European court to evaluate local needs and conditions. In particular, the Court stressed the fact that where questions concerning the relationship between state and religions were at stake, on which opinion in a democratic society might reasonably differ widely, the role of the national decision-making body must be given special

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199 ECtHR, 29 June 2004, *Leyla Şahin v. Turkey*, No. 44774/98. It should be noted that a similar case (ban on wearing Islamic headscarves during practical classes in a nursing college) was declared admissible: ECtHR, 2 July 2002, *Tekin v. Turkey*, No. 41556/98.

200 ECmHR, 3 May 1973, *Karaduman v. Turkey*, 74 DR 93.

201 ECtHR, 15 February 2001, *Dahlab v. Switzerland*, Reports 2001-V.

202 On proselytising more generally, see below: [46] *et seq.*

203 *Leyla Şahin, op. cit.*, § 98.

importance.<sup>204</sup> Although this does not rule out European supervision entirely, the fact nonetheless remains that a margin of appreciation is particularly appropriate when it comes to the regulation by the contracting states of the wearing of religious symbols in educational institutions, since rules on the subject vary from one country to another depending on national traditions and there is no uniform European conception of the requirements of “the protection of the rights of others” and of “public order”.<sup>205</sup>

In this case, the European judges were very mindful of the fact that the interference was based, in particular, on two principles – secularism and equality – which reinforced and complemented each other. They noted that this notion of secularism appeared to the Court to be consistent with the values underpinning the Convention and it accepted that upholding that principle might be regarded as necessary for the protection of the democratic system in Turkey.<sup>206</sup> Given the local context and the margin of appreciation that should be left to member states, the Court found that the University of Istanbul’s regulations imposing restrictions on the wearing of Islamic headscarves and the measures taken to implement them were justified in principle and proportionate to the aims pursued and therefore could be regarded as “necessary in a democratic society”. There was consequently no breach of Article 9 of the Convention.<sup>207</sup>

### **c. Proselytising**

#### *[46] Propagation of religious beliefs*

The freedom to propagate religious beliefs and attempt to persuade others is beyond dispute, especially as it is the logical consequence of other freedoms expressly recognised by the European Convention on Human Rights, such as freedom to manifest one’s religion and freedom to change

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204 *Leyla Şahin, op. cit.*, § 101. See, *mutatis mutandis*, *Cha’are Shalom Ve Tsedek, op. cit.*, § 84 and ECtHR, 25 November 1996, *Wingrove v. the United Kingdom*, Reports 1996-V, p. 1958, § 58.

205 *Leyla Şahin, op. cit.*, § 102.

206 *Leyla Şahin, op. cit.*, §§ 104 and 106.

207 *Leyla Şahin, op. cit.*, §§ 114 and 115.

it. But the fact remains that “improper” manifestations of freedom of propagation cannot be permitted, particularly when they are likely to interfere with the rights of others or undermine public order through dangerous and extremist messages.

[47] *The Kokkinakis judgment*

The *Kokkinakis* judgment is of considerable significance, since the applicant, who had become a Jehovah’s Witness, had been arrested over sixty times for proselytising and had on several occasions been imprisoned. The European Court here reiterated that according to Article 9, freedom to manifest one’s religion was not only exercisable in community with others, “in public” and within the circle of those whose faith one shares, but could also be asserted “alone” and “in private”. Furthermore, it included in principle the right to try to convince one’s neighbour, for example through “teaching”, failing which, moreover, “freedom to change [one’s] religion or belief”, enshrined in Article 9, would be likely to remain a dead letter.<sup>208</sup>

This was definitely a case of interference by the state. This interference was prescribed by law, more specifically by Section 4 of Law No. 1363/1938, which states: “Anyone engaging in proselytism shall be liable to imprisonment and a fine of between 1,000 and 50,000 drachmas; he shall, moreover, be subject to police supervision for a period of between six months and one year to be fixed by the court when convicting the offender. By ‘proselytism’ is meant, in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion, with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety.” Moreover, the interference was in pursuit of a legitimate aim, namely the protection of the rights and freedoms of others.

The requirement that it be “necessary in a democratic society” was more problematical. The European judges drew a distinction between bearing

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208 *Kokkinakis*, op. cit, § 31.



Christian witness and improper proselytism: the former corresponded to true evangelism – which a report drawn up under the auspices of the World Council of Churches had described as an essential mission and a responsibility of every Christian and every Church – while the latter, which represented a corruption or deformation of it, might take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need, perhaps using violence or brainwashing. This could not be compatible with respect for the freedom of thought, conscience and religion of others.<sup>209</sup> The Court noted, however, that the Greek courts had merely reproduced the wording of section 4 without sufficiently specifying in what way the accused had attempted to convince his neighbour by improper means. Consequently, they had not shown that the applicant's conviction was justified in the circumstances of the case by a pressing social need. Since the contested measure was not proportionate to the legitimate aim pursued and therefore not “necessary in a democratic society ... for the protection of the rights and freedoms of others”, there was a breach of Article 9 of the Convention.<sup>210</sup>

[48] *Protection of vulnerable and disadvantaged people*

The *Larissis* judgment, concerning the conviction of air-force officers for proselytising, highlights the special precautions that must be taken to protect the rights of subordinates.<sup>211</sup> In this case, three officers of the Greek air force were followers of the Pentecostal Church, a Protestant Christian denomination which adheres to the principle that it is the duty of all believers to engage in evangelism. These officers engaged the airmen under their command in religious discussions, read the Bible aloud, and encouraged the airmen to accept the beliefs of the Pentecostal Church.

The European judges stressed that while religious freedom was primarily a matter of individual conscience, it also implied, *inter alia*, freedom to “manifest [one's] religion”, including the right to try to convince one's

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209 *Kokkinakis*, op. cit, § 48.

210 *Kokkinakis*, op. cit, §§ 49 and 50.

211 ECtHR, 24 February 1998, *Larissis and Others v. Greece*, Reports 1998-I.

neighbour, for example through “teaching”. But they also stated that Article 9 did not, however, protect every act motivated or inspired by a religion or belief; in particular, it did not protect improper proselytism, such as the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a Church.<sup>212</sup> The Court considered that the Greek authorities were in principle justified in taking some measures to protect the lower-ranking airmen from improper pressure applied to them by the applicants in their desire to promulgate their religious beliefs. These measures were not disproportionate, especially as they were not particularly severe and were more preventative than punitive in nature, since the penalties imposed were not enforceable if the applicants did not re-offend within the following three years. Article 9 of the Convention had therefore not been violated.<sup>213</sup>

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212 ECtHR, 24 February 1998, *Larissis and Others v. Greece*, op. cit, § 45.

213 ECtHR, 24 February 1998, *Larissis and Others v. Greece*, op. cit, §§ 54 and 55.

## **CONCLUSION**

[49] *A European safeguard*

Freedom of thought, conscience and religion is clearly an essential freedom, where much is at stake. A source of strong emotions and often intolerance, this freedom is enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms. This European safeguard is important, since the work of the judges in the European Court of Human Rights – over and above specific cases – is unquestionably a factor in calming any tensions that may arise. Of course these judges will never be able to solve every problem in a world full of conflict, but they may nevertheless help us to co-exist in it a little better, with respect for each other and for the rule of law.

## **APPENDIX I: KEY JUDGMENTS AND DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS**

*(Extracts)*

### **Kokkinakis v. Greece**

#### **(Conviction of a Jehovah's Witness for proselytism)**

[...]

31. 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.

While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions.

According to Article 9, freedom to manifest one's religion is not only exercisable in community with others, "in public" and within the circle of those whose faith one shares, but can also be asserted "alone" and "in private"; furthermore, it includes in principle the right to try to convince one's neighbour, for example through "teaching", failing which, moreover, "freedom to change [one's] religion or belief", enshrined in Article 9, would be likely to remain a dead letter.

32. The requirements of Article 9 are reflected in the Greek Constitution in so far as Article 13 of the latter declares that freedom of conscience in religious matters is inviolable and that there shall be freedom to practise any known religion (see paragraph 13 above). Jehovah's Witnesses accordingly enjoy both the status of a "known religion" and the advantages flowing from that as regards observance (see paragraphs 22-23 above).

33. 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 those Articles, 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.

[...]

35. The Court will confine its attention as far as possible to the issue raised by the specific case before it. It must nevertheless look at the foregoing provisions, since the action complained of by the applicant arose from the application of them (see, *mutatis mutandis*, the *de Geouffre de la Pradelle v. France* judgment of 16 December 1992, Series A No. 253-B, p. 42, para. 31).

[...]

36. The sentence passed by the Lasithi Criminal Court and subsequently reduced by the Crete Court of Appeal (see paragraphs 9-10 above) amounts to an interference with the exercise of Mr Kokkinakis's right to "freedom to manifest [his] religion or belief". Such an interference is contrary to Article 9 unless it is 'prescribed by law', directed at one or more of the legitimate aims in paragraph 2 and 'necessary in a democratic society' for achieving them.

[...]

40. The Court has already noted that the wording of many statutes is not absolutely precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague (see, for example and *mutatis mutandis*, the *Müller and Others v. Switzerland* judgment of 24 May 1988, Series A No. 133, p. 20, para. 29). Criminal-law provisions on proselytism fall within this category. The interpretation and application of such enactments depend on practice.

In this instance there existed a body of settled national case-law (see paragraphs 17-20 above). This case-law, which had been published and was accessible, supplemented the letter of section 4 and was such as to enable Mr Kokkinakis to regulate his conduct in the matter.

As to the constitutionality of section 4 of Law No. 1363/1938, the Court reiterates that it is, in the first instance, for the national authorities, and in particular the courts, to interpret and apply domestic law (see, as the most recent authority, the *Hadjianastassiou v. Greece* judgment of 16 December 1992, Series A No. 252, p. 18, para. 42). And the Greek courts that have had to deal with the issue have ruled that there is no incompatibility (see paragraph 21 above).

41. The measure complained of was therefore “prescribed by law” within the meaning of Article 9 para. 2 of the Convention.

[...]

44. Having regard to the circumstances of the case and the actual terms of the relevant courts’ decisions, the Court considers that the impugned measure was in pursuit of a legitimate aim under Article 9 para. 2, namely the protection of the rights and freedoms of others, relied on by the Government.

[...]

47. The Court has consistently held that a certain margin of appreciation is to be left to the Contracting States in assessing the existence and extent of the necessity of an interference, but this

margin is subject to European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate.

In order to rule on this latter point, the Court must weigh the requirements of the protection of the rights and liberties of others against the conduct of which the applicant stood accused. In exercising its supervisory jurisdiction, the Court must look at the impugned judicial decisions against the background of the case as a whole (see, *inter alia* and *mutatis mutandis*, the *Barfod v. Denmark* judgment of 22 February 1989, Series A No. 149, p. 12, para. 28).

48. First of all, a distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church. The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others

Scrutiny of section 4 of Law No. 1363/1938 shows that the relevant criteria adopted by the Greek legislature are reconcilable with the foregoing if and in so far as they are designed only to punish improper proselytism, which the Court does not have to define in the abstract in the present case.

49. The Court notes, however, that in their reasoning the Greek courts established the applicant's liability by merely reproducing the wording of section 4 and did not sufficiently specify in what way the accused had attempted to convince his neighbour by improper means. None of the facts they set out warrants that finding.

That being so, it has not been shown that the applicant's conviction was justified in the circumstances of the case by a pressing social need. The contested measure therefore does not appear to have been proportionate to the legitimate aim pursued or, consequently, "necessary in a democratic society ... for the protection of the rights and freedoms of others".

50. In conclusion, there has been a breach of Article 9 of the Convention.

## **Manoussakis and Others v. Greece**

### **(Creation of a place of worship without authorisation from the Minister of Education and Religious Affairs)**

[...]

36. The validity of the private agreement concluded by the applicants on 30 March 1983 (see paragraph 7 above) is not in dispute.

The applicants' conviction by the Heraklion Criminal Court sitting on appeal for having used the premises in question without the prior authorisation required under Law No. 1363/1938 was therefore an interference with the exercise of their "freedom ..., to manifest [their] religion ..., in worship ... and observance". Such interference breaches Article 9 unless it was "prescribed by law", pursued one or more of the legitimate aims referred to in paragraph 2 and was "necessary in a democratic society" to attain such aim or aims.

[...]

38. The Court notes that the applicants' complaint is directed less against the treatment of which they themselves had been the victims than the general policy of obstruction pursued in relation to Jehovah's Witnesses when they wished to set up a church or a place of worship. They are therefore in substance challenging the provisions of the relevant domestic law.



However, the Court does not consider it necessary to rule on the question whether the interference in issue was “prescribed by law” in this instance because, in any event, it was incompatible with Article 9 of the Convention on other grounds (see, *mutatis mutandis*, the *Funke v. France* judgment of 25 February 1993, Series A No. 256-A, p. 23, para. 51, and paragraph 53 below).

[...]

40. Like the applicants, the Court recognises that the States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population. Nevertheless, it recalls that Jehovah’s Witnesses come within the definition of “known religion” as provided for under Greek law (see the *Kokkinakis v. Greece* judgment of 25 May 1993, Series A No. 260-A, p. 15, para. 23). This was moreover conceded by the Government.

However, having regard to the circumstances of the case and taking the same view as the Commission, the Court considers that the impugned measure pursued a legitimate aim for the purposes of Article 9 para. 2 of the Convention, namely the protection of public order.

[...]

44. As a matter of case-law, the Court has consistently left the Contracting States a certain margin of appreciation in assessing the existence and extent of the necessity of an interference, but this margin is subject to European supervision, embracing both the legislation and the decisions applying it. The Court’s task is to determine whether the measures taken at national level were justified in principle and proportionate.

In delimiting the extent of the margin of appreciation in the present case the Court must have regard to what is at stake, namely the need to secure true religious pluralism, an inherent feature of the notion of a democratic society (see the above-mentioned *Kokkinakis* judgment, p. 17, para. 31). Further, considerable weight has to be attached to that need when it comes to determining, pursuant to paragraph 2 of Article 9, whether the restriction was proportionate to the legitimate

aim pursued. The restrictions imposed on the freedom to manifest religion by the provisions of Law No. 1363/1938 and of the decree of 20 May/2 June 1939 call for very strict scrutiny by the Court.

45. The Court notes in the first place that Law No. 1363/1938 and the decree of 20 May/2 June 1939 - which concerns churches and places of worship that are not part of the Greek Orthodox Church – allow far-reaching interference by the political, administrative and ecclesiastical authorities with the exercise of religious freedom. In addition to the numerous formal conditions prescribed in section 1 (1) and (3) of the decree, some of which confer a very wide discretion on the police, mayor or chairman of the district council, there exists in practice the possibility for the Minister of Education and Religious Affairs to defer his reply indefinitely – the decree does not lay down any time-limit – or to refuse his authorisation without explanation or without giving a valid reason. In this respect, the Court observes that the decree empowers the Minister – in particular when determining whether the number of those requesting an authorisation corresponds to that mentioned in the decree (section 1 (1) (a)) – to assess whether there is a “real need” for the religious community in question to set up a church. This criterion may in itself constitute grounds for refusal, without reference to the conditions laid down in Article 13 para. 2 of the Constitution.

[...]

47. The Court observes that, in reviewing the lawfulness of refusals to grant the authorisation, the Supreme Administrative Court has developed case-law limiting the Minister's power in this matter and according the local ecclesiastical authority a purely consultative role (see paragraph 26 above).

The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate. Accordingly, the Court takes the view that the authorisation requirement under Law No. 1363/1938 and the decree of 20 May/2 June 1939 is consistent with Article 9 of the Convention only in so far

as it is intended to allow the Minister to verify whether the formal conditions laid down in those enactments are satisfied.

48. It appears from the evidence and from the numerous other cases cited by the applicants and not contested by the Government that the State has tended to use the possibilities afforded by the above-mentioned provisions to impose rigid, or indeed prohibitive, conditions on practice of religious beliefs by certain non-Orthodox movements, in particular Jehovah's Witnesses. Admittedly the Supreme Administrative Court quashes for lack of reasons any unjustified refusal to grant an authorisation, but the extensive case-law in this field seems to show a clear tendency on the part of the administrative and ecclesiastical authorities to use these provisions to restrict the activities of faiths outside the Orthodox Church.

49. In the instant case the applicants were prosecuted and convicted for having operated a place of worship without first obtaining the authorisations required by law.

[...]

51. The Court notes, nevertheless, that both the Heraklion public prosecutor's office, when it was bringing proceedings against the applicants (see paragraph 12 above), and the Heraklion Criminal Court sitting on appeal, in its judgment of 15 February 1990 (see paragraph 15 above), relied expressly on the lack of the bishop's authorisation as well as the lack of an authorisation from the Minister of Education and Religious Affairs. The latter, in response to five requests made by the applicants between 25 October 1983 and 10 December 1984, replied that he was examining their file. To date, as far as the Court is aware, the applicants have not received an express decision. Moreover, at the hearing a representative of the Government himself described the Minister's conduct as unfair and attributed it to the difficulty that the latter might have had in giving legally valid reasons for an express decision refusing the authorisation or to his fear that he might provide the applicants with grounds for appealing to the Supreme Administrative Court to challenge an express administrative decision.

52. In these circumstances the Court considers that the Government cannot rely on the applicants' failure to comply with a legal formality to justify their conviction. The degree of severity of the sanction is immaterial.

53. Like the Commission, the Court is of the opinion that the impugned conviction had such a direct effect on the applicants' freedom of religion that it cannot be regarded as proportionate to the legitimate aim pursued, nor, accordingly, as necessary in a democratic society.

In conclusion, there has been a violation of Article 9.

## **Kalaç v. Turkey**

### **(Compulsory retirement of a judge advocate for unlawful fundamentalist opinions)**

[...]

27. The Court reiterates that while religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion not only in community with others, in public and within the circle of those whose faith one shares, but also alone and in private (see the *Kokkinakis v. Greece* judgment of 25 May 1993, Series A No. 260-A, p. 17, para. 31). Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance. Nevertheless, Article 9 does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account.

28. In choosing to pursue a military career Mr Kalaç was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians (see the *Engel and Others v. the Netherlands* judgment of 8 June 1976, Series A No. 22, p. 24, para. 57). States may adopt for their

armies disciplinary regulations forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service.

29. It is not contested that the applicant, within the limits imposed by the requirements of military life, was able to fulfil the obligations which constitute the normal forms through which a Muslim practises his religion. For example, he was in particular permitted to pray five times a day and to perform his other religious duties, such as keeping the fast of Ramadan and attending Friday prayers at the mosque.

30. The Supreme Military Council's order was, moreover, not based on Group Captain Kalaç's religious opinions and beliefs or the way he had performed his religious duties but on his conduct and attitude (see paragraphs 8 and 25 above). According to the Turkish authorities, this conduct breached military discipline and infringed the principle of secularism.

31. The Court accordingly concludes that the applicant's compulsory retirement did not amount to an interference with the right guaranteed by Article 9 since it was not prompted by the way the applicant manifested his religion.

There has therefore been no breach of Article 9.

## **Buscarini and Others v. San Marino**

### **(Obligation of members of parliament to take an oath on the Gospels)**

[...]

7. The applicants were elected to the General Grand Council (the parliament of the Republic of San Marino) in elections held on 30 May 1993.

8. Shortly afterwards, they requested permission from the Captains-Regent, who act as the heads of government in San Marino, to take the oath required by section 55 of the Elections Act (Law No. 36 of 1958) without making reference to any religious text. The Act in question

referred to a decree of 27 June 1909, which laid down the wording of the oath to be taken by members of the Republic's parliament as follows:

"I, ..., swear on the Holy Gospels ever to be faithful to and obey the Constitution of the Republic, to uphold and defend freedom with all my might, ever to observe the Laws and Decrees, whether ancient, modern or yet to be enacted or issued and to nominate and vote for as candidates to the Judiciary and other Public Office only those whom I consider apt, loyal and fit to serve the Republic, without allowing myself to be swayed by any feelings of hatred or love or by any other consideration."

[...]

30. Mr Buscarini and Mr Della Balda submitted that the obligation which the General Grand Council imposed on them on 26 July 1993 demonstrated that in the Republic of San Marino at the material time the exercise of a fundamental political right, such as holding parliamentary office, was subject to publicly professing a particular faith, in breach of Article 9.

[...]

34. The Court reiterates that: "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" (see the *Kokkinakis v. Greece* judgment of 25 May 1993, Series A No. 260-A, p. 17, § 31). That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.

In the instant case, requiring Mr Buscarini and Mr Della Balda to take an oath on the Gospels did indeed constitute a limitation within the meaning of the second paragraph of Article 9, since it required them to swear allegiance to a particular religion on pain of forfeiting their parliamentary seats. Such interference will be contrary to Article 9

unless it is “prescribed by law”, pursues one or more of the legitimate aims set out in paragraph 2 and is “necessary in a democratic society”.

[...]

35. As the Commission noted in its report (paragraph 38), “the interference in question was based on section 55 of the Elections Act, Law No. 36 of 1958, which referred to the decree of 27 June 1909 laying down the wording of the oath to be sworn by members of parliament ... Therefore, it was ‘prescribed by law’ within the meaning of the second paragraph of Article 9 of the Convention”. That point was not disputed.

[...]

38. The Court considers it unnecessary in the present case to determine whether the aims referred to by the Government were legitimate within the meaning of the second paragraph of Article 9, since the limitation in question is in any event incompatible with that provision in other respects.

39. The Court notes that at the hearing on 10 December 1998 the Government sought to demonstrate that the Republic of San Marino guaranteed freedom of religion; in support of that submission they cited its founding Statutes of 1600, its Declaration of Rights of 1974, its ratification of the European Convention in 1989 and a whole array of provisions of criminal law, family law, employment law and education law which prohibited any discrimination on the grounds of religion. It is not in doubt that, in general, San Marinese law guarantees freedom of conscience and religion. In the instant case, however, requiring the applicants to take the oath on the Gospels was tantamount to requiring two elected representatives of the people to swear allegiance to a particular religion, a requirement which is not compatible with Article 9 of the Convention.

As the Commission rightly stated in its report, it would be contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs.

40. The limitation complained of accordingly cannot be regarded as “necessary in a democratic society”. As to the Government’s argument that the application ceased to have any purpose when Law No. 115/1993 was enacted, the Court notes that the oath in issue was taken before the passing of that legislation.

41. In the light of the foregoing, there has been a violation of Article 9 of the Convention.

## **Cha’are Shalom Ve Tsedek v. France**

### **(Refusal to approve a liturgical association wishing to perform ritual slaughter)**

[...]

58. The applicant association, whose arguments were endorsed by the Commission, submitted that by refusing it the approval necessary for it to authorise its own ritual slaughterers to perform ritual slaughter, in accordance with the religious prescriptions of its members, and by granting such approval to the ACIP alone, the French authorities had infringed in a discriminatory way its right to manifest its religion through observance of the rites of the Jewish religion. It relied on Article 9 of the Convention, taken alone and in conjunction with Article 14.

[...]

72. The Court considers, like the Commission, that an ecclesiastical or religious body may, as such, exercise on behalf of its adherents the rights guaranteed by Article 9 of the Convention (see, *mutatis mutandis*, the *Canea Catholic Church v. Greece* judgment of 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, p. 2856, § 31). In the present case, a community of believers – of whatever religion – must, under French law, be constituted in the form of a liturgical association, as is the applicant association.

73. The Court next reiterates that Article 9 lists a number of forms which manifestation of one’s religion or belief may take, namely worship, teaching, practice and observance (see the *Kalaç v. Turkey* judgment of



1 July 1997, *Reports* 1997-IV, p. 1209, § 27). It is not contested that ritual slaughter, as indeed its name indicates, constitutes a rite or “rite” (the word in the French text of the Convention corresponding to “observance” in the English), whose purpose is to provide Jews with meat from animals slaughtered in accordance with religious prescriptions, which is an essential aspect of practice of the Jewish religion. The applicant association employs ritual slaughterers and *kashrut* inspectors who slaughter animals in accordance with its prescriptions on the question, and it is likewise the applicant association which, by certifying as “*glatt*” kosher the meat sold in its members’ butcher’s shops, exercises religious supervision of ritual slaughter.

74. It follows that the applicant association can rely on Article 9 of the Convention with regard to the French authorities’ refusal to approve it, since ritual slaughter must be considered to be covered by a right guaranteed by the Convention, namely the right to manifest one’s religion in observance, within the meaning of Article 9.

75. The Court will first consider whether, as the Government submitted, the facts of the case disclose no interference with the exercise of one of the rights and freedoms guaranteed by the Convention.

76. In the first place, the Court notes that by establishing an exception to the principle that animals must be stunned before slaughter, French law gave practical effect to a positive undertaking on the State’s part intended to ensure effective respect for freedom of religion. The 1980 decree, far from restricting exercise of that freedom, is on the contrary calculated to make provision for and organise its free exercise.

77. The Court further considers that the fact that the exceptional rules designed to regulate the practice of ritual slaughter permit only ritual slaughterers authorised by approved religious bodies to engage in it does not in itself lead to the conclusion that there has been an interference with the freedom to manifest one’s religion. The Court considers, like the Government, that it is in the general interest to avoid unregulated slaughter, carried out in conditions of doubtful hygiene, and that it is therefore preferable, if there is to be ritual slaughter, for it to be performed in slaughterhouses supervised by the public authorities. Accordingly, when

in 1982 the State granted approval to the ACIP, an offshoot of the Central Consistory, which is the body most representative of the Jewish communities of France, it did not in any way infringe the freedom to manifest one's religion.

78. However, when another religious body professing the same religion later lodges an application for approval in order to be able to perform ritual slaughter, it must be ascertained whether or not the method of slaughter it seeks to employ constitutes exercise of the freedom to manifest one's religion guaranteed by Article 9 of the Convention.

79. The Court notes that the method of slaughter employed by the ritual slaughterers of the applicant association is exactly the same as that employed by the ACIP's ritual slaughterers, and that the only difference lies in the thoroughness of the examination of the slaughtered animal's lungs after death. It is essential for the applicant association to be able to certify meat not only as kosher but also as "glatt" in order to comply with its interpretation of the dietary laws, whereas the great majority of practising Jews accept the kosher certification made under the aegis of the ACIP.

80. In the Court's opinion, there would be interference with the freedom to manifest one's religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable.

81. But that is not the case. It is not contested that the applicant association can easily obtain supplies of "glatt" meat in Belgium. Furthermore, it is apparent from the written depositions and bailiffs' official reports produced by the interveners that a number of butcher's shops operating under the control of the ACIP make meat certified "glatt" by the Beth Din available to Jews.

82. It emerges from the case file as a whole, and from the oral submissions at the hearing, that Jews who belong to the applicant association can thus obtain "glatt" meat. In particular, the Government referred, without being contradicted on this point, to negotiations between the applicant association and the ACIP with a view to reaching an agreement whereby

the applicant association could perform ritual slaughter itself under cover of the approval granted to the ACIP, an agreement which was not reached, for financial reasons (see paragraph 67 above). Admittedly, the applicant association argued that it did not trust the ritual slaughterers authorised by the ACIP as regards the thoroughness of the examination of the lungs of slaughtered animals after death. But the Court takes the view that the right to freedom of religion guaranteed by Article 9 of the Convention cannot extend to the right to take part in person in the performance of ritual slaughter and the subsequent certification process, given that, as pointed out above, the applicant association and its members are not in practice deprived of the possibility of obtaining and eating meat considered by them to be more compatible with religious prescriptions.

83. Since it has not been established that Jews belonging to the applicant association cannot obtain "glatt" meat, or that the applicant association could not supply them with it by reaching an agreement with the ACIP, in order to be able to engage in ritual slaughter under cover of the approval granted to the ACIP, the Court considers that the refusal of approval complained of did not constitute an interference with the applicant association's right to the freedom to manifest its religion.

84. That finding absolves the Court from the task of ruling on the compatibility of the restriction challenged by the applicant association with the requirements laid down in the second paragraph of Article 9 of the Convention. However, even supposing that this restriction could be considered an interference with the right to freedom to manifest one's religion, the Court observes that the measure complained of, which is prescribed by law, pursues a legitimate aim, namely protection of public health and public order, in so far as organisation by the State of the exercise of worship is conducive to religious harmony and tolerance. Furthermore, regard being had to the margin of appreciation left to Contracting States (see the *Manoussakis and Others v. Greece* judgment of 26 September 1996, *Reports* 1996-IV, p. 1364, § 44), particularly with regard to establishment of the delicate relations between the Churches and the State, it cannot be considered excessive or disproportionate. In other words, it is compatible with Article 9 § 2 of the Convention.

85. There has accordingly been no violation of Article 9 of the Convention taken alone.

86. As regards the applicant association's allegation that it suffered discriminatory treatment on account of the fact that approval was granted to the ACIP alone, the Court reiterates that, according to the established case-law of the Convention institutions, Article 14 only complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to that extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.

87. The Court notes that the facts of the present case fall within the ambit of Article 9 of the Convention (see paragraph 74 above) and that therefore Article 14 is applicable. However, in the light of its findings in paragraph 83 above concerning the limited effect of the measure complained of, findings which led the Court to conclude that there had been no interference with the applicant association's freedom to manifest its religion, the Court considers that the difference of treatment which resulted from the measure was limited in scope. It further observes that, for the reasons set out in paragraph 84, in so far as there was a difference of treatment, it pursued a legitimate aim, and that there was "a reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, among other authorities, the *Marckx v. Belgium* judgment of 13 June 1979, Series A No. 31, p. 16, § 33). Such difference of treatment as there was therefore had an objective and reasonable justification within the meaning of the Court's consistent case-law.

88. There has accordingly been no violation of Article 9 of the Convention taken in conjunction with Article 14.

## Hasan and Chaush v. Bulgaria

### (Replacement of the leadership of the Muslim religious community by the authorities)

[...]

55. The applicants complained that the alleged forced replacement of the leadership of the Muslim religious community in Bulgaria in 1995 and the ensuing events up to October 1997 had given rise to a violation of their rights under Article 9 of the Convention.

[...]

60. The Court recalls that freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the Convention. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it (see *Serif v. Greece*, No. 38178/97, § 49, ECHR 1999-IX, and the *Kokkinakis v. Greece* judgment of 25 May 1993, Series A No. 260-A, pp. 17-18, §§ 31 and 33).

While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance. Nevertheless, Article 9 does not protect every act motivated or inspired by a religion or belief (see the *Kalaç v. Turkey* judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, p. 1209, § 27).

[...]

62. The Court recalls that religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of a divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is

undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9 of the Convention.

Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. Seen in this perspective, the believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.

63. There is no doubt, in the present case, that the applicants are active members of the religious community. The first applicant was an elected Chief Mufti of the Bulgarian Muslims. The Court need not establish whether the second applicant, who used to work as an Islamic teacher, was also employed as a secretary to the Chief Mufti's Office, it being undisputed that Mr Chaush is a Muslim believer who actively participated in religious life at the relevant time.

64. It follows that the events complained of concerned both applicants' right to freedom of religion, as enshrined in Article 9 of the Convention. That provision is therefore applicable.

65. [...] The Court finds, therefore, that the applicants' complaints fall to be examined under Article 9 of the Convention. In so far as they touch upon the organisation of the religious community, the Court reiterates that Article 9 must be interpreted in the light of the protection afforded by Article 11 of the Convention.

[...]

77. The Court does not deem it necessary to decide *in abstracto* whether acts of formal registration of religious communities and changes in their leadership constitute an interference with the rights protected by Article 9 of the Convention.

78. Nevertheless, the Court considers, like the Commission, that facts demonstrating a failure by the authorities to remain neutral in the exercise of their powers in this domain must lead to the conclusion that the State interfered with the believers' freedom to manifest their religion within the meaning of Article 9 of the Convention. It recalls that, but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate. State action favouring one leader of a divided religious community or undertaken with the purpose of forcing the community to come together under a single leadership against its own wishes would likewise constitute an interference with freedom of religion. In democratic societies the State does not need to take measures to ensure that religious communities are brought under a unified leadership (see *Serif*, cited above, § 52).

79. In the present case the Court notes that by virtue of Decree R-12 and the decision of the Directorate of Religious Denominations of 23 February 1995 the executive branch of government in Bulgaria proclaimed changes in the leadership and statute of the Muslim religious community. No reasons were given for this decision. There was no explanation why preference was to be given to the leaders elected at the national conference of 2 November 1994, which was organised by Mr Gendzhev's followers, and not to the first applicant, who had the support of another part of the community, as evidenced by the results of the national conference held on 6 March 1995.

The Court further observes that in Bulgaria the legitimacy and representation powers of the leadership of a religious denomination are certified by the Directorate of Religious Denominations. The first applicant was thus deprived of his representation powers in law and in practice by virtue of the impugned decisions of February 1995. He was refused

assistance by the prosecuting authorities against the forced eviction from the offices of the Chief Mufti precisely on the ground that Decree R-12 proclaimed another person as the Chief Mufti. He was apparently not able to retain control over at least part of the property belonging to the community, although Mr Hasan undoubtedly had the support of a significant proportion of its members. The impugned decisions thus clearly had the effect of putting an end to the first applicant's functions as Chief Mufti, removing the hitherto recognised leadership of the religious community and disallowing its statute and by-laws.

The resulting situation remained unchanged throughout 1996 and until October 1997 as the authorities repeatedly refused to give effect to the decisions of the national conference organised by the first applicant on 6 March 1995.

[...]

81. The Government's argument that nothing prevented the first applicant and those supporting him from organising meetings is not an answer to the applicants' grievances. It cannot be seriously maintained that any State action short of restricting the freedom of assembly could not amount to an interference with the rights protected by Article 9 of the Convention even though it adversely affected the internal life of the religious community.

82. The Court therefore finds, like the Commission, that Decree R-12, the decision of the Directorate of Religious Denominations of 23 February 1995, and the subsequent refusal of the Council of Ministers to recognise the existence of the organisation led by Mr Hasan were more than acts of routine registration or of correcting past irregularities. Their effect was to favour one faction of the Muslim community, granting it the status of the single official leadership, to the complete exclusion of the hitherto recognised leadership. The acts of the authorities operated, in law and in practice, to deprive the excluded leadership of any possibility of continuing to represent at least part of the Muslim community and of managing its affairs according to the will of that part of the community.



There was therefore an interference with the internal organisation of the Muslim religious community and with the applicants' right to freedom of religion as protected by Article 9 of the Convention.

83. Such an interference entails a violation of that provision unless it is prescribed by law and necessary in a democratic society in pursuance of a legitimate aim (see *Cha'are Shalom Ve Tsedek v. France* [GC], No. 27417/95, §§ 75 and 84, ECHR 2000-VII).

[...]

84. The Court reiterates its settled case-law according to which the expressions "prescribed by law" and "in accordance with the law" in Articles 8 to 11 of the Convention not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question. The law should be both adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct (see the *Sunday Times v. the United Kingdom (No. 1)* judgment of 26 April 1979, Series A No. 30, p. 31, § 49; the *Larissis and Others v. Greece* judgment of 24 February 1998, Reports 1998-I, p. 378, § 40; *Hashman and Harrup v. the United Kingdom* [GC], No. 25594/94, § 31, ECHR 1999-VIII; and *Rotaru v. Romania* [GC], No. 28341/95, § 52, ECHR 2000-V).

For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise (see *Rotaru*, cited above, § 55).

The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to

cover and the number and status of those to whom it is addressed (see *Hashman and Harrup*, cited above, § 31, and the *Groppera Radio AG and Others v. Switzerland* judgment of 28 March 1990, Series A No. 173, p. 26, § 68).

85. The Court notes that in the present case the relevant law does not provide for any substantive criteria on the basis of which the Council of Ministers and the Directorate of Religious Denominations register religious denominations and changes of their leadership in a situation of internal divisions and conflicting claims for legitimacy. Moreover, there are no procedural safeguards, such as adversarial proceedings before an independent body, against arbitrary exercise of the discretion left to the executive.

Furthermore, Decree R-12 and the decision of the Directorate were never notified to those directly affected. These acts were not reasoned and were unclear to the extent that they did not even mention the first applicant, although they were intended to, and indeed did, remove him from his position as Chief Mufti.

The Court has already found that these acts and the subsequent refusal of the Council of Ministers to recognise the leadership of Mr Hasan had the effect of arbitrarily favouring one faction of the divided religious community. It is noteworthy in this context that the replacement of the community's leadership in 1995, as well as in 1992 and 1997, occurred shortly after a change of government.

86. The Court finds, therefore, that the interference with the internal organisation of the Muslim community and the applicants' freedom of religion was not "prescribed by law" in that it was arbitrary and was based on legal provisions which allowed an unfettered discretion to the executive and did not meet the required standards of clarity and foreseeability.

[...]

88. In view of these findings the Court deems it unnecessary to continue the examination of the applicants' complaints in respect of the "legitimate aim" and "necessary in a democratic society" requirements. Such an

examination can only be undertaken if the aim of the interference is clearly defined in domestic law.

89. There has, therefore, been a violation of Article 9 of the Convention.

## **Metropolitan Church of Bessarabia and Others v. Moldova**

### **(Authorities' refusal to recognise an autonomous Orthodox Church)**

[...]

94. The applicants alleged that the Moldovan authorities' refusal to recognise the Metropolitan Church of Bessarabia infringed their freedom of religion, since only religions recognised by the government could be practised in Moldova. They asserted in particular that their freedom to manifest their religion in community with others was frustrated by the fact that they were prohibited from gathering together for religious purposes and by the complete absence of judicial protection of the applicant Church's assets.

[...]

101. The Court reiterates at the outset that a Church or ecclesiastical body may, as such, exercise on behalf of its adherents the rights guaranteed by Article 9 of the Convention (see *Cha'are Shalom Ve Tsedek v. France* [GC], No. 27417/95, § 72, ECHR 2000-VII). In the present case the Metropolitan Church of Bessarabia may therefore be considered an applicant for the purposes of Article 34 of the Convention.

[...]

105. The Court notes that, according to the Religious Denominations Act, only religions recognised by government decision may be practised.

In the present case the Court observes that, not being recognised, the applicant Church cannot operate. In particular, its priests may not conduct divine service, its members may not meet to practise their religion and, not having legal personality, it is not entitled to judicial protection of its assets.

The Court therefore considers that the government's refusal to recognise the applicant Church, upheld by the Supreme Court of Justice's decision of 9 December 1997, constituted interference with the right of the applicant Church and the other applicants to freedom of religion, as guaranteed by Article 9 § 1 of the Convention.

106. In order to determine whether that interference entailed a breach of the Convention, the Court must decide whether it satisfied the requirements of Article 9 § 2, that is whether it was "prescribed by law", pursued a legitimate aim for the purposes of that provision and was "necessary in a democratic society".

[...]

109. The Court refers to its established case-law to the effect that the terms "prescribed by law" and "in accordance with the law" in Articles 8 to 11 of the Convention not only require that the impugned measures have some basis in domestic law, but also refer to the quality of the law in question, which must be sufficiently accessible and foreseeable as to its effects, that is formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct (see *Sunday Times v. the United Kingdom (No. 1)*, judgment of 26 April 1979, Series A No. 30, p. 31, § 49; *Larissis and Others v. Greece*, judgment of 24 February 1998, Reports 1998-I, p. 378, § 40; *Hashman and Harrup v. the United Kingdom [GC]*, No. 25594/94, § 31, ECHR 1999-VIII; and *Rotaru v. Romania [GC]*, No. 28341/95, § 52, ECHR 2000-VI).

For domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise (see *Hasan and Chaush v. Bulgaria [GC]*, No. 30985/96, § 84, ECHR 2000-XI).

The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see *Hashman and Harrup*, cited above, § 31, and *Groppera Radio AG and Others v. Switzerland*, judgment of 28 March 1990, Series A No. 173, p. 26, § 68).

110. In the present case the Court notes that section 14 of the Law of 24 March 1992 requires religious denominations to be recognised by a government decision and that, according to section 9 of the same law, only denominations whose practices and rites are compatible with the Moldovan Constitution and legislation may be recognised.

Without giving a categorical answer to the question whether the above-mentioned provisions satisfy the requirements of foreseeability and precision, the Court is prepared to accept that the interference in question was “prescribed by law” before deciding whether it pursued a “legitimate aim” and was “necessary in a democratic society”.

[...]

113. The Court considers that States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population or to public safety (see *Manoussakis and Others*, cited above, p. 1362, § 40, and *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Nos. 29221/95 and 29225/95, § 84, ECHR 2001-IX).

Having regard to the circumstances of the case, the Court considers that the interference complained of pursued a legitimate aim under Article 9 § 2, namely protection of public order and public safety.

[...]

123. The Court notes that Article 31 of the Moldovan Constitution guarantees freedom of religion and enunciates the principle of religious denominations’ autonomy *vis-à-vis* the State, and that the Religious

Denominations Act (the Law of 24 March 1992) lays down a procedure for the recognition of religious denominations.

[...]

The Court notes first of all that the applicant Church lodged a first application for recognition on 8 October 1992 to which no reply was forthcoming, and that it was only later, on 7 February 1993, that the State recognised the Metropolitan Church of Moldova. That being so, the Court finds it difficult, at least for the period preceding recognition of the Metropolitan Church of Moldova, to understand the Government's argument that the applicant Church was only a schismatic group within the Metropolitan Church of Moldova, which had been recognised.

In any event, the Court observes that the State's duty of neutrality and impartiality, as defined in its case-law, is incompatible with any power on the State's part to assess the legitimacy of religious beliefs, and requires the State to ensure that conflicting groups tolerate each other, even where they originated in the same group. In the present case, the Court considers that by taking the view that the applicant Church was not a new denomination and by making its recognition depend on the will of an ecclesiastical authority that had been recognised – the Metropolitan Church of Moldova – the State failed to discharge its duty of neutrality and impartiality. Consequently, the Government's argument that refusing recognition was necessary in order to uphold Moldovan law and the Moldovan Constitution must be rejected.

[...]

124. The Court notes in the first place that in its articles of association, in particular in the preamble thereto, the applicant Church defines itself as an autonomous local Church, operating within Moldovan territory in accordance with the laws of that State, and whose name is a historical one having no link with current or previous political situations. Although its activity is mainly religious, the applicant Church states that it is also prepared to cooperate with the State in the fields of culture, education and social assistance. It further declares that it has no political activity.

The Court considers those principles to be clear and perfectly legitimate.

125. At the hearing on 2 October 2001 the Government nevertheless submitted that in reality the applicant Church was engaged in political activities contrary to Moldovan public policy and that, were it to be recognised, such activities would endanger Moldovan territorial integrity.

The Court reiterates that while it cannot be ruled out that an organisation's programme might conceal objectives and intentions different from the ones it proclaims, to verify that it does not the Court must compare the content of the programme with the organisation's actions and the positions it defends (see *Sidiropoulos and Others*, cited above, p. 1618, § 46). In the present case it notes that there is nothing in the file which warrants the conclusion that the applicant Church carries on activities other than those stated in its articles of association.

As to the press articles mentioned above, although their content, as described by the Government, reveals ideas favourable to reunification of Moldova with Romania, they cannot be imputed to the applicant Church. Moreover, the Government have not argued that the applicant Church had prompted such articles.

Similarly, in the absence of any evidence, the Court cannot conclude that the applicant Church is linked to the political activities of the above-mentioned Moldovan organisations (see paragraph 120 above), which are allegedly working towards unification of Moldova with Romania. Furthermore, it notes that the Government have not contended that the activity of these associations and political parties is illegal.

As for the possibility that the applicant Church, once recognised, might constitute a danger to national security and territorial integrity, the Court considers that this is a mere hypothesis which, in the absence of corroboration, cannot justify a refusal to recognise it.

[...]

126. The Court notes that the Government did not dispute that incidents had taken place at meetings of the adherents and members of the clergy of the applicant Church (see paragraphs 47-87 above). In particular, conflicts have occurred when priests belonging to the applicant Church tried to celebrate mass in places of worship to which the adherents and

clergy of the Metropolitan Church of Moldova laid claim for their exclusive use, or in places where certain persons were opposed to the presence of the applicant Church on the ground that it was illegal.

On the other hand, the Court notes that there are certain points of disagreement between the applicants and the Government about what took place during these incidents.

127. Without expressing an opinion on exactly what took place during the events concerned, the Court notes that the refusal to recognise the applicant Church played a role in the incidents.

[...]

129. The Court notes that, under Law No. 979-XII of 24 March 1992, only religions recognised by a government decision may be practised in Moldova. In particular, only a recognised denomination has legal personality (section 24), may produce and sell specific liturgical objects (section 35) and engage clergy and employees (section 44). In addition, associations whose aims are wholly or partly religious are subject to the obligations arising from the legislation on religious denominations (section 21).

That being so, the Court notes that in the absence of recognition the applicant Church may neither organise itself nor operate. Lacking legal personality, it cannot bring legal proceedings to protect its assets, which are indispensable for worship, while its members cannot meet to carry on religious activities without contravening the legislation on religious denominations.

As regards the tolerance allegedly shown by the government towards the applicant Church and its members, the Court cannot regard such tolerance as a substitute for recognition, since recognition alone is capable of conferring rights on those concerned.

The Court further notes that on occasion the applicants have not been able to defend themselves against acts of intimidation, since the authorities have fallen back on the excuse that only legal activities are entitled to legal protection (see paragraphs 56, 57 and 84 above).



Lastly, it notes that when the authorities recognised other liturgical associations they did not apply the criteria which they used in order to refuse to recognise the applicant Church and that no justification has been put forward by the Government for this difference in treatment.

130. In conclusion, the Court considers that the refusal to recognise the applicant Church has such consequences for the applicants' freedom of religion that it cannot be regarded as proportionate to the legitimate aim pursued or, accordingly, as necessary in a democratic society, and that there has been a violation of Article 9 of the Convention.

## **Pretty v. the United Kingdom**

### **(Ban on assisted suicide)**

[...]

82. 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 § 1 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 § 1 does not cover each act which is motivated or influenced by a religion or belief (see *Arrowsmith v. the United Kingdom*, No. 7050/77, Commission's report of 12 October 1978, DR 19, p. 19, § 71). To the extent that the applicant's views reflect her commitment to the principle of personal autonomy, her claim is a restatement of the complaint raised under Article 8 of the Convention.

83. The Court concludes that there has been no violation of Article 9 of the Convention.

## Vergos v. Greece

### (Authorities' refusal of permission to build a prayer-house)

[...]

26. The appellant alleged that the authorities' refusal to modify the land-use plan of the town where he lived so that he could be granted planning permission to build a prayer-house on a plot of land belonging to him for followers of the Julian calendar residing in his district infringed his freedom of religion.

[...]

37. The Court reiterates that it has already examined the compatibility with Article 9 of the Convention of the statutory provisions of Greek national law making construction of a place of worship subject to prior authorisation by local government. Thus in *Manoussakis v. Greece* (cited above), the Court concluded that Article 9 had been violated because it found that the Greek authorities had tended to use the possibilities afforded by the relevant law to impose rigid, or indeed prohibitive, conditions on the practice of religious beliefs by certain non-Orthodox movements, in particular by hindering the construction of places of worship by Jehovah's Witnesses.

38. However, the present case is very different from the *Manoussakis* case. Firstly, the Supreme Administrative Court noted that the prayer-house the applicant wished to build was a public building and that, under the decree of 16 August 1923, buildings in that category were not permitted on sites not designated for such use in the land-use plan. Construction of the prayer-house would therefore require modification of the land-use plan. Consequently, in the present case the applicant was not seeking enforcement by the authorities of a right relating to the exercise of his freedom of religion, which was already positively recognised by domestic legislation. His plot could only be used for specified purposes. The applicant was thus requesting, in the name of the exercise of freedom of worship, a derogation from the pre-established planning regulations of the town where he lived.

39. Secondly, in this case the application to construct a church came not from Jehovah's Witnesses but from a member of the Old Calendarists, who are considered to be Orthodox, although they do not belong to the Greek Church. With Judgment No. 144/1991 of the Supreme Administrative Court, the statutory provisions applying to non-Orthodox communities ceased to apply to Old Calendarists, for whom construction of churches is now subject solely to planning law, such as the decree of 16 August 1923. Consequently, this is not a case of administrative practice directly aimed at limiting the activities of non-Orthodox faiths. On the contrary, it is a matter of the compatibility of Article 9 of the Convention with existing legal provisions concerning the criteria for modifying a land-use plan for the purposes of constructing a public building, as interpreted by the Greek Supreme Administrative Court.

40. It follows that in this instance, unlike the *Manoussakis* case, the Court has to decide whether the interpretation of a law that is at first sight neutral regarding the exercise of freedom of worship (see above, "Relevant domestic and international law and practice") is consistent with the Convention. The specific question arising here is whether the Supreme Administrative Court's enforcement of general planning provisions in this case might contravene Article 9 of the Convention. It is a matter of weighing the applicant's freedom to manifest his religion against the public interest in rational planning. It is therefore important to consider whether the quantitative criterion used by the Supreme Administrative Court to determine whether or not there was a "social need" is consistent with the requirements of Article 9 § 2 of the Convention.

41. The Court finds that the criterion adopted by the Supreme Administrative Court cannot be called arbitrary. Permission to modify the land-use plan could only be granted for the construction of a public building. Although it is reasonable to think that, in these circumstances, the needs of the religious community might play a role, it is obvious that the public interest in rational planning could not be overruled by the need to worship of a single member of the religious community

concerned when there was a prayer-house in a neighbouring town which met the community's needs in the region.

42. In the light of the foregoing, and having regard to contracting states' margin of appreciation in matters of town and country planning (see *Buckley v. the United Kingdom*, judgment of 25 September 1996, Reports 1996-IV, §§ 74-75; *Johannische Kirche & Horst Peters v. Germany* (dec.), No. 41754/98, 10 July 2001) the Court finds that the measure concerned was justified in principle and proportionate to the aim pursued.

43. Accordingly, there has been no violation of Article 9 of the Convention.

## **Leyla Şahin v. Turkey**

### **(Ban on wearing the Islamic headscarf at university)**

[...]

53. In European countries, the debate on the Islamic headscarf is concerned more with primary and secondary State schools than with higher-education institutions. In the French speaking parts of Belgium, where there are no rules concerning the headscarf and disputes on the issue are generally resolved at local level, a number of State schools have refused to allow the Islamic headscarf. In the cases which have come before them, the Belgian courts have consistently held that the principles of equality and neutrality of State education take precedence over freedom of religion and have found against the complainants and their families.

54. In France, where secularism is regarded as one of the cornerstones of republican values, the question of the Islamic headscarf in State schools has given rise to a very lively debate. After the Commission on Secularism had reported to the President of the Republic with its opinion, the National Assembly approved a bill on 10 February 2004 regulating, pursuant to the principle of secularism, the wearing of signs or dress manifesting a religious affiliation in State primary and secondary schools. Article 1 of the Act provides:

“In State primary and secondary schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited.

“The school rules shall state that the institution of disciplinary proceedings shall be preceded by a dialogue with the pupil.”

55. As regards the universities, the Commission on Secularism considered that precedence should be given to the students' right to express their religious, political and philosophical convictions. However, it stated in its report that such expression should not lead to transgressions of the rules on the functioning of universities.

56. In other countries, in some cases after a protracted legal debate, the State education authorities permit Muslim pupils and students to wear the Islamic headscarf (in Germany, the Netherlands, Switzerland and the United Kingdom). Nevertheless, the legal position is not uniform. In Germany, where the debate has for several years focused on whether teachers should be allowed to wear the Islamic headscarf, the Constitutional Court stated on 24 September 2003 in a case between a teacher and the *Land* of Baden-Württemberg that the lack of any express statutory prohibition meant that teachers were entitled to wear the headscarf. In the United Kingdom the Islamic headscarf is accepted by most teaching institutions and the rare disputes that do arise are generally resolved within the institution concerned.

57. It would appear that in a number of other countries, the issue of the Islamic headscarf has yet to give rise to any detailed legal debate (Sweden, Austria, Spain, the Czech Republic, Slovakia and Poland).

[...]

64. The applicant submitted that the ban on wearing the Islamic headscarf in higher-education institutions constituted an unjustified interference with her right to freedom of religion, and, in particular, her right to manifest her religion.

[...]

66. The Court reiterates that 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. This freedom 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. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (see, among other authorities, *Kokkinakis v. Greece*, 25 May 1993, Series A No. 260-A, p. 17, § 3; and *Buscarini and Others v. San Marino* [GC], No. 24645/94, § 34, ECHR 1999-I).

While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance (see, *mutatis mutandis*, *Cha'are Shalom Ve Tsedek v. France* [GC], No. 27417/95, § 73, ECHR 2000-VII).

Article 9 does not protect every act motivated or inspired by a religion or belief and does not in all cases guarantee the right to behave in the public sphere in a way which is dictated by a belief (see, among many other authorities, *Kalaç v. Turkey*, judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, p. 1209, § 27; *Arrowsmith v. the United Kingdom*, No. 7050/75, Commission decision of 12 October 1978, *Decisions and Reports* (DR) 19, p. 5; and *C. v. the United Kingdom*, No. 10358/83, Commission decision of 15 December 1983, DR 37, p. 142).

[...]

70. The Court notes, firstly, that, according to the material in the case file, no disciplinary proceedings have been brought against the applicant that resulted in her expulsion for failure to comply with the rules on dress. Nor has the applicant complained about the disciplinary penalties that were imposed on her before being annulled on 28 June 2000 (see paragraph 24 above). The present application, therefore, only concerns a general measure issued by the University of Istanbul, namely the circular of 23 February 1998, and its implementation in the instant case.

[...]

74. The Court reiterates its established case-law, according to which the words “prescribed by law” not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see, among many other authorities, *Rotaru v. Romania* [GC], No. 28341/95, § 52, ECHR 2000-V).

75. In the instant case, the Court notes that the circular of 23 February 1998, which banned students with beards or wearing veils from access to lectures, courses and tutorials, is a regulatory provision that was issued by the Vice Chancellor of the University of Istanbul. There is no doubt that, as the executive organ of the University, the Vice Chancellor had the requisite power, subject to complying with the requirement of lawfulness (see paragraphs 15, 50 and 51 above). According to the applicant, however, that circular was not compatible with transitional section 17 of the Higher-Education Act (Law No. 2547), as that section did not impose a ban on wearing the Islamic headscarf.

76. The Court must therefore consider whether transitional section 17 of the Higher-Education Act (Law No. 2547) can constitute a legal basis for the circular. It reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (*Kruslin v. France*, judgment of 24 April 1990, Series A No. 176-A, p. 21, § 29). In that regard, it notes that in rejecting the argument that the circular was illegal, the administrative courts relied on the settled case-law of the Supreme Administrative Court and the Constitutional Court (see paragraph 15 above).

77. Further, as regards the words “in accordance with the law” and “prescribed by law” which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term “law” in its “substantive” sense, not its “formal” one; it has included both “written law”, encompassing enactments of lower rank than statutes (*De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A No 12, p. 45, § 93) and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by

parliament (*Barthold v. Germany*, judgment of 25 March 1985, Series A No. 90, p. 21, § 46) and unwritten law. "Law" must be understood to include both statutory law and judge-made "law" (see, among other authorities, *Sunday Times v. United-Kingdom* (No. 1), judgment of 26 April 1979, Series A No. 30, p. 30, § 47; *Kruslin*, cited above, § 29 *in fine*; and *Casado Coca v. Spain*, judgment of 24 February 1994, Series A No. 285-A, p. 18, § 43). Judge-made law is regarded as a valid source of law under Turkish law (see paragraph 51 above). In sum, the "law" is the provision in force as the competent courts have interpreted it.

78. Accordingly, the question must be examined on the basis not only of the wording of transitional section 17 of the Higher-Education Act (Law No. 2547), but also of the case-law. From that standpoint, the question of the foreseeability of the "law" concerned does not give rise to any problem, as the Constitutional Court's judgment makes it clear that authorising students to "cover the neck and hair with a veil or headscarf for reasons of religious conviction" in the universities was contrary to the Constitution (see paragraph 38 above).

That judgment of the Constitutional Court, which was both binding (see paragraph 52 above) and accessible, as it had been published in the Official Gazette of 31 July 1991 (see paragraph 38 above), supplemented the letter of transitional section 17 and followed the Constitutional Court's own previous case-law (see paragraph 36 above). In addition, the Supreme Administrative Court had for many years prior to that taken the view that the Islamic headscarf was not compatible with the fundamental principles of the Republic (see paragraph 34 above).

79. As to the manner in which the University of Istanbul applied the relevant provision, it is beyond doubt that regulations on wearing the Islamic headscarf had existed well before the applicant enrolled at the University. As shown by the University's resolution of 1 June 1994 and the memorandum issued in 1994 by the Vice Chancellor (see paragraphs 40-42 above), students, particularly those who, like the applicant, were studying a health-related subject, were required to comply with rules on dress. The rules clearly prohibited students from wearing religious attire,



including the Islamic headscarf, during tutorials on health and applied sciences.

[...]

81. In these circumstances, the Court finds that there was a basis for the interference in Turkish law. The law was also accessible and sufficiently precise in its terms to satisfy the requirement of foreseeability. It would have been clear to the applicant, from the moment she entered the University of Istanbul, that there were regulations on wearing the Islamic headscarf and, from 23 February 1998, that she was liable to be refused access to lectures if she continued to do so.

[...]

84. Having regard to the circumstances of the case and the terms of the domestic courts' decisions, the Court finds that the impugned measure primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order.

[...]

97. In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected (*Kokkinakis*, cited above, p. 18, § 33).

98. The Court notes that, in the decisions of *Karaduman v. Turkey* (No. 16278/90, Commission decision of 3 May 1993, DR 74, p. 93) and *Dahlab v. Switzerland* (No. 42393/98, ECHR 2001-V), the Convention institutions found that in a democratic society the State was entitled to place restrictions on the wearing of the Islamic headscarf if it was incompatible with the pursued aim of protecting the rights and freedoms of others, public order and public safety. In the *Dahlab* case cited above, in which the applicant was a schoolteacher in charge of a class of small children, it stressed among other matters the impact that the "powerful external symbol" conveyed by her wearing a headscarf could have and questioned whether it might have some kind of proselytising effect, seeing

that it appeared to be imposed on women by a precept laid down in the Koran that was hard to reconcile with the principle of gender equality.

99. Likewise, the Court has also previously stated that the principle of secularism in Turkey is undoubtedly one of the fundamental principles of the State, which are in harmony with the rule of law and respect for human rights (*Refah Partisi and Others*, cited above, § 93). In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under Article 9 § 2 of the Convention. In that context, secular universities may regulate manifestation of the rites and symbols of the said religion by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others (*Refah Partisi and Others*, cited above, § 95).

100. The Court observes at the same time that the role of the Convention machinery is essentially subsidiary. As is well established by its case-law, the national authorities are in principle better placed than an international court to evaluate local needs and conditions (see, among other authorities, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A No. 24, § 48). It is for the national authorities to make the initial assessment of the "necessity" for an interference, as regards both the legislative framework and the particular measure of implementation. Although a margin of appreciation is thereby left to the national authorities, their decision remains subject to review by the Court for conformity with the requirements of the Convention (see, *mutatis mutandis*, *Hatton and Others v. the United Kingdom* [GC], No. 36022/97, § 101, ECHR 2003-VIII).

101. In determining the scope of the margin of appreciation left to the States, regard must be had to the importance of the right guaranteed by the Convention, the nature of the restricted activities and the aim of the restrictions (see, *mutatis mutandis*, *Hatton and Others*, cited above, § 101;

and *Buckley v. the United Kingdom* judgment of 25 September 1996, *Reports* 1996-IV, p. 1292, § 76). Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance (see, *mutatis mutandis*, *Cha'are Shalom Ve Tsedek*, cited above, § 84; and *Wingrove v. the United Kingdom* judgment of 25 November 1996, *Reports* 1996-V, p. 1958, § 58). In such cases, it is necessary to have regard to the fair balance that must be struck between the various interests at stake: the rights and freedoms of others, avoiding civil unrest, the demands of public order and pluralism (see, *mutatis mutandis*, *Kokkinakis*, cited above, § 31; *Manoussakis and Others v. Greece* judgment of 26 September 1996, *Reports* 1996-IV, p. 1364, § 44; and *Casado Coca*, cited above, § 55).

102. A margin of appreciation is particularly appropriate when it comes to the regulation by the Contracting States of the wearing of religious symbols in teaching institutions, since rules on the subject vary from one country to another depending on national traditions (see paragraphs 53-57 above) and there is no uniform European conception of the requirements of "the protection of the rights of others" and of "public order" (*Wingrove*, cited above, § 58; and *Casado Coca*, cited above, § 55). It should be noted in this connection that the very nature of education makes regulatory powers necessary (see, *mutatis mutandis*, *Kjeldsen, Busk Madsen and Pedersen v. Denmark* judgment of 7 December 1976, Series A No. 23, p. 26, § 53, *X v. the United Kingdom*, No. 8160/78, Commission decision of 12 March 1981, DR 22, p. 27; and *40 mothers v. Sweden*, No. 6853/74, Commission decision of 9 March 1977, DR 9, p. 27). That, of course, does not exclude European supervision, especially as such regulations must never entail a breach of the principle of pluralism, conflict with other rights enshrined in the Convention, or entirely negate the freedom to manifest one's religion or belief (see, *mutatis mutandis*, *Case relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium* judgment of 23 July 1968, Series A No. 6, p. 32, § 5; and *Yanasik v. Turkey*, No. 14524/89, Commission decision of 6 January 1993, DR 74, p. 14).

[...]

103. In order to assess the “necessity” of the interference caused by the circular of 23 February 1998 imposing restrictions as to place and manner on the rights of students such as Ms Şahin to wear the Islamic headscarf on university premises, the Court must put the circular in its legal and social context and examine it in the light of the circumstances of the case. Regard being had to the principles applicable in the instant case, the Court’s task is confined to determining whether the reasons given for the interference were relevant and sufficient and the measures taken at the national level proportionate to the aims pursued.

104. It must first be observed that the interference was based, in particular, on two principles – secularism and equality – which reinforce and complement each other (see paragraphs 34 and 36 above).

105. In its judgment of 7 March 1989, the Constitutional Court stated that secularism in Turkey was, among other things, the guarantor of democratic values, the principle that freedom of religion is inviolable – to the extent that it stems from individual conscience – and the principle that citizens are equal before the law (see paragraph 36 above). Secularism also protected the individual from external pressure. It added that restrictions could be placed on freedom to manifest one’s religion in order to defend those values and principles.

106. This notion of secularism appears to the Court to be consistent with the values underpinning the Convention and it accepts that upholding that principle may be regarded as necessary for the protection of the democratic system in Turkey.

107. The Court further notes the emphasis placed in the Turkish constitutional system on the protection of the rights of women (see paragraph 28 above). Gender equality – recognised by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe (see, among other authorities, *Abdulaziz, Cabales and Balkandali v. United-Kingdom*, judgment of 28 May 1985, Series A No. 77, p. 38, § 78; *Schuler-Zraggen v. Switzerland*, judgment of 24 June 1993, Series A No. 263, pp. 21–22, § 67; *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A No. 280-B, p. 29, § 27; *Van Raalte v. the Netherlands*, judgment of

21 February 1997, *Reports* 1997-I, p. 186, § 39, *in fine*; and *Petrovic v. Austria* judgment of 27 March 1998, *Reports* 1998-II, p. 587, § 37) – was also found by the Turkish Constitutional Court to be a principle implicit in the values underlying the Constitution (see paragraph 36 above).

108. In addition, like the Constitutional Court (see paragraph 36 above), the Court considers that, when examining the question of the Islamic headscarf in the Turkish context, there must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it. As has already been noted (see *Karaduman*, decision cited above; and *Refah Partisi and Others*, cited above, § 95), the issues at stake include the protection of the “rights and freedoms of others” and the “maintenance of public order” in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated (see paragraphs 32 and 34 above), this religious symbol has taken on political significance in Turkey in recent years.

109. The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts (see paragraphs 32 and 33 above). It has previously said that each Contracting State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience (*Refah Partisi and Others*, cited above, § 124). The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university.

110. Having regard to the above background, it is the principle of secularism, as elucidated by the Constitutional Court (see paragraph 36 above), which is the paramount consideration underlying the ban on the wearing of religious insignia in universities. It is understandable in such a

context where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women, are being taught and applied in practice, that the relevant authorities would consider that it ran counter to the furtherance of such values to accept the wearing of religious insignia, including as in the present case, that women students cover their heads with a headscarf while on university premises.

111. The applicant has been critical of the manner in which the university authorities applied the measures (see paragraphs 86-88 above). However, the Court notes that it is undisputed that in Turkish universities, to the extent that they do not overstep the limits imposed by the organisational requirements of State education, practising Muslim students are free to perform the religious duties that are habitually part of Muslim observance. In addition, the resolution which was adopted by Istanbul University on 9 July 1998 (see paragraph 45 above) treated all forms of dress symbolising or manifesting a religion or faith on an equal footing in barring them from the university premises.

112. As stated above (see paragraph 78), it is quite clear that the Turkish courts considered the Islamic headscarf to be incompatible with the Constitution and that regulations on wearing headscarves on university premises had existed for a number of years (see paragraphs 33, 34 and 42 above). That being so, the fact that some universities may not have applied the rules rigorously – depending on the context and the special features of individual courses – does not mean that the rules were unjustified. Nor does it mean that the university authorities waived their right to exercise the regulatory power they derived from statute, the rules governing the functioning of universities and the needs of individual courses. Likewise, whatever a university's policy on the wearing of religious symbols, its regulations and the individual measures taken to implement them are amenable to judicial review in the administrative courts (see paragraph 51 above).

113. Moreover, there had already been a lengthy debate on whether students could wear the Islamic headscarf by the time the circular was issued on 23 February 1998 (see paragraphs 31 and 33-38 above). When the issue surfaced at Istanbul University in 1994 in relation to the medical

courses, the university authorities reminded the students of the applicable rules (see paragraphs 40-42 above). The Court notes that, rather than barring students wearing the Islamic headscarf access to the university, the university authorities sought throughout that decision-making process to adapt to the evolving situation through continued dialogue with those concerned, while at the same time ensuring that order was maintained on the premises.

114. In the light of the foregoing and having regard in particular to the margin of appreciation left to the Contracting States, the Court finds that the University of Istanbul's regulations imposing restrictions on the wearing of Islamic headscarves and the measures taken to implement them were justified in principle and proportionate to the aims pursued and, therefore, could be regarded as "necessary in a democratic society".

115. Consequently, there has been no breach of Article 9 of the Convention.

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## **APPENDIX III: TABLE OF ABBREVIATIONS USED IN FOOTNOTES**

*Add.*: Addendum

AFDI: *Annuaire français de droit international*

AJDA: *Actualité juridique du droit administratif*

CDE: *Cahiers de droit européen*

Civ.: Civil Division of the Court of Cassation

Crim.: Criminal Division of the Court of Cassation

D.: Recueil Dalloz

Doc.: Document

ECHR: European Convention on Human Rights

ECmHR: European Commission of Human Rights

ECtHR: European Court of Human Rights

GP: *Gazette du Palais*

IR: Informations rapides du Recueil Dalloz

J.: Jurisprudence

JC: Juris-Classeurs

JCP: Jurisclasseur périodique (*La Semaine Juridique*)

JDI: *Journal de droit international*

JO: *Journal Officiel* (French official gazette)

JTDE: *Journal des Tribunaux – Droit européen*

OJEC: *Official Journal of the European Communities*

*Op. cit.*: Previously cited

Rec.: Recommendation

Res.: Resolution

RDI: *Revue des droits de l'homme*

RDP: *Revue du droit public*

RDSS: *Revue de droit sanitaire et social*

RFDA: *Revue française de droit administratif*

RGDIP: *Revue générale de droit international public*

RSC: *Revue de science criminelle*

RTDH: *Revue trimestrielle des droits de l'homme*

RUDH: *Revue universelle des droits de l'homme*

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