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The meeting comprised participants from all EU member states. This widespread participation is mirrored in the contributions of this book. There are national reports from all Member States of the European Union, except for Belgium and Malta. Each national report contains translated extracts of the most important national legal decisions concerning the theme of the book. Prof. Jean Duffar has provided an overall introduction to the subject, while Prof. Malcolm Evans has provided a synthesis of the national reports.

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PEETERS

ACHILLES EMILIANIDES – Religious Freedom in the European Union

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2011

EUROPEAN CONSORTIUM FOR CHURCH AND STATE RESEARCH

Religious Freedom in the European Union

Edited by:

ACHILLES EMILIANIDES

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2011

RELIGIOUS FREEDOM IN THE EUROPEAN UNION

The volume is dedicated to
Alberto de la Hera

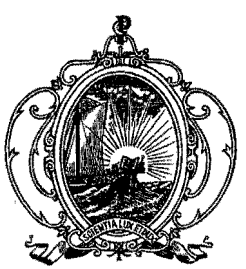
RELIGIOUS FREEDOM IN THE EUROPEAN UNION:

The Application of the European Convention on Human Rights in the European Union

Proceedings of the 19th Meeting of the European Consortium for Church and State Research Nicosia (Cyprus), 15-18 November 2007

Edited by

ACHILLES EMILIANIDES



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PREFACE

This book contains the documentation from the 19th meeting of the European Consortium for Church and State Research. It was held in Nicosia, Cyprus on 15-18 November 2007. The theme for the meeting was: 'The Application of Article 9 of the European Convention on Human Rights and other Articles of the Convention Which Deal with Religious Freedom, in the European Union Countries'. The aim of the conference was to provide an overview of the different legal ways in which the Member States of the European Union interpret in their domestic legal orders, the provisions of the European Convention on Human Rights which relate to religious freedom.

The meeting comprised participants, both members of the Consortium and invited guests, from all EU member states. This widespread participation is mirrored in the contributions of this book. The book begins with a paper by Prof. Jean Duffar who provides an overall introduction to the subject, by analysing in depth, the case – law of the European Court of Human Rights with respect to religious liberty. The first paper thus, relates to the manner in which the Convention is interpreted by the European Court in Strasbourg. The main part of the book consists of the national country reports which analyse in a comparative manner the way in which the Convention is interpreted domestically by the Member States of the European Union. Each national report contains translated extracts of the most important national legal decisions concerning the theme of the book. There are national reports from all Member States of the European Union, except for Belgium and Malta. The book is completed with an article by Prof. Malcolm Evans, who attempts to synthesise, in his own – 'idiosyncratic' as he calls it – manner, the national reports.

The book will have achieved its aim, if it provides the reader with a starting point for a comparative analysis of the manner in which the European Convention on Human Rights is interpreted by the domestic courts, with respect to the issue of freedom of religion. A comparative analysis of the method in which each national court applies the Convention, or the principles enshrined in the Convention, undoubtedly further enhances our understanding of the Convention system and promotes the dialogue for safeguarding religious freedom more effectively.

I wish to thank all those who have made contributions to this volume and to the meeting of the Consortium: members, rapporteurs and invited guests. I am also grateful to the members of the Executive Committee of the Consortium, especially I. Iban and L. Friedner, for their support and advice. I would also like to thank my major sponsor: the Government of the Republic of Cyprus, as well as my other sponsors: the Orthodox Church of Cyprus, Lumiere TV, the Hellenic Bank, Holiday Inn and Cyprus Airways. Special thanks go to the former President of the Republic of Cyprus Tassos Papadopoulos who opened the conference, as well as to the Attorney – General of the Republic, Petros Clerides and to the President of the Supreme Court, Christos Artemides.

The contributions contained in this volume have been updated up to April 2008.

I thank Peeters in Leuven, Belgium, for publishing this book.

Nicosia, 2 September 2008
Achilles C. EMILIANIDES

JEAN DUFFAR

LA JURISPRUDENCE DE LA COUR EUROPEENNE DES DROITS DE L'HOMME EN MATIÈRE DE LIBERTÉ RELIGIEUSE

«(...) La tolérance et le respect de l'égale dignité de tous les êtres humains constituent le fondement d'une société démocratique et pluraliste».[1]

Le sujet retenu pour notre Congrès est dominé par **le pluralisme.**

1 – La religion n'est plus un sujet seulement «national» mais aussi européen. Le droit interne doit nécessairement prendre en compte le pluralisme des religions dans un même État, espace ou coexistaient, il y a encore peu, une ou deux religions seulement. (... «notre époque caractérisée par une multiplicité croissante de croyances et de confessions»).[2] Pluralisme des religions dans un même État, c'est la première constatation.

2 – Dans la Convention européenne des droits de l'homme (ci-après «la Convention»), la liberté religieuse relève de l'article 9 dont le titre déjà annonce un second pluralisme «Liberté de pensée, de conscience et de religion». La liberté de religion ne présente pas dans la Convention une singularité qui justifierait un article particulier, tel qu'il en existe dans de nombreuses Constitutions. Comme l'article 18 de la Déclaration Universelle des droits de l'homme et du Pacte international relatif aux droits civils et politiques, l'article 9 de la Convention garantit un régime commun et égal aux trois libertés de pensée de conscience et de religion. Il protège toutes les convictions qu'elles soient ou non religieuses.

3 – La liberté de religion, en tant que telle, aurait perdu toute spécificité juridique dans l'article 9?[3] Le sujet présente-t-il une singularité et peut-il justifier notre Congrès? Maintenant que nous sommes réunis grâce à la

[1] Cour *Gunduz* c. *Turquie*, 04 12 2003, 40.
[2] Cour, n°44179/98, *Murphy* c. *Irlande*, 10 07 2003, 67.
[3] Liberté de pensée de conscience et de religion:
«1. Toute personne a droit à la liberté de pensée, de conscience et de religion; ce droit implique la liberté de changer de religion ou de conviction, ainsi que la liberté de manifester

cordiale hospitalité de notre excellent collègue Emilianides Achilles, il est trop tard pour s'interroger.

D'ailleurs la Cour nous invite à poursuivre. L'arrêt *Kokkinakis* du 25 mai 1993, opère une distinction entre les non croyants et les croyants: «La liberté de pensée de conscience et de religion représente l'une des assises d'une "société démocratique" au sens de la Convention, une société pluraliste – elle est un bien précieux, pour les non croyants: les athées, les agnostiques, les sceptiques ou les indifférents». Mais dans sa dimension religieuse, elle figure parmi les éléments les plus essentiels de l'identité des croyants et de leur conception de la vie. Il y va du pluralisme-chèrement acquis au cours des siècles – consubstantiel à pareille société... La liberté religieuse relève d'abord du for intérieur mais elle «implique» de surcroît la liberté de manifester sa religion.[4] Notre sujet existe bien; l'arrêt esquisse déjà les principales composantes de la liberté de religion: l'individuel, le collectif, le for intérieur, la manifestation extérieure mais toujours dans le respect du pluralisme.

4 – Cette présentation serait, cependant, partielle si elle ne mentionnait dès ici l'incidence de l'Union européenne sur l'ensemble des analyses qui suivront. D'abord, l'article II-70-1 de la Charte des droits fondamentaux «Liberté de pensée, de conscience et de religion» reproduit à un point près, l'article 9-1 de la Convention.[5] Cette rédaction a inspiré notre Consortium. Le Congrès de Tübingen consacré aux relations entre l'Union européenne et les Religions[6] a notamment insisté sur les articles I-47 «Démocratie participative» et I-52 «Statut des églises et des organisations non confessionnelles»[7] du Traité établissant une Constitution pour l'Europe.

sa religion ou sa conviction individuellement ou collectivement, en public ou en privé, par le culte, l'enseignement, les pratiques et l'accomplissement des rites.

2. La liberté de manifester sa religion ou ses convictions ne peut faire l'objet d'autres restrictions que celles qui, prévues par la loi, constituent des mesures nécessaires dans une société démocratique, à la sécurité publique, à la protection de l'ordre, de la santé ou de la morale publiques, ou à la protection des droits et libertés d'autrui».

[4] Cour, *Kokkinakis* 25 05 1995, 31; 97 *Membres de la Congrégation des Témoins de Jéhovah de Gldani* c. *Géorgie*, 03 05 2007.

[5] J. DUFFAR, in *Traité Etablissant une Constitution pour l'Europe, Partie II, La Charte des Droits Fondamentaux*, sous la direction de Laurence Burgorgue-Larsen, Anne Levade, (Fabrice Picod,, Bruylant, 2005), p. 166-176.

[6] *Religion et Droit en Dialogue: Collaboration Conventionnelle et non Conventionnelle entre État et Religion en Europe*, Actes du Colloque de Tübingen, 18-21novembre 2004, édité par R. PUZA et N. DOE, (Peeters, Leuven-Paris-Dudley-Ma, 2006).

[7] J. DUFFAR, 'Les Relations entre l'Union Européenne et les Églises', eod.loc. 265-284.

Comment, dans cette même perspective, ne pas évoquer les deux considérants suivants:

(8) «La promotion d'un dialogue interconfessionnel et multiculturel au niveau de l'Union européenne contribuerait à préserver et à renforcer la paix et les droits fondamentaux (...).

(16) Etant donné que les objectifs du programme, notamment le soutien aux organisations de la société civile et la lutte contre le racisme, la xénophobie et l'antisémitisme ainsi que la protection des droits fondamentaux et des droits des citoyens grâce à un dialogue interconfessionnel et multiculturel, ne peuvent pas être réalisés de manière suffisante par les États membres et peuvent donc, en raison des dimensions et des incidences du programme, être mieux réalisés au niveau communautaire, la Communauté peut prendre des mesures conformément au principe de subsidiarité consacré par l'article 5 du traité. Conformément au principe de proportionnalité, tel qu'énoncé audit article, la présente décision n'excède pas ce qui est nécessaire pour atteindre ces objectifs».[8]

La liberté de religion est aussi un sujet européen! L'exposé s'articulera autour des trois intitulés suivants:

I. La Liberté d'Avoir, d'Adopter ou de Changer sa Religion ou ses Convictions

La première partie repose sur les deux idées fondamentales d'égalité et de liberté. Egalité entre les religions; égalité entre les convictions et les religions; liberté absolue d'adhérer ou non à la religion ou à la conviction de son choix et éventuellement de l'abandonner. Quelques précisions, d'abord, sur l'égalité Religion – conviction §1; ensuite sur la liberté absolue de religion et de conviction §2.

A. *Égalite Religion – Conviction*

1 – La question est centrale: le droit à la liberté de pensée, de conscience et de religion implique par rapport à la religion ou à la conviction les

[8] Décision du Conseil du 19 avril 2007établissant pour la période 2007-2013, dans le cadre du programme général «Droits fondamentaux et justice», le programme spécifique «Droits fondamentaux et citoyenneté» JOUE, 27.4.2007, L 110 33 et le calendrier des rencontres entre le Président Barroso et, notamment, les représentants des religions monothéistes depuis 2005, Europa, Bureau des Conseillers de Politique Européenne.

libertés suivantes: être sans religion[9], avoir une religion et pouvoir en changer.[10] Chacun peut se convertir à une autre religion sans qu'il puisse en résulter aucun inconvénient pour le converti.[11] La jurisprudence, d'abord de la Commission, a éclairé les deux mots, qui tracent les limites de la protection de la liberté de religion par l'article 9. Les religions et les convictions doivent être traitées avec égalité comme les religions entre elles.

2 – La religion n'existe pas par la seule revendication d'un individu ou d'un groupe. La religion est un fait collectif «communauté religieuse organisée, fondée sur une identité ou une substantielle similitude de convictions»[12]. Pour être constituée socialement une religion exigerait la réunion des 3 conditions suivantes: une communauté; une organisation ce qui implique nécessairement une certaine hiérarchie, enfin des convictions communes partagées. En l'absence de ces conditions une religion alléguée ne bénéficierait pas de la garantie de l'article 9: le requérant «n'a exposé aucun fait permettant d'établir l'existence d'une religion WICCA»[13], non plus qu' un prisonnier qui se prétend adorateur de la lumière.

3 – Toutes les dispositions pertinentes des instruments internationaux associent les termes religion et «conviction». Mais toutes les convictions ne sont pas protégées par l'article 9. Selon la Commission, la conviction est l'expression d'une vision cohérente sur des problèmes

[9] L'Assemblée parlementaire du Conseil de l'Europe a recommandé au Comité des Ministres d'encourager les gouvernements des États membres à veiller à l'enseignement du fait religieux dont l'objectif «doit consister à faire découvrir aux élèves les religions qui se pratiquent dans leur pays et celles de leurs voisins, à leur faire voir que chacun a le même droit de croire que sa religion <est la vraie> et que le fait que d'autres ont une religion différente, ou n'ont pas de religion, ne les rend pas différents en tant qu'êtres humains» Recommandation (1720) 2005, Éducation et Religion, du 04 10 2005. Cette Recommandation a été précédée par une Résolution du Parlement Européen sur les droits de l'homme en 2002 et la politique de l'Union européenne en matière de droits de l'homme (2002/2011(INI) du 04 09 2003. À partir de l'article 18 de la Déclaration Universelle des droits de l'homme, la Résolution considère que le droit de ne confesser aucune religion est implicite, mentionne la liberté de ne pas croire et la liberté fondamentale de ne pas croire. J. DUFFAR. 'Liberté de Religion et Droit Européen' en 2003, Revue Europ. relations Églises – État.

[10] Cour *Kokkinakis* c. *Grèce*, 25 05 1993, 31.

[11] «Nul ne doit être inquiété pour ses opinions, même religieuses»... art. 10 de la Déclaration des droits de l'homme et du citoyen du 24 août 1789.

[12] D 7374/76, *X* c. *Danemark*, 8 3 1976, DR 5/157.

[13] D 7291 /75, *X* c. *RU*, 4 10 1977, DR 11/55.

fondamentaux[14]. Aussi la Cour en a-t-elle souligné la «densité»: «le mot <convictions> n'est pas synonyme des termes <opinions> et <idées> tels que les emploie l'article 10 de la Convention qui garantit la liberté d'expression; (...) il s'applique à des vues atteignant un certain degré de force, de sérieux, de cohérence et d'importance»[15]. Une catégorie particulière serait constituée par les convictions intimes.[16]

4 – Un des apports essentiels de l'arrêt Kokkinakis du 25 05 1993, 31 est de souligner que les convictions religieuses ou non religieuses (athéisme, indifférence) doivent être protégées à égalité avec les convictions religieuses, comme l'indique dans la phrase le mot «aussi».

«Telle que la protège l'article 9, la liberté de pensée, de conscience et de religion représente l'une des assises d'<une société démocratique> au sens de la Convention. Elle figure, dans sa dimension religieuse, parmi les éléments les plus essentiels de l'identité des croyants et de leur conception de la vie, mais elle est aussi un bien précieux pour les athées, les agnostiques, les sceptiques ou les indifférents. Il y va du pluralisme – chèrement conquis au cours des siècles – consubstantiel à pareille société».

B. *Liberté Absolue de Religion et de Conviction*

5 – Toute personne a le droit d'avoir ou d'adhérer à la religion de son choix et donc d'en changer, droit qui indirectement pose la question de l'étendue et des limites du prosélytisme.[17] L'article 9 §2 prévoit, il est vrai, des restrictions possibles à la liberté de manifester sa religion ou ses convictions, mais non à celle d'avoir ou de changer sa religion ou ses convictions: «dans le cadre de l'article 9§1, tout État contractant est tenu de respecter le droit général de toute personne à la liberté de religion et

[14] D 8741/79, *X* c. *RFA*, 10 3 1981, DR 24/141.

[15] Cour, *Campbell et Cosans*, 25 02 1982, 36; *Efstratiou* c. *Grece*, 18 12 1996, 26. «La confession des Alévis... constitue une conviction religieuse profondément enracinée dans la société et l'histoire turque et qu' elle présente des particularités qui lui sont propres. Elle se distingue ainsi de la conception sunnite de l'Islam enseignée à l'école. Il ne s'agit certainement ni d'une secte (...). Par conséquent, l'expression <convictions religieuses> au sens de la seconde phrase de l'article 2 du Protocole n°1 s'applique sans conteste à cette confession» Cour *Hasan et Eylem Zengin* c. *Turquie* 09 10 2007, 66.

[16] (...) «questions susceptibles d'offenser des *convictions intimes* dans le domaine de la morale et spécialement de la religion» Cour *Gunduz* c. *Turquie* 04 12 2003, 37.

[17] Dans l'arrêt *Murphy* préc., 73, l'interdiction de toute annonce télévisuelle à caractère religieux était fondée sur le danger de tout prosélytisme.

ce droit ne peut faire l'objet de restrictions».[18] Cette obligation positive peut cependant comporter des limites: l'article 9 n'implique pas le droit pour un ressortissant étranger d'être admis dans un État pour y exercer un emploi auprès d'une organisation religieuse.[19] Après plusieurs décisions de la Commission, la Cour a rappelé: «l'article 9 protège avant tout le domaine des convictions personnelles et des croyances religieuses ce qu'on appelle parfois, le for intérieur»[20] Comment limiter les convictions religieuses si elles sont secrètes? Ce caractère absolu entraîne notamment deux conséquences, inscrites aussi dans le droit des pays d'Europe: l'interdiction de toute contrainte en matière de religion (A) de toute discrimination fondée sur la religion (B) interdictions qui n'excluent pas, dans certaines circonstances, la possibilité de différences de traitement (C).

1. *Interdiction de toute Contrainte en Matière de Religion*

6 – L'interdiction de toute contrainte en matière de religion était déjà inscrite au canon 1951 du Code de 1917 «Nul ne doit être contraint d'embrasser la foi catholique contre sa volonté».[21] Cette contrainte constitue dans plusieurs États membres de l'Union Européenne, une infraction réprimée pénalement.[22]

– La Commission européenne des droits de l'homme (ci -après «La Commission») a déclaré que le droit général à la liberté de religion protège toute personne contre l'obligation qui pourrait lui être imposée

[18] Il n'en fut pas toujours ainsi: la loi autrichienne du 25 mai 1868 a abrogé les dispositions du Code civil permettant de déshériter la personne ayant abandonné la foi chrétienne et les dispositions du Code pénal incriminant comme délit l'incitation à abandonner la religion chrétienne et la diffusion d'une doctrine qui lui serait contraire. CCPR/ C/83/ Add.3 15 octobre 1997, 179. A titre de comparaison actuelle, tous les nationaux des Maldives sont présumés Musulmans. L'apostasie, ou la renonciation expresse à la religion islamique constitue une infraction criminelle en vertu de la Charia, applicable, mais non codifiée. Rapport de la Rapporteuse spéciale sur la liberté de religion ou de conviction, Mme Asma Jahangir, Mission aux Maldives, A/HRC/4/21/Add.3, 7 février 2007, 32.

[19] Cour *Perry* c. *Lettonie* 08 11 2007, 51. L'article 9 ne garantit pas aux ressortissants étrangers un droit à obtenir un permis de séjour aux fins d'exercice d'un emploi (en l'espèce iman) dans un État contractant, quand bien même l'employeur serait une association religieuse. Cour *El Majjaoui et Stechting Touba Moskee* c. *Pays-Bas*, 20 12 2007,32 et références.

[20] Cour, *Kokkinakis*, 25 05 1993, 31.

[21] L'article 18 §2 du PIDCP énonce explicitement: «Nul ne subira de contrainte pouvant porter atteinte à sa liberté d'avoir ou d'adopter une religion ou une conviction de son choix».

[22] J. DUFFAR, 'Le Statut Constitutionnel des Cultes dans les Pays de l'Union Européenne' Colloque du Consortium Européen Rapports Religions- États, Paris XI, 18-19 /11/ 1994, Litec, 1995, p.21-22.

de participer directement à des activités religieuses contre son gré par exemple le paiement d'un impôt confessionnel doit être considéré comme une telle participation.[23]

– Autre exemple: l'obligation de prêter serment sur les évangiles constitue bien une contrainte, les deux requérants avaient du faire allégeance à une religion donnée sous peine de déchéance de leur mandat de parlementaires.[24] la jurisprudence des organes de Strasbourg reflète des principes communs à la majorité des systèmes de droit des États membres de l'Union européenne.

2. *Interdiction de toute Discrimination Fondée sur la Religion*

7 – L'interdiction de toute discrimination fondée sur la religion, interdite notamment par les conventions de l'Organisation Internationale du Travail, et l'article 13 du Traité de la Communauté européenne[25] est une autre conséquence de l'absolue liberté d'avoir une religion ou une conviction et de pouvoir en changer. Une courte citation résume toute la jurisprudence pertinente: «Nonobstant tout argument contraire possible, on ne saurait tolérer une distinction dictée pour l'essentiel par des considérations de religion».[26]

Or, l' appartenance religieuse, notamment dans certains pays à religion d'État ou à religion nationale ou à religion dominante[27], peut entraîner des conséquences défavorables pour les groupes religieux minoritaires, parfois appelés «dissidents».[28] Dans certains pays, ces «dissidents» ne

[23] R. 11581/85 *Darby* c. *Suede*, 09 05 1989.

[24] Cour, *Buscarini* c. *Saint-Marin*, 18 2 1999.

[25] Par cet article, le Conseil est habilité à prendre les mesures nécessaires en vue de combattre toute discrimination fondée en particulier sur «la religion ou les convictions». La Directive 2000/78 du 17 11 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail place en tête des discriminations à combattre «la religion ou les convictions» (art.1). L'article 4 traite des emplois de tendance, ceux pour lesquels la considération de la croyance ou de la conviction constitue une exigence professionnelle: leur prise en compte par l'employeur ne constitue pas une discrimination.V; J. DUFFAR, 'Les Relations entre l'Union Européenne et les Églises' Actes du Colloque de Tübingen, 18-21 Novembre 2004, (Peeters, 2006), 269.

[26] Cour, *Hoffmann* c. *Autriche*, 23 06 1993, 36.

[27] V. D de recevabilité, n°48107/99 *Paroisse Gréco-Catholique Sambata Bihor* c. *Roumanie*, 25 05 2004. La requérante, église catholique uniate, allègue la violation de l'article 14 la jouissance sans discrimination du droit d'accès à un tribunal, de la liberté de religion et du droit au respect de ses biens.

[28] J. DUFFAR, 'Églises Nationales et Convention Européenne des Droits de l'Homme: Quelques Observations Tirées de la Jurisprudence, L'Année Canonique, Tome XLIII, 2001', p. 115-118.

peuvent, encore aujourd'hui, accéder par exemple à des emplois ou à certains honneurs.[29] Les groupements religieux minoritaires non reconnus, jouissent, en principe, de la liberté de religion, mais ils sont souvent exclus des avantages matériels et sociaux réservés aux religions majoritaires et traditionnelles.[30]

Les dispositions de la **Constitution Argentine** obligeant le Président et le Vice- Président de la République à être de confession catholique n'ont été abrogées que par la révision constitutionnelle du 22 août 1994. L'article 2 de la Constitution dispose: «Le Gouvernement fédéral soutient le culte catholique, apostolique et romain», formulation reprise dans certaines constitutions fédérales et provinciales.[31] La jurisprudence est constante: aucune discrimination ne peut être fondée sur la religion.

La Cour a constaté la violation de l'article 9 combiné avec l'article 14 à l'égard d'Églises ou de groupes religieux moins nombreux: Discrimination à l'encontre de l'Église Catholique[32], discrimination au détriment des témoins de Jéhovah[33], pour refus de dispenser du service militaire les

[29] J. DUFFAR, 'Le Statut Constitutionnel des Cultes', op. cit., p.11 et s.

[30] Le Financement des Religions dans les États de l'Union Européenne, Rapports Nationaux et Rapport de synthèse par J. DUFFAR, Consortium Européen pour les relations Religions – États, Congrès de Messine, 2007.

[31] Le Doyen AMOR rappelle «que ce lien privilégié entre l'État et une religion déterminée n'est pas en soi en contradiction avec les droits de l'homme. Tout en notant que cette reconnaissance particulière ne confère pas à la religion catholique le statut de religion officielle dans le cadre de la constitution fédérale – ce qui est par contre le cas de certaines constitutions provinciales- il est important de souligner que la religion d'État ou de l'État n'est pas remise en cause par le droit international et en particulier la jurisprudence du Comité des droits de l'homme (observation n° 22 du 20 juillet 1993). Celle- ci précise cependant que cette donnée ne doit pas être exploitée aux dépens des droits de l'homme et des minorités. Rapport de M. Abdelfattah AMOR, Rapporteur spécial conformément à la résolution 2001/42 de la Commission des droits de l'homme,Visite en Argentine, E/CN.4/2002/73/Add. 1, 16 janvier 2002,19 et 119. *A contrario*, l'article 116 de la Constitution Australienne dispose «Le Commonwealth ne fera aucune loi pour établir une religion ni pour imposer un culte religieux, ni pour interdire le libre exercice d'une religion». Dans l'affaire Attorney – general for Victoria; ex rel Black c. Commonwealth (1981) 55 ALJR 155, la Haute Cour d'Australie a considéré que l'article 116 interdisait au Commonwealth d'adopter une quelconque loi qui «confère à une religion particulière ou à un organisme religieux déterminé le statut de religion ou d'église d'État ou nationale». CCPR/ C /AUS /98 /3, 22 7 1999, n°950.

[32] «L'église requérante, propriétaire de son terrain et de ses bâtiments, s'est vue empêchée d'ester en justice pour les protéger alors que l'Église orthodoxe ou la communauté juive peuvent le faire pour protéger les leurs sans aucune formalité ou modalité. <violation de l'article 14 combiné avec l'article 6§1> car aucune justification objective et raisonnable n'a été avancée». Cour, Église catholique de la Canée c. Grèce, 16 12 1997, 47.

[33] Cour, *Hoffmann* c. *Autriche*, 25 06 1093.

ministres de ce groupement religieux[34], opposition à la construction de lieux de prière et de rassemblements.[35]

Les violations de la liberté de religion affectaient exclusivement les Chypriotes grecs vivant dans le nord de l'île et se fondaient sur leurs «origine ethnique, race et religion». Le traitement qu'ils ont subi ne peut s'expliquer que par ces caractéristiques, la discrimination a «*atteint un tel degré de gravité qu'elle constituait un traitement dégradant*»: violation de l'article 3.[36]

3. *L'Interdiction de la Discrimination n'Exclut pas toute Différence*

8 – Il n'y a pas discrimination si une différence de traitement s'applique à des personnes ou des institutions qui ne se trouvent pas dans la même situation, leur appliquer un traitement identique constituerait alors une discrimination.

- Tout candidat condamné pour crime, quel que fut le crime, ne pouvait être nommé à un poste d'expert comptable: c'est la situation de M. Thlimmenos, qui a été condamné pour le crime de refus de porter l'uniforme pour motifs religieux: le requérant a subi une discrimination dans la jouissance de son droit au respect de l'article 9, du fait de la législation. qui n'opère pas de distinction selon la nature des crimes commis.[37]
- Autre exemple: «la liberté de religion n'implique nullement que les Églises ou leurs fidèles doivent se voir accorder un statut fiscal différent de celui des autres contribuables» (...) il n'existe pas au niveau européen un standard commun en matière de financement des églises ou cultes; ces questions étant étroitement liées à l'histoire et aux traditions de chaque pays».[38] Il n'y a pas de violation de l'article 9 combiné

[34] *Tsirlis et Kouloumpas*.

[35] Cour, *MANOUSSAKIS* c. *Grece*, 26 09 7996; *Pentidis, Katharios, et Stagopoulos* c. *Grece*.

[36] Cour, *Chypre* c. *Turquie*, 10 5 2001, 304-311. Revue européenne des relations Églises-État, 2001, p, 10.

[37] Cour, *Thlimmenos* c. *Grèce*, 6 04 2000.

[38] Cour, D d'irrecevabilité. 24 11 1999, *J Aluer Fernandez et Caballero Garcia* c. *Espagne*; d'irrecevabilité, 29 03 2007, Spampinato c; Italie, 23123/04.A titre de rapprochement: les requérants ne sauraient déduire de l'article 9 le droit de se dérober à des impôts établis conformément à l'article 1 du Protocole additionnel Commission, D 20471/92, *Kustannus* c. *Finlande*, 15 04 1996 (irrecevable) Rev.europ. relations Églises-État, 1997-Vol 4, p. 170.

avec l'article 14 dans le refus d'accorder à une église Baptiste l'exonération de taxe foncière dont bénéficie l'Église catholique. Cette exonération est prévue dans le Concordat, mais l'église Baptiste n'a ni conclu, ni demandé à conclure un tel concordat avec l'Espagne.[39]

En terminant cette première partie et ce développement sur l'interdiction de toute discrimination en matière religieuse, comment ne pas évoquer, ici, le Grand arrêt *Chypre* c. *Turquie* du 10 05 2001, qui porte condamnation des discriminations qui affectaient les chypriotes grecs de la région du Karpas, «en raison de leur origine ethnique, race et religion». La Cour conclut qu'il ya violation de l'article 3 en ce que cette population a subi une discrimination s'analysant en un traitement dégradant interdit par l'article 3 de la Convention. (310-311). Telles sont, rapidement présentées, les principales conséquences du caractère absolu de la liberté d'avoir, d'adopter ou de changer de religion. La seconde partie retiendra plus longtemps: elle présente davantage de difficultés juridiques.

II. La Liberté de Manifester sa Religion ou sa Conviction

9 – Sur le modèle fondateur de l'article 10 de la Déclaration des droits de l'homme et du citoyen du 26 août 1789 «Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi», les instruments internationaux (art. 18 de la Déclaration Universelle; art. 18 du PIDCP; art. 12 de la Convention Américaine et art. 9 de la CEDH), distinguent entre le droit à la liberté de pensée, de conscience, de croyance, de religion ou de conviction et par ailleurs, dés 1789, la manifestation, c'est-à-dire l'expression, l'extériorisation vers le public de ces différentes formes d'opinions. Les restrictions éventuelles ne peuvent affecter que la liberté de manifester sa religion ou sa conviction.[40]

Avant de présenter certaines formes de manifestation de la religion ou de la conviction (§-2); leur manifestation par les personnes physiques (§3); puis leur manifestation par les institutions et les communautés religieuses (§4), seront brièvement exposées, d'abord, les restrictions possibles prévues par l'article 9-2 (§).

[39] D. 17522/ 90, *Iglesia Bautista «Salvador»* c. *Espagne*, 11 011992, DR 72/256.

[40] Cour, *Kokkinakis* 25 05 1995, 31; 97 *Membres de la Congrégation des Témoins de Jéhovah de Gldani* c. *Géorgie*, 03 05 2007.

A. *Les Restrictions à la Liberté de Manifester sa Religion ou ses Convictions*

10 – Le second paragraphe de l'article 9 expose les conditions à remplir pour que les restrictions à la liberté de manifester sa religion ou ses convictions soient licites au regard de la convention: elles doivent être prévues par la loi, poursuivre un ou des buts légitimes prévus par l'article 9§2, enfin être nécessaires dans une société démocratique pour atteindre ces buts légitimes.

1. *Les Restrictions sont Prévues par la Loi*

11 – Le refus des autorités étatiques d'enregistrer l'église des requérants, malgré des décisions juridictionnelles leur enjoignant de le faire, constitue une ingérence dans le droit de l'Église et des requérants à la liberté de religion, garanti par l'article 9. Le refus d'enregistrer l'église requérante n'a pas de base légale en droit moldave. L'ingérence n'est pas prévue par la loi. La Cour constate la violation de l'article 9, sans avoir à examiner si l'ingérence poursuivait un but légitime et si elle était nécessaire dans une société démocratique.[41] Le refus opposé à des détenus de participer à des offices religieux et de recevoir la visite d'un aumônier est une ingérence dans le droit de manifester sa religion qui n'est pas prévue par le droit interne.[42]

2. *Les Restrictions Poursuivent un ou des Buts Légitimes*

12 – Les buts légitimes sont énumérés à l'article 9-2: la sécurité publique, le protection de l'ordre, de la santé, ou de la morale publiques et la protection des droits et des libertés d'autrui.[43]

3. *Les Restrictions Nécessaires dans une Société Démocratique*

13 – Les États sont crédités d'une marge d'appréciation plus large dans les domaines de la religion et de la morale. «(...) lorsqu'ils réglementent

[41] Cour, n°952/03, *Biserica Adevarat Ortodoxa Din Moldova* v. *Moldova*, 27 02 2007, 31-37.

[42] Cour *Poltoratsky* c. *Ukraine*, 29 04 2003 et *Igors Dimitrejvs* c. *Lettonie*, 30 11 2006.

[43] Cette énumération, très proche de celle des seconds paragraphes des articles 8, 10 et 11, comporte cependant des nuances, relevées par la Cour «le terme <ordre> qui figure aussi à l'article 10-2 ne désigne pas seulement l'ordre public au sens, en particulier, de l'article 9-2 de la Convention» Cour, Engel, 08 06 1976, 98.

la liberté d'expression sur des questions susceptibles d'offenser les convictions intimes dans le domaine de la morale et spécialement de la religion».[44]

Il faut laisser à chaque État une marge d'appréciation pour ce qui est de l'établissement des délicats rapports entre l'État et les religions.[45]

Enfin, dans une société démocratique ou plusieurs religions coexistent, il peut s'avérer nécessaire d'assortir la liberté de manifester sa religion de limitations propres à concilier les intérêts des divers groupes et à assurer le respect des convictions de chacun.[46]

B. *Liberté et Formes de la Manifestation de la Religion ou de la Conviction*

1. *Liberté de Manifester ou de ne pas Manifester*

14 – De même que la liberté d'avoir une religion implique celle de ne pas en avoir, de même la liberté de la manifester implique aussi celle de ne pas la révéler. Dans une société démocratique la religion et les convictions des personnes doivent pouvoir être tenues secrètes, sans qu'existe une obligation juridique imposant de les faire connaître.[47]

Le Comité des droits de l'homme,[48] la Cour et la Commission ont marqué que l'article 9 protège avant tout le for intérieur indiquant que la garantie portait avant tout sur le secret de la croyance et de la conviction[49]. Une décision précédente énonçait déjà: la présente affaire ne pose pas le problème général du caractère confidentiel des informations sur la religion d'une personne.[50] Dans sa dimension religieuse, l'article 9

[44] Cour *Wingrove* c. *RU*, 25 11 1986, 58.

[45] Cour, *Manoussakis* c. *Grèce*, 29 09 1996, 44.

[46] Cour *Refah Partisi*, GC, 13 02 2003.

[47] Un requérant italien se plaint qu' en souscrivant sa déclaration de revenu, en 2004, il ait été obligé de manifester ses convictions religieuses. Or, la loi autorise les contribuables à ne pas exprimer de choix quant à la destination de la fraction des 8/1000ème de l'impôt sur le revenu. La disposition légale n'entraîne aucune obligation de manifester ses convictions religieuses qui serait contraire à l'article 9, Cour, Déc. n°23123/04, *Spampinato* c. *Italie*, 29 03 2007, J. DUFFAR, 'Les Limites de la Liberté d'Expression' L'Année canonique, Tome XLI, 1999, p. 75 et s.

[48] Dans L'Observation Générale n° 22 sur l'article 18 du PIDCP, le Comité des droits de l'homme déclare «Conformément à l'article 17 et au paragraphe 2 de l'article 18, nul ne peut être contraint de révéler ses pensées ou son adhésion à une religion ou à une conviction».

[49] 10358/83, 15 12 1983,DR 37/153 et D 11308/84, 13 03 1986, DR 13/204.

[50] D 8160/78, X c.RU, 12 03 1981, DR 22/4. (...) «Les informations relatives aux convictions religieuses et philosophiques personnelles concernent certains des aspects les plus intimes de la vie privée. (...) le fait d'obliger les parents à communiquer à l'école des renseignements détaillés sur leurs convictions religieuses et philosophiques peut entraîner une violation de l'article 8 de la Convention, voire aussi de l'article 9» Cour, GC, *Folgero et autres* c. *Norvège*, 29 06 2007, 98 et *Zengin* c. *Turquie*, préc., 73-75.

«implique non seulement la liberté d'adhérer ou non à une religion mais aussi celle de la pratiquer ou de ne pas la pratiquer, c'est à dire de la manifester ou non».[51]

15 – «Un bulletin scolaire est un document public qui doit être présenté à divers employeurs et autorités, et il ne devrait pas contenir d'informations relatives à un *domaine aussi personnel que les convictions religieuses.* Son contenu peut provoquer une hostilité envers la requérante, et la placer dans une situation défavorable».[52]

Une décision ministérielle qui supprime la mention de la religion sur les cartes d'identité grecques n'est pas critiquable au regard de l'article 9: les convictions religieuses ne constituent pas une donnée servant à individualiser un citoyen dans ses rapports avec l'État.[53] Toutefois il n'est pas contraire à l'article 9 de demander la justification de sa religion à celui qui sollicite pour cette raison une mesure particulière (dispense de service).[54]

16 – Les droits internes et les instruments européens et communautaires[55] interdisent non seulement tout enregistrement des croyances d'une personne mais aussi toute demande ou recherche tendant à les connaître.

– À titre d'exemples d'une interdiction constitutionnelle, l'article 16-2. de la Constitution Espagnole du 27 décembre 1978 dispose: «Nadie podra ser obligado a declarar sobre su ideologia, religion o creencias».

[51] Cour, *Kokkinakis*, 25 5 1993, 31; *Buscarini*, 18 02 1999, c. *Saint-Marin*, 34; *Refah Partisi* c. *Turquie*, 13 02 2003, 90.

[52] D 23380/94 16 1 1996 DR84 B/54.

[53] Cour, *Sofianopoulos, Spaïdotis, Metallinos, et Kontogiannis* c. *Grece*, 12 12 3002. (Irrecevable sous l'angle de l'article 9), Rev. europ. relations Églises-État, 2003- Vol. 10, p. 143.

[54] Cour Kosteski c. Ex-République Yougoslave de Macédoine, 13 04 2006.

[55] V. article 6 de la Convention du Conseil de l'Europe sur la protection des personnes à l'égard du traitement automatisé des données à caractère personnel qui interdit, sauf garanties appropriées, le traitement automatique des données à caractère personnel révélant en particulier les convictions religieuses ou autres convictions «et l'article 8§1de la Directive CE n° 95/46 du 24 10 1995 qui fait obligation aux États d'interdire les traitements des données à caractère personnel qui révélent» (...) «les convictions religieuses ou philosophiques»(...).

- L'article 53-7 de la Constitution Polonaise du 2 avril 1997 dispose: «Nul ne peut être engagé par les autorités de la puissance publique à révéler sa conception du monde, ses convictions religieuses ou sa confession».
- L'article 18 de la Constitution de Colombie de 1991 dispose: «La liberté de conscience est garantie. Nul ne peut être inquiété pour ses convictions de croyance, ni être contraint de les révéler ou d'agir contre sa conscience».[56]
- Au nombre des droits intangibles énumérés au Chapitre II de la Constitution Suédoise figure avec la liberté de culte, la protection contre toute contrainte de la part de l'autorité publique obligeant un citoyen à divulguer son opinion politique, religieuse, culturelle ou autre.[57]

Voilà un principe général commun à plusieurs sociétés démocratiques.[58]

2. *Formes de la Manifestation de la Religion ou de la Conviction*

17 – L'article 9 de la CEDH énonce que le droit à la liberté de pensée, de conscience et de religion implique «la liberté de manifester sa religion ou sa conviction individuellement ou collectivement, en public ou en privé, par le culte, l'enseignement, les pratiques et l'accomplissement des rites». Cette liberté est susceptible de limitations. «Si la liberté religieuse relève d'abord du for intérieur, elle implique de surcroît, notamment celle de manifester sa religion. Le témoignage en paroles et en actes, se trouve lié à l'existence de convictions religieuses». Cour, *Kokkinakis*, 31.

18 – La jurisprudence offre certains exemples:

(a) d'abord sur les rites, l'abattage rituel des animaux doit «être considéré comme relevant d'un droit garanti par la Convention, à savoir le droit de manifester sa religion par l'accomplissement des rites au sens de l'article 9» Cour, *Cha'are Shalom v° Tsedek*, 27 06 2000, 74.

[56] CCPR/ C / COL / 2002/ 5, 18 9 2002, n° 795.

[57] E -HRI/CORE/ 1/Add.4/Rev.27 mai 2002, 58. Sur le principe selon lequel nul ne peut être contraint de révéler ses convictions, V. aussi la Cour d'Arbitrage de Belgique 15 7 1993, n°65/93, MB, 18 9 1993, et CA, 20 1 1994, n°7/94, MB, 23 3 1994.

[58] Ces interdictions doivent s'articuler avec les politiques de discrimination positive qui requièrent, semble-t-il, la collecte de données sur l'origine et la religion des personnes, V. Séminaire sur la collecte des données ethniques; Commission européenne contre le racisme et l'intolérance (ECRI), 17-18 février 2005, Bull. d'information sur les droits de l'homme, n°64, p. 100.

(b) autre précision sur «l'enseignement», au sens de l'article 9 (...) «en outre elle <la liberté de manifester sa religion> comporte en principe le droit d'essayer de convaincre son prochain par exemple au moyen d'un enseignement» Cour, Kokkinakis, 31.

(c) Enfin, que faut-il entendre par «pratiques» comme manifestation d'une religion ou d'une conviction?[59] «Le terme pratiques, la Commission l'a maintes fois rappelé, ne désigne pas n'importe quel acte motivé ou inspiré par une religion ou une conviction». «L'article 9 de la Convention ne garantit pas toujours le droit de se comporter dans le domaine public d'une manière dictée par cette conviction».[60] Qui décidera, la question touche à l'ordre public.

19 – Une pratique religieuse, au sens de l'article 9, devra se recommander d'une tradition, témoigner d'une consistance de contenu et se référer à une communauté organisée dotée de responsables religieux.[61] Ces pratiques sont des faits sociaux objectifs.[62]

20 – Le second critère tient à la nécessaire proximité du rapport entre d'une part la religion ou la conviction et d'autre part le comportement, la pratique qui en est la manifestation. Il faut que ce rapport soit exclusif et direct. Dans l'arrêt *Les Saints Monastères*, 09 12 1994, 87, la Cour a considéré, par exemple, que l' expropriation «ne vise en aucune manière les biens des requérants destinés à la pratique du culte, et partant, ne porte pas atteinte à l'exercice du droit à la liberté de religion». La Commission résume ces exigences dans les termes suivants «cette disposition <l'article 9> protège les actes intimement liés à ces comportements, par exemple des actes de culte ou de dévotion qui sont des aspects des pratiques d'une religion ou d'une croyance reconnues».[63]

21 – Les pratiques ne seront protégées par l'article 9 que si elles sont la conséquence indissociable de la religion et de la conviction, bref si les

[59] V. P. ROLLAND, *Ordre Public et Pratiques Religieuses*, in Publications de l'Institut International des Droits de l'Homme, (Institut René CASSIN de Strasbourg, Bruylant, 2002), p.233-270).

[60] D 10358/83, C c. R.U.,.15 12 1983, DR 37/153; Cour, *Kalac*, 1 7 1997, 27.

[61] D 10358/83, C c. R.U.,.15 12 1983, DR 37/153; Cour, *Kalac*, 1 7 1997, 27 Références aux autorités rabbiniques: D 5947/ 72, X c.RU, 5 3 1976, DR 5/9 et D *Daratsakis*.

[62] P. Rolland, op. cit., p. 246-248.

[63] D, Kalac 27 02 1996, 34.

comportements constituent un élément essentiel de la pratique religieuse.[64] Ainsi:

- «L'abattage rituel vise à fournir une viande provenant d'animaux abattus conformément aux prescriptions religieuses, ce qui représente un élément essentiel de la pratique de la religion juive».[65]
- Ou encore, la manière d'enterrer les morts et d'aménager les cimetières représente un élément essentiel de la pratique religieuse de la première requérante».[66] Dans les deux cas, ces éléments essentiels de la pratique religieuse n'ont pas été suffisants pour écarter le droit national, déjà applicable, en matière d'abattage rituel et d'urbanisme[67]: «La Commission n'estime pas que l'article 9 de la Convention puisse servir à contourner la législation d'urbanisme en vigueur si, dans la procédure engagée en vertu de cette législation, *le juge attache une importance suffisante à la liberté de religion*».

C. *La Liberté des Personnes Physiques de Manifester leur Religion ou leur Conviction*

22 – Quelques exemples tirés de la jurisprudence montrent qu'en général les personnes «en situation» ne pourront invoquer leur religion ou leurs

[64] Leyla Sahin considérait le port du voile comme une «pratique reconnue». Sans caractériser ce comportement au regard des formes de manifestation de l'article 9-1, la Chambre, suivie par la Grande Chambre, a considéré «qu'il s'agit d'un acte motivé ou inspiré par une religion ou une conviction et, sans se prononcer sur la question des savoir si cet acte, dans tous les cas, constitue l'accomplissement d'un devoir religieux (...) la réglementation litigieuse (...) a constitué une ingérence dans l'exercice par la requérante du droit de, manifester sa religion». Cour, GC, 1O 11 2005, 78. Formulation voisine pour l'obligation imposée à un sikh de retirer son turban, Cour, Déc.irrecevabilité, *Phull* c. *France*, 11 01 2005. Une hiérarchie s'esquisserait-elle entre le fondamental et l'accessoire dans les pratiques religieuses? Un telle distinction est-elle indispensable pour le respect du pluralisme dans une société démocratique? V. Professeur Patrice Rolland, Synthèse et Conclusion, Laïcité, liberté de religion et Convention européenne des droits de l'homme, (Colloque du 18 11 2005, I. D. E.D.H. EA 3976), (Bruylant, 2006), 265-266.

[65] COUR, *Cha' are Shalom ve Tsedek* c. *France*, 27 06 2000, 74.

[66] Cour, D, 10 7 2001, *Johannische Kirche* c. *Allemagne*.

[67] D 20490/92, Iskcon c. RU, 08 03 1994, DR 76 B/107. A rapproche de deux arrêts de la 3ème chambre civile de la Cour de Cassation française:- refus de remplacer par un dispositif mécanique, l'ouverture électrique de la porte-: «les pratiques dictées par les convictions religieuses des preneurs n'entrent pas, sauf convention expresse, dans le champ contractuel du bail et ne font naître à la charge du bailleur aucune obligation spécifique». Cass. 3ème civ 18 12 2002). Rejet du pourvoi formé contre un arrêt d'appel «validant» l'enlèvement d'une souccah du balcon édifiée en violation du réglement de copropriété» la liberté religieuse pour fondamentale qu'elle soit, ne pouvait avoir pour effet de rendre licites les violations d'un règlement de copropriété» Cass. 3ème civ, 08 06 2006, n°05-14774.

convictions pour faire échec à l'application du droit interne dans une société démocratique, sous réserve de ce qui a été dit sur les discriminations. La jurisprudence fournit notamment les quatre catégories suivantes d'illustrations: les ministres du culte A; les militaires B; les salariés C et les détenus D.

1. *Les Ministres du Culte et les Fidèles*

23 – La Cour prend en compte la place hiérarchique des ministres du culte dans les religions et voit dans leur ministère une manifestation particulière de la liberté de religion protégée par l'article 9. Dans le prolongement de l'arrêt de la GC Hassan et Tchaouch c. Bulgarie, 62, la Cour a rappelé dans un arrêt du 8 novembre 2007 que «les communautés religieuses existent traditionnellement et universellement sous la forme de structures organisées, et qu'elles respectent des règles que les adeptes considèrent souvent comme étant d'origine divine. Les cérémonies religieuses ont une signification et une valeur sacrée pour les fidèles lorsqu'elles sont célébrées par des ministres du culte qui y sont habilitées en vertu de ces règles. La personnalité de ces derniers est assurément importante pour tout membre actif de la communauté, et leur participation à la vie de cette communauté est donc une manifestation particulière de la religion qui jouit en elle-même de la protection de l'article 9 de la Convention».[68]

24 – La question se posait principalement dans les pays ou les ministres du culte des Églises d'État ou des Églises nationales ou dominantes remplissent des fonctions religieuses mais aussi administratives: registres d'état civil, services sociaux etc. Ces systèmes invitent à veiller au respect de la liberté des croyants. La Commission a d'ailleurs déclaré «nul ne peut être contraint de devenir membre ni empêché de cesser d'être membre d'une Église d'État.[69]

Les principes qui résultent d'une jurisprudence constante ont été rappelés par la Commission dans les termes suivants: «l'article 9 ne fait pas obligation aux Hautes Parties Contractantes d'assurer que les Églises relevant de leur juridiction accordent la liberté religieuse à leurs fidèles et prêtres.[70] La liberté de religion ne confère pas à un ministre du culte

[68] Cour *Perry* c. *Lettonie*, 08 11 2007, 55.

[69] R 11581/ 85, *Darby*, 09 05 1989, 45. (V. Mutatis mutandis juris. récente sur l'article 11 droit de ne pas s'associer et de ne pas se syndiquer).

[70] D7374/76, 08 03 1976, DR 5/187.

le droit de défendre des conceptions religieuses particulières, dans le cadre d'une église où il exerce ses fonctions et dont il sollicite un poste. Si les vues du requérant sur les ministres femmes et, partant ses intentions concernant la coopération avec des collègues de sexe féminin, sont jugées incompatibles avec les vues générales de l'église considérée, celle-ci n'est pas tenue d'admettre le requérant comme ministre».[71]

La Commission a estimé non contraire à l'article 9, le licenciement d'un pasteur qui refusait d'accomplir ses fonctions administratives, après que la Norvège ait adopté une législation autorisant l'avortement.[72] De manière générale, les pasteurs ne peuvent invoquer utilement la liberté de religion, telle que garantie par l'article 9, à l'encontre de l'institution ecclésiale dont ils sont les ministres. Il leur appartient de mettre en pratique et enseigner une religion déterminée et non de faire prévaloir leur propre conception de la religion: licenciement d'un ministre du culte qui soumettait le baptême des enfants à la condition illégale et préalable d'une instruction religieuse des parents pendant 5 jours. La liberté de religion des pasteurs s'exerce d'abord lorsqu'ils acceptent librement d'exercer leurs fonctions, ensuite dans la possibilité de quitter librement l'Église, s'ils sont en désaccord avec elle.[73] «Si les conditions imposées par l'église sont contraires aux convictions d'une personne, celle ci doit avoir toute latitude de quitter sa charge. Cette liberté de partir était, selon la Commission, une garantie fondamentale du droit à la liberté de pensée, de conscience et de religion».[74]

25 – Ces observations sont aussi valables pour les fidèles: ils ne peuvent invoquer utilement l'article 9 de la Convention à l'encontre des règles de l'Église dont ils sont membres, mais ils doivent pouvoir la quitter librement s'ils le souhaitent. La liberté de religion des fidèles consiste notamment dans la participation à la vie de la communauté. Aussi le droit des fidèles à la liberté de religion suppose que la Communauté puisse fonctionner paisiblement, sans ingérence arbitraire de l'État.[75]

26 – La liberté des ministres du culte de manifester leur religion se présente différemment dans plusieurs affaires récentes qui mettent en jeu les relations des Églises et des États.

[71] D12356/86, DR 57/178.
[72] D 11045/84, *Knudsen* c. *Norvege*, 08 03 1985, DR 42/268.
[73] D 7374/76 *X* c. *Danemark*, 08 03 1976, DR 5/157.
[74] D 12356/86, *Karlsson* c. *Suede*, 8 9 1988, DR 57/178.
[75] Cour, Hassan et *Tchaouch* c. *Bulgarie*, 26 10 2000, 62.

D'abord lorsque certains mouvements ne sont pas reconnus comme des religions, leurs ministres ne bénéficient pas d'avantages particuliers: ministres du culte des témoins de Jéhovah refusant d'accomplir le service militaire et poursuivis pénalement. Ils ne sont pas dispensés de service militaire comme les ministres des cultes reconnus.[76]

Ensuite, conséquence d'une sorte de schisme à l'intérieur d'une même religion. Revendication de deux ministres concurrents pour diriger la communauté religieuse, dont l'un est nommé ou soutenu par le pouvoir politique. Ces arrêts ont permis à la Cour de préciser les rapports entre l'État et les religions.

2. *Les Militaires et les Fonctionnaires*

27 – Des officiers de l'armée grecque, de confession pentecôtiste, sont reconnus coupables de prosélytisme envers des soldats et des civils. Ces ingérences dans le droit de manifester leur religion- sont-elles nécessaires dans une société démocratique? À la différence de la condamnation réprimant le prosélytisme envers les civils (non violation de l'article 9), celle réprimant ce comportement envers les soldats ne méconnaît pas l'article 9. «La structure hiérarchique qui constitue une caractéristique de la condition militaire peut donner une certaine coloration à tout aspect des relations entre membres des forces armées, de sorte qu'un subordonné a du mal à se soustraire à une conversation engagée par celui-ci. Ce qui en milieu civil, pourrait passer pour un échange inoffensif d'idées que le destinataire est libre d'accepter ou de rejeter peut, dans le cadre de la vie militaire, être perçu comme une forme de harcèlement ou comme l'exercice de pressions de mauvais aloi par un abus de pouvoir. Il faut préciser que les discussions entre individus de grade inégaux sur la religion ou d'autres questions délicates ne tombent pas toutes dans cette catégorie. Il reste que, si les circonstances l'exigent, les États peuvent être fondés à prendre des mesures particulières pour protéger les droits et libertés des subordonnés dans les forces armées(...) la Cour considère comme justifié, en principe, que les hommes du rang soient à l'abri des pressions abusives que les requérants leur faisaient subir dans leur désir de promouvoir leurs convictions religieuses.» (non violation de l'article 9).[77]

[76] Cour, Kokkinakis, 23 05 1993; *Georgiadis* c. *Grèce*, 21522/93 Com.Rapport, 27 02 1996; *Tsirlis et Kouloumpas* Com.Rapport 19233/91 et 19234/91, 07 03 1996, Rev.europ. relations Églises-État, 1997-vol 4, 174-176. Déc (Règlement amiable), *Association religieuse «Témoins de Jéhovah»* c. *Roumanie*, 11 07 2006.
[77] Cour *Larissis et autres* c.*Grèce*, 24 02 1998, 51. Rev.europ. relations Églises – État, vol-6, 199-200.

28 – Un État démocratique est en droit d'exiger de ses fonctionnaires qu'ils soient loyaux envers les principes constitutionnels sur lesquels il s'appuie».[78] La formule s'applique à un officier turc, le colonel KALAC, juge militaire, mis à la retraite d'office, au motif que son comportement et ses agissements révèlent des opinions intégristes illégales. Il n'y a pas violation de l'article 9. «En embrassant une carrière militaire, M. KALAC se pliait, de son plein gré, au système de discipline militaire. Ce système implique par nature la possibilité d'apporter à certains droits et libertés des membres des forces armées des limitations ne pouvant être imposées aux civils.[79] Les États peuvent adopter, pour leurs armées, des règlements disciplinaires interdisant tel ou tel comportement, notamment une attitude qui va à l'encontre de l'ordre établi répondant aux nécessités du service militaire» (...). Ceux -ci <les comportements du colonel KALAC>, selon les autorités turques, portaient atteinte à la discipline militaire et au principe de laïcité.[80] En Turquie, comme en France, le principe de laïcité est inscrit dans la constitution.

En revanche la requérante membre d'une communauté chrétienne persécutée «Verbe de Vie» a subi une violation de sa liberté de religion en perdant son emploi dans un service d'État en raison de ses croyances religieuses.[81]

3. *Les Salariés*

29 – Le salarié qui souhaiterait que les exigences de sa religion soient prises en considération dans l'aménagement de ses horaires devra les signaler lors de son engagement. S'il ne le fait pas, l'obligation imposée à un enseignant de respecter les heures de travail, qui ne lui permettraient pas de s'associer aux prières, à la mosquée, peut être compatible avec la liberté de religion. La Commission relève que tout au long de son emploi,

[78] Cour, *Vogt* c. *Allemagne*, 26 09 1995.

[79] Cour, *Engel*, 8 6 1976, 57.

[80] Cour, *Kalac*, 1 07 1997, 28.Cette situation se rapproche de celle des pharmaciens, qui contrairement aux engagement pris en entrant dans la profession, refusent, pour des motifs religieux, de délivrer des produits contraceptifs. Condamnés pour refus de vente de la pilule contraceptive, la Cour déclare leur requête irrecevable: «dés lors que la vente de ce produit est légale, intervient sur prescription médicale uniquement et obligatoirement dans les pharmacies, les requérants ne sauraient faire prévaloir et imposer à autrui leurs convictions religieuses pour justifier le refus de vente de ce produit, la manifestation desdites convictions pouvant s'exercer de multiples manières hors de la sphère professionnelle.» Cour, D, *Pichon et Sajous* c. *France*, 07 06 1999.

[81] Cour, *Ivanova* c. *Bulgarie*, 12 04 2007, 86.

le requérant avait la faculté de démissionner, s'il estimait que ses obligations pédagogiques entraient en conflit avec ses devoirs religieux.[82]

30 – De même, un requérant, employé des chemins de fer finlandais depuis 1986, devient, en 1991 adventiste du 7ème jour. A plusieurs reprises, il interrompt son travail, le vendredi dés le coucher du soleil: il est licencié. «En l'espèce, la Commission estime que le requérant, en sa qualité d'agent des chemins de fer finlandais, avait le devoir de s'acquitter de certaines obligations envers son employeur, notamment celle de respecter les règles applicables à ses horaires de travail. (...) Dans les circonstances particulières de la cause, (...) le requérant n'a pas été révoqué en raison de ses convictions religieuses, mais pour avoir refusé de respecter ses horaires de travail. Ce refus, bien que motivé par ses convictions religieuses, ne saurait être considéré comme relevant en soi de la protection de l'article 9 §1. (...) La Commission observe en outre qu'après avoir constaté que ses horaires de travail étaient incompatibles avec ses convictions religieuses, le requérant était libre de quitter son emploi. Pour la Commission, cette possibilité est la garantie fondamentale de son droit à la liberté de religion».[83]

L'article 9 de la Convention ne contient pas un droit pour le salarié de se dispenser du respect des horaires de travail, initialement et librement acceptés, pour des motifs tirés de ses convictions religieuses. En revanche, pour résoudre le conflit éventuel entre ses convictions et son «devoir d'état», l'article 9 lui garantit le droit de démissionner librement.[84]

4. *Les Détenus*

31 – Le détenu est seul, souvent malade, parfois oublié par sa famille. En prison, comme dans tous les lieux d'enfermement (hôpital, pensionnat, asile psychiatrique), la religion demeure une forme d'évasion... vers le haut. Aussi l'expression des convictions religieuses doit -elle être facilitée. Pourtant, la Commission n'a déclaré recevable aucune des requêtes de détenus qui invoquaient l'ingérence dans leur liberté de religion. Quelques exemples:

[82] D, 8160/78, 12 O3 1981, DR, 22/27 et D 29107/95 *Louise Stedman* c. *RU*, 9 4 1997, DR 89 B/104.

[83] D 24949/14 *Kontinen* c. *Finlande*, 3 12 1996, DR 87-B /75. Rev.europ, Églises-État, 1997-Vol 4, p.171.

[84] J. Duffar, 'Religion et Travail dans la Jurisprudence de la Cour de Justice des Communautés Européennes et des Organes de la Convention Européenne des Droits de l'Homme', Revue du droit public, 1993, 696-718.

32 (a) – Détenus bouddhistes à qui la disposition d'un chapelet et le port de la barbe ont été refusés,[85] ou qui n'a pas été autorisé à adresser des articles à une revue bouddhiste[86]: ils n'ont pas démontré la nécessité de ces comportements pour la pratique de leur religion. Interception par les autorités pénitentiaires d'un livre bouddhiste Tao intitulé, «une chorégraphie du corps et de la pensée» dont un chapitre porte sur les arts martiaux et les techniques de défense.[87]
(b) – Le Comité des droits de l'homme apporte une réponse différente. L'article 18 du PIDCP protège le droit à la liberté de pensée, de conscience et de religion. Le para graphe 3 dispose que la liberté de manifester sa religion ou ses convictions ne peut faire l'objet que des seules restrictions prévues par la loi et qui sont nécessaire à la protection de la sécurité, de l'ordre et de la santé publique, ou de la morale et des droits fondamentaux d'autrui.

Un détenu affirmait que ses livres de prières lui avaient été confisqués, que le port de la barbe et la pratique de la prière dans le cadre d'offices religieux lui étaient interdits. Le Comité des droits de l'homme a conclu que: «La liberté de manifester sa religion et sa conviction par le culte, l'accomplissement des rites, les pratiques et l'enseignement englobent des actes très variés et que le concept de culte comprend les actes rituels et cérémoniels exprimant une conviction, ainsi que différentes pratiques propres à ces actes. En l'absence de toute explication de la part de l'État partie concernant les allégations de l'auteur (...), le Comité conclut qu'il y a violation de l'article 18 du Pacte».[88]

Plus récemment, la Cour a été saisie par un détenu condamné à mort,[89] et un détenu provisoire[90] à qui la possibilité de participer à des services religieux et de recevoir la visite d'aumôniers avait été refusée. Cette interdiction «a sans aucun doute constitué une ingérence dans l'exercice de son droit de manifester sa religion ou sa conviction (...) par le culte, (...) les pratiques et l'accomplissement des rites». En l'absence de disposition du droit interne sur l'exercice des droits religieux en prison des

[85] D 1753/63, Rec 16/20. V. Les conditions de la détention et la Convention Européenne des droits de l'homme, n° 5 (1981).
[86] D 5442/72, X c/ RU, 20 12 1974, DR 1/41.
[87] D 6886/75, X c/ R U, 18 5 1976, DR 5/100.
[88] Communication n° 721/1996, *Boodoo* c. *Trinite-et-Tobago*, Rapport du Comité des droits de l'homme, volume I, 2002, A/57/40 (Vol I) p. 94. Constatations 2 4 2002, Vol II, Annexes, p. 67.
[89] Cour *Poltoratsky* c. *Ukraine*, 29 04 2003.
[90] Cour *Igors Dmitrijevs* c. *Lettonie*, 30 11 2006.

détenus provisoires et des condamnés à mort: l'ingérence n'était pas prévue par la loi: violation de l'article 9.[91]

D. *La Manifestation de leur Religion par les Institutions et les Communautes Religieuses*

33 – À la différence de l'article I- 52 du Projet de Constitution du 29 10 2004: «Statut des Églises et des Organisations non- confessionnelles»,[92] l'article 9 de la Convention décrit principalement une liberté individuelle, même si l'article 9-1 envisage la manifestation collective de la liberté de religion. Aussi, certaines requêtes ont invoqué la violation de l'article 9 dans sa dimension collective. La Cour – comme le droit des États parties – reconnaît l'autonomie des églises et des communautés (A); cette autonomie ne dispense pas les États de l'obligation, dans certaines circonstances, de protéger ces églises et ces communautés (B); enfin, et en toutes circonstances, l'État est l'organisateur neutre et impartial des cultes (C).

1. *Autonomie, Personnalité Juridique et Reconnaissance, et vie Collective des Communautés Religieuses*

a. Autonomie: Article 9

34 – L'autonomie des collectivités religieuses comprise dans l'article 9 de la Convention, n'est qu'une application particulière du principe plus général d'auto-organisation des groupements dans le respect de l'ordre public de l'État. Cette autonomie s'impose à l'État qui doit la respecter et la protéger. En revanche, elle ne saurait être opposée par des fidèles ou par une communauté particulière à l'autorité religieuse qui s'impose à eux. «L'autonomie des communautés religieuses est indispensable au pluralisme dans une société démocratique et se trouve au coeur même de la protection offerte par l'article 9».[93]

[91] Pour un détenu handicapé: exemple de non violation de l'article 9, Cour *Vincent* c. *France*, 24 10 2006, 133-138.
[92] «1 – L'Union respecte et ne préjuge pas du statut dont bénéficient, en vertu du droit national, les églises et les associations ou communautés religieuses dans les États membres. 2 – L'Union respecte également le statut dont bénéficient, en vertu du droit national, les organisations philosophiques et non-confessionnelles. 3 – Reconnaissant leur identité et leur contribution spécifique, l'Union maintient un dialogue ouvert, transparent et régulier avec ces églises et organisations». Rev.europ. relations Églises-État, vol-6, 197-198.
[93] Cour *Hassan et Tchaouch* 26 10 2000, 62.

35 – Une manifestation de l'autonomie des groupements religieux est l'établissement de lieux de prières et de culte. Un régime d'autorisation préalable n'est acceptable que si le pouvoir du ministre est limité au contrôle des seules conditions formelles et qu'il ne fasse pas intervenir dans le processus décisionnel l'Église dominante.

Même si l'institution est propriétaire du terrain, elle n'est pas dispensée de l'obtention d'une ou plusieurs autorisations d'urbanisme.[94] Mais le pouvoir d'autorisation ne doit pas être détourné à d'autres fins «le droit à la liberté de religion, tel que l'entend la Convention exclût toute appréciation de la part de l'État sur la légitimité des croyances religieuses ou sur les modalités d'expression de celles-ci». La condamnation pénale des requérants, témoins de Jéhovah, pour création et utilisation d'une maison de prières sans autorisation n'est ni proportionnée, ni nécessaire dans une société démocratique, ni compatible avec l'esprit de tolérance et d'ouverture dont doit faire preuve de nos jours une société démocratique.[95]

Enfin le respect de la liberté de religion implique que les fidèles puissent se rendre librement aux lieux de culte et de vénération, dans les circonstances de l'espèce, au monastère Apostolos Andréas.[96]

36 – «L'Église, elle-même, bénéficie d'une protection dans sa liberté de manifester sa religion, d'organiser et de célébrer son culte, d'enseigner les pratiques et les rites et elle peut assurer et imposer l'uniformité en ces matières».[97] Comme les personnes physiques, les composantes d'une confession ne peuvent invoquer utilement l'article 9 contre l'institution à laquelle elles appartiennent: «La paroisse requérante fait partie intégrante de l'Église de Suède. À ce titre elle est dans l'obligation de se conformer aux décisions de l'Assemblée de l'Église portant notamment sur la célébration des services religieux (...) Il n'a pas été démontré que la paroisse requérante ne serait pas autorisée à quitter l'Église de Suède s'il lui était impossible d'accepter la liturgie de cette Église».[98]

[94] Cour *Vergos* c. *Grèce* 24 06 2004.

[95] Cour *Manoussakis* c. *Grèce*, 26 09 1996, 47 et autres réfèrences, Rev. europ. relations Églises-État, 1997 Vol 4, 172-175. En revanche, l'obligation d'obtenir l'autorisation de tous les copropriétaires pour transformer un local d'habitation en lieu de culte, n'est pas assimilable à un régime d'autorisation publique ou religieuse préalable. La condamnation des requérants à une amende pour non respect de la législation est une mesure justifiée dans son principe et proportionnée aux objectifs de protection des droits et libertés d'autrui et de l'ordre mublic Déc.recevabilité, n°74242/01, *Eskal Tanyar* c. *Turquie* 07 06 2005.

[96] Cour *Chypre* c. *Turquie*, 10 05 2001.

[97] D7374/76, O8 O3 1976, DR 5/157.

[98] D 24019/94 *Finska Församlingen i Stockolm* c. *Suede*, 11 4 1996, DR 85 B/95.

L'autonomie des communautés religieuses est reconnue dans la plupart des droits des pays européens;[99] sa nécessité a été soulignée par la Cour.

b. Personnalité Juridique et Reconnaissance: Article 9

37 – Une Église ou l'organe ecclésial d'une église peut comme tel exercer au nom de ses fidèles les droits garantis par l'article 9 la qualité de requérant n'implique pas nécessairement la personnalité juridique en droit interne. En l'espèce, l'Église métropolitaine de Bessarabie peut donc être considérée comme requérante au sens de l'article 34 de la Convention».[100]

38 – La nécessité du commerce juridique implique la personnalité juridique de droit interne des Églises. Cette question continue à donner matière à jurisprudence.[101] Elle se trouve actualisée par l'adoption de législations nouvelles qui exigent l'enregistrement des groupements religieux nouveaux, ainsi que la mise en conformité et le re-enregistrement des Églises anciennes. Dans les États à structures non-unitaires, la personnalité juridique peut exister au niveau central ou fédéral, sans que cette reconnaissance suffise au niveau local et réciproquement
– L'absence de personnalité juridique de l'Église catholique en Grèce privait celle-ci du droit d'accès à un tribunal. «Une jurisprudence et une pratique administrative constantes avaient créé au fil des années une sécurité juridique (...) à laquelle l'église requérante pouvait légitimement se fier. En jugeant que l'Église requérante se trouverait dans l'incapacité d'ester en justice, la Cour de cassation (...) a imposé à l'intéressée une restriction qui l'empêcha et l'empêche à l'avenir de faire trancher par les tribunaux, tout litige relatif à ses droits de propriété. Une telle limitation porte atteinte à la substance même du <droit à un tribunal> de la requérante».[102]

39 – La situation topique de cette affaire peut servir de canevas de réflexion. La loi moldave du 24 03 1992 prévoit que seuls peuvent être pratiqués les cultes reconnus par une décision du gouvernement. «La Cour note que n'étant pas reconnue l'Église requérante ne peut pas

[99] V. Le statut constitutionnel des cultes..., op. cit., p. 6-8.

[100] Cour, *Église Métropolitaine de Bessarabie*, 13 12 2001, 101.

[101] Dans l'affaire *Institut de Prêtres Français* c. *Turquie*, Cour 14 12 2000,

[102] Violation de 6§1. Cour, *Église catholique de la Canée* c. *Grèce*, 16 12 1997, 39-40; Revue européenne des relations Églises- État, 1998-Vol.5, p. 151-152.

déployer son activité. En particulier, ses prêtres ne peuvent pas officier, ses membres ne peuvent pas se réunir pour pratiquer leur religion et étant dépourvue de personnalité morale, elle ne peut pas bénéficier de la protection juridictionnelle de son patrimoine».[103] Le refus du gouvernement de reconnaître l'Église requérante constitue une ingérence dans la liberté de religion telle que garantie par l'article 9.

c. Vie Collective des Communautés Religieuses: Articles 9 et 11

40 – «Lorsque l'organisation de la communauté religieuse est en cause, l'article 9 doit s'interpréter à la lumière de l'article 11 de la Convention qui protège la vie associative contre toute ingérence injustifiée de l'État. Vu sous cet angle, le droit des fidèles à la liberté de religion suppose que la communauté puisse fonctionner paisiblement, sans ingérence arbitraire de l'État En effet l'autonomie des communautés religieuses est indispensable au pluralisme dans une société démocratique et se trouve donc au coeur même de la protection offerte par l'article 9. (...) Si l'organisation de la vie de la communauté n'était pas protégée par l'article 9 de la Convention, tous les autres aspects de la liberté de religion de l'individu s'en trouveraient fragilisés Le droit des fidèles à la liberté de religion qui comprend le droit de manifester sa religion collectivement suppose que les fidèles puissent s'associer librement sans ingérence arbitraire de l'État».[104] La reconnaissance de cette autonomie ne dispense pas les États de toute action positive à l'égard des religions et communautés religieuses.

41 – La Cour a réaffirmé le lien étroit qui unit les droits garantis aux articles 9 et 10 de la Convention et ceux garantis à l'article 11, et la place fondamentale que ces droits occupent dans une société démocratique au sens de la Convention. En particulier, les exceptions à l'article 11 appellent, à l'égard notamment des partis politiques comme des associations, une interprétation stricte, seules des raisons convaincantes et impératives pouvant justifier des restrictions à leur liberté d'association et surtout l'application d'une mesure aussi sévère que l'interdiction d'une association religieuse».[105]

[103] Cour, *Église Métropolitaine de Bessarabie*, 13 12 2001, 105.

[104] Cour, *Hassan et Tchaouch* 62; *Église Metropolitaine DE Bessarabie*, 13 12 2001, 118.

d. Protection Juridictionnelle des Communautés Religieuses: Article 9 et Article 6

42 – L'Église de la Canée, privée de la personnalité juridique de droit interne (V. supra) ne pouvait accéder à un tribunal et se trouvait victime d'une atteinte à la substance même du droit à un tribunal «L'un des moyens d'exercer le droit de manifester sa religion, surtout pour une communauté religieuse, dans la dimension collective, passe par la possibilité d'assurer la protection juridictionnelle de la communauté, de ses membres et de ses biens, de sorte que l'article 9 doit s'envisager, non seulement à la lumière de l'article 11, mais également à la lumière de l'article 6».[106]

43 – Des ministres du culte, Témoins de Jéhovah, condamnés à des peines privatives de liberté, furent finalement acquittés par les juridictions grecques. La décision était cependant assortie d'un refus de toute indemnisation, puisque leur détention était imputable à leur «grossière négligence». (circonstance exonératoire de la responsabilité de l'État). Le refus d'indemnisation affectait les droits de caractère civil des requérants. Ceux-ci n'avaient pas été entendus, alors qu'ils n'avaient pas renoncé à l'exercice de ce droit, l'un des plus fondamentaux de l'article 6. Les juridictions se sont bornées à reproduire le texte de la loi sans préciser en quoi la détention des requérants était imputable à leur grossière négligence.[107]

e. Existence d'un Recours Effectif devant une Instance Nationale Article 9 et Article 13

44 – L'article 13 de la Convention[108] reconnaît le droit à un recours effectif à toute personne physique ou morale. Dans plusieurs affaires la Commission et la Cour ont constaté la violation de l'article 13 dans le

[105] Cour (Déc.irrecevabilité) *Kalifatstaat* c.*Allemagne*, 11 12 2006: en l'espèce, la Cour a considéré que l'interdiction de cette association n'emportait pas violation de l'article 11.

[106] *Église métropolitaine de Bessarabie*, préc.118 et réfèrences.

[107] Cour *Georgiades* c. *Grèce*, *Tsirlis et Kouloumpas* c. *Grèce*, Revue européenne des relations Églises -État, vol.4, 1997, 176-177.

[108] «Droit à un recours effectif- Toute personne dont les droits et libertés reconnus dans la présente Convention ont été violés, a droit à l'octroi d'un recours effectif devant une instance nationale, alors même que la violation aurait été commise par des personnes agissant dans l'exercice de leurs fonctions officielles».

chef de requérants personnes physiques: Elèves de lycées grecs, témoins de Jéhovah, renvoyées temporairement de leur établissement, pour s'être abstenues de participer au défilé lors de la fête nationale. Non violation des articles P-1-2 et 9 de la Convention, mais les allégations de ces violations sont «défendables» au sens de cette disposition. Ni l'annulation de la sanction du renvoi temporaire, ni l'octroi d'une indemnité ne peuvent être demandées à une juridiction. Les requérants n'ont pas bénéficié d'un recours effectif devant une instance nationale pour exposer les griefs qu'ils ont présentés à Strasbourg: Violation de l'article 13 combiné avec les articles 2 au Protocole n°1et 9 de la Convention.[109]

2. *L'État – Protecteur des Croyances et des Cultes*

Protection contre les offenses à la religion (1) et contre les persécutions (2).

a. Protection contre les Offenses: Combinaison des Articles 9 et 10

45 – La liberté d'expression est un droit fondamental dans une société démocratique[110], aussi «la liberté de religion ne confère pas à une croyance ou à une confession particulière un droit d'être à l'abri des critiques».[111] «Ceux qui choisissent d'exercer la liberté de manifester leur religion, qu'ils appartiennent à une majorité ou à une minorité religieuse, doivent tolérer et accepter le rejet par autrui de leurs croyances religieuses et même la propagation par autrui de doctrines hostiles à leur foi».[112] L'article 9 §1 «n'implique pas nécessairement et en toutes circonstances le droit d'engager des poursuites, quelles qu'elles soient, contre ceux qui, par un ouvrage ou une publication, blessent la sensibilité d'un individu ou d'un groupe d'individus».[113] L'État démocratique peut-il, dans une société démocratique, laisser la liberté d'expression se transformer en campagne hostile à une ou plusieurs religions dans une société

[109] Cour (2arrêts) *Valsamis et Efstratiou* c. *Grèce*, 18 12 1996; Rev, europ. des relations Églises-État, 1997-vol 4, 177-178.

[110] Cour, D, 14 12 1999, *Gluchowski* c. *France*.

[111] D 8282/78 *Church of Scientology* (...) c. *Suede*, 14 7 1980, DR 21/114.

[112] Cour, *Otto Preminger*, 20 09 1994, 47 et Cour *Murphy* c. *Irlande*, 10 07 2003, 72.(non-violation de l'article 10).

[113] V. mutatis mutandis D 17439/90, 5 3 1991, (non publiée) D *Teresa Dubowska* c. *Pologne*, 18 4 1997, DR 89 B/161.

[114] J. Duffar, 'Les Limites à la Liberté d'Expression en Europe', L'Année Canonique, Tome XLI, 1999, p., 72 s.

pluraliste?[114] «La responsabilité de l'État peut être engagée lorsque les croyances religieuses font l'objet d'une opposition ou de dénégation qui dissuade les personnes qui les ont d'exercer leur liberté de les avoir ou de les exprimer. En pareil cas, l'État peut être amené à assurer à ceux qui professent ces croyances la paisible jouissance du droit garanti par l'article 9».[115] La question – déjà posée dans Otto Preminger Institut, 55 – «implique donc une mise en balance des intérêts contradictoires tenant à l'exercice des deux libertés fondamentales: d'une part, le droit, pour le requérant de communiquer au public ses idées sur la doctrine religieuse, et, d'autre part, le droit d'autres personnes au respect de leur liberté de pensée, de conscience et de religion».[116]

b. Décisions Favorables à la Liberté de Religion: Violation de l'Article 9 et non Violation de l'Article 10

46 – Déjà, la Commission n'avait pas exclu «que la critique ou l'agitation fomentées contre une Église ou un groupement religieux atteignent un niveau tel, qu'ils puissent mettre en danger la liberté de religion auquel cas le fait pour les pouvoirs publics de tolérer pareil comportement pourrait engager la responsabilité de l'État».[117]

47 – Pour la Cour, «la manière dont les croyances et doctrines religieuses font l'objet d'une opposition ou d'une dénégation est une question qui peut engager la responsabilité de l'État, notamment celle d'assurer à ceux qui professent ces croyances et doctrines la paisible jouissance du droit garanti par l'article 9. En effet, dans des cas extrêmes le recours à des méthodes particulières d'opposition à des croyances religieuses ou de dénégation de celles-ci peut aboutir à dissuader ceux qui les ont d'exercer leur liberté de les avoir et de les exprimer (...) On peut légitimement estimer que le respect des sentiments religieux des croyants, tel qu'il est garanti à l'article 9, a été violé par des représentations provocatrices d'objets de vénération religieuse; de telles représentations peuvent passer pour une violation malveillante de l'esprit de tolérance, qui doit aussi caractériser une société démocratique».[118]

[115] Cour *Ollinger* c. *Autriche*, 29 06 2006, 39.

[116] Cour, *Aydin Tatlav* c. *Turquie*, 02 05 2006, 26.

[117] D 8160/78, *X* c. *RU*, 12 3 1981, DR 22/27.

[118] Cour, *Otto Preminger*, 20 09 1994, 47.

[119] Cour *IA* c. *Turquie*, Bref aperçu des affaires examinées par la Cour en 2005, p. 35-36.

48 – Les devoirs et responsabilités inhérents à l'article 10 comportent «une obligation d'éviter autant que faire se peut des expressions qui sont gratuitement offensantes pour autrui et constituent donc une atteinte à ses droits et qui dès lors ne contribuent à aucune forme de débat public capable de favoriser le progrès dans les affaires du genre humain». La Cour a considéré que les déclarations contenues dans «*Les phrases interdites*» n'étaient pas seulement insultantes mais constituaient une attaque injurieuse pour le prophète Mohammed et les musulmans pouvaient se sentir attaqués et offensés. La condamnation de l'éditeur à une amende légère sans confiscation de l'ouvrage n'était pas une mesure disproportionnée.[119]

49 – L'office des visas britannique avait refusé le visa de diffusion d'un film vidéo «Visions d'extase», au motif que la mise en scène de sainte Thérèse d'Avila dans certaines situations avec le Christ, était réputée blasphématoire.[120] La Cour relève que, comme l'a souligné l'office, l'ingérence – soit le refus de visa – avait pour but de protéger contre le traitement d'un sujet à caractère religieux d'une manière <qui est de nature à choquer (dans le sens de susceptible de, et non de conçue pour choquer) quiconque connaît, apprécie ou fait siennes l'histoire et la morale chrétiennes, en raison de l'élément de mépris, d'injure, d'insulte, de grossièreté ou de ridicule que révèlent le ton, le style et l'esprit caractérisant la présentation du sujet>.

Après avoir reproduit ces motifs de l'office, la Cour ajoute «Voilà indéniablement un but qui correspond à celui de protection des <droits d'autrui> au sens du paragraphe 2 de l'article 10. **Il cadre aussi parfaitement avec l'objectif de protection de la liberté religieuse offerte par l'article 9».**[121]

[120] V. Commission de Venise, Recueil des législations nationales européennes en matière de blasphème, insultes religieuses et incitation à la haine religieuse, préparé par M. Louis-Léon Christians (Expert, Belgique). Avec l'assistance du Secrétariat de la Commission Etude n°406/2006, 23 mars 2007, 61 p.; CDL-AD(2007)006 et Rapport préliminaire sur les législations nationales d'Europe relatives au blasphème, aux insultes à caractère religieux et à l'incitation à la haine religieuse adopté par la Commission à sa 70èmes session plénière, Venise, 16-17 mars 2007, sur la base des observations de M. Louis-Léon Christians (Expert, Belgique; M. Peter van Dijk (Expert, Pays-Bas); Mme Finola Fanagan (Membre, Irlande); Mme Hanna Suchocka (Membre, Pologne) 10 p.

[121] Cour, *Wingrove*, 25 11 1996, 48. (non violation de l'article 10). Rev.europ. relations Églises-État, 1997, Vol. 4, 168-169.

50 – Dans ces arrêts, la Cour a considéré que le seuil de la tolérance était dépassé et les États fondés à protéger la sensibilité religieuse des personnes offusquée par certaines représentations. A fortiori, l'État, gardien de l'ordre public et du pluralisme, (V. Infra) devrait-il protéger les églises et communautés religieuses qui pourraient être, harcelées ou persécutées.

c. Décisions Favorables à la Liberté d'Expression: Violation de l'Article 10

51 – L'exercice de la liberté d'expression comporte des devoirs et des responsabilités (art.10-2). «Parmi ceux-ci, dans le contexte des croyances religieuses peut légitimement figurer l'obligation d'éviter des expressions qui sont gratuitement offensantes pour autrui et profanatrices»[122] «et constituent donc une atteinte à ses droits et qui, dès lors, ne contribuent à aucune forme de débat public capable de favoriser le progrès dans dans les affaires du genre humain».[123]

52 – Les mesures prises à l'encontre des écrits critiques à l'endroit de la religion sont des ingérences dans la liberté d'expression de leurs auteurs. Ces ingérences sont le plus souvent prévues par la loi et poursuivent un but légitime (protection de l'ordre public, de la morale, des droits d'autrui). Sont-elles pour autant nécessaires dans une société démocratique, au sens de 10-2? Les États jouissent d'une marge d'appréciation élargie «lorsqu'ils réglementent la liberté d'expression dans des domaines susceptibles d'offenser des convictions personnelles intimes relevant de la morale ou de la religion. Un État peut légitimement réprimer certaines formes de comportement y compris la communication d'informations et d'idées jugées incompatibles avec le respect de la liberté de pensée, de conscience et de religion d'autrui». C'est la Cour qui statuera définitivement sur la compatibilité de la restriction avec la Convention[124] en appréciant si l'ingérence correspond à un besoin social impérieux et si elle est proportionnée au but légitime poursuivi. Quelques exemples:

[122] Cour *Aydin Tatlav*, préc., 22-31.

[123] Inter alia Cour *Gunduz* c. *Turquie* 04 12 2003, 37.

[124] «Un tel contrôle peut être considéré d'autant nécessaire que la notion de respect des convictions religieuses d'autrui est assez vague et que des risques d'ingérence excessive dans la liberté d'expression, sous le couvert de mesures prises contre des éléments prétendument offensants, existent». Cour, *Murphy* c. *Irlande*, 10 07 2003, 68.

53 – Le requérant dirigeant d'une secte islamique – *Tarikat Aczmendi* – est condamné pénalement (2 ans d'emprisonnement), pour incitation publique à la haine et à l'hostilité sur la base d'une distinction fondée sur l'appartenance à une religion (13). Au cours d'un débat télévisé, en direct, il a dénoncé le caractère «impie» de la démocratie, de la laïcité et du Kemalisme, milité pour la charia et flétri la situation des enfants nés d'un mariage laïc. La Cour considère que les appréciations du requérant ne peuvent passer pour un appel à la haine ou à la violence fondé sur l'intolérance religieuse. La nécessité de la condamnation n'a pas été établie: violation de l'article 10.[125]

54 – Un ouvrage présente la religion comme la justification des injustices sociales par la volonté de Dieu. Cette vue critique d'un non-croyant ne contient pas «un ton insultant visant directement la personne des croyants, ni une attaque injurieuse pour des symboles sacrés, notamment des Musulmans, même si elle peut offusquer certains d'entre eux». Les poursuites n'ont été engagées que lors de la sortie de la cinquième édition. La condamnation pénale, même légère, «comportant le risque d'une peine privative de liberté, pourrait avoir un effet propre à dissuader les auteurs et éditeurs de publier des opinions qui ne soient pas conformistes sur la religion et faire obstacle à la sauvegarde du pluralisme indispensable pour l'évolution saine d'une société démocratique» L'existence d'un besoin impérieux n'a pas été démontrée ce qui ne permet pas de considérer l'ingérence comme proportionnée au but légitime poursuivi; violation de l'article 10.[126]

55 – Un journaliste fait paraître un article «*l'obscurité de l'erreur*» consécutif à l'encyclique de Jean-Paul II «Veritatis Splendor», publiée fin 1993. Cet article tend à soutenir que la doctrine de «l'accomplissement» de l'ancienne alliance dans la nouvelle serait à l'origine de l'antisémitisme et d'Auschwitz. L'auteur est condamné pour diffamation publique envers un groupe de personnes en raison de leur appartenance à une religion, en l'espèce la communauté des chrétiens. (Loi du 29 07 1881). «Cela revient à reprocher aux catholiques et plus généralement aux chrétiens d'être responsables des massacres nazis». Les chrétiens sont donc victimes du délit de diffamation 46.

[125] Cour *Gunduz* c. *Turquie*, 04 12 2003.
[126] Cour, *Aydin Tatlav* c. *Turquie*, 02 05 2006.

La Cour ne souscrit pas à cette thèse. L'article critique une encyclique du Pape et non l'ensemble de la chrétienté. Surtout le requérant apporte une contribution à un débat d'idées sur l'origine de l'Holocauste. C'est une question d'intérêt général dans une société démocratique. «Il est primordial dans une société démocratique que le débat engagé, relatif à l'origine des faits d'une particulière gravité constituant des crimes contre l'humanité puisse se dérouler librement». (...) la recherche de la vérité historique fait partie intégrante de la liberté d'expression (...) L'article n'avait d'ailleurs aucun caractère <gratuitement offensant>, ni injurieux et il n'incite ni à l'irrespect ni à la haine. «En outre, il ne vient en aucune manière contester la réalité de faits historiques clairement établis. (...) la condamnation du chef de diffamation publique envers la communauté des chrétiens ne répondait pas à un besoin social impérieux» Violation de l'article 10.[127]

56 – Un journaliste écrit un article très critique sur le primat catholique du pays. Il est condamné pour avoir diffamé le plus haut dignitaire de l'Église catholique et par voie de conséquence offensé les membres de cette église. L'opinion vigoureusement péjorative du journaliste s'adresse uniquement à la personne de l'archevêque. La Cour, contrairement aux juridictions nationales, n'est pas persuadée que les opinions du journaliste aient discrédité la partie catholique de la population. Elle considère, avec le requérant, que l'article ne portait pas atteinte au droit des croyants d'exprimer et de pratiquer leur religion et qu'il ne dénigrait pas le contenu de leur religion. La condamnation du requérant a violé son droit à la liberté d'expression (violation article 10).[128]

d. Protection Physique et Matérielle des Croyants et des Religions

57 – Heureusement peu de décisions relatives à des persécutions. Récemment les réunions d'un mouvements religieux «Verbe de vie» ont été perturbées par la police ou par des religieux zélés de la confession dominante.[129]

58 – Autre affaire récente dont les témoins de Jéhovah sont victimes. A l'occasion d'une réunion, les fidèles sont attaqués et battus par un groupe d'extrémistes conduits par un prêtre défroqué, le père Basile. La

[127] Cour *Giniewski* c. *France*, 31 01 2006, 49-56.
[128] Cour *Klein* c. *Slovaquie*, 31 10 2006, 50-53.
[129] Cour *Ivanova* c. *Bulgarie*, 12 04 2007.

Cour a conclu à la violation de l'article 3 (Traitements inhumains et dégradants) pour manquement de l'État défendeur à **ses obligations positives** (125) et à la violation de l'article 9 «par leur inactivité, les autorités compétentes manquèrent à leur obligation de prendre des mesures nécessaires à assurer que le groupe d'extrémistes orthodoxes animé par le père Basile tolère l'existence de la congrégation religieuse des requérants et permette à ceux-ci un exercice libre de leurs droits à la liberté de religion» (134). L'État a l'obligation positive «d'assurer à ceux qui professent ces croyances et doctrines la paisible jouissance du droit garanti par l'article 9» Otto Preminger, 20 09 1994, 47; Wingrove, 25 11 1996, 48.[130]

3. *L'État Organisateur Neutre et Impartial des Cultes*

59 – Le libellé de l'intitulé est emprunté à la jurisprudence de la Cour. Il implique au moins une attention permanente aux religions. L'expression n'est elle pas cependant contradictoire: l'organisateur dispose, aménage dans des buts précis, bref il s'engage mais il ne peut le faire que dans le détachement et la distance, pour respecter la neutralité et l' impartialité. «La Cour a souvent mis l'accent sur le rôle de l'État en tant qu'organisateur neutre et impartial de l'exercice des diverses religions, cultes et croyances, et indiqué que ce rôle contribue à assurer l'ordre public, la paix religieuse et la tolérance dans une société démocratique».[131]

Pourquoi l'État doit il être organisateur et comment peut-il être en même temps neutre et impartial?

a. «ORGANISATEUR»?

60 – D'abord, l'État est le gardien de l'ordre public: la protection de l'ordre et de la sécurité publique est un but légitime (article 9-2) justifiant éventuellement des restrictions à la liberté de manifester sa religion. «La Cour considère que les États disposent du pouvoir de contrôler si un mouvement ou une association poursuit à des fins prétendument religieuses, des activités nuisibles à la population ou à la sécurité publique».[132]

[130] Cour 97 *Membres de la Congrégation des Témoins de Jéhovah de Gldani* c. *Géorgie*, 03 05 2007.

[131] Cour, GC, *Refah Partisi*, 13 2 2003.

[132] Cour, *Manoussakis*, 26 09 1996, 40, Rev.europ. relations Églises-État, 1997 Vol 4, p.172-173; Église métropolitaine de Bessarabie, 13 12 2001, 113. La formulation de ces arrêts a été élargie et synthétisée dans les termes suivants: «Les libertés garanties par

L'autonomie des institutions religieuses ne fait pas obstacle aux pouvoirs de police et de surveillance des États, notamment à l'égard «des mouvements ou associations» qui sous une livrée religieuse poursuivraient en fait d'autres objectifs. Dans une société pluraliste, le pouvoir de police des autorités est, peut-être, encore plus que dans une société à religion dominante, une condition du maintien de la paix sociale.

61 – La Cour avait, déjà, désigné l'État comme «l'ultime garant du pluralisme».[133] Afin d'en préserver le maintien dans une société démocratique où plusieurs religions coexistent au sein d'une même population, il peut se révéler nécessaire d'assortir la liberté de limitations propres à concilier les intérêts des divers groupes et à assurer le respect des convictions de chacun.[134] Permettre la conciliation et la coexistence, sans violence, des religions traditionnelles et des nouveaux mouvements religieux.

62 – Sans doute faut- il laisser à chaque État une marge d'appréciation, notamment pour ce qui est de l'établissement des **délicats rapports entre l'État et les religions,**[135] Dans l'arrêt Cha'are Shalom, la Cour considère, par exemple, que *l'organisation* par l'État de l'exercice du culte israélite «concourt à la paix religieuse et à la tolérance». Ce rôle contribue à assurer l'ordre public, la paix religieuse et la tolérance dans une société démocratique.[136] Ainsi, dans certaines situations, le maintien de l'ordre public et du pluralisme justifient le rôle actif de l'État comme organisateur.

b. Neutre et Impartial

63 – Les deux adjectifs ne sont pas synonymes. En droit français, par exemple, la laïcité est souvent présentée comme la neutralité en matière

l'article 11 de la Convention ainsi que par les articles 9et 10 ne sauraient cependant priver les autorités d'un État, dont une association, par ses activités met en danger les institutions, du droit de protéger celles-ci. On ne saurait en effet exclure qu'une association, en invoquant les droits consacrés par l'article 11 de la Convention ainsi que par les articles 9 et 10 essaie d'en tirer le droit de se livrer effectivement à des activités visant à la destruction des droits ou libertés reconnus dans la Convention et ainsi, la fin de la démocratie. Or, compte tenu du lien très clair entre la Convention et la démocratie, nul ne doit être autorisé à se prévaloir des dispositions de la Convention pour affaiblir ou détruire les idéaux et valeurs d'une société démocratique» Cour, Déc. (irrecevabilité), 11 12 2006, *Kalifatstaat* c. *Allemagne*, n°13828/04.

[133] Cour, 24 11 1993, *Informationsverein Lentia* c *Autriche* 38.

[134] Cour, *Kokkinakis*, 33; *Refah*, 13 02 2003.

[135] Cour, *Manoussakis*, 29 09 1996, 44; *Cha'are Shalom* 84.

[136] Cour, *Refah Partisi*, 13 02 2003, 90.

religieuse. Dans le vocabulaire de la convention l'adjectif «impartial» évoque immédiatement le «Tribunal impartial» condition du procès équitable au sens de l'article 6 et plus généralement une qualité essentielle pour régler juridiquement un conflit entre deux parties.

64 – Le devoir de neutralité et d'impartialité de l'État est incompatible avec un quelconque pouvoir d'appréciation de la part de l'État quant à la légitimité des croyances religieuses.[137] «Ce devoir impose à celui-ci de s'assurer que des groupes opposés l'un à l'autre, fussent-ils issus d'un même groupe, se tolèrent. En l'espèce, la Cour estime qu'en considérant que l'Église requérante ne représentait pas un nouveau culte et en faisant dépendre sa reconnaissance de la volonté d'une autorité ecclésiastique reconnue, l'Église métropolitaine de Moldova, le Gouvernement a manqué à son devoir de neutralité et d'impartialité».[138]

65 – L'État ne doit pas être suspecté de partialité à l'égard d'une religion et à fortiori doit se garder, dans une communauté divisée, d'intervenir en faveur d'une partie de celle-ci. «Si des difficultés surviennent entre formations religieuses, le rôle des autorités n'est pas d'enrayer la cause des tensions en éliminant le pluralisme, mais de s'assurer que, par le dialogue et sans recours à la violence, des groupes opposés l'un à l'autre se tolèrent. Il y va du pluralisme et du bon fonctionnement de la démocratie».[139]

66 – La neutralité et le respect du pluralisme s'opposent à ce que des mesures de l'État favorisent un dirigeant ou des organes d'une communauté religieuse divisée ou visent à contraindre la communauté ou une partie de celle ci à se placer contre son gré sous une direction unique, constitueraient également une atteinte à la liberté de religion. «Dans une société démocratique l'État n'a pas besoin de prendre des mesures pour garantir que les communautés religieuses soient ou demeurent placées sous une direction unique».[140] La présence de plusieurs religions, dans

[137] Cour, GC, *Refah Partisi*, 13 02 2003, 91 et références, dont notamment la réserve figurant dans Cour *Hassan et Tchaouch*, 26 10 2000,78 «sauf dans des cas très exceptionnels».

[138] Cour, *Église Métropolitaine de Bessarabie*, préc., 123.

[139] (mutatis mutandis Cour, *Plattform «Arzte fur das Leben»* c. Autriche, 21 6 1988, 32 et *Serif* c. *Grèce* 14 12 1999, 52; *Église Metropolitaine de Bessarabie* c. *Moldova*, 18 12 2001, 115-117; *Agga* c. *Grèce*, 17 10 2002; *Refah Partisi*, GC, 13 2 2003, 91.

[140] Cour *Serif*, 52; *Église Metropolitaine de Bessarabie* 18 12 2001, 117.

une société démocratique, implique nécessairement un rôle plus actif de l'État.

III. Le Droit des Parents d'Assurer l'Éducation et l'Enseignement Conformement à leurs Convictions Religieuses ou Philosophiques

– Aprés quelques précisions de vocabulaire (§1); seront successivement exposées: le droit des parents et l'enseignement privé (§2); enfin le droit des parents et l'enseignement public (§3).

A. *Le Vocabulaire: Instruction, Enseignement, Éducation, Respect*

67 – L' intitulé de cette troisième partie reproduit, en substance, les dispositions pertinentes des instruments internationaux, L'article 14 de la Convention relative aux droits de l'enfant du 26 janvier 1990 s'en écarte en ce qu'il fait obligation aux États de respecter: «le droit de l'enfant à la liberté de pensée, de conscience et de religion». «Les parents ont seulement le droit de guider celui-ci dans l'exercice de ce droit d'une manière qui corresponde au développement de ses capacités».[141]

68 – L'article 2 du Protocole additionnel à la Convention énonce «*Nul ne peut se voir refuser le droit à l'instruction. L'État dans l'exercice des fonctions qu'il assurera dans le domaine de l'éducation et de l'enseignement, respectera le droit des parents d'assurer cette éducation et cet enseignement conformément à leurs convictions religieuses et philosophiques*». Cet article, distinct de l'article 9 de la Convention étudié ci-dessus,[142] diffère de l'article 18 du PIDCP qui réunit dans ce seul article la liberté de religion et celle des parents de faire assurer l'éducation religieuse de leurs enfants, conformément à leurs convictions. La jurisprudence a atténué cette séparation: la Cour a déclaré que les dispositions de la Convention et celles du Protocole devaient être envisagées comme un tout.[143] Les deux phrases de l'article 2 du Protocole doivent être lues, l'une à la lumière de l'autre, mais aussi des articles 8 (droit au respect de la vie privée et familiale), 9 (liberté de pensée de conscience et de

[141] F. Laroche – Gisserot, *Les Droits de l'Enfant*, Dalloz, Connaissance du droit.

[142] L'article P1-2 «est la *lex specialis* en matière d'éducation» Cour, *Folgero*, GC, 54.

[143] Cour, Affaire *Linguistique Belge*, 23 7 1968, 1.

religion) et 10 (liberté de recevoir ou de communiquer des informations ou des idées).[144]

69 – Ces deux phrases de l'article n'ont pas, cependant, une valeur égale.

- «En s'interdisant de "refuser le droit à l'instruction", les États contractants garantissent à quiconque relève de leur juridiction un droit d'accès aux établissements scolaires existants à un moment donné et la possibilité de tirer, par la reconnaissance officielle des études accomplies, un bénéfice de l'enseignement suivi».[145]
- Sur le droit fondamental de l'enfant à l'instruction «se greffe le droit énoncé par la seconde phrase de l'article 2. C'est en s'acquittant d'un devoir naturel envers leurs enfants, dont il leur incombe en priorité d'assurer (l') éducation et (l') enseignement» que les parents peuvent exiger de l'État le respect de leurs convictions religieuses et philosophiques. Leur droit correspond donc à une responsabilité étroitement liée à la jouissance du droit à l'instruction. «La Commission renvoie au caractère dominant du droit de l'enfant à l'instruction visé à l'article 2 du Protocole».[146] Ainsi, le droit des parents au respect de leurs convictions est- il second par rapport au droit fondamental de l'enfant à l'instruction, qui vaut pour les élèves des écoles privées et publiques sans aucune distinction. L'État a le devoir de veiller à ce que les enfants puissent l'exercer.[147] la jurisprudence maintient la prévalence constante du droit de l'enfant à l'instruction. (V. infra).

70 – L'article 2 énonce encore: l'État «respectera» les convictions religieuses et philosophiques des parents. Cette seconde phrase «implique que l'État en s'acquittant des fonctions assumées par lui en matière d'éducation et d'enseignement, veille à ce que les informations ou connaissances figurant au programme soient diffusées de manière objective, critique et pluraliste, permettant aux élèves de développer un sens critique à l'égard du fait religieux (voir en particulier l'article 14 de la Recommandation 1720(2005), dans une atmosphère sereine, préservée de tout prosélytisme intempestif.[148] Elle lui interdit de poursuivre un but

[144] Cour, *Kjeldsen, Busk Madsen et Pedersen*, 7 12 1976, 52.
[145] Cour, *Folgéro*, préc., 84.
[146] (...) D 25212/94 *Martin Klerks* c. *Pays- Bas*, 4 7 1995, DR 82 B/ 132.
[147] Cour, *Costello – Roberts*, 25 3 1993, 27.
[148] Cour, *Hasan et Eylem Zengin* c. *Turquie*, 09 10 2007, 52.

d'endoctrinement qui puisse être considéré comme ne respectant pas les convictions religieuses et philosophiques des parents. C'est là que se situe la limite à ne pas dépasser».[149]

Si, des abus se produisent dans l'application concrète des textes «il incombe aux autorités compétentes de veiller avec le plus grand soin à ce que les convictions religieuses et philosophiques des parents ne soient pas heurtées à ce niveau par imprudence, manque de discernement ou prosélytisme intempestif».[150] «Ce 'respect' n'implique pas nécessairement une participation financière aux écoles privées (V. infra) mais jusqu'où peut- il entraîner l'État? 'Respecter', ainsi que le confirme la substitution de ce mot à 'tiendra compte' pendant la genèse de l'article 2, signifie plus que 'reconnaîtra' ou 'prendra en considération'; en sus d'un engagement plutôt négatif, ce verbe implique à la charge de l'État une *certaine* obligation positive».[151]

71 – Cette obligation demeure, il est vrai, circonscrite par les fonctions «qu'il assumera dans le domaine de l'éducation et de l'enseignement», mais comment entendre ces termes voisins? «*L'éducation* des enfants est la somme des procédés par lesquels, dans toute société, les adultes tentent d'inculquer aux plus jeunes leurs croyances, coutumes et autres valeurs, tandis que *l'enseignement ou l'instruction* vise notamment la transmission des connaissances et la formation intellectuelle».[152]

72 – Après le rappel des principes qui gouvernent la seconde phrase de l'article P1-2, la Cour déclare «qu'une telle interprétation (...) se concilie avec à la fois avec la première phrase de la même disposition, avec les articles 8 à 10 de la Convention et avec l'esprit général de celle-ci destinée à sauvegarder et promouvoir les idéaux et valeurs d'une société

[149] Cour Kjeldsen, préc. 53; Folgero, préc., 84. Cour, Déc.irrecevabilité, *Ciftci* c. *Turquie*, 17 06 2004: L'exigence d'un diplôme d'enseignement primaire pour s'inscrire aux cours coraniques «vise l'acquisition d'une certaine maturité par les mineurs désireux de poursuivre une formation religieuse dans des cours coraniques, grâce à une éducation élémentaire offerte par les écoles primaires. En tant que telle, elle ne constitue pas une tentative d'endoctrinement visant à empêcher l'instruction religieuse. (...) La Cour estime que loin de constituer une tentative d'endoctrinement, la condition posée par le législateur vise, en fait, à restreindre l'exercice d'un éventuel endoctrinement des mineurs se trouvant dans un âge où ils se posent beaucoup de questions tout en étant facilement influençables par des cours coraniques».
[150] Cour, *Folgero*, préc., 84.
[151] Cour *Campbell et Cosans*; préc., 37. Sur la notion de «respect;» Rev.europ.relat. Églises-État, vol-6, 197-198.
[152] Cour, *Campell*, préc., 33.

démocratique (...) Cela vaut d'autant plus que *l'enseignement constitue l'un des procédés par lesquels l'école s'efforce d'atteindre le but pour lequel on l'a créée, y compris le développement et le façonnement du caractère et de l'esprit des élèves ainsi que leur autonomie personnelle*».[153] Plus généralement, P1-2 consacre les «principes de pluralisme et d'objectivité».[154] Même si la première phrase ne distingue pas plus que la seconde entre l'enseignement public et l'enseignement privé,[155] la commodité de l'exposé conduira à examiner d'abord le droit des parents dans l'enseignement privé (§2); puis dans l'enseignement public (§3).

B. *Le Droit Des Parents Et l'Enseignment Privé*

73 – Ce droit s'exprime d'abord, dans le respect des conditions techniques légales, par la liberté des parents de créer des écoles privées (A); mais l'État n'est pas tenu, aux termes de l'article 2 du Protocole, de les subventionner (B).

1. *La Liberté de Créer et de Gérer des Écoles Privées*

74 – La liberté de créer des écoles privées est explicitement reconnue par les articles 29 §2 de la Convention relative aux droits de l'enfant et 13 §3 et §4 du PIDESC du 16 12 1966:
3. Les États parties au présent Pacte s'engagent à respecter la liberté des parents et le cas échéant, des tuteurs légaux, de choisir pour leurs enfants des établissements autres que ceux des pouvoirs publics, mais conformes auc normes minimales qui peuvent être prescrites ou approuvées par l'État en matière d'éducation et de faire assurer l'éducation religieuse et morale de leurs enfants conformément à leurs propres convictions.
4. *«Aucune disposition du présent article ne doit être interprétée comme portant atteinte à la liberté des individus et des personnes morales de créer et de diriger des établissements d'enseignement, sous réserve que les principes énoncés au paragraphe 1 du présent article soient observés et que l'éducation donnée dans ces établissements soit conforme aux normes minimales qui peuvent être prescrites par l'État».*

[153] Cour, *Hasan* c. *Turquie*, préc. 55.
[154] Cour, *Folgero*, préc., 88.
[155] Cour, GC, *Folgero* C. *Norvège*, 29 06 2007, 84.
[156] Cour, *Kjeldsen, Busk Madsen et Pedersen*, 7 12 1976, 49; rendu le même jour que l'arrêt *Handyside*, qui affirme qu'il n'est pas de société démocratique sans «le pluralisme, la tolérance et l'esprit d'ouverture» 49).

75 – Le caractère détaillé de ces deux paragraphes contraste avec l'article 18 du PIDCP et P1-2 qui ne reconnaissent cette liberté qu'implicitement. La Cour a déclaré à son sujet: «*les travaux préparatoires (...) montrent sans conteste le prix que beaucoup de membres de l'Assemblée Consultative et nombre de gouvernements attachaient à la liberté d'enseignement, c'est à dire la liberté de créer des écoles privées. (...) La seconde phrase de l'article 2 vise en somme à sauvegarder la possibilité d'un pluralisme éducatif essentielle à la préservation de la* société démocratique».[156]

76 – Certains parents choisiront, pour leur enfants, des écoles privées confessionnelles, conformément à leurs convictions religieuses. En conséquence, l' État doit accorder les autorisations nécessaires à la création d'écoles. Il «ne doit pas, par les mesures qu'il prend dans le secteur de l'enseignement, empêcher les parents d'exercer le droit consacré par cette disposition (P1-2)».[157] La Commission a rappelé que l'article 2 garantit le droit d'ouvrir et de gérer une école privée. Une Fondation d'écoles chrétiennes entretient une relation contractuelle avec les parents de chaque enfant et leur contribution financière est indispensable à l'existence de l'école.[158]

2. *L'État n'Est pas Tenu de Créer ou de Subventionner des Écoles Privées*

77 – La Cour a interprété ainsi la première phrase de P1-2: «L'objet de ce droit (le droit à l'instruction) est essentiellement de garantir aux personnes placées sous la juridiction des Parties Contractantes le droit de se servir, en principe, des moyens d'instruction existant à un moment donné. Quant à l'étendue de ces moyens et à la manière de les organiser ou de les subventionner, la Convention n'impose pas d'obligations déterminées».[159]

«En conséquence, si l'on interprète l'article comme un tout, les États n'ont pas une obligation positive à teneur de la deuxième phrase de l'article 2, de subventionner une forme particulière d'enseignement pour

[157] D 9461/81, *X et Y* c. *RU*, 7 12 1982, DR 31/ 212; D 10476/ 83, 11 12 1985, DR 45/ 155.
[158] D 11533/85 *Fondation des Ecoles Chretiennes Ingrid Jordebo* c *Suede*, 8 12 1987, DR 61/118.
[159] Cour, *Affaire Linguistique Belge*, 23 7 1968, 31. et Cour, éc. D'irrecevabilité, *Kose et 93 autres* c. *Turquie*, 24 01 2006.

respecter les convictions religieuses ou philosophiques des parents. Il leur suffit, pour s'acquitter des obligations qui leur incombent au titre de l'article 2, de montrer qu'ils respectent les convictions religieuses et philosophiques des parents dans l'enseignement tel qu'il existe et qu'il se développe».[160] La Commission a précisé «l'État n'est pas tenu de **créer** ou de subventionner un établissement d'enseignement conforme à des convictions religieuses ou philosophiques déterminées» (École Rudolf Steiner).[161]

78 – De nombreux États accordent une aide financière pour le fonctionnement d'écoles primaires et secondaires privées qu'elles soient ou non confessionnelles. Ces subventions sont évidemment compatibles avec l'article 2 à condition que leur octroi ne génère pas de discrimination. L'État accorde aux écoles privées un financement couvrant seulement 85% des frais d'investissements et 100% des frais de fonctionnement alors que le financement accordé aux écoles publiques s'élève à 100% pour les frais d'investissement et de fonctionnement. La Commission «exprime l'avis qu'il est légitime que l'État exerce un droit de regard important sur la propriété et l'administration des établissements qu'il finance à 100%. Inversement, la Commission estime raisonnable que l'État exige une certaine contribution financière des organismes qui désirent être propriétaires d'écoles privées et veulent exercer un pouvoir déterminant sur la gestion de ces établissements» (absence de discrimination).[162]

79 – Ce 4 ème exemple est tiré de l'article 2 du protocole additionnel qui doit être lu avec l'article 9.[163] La Cour a déclaré que la seconde phrase de l'article 2 implique que l'État veille à ce que les informations ou connaissances figurant **au programme** soient diffusées de manière objective, critique et pluraliste. Elle lui interdit de poursuivre un but d'endoctrinement.[164] Les États définissent les programmes et leur contenu qui peut comprendre des informations ayant un caractère religieux ou philosophique: les parents ne peuvent pas s'opposer à l'intégration de ces enseignements dans le programme.

[160] D 7782/77, *X* c. *RU*, 2 5 1978, DR 14/184.
[161] D 9461/81 *X et Y* c. *RU*, 7 12 1982, DR 31/212.
[162] D 7782/77 *X* c. *RU*, 2 5 1978, DR 14/185 et D 23419/94 *Verein Gemeinsam Lernen* c. *Autriche*, 6 9 1995: absence de discrimination entre une école privée laïque et les écoles privées confessionnelles. DR 82 B/45.
[163] Cour, Affaire *Linguistique Belge*, 23 07 1968, 1.
[164] Cour, *Kjeldsen*, 7 12 1976, 53; VOGT,26 09 1995, 60.

C. *Le Droit des Parents et l'Enseignment Public*

80 – L'existence d'écoles privées subventionnées par l'État ne dispense pas celui-ci de respecter les convictions religieuses et philosophiques des parents dans les écoles publiques. La seconde phrase de l'article 2 du Protocole s'impose aux États dans l'exercice de l'ensemble «des fonctions» (...) dont ils se chargent en matière d'éducation et.d'enseignement, y compris celle qui consiste à organiser et financer un enseignement public. (...) <il ressort des travaux préparatoires> «que l'on n'a pas perdu de vue la nécessité d'assurer dans l'enseignement public le respect des convictions religieuses et philosophiques des parents» (...). «En raison du poids de l'État moderne, c'est surtout par l'enseignement public que doit se réaliser ce dessein» (soit sauvegarder la possibilité d'un pluralisme éducatif).[165]

81 – Les écoles privées attirent certains parents en raison de leurs convictions religieuses; les écoles publiques peuvent être choisies pour des motifs tenant aux convictions philosophiques. «Eu égard à la Convention tout entière, y compris l'article 17, l'expression <convictions philosophiques> vise (...) *des convictions qui méritent respect dans une société démocratique (...), ne sont pas incompatibles avec la dignité de la personne et, de plus ne vont pas à l'encontre du droit fondamental de l'enfant à l'instruction, la première phrase de l'article 2 dominant l'ensemble de cette disposition*».[166]

82 – Comment assurer le «respect» des convictions des parents dans les écoles publiques?

Au gouvernement du Danemark qui proposait, que la deuxième phrase implique uniquement le droit pour les parents de faire exempter leurs enfants des cours d'instruction religieuse de caractère confessionnel, la Cour a répondu: «L'article 2, qui vaut pour chacune des fonctions de l'État dans le domaine de l'éducation et de l'enseignement, *ne permet pas de distinguer entre l'instruction religieuse et les autres disciplines.* C'est dans l'ensemble du programme de l'enseignement public qu'il prescrit à l'État de respecter les convictions tant religieuses que philosophiques des parents»[167]. La réponse de la Cour suscite deux questions sur le «programme»: son contenu (A) et son mode de diffusion (B).

[165] Cour, *Kjeldsen*, préc., 50.
[166] Cour, *Campbell et Cosans*, 25 2 1982, 36.
[167] Cour, *Kjeldsen*, préc., 51; *Folgero*, préc., 84 c.

1. *Contenu du Programme*

83 – Les États sont en principe compétents pour définir et aménager le programme des études. Ils peuvent diffuser par l'enseignement ou l'éducation des informations ou connaissances ayant, directement ou non, un caractère religieux ou philosophique. La seconde phrase de P1-2 n'autorise pas les parents à s'opposer à l'intégration de cet enseignement ou éducation dans le programme scolaire[168] «Le droit à l'instruction appelle de par sa nature même une réglementation par l'État».[169]

84 – Les requérants demandaient, pour leurs enfants, une dispense des cours d'éducation sexuelle. «La Cour aboutit donc à la conclusion que la législation litigieuse ne blesse pas en soi les convictions religieuses et philosophiques des requérants dans la mesure prohibée par la seconde phrase de l'article 2 du Protocole, interprétée à la lumière de la première et de l'ensemble de la Convention» (non violation de l'article 2 du Protocole).[170]

85 – Le requérant informa le chef d'établissement que sa fille n'assisterait pas au cours d'éducation sexuelle. Interrogée lors de l'examen final sur la matière, elle refusa de répondre et dût redoubler l'année. Après le rappel des principes de l'arrêt Kjeldsen, la Cour fait les deux constatations suivantes:

- Première constatation: Le cours d'éducation sexuelle et la brochure constituaient des informations de caractère général pouvant être conçues comme d'intérêt général. La Cour relève, comme dans l'arrêt Kjeldsen, (n° 54), que «cette information ne touche pas au droit des parents d'éclairer et conseiller leurs enfants, d'exercer envers eux leurs fonctions naturelles d'éducateurs, de les orienter dans une direction conforme à leurs propres convictions religieuses ou philosophiques».
- Seconde constatation: Les parents sont libres de confier leurs enfants à des écoles privées, dont il existe en Espagne un vaste réseau, dispensant une éducation plus conforme à leur foi ou à leurs opinions.[171] Les

[168] Cour, *Folgero*, préc. 84 h.
[169] Cour, *Campbell et Cosans* c. *RU*, 25 02 1982, 41.
[170] Cour, *Kjeldsen*, 54.
[171] Dans l'arrêt *Folgero* les enfants soumis à un enseignement religieux auraient pu y échapper en s'inscrivant dans des écoles privées subventionnées à 85% par l'État. «en l'espèce l'existence de pareille possibilité ne saurait dispenser l'État de son obligation de garantir le pluralisme dans les écoles publiques qui sont ouvertes à tous» 101.

requérants n'ont pas allégué que leur fille ait été empêchée d'y suivre sa scolarité.

En conséquence, la formule mérite d'être soulignée, «Dans la mesure où les parents ont opté pour l'enseignement public, le droit au respect de leurs croyances et idées tel que garanti par l'article 2 du Protocole n°1 ne saurait être analysé comme leur conférant le droit d'exiger un traitement différencié de l'enseignement imparti à leur fille en accord avec leurs propres convictions» (requête manifestement mal fondée en application de l'article 35§3 de la Convention).[172]

86 – Des adventistes du 7ème jour demandent que leur enfant soit dispensé d'assiduité scolaire, le samedi. Ils invoquent la violation de l'article 9 de la Convention, estimant que le refus qui leur est opposé constitue une atteinte au droit de pratiquer leur religion. La Cour rappelle sa jurisprudence sur le caractère fondamental de la liberté garantie par l'article 9, la restriction apportée au droit de manifester la religion par les refus de dispense d'assiduité, la marge d'appréciation reconnue aux États parties et le contrôle européen «portant à la fois sur la loi et sur les décisions qui l'appliquent». La tâche de la Cour consiste à rechercher si les mesures prises au niveau national se justifient dans leur principe et sont proportionnées.

Le droit interne Luxembourgeois prévoit, des dispenses pour célébration de cultes religieux, comprises entre huit et trente jours. Ces dispenses ponctuelles «ne doivent pas revêtir un caractère général tel qu'elles aboutissent *à porter atteinte au droit à l'instruction, protégé par l'article 2 du protocole n°1 et dont l'importance dans une société démocratique ne saurait être méconnue*». La dispense sollicitée avait pour objet de soustraire l'enfant au rythme normal de la scolarité, le samedi «étant un jour à part entière dans **le programme** d'enseignement dans la mesure où il comporte notamment des leçons ainsi que des devoirs sur table rédigés en classe». (...)

L'État a le devoir de veiller à ce que *les enfants puissent exercer leur droit à l'instruction*[173] Lorsqu'au lieu de le conforter, le droit des parents au respect de leurs convictions religieuses entre en conflit avec le droit

[172] Cour, D, *Alejandro Jimenez Alonso et Pilar Jimenez Merino* c. *Espagne*, 25 05 2000.
[173] Cour, *Costello – Roberts* c. *RU*, 25 03 1993, 27.

de l'enfant à l'instruction, ***«les intérêts de l'enfant priment»***.[174] La décision fait application d'une jurisprudence constante selon laquelle le droit des parents au respect de leurs convictions religieuses est second par rapport au droit de l'enfant à l'instruction.

87 – La solution de la Cour coïncide avec le principe de l'intérêt supérieur de l'enfant qui sous- tend la Convention sur les droits de l'enfant et les droits internes.

- La loi portugaise 16/2001 du 22 juin 2001 sur la liberté religieuse dispose que «les parents ont le droit d'élever leurs enfants en cohérence avec leurs convictions en matière religieuse, dans le respect de leur intégrité morale et physique et sans préjudice de leur santé».[175]
- Le Tribunal fédéral Suisse a décidé que l'école obligatoire étant un devoir civique, un élève ne peut se prévaloir de la liberté de conscience pour obtenir des congés.[176]
- Dans un arrêt récent, la Cour Suprême du Canada, a décidé que le droit de l'enfant à un traitement médical salutaire avait préséance sur le droit de ses parents à la liberté de religion. Les parents avaient refusé que leur enfant reçoive une transfusion sanguine en raison de leurs croyances religieuses (*B* c. *Children's Aid Society of Metropolitan Toronto* (1995) 1 R.C. S. 315).[177] Dans son rapport initial au Comité des droits de l'homme «Le Gouvernement Fédéral reconnaît qu'il faut s'assurer que la liberté de religion des parents ne serve pas à justifier l'imposition aux enfants de pratiques qui font fi de leurs propres convictions religieuses, qui sont sexistes, néfastes pour leur santé, ou mènent à la violence ou aux abus».[178]

2. *La Manière de Diffuser Informations ou Connaissances: Interdiction de l'Endoctrinement*

88 – Les principes ont été rappelés par l'arrêt Hasan et Eylem Zengin c. Turquie: «La seconde phrase de l'article 2 implique en revanche que l'État, en s'acquittant des fonctions assumées par lui[179] en matière

[174] D13887, 5 02 1990, DR, 64/158; D, 08 09 1993, DR, 75/65. Cour, D, irrecevable, *Amaro Martins Casimiro* c. *Luxembourg*, 27 04 1999.
[175] CCPR/C/PRT/2002/3, 6 juin 2002, 18.8.
[176] ATF 66 I 158; CCPR / C/ 81/ Add.8 26 mai 1995, 358.
[177] CRC/C/ 83/ Add.6 27 mars 2003, 97.
[178] CRC/C/11/Add. 3, 29 juillet 1994, 115.
[179] Cour, 1448/04, 09 10 2007, 52.

d'éducation et d'enseignement, veille à ce que les informations ou connaissances figurant au programme soient *diffusées de manière objective, critique et pluraliste, permettant aux élèves de développer un sens critique à l'égard du fait religieux(voir en particulier l'article 14 de la Recommandation 1720 (2005) dans une atmosphère sereine, préservée de tout prosélytisme intempestif. Elle lui interdit de poursuivre un but d'endoctrinement qui puisse être considéré comme ne respectant pas les convictions religieuses et philosophiques des parents. Là se place la limite à ne pas dépasser»*.[180] Lorsque les parents tentent d'obtenir pour leurs enfants une dispense de certains cours, la Cour examine si le contenu de la législation ou des manuels ou les modalités de l'enseignement constituent des tentatives d'endoctrinement. Quelques exemples: sexualité, politique et religion.

a. Cour d' Education Sexuelle

89 – L'examen de la législation incriminée prouve en effet qu'elle ne constitue point une tentative d'endoctrinement visant à préconiser un comportement sexuel déterminé. Elle ne s'attache pas à exalter le sexe, ni à inciter les élèves à se livrer précocement à des pratiques dangereuses pour leur équilibre, leur santé, ou leur avenir ou répréhensibles aux yeux de beaucoup de parents.[181]

- «En l'espèce, la Cour constate que le cours d'éducation sexuelle litigieux tendait à procurer aux élèves une *information objective et scientifique sur la vie sexuelle de l'être humain, les maladies vénériennes et le sida. Cette brochure essayait de les alerter sur les grossesses non désirées, le risque de grossesse à un âge de plus en plus précoce, les méthodes de contraception et les maladies sexuellement transmissibles*. Il s'agit là d'informations de caractère général et pouvant être conçues comme d'intérêt général et qui ne constituent point une

[180] La protection contre l'endoctrinement en général de l'article P1-2 seconde phrase de P1-2 rejoint la protection spéciale de l'article 9 de la CEDH qui «offre une protection contre l'endoctrinement religieux par l'État». Com, D 23380/94 CJ., *EJ. et EJ.* c. *Pologne*, 16 1 1996, DR 84 B /56.
[181] Cour Kjeldsen... préc., 07 12 1976, 54. Cette rédaction rappelle un passage de l'arrêt *Handyside* c. *RU*, rendu le même jour, 07 12 1976. La Cour relève dans *The little Red Schoolbook* «des phrases ou paragraphes que des jeunes (...) pouvaient interpréter comme un encouragement à se livrer à des expériences précoces et nuisibles pour eux» 52 §2 (...).

tentative d'endoctrinement visant à préconiser un comportement sexuel déterminé».[182]

b. Endoctrinement Politique

90 – Le risque résidait dans la possibilité que, contrairement aux devoirs et responsabilités particuliers incombant aux enseignants, elle <Madame Vogt, enseignante communiste> tirât profit de sa position pour endoctriner ou exercer quelque autre influence indue sur ses élèves pendant les cours. Or aucune critique ne lui a été adressée sur ce point.[183]

c. Endoctrinement Religieux

91 – Dans une école publique, un enseignant d'anglais et de mathématiques met à profit ses cours pour dispenser un enseignement religieux tandis qu'il arbore sur ses vêtements des affichettes autocollantes portant des slogans religieux ou opposés à l'avortement. Instruction lui est donnée de cesser, à l'intérieur de l'école, toute publicité pour ses convictions politiques, morales ou religieuses. Après plusieurs avertissements, il est licencié.

La Commission est d'avis que cette instruction constitue une ingérence dans l'exercice de la liberté d'expression du requérant. Toutefois elle estime que les enseignants doivent tenir compte des droits des parents, de façon à respecter leurs convictions religieuses et philosophiques dans l'éducation de leurs enfants. Cette exigence revêt une importance particulière dans une *école non-confessionnelle, où la législation en vigueur prévoit que les parents peuvent demander que leurs enfants soient dispensés des cours d'instruction religieuse et en outre que l'instruction religieuse donnée, quelle qu'elle soit, ne comporte «aucun catéchisme ou recueil de formules caractéristiques d'une confession religieuse particulière»*.[184]

92 – Dans l'affaire Folgero, (préc.)les requérants ont demandé que leurs enfants, scolarisés dans le primaire, soient dispensés du cours KRL. (christianisme, religion et philosophie). Inspiré par les idées d'objectivité, de pluralisme et de non exclusion, ce cours devait rassembler tous les

[182] Cour, D, 25 5 2000, *Jimenez Alonso*.
[183] Cour, *Vogt* c. *Allemagne*, 26 09 1995, 60.
[184] D *X* c. *RU*, 1 3 1979, DR 16/104.

élèves autour d'un enseignement commun. La deuxième phrase de P1-2 *«ne renferme aucunement le droit pour les parents de laisser leurs enfants dans l'ignorance en matière de religion et de philosophie»* (89). La circonstance que le cours accorde une place plus importante au christianisme ne saurait «passer en soi pour une entorse aux principes de pluralisme et d'objectivité susceptible de s'analyser en un endoctrinement». L'arrêt reconnaît la place historique et traditionnelle du christianisme en Norvège.[185] Cette question relève de la marge d'appréciation dont jouit l'État pour définir et aménager le programme des études. (89)

Cependant, dans son application, l'importance de la religion chrétienne luthérienne se manifeste de façon prédominante (90-95) accentuant le déséquilibre à l'égard des autres religions et philosophies. Le mécanisme de demande et d'octroi des dispenses très complexe (motivation des parents, dispense partielle) «peut difficilement passer pour compatible avec le droit des parents au respect de leurs convictions aux fins de l'article 2 du Protocole n°1 tel qu'interprété à la lumière des articles 8 et 9 de la Convention» (100). L'État *«n'a pas suffisamment veillé à ce que les informations et connaissances figurant au programme de ce cours soient diffusées de manière objective, critique et pluraliste pour satisfaire aux exigences de l'article 2 du Protocole n°1»* (102).

93 – La demande de M. Zengin et de sa fille ne procède pas de convictions philosophiques mais de convictions religieuses.[186] Il sont membres de la communauté des Alèvis: la dispense du cours de Culture religieuse et Connaissance morale – matière obligatoire dans les établissements publics primaire et secondaire – lui est refusée par les autorités turques.

d. Contenu du Cours

Le programme de ce cours (présentation des grandes religion dans le respect du principe de laïcité) est conforme, dans ses intentions, aux

[185] (86% de la population). «La religion évangélique luthérienne demeure la religion officielle de l'État. Les habitants du Royaume qui la professent sont tenus d'élever leurs enfants dans cette foi» (Constitution art. 2.).
[186] La confession des alévis constitue une conviction religieuse profondément ancrée dans la société et l'histoire turque. «Il ne s'agit certes ni d'une secte (...) Par conséquent l'expression <convictions religieuses> au sens de la seconde phrase de l'article 2 du Protocole n°1, s'applique sans conteste à cette confession» Cour *Hasan et Eylem Zengin* c. *Turquie*, 09 10 2007, 66.

principes de pluralisme et d'objectivité consacrés par P1-2. Le principe constitutionnel de laïcité interdit à l'État de témoigner une préférence pour une religion ou croyance précise. (58-59)

Le programme d'enseignement et les manuels accordent une place plus importante à l'Islam «cela ne saurait passer en soi pour un manquement aux principes de pluralisme et d'objectivité susceptibles susceptibles de s'analyser en un endoctrinement, eu égard au fait que la religion musulmane est majoritairement pratiquée en Turquie, nonobstant le caractère laïc de cet État» (60-63).

L'enseignement ne mentionne pas les alévis à la mesure de leur importance numérique et ne rend pas compte de la diversité religieuse de la société turque. «Lorsque les États contractants intègrent l'enseignement du fait religieux dans les matières des programmes d'étude, indépendamment des modalités de dispense, **les parents d'élèves peuvent légitimement s'attendre à ce que de telles matières soient enseignées de manière à répondre aux critères d'objectivité et de pluralisme en respectant leurs convictions religieuses ou philosophiques. (...) dans une société démocratique, seul un pluralisme éducatif peut permettre aux élèves de développer un sens critique à l'égard du fait religieux (...) (66-69)**». L'enseignement dispensé dans le cours ne respecte pas les convictions religieuses et philosophiques du père de Melle Zengin (contenu du cours insuffisant sur la confession des alévis) (70).

e. Existence ou non de Moyens Appropries Tendant a Assurer le Respect des Convictions des Parents

L'article deuxième phrase de P1-2 donne aux parents le droit d'exiger de l'État le respect de leurs convictions religieuses et philosophiques dans l'enseignement du fait religieux. (obligation positive). Si le fait religieux est intégré dans les programmes d'étude, il ne doit pas produire chez les élèves un conflit entre l'éducation reçue à l'école et les convictions religieuses ou philosophiques de leurs parents. Dans les pays d'Europe est prévue la possibilité pour les élèves de ne pas suivre les cours de religion (33 et 71).

Dans le système Turc, seuls les juifs et les chrétiens peuvent obtenir une dispense, en se déclarant comme adeptes de ces religions, déclaration peu compatible avec le respect du secret des croyances (V. supra). Même si, aux mêmes conditions, la dispense peut être accordée à d'autres convictions, elle peut être refusée, en l'absence de tout texte clair. Ainsi le régime de la dispense n'est pas un mécanisme approprié pour protéger

les parents et les enfants contre un éventuel conflit entre l'enseignement obligatoire de l'Islam sunnite reçu en classe – pour lequel il n'existe pas d'alternative – et les valeurs et convictions différentes pratiquées dans la famille. Le droit des requérants garanti par la deuxième phrase a été violé.

Conclusion: Role de l'État – Démocratie – Laicité

94 – Les religions ont une place importante dans la société démocratique, elles doivent en respecter les règles et en particulier celles qui concourent à ce que des «groupes opposés se tolèrent».[187] Une des conséquences de la mondialisation est la coexistence de plusieurs religions dans la même société. Sans doute les religions historiques traditionnelles bénéficient-elles de certains avantages[188] mais à l'intérieur du principe de l'égalité des convictions religieuses et philosophiques.

Cette constatation pose la question du respect des religions minoritaires sous l'éclairage du pluralisme de la tolérance et de l'esprit d'ouverture. La démocratie commande «un équilibre qui assure aux individus minoritaires un traitement juste et évitant tout abus d'une position dominante (...)». Le pluralisme et la démocratie doivent également se fonder sur le dialogue et un esprit de compromis qui impliquent nécessairement de la part des individus des concessions diverses.

L'article 9 mentionne au nombre des buts légitimes qui peuvent justifier des restrictions à la liberté de manifester sa religion ou ses convictions «les droits et libertés d'autrui». «Si ceux-ci sont garantis par la Convention ou ses protocoles la nécessité de les protéger peut conduire les États à restreindre d'autres droits et libertés également garantis».

95 – Comme il n'existe pas en Europe une conception uniforme de la signification de la religion dans la société,[189] de profondes divergences peuvent raisonnablement exister dans une société démocratique, aussi vu

[187] Cour *Serif* c. *Grèce*, 53 et *Leyla Sahin* c. *Turquie*, GC10 11 2005, 107.

[188] Voir la place faite dans l'enseignement à la religion luthérienne dans Folgéro et à l'islam sunnite dans Zengin qui ne suscite pas en elle même la critique de la Cour «Eu égard à la place qu'occupe le christianisme dans l'histoire et la tradition de l'État défendeur», il y a lieu de considérer que cette question relève de la marge d'appréciation dont jouit celui-ci pour définir et aménager le programme des études Folgéro, 89; «eu égard au fait que la religion musulmane est majoritairement pratiquée en Turquie, nonobstant le caractère laïc de cet État» (Zengin, 63).

[189] Cour, GC, *Leyla Sahin* c. *Turquie*, 10 11 2005, 109.

le caractère délicat des rapports entre les États et les religions, «il y a lieu d'accorder une importance particulière au rôle du décideur national». L'importance de la marge d'appréciation qu'il conserve ne s'exerce pas sans contrôle européen. «La Cour veille notamment à la protection des droits et libertés d'autrui, les impératifs de l'ordre public, la nécessité de maintenir la paix civile et un véritable pluralisme religieux, indispensable pour la survie d'une société démocratique» (ibid, 110).

96 – Le programme du parti REFAH rejoint notre sujet: il comprend, notamment, l'abolition de la laïcité – inscrite dans la constitution Turque, un système politique théocratique fondé sur la religion des personnes, l'application de la Charia et, si nécessaire la prise du pouvoir par la force (djihad).[190]

97 – La Cour constate qu'il résulte tant du préambule que des articles 8, 9, 10 et 11de la Convention ainsi que de sa jurisprudence que «la démocratie représente sans nul doute un élément fondamental de l'ordre public européen» pour conclure que «La démocratie, apparaît ainsi comme l'unique modèle politique envisagé par la Convention et, partant, le seul qui soit compatible avec elle» n°86, et d'ajouter «Selon la Cour, il n'est pas de démocratie sans pluralisme», n°89. Conséquence pour notre sujet: pas de liberté religieuse, sans démocratie pluraliste.

98 – «Appliquant ces principes à la Turquie, qui était l'État défendeur, la Cour relève que» les organes de la Convention ont estimé que *le principe de laïcité était assurément l'un des principes fondateurs de l'État qui cadrent avec la prééminence du droit et le respect des droits de l'homme et de la démocratie. Enfin*, c'est l'aboutissement de tout ce qui vient d'être dit «une attitude ne respectant pas ce principe <soit le principe de laïcité> ne sera pas nécessairement acceptée comme faisant partie de la liberté de manifester sa religion et ne bénéficiera pas de la protection qu'assure l'article 9 de la Convention».

[190] Sa dissolution est prononcée par un arrêt du 16 janvier 1998 de la Cour Constitutionnelle Turque au motif qu'il est devenu «le centre d'activités contraires au principe de laïcité». Dans un premier arrêt du 31 juillet 2001, la Cour décide que la dissolution ne viole pas l'article 11 de la Convention: (droit à la liberté de réunion pacifique et à la liberté d'association). Par un arrêt du 13 février 2003, la Grande Chambre décide, à son tour, qu'il n'y a pas eu violation de l'article 11.

BRIGITTE SCHINKELE

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN AUSTRIA

I. Introduction (General Remarks)

First of all it must be noted that Austria has explicitly declared the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) to be part of the constitutional law.[1] This Austrian specificity has to be seen in connection with the special genesis of the Austrian "fundamental rights catalogue" which has paramount effects in some respects.

In Austria, the protection of fundamental rights has experienced three major developments: the National Law on Fundamental Rights 1867 (*Staatsgrundgesetz* – StGG), the Treaty of St. Germain 1919 which became part of the framework of the young Republic of Austria in 1920,[2] and finally the ECHR which was ratified in 1958. With the European Convention the most comprehensive protection of religious freedom became part of the constitutional system. These basic laws date from several historical epochs with various state-church relationships and a different apprehension of fundamental rights.

This state of affairs in Austria complicates any attempt to systematically synthesize the individual fundamental guarantees. Not only are they a product of different historical circumstances, but they also stem from different sources, namely national and international law. As a result of this gradual development, the individual constitutional provisions are overlaying and overlapping each other. With respect to this process of interaction and superimposition the meaning of a certain right can only be established by considering the relevant fundamental guarantees on the whole. Therefore, the different norms are to be summarized by means of a teleological synopsis amounting to an 'aggregated' or 'pooled' norm of fundamental rights (*aggregierte Grundrechtsnorm: Walter Berka)*, part

[1] BGBl. 219/1958, BVG BGBl. 59/1964.
[2] RGBl. 142/1867; StGl. 303/1920.

of which is the entire law of religious rights and freedoms.[3] Thus the various constitutional guarantees altogether form a unified and comprehensive right of freedom of religion and philosophical conviction. The various reservation clauses and qualifications do not represent an obstacle for such a harmonizing approach. The determination of the content of the various fundamental rights – understood as an answer to concrete threats to freedom – must be established by considering the entire context, beyond the understanding of the historical legislator, employing a dynamic and teleological approach to interpretation, to adequately provide sufficient legal protection. In sum it can be concluded that the reservations enumerated in Article 63 of the Treaty of St. Germain and – to a greater extent – the value-based limitations such as laid down in Article 9 of the Convention are both important developments in a process of juridification. Consequently, these reservations should not be seen in terms of inhibitions of freedom but rather as more effective protection of fundamental rights.

Against this background, the concept of the Convention, as laid down in its preamble and represented in the dynamic approach of the European Commission and the Court, had a great impact on constructing fundamental rights in Austria, with regard to the fundamental rights doctrine, as well as the case law. By and by a quite static and positivistic attitude, characteristic of the legal theoretical and dogmatic approach, has been modified essentially. This development is clearly reflected in the Constitutional Court's case law. Since the early eighties of the last century the Court's decision-making has changed so significantly that it is to be qualified as a "paradigm shift". The understanding of fundamental rights as rights with a merely defensive effect towards the State has transcended (status *negativus*). The Court departed form the attitude of "judicial self-restraint" in general, which was replaced by a more evolutionary and progressive approach. Nowadays a certain degree of "judicial self-activism"[4] is a distinctive sign of its jurisdiction. More and more fundamental rights have been understood as objective principles, and therefore they might impose certain positive obligations on the side of the State in order to ensure the rights and freedoms set forth in the Convention; rights and freedoms which might thus involve duties (*status positivus*), even in

[3] For more see *KALB, POTZ, SCHINKELE, Religionsrecht*, Vienna, 2003, 43 ss.

[4] Cf. *ÖHLINGER*, Die Grundrechte in Österreich, EuGRZ 1982, p. 216 ss; *KORINEK, Entwicklungstendenzen in der Grundrechtsjudikatur des Verfassungsgerichtshofes*, (Wien, 1992).

order to protect an individual's right against infringements by private parties (so-called third party effect "*Drittwirkung*"). Accordingly, the Constitutional Court has stated that Article 9 ECHR contained a positive obligation for the State to protect persons manifesting their religion against deliberate disturbance by others.[5]

Simultaneously, the principle of proportionality has been embodied on the constitutional level. In contrast to the formal legal reservations typically found in the StGG, State actions affecting legal rights are only permissible to protect certain exhaustively listed objects of legal protection which must be interpreted through the clause 'necessary in a democratic society' ('limitation-limitation-clause'). This system created by the Convention generally requires the balancing of the competing requirements, whereby the reference to the ideals of a democratic society amounts to a reference to the standards and values of the legislature, which must be used by the institutions that interpret the law and balance the competing requirements, as a guide strictly to be observed.

Another essential aspect is that the Austrian Constitution does not provide for a right of appeal against court decisions based on constitutional grounds, whereas according to the Convention the European authorities can review national case law, in order to determine whether they are in correspondence with the Convention. This has led the Austrian courts to attribute to the Convention greater weight as a general guide and as a factor in their decision-making. Thus the Supreme Court has repeatedly emphasised the general planning significance of the Convention in the interpretation of national law. After an initial period of hesitation and reservation against the Convention, especially on the part of the Constitutional Court, an increasing process of acceptance and absorption took place. For a long time the ECHR has been of central significance for the protection of fundamental rights in Austria.

II. Article 9 ECHR – Right to Freedom of Thought, Conscience and Religion

1. *General Case Law*

The aforementioned development highly initiated by the European Convention, as well as the multi-layered nature of the guarantees of the fundamental rights, are also clearly mirrored in the decision-making in the

[5] VfSlg. 16.054/2000; cf. also VfSlg.15.680/1999 and below V.2.

field of law on religion, especially in the Constitutional Court's case law. Whereas a quite static attitude and an isolating observation of the individual fundamental guarantees had been prevailing until the early eighties, since then the Court has gradually abandoned this approach. A significant turning point was the Constitutional Court's judgement of 1985[6] whose reasoning has been deepened in later decisions.[7] Nowadays it is established case law that the relevant constitutional guarantees are to be understood as an integrated whole: Article 14 StGG has been supplied by Article 63 Treaty of St. Germain and Article 9 ECHR, where the limitations are outlined more precisely.

2. *Most Important Leading Decisions (Representative Selection)*

2.1. Pastoral Care During Detention[8]

In this decision, which is to be pointed out first of all, the Court considered the individual fundamental guarantees (Art. 14 StGG, Art. 63 Treaty of St. Germain, Art. 9 ECHR) to be a unity in the sense of an "aggregated fundamental norm" (cf. I.) though without using this paraphrase explicitly.

A prisoner had put in a claim for pastoral care of a spiritual adviser of Jehova's Witnesses relying on §85 Law on Execution of Imprisonment,[9] though he was neither baptised nor a member of this religious community. The request had been dismissed due to the prisoner's missing formal membership to the religious community concerned. According to §85 leg cit prisoners are principally entitled to receive pastoral care of a pastor of their "own religious belief" outside the regular visiting time as well, subject to certain restrictions inherent to detention.

The Constitutional Court stated an infringement of the right of religious freedom guaranteed by Article 14 of the StGG read in conjunction with Article 9 of the Convention. According to the Court's reasoning, the wording "one's own religious belief" in section 85 leg cit corresponds with the outward appearance of the inner attitudes and values irrespective of the formal membership. The Court regarded the right to receive pastoral care to be an essential part of the individual's right to manifest one's religion, presuming the serious attitude is accepted from the community

[6] VfSlg. 10.547/1985 (concerning the use of cultic objects during detention).
[7] VfSlg. 15.394/1998; VfSlg. 15.592/1999 (cf. II.2.1. and II.2.2.).
[8] VfSlg. 15.592/1999.
[9] BGBl. 144/1969 as amended.

concerned by being prepared to comply with the prisoner's wish for pastoral care.

This decision is of great interest from another point of view as well. For the first time after the Law on the Legal Status of Registered Religious Communities (BekGG)[10] entered into force, the Constitutional Court expresses its position concerning the legal significance of being registered as a religious community. The Court's finding indicates that both categories – churches and religious societies under public law on the one side and the State registered religious community according to BekGG as legal entities under private law on the other side – are based on a State act of recognition in a broad sense, though according to BekGG on a lower level. As a result, as the Court argued, one has to proceed from the assumption that the objects of legal protection enumerated in Article 9 (2) ECHR are not endangered or violated by practising pastoral care with prisoners, irrespective of the legal status of the community concerned.

2.2. Ritual Slaughtering (Public Order and Good Morals)[11]

According to the Constitutional Court's position, religious slaughtering falls within the scope of the fundamental right's guarantee of religious freedom (Article 14 and 15 StGG, Article 63 Treaty of St. Germain, Art. 9 ECHR), and limitations amounting from provisions protecting animals do not come into effect. The religious precepts concerning ritual slaughter neither offence public morals nor infringe with public order. This attitude is corresponding with the decision making of the High Administrative Court at the time of the monarchy[12] and the recent Supreme Court's case law, from a constitutional as well as from a penal law point of view.[13]

Moreover, referring to the protection of public order, the Court outlines more precisely the meaning of this legal term used in Article 63 Treaty of St. Germain and Article 9 ECHR. According to its current position, public order only refers to actions which are incompatible with a peaceful living together, and therefore only provisions, which are of essential importance from that point of view are able to confine religious

[10] BGBl. I 19/1998. For more see below II.2.3.
[11] VfSlg. 15.394/1998.
[12] VwGHSlg. 10.666/1897; VwGHSlg. NF 5248 A/1907.
[13] OGH 28.3.1996, 15 Os 27, 28/96.

or denominational manifestations.[14] As far as "good morals" are concerned, they are understood by the Constitutional Court as "general fundamental ideas anchored in the population concerning a correct way of life, explicitly protected by a legal provision".

2.3. Status of State Registered Religious Communities

In several decisions the Constitutional Court and the High Administrative Court had to deal with the different treatment of legally recognized churches and religious societies on the one side and of State registered religious communities on the other. It is a characteristic feature of the respective case law that the Courts do not deal in detail with the question whether this differentiation can be justified for objective and reasonable grounds, but only rely on the "clear wording of the legal text" of each Act concerned. Moreover, they do not take into account that the historic legislator could not anticipate the later established legal status of registered religious communities. Up to now the following legal fields were at issue:

2.3.1. Personal Status

The applicants, adherents of Jehova's Witnesses, since 1998 a State registered religious community, had required their membership to be registered in the marriage certificate and considered the administrative body's dismissal to be an interference with the fundamental guarantee of religious freedom in conjunction with the principle of equality and non-discrimination.[15]

Pursuant to section 24 (2) 2 lit. 1 Law on Personal Status[16] only the membership to legally recognized churches and religious societies is provided for registration in personal status documents. The Court assumed a broad margin of appreciation pertaining to legal policy within which the legislator would be authorized to regulate status law. It considered the provision in question not to be within the ambit of religious freedom, and as a consequence, not to conflict with the rule of non-discrimination (Article 14) in connection with Article 9 ECHR.

[14] According to the Court's previous view "public order" was to be considered as synonymous with the "embodiment of the prevailing fundamental thoughts and conceptions of the legal order" (VfSlg. 2944/1955; VfSlg. 3505/1959).

[15] VfSlg. 16.998/2003; cf. VwGH 29.6.2004, 2003/01/0576.

[16] BGBl. 60/1983 as amended.

Contrary to such reasoning, it is to be pointed out that according to the prevailing doctrine the "compulsion to reveal one's religion or conviction" contravenes Article 9. Consequently, the "compulsion not to disclose it" is deemed to be connected with the basic right of religious freedom as well. In concordance with this legal opinion, the European Commission of Human Rights deduced from Article 9 the right to have one's religion or belief correctly registered by the municipal authorities and considered the administrative body's refusal to provide the applicant with a certificate indicating his religion falling within the scope of Article 9.

According to the established European case law, as far as the prohibition of discrimination is concerned, it is not required that any of the rights and freedoms as laid down in the Convention has actually been violated. Even if a restriction in itself does not contravene the relevant provision of the Convention, the restriction must not be applied in a discriminatory way. Consequently, if the State authorities proceed to subside or promote a certain religious community or its activities, other religious communities are in principle entitled to the same treatment. In concordance with this case law and on the basis of a substantial comprehension of fundamental rights the registration of a person's religion ought to be provided, at someone's request, for the adherents of every religious community.

Another Constitutional Court decision[17] had to deal with the question whether or not the exemption clause under section 1 (2) lit. d Employment of Foreigners Act[18] was of discriminatory character in the meaning of Art. 9 in connection with Article 14 of the Convention. The general provision that employed persons without an Austrian nationality[19] need an official licence, does not apply to foreigners as far as they are doing spiritual welfare work within a legally recognized church or religious society.

The Court assumed a far-reaching discretion as far as the construction of labour law and the order of the labour market are concerned. With respect to the principles of equality and non-discrimination the Court once again referred to its established case law that the differentiation between recognized and non-recognized religious communities, constitu-

[17] VfSlg. 17.021/2003; cf. VwGH 15.12.2004, 2003/09/0149.

[18] BGBl. 218/1975 as amended.

[19] That applies also to persons with a nationality of a member-state of the European Union.

tionally laid down in Article 15 StGG[20], would be reasonably justified, if there were an enforceable claim to gain recognition for those complying with the legal preconditions.[21]

However, at the time being, owing to the additional prohibiting preconditions for legal recognition the public law status seems to be out of reach for almost every religious community striving for this status. Moreover, the question of justifying such an unequal legal treatment arises regardless of the enforceability of recognition, though it becomes a matter of higher priority if both aspects coincide.

Evidently– as the Court argues – it is within the legislator's discretion to determine the essential subject matter of the public law status of legally recognized religious communities or – in words used by the Court – "how to take part in the public life of the State". However, it needs to be pointed out that this margin of appreciation is restricted as far as fundamental rights or the principle of equality is concerned. It must be emphasized that doing and receiving spiritual welfare work – which is at issue in the case in question – is not a matter of "co-organising the public life of the State", but one of the most essential Church activities according to their self-understanding. Primarily, religious interests of the individual believer are concerned which are necessary to be satisfied, irrespective of the legal status of the religious community in question. Pastoral care is not at all a matter of participating in the public life of the State.

The State authorities – though neutral towards religious and philosophical beliefs – actually have the right to set measures of promotions in favour of churches and other religious communities as socially relevant factors. The distinguishing characteristic criteria, however, have to be of secular and not of religious nature. If the State promotes genuine Church activities – maybe ensuing form the State's obligation to guarantee an efficient practice of religion or belief – the State authorities are bound to the rule of non-discrimination. Without any doubt, there is no reasonable and objective ground for such a differentiation between both categories of religious communities in the sphere of pastoral care. An exemption clause as included in the Employment of Foreigners Act might even be of greater interest and appropriateness for smaller religious communities or New Religious Movements respectively, having their origin outside Europe than for the traditional churches and religious communities.

[20] Article 15 StGG guarantees the fundamental right to self-determination ("internal affairs").

[21] Cf. especially VfSlg. 9185/1981, 11.931/1988.

The exemption clause under §13a Substitute Service Act[22] may also be taken as a striking example for a differentiation between both categories of religious communities without any reasonable and objective ground. According to this provision priests and other ecclesiastical functionaries who work in pastoral care or religious teaching on the basis of complete course of theological studies are exempt from substitute service, if they belong to a legally recognized church or religious society.

The High Administrative Court,[23] just as it had done in a previous judgement, referred to the clear wording of the Law without making any considerations regarding the question of constitutionality of such unequal legal treatment (Article 14 in conjunction with Article 9 ECHR). Apart from these critics, however, the reasonability of the exemption rule concerned is to be put into dispute in general.

III. Article 8 – Private and Family Life

With respect to the religious dimension, the Courts mainly refer to the guarantees embodied in Art. 8 ECHR in connection with questions of care and custody. The well-known *Hoffman-Case*,[24] originated in an Austrian Supreme Court's decision, has been of significant importance for the later respective case law.

In its judgement, the Supreme Court[25] had overturned the District Court's and the Regional Court's decisions. The only argument of the children's father had been that the mother's membership to the religious community of Jehova's Witnesses would have serious detrimental effects on the children. According to the lower Courts' reasoning, parental rights and duties could not be refused to a parent or withheld from him or her for the sole reason that s/he belongs to a religious minority. Therefore, it needed to be examined thoroughly in the concrete case whether the mother's religious convictions did harm to the children. The District Court admitted that some of the characteristic features of the doctrine in question (ban on blood transfusion, rejecting communal celebration of customary holidays, impaired social integration) could principally have negative influence on the children. However, as far as the permission for a medically necessary blood transfusion is concerned, it could be replaced by a judicial decision so that no danger to the children needed to be

[22] BGBl. 679/1986 as amended.

[23] VwGH 18.3.2003, 2002/11/0256; cf. VwGH 10.11.1998, 98/11/10/0175.

[24] European Court of Human Rights 23.6.1993, Appl. 128757:

[25] OGH 3.9.1986, 1 Ob 586/86.

inferred from the mother's attitude. The District Court emphasised that only the children's well-being fell to be considered. Altogether, the children had stronger emotional ties with the applicant mother, and separating from her might cause them psychological harm. The Regional Court added that Jehova's Witnesses were not outlawed in Austria, it might, therefore, be assumed that their objectives neither infringe the law nor offend the morality (making reference to Art. 16 Basic Law in conjunction with Article 9 ECHR). Therefore. the mother's membership to that religious community could not by itself constitute a danger to the children's welfare.

The Supreme Court, however, took the position that the lower Courts had failed in their decisions to give due consideration to the children's welfare. Moreover, the Court attached an inadequate significance to the fact that upbringing the children according to the principle of Jehova's Witnesses contravened the provision of the Federal Law on the Religious Education of Children, owing to the fact that the children had been baptised as Roman Catholics.

In the "*Hoffmann*" decision the European Court of Human Rights set forth that notwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion was not acceptable. The Court, therefore, could not find that a reasonable relationship of proportionality existed between the means employed and the aims pursued; there has accordingly been a violation of Article 8 taken in conjunction with Article 14.

Since then, as far as the religious or philosophical dimension in care and custody cases are concerned, the lower Courts as well as the Supreme Court dealing with questions of care and custody are increasingly taking into account the guarantee of fundamental rights enshrined in Article 8 ECHR. As a consequence, in case of a divorce or another form of separation, the membership to certain religious communities as such (mainly some new religious movements or so-called "sects") does not inhibit a parent from being awarded care and custody. Instead, should the situation arise because of endangering the child's welfare, a restriction of the parental rights under a certain aspect is to be imposed, while the welfare body or the guardianship authority is charged with the respective task. That is the way, how to give due consideration to the child's welfare as the most important principle in the sphere of child law.

Such an approach is to be carried out primarily with regard to some methods of medical treatment of minors such as blood transfusions.[26] In

[26] OGH 4.6.1996, 1 Ob 601/95.

another case within the first instance proceedings, the mother concerned, member of the "Church of Scientology", had to give an official statement to keep the minor son away from any kind of this movement's activities, while the youth welfare office had been charged with surveillance.[27] Likewise, with respect to a parent's membership to "Sahaja Yoga" the parental rights had been restricted regarding "school affairs and education".[28]

Nowadays, it is established case law of the lower Courts and the Supreme Court as well that refusing or withdrawing the right of care and custody solely because of one parent's membership to a religious movement infringes Article 8 in conjunction with Article 14 ECHR.

IV. Article 10 ECHR – Freedom of Opinion and Expression

With regard to the right of freedom of expression the religious dimension is primarily touched upon in connection with works of art, possibly violating religious feelings or endangering the religious peace respectively. The domestic Courts, especially the Supreme Court, have repeatedly adopted the European Court of Human Rights' established position, that freedom of expression is applicable not only to "information" and "ideas" which are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society".[29]

According to the Austrian case law, including deliberations pertaining to legal policy, the purpose of the criminal offence "disparaging religious doctrines" (section 188 s of the Penal Code 1975) aims at the protection of an undisturbed practice of religious cults as well as manifestations of personal convictions without interference and compulsion; in other words, it aims at the protection of religious feelings of believers and the peaceful living together of citizens with various religious and philosophical convictions. This provision contravenes neither the guarantees of Article 9, nor those of Article 10 of the Convention.[30]

The leading cases – "*Das Gespenst*" ("The Ghost") by *Herbert Achternbusch*, and "*Das Liebeskonzil*" (Council in Heaven") –concern

[27] OGH 13.8.1996, 2 Ob 2192/96h.

[28] OGH 30.1.1996, 1 Ob 623/95.

[29] For instance VfSlg 12.086/1989, VfSlg. 13.694/1994; OGH 18.5.1995, 6 Ob 20/95.

[30] OGH 19.6.1970, 10 Os 36/70; OGH 19.12.1985, 11 Os 165/85.

questions of forfeiture and seizure of film productions (media offences). Comparing both cases, a certain development in the Courts' reasoning can be observed.[31] Whereas in the first mentioned case the Courts had proceeded from the assumption that the Penal Code in itself imposes limitations to the artistic freedom, they took a differentiated attitude in the other one: The limitations on artistic freedom are to be found, firstly, in other basic rights and freedom guaranteed by the Constitution, such as freedom of religion and conscience, secondly, in the need for an ordered form of human coexistence based on tolerance, and finally in flagrant and extreme violations of other interests protected by law. The specific circumstances have to be weighed up against each other in each case, taking due account of all relevant circumstances. Consequently, the fact that the conditions of section 188 Penal Code are fulfilled does not automatically mean that the limit of artistic freedom has been reached. In spite of this advanced aspect in the judgement finding in comparison to the first mentioned case, the Regional Court reached the conclusion that in view of the multiple and sustained violation of legally protected interests (religious feelings of catholic believers) the basic right of artistic freedom would in the instant case have to come second.

The European Court for Human Rights (*Otto-Preminger-Institut versus Austria*)[32] also held that there had been no violation of Article 10 of the Convention, admitting a broad margin of appreciation to the national institutions. The conclusion taken by the Austrian Regional Court and the European Court of Human Rights as well might be put into dispute. The principle of appropriation does not seem to be taken into due consideration, not at least with regard to the fact that the judicial decision amounts to a measure of pre-censorship.

V. Article 11 ECHR – Freedom of Assembly and Freedom of Association

For a long period of time the question whether the Act on Associations is pertinent to religious communities was answered controversially. The crucial provision was section 3a leg cit which stated that this law was not

[31] Regional Court Graz 12.12.1983, 8 Bs 377/83; Regional Court Innsbruck 30.7.1985, 3 Bs 294/85. It needs to be pointed out that the decisions of the domestic Courts were based on Article 17a StGG, a particular guarantee protecting freedom of art, which has been implemented into the Fundamental Law in 1982.

[32] European Court of Human Rights 20.9.1994, Appl. 13.470/87.

applicable to religious orders, congregations, and religious communities generally, because of being subject to their own laws. Owing to that regulation in the administrative practice – refusing an "interpretation in favour of constitutionality" in the meaning of Article 9 and Article 11 of the ECHR – only the foundation of associations with partly religious function (*Vereine mit religiösem Teilzweck*) has been seen admissible. If religious groupings did not fulfil the conditions for recognition, or this status was not in accordance with their self-understanding, they had no other possibility to get a legal status at all, until the Law concerning the Legal Personality of Religious Communities 1998 (RRBG)[33] was put into force. Since the middle of the eighties of the last century as a result of a proceeding before the European Court of Human Rights the administrative body partly deviated from its practice by conceding religious communities to be constituted according to the Act on Associations. Owing to the concrete circumstances and facts, the Constitutional Court and the High Administrative Courts could refrain from scrutinizing this complex legal question in detail.[34] A definite clarification in accord with Article 11 ECHR was done by the new Act on Associations 2002.[35]

As far as freedom of assembly is concerned, in a recent decision[36] the Constitutional Court had to deal with the prohibition of a meeting supposed to be held on All Saints' Day (1 November 1998) at the Salzburg municipal cemetery in front of the war memorial. The purpose of the meeting should be to commemorate the Salzburg Jews killed by the SS during the Second World War. The participants intended to carry commemorative messages in their hands and attached to their clothes, but they had not planned to use other means of expression which might offend piety or undermine public order.

The State authorities (Salzburg Federal Police Authority, Federal Public Authority) relying on section 6 of the Assembly Act and on Article 11 of the Convention prohibited the meeting on the ground that it would coincide with the gathering of Comradeship IV (*Kameradschaft* IV), and therefore endanger public order and security. They noted that Comradeship IV, a registered association, traditionally held a commemoration ceremony at the Salzburg municipal cemetery on All Saints' Day. In the

[33] BGBl. I 19/1998.

[34] VfSlg. 8387/1978; European Commission of Human Rights 12.3.1981, Appl. 8160/1981.

[35] BGBl. I 66/2002.

[36] VfSlg. 15.680/1999; cf. also VfSlg. 16.054/2000.

State authorities' view the disturbance of this commemoration ceremonies was likely to offend the religious feelings of people visiting the cemetery and would indisputably be regarded as disrespectful towards the dead soldiers of both world wars and thus as an unbearable provocation. Accordingly, they assumed a risk of protests by visitors to the cemetery which could degenerate into open conflict between them and those participating in the assembly.

The Constitutional Court dismissed the complaint alleging violations of the rights to freedom of assembly, freedom of expression, freedom of religion and non-discrimination. It considered the prohibition of the meeting proposed by the applicant justified with regard to the fact that the gathering of Comradeship IV had in previous years been the target of activities aimed at disturbing it; activities which had caused considerable nuisance to other visitors of the cemetery and had each time required police intervention. The Constitutional Court further observed in support of that conclusion that All Saints' Day was an important religious holiday on which the population traditionally visited cemeteries in order to commemorate the dead. As a religious tradition, the commemoration of the dead was protected by Article 9 of the Convention, which contained a positive obligation for the State to protect persons manifesting their religion against deliberate disturbance by others. In the Constitutional Court's view the prohibition of the assembly at issue was necessary under Article 11 (2) of the Convention, in order to protect the rights and freedoms of others.

The European Court of Human Rights held – and I would like to pronounce in favour of this opinion – that the national authorities had given too little weight to the applicant's interest in holding the intended assembly and expressing his protest against the meeting of Comradeship IV while giving too much weight to the interest of cemetery-visitors in being protected against some rather limited disturbances. Notwithstanding the margin of appreciation afforded to the State in this area, the Court considered that the Austrian authorities failed to strike a fair balance between the competing interests, and therefore held that there had been a violation of Article 11 ECHR.[37]

VI. Article 2 First Protocol

In our context, legal questions regarding Article 2 of the First Protocol are focused on a problem in connection with the Private School Act.

[37] Case of *Öllinger versus Austria*, 29.9.2006, Appl. 76900/01.

Though Article 2 does not require granting financial assistance or subsidies to private schools, the question arises as to whether or not the differential treatment of the two types of private schools is compatible with the constitutional law.

Section 17 Private School Act provides for a subsidy for human resources for private schools granted public law status and run by a legally recognized church or religious society (denominational private schools), in so far as certain requirements are fulfilled. In particular, the number of students per class may not be smaller than the normal number in a comparable public school. In contrast, other private schools under public law (non-denominational private schools) have no right to claim a subsidy towards the cost of personnel (Section 21 Private School Act). A subsidy may simply be granted on the basis of a discretionary decision of the administrative body according to the Federal Law on Finances.

Unfortunately, the Constitutional Court, owing to the facts and circumstances of the case, could refrain from scrutinizing the subject matter of this provision thoroughly. The Court dismissed an appeal against the discriminatory legal provision for subsidising denominational and non-denominational private schools.[38] In its reasoning the Court argued that there had not been a due prospect of succeeding, taking into account the Constitutional Court's decisions on the principle of equality as well as the Strasbourg case law.

As far as the respective application is concerned, it is to be highlighted that due to the particulars of the case the European Commission for Human Rights was not required to discuss the underlying issues comprehensively.[39] Instead, it only dealt with the needs of the population which is a prerequisite for a subsidisation under section 21 (1) Private School Act, and, therefore, underlined that the appellant school did not point to 'new church schools of a similar size'. This is the reason why the decision of the European Human Rights Commission must not be used as a basis for the conclusion that the Strasbourg case law had already determined that the differential subsidising regulations were not of a discriminatory character.

In fact, there is not any reasonable ground to legitimise this differential treatment in terms of the subsidising private schools under public law, and thus it is deemed to be discriminatory in the meaning of Article 14 ECHR in conjunction with Article 2, First Protocol. The argument used

[38] VfGH 27.2.1990, B 1590/88; cf. also VfSlg 12.751/91.
[39] European Commission of Human Rights 7.2.1994, Appl. 23.419/94

for justification that denominational private schools allow parents to educate their children in accordance with their religious beliefs as is required by the right expressed in Article 2 – such as it is found in the legislator's explanatory remarks[40] as well as in an Administrative High Court's decision[41] – ignores two points: first that religious convictions are covered, irrespective of the legal status of the religious community concerned, and second, that this right also covers philosophical convictions of a non-religious character. So long as the clearly underprivileged (in terms of subsidies) non-denominational private schools satisfy a need or requirement of the population and have classroom numbers that accord with comparable public schools, then there is no 'objective and reasonable justification' and there is a breach of the principle of equality and of the prohibition of discrimination.

VI. Procedure rights – Article 6 and Article 13

With respect to the procedure rights, generally spoken, primarily the right to a fair trial had a great impact on the Austrian system of judicial relief. In our context, the proceeding guarantees are relied upon rather rarely; however, two aspects are to be mentioned:

For a long time (until 1997) the principally given legal claim for recognition as a legally recognized church or religious society had not been enforceable, owing to the fact that there is no appeal against a statutory instrument. Whenever a religious grouping concerned made reference to Article 13 ECHR, the High Administrative Court refused to deal with this guarantee, reasoning that in the case in question not any freedom or right set forth in the Convention would have been concerned.[42] However, nowadays, these court decisions are not relevant any longer. The Constitutional Court has declared the respective administrative practice arbitrary. Finally, the High Administrative Court has also changed its attitude following the Constitutional Court's position.[43]

As far as an effective remedy is concerned, there is another legal problem in the sphere of law on religion, which should be shortly mentioned, though Article 13 has not been explicitly referred to in the decision of the Instant Court. At the time being, there does not exist any resort to a

[40] EB RV 735 NR GP IX,12.
[41] VwGH 28.3.2002, 95/10/0265.
[42] VwGH 22.3.1993, 92/10/0155.
[43] VwGH 28.4.1997, 96/10/0049.

higher court or authority in case of State information on religious or philosophical movements interfering with the fundamental guarantees, which might have its basis in an unjustified defamation of reputation. This lack of legal protection might involve quite detrimental consequences for the religious groupings concerned, mainly new religious movements and so-called "sects". The Supreme Court[44] considered a loophole in the law concerning judicial relief, which was to be closed by the legislator and not by the judicial organs. Consequently, there is an urgent need for action on the side of the legislative power, notwithstanding the fact that there has been constituted a legal basis for such State activities by the Federal Law on the Establishment of an Office on Documentation and Information about Sects in 1998.

[44] OGH 19.1.1999, 1 Ob 306/98a.

Atanas Krusteff

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN BULGARIA

Introduction

When I first thought over the proposed heading for this paper, something – probably obvious for others – came to me, namely that such heading presupposes a unique endemic correlation, or is at least asking whether in all Bulgarian cases there exist legal problems in the field of freedom of thought, conscience and religion; a specificity juxtaposed to possible other legal realities in each country of the Council of Europe. The human mind always warmly welcomes any invitation to generalise. Hence, the questions I had started asking myself were: Can we discover in the legal framework and the case-law in respect to violations of Art. 9 of the ECHR some sort of recurring important similarities? Are we able to work out some kind of pathology of violation of this fundamental right in Bulgaria?

Methodologically, I have chose a weaker magnifying glass, not following levels of legal acts (Constitution, laws, case-law) or focusing on one of them. I rather took a mostly chronological path, intertwining facts, law and practice, which I think can explain better the specifics of the Bulgarian reality in the light of Article 9 of the European Convention. Although there is interesting court practice on all laws relating to freedom of religion, I have restricted this text just to the cases, which I think are closer to the picture of the basic understanding of this fundamental right in Bulgaria from the legislature and courts.

A. Legal Framework of Freedom of Religion in Bulgaria

All basic norms of Bulgarian applicable law in respect of the right to freedom of thought, conscience and religion are relatively new and are in the Constitution, the Law on Religions of 2003, the Law on Replacement of Military Obligations with Alternative Service the Law on the Protection against Discrimination, the Law on National Education, the Law on the Execution of Penalties, etc.

As a result of the so-called Helsinki process during the 1970s, Bulgaria became part of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). However, the Convention was only ratified in 1992,[1] three years after the beginning of the democratic political reform of 1989.

The reform of 1989 was designed to be a revolutionary comprehensive effort and logically resulted in the adoption of a new Constitution of the Republic of Bulgaria in 1991. Its main purpose was to establish a liberal socio-political and economical system, shaping itself after the mould of western democracies. Naturally, it had to pay special attention to the core principle of those established democracies, namely the protection of human rights and fundamental freedoms.

The new Constitution provided for the basic texts related to fundamental human rights and respectively to freedom of thought, conscience and religion. Although the European Convention was not yet in force for the Republic of Bulgaria, without any doubt the new Constitution was adopted in the perspective for its immediate ratification and enactment.

Article 13

(1) Religions shall be free.

(2) Religious institutions shall be separate from the State.

(3) Eastern Orthodox Christianity shall be considered the traditional religion in the Republic of Bulgaria.

(4) Religious institutions and communities, and religious beliefs shall not be used for political ends.

Article 37

(1) The freedom of conscience, the freedom of thought and the choice of religion or of religious or atheistic views shall be inviolable. The State shall assist in the maintenance of tolerance and respect between the adherents of different denominations, and between believers and non-believers.

(2) The freedom of conscience and religion shall not be exercised to the detriment of national security, public order, public health and morals, or of the rights and freedoms of others.

It is noteworthy that freedom of religion, as defined in Article 13, was set among the founding principles of the Constitution in its Chapter One, named "Founding Principles". Along with those provisions with Article 5 (4) of the Constitution, the European Convention, including Article 9, became directly applicable in Bulgaria, with the text proclaiming that "all

[1] State Gazette No 80 from 2 October 1992.

international agreements ratified after a constitutional order, proclaimed and in force, become part of the internal Bulgarian law with priority over other acts of Bulgarian legislation, which contradict them".

However, seeds for contradictions between the understanding of the European Convention and the Constitution itself can still be observed on this level by merely comparing the texts of Article 9 of the European Convention and Articles 13 and 37 of the Constitution, even though in some cases courts reason that the Constitution "reiterates" the Convention. While Article 9 (2) ECHR obviously sets a fixed border line against state interference, the wording of the Constitution in Article 37 (2) seems to welcome state interference, somehow associates the enumerated social dangers with religion in general and requires higher level of attention by state authorities.

As an example of the different meaning of the language of the Constitution, below is the reading of the Supreme Administrative Court in administrative case 7237/2000:

> '...with the provisions of Article 13, par. 4 and Article 37, par. 2 of the Constitution some limitations to this right [freedom of religion] are being set ... Against admission of such violations with Article 6, par. 1 of the Law on Religions (1949) a regimen is introduced for recognition of different denominations by the Council of Ministers of the Republic of Bulgaria which is an absolutely necessary requirement not only for obtaining the capacity of a legal entity of the denomination but also for doing activities and organized religious rituals by the respective communities'.

The understanding of the court for the preventive character of the limitation clause is obvious. A general characteristic of the constitutional texts could be that despite the passionately proclaimed effort to emancipate Bulgaria rapidly with developed democracies, part of which is the new Constitution itself, these texts bear marks of the difficulties of every beginning.[2] They represent also the doubts of each political force changing opposition for the government to leave the comfort of the principle

[2] Two examples can be given, one of which has already been mentioned, which do not exhaust all problems: Firstly, the introduction of national security as part of the limitations of freedom of religion, and secondly, the whole wording of Article 37 (2) which puts possible limitations in a different context – while the wording of Article 9 (2) of the European Convention obviously defines limitations as exception and the right as the rule, Article 37 (2) does not explicate the same meaning. When the European Convention says "Freedom to manifest one's religion or beliefs shall be subject only to such limitations ..." the Constitution, on the other hand, says that "the right shall not be exercised to the detriment of..." This wording makes the impression that danger for these public values is something usually expected to entail religious practice and it fails to outline the exceptional character of the limitations.

of maximum-possible-power, they were burdened with compromises and uncertainty. All problems for religious freedom, which entailed and were represented in the case-law on Article 9 of ECHR against Bulgaria, prove this conclusion.

For a long time- until 2003- the new Constitution has coexisted absurdly with the totally anachronistic Law on Religions of 1949, which represented a top example of communist legislation. Despite Judgment 5/92 of the Constitutional Court, which declared some parts of this law unconstitutional, by substance it had still been applied and remained a safe totalitarian reservoir of etatism and excessive state interference in the field of religious freedom.

According to the interpretation of the courts in numerous cases,[3] the Law on Religions gave the state unfettered power to decide on the existence of legal entities of different religions, to regulate internal life of recognized religions and on the whole to keep a controlling position upon religious activities. Although with a decision of 14 October 1996 the Supreme court lifted the lid of the taboo *one people – one church*, and admitted some pluralism, in the end, it still maintains that acts of church registration by the Council of Ministers are not subject to court review on the merits, and thus the government has unrestricted discretion to recognize or not a certain religious organization.

Obviously, the legal system could not respond adequately to the new social realities. Logically this situation has entailed a deep crisis in both major religions – the Orthodox Church and Muslims. Natural processes of renewal among religious organizations, suppressed decades by a brutal regime, could not develop normally in this conservative legal environment where the state has continued to play a decisive role. Thus, divisions and high level of tension have been followed by conflicts, splits and acts of violence between opposite fractions exacerbated by government support for state favourised groups.

II. Decision No 5 from 11.06.1992 in case No 11 of 1992 of the Constitutional Court of the Republic of Bulgaria

When conflicts among major religions in Bulgaria amounted to an extreme level of intolerance and disorder, mostly due to some acts of

[3] See judgments of Supreme Administrative Court No 4816 of 21 September 1999 in case No 2697/99; No 2919 of 28 April 2001 in case No 8194/99; No 9184 of 16 October 2003 in case No 6747/02.

direct state interference in their internal affairs, the President of the Republic of Bulgaria and some deputies took the initiative to file a case before the Constitutional Court for the interpretation of the texts of the Constitution relating to freedom of religion.

On 11.06.1992 the Constitutional Court held its decision No 5 of 1992. It was an important step of drawing the meaning of the Constitution closer to the one of international standards, namely Article 18 of the International Covenant on Civil and Political Rights and Article 9 of the European Convention. Despite the fact that at the time of the decision the European Convention was not yet applicable in Bulgaria, because it had not been ratified yet, the Court took the Convention expressly into consideration, reasoning on its decision together with Article 18 of the enacted International Covenant on Civil and Political Rights, having no doubt that its ratification is impending.

Firstly, the Court confirmed the place of freedom of religion among fundamental values of democratic society stating that: "it [the right to freedom of religion] is a value of supreme order. Existence of a democratic society is unthinkable without its guaranteed exercise". Then the court depicted clearly the sphere of possible state interference. It pointed out the difference between the internal right *forum internum,* worded "choice of religion", and assumed that "it is a sphere, which by its nature is not subject to legal sanction". Moreover, it defined the most important forms of the outer expression of the right, stating that "free exercise of religions" includes doing it through "word, press, association".

In relation to the cases of possible limitation of the right the Court came much closer to the wording and context of Article 9 (2) of the European Convention. It changed the grammatical inclination of the Constitution and accepted that of Article 9 (2), confirming that "[R]ight to freedom of religion cannot be limited by any means except in the cases of Articles 13 (4) and 37 (2) of the Constitution". The decision underlined the exceptional character of limitations to this right and put the stress clearly on the right, not on the limitations.

Furthermore, the Court pointed out that the reasons for limitations specified in Articles 13 (4) and 37 (2) of the Constitution were enumerated exhaustively *numerus clausus* and that they "cannot be extended or amended by law or interpretation." On this, it clarified that only "mechanisms for their [of the limitations] application" can be provided. Having the task to interpret a broader concept of possible state interference the Court enlightened further upon the principle of separation between Church and State. Clearing the doubts as to the circle of religious subjects

which this principle concerns, the Court supported that it is valid not only for religious institutions, which term could be interpreted in a narrow sense, but it is also valid for religious communities in general. Then the Court concretized the meaning of separation explaining that: "State interference and state administration of the internal organizational life of religious communities and institutions are inadmissible, as well as in their public manifestation, except in the already specified cases of Articles 13 (4) and 37 (2) of the Constitution."

This decision points out expressly some parts of the Law on Religions as unconstitutional, although it reconfirms the powers of any court to do so with laws enforced prior to the adoption of the Constitution. Not having powers to amend parts of the Constitution, the Court did not deliberate on the "national security" as a controversial reason for limitation.

III. Local Registration and City Councils Regulations

While control upon majority religions seemed to focus mostly on national level, problems of minor religious communities extended and even severed on local level. Relatively new religious communities, which had achieved national registration, had to obtain additionally the recognition of most of the local authorities. According to the provision of Article 16 of the Law on Religions of 1949, the legal status of local branches originates automatically with the national registration of the respective community. At local level the religion has to submit documents to the mayor, proving national registration of the community, together with the names of the members of the leadership of the local branch. Nevertheless, local authorities assume this provision as if it grants to them discretional powers to decide whether to register or not the respective religion. Registration, on the other hand, is understood as a license to practice.

This wrong understanding, together with another one relating to the scope of powers given by the Constitution to local authorities to issue local regulations, has led to a large number of regulations of city councils all over the country controlling practice of religious communities on their territory. Such regulations usually require a separate registration, which has its own requirements, different from those of the national law. They forbid religious activities without such special local registration: "Religious activities shall be accomplished only by confessional communities registered after the due order", forbid "religious activities out of the cult places or temples of the religious communities", "distribution of literature with pornographic and religious contents"[4], etc. Such regulations

were designed openly against new non-traditional religious groups and were inspired by the most nationalistic xenophobic political circles as IMRO – a political party pretending to represent a historical political line of the protection of the Bulgarian national identity. Registration of Jehovah's Witnesses, Mormons, and other non-traditional churches has thus been refused for many years in many major municipalities.

There are numerous cases when missionaries of non traditional religions, who are known to be more active in public, have not been allowed to distribute literature, to preach and even to accomplish any religious activities in public, or in private, because of lack of such registration. Many of them have been fined on the grounds of those local regulations.

IV. Cases against the Local Regulations

The following cases do not exhaust the court practice on the regulations of local authorities; however, I consider them indicative enough. For technical reasons these cases, unfortunately, could not be heard at the ECtHR.

In 1998 three members of Jehovah's Witnesses practicing in Plovdiv were fined on separate occasions for violation of the local regulation for "without the necessary registration preaches of the religious ideas of the denomination". In the first two cases Jehovah's Witnesses had been part of a group studying the Bible in a private home, while in the second case, a Jehovah's Witness had been lecturing at an indoor meeting in a small public hall hired for the purpose. All three Jehovah's Witnesses appealed the administrative acts and before the court they objected the fines, because the corresponding regulations were in contradiction with the Constitution, the European Convention and the national law regulating the sphere of freedom of religion. The court upheld the fines without reviewing the regulations just referring to it. The District Court upheld the decisions of the First Instance Court.[5] This was the final decision within this procedure. Then the appellants filed cases against the Regulations in a different procedure claiming that it is null and void because it

[4] Regulation on the Protection of Public Order at the Activities of Religious Communities on the Territory of Municipality of Plovdiv, adopted with Decision No 264 of 13.09.1996. Regulation No 1 on the Protection of Public Order at the Municipality of Plovdiv.

[5] Administrative cases No 87/1999, No 88/1999, No 89/1999 of Plovdiv District Court.

contradicts the Constitution, the European Convention, the Law on Religions and the Law on Local Self- Administration and Local Administration. In case the court cancelled the Regulations it would give them another option to attack the fines. Appellants were claiming that Regulations contradict all these acts which are of higher priority, and thus Regulations were null and void.

The District Court dismissed the appeals. The appellants filed cases before the Supreme Administrative Court which upheld the decisions of the District Court finding that such regulation is within the competence of the city council.[6] These decisions are significant with finding a difference between the personal right to freedom of religion and the activities of religious communities as a whole, cutting the connection between them.

> 'The Regulation of Plovdiv City Council does not contradict the normative acts specified [the Constitution, Law on Religions, Law on Local Self-Administration and Local Administration]. As a matter of fact it [the Regulation] prohibits only the activity of religious communities, which have not fulfilled the requirements pointed out. The prohibition pointed out in Art. 2 of the Regulation cannot be viewed isolated from the rest of the text of the normative provision and to maintain that it affects the personal right to freedom of religion of the appellant'.[7]

The appellants referred to the ECtHR, which unfortunately found their applications inadmissible because with the cases against the fines the applicants had exhausted national remedies, and had to place their complaints six months after the final decision on the fines, not after the cases against the regulations. Although the second procedure was a possible remedy, according to the internal Bulgarian legislation, the applicants did not have the opportunity to give an opinion on this issue.

In another recent case in 2006, a Jehovah's Witness appealed his fine imposed on the grounds of another local Regulation on the Protection of Public Order in Plovdiv, which prohibits religious activities "out of the cult places and temples of the religious communities". The Regional Court dismissed the appeal without analyzing the contradiction of the Regulation with the normative acts of higher priority, including the European Convention, which the defense claimed to be obvious. Instead, it analyzed the facts in connection with the text of the Regulation. It was

[6] Administrative cases No 7237/2000, No 2174/2000, No 5116/2003 of the Supreme Administrative Court.

[7] Decision No 3136 on Administrative case No 7237/2000 of the Supreme Administrative Court.

mentioned in the decision that the appellant claimed that the fine is a violation of Article 9 of the European Convention but reasoned simply that in Article 9 (2) the Convention also provides for limitations of the right reiterated in Article 37 (2) of the Constitution, and that Regulation is aiming exactly "to guarantee fulfillment of the law and protection of public orderliness, providing order at holding religious activities, but not aimed at the limitation of free exercise of religion". Obviously, the court regards preventive limitations in general as something natural for religious activities and possible according to the Constitution. We consider this example as very characteristic of the specific meaning of the limitation clause in the Bulgarian Constitution, as perceived by some courts.[8]

The decision of the Regional Court was appealed before the District Court of Plovdiv. The District Court overturned the decision of the Regional Court, declared the Regulation in its appealed part concerning the prohibition of religious activities as null and void, and respectively dismissed the fine.[9] The Court finds *inter alia* that:

> 'The substance consists in the only lawful conclusion, that the norm of Article 7, par. 2 of Regulation No 1 (providing for the prohibition)..., does not contain definite elements against public order, and thus contradicts norms of acts of higher priority: Article 9 of the European Convention, then Article 37 of the Constitution and Articles 5 and 7 of the Law on Religions'.

Moreover, the Court notes that freedom of religion is not a matter of local significance to be subject to a local regulation, while the City Council has acted in excess of its powers. The Court rejects the prevention theory of the Regulation and the Regional Court, and finds that limitation could only be a result from a real and concrete abuse of certain public values enumerated in Article 9 (2) of the Convention and Article 37 (2) of the Constitution. It concludes that limitation cannot be applied as a general preventive measure.

V. The ECHR Case-law

Bearing in mind the scarce practice of the ECtHR on Article 9 of the ECHR, Bulgaria can be placed among the leaders in respect of number of decided cases. In some, the country took up the baton from Greece and *Serif v. Greece* was followed by a Bulgarian dash with *Hasan and*

[8] See supra note 1.

[9] Decision No 755 of 17.07.2006 on cassation case No 464/2006 in Plovdiv District Court.

Chaush v. Bulgaria[10] and *Supreme Holy Council of the Muslim Community v. Bulgaria*[11]. Another analogue case of the so-called Alternative Synod of the Orthodox Church in Bulgaria is pending. Also the case *Jehovah's Witnesses in Bulgaria v. Bulgaria*[12] should be mentioned as analogue, although it ended with a friendly settlement as a result of which this denomination was registered. The Court held another decision this year on the case *Ivanova v. Bulgaria*[13], which reveals the usual hardships of members of non-registered new religions. All these cases reiterate the same theme – only groups and leaders of major denominations sanctioned by state may exist and practice and in a way which is in accordance with state politics. It is noteworthy to mention that in the cases *Hasan and Chaush v. Bulgaria* and *Supreme Holy Council of the Muslim Community v. Bulgaria* in a couple of years the persons of applicant and victim changed their roles diametrically in fully analogue situations. That is why this pair of cases is very significant of the analyzed typology of the correlation Bulgaria and Article 9 of the ECHR:

> In 1992, a new pro-democratic government came into power. It thus "fired" the leaders of the Orthodox and Muslim religions (Mr. Nedim Gendzhev). Shortly afterwards, a National Conference of Muslims elected Mr. Fikri Hasan as Chief Mufti. At the end of 1994 the Bulgarian Socialist Party (the ex-communists) came back into power. The new government took office in January 1995. On 22 February 1995 this government registered Mr. Nedim Gendzhev as Chief Mufti, while a couple of days later this new leadership accompanied by private guards forcibly evicted Mr. Hasan and the staff working in the building of the Chief Mufti and took all the documentation. The complaint before the Chief Prosecutor's Office was dismissed. This office found that the new occupants of the building had legal grounds to stay there as they were duly registered by the Directorate of Religions. Without expressly stating this, the act of registration of the new leadership meant undoubtedly that only one leadership is allowed for this religion. Mr. Hasan appealed before the court and explained in his complaint that registration of the new leadership in 1995 could only mean that another religious Muslim organization came to existence, while his registration was not cancelled. However, the court at all instances rejected the appeal and reconfirmed a practice which accepts that under the Law on Religions (1949) the Council of Ministers enjoyed full discretion in its decision as to whether or not to register a given religion.[14]

[10] Application No 30985/96.
[11] Application No 39023/97.
[12] Application No 28626/95.
[13] Application No 52435/99.

In 1997 the rival right wing party UDF won the general elections. Mr. Hasan reactivated his efforts to remove Mr. Gendzev. Having strong expectations of what was going to happen, Mr. Gendzhev proposed in a letter to the Directorate of Religions the holding of a unification conference. This development of affairs, bearing in mind their prehistory as well, outlines two important features of the legal regime: on the one hand, the role of the Directorate as a necessary administrative distribution center for decision of problems of religions, and on the other hand, the united leadership of the whole religion as the only option for each group. The Court uncovers this last feature as a defect of the applicable law itself:

> 'It is highly significant that the relevant law as applied in practice required – and still requires – all believers belonging to a particular religion and willing to participate in the community's organization to form a single structure, headed by a single leadership even if the community is divided, without the possibility for those supporting other leaders to have an independent organizational life and control over part of community's assets. The law thus left no choice to the religious leaders but to compete in seeking the recognition of the government of the day, each leader proposing to "unite" the believers under his guidance'.[15]

The "unification" conference was held without the presence of Mr. Gendzhev, while his supporters had withdrawn shortly before the conference took place, complaining against state interference to the benefit of the rival group. The government registered a new leadership elected at the "unification" conference. Mr. Gendzhev appealed in the name of the Supreme Holy Council before the Supreme Administrative Court. Among other complaints, he pointed out that the Directorate prepared the forms on which the results of the election of delegates had been filled in, that local mayors had certified these results and that delegates without such certificate were not allowed at the conference, and that among the very delegates to the conference there had been a number of local mayors. After two hearings, when the Supreme Administrative Court had pronounced itself on the merits of the case, it found that the acts of the authorities did not constitute an interference with the internal organization of the Muslim community.

[14] *Hasan and Chaush* v. *Bulgaria*, par. 30.
[15] *Supreme Holy Council of the Muslim Community* v. *Bulgaria*, par. 81.

The ECtHR both in *Hasan and Chaush* and *Supreme Holy Council of the Muslim Community* notes in answer to the assertions of the applicant the excessive involvement of politics in Muslim religious community life: "Indeed, the replacement of the leadership of the Muslim religion had curiously coincided with the change of government in Bulgaria"[16].

> '[t]he court notes, however, that the unification process in 1997 took place against the backdrop of the events in 1992 and 1995 when changes of government were swiftly followed by state action to replace religious leaders and grant legal recognition to one of the two rival leaderships. [...] 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... 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 undertake measures to ensure that religious communities are brought under a unified leadership'.[17]

All events which followed and which are the basis for the decision in *Supreme Holy Council of the Muslim Community v. Bulgaria,* for the pending *Alternative Synod of the Orthodox Church* case only sadly reconfirm this observation. But why is the state so much interested in church unity? The answer lies in the idea for unity but under a manageable leadership pledging allegiance to the government. In a time of acute fight for power between major political parties in Bulgaria, support, or elimination of opposition, of churches, rehabilitating and gathering strength after communism, it seems important. For a government in power, any unity under a manageable leadership seems simply very convenient. New religious groups, which are usually not nationally dependant, also do not fit to this view on unity. Such forced consolidation is unnatural and dangerous for democracy. That is why the court reiterates in all these cases that "freedom of thought, conscience and religion is one of the foundations of a democratic society. The pluralism indissociable from a democratic society, which has been dearly wan over the centuries, depends on it".[18]

> 'The Court reiterates that autonomous existence of religious communities is indispensable from pluralism in a democratic society... the State has a duty to remain neutral and impartial in exercising its regulatory power... What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principle characteristics of which is the possibility it offers of resolving a country's problems through dialogue, even when they are irksome'.[19]

[16] *Hasan and Chaush* v. *Bulgaria*, par. 67.
[17] Ibid, par. 78.
[18] Ibid, par. 60.

VI. The New Law on Religions

After a long debate, which took place during the mandate of three parliamentary mandates, at the end of 2002 a new Law on Religions was passed. It came into force in the very beginning of 2003. Unfortunately, the reason for its adoption was not the long expected clarity and harmonization of the freedom of religion legislation and court practice with the Constitution, respectively, with the European Convention. Its main purpose was not to enrich the constitutional freedom of religion with an update of 14 years of democratic experience, but rather to solve with legal means a problem of the political establishment – the split within the leadership of the Orthodox Church- and to support one of the existing two rival Holy Synods. So, this law further sealed pluralism for the Orthodox Church, so necessary in a democratic society according to the meaning of Article 9 of the European Convention.

The law endorsed the principle "one nation – one church; one church – one leadership". It gave a positive solution for the registration of religious organizations, providing court registration for religious legal entities, including them in the general court register of legal persons and thus allowing court review. At the same time, Article 10 of this law proclaimed that the Orthodox Church is registered *ex lege* with this law, thus excepting this major denomination from the order for registration valid for all other denominations. Article 10 describes specifics to which only the favoured leadership responds: "It [the Church] is lead by the Holy Synod and is represented by the Bulgarian Patriarch who is also Metropolitan of Sofia".[20] And this is nobody else but Patriarch Maxim who was appointed in the 1950s by the communist government.

With paragraph 3 of the Transitional and Closing Provisions, the law reconfirms the monopoly of this leadership upon Orthodox congregation and church organisation and property but also of leadership of any religion recognized by the state. At the same time, it prevents rival groups

[19] *Supreme Holy Council of the Muslim Community* v. *Bulgaria*, par. 93.
[20] Article 10, par. 1: Last sentence of the Law on Religions of 2003.

from having part of the property of the denomination.[21] As a result, the followers of the so-called Alternative Synod of the Orthodox Church, who challenged the legality of Patriarch Maxim, were forcefully removed from their churches by armed police, some even arrested and beaten.

VII. Decision 12 from 13 July 2003 of the Constitutional Court

Deputies from the opposition challenged the new law before the Constitutional Court, although not in all parts, which are considered by most experts as problematic. Besides, Article 10, par. 1 and 2 and Par. 3 of the Transitional and Closing Provisions were targeted by the request. With equal votes pro and against the unconstitutionality of the respective constitutional provisions, the Court dismissed the request. However, this decision is interesting with the dissenting opinion of justices who supported the request for the unconstitutionality. They considered that these provisions "are undermining pluralism in a democratic society".

Conclusion

On the grounds of the aforesaid, some typology of problems of freedom of religion in Bulgaria can be observed. I would say it describes some paleo-phenomenology of religious freedom abuse. In essence, it is a style not yet as refined as in a typical modern western democracy and tends to use rougher methods as simply stopping certain religious groups from practice and openly favouring others. To this purpose, despite the new democratic Constitution, problems with the registration of religious organisations, or registered face harassment on the lower level of local authorities still exist. Registration itself is comprehended by many officials, not without the help of prevailing case-law, as a licence to practice. A too intense sometimes and unjustified hostility towards minor religious groups, which I would name *sectism,* is very characteristic. An old fashioned manner of government intrusion in church autonomy still exists, misunderstanding of the nature of religious organisations as derivative to and part of individual religious freedom, comprehending limitations to religious freedom not as exception but as a rule, and, on the whole,

[21] Par. 3 reveals conspicuously a concrete historical moment – transpires the state effort to solve the division in the Orthodox Church to the full benefit of one of the leaderships: "Persons, who at the time of enforcement of this law have separated from the religious institution in violation of its approved after the due order statute, cannot use an identical name and use or dispose of its property".

understanding religion as a source of higher danger, are part of this typology.

I would deter in this paper to make comparisons with other post-communist or Orthodox countries but I am sure some similarities appear and a generalization at this level requires further research. I would still like to add here, however, that understanding Bulgarian reality should also include some knowledge about centuries of old history of symbiosis and "symphony" between Church and State so specific for Orthodoxy in general. The approach for this legal research is by necessity external to religious logic, since it does not always find pluralism as "indissociable" as the way a secular democratic mind does. Such logic does not make this "internal" understanding less valuable for believers. Unity of a typical Orthodox Church as the body of Christ is a metaphysical requirement and supreme value, which is part of faith itself. However, unity – or better – uniformity – as a tool for imposing uncontrolled state power is something post communist countries are well experienced at. Therefore, we should be very careful which of those pro unity forces works because not everyone of them is equally respectful and vital for a peaceful democratic society.

ACHILLES C. EMILIANIDES

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN CYPRUS

I. The Status of the European Convention on Human Rights in the Cypriot Legal Order

The European Convention on Human Rights first became applicable in Cyprus during the British rule of the island. The United Kingdom, by its declaration n. 61/48/53 of the 23rd October 1953, made under article 63 of the Convention, extended it to various territories for the international relations of which it was held to be responsible, including the then colony of Cyprus.[1] The Republic of Cyprus was established as an independent and sovereign republic on 16th August 1960, when its Constitution came into force and the British sovereignty over Cyprus, as a crown colony, ceased. The establishment of the Republic was the outcome of the Zurich and London Agreements, on which the Constitution was based.

Following the declaration of independence of the Republic of Cyprus, the application of the Convention in Cyprus ceased.[2] On the 24th May 1961 the Republic of Cyprus became a member of the Council of Europe[3] and on the 16th December 1961 it acceded to the European Convention on Human Rights. The Convention was ratified in the internal legal order by the European Convention for the Protection of Human Rights (Ratification) Law n. 39/1962.[4]

[1] See for its application to the island during the turbulent years of 1955 – 1959 the first interstate application of Greece v. United Kingdom n. 176/1956, as well as the second interstate application of Greece v. United Kingdom 299/1957, (1997) 18 Human Rights Law Journal 348ff. Also E. LAUTERPACHT, 'European Convention on Human Rights: Suspension of its Application to Cyprus' (1956) 6 International and Comparative Law Quarterly 432-434.

[2] See also C. TORNARITIS, *The European Convention on Human Rights in the Legal Order of the Republic of Cyprus*, (Nicosia, 1975), p. 6.

[3] See C. TORNARITIS, *Council of Europe and the Republic of Cyprus*, Nicosia, 1978, pp. 42, A. LOIZOU, 'Cyprus' in R. BLACKBURN, and J. POLAKIEWICZ, *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950 – 2000*, (Oxford: Oxford University Press, 2001), p. 219.

[4] The instrument of ratification was deposited with the Secretary of the Council of Europe on the 6th October 1962.

Part II of the Constitution of Cyprus which guarantees the fundamental rights and liberties is modelled on the European Convention on Human Rights. However, the provisions of the European Convention have been extended and enlarged in some respects with a number of social and economic rights added in order to meet the basic requirements of a modern society.[5] Thus, to the extent that it has been incorporated in constitutional provisions and to the degree that its provisions have not been altered during incorporation, the Convention enjoys limited constitutional status.[6] Legislation which is contrary to the provisions of the Constitution safeguarding individual human rights, may be declared unconstitutional by the trial court. Further, under article 169 §3 of the Constitution, treaties, conventions and agreements concluded by decision of the Council of Ministers and approved by a law enacted by the House of Representatives have superior force to any municipal law.[7] It follows that the European Convention on Human Rights and its Protocols have, on the basis of the aforesaid article 169 §3 of the Constitution, superior force to any municipal law, either antecendent or subsequent to their ratification by Law. However, the Convention is not superior to the Constitution and thus, the constitutional provisions shall prevail in case of any inconsistency between them and the provisions of the Convention.[8]

It should be further observed that the Cypus courts are invoking the case – law of the European Court of Human Rights, not only with respect to the interpretation of the Convention, but also with respect to the interpretation of the corresponding constitutional articles. Therefore, the courts will try, wherever possible, to interpret the relevant constitutional provisions in a manner which is consistent with the interpretation adopted by the European Court of Human Rights.[9]

[5] Acknowledged in several judgments of the Supreme Court of Cyprus e.g. *Attorney – General* v. *Ibrahim* [1964] CLR 195, at 225, *Attorney – General* v. *Afamis* 1 RSCC 121, at 125-126. P. EVANGELIDES, *The Republic of Cyprus and its Constitution with special regard to Constitutional Rights*, (Difo – Druck GmbH, 1996), C. TORNARITIS, *The Human Rights as Recognized and Protected by Law, with special reference to the Law of Cyprus*, (Nicosia, 1967), C. TORNARITIS, 'The Social and Economic Rights under the Law of the Republic of Cyprus' in *Melanges Bridel*, (Lausanne, 1968), p. 533-556.

[6] See also A. EMILIANIDES, *Beyond the Constitution of Cyprus*, (Sakkoulas, Athens – Thessaloniki, 2006) (in Greek).

[7] See C. TORNARITIS, 'The Introduction of International Law into the Legal System of Cyprus' [1990] 3 Cyprus Law Tribune 460-474. Also *Isaac Mizrahi* v. *The Republic* [1968] 3 CLR 406, *Kantara Shipping Company* v. *The Republic* [1971] 3 CLR 176.

[8] See also T. HADJANASTASSIOU, 'The European Convention on Human Rights applicable in Cyprus' [1976] 3 Cyprus Law Tribune p. 97-113.

[9] See further with respect to the application of the ECHR by the Cypriot courts A. LOIZOU, *Cyprus and the European Convention on Human Rights*, (Sakkoulas, Athens – Komotini, 2003) (in Greek), C. TORNARITIS, 'The Operation of the European Convention for the Protection of Human Rights in the Republic of Cyprus' (1983) 3 Cyprus Law Review 455-464, C. CLERIDES, 'The Operation of the European Convention on Human Rights in the Civil Courts of Cyprus' (1992) 39-40 Cyprus Law Review 6029-6043 (in Greek).

II. Religious Freedom under the Cypriot legal order: The ECHR and the Constitution

Article 18 of the Constitution safeguards the right of religious freedom, including the freedom of religious conscience and freedom of worship.[10] The aforementioned article corresponds in many ways to article 9 of the European Convention of Human Rights, but it is more detailed and its provisions cover sectors, that are not recorded in article 9. By virtue of §1 of this article every person has the right to freedom of thought, conscience and religion. Freedom of thought is safeguarded for any person, either a believer or an atheist, a citizen or a non – citizen of the Republic of Cyprus. Paragraph 2 of the said article stipulates that all religions whose doctrines or rites are not secret are free.

By virtue of 18 §3 all religions are equal before the law and no legislative, executive or administrative act of the Republic shall discriminate against any religious institution or religion. Article 18 §4 guarantees the more particular manifestation of an individual's religious freedom, stipulating that every person is free and has the right to profess his faith and to manifest his religion or belief, in worship, teaching, practice or observance, either individually or collectively, in private or in public, and to change his religion or belief. Illicit proselytism in favor of or against any religion, is prohibited for any individual, as 18 §5 prohibits the use of physical or moral compulsion for the purpose of making a person change or preventing him from changing his religion. This constitutional prohibition has not, however, been supplemented by law.

The freedom to manifest one's religion can be restricted, by virtue of article 18 §6, only if such limitations are prescribed by law and are necessary in the interests of the: a) security of the Republic, b) constitutional order, c) public safety, d) public order, e) public health, f) public morals, g) protection of the rights and liberties guaranteed to every person by the Constitution. In addition to the conditions mentioned above, any limita-

[10] See A. EMILIANIDES, 'State and Church in Cyprus' in Robbers, G., State and Church in the European Union, second edition, Nomos Verlagsgesellschaft, Baden Baden, 2005, p. 231ff, A. EMILIANIDES, *The Cypriot Law of Marriage and Divorce*, (Sakkoulas, Athens – Thessaloniki, 2006), p. 128ff (in Greek), C. PAPASTATHIS, 'The Legal Status of Religions in the Republic of Cyprus' *The Status of Religious Confessions of the States Applying for Membership to the European Union*, Strasbourg, p. 197ff.

tions of the freedom to manifest one's religion must be considered to be necessary in a democratic society, under the mandate of article 9 §2 of the European Convention of Human Rights and this has been readily accepted by the Cypriot courts. Article 18 §7 states that until a person attains the age of sixteen, the decision as to the religion to be professed by him shall be taken by the person having the lawful guardianship of such person. Finally, by virtue of 18 §8 no person shall be compelled to pay any tax or duty the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own.

Indirectly related to religious freedom are the constitutional provisions of articles 10 §3 (b) and 28 §2. Article 10 §3 (b), states that the term "forced or compulsory labour", which no person shall be required to perform, shall not include, "any service of military character if imposed or, in case of conscientious objectors, subject to their recognition by a law, service exacted instead of compulsory military service". The said constitutional statute, implements article 4 §3 section b, of the European Convention on Human Rights and empowers the legislative branch to relieve of their compulsory military service those who object to it for reasons of conscience, and order them to provide services of another nature. Paragraph 2 of article 28, implementing article 14 of the European Convention of Human Rights, ordains that every person shall enjoy all the rights and liberties provided for in this Constitution without any direct or indirect discrimination against any person on the ground of his community, race, religion, language, sex, political or other convictions, national or social descent, birth, color, wealth, social class, or on any ground whatsoever, unless there is express provision to the contrary in this Constitution. It should be noted, however, that article 28 is autonomous and its application is not dependent upon a finding of violation of another article of the Constitution, contrary to article 14 of the Convention.[11]

Other articles of the Constitution which might be indirectly related to religious freedom include: a) article 15 which provides for the right to respect the private and family life, similarly to article 8 of the Convention, b) article 19 which safeguards the right to freedom of speech and expression, similarly to article 10 of the Convention, c) article 21 which guarantees the right to assebly and the freedom of association similarly to article 11 of the Convention, d) article 22 safeguarding the right to

[11] C. TORNARITIS, 'The Concept of Equality of Treatment and Absence of Discrimination' [1969] 5-6 Cyprus Law Tribune, p. 7-10, C. TORNARITIS, 'The Right of Equality of Treatment and Absence of Discrimination' [1973] 3-4 Cyprus Law Tribune, p. 5-6.

marry and found a family corresponding to article 12 of the Convention, e) article 23 which provides for the protection of property, safeguarding the right enshrined in article 1 of the First Protocol of the Convention, f) article 20 which safeguards the right to education corresponding to article 2 of the First Protocol of the Convention. In most cases the aforementioned constitutional rights are wider and regulated in more detail, compared to the provisions of the Convention.

III. Leading Cases of the National Courts Applying the ECHR with respect to Freedom of Religion

1. *Consientious Objection*

In the leading case of *Pitsillides* there arose a question concerning the interpretation of article 18 of the Constitution and of article 9 of the Convention with respect to consientious objectors.[12] The two appellants were convicted and sentenced by the Military Court to 12 months and 10 months imprisonment, respectively, of the offence of not joining the National Guard of the Republic, i.e. the national army, when called up, contrary to the National Guard Laws. On being formally charged in respect of the offence, the appellants had replied that the reason for not enlisting was due to their being Jehovah witnesses and that their conscience did not allow them to take up arms. The appellants argued that their religious belief and conscience constituted a reasonable cause that absolved them from any criminal liability and that compulsory military service run contrary to article 18 of the Constitution and violated their freedom of religion and conscience.

The Supreme Court held that reasonable is a relative term and for the cause to be reasonable, it must be objectively fair, with good faith and not contrary to or incompatible with the Law. It was thus, held that the religious beliefs and grounds of conscience of the appellants do not by themselves constitute a reasonable cause, so long as the Law does not otherwise absolve them from criminal liability due to such beliefs. On the question whether compulsory military service was inconsistent to article 9 of the Convention and article 18 of the Constitution the Court held the following[13]:

[12] *Pitsillides* v. *The Republic* [1983] 2 CLR 374. See also *Christou* v. *The Republic* [1982] 2 CLR 365.

[13] The Court referred to app. 2299/64 *Grandrath* v. *Federal Republic of Germany*, Commission decision of 2/4/1973.

> "These articles safeguard religious liberty, which is not to be confused with religious tolerance. Tolerance as a legal concept is premised on the assumption that the State has ultimate control over religion and the churches, and whether and to what extent religious freedom will be granted and protected is a matter of state policy. The right of religious liberty is a fundamental right. The days that oppressive measures were adopted and cruelties and punishments inflicted by Governments in Europe and elsewhere for many ages, to compel parties to conform in their religious beliefs and modes of worship to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons and enforce an outward conformity to a prescribed standard, have gone. Mankind has advanced and the right to freedom of thought, conscience and religion is now a fundamental right and was so pronounced and safeguarded in many legislations... Conscience and religion are not confined to the belief or the relation of a human being to a Creator. Religion or conviction refer to theistic, non-theistic and atheistic convictions. It includes convictions such as agnosticism, free thinking, pacifism, atheism and rationalism. Freedom of religion and conscience includes freedom of belief, freedom of practice, freedom of manifestation by worship, teaching and observance, freedom of association of religious bodies and freedom of religious education, freedom to change one's religion, freedom to manifest both one's religion and convictions...".

In declaring whether the limitation of religious freedom prescribed by the Law was deemed to be necessary in the interests of the security of the Republic, the Supreme Court considered that due to the Turkish military occupation of about 37% of the area of the Republic of Cyprus, the very existence of the State continues to be under express danger and that these circumstances justify the limitation of the right to freedom of religion and conscience by the imposition of compulsory military service. The Court concluded that "so long as the National Guard is used for the defence and security of the country, the Law imposing the obligation for military service on the citizens of Cyprus, irrespective of whether the right to religion and conscience is restricted, is not unconstitutional".

However, the Court noted that the appropriate authorities of the Republic ought to consider in the future the exemption of conscientious objectors from compulsory military service and/or the imposition of alternative service. Law 2/1992 amended the National Guard Laws so that the right of conscientious objectors to choose civilian service has been since recognized.[14] The National Guard Law was recently further amended by

[14] For discussion of recent developments and further problems see T. CHRISTODOULIDOU, 'Religious Conscientious Objection in Cyprus' (2006) 2 Cyprus and European Law Review p. 324-330.

Laws 88(I)/2007 and Law 61(I)/2008, which replaced the provisions of Law 2/1992. The new legal framework with respect to conscientious objectors is now more detailed and provides a higher degree of protection to conscientious objectors, when compared with the previous legislation.

2. *Religious Beliefs and Obligation to Serve in the Army*

In the recent case of *Daniel Sarieddine* the petitioner, an adherent of a Moslem sect, argued that he should not have an obligation to serve in the National Guard, since such National Guard has a Christian Orthodox character.[15] The Supreme Court rejected the petitioner's arguments and held that the obligation to serve in the National Guard refers to the citizens of the Republic and not to the adherents of any particular religion or creed. Indeed the National Guard Laws provide that non Christians ought to be facilitated in the exercise of their religious beliefs. In view of the above, it was held that there was no violation of article 18 of the Constitution, or of article 9 of the Convention. Further in 2006 the Ombudsman held that the decision of the Council of Ministers to exclude the members of the three religious groups of the Republic, namely the Maronites, the Roman Catholics and the Armenians, from the obligation to serve in the National Guard, violated the principle of equal treatment and constituted discrimination on grounds of religion. Following the Ombudsman's decision, the Council of Ministers decided that members of the three religious groups now have an obligation to serve in the National Guard.

3. *Blood Transfusion*

In the case of *Titos Charalambous* the parents of a young girl, being Jehovah's Witnesses, refused to give their consent for their child to have blood transfusion due to their religious beliefs, despite the fact that their child's life was at risk.[16] The Court held that the Director of the Social Welfare Department had rightly undertaken the parental rights of the child in order to allow for the necessary blood transfusion to take place, without the parents' consent, using the Social Welfare Department's powers under the Children Law. Further the Court held that sections 3

[15] *Daniel Sarieddine* v. *The Republic* [2004] 3 CLR 572.
[16] *Titos Charalambous* [1994] 1 CLR 396.

and 4 of the Children Law do not violate Article 15 of the Constitution, or article 8 of the Convention in relation to the right to private life, since their aim is to guarantee the life and the welfare of the child, fundamental rights that are also safeguarded by the Constitution.[17]

4. *The Succession of Monks and the Right to Property*

In the recent case of the *Monastery of Mahairas*, the Supreme Court examined the issue of the hereditary succession of monks in Cyprus.[18] The deceased had been a monk of the Monastery of Mahairas from 1949 until 2000, when he passed away. According to the Charter of the Orthodox Church of Cyprus and the internal regulation of the Monastery, the property of all monks belongs to the monastery and not personally to them. The relatives of the deceased monk argued that such property should belong to the heirs of the deceased monk and not to the monastery and that all inconsistent provisions of the Charter of the Orthodox Church violated article 23 of the Constitution relating to the right of property. The Supreme Court acknowledged that according to article 110, §1 of the Constitution, the Autocephalous Greek Orthodox Church of Cyprus shall continue to have the exclusive right of regulating and administering its own internal affairs and property in accordance with the Holy Canons and its Charter in force for the time being. However, it did not accept that the exclusive right of the Orthodox Church to regulate and administer its property extends also to the property of its monks, or that the property of its monks could be considered to be property of the Church. In view of the above, it was held that each monk continues to have a right to his own property, as safeguarded by the Constitution and that the monastery does not have any right to such property. Thus, the relatives of the deceased monk were considered to be the heirs of the deceased monk.

The aforementioned case is problematic from a legal point of view for two reasons: the first is that it fails to examine the application of article 18 with respect to religious freedom. The monk had exercised his religious freedom by acquiring the capacity of the monk and by accepting the provisions of canon law and the internal regulation of the monastery, where he had been a monk for 50 years. The right to personal property

[17] See also CHRISTODOULIDOU, 'Religious Conscientious Objection in Cyprus', n. 14, above.

[18] *Holy Monastery of Mahairas* v. *Maria Papasavva*, Civil Appeal n. 12193, 4/4/2007.

cannot be examined in isolation and without examining whether in the circumstances of the particular case the monk had exercised his religious freedom which is also safeguarded by the Constitution. The second reason is that article 53 of the Succession Law, Cap. 195 stipulates that rights of religious organizations should be safeguarded. This fact was not examined by the Supreme Court.[19]

5. *Discrimination between Religions*

An interesting case with respect to discrimination between religions is the case of *The Jehovah's Witnesses Congregation (Cyprus) Ltd.*[20] The Minister of Interior had decided to omit marriage officers of the Jehovah's Witnesses Congregation from the annual list of officers authorized to conclude marriages, on the ground that such officers had ceased to be considered as such following the enactment of Civil Marriage Law 21/90. The Supreme Court held that according to article 18 of the Constitution, freedom of religion should not be violated, either directly, or indirectly, and that all religions whose rites are known, are equal before the Law. It further held that Law 21/90 should not have been interpreted in the manner in which the Minister of Interior had. Thus, it was held that the marriage officers of the Jehovah's Witnesses Congregation should not have been omitted from the relevant list of officers authorized to conclude marriages.

Similarly, in the case of *Ktimatiki Eteria Neas Taxeos* the members of the applicant company were Jehovah Witnesses.[21] The applicants applied for a building permit to erect at the quarter of Zakaki a two story building. The respondents refused the permit, without disclosing the real reasons for doing so. The applicants impugned the decision whereby the permit was refused. During the proceedings in the recourse it was made apparent that the real reason was public order or safety because of the opposition of the Orthodox Church and the inhabitants of the Zakaki area to have a building belonging to the said religion erected in their area. The Supreme Court annulled the sub judice decision and held that reasons for

[19] See A. EMILIANIDES, 'The Constitutional Position of the Charter of the Orthodox Church of Cyprus' [2005] 1 Nomokanonika p. 41-54 (in Greek).

[20] *The Minister of Interior* v. *The Jehovah's Witnesses Congregation (Cyprus) Ltd* [1995] 3 CLR 78. See comments in EMILIANIDES, *The Cypriot Law of Marriage and Divorce*, n. 10 above, p. 212-213.

[21] *Ktimatiki Eteria Neas Taxeos* v. *The Chairman and Members of the Municipal Committee of Limassol* [1989] 3 CLR 461.

denying the right of a person or group of public safety or public order to manifest his or their religion or belief can only be limited by Law, according to Article 18 of the Constitution and Article 9 of the European Convention on Human Rights; an administrative organ cannot by itself refuse on such grounds an application submitted to it.

In another case, the case of *Church of Nazarene International Ltd*, the petitioners argued that the State should not have refused to grant them a permit to buy offices in Cyprus, because that ran contrary to the freedom of religious liberty enshrined in article 18 of the Constitution and article 9 of the Convention.[22] The Court acknowledged that the administration cannot hinder, directly or indirectly, the exercise of religious freedom, but held that in the circumstances of the particular case, there had been no violation of article 18 of the Constitution. This was due to the fact that the petitioners had asked for a permit to buy offices in Cyprus for residence purposes, or vacation purposes and not for any purpose, directly or indirectly related to the exercise of religious freedom. Thus, article 18 of the Constitution was not deemed to be applicable in the aforementioned case.

[22] *Church of the Nazarene International Ltd* v. *Minister of Interior* [1996] 3 CLR 3091.

JIŘÍ RAJMUND TRETERA and ZÁBOJ HORÁK

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE CZECH REPUBLIC

It is crucial to mention at the very beginning of this report that Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was the inspiration of Article 16 of the Czechoslovak Charter of Fundamental Rights and Freedoms of 9 January 1991, which was assumed even before the formal ratification of the European Convention by Czechoslovakia. The European Convention was only ratified by Czechoslovakia on 18 March 1992.[1] With the independence of the Czech Republic on 1 January 1993, the Charter of Fundamental Rights and Freedoms, and the European Convention, were both adopted into the constitutional order of the State.

In the frame of the Czech legal system, the Constitutional Court of the Czech Republic has the responsibility of the interpretation of the two aforementioned documents. On the other hand, according to the Czech Constitution, the European Convention can be applied directly.[2] For the reason that Art. 16 of the Charter of Fundamental Rights and Freedoms is almost identical to Art. 9 of the European Convention, the Czech Constitutional Court bases its argumentation on Art. 16 of the Charter.

In the frame of the freedom of religion, the Constitutional Court of the Czech Republic has made the following two decisions:

I. A Decision Involving Some Changes which Restrict the Definitions of Church and Religious Society, Introduced by the new Act on Churches and Religious Societies

On 27 November 2002 the Constitutional Court of the Czech Republic abolished some provisions of Act No. 3/2002 Sb. on churches and religious societies. The decision of the Constitutional Court was published

[1] Published under No. 209/1992 Sb. (Sb.= Collection of Laws).
[2] Art. 10 of the Constitution of the Czech Republic, No. 1/1993 Sb.

in Collection of Laws under No. 4/2003 Sb. At the beginning of this decision, the Constitutional Court expressed fundamental principles of religious freedom in relation to autonomy of churches in the constitutional order of the Czech Republic, with the following words:

> '... The principle of religious pluralism and tolerance is also implemented in Art. 15 paragraph 1 and in Art. 16 of the Charter. Art. 15, paragraph 1 of the Charter provides that freedom of thought, conscience and religious faith is guaranteed, and that everyone has the right to change his religion or faith or to be non-denominational. Under Art. 16 of the Charter, everyone has the right to freely manifest his religion or faith, either alone or in community with others, in private or in public, through worship, teaching, practice or observance (paragraph 1). Churches and religious societies govern their own affairs; in particular they establish their own governing bodies, ordain their clergy, and found religious orders and other church institutions independently of state authorities (paragraph 2). The exercise of these rights may be limited by law, in the case of a measure which is necessary in a democratic society for the protection of public safety and order, health and morals, or the rights and freedoms of others (paragraph 4). As the Constitutional Court has already stated in the past, unlike the freedom of conscience and religious faith, for the restriction of which the Charter does not expressly provide any possible conditions, the freedom to practice a religion or faith can be limited by statute for the reasons cited. However, this means the ability to limit the exercise of these rights, not of their regulation by the State'.
>
> (decision of 8 October 1998 file no. IV. ÚS 171/97, the Constitutional Court: Collection of Decisions, vol. 12, p. 457 et seq.)

Before all in this same decision, the Court abolished provisions, which "...directly give rise to subjecting the legal coming into existence of religious legal entities to a State decision, i.e. de facto registration of them, even though in the Act it is formally described as recording."
The Constitutional Court also abolished provisions which, in essence, enabled the State (Ministry of Culture) to cancel authorization to exercise special rights,[3] if a registered Church or religious society did not publish an annual report:

[3] Special rights are: officiate marriages with civil effects, teach religion at public schools, create public or private church schools, propose chaplains in the army and detention facilities, get State financial support for salaries of ministers, recognition of secrecy of confession because of denomination doctrine older than 50 years. Cf. Art. 7 of the Act No. 3/2002 Sb.

> 'In the Constitutional Court's opinion, this framework clearly does not observe the principle of proportionality, under which a statutory framework would consistently preserve a balanced relationship between the violation of a right on the part of a church or religious society, on the one hand, and the penalty imposed by the state, on the other hand. In this case, however, this proportionality is not preserved, because error by churches or religious societies in an area of an exclusively informative obligation is followed by a penalty which, by its nature, falls into the area of religious activity'.

Finally, the Constitutional Court abolished the provision, according to which churches were allowed to use achieved profits only to meet the religious goals of the activities of the Church or religious society:

> 'However, in the Constitutional Court's opinion, this limitation clearly does not correspond with the purpose and mission of churches and religious societies. As stated elsewhere in this finding, the task of these entities can not, under any circumstances, be reduced to the mere profession of a particular religious faith – as the contested provision de facto says – but their role in society is considerably wider and also consists of radiating religious values externally, not only through religious activities but also, e.g. charitable, humanitarian and general educational activities. Therefore, limiting churches and religious societies to freely making use of their legally obtained income only in the area of professing religious faith is arbitrary interference on the part of the State in the private law essence of these entities, and this interference is clearly not legitimized by any relevant public interest...'

II. Decisions Involving Church autonomy in Internal Issues of Churches, such as the Employment of their Spiritual Workers

A decision of the Constitutional Court of 26 March 1997 file no. I ÚS 211/96 rejected the jurisdiction of secular courts in disputes concerning the termination of a service relationship involving members of the clergy and other pastoral employees of religious communities. The process had been initiated by two former pastors of the Czechoslovak Hussite Church – the married couple Z. Duda and E. Dudová – who were unsatisfied with the same judgments of Czech common courts.[4]

According to the opinion of the Constitutional Court, the persons executing pastoral service act on behalf of churches or religious societies, and follow internal Church rules. Only churches or religious societies can

[4] See also TRETERA, JIŘÍ RAJMUND, *State and Church in the Czech Republic*, in: ROBBERS, GERHARD (ed.), *State and Church in the European Union*, Second Edition, Baden-Baden, 2005, p. 49.

judge the abilities of those persons for pastoral service, and decide on their engagement. As a result, State courts do not decide on Church engagement of pastoral workers because in such a case they should unduly interfere with the churches' internal autonomy, and their right of independent decision.

In the case of salaries, respectively of other civil claims of ministers, State courts are competent, according to Art. 7 of the Civic Judicial Process Rules,[5] to decide on issues of civil labour law, where the private character of Church comes to the fore as a legal entity. In these civil cases, judicial proceeding does not interfere with the internal autonomy of churches and their decision power.

On 30 January 2001, the European Court of Human Rights decided on the case of Dudová & Duda against the Czech Republic and confirmed implicitly the argumentation of the Czech Constitutional Court.[6]

On 31 August 2000 the Constitutional Court decided under file no. III. ÚS 136/2000 analogous case of the action of a former minister of the Unity of Brethren (Moravian Brethren), with the same result.

III. A Decision Involving Religious Freedom and the Parents' Rights in the Healthcare of their Children

On 20 August 2004 the Constitutional Court decided under file no. III. ÚS 459/03 action of the parents – members of the Religious Society of Jehovaḱs Witnesses – against the break of their religious freedom in case of a medical treatment of their child by blood derivates. The Court refused this action.

The Constitutional Court confirmed that the provisional order of a county court about the transfer of an endangered child to the hospital and the temporary appointment of a public curator for the child do not break art. 32/4[7] and art. 16/1 of the Charter of Fundamental Rights and Freedoms. If the parents refuse standard hospital care of an under-age, who is in imminent danger of life, the provisional order of court, according to art. 76a of the Civic Judicial Process Rules on commitment of under-age to care of hospital, does not interfere with rights guaranteed in article 32/4 or article 16/1 of the Charter of Fundamental Rights and Freedoms.

[5] Act. no. 99/1963 Sb.
[6] No. 40224/98.
[7] Art. 32/4 concerns protection of family.

Conclusion

In the decision practise the Constitutional Court of the Czech Republic highly respects religious freedom, guaranteed in the European Convention, following in the same extent in the Czech Charter of the Fundamental Rights and Freedoms. Following the decision practise of the European Court of Human Rights, the Constitutional Court emphasizes that legal provisions and their interpretation must be in accordance with the principle of proportionality.

INGER DÜBECK

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN DENMARK

In 1987 the Institute of Human Rights was established in Copenhagen as a national institute. During the following years the institute made a great effort to inform Danish legal agencies and universities about the significance of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In 1989 the Danish parliament, Folketinget, decided to set up a governmental committee with the task of examining the advantages and disadvantages involved in the incorporation of the ECHR into Danish law. The committee found that the early legal practice had given doubt in the jurisprudential debate as to whether the Convention could be invoked at all before courts of law. In 1989 this question was clarified by the Supreme Court, which in more decisions showed that Danish courts of law were under an obligation to base their interpretation of Danish law to the widest extent possible on the practice of ECHR. The ECHR was then codified and incorporated as a part of the Danish legislation in 1992. Today it is the general opinion in the jurisprudential literature, that the incorporation of the ECHR not only concerns the Convention with the content of the 1992 incorporation, but rather with the content it will have each time on the background of the conventional practice.

A national Danish problem is the question of the influence from the interpretation of the Convention upon the interpretation of the Danish Constitution, Grundloven, and especially upon the interpretation of the Human Rights of the Constitution, because the rights and the protection in both legal sources are more or less identical. In order to understand the Danish practice of the Supreme Court (Højesteret) it is necessary to mention that Danish courts, especially the Supreme Court, have developed a somewhat singular culture as to the pronouncement and extract of the records. The Supreme Court was established by the absolute King Frederik III in 1661, but was in fact a continuation of the medieval Kings Court. The essential difference between the two was the background of the judges, who in the old court were members of the King's Council,

while the members of the new Supreme Court should be "fifty-fifty" nobel and common people with a more or less learned background. In the modern Supreme Court all judges must have a high legal education. The voting of the judges in the Supreme Court is and has always been secret. In addition, the published extracts of the judgements used to be very short, without grounds or information about dissenting opinions. Since 1856, however, the Supreme Court has been obliged to give grounds for its judgements. Besides, in modern times it is normal to refer to dissenting opinions, too. Nevertheless, a long lasting costume of the Supreme Court is that the voting members try to agree on the premises, if they agree upon the result, in order to avoid dissenting opinions. Therefore judgements from the Danish Supreme Court published in the legal periodicals are still often rather short in comparison with judgements published by American, English, Norwegian or Swedish courts.

I. Art. 9: Freedom of Thought, Conscience and Religion

Freedom of thought, conscience and religion are looked upon as absolute rights, which include atheistic, philosophical, scientific and political aspects, too. These freedoms shall protect against unwanted indoctrination and unwilling participation in religious and corresponding activities. However, the right to exercise these freedoms is relative and might be curtailed by the state, concerning the ECHR Art. 9.2.

Practice[1]*:*

U.2005.1265 H: The dismissal of a woman, because she wore a religious head scarf, which was contrary to the rules of service uniform for all employees, was not illegal discrimination. 'Concerning the prohibition of wearing headscarves, the High Court (Østre Landsret) had remarked that "it should be seen in connection with the rules of service uniforms as a whole, which was part of the presentation of the concern ("Føtex") to the costumers. The rules were enforced consequently concerning the given explanations, and they were clear and general". The Court found that "irrespective that the prohibition against headscarves will typically

[1] The main Danish legal periodical for the administration of justice is "Ugeskrift for Retsvæsen" (Weekly Legal Periodical), normally shortened and cited as: "U. Year. Page and the letter for the Court: H for Højesteret (Supreme Court), and V or Ø (for respectively the High Court of Western or of eastern Denmark)".

affect Muslim women, the prohibition is sufficient, objectively motivated, and it stands in a reasonable proportion to the purpose, which Føtex had in view". The high Court did not discuss the relation to the ECHR Art. 9, but only to the Danish Act on Prohibition of Discrimination at the Working Market. The Supreme Court (Højesteret) affirmed the judgement with a short addition to the European practice: "There is concerning the practice of the European Court of Human Rights no basis to consider the enforcement of the prohibition as contrary to the ECHR Art 9." The Supreme Court did not express any special obligation in relation to Art. 9.

II. Art. 8: Private and Family Life

The concept of "private life" was in the judicial practice of the Supreme Court originally construed as more restricted than the one of Art. 8. The youngest practice concerning private life has since the year 2000 mainly concerned problems in connection with the registration of persons and open administration.

Practice on Private Life:

U. 1992.948 V (The High Court of Western Denmark) was concerned with the right of the police to store fingerprints from a person, who had not been found guilty. The local court was of the opinion that the person could claim the destruction of his/her fingerprints. The High Court, on the other hand, had the opposite opinion, because an amendment of the Administration of Justice Act had given the police the right to store fingerprints, which were lawfully taken. And so the court remarked: "This rule cannot be supposed to be contrary to Art. 8 in the European Convention of Human Rights".

In Danish legal practice, the concept of "family life" does not only embrace married couples, but also de facto unmarried cohabitants, yet until now not homosexual relations. The so called "intended family life", for instance between a biological father and a child under age, who stays with the mother or a third person, may be accepted. Although, on the one hand, Art. 8 does not secure any right for foreigners to admission, residence permit or reunion of families, denial in these relations, on the other hand, may be a violation of the right to respect for family life. Since the year 2000 the question of deportation from Denmark in spite of some kind of family life in Denmark has been of a growing importance. In this

respect, both the Supreme Court and the High Courts have examined, if intended deportations might be contrary to the ECHR Art. 8.

The Danish Aliens Act was tightened up several times during the 1990s and during the last 7 years, especially after the events of 11/09/2001 in New York. The actual version of the Danish Aliens Act no. 945 from the 1/9/2006, decides in §26,1 which considerations shall be taken regarding decisions of deportation. The following 6 conditions are emphasized, but other causes may also have an influence: 1) The connection of the foreigner to the Danish Society; 2) age, health and other personal matters of the foreigner; 3) the connection of the foreigner to other persons living in Denmark; 4) the consequences for close members of his/her family living in Denmark, especially as to the respect for the unity of the family; 5) the foreigner's lacking or very little connection to the homeland or other countries, where s/he might be expected to take up his/her residence; 6) the risk that the foreigner will come to suffer injury or harm in his/her homeland or other land, where s/he would be expected to take residence. Concerning §26,2, the foreigner shall be deported, if s/he is sentenced to deportation for serious crime, unless the conditions in number 1) to 6) conclusively speak against deportation.

The Aliens Act §24a decides that a court decision on deportation shall lay stress on the question, if deportation shall be looked upon as especially required because of: 1) the seriousness of the committed crime; 2) the length of the convicted imprisonment; 3) the danger, damage or injury, which was connected with the committed crime; and 4) earlier sentences in criminal cases. §24a was inserted in the Aliens Act in 2006 in order to make precise the considerations, developed since 2000 by the Danish courts, in the practice concerning deportation. The Supreme Court found in two cases of the year 1999 (U.1999.271 H and 1999.275H) that deportation would be contrary to the ECHR. Consequently, it dismissed the claim of deportation from the prosecution, because it was based upon the older legislation, which was contrary to the newer legislation. The Supreme Court emphasized that the practice from the local courts and the High Courts was no longer normative, and that it would be necessary to make a concrete evaluation of the connection of foreigners to Denmark, and to take other humanitarian considerations in accordance with the international obligations of Denmark. These considerations are now to be found in the Aliens Act §26,1. Since the cases of 1999, the Supreme Court has followed those views in all the cases of deportation. Several cases have concerned serious crimes, as well as the question whether a deportation would be contrary to Art. 8.

Practice on Family Life:

U.2000.137 H: A Turk, who came to Denmark as a 13-year-old boy, had established a family with a Turkish wife. He spoke Danish. In the period between 1985 and 1999 he was convicted 12 times for serious violence and threats. The High Court (Vestre Landsret) convicted him to preventive detention and deportation for ever. The court, consisting of 3 judges and a jury found the actual crime together with the earlier crimes so serious, that it would not irrespective of his close connection to Denmark, be contrary to the Danish legislation on foreigners to deport him for ever. Nevertheless, a minority found that a "deportation would be contrary to the claim of proportionality in the ECHR Art. 8". The court followed the majority. The Supreme Court confirmed the sentence of the High Court as to detention and deporting without any comments.

U.2000.546 H: A person with Chilean citizenship had during the years 1986-1998 been convicted several times to prison for having committed different crimes concerning drugs and robbery. He was not born in Denmark, but he had been living there with his mother, since he was 14 years old. His father had left Denmark, to live in Spain. He spoke Danish, as well as Spanish. He was in the actual case convicted to prison in 5 months and to 5 years of deportation. In the High Court (Østre Landsret) the voting judges were divided in relation to the question of deportation. One judge found the deportation not advisable in relation to earlier practice from the Supreme Court, yet the other judges were convinced that deportation was necessary for social reasons, and therefore not contrary to Art. 8 of the ECHR.

In the Supreme Court the judges were also divided as to the question of deportation, although not in relation to the length of the imprisonment. Three judges out of five "did not find the connection of the Chilean that strong, that deportation because of his extensive and serious crimes would be contrary to the claim of proportionality, which is prescribed in the ECHR Art. 8". Two judges found that "the connection of the charged person to Denmark is so strong, that deportation because of his earlier criminality would be contrary to the claim of proportionality in the ECHR Art. 8".

U.2000.820 H: A Pakistani citizen was convicted to prison in 2½ years for robbery, but was not deported. He had lived in Denmark, since he was 4 years old. He spoke Punjabi with his parents, but could not read or write that language. He spoke Danish, had gone in Danish schools and had been living in Denmark for 23 years. He had very few connections

to Pakistan. The High Court (Østre Landsret) found that the conditions in the Danish legislation for deportation were fulfilled and that a deportation would not be contrary to the ECHR Art. 8, even though he had parents and family in Denmark. In the Supreme Court all 5 judges declared that he had, in reality, no connection with Pakistan, and found that "his connection to Denmark is so strong- and so much stronger than his connection to Pakistan – that a deportation would be contrary to the claim of proportionality, which follows from the ECHR Art. 8. It was also considered that he had not been punished earlier, and that the sentence only concerned a single, although serious case of robbery".

U. 2000.1499 H: In a criminal case 3 persons, T1, T2 and T3, were charged for import of heroin. T1 was convicted to prison in 3 years, whereas T2 in 3 years and 9 months. T1 and T2 were born in Turkey and came to Denmark as 13- and 16-year-old boys. They both married Turkish women. The wife of T1 stayed in Denmark together with their children, but was separated from him in 1995. T2 had first married a Turkish woman, who had not moved to Denmark. After a divorce, he married another Turkish woman, who returned to Turkey after some years. T2 later cohabitated with a Danish woman and had children with her. His parents lived in Denmark, and he had no contact with family in Turkey. The High Court (Vestre Landsret) found that T1, who had lived in Denmark for 27 years and who had close contacts with his children, had so close connections to Denmark that it would be contrary to Art. 8 in the ECHR, in spite of the serious drug criminality, to claim deportation. Regarding T2, the court found that he had stayed in Denmark for 10 years, and he had lived together with a Danish woman, with whom he had two children. He had no family in Turkey. The High Court decided that "the connection of T2 to Denmark was not so strong, that it would be contrary to the proportionality principle in the Danish legislation, to claim deportation because of the serious drug crime". The Supreme Court confirmed the sentence of the High Court, as well as the reasons for not deporting T1 on the one hand, and for the deportation of T2 on the other hand.

U.2000.1600 H: A 24-year-old man born in Denmark by Turkish parents was convicted for different offences against property. He could read, speak and write Danish, but not much Turkish. He was convicted to prison without deportation in the local court and in the Supreme Court, the latter of which stressed his much stronger connection to Denmark than to Turkey, finding that irrespective of the seriousness of the crime, a deportation would be contrary to the ECHR Art. 8. Previously, the High Court (Østre Landsret) had claimed deportation, supporting that it was not contrary to the claim of proportionality which follows from the ECHR Art.8, even though the Court had to admit the individual's closer connections to Denmark than to Turkey. The decisions in this case certify the differences between the views of the Supreme Court and the High Court around the year 2000.

U.2001.444 V (Vestre Landsret): A person had molested staff members on a psychiatric hospital and had destroyed property wantonly. He was found guilty, but was acquitted for punishment and convicted to psychiatric treatment. The man was born in Somalia, came to Denmark at 21 years of age in 1989, was without any work, his wife and children lived in Ethiopia, and he had very little contact with his brothers, who also lived in Denmark. The local court had found, that a deportation would not be contrary to the principles of proportionality neither in the Danish rules in the Aliens Act §26 nor in Art. 8 in the ECHR. In the High Court the opinions of the judges were divided. The majority found that a deportation would be contrary to the principle of proportionality in Art. 8, irrespective of the fact that he had some family connections in Somalia. The minority found that the connection to Somalia was of a certain importance, because his new wife and children lived in Somalia, and he also had his mother and two sisters in Somalia. They voted for deportation, which they did not find contrary to the ECHR. He was not deported, however, due to the votes of the majority.

U.2002.58 H: 5 persons were convicted for serious drug crimes by the High Court (Østre Landsret). Among the five, one person, T5 was born in Bosnia and came to Denmark in 1996, when he was 20 years old. In 1997, he married a Danish woman. The had only lived together for one year. The prosecution asked the Administration of Aliens to comment on the question of deportation. The Administration of Aliens argued that T5 had not had any work during his time in Denmark, that he spoke some Danish and that he had lived in Denmark for 4 ½ years. He had no family in Bosnia. The Administration did not find that there would be a risk for him to be punished severely, if he returned to Bosnia. Because he was expected to be convicted to prison of more than 5 years, the Administration did not find the considerations in the Act on Aliens §26 contrary to a deportation, which had also been the opinion followed by the High Court. The claims of Art 8 in the ECHR had not been mentioned by the High Court. But the Supreme Court, which confirmed the sentence, remarked that "deportation of T5 cannot be taken for contrary to the claim of proportionality, which follows from Art. 8 in the ECHR,, either concerning the serious character of the committed crime, or as to his connection to Denmark, respectively Bosnia".

U.2002.559 H: A man born and raised in Lebanon came to Denmark in 1986, when he was 19 years old, and was convicted to 5 years of prison for selling drugs. The prosecution received a statement from the Administration of Aliens concerning his stay in Denmark. He had had a legal stay in Denmark for 10 years and 10 months, but he had lived in Denmark for a total of 14 years and 3 months. As to the question if the conditions in the Act on Aliens would make a decision of deportation problematic, the Administration of Aliens remarked that he had fulfilled the Danish school claims he had during 1992-93 and 1997-1998 and again from 1999 lawful work He also had some health problems. He was unmarried and had no children, but his parents and 3 sisters and brothers with whom he had close relations, also lived in Denmark. The Administration did not find any risk that he would suffer any harm from the country, where he might be expected to take a stay, or that he would be punished with severe sanctions, if he returned to Lebanon. The majority of the High Court together with a jury voted on this background for deportation and permanent prohibition against reentry, because none of the rules of the Act on Aliens in §26,1 spoke against deportation, and, also, because deportation on the ground of the serious crimes and earlier criminality would not be contrary to the claim of proportionality in Art. 8 of the ECHR. The minority voted for his being acquitted for deportation. The Supreme Court confirmed the majority-sentence of the High Court.

U.2006.639 H is a case with somewhat different problems, which reflects the development of questions concerning aliens in Denmark under the actual government. The main problem is the question whether the decision of the Ministry of Integration that the application for extension of the residence permit of the spouse A of a man B, born in Denmark by Pakistani parents had been legal and in accordance with the legislation concerning residence permits. The man B had married the Pakistani woman A in 1998. Afterwards, A asked for a residence permit in Denmark in the Danish Embassy in Islamabad, because of their common wish to family reunion. She was granted a conditional temporary permit. Among the conditions was the claim, regarding "the applicant's spouse being able to maintain the applicant concerning section 9,4 of the Danish Aliens Act". A came to Denmark in 2000 and after a year she asked for prolongation of the permit. At that time, her husband was unemployed. In 2002 the Administration of Aliens denied an extension of the residence permit for A, because B could no longer maintain the applicant. The Ministry of Integration

followed the decisions of the Administration of Aliens. The ministry did not find any special arguments for a prolongation, because the wife had stayed in Denmark for only two years, while neither she nor their little child had special connection to Denmark. It also found that B as a Pakistani citizen would be able to settle down in Pakistan together with his wife and child. There were in the opinion of the ministry no special reasons such as health problems or other personal problems, which would make troubles for the wife, when she returned to her homeland.

In the High Court A and B tried to combine the ECHR Art. 8 with Art. 14, which forbids discrimination because of nationality, among other matters, in order to prove that a prolongation could not be denied. The Ministry of Integration argued that the court had no authority to give residence permits. The new Act on Aliens claimed documentation for ability to maintain the wife, which B had not fulfilled, and the ministry found that it was irrelevant which criteria were normal under the earlier legislation. Both A and B, together with their now two children were Pakistani citizens. A had her whole family in Pakistan. The ministry also claimed that no practice concerning Art. 8 allows a disregard of decisions taken by the Ministry. The ECHR does not impose the member states a duty generally to respect the choice of residence country, nor in relation to family reunion. Art. 14 of the Convention has in the opinion of the ministry "no independent importance and cannot in itself cause a disregard of the decision of the ministry".

The High Court did not find reason to disregard the decision of the Ministry of Integration and expressed especially concerning Art. 8 that "it does not impose the member states a general duty to respect the choice of residence country in relation to marriage or to allow family reunion. As Art. 8 has not been violated, there will be no basis for claim that Art. 14 in connection with Art. 8 has been violated". The Supreme Court concluded that the Ministry of Integration could properly claim documentation for Bs ability to maintain A in connection with the decision of 30 January 2003 to withdraw the residence permit of A, and so it confirmed the judgement of the High Court and the reasons provided by that court. A comment as to the Danish practice concerning residence permits for aliens is hereafter that the Danish legislator, Folketinget (the majority), has given the special governmental administrative agencies concerning aliens a very strong position seen in relation to the courts, while practice shows that these administrative agencies use their new influence in a rather aggressive way.

III. Art. 2- P-1: Right to Education and Instruction

The article entitles the right to a certain minimum of free education in basic schools and a right to recognition of an education in order to take advantage of it. The concept of education is interpreted broadly as the whole process of bringing forward to the youth the ideas, values and culture of the adults. Education has to be objective, critical and pluralistic and not indoctrinating. In the case "Kjeldsen et alia against Denmark" (23), it was decided that children should attend a compulsory course of sexology in the public basic school. It was found important, however, that the instruction should not be proclaiming, but based on an objective description, and the fact that Denmark had more private alternatives to the public basic school. The result was that no violation of the parents rights concerning Art. 2-P-1 had taken place.

IV. Art. 10: Freedom of Opinion and Expression

In accordance with the Danish Constitution, Art. 77 Danish legal theory distinguishes normally between formal and material freedom of expression. Formal freedom means that censorship in the form of a public approval given in advance, as known during the Absolutism, is in no way any more acceptable and legal. Material freedom of expression means that the state is not allowed to limit the scope of lawful expression in an undue way. The ECHR Art. 10 protects the material freedom of expression and is of essential importance for the understanding of democracy. Manifestations of speech and opinions may be information about facts or ideas or value judgements. The question whether information about facts might be violating, depends among other things on the good or bad faith of the plaintiff in relation to truth value. In Danish judicial practice a more extensive freedom of expression is accepted in relation to comments on politicians and political subjects, the private life of politicians, and also topics of general public interest. The press, the news and other media enjoy a clear protection against restriction, because of their special role in the society.

Practice:

In U.1989.399 H concerning freedom of expression versus the violation of this freedom because of race, the case was decided on rules in the Danish penal code alone, without any reference to the ECHR. A journalist, Jersild, from the Danish Radio, made a TV report with some young people, who expressed serious discriminations as to the race of people of Afro-American origin. The reporter was convicted to a penalty of a small fine. The reporter went to the European Court of Human Rights (Jersild versus Denmark, 23/ 9/1994), which concluded: "1.that it holds by twelve votes to seven that there has been a violation of Article 10 of the Convention, 2. that it holds by seventeen votes to two, that Denmark is to pay the applicant within three months 1000 Danish kroner in compensation for pecuniary damages and for costs and expenses [...], and 3. that it dismisses unanimously the remainder of the claim for just satisfaction". In Denmark the Supreme Court case was reopened by the Special Danish Court of Appeal because the sentence of the Supreme Court had been found contrary to Art. 10. Jersild was now found not guilty.

In U.1994.988 H a television reporter had violated the right of privacy of a politician by entering his private garden, but was found not guilty for the violation of privacy, because the importance of the public interest in the presentation of news had a greater weight. In this case, Art. 10 concerning freedom of opinion and expression and the European practice became part of the argumentation from the defence and therefore it was also part of the court's sentence, which mentioned Art. 10, as well as the Jersild case, which had opened the eyes of the Supreme Court for the necessity of being aware of the practice of the European Court for Human Rights.

U.2004.698 Ø (Østre Landsret) A, who had been an agent for the intelligence service of DDR "Stasi" earlier, was in 1998 employed as an assistant on a Danish newspaper. Before his employment, he had brought some articles in the same newspaper concerning communist agents in Denmark, based on information from archives of Stasi. Nevertheless, he did not inform the newspaper about his own earlier connection with Stasi, when he was employed. In March 1999, the said newspaper brought an article about A's work for Stasi, where it was told, that he had infiltrated the said newspaper's editorial staff, and that he had contributed to the imprisonment of DDR citizens in inhuman prisons, that he had earned money through procuring, and that he was probably still an agent for the intelligence service of Russia after the collapse of DDR. The High Court remarked that it was of a considerable public interest to mention Danish citizens' activities for secret services of foreign countries, and especially for the Stasi. In order to judge whether the press coverage of those activities imply a punishable libel, it has to be seen in the light of the ECHR Art. 8 as incorporated in Danish legislation. Consideration of the freedom

of expression is very essential in relation to the weighing out of the consideration of the protection of the reputation of individuals. The result of this weighing out implies a rather far reaching freedom of expression for the press, and the press consequently has to be granted a certain right as a public "watchdog" to overstate and provoke in connection with the press coverage of these questions, if there is a factual basis for a critical comment. For the above reason, and also because A had not informed the newspaper about his earlier personal connection with Stasi when employed, the editor and the journalists were found not guilty.

V. Art. 11: Freedom of Meeting and Union of Persons and Institutions

Practice:

U.2000.1728 H: A person L was employed by A in March 1996. In May 1996 she was offered an employment contract, which claimed that all employees by A should be members of the special trade Union, F, of which L was not a member. When she declared that she was not interested in being a member of F, she was dismissed from her job. In the High Court (Vestre Landsret) she was awarded 10.000 Danish kroner in damages, because she had not received her contract at once, but the court did not find the "closed shop stipulation" illegal. The High Court discussed the practice of the European Court of Human Rights (British Rail and Sigurjónsson) and remarked that the Danish Act on Freedom of Unions of 1982 was passed in order to accomplish Art. 11 in the ECHR. The Supreme Court remarked that the practice of the European Court of Human Rights gave no basis for another view as to such "closed shop stipulations". The sentence of the High Court was confirmed also in relation to F and A, which were acquitted.

VI. Protection of Property of Persons and Institutions: P. 1-1

In Danish legal theory P 1-1 is understood as a rule, which protects private property against unwanted deprivation or control of its performance. It may be generally perceived as a protection of the inviolability of private property. There has been no special judicial practice in Danish courts, which refer to this European rule, maybe because Art. 73 of the Danish Constitution has protected private property in the same way.

VII: Procedure Rights of Persons and Institutions: Arts. 6 and 13

Art. 6 is not only in European connections, but also in Danish court practice the article in the ECHR which is mostly used. Although Art. 13 is to a certain degree overlapping with Art. 6, and may often be absorbed by the more specified claims in Art. 6, it has a growing importance, especially in relation to the claims of effective remedies concerning reasonable time limits in Art. 6,1. The courts as stately agencies are obliged to secure the hearing independently within a reasonable time, also in civil law suits notwithstanding the principle of party presentation. The Danish Courts are using the claim of reasonable time as a cause for reduction of the sanctions in criminal cases.

Practice:

In U.2003.2031 H the punishment for handling stolen goods of a serious character was reduced to prison in 1 year, because of the long and unreasonable time of the public hearing, the prolongations of which were probably contrary to Art. 6,1 in the ECHR concerning both the High Court and the Supreme Court.

U.2005.2321/2 Ø (Østre Landsret) A person had illegally "borrowed" another person's car and committed drunken driving. He was sentenced to prison in 20 days and with a penalty of 5.999 Danish kroner. However, because of an unreasonable time prolongation contrary to Art. 6,1 the High Court found that the punishment should be reduced, and so the claim of imprisonment was conditionally discharged.

Concerning the question of disqualification of judges, the Danish legal theory finds that the practice of the Danish Supreme Court is well in accordance with the European practice concerning Art. 6. The European perspective may be characterised as a natural part of the considerations in the Danish judicial practice, even if it may be admitted that the governmental agencies have been conferred more influence in the decisions.

VIII. Discrimination on the Ground of Religion: Art. 14 related to Art. 8, Art. 9.1 and p.1-1: *Supreme Court Decision of 5 November 2007*(case no. 165/2006)

A Danish citizen, NHK, being not member of the Danish evangelical-lutheran Folkchurch, claimed that the duty to notify the birth of his

daughter to the vicar of the local Folkchurch was a discrimination on the ground of religion of him concerning the ECHR and an offence of his right to respect for his family life as a parent. Danish vicars do not only serve as ministers of their parish churches, but also act as civil servants for the government with authority to take care of the making of personal files for the central national register. This system holds good in most of Denmark, except for the southern parts of Jutland where people have to register for the municipal authorities; a German system which was continued, when these parts of the country came back to Denmark in 1920 after World War I.

NKH also claimed that his personal contribution as a taxpayer to the preachings of the Folkchurch was a discrimination on the ground of religion and an offence of his property rights contrary to the ECHR. The Supreme Court found that the personal registration was part of the public legal administration without any religious content. It was no offence of the freedom of religion concerning Art. 9.1, nor of the right to respect for his private and family life concerning Art. 8, or an offence of the enjoyment of the right of Art. 14 to be without discrimination on the ground of religion. The Supreme Court found the authority to register as founded in a delegation of governmental authority to all vicars, not as ministers, but rather as civil servants outside the sphere of religious activities. This conclusion is of great importance to all members of denominations and beliefs other than the Danish evangelical-lutheran Folkchurch. The court furthermore found that the freedom of religion concerning Art. 9.1 was not offended by his indirect tax contribution, because these tax means are part of the financial basis for the administration of the central national register and the civil burial authorities. The court referred in this connection to the decision of the European Commission of Human Rights no. 11581/85: Darby against Sweden. The court also denied had he suffered any offence of his property rights concerning p. 1-1, because tax paying was no offence of Art. 14 related to Art. 9 and p. 1-1.

MERILIN KIVIORG

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN ESTONIA

Introduction

Estonia became a member of the Council of Europe on 14 May 1993, and signed at the same day the treaty of the European Convention for Fundamental Rights and Freedoms. The Estonian Parliament ratified the European Convention on Human Rights on 13 March 1996,[1] the letters of which were deposited on 16 April 1996. Since that date, the convention has become part of the Estonian legal system, thus legally binding.[2] Already prior to ratification of the ECHR, the Estonian courts had used the ECHR and its practice, for the interpretation of domestic legislation or *obiter dictum*. There is a growing trend in the decisions and judgments of the European Court of Human Rights towards Estonia. However, none of the cases have been concerned with freedom of religion or belief under article 9 or under related articles of the Convention. Similarly, there have only been a few cases in the Estonian courts concerning freedom of religion or belief. Only in a couple of cases has article 9 of the ECHR or other relevant articles been invoked. However, there have been cases in the Estonian Supreme Court which have set general principles, for example, regarding non-discrimination and limits to fundamental rights and freedoms.[3] In these cases the Supreme Court was using the case law of the ECHR. These decisions are most likely to affect the interpretation of potential cases on freedom of religion or belief in the future.

The Estonian Supreme Court has passed judgment on two cases dealing with freedom of religion. One case concerned the constitutionality of

[1] RT II 1996, 11/12, 34.

[2] See also *Viikaman* v. *Estonia* (1997), Appl. No. 35086/97 (incompatibility with *ratione temporis*).

[3] See Decisions of the Constitutional Review Chamber of the Supreme Court, Case no. III-4/A-4/93,4 Nov. 1993 (RT III 1993, 72/73, 1052); case no. III-4/A-1/94, 12. Jan. 1994 (RT III 1994, 8, 129); case no. III-4/A-2/94, 12 Jan. 1994 (RT III 1994, 8, 130).

the Non-profit Associations Act[4] and the other conscientious objection to military service[5]. There have been several cases in the lower courts concerning Orthodox Churches in Estonia[6]. There has been one case concerning rights of prisoners[7] and one about limiting the manifestation of religion / right to assembly on the grounds of public order[8]. The majority of cases where religious communities have filed complaints are related to land reform and restoration of illegally expropriated property. This has been the dominant issue relating to institutional/corporate religious freedom since regaining independence in the beginning of 1990s. One of the emerging issues may be religious education. The latter has created heated public debates. Headscarves[9], religious garb or symbols have not been an issue in Estonia yet. There have been no court cases concerning equal treatment or protection of minority religions.[10]

This article will firstly describe in brief the position of international law, including the ECHR in the Estonian legal system. Secondly, it will provide some comparisons of article 9 and article 40 of the Estonian Constitution. However, the main focus here is on the emerging case law

[4] See Case no. 3-4-1-1-96 (RT) concerning a review of the petition by the President of the Republic to declare the Non-profit Association Act, passed on 1 April 1996, unconstitutional. The case is also published on the Supreme Court webpage: http://www.nc.ee/english/const/96/4a9601i.html 22.07.07.

[5] Case no. 3-1-1-82-96 of the Criminal Chamber of the Supreme Court.

[6] These cases dealt with registration and conflict between two Orthodox Churches one of which is descendent *in jure* of the Estonian Apostolic Orthodox Church of 1923-1940 (subordinated to Ecumenical Patriarchate of Constantinople) and the other one (subordinated to Moscow Patriarchate) was established with the help of the Soviet occupation in 1945 eliminating the EAOC Synod in Estonia. For more detailed analysis see M. Kiviorg, 'Eesti Apostlik-Õigeusu Kirik ja objektiivne kirikuõigus [Estonian Apostolic Orthodox Church and Law on Religions]' in Juridica, 1997, no. 10, pp. 518-523.

[7] Tartu Ringkonnakohus [Tartu District Court], Case No. 3-07-701 (2 May, 2007).

[8] Harju Maakohus, Case No. 4-05-936/1 (25 October, 2006). Note the difference in the use of grounds – public order and public safety / disorder in Article 11 of the ECHR.

[9] The wearing of the headscarf is not prohibited. Currently there are no reported problems of wearing a headscarf at the workplace or elsewhere. The Government Regulation No. 79 (2005) amended the previous regulation concerning photos on identification documents. According to this new regulation a person has a right on religious ground to submit a photo with a head covering for identification documents. However, the face from mandible to upper forehead should be uncovered. This applies not only to Muslim women, but also to Christian nuns.

[10] There has been criticism of law imposing Christian terminology on non-Christian faiths especially in their names and for favouring Christian religions generally. The latter was brought to the attention of the Legal Chancellor, for the test of the compatibility with the constitution by non-religious organisations. The law was changed accordingly. (Petition to check the constitutionality of §2, §7 and §11 of the Churches and Congregation, Registered No. 1-14/158, 22. 05. 2002, Office of Legal Chancellor).

regarding freedom of religion and interpretation of article 9 of the ECHR in the Estonian courts.

I. The Position of International Law including the ECHR in Estonia

It is theoretically debatable, whether Estonia has adopted a moderate dualist approach or a moderate monist approach to international law. Article 3 of the Estonian Constitution stipulates that universally recognised principles and norms of international law shall be an inseparable part of the Estonian legal system. By Article 3 of the Estonian Constitution, the universally recognised principles and norms of international law are adopted into the Estonian legal system and do not need further transformation. They are superior in force to national legislation and binding on the exercising of legislative, administrative, and judicial powers. It should be noted that Article 3 incorporates international customary norms and general principles of law into the Estonian legal system. The international treaties (ratified by the parliament[11]) are incorporated into the Estonian legal system by Article 123(2) of the Constitution. Article 123(2) also establishes the hierarchy of these treaties stating that if Estonian acts or other legal instruments contradict foreign treaties ratified by the *Riigikogu* (parliament), the provisions of the foreign treaty shall be applied. This rule of superiority of foreign treaty law over domestic legislation applies also to internal laws enacted after the ratification of the treaty. The Constitution does not mention anything about the legal position of international treaties, in the hierarchy of norms, concluded by the Estonian government, but not ratified by the parliament. In practice, many such international treaties exist, and the majority view among legal scholars is that these treaties have the same position in the norm hierarchy as international treaties ratified by the parliament. This interpretation is also in conformity with the international obligations of Estonia under the 1969 Vienna Convention on the Law of Treaties.[12]

[11] According to section 121 (1) the parliament ratifies treaties: 1) which amend state borders; 2) the implementation of which requires the adoption, amendment or voidance of Estonian laws; 3) by which the Estonian Republic joins international organisations and leagues; 4) by which Estonia assumes military or financial obligations; where ratification is prescribed.

[12] Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne [Commentaries of the Estonian Constitution], Tallinn: Juura, 2002; *K. Merusk, R. Narits*, Eesti Konstitutsiooniõigusest [About Estonian Constitutional Law], Tallinn, 1998, pp. 26-32.

The implementation of international norms in Estonia can take place in three different ways: (a) international norms are directly applied; (b) international norms and their interpretation on international level are used for interpretation of similar norms in domestic law; (c) international law is used to check conformity of domestic norms with international norms. A fourth option – permitting executive acts to be taken directly on the basis of international law – is not permitted by the Estonian Constitution.[13] The Constitution establishes the principle of legality. All executive acts have to be based on the Constitution and laws; the executive branch enforces the laws; and the executive branch only has a law-making function if one is delegated to it by the parliament.[14]

In general, Estonia represents a more monistic approach to the relationship of international and municipal law. The direct applicability of international norms in Estonia depends on the quality of that norm. First of all, that norm has to be a part of the Estonian legal system. Directly applicable norms have to be internationally in force and binding upon Estonia (in this regard also, reservations to international treaties have to be taken account). Secondly, the norm has to be self-executing. The ECHR is directly applicable in the Estonian legal system.

II. Comparison of Article 9 of the ECHR and Article 40 of the Constitution

The Estonian Constitution provides express protection to freedom of religion. Art. 40 sets out that:

> 'Everyone has freedom of conscience, religion and thought. Everyone may freely belong to churches and religious associations. There is no state church. Everyone has the freedom to practise his or her religion, both alone and in a community with others, in public or in private, unless this is detrimental to public order, health or morals'.

Article 41 protects freedom of belief, while article 42 protects privacy. In addition, other constitutional provisions complement basic freedom of religion. For example, Article 45 concerning the right to freedom of expression, Article 47 concerning the right to assembly and Article 48 concerning the right to association, each provides specific protection for aspects of religious freedom.

[13] H. VALLIKIVI, 'Siseriikliku õiguse ja rahvusvahelise õiguse suhe' in M. KIVIORG, K. LAND, H. VALLIKIVI, *Rahvusvaheline õigus* [International Law]. Tartu, 2002.

[14] Art. 87 (6) and 94 (2) of the Estonian constitution.

Article 40, as Article 9 of the ECHR, protects the wide range of religions or beliefs. Even during a state of emergency or a state of war, the rights and liberties in Article 40 of the Constitution may not be restricted (Article 130 of the Estonian Constitution). Note that Article 9 is not in the list of non-derogable articles included in the second paragraph of Article 15 of the ECHR. However, it is not clear whether Article 130 of Estonian Constitution offers absolute protection to manifestation of freedom of religion.

There is some variation regarding the list of possible grounds for limiting freedom of religion.[15] However, the Constitution has to be interpreted cohesively. Similar grounds to the ones in Article 9 (2) for limiting freedom of religion can be found in other articles of the Constitution; for example,,the Estonian Constitution contains four general limitation clauses: the first sentence of Article 3(1),[16] Article 11, Article 13(2),[17] and Article 19(2). Article 11, however, is a central and most important limitations clause: "Rights and liberties may be restricted only in accordance with the Constitution. Restrictions may be implemented only insofar as they are necessary in a democratic society, and their imposition may not distort the nature of the rights and liberties." Thus, similarly to the practice of the ECHR, every case of restriction of rights and liberties has to be justified and pass the test of proportionality. Article 19(2) constitutionalises the common sense idea that, in exercising their rights and liberties, all persons must respect and consider the rights and liberties of others ("and observe the law").[18]

III. The Application of the ECHR in Courts

A. *Supreme Court of Estonia*

The references to the ECHR constitute approximately 60% of the total references to international treaties.[19] In addition to international treaties,

[15] Article 40 of the Constitution allows limits when it is detrimental to public order, health or morals. The Convention: in the interests of public safety, protection of public order, health or morals, rights and freedoms of others.

[16] "State power shall be exercised solely on the basis of the constitution and such laws which are in accordance with the constitution".

[17] "The law shall protect all persons against arbitrary treatment by state authorities".

[18] See also R. ALEXY, 'Põhiõigused Eesti põhiseaduses [Fundamental Rights in the Estonian Constitution]' – Iuridica 2001, eriväljaanne [the special issue].

[19] See also H. VALLIKIVI, 'Euroopa inimõiguste konventsiooni kasutamine Riigikohtu praktikas [Use of the European Convention on Human Rights in the Practice of the Supreme Court]' – Juridica, 2000, no. VI, p. 401.

the human rights documents of international organisations have also been referred to in court cases.[20] Moreover, the quality of the use of international law by the Supreme Court has increased from year to year.

The Constitutional Review Chamber of the Supreme Court has provided some important interpretative principles.[21] First, many restriction clauses in the Fundamental Rights and Freedoms Chapter of the Constitution (e.g., Articles 11, 47) permit reservations in accordance with the law. The term "law", used in the restriction clauses of the Fundamental Rights and Freedoms Chapter of the Constitution, means an act of the *Riigikogu* (parliament). This means in effect that restrictions must appear in the Constitution or as set forth in laws enacted by the Parliament. Setting limitations to rights and liberties in lower administrative or executive acts would be unconstitutional. In this regard, the Supreme Court has adopted even higher standards for the protection of fundamental freedoms and rights than the European Court of Human Rights itself.[22] Secondly, relating to the former principle, the Supreme Court has also ruled that the Parliament cannot delegate its legislative powers regarding duties specifically vested in it by the Constitution.[23] Thirdly, restrictions to the fundamental freedoms and rights are unconstitutional if they are not clear and detailed enough to enable the putative subjects of law to determine their conduct on the bases of informed choice.[24]

As mentioned before, there have been only two cases in the Supreme Court of Estonia which involved freedom of religion. However, neither of these cases mentions the ECHR *expressis verbis*. The first case was decided by the Constitutional Review Chamber.[25] This case concerned a review of the petition by the President of the Republic to declare the Non-profit Association Act, passed on 1 April 1996, unconstitutional. The court dealt with three different issues in this case, which related to freedom of religion and freedom of association. Firstly, it dealt with the legal status of non-profit associations, including religious communities.

[20] See e.g. Cases no. III-4/1-5/94 (RT I 1994, 66, 1159).

[21] See Decisions of the Constitutional Review Chamber of the Supreme Court, Case no. III-4/A-4/93,4 Nov. 1993 (RT III 1993, 72/73, 1052); case no. III-4/A-1/94, 12. Jan. 1994 (RT III 1994, 8, 129); case no. III-4/A-2/94, 12 Jan. 1994 (RT III 1994, 8, 130).

[22] See e.g. *Sunday Times* v. *UK* (1979); *De Wilde, Ooms and Versyp* v. *Belgium* (1971); *Kruslin* v. *France* (1990); *Barthold* v. *Germany* (1985).

[23] Case no. III-4/A-1/94 (RT III 1994, 8, 129).

[24] Case no. 3-4-1-5-02; P. Roosma, 'Protection of Fundamental Rights and Freedoms in Estonian Constitutional Jurisprudence' Juridica International, Vol. IV, 1999, pp. 35-44.

[25] Case no. 3-4-1-1-96.

It was emphasised by the court that the right of association, (in Article 48 of the Constitution), meant the right to associate with an appropriate legal foundation, and to form associations which either have or do not have the status of a legal person. It was found that the form of societies provided by the Non-profit Associations Act did not fully correspond to these requirements, as the law recognised only non-profit associations that had the status of private law legal persons. Secondly, the Act did not allow persons less than 18 years of age to found non-profit associations. The court found that also adults who do not want to associate as private legal persons, or object to it because of religious reasons are deprived of the possibility to fully realise their constitutional right of association. Thirdly, the act allowed the exclusion of a member from the association on inconsistent and indefinite grounds. It provided at the time that a member of a non-profit association may be excluded from an association "if he fails to fulfil a decision of...an authority...or upon other weighty reasons".

The president of Estonia argued in his petition that the Non-profit Associations Act creates the possibility of interfering with the activities of a non-profit association by discretionary decisions of state authorities.[26] Furthermore, the President argued that this provision cannot be applied to religious societies. "Membership of such societies is a matter of religious belief. No authority can oblige any person to surrender his or her religious beliefs. The established restriction distorts the nature of the rights and freedoms of members of non-profit associations, including religious societies; it is not necessary in a democratic society; and it is in conflict with Articles 11 and 40 of the Constitution." The Supreme Court found the provisions of the Act unconstitutional. Later, the unconstitutional provisions were amended by the parliament. Although, article 9 of the ECHR was not directly mentioned, the decision was in line with the freedom to hold and manifest a belief as enshrined in article 9 and 11 of the ECHR.

The second case was decided by the Criminal Chamber of the Supreme Court. The court found that Art 40 (freedom of religion or belief) of the constitution does not include the right to refuse alternative service.[27] The

[26] Religious communities are considered to be non-profit organisations in Estonia. The Non-profit Organisations Act is *lex generalis* as regards regulation of activities of these communities. The Churches and Congregation Act specifically regulating activities of religious communities / and to certain axtent individual freedom/ is *lex specialis*.

[27] Case no. 3-1-1-82-96.

Court concluded that all persons in accordance with the Art 124(2) of the Constitution, who refused service in the Defence forces for religious or ethical reasons, were obliged to participate in alternative service. No direct reference to the ECHR was made, which is not actually surprising. In the first conscientious objection cases, the Strasbourg organs took the view that States are not obliged by article 9 to recognize conscientious objectors.[28] The right to conscientious objection to military service is not spelled out in the Convention. Quite the contrary, Article 4 (3) (b) sets forth that the terms 'forced or compulsory labour' shall not include any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service.[29] However, the right to conscientious objection to military service has gained stronger ground on the international arena.[30] Although the practice of the Council of Europe member States varies in this regard, military service can in most States be substituted by an alternative or civil service. One could even argue that there is a positive international duty on states to provide for exemption from military service in the form of alternative or civil service. Estonia is and has been taking into account these developments. More problematic is to answer the question as to whether there is a visible positive duty to accommodate everybody, or a certain category of individuals (religions or beliefs), or those who refuse both military and alternative service. There is a case law in the European Human Rights Court, which suggests that concerning conscientious objection, States may legitimately require strong evidence of genuine religious objections to justify exemption from (civil duty of) military service.[31] Thus, not everybody may be entitled to be exempted from service.

[28] E.g. *Grandrath* v. *Federal Republic of Germany*, App. No. 2299/64, 10 YB RCHR 626 (1966); C. EVANS, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2003), pp. 170-173.

[29] ECHR, Art. 4 (3) (b).

[30] PA Resolution 337 (1967) on the right of conscientious objection; Recommendation 816 (1977) on the right of conscientious objection to military service; Committee of Ministers' Recommendation No. R (87) 8. regarding conscientious objection to compulsory military service; PA Standing Committee Recommendation 1518 (2001) on exercise of the right of conscientious objection to military service in Council of Europe member states. UN Human Rights Committee stated in the General Comment No. 22 that 'the covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief'.

[31] *Kosteski* v. *the Former Yugoslav Republic of Macedonia* (2006), para. 39; *N.* v. *Sweden*, no. 10410/83, Commission decision of 11 October 1984, D.R. 40 p. 203, *Raninen* v. *Finland*, no. 20972/92, Commission Decision of 7 March 1996.

B. *Application of Human Rights Law in Lower Courts*

As mentioned above, the majority of cases in lower courts have been related to land reform and the restoration of illegally expropriated property. These cases have dealt with injustices perpetrated during the soviet times and legal disputes regarding claims on property. No reference to the ECHR or Article 40 of the Estonian constitution has been made in these cases. There have been two cases which raised issues relating to article 9 of the ECHR. The first case was decided on by the court of first instance (Harju Maakohus) in 2006 and concerned restricting freedom of religion and freedom of assembly on grounds of public order.[32] A small group of believers gathered by Tallinn railway station. They were singing religious songs using microphones and loudspeakers. The organisers of the event did not notify the local authorities of the event, and did not have permission to carry out this meeting. Although the religious meeting had a peaceful character, it was established that they were obstructing traffic coming into railway station, and were also disturbing people selling flowers at the market nearby. Organisers of the event were asked to stop singing, and when they disobeyed, six people were arrested. Their activities were found contrary to §7 (1 and 2) of the Public Meetings Act, as they were violating public order and obstructing traffic. Neither Article 9, nor 11 of the ECHR, nor Article 40 or 47 (right to assembly) of the Estonian Constitution was invoked. There was no elaboration on justifications and/or proportionality of the restriction. Article 47 of the Constitution sets forth the right to peaceful assembly and meetings without prior permission. However, this right can be restricted in accordance with the law in order to ensure national security, public order or morals, traffic safety and the safety of the participants in such meetings or to prevent the spread of infectious diseases. The Estonian Supreme Court has elaborated on the meaning of public order in a couple of cases.[33] However, it is hard to tell at the moment whether "public order" has a general meaning in the Estonian legal system, or whether it has variations when it comes to different articles of the Constitution.

The second case was decided on by Tartu District Court in 2007 and concerned the confiscation of candles from a prisoner. Prison authorities justified their act on the grounds of prison security. The prisoner claimed that his religious belief (Buddhism) required the use of incense candles.

[32] Harju Maakohus, Case No. 4-05-936/1 (25 October, 2006).

[33] Case No. 3-1-1-7-07 (21 May, 2007).

He claimed that prison authorities violated his rights under Article 40 of the Constitution and undermined his dignity. Interestingly, the District Court gave an opinion on what Buddhism requires. It stated that although candles are an important part of Buddhist rituals, Buddhism does not require a prisoner to burn candles in his cell. With this, it was established that no unreasonable damage to the prisoner was caused. The grounds for restriction (justifications) or proportionality of the measure was not discussed. Moreover, although the Human Rights Court does not have a clear approach to the meaning of religion or belief or manifestation of it, it could be said that this decision has conflicts somewhat with the European Human Rights Court's statement that a State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or ways in which those beliefs are expressed.[34]

Conclusion

The European Convention on Human Rights is the most referred to international treaty in the Estonian courts, and it is directly applicable in Estonia. However, in freedom of religion cases, neither article 9 nor related articles of the Convention, have been directly invoked. As was discussed above, there have only been a few cases directly or indirectly involving freedom of religion or belief. However, this is probably a positive sign, indicating that there are not many problems with freedom of religion or belief in Estonia yet.

[34] *United Communist Party of Turkey and Others* v. *Turkey*, judgment of 30 January 1998, Reports 1998-I, §57, *Metropolitan Church of Bessarabia* v. *Moldova*, 2001.

MATTI KOTIRANTA

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN FINLAND

I. The Status of International Law and the European Convention for the Protection of Human Rights and Fundamental Freedoms within the Finnish Legal System

Finland joined the Council of Europe in 1989 and ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) the following year, on 10.5.1990.[1]

In common with the other Nordic countries, Finland has principally adopted a dualistic model with regard to the relationship between international agreements and the country's internal legislation. The principles laid down in the Constitution and the established practices arising from those oblige the Finnish Parliament both to approve international agreements that are binding upon Finland and to grant them force of law to the extent that they contain provisions that "are of a legislative nature".[2]

[1] Finland had nevertheless established relatively close relations with the Council of Europe before joining it formally. This had begun in 1963, when representatives first attended meetings on topics such as legal cooperation in an observer capacity and members of the Finnish Parliament were first invited to general parliamentary sessions. Finland had signed the European General Agreement on Culture in 1970, so that this became the first Council of Europe general agreement that it ratified, and it had subsequently signed numerous other such agreements prior to becoming a full council member. Some of these agreements have had a substantial influence on the evolution of the country's internal legislation. Thus the law on the extradition of persons suspected of having committed a criminal offence (Finnish Law Collection 456/1970) is largely constructed on the model of the corresponding European general agreement (SopS 32/1971; 15/1985), while the Council of Europe's general agreement on data protection (SopsS 36/1992) greatly influenced the content of the law on the recording of personal data (471/1987), which had come into force before Finland joined the council and its ratification of that agreement took effect. Finland had also participated in the work of many committees and other bodies responsible to the Council of Europe before achieving formal membership PELLONPÄÄ, Euroopan ihmisoikeussopimus, (Helsinki, 4th Ed., 2005), 6. The Convention on Human Rights was signed in connection with the act of joining the Council of Europe on 5.5.1989 and ratified a year later, on 10.5.1990 (SopS 18-19/1990).

[2] The relevant principles were contained in §33 of the original Constitution and §69 of the Parliament Act. The corresponding paragraphs of the new Constitution are §94 and §95.

If an agreement does not contain provisions that are of a legislative nature it may be brought into force simply by means of a statute. If, on the other hand, the discrepancy between the provisions of the agreement and the existing Finnish legislation is of a constitutional nature, it will need to be brought into force by means of a constitutional act of parliament passed with a two-thirds majority (Finnish Constitution §95: 2).

The provisions of most treaties and other international obligations are brought into law in Finland in the form of "blanket laws" which state that they "shall come into force in the manner agreed upon". Thus the law obtains its material content from the agreement itself, which is published as an annex to the statute implementing the law. The statute may be purely of a blanket form or it may contain additional regulations, e.g. ones containing reservations regarding the applicability of the agreement.[3]

The approval of such a blanket or hybrid law (and/or statute) implies "incorporation" of the agreement into the internal legislation of Finland, but in addition to this it is possible and quite common for specific alterations to be made to existing legislation in the same sphere, i.e. this incorporation is supplemented with "transformation". If all the relevant legislation has been altered prior to approval of the international agreement, it is possible to incorporate the agreement by means of a blanket statute alone. It is nevertheless important in the case of human rights agreements, which have an immediate impact on the legal status of the individual, that these should always be incorporated by means of a law.[4]

Once an agreement is brought into force in the manner described above, it becomes a part of Finnish law and applicable in principle in the same manner as any other part of the legislative code.

In his comparison of the observance of general human rights agreements in the internal legislation of various countries, Professor Matti Pellonpää notes in the case of Finland that the real significance of such agreements in practical terms is not determined solely by the formal status of the agreement. This claim is supported by the minor significance which this agreement had on the decisions of the Finnish courts for a long time. Pellonpää observes that there had been more than ten years before the Agreement on Civil and Political Rights brought into force in 1976 (Law 107/1976 and Statute 108/1976) was referred to in a Finnish high court for the first time, in the Supreme Administrative Court in 1988.[5]

[3] PELLONPÄÄ, n. 1 above, 54.

[4] PeVL 2/1990 vp., s. 1; PELLONPÄÄ, n. 1 above, 54.

[5] The case KHO 1988 A 48, concerned a conflict between the existing statute on passports, since rescinded, and the provisions of §12 of the Agreement on Civil and Political Rights regarding freedom of movement.

Earlier the same year, the Supreme Administrative Court had issued a ruling concerned with the general agreement on the legal status of refugees (SopS 77/1968) that can be regarded as the first decision by a high court in Finland which was an application of any international agreement that could be described as connected with human rights.[6] References to human rights agreements have become more common in Finnish courts since that time, however, and it must be noted that the Parliamentary Ombudsman had in practice regularly invoked legal arguments derived from this human rights agreement prior to the court cases.[7]

In Pellonpää's opinion one can speak of a breakthrough that has taken place within Finnish jurisprudence over the last 15 years or so, with regard to human rights. Where the core of the Finnish system of fundamental human rights is concentrated on the legislative organs – as these fundamental considerations have defined a certain order of enactment for the country's laws – it is particularly through international human rights agreements that it has become customary to take questions of civil rights into account in "everyday" legal practise.[8] It is this, above all, that has been brought about by the European Convention on Human Rights and Fundamental Freedoms.

The code of civil rights in Finland was effectively altered to conform to international obligations – and even to exceed these obligations at some points – through the transfer of the content of the 1995 reform of the Finnish Constitution of 1919 into a new Constitution approved in the year 2000.[9]

It is laid down in §22 of the new Constitution that the public authorities shall be responsible for guaranteeing fundamental human rights. In accordance with the constitutional reform of 1995, these public authorities, which are deemed to include the Evangelical-Lutheran Church of Finland as mentioned in §76 of the Constitution, are obliged and bound

[6] PELLONPÄÄ, n. 1 above, 55 points out that in the case KHO 1988 A 49, the court was simply making use of the refugee agreement which had been brought into force by means of a blanket statute as a tool for interpreting the law on aliens (400/1983), rather in the same way as the European Convention on Human Rights, which had not yet attained a position in the internal legislation of the Nordic countries, had been applied there previously.

[7] PELLONPÄÄ, n. 1 above, 55.

[8] PELLONPÄÄ, n. 1 above, 55.

[9] HALLBERG, 'Kokoontumisvapaus' in: HALLBERG, PEKKA – KARAPUU, HEIKKI – SCHEININ, MARTIN – TUORI, KAARLO – VILJANEN, VELI-PEKKA, *Perusoikeudet*, pp. 420-431. (Juva 1999), 37) regards the exceptional code of civil rights, in which both the fundamental freedoms and the economic, educational and social rights of citizens are expressed in connection with the constitution, as a distinctive feature of Finnish jurisprudence.

to take responsibility for the implementation of civil rights in all forms of public activity, including legislative, administrative and executive aspects. It is not (any longer) regarded as sufficient that the public authorities should refrain from interfering with the fundamental rights of citizens through legislative or other measures; they are instead expected to take an active role in protecting personal freedoms from external violations and to create conditions that truly foster the practical application of the principles of civil rights.[10] Apart from procedural issues, this is also a question of guaranteeing basic rights in a material sense.

For the Evangelical-Lutheran Church of Finland[11] and the Orthodox Church of Finland, as communities governed by public law, the question of fundamental rights entails an active responsibility for the implementation of civil rights within their own communities. Other registered religious associations, on the other hand, not being governed by public law, are subject to the legislation that applies to private corporations and have the responsibilities laid down in other judicial norms (e.g. the law on equality and the labour legislation), which lead them to act in conformity with the actual principles of human rights and fundamental freedoms.[12]

II. Freedom of Religion and Conscience under the Finnish Constitution

The fundamental freedoms recognised by the EU are to a great extent consistent with those laid down in the constitutions of its member states and in the provisions of international human rights agreements.[13] The

[10] This obligation extends to the local authorities and other public sector organizations primarily only in so far as they are assigned responsibilities and jurisdiction with regard to fundamental freedoms. As far as the church is concerned, this applies to it as a statutory public body, so that it can be expected to act in such a way as to ensure the civil rights of its clergy and staff.

[11] In the case of the unique rights enjoyed by the Evangelical-Lutheran Church of Finland, as laid down in the laws governing that church, one cannot, however, speak of an *active* obligation under the Constitution, as the Finnish Constitution provides for the legislative autonomy of the church, the principal mark of which is the order of enactment of ecclesiastical law (Ecclesiastical Law §2:2, clause 1). This last grants the Church Assembly the exclusive right to propose changes to this law, while barring the state legislative bodies from interfering in the content of any such proposals.

[12] No investigations or surveys have been conducted with regard to the implementation of human rights in the churches or religious associations of Finland, as far as decisions of the higher courts are concerned, but PITKÄNEN, "On annettava merkitystä–." Tutkimus perusoikeuksien toteutumisesta ylimpien tuomioistuinten lainkäytön näkökulmasta. Degree dissertation, University of Joensuu, 2006 has produced a more general account of human rights in Supreme Court decisions as a whole.

[13] Although admittedly there are some differences between the EU legislation and other systems in the development of the civil rights dimension.

relevant section of the Finnish Constitution of 2000 dealing with freedom of religion and conscience, §11, mirrors the provisions of §9 of the European Convention to a considerable extent, stating that *(1) Everyone has freedom of religion and conscience, implying the right to profess and practice a religion, the right to express one's convictions and the right to be a member of or decline to be a member of a religious community. (2) No one shall be under any obligation to participate in the practise of a religion against his or her conscience.*[14]

The committee responsible for the preparation of the new law on the freedom of religion, which came into force on 1.8.2003 (453/2003) discussed in its report the question of freedom of religion as a fundamental civil right and the freedom of religion and conscience as laid down in §11 of the Finnish Constitution. It concluded that this latter provision should form the basis for all legislation in Finland that concerns freedom of religion and conscience. If the issue of freedom of religion and conscience is linked to the *principle of equality before the law*, enshrined in §6 of the Constitution, as the committee proposes, the latter can be interpreted as an implication of an obligation on the public authorities to treat all religious and philosophical associations on an equal footing. Within this ancient category in the genealogy of fundamental rights, the committee's interpretation places particular weight not only on individual religious freedom but also on freedom *as a right pertaining to religious groups*. The external manifestations of the classic fundamental rights of the individual in this respect are specifically expressed in the Constitution, §11 of which states that every person shall enjoy freedom of religion and conscience. That includes *the right to profess and practice a religion, the right to express one's convictions and the right to be a member of or decline to be a member of a religious community. No one shall be under any obligation to participate in the practise of a religion against his or her conscience.*[15]

[14] The corresponding §9 of the European Convention on Human Rights states:

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.

[15] Uskonnonvapauskomitean välimietintö (KM 1995:5). SCHEININ, 'Omantunnon ja uskonnonvapaus' in HALLBERG, PEKKA – KARAPUU, HEIKKI – SCHEININ, MARTIN – TUORI, KAARLO – VILJANEN, VELI-PEKKA, *Perusoikeudet*, pp. 253-386. (Juva 1999), 353; LEINO, Kirkko ja perusoikeudet 2003, 224.

Nothing new was actually added in the reform of 1995 to the fundamental rights expressed in the old Constitution; it was rather possible in the course of legislation to arrive at the same conclusions as on the basis of the earlier provisions. The freedom to pursue a cult was also regarded as belonging to the concept of religious freedom. What is more, the work of preparing a new law on the freedom of religion placed emphasis on the system of human rights as a whole, in the practical implementation of the freedom of religion and conviction, e.g. in that it attached great importance to the other fundamental rights provided for in the Constitution, e.g. freedom of expression (§12), freedom of assembly and association (§13) and the right of exemption from military service on grounds of conscience (§127).

Given the more precise characterization of the "negative dimensions of religious freedom" in the last sentence of §11 clause 2 of the Finnish Constitution, this sentence may be said to imply a fundamental freedom in view of the position of the majority church under public law, in the sense that noone is obliged to engage in the religious observances against his own convictions. This is in fact the same issue raised in the provisions for the range of application of the law on equality, where it is stated that "this law shall not apply to activities connected with the practise of religion within the Evangelical-Lutheran Church".[16]

The new law on religious freedom sets out as before from recognition of the freedom of religion and conscience guaranteed to all under the constitution, and its purpose remains to create suitable conditions for individuals and communities to execute their right to religious freedom, but at the same time a modern interpretation of religious freedom *specifically as a positive right* has gradually appeared in Finland through the approval of international agreements. As general justifications for this, the fundamental human right of freedom of religion and conscience as laid down in the law on religious freedom and certain other related laws has been seen in the context of the prohibition of discrimination on the grounds of religion or conviction providing for in §6, clause 2, of the constitution to imply among other things an obligation on the public authorities to ensure impartial treatment for all religious communities and ideological persuasions.

[16] According to BRUUN – KOSKINEN (1997, 39), this law should not be taken as applying to the Evangelical-Lutheran Church, for legislative reasons at least, since it is clear from §31.2 of the Parliament Act and §15.2 of the Ecclesiastical Law that the right to proposed laws that concern the Church's internal affairs rests exclusively with the Church Assembly. See also LEINO, n. 15 above, 225.

In accordance with this line of argument, the acceptability of the "state church" system is dependent on the state approving other religious beliefs as well as honouring the right of individuals to decide whether or not they wish to belong to a state church.

III. Freedom of Opinion, Belief and Conviction: A Domestic Matter, a Private and Family Matter and an International Matter

A. *§9: Freedom of thought, conscience and religion*

It is possible to find important precedents among the rulings for which §9 of the European Convention on Human Rights has been applied,[17] although only one of those concerns Finland: the case *Konttinen v. Finland* (1994).

Konttinen v. *Finland*

[§9 (Freedom of thought, conscience and religion) *Konttinen* v. *Finland* (Ruling of the Commission on Human Rights in the case of Appeal no. 24949/94)].

In response to this appeal regarding the interpretation of the European Convention on Human Rights, the European Commission on Human Rights ruled that §9 of the European Convention on Human Rights had restricted the rights of the public authorities to dismiss employees for refusal to discharge certain duties on the grounds of conscience. §9 was not, however, regarded as permitting the plaintiff, a member of the Adventist Church who had been dismissed by the Finnish State Railways, to absent himself from his place of work without permission on religious grounds. In the commission's opinion the ultimate guarantee of religious freedom was *the right of resignation from employment.*[18]

The judgement reached by the European Commission on Human Rights in the case of *Konttinen* v. *Finland* was in conformity with the line on religious freedom adopted in the earlier case of *X v. Denmark*[19].

[17] E.g. *the cases of X* v. *Denmark* (1976), *Karlsson* v. *Sweden* (1988), *Kokkinakis* v. *Greece* (1993), *Otto-Preminger-Institut* v. *Austria* (1994), *Kalac* v. *Turkey* (1997), *Bessarabian Metropolitan Church et al.* v. *Moldavia* (2001).

[18] SCHEININ, n. 15 above, 389-383. See closer LEINO, n. 15 above, 203-220.

[19] Case 7374/76 of the European Commission on Human Rights (X vs. Denmark), decision of 8.3.1976, DR 5. This was the case of a minister who had insisted that the parent of a child brought to be baptised should first receive religious instruction. It is noted in the explanation appended to the judgement that this was specifically a question of a

In the present case, however, the plaintiff was not an employee of the Adventist Church, but merely represented the doctrinal opinions of that church. His convictions were not, however, in conformity with the policies of his employer, the Finnish State Railways, which would not agree to his observance of holy days in accordance with the calendar of that church.[20]

minister of the state church of Denmark performing the duties required of him in a parish belonging to that church in insisting that the parents attended a course of five lectures of "baptismal instruction". The Ministry of Church Affairs (Kirkeministeriet) supported that the minister could not attach such conditions to the conducting of a baptism, and ordered him to choose between abandoning that practice or resigning. When the plaintiff, known simply as Rev. X, refused to comply, the ministry set up a consistory court of an advisory character to adjudicate on the matter. The plaintiff's demand for a public discussion of his case was not accepted, as the public prosecutor regarded the case as a disciplinary rather than a criminal matter. The consistory court nevertheless postponed the discussion of the matter, pending a decision from the European Commission on Human Rights. The plaintiff had appealed to the Commission on the grounds of freedom of thought, conscience and religion as allowed for in §9 of the European Convention on Human Rights, which included the freedom to practice religion. In the commission's view, the church as a religious body was to be understood as a community of persons who were of like mind, so that the protection afforded by §9 could be regarded as applying to the church itself and its practise of religion. In the state church system, the personnel are employed precisely to teach the doctrines of the church concerned. Thus *the individual freedoms of thought, conscience and religion of a minister of such a church may be regarded as being exercised in the acts of entering employment with it, terminating that employment or resigning from membership of the church.* The commission went as far in its ruling as to indicate that a church does not have to ensure the freedom of religion of its employees and members in the same way as the state is obliged under its own legislation to ensure the religious freedom of its citizens. In other words, the commission did not regard a minister (in the state church system) as having the right under §9 (1) of the European Convention on Human Rights to impose conditions for the baptism of a child that were contrary to the regulations of the highest administrative authority, the Ministry of Church Affairs. The commission also ruled, contrary to the plaintiff's demands, that a matter being internal to a particular religion or belief did not fall within its jurisdiction or within the provisions of §6(1) of the European Convention on Human Rights, GARDE, Ret og tro. Indlaeg ved Kirkeretlig Konference 2. Oktober 1999 på Logum-kloster Hojskok. Om norm & rätt I trosamfunden' pp. 75-86. Nordisk Ekumenisk Rådet, Uppsala, 2001), 76; Leino, n. 15 above, 205-206.

[20] Three further cases have been recognised in Finland that are comparable to the Konttinen case and constitute important precedents with respect to the European Convention on Human Rights but have not proceeded to the Supreme Court. The first case involved a Muslim woman's right to keep her head covered during office hours. The woman had been offered a full-time job as an office worker in a travel agency and had said that she was willing to accept the job but had informed the employer at the interview that she wished to wear a *hijab* for religious reasons. The employer did not accept this and refused to employ the woman. The authorities then denied the woman her right to unemployment benefit on the grounds that she had herself refused employment which had been offered her. The woman did not accept the decision, appealing to the Insurance Court, which concluded by a vote of 4 against 1 that the woman was entitled to unemployment benefit. The court's reasoning for the decision was that the woman had the right to practise her

When evaluating the dividing line laid down by the European Human Rights Commission in the case *Konttinen v. Finland*, it should be noted that it is impossible to reach any direct conclusions regarding the situation in Finland, merely by comparing the individual case of a minister who had lost his appeal against the state church of Denmark, partly on formal grounds, in that §6 does not apply to dismissal from a public office (*X v. Denmark*), with the case of a person whose convictions did not conform to the policies of a state-owned company (i.e. a public body).[21]

On the one hand, it should be noted that the approach adopted, at least so far, by the Supreme Administrative Court in Finland, in which freedom of religion has been interpreted as freedom of withdrawal (i.e. freedom of religion is exercised by resigning from a religious or public community whose principles the individual is unable to accept), can be

religion and as a Muslim woman, she would customarily keep her head covered, without being held responsible for the cancellation of the employment contract. The second case concerned a woman belonging to the Jehovah's Witnesses, who had been offered a temporary job as a cleaning lady in an Evangelical Lutheran church. The woman rejected the job offered for religious reasons, referring, for instance, to a line in the Epistle to the Corinthians, which forbids one "to be partners with demons". The Unemployment Benefit Society, however, concluded that the woman had rejected a job offered to her without an acceptable reason and refused to pay her daily unemployment benefit. The Appeal Board confirmed this decision on the grounds that labour policy did not consider religious beliefs an acceptable reason for rejecting a job offer. The Insurance Court overturned the decisions made by the Unemployment Benefit Society and the Unemployment Appeal Board. As in the case of the Muslim woman, it concluded by a vote of 4 against 1 that the woman's religious beliefs were an acceptable reason for refusing to clean a Lutheran church. The Insurance Court thus ordered that the woman should be paid her daily unemployment allowance for the three weeks during which it had been denied to her. The Insurance Court based its decisions concerning both the Muslim woman and the Jehovah's Witness on the Freedom of Religion Act in the European Convention for the Protection of Human Rights and Fundamental Freedoms, its reasoning being that under the act, freedom of religion could be restricted by rule of law only in cases in which the restrictions served a justified purpose, such as the maintenance of general order or the protection of health or morality. The third case supporting this view concerned a decision by the Insurance Court according to which a woman belonging to the Jehovah's Witnesses had the right to reject a job as an office employee offered by the Ministry of Defence without losing her unemployment benefit. The woman thought her religious beliefs justified her refusal to work for the army in the same way as a male Jehovah's Witness may refuse military service. The Insurance Court decided in favour of the woman, referring to the fact that men belonging to the Jehovah's Witnesses are exempt from both military and non-military service during peacetime. In the light of the above cases, one may ask, as Prof. SEPPO, 'Church and State in Finland' [1997] European Journal for Church and State Research, p. 128-129) remarks, whether or not the interpretation of the Finnish Insurance Court concerning the limits of freedom of religion follows the views adopted by the European Human Rights Commission.

[21] PELLONPÄÄ, n. 1 above, 399; LEINO, n. 15 above, 207.

regarded as consistent with the decisions of the European Court of Human Rights, as expressed in its judgement in the case *X v. Denmark.*[22]

Thus it may be said that in Finnish high court praxis, a person who is employed by a church or other religious community and finds him or herself in conflict with that church or community on an issue of belief or conviction is deemed to have exercised his or her individual religious freedom in the act of taking up such employment. Once s/he has done so, s/he cannot thereafter appeal to the freedom of religion in order to depart from the tenets of that religious community.[23]

Nevertheless, as also in the state churches of Denmark and Sweden (previously), instances of an office holder (including a minister) refusing to carry out certain obligations have also been interpreted in Finland purely on grounds of administrative law as neglect of duty. These decisions of the Finnish Supreme Court have mostly concerned one of two groups of cases: those in which a minister has placed conditions of his or her own on the baptism of a child,[24] and those in which a bishop has refused to ordain women as priests. This was the approach adopted by the Chancellor of Justice in resolution 561/24.5.1989, for example,

[22] SCHEININ, n. 15 above 380-383. LEINO, n. 15 above, 208.

[23] This is also suggested in the statement made by the Parliamentary Constitutional Committee to the Parliamentary Administrative Committee (PeVL 22/1997) on the bill for alterations to §16c of the law on the Orthodox Church in Finland: –Every person enjoys the fundamental right of the freedom of speech, although more precise regulations regarding this are given in law. It is in the nature of the offices mentioned in the bill that their holders should teach in accordance with the precepts of the Orthodox Church and that they should be aware of this fact when taking up such an office. It is similarly noted in the statement on disciplinary proceedings that: – [...] matters concerned with the right to remain in public office have been demonstrated in the practises of the Human Rights Commission to lie beyond the scope of article 6 of the European Convention on Human Rights.

Admittedly, no instances of problems or conflicts, or even of differences in interpretation, have arisen with regard to the doctrines of the Orthodox Church of Finland.

[24] One example that could be mentioned is a case in which a minister of the church at Sulkava in the Diocese of Mikkeli refused to accept an unmarried couple as godparents for a child. The Supreme Court, having first granted on 7.10.1988 an injunction on the execution of the relevant decision of the Eastern Finland Court of Appeal (no. 1347, 30.8.1988), overturned the Appeal Court decision in its ruling no. 2792 of 13.10.1989 (KKO 1989:122). As a result, the charge of intentional neglect of duty and the accompanying punishment upheld by the Appeal Court was commuted to a charge of indiscretion in the performance of one's duties, leading to an official caution. The Supreme Court ruled that it was part of the duties of a minister to ascertain that the people proposed as godparents fulfilled the requirements laid down in §36 of the Ecclesiastical Law of 1964. Thus the minister had not exceeded his powers as the Diocesan Chapter and the Court of Appeal had maintained.

regarding a bishop as an official of the state, and considering his right to refuse to ordain women as priests in the light of this.

It should be mentioned in the latter connection that the law allowing the ordination of women is perhaps the most far-reaching change that has been enacted in the Evangelical-Lutheran Church of Finland in recent decades. It has been an exemplary piece of legislation, in spite of being the subject of protracted deliberations. However, its implementation continues to present problems,[25] and there are still many people employed by the church for whom this majority decision runs against their convictions. One confounding factor is an additional resolution regarding the definition of the place of residence for persons opposed to women in the priesthood, which has been recently revived, even though a part of the early phase in the process was already in effect, and should no longer be of any significance. This resolution has thrown the spotlight onto a number of young priests who have not adapted to the ordination of women,[26] as they are inclined to regard it as having the force of law.

The leadership of the Lutheran Church, headed by Archbishop Jukka Paarma, has recently taken a firm stand against this resolution and decreed that the clergy have no longer any right to refuse to officiate alongside women priests. This may be regarded as making it more difficult than ever for a minister who objects to the ordination of women to be vicar of a parish which already employs women priests.

The decisions of the Supreme Court in Finland have also consistently emphasized that following the enacting of the law of equality of opportunities, the Evangelical Lutheran Church has opened the ministry to women. In accordance with this, the court has ruled that, being a matter of the practise of religion, the church's freedom to choose its ministers is governed by the provisions of the Constitution and the requirement to respect the equality of the sexes. In that respect, the Supreme Court and the Supreme Administrative Court have established four interesting precedents with regard to the law on equality: the Supreme Court decision of 19.1.2001 (no. 88/DNo. S 99/1215), Supreme Administrative Court decisions of 13.3.2001 (deposit no. 469) and 23.9.2002 (T 2260) and the very recent decision of the Turku Administrative Court reached on 13.6.2007 (00362/07/2302). It is worth considering the first of these and the last two

[25] MATTI HALTTUNEN, Church Counsellor of the Ev.-Lutheran Church of Finland, 2007, 6 (Interview in the weekly newspaper Kotimaa 38/20.9.2007).

[26] Those opposed to the ordination of women in Finland include one revivalist movement, the Finnish Lutheran Evangelical Society (SLEY), the Luther Foundation and some of the missionary organizations within the Evangelical-Lutheran Church of Finland.

in more detail, as these are instances in which the church administration has been forced through the courts of law to recognise that the regulations governing fundamental freedoms also apply to the church.

Case: *Supreme Court 19.1.2001: selection of a curate*

The relation between the system of Ecclesiastical Law and the two fundamental freedoms, equality and freedom of religion, was defined in the Supreme Court verdict of 19.1.2001 (no. 88/DNo. S 99/1215). The verdict was in favour of the law on equality, when pitted against the church's right to decide on questions which it regards as its own internal matters. The Supreme Court based its judgement on the view adopted in a government proposal (57/1985) that equality of the sexes is a principle which is also accepted by the church.

Case: *Supreme Court 23.9.2001: election of a vicar*

The Supreme Administrative Court (Deposit no. 2260) regarded that a diocesan chapter was justified in ruling as ineligible for election to the office of vicar an applicant who, in view of his negative attitude towards the ordination of women and his actions consistent with that, could be regarded as incapable of discharging the duties of vicar in a parish, where 3 of the 8 ministers were women.[27]

Case: *Turku Administrative Court 13.6.2007: election of a vicar*

In this case (00362/07/2302) the Turku Administrative Court came to a similar decision as the aforementioned. The plaintiff was not prepared to undertake to conduct divine services with a woman minister, leading the diocesan chapter to conclude that he would evidently not be able to discharge the duties and obligations belonging to the office of vicar, so that arrangements would have to be made, contravening the law on equality. The court therefore ruled that there was a serious and demonstrable reason for regarding the plaintiff as incapable of acting as vicar of the parish of Kalanti.[28]

[27] For the legal principles applied, see PL 6,2 and §21.

[28] For the legal principles applied, see PL 6,2, KL 5, §1, 1st mom. and §8, 1, KJ 5, §1, 1st mom., KJ 6, §18, §22 and §24, 1st mom., §3 and 34, and the law on equality between men and women §2, 1st mom. clause 1, §4, §6 and §7.

Also consistent with this line of reasoning was the recent decision by the Diocese of Oulu (3.10.2007) to suspend a minister from office for 2 months for refusing to conduct services together with a woman. The minister in question has publicly announced that he intends to take his case to the Oulu Provincial Court of Appeal and then to higher instances, if necessary.

It has not yet been necessary in Finland, however, to decide directly on the right of a minister who is opposed to the ordination of women to become vicar of a parish where there are women ministers, as has happened in Sweden (*the case Karlsson v. Sweden* 12356/86).[29]

B. *§8: Private and family life*

§8 of the European Convention on Human Rights and Fundamental Freedoms protects the private and family life and personal correspondence of every individual and ensures that these are respected. On the other hand, §14 prohibits discrimination on grounds that include sex and belonging to a national minority. This means in effect that discrimination as laid down in §14 cannot take place except in the presence of an infringement of one of the other fundamental freedoms laid down in the convention.[30] The debate on §8 in the Finnish context has centred on the government bill (200/2000) and the resulting act (950/2001) on the registration of relationships between two persons. Although sex is not separately mentioned in the clause on respect for private and family life in §8 of the

[29] For the sake of accuracy, the following indications of the European Commission on Human Rights in its judgement need to be pointed out: the Swedish government had specifically established that the refusal to accept Karlsson as a candidate had not been connected with his views on the ordination of women. In the commission's view, protection should also be given to the "official" approved doctrines of the state church.

[30] Infringements recorded: *The case Hokkanen* v. *Finland,* ECHR 23.9.1994, involving §8 – respect for family life (the right of a father to see his child); *the case Z* v. *Finland,* ECHR 25.2.1997 involving respect for private life (confidentiality of the identity and medical reports of a person who was found HIV-positive), and *the case Johansson* v. *Finland,* ECHR 6.9.2007 (respect for private life – respect for family life – discrimination –surname). A parish priest had initially been involved in this last-mentioned case, when he refused in 1999 to give a boy the forename "Axl" in baptism. The ECHR noted that there were three boys by the name of Axl in the Finnish population register in that year and two more had been registered later. The commission thus concluded that the name had been approved in Finland and that it had not been demonstrated that its existence would have any undesirable cultural or linguistic consequences there. A case of no infringement: *The case Stjerna* v. *Suomi* ECHR 25.11.1994, §8-1 and §14, ECHR A-199-B (respect for private life– respect for family life – discrimination – surname).

European Convention on Human Rights,[31] the interpretation of this article in practice has been extended in Finland to cover respect for the private and family lives of couples engaged in the new forms of registered relationship.

Respect for private life is ensured in accordance with §6 of the Finnish Constitution "Everyone is equal before the law", in that it is forbidden to discriminate between persons on the grounds of their sex, state of health or possible handicap, or on other personal grounds without good reason. Thus questions of the human rights of sexual minorities can be regarded as falling within the scope of the anti-discrimination legislation.

Following the introduction of the registration of homosexual couples, a situation arose in Finland in which provision was made for the recognition of certain types of couples under the law of the land but not within ecclesiastical law. This led five delegates to the general assembly of the Evangelical Lutheran Church to put forward a proposal on 18.3.2002 to the effect that an addition should be made to the church ordinance, preventing a person living in a registered relationship with another person of the same sex from holding office in the church or being otherwise employed by it. The argumentation behind this proposal mentioned, among other things, that the Parliament had approved the law on the registration of same-sex couples partly as a "manifestation" of the fact that the Constitution was gradually moving away from the Christian faith and its ethics.

The aim, of course, was to "prevent church workers from entering into registered homosexual relationships". The proposal was nevertheless that the addition should be made *to the church ordinance* and not to ecclesiastical law.[32] Discussion on the subject is still ongoing. A statement issued in public on the subject was that of the church's chief negotiator on employment questions, Church Counsellor Risto Voipio, in the church's newspaper Kotimaa, who maintained that the church cannot in its own legislation prevent its homosexual employees from registering

[31] This connection is specifically made in §14 of the European Convention on Human Rights, in its statement that the rights and freedoms laid down in the convention are to be enjoyed without any discrimination, e.g. on the grounds of sex.

[32] Another addition to the church ordinance proposed at the same time was that an order of service for the blessing of homosexual couples should be included in the Service Book. The two proposals were referred to a committee, which suggested that both should be dropped. The matter nevertheless advanced as far as the synod of bishops, where it is still pending.

their relationships.[33] Another public statement came from the former Chancellor of Justice, Paavo Nikula, that "the church ordinance and ecclesiastical law cannot contain regulations that are at variance with the Constitution."[34]

The question of the rights of gays or lesbians to marriage, common law marriage or registered relationships has not yet resulted in any demands on the Finnish state that failure to recognise the registered status of such couples should be regarded as an infringement of human rights, even though it is clear that §6 of the Constitution, §14 of the European Convention on Human Rights and §26 of the General Agreement on National and Political Rights all forbid discrimination on the grounds of sexual orientation. Interpretations of sexual deviance as reasons for discrimination vary greatly. Nevertheless, it would in principle be possible from the position of the church as a public body and from the position of representatives of the public authorities to follow the model of the responsibilities devolving upon the state under the human rights agreements, if the contractual provisions applying to the church administration are not observed, e.g. with regard to sexual matters. This can be done, however, only provided that no acceptable justifications for such deviations from the contractual provisions can be found that are based on the doctrines and confession of the church.

§2 of the separate law, aimed specifically at promoting sexual equality at work promulgated on the basis of §6 of the Constitution, contains restrictions on the applicability of this law to the church and other religious communities, thus recognising that it cannot be applied directly to many aspects of the religious observances of the Evangelical Lutheran Church, the Orthodox Church and other religious groups (on account of restrictions on the priesthood, the nature of religious observances, confessions etc.). The Equality Ombudsman has in fact issued a number of statements regarding positions in the (Evangelical-Lutheran) Church, and a fairly clear code of practise has emerged on the applications of the law to the church as an employer since 1987. According to data received from the Office of the Ombudsman Equality, at least 24 such statements were provided in the years 1991–2002.[35] Four precedents created by the

[33] Voipio, interview in Kotimaa 11.1.2002 (Can the church trample fundamental rights under foot?).

[34] Nikula, interview in Kotimaa 11.1.2002 (Can the church trample fundamental rights under foot?).

[35] Eleven of those statements entailed reaching a verdict of discrimination, as in the judgement of the Supreme Administrative Court on 5.3.1991, DNo. 752.

Supreme Court and Supreme Administrative Court in cases connected with the equality legislation have also been referred to.

C. *§2, clause 1: Right to education: training and instruction (First Supplementary Protocol §2)*

§2 of the First Supplementary Protocol to the European Convention on Human Rights "provides for the right not to be denied an education and the right for parents to have their children educated in accordance with their religious and other views."

"Nobody shall be denied the right to education. In discharging its duties in the sphere of teaching and education, the state shall respect parents' rights to ensure that their children receive teaching and education in accordance with their own religious and philosophical persuasions."

If the first sentence can already be interpreted as implicitly requiring a publicly maintained school system, then the second part of §2 sets out from the assumption that the state will be involved in the maintenance of such institutions. The article thus shows that in the context of its own contribution to teaching and education, the state shall respect the right of parents to obtain education for their children that is in accordance with their own religious and philosophical convictions. This is the essence of the provision, even though the Finnish rendering of the agreement may be to some extent open to varying interpretations.

This article in the convention does not oblige the state to provide support for private schools, although it can be regarded as guaranteeing the right to found such schools. In other respects, the details of how the right to obtain education for one's children in accordance with one's own convictions is to be defined are laid down in more detail in the law on the freedom of religion (453/2003).

The introduction of a new law on religious freedom in Finland in 2003 meant above all the removal of certain restrictions, which has so far ensured that no cases of infringements of §2 with respect to education in accordance with one's religion and convictions have yet been brought before the Supreme Court. The new law differs in many respects from its predecessor, which had been passed in 1922.[36] The new law and the

[36] It is very similar in structure, however, being divided into four main sections, the first containing provisions of a general nature, mostly connected with the individual's freedom of religion and the use to be made of it, the second dealing with registered religious communities, their purpose, foundation procedures and forms and conditions of activity, the third containing regulations for application of the law on public assembly to the practise of religion and setting out sanctions for infringements of the law on requiring communication of data on the membership of religious communities to the authorities, and the fourth containing details of when and how the law should come into force and also details of transition regulations.

consequent changes to the compulsory education law and the law on upper secondary schools[37] have resulted in a considerable strengthening of the position of the teaching of religion in schools and a clarification of its nature and purposes. That is very clearly reflected not only in the laws themselves, but also in the statement issued by the Parliamentary Education Committee and the report of the Constitutional Committee. It may be concluded from these and from the discussions held in the Parliament that a very large majority of representatives were extremely favourably disposed towards pupils receiving teaching in their own religion.[38]

Firstly, the right of instruction of religion or the philosophy of life had been clearly defined in the Constitution, so that the receiving of such instruction could be seen to be in agreement with the Constitution. Secondly, a distinction had been made between instruction in one's own religion and religious observance as referred to in the Constitution. Those who emphasized the nature of religious instruction as a form of religious observance during the preparation of the new law were of the opinion that teaching of this kind should be made optional, with the alternative of teaching of the philosophy of life, or even that it should be replaced by a form of teaching of the world's religions, which would be common to everyone. The minimum requirement was the right to opt out if the

[37] §13 of the law on compulsory education and §9 of the law on upper secondary schools contain both old and new provisions on the rights of individuals and certain groups to receive instruction in their own religion or philosophy of life. As heretofore, the instance responsible for arranging compulsory education is obliged to ensure that those belonging to the religious group of the majority receive appropriate instruction. A new feature, however, is the provision that pupils or students who do not belong to any religious community shall only attend classes in the majority religion, if they so desire, as indicated by their parents in the case of compulsory schooling, or by the students themselves at upper secondary school. Teaching in their own religion shall also be guaranteed to minority groups of at least three pupils belonging to either the Evangelical Lutheran Church or the Orthodox Church, while corresponding teaching shall be arranged for groups of at least three pupils belonging to some other religious group only on application from a parent or guardian or from the students themselves at upper secondary school. The legislation of upper secondary school grants students entering that level of schooling the right to choose between religious instruction or teaching in the philosophy of life (SEPPO, n. 20 above, p. 183).

[38] SEPPO, n. 20 above, 182-183.

teaching contained events or rituals of a kind that could be regarded as religious observances.[39]

The Parliament, nevertheless, established firmly that *religious instruction should not be equated with religious observance* and quashed all interpretations to that effect. The Parliament's position thus brought years of wrangling on the subject to an end and removed the uncertainty experienced on this point in schools. It is important that no one among those obliged to attend classes in religious instruction should be able to demand exemption on the grounds of it taking on the nature of religious observance.[40]

The Parliament also laid down that all syllabi should be examined upon the new law coming into force to ensure that they met the requirement for instruction in the pupils' own religion in an impartial manner, and also to ensure that the religion and philosophy of life syllabi for the upper secondary school contained "the foundations of the major religions of the world to the extent required for a good general education". This latter aim has now clearly been taken into account, at least as far as instruction in the majority religion is concerned.[41]

The new law is also clearer than its predecessor from a material point of view, in that it transfers the regulations applying to individual detailed issues from the law on religious freedom to the relevant points in the general legislation. In some situations, this tendency towards a clarification has created a need for an entirely new legislation as far as the church is concerned, the most notable example being the legislation on burials (457/2003).

D. *§10: Freedom of opinion and expression*

The European Court of Human Rights has constantly emphasized the essential importance of freedom of expression in a democratic society, provided for in §10. To begin with, freedom of expression subsumes freedom of opinion, the right to which should not be restricted, even by appealing to the conditions laid down in clause 2 of the same §10. Moreover, this freedom applies to *the expression and receipt of opinions and information not only orally but also in writing and by electronic means of communication.* One particularly interesting case relevant to the last-

[39] Ibid.
[40] Ibid.
[41] Ibid.

mentioned aspect has arisen concerning a violation of the church's freedom of expression, which resulted in a most curious ruling issued by the Assistant Parliamentary Ombudsman, departing from the line of argument previously adopted, and arousing criticism even in the Parliamentary Legal Justification Committee.

Case: *The distribution of religious literature to persons not belonging to the religious community concerned*

The appellant had sent an e-mail to the Parliamentary Ombudsman asking him to investigate the case of the Evangelical Lutheran Parish of Rekola in Vantaa, which had distributed magazines intended for its members, to households which were not members. In his decision on the matter (3851/4/05), the Assistant Parliamentary Ombudsman stated that the parish had acted illegally in doing this. Thus, although the distribution of commercial advertisements to the post boxes or letter-boxes of all houses in a given district which do not explicitly forbid this is justified under the principle of freedom of expression, the distribution of religious material in the same manner is not. In addition, as expressed by the official, "the distribution of religious publications to everybody, regardless of whether they are members of the parish or not, cannot be compared with the broadcasting of religious programmes on the radio, as although these in principle reach all homes, each person can decide whether to switch the radio on or not. A magazine, on the other hand, arrives in one's post box or letter-box whether one wants it or not, and sometimes in spite of a specific prohibition notice." In his discussion of the principles behind his decision, the Assistant Ombudsman referred to the freedom of religion provisions contained in §11 of the Constitution and §9 of the European Convention on Human Rights, which include the right not to belong to a given religious community.

The Parliamentary Constitutional Committee, which is the supreme authority in matters of interpreting the Constitution in Finland (where there is no constitutional court as such), discussed the ombudsman's statement and noted in its report (17/2006) with reference to §9 of the European Convention of Human Rights that both this document and the Constitution provide powerful protection for freedom of expression in matters of religious and philosophical communication. In its opinion there was no justification for placing greater restrictions on the freedom of expression of church parishes or on the circulation of its publications than on the distribution of advertising leaflets or newspapers or the

publications of political or other ideological bodies, on the contrary. In the light of this opinion, the Council of the Evangelical Lutheran Church of Finland concluded that the statement issued by the Assistant Parliamentary Ombudsman was against the law.

What makes this case an unusual one is that it was raised in the form of a procedural appeal and not in the course of the administration of justice, so that it was not possible to obtain a judgement on it from the Supreme Court or Supreme Administrative Court, which would in turn have allowed an appeal to be made to the European Court of Human Rights. As it was, the matter had to remain in the province of the highest authority in legal matters within Finland itself. It is thus possible that this ruling by the Assistant Ombudsman does not allow any procedural opening for resolution in a human rights court.

The other relevant decisions of the Finnish Supreme Court and infringements of the freedom of speech that have been brought before the European Court of Human Rights have almost without exception concerned freedom of the press and related libel cases and/or awards of compensation for damage to the appellant's reputation or private life.[42]

One prerequisite for the implementation of the fundamental right of freedom of speech is an open society which observes the principle of the public disclosure of information. The need for society to protect itself nevertheless means that the principles of openness and freedom of speech cannot be invoked so comprehensively that they preclude the limitation of such rights in certain circumstances. Hence the Evangelical Lutheran Church of Finland and similarly the Orthodox Church observe in their administration the principles that apply for the most part elsewhere in the public sector but have to admit that the nature of the office of priest and certain special features of the church's pastoral and social work may require a somewhat different approach. One obvious exception to the

[42] Infringements recorded: *The case Karhuvaara and Iltalehti* v. *Finland* (2004), a lawsuit in which the Editor-in-Chief (the first appellant) had been prosecuted for intrusion into the private life of a member of the parliament under extremely aggravating circumstances, and *the case Selistö* v. *Finland* (2004), in which the name, age and sex of a person accused of serious offences had not in fact been mentioned at the point in question in a newspaper article. The appellant (the newspaper reporter) had claimed that the surgeon in question had been in a drunken or hang-over condition when performing an operation in which the spouse of the person interviewed had died. The most important ruling concerning freedom of speech in the case of a counsel at law was made in the case *Nikula* v. *Finland* (2002), in which the counsel had been accused of defamation of character not against his better knowledge in criticising a prosecutor of "role manipulation" – which in the view of the Commission on Human Rights was in contravention of §10.

general principle of openness concerns the confidentiality of confessions made to a priest (KL 5:2, 6:12),[43] although comparable situations may be found in the work of other professions, e.g. doctors.

Supervision of the doctrinal beliefs of priests is felt to be a difficult aspect of the duties of the church administration from time to time as far as freedom of speech is concerned.[44] In practice, however, the fundamental rights laid down in the Constitution have not been seen as an impediment to the church's insistence that its priests and other employees engaged in work of a doctrinal character should accept its confessions and act accordingly.[45]

§11 of the broad-based document on fundamental rights, issued by the European Union, acknowledges the principle of freedom and diversity of the press and emphasizes that every person has the right of freedom of speech, which subsumes freedom of opinion and the freedom to receive and disseminate ideas and information without interference from the authorities and regardless of any frontiers. By comparison with §10 of the European Convention on Human Rights, §11 of this document lacks any mention of the media for which a licence may be required (radio, television and the cinema). In practice, however, the freedom of expres-

[43] In terms of limitation of freedom of speech and public disclosure of information, confessional confidentiality has many features in common with the right of the media to protect their sources.

[44] Ministers of the Evangelical Lutheran Church of Finland are required to give an undertaking at their ordination that they will refrain from proclaiming in public, disseminating or secretly promoting any doctrine that is at variance with the confession of the church. This regulation which effectively restricts the freedom of speech and public behaviour of its ministers, is not contained in the law on the Evangelical Lutheran Church but is contained in the church ordinance issued on the basis of that law (KJ 5:6), so that, strictly speaking, in this sense, the practise does not comply with the constitutional requirement that any limitations shall be laid down *in law*.

[45] Three cases of priests departing from the doctrines of the church have been made public in recent times. Two of those were working as ministers of the church at the time, while the third was working as a teacher of psychology. In the first two cases, which occurred in the dioceses of Helsinki and Tampere, the complaints did not give the diocesan chapter any cause for taking further action, but in the third, in the Diocese of Lapua, the priest had not, following an appearance before the diocesan chapter, taken the steps laid down in §5, clause 2 of section 3 of the ecclesiastical law to rescind his statement that he did not believe in a God in the sense implied in the Christian faith. The subsequent decision to expel the person from the priesthood made reference to ruling 22/1997 of the Parliamentary Constitutional Committee, which had regarded the obligation on a priest, deacon or cantor in the Orthodox Church to teach in accordance with the doctrines of that church, as a requirement which belongs to the nature of the office and something which the people concerned are well aware of, at the time of accepting that office. A corresponding interpretation could well be taken as applicable to persons engaged in doctrinal teaching work within the Evangelical Lutheran Church.

sion laid down in §10 of the European Convention on Human Rights is employed as a universal right in rulings of the European Court of Human Rights, providing protection for natural persons, legal persons and profit-making corporate bodies. In the interpretation placed on personal rights during the preparation of the new Finnish constitutional legislation (HE 309/1993, 23), officials are deemed to include both the rights of natural persons and the indirect fundamental rights enjoyed by legal persons.

In accordance with the principle of public disclosure of information applying to all public bodies as laid down in §12, clause 2, of the Finnish Constitution, every person has the right to information on the way in which the public authorities exercise their powers, and on other official actions.[46] There may be exceptions to this principle, but those exceptions require special justification and are to be defined precisely by law (cf. §21, §50, §79-80 and §83 of the constitution). Although these provisions are directly applicable to the Evangelical Lutheran Church of Finland, section 25, §8, of the ecclesiastical law also contains a reference provision for the enacting of the law on the public disclosure of the official actions (621/1999), in a form applicable to the church administration. That provision contains a list of the exceptional circumstances in which this general law shall not apply, including confessionals administered by a priest or parish lecturer (KL 5:2, 6:12), other instances of confidentiality (KL 6:3) and the provisions of section 24. Section 25, §8, also contains separate regulations on the confidentiality of documents in the possession of the church administration. The church authorities are thus expected to observe the provisions of both the ecclesiastical law and the law on the public disclosure of information with regard to their handing of documents.

IV. Freedom of Assembly and Association (of Persons and Institutions)

No cases involving infringements of the freedoms of assembly and association by churches or religious communities have reached the supreme courts in Finland.

[46] The fundamental rights guaranteed in §12 of the Finnish Constitution are freedom of speech and access to documents and records. The wording of this provision may be regarded as neutral as far as the medium of communication is concerned, so that it applies to both written text and verbal and visual presentation and to all forms of messages, information, opinions and other communications, regardless of their content. On freedom of speech in the electronic media, see KOTIRANTA, 'The legal position of religion and the media in Finland' in Proceedings of the Meeting The Portrayal of Religion in Europe, Cardiff November 21 – 24, 2002, Peeters: Leuven, 2005.

V. Protection of the Property of Persons and Institutions: P 1-1 (§1 of the First Supplementary Protocol)

The protection of private property was not included in the UN Human Rights agreements of 1996,[47] and it proved impossible to reach a consensus on this fundamental right when concluding the European Convention on Human Rights. The resulting §1 of the supplementary protocol protects existing property but does not guarantee the right to gain property.

Proceedings of the Meeting, Cardiff, November 21– 24, 2002. Peeters. Leuven – Paris – Dudley.

No cases involving infringements of the protection granted to the property of churches or religious communities have reached the high courts in Finland.

VI. Rights of Persons and Institutions to a Fair Trial: §6 and §13

Under §6, paragraph 1, of the European Convention on Human Rights every person whose rights and/or obligations are to be determined or who has been accused of a crime is entitled to a fair public trial in a legally constituted, independent and impartial court within a reasonable length of time.

Certain cases may be picked out from among the judgements reached with respect to the provisions of the European Convention on Human Rights that can be regarded as being of at least indirect relevance to the administration of the church. A small number from among the 20 or so cases to which the state of Finland has been a party may be taken for consideration here.

VII. Infringements Recorded

Case: *Kerojärvi v. Finland*

Kerojärvi v. *Finland* before the European Court of Human Rights, 19.7.1995: §6 – Right to a fair trial (an appellant's right of inspection)

[47] The provisions of the Finnish constitution read as follows: "§15 *Protection of property*. The property of everyone is protected. Provisions on the expropriation of property, for public needs and against full compensation, are laid down by an Act."

Case: *Launikari v. Finland*

Launikari vs. *Suomi*. (European Court of Human Rights, Application no. 34120/96). This is an example of the binding nature of international agreements, although admittedly in the form of a decision by the European Court of Human Rights on 5.10.2000 on a matter that had been under discussion among the authorities of the Evangelical Lutheran Church of Finland for a long time. The court deemed Finland to have contravened §6, paragraph 1, of the European Convention on Human Rights regarding the right to a fair trial within a reasonable length of time, in the case of an appeal and administrative dispute that had been under consideration among the church authorities and in the Supreme Administrative Court from February 1987 until January 1996. No individual stage in its handling was open to reproach, but the erroneous instructions for appeal issued by the Church Council meant that the state was accused of allowing a delay of unacceptable proportions in view of the fact that it was a matter of the office held by the appellant and thus of his source of livelihood.

No infringement:

Case: *Helle v. Finland*

Helle v. *Finland*, European Court of Human Rights, 19.12.1997: §6 – Right to a fair trial (right to a hearing and other legal guarantees in an employment dispute involving the Lutheran Church)

The case originally concerned a dispute over the financial losses sustained by a parish verger, as a result of his post being reduced to a part-time one and subsequently extended to the manner in which this dispute was handled, including the failure to arrange a hearing in an impartial court.

The Supreme Administrative Court had rejected the appeal against the decision of the diocesan chapter in some respects and had concluded that there were no grounds for altering its verdict. The European Court of Human Rights regarded the technique by which the court had "incorporated" the justifications for the verdict that was the object of the appeal into its own judgement as being in accordance with the convention, and emphasized that the judgement of the Supreme Administrative Court had been linked to the verdict in each question separately and that the arguments behind the diocesan chapter's original verdict had been adequate.[48]

[48] See points 55-61.

CHRISTINE PAUTI

L'APPLICATION DES DISPOSITIONS DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME PROTÉGEANT LA LIBERTÉ DE RELIGION ET DE CONVICTION EN FRANCE

C'est seulement le 3 mai 1974 que la France a ratifié la Convention européenne des droits de l'homme et des libertés fondamentales (CEDH), texte pourtant ouvert à la ratification depuis plus de vingt ans. Les premières décisions des juridictions suprêmes rendues en matière de liberté de religion et de conviction qui se réfèrent explicitement au texte européen sont intervenues quelques années plus tard et concernent l'objection de conscience au service militaire (Cass., criminelle, 5 mai 1978, n° 77-92602; Cass., Chambre criminelle, 4 janv. 1979, n° 78-92042; CE, 21 déc. 1979, n° 17303). Parmi les raisons qui expliquent cette ratification tardive figure, même si elle n'a pas été déterminante, l'opposition de certains parlementaires, au nom du principe de laïcité, à la seconde phrase de l'article 2 du Protocole additionnel à la CEDH en date du 20 mars 1952 selon laquelle «L'État, dans l'exercice des fonctions qu'il assumera dans le domaine de l'éducation et de l'enseignement, respectera le droit des parents d'assurer cette éducation et cet enseignement conformément à leurs convictions religieuses et philosophiques». À ce retard dans la ratification de la CEDH, s'est ajouté un autre obstacle lié à la lenteur de l'intégration du droit international dans l'ordre juridique français par les différentes juridictions. En effet, si, en vertu de l'article 55 de la Constitution, les traités régulièrement ratifiés ont une autorité supérieure à celle de la loi, ce n'est que depuis les jurisprudences de la Cour de cassation Société des Cafés Jacques Vabre du 24 mai 1975 et du Conseil d'État Nicolo du 20 octobre 1989, marquant la fin de la théorie de la «loi-écran», que cet article jouit d'une pleine efficacité. Auparavant en effet, les juges considéraient comme inopérant tout moyen issu de la CEDH quand la violation invoquée résultait de dispositions législatives postérieures à l'introduction de la CEDH en droit interne. Depuis ces revirements

[1] Si la CEDH prévaut donc désormais sur la loi, qu'elle soit antérieure ou postérieure, en revanche, en droit interne, la Constitution l'emporte sur les conventions internationales (CE Ass., 30 oct.1998, Sarran, Levacher et autres).

de jurisprudence, l'exercice entier du contrôle de conventionnalité permet aux juridictions administratives et judiciaires françaises de pallier les inconvénients résultant de l'interdiction qui leur est faite de contrôler la constitutionnalité de la loi – appréciation relevant du seul juge constitutionnel – puisque les garanties offertes à la liberté de religion et de conviction dans la CEDH et dans la Constitution sont équivalentes.[1] Par ailleurs, la CEDH est d'applicabilité directe en droit français et peut être invoquée par les justiciables devant les tribunaux administratifs ou judiciaires. Après des années de réserve – voire d'hostilité – vis-à-vis de la CEDH, les juges sont aujourd'hui généralement prompts à assurer ce respect, conscients des risques d'une éventuelle condamnation ultérieure par la juridiction européenne. Ce danger est d'autant plus grand depuis le 2 octobre 1981, date à laquelle, avec à nouveau un grand retard par rapport à la plupart de ses proches partenaires européens, la France a accepté le mécanisme de recours individuel.[2]

Selon les statistiques de la CourEDH, tous pays confondus, de 1999 à 2006, seuls 13 arrêts sur 6691 ont constaté une violation de l'article 9 de la CEDH. Aucun ne concernait la France qui était pourtant l'État défendeur dans 541 arrêts durant cette période et avait été condamnée dans 431 d'entre eux.[3] Même sur le fondement d'autres articles de la CEDH, une grande majorité des arrêts de la CourEDH concernant directement ou indirectement la liberté de religion et de conviction dans lesquels la France est l'État défendeur déclare la requête irrecevable, jugeant que la liberté de religion et de conviction n'a pas été violée. La rareté des arrêts de condamnation en ce domaine s'explique sans doute non seulement par le fait que la CourEDH reconnaît une grande marge d'appréciation aux États en la matière mais aussi – témoignage du «dialogue des juges» – par le fait que le juge français respecte en amont la jurisprudence de la CourEDH, à l'aune des arrêts relatifs à la liberté de religion et de conviction mettant en cause d'autres pays et, enfin, par le fait que cette liberté bénéficie déjà d'une protection constitutionnelle en France. En effet, en droit français, la liberté de religion et de conviction est proclamée dans des textes adoptés à des époques différentes, désormais tous inclus dans ce que l'on a coutume d'appeler le «bloc de constitutionnalité». Les

[2] La première condamnation de la France par la Cour européenne des droits de l'homme (CourEDH) – en l'espèce pour violation de l'article 5, §1 de la CEDH relatif au droit à la liberté et à la sûreté – date du 18 décembre 1986 dans l'affaire Bozano.

[3] L'immense majorité des arrêts concernant la France constate une violation des articles 5 sur le droit à la liberté et à la sûreté ou 6 sur le droit à un procès équitable.

premiers fondements de ce droit se retrouvent dans la Déclaration des droits de l'homme et du citoyen du 26 août 1789. Aux termes de l'article 10 de cette dernière: «Nul ne doit être inquiété pour ses opinions, mêmes religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi». L'article 1er de la loi de séparation des Églises et de l'État du 9 décembre 1905 dispose quant à lui: «La République assure la liberté de conscience (...)», liberté qui a été proclamée par le Conseil constitutionnel comme un principe fondamental reconnu par les lois de la République en 1977.[4] Par ailleurs, l'alinéa 5 du Préambule de la Constitution du 27 octobre 1946 affirme que «Nul ne peut être lésé dans son travail ou son emploi en raison de ses origines, de ses opinions ou de ses croyances». Enfin, l'article 1er de la Constitution du 4 octobre 1958 dispose que «La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances».

Après une recherche approfondie combinant le terme «CEDH» avec différents mots-clefs («religion», «religieux», «liberté religieuse», «croyance», «conviction»), le site «Légifrance» fait apparaître plus de 150 décisions du Conseil d'État et de la Cour de cassation relatives à la liberté de religion ou de conviction se référant à la CEDH, l'immense majorité d'entre elles rendues depuis les années 1990. Dans l'ensemble de ces décisions, il n'est en revanche quasiment jamais fait mention de la jurisprudence des organes de la CEDH pour justifier l'interprétation d'une disposition de la CEDH.[5] Le Conseil constitutionnel quant à lui n'a pas toujours été saisi des textes qui auraient pu l'amener à se prononcer sur la liberté de religion et de conviction: l'exemple topique est celui de la loi du 15 mars 2004, encadrant, en application du principe de laïcité, le port de signes et de tenues manifestant une appartenance religieuse

[4] Considérant n°5 de la décision CC n°87 DC du 23 nov. 1977 sur la liberté d'enseignement. Le Conseil constitutionnel ne tire pas le principe de la loi du 9 décembre 1905 mais de la combinaison de l'article 10 de la Déclaration de 1789 et de l'alinéa 5 du Préambule de la Constitution de 1946.

[5] C'est avec l'arrêt Rennemann de la 1ère Chambre civile de la Cour de cassation du 10 janvier 1984 (relatif à la publicité des débats en matière de poursuites disciplinaires engagées contre un avocat) que, pour la première fois en France, une juridiction suprême s'est référée à la jurisprudence de la CourEDH. Dans le cadre de la recherche, aucune des décisions étudiées de la Cour de cassation ne se réfère à un arrêt de la CourEDH. En revanche, dans un arrêt du 6 mars 2006, Association United Sikhs (n°289947), le Conseil d'État cite dans ses visas, outre la CEDH, l'arrêt de la CourEDH du 11 janv. 2005, Phull c. France.

dans les écoles, collèges et lycées publics.[6] Par ailleurs, les rares décisions du Conseil constitutionnel qui concernent directement ou indirectement la liberté de religion ou de conviction ne font pas référence à la CEDH (CC n° 77-87 DC du 23 nov. 1977 sur la loi relative à la liberté de l'enseignement; n° 93-329 DC du 13 janv. 1994 sur la loi relative aux conditions de l'aide aux investissements des établissements d'enseignement privé par les collectivités territoriales; n° 2000-434 DC du 20 juillet 2000 sur la loi relative à la chasse; n° 2001-446 DC du 27 juin 2001 et n° 2001-449 DC du 4 juillet 2001 sur la loi relative à l'interruption volontaire de grossesse et à la contraception). Cette absence de référence au texte européen s'explique principalement par la jurisprudence IVG du 15 janvier 1975 dans laquelle le Conseil constitutionnel a jugé qu'il ne lui appartenait pas d'examiner la conformité d'une loi à un traité international, en l'espèce la CEDH.[7] Seule la décision n° 2004-505 DC du 19 novembre 2004 relative au Traité établissant une Constitution pour l'Europe fait référence à la CEDH – et même à la jurisprudence de la CourEDH, en l'espèce l'arrêt du 29 juin 2004, Leyla Sahin c. Turquie cité à la fois dans les visas et dans les motifs de la décision[8] –, soulignant la large marge d'appréciation laissée par la CourEDH aux États «pour définir les mesures les plus appropriées, compte tenu de leurs traditions nationales, afin de concilier la liberté de culte avec le principe de laïcité».[9] Le Conseil constitutionnel juge par conséquent que le premier paragraphe de l'article II-70 de la Charte des droits fondamentaux, qui reconnaît le droit à chacun, individuellement ou collectivement, de manifester, par ses pratiques, sa conviction religieuse en public, est conforme

[6] Lors de son audition devant la Commission Stasi le 17 octobre 2003, Jean-Paul Costa, alors vice-président à la CourEDH et actuel Président de cette dernière, avait affirmé que, si elle était contestée devant le juge européen, une éventuelle loi sur l'interdiction des signes religieux serait jugée compatible avec la CEDH.

[7] Cependant dès lors que l'article 88-2 de la Constitution, issu de la révision constitutionnelle du 25 juin 1992, rappelle expressément le traité sur l'Union européenne – qui lui-même se réfère à la CEDH – il n'est pas exclu que le Conseil constitutionnel puisse être conduit à contrôler la compatibilité de lois avec les articles de la CEDH protégeant la liberté de religion ou de conviction. En ce sens, v. F. Messner, P.-H. Prelot et J.-M. Woehrling, *Traité du droit français des religions*, Paris, Litec, 2003, p. 392.

[8] C'était la première fois que le Conseil constitutionnel inscrivait au nombre des visas d'une de ses décisions un arrêt de la CourEDH.

[9] Dans sa décision n° 2007-560 DC du 20 décembre 2007 relative au Traité modifiant le traité sur l'Union européenne et le traité instituant la Communauté européenne (dit «Traité de Lisbonne»), le Conseil constitutionnel ne juge pas nécessaire de réexaminer la question car «les stipulations de la Charte, à laquelle est reconnue la même valeur juridique que celle des traités, sont identiques à celles qui ont été examinées par le Conseil constitutionnel dans sa décision du 19 novembre 2004 susvisée».

à l'article 1er de la Constitution française aux termes duquel «la France est une République laïque».[10]

Toutes les décisions des juridictions suprêmes analysées dans le cadre de ce rapport citent la CEDH. Mais quand les références à la CEDH ne se limitent pas à une simple mention dans les visas, sans référence à un article précis, elles se bornent le plus souvent tout au plus à un constat de non-violation de celle-ci ou d'un de ses articles, sans autre motivation ou avec une motivation réduite au minimum. Ce laconisme tranche avec la précision de l'argumentation de la CourEDH, s'agissant notamment du contrôle de la légitimité des restrictions apportées à la liberté de religion et de conviction. Par ailleurs, la Cour de cassation se réfugie souvent derrière le pouvoir souverain d'appréciation des juges du fond, ce qui limite nécessairement encore davantage son argumentation.[11]

Dans le cadre de ce rapport, on peut aisément distinguer les décisions des juridictions suprêmes françaises rendues en matière de liberté de religion et de conviction se référant à l'article 9 de la CEDH de celles renvoyant à d'autres articles de la CEDH.

I. Les décisions des Juridictions Suprêmes Françaises Relatives à la Liberté de Religion et de Conviction se Référant à l'Article 9 de la CEDH

Les juges français reconnaissent, de façon quasi systématique, la légitimité des limitations à la manifestation de la liberté de religion et de conviction protégée par l'article 9, §1 de la CEDH.

A. *La Délimitation du Droit Protégé par l' Article 9, §1 de la CEDH par les Juges Français*

1. *L'Énonciation du Droit: la Liberté de Religion et de Conviction*

– Une interprétation extensive des convictions incluses dans le champ d'application de l'article 9 de la CEDH

[10] Le CC est amené à développer la jurisprudence de la CourEDH afin d'examiner la constitutionnalité du premier paragraphe de l'article II-70 de la Charte des droits fondamentaux car, selon le praesidium de la Convention qui a élaboré la Charte, cet article reconnaît un droit qui a «le même sens et la même portée» que celui garanti par l'article 9 de la CEDH.

[11] Les requérants peuvent invoquer des moyens fondés sur l'incompatibilité tant d'une règle de droit interne que de la décision contestée avec des dispositions de la CEDH.

Dans la quasi-totalité de la jurisprudence étudiée, l'existence d'une religion ou d'une conviction au sens de l'article 9 de la CEDH ne laisse guère place au doute, les cas relatifs à la religion étant d'ailleurs beaucoup plus nombreux que ceux ayant trait aux autres convictions. Un arrêt récent du Conseil d'État, qui fait du choix du mode de sépulture un aspect de la vie privée, semble même adopter une interprétation du champ d'application de l'article 9 de la CEDH plus large que celle retenue par le juge européen qui, il y a un quart de siècle, avait refusé de voir dans le souhait de faire disperser ses cendres dans une propriété privée la manifestation d'une «conviction» (Comm. EDH 10 mars 1981, X c/ RFA, req. n° 8741-79). Dans son arrêt du 6 janvier 2006, Martinot et autres (n°260307), le Conseil d'État juge en effet que la volonté du défunt exprimée de son vivant de voir conserver son corps après sa mort par un procédé de congélation, en raison de sa conception d'un retour possible à la vie grâce aux progrès de la science, «doit être regardée comme une manifestation de conviction (...) entrant dans le champ d'application de l'article 9 de la CEDH».

– L'absence de contrainte en matière de religion et de conviction

La liberté de pensée, de conscience et de religion implique avant tout le droit de ne pas subir de contrainte en ce domaine, ce que souligne l'article 18 du Pacte international sur les droits civils et politiques auquel différentes décisions font d'ailleurs expressément référence parallèlement à l'article 9 de la CEDH. C'est ainsi que face à des requérants qui contestaient le refus qui leur avait été opposé de procéder au retrait de leur propriété du périmètre de l'Association communale de chasse agréée, le Conseil d'État juge, au motif qu'«aucune disposition de la loi du 10 juillet 1964 [qui a institué des associations communales de chasse agréées] ne fait obligation au non-chasseur de pratiquer ou d'approuver la chasse», que les dispositions de cette loi ne sont pas contraires à l'article 9 de la CEDH (CE, 22 févr. 1995, n°120407; 10 mars 1995, n°120346; 10 mai 1995, n°112580). Dans son arrêt du 29 avril 1999, Chassagnou et autres c. France (n^{os} 25088/94, 28331/95 et 28443/95), la CourEDH condamnera au contraire la France pour cette adhésion forcée jugée contraire aux convictions des requérants.[12] Cet arrêt est d'autant

[12] La CourEDH conclut à une violation de l'article 1er du Protocole additionnel du 20 mars 1952 relatif à la protection de la propriété pris isolément et combiné avec l'article 14 de la CEDH et de l'article 11 de la CEDH pris isolément et combiné avec l'article 14 de la CEDH. Par suite, elle juge qu'il ne s'impose pas d'examiner séparément le grief tiré de la violation de l'article 9 de la CEDH.

plus intéressant que c'est le droit français qui est directement mis en cause. En outre, dans l'arrêt du 6 avril 2001, SNES (n° 219379, 221699, 221700), le Conseil d'État juge – en harmonie avec la jurisprudence européenne – que la législation spéciale relative à l'enseignement religieux obligatoire dans les écoles publiques des départements du Bas-Rhin, du Haut-Rhin et de la Moselle n'est pas contraire à l'article 9 de la CEDH dès lors que cet enseignement s'accompagne d'une faculté de dispense ouverte aux élèves.

– L'absence de discrimination en matière de religion et de conviction

Le Conseil d'État a été saisi de la légalité de deux circulaires du garde des sceaux, ministre de la Justice, adressées aux procureurs généraux et aux procureurs de la République, du 29 février 1996 et du 1er décembre 1998, relatives à la lutte contre les atteintes aux personnes et aux biens commises dans le cadre des mouvements à caractère sectaire. Dans un arrêt du 18 mai 2005 (n°259982), il juge que «eu égard aux risques que peuvent présenter les pratiques de certains organismes communément appelés sectes, alors même que ces mouvements prétendent également poursuivre un but religieux, les associations ne sont pas fondées à soutenir que les circulaires précitées méconnaîtraient le principe de la liberté religieuse garanti par (...) les stipulations des articles 9 et 14 de la CEDH». Le Conseil d'État avait déjà adopté cette argumentation treize ans plus tôt pour rejeter le recours dirigé contre l'octroi d'une subvention par l'État à une association afin d'éditer une brochure destinée à informer le public, et particulièrement les jeunes, des pratiques et des comportements de diverses organisations qu'il qualifiait de "sectes" (CE, 17 févr. 1992, Église de scientologie de Paris, n°86954). Compte tenu du fait que la CourEDH considère, dans l'arrêt Fédération chrétienne des Témoins de Jéhovah de France c. France du 6 novembre 2001, que la lutte contre les sectes constitue une «préoccupation légitime du législateur», tout laisse à croire que les juges français ne risqueraient pas de censure si la CourEDH était saisie dans ce type d'affaires.[13] Par ailleurs, dans une série

[13] Dans un arrêt du 23 mars 1998, M. Georges Tavernier (n°180962), le Conseil d'État a jugé «que la reconnaissance d'utilité publique d'une association [en l'espèce l'Union nationale des associations pour la défense des familles et de l'individu (U.N.A.D.F.I) dont l'objet est notamment d'apporter une aide aux victimes de pratiques imputables à certains groupements ou organismes à caractère sectaire], ne porte pas, en elle-même, atteinte à la liberté de conscience et de religion garantie par l'article 10 de la Déclaration des droits de l'homme et du citoyen et par l'article 9 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales». Le 14 déc. 1999, la CourEDH a déclaré irrecevable la requête n° 44789/98, présentée par Philippe GLUCHOWSKI et autres contre la France.

de trois affaires, le Conseil d'État juge, après avoir mentionné la CEDH dans les visas, que «pour refuser de communiquer les informations concernant M. X contenues dans le fichier des renseignements généraux, le ministre de l'intérieur s'est fondé exclusivement sur l'appartenance de M. X à l'église de scientologie et sur la menace pour la sécurité publique que représente ce mouvement sectaire; que ce seul motif d'ordre général (...) n'est pas de nature à justifier la décision de refus de communication» (CE 30 juill. 2003, M. Michel X, n°242812; 21 nov. 2003, n°242817; 28 juill. 2004, n°243417). En reconnaissant l'existence d'une discrimination fondée sur la religion, cet arrêt fait ainsi figure d'exception au sein d'une jurisprudence dans laquelle, pour l'essentiel, on considère que les dispositions européennes permettant, directement ou indirectement, de garantir la liberté de religion ou de conviction n'ont pas été violées.

Enfin, dans une série d'arrêts du 5 décembre 2007 (n°285394, n°285395, n°285396 et n°295671), le Conseil d'État affirme que la sanction de l'exclusion définitive prononcée à l'égard d'un élève qui ne se conforme pas à l'interdiction légale du port de signes extérieurs d'appartenance religieuse «qui vise à assurer le respect du principe de laïcité dans les établissements scolaires publics sans discrimination entre les confessions des élèves, ne méconnaît pas (...) le principe de non-discrimination édicté par les stipulations de l'article 14 [de la CEDH]».[14]

2. *La Portée et les Limites de la Liberté de Manifester sa Religion ou sa Conviction*

– Les comportements ne bénéficiant pas de la protection de l'article 9 de la CEDH

Comme l'ont plusieurs fois rappelé les juges européens, l'article 9 de la CEDH ne garantit pas toujours le droit de se comporter dans la sphère publique d'une manière dictée par sa conviction. La Cour de cassation juge par exemple que l'adhésion obligatoire à l'Ordre des médecins et à l'Ordre des architectes et le paiement obligatoire des cotisations qui en résulte ne sont pas contraires à l'article 9 de la CEDH eu égard aux

[14] En revanche, le Conseil d'État, du fait qu'ils sont invoqués pour la première fois en cassation, rejette comme irrecevables «les moyens tirés de ce que la décision attaquée serait constitutive d'une discrimination à l'égard de la minorité nationale que formerait la communauté sikhe de France, contraire à l'article 14 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et d'une violation de l'article 8 de la même convention» (CE, 5 déc. 2007, n°285394, n°285395, n°285396).

finalités et aux règles de fonctionnement de ces ordres (Cass. 29 févr. 1984, n°83-10203; 16 janv. 1985, n°83-14070; 7 nov. 1986, n°85-15962; 27 janv. 1987, n°85-17106; 30 juin 1987, n°86-11564). Par ailleurs, la Cour de cassation a rejeté le recours de requérants demandant, pour des raisons de conscience, le remboursement des fractions de cotisations de sécurité sociale affectées à des dépenses présentant un lien avec des IVG, car elle juge que «le recouvrement des cotisations de sécurité sociale légalement dues ne p[eut] en aucun cas constituer une atteinte aux convictions personnelles, à la liberté de pensée et de conscience des assujettis [protégées notamment par l'article 9 de la CEDH]»; par conséquent les assujettis «sont tenus de les acquitter quelle que soit l'affectation qui leur est donnée» (Cass. 13 déc. 1990, n°89-11713; 20 juin 1991, n°88-11156; 5 mars 1992, n°88-11788; 9 déc. 1993, n°90-12333).[15] Les juges français suivent en cela les juges européens pour qui l'acquittement de l'impôt ou le paiement de cotisations sociales est une obligation d'ordre général, neutre, qui n'a en elle-même aucune incidence précise sur la conscience, et ne peut donc constituer une ingérence soumise au §2 de l'article 9 de la CEDH.[16] De même, ne peuvent s'abriter derrière le principe de l'"objection de conscience" les pharmaciens refusant de stocker et de vendre des produits contraceptifs prescrits par des médecins, alors qu'ils bénéficient de l'exclusivité de la vente de ces médicaments (Cass. 21 oct. 1998, n°97-8098).[17] Enfin, dans un arrêt du 8 juin 1990, Chardonneau (n°87195), le Conseil d'État juge que l'objection de conscience au service militaire n'est pas un droit protégé par la CEDH et que sa réglementation relève uniquement du droit interne, ce que confirmeront d'ailleurs les juges européens.[18]

[15] Le 18 févr. 1993, la CommissionEDH a jugé la requête n° 20747/92 présentée par Jean Bouessel du Bourg contre la France (affaire Cass. 5 mars 1992) irrecevable.

[16] V. CommissionEDH 15 déc. 1983 C. c. Royaume-Uni: quaker refusant, pour des raisons religieuses, de s'acquitter de la partie de ses impôts affectée aux dépenses militaires.

[17] Dans un arrêt du 2 oct. 2001, Pichon et Sajous c. France, la CourEDH a déclaré la requête n° 49853/99 irrecevable.

[18] La CommissionEDH a jugé la requête n° 17559/90 de Chardonneau contre la France irrecevable par arrêt du 29 juin 1992. Par ailleurs, la Cour de cassation a jugé que les dispositions de la CEDH (art. 4-3b, 9, 10 et 14) «ne font pas obstacle à ce que les objecteurs de conscience soient assujettis par la loi interne à un service dont la durée est supérieure à celle du service militaire actif lorsque cette durée (...) n'excède pas une limite raisonnable et ne porte pas atteinte à leurs libertés fondamentales» (3 mai 1989, n°88-86767; 20 janv. 1993, n°92-80568; 12 oct. 1994, n°92-83756; 12 déc. 1994, n°93-85084; 14 déc. 1994, n°93-81628; 7 août 1995, n°94-85930).

– La diversité des manifestations de sa religion ou de sa conviction

La liberté de manifester sa religion ou sa conviction peut se traduire de différentes façons énumérées par l'article 9, §1 de la CEDH: le culte, l'enseignement, les pratiques[19], l'accomplissement des rites. Dans un arrêt du 25 août 2005, Commune de Massat (n°284307), où la CEDH est citée dans les visas, le Conseil d'État juge que l'autorité publique porte une atteinte grave et manifestement illégale à la liberté de culte, qui a notamment pour composante «la libre disposition des biens nécessaires à l'exercice d'un culte», en autorisant une manifestation publique dans un édifice affecté à l'exercice d'un culte en dépit de l'opposition du ministre du culte chargé d'en régler l'usage. En l'espèce, le constat de violation de la liberté de religion mérite d'être souligné tant il est rare dans le cadre des décisions faisant l'objet de cette étude.

La liberté de manifester sa religion inclut par ailleurs la participation à la vie de la communauté religieuse et suppose donc qu'il n'y ait pas d'ingérence arbitraire de l'État dans son fonctionnement. C'est ce que souligne le Conseil d'État dans son arrêt du 25 novembre 1994, Association cultuelle israélite Cha'are Shalom Ve Tsedek (n°110002), dans lequel il juge que le refus des autorités françaises de délivrer à cette association l'agrément nécessaire pour pouvoir accéder aux abattoirs en vue de pratiquer l'abattage rituel est conforme à l'article 9 de la CEDH.[20]

La liberté de religion et de conviction peut subir des limitations, mais uniquement dans ses manifestations. En vertu du caractère subsidiaire du mécanisme de contrôle institué par la CEDH, la CourEDH estime que «les autorités de l'État se trouvent en principe mieux placées que le juge international» pour se prononcer sur les restrictions aux droits énoncés par la CEDH (CourEDH, 7 déc. 1976, Handyside c. Royaume-Uni), ce qui laisse une marge d'appréciation certaine aux juridictions suprêmes françaises en ce domaine.

[19] Selon la CommissionEDH, le terme «pratiques» «ne désigne pas n'importe quel acte motivé ou inspiré par une religion ou une conviction». Par exemple, le refus d'un requérant de confession juive de délivrer le «guett» – ou lettre de répudiation – à son ex-épouse ne constitue pas une pratique au sens de l'article 9 de la CEDH (CommissionEDH, 6 déc.1983, D. c. France).

[20] Dans son arrêt du 27 juin 2000, Association cultuelle israélite Cha'are Shalom Ve Tsedek c. France, la CourEDH juge qu'il n'y a pas ingérence dans la liberté de manifester sa religion car l'interdiction de pratiquer légalement cet abattage ne conduit pas à l'impossibilité pour les croyants ultra-orthodoxes de manger de la viande provenant d'animaux abattus selon les prescriptions religieuses qui leur paraissent applicables en la matière.

B. *L'Identification des Restrictions Légitimes à la Liberté de Manifester sa Religion ou ses Convictions au sens de l'Article 9, §2 de la CEDH par les Juges Français*

Certaines des décisions étudiées, plutôt que de retenir une des limites énoncées par le §2 de l'article 9 de la CEDH, préfèrent une référence plus globale et positive à l'intérêt général ou aux intérêts du service public. C'est le cas dans l'arrêt du 16 février 2004, M. Ahmed X. (n°264314) où le Conseil d'État juge que les exigences du fonctionnement normal du service public justifient le refus opposé à l'agent d'un service public (office d'HLM) de s'absenter pour fréquenter la mosquée tous les vendredis. Il y a vingt-cinq ans, la CommissionEDH avait déjà adopté la même position à propos d'un instituteur de confession islamique (X. c. Royaume-Uni, déc. 12 mars 1981, n°8160/78). De même, dans un arrêt du 16 décembre 1992, Guillot (n° 96459), le Conseil d'État juge compatible avec la CEDH la révocation d'un agent hospitalier membre de l'église adventiste du 7e jour refusant d'assurer son service le samedi même s'il ne peut être remplacé, car cela constitue une «attitude incompatible avec la nécessaire continuité du service». Par ailleurs, dans un arrêt du 28 juillet 1993, Marchand (n° 97189), le Conseil d'État juge qu'a légalement été mis fin aux fonctions pour manquement au devoir de réserve d'une femme, agent public, chargée de mission pour les droits de la femme auprès du préfet, qui, en qualité de présidente et animatrice d'une association, avait publié plusieurs communiqués dénonçant la suppression du ministère des droits de la femme et critiquant en ce domaine la politique du Gouvernement. Le Conseil d'État estime donc qu'il n'y a pas d'atteinte à l'article 9 de la CEDH. Enfin, dans l'arrêt du 8 octobre 2004, Union française pour la Cohésion nationale (n°269077), le Conseil d'État considère que la circulaire relative à la mise en oeuvre de la loi du 15 mars 2004 posant l'interdiction des signes manifestant ostensiblement l'appartenance à une religion ne viole pas l'article 9 de la CEDH «dès lors que l'interdiction édictée par la loi et rappelée par la circulaire attaquée ne porte pas à cette liberté une atteinte excessive, au regard de l'objectif d'intérêt général poursuivi visant à assurer le respect du principe de laïcité dans les établissements scolaires publics».[21] Le Conseil d'État reprendra cette argumentation dans un arrêt du 5 décembre 2007

[21] V. aussi Cass. 21 juin 2005, n° 02-19831: l'interdiction du port du foulard par le règlement intérieur d'un collège sous contrat d'association est compatible avec l'article 9 de la CEDH.

(n°295671) où une jeune fille avait été exclue définitivement de son établissement en raison de son refus d'ôter le carré de tissu de type bandana qui couvrait sa chevelure. Par ailleurs, dans une série d'arrêts du 5 décembre 2007 (n°285394, n°285395 et n°285396), dans lesquels étaient attaquées les mesures d'exclusion du lycée prononcées à l'encontre d'élèves sikhs refusant d'ôter leur keshi, sous-turban «d'une dimension plus modeste que le turban traditionnel et de couleur sombre», le Conseil d'État juge que «compte tenu de l'intérêt qui s'attache au respect du principe de laïcité dans les établissements scolaires publics, la sanction de l'exclusion définitive prononcée à l'égard d'un élève qui ne se conforme pas à l'interdiction légale du port de signes extérieurs d'appartenance religieuse n'entraîne pas une atteinte excessive à la liberté de pensée, de conscience et de religion garantie par l'article 9 [de la CEDH]». Dans son arrêt Leila Sahin c. Turquie du 29 juin 2004, qui sera confirmé en Grande chambre le 10 novembre 2005, la CourEDH avait admis la compatibilité de l'interdiction du port du foulard islamique dans les universités turques avec l'article 9 de la CEDH. Mais la ressemblance s'arrête là tant les contextes juridiques et politiques de la Turquie et de la France diffèrent.

De façon plus précise, la protection de l'ordre public, de la santé publique et des droits et libertés d'autrui peut, aux termes de l'article 9, §2 de la CEDH, justifier des restrictions à la libre manifestation des convictions religieuses.

1. *La Sécurité Publique et la Protection de l'Ordre*

L'obligation du port de la ceinture de sécurité pour les conducteurs et passagers des véhicules automobiles (Cass., 4 févr. 1998, n°97-83521)[22] comme celle de la présentation d'une photo d'identité tête nue sur les documents d'identité afin de réduire les risques de fraude et de falsification (CE, 27 juill. 2001, Fonds de défense des musulmans en justice, n°216903; 24 oct. 2003, Mme Fatima, n°250084; 2 juin 2003, Mlle Rabia X, n°245321; 6 mars 2006, n°289947, Association United Sikhs; 15 déc. 2006, n°289946, Association United Sikhs) ne sont pas incompatibles avec la CEDH[23]. La position du juge français ne diffère pas de celle du juge européen[24].

[22] Par décision du 14 déc. 1999, la CommissionEDH a jugé la requête n° 41781/98 de Jean-Michel VIEL contre la France irrecevable.

[23] Pour le même raisonnement appliqué au refus de délivrance de visa à une femme refusant d'enlever son foulard pour un contrôle de sécurité à l'entrée du consulat: CE, 7 déc. 2005 M. YX (n°264464).

[24] V. CourEDH, 11 janv. 2005, Suku PHULL c. France, n° 35753/03: compatibilité avec l'article 9 de la CEDH du contrôle de sécurité d'un ressortissant britannique de confession sikh à l'aéroport de Strasbourg l'obligeant à enlever son turban. Et encore: CommissionEDH, 12 juill. 1978, X. c. Royaume-Uni, n° 7992/77: obligation de porter un casque de moto imposée à un cyclomotoriste sikh pour des raisons de santé publique; CommissionEDH 3 mai 1993, *Karaduman* c. *Turquie*, n°16278/90: l'obligation résultant du règlement d'une université turque de fournir une photographie tête nue pour obtenir un diplôme ne constitue pas une ingérence dans le droit garanti par l'article 9 de la CEDH. La photographie ne vise qu'à «assurer l'identification de l'intéressé et ne peut être utilisée par celui-ci afin de manifester ses convictions religieuses».V. aussi CourEDH, 12 déc. 2002, *Sofianopoulos et autres* c. *Grèce*.

Par ailleurs, dans une décision du 11 avril 1991, la Cour de cassation juge que les restrictions à la libre manifestation de sa religion imposées, dans le cadre d'un contrôle judiciaire et pour les nécessités de l'instruction, à une requérante scientologue ne sont pas contraires à l'article 9 de la CEDH. Enfin, dans un arrêt du 29 juin 2006, Mme Hak Ja Han A (n°294649), le Conseil d'État juge que le fait que le mari de Mme Moon soit frappé d'un signalement au Système d'Information Schengen justifie le refus opposé à cette dernière à sa demande de visa sollicitée auprès des autorités françaises afin de pouvoir participer à un service spécial à l'occasion du 40ème anniversaire de «l'Église de l'Unification».

2. *La Santé Publique*

Sont jugées compatibles avec la CEDH les dispositions du Code de la santé publique condamnant le délit d'entrave à l'IVG (Cass., 31 janv. 1996, n°95-81319; 5 mai 1997, n°96-81747; 7 avr. 1999, n°98-80929; 15 juin 1999, n°98-84045; 3 avr. 2001, n°00-86515; 12 févr. 2002, n°01-83554) ou celles du Code général des collectivités territoriales n'autorisant, après le décès d'une personne, que l'inhumation ou la crémation de son corps (CE, 6 janv. 2006, Martinot et autres, n°260307). Par ailleurs, dans un arrêt du 16 août 2002, Mme Feuillatey (n°249552), le Conseil d'État juge compatible avec l'article 9 de la CEDH le fait pour un médecin, après avoir tout mis en oeuvre pour convaincre le patient majeur d'accepter les soins indispensables, d'administrer une transfusion sanguine à ce patient dans le but de tenter de le sauver, ce qui constitue un acte indispensable à sa survie et proportionné à son état. Enfin, dans un arrêt du 21 décembre 2007 (n°282100), le Conseil d'État juge qu'un arrêté du ministre de la solidarité, de la santé et de la famille classant certaines plantes parmi les substances stupéfiantes, alors même qu'elles sont utilisées lors de cérémonies organisées par des associations telles que «l'Église du Santo Daime», ne porte pas d'atteintes excessives ou disproportionnées à la liberté de religion et de conviction garantie

notamment par l'article 9 de la CEDH «au regard des préoccupations de santé publique».

3. *Les Droits et Libertés d'Autrui*

Comme l'a jugé la Cour de cassation, conformément à l'article 9, §2 de la CEDH, l'intérêt de l'enfant peut justifier l'interdiction faite à une mère de mettre ses enfants en relation avec des membres du mouvement raëlien auquel elle appartient, à l'exception d'elle-même et de son compagnon (Cass. 22 févr. 2000, n°98-12338)[25], ou la suspension du droit de visite d'un père à l'égard de ses filles qu'il obligeait à porter le voile et à qui il interdisait de se baigner dans des piscines publiques (Cass. 24 oct. 2000, n°98-14386). Toujours dans le domaine familial, les juges tiennent compte, pour le prononcé du divorce, des conséquences excessives d'une pratique religieuse sur le lien matrimonial, estimant que le divorce prononcé pour faute exclusive du «pratiquant» n'est pas contraire à l'article 9 de la CEDH (pour un époux catholique: Cass. 21 mai 1990, n°89-12512; pour une épouse témoin de Jéhovah: Cass. 9 oct. 1996, n°95-10461). De même, la protection de la vie privée peut justifier des limitations à la libre manifestation de sa religion ou de ses convictions: n'est donc pas contraire à l'article 9 de la CEDH la décision de la cour d'appel qui condamne pour atteinte à la vie privée un homme ayant publié sur un journal un communiqué invitant les personnes conviées au remariage projeté de son ex-épouse à "prendre leurs responsabilités", au motif que, selon lui, le mariage religieux musulman l'unissant à elle n'est pas dissous (Cass. 6 mars 2001, n°99-10928).

La liberté de religion ou de conviction peut également être garantie sur le fondement d'autres articles de la CEDH.

II. Les Décisions des Juridictions Suprêmes Françaises Relatives à la Liberté de Religion et de Conviction se Référant à d' autres Articles de la CEDH et de ses Protocoles

Hormis quelques décisions visant l'article 3 de la CEDH relatif à l'interdiction de la torture et des peines ou traitements inhumains ou

[25] Pour la même raison, ne sont pas violés les articles 8 §1, 10 et 11 de la CEDH. Le 3 nov. 2005, la CourEDH, dans un arrêt F.L. c. France, déclarera la requête n° 61162/00 irrecevable.

dégradants, l'essentiel de la jurisprudence concerne l'article 8 sur le droit au respect de la vie privée et familiale, l'article 2 du Protocole additionnel du 20 mars 1952 sur le droit à l'instruction et l'article 10 de la CEDH relatif à la liberté d'expression.

A. *La Liberté de Religion et de Conviction et l' Article 3 de la CEDH*

Dans de nombreux arrêts concernant des décisions de reconduite à la frontière, les requérants allèguent les risques de traitements prohibés par l'article 3 de la CEDH auxquels ils seraient susceptibles d'être soumis en cas de retour dans leur pays d'origine en raison de leurs convictions religieuses. Le Conseil d'État rejette ces allégations dans la mesure où elles ne sont assorties d'aucune justification probante.[26] Par ailleurs, dans un arrêt du 26 octobre 2001, Mme Catherine X (n°198546), le Conseil d'État estime que le fait d'administrer une transfusion sanguine à un patient témoin de Jéhovah, malgré son opposition, compte tenu de l'urgence, et dans le but de protéger sa santé et de sauvegarder sa vie, n'est pas contraire à l'article 3 de la CEDH.

B. *La Liberté de Religion et de Conviction et l' Article 8 de la CEDH*

L'article 8 de la CEDH relatif à la protection de la vie privée et familiale est fréquemment invoqué, combiné avec l'article 14 de la CEDH. Conformément à la jurisprudence Hoffmann c. Autriche du 23 juin 1993 de la CourEDH, en l'absence de justification objective et raisonnable, une différence de traitement reposant sur la religion est discriminatoire. Dans toutes les décisions examinées, la Cour de cassation rejette le moyen d'inconventionnalité en jugeant que la Cour d'appel ne s'est pas prononcée *in abstracto* en fonction de l'appartenance religieuse des requérants, mais au contraire *in concreto* en se fondant sur les conséquences effectives pour l'enfant du mode de vie adopté par ses parents, tels que le «manque de disponibilité» d'un père scientologue, sa «propension (...) à effectuer inconsidérément des dons d'argent» et le risque encouru par son enfant «quant à la prise en charge de ses soins médicaux» (Cass. 12 déc. 2006, n°05-22119), ou «les obligations et interdictions» imposées à ses enfants par une mère membre de la communauté des «Frères»

[26] V. par ex. CE, 20 oct. 1995, n°156654; 6 mai 1996, n°156266; 5 juin 1996, n°148327; 21 oct. 1998, n°189436; 18 déc. 2002, n°244512; 8 juill. 2005, n°274381; 23 nov. 2005, n°268505.

(Cass. 19 févr. 2002, n°99-19954).[27] C'est dans ce type de contentieux familial que la CourEDH a condamné la France dans son arrêt Palau Martinez c. France du 16 décembre 2003, devenu définitif le 16 mars 2004. Elle a estimé que les juges français s'étaient prononcés sur le changement de résidence d'un enfant en fonction de considérations de caractère général relatives aux règles éducatives imposées par les Témoins de Jéhovah, sans établir de lien direct entre les conditions de vie des enfants auprès de leur mère et leur intérêt réel: l'atteinte portée au droit à la vie familiale a donc été considérée comme discriminatoire.[28] Sans minimiser l'importance de cette condamnation, il convient néanmoins de souligner que c'est une décision individuelle, et non une règle du droit français, qui est en l'espèce jugée contraire à la CEDH. En revanche, le 26 juillet 2007, dans l'arrêt Schmidt c. France, la CourEDH a jugé que le placement d'un enfant avait été motivé par l'intérêt exclusif de ce dernier et non en raison de l'appartenance de ses parents à l'Église chrétienne biblique dite «La citadelle»: elle a donc conclu à l'absence de violation de l'article 8 de la CEDH.

C. *La Liberté de Religion et de Conviction et l'Article 2 du Protocole Additionnel à la CEDH*

Dans deux arrêts d'Assemblée du 14 avril 1995, Consistoire central des israélites de France (n°125148) et M. Koen (n°157653), le Conseil d'État juge que les dispositions réglementaires imposant l'assiduité des élèves aux cours «n'ont pas eu pour objet et ne sauraient avoir légalement pour effet d'interdire aux élèves qui en font la demande de bénéficier individuellement des autorisations d'absence nécessaires à l'exercice d'un culte ou à la célébration d'une fête religieuse dans le cas où ces absences sont compatibles avec l'accomplissement des tâches inhérentes à leurs études et avec le respect de l'ordre public dans l'établissement». La haute juridiction considère que ces dispositions ne sont donc pas contraires à l'article 9 de la CEDH et à l'article 2 de son Protocole additionnel.[29] Par

[27] Par un arrêt du 16 mai 2006, la CourEDH a déclaré irrecevable la requête n°31956/02 présentée par Claudine Deschomets contre la France.

[28] En l'espèce, la Cour de cassation avait estimé que la cour d'appel avait bien justifié sa décision et n'avait pas violé la CEDH (Cass. 13 juill. 2000, n°98-13673). Selon elle, la Cour d'appel n'avait pas l'obligation d'ordonner une enquête sociale, enquête qui aurait pourtant peut-être permis d'éviter des considérations trop abstraites.

[29] V. CommissionEDH, 27 avr. 1999, Martins Casimiro et Cerveira Ferreira c. Luxembourg: le refus d'accorder au fils d'adventistes du 7ème jour une dispense générale de

ailleurs, dans un arrêt du 3 juillet 1996, M. Paturel (n°140872), le Conseil d'État juge que les dispositions réglementaires qui permettent, sous certaines conditions, de passer outre l'opposition des parents (notamment pour les transfusions sanguines) lorsque la santé ou l'intégrité corporelle du mineur risque d'être compromise «n'excèdent pas, en tout état de cause, les limitations qui peuvent être apportées, eu égard aux intérêts de la santé publique, aux dispositions des articles 8 et 9 de la CEDH et de l'article 2 du protocole additionnel n° I à cette convention». Et, s'agissant de parents refusant les vaccinations obligatoires pour des raisons religieuses, le Conseil d'État juge dans un arrêt du 10 janvier 1996, M. Michel Huret (n° 153477) que «les dispositions législatives (...) qui, dans l'intérêt de la santé publique, subordonnent l'accès aux établissements scolaires à diverses vaccinations ne sont pas incompatibles avec la stipulation du protocole qui garantit le droit à l'instruction». Cependant, en l'espèce, le Conseil d'État considère que la deuxième phrase de l'article 2 du Protocole additionnel est inapplicable car les mesures visées ne relèvent pas de l'exercice des fonctions d'éducation et d'enseignement assurées par l'État et mentionnées dans cette phrase.[30] Enfin, toujours dans le cadre de l'école, le Conseil d'État a jugé dans un arrêt du 18 octobre 2000, Association Promouvoir (n°213303), que les dispositions d'une circulaire prévoyant l'organisation de séquences d'éducation à la sexualité dans un but global d'éducation à la santé ne méconnaissent pas les principes de neutralité et de laïcité et «n'ont ni pour objet ni pour effet de porter atteinte aux convictions religieuses et philosophiques tant des élèves, que de leurs parents ou des enseignants». Dans son arrêt du 7 décembre 1976, Kjeldsen, Busk Madsen et Pedersen c. Danemark, la CourEDH avait pareillement jugé que le programme d'enseignement sexuel obligatoire dans les écoles publiques danoises, qui visait à attirer l'attention des enfants sur des problèmes d'intérêt général (comme la contraception ou les maladies sexuellement transmissibles), n'était pas

l'obligation scolaire le samedi dans l'enseignement public primaire est compatible avec l'article 9 de la CEDH. Par ailleurs, le Conseil d'État juge que la tenue d'audiences de la section disciplinaire du Conseil national de l'Ordre des médecins des jours de fête religieuse n'est pas incompatible avec l'article 9 de la CEDH compte tenu des contraintes d'ordre professionnel auxquelles sont soumis les médecins et «faute pour le requérant d'avoir justifié de circonstances particulières démontrant qu'une telle pratique aurait conduit à le priver du droit de manifester sa religion» (CE, 23 févr. 2000, M. Exposito; n°198931; et aussi: CE, 29 janv. 2001, M. Soly Bensabat, n°192128 et n°192129).

[30] La CommissionEDH juge que la sanction infligée pour le refus de soumettre ses enfants à des vaccinations obligatoires ne constitue pas une ingérence dans la liberté de religion: 15 janv. 1998, Boffa c. Saint-Marin.

contraire aux stipulations de l'article 2 du protocole additionnel à la CEDH.

D. *La Liberté de Religion et de Conviction et l'Article 10 de la CEDH*

Dans son arrêt Wingrove c. Royaume-Uni du 25 novembre 1996, la CourEDH a rappelé que les États bénéficient d'une large marge d'appréciation «lorsqu'ils réglementent la liberté d'expression sur des questions susceptibles d'offenser des convictions intimes dans le domaine de la morale et spécialement de la religion» (§58). La Cour de cassation a jugé que ne constituaient pas un abus de la liberté d'expression susceptible d'être sanctionné au titre de l'article 10 de la CEDH, des dessins et leurs légendes publiés dans un journal satirique tournant en dérision l'Église catholique mais n'ayant pas «pour finalité de susciter un état d'esprit de nature à provoquer à la discrimination, la haine ou la violence» à son égard (Cass, 8 mars 2001, n°98-17574), un tract comportant un dessin de religieuse annonçant une manifestation d'information et de prévention du SIDA même s'il pouvait heurter la sensibilité de certains catholiques (Cass, 14 févr. 2006, n°05-81932), une affiche parodiant la Cène de Léonard de Vinci dans la mesure où elle n'avait pas «pour objectif d'outrager les fidèles de confession catholique, ni de les atteindre dans leur considération en raison de leur obédience» (Cass, 14 nov. 2006, n°05-15822), ou enfin, un tract dénonçant un financement public pour la construction d'une mosquée qui, même s'il pouvait choquer la communauté musulmane, était de nature politique et relevait de la simple dérision (Cass, 30 mai 2007, n°06-84328).

Cette jurisprudence privilégiant, presque toujours, la liberté d'expression par rapport à la liberté de religion, contraste avec la jurisprudence européenne qui a souvent effectué des arbitrages inverses.[31] On assiste pourtant à une sorte de renversement des rôles dans de récentes affaires, la CourEDH s'attachant à l'idée, maintes fois rappelée par elle, selon laquelle, «sous réserve du paragraphe 2 de l'article 10», la liberté d'expression «vaut non seulement pour les «informations» ou «idées» accueillies avec faveur ou considérées comme inoffensives ou indifférentes, mais aussi pour celles qui heurtent, choquent ou inquiètent l'État ou

[31] V. CourEDH, 20 sept. 1994, Otto-Preminger-Institut c. Autriche: conventionnalité de l'interdiction de la projection d'un film et de la confiscation de ce film ne respectant pas la liberté religieuse de la majorité de la population catholique; CourEDH, 25 nov. 1996, Wingrove c. Royaume-Uni: conventionnalité du refus d'octroi d'un visa à un film constituant une infraction au droit anglais sur le blasphème.

une fraction quelconque de la population» (CourEDH, 7 déc. 1976, Handyside c. Royaume-Uni). Dans une décision du 5 octobre 1999, la Cour de cassation a rejeté le recours d'une personne, témoin de Jéhovah, qui invoquait une violation de l'article 10 de la CEDH, après avoir été condamnée par la cour d'appel pour diffamation publique envers l'association UNADFI en raison des propos tenus dans son ouvrage intitulé "Sectes Religions et Libertés Publiques" et dont plusieurs passages mettaient en cause les dérives des associations luttant contre l'influence des sectes. Dans un arrêt du 22 décembre 2005, devenu définitif le 22 mars 2006, Paturel c. France, la CourEDH juge au contraire «qu'en exigeant du requérant qu'il prouve la véracité des extraits litigieux, au demeurant sortis du contexte général de l'ouvrage, tout en écartant systématiquement les nombreux documents produits à l'appui de ceux-ci et ce, en lui opposant de manière récurrente une prétendue partialité et une animosité personnelle principalement déduites de sa qualité de membre d'une association qualifiée de secte par la partie civile, les juridictions françaises ont excédé la marge d'appréciation dont elles disposaient. La condamnation du requérant s'analyse donc en une ingérence disproportionnée dans la liberté d'expression de l'intéressé». Par ailleurs, dans une décision du 14 juin 2000 (n° 99-80043), la Cour de cassation a rejeté le pourvoi dont elle était saisie sur le fondement de l'article 10 de la CEDH et dirigé contre l'arrêt de la cour d'appel condamnant le requérant pour complicité de délit de diffamation publique envers la communauté des chrétiens en raison de leur appartenance à cette religion car il avait publié un article invoquant les ferments d'antisémitisme contenus dans une Encyclique papale et qui avait, selon lui, «favorisé la conception et l'accomplissement de l'Holocauste». Dans un arrêt du 31 janvier 2006, devenu définitif le 31 avril 2006, Giniewski c. France, la CourEDH conclut au contraire à la violation de l'article 10 de la CEDH. Selon la CourEDH, «en envisageant les conséquences dommageables d'une doctrine, le texte litigieux participait (...) à la réflexion sur les diverses causes possibles de l'extermination des Juifs en Europe, question relevant incontestablement de l'intérêt général dans une société démocratique» (§51), admettant ainsi que la critique religieuse peut également faire partie du débat public.

Au terme de cette étude, deux constats s'imposent: tout d'abord, on note une grande harmonie entre les jurisprudences française faisant référence à la CEDH et européenne en matière de liberté de religion et de conviction. En effet, d'une part, la jurisprudence française se borne souvent à

reprendre, sans pour autant les citer, des principes fixés à Strasbourg dans des affaires similaires et, d'autre part, la CourEDH, quand elle est saisie d'une affaire mettant en cause la France, constate très rarement une violation de la CEDH. Ensuite, force est de constater que l'immense majorité des décisions des juridictions suprêmes françaises conclut à l'absence de violation de l'article 9 de la CEDH ou de l'article 2 du Protocole additionnel à la CEDH ou des articles offrant une protection indirecte de la liberté de religion ou de conviction. Les juges estiment soit qu'il n'y a pas d'atteinte à la liberté de religion ou de conviction, soit que cette atteinte existe mais qu'elle est justifiée. Le plus souvent, la CEDH sert de référence pour démontrer la légitimité des restrictions apportées à ce droit ou l'illégitimité des restrictions posées à d'autres droits, comme la liberté d'expression, lorsqu'ils ont pour effet d'affecter la liberté religieuse. Il peut paraître paradoxal que les références à la CEDH justifient davantage les restrictions à la liberté de religion et de conviction plus qu'elles ne servent à l'affirmation d'une plus grande liberté. Néanmoins, dans un arrêt du Conseil d'État du 20 mai 1996 (n°170343), relatif au port du foulard par une collégienne, la CEDH est citée dans les visas à côté de textes nationaux à l'appui d'une reconnaissance élargie de la liberté de conscience de l'élève, dans la droite ligne de l'avis de l'Assemblée générale du Conseil d'État du 27 novembre 1989. Ainsi, cet arrêt fait figure d'exception au sein de la jurisprudence étudiée dans le cadre de ce rapport. Il convient cependant de relativiser la portée de cette exception car, comme en témoignent les récents arrêts du Conseil d'État du 5 décembre 2007, depuis l'adoption de la loi du 15 mars 2004, encadrant, en application du principe de laïcité, le port de signes et de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics, cette jurisprudence n'est justement plus d'actualité... La Cour de cassation a même été jusqu'à «neutraliser» l'article 9 de la CEDH. Déjà, dans une décision du 18 décembre 2002 (n°01-00519), la troisième chambre civile avait considéré que, faute de prévision contractuelle, les pratiques inspirées par la religion de plusieurs locataires n'entraient pas dans le champ contractuel du bail et ne pouvaient engendrer d'obligation à la charge de leur bailleur. En l'espèce, la société propriétaire n'était donc pas obligée de poser une serrure mécanique en plus du système électrique pour respecter les pratiques religieuses de ses locataires. Cette solution peut se comprendre tant l'exigence du respect de la pratique religieuse des locataires risquerait d'entraîner des charges excessives à l'égard des bailleurs. En revanche, autrement plus contestable est une autre décision de cette même troisième chambre ayant fait primer les

dispositions d'un règlement de copropriété sur la liberté religieuse, alors que l'on est au contraire en droit d'attendre que la CEDH serve à limiter des restrictions contractuelles apportées aux droits fondamentaux: la Cour de cassation a en effet jugé justifié l'enlèvement d'une construction en végétaux qu'un couple de copropriétaires avait édifié, pour une semaine, sur son balcon à l'occasion de la fête juive des cabanes car cette construction faisait partie des ouvrages prohibés par le règlement et portait atteinte, en étant visible de la rue, à l'harmonie générale de l'immeuble (Cass, 8 juin 2006, n°05-14774).

En définitive, l'analyse de la jurisprudence des juridictions suprêmes françaises relative à la religion et à la conviction faisant référence à la CEDH témoigne certes d'une harmonie globale avec celle du juge européen, mais également d'une relative autonomie vis-à-vis de cette dernière. Cette liberté s'explique non seulement par le caractère multiforme de l'interprétation possible de l'article 9 de la CEDH et des autres articles pouvant avoir une incidence en la matière, comme l'atteste l'évolution de la jurisprudence du Conseil d'État relative au port de signes religieux dans les établissements publics, mais également par la marge d'appréciation laissée par la CourEDH aux États en ce domaine sensible où elle se limite généralement à un contrôle restreint. Or, plus le nombre d'États parties augmentera, plus cette «autonomie» offerte aux États aura sans doute tendance à s'accroître, tant il semble difficile de fixer un standard commun en matière de liberté de religion et de conviction.

AXEL FRHR. VON CAMPENHAUSEN

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN GERMANY

I. Freedom of Opinion, Belief and Conviction

1. *Freedom of Thought, Conscience and Religion*

Religious freedom has played an outstanding role since the Peace of Augsburg of 1555. Through the years of opposition of the Protestant and Roman Catholic churches and the Protestant and Roman Catholic territories and cities there had been freedom to develop one's religious practice earlier than anywhere else. However, it was primarily bound to the imperial estates, and not to the individual. Liberal, religious, conservative and socialist forces reached a compromise in the imperial constitution of 1919. It was proven viable and was thus included in the Basic Law (GG) of 1949. After the fortunate reunification of Germany, it was reaffirmed in 1990. This regime has proved itself in continuity and change over 80 years.

The German Basic Law does not use the concept of religious freedom. For reasons of historical memory, it rather lists individual aspects of religious freedom. These aspects recall the gradual introduction of an all-embracing religious freedom that has taken place since the Reformation. Religious freedom is enshrined in Article 4 of the Basic Law. Further special arrangements for the relationship of the state to religious communities (organisations under public or private law, church taxes, questions of state benefits on the grounds of historical expropriation, protection of Sunday and public holidays, chaplaincies in the army, prisons, hospitals, religious education) are to be found in further provisions (in particular in Article 140 and Article 7 GG). Article 140 adopts the corresponding provisions of the Weimar Constitution of 1919 (WRV) without changing the wording: see Articles 136, 137, 138, 139 and 141 (WRV). The articles of the Weimar Constitution incorporated in Art. 140 GG represent a fully valid constitutional law, not of any lower rank, while they form an organic whole with the Basic Law, according to the

decisions of the Federal Constitutional Court (BVerfGE 19, 206 (219); 42, 312 (332); 53, 366 (400)).

The great importance of the judgements of the Federal Constitutional Court in the 20th century lies on the fact that the court predominantly focused on the individual core of this basic right. Its jurisprudence concluded the transition from the older system of a Christian state with relative freedom, to a modern, secular state with absolute freedom of religion. It thereby overcame the predominance of the institutions, with the jurisprudence consistently directed towards the individual. The institutions stemming from older phases of constitutional law (theological faculties, religious education in state schools etc.) were reinterpreted as institutions of joint activities and concerns of the citizens and their religious groupings. They allowed for the realisation of individual religious rights and were no longer a guarantee of the existence of a state understood as Christian, in whatever sense of the word. The self-determination rights of religious communities were recognised as the expression of corporate religious freedom. Problems of parity were now determined by the equality of individuals; no longer by the equality of religious communities. The church-state law model of a pluralist society was spelled out, on the basis of old constitutional texts by the jurisprudence of the Federal Constitutional Court. Through its jurisprudence, the court enabled a deepening and broadening of church-state law, reflecting modernity and a pluralist equilibrium.

Article 4(1) Basic Law stipulates that "Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable". In paragraph 2, it guarantees the undisturbed practice of religion. The Federal Constitutional Court skirted the difficulty of defining the individual areas of religious freedom, realising Article 4(1) and (2) as a uniform basic law of religious freedom, of which merely freedom of conscience is understood as a separate basic right with an independent claim to be guaranteed. Religious freedom comprises of freedom of thought, conscience and religion. Hence, traditionally there have been no difficulties.

All religions are legally equal. On the other hand, on the question whether a religious community as such is still a religious community or not, philosophical communities are placed on a completely equal footing (Article 140 GG, Article 137(7) WRV).

Here, religious freedom is understood in a broad sense and interpreted extensively, because it is a central form of human dignity. The constitution responds to the worldwide oppression of religions, and in the case

of Germany, especially in the time of National Socialism and the Soviet regime.

> In a state in which human dignity is the supreme value and in which free individual self-determination is recognised to have a community-forming value, freedom of religion grants individuals a legal space free of state interference in which they can follow the way of life corresponding to their belief. To that extent, freedom of religion is more than religious tolerance, i.e. the mere condoning of religious confessions or non-religious beliefs. It thus embraces not just the (inner) freedom to believe or not, but also the outer freedom to manifest, profess and spread faith. That also includes the right of individuals to pattern their whole behaviour on the teachings of their faith and to act according to their inner beliefs [BVerfGE 32, 98 (106)].

The decisive criterion of the case is therefore the specific religious motive and the specific religious effect. It is thus different from other basic laws covering externally definable areas, expressions of life or forms of worship. That is what makes the definition of the general freedom of action so difficult.

This global understanding of freedom of religion corresponds, moreover, to the comprehensive understanding of Christian religion, which has prevailed since the Reformation. That began in 1517, with Martin Luther publishing his 95 Theses in Wittenberg; the first thesis states that the whole life of believers should be filled by Christian faith.

Regarding the often difficult definition of whether a community can be recognised as professing a religion or worldview, the jurisprudence of the Federal Constitutional Court refers primarily, if not exclusively, to the self-understanding of the faithful and the faith communities. The pivotal point of the interpretation of religious freedom is the way the holders of human rights themselves determine what they understand by faith, conscience, confession, religious practice, and what religious duties arise from this understanding. The holders of human rights are permitted to identify themselves as they which – a right which appears essential. Naturally, the concept of religious practice relates dirctly to what is generally understood by religion.

> The mere claim and self-understanding that a community professes a religion and is a religious community cannot justify for it and its members the appeal to the freedom guarantee of Art. 4(1) and (2) GG; rather there has actually to be a religion and religious community in terms of spiritual content and external appearance. In the event of a dispute it is up to the state organs, ultimately the courts, to verify this as the application of a state regulation. (BVerfGE 84, 341).

This situation has become important, as new groupings have claimed to be religious communities, but appeared to the observer more as business organisations. The mere assertion that people are practising a religion does not turn purely commercial or criminal activity into a religion. One cannot cheat and obtain the broad protection of Article 4, for instance, in order to avoid regulations on the protection of creditors under commercial law, or to undermine the demand for starting capital for a trading company [BVerfGE 83, 341 (353)].

Through the "rag-trader" decision [BVerfGE 24, 236 (247 f.)], religious self-understanding became a core concept of church-state law:

> In the assessment of what is to be regarded as the practice of religion and worldview in the individual case, the self-understanding of the religious and non-confessional communities must not be disregarded. Admittedly, the state is neutral in religious matters and has to interpret constitutional terms on neutral, general grounds, and not on those bound to the particular belief or philosophy. Where, however, in a pluralist society the legal order assumes the existence of the religious or philosophical self-understanding as it does freedom of worship, the state would violate the autonomy granted to the churches and the communities of faith and conviction, and their independence in their own sphere, if it did not consider their own self-understanding when interpreting the practice of religion resulting from a specific belief or worldview. [BVerfGE 24, 236 (247 f.)].

It is of the nature of the case that that is age-old *(What does that mean? Maybe we could instead say:* It is the nature of the case which makes it old-age. *But I am missing the point).* History shows that religious freedom becomes a farce if people outside the faith, or opponents of it, among the state authorities, take upon themselves the power of defining the confession of faith of a religious community and declare it to be binding.

Religious freedom naturally applies to all those who set foot on German soil. Questions of nationality and language knowledge are irrelevant here. The broad area of protection of religious freedom was adopted in the more recent Article 9 of the European Human Rights Convention of 1950, as well as in the wording of Article 18 of the Universal Declaration of Human Rights of 1948. It is specifically stated that religious freedom covers the freedom to change one's "religion or belief". That point is indeed problematic for Muslims, in particular, since for them, religious freedom does not presuppose the right of apostasy. This difference is evident, in particular, in the Islamic Declaration of Human Rights (Article 10, Cairo Declaration of Human Rights in Islam of 5.8.1990).

When there was a state religion, or when there existed privileges for the Christian religion, the negative component of religious freedom was of particular importance: it guaranteed the right *not* to follow the others, *not* to baptize infants, *not* to attend a worship, etc. For generations that has been undisputed in Germany. Following that, the positive aspect of religious freedom comes out more strongly. It enables the citizens to stand up for their beliefs, to meet with fellow believers, to found common schools, to publish houses, kindergartens, hospitals, etc., and to propagate them in the public square.

Practising religious freedom is, moreover, bound to the *ordre public*. Burning widows, ritual killings, polygamy are not permitted, even on the pretext of being religious practices. The extensive case law of the Federal Constitutional Court has led to a far-reaching consensus in the literature and doctrine. Only recently have there been controversial questions about the rise of Islam, in particular, which test the borders of religious freedom in private life, in public and in state institutions.

Article 4 contains no legal reservation about the rights guaranteed in paragraphs 1 and 2. Their limits are the limits of other basic laws (general freedom of action, Article 2(1), freedom of opinion, Article 5(2), freedom of assembly, Article 8(2) GG are not transferable to Article 4 GG (BVerfGE 32, 98 (107); 52, 223 (246))). Those basic rights apply without reservation, while the Federal Constitutional Court only allows restrictions to them, which apply for the benefit of other rights with constitutional status.

The principles of limitation in the "faith-healer" case and in the Eid decision [BVerfGE 32, 98 (108); 33, 23 (29 f.)] were developed on the model of the "Mephisto decision" on artistic freedom [BVerfGE 30, 173 (193)]. The guarantee of religious freedom is integrated into the unity of Basic Law value orders. Conflicts from Article 4 GG are therefore supposed to be resolved through a balance of religious freedom, basic rights which conflict with it, and other constitutional goods, in such a way that they can develop a reciprocal relationship in the most ideal way

Since freedom of religion involves no reservation for the simple legislator it may not be qualified by the general legal order, nor by an indeterminate clause about a threat to the continuance of the goods needed for state community, without this clause taking a constitutional law approach and without adequate constitutional security. Rather, in the framework of the guarantee of freedom of religion, the possible conflict must be solved according to the fundamental value order and considering the unity of this basic value system. [BVerfGE 32, 98 (108)].

This judgement also created problems, in that limitations derived from simple laws suddenly called for long-winded justifications, in order to turn them into constitutional goods. This was the case in laws on road transport, compulsory schooling, compulsory vaccination etc. There is a danger here that the constitutional interpretation of the Federal Constitutional Court might replace the legislator, who had taken the decision in keeping with its competence. This is an open problem of German constitutional law.

A part of the teaching, therefore, recommends having recourse to the legal reservation in Art. 140 GG/Art. 136(1) WRV: "Civil and citizens' rights and duties shall be neither defined nor restricted by the practice of freedom of religion."

There are practically no problematic cases in the core area of religious education and profession of faith. The difficulty arises in borderline areas of religious practice. Unlike the German Basic Law, Article 9 ECHR contains an express reservation in favour of restrictions, "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 the protection of the rights and freedoms of others".

This barrier provision goes further than the possible restrictions inherent in the constitution under German law. The fact that the Basic Law thereby protects religious freedom more strongly than the ECHR, may have contributed to Article 9 ECHR, having the status of a federal law in Germany. However, unlike in other states, it has not acquired any great significance, due to the fact that the German legal protection is more far-reaching.

That is particularly shown in the recognition of the church right of self-determination, which is beyond dispute in Germany, although only developing gradually if Article 9 ECHR is interpreted in a reasonable sense.

The relationship of religious freedom with other basic rights is presented relatively simply in Germany. If religion is in play, religious freedom takes precedence, being a more specific basic law. In the German understanding, the religious way of life is only protected by other basic rights, thus through freedom of opinion, assembly, association, trade and profession and property. Accordingly, their limits do not apply with respect to religious practice.

2. *Private and Family Life*

The individual and collective perception of religious freedom includes the fact that family life and education are organised according to personal

conviction. A limit is found through compulsory schooling. In recent times, the right of the state to subject children to compulsory schooling has been contested.

> Freedom of religion guaranteed in Art. 4(1) GG also covers the right to live and act according to one's own beliefs (cf. BVerfGE 32, 98, 106; 93, 1, 15). In conjunction with Art. 6(2)1 GG, which guarantees for parents the right to care for and bring up their children, Art. 4(1) GG grants parents the right to educate their children in a religious and philosophical sense. Accordingly, it is up to the parents to teach their children beliefs in questions of faith and conviction (cf. BVerfGE 41, 29, 44, 47 f.) and not to impart to them views they do not share (cf. BVerfGE 93, 1, 17).
> aa) Even if this basic right is not subject to a statutory reservation, it is accessible to restrictions arising from the constitution itself. These include the educational responsibility granted to the state in Art. 7(1) GG (cf. BVerfGE 34, 165, 181; 93, 1, 21). Consequently, the parental right of education is restricted through the general compulsory schooling decreed to realise this state responsibility in a fundamentally admissible way (cf. Decision of the 2nd Chamber of the First Bench of the Federal Constitutional Court of 21.4.1989 – 1 BvR 235/89 – juris). In the individual case, conflicts between the parental right to raise their children and the educational responsibility of the state are to be balanced out according to the principles of practical concordance (cf. BVerfGE 93, 1, 21). Bundesverfassungsgericht, Decision of 31.5.2006 – 2 BvR 1693/04 – (http://www.bverfg.de/entscheidungen/rk20060531_2bvr169304.html); Zeitschrift für evangelisches Kirchenrecht 52 (2007) S. 100 ff.

3. *Right to Education, Training and Instruction*

In Germany, schools are mainly public schools. In most parts of Germany they are not denominational, but open to traditional Christian values. The case law of the Federal Constitutional Court expressly confirms the right of the state to provide a Christian-type cultural heritage in schools for students of all faiths. This material is not taught in a missionary sense but as an element of the German culture: even someone who is not a believer must know something about Boniface or Luther; besides, Bible stories are part of general knowledge, since one cannot visit a classical picture gallery without knowing those stories.

Denominational schools are admissible and in some cases foreseen according to state laws. Here the whole of the syllabus is taught by teachers with a background in the respective confessional beliefs. All Germans have the right to found private, non-state schools. That is laid down in

Article 7(4) and (5). The preconditions are the relevant professional qualifications and financial security, with the state providing much of the funds needed for the schools. A particular difficulty here is finding the sufficient starting capital.

The state prohibits exclusive schools for the children of rich parents and forbids the establishment of schools which do not guarantee an orderly payment of teachers. In the case of elementary schools, private schools are only allowed when the teaching authority recognises a special educational interest. On the application of those entitled to raise the children, this may be applied for as a denominational community school, a confessing school, or a school with a particular philosophy, if an appropriate school of that belief does no already exist.

The fact that the negative and the positive aspect of religious freedom are two sides of the same coin is particularly shown inside schools, where negative religious freedom can be the occasion to combat certain Christian traditions, while other students and parents precisely want to retain them. In significant decisions the Federal Constitutional Court stated:

1. Art. 7 GG leaves it to the democratic state parliamentary legislator to determine the religious or philosophical character of the public school under consideration of the basic law from Art. 4 GG.
2. The basic law from Art. 4(1) and (2) GG includes the right of parents to provide their child with the religious or philosophical education they consider right.
3. It is the task of the democratic legislator to resolve the tension unavoidable in the school system between 'negative' and 'positive' religious freedom on the principle of 'concordance' between the different constitutionally protected legal goods.
4. A school form that excludes the philosophical-religious coercions as far as at all possible and gives room for an objective engagement with all religious and philosophical views – albeit from a Christian point of view – thereby respecting the requirement of tolerance, will not lead parents and children who reject a religious education into a constitutionally unacceptable conflict of religion and conscience (BVerfGE 41, 29).

In the case of a crucifix in the classroom of the public school the Federal Constitutional Court ruled: 'Hanging up a cross or crucifix in classrooms of a compulsory state school that is not a confessional school is an infringement of Art. 4(1) GG'. (BVerfGE 93, 1) That applies as far as school legislation does not provide for exemptions.

By contrast, it found that the basic right of religious freedom of the teacher protects her right to wear a headscarf.

1. In the state of Baden-Württemberg, a prohibition for teachers to wear a headscarf at school and in class is not sufficiently well-founded in legal terms.
2. The societal change linked to increasing religious pluralism may be occasion for the legislator to redefine the admissible extent of religious references at school (BVerfGE 108, 282).

This is in contrast to traditional jurisprudence. There has usually just been a clear-cut ban on teachers advertising for a certain faith through their garb: outside school the teachers can do what they like. Within a school they have to respect religious neutrality as is required for state institutions. The decisions on the crucifix and on the headscarf are both disputed.

New problems arise from the fact that certain Christian communities, as well as Muslims, in particular, are offended by coeducation, sport lessons, swimming classes and hiking excursions. Granting exceptions in the individual case or in general has so far been a sufficient solution, enabling the activity to continue: the child in question would be exempted from religious education, swimming classes or an excursion. The same applies for sexual education and for biology classes involving how the world was created.

Article 7(3) GG contains an express stipulation on religious education: public schooling in Germany also provides for education, in which religion is taught according to the principles of the religious community in question. That presupposes a trusting cooperation between the religious authority and the ministry of education. In the case of Protestant and Catholic Christians, who used to make up the whole population, this creates no problems. In more recent times, however, communities of conviction have entered into competition with them and also insisted on having their own school time. Currently Muslims in Germany have a difficulty in organising themselves, and as a result, Muslim associations cannot point to an impressive number of members. Hence a basic provisional Muslim teaching has been introduced that does not correspond to the principles of religious education.

What is crucial, is that the right to enjoy religious education in accordance with one's own beliefs is not bound to the corporate status of the religious communities. All public schools with certain exceptions are obliged to establish and offer religious education. This is imparted regardless of the state school competences, according to the principles of the respective religious community. The ministries must agree on this with the religious authorities. The parents, on the other hand, have the right to

determine the child's attendance (Article 7(2) GG). As soon as they reach religious maturity, students may decide themselves whether they desire to attend or not. A state-school teacher may refuse to teach religious education, without stating any grounds. In that sense, religious freedom also applies to the teacher.

4. *Freedom of Opinion and Expression*

Religious freedom includes the freedom to confess the religion alone or together with others, in public or in private, through worship, teaching, practising customs and rites. A decision of the Federal Constitutional Court listed such points like a text book, without any claim to completeness:

> 'Religious practice does not just cover cultic actions and practices and the observance of religious customs such as worship, church collections, prayers, receiving the sacraments, procession, showing church flags, and ringing bells. It also extends to religious education, private religious and atheistic celebrations and expressions of the way of life connected to the religion or beliefs'. [BVerfGE 24, 236 (246)]

Naturally, the right to religious freedom also involves making use of one's beliefs in the public domain. A famous decision regarded a policeman who advertised his religious community through house visits. Indeed, he was allowed to engage in any missionary activity when off duty; during working hours, however, that was, of course, prohibited. There is no questioning in Germany and it is not legally problematic.

II. Freedom of Assembly and Association

Religious freedom includes the right for assembly and for association. The other basic rights of association and assembly are then sidelined by the more specific law of Article 4: Religious freedom, under Art. 4(1) and (2) GG, also includes freedom of religious association, as derived from this provision in connection with the relevant church articles of the Weimar constitution included in Art. 140 GG.

> Freedom of religious association guarantees the freedom to form and organise a religious society. That does not constitute a claim to any specific legal form, for example an association with legal capacity or any other form of legal entity; what it guarantees is the possibility of some kind of legal existence including participation in general legal transactions (BVerfGE 83, 341).

Freedom of assembly and association has recently taken on a problematic overtone when the Federal Constitutional Court repeatedly pointed out

that the protection of the Basic Law did not allow self-appointed religious leaders possibly with state subsidies speaking in favour of alleged coreligionists, who for their part had not declared their affiliation through a legally undisputed act (baptism or circumcision). This problem arises for Muslims, whose religion does not involve a church or a religious institution. They recognise no representative and no contribution lists. For this reason alone it has hitherto been inconceivable to grant them corporate rights with a right to collect taxes: there is the problem of whom to collect taxes from, and also which authority will be the one to decide about the collected taxes.

The question of becoming a corporation under public law is not part of religious freedom. The corporation status permits religious communities in Germany to operate under public law, which results in the facilitation of matters of practical administration. Several dozen religious communities have taken this step. By way of precondition, they have to provide a guarantee of duration through their membership numbers and their constitution (Article 140 GG/Article 137(5) WRV). The Muslims have always considered this requirement as a barrier, since they cannot present any lists of members, while their fellow believers cannot be induced to sign such lists.

III. Protection of Property of Persons and Institutions

Church property is traditionally exposed to particular dangers. Church history has been a history of secularisation and plundering of church property for over 1000 years. The last major waves of secularisation took place in Germany in 1803. They led to the compensatory payments of the state. On the grounds of Article 140 GG, 138(1) WRV, such payments are to be abolished. A federal law is to be passed to that effect. As this has not been the case so far, the payments continue to be made, on the grounds of historical expropriation.

Such historical payments have been placed on a unified and simplified basis in numerous agreements between churches and the state at the regional (Länder) level. Moreover, all religious communities enjoy the protection of Article 14 GG (property). No special problems have arisen in the last 50 years.

IV. Procedural Rights of Persons and Institutions

As holders of basic rights, all churches and religious communities are able to appeal for recognition of their rights in court. "Should any per-

son's rights be violated by public authority, he/she may have recourse to the courts" (Article 19(4) GG). That, of course, also applies to religious rights and to religious communities themselves. The most important and popular instrument for this in Germany is appealing to the Federal Constitutional Court. Under Article 93(1)4a, anyone can invoke the constitution claiming that his/her rights have been violated by the public authorities. If a constitutional appeal is raised with this claim, the court automatically checks whether there has not been a violation of other provisions in favour of religious communities that are not directly the subject of religious freedom. That includes, in particular, churches' right of self-determination. This applies to questions related to the granting of the corporate status, church taxes, protection from secularisation, Sunday observance etc.

KONSTANTINOS G. PAPAGEORGIOU

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN GREECE

I. The Legislative Reform of Law No. 3467/2006 (Article 27)

About one year ago, Law No. 3467/21-6-2006 on the "*Selection of primary and secondary education officers, regulation of administrative and educational issues and other provisions*" (Government Gazette[1] A 128) was passed in Greece. Although irrelevant in its entirety to religious issues, it does include the regulation of Article 27, which can be considered "revolutionary" for the applicable ecclesiastical laws of the Greek State. However, all those who are not familiar with the modern Greek ecclesiastical reality may be surprised by the fact that such a common regulation for any other (secular) state was enacted with a special legislative provision. This very interesting Article 27 of Law No. 3467/2006 stipulates the following:

1. The permit or opinion of the local ecclesiastical authorities of the Greek Orthodox Church is not required for the establishment, construction or operation of a temple or church of any religion or doctrine, with the exception of the Greek Orthodox Church. Any other provision stating otherwise shall be repealed [Article 1 of Compulsory Law No. 1363/1938 (GG, A 305), as amended by Article 1 of Compulsory Law No. 1672/1939 (GG, A 123), Article 41 of Compulsory Law No. 1369/1938 (GG, A 317)].
2. The application for granting permit for the establishment, construction or operation of a temple or church of any religion or doctrine, with exception of the Greek Orthodox Church, shall be directly submitted to the Ministry of National Education and Religious Affairs and not to the local ecclesiastical authorities. Any other provision stating otherwise shall be repealed [Article 1 of the Royal Decree 20.5/2.6.1939 (GG, A 220)].

[1] **ABBREVIATIONS**: GG: "Government Gazette" – C.: Constitution – L.: Law – C.L.: Compulsory Law – CoS: Council of State – R.D.: Royal Decree – S.C.: Supreme Court– ECHR: European Convention on Human Rights – ECtHR: European Court of Human Rights.

Upon application of the above mentioned regulation, Article 1 of the C.L. No. 1363/1938 was repealed (as amended and in force) which stipulated the issue of "permit" by the local ecclesiastical authorities of the Greek Orthodox Church (i.e. by the competent local Metropolitan!) so that non-orthodox citizens (heterodox or of different religion) would be able to establish, construct or put into operation a temple or church of their own religion or doctrine. Based on the new regulation, the application for granting permit for the establishment, construction or operation of a temple or church of any religion or doctrine (with the exception of Orthodox churches), shall be directly submitted to the Ministry of National Education and Religious Affairs (no "permit" of any kind shall be required by the Orthodox Metropolitan).

As discussed below, this repealed regulation was repeatedly criticized by the entire scientific community as violating directly the constitutional provisions safeguarding the right of freedom of worship.[2] This right is the second and perhaps the most important manifestation of the right of religious freedom, as generally accepted (the freedom of religious conscience being the primary manifestation of this right). The freedom of worship is safeguarded by Article 13, par. 2 of the Constitution, stating that "*Every known religion is free and its related worship is practised unhindered under the protection of the law. The practice of the worship must not pose a threat to public order or morals. Proselytism is prohibited...*"

If worship involves ritual actions, with which faith and religious emotions are expressed based on the special ritual rules of each religious community, then the freedom of worship is the individual right of the unhindered practice of worship and ritual actions of the relevant religion.

The practice of worship is free[3] under the following two main requirements set by the Greek Constitution:

(a) Worship is exercised by people representing a "known" religion, a religion with no secret doctrine, worship, organisation and objectives.

[2] For more information see C. PAPASTATHIS *Freedom of Worship and Dominant Religion and Religious Freedom and Dominant Religion*, (Athens-Thessaloniki, 2000), 25.

[3] Note that the protection of the right of religious freedom in Greece is relevant mainly because Article 3 of the Constitution stipulates the existence of a "dominant" religion (i.e. Eastern Orthodox Church). According to science and case law (CoS 3533/1986, 3356/1995, 2176/1998), "dominant" religion is the religion of the majority of the Greek people. However, this characteristic has been linked by the common legislator with certain privileged equitable effects which lead to an unequal treatment of other religions.

(b) The worship of the known religion must not violate public order or morals, i.e. the fundamental state, social, moral and economic principles and views prevailing in Greece at that time.[4] Whether the exercise of worship violates public order and morals, shall be decided at all times by the court, while such decision should no be based on the personal beliefs of the judges but on objective criteria and the opinion of the majority of the Greek people.

(c) The followers of every religion must not be involved in proselytism.[5]

As far as the religious establishments are concerned, there are two possible places of worship based on the Greek legal order[6]: the *temple* (which includes mosque, synagogues, etc.) and in the case of the Protestant religion mainly, the *church*. The difference between these two types lies on the size and the capacity of the establishments.

In Greece, the construction and operation of temples and churches of other religions[7] is possible provided an administrative permit is issued by the Ministry of National Education and Religious Affairs, as well as based on the provisions of Article 1 of the C.L. No. 1363/1938 "*on the protection of the provisions of Articles 1 and 2 of the Constitution*"(GG, A 305/3.9.1938) [as amended by Article 1 of the C.L. No. 1672/1939 "*on the amendment of the C.L. No. 1363/1938 etc.*" (GG, A 123/29-3-1939)] and Article 1, par. 1 and 3 of the R.D. 20.5/2-6-1939 "*on the application of the provisions of the C.L. No. 1672/1939*".

Before the enactment of the above mentioned Article 27 of Law No. 3467/2006, one of the requirements for the construction and the operation of any type of temple of any religion was the issue of "permit" by the competent local Orthodox Metropolitan, followed by the "approval" of

[4] C. PAPASTATHIS, *Freedom of Worship and Dominant Religion*, above, n. 2, p. 25.

[5] This requirement was not considered incompatible with the ECHR according to the judgment of the ECHR on *Kokkinanis v. Greece* case (Series A, 260-A/25.5.1993). See K. PAPAGEORGIOU, 'Freedom of Religion: A case of discrepancy between the Greek and the European Legal Order, before the European Court of Human Rights', *Jurisdiction in Europe. Towards a Common Legal Method*, (Munster, 1997).

[6] In addition, climatic conditions in Greece favour and facilitate the frequent exercise of worship or religious congregations outdoors.

[7] It is noted that the regime regarding the establishment, construction and operation of temples of the Greek Church is regulated by a special framework of provisions – compared to non-orthodox temples – consisting of the regulations of L. 590/1977 "*on the Constitutional Charter of the Greek Church*" as well as by the special Regulations issued under the same law.

the Ministry of National Education and Religious Affairs. This paradoxical requirement may be explained by the fact that such permit was prescribed by the laws enacted during periods of political unrest in Greece, i.e. during the Junta on 4th August and the period of occupation. In addition, the same provisions stipulated the intervention of the police authorities in the case of violation of the above mentioned provisions, the punishment of offenders by imprisonment, and the demolition of the illegally built temple, upon order of the competent Orthodox Metropolitan!

II. The Greek Case Law in Relation to the Repealed Provision

Based on previous case law of the Greek courts the regulations of the above mentioned laws during the period 1938-1941 were not considered a violation of the constitutional right of freedom of worship.[8] And that was not all. A series of court decisions extended unreasonably the above mentioned requirements for the establishment and the operation of temples and churches. One such case was the decision of CoS No. 721/1969, accepting that the above mentioned permit by the local Orthodox Archpriest is necessary not only for temples but also for churches, as well as religious halls. However, the same court (CoS No. 721/1969, Plenary Session of CoS No. 1444/1991, CoS No. 1465/1992, CoS No. 1842/1992) decided that the permit of the local Orthodox Archpriest for temples and churches *is not an executive administrative act but simply a preparatory/ confirmation act (and thus not binding on the minister)*. The latter is the competent body to decide at all times on the establishment etc. of temples and churches, even though the minister shall have to justify his/her decision if the opinion of the Metropolitan is contrary.

The case law of the Supreme Court is equally conservative. According to the decision of the S.C. No. 421/1991, punishment by imprisonment for the offence of operating a church without permit by the Orthodox Metropolitan, pursuant to the C.L. No. 1363/1938, is not contrary to Articles 11 and 13 of the Constitution of 1975, the ECHR and the Additional Protocol to the ECHR signed in Paris.[9] The judgments of the S.C. No. 1204/1993 followed the same interpretation basis,

[8] Vindicating in this respect all those who supported that the Greek courts are extremely conservative, mainly as far as higher levels of justice are concerned.

[9] However, the opinions expressed by the court's minority were interesting and promising, based on which the above mentioned provisions of C.L. No. 1363/1938 and C.L. No. 1672/1939 violated Articles 13, par. 2 and 25 of the Constitution.

– according to which the above mentioned provisions conform with the ECHR and in particular with Article 9, par. 1 thereof, which recognises religious freedom, and par. 2 of the same Article, which stipulates that such right is subject to the limitations prescribed by the law which are necessary in a democratic society or ensure the protection of public safety, public order, health and morals, or the protection of the rights and freedoms of others, and

– the Order of the Misdemeanour Court of Kavala No. 74/1994.

Thus, based on the relevant legislation, as supplemented by the case law of the CoS, on the establishment of temples of different religions and Christian doctrines, the following requirements should be met, with the exception of the Church of the dominant religion:

1. Application of at least 50 neighbouring families, submitted to the local Orthodox Metropolitan,
2. There is real "need" for the establishment of a temple, i.e. the nearest temple of the religion in question should be at such distance that it cannot be attended by the applicants,
3. Certificate verifying the authenticity of their signatures and the truth of the above mentioned information, issued by police authorities,
4. Permit granted by the Metropolitan, and
5. Approval by the Minister.

Requirements for the establishment of churches:

1. Application, without minimum number of people or families, submitted by their chief minister to the ministry,
2. Certificate verifying the authenticity of their signatures by the mayor or the president of the community,
3. There is real need for the establishment of the church since there is no other place of worship for the religion in question in that area,
4. Opinion of the local Orthodox Metropolitan, and
5. Permit by the Minister.

As far as the Metropolitan's permit is concerned (which the CoS, as mentioned above, replaced with a "simple non-binding opinion"), it is needless to point out that such a permit was very rarely granted due to unreal or completely discriminatory reasons in most cases (there was once a quite humorous case, where the permit was not granted due to phobia and religious fanaticism which characterise the majority of Orthodox Metro-

politans[10]). One such example is a case in which German women, married to Greek men, permanently established in Thessaloniki, Evangelical in religion, requested to be granted permit for the establishment of a church in which the rituals would take place in the German language. Of course, the Metropolitan of Thessaloniki did not grant the permit, stating that based on this information, among other things, the applicants *"did not have a priest but a female pastor"*, which is contrary to the Greek public order and morals! In addition, the ministry rejected the application on the grounds that there were other Evangelical churches in the same area. Fortunately, the CoS with its decision No. 3590/1987 accepted their appeal and annulled the ministerial decision.

Following a completely opposing interpretation basis, compared to previous case law, the entire scientific community criticised the repealed provision as unconstitutional. According to *Ch. Papastathis*[11], the above mentioned provisions that required the permit-opinion of an orthodox Metropolitan were, in fact, repealed. Nevertheless, it is impermissible for the Orthodox Church to exercise power, in any form and extent, on other religions, known or unknown, since the fact that Orthodoxy is the national religion in Greece or that 97% of the Greek people are Orthodox followers does not mean that the Orthodox Church has the right to exercise power on other religions, thus violating the right of religious freedom. *S. Troianos* and *G. Poulis* argue[12] that the above mentioned legislative framework had created a multitude of problems and had to be replaced. The same views were shared by *K. Kyriazopoulos*.[13]

III. The Relevant Case Law of the ECtHR

The anachronistic framework of the above mentioned provisions (C.L. No. 1363/1938 – C.L. No. 1672/1939 – R.D. on 20.5/2-6-1939) was three times the subject of proceedings in the European Court of Human Rights (ECtHR). Those were the cases of *Manousakis and others* v. *Greece*, *Pentidis and others* v. *Greece* and *Tsavachidis* v. *Greece*.

[10] Based on the above mentioned regulations, these Metropolitans decided on the religious and worship requests of non-orthodox movements pursuant to the law of their own Orthodox Church!

[11] C. Papastathis, *Freedom of Worship and Dominant Religion*, n. 1 above, p. 48ff.

[12] S. Troianos – G. Poulis, *Ecclesiastical Law*, (Athens, 2nd Ed., 2003), p. 48ff.

[13] K. Kyriazopoulos, 'Does the Applicable Greek Law Governing the Establishment or Operation of Temples or Churches of Heterodox Movements Conform with the ECHR? – An Approach to *Manoussakis* v. *Greece* Case", Yperaspisis 1997, p. 939ff.

In the case of *Manousakis and others* v. *Greece*[14], which can be considered the most important of the three, the Court convicted Greece for the violation of Articles 11 and 13 of the Constitution, as well as of Article 9 of the ECHR. According to the grounds of such decision by the ECtHR, Article 9 of the ECHR does not exclude the granting of an administrative permit for the operation of temples or other places of worship, provided certain standard requirements are met, which do not involve a control of the "lawfulness" of such religious beliefs. According to the wording of the decision on *Manousakis* case, it seems that the only preventive controls, that can be performed by the minister, are whether certain strictly standard requirements are met, such as if there is a certain number of signatures, if the place of residence of the applicants is known and if the signatures have been verified by police authorities. On the contrary, the ECtHR did not leave much room for the compliance of the applicable Greek legislative framework with the ECHR, stating that the C.L. No. 1363/1938 and the R.D. on 20-5/2-6-1939 on temples and churches that do not belong to the Greek Orthodox Church allow far-reaching interference by the political, administrative and ecclesiastical authorities with the exercise of religious freedom.

Finally, in the other two cases, Greece had granted the permit before the hearing of the case (*Pentidis*[15]) and agreed on an amicable settlement (*Tsavachidis*[16]) under the threat of being convicted for violation of the ECHR Article.

IV. Greek court case law following the cases of the ECtHR (*Manousakis, Pentidis and Tsavachidis* v. *Greece*)

The conviction of Greece in the aforementioned *Manousakis* case and the amicable closure of the other two cases requested by the Greek State (*Pentidis, Tsavachidis*) were followed by important court decisions such as:

1. The decision of the Plenary Session of the Supreme Court No. 20/2001, based on the majority of which the applicable framework for granting permit for the establishment of a church, as provided for by the above mentioned provisions, is not contrary to the Constitution and the ECHR, which stipulate that:

[14] On 26-9-1996.

[15] On 19-3-1997.

[16] On 21-1-1999.

(a) The practice of worship is subject to the limitations imposed by public order and morals as well as by the prohibition of proselytism.

(b) A permit issued by the Ministry of National Education and Religious Affairs is required for the construction or operation of a temple of any religion or church. Such permit is granted at the discretion of the minister and may be refused if the minister believes that the construction or operation of the temple or church does not serve a real need of the religious community comprising the applicants.

(c) The applicable framework in the Greek legal order regarding the granting of permits for the establishment of a church aims to protect public order, and conforms, in principle, with Article 13, par. 1-2 of the Constitution and Article 9, par. 1-2 of the ECHR, to the extent that such framework is limited to the control of the requirements laid down in Articles 13, par. 2 of the Constitution and 9, par. 2 of the ECHR (known religion, respect of public order or morals, unfair practices of proselytism), as well as of standard requirements laid down by the provisions of the C.L. No. 1363/1938 and the executive decree for granting permits pursuant to the decision dated 29.9.1996 of the ECtHR on *Manousakis* v. *Greece* case.

According to the same decision of the Plenary Session of the Supreme Court No. 20/2001, the legal requirement of prior administrative permit is not unconstitutional, as long as its aim is to check whether certain criteria are met and such permit is granted at all times, unless the exceptions set forth in this provision apply. That is, when contrary to the law:

– The religious belief is secret and not known, or
– The worship poses a threat to public order or morals, or
– The aim of this religion is proselytism.

These requirements, according to the majority opinion in the Supreme Court decision No. 20/2001, are not contrary to Article 9 of the ECHR, provided that the granting of the permit is prescribed by the law. These requirements are also necessary in a democratic society in order to protect public order, while they do not constitute a measure similar to the intended lawful purpose.

The minority opinion in this decision was held by the President of the Supreme Court and another judge who believed that Article 13, par. 2, section (a) of the Constitution (stating that any known religion is free and that its related worship is practised unhindered under the protection of the law), and that Article 9, par. 1 of the ECHR stipulate the free and unhindered worship of a known religion and do not allow the prior issue of an administrative permit (apart from a simple urban planning or building permit) for the establishment or operation of places of worship, *since in this way the worship of a religion is dependant on a prior permit and is hindered in a preventive way*. Based on the minority opinion, the above mentioned constitutional provision and the ECHR allow all limitations imposed for reasons of public order and morals – as well as for reasons of "public health" and "the protection of rights and freedoms of others" according to the ECHR. However both the Constitution, using the expression "it must not pose a threat", and the ECHR, stating that a limitation is acceptable "as long as it is necessary in a democratic society", exclude any other preventive control that "would not be necessary in a democratic society" (Article 9, par. 2 of the ECHR), as already accepted by the ECtHR in the *Manousakis* case. And that is because the preventive control usually results in unreasonable prohibition or improper refusal of permits on vague grounds. In addition, the annulment of the refusal by the court is not the solution to the problem, since it involves long and costly procedures, which discourage the interested parties and may entail the prohibition of freedom of worship for a long period of time. According to the minority opinion, the above mentioned provisions of the C.L. No. 1363/1938 etc., are, on the one hand, unconstitutional and, on the other hand, contrary to Article 9 of the ECHR, and thus null and void (Articles 111 par. 1, 93 par. 4 and 28 par. 1 of the Constitution).

2. The Report of the Public Prosecutor of the Misdemeanour Court of Kavala No. 212/2001, based on which the offence for the operation of a church without permit, as laid down in the provisions of Article 1, section (b), of the C.L. No. 1363/1938, is contrary to Article 9 of the ECHR, something that was pointed out in the hearing of "*Manousakis* v. *Greece*" case in the ECtHR.

3. The decision of the Court of Appeals of Crete No. 297/2002 which annulled the judgment of conviction for the operation of a church without prior permit issued by the local ecclesiastical authorities and the Ministry of National Education and Religious Affairs, on the grounds that the conviction constitutes violation of the right of religious freedom pursuant to the decision of the European Court of Human Rights in the case of *Manousakis* v. *Greece* and Article 9 of the ECHR.

4. The decision of the CoS No. 1411/2003 (Sect. D) which, due to the importance of the issues raised and the various opinions expressed, referred the issue to the seven-member committee of the Court.

In particular, the following opinions were expressed in relation to the constitutionality of the regime of granting prior permit for the operation of a church:

a) This regime is not contrary to the Constitution and the ECHR, in the sense that the Administrative authorities are obliged to grant the permit, provided that it is ascertained that the doctrine in question is a "known" religion pursuant to the Constitution, that it is not contrary to public order and morals, and that a real need of the religious community is served.

b) The practice of worship of any known religion is unhindered and subject to the limitations imposed by public order and morals. Thus, the prior issue of an administrative permit for the establishment and operation of a church conforms with Article 13 of the Constitution to the extent that the Administrative authorities are obliged to grant the permit if the above mentioned requirements are met, i.e. the religion in question is a known religion that does not pose a threat to public order or morals, and it does not involve practices of proselytism based on objective proof. Consequently, as far as the approval by the Minister of National Education and Religious Affairs is concerned, i.e. that there are "essential reasons" that make the establishment of the church imperative, the provision of par. 3, Article 1 of the R.D. on 20.5/2.6.1939 limits unjustifiably the freedom of worship, since it introduces an additional requirement which is not prescribed by Article 13, par. 2 of the Constitution, recognising moreover the right of the competent Minister to refuse, at his/her discretion, to grant the permit, if s/he believes that the establishment of the church does not fulfil a real need of the applicants, either due to their limited number, or due to the fact that they can exercise their worship duties elsewhere. In view of the above, the aforementioned regulation of the R.D. on 20.5/2.6.1939 is contrary to Article 13 of the Constitution and Article 9 of the ECHR and, thus considered invalid.

Conclusion

The decision of the ECtHR on the *Manousakis* case questioned to a great extent the special Greek regime, regulating the issue of administrative permits for the establishment and operation of temples and churches of heterodox movements. According to the ECtHR, this regime provides for an extensive preventive control by administrative and orthodox ecclesiastical authorities, which is contrary to Article 9, par. 2 of the ECHR, since it limits significantly the freedom of worship. The ECtHR decided

that such regime conforms with the ECHR, as long as it aims to provide for a standard and objective administrative control of whether the minimum requirements for granting the above mentioned permits are met.

However, the Greek courts, with their above mentioned decisions, following the decision of the ECtHR on the *Manousakis* case, seemed reluctant to accept that the legal framework set forth in the provisions of the C.L. No. 1363/1938, C.L. No. 1672/1939 and R.D. on 20.5/2-6-1939[17] is unconstitutional and contrary to the ECHR, with the exception of the minority members of the court and their opinions, which can be considered promising.

Fortunately, this reluctance of the Greek case law has been criticized by a big part of the scientific community, which believes that the administrative authorities should take repressive measures only if the operation of a temple or church violates the Greek legal order. What is also fortunate, is that there is unanimous (?) agreement on one obvious thing: that the orthodox ecclesiastical authorities should not be responsible for the preventive or repressive control regarding the establishment and operation of a temple or church. The result of this unanimous agreement was the enactment of Article 27 of L. 3467/2006 which, however, must be followed by "braver" legislative initiatives of the Greek State.

[17] For the general problems arising out of this reluctance of the Greek courts and the judicial authorities to harmonise with the European Court of Human Rights, see. K. CHRYSOGONOS, *The Incorporation of the ECHR into the Domestic Legal Order. The Difficulties of Harmonising Greek Practices with the European Public Order of Human Rights*, (Athens-Komotini 2001).

Balázs Schanda

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN HUNGARY

I. The Status of the ECHR in Hungary

Hungary applies a moderate dualistic approach to international law. Generally accepted norms of international law may be directly applicable, while the Constitution pledges for the conformity of domestic law with accepted international obligations.[1] International agreements need transformation, that is, if the subject of the agreement is a legislative issue, they have to be ratified by an act of Parliament. International agreements ratified by an act of Parliament have a higher standing in the hierarchy of norms, than merely domestic acts of Parliament: if a merely domestic act of Parliament and an international agreement ratified by an act of Parliament are in collusion, the domestic act is to be abolished by the Constitutional Court, as if it would violate the Constitution itself. The procedure would be abstract: without a case or a controversy the Constitutional Court has the power (even ex officio) to strike down a domestic law.[2]

Hungary joined the ECHR in 1992, shortly after the collapse of the communist regime. The Parliament ratified the ECHR in 1993,[3] together with additional protocols in force that time. Since 1993 Strasbourg remedies have been open for victims from Hungary. The number of cases has remained moderate (most violations were found with regard to Article 6, as court procedures are often too long) – none of them related to religious issues. Up to now the ECHR has not lead to hierarchy of norm cases at the Constitutional Court.

II. Domestic Protection of Rights Protected by the ECHR

Decisions in legal procedures are generally based on Hungarian laws – in some (rare) cases directly based on the Constitution. Although interna-

[1] Article 7 (1).
[2] Act XXXII/1989 §1 c).
[3] Act XXXI/1993.

tional human rights agreements are rather invoked in order to strengthen the reasons, a case decided exclusively on the basis of the ECHR (or other human rights treaties) would be hardly imaginable. Rights protected by the ECHR are also protected by the Hungarian Constitution: with regard to the freedom of religion and other convictions, there are no elements of the ECHR that would not be protected by the national Constitution.

III. Legal Decisions Referring to the ECHR

The court system has four levels (local courts, county courts, courts of appeal and the Supreme Court) and is uniform, i.e. the same courts (but certainly different panels) deal with civil, criminal and administrative cases. The only exception is the labor court on the level of local courts, although appeals against labor court judgments are decided by the county courts. The Constitutional Court is not considered as an ordinary court. It deals exclusively with constitutional disputes. The Constitutional Court can declare acts of Parliament, decrees of Government or those of local self-governments void, on the basis that they are unconstitutional. A constitutional complaint can be brought before the Constitutional Court by any person claiming that a law is unconstitutional (no case or controversy has to exist in the background: the norm control can be abstract).

IV. Constitutional Court

References to the ECHR or to the Strasbourg case law occasionally appear in decisions of the Constitutional Court. In its fundamental decision on the freedom of religion the Constitutional Court stated the following, concerning the realization of freedom of religion in compulsory school education:

> 'In order to implement Article 60, the Parliament passed Act IV/1990 on the Freedom of Conscience and Religion, and on the Churches. Section 5 of this Act states that the parent or guardian has the right to decide on and provide for the moral and religious education of the minor child. According to section 17, churches in the capacity of legal persons can carry out any educational or instructional activity that no Act restricts to be carried out by the State alone. [In] institutions of education and instruction run by the State, the church can teach religion as an elective subject.
> These regulations partially implement Article 60 of the Constitution but are not sufficient implementations of the full obligation of the State concerning the freedom of religion. Moreover, Hungary assumed more than this in international agreements.
> 'According to Article 2 of the First protocol to the European Convention of Human Rights, "no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education to teaching in conformity with their own religious and philosophical convictions." According to Article 18, section 4 of the International Covenant on Civil and Political Rights the States Parties 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. According to Article 2 the States Parties undertake legislative or other measures as may be necessary to give effect to the rights recognized in the Covenant. The Convention on the Rights of the Child signed in New York on November 20, 1989 (promulgated by Act LXIV/1991) declares the right of the child to freedom of thought, conscience and religion, and recognizes the right of the parents to provide direction to the child in a manner consistent with its evolving capacities (Article 14)'.[4]

In addition to the reasoning – when clarifying the fundamental differences between public, neutral and church run schools – the latter not bound by the principle of neutrality refers to the Kjeldsen, Busk, Madsen and Pedersen-case:

> The State must remain neutral in matters of religion. Therefore public schools must also be neutral. The State realizes through these public schools which are open to all children the right to education and ensures the conditions of compulsory schooling. Neutrality requires that the State shapes the syllabi and organizes and supervises its schools in such a manner that information on and knowledge in religion and world-view be transferred in an "unbiased, critical and pluralist fashion. The public school must not carry out education in a manner that can be considered to disregard the convictions of the parents (and the child). (see the decision of the European Court of Human Rights in *Kjeldsen, Busk, Madsen and Pedersen*, Judgment of 7 December 1976, Series A, No. 23).

References of this kind do not mean that the decision itself would be based on the ECHR; the ground of the decision is merely the Constitution. References to international human rights treaties and eventually to cases only serve as an element strengthening the reasoning.

[4] Decision 4/1993. (II. 12.) AB, in English: *Sólyom, L./Brunner, G.* (eds.), Constitutional Jurisdiction in a New Democracy. The Hungarian Constitutional Court, The University of Michigan Press 2000, 246-266.

In a later decision clarifying the separation clause with regard to remedies available for internal church disputes, the Constitutional Court referred to Article 6, paragraph 1 of the ECHR, as to a non-absolute right, as in many cases the legal grounds for invoking a remedy are lacking. The selection of cases referred to by the Constitutional Court are the following: *Keegan* v. *Ireland*, judgment of 26 May 1994, Series A no. 290; *De Moor* v. *Belgium*, judgment of 23 June 1994, Series A no. 292-A; *Holy Monasteries* v. *Greece*, judgment of 9 December 1994, Series A no. 301-A; *Terra Woningen B.V.* v. *The Netherlands*, judgment of 17 December 1996, Reports 1996-VI, p. 2105). For pivate law relations, however, an acess to court seems to be necessary: *Goldner* v. *United Kingdom*, judgment of 21 February 1975, Series A no. 18.[5] The enumeration of ECHR cases are rather of illustrative nature again.

V. Supreme Court and Ordinary Courts

Ordinary courts hardly refer to the ECHR. If they do so, the references made – in a somewhat similar manner to the references made by the Constitutional Court – tend only to add colour, although they are not decisive elements of the judgement. Having relevance in regard of freedom of religion the Supreme Court has referred in a case on child custody to the *Hoffmann* v. *Austria* case, when declaring that differences in would view cannot be taken into consideration neither in favour, nor to the contrary with regard to the decision. Of course, consequences of religious options may have relevance, but not the religious affiliation itself.[6]

Conclusion

Although the ECHR is not an instrument often invoked by domestic courts in Hungary, it serves as a hidden reference in at least two ways: first of all, as an interpretation background for fundamental rights (rights protected by the Constitution may be interpreted with regard to Strasbourg jurisprudence); secondly, by enhancing by its very existence the general awareness and respect for human rights: The fact of having an instrument and a remedy has a significance that goes beyond articles and judgments.

[5] Decision 32/2003. (VI. 4.) AB.
[6] BH 1998. 132.

PAUL COLTON[1]

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN IRELAND

Introduction

The European Consortium for Church and State Research has requested national rapporteurs to analyse national legal decisions concerning the freedom of religion which have referred to the European Convention on Human Rights (ECHR). This presents the writer from Ireland with a fundamental dilemma. Insofar as this writer can establish, the principal (if not all) cases involving questions of religious freedom or religious issues *per se* have been determined in Ireland with reference to the provisions of *Bunreacht na hÉireann*[2] rather than to the ECHR.

Factors which have shaped this, in all probability, include the comparatively monochrome character of religious demography (at least until recently) in Ireland; the complex and somewhat *ad hoc* nature of church-state relations;[3] the existing protections afforded by the Irish Constitution which overlap substantially with the ECHR; and the fact that incorporation of the ECHR occurred so recently in the Irish context.[4]

That is not to suggest that there is nothing to say. The unfolding dynamics of engagement between the courts in Ireland and the ECHR illustrate how cases, in general, have been handled in this regard. An examination of the approach to the ECHR adopted by the Irish courts enables us to postulate, by analogy, how cases involving religious organisations or religious perspectives argued invoking Article 9, or for that matter any other article of the ECHR, might have been determined.

[1] Bishop of Cork, and Research Associate at the Centre for Law and Religion, Cardiff University.
[2] *Bunreacht na hÉireaan*: The Constitution of Ireland (hereinafter the Irish Constitution).
[3] See generally P. COLTON, 'Religion and Law in Dialogue in Ireland' in *Religion and Law in Dialogue: Convenantal and Non-convenantal Co-operation between State and Religion in Europe – Religion et Droit en Dialogue: Collaboration Conventionnelle et Non-conventionielle entre l'État et Religion en Europe* (Peeters, Leuven/Louvain, 2006).
[4] European Convention on Human Rights Act 2003.

I. Ireland and the ECHR[5]

The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[6] adopted by the Council of Europe was signed by the Irish Minister for External Affairs on 4th November 1950 and formally ratified on 25th February 1953. At the time of entry into force of the ECHR in September 1953 Ireland was one of only two states which had granted the right of petition to its citizens.[7] The first case before the European Court of Human Rights (ECtHR) was against Ireland.[8] Ireland was affirming of the ECHR from the outset. Ironically, therefore, it had the dubious distinction of being the last State to incorporate the ECHR into domestic law.[9] The United Kingdom had passed the Human Rights Act 1998 and under the Belfast Agreement[10] it was agreed that:

> 'The Irish Government will also take steps to further strengthen the protection of human rights in its jurisdiction. The Government will [...] bring forward measures to strengthen and underpin the constitutional protection of human rights. These proposals will draw on the European Convention on Human Rights and other international legal instruments in the field of human rights and the question of the incorporation of the ECHR will be further examined in this context. The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland'.[11]

Introducing the Second Reading of the European Convention on Human Rights Bill 2001 in Dáil Éireann on 14th June, 2001, the Minister for Justice Equality and Law Reform[12] said:

> 'As a nation, we are fortunate in being one of the few states to have a formal written Bill of Rights enshrined in our 1937 Constitution. Indeed, it has to be acknowledged from the outset that Ireland is unique among the member states of the European Union, and among the other signatory states of the convention, in having a written Constitution which embodies a system of fundamental rights chosen by the people, which are unalterable save by the wish of the people, and which are made superior and justiciable at the instance of the individual over all other law, both in theory and in practice. Our excellent human rights record before the Court of Human Rights in Strasbourg is due in no small measure to these factors. The hallmark of our protection of fundamental rights in the Constitution has been their development by the superior courts through the doctrine of un-enumerated personal rights largely by means of judicial review of legislation. The drawing up of international human rights texts by the United Nations and the Council of Europe has also influenced that process'.[13]

[5] For an extensive analysis of the approach to the ECHR in Ireland generally prior to its incorporation into domestic law see D. O'Connell, 'Ireland' in R. Blackburn and J. Polakiewicz *Fundamental Rights in Europe* (Oxford University Press, 2001) pp. 423-73.

[6] Known as the European Convention on Human Rights (hereinafter ECHR). Text available at http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm, last accessed 14th July, 2007.

[7] The other was Sweden. The right was granted in Germany in 1957, the United Kingdom in 1965 and in France in 1975.

[8] *Lawless* v. *Ireland* (1961) 1 EHRR 13.

[9] European Convention on Human Rights Act 2003.

[10] Also known as the Good Friday Agreement, signed on 10th April 1998 and available at http://www.nio.gov.uk/agreement.pdf, last accessed on 14th July, 2007.

[11] Belfast Agreement p. 22 par. 9.

[12] John O'Donoghue, T.D.

II. Bunreacht na héireann and the ECHR[14]

Bunreacht na héireann[15] specifically enumerates fundamental rights (equality before the law,[16] the personal rights of the citizen,[17] the life, person good name and property of citizens,[18] the right to life of the unborn and of the mother,[19] personal liberty,[20] to the inviolability of a citizen's dwelling,[21] to freedom of expression,[22] freedom of assembly,[23] freedom of association,[24] prohibition of discrimination in regulating freedom of assembly and association,[25] rights relating to the family,[26] to education,[27] private property[28] and religion[29]).

[13] Dáil Reports, Volume 538, 14th June, 2001 as found at http://www.oireachtas-debates.gov.ie/en.toc.dail.html last accessed 14th July 2007.

[14] For the situation prior to incorporation of the ECHR into domestic law see G. Hogan and G. Whyte, *J. M. Kelly: The Irish Constitution* (4th Edition, LexisNexis Butterworths, Dublin, 2003) p. 38 (1.1.70); pp.553-4 (5.3.127 – 5.3.138); pp. 794-6 (6.2.91 to 6.2.93) and pp 1319-21 (7.1.157 – 7.1.161) and see also J. Casey, *Constitutional Law in Ireland* (Round Hall, Sweet and Maxwell, Dublin, 2000) pp. 198-201 and pp. 545-57.

[15] The Constitution of Ireland (hereinafter the 'Irish Constitution').

[16] Ibid, Article 40.1.

[17] Ibid, Article 40.3.1°.

[18] Ibid, Article 40.3.2°.

[19] Ibid, Article 40.3.3°.

[20] Ibid, Article 40.4.

[21] Ibid, Article 40.5.

[22] Ibid, Article 40.6.1° i.

[23] Ibid, Article 40.6.1° ii.

[24] Ibid, Article 40.6.1° iii.

[25] Ibid, Article 40.6.2°.

[26] Ibid, Article 41.

[27] Ibid, Article 42.

[28] Ibid, Article 43.

[29] Ibid, Article 44.

In addition, a doctrine of unenumerated personal rights based on Article 40.3.1° of the Irish Constitution has evolved.[30] These rights, summarised by the Constitution Review Group, include the right: to bodily integrity;[31] not to be tortured or ill-treated;[32] not to have health endangered by the State;[33] to earn a livelihood;[34] to marital privacy;[35] to individual privacy;[36] to have access to the courts;[37] to legal representation on criminal charges;[38] to justice and fair procedures;[39] to travel within the State;[40] to travel outside the State;[41] the right to marry;[42] to procreate;[43] to independent domicile;[44] to maintenance;[45] of an unmarried mother in regard to her child;[46] of a child;[47] and the right to communicate.[48]

Gerard Hogan identifies factors which have affected the engagement of the legal processes in Ireland with the ECHR: a relatively vibrant corpus of constitutional jurisprudence in Ireland; the fact that Irish courts have, since 1937, 'been working within a system of judicial review of legislation which confers on them far-reaching powers of review... [And] ... [t]o complete the picture, it has to be said that there is a very high degree of overlap between the Constitution's guarantees and those of the ECHR'.[49]

While the overlap between the fundamental rights guaranteed by the Irish Constitution and those articulated in the ECHR is recognised; so too

[30] See *Report of the Constitution Review Group* (1996, Dublin) p 246. See generally G.W. HOGAN, G.F. WHYTE, *J.M. KELLY: The Irish Constitution*, n. 14 above; and see also J. CASEY, *Constitutional Law in Ireland*, n. 14 above, 394-433.

[31] *Ryan* v. *Attorney General* [1965] IR 294.

[32] *The State (C)* v. *Frawley* [1976] IR365.

[33] *The State (C)* v. *Frawley* [1976] IR365.

[34] *Murphy* v. *Stewart* [1973] IR 97.

[35] *McGee* v. *Attorney General* [1974] IR 284.

[36] *Kennedy* v. *Ireland* [1987] IR 587.

[37] *Maccauley* v. *Minister for Posts and Telegraphs* [1966] IR 345.

[38] *The State (Healy)* v. *Donoghue* [1976] IR 325.

[39] *In re Haughey* [1971] IR 217; *Garvey* v. *Ireland* [1980] IR 75.

[40] *Ryan* v. *Attorney General* [1965] IR 294.

[41] *The State (M)* v. *Attorney General* [1979] IR 73.

[42] *Ryan* v. *Attorney General* [1965] IR 294; *McGee* v. *Attorney General* [1974] IR 284.

[43] *Murray* v. *Ireland* [1985] IR 532.

[44] *CM* v. *TM* [1991] ILRM 268.

[45] Ibid.

[46] *The State (Nicolaou)* v. *An Bord Uchtála* [1966] IR 567; *G.* v. *An Bord Uchtála* [1980] IR 32.

[47] *In re Article 26 and the Adoption (No 2) Bill 1987* [1989] IR 656; *G.* v. *An Bord Uchtála* [1980] IR 32.

[48] *Attorney General* v. *Paperlink Ltd* [1984] ILRM 343.

[49] G. HOGAN 'Incorporation of the ECHR: Some issues of Methodology and Process' in U. KILKELLY (ed.) *ECHR and Irish Law* (Jordans, Bristol, 2004), pp. 12-24. at 14-5.

there is acknowledgement that the list of rights enunciated in the Irish Constitution is incomplete.[50] In reaching this conclusion, the Constitution Review Group, for example, did so, with reference, *inter alia*, to the ECHR.[51]

III. Ireland and the European Court of Human Rights

As a consequence of decisions of the ECtHR Ireland has had to amend its law: to provide for the introduction of civil legal aid;[52] the decriminalisation of homosexuality;[53] the abolition of discrimination against children born outside marriage;[54] the provision of limited information about abortion;[55] and the rights of natural fathers in the adoption process.[56] In a number of cases, where the ECtHR determined that the ECHR had been violated by Ireland, damages were awarded.[57] Of the cases against Ireland which were unsuccessful,[58] one had invoked articles 9 and 10.[59]

A. *Ireland and the ECHR before 2003*

In relation to international law generally the Irish Constitution provides that 'Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States'.[60] Ireland espouses the dualist approach to international law. 'The sole and exclusive power of making laws for the State is [...] vested in the Oireachtas: no other legislative authority has power to make laws for the State'.[61]

[50] *Report of the Constitution Review Group*, n. 30 above, p. 214.

[51] Ibid. With reference to Article 40.6.1° i (Freedom of Expression) see 298.

[52] *Airey* v. *Ireland* (1980) 2 EHRR 305.

[53] *Norris* v. *Ireland* (1989) 13 EHRR 186. See Criminal Law (Sexual Offences) Act 1993.

[54] *Johnston* v. *Ireland* (1987) 9 EHRR 203. See also Status of Children Act 1987.

[55] *Open Door Counselling* v. *Ireland* (1993) 15 EHRR 244. See also Fourteenth Amendment of the Constitution Act 1992.

[56] *Keegan v. Ireland* (1994) 18 EHRR 342. See also Adoption Act 1998.

[57] See e.g. *Pine Valley Developments Ltd and Others* v. *Ireland* (1992) 14 EHRR 319; *Heaney and McGuinness* v. *Ireland* (2001) 33 EHRR 12; *Quinn* v. *Ireland* [2000] ECHR 690, *D.G.* v. *Ireland* [2002] ECHR 447; *McMullen v.* Ireland [2004] ECHR 404; *O'Reilly and others* v. *Ireland* [2004] ECHR 407; *Barry v. Ireland* [2005] ECHR 865.

[58] See e.g. *Lawless* v. *Ireland* (1961) 1 EHRR 13; *McElhinney* v. *Ireland* (2002) 34 EHRR 322; *Murphy v. Ireland* (2004) 38 EHRR 13; *Independent News and Media and Independent Newspapers Ireland Ltd* v. *Ireland* [2005] ECHR 402; *Bosphorus Airways* v. *Ireland* [2005] ECHR 440.

[59] *Murphy* v. *Ireland* (2004) 38 EHRR 13.

[60] Irish Constitution, Article 29.3.

[61] Ibid, Article 15.2.

Additionally, Article 29.6 prescribes that 'no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas'.

Prior to incorporation of the ECHR it was, therefore, the consistent ruling of the courts that the convention was not part of the domestic law of Ireland.[62] The judgments are, however, more nuanced than such a statement suggests, particularly as Ireland moved towards incorporation of the ECHR in 2003, and the courts took a more engaging and favourable view of the Convention.

A chronological consideration of some of the principal cases illustrates the unfolding approach of the Irish courts to the ECHR.

In *In Re Gearóid Ó Laighléis*[63] the applicant, who had been arrested on suspicion of illegal and subversive activities, contended that his detention under the Offences Against the State (Amendment) Act 1940 contravened the ECHR. The Supreme Court affirmed the judgment of the High Court, ruling that the ECHR was not part of the domestic law of the State and, under Article 29 of the Constitution, it could not be so. In his judgment Maguire CJ, referring to the ECHR and its relation to the Irish Constitution said that Article 29,[64]

> '...the Article dealing with international relations provides at section 6 that "no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas." The Oireachtas has not determined that the Convention of Human Rights and Fundamental freedoms is to be part of the domestic law of the State, and accordingly this Court cannot give effect to the Convention if it be contrary to domestic law or purports to grant rights or impose obligations additional to those of domestic law. No argument can prevail against the express command of section 6 of Article 29 of the Constitution before judges whose declared duty it is to uphold the Constitution and the laws. The Court accordingly cannot accept the idea that the primacy of domestic legislation is displaced by the State becoming a party to the Convention for the Protection of Human Rights and Fundamental Freedoms. Nor can the Court accede to the view that in the domestic forum the Executive is in any way estopped from relying on the domestic law. It may be that such estoppel might operate as between the High Contracting Parties to the Convention, or in the court contemplated by Section IV of the Convention if it comes into existence, but it cannot operate in a domestic Court administering domestic law. Nor can the Court accept the contention that the Act of 1940 is to be construed in the light of, and so as to produce conformity with, a Convention entered into ten years afterwards'.[65]

[62] See e.g. *In Re Gearóid Ó Laighléis* [1960] IR 93; *In Re Article 26 and the Illegal immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 *Kavanagh* v. *Governor of Mountjoy Prison* [2002] 3 IR 97.

[63] *In Re Gearóid Ó Laighléis* [1960] IR 93.

[64] Irish Constitution Article 29.

Gearóid Ó Laighléis subsequently made an application to the European Commission on Human Rights on 9th November 1957, ultimately the first case to come before the ECtHR.[66]

In *E v E*[67] counsel for the defendant sought to rely on the judgment of the ECtHR in *Airey v Ireland*[68] and argued that a judgment of the ECtHR in proceedings in which the State was a party, bound the State for the future and could be given effect to in later proceedings brought against the State in the domestic courts. In the High Court, O'Hanlon, J. said:

> 'I am unable to accept this contention is correct. It appears to me that the defendant in the present proceedings is claiming that the State in setting up the Scheme of Civil Legal Aid and Advice did not go far enough in complying with the requirements of the European Convention, as interpreted by the Court of Human Rights in the *Airey* case, and that as a result the defendant in the present action is in danger of finding himself without any legal representation in continuing proceedings of a nature and complexity comparable to those which obtained in the *Airey* case'.

In *Norris v Attorney General*[69] the plaintiff, in challenging sections 61 and 62 of the Offences Against the Person Act 1861 and section 11 of the Criminal Law Amendment Act 1885 (both of which criminalised certain homosexual activities), contended that the legislation constituted an unwarranted interference in his private life and therefore infringed his right to privacy as articulated by Article 8 of the ECHR. In the Supreme Court, O'Higgins, C.J. declined to follow the ECtHR in *Dudgeon v United Kingdom*[70] and quoting the views of Maguire, C.J. in *In Re Gearóid Ó Laighléis* said 'I agree with those views ... Neither the Convention on Human Rights nor the decision of the European Court in *Dudgeon* v. *United Kingdom* (1981) 4 E.H.H.R. 149 is in any way relevant to the question which we have to consider in this case'. The pre-

[65] Maguire, C.J. in *In Re Gearóid Ó Laighléis* [1960] IR 93 at 124-5.

[66] *Lawless* v. *Ireland* (1961) 1 EHRR 13.

[67] *E* v. *E* [1982] ILRM 497.

[68] *Airey* v. *Ireland* (1979) 2 EHRR 305.

[69] *Norris* v. *Attorney General* [1984] IR 36.

[70] *Dudgeon* v. *United Kingdom* (1981) 4 EHRR, 149.

sumption of compatibility between the Irish Constitution and the ECHR was specifically rejected. He said:

> 'I must reject it. In my view, acceptance of Mrs. Robinson's submission would be contrary to the provisions of the Constitution itself and would accord to the Government the power, by an executive act, to change both the Constitution and the law. The Convention is an international agreement to which Ireland is a subscribing party. As such, however, it does not and cannot form part of our domestic law nor affect in any way questions which arise thereunder. This is made quite clear by Article 29, s. 6, of the Constitution...'.[71]

Norris subsequently brought his case to the ECtHR.[72]

Likewise, in *O'B v S*[73] the Supreme Court said that the ECtHR decision in *Marckx v Belgium*[74] had no bearing on the question before it; and that, governed as it was by Article 29.6 of the Irish Constitution,[75] it was obliged to follow the relevant domestic legislation.[76]

By the 1990s the courts, while still noting that the ECHR was not part of Irish domestic law, appeared to take a more affirming view of the convention's role and potential. In *Desmond v Glackin*[77] O'Hanlon, J. said the ECHR had persuasive effect.[78]

In *Gilligan v Criminal Assets Bureau*[79] McGuinness, J. said that '... [w]hile there can be no question but that this Court is entitled to have regard to decisions of the Court of Human Rights in construing provisions of the Constitution there can be no question of any decision of the European Court of Human Rights furnishing in and of itself a basis for declaring legislation unconstitutional. I am bound by the repeated decisions of the Supreme Court that the European Convention on Human Rights is not a part of the domestic law of this jurisdiction'.

[71] *Norris* v. *Attorney General* [1984] IR 36 at 66.
[72] *Norris* v. *Ireland* (1989) 13 EHRR 186.
[73] *O'B* v. *S* [1984] IR 316.
[74] *Marckx* v. *Belgium* (1980) 2 EHRR 330.
[75] Irish Constitution, Article 29.6: 'No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas'.
[76] Succession Act 1965.
[77] *Desmond* v. *Glackin* [1993] 3 IR 1. See also *O'Leary* v. *Attorney General* [1993] 1 IR 102; *Heaney* v. *Ireland* [1994] 2 ILRM 420; *Hunter* v. *Gerald Duckworth and Co Ltd* [2003] IEHC 81 (31 July 2003).
[78] *Desmond* v. *Glackin* [1993] 3 IR 1 at 29.
[79] *Gilligan* v. *Criminal Assets Bureau* [1998] 3 IR 185. See also the view of the same Judge in *Quinlivan* v. *the Governor of Portlaoise Prison* [1998] 2 IR 113.

In *Hanahoe v Hussey*[80] Kinlen J. said that the '...Judgment of the Court of Human Rights is not simply of persuasive authority. It has been accepted that in cases of doubt or where jurisprudence is not settled, the Courts should have regard to the Convention for the Protection of Human Rights'.

Similarly in the High Court in *Murphy v Independent Radio and Television Commission*[81] Geoghegan, J. said:

> 'Although the European Convention of Human Rights is not part of Irish municipal law, regard can and should be had to its provisions when considering the nature of a fundamental right and perhaps more particularly the reasonable limitations which can be placed on the exercise of that right. In this case the solution lies, in my view, in Article 10 of the European Convention. What would be considered to be reasonable limitations under that Article should, equally, be considered reasonable limitations under Article 40(3) of the Constitution. The recent Report of the Constitution Review Group recommends amendment of the Constitution so as to conform with Article 10 of the European Convention on Human Rights'.

Delivering the judgment of the Supreme Court in *Doyle v Commissioner of An Garda Síochána*[82] Barrington, J. said:

> 'Ireland is a signatory of the European Convention on Human Rights and accepts the right of individual petition. But Ireland takes the dualistic approach to its international obligations and the European Convention is not part of the domestic law of Ireland (see *In re Ó Laighléis* [1960] IR 93). The Convention may overlap with certain provisions of Irish Constitutional law and it may be helpful to an Irish court to look at the convention when it is attempting to identify unspecified rights guaranteed by Article 40.3 of the Constitution. Alternatively the Convention may, in certain circumstances influence Irish law through European Community law. But the Convention is not part of Irish domestic law and the Irish court has no part in its enforcement. [...] The position of the European Convention on Human Rights in Irish law contrasts sharply with that of the founding treaties of the European Union. These have become part of the domestic law of Ireland and have resulted in the formation of a European community the laws of which bind both the member states and their citizens and may have direct effect in ach

[80] *Hanahoe* v. *Hussey* [1998] 3 IR 69 See also *R* v. *Crown Court ex parte Customs and Excise* [1989] 3 All ER 673 at 677.. *Niemitz* v. *Germany* (1993) 16 EHRR 97 was also cited.
[81] *Murphy* v. *Independent Radio and Television Commission* [1999] 1 IR 12.
[82] *Doyle* v. *Commissioner of An Garda Síochána* [1999] 1 IR 249.

of the member state. As a result the national judge is a community judge and is obliged to give priority to community law in his court'.[83]

Budd, J. in *Brennan v Governor of Portlaoise Prison*[84] described the ECHR as an influential guideline. He said: 'It seems to me that this Court can look to the European Convention as being an influential guideline with regard to matters of public policy. However, the convention has never been incorporated into domestic Irish Law and while it applies to Ireland it does not apply within Ireland.' It was his view that the Irish Constitution, both by enumerated and unenumerated rights, already gives appropriate protection.

By 2001 McGuinness, J., in *Gooden v Waterford Regional Hospital*[85] appeared to indicate an awareness of the emerging legislative proposals[86] when she said: '...it has been made clear repeatedly by the High Court and by this court that the European Convention on Human Rights does not (at least to the present) form part of Irish domestic law. The provisions of the Convention may be helpful in considering unspecified personal rights which arise under the Constitution of Ireland...'

In *Glencar Exploration Plc v Mayo County Council*[87] the comments of Fennelly, J. indicate how the perspective of the Irish courts had developed:

> 'The judgments of the Court of Human Rights may be useful sources of persuasive authority where they contain reasoning relevant to the interpretation of legal rights guaranteed by the convention which are analogous to rights which are known in our law and Constitution and which our courts have to apply'.[88]

In *Hunter v Gerald Duckworth and Co Ltd*[89] Ó Caoimh, J. went so far as to say that in interpreting Article 40.6.1° of the Irish Constitution '... this Court can have regard to the interpretation of the Convention insofar as it indicates how Article 40.6.1° may be interpreted'.

It is clear that, by the time of incorporation of the ECHR into domestic law, one could say that: '...the practice of the courts interpreting either the provisions of the Constitution by reference to the European

[83] Ibid, per Barrington, J at 268-9.
[84] *Brennan* v. *Governor of Portlaoise Prison* [1999] 1 ILRM 190.
[85] *Gooden* v. *Waterford Regional Hospital* [2001] IESC 14.
[86] European Convention on Human Rights Bill 2001.
[87] *Glencar Exploration Plc* v. *Mayo County Council* [2002] 1 ILRM 481.
[88] Ibid, at 522.
[89] *Hunter* v. *Gerald Duckworth and Co Ltd* [2003] IEHC 81 (31 July 2003).

Convention on Human Rights itself or the case law of the European Court itself is by now well established'.[90] A presumption that Irish Law is in conformity with the ECHR was, by then also, acknowledged by the courts.[91] By the end of 1998, O'Connell argued that until then the courts took a too restrictive view of Articles 15.2 and 29.6 of the Irish Constitution:

> 'While both provisions point clearly to the need for legislative incorporation to maximize the domestic effect of international conventions, nothing in the Constitution prevents the judiciary from having regard to international instruments and decisions of international courts and commissions as persuasive authorities even in matters of constitutional interpretation. To that extent, the so-called belt and braces approach, favoured by certain High Court judges, could be said to indicate a more faithful judicial reflection of the state's international law obligations than the comparatively "hiberno-centric" pattern of reasoning of the previous Supreme Court'.[92]

B. *European Convention on Human Rights Act 2003*

When the European Convention on Human Rights Act 2003 (the Act) was passed, its stated intention, no doubt mindful of this unfolding position of the courts, was 'to enable further effect to be given, subject to the Constitution, to certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms...'.[93]

Disappointment was strongly expressed, however, when the Irish Government first published the European Convention Human Rights Bill 2001 on the grounds that the model of incorporation was minimalist and did not propose direct legislative incorporation.[94] The ECHR was to be incorporated at a sub-constitutional level.

[90] G.W. Hogan, G.F. Whyte, *J.M. Kelly: The Irish Constitution*, n. 14 above, p. 38 at 1.1.70 and p. 551-2 at 5.3.123.
[91] See *Desmond* v. *Glackin (No 1)* [1993] 3 IR 1; *The State (DPP)* v. *Walsh* [1981] IR 412 per Henchy, J at 440. However, see also, *Norris* v. *Attorney General* [1984] IR 36 at 66.
[92] See D O'Connell 'Ireland', n. 5 above, pp. 423-73 at 434-5.
[93] European Convention on Human Rights Act 2003, Long Title.
[94] 'Submission on the European Convention on Human Rights Bill 2001 to the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights (June 2002, Irish Human Rights Commission, Dublin) p. 4 See generally: D. O'Connell, 'The ECHR Act 2003: A Critical Perspective' in U. Kilkelly, (ed.), *ECHR and Irish Law* (Jordans, Bristol, 2004), pp. 1-11; G. Hogan 'Incorporation of the ECHR: Some issues of Methodology and Process', n. 49 above, pp. 12-34.

The anticipated effect of the proposed incorporating legislation was summarised well in colloquial terms by Donal Barrington, President of the Irish Human Rights Commission:

> 'In some ways incorporation does not mean anything very new. We are already bound by the Convention. If someone's rights are clearly violated, s/he can get a decision from the Strasbourg Court and the Government will, with varying degrees of enthusiasm, obey the ruling and change the law or practice that has been condemned. The big difference would be that when the Convention is made part of domestic law, it will be accessible to the man or woman in the street and they will not have to spend a small fortune and wait for six to eight years to get a decision from Strasbourg. And we hope that when the Convention starts to be regularly raised in Irish courts, it will have an effect on public bodies and authorities here and make the think about the rights protected by the European Convention and how their activities and decisions will impinge upon those rights. And also we hope that members of the public will become more aware of their rights and more ready and able to assert tem when required, In other words, we hope it will develop a culture of human rights at all levels in our public life. There is nothing here for us to be afraid of. Our courts already have a record of defending the rights protected by the Constitution. Now we hope there will be a fruitful dialogue or interaction between the Constitution and Convention rights and jurisprudence, leaving us all the richer as a result'.[95]

The Act, came into force on 31st December 2003. Section 2 provided that courts are subject to the rules of law relating to interpretation and application, and *in so far as is possible*,[96] to interpret any statutory provision or rule of law (including the common law[97]; and both existing and future[98]), in a manner compatible with the State's obligations under the Convention provisions.[99]

Section 3 (1) of the Act provides that 'every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions', subject, however, 'to any statutory provision (other than this Act) or rule of law.' 'Statutory provision' is defined as 'any provision of an Act of the Oireachtas or of any order,

[95] 'Submission on the European Convention on Human Rights Bill 2001 to the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights (June 2002, Irish Human Rights Commission, Dublin) p. 3.

[96] Emphasis added.

[97] European Convention on Human Rights Act 2003 s 1 (1).

[98] Ibid, s 2 (2).

[99] Ibid, s 2 (1).

regulation, rule, licence, bye-law or other like document made, issued or otherwise created thereunder or any statute, order, regulation, rule, licence, bye-law or other like document made, issued or otherwise created under a statute which continued in force by virtue of Article 50 of the Constitution.'[100] Excluded from the definition of 'organ of State' are the President, the Oireachtas (or either house or a committee thereof) and, notably, the courts.[101] However, a person who suffers injury, loss or damage arising from the breach by an 'organ of State' of Section 3 (1), and if no other remedy in damages is available, may institute proceedings to recover damages,[102] and the Circuit Court or High Court may award appropriate damages.[103]

In addition, the Act (in section 4) provides that judicial notice is to be taken of the Convention provisions. The courts are to take notice also of any declaration, decision, advisory opinion or judgment of the European Court of Human Rights; and any decision of opinion of the European Commission on Human Rights; and any decision of the Committee of Ministers established under the Statute of the Council of Europe.[104]

Lastly, it is open to the High Court or Supreme Court, (on the application of a party or of its own motion), having regard to section 2 of the Act,[105] and '...where no other legal remedy is adequate and available, make a declaration (referred to in this Act as ''a declaration of incompatibility'') that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions'.[106]

A declaration of incompatibility does not affect the validity, operation or enforceability of the statutory provision in question.[107] Such a declaration is not equivalent to a finding that a provision is unconstitutional.[108] Where a court makes such a declaration of incompatibility, the Taoiseach[109] is obliged to lay a copy of the declaration before each House of

[100] Ibid, s.1 (1).

[101] Ibid, s.1 (1).

[102] Ibid, s 3 (2).

[103] Ibid, s 3 (3).

[104] Ibid, s 4. See also *Doherty* v. *South Dublin County Council* [2007] IEHC 4.

[105] s 2 (1): 'In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions'.

[106] European Convention on Human Rights Act 2003 s 5.

[107] Ibid, s 5 (2)(a).

[108] See G. HOGAN 'Incorporation of the ECHR: Some issues of Methodology and Process', n. 49 above, pp. 12-34 at 21-8.

[109] Prime Minister.

Oireachtas within 21 days.[110] Although there is no onus on the Taoiseach, in doing so, to indicate what remedial action needs to be taken,[111] nonetheless, it is to be inferred from the legislation that where a court makes such a declaration of incompatibility, 'a political will may exist to alter relevant legislation in favour of compatibility'.[112]

Furthermore, a party to the proceedings may apply to the Attorney General seeking an award of compensation[113] and the Government has a discretionary power (having sought advice about the amount if it so wishes) to award an *ex gratia* payment.[114]

C. *Since 2003*

It appears that there is '...a low take-up of the 2003 Act compared with the position in the UK...'[115] An examination of the reported cases indicates that it would appear that, to date, no declarations of incompatibility have been granted under section 5 of the Act. Applications for a declaration of incompatibility have been made but have not succeeded.[116] The courts have continued to allude to the ECHR and to their responsibilities following the passing of the Act.

The approach of the courts has developed in line with the Act. In the case of *Bode v Minister for Justice, Equality and Law Reform*[117] (a case, in the High Court concerning the refusal of residency to foreign national parents of children who are Irish citizens) the judgment of Finlay Geoghegan, J., in ruling in favour of the plaintiff, relies, on the rights of the child arising from Article 40.3.1 of the Irish Constitution, but also with reference to Article 8 of the ECHR, the jurisprudence of the ECtHR[118] and the State's obligation to act in a manner compatible with the ECHR. The outcome of the State's appeal to the Supreme Court is awaited.[119] The court ruled in favour of the applicant on the basis of rights established in both the Irish Constitution and the ECHR.

However, it was significant that in the case of *O'Donnell v South Dublin County Council* the court found in favour of three plaintiffs (members of the traveller community who suffered from a sever disability) on the basis of a breach of Article 8 of the ECHR where it also considered that there had been no breach of the plaintiffs' rights under the Irish Constitution.

IV. Ireland, the ECHR and Freedom of Religion

Ironically perhaps, Ireland being the religious country (albeit more pluralistically so in recent decades) that it is, Article 9 of the ECHR has not been argued, insofar as I can ascertain, in any of the cases involving churches or religious institutions, either before or since incorporation of the ECHR. Where religion arose in cases in which reference was made to the ECHR, it was not Article 9 that was referred to but other Articles.

The *Murphy*[120] case was argued in Ireland on the basis of the Irish Constitution and Article 10 of the ECHR, and it was only when it came to the ECtHR that reliance was placed also on Article 9. The Independent Radio and Television Commission refused to broadcast an advertisement on independent radio which had been submitted by a Pastor from the Irish Faith Centre on the basis that to do so would infringe s.10(3) of the Radio and Television Act 1988.[121] The advertisement submitted would have read as follows:

> 'What think ye of Christ? Would you, like Peter, only say that he is the son of the living God? Have you ever exposed yourself to the historical facts about Christ? The Irish Faith Centre are presenting for Easter week an hour long video by Dr. Jean Scott PHD on the evidence of the resurrection from

[110] European Convention on Human Rights Act 2003 s 5 (3).

[111] Per kearns, J. in *Dublin City Council v Fennell* [2005] IR 604.

[112] Per charleton, J. in *Doherty v South Dublin County Council* [2007] IEHC 4 (22nd January 2007).

[113] European Convention on Human Rights Act 2003 s 5 (4)(b).

[114] Ibid, s 5 (3)(c) See also ECHR Article 41.

[115] M. FARRELL, Senior Solicitor, Free Legal Advice Centre, 'The Challenge of the ECHR' A Paper delivered at a conference (Rebalancing Criminal Justice in Ireland) organised by the Centre for Criminal Justice and Human Rights at University College Cork on 29th June 2007 (see p. 3) as found at http://www.ucc.ie/law/docs/UCC-paper-final-Michael-Farrell.doc last accessed 14th July 2007.

[116] *Carmody* v. *Minister for Justice, Equality and Law Reform* [2005] 2 ILRM 1; *McCoppin* v. *Kennedy* [2005] 4 IR 66; *Dublin City Council* v. *Fennell* [2005] 1 IR 604; *Superwood Holdings Plc* v. *Ireland* [2005] 3 IR 398; *K.(M.)* v. *Minister for Justice, Equality and Law Reform* [2005] IEHC 247; *Law Society of Ireland* v. *Competition Authority* [2006] 2 IR 262; *Grace* v. *Ireland* [2007] IEHC 90.

[117] *Bode* v. *Minister for Justice Equality and Law Reform* [2006] IEHC 341.

[118] *Niemitz* v. *Germany* (1992) 16 EHRR 97; *Kutzner* v. *Germany* (2002) 35 EHRR 653.

[119] As of 14th July 2007.

[120] *Murphy* v. *Independent Radio and Television Commission* [1999] 1 IR 12.

[121] 'No advertisement shall be broadcast which is directed towards any religious or political end or which has any relation to an industrial dispute'.

> Monday 10th – Saturday 15th April every night at 8.30 p.m. and Easter Sunday at 11.30 a.m. and also live by satellite at 7.30 p.m'.

The Supreme Court upheld the ruling of Geoghegan, J. in the High that the prohibition on this particular advertisement was not an attack on freedom of conscience or the free practice of religion. Indeed, he held that the advertisement itself "might be an intrusion on the quiet possession of religious beliefs". Nor, he held, could the advertisement be regarded as a discrimination made on the grounds of religious profession, belief or status contrary to Article 44.2.3 of the Constitution. Barrington, J. said:

> 'There is no question of any form of discrimination or distinction being made by s. 10(3) on the grounds of religious profession belief or status. The ban contained in sub-s. (3) is directed at material of a particular class and not at people who profess a particular religion. All people in the same position are treated equally. The fact that people who wish to advertise motor cars or tinned beans may be treated differently is not relevant. [...] It is sufficient to admit that the ban on religious advertising is a restriction, however limited, on the freedom of the citizen to profess, express or practise his religion and to inquire whether, in the circumstances of the case, the restriction is justified'.[122]

When *Murphy* brought his case to the EctHR,[123] he alleged an interference with his rights under both Articles 9 and 10. The Court determined, however, that the case did not relate to an interference with Murphy's profession or manifestation of religion and that there had been no violation of Article 10 of the ECHR.

> In *Johnston*[124] one of the applicants, a member of the Society of Friends, alleged that his religion was not oppose to divorce, and that as no divorce was available in Ireland, his inability to live other than in an extra-marital relationship was contrary to his conscience and that on that account he was the victim of a violation of Article 9. The ECtHR said that the non-availability of divorce under Irish law, was a matter to which Article 9 cannot, in its ordinary meaning, be taken to extend.

In addition, all that can be said is that, undoubtedly, in the nature of things, the religious outlook, whether of individuals or of society at the time, may, indeed have impinged on or been argued in some cases before the courts in Ireland. For example in *Norris v Attorney General*[125] the religious

[122] *Murphy* v. *Independent Radio and Television Commission* [1999] 1 IR 12 at 22-3.
[123] *Murphy* v. *Ireland* (2004) 38 EHRR 13.
[124] *Johnston* v. *Ireland* (1987) 9 EHRR 203.
[125] *Norris* v. *Attorney General* [1984] IR 36.

perspective was adduced, from opposite perspectives in two judgments (both majority and minority judgments). O'Higgins, C.J. said:

> 'From the earliest days, organised religion, regarded homosexual conduct, such as sodomy and associated acts with a deep revulsion as being contrary to the order of nature, a perversion of the biological functions of the sexual organs and an affront both to society and to Gods. With the advent of Christianity this view found clear expression in the teachings of St. Paul, and has been repeated over the centuries by the doctors and leaders of the Church in every land in which the Gospel of Christ has been preached'.

In contrast, Henchy, J. referred to the evidence given by two theologians – one Roman Catholic and another Church of Ireland (Anglican) – both of whom had proffered the view that, in their expert opinion, the legislation in question was unchristian. Subsequently when the ECtHR decided in favour of *Norris,*[126] it did so on the grounds that there had been an interference of his right to respect for his private life under Article 8.

The fact remains, however, that in cases such as this one, Article 9 of the ECHR was not adduced in argument.[127] Instead the cases turned on the provisions of the Irish Constitution, principally Article 44.[128] These cases concerned: freedom of conscience;[129] free practice and profession of religion;[130] the status (lay or ordained) of a teacher;[131] the receipt of State funding and the right of a religious group to manage its own affairs;[132] freedom of expression and the constitutionality of a statutory restriction on religious broadcasting;[133] the constitutionality of derogations from certain provisions of employment equality legislation to reli-

[126] *Norris* v. *Ireland* (1989) 13 EHRR 186.
[127] *Quinn's Supermarket* v. *Attorney General* [1972] IR 1; *McGrath and Ó Ruairc* v. *Trustees of the College of Maynooth* [1979] I.L.R.M. 166; *Mulloy* v. *Minister for Education* [1975] IR 88*Murphy* v. *Independent Radio and Television Commission* [1997] 2 ILRM 467; *Murphy* v. *Independent Radio and Television Commission* [1999] 1 IR 12; *Article 26 and the Employment Equality Bill 1996* [1997] IR 321; *Campaign to Separate Church and State Ltd* v. *Minister for Education* [1998] 3 IR 321, [1998] 2 ILRM 81; *Corway* v. *Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484.
[128] For a full treatment and analysis of Article 44 of *Bunreacht na hÉireann* (The Irish Constitution) see: HOGAN, G.W. and WHYTE, G.F., *J.M. KELLY: The Irish Constitution*, n 14 above, 2029 to 2075; and also Casey, J., n. 14 above, 685 to 708.
[129] *McGee* v. *Attorney Genera;* [1974] IR 284.
[130] *Quinn's Supermarket* v. *Attorney General* [1972] IR 1.
[131] *Mulloy* v. *Minister for Education* [1975] IR 88.
[132] *McGrath and Ó Ruairc* v. *Trustees of the College of Maynooth* [1979] I.L.R.M. 166.
[133] *Murphy* v. *Independent Radio and Television Commission* [1997] 2 ILRM 467; *Murphy* v. *Independent Radio and Television Commission* [1999] 1 IR 12.

gious institutions;[134] the funding of the salaries of chaplains at community schools;[135] and an allegedly blasphemous cartoon.[136]

The Constitution Review Group expressed the view that the ECHR provisions concerning religion '...guarantee substantially the same rights wit regard to free practice of religion as those contained in Article 44'.[137] However, a majority of the group recommended that the qualifying language of Article 44.2.1° [138] should be modelled on Article 9 (2) of the ECHR, and reformulated along these lines:

> 'The exercise of these rights and freedoms may be subject only to such limitations as may be imposed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health and morals, or for the protection of the rights and freedoms of others'.[139]

If one were to anticipate future developments, there is, it is suggested, little doubt that the increasing religious pluralism and cultural diversity in Ireland, allied to an increasingly secular outlook on the part of some will pose challenges, not least in the field of education.[140]

V. Churches and the ECHR

The Consortium has not requested *rapporteurs* to address the perspectives and legal framework of a key factor in this equation: what the perspective and activity of the churches is, in relation to human rights and to the ECHR in particular. It is an odd lacuna that only the State and juridical perspective is sought. What is the attitude of the churches and religious groupings to human rights legislation and provisions, not least in relation to equality? How is this outlook – based on theology, ecclesiology and ethics – articulated in the canon or church law framework of the churches of Europe?

[134] *Re Article 26 and the Employment Equality Bill 1996* [1997] IR 321.

[135] *Campaign to Separate Church and State Ltd* v. *Minister for Education* [1998] 3 IR 321, [1998] 2 ILRM 81.

[136] *Corway* v. *Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484.

[137] *Report of the Constitution Review Group* (1996, Dublin) p. 370.

[138] Irish Constitution Article 44.2.1° 'Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen'.

[139] *Report of the Constitution Review Group*, n. 30 above, 380.

[140] For corroboration of this view see Ibid, p. 375.

This is important and should concern the consortium not least because, in parts of Europe, legislation (notably dealing with equality) accords privileged derogations to churches and religious institutions.[141] Indeed, cases which centre on determining the balance within the tension of rights and the Church's perspectives on those rights, have hit the headlines in this summer prior to our meeting.[142]

[141] See e.g. Employment Equality Act 1998, Equal Status Act 2000 and Equality Act 2004. See also e.g. Re Article 26 and the Employment Equality Bill 1996 [1997] IR 321.

[142] See e.g. the case of a Youth Worker who is gay, and who was found by an Employment Appeals Tribunal to have been discriminated against by the Church of England (Diocese of Hereford's Diocesan Board of Finance): The Times, 19th July 2007; Daily Telegraph, 19th July, 2007; The Guardian 19th July, 2007.

MARCO VENTURA

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN ITALY

I. The Impact of the ECHR on the Italian Legal System

The Italian 1947 Constitution provides for a high degree of formal integration of international and European covenants into the domestic legal sources.[1] The domestic implementation of the EC and EU law was facilitated by the development of an efficient system, bridging the European and the national legal frameworks. Thanks to such a detailed and articulated structure, Italian Courts (namely the Constitutional Court) were enabled to fully implement not only the EC and EU regulations, but also the jurisdiction and the interpretation of the European Court of Justice.[2]

The same did not occur in the case of the ECHR, for two main reasons:

a) First of all, because of the very nature of the ECHR provisions: fundamental principles pertaining to human rights, the ECHR provisions can come into consideration only insofar as a national court refers to them 1) as general principles stirring the interpretation, or 2) as a specific interpretation in a case judged by the Court of

[1] According to the 1947 Constitution, the Italian State has the duty to implement international law and international agreements (art. 10: "The legal system of Italy conforms to the generally recognized principles of international law"; art. 80: "Chambers ratify by law international treaties which are of political nature").

[2] By a first decision of 27 December 1965 (n. 98) the Constitutional Court tried to affirm its power to control the application of EC law in Italy. At the same time, the European Court of Justice stated that member states have "limited their sovereign rights, albeit within limited fields" and more precisely (in Costa v. Enel, case 6/64 of 15 July 1964) that "the transfer by the states from their domestic legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the community cannot prevail". This interpretation was eventually outlined by the Constitutional Court in the fundamental decisions of 27 December 1973 n. 183, of 5 June 1984 n. 170, of 19 April 1985 n. 113 and of 4 July 1989 n. 389: the legal ground having been found in art. 11 of the Constitution: "(Italy) agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations".

Strasbourg, and which can be applied to the case specifically dealt with by the national court;

b) secondly, because Italian courts -and especially the Constitutional Court- avoided almost any reference of both the 1) and the 2) kinds: as for the 1) kind of reference (ECHR principles as general principles stirring the interpretation), the Constitutional Court explained that at the time of the ratification of the Convention, Italy already had an advanced catalogue of human rights, which made the ECHR principles either superfluous or overlapping[3]; as for the 2) kind of reference (by the means of the case law), the Italian courts proved focused only on the Italian specificity of the case and refused to take into account similarities in the case law which could have required a reference to the case law of the Court of Strasbourg. The educational and cultural background of Italian judges is also an influential factor since it is still basically driven by the superiority of domestic sources and jurisprudence.

The jurisdiction of the Court of Strasbourg effectively applied to Italy (especially in the field of defence rights and fair trial) and impacted by the means of several condemnations (within the limits of the ECHR system). Nevertheless this was not taken by the Italian courts –and especially by the Constitutional Court– as a substantial reference in the judicial interpretation.

Only rarely the Constitutional Court did mention the principles of the ECHR, and even more rarely did it refer to the decisions of the Court of Strasbourg.[4] The Court of Strasbourg itself complained about such a lack of attention when in 2001 it remarked that "the Constitutional Court made no reference to the procedural safeguards embodied in art. 6 of the Convention, or to the criteria established by the Court's case law".[5] The situation is probably changing: the growing awareness of the possibility of appealing before the Court of Strasbourg and the increasing number of Italian cases judged in Strasbourg are likely to force Italian courts to take into consideration from the outset the ECHR principles, as they are interpreted in the case law of the Court of Strasbourg. Still the process seems quite slow, and the resistance of Italian judges particularly strong.

[3] In the decision n. 388 of 1999 the Constitutional Court explained that "the human rights protected by universal or regional conventions signed by Italy are expressed – and protected with the same intensity – by the Constitution".

[4] See the decision n. 188 of 1980 and the decision n. 399 of 1998, both concerning the principle of the fair trial and defence rights.

[5] ECHR, *Lucà* v. *Italy*, 27 May 2001, n. 26.

II. The Impact of the ECHR on the Italian *Diritto Ecclesiastico*

Hardly applied by the Italian courts in areas where Italy has been condemned several times in Strasbourg (as it was the case with the excessive length of trials), ECHR is almost irrelevant, as far as religion is concerned. When in 1967 Francesco Margiotta Broglio wrote a book on the pertinence of ECHR in the area of religion, that sounded like a very imaginative step[6](). The challenge was remarkable. In general, ECHR opposed the traditional domestic monopoly in the domain. In particular, it provided an alternative jurisdiction (the Court of Strasbourg), whose case law was likely to interfere with the national courts.

The challenge of ECHR was particularly remarkable in Italy, because of the specific context and structure of the Italian *diritto ecclesiastico* (the expression designating the area of the legal treatment of religion, including church and state relationships). We will continue with a brief reconstruction of the basic features of the system, in order to establish the specific context and structure which affect the impact of the ECHR on the Italian judiciary:

a) Since the Lateran Pacts of 1929 (granting the Catholic Church a privileged status protected by internationally binding treaties) and their recognition in the 1947 Republican Constitution (at art. 7), the whole regulatory system has been shaped in order to prevent the parliament from unilaterally affecting the status quo.[7]

b) By consequence courts, and especially the Constitutional Court (whose institution was provided by the 1947 Constitution, but which was set only in 1956), were the only actors possibly playing a role in changing the system as far as the most fundamental issues were concerned (namely religious freedom of minorities and unbalance in the recognition and treatment of the Catholic Church on the one hand, and the other religious denominations on the other).

[6] I refer to F. Margiotta Broglio, *La protezione internazionale della libertà religiosa nella convenzione europea dei diritti dell'uomo*, (Milano: Giuffrè, 1967).

[7] Article 7 [Relation between State and Church]: "(1) State and catholic church are, each within their own reign, independent and sovereign. (2) Their relationship is regulated by the Lateran pacts. Amendments to these pacts which are accepted by both parties do not require the procedure of constitutional amendments".

c) Through a narrow interpretation of art. 7 of the Constitution, those defending the status quo argued that the Constitutional Court could not judge the Lateran Pacts whose provisions had to be placed at the same level as the Constitutional ones. Such an interpretation had been substantially shared by the Constitutional Court until 1970, when it stated that the fundamental constitutional principles ("*principi supremi*") are stronger than any concordatarian provisions.
d) The subsequent decisions given by the Constitutional Court – as well as those given by the Cassation Court and by the local courts – focused exclusively on the Italian specificity, leaving no room for any substantial reference to the principles of the ECHR, or to the case law of the Court of Strasbourg. This was the case, for instance, with the 1982 decision of the Constitutional Court undermining the concordatarian civil recognition of Catholic marriages and forcing the Holy See to accept a renegotiation of the Concordat (the new agreement was signed in 1984). The European jurisdictions were formally acknowledged, yet they never played an effective role in any judgment related to the diritto ecclesiastico. So far, the specificity of Italian diritto ecclesiastico prevailed.[8]
e) The impact of the ECHR was rather limited to the legal theory of the diritto ecclesiastico. In the eighties, textbooks and scientific works began with the reference to the European protection of human rights as a whole and to the specific religion related articles of ECHR, starting from art. 9: in this phase and context, the reference was almost exclusively limited to the dimension of general principles: the role of the Court of Strasbourg was still unclear; commentators were (correctly) sceptical about its impact on domestic judicial decisions.
f) A new phase began in the late eighties and nineties, thanks to the first ECHR decisions impacting on the national regulation of religion. The *Kokkinakis* case, in particular, made clear that ECHR

[8] The same approach only focusing on internal sources and interpretations concerned the acknowledgment in 1989 of the principle of *laicità* as the "profile of the form of state delineated in the constitutional charter of the Republic". This should not only be taken negatively, as an indifference of the state toward religions, but also positively, as a guarantee by the state "for the safeguarding of freedom of religion, in a situation of confessional and cultural pluralism". It consists in "that distinction between distinct *orders* that characterizes in its essence the fundamental or *supreme* principle of the *laicità* or nonconfessionality of the state" (Constitutional Court, decision of 8 October 1996, n. 334).

could not be regarded any longer as a simple matter of principles to be added to (and articulated with) the national constitution. The Court of Strasbourg had to be considered an actor, possibly interplaying with the Italian internal religious tensions. What Italian lawyers and scholars had already realised in other fields (in particular through the condemnations suffered by Italy in Strasbourg on the length of trials), became definitely uncontested with the case of *Pellegrini* in 2001 when for the first time the Italian diritto ecclesiastico was (by implication) judged by the Court of Strasbourg. Yet what is at stake in this new phase is the role of the Court of Strasbourg in legal strategies One can only guess that this is likely to be a crucial step in the perspective of a stronger reference to ECHR in the Italian courts.

III. Freedom of Opinion, Belief and Conviction

ECHR was never referred to by domestic courts in any judgment concerning freedom of opinion, belief and conviction. Relevant Italian cases judged by the Court of Strasbourg still remain invisible to the Italian courts.[9] The recent case of *Spampinato* concerning art. 9 and 14 as art. 1 Protocol n. 1 (taxation for public funding of religion with respect to the Italian system of the "otto per mille") represents another opportunity for Italian courts to realize that European jurisdictions do exist.[10]

It is crucial to clarify that art. 19 of the Italian 1947 Republican Constitution defines religious freedom as follows: "Everyone is entitled to freely profess religious beliefs in any form, individually or with others, to promote them, and to celebrate rights (instead of rites) in public or in private, provided they are not offensive to public morality." Compared with the definition adopted three years later (in 1950) by the ECHR it is worth noticing three main differences:

a) the Italian constitutional text only refers to "religious freedom", while the ECHR art. 9 protects "the right to freedom of thought, conscience and religion".
b) in the Italian constitutional text the "freedom to change his religion or belief and freedom" is not explicitly mentioned;

[9] Despite the absence of cases openly dealing with religious freedom under art. 9, some other cases are nevertheless interesting. See for instance ECHR, *Perna* v. *Italy*, 6 May 2003, where in a case concerning the freedom of expression of a journalist, Italy was condemned for a violation of art. 10 ECHR.

[10] I refer to ECHR, *Spampinato* v. *Italy*, 29 March 2007.

c) the extent of the limitations explicitly mentioned by art. 19 (public morality) is significantly less wide than that of par. 2 of art. 9 covering "limitations 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".

The different definition of the right is not particularly problematic. Although the Italian constitutional text includes neither freedom of thought and conscience, nor the freedom to change one's own religion, it is undoubtedly plausible on the extent of the definition which is ultimately the same. The clause also including the protection of the rights and freedoms of others can, too, be considered existing in the Italian framework by implication.

The draft law on religious freedom, which passed by the Constitutional Affairs Commission of the Camera dei Deputati in July 2007, includes a reference to the ECHR: in the preparatory works, religious freedom was defined also by reference to art. 9 ECHR. These legislative aspects witness the increasing attention paid by Italian diritto ecclesiastico to ECHR; however, courts still remain silent in their judgments as far as an effective implementation of ECHR in the domain is concerned.

IV. Private and family life

A highly sensitive area for the relationships between the Italian state and the Catholic Church, family law and biolaw tend to be kept by the Italian Parliament far from the European trend in favour of a more liberal approach to same sex partnerships, civil unions, assisted reproduction, end of life regulations, embryonic research. The 2004 act on assisted reproduction is by far one of the most restrictive in the European Union. The tentative introduction of new regulations in the fields of civil partnerships and end of life treatments has been strongly opposed by the Catholic Church and by the Catholic MPs of both centre-right and centre-left coalition.

The shift in the case law of the Court of Strasbourg to a more open understanding of privacy, as a tool to overcome the traditional notion of family, hence legitimising civil partnerships, has not influenced the Italian legal landscape. Due to such a "Catholic sensitiveness" in this field, Italy welcomes the wide interpretation of the clause of the national margin of appreciation usually given by the Court of Strasbourg like in the

case of *Evans* v. *UK*: "[...] since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is no clear common ground amongst the Member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one".[11]

V. Education

One other very sensitive area, which, when touched upon, typically focuses only on domestic sources and case law, is the legal aspect of religious education, which has been defined by the Italian courts, with no reference to the ECHR.

VI. Freedom of Association

Despite some interesting decisions of the Court of Strasbourg in Italian cases on the ground of art. 11, and despite the sensitiveness of the field for Italian diritto ecclesiastico, Italian courts have referred neither to the art. 11 itself, nor to the case law of the Court of Strasbourg.[12]

VII. Procedure rights

Despite the reform of the Concordat in 1984 many issues related to the concordatarian marriage are still at stake. It is worth noticing that in the above mentioned case of *Pellegrini* v. *Italy* (20 July 2001 n. 30882/96), the European Court of Human Rights held unanimously that there had been a violation of Article 6 §1 (right to a fair hearing) of the European Convention on Human Rights, in that the Italian courts had failed to ensure that the applicant had had a fair hearing in the ecclesiastical proceedings before issuing an authority to enforce a judgment of the Tribunal of the Roman Rota. The 2001 decision is likely to undermine the relevant Italian provisions of diritto ecclesiastico and the pattern approach of Italian courts. Nevertheless, since then, Italian courts have managed to face similar conflicts without referring to the case of *Pellegrini* itself.

[11] ECHR, Evans v. UK, 10 April 2007, n. 81.

[12] See in particular ECHR, *Maestri* v. *Italy*, 17 February 2004. The case concerned the freedom of association to a Masonic group for an Italian judge. Also see the very recent ECHR, *Ormanni* v. *Italy*, 17 July 2007.

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On the more specific implications of ECHR implementation for the legal treatment of religion see M. Ventura, *La religione tra Corte costituzionale e giurisdizioni europee*, in *Diritto ecclesiastico e Corte costituzionale*, a cura di R. Botta, Napoli, ESI, 2006, pp. 367-379. On freedom of religion see M. Ventura, *The permissible scope of legal limitations on the freedom of religion or belief in Italy*, in "Emory International Law Review", vol. 19, n. 2, Summer 2005, pp. 913-928. On the case of *Pellegrini* see *La sentenza della Corte europea dei diritti dell'uomo del 20 luglio 2001*, Milano, Giuffrè, 2004.

RINGOLDS BALODIS

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN LATVIA

Introduction

The second period of Latvia's independence began on 4 May 1990, when the Supreme Council of the Latvian Soviet Socialist Republic (SC) approved a declaration on the restoration of the independence of the Republic of Latvia.[1] The authority of the Latvian Constitution (*Satversme*) was re-established after 4 May. However, since Satversme did not include a chapter on human rights at that moment, human rights in the Latvian State have become effective through constitutional Law. On 10 December 1991, the Latvian Parliament approved a law called "Human and Civil Rights and Obligations".[2] This was an important law from the perspective of human rights, but it was also somewhat questionable from the perspective of constitutional law.[3] The situation was clarified in October

[1] *LR Saeimas un MK Ziņotājs*, No. 20, 17 May 1990.

[2] *LR Saeimas un MK Ziņotājs*, No. 4, 30 January 1992.

[3] The law might appear to be a constitutional law if one reads its title, but it does not satisfy the formal criteria to be declared truly constitutional. On the other hand, it did fill up the previously empty niche of human rights all the way until October 1998, when a new human rights section in the Constitution took effect. Supreme Court Senator Jautrīte Briede has written that the constitutional nature of the law is questionable because the norms that are in it cannot be seen as higher in the legal hierarchy. What is more, the Latvian Constitution, unlike the Soviet Latvian legal system, does not even define the category of constitutional laws. Some authors have argued, not without reason, that legislators at that time were often confused and incompetent. The bottom line here is that legislators were not particularly consistent vis-à-vis constitutional principles and the occupation regime of the Soviet Union. This created some confusion, and there were even proposals to formally repeal the Constitution of the Latvian SSR. See J. BRIEDE, 'LATVIJAS Nacionālā Cilvēktiesību Likumdošana Eiropas Cilvēktiesību Konvencijas Kontekstā' (Latvian National Laws in the Area of Human Rights in the Context of the European Human Rights Convention). in T. Jundzis, (ed.)., *Baltijas Valstis Likteņgriežos. Politiskas, Ekonomiskas un Tiesiskas Starptautiskās Sadarbības Problēmas uz XXI gadu simteņa Sliekšņa Rakstu Krājums* (The Baltic States and their Destiny: Issues Related to Political, Economic and Legal Co-operation at the International Level on the Threshold of the 21st Century (1998), p. 276. See also M. MĪTS, 'Satversme Eiropas Cilvēktiesību Standartu Kontekstā" (The Constitution in the Context of European Human Rights Standards),

1998, when Satversme was supplemented with a new section on human rights. This eighth section, called "Fundamental Rights of the Individual" mentions religion/church only in Article 99, declaring that: *"Everyone has the right to freedom of thought, conscience and religion. The Church shall be separate from the State."* The principle of freedom of religion was defined by the Law on Religious Organisations[4] on 7 September 1995.[5]

The European Convention on Human Rights was ratified by the Saeima on 4 June 1997. One year after acceding to the European human rights convention and signing the association agreement with the EU, Latvia approved a law on a new Human Rights Bureau,[6] and another on a new Constitutional Court.[7] In the case when the Human Rights Bureau has the same complaints about religious freedom violations, the Constitutional Court rules (as in its first case on 28 April 1997).[8] Nevertheless, until 2007, it has never solved issues connected with religious freedom.

I. Issues on Religious Freedom in Latvia as Viewed by International Observers

The State Department of the United States in its 1997 report on religious freedom criticised Latvia for violation of religious freedom.[9] On the contrary, later on, according to the International Religious Freedom Report of 2006, published by the Bureau of Democracy, Human Rights, and

Cilvēktiesību Žurnāls, 1999, pp. 42-43, I. BIŠERS, 'Satversmes Reforma' (Reform of the Constitution). Materials of the expert seminar "Constitutional Reform in Latvia: Pros and Cons", 15 June 1995. Rīga: Sociāli ekonomisko pētījumu institūts "Latvija" (1995), p. 12.

[4] Law "On Religious Organisations", which was approved on 11 September 1990, and replaced with a similarly titled law on 7 September 1995. The first law was adopted in 1992, but was found unsatisfactory. Therefore, in 1995 the Parliament of Latvia issued a new law. However, this law is also admitted to have its flaws, and since its adoption is has been amended 5 times already, and most likely there will be successive amendments in the future. Religious organisations in Latvia are not obliged to register with the Board of Religious Affairs, however, they obtain rights and relieves available to religious organisations only upon the receipt of a registration certificate.

[5] LATVIJAS VĒSTNESIS, No. 146, 26 September 1995.

[6] Latvijas Vēstnesis, No. 221, 17 December 1996.

[7] Latvijas Vēstnesis, No. 103, 14 June 1996.

[8] E. RADZIŅŠ, 'Ko tas Nozīmē Latvijas tiesu Sistēmai?' (What Does That Mean for Latvia's Courts?), in *Karavāna Tuvojas – Kam? Satversmes Tiesas Pirmais Spriedums* (The Caravan is Approaching – What? The First Ruling of the Constitutional Court), (Rīga, 1998), p. 17.

[9] On account of Latvia's refusal to register Jehovah's Witnesses.

Labour,[10] "...considerable violations of human rights have not been observed in Latvia in the field of religious freedom...." The 2007 Report includes similar statements: "...There was no change in the status of religious freedom by the Government during the period covered by this report, and government policy continued to contribute to the generally free practice of religion; however, bureaucratic problems persisted for some minority religious groups. [...] There were no reports of forced religious conversion, including of minor U.S. citizens who had been abducted or illegally removed from the United States, or of the refusal to allow such citizens to be returned to the United States".[11]

II. Issues on the Condition of Religious Freedom in Latvia: The Government's Responsibility for the Co-ordination of State's Policy on Religious Affairs

The Board of Religious Affairs is a governmental institution under the supervision of the Ministry of Justice. The Cabinet of Ministers ratifies its Regulation. Within the competences set by laws and other normative acts, the Board of Religious Affairs ensures fulfilment and co-ordination of State's policy on religious affairs. In addition, it deals with issues connected with mutual relations between the State and religious organizations, it monitors the effectiveness of the State's legal regulation on practicing religion, and it proposes measures to be taken to avert violations of human rights guaranteed in the Constitution of the Republic of Latvia and in the international agreements on religious sphere, as well as conditions promoting them.

It is interesting to notice that the institution which is responsible for the State – Church relations in Latvia, the Board of Religious Affairs of the Republic of Latvia, does not respond to the question about carrying out and observing the rights included in the European Convention on Human Rights Article 9 (Convention). Instead, it forwards the question to other state structures.[12] On the other hand, in the 2007 report on religious freedom of the United States State Department we can find that in

[10] Latvia/ US State department/ International Religious Freedom Report 2006 http://www.state.gov/g/drl/rls/irf/2006/71390.htm

[11] Latvia/ US State department/ International Religious Freedom Report 2007 http://www.state.gov/g/drl/rls/irf/2007/90183.htm

[12] *Letter No. 2.1-51 of I. Romanovska, Chief of the Board of Religious Affairs of the Republic of Latvia to R. Balodis, Head of Constitutional Law Department, Faculty of Law of the University of Latvia.*

2005 the Board of Religious Affairs had again proposed amendments to the Law on Religious Organizations that would abolish restrictions on single association registration. Nevertheless, the State Department added that neither the Ecclesiastical Council nor the Government had acted on this recommendation by the end of the reporting period.[13]

The Ministry of Justice which supervises the above-mentioned Board and the religious policy of the State considers that the normative regulation in the field of religion complies with Article 9 of the Convention and that there are in fact no problems with that application in practice.[14]

IV. Issues on the Condition of Religious Freedom in Latvia: The Latvian Ombudsman

The opinion of the Ombudsman of the Republic of Latvia is somewhat different. According to the Ombudsman, it is necessary to assess the conformity of several provisions of the Religious Organizations Law (ROL) to the provisions of the Convention. However, the assessment of the provisions should start after the Saeima passes the laws which regulate the relations with particular Churches.[15] The agreement between the

[13] Latvia/ US State department/ International Religious Freedom Report 2007 http://www.state.gov/g/drl/rls/irf/2007/90183.htm

[14] Letter No. 1-7.8/2116 of 16 May 2007 of M. Bičevskis, State Secretary of the Ministry of Justice of the Republic of Latvia to R. Balodis, Head of Constitutional Law Department, Faculty of Law of the University of Latvia.

[15] From a comparative point of view, W. Cole Durham (United States of America) notes[15] that there exist three models of churches in the world states, which characterize the regimes of the states: Cooperationist Regimes; Accommodationist Regimes; Separationist Regimes. W.C Durham. *Perspectives on Religious Liberty: A Comparative Framework/ Religious Human Rights in Global Perspective/* Ed. by J. D. Van Der Vyver and J. Witte JR; (Netherlands Kluwer Law International. – 1996), p. 20-21). After the first specific Law of the Latvian Baptist Community Association was passed in May 2007, Latvia became a state of Cooperationist Regimes. Consequesntly and without doubts, by the end of 2007, the Latvian Evangelical Lutheran Church, the Roman Catholic Church, the Latvian Orthodox Church, the Latvian Old Believers Church, the Latvian Associated Methodist Church, the Latvian Baptist Community Association, the Seventh Day Adventist Latvian Community Association, the Riga Jewish Religious Community will have their own laws, which will be state proclamations of traditionality. These processes began with the agreement of Churches. The Holy See Latvian Government agreement was signed on 9 October 2000, and was ratified on 12 September 2002, continuing with another (except Jewish) denomination Government agreement on 8 June 2004. Because of the decision of the Parliament, those agreements have been converted into Laws (R. Balodis, 'Lygiateisiškumo Principas ir Religijos Laisvė Baltijos Valstybėse/Jurisprudencija Mokslo Darbai Mykolo Romerio Universitetas 2006 12 (90) p. 103-106)). In fact, all the aforementioned are confessions included in Article 51[15] of the Civil Law, which gives the right to solemnize the marriages of the members of a Church.

Ombudsman and the Saeima Human Rights and Social Affairs Committee, regarding this direction of events, has been reached. The Ombudsman is ready in case of necessity to ask the Saeima to make amendments to the ROL.[16]

V. Complaints about Ensuring Religious Freedom in Practice

Although State institutions assert that there are hardly any problems, the Representative of the Cabinet of Ministers of the Republic of Latvia in the International Human Rights Institutions (CM Representative),[17] whose responsibility is to represent the interests of the CM in the European Court of Human Rights, gives the information that up to May 2007 the Bureau has had 6 complaints to the European Court of Human Rights (ECHR) about alleged violation of Article 9 of the convention. Four of them are connected with the rights of arrested persons to religious freedom. One is connected with the limitation of religious freedom by the decision of the immigration authority, yet another one has been submitted in connection with alleged violations of the re-registration of one religious organization. Two of the 6 complaints have been rejected. Four of the six complaints were in connection with the rights of arrested persons to religious freedom. One case, *Balabanovs* v. *Latvia, judgment of 15 March 2007, application No. 76856/01,* was excluded from the list of the cases to be heard in the Court, because the applicant of the complaint had stopped responding to the letters of the Court, wherewith the Court considered there were grounds to conclude that the applicant did not wish to maintain his claim. On the other hand, the case *Burcevs* v. *Latvia*, judgment of 29 March 2007, application No. 11249/03 was excluded from the list of the cases to be heard in the Court, because the applicant himself had revoked his claim. One case actually ended with the applicant's victory.

According to the Ombudsman,[18] there are a few complaints about ensuring religious freedom in practice. From 1996 to 2006 including,

[16] Letter No. 3-2-2/1075 of R.Apsītis, the Ombudsman of the Republic of Latvia, to R. Balodis, Head of Constitutional Law Department, Faculty of Law of the University of Latvia.

[17] Letter No. 03/198-3945 of 7 May 2007 of I. Reine, the Representative of the Cabinet of Ministers of the Republic of Latvia in the International Human Rights Institutions to R. Balodis, Head of Constitutional Law Department, Faculty of Law of the University of Latvia.

[18] Letter No. 3-2-2/1075 of 25 May 207 of R.Apsītis, the Ombudsman of the Republic of Latvia, to R. Balodis, Head of Constitutional Law Department, Faculty of Law of the University of Latvia.

the Latvian National Human Rights Office (LNHRO) had received 50 applications concerning this issue. Furthermore a big part of them were connected with the internal conflict of one congregation. In general, describing the content of the above-mentioned complaints, the Ombudsman pointed out that the applications were connected with such issues as registration of new religious organizations, alternative service and religious education at schools.[19] In 2007 the Office of the Ombudsman received 9 applications about the discrimination on the grounds of religious orientation. Seven of them are connected with the cartoon in the newspaper *Diena,* which according to the applicants offended their religious feelings. Nevertheless, after an evaluation of the state of affairs, the Ombudsman found that the newspaper *Diena* had not violated the limits of freedom of speech and prohibition of discrimination. The two remaining applications concern the question whether nuns may use passport photographs, where they are with head covering. This case is still pending.[20]

VI. Provisions of the Religious Organizations Law and their Applicability in the Convention

In the conclusion it is necessary to return to the Ombudsman's determination to discuss in future about the incompliance of the ROL with the Convention. First of all, it is necessary to note that the difference of opinions is in essence about Articles 7 and 8 of the ROL.[21] A few years

[19] Annual reports of Latvian National Human Rights Office can be found on the Internet at http://www.vcb.lv/eng/index.php?open=publikacijaseng&this=031103.92.

[20] Letter No. 3-2-2/1075 of 25 May 207 of R.Apsītis, the Ombudsman of the Republic of Latvia, to R. Balodis, Head of Constitutional Law Department, Faculty of Law of the University of Latvia.

[21] **Article 7. Procedure of establishing religious organisations**

(1) Congregation may be established by at least 20 citizens of Latvia or persons who have been registered in the Population Register and have reached 18 years of age. The same person shall be entitled to be the founder of only one congregation. Every inhabitant of Latvia shall have the right to join a congregation and to be its active member. Young persons under 18 may become congregation members only with a written consent of their parents or guardians.

(2) Ten (or more) congregations of the same denomination that are registered in the Republic of Latvia may form a religious association (Church). This provision shall not apply to religious organisations referred to in Article 8, Paragraph 4 of this Law.

(3) Congregations of the same denomination may establish only one religious association (Church) in the country.

(4) A religious association (Church) may establish a diocese by making a relevant decision.

ago, the predecessor of the Ombudsman – the Latvian National Human Rights Office (LNHRO) had asked the Parliament to amend Sections 2 and 3 of Article 7 of the ROL, as well as Section 4 of Article 8. In connection with the abovementioned articles, in the opinion of LNHRO, there have not been any problems with Section 2 of Article 13.[22]

Article 8. Registration of religious organisations, educational institutions for the ecclesiastics, monasteries, missions and deaconate institutions

(1) Religious organisations shall be registered with the Board of Religious Affairs. Educational institutions for the ecclesiastics, monasteries, missions and deaconate institutions also shall be registered with the Board of Religious Affairs.

(2) The Board of Religious Affairs shall within one month examine the documents submitted for registration. When examining the documents submitted by congregations of those denominations and religions which begin functioning in the Republic of Latvia for the fist time and which do not belong tot he religious associations (Churches) already registered in the country, the Board of Religious Affairs may extend the term of examining the documents for one month, notifying the applicant thereof.

(3) The decision on registration or re-registration of the religious organisation or the institution of the religious organisation as well as the decision to refuse the registration or re-registration is made by the Chief of the Board of Religious Affairs.

(4) The congregations of those denominations and religions which begin functioning in the Republic of Latvia for the first time and which do not belong to the religious associations (Churches) already registered in the country shall re-register with the Board of Religious Affairs each year during the first ten years so that the Board may ascertain that these congregations are loyal to the State of Latvia and that their activities comply with legislative acts. Documents for re-registration of the religious organisation must be submitted to the Board of Religious Affairs one month prior the date indicated in the decision on registration or re-registration of the religious organisation.

(5) Any amendments in the Charter (Constitution, Regulations) of a religious organisation, as well as information about any changes in their leadership and the membership of the Audit Committees shall be submitted to the Board of Religious Affairs within two weeks.

(6) When a religious organisation is registered, a registration certificate shall be issued to its leader or some other authorised person. The Chief of the Board of Religious Affairs approves the specimens of the registration certificates of the religious organisations and the institutions of the religious organisations.

[22] Article 13. Rights of religious organisation

(1) A religious organisation shall gain the rights of a legal entity as of the moment of registration. A religious association (Church) or a diocese determines the legal status of an educational establishment for the ecclesiastics, a monastery, a mission and a deaconate institution.

(2) Only registered religious associations (Churches) or dioceses shall be entitled to establish educational institutions for the ecclesiastics, monasteries, missions and deaconate institutions.

(3) Only registered religious organisations and establishments formed by such organisations shall be entitled to use names and emblems of religious organisation in their official forms and stamps.

A. *Religious Organizations Law – Section 2 of Article 7*

The Latvian National Human Rights Office has pointed out that these regulations, which impose limitations on the establishment of new religious organisations, obliging the congregations to re-register every year for the first ten years of their activity, disproportionately limit the religious freedom guaranteed in the Constitution and international human rights documents. Therefore, not only are the rights of religious organizations to establish an organisation supervising their activity restricted, but also the rights to open educational institutions for ecclesiastics and monasteries, according to Section 2 of Article 13 of the ROL.

B. *Religious Organizations Law – Section 3 of Article 7*

In 2003 the Board of Religious Affairs (BRA) drew up amendments in the ROL. It provided for the crossing out of Section 3 of Article 7, considering its discriminative character. The amendments, however, were not supported. The reason mentioned by the Ministry of Justice was "public order security concerns",[23] but in the opinion of the author of the report, it failed to withstand serious criticism. The Office of the Ombudsman[24] pointed out that the situation where the state allowed congregations of the same denomination to establish only one religious association in the country was contrary to the principle of separation of church and state, included in Article 99 of the Constitution. By determining that there might be only one religious association in the same denomination, the State would interfere in the affairs of church, because it was not considered that the establishment of several religious associations might conform to canonical regulations of the denomination. For justification, responsible officials of the Ministry of Justice concluded by interpreting the provision historically[25] that the provision had not been created just to limit a schism within religious associations

[23] Letter No. 1-7.8/2116 of 16 May 2007 of M. Bičevskis, State Secretary of the Ministry of Justice of the Republic of Latvia, to R. Balodis, Head of Constitutional Law Department, Faculty of Law of the University of Latvia

[24] Letter No. 3-2-2/1075 of 25 May 207 of R. Apsītis, the Ombudsman of the Republic of Latvia, to R. Balodis, Head of Constitutional Law Department, Faculty of Law of the University of Latvia

[25] Letter No. 1-7.8/2116 of 16 May 2007 of M. Bičevskis, State Secretary of the Ministry of Justice of the Republic of Latvia, to R. Balodis, Head of Constitutional Law Department, Faculty of Law of the University of Latvia

(Churches). Although the aim of the Religious Organisation Law adopted in 1995 had been to ensure the realisation of believers' association liberty, it was also necessary to preclude uncertainties with recovery of property nationalised in 1940.

C. *Religious Organizations Law – Section 4 of Article 8*

In 2005, the Latvian National Human Rights Office asked the responsible Committee of the Parliament to cross out Section 4 of Article 8 of the ROL. The LNHRO pointed out that these regulations imposing limitations on establishing religious associations and obligation for congregations to re-register every year during the first ten years of their activity disproportionately limit the religious freedom guaranteed in the Constitution and international human rights documents. Section 4 of Article 8 of the ROL provides:

> 'The congregations of those denominations and religions which begin functioning in the Republic of Latvia for the first time and which do not belong to the religious associations (Churches) already registered in the country shall re-register with the Board of Religious Affairs each year during the first ten years so that the Board may ascertain that these congregations are loyal to the State of Latvia and that their activities comply with legislative acts. Documents for re-registration of the religious organisation must be submitted to the Board of Religious Affairs one month prior the date indicated in the decision on registration or re-registration of the religious organisation'.

Therefore not only are the rights of religious organizations to establish an organisation coordinating their activity restricted, but also the rights to open educational institutions for ecclesiastics and monasteries, according to Section 2 of Article 13 of the ROL. At the end of the report it should be mentioned that in practice Latvia is a partial separation state, where the constitutionally declared separation of church and state does not work in practice. Latvia does not associate itself with any specific religion. The question is not about religious tolerance, but rather about the interpretation of the article about church and state separation in the Constitution, because there is no clear opinion about where the borderline between the state and church should be strictly marked.[26]

[26] R. Balodis, 'School – Religion Relations: Republic of Latvia' Revue Europeenne de Droit Public, 2005; Vol. 17 (1) spring p. 397 – 408

VII. Another Case against Latvia, or at last Improvements of Religious Freedoms according to the Convention?

The former Latvian President, Vaira Vīķe-Freiberga, once said that even though much remained to be done in the judicial branch of the government, the Latvian court system had undergone significant improvements. She stated that the courts were moving away from the normative approach to issues that were typical of the Soviet system – a system in which the letter of the law was the key – and were moving, instead, toward a system in which the spirit of the law and the overall principles of the law came to the forefront. She continued supporting that improvements in that area appeared to be an endless process, but new procedural norms had been introduced to make court proceedings faster, more effective and more transparent.[27] The president's statement is very much in line with the way in which the principles of the European Human Rights Convention are brought to life in Latvia, particularly as seen in the case *Igors Dmitrijevs* v. *Latvia*.[28]

The European Court of Human Rights (ECHR) found in this case that although the Latvian state had been found guilty of violating the norms of the Convention, its admission of that fact represented sufficient compensation in and of itself.[29] That is indeed very much true.

The petitioner, Igors Dmitrijevs, for example, was released from prison five years ago,[30] but his case is still helping Latvia to close up some "loopholes" in the law.[31] In his petition, Dmitrijevs argued that the Convention had been violated in several different ways.[32] Of certain interest is the claim that the prohibition against the petitioner corresponding with

[27] The president made her remarks in her farewell address before the Parliament on 21 June 2007. Latvijas Vēstnesis, 22 June 2007.

[28] *I. Dmitrievs* v. *Latvia*, judgment of 9 November 2006, application No. 61638/00.

[29] Dmitrijevs had not, in fact, sought any compensation.

[30] According to the representative of the Cabinet of Ministers in relations with international human rights institutions, whose job is to monitor cases at the European court, Igors Dmitrijevs was convicted on 27 February 2001, and sentenced to three years in prison. All appeals were denied, and after completing his sentence, Dmitrijevs was released in 2002. See http://www.mkparstavis.am.gov.lv/lv/?id=224.

[31] This specifically applies to norms which regulate the rights of arrested persons. Cabinet of Ministers regulations on internal procedures in prisons can be found IN Latvijas Vēstnesis, No. 193(3769), 30 November 2007.

[32] He claimed that his correspondence was censured, that his complaint was not submitted to the court, that he was banned from corresponding with his mother and with the court, and that he was barred from taking part in religious processes during his pre-trial incarceration. This would represent a violation of Articles 3, 5.1c, 6.1, 8, 14 and 34 of the Convention.

his mother[33] was based on an instruction,[34] while procedures related to the religious freedoms of people under pre-trial incarceration were not regulated in any legal norm at all.[35] The prohibition, in other words, was not based on a "law" as defined by the Convention.[36] An instruction simply defines the way in which an external normative act or a general principle of the law is to be applied – it is an internal normative act.[37] As already known, the European Court of Human Rights cannot evaluate reasons for a prohibition. Perhaps the reasons were justified, but that has nothing to do with finding the state guilty. That is based on the fact that at the time of the alleged violation in 2000, the Latvian law did not contain specific legal regulations in the relevant areas. When the court hearing was released on 30 November 2006, the relevant regulations were in place, and so this author assumes that the petitioner's application before the ECHR and his argument that the state was to blame in the specific area were not just a signal, but a rather serious impulse aimed at producing the relevant regulations. The way in which that was done confirms that this was so:

- In 2002, the Cabinet of Ministers approved regulations on a chaplains' service;[38]
- In 2004, the country's Punitive Code was amended to create a chaplains' service at the Prisons Board;[39]
- In 2006, a law on the incarceration of individuals was approved;[40]
- In 2006, regulations concerning the internal procedures of places of incarceration were approved;[41]

[33] On 4 July, the petitioner wrote to his trial judge, asking permission to take part in a religious celebration in the prison chapel. The prison's administrators told the Rīga Regional Court that they could not "guarantee isolation during a celebration". In a letter dated 11 July 2000, the judge rejected the petitioner's request.

[34] On 30 April 1994, the interior minister issued Instruction No 113 – "Instructions on the procedures related to suspected, accused and convicted persons residing in the investigatory prisons of the Interior Ministry".

[35] The law on religious organisations which was approved on 7 September 1995 only speaks about general principles.

[36] The limitation was set by Decree No 113 by the Ministry of the Interior which was based on the Penal Law. The ECHR considered that Article 46[1] of the Penal Law cannot be applied because it is applicable only to the tried ones. Respectively the limitation had to be set by the law. Accordingly Detention Law was adopted in 2006 and the limitation was set by the law.

[37] Section 73 of the Law on National Governance, Latvijas Vēstnesis, No. 94(2669), 6 June 2002.

[38] Latvijas Vēstnesis, No. 101, 5 July 2002.

[39] The changes took effect on 9 December 2004.

[40] Latvijas Vēstnesis, No. 103(3471), 4 July 2006.

[41] Latvijas Vēstnesis, No. 32(2607), 27 February 2002.

• In 2007, regulations concerning the internal procedures of the investigatory prison were approved.[42]

VIII. Freedom of Religion at Places of Incarceration – The Situation in 2007

Now let us take a more detailed look at the Latvian law insofar as religious practices in places of incarceration are concerned – the law which is related to the goal stated in Section 1 of the Law on Criminal Procedure[43] is in effect right now, but was not in force at the time when the violations determined by the ECHR were in place.

What follows is a review of those legal subjects to whom legal regulations apply. People who are in places of incarceration are either detained (i.e., people who have been ordered to be under detention by a judge or a court during pre-trial proceedings), or convicted (those who have been sentenced to incarceration as a result of having been found guilty of a crime). The co-ordinator of the religious needs of both categories of people is the chaplain. The chaplain represents people in relations with administrators insofar as issues such as religious diet, religious festivities, etc., are concerned. The chaplain also helps when the incarcerated individual needs to contact a clergyperson of his or her religion. The chaplain must ensure that detained and convicted people enjoy the full right of freedom of religion, offering them moral support and consultations on issues of a religious and ethic nature, and helping them to improve themselves in the moral sense.[44] Chaplains provide spiritual care for detained and convicted people, co-ordinating religious processes in places of incarceration. To clarify, detained and convicted people have different status and regimes, and there are differences in the way they are regulated. The chaplains who work at places of incarceration are regulated by the Prisons Board of the Ministry of Justice.[45]

Detained persons may satisfy their religious needs in accordance with the law on procedures related to incarceration.[46]

[42] Latvijas Vēstnesis, No. 193(3769), 30 November 2007.
[43] Latvijas Vēstnesis, No. 74, 11 May 2005.
[44] Regulations concerning this can be found in Latvijas Vēstnesis, No. 101, 5 July 2002.
[45] There are also chaplains for the National Armed Forces and for other institutions at which ordinary contacts with clergymen are not possible.
[46] Latvijas Vēstnesis, No. 103 (3471), 4 July 2006.

'Section 27: Spiritual care for incarcerated persons

(1) Spiritual care of incarcerated persons shall be the responsibility of the chaplains' service of the Prisons Board.
(2) The chaplains' service of the Prisons Board shall organise and co-ordinate the activities of religious organisations in the investigatory prison.
(3) An incarcerated person shall have the right to ask the chaplain to bring in a clergyperson from the faith of the said incarcerated person.
(4) The procedure whereby an incarcerated person is permitted to meet with a clergyperson and/or to take part in the religious activities of religious organisations shall be determined in the internal rules of procedure of the investigatory prison'.

The regulations referred to in the fourth paragraph of the aforementioned law define the internal procedures of the investigatory prison, addressing such issues as health examinations, sanitation, and the way in which incarcerated persons have the right to take part in educational events:[47]

'VII. Educational events and the spiritual care of incarcerated persons

53. Educational and religious events at the investigatory prison shall take place at specified times of the day and in the presence of representatives of the investigatory prison's administration. Incarcerated persons shall take part in educational and religious events on a voluntary basis.
54. The administration of the investigatory prison shall inform incarcerated persons about opportunities to take part in educational and religious events.
55. An incarcerated person shall inform the administration of the investigatory prison of his or her desire to take part in educational and religious events or to meet individually with a clergyperson.
56. The director of the investigatory prison or an official authorised by the said director may permit an incarcerated person to attend educational and religious events or to meet individually with a clergymen whilst taking into account all limitations specified by the procedural institution, all requirements vis-à-vis isolation, instructions from medical personnel, and other considerations related to the security of the institution. Where necessary, the request may be refused'.

[47] Latvijas Vēstnesis, No. 193(3769), 30 November 2007.

The regulations also mention about the types of objects and food products which incarcerated persons may keep. These include a plate, a cup, a spoon, clothing that is appropriate for the season, etc. Moreover, incarcerated persons are allowed to have newspapers, magazines and seven books. That also means that they can possess and read legal literature.[48]

Convicted persons can pursue their religious needs on the basis of comparable legal regulations, as those which apply to detained persons (see Section 46[1] of the Punitive Code).[49] The only difference is that the procedure whereby convicted persons are permitted to meet with clergypersons and attend events aimed at moral improvement is regulated by the Cabinet of Ministers Regulation No. 423, 30 May 2006: "Regulations on the Internal Procedures of Institutions of Incarceration".[50] Sections 35 to 39 of these regulations are specifically dedicated to spiritual care:

'VII.Spiritual care of convicted persons

35. In order to provide for the spiritual care of convicted persons, chaplains shall organise the religious activities of religious organisations at institutions of incarceration or conduct same in accordance with norms related to the chaplains' service.
36. All religious activities of religious organisations except for confession shall take place in the presence of an employee of the relevant institution of incarceration.
37. Convicted persons shall meet with clergypersons in accordance with the agenda and rules of the institution of incarceration, as specified by the director of the Prisons Board.
38. Convicted persons who are in punitive confinement shall be visited by a clergyperson only with the express approval of the director of the relevant institution of incarceration. A representative of the administration shall always be present during any such visit.

[48] Appendix 4 to Cabinet of Ministers Regulation No. 800, 27 November 2007.

[49] The code was approved in 1970 and has been in effect since 1971. Section 46.1 speaks about spiritual care in institutions of incarceration, noting that there are chaplains services at such institutions. These are subordinates of the Prisons Board. Chaplains are appointed with the agreement of the Board of Religious Affairs. Legally registered religious, charitable and welfare organisations are allowed to provide services aimed at moral improvement at places of incarceration. The procedure whereby convicted persons are allowed to meet with clergy and take part in moral improvement procedures is regulated in the internal procedures of the relevant places of incarceration.

[50] Latvijas Vēstnesis, No. 32(2607), 27 February 2002.

39. Religious literature shall be distributed at an institution of incarceration by religious organisations referred to in normative acts related to the chaplains' service'.[51]

In conclusion, it can be said that it is important that individuals, not the state, have initiated improvements in the situation by defending their fundamental rights and thus bringing better order to the legal environment, so as to make sure that similar violations do not reoccur. On the other hand, this is not really acceptable. The protection of human rights is one of the most crucial guarantees in a country where the rule of law prevails, while it is specifically the duty of the state to ensure effective protections for anyone whose rights have been violated.[52]

[51] Basic regulations concerning institutions of incarceration include the isolation and supervision of convicted persons with the aim of preventing them from committing additional criminal offences. Convicted persons face various regimes and conditions, depending on the criminal offence they have committed, as well as their personal nature and behaviour. Section 50[4].9.8 of the Punitive Code, for instance, states that those prisoners who are at the lowest level of the prison regime have the right to attend worship services in the prison chapel and to meet with clergypersons without the presence of any other person.

[52] Ruling of the Constitutional Court of the Republic of Latvia on Case No. 2001-07-0103, Latvijas Vēstnesis, 7 December 2001.

JOLANTA KUZNECOVIENE

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN LITHUANIA

The report deals with the Cases published in the Official Gazette "Valstybes žinios", or presented in other official publications. Since 1991 the Constitutional and District Courts have investigated only a few cases related to the problem of freedom of religion and other convictions.

I. The constitution of the Republic of Lithuania was adopted on October 25, 1992. On May 14, 1993, the minister of Foreign Affairs of Lithuania signed the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols No1, No 4, No 7. However, in 1993 a group of politicians raised the problem of the Constitution's compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In February 1994 the President of the Republic of Lithuania formed a working group for the preparation of a comparative analysis of the European Convention of Human Rights and Fundamental Freedoms with the Constitution of the Republic of Lithuania. The decision to carry out the analysis was based on the following argument: according to Article 1 of the Convention, the state shall "secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention". That implies that national legislation must comply with the requirements of the Convention. In the opposite case, Lithuania, having ratified the Convention and its Protocols, would not be able to comply with the international obligations, as the first part of Article 7 of the Constitution determines that "any law or other statute which contradicts the Constitution shall be invalid".[1]

The results of the comparative analysis of the Convention and the Constitution carried out by the working group revealed that some articles of the Convention contradict the Constitution of Lithuania. In January

[1] Valstybes žinios, 95-01-27, Nr. 9-199. p. 23-24.

1995, the President submitted the inquiry to the Constitutional Court, requesting to present the conclusions whether Art. 9, 14 and Art. 2 of Protocol No. 4 of the European Convention of Human Rights and Fundamental Freedoms are in compliance with the Constitution of the Republic of Lithuania.

The request of the President stated that the second part of Article 9 of the Convention provides the possibility to restrict a person's "freedom to manifest one's religion or beliefs", whereas part 4, Article 26 of the Constitution of Lithuania states a possibility to limit "freedom to profess and propagate his or her religion or faith". According to that inquiry, in the Convention, as well as in the Constitution, two different freedoms – freedom to profess and freedom to manifest religion and beliefs are declared. However, the second part of Article 9 of the Convention provides the possibility to restrict a person's "freedom to manifest one's religion or beliefs". The question of the President was as follows: may it be treated that the Convention prescribes the possibility to restrict manifestation of religion or beliefs but it does not prescribe any possibility to limit a person's freedom to profess religion or belief?[2]

The decision of the Constitutional Court states, firstly, that the Convention does not declare two types of freedoms, since the freedom to profess religion is not mentioned in it at all. According to the Constitutional Court, international legal documents and the Constitution of the Republic of Lithuania while providing freedom of religion, employ different terms to define it (for example the International Covenant on Civil and Political Rights employs the term "to have").[3] Secondly, there is no basis for interpreting Article 26 of the Constitution of the Lithuanian Republic as providing the possibility to limit the freedom to profess religion or beliefs, whereas, on the other hand, the first part of Article 26 states that "freedom of thought, conscience, and religion shall not be restricted" and the second part declares that "every person has the right to choose freely any religion or faith and, either individually or with others, in public or on private, to manifest his or her religion or faith in worship, observance, practice or teaching. Thirdly, the term "profession of religion or belief" is "a spiritual category" which implies the possession of religion or belief, while stressing both the spiritual nature of religion and the state of a person's soul (...). It is not accidental that the Lithuanian words "laisve ispazinti" ("freedom to profess") in the English texts of international legal documents correspond to "freedom to have", respectively, the word-for-word translation of which would be "laisve tureti" ("freedom to have"). In the translations, the word "to profess" was used instead of "to have" because the latter does not entirely reflect the spiritual nature of religion or faith, nor does it reflect the inner state of the human soul. This state may not be restricted in any way if only by persecuting a person for his of her religion or faith, and even in such a case, the persecution cannot deprive him or her of his or her religious beliefs or faith. In this case a general legal principle is valid: "lex non cogit ad impossiblia"–"the law does not require impossible things".[4] The Constitutional Court has concluded that the word "to profess" employed in the statement "a person's freedom to profess and propagate his or her religion or faith may be subject only to those limitations prescribed by law" (Part 4, Article 26 of the Constitution of the Republic of Lithuania) may be interpreted as corresponding to the words "one's religion" in the Convention.

[2] Valstybes žinios, 95-01-27, Nr. 9-199. p. 27.
[3] Valstybes žinios, 95-01-27, Nr. 9- 199. p. 28.

According to the Constitutional Court, "if the Constitution provided two separate freedoms, namely to profess and to manifest religion, these two phrases would be joined by the conjunction 'or' instead of 'and'. The phrase 'to profess and to propagate' means nothing else but one's religion or belief".[5] The Court came to the conclusion that Article 9 of the Convention does not contradict the Constitution of the Republic of Lithuania.

II. In May 2000, the group of members of the Seimas submitted to the Constitutional Court a petition requesting to investigate the compliance of the Law on Education with the Constitution of the Republic of Lithuania. The inquiry of the petitioner was based on the following argument: according to the Law on Education the main goal of education in Lithuania is "to guarantee the same rights and conditions for members of traditional religions as for all the residents to bring up their children in educational establishments according to their convictions" (Article 1, Item 5). The Constitution guarantees the right to freely choose and manifest any religion or faith in worship, practice or teaching (Article 26, Parts 1, 2, 3). It also declares that there is no state religion in Lithuania (Article 43, Part 7) and government establishments of teaching and education shall be secular (Article 40, Part 1). In the same article of the Constitution it is declared that the state recognizes traditional churches

[4] Valstybes žinios, 95-01-27, Nr. 9-199, p. 28.
[5] Ibd., p. 28.

and organizations and other religious organizations which "have basis in society and their teaching and rituals do not contradict morality and law" (Article 43, Part 1).

The petitioner came to conclusion, that no church is granted any special right. However, in the opinion of the petitioner, the Law on Education (Article 1, Part 5), provides the right to bring up children in educational establishments according to their or their parents' convictions only for members of traditional religious organizations but not for other religious organizations. That implies discrimination against other religious organizations. The petitioner draws conclusions that Article 1, Part 5 of the Law on Education conflicts with Article 26, Parts 1,2,3, Article 40, Part 1 and Article 43, Parts 1,7 of the Constitution.

According to the petitioner, the Constitution (Article 26, 29, 43) guarantees equal opportunities for all persons to bring up their children according to the religion professed in their family. However, Article 20 of the Law on Education, stating that under request of the parents, religious instruction of the traditional churches shall be given at the state and local schools, violates the rights of individuals who profess non-traditional religions. Consequently, in the opinion of the petitioner, Article 20 of the Law on Education conflicts with the Constitution, as well.[6]

The second issue of the inquiry under scrutiny was related to the procedure of the foundation of educational establishments. According to the Law on Education, "educational establishments may be founded on the basis of an agreement of several co-founders. At the request of parents, on the basis of an agreement, state or local governmental educational establishments (classes, groups) may be co-founded with a state-recognized traditional religious association on the initiative of the said association, the local governmental council, or a state institution. The procedure of foundation, reorganization or closing down of those educational establishments, coordinated with a state-recognized traditional religious association, shall be established by the Government or its authorized institution" (Article 10, Part 4).

The opinion of the petitioner was that Article 10 of the Law conflicts with the Constitution. The petitioner's arguments were based on the following interpretation of the Constitution: Article 43, Part 7 of the Constitution states that there is no state religion in Lithuania; Part 5 states that the status of churches and other religious organizations in the state shall be established by agreement or by law; Article 40, Part 1 declares

[6] Valstybes žinios, 2000-06-16, Nr. 49-1424, p. 2.

that teaching and education in educational establishments of Lithuania are secular, while at the request of parents, they shall offer classes of religious instruction.

According to the petitioner, while the tax payers, whose funds maintain secular schools, are of various religions or have a secular world view, allocation of part of state funds for joint state and traditional church educational establishment would hurt the feelings of those who profess non-traditional religions or who do not profess any religion. Moreover, the petitioner stated that by granting the right to found joint state and church schools only for traditional religious organizations, the Law on Education grants the privilege to them, although the Constitution (Article 29) states that nobody may be granted privileges on the basis of religion or conviction.[7]

The petitioner argued that the Constitution provides the possibility of founding non-governmental educational establishments (Article 40), but it does not include any provisions for the foundation of joint state and church schools.[8] The Decision of the Constitutional Court states: a. the Constitutional provision of the institute of traditional churches and religious organizations (Article 43) is the basis upon which a different status of traditional churches may be established in comparison with other religious organizations. The institute of traditional churches also means that for those churches, extra rights may be garneted by the law; therefore the rights granted for traditional religious organizations by Article 10 of the Law on Education do not make grounds to state that the article under scrutiny violates the equality of individuals provided by the Constitution; b. the Constitutional statement which provides the possibility to found joint state and local governmental establishments of teaching and education does not mean that several co-founders of state or local governmental establishments of teaching and education are prohibited. Article 10 of the Law on Education includes that joint state and traditional religious organizations schools are state (local government) schools. According to the Constitution (Article 40), on the other hand, such jointly founded schools are secular.[9]

The Constitutional Court also stated that the disputed act conflicts with the articles of the Constitution which had not been analyzed by the petitioner. According to the Decision of the Constitutional Court, Article 10

[7] Valstybes žinios, 2000-06-16, Nr. 49-1424, p. 7-8.
[8] Ibd., p. 8.
[9] Ibd., p. 19.

of the Law on Education, which provides the government with the possibility of determining the procedure of the foundation or the closing down of the joint state and traditional religious organizations establishments only upon coordination with traditional religious organizations, violates both the principles of state and church separation, as well as secularity of state schools.[10]

The Constitutional Court stated that according to the Constitution (Article 40), state and local government schools shall be secular. This implies that classes or groups in the primary and higher schools shall also be secular. Under request of parents in state or local government primary and higher schools, classes or groups for religious instruction have to be formed (Article 40). However, according to the Constitutional Court, such groups may not be founded in state or local governmental schools for teaching secular subjects. In such a case, "the secular character of state and local government educational establishments would be denied, resulting in the violation of the constitutional principle of state and church separation".[11]

The Constitutional Court came to the conclusion that Article 10, Part 4 of the Law on Education, which states that in state or local governmental schools classes or groups may be co-founded with traditional religious communities in order to give both religious instruction and to teach secular subjects, "creates legal preconditions to change the secular character of state schools". Therefore, the Constitutional Court decided that Article 10, Part 4 of the Law conflicts with Article 40, Part 1 of the Constitution.[12]

The next question of the request was related to Article 32 of the Law on Education. The article states: a. regulations of joint state and religious organization schools must be approved by both founders; b. the church must set the requirements of world view formation for the staff of those schools; c. certification of the heads of such schools must be organized also by both founders. The petitioner argues that this article conflicts with the statement of the Constitution on the secularity of state schools (Article 25, 26, 40).

The Constitutional Court stressed that state schools are secular and for that reason requirements to teachers' convictions may not be set up. The provision of the disputed article that religious organizations may set up

[10] Ibd., p. 19.
[11] Valstybes žinios, 2000-06-16, Nr. 49-1424, p. 19.
[12] Ibd., p. 19.

requirements of world outlook for the staff of state schools also contradicts both the constitutional concept of the freedom of convictions and their expression, as well as the constitution statement that culture, science, research and teaching shall be unrestricted (Article 42). The Constitutional Court concluded that items 1, 2, 3 of Part 2, Article 32 of the Law on Education conflict with Part 1 of Article 25, Parts 1, 2 of Article 26 and Article 42 of the Constitution.[13]

According to the Constitutional Court, the provision of Article 32 of the Law on Education which states that "the heads of the joint state and traditional religious organizations have to be appointed and dismissed on the recommendation of the religious organization" means a dependence of state institutions on the will of traditional religious organizations. This fact was interpreted as contradicting the constitutional principle of state and church separation (Article 25, Part 1 of the Constitution).[14]

The Court stated that "the principle of secularity declared in Article 40, Part 1 of the Constitution, among other issues means the following: a. state and local government secular establishments of teaching and education are tolerant, open and accessible to people of all faiths, as well as to the members of society who are non-believers; b. the content of world-view education in these establishments is secular; c. in the course of teaching of secular subjects neither any religion nor faith is implanted in pupils. No requirements related to their convictions may be set up for teachers or other employees of secular educational establishments (save teachers of religion). It is only the state and local governmental institutions that are permitted to manage, organize and supervise activities of state and local governmental educational establishments, but never churches or religious organizations".[15]

According to the Constitutional Court, in legal regulations declared in items 1, 2, 3 of Part 2 of Article 32 of the Law, the principle of state and church separation is violated. Traditional religious organizations which are co-founders of a school are permitted by Law to interfere with the management and supervision of that school and to change the secular character of the educational establishment. Hence the Court came to the conclusion that Part 2 of Article 32 of the Law conflicts with Part 1 of Article 40 of the Constitution.[16]

[13] Ibd., p. 21-22.
[14] Ibd., p. 21.
[15] Ibd., p. 21-22.
[16] The Law on the Amendment of the Law on Education came to power on 29.11.2000.

III. In 1994, the Constitutional Court conducted the investigation of the Case subsequent to the one requested by the Plunge District Court to investigate whether Article 6, Part 2, Article 11 and Article 12, Part 2 of the Matrimonial and Family Code comply with the Constitution of the Republic of Lithuania.[17] The request of the District Court was based on the following argument: Article 38, Part 4 of the Constitution states that "the State shall also recognize marriages registered in church". However, the Matrimonial and Family Code (Article 6) declares that only marriages registered in the state civil registry offices shall be recognized; religious ceremonies of marriage, on the other hand, have no legal effect.

The Constitutional Court referred to the legal rule which states that in the sphere of legal regulations a law has no retroactive validity. Adoption of retroactive norms of law is an exception. The Constitution of the Republic of Lithuania was adopted on 25 October 1992 and came into force the following day, after the promulgation of the results of the referendum. Neither the Constitution nor the law "on the Procedure for the Enforcement of the Constitution of the Republic of Lithuania" provides for the retroactive validity of the constitutional norms.[18] The Constitutional Court, therefore, stated that the provision of Article 38, Part 4 may not be applied to the legalization of a church wedding contracted prior to the enforcement of the Constitution. "If, before the aforementioned adoption, the marriage had not been registered in civil registry offices as it was prescribed by the norms of the Matrimonial and Family Code, it still did not cause any legal consequences, since it could not have caused them under laws that had been in effect earlier".[19]

[17] In early 1994 the Plunge District Court conducted the investigation of the civil case upon the complaint related to the refusal of the Plunge district notary to issue a certificate of the right of succession under law.

[18] Valstybes Žinios, 1994-04-27, Nr. 31-562, p. 28.

[19] The Constitutional Court recognized that part 2 of Art. 6, of the Matrimonial and Family Code, which stated that only marriages registered in State civil registry offices should be recognized, while the religious ceremony of marriage had no legal effect, and part 2 of Art. 12 which provided that rights and duties of spouses should be marriages registered in State civil registry offices contradict part 4 of Art. 38 of the Constitution. The new Civil Code came into force on 1 July 2001. The Civil Code states that church (confessional) marriage will have civil effects pursuant to the legal acts of the Republic of Lithuania from the moment of its religious celebration, provided as follows: a) there are no impediments to the requirements of Article 3.12-3.17 of the Civil Code concerning spouses age and free will, b) the marriage was celebrated according to the canons of a religious organization registered and recognized by the Lithuanian State, and c) the church (confessional) marriage has been recorded in the civil register.

IV. In 2005, the Office of Equal Opportunities Ombudsperson investigated the first case upon the complaint, which stated that people of non-Christian religions were not provided with the possibilities and conditions to take nourishment at schools, hospitals, the army, prisons etc., in accordance to the norms of their religion. The complainant asserted that for this reason, he and his family were discriminated on the ground of religion, although direct or indirect discrimination based upon age, sexual orientation, disability, racial or ethnic origin, religion or beliefs is prohibited by the Law on Equal Treatment (Article 1).[20] The conclusions of the investigation carried out by the Office of Equal Opportunities Ombudsperson were based on the arguments of experts from the Ministry of Health Care and the Ministry of National Defense.[21]

The Ministry of Health Care stated that at schools, hospitals, the army etc. the nourishment is organized on the bases of physiological, age and health features of individuals, and also according to recommended by experts of the Ministry of Heath Care daily norms of nutrient and energy (the Decree of the Minister of Health Care No. 510).[22] The report of the Ministry of Heath Care was grounded on two arguments: firstly, according to the Law on Religious Communities and Associations, State and Church are separated (Article 7); secondly, based on the "principles of wholesome nourishment", the Ministry stated that there are many different religious organizations in Lithuania, and sometimes their members raise claims which contradict principles of wholesome nourishment. The Ministry of Heath Care suggested that in the frame of rational compromise, the heads of such organizations on their personal initiative could organize nourishment for individuals who need special nourishment.[23]

The answer of the Ministry of National Defense was based on analogous arguments. The expert from the Ministry stated that nutrition of solders is organized according to the adopted by the Government physiological norms of nutrition of soldiers.[24] Those norms are established and have to be applicable for all soldiers. The exceptional cases (groups of soldiers or individuals) are not provided by the Decree. Therefore, in the opinion of the expert from the Ministry of National Defense, there were no grounds to assert that the complainant was discriminated against.

[20] Adopted on 1 January 2005.

[21] www.religija.lt/content/view/675/45.

[22] Valstybes Žinios, 1999, No. 102-2936.

[23] www.religija.lt/content/view/675/45.

[24] Decree of the Government No. 1178 (October 24, 1997).

In addition, the Office of Equal Opportunities Ombudsperson stated that since only 0,16%[25] of imprisoned persons had special needs for nutrition on the bases of their religion, and those persons were about 13 at that time, it was not expedient to change legal regulations related to the nutrition of imprisoned persons.

On the ground of the aforementioned arguments, the Office of Equal Opportunities Ombudsperson rejected the complainant's claim, with the reasoning that facts of violation of the equal opportunities were not confirmed.

V. In February 2004, the Klaipeda District Court investigated a case related to a request for alternative military service. One year before, in 2003 the Klaipeda Regional Court had set a penalty for evading compulsory military service by two members of the Jehovah's Witnesses religious community. The Decision of the Klaipeda Regional Court was based on the conclusion of the Commission of the Ministry of National Defense for Alternative Military Service. The Commission had concluded that the requirement of the believers could not be implemented, for the reason that suggested alternatives were not accepted by them. The Klaipeda Regional Court did not take into account the fact that believers had been offered to fulfill alternative military service in the army. Hence one year afterwards, the Klaipeda District Court came to the conclusion that the judgment of the Klaipeda Regional Court was ungrounded.[26]

[25] Statistics of Office of Equal Opportunities Ombudsperson.
[26] Lietuvos Rytas, Febuary 12, 2003; www.religija.lt/content/view/675.

ALEXIS PAULY et PATRICK KINSCH

L'APPLICATION DES DISPOSITIONS DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME PROTÉGEANT LA LIBERTÉ DE RELIGION ET DE CONVICTION À LUXEMBOURG

I. Le Statut de la Convention Européenne des Droits de l'Homme devant les Tribunaux Luxembourgeois

La Convention, signée à Rome le 4 novembre 1950, est entrée en vigueur en 1953 avec le dépôt du dixième instrument de ratification, celui du Grand-Duché de Luxembourg.[1] Elle joue au Luxembourg – de même qu'en France et en Belgique, les deux pays avec lesquels le Luxembourg a le plus de points communs en ce qui concerne son ordre juridique – un rôle éminent, pour deux raisons: les dispositions de la Convention qui garantissent des droits et libertés sont reconnus comme directement applicables en droit interne luxembourgeois; la Convention bénéficie de surcroît de la primauté par rapport aux normes de droit interne.

Cette situation n'est pas propre à la Convention européenne des droits de l'homme, mais elle est celle de tous les traités internationaux ratifiés par le Grand-Duché de Luxembourg. L'applicabilité directe de la plupart des dispositions de traités est reconnue depuis très longtemps en droit luxembourgeois[2]; elle s'étend notamment à la Convention européenne. La primauté de la Convention est reconnue, au même titre que la primauté des autres traités internationaux, par une jurisprudence constante depuis un arrêt de la Cour de cassation du 8 juin 1950.[3] Cet arrêt est

[1] SPIELMANN et WEITZEL, *La Convention Européenne des Droits de l'Homme et le Droit Luxembourgeois*, Bruxelles, 1991, p. 15. La loi de ratification est la loi du 29 août 1953.
[2] Comme l'a souligné P. PESCATORE, 'L'Application Judiciaire des Traités Internationaux dans la Communauté Européenne et dans ses États – Membres', *Mélanges Pierre-Henri Teitgen*, (Paris 1984), p. 355, 389, la jurisprudence luxembourgeoise avait longtemps la particularité de reconnaître, sans difficulté, l'applicabilité directe de tous les traités sans exception. Ce n'est plus le cas actuellement: cf. P. KINSCH, 'L'Application du Droit International Public par les Tribunaux Luxembourgeois', Ann. dr. lux. 3 (1993) 183, 199-210..
[3] Pas. lux. 15, 41, qui a retenu qu''en cas de conflit entre les dispositions d'un traité international et celles du loi interne postérieure, la loi internationale doit prévaloir sur la loi nationale'.

d'autant plus remarquable qu'en 1950, le principe de la primauté d'un traité international par rapport à une loi interne postérieure à l'entrée en vigueur du traité n'était reconnue ni en France, ni en Belgique. Le principe de la primauté a, depuis lors, été régulièrement réaffirmé en jurisprudence.[4]

Le contrôle de la conventionnalité des lois par rapport à la Convention européenne des droits de l'homme avait pendant longtemps l'avantage de pouvoir être pratiqué par les tribunaux, alors que le contrôle de la *constitutionnalité* des lois leur était interdit par une tradition jurisprudentielle qui s'était fragilisée au cours des années 1980 et 1990, mais qui n'avait pas été officiellement été abandonnée par les plus hautes juridictions du pays. Or, le contrôle de conventionnalité par rapport à la Convention peut jouer, en pratique, un rôle équivalent au contrôle de constitutionnalité par rapport aux libertés publiques définies par la Constitution: le contenu du chapitre II de la Constitution, intitulé «Des libertés publiques et des droits fondamentaux»[5], est pratiquement identique à celui des quatorze premiers articles de la Convention. Depuis une révision constitutionnelle de 1996, le contrôle de la constitutionnalité des lois a été introduit au Luxembourg et a été confié à une Cour constitutionnelle dont les saisines sont relativement nombreuses. Le contrôle de constitutionnalité – qui ne s'opère que par rapport au texte de la Constitution et non par rapport aux traités internationaux – est centralisé entre les mains de la Cour constitutionnelle, alors que le contrôle de conventionnalité continue d'exister en tant que contrôle décentralisé pouvant être exercé par chaque juridiction. Il est néanmoins remarquable que dans une affaire récente qui pouvait être traitée soit comme relevant du contrôle de constitutionnalité, soit comme relevant du contrôle de conventionnalité, la Cour de cassation a décidé, sans motiver autrement ce choix, de privilégier le contrôle de constitutionnalité en saisissant la Cour constitutionnelle, au lieu de commencer par résoudre elle-même la question de conventionnalité.[6]

[4] C.E. 28 juillet 1951, Dieudonné, Pas. lux. 15, 263, 268; Cass. 14 juillet 1954, Pas. lux. 16, 150, 152; J.T. 1954, 694, 696, concl. L. de la Fontaine, note PESCATORE; Rev. crit. dr. int. pr. 1955, 293, note DE VISSCHER; Cass. 14 avril 1994, Pas. lux. 29, 331; Ann. dr. lux. 5 (1995) 394, et de très nombreuses autres décisions – V. la discussion par P. PESCATORE, *Conclusion et Effet des Traités Internationaux selon le Droit Constitutionnel, les Usages et la Jurisprudence du Grand-Duché de Luxembourg*, Luxembourg, 1964, p. 104 et s.; P. KINSCH, op. cit., p. 226 et s.

[5] Jusqu'à la révision constitutionnelle du 23 décembre 1994, le titre du chapitre II était «Des Luxembourgeois et de leurs droits», mais cette restriction aux Luxembourgeois ne se reflétait pas dans la pratique constitutionnelle.

[6] Cass. 21 juin 2007, n° 35/07. V. également les conclusions du Procureur Général du 8 mai 2007, qui font état du fait que le texte constitutionnel invoqué (le principe d'égalité, en l'occurrence entre le père et la mère d'un enfant naturel) est «une norme interne supérieure dont le respect est garanti par un organe judiciaire spécialement créé à ces fins et que le droit fondamental consacré par le texte constitutionnel est analogue quant à ses finalités aux textes conventionnels invoqués en second lieu».

Enfin, la jurisprudence luxembourgeoise a tendance à trancher la question d'éventuels conflits entre la Convention européenne des droits de l'homme et la Constitution en faisant prévaloir la Convention européenne, donnant ainsi une portée extrême à l'idée de primauté de l'ordre juridique international.[7]

II. L'application des dispositions de la Convention européenne des droits de l'homme protégeant la liberté de religion et de conviction

Les cas d'application de ces textes sont relativement rares, à la fois en raison de la taille réduite du pays et en raison du fait que la situation des religions au Luxembourg se caractérise par un haut degré de tolérance de la part des autorités publiques et de la part des citoyens entre eux.

Un nombre restreint de décisions faisant application de l'article 9 de la Convention européenne des droits de l'homme ont été publiées, et leur contenu sera rapporté ci-dessous.[8] On aurait pu imaginer qu'il fût fait appel à la Convention européenne dans des affaires ayant trait à l'éviction, par l'ordre public luxembourgeois, de dispositions de lois étrangères qui s'inspirent de la *charia* traditionnelle et qui sont considérées comme contraires aux droits de l'homme qui lient l'État luxembourgeois, mais tel n'a pas été le cas.[9]

[7] Cour d'appel 13 novembre 2001, Ann. dr. lux. 12 (2002) 455.

[8] Aucune décision publiée, ayant trait à la liberté de religion et de conviction proprement dite, n'applique un autre texte de la Convention européenne que l'article 9. En matière d'appartenance forcée à des syndicats de chasse, contraire aux convictions d'ordre éthique (hostilité de principe à la chasse) de certains propriétaires de terrains intéressés, des jugements des juridictions administratives ont fait application de l'article 11 (liberté d'association négative: droit de ne pas faire partie d'un syndicat de chasse) et de l'article 1er du premier Protocole additionnel (atteinte au droit de propriété par un usage forcé, contraire aux convictions éthiques des propriétaires): T.A. [tribunal administratif] 18 dé-cembre 2003, n° 15096; v. également la solution en sens contraire de T.A. 12 février 2003, n° 15316 confirmée par adoption de motifs par C.A. [Cour administrative] 10 juillet 2003, n° 16177C; dans cette dernière affaire, la Cour européenne des droits de l'homme a constaté une violation de l'article 11 de la Convention et premier du premier Protocole additionnel par le Grand-Duché de Luxembourg: C.E.D.H. 10 juillet 2007, *Schneider* c. *Luxembourg*, n° 2113/04.

[9] Deux jugements du tribunal d'arrondissement de Luxembourg des 29 novembre 1984 et 13 juillet 1989 (Bull. Laurent 1995, I, 25), qui écartent l'application du droit iranien du divorce au motif que l'institution d'un divorce par répudiation est contraire à l'égalité entre

A. *Les Adventistes du Septième Jour et l'Obligation Scolaire s'Appliquant au Samedi*

Les membres de l'Église adventiste du Septième Jour se considèrent comme tenus d'observer, par fidélité au quatrième commandement du Décalogue, le sabbat, septième jour et non le dimanche, premier jour de la semaine. Cette obligation d'ordre religieux était de nature à entrer en conflit avec l'obligation, au titre de la loi scolaire (loi modifiée du 10 août 1912 concernant l'organisation de l'enseignement primaire, qui prescrit que tout enfant recevra pendant neuf années consécutives un enseignement organisé par cette loi), d'assister aux cours d'enseignement primaire ou secondaire, y compris lorsqu'ils ont lieu le samedi en vertu du mode d'organisation de l'école choisie par l'élève.[10]

Des litiges ont été portés devant les juridictions administratives, saisies de recours en annulation contre des refus d'accorder à des élèves une dispense générale d'assister aux cours le samedi. Deux élèves étaient en cause: un élève de l'école primaire et un élève de l'école secondaire. L'affaire ayant trait à l'élève de l'école primaire – l'affaire *Martins Casimiro* – a donné lieu à un jugement du tribunal administratif[11] et un arrêt de la Cour administrative[12] ainsi que, sur recours devant la Cour européenne des droits de l'homme, à une décision de cette juridiction déclarant la requête irrecevable pour défaut manifeste de fondement.[13] Le cas de l'élève de l'école secondaire est l'affaire *Azenha Sansana*, qui a donné lieu à un jugement du tribunal administratif saisissant la Cour constitutionnelle de la question de la compatibilité de l'obligation découlant de

les hommes et les femmes, se réfèrent à la Déclaration universelle des droits de l'homme adoptée par l'Assemblée générale des Nations Unies en 1948; le protocole n° 7 à la Convention européenne des droits de l'homme, dont l'article 5 formule le principe de l'égalité entre les époux dans des termes inspirés de la Déclaration de 1948, n'est entré en vigueur que suite à sa ratification par la loi du 27 février 1989. V. également Cour d'appel, 8 janvier 2004, n° 27530 (refus d'accorder l'exequatur à une kafala conventionnelle de droit marocain, jugée contraire à l'ordre public: «l'autorité parentale apparaît dans ce système comme un élément du patrimoine juridique du père dont il peut disposer dans le cadre de ses prérogatives parentales. L'avis de la mère ne revêt aucune importance, l'appréciation de l'intérêt de l'enfant relève du pouvoir souverain du père, l'autorité publique reste étrangère à la création de la Kafala.» Il n'est pas fait référence expressément à la Convention européenne, ni d'ailleurs à un autre texte garantissant des droits de l'homme).

[10] Depuis quelques années, la scolarité du samedi n'existe plus, ce qui a résolu le problème du conflit avec les obligations d'ordre religieux.

[11] T.A. 16 février 1998, n^{os} 9360 et 9430, Bull. Laurent 2000, IV, 5.

[12] C.A. 2 juillet 1998, n° 10648C, Bull. Laurent 2000, IV, 20.

[13] C.E.D.H. 27 avril 1999, *MARTINS CASIMIRO* c. *Luxembourg*, n° 44888/98, Bull. Laurent 2000, IV, 30, obs. Nothar.

la loi scolaire avec le principe de liberté de manifester ses opinions religieuses, garanti par l'article 19 de la Constitution[14], un arrêt de la Cour constitutionnelle qui constate la conformité de la loi à la Constitution[15], un autre jugement du tribunal administratif rejetant, en conséquence, le recours[16] et un arrêt d'appel confirmatif de la Cour administrative.[17]

Chacune de ces décisions repose sur la même idée de base: la liberté de religion n'est pas absolue; elle doit être conciliée avec le droit des élèves à l'instruction et avec leur obligation de respecter la programmation des cours scolaires et donc le système éducatif. Il s'ensuit, selon les juridictions, que les restrictions au droit des requérants de manifester leur religion telles qu'elles se dégagent de la loi scolaire sont légitimes et proportionnées.

La décision de la Cour constitutionnelle ne fait application que de la Constitution, et la décision de la Cour européenne des droits de l'homme n'est pas une décision d'une juridiction nationale. On citera ci-après les passages les plus significatifs des décisions des juridictions administratives.

Selon le tribunal administratif, dans l'affaire *Martins Casimiro*:

> 'L'article 9 de la Convention européenne consacre la liberté du culte en disposant que "toute personne a droit à la liberté de pensée, de conscience et de religion; ce droit implique la liberté de changer de religion ou de conviction, ainsi que la liberté de manifester sa religion ou sa conviction individuellement ou collectivement en public ou en privé, par le culte, l'enseignement, les pratiques et l'accomplissement des rites", tout en retenant dans son deuxième alinéa le principe que la liberté de manifester sa religion ou ses convictions ne peut faire l'objet "d'autres restrictions que celles, qui, prévues par la loi, constituent des mesures nécessaires dans une société démocratique, à la sécurité publique, à la protection de l'ordre, de la santé et de la moralité publics ou à la protection des droits et libertés d'autrui". Dans un même ordre d'idées, l'article 19 de la Constitution garantit la liberté des cultes ainsi que celle de leur exercice public et la liberté de manifester ses opinions religieuses sous la réserve expresse de la répression des délits commis à l'occasion de l'usage de ces libertés, tandis que l'article 20 de la Constitution pose le principe que nul ne peut être contraint de concourir d'une manière quelconque aux actes et aux cérémonies d'un culte

[14] T.A. 15 avril 1998, n° 9633. La Cour constitutionnelle n'avait pas été saisie dans la première affaire, qui a été tranchée par référence à la seule Convention européenne.

[15] Cour const. 20 novembre 1998, Mém. A 1999, 15.

[16] T.A. 10 février 1999, n° 9633.

[17] C.A. 8 juillet 1999, n° 11205C.

ou d'en observer les jours de repos. D'un autre côté, l'article 23 de la Constitution investit la puissance publique d'une mission constitutionnelle consistant à veiller à ce que tout Luxembourgeois reçoive l'instruction primaire, qui sera obligatoire et gratuite'.

Il est en effet constant que l'école publique gratuite, obligatoire et ouverte à tous symbolise la démocratie et constitue un des pivots des institutions collectives nationales en ce qu'elle a pour but de conférer à tous les citoyens un minimum uniforme d'éducation. Ainsi, le droit à l'éducation fait partie des droits fondamentaux dans un État démocratique et constitue partant un droit digne de protection, susceptible de restreindre la liberté de manifester sa religion ou ses convictions, au sens du 2e alinéa de l'article 9 précité de la Convention européenne. Il en découle qu'une mesure qui s'avère nécessaire dans une société démocratique pour protéger le droit à l'éducation est de nature à s'inscrire dans les prévisions dudit alinéa, de sorte qu'il y a lieu d'analyser en l'espèce dans quelle mesure la mission constitutionnelle de la scolarité obligatoire doit pouvoir se conjuguer avec le principe de la liberté de croyance.

'L'article 2 du Protocole additionnel à la Convention européenne du 20 mars 1952 disposant que "*nul ne peut se voir refuser le droit à l'instruction*" et que "*l'État, dans l'exercice des fonctions qu'il assumera dans le domaine de l'éducation et de l'enseignement, respectera le droit des parents d'assurer cette éducation et cet enseignement conformément à leurs convictions religieuses et philosophiques*", il est en effet clair que l'école publique doit accueillir les élèves de toutes confessions et ne peut partant refuser l'admission d'un élève dans le système scolaire en raison de son appartenance religieuse. D'un autre côté, aucune des dispositions invoquées de la Convention européenne, de la Constitution, ni encore du Pacte international relatif aux droits civils et politiques ou de la Convention de l'Unesco relative à la lutte contre la discrimination dans le domaine de l'enseignement, n'établit un impératif faisant que des convictions religieuses doivent pouvoir affranchir de l'obligation scolaire.

A défaut de règles spécifiques régissant le conflit résultant de la confrontation entre les principes de la liberté des cultes et de la scolarité obligatoire tant au niveau de la Convention européenne que de celui de la Constitution, il incombe dès lors au tribunal d'apprécier si les autorités communales, dans le cadre du pouvoir dont elles disposent pour accorder une dispense de l'enseignement primaire en application de l'article 7 de la loi scolaire, ont pu dépasser les limites légales de leur pouvoir d'appréciation en décidant que les deux principes en cause ne sont pas conjugables dans le sens escompté par les demandeurs.

Il y a lieu de retenir que s'il doit en principe être possible aux élèves qui en ont font la demande de bénéficier individuellement et ponctuellement des dispenses de l'enseignement scolaire nécessaires à l'exercice d'un culte ou à la célébration d'une fête religieuse, cette possibilité doit rester relativisée dans la mesure de la compatibilité des absences qui en découlent avec l'accomplissement des tâches inhérentes aux études et avec le respect de l'ordre dans l'établissement concernant l'ensemble de la communauté scolaire. Or, dans la mesure où l'ordre interne est une condition nécessaire au déroulement normal de l'activité scolaire et que la journée du samedi couvre en fait une partie signifiante de l'emploi du temps normal dans l'enseignement primaire qui peut comporter notamment des contrôles de connaissances ou l'intervention de titulaires différents, une dérogation systématique, sinon du moins quasi-systématique, à l'obligation de présence pendant une journée déterminée de la semaine, en l'occurrence le samedi, est en l'espèce susceptible de désorganiser démesurément les programmes scolaires aussi bien du point de vue du bénéficiaire du régime ainsi dérogatoire que des responsables de classe, de même que des autres élèves de la (ou des) classe(s) scolaires concernés, notamment au regard des adaptations de l'emploi du temps et de l'évacuation des programmes ainsi engendrés'.[18]

Les deux arrêts de la Cour administrative sont motivés de manière très similaire en ce qui concerne le rejet du moyen tiré de l'article 9 de la Convention européenne. Selon l'arrêt *Martins Casimiro*,

'Les appelants critiquent la motivation [du tribunal administratif] en faisant remarquer que la décision critiquée ferait croire, sans être corrigée sur ce point par le jugement, que la dispense était demandée sur base de "convictions religieuses", alors qu'en fait la base légale en serait à chercher dans le droit positif, et notamment dans la Convention européenne des Droits de l'Homme. Cette critique n'est pas fondée, alors que, sans s'arrêter à la formulation employée par le Conseil communal, le Tribunal administratif a examiné l'objet du litige sous l'éclairage de l'article 9 de ladite convention, ainsi que des articles 19, 20 et 23 de la Constitution luxembourgeoise. En relativisant la liberté d'exercice des cultes le raisonnement des premiers juges s'insère dans le courant prépondérant de la jurisprudence internationale.

Ainsi la Cour suprême des États Unis s'est prononcée comme suit: *La liberté religieuse embrasse deux concepts, d'une part la liberté de croire et d'autre part la liberté de manifester sa croyance par l'action. Si la*

[18] T.A. 16 février 1998, précit.

première est sans restriction, la deuxième, par la nature des choses, ne saurait l'être (cf.: Cour suprême des États-Unis: Cantwell c/ Connecticut 310 US 296 du 20 mai 1940). La Cour Européenne des Droits de l'Homme a relevé que selon le texte-même de l'article 9 paragraphe 2 de la Convention Européenne des Droits de l'Homme la liberté de manifester sa religion ou sa conviction peut faire l'objet de restrictions (Arrêt CEDH du 25 mai 1993, Kokkinakis c/ Grèce). La Cour de droit public de la Confédération helvétique a estimé que cette liberté de religion peut être limitée à condition que la restriction repose sur une base légale suffisante, réponde à un intérêt public prépondérant et respecte le principe de la proportionnalité (arrêt BGE 123 I 296 du 12.11.1997; affaire X c/ Conseil d'État du Canton de Genève). Le jugement entrepris, conforme au droit interne, à la Convention européenne des Droits de l'Homme et à la jurisprudence internationale, est donc à confirmer en toutes ses forme et teneur'.[19]

L'arrêt *Azenha Sansana* indique, plus brièvement:

> 'Quant au principe de la conformité de l'obligation scolaire à la Convention Européenne des Droits de l'Homme, la Cour se réfère à l'arrêt CEDH du 25 mai 1993 (Kokkinakis c/ Grèce) dans lequel la Cour Européenne des Droits de l'Homme a relevé que selon le texte-même de l'article 9 paragraphe 2 de la Convention Européenne des Droits de l'Homme la liberté de manifester sa religion ou sa conviction peut faire l'objet de restrictions'.[20]

B. *Conciliation de la Liberté de Conscience et du Devoir de Loyauté entre Époux*

Dans un arrêt de la Cour d'appel de 1999[21], une conciliation a été opérée entre la liberté de conscience, d'opinion et de religion de l'un des époux – le mari, qui n'entendait pas participer à des cérémonies religieuses – et la bonne foi dans les rapports entre époux. L'épouse reprochait au mari de s'être s'opposé catégoriquement à l'éducation religieuse de l'enfant commun, après avoir pourtant accepté le mariage religieux et le baptême de l'enfant commun; d'avoir, sans demander l'avis de son épouse, refusé l'inscription de l'enfant au cours d'enseignement religieux; et d'avoir refusé d'assister à la première communion de l'enfant. Elle entendait en

[19] C.A. 2 juillet 1998, précit.

[20] C.A. 8 juillet 1999, précit.

[21] C.A. 7 juillet 1999, *A.W. c. G.E.*, n° 22552 et 22766 du rôle: cf. A. Pauly et P. Kinsch, 'Religions et État au Grand-Duché de Luxembourg', Revue européenne des relations Églises-États 9 (2002) 97.

tirer une cause de divorce pour injure grave. Le mari objectait que ces faits d'opposition n'étaient que l'exercice d'un droit, en l'occurrence le droit à la liberté de conscience.

La conciliation opérée par la Cour d'appel, au regard de la Constitution et de la Convention européenne des droits de l'homme, a pris la forme suivante:

> 'G.E. expose correctement que l'exercice des droits reconnus par la Constitution et par la Convention des droits de l'homme, – liberté de conscience, d'opinion, de religion –, ne peut jamais constituer en soi une cause de divorce au sens de l'article 229 du code civil. Toutefois des agissements déloyaux ou vexatoires, en rapport avec l'exercice de ces droits et qui trahissent la confiance du conjoint ou dénotent un manque de considération à son égard peuvent constituer une violation des devoirs du mariage.
> Le respect de la liberté de conscience interdit aux juges de porter des appréciations sur l'opportunité des décisions prises par l'un ou l'autre des parents quant à l'éducation religieuse ou laïque de l'enfant et les conflits relatifs à cette éducation ne font apparaître que de façon indirecte une violation des devoirs entre époux. [...]
> Il y a injure dès lors qu'un des conjoints a agi à l'insu ou contre la volonté de l'autre. La violation des engagements pris par les époux l'un envers l'autre quant à la religion des enfants présente le caractère d'une faute contraire aux devoirs entre époux. [...]
> La non participation de l'époux à la fête organisée par l'épouse à l'occasion de la première communion de l'enfant doit être située dans le cadre de l'exercice de son droit de liberté de conscience et d'opinion. En effet, la fête en question avait eu lieu pour célébrer la communion de l'enfant et avait donc une connotation religieuse. [...]
> Il ressort cependant du témoignage de la mère de l'épouse que G.E., sachant que son épouse voulait que l'enfant suive le cours de religion chrétienne a décidé de ne pas faire inscrire [l'enfant] à ce cours sans en avertir au préalable son épouse, c'est-à-dire à son insu et contre sa volonté. Cet agissement déloyal constitue une atteinte à la bonne foi dans les rapports entre époux, dénote un manque de considération à l'égard de l'épouse et est un facteur de dissociation du foyer'.

La demande en divorce a en conséquence été admise.

SOPHIE VAN BIJSTERVELD

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE NETHERLANDS

I. Introduction

The European Convention on human rights has gained a prominent place in Dutch legal awareness. This is the case for both the functioning of the European Convention at the European level as well as its functioning at the national level. This essay deals with the way freedom of religion or belief as guaranteed in Article 9 of the European Convention plays a role in domestic court cases. It will also pay attention to other rights guaranteed in the European Convention in as far as they are relevant to the right of freedom of religion or belief.

Before discussing the current role of Article 9 of the European Convention in the Dutch court room,[1] it is necessary to develop an overall understanding of the position of the European Convention in Dutch Constitutional Law (2), the various ways in which Article 9 may play a role in a court case (3), and the interpretation of Article 9 of the European Convention in early cases in the 1960s (4). A distinction will be made between freedom of thought, conscience, and religion including religious expression (5), and specific areas (6), including religion in the context of family law, religion in the context of education, and religion in the context of procedural rights and rights of the church as an institution. A brief conclusion will summarise the results (7).

II. The European Convention on Human Rights in Dutch Constitutional Law

Before we enter into a discussion of national court decisions regarding freedom of religion and belief that refer to the European Convention on

[1] The discussion of case law in this contribution is by no means exhaustive. Comparatively more attention will be paid to the general ways in which Article 9 ECHR is dealt with by the courts. The way Article 9 ECHR is dealt with in specific areas of the law (Section 6) by and large fall within this pattern.

human rights, we need to assess the legal status of the European Convention in the Dutch legal order and its relation to the Dutch Constitution. Against this background it will be possible to gain an in-depth idea of the way Article 9 ECHR and connected freedoms function in national court decisions.

According to the Dutch Constitution, no court is allowed to review parliamentary legislation, i.e., legislation enacted jointly by the government and parliament, on its compatibility with the Constitution. Article 120 of the Constitution states that the 'constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts'. Of course, such legislation must comply with the Constitution, but it is the legislator himself or herself who has the final say about the constitutionality. In the choice between the 'democratic' element and the 'legal-specialist' element, the 'democratic' element prevails. This choice was in line with the tradition of many continental European legal systems. Notably after the Second World War, many Western European countries changed their systems and introduced judicial review, often with a specialised constitutional court for the ultimate check on constitutionality. The Netherlands never changed the system, although the debate about this is ongoing. Currently, there is a pending initiative proposal to change the Constitution in this respect. Nevertheless, whether the proposal will be successful, remains to be seen. The veto of judicial review on the constitutionality only extends to national parliamentary legislation. Delegated legislation (enacted by the Crown or by ministers) and legislation enacted at decentralised levels (provinces and municipalities) can be reviewed on their constitutionality.

Traditionally, the Dutch constitutional system has always been open towards international law and to giving effect to international law in the Dutch legal order. Article 93 of the Constitution states that "[p]rovisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published". Article 94 subsequently states that "[s]tatutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions".

This means that provisions of international law that have the quality of being directly applicable into the Dutch legal order are directly applicable and take precedence above any national legislation, parliamentary legislation and even the Constitution itself. Citizens can directly appeal to these provisions in court. The question as to whether the provisions

actually have this quality of being directly applicable is decided by the court. Over the last decades, there has been a general tendency to be more generous in the assessment of whether a provision has this directly binding quality. Generally speaking, human rights provisions of international treaties, especially those guaranteeing classical human rights, are considered to be directly applicable. This is also true for the European Convention on human rights.

Articles 93 and 94 of the Constitution were first incorporated in the Constitution in 1953. The adoption of those Articles was seen as a confirmation of the already existing (unwritten) system. The review is carried out by any court; it is not the privilege of one specialised court.

Thus, in the constitutional system, fundamental rights, including freedom of religion or belief, as guaranteed in the Dutch Constitution cannot be invoked by the courts in domestic cases concerning parliamentary legislation, but the fundamental rights as guaranteed by the ECHR can. That is seen by many as an anomaly. In any case, we see that the ECHR plays a prominent role in domestic litigation which involves fundamental rights.

It is also important to make another general observation regarding the way the ECHR plays a role in the Dutch legal system must be made. In the course of the previous decades, the courts have slowly grown used to the fact that they have this power. In some specific areas of the law they have played a fairly active role, notably in the field of social security law and family law. Yet, that is not the case with regard to freedom of religion or belief.

III. Article 9 of the European Convention in Dutch Court Cases[2]

From the early sixties onwards, Article 9 of the European Convention has been invoked in court cases. It was highly interesting to see how the courts interpreted the various elements of Article 9. The ban on judicial review of parliamentary legislation has made this review possibility all the more exciting.

It must be realised that not every court case in which freedom of religion plays a role, calls upon Article 9, or reviews a Dutch legal provision on its compatibility with Article 9. Neither are public authority actions

[2] Quotations in inverted commas are attempts at a translation of a ruling. However, it must be borne in mind that even where not explicitly stated, these are often free translations or even paraphrases. Especially the older rulings use archaïc language and ways of constructing a sentence that do not easily translate.

always reviewed on their compatibility with Article 9. It is more often the case that Article 9 ECHR plays a role in a more indirect way.

Courts may be called, for instance, to interpret "open" concepts in legislation. This happens regularly in civil lawsuits. Freedom of religion as guaranteed in the Constitution or in the ECHR or other treaty may play a role in that case in a general way to determine whether, for example, a dismissal was "fair" or whether there were "reasonable grounds" to take a particular measure.

Another example of such an indirect role of Article 9 ECHR (and other provisions which guarantee freedom of religion) is that in assessing whether an exemption, permit or permission was rightly denied to an individual, the fact that religion is involved may be taken into account. In such cases, a court may or may not even refer to Article 9 ECHR or its equivalents. A similar situation is taking the element of religion into account in the determination of a sentence in a criminal case.

Sometimes a reference is made to Article 9 ECHR or its equivalents, without further arguing why a claim is rewarded or not. Thus, in those cases, it is not so much the literal text of the ECHR that plays a role, but the fact that freedom of religion is guaranteed in the Netherlands.

It must also be realized that in many cases Article 9 EHRM is not explicitly invoked. Perhaps, the equivalent Article 18 ICCPR is invoked instead. Both Articles may be invoked, of course. Sometimes the Constitution will be invoked together with (one of) these treaty articles. In such cases, not always a very detailed interpretation takes place.

A final remark needs to be made. Cases are often judged on the basis of the Dutch (formal) law itself, without the express invocation or interpretation of fundamental rights. That may be the case, for example, in hate speech cases which are decided according to the provisions in the Criminal Code.

IV. The Early Period

A spectacular 1962 ruling of the Supreme Court involving Article 9 ECHR concerned a provision in the Constitution itself. At that time, the Dutch Constitution still contained a provision that was known in popular speech as the 'procession ban'. Since 1848, the Constitution had stated that 'public manifestations of religions outside buildings and enclosed places remain permitted, where they are currently allowed according to the laws and regulations'. For all practical purposes, this meant a prohibition.

A catholic priest who had organised a procession and was prosecuted, invoked Article 9 ECHR. In a widely criticised ruling, in which it reviewed the contested provision of the Constitution on its compatibility with Article 9 ECHR, the Supreme Court stated that it could only come to the conclusion that the applicability of "a certain regulation which entails a limitation to the liberty of holding public religious manifestations outside buildings and enclosed places" is not in conformity with Article 9 ECHR, if it were absolutely unthinkable that a legislator which was confronted with the necessity of enacting a regulation for the purpose of the protection of public order "in all reasonableness could enact or uphold such a regulation".[3] The criticism mainly concerns the fact that the Supreme Court presented a much stricter test for assessing the lawfulness of limitations to the guaranteed freedom, than Article 9, Section 2, ECHR gives itself. Currently, courts do follow the limitation clause of Section 2 of Article 9 ECHR more closely.

This case clearly involved the exercise of religion. In other cases in the early period, the Supreme Court dealt with the question whether a manifestation was actually a manifestation of religion in the sense of Article 9 ECHR. A famous 1960 Supreme Court ruling concerned a Dutch church minister with conscientious objections against the levy for his old age pension on the grounds that the care for the life support of church ministers and emeriti was the responsibility of his church. The Supreme Court entered into an interpretation of the original French and English words "practice" and "les practiques". It considered that these words did not mean "the observance of church prescriptions in the practice of every day life, (...) but referred (...) to actions, whose nature gives expression to a religion or belief in any way".[4]

The Court also stated that the guaranteed right does not grant the freedom in general to ignore a legislative prescript on grounds of an objection derived from one's religion. In other words, the Court's opinion was that in this case freedom of religion was not at stake. Therefore, it did not need to assess whether the limitation clause of Article 9, Section 2, was respected.

A number of years later, the same reasoning was applied in a case which involved the (ritual) slaughtering of a goat (at home) without

[3] The language used in the original Dutch ruling is quite archaïc, so that a literal translation would be quite cumbersome. In the paraphrasing, the actual Dutch phrasing is translated as close as possible, even if this paraphrasing is not reproduced in inverted commas. HR 19 January 1962, NJ 1962, 107.

[4] HR 13 April 1960, NJ 1960, 436.

having notified the authorities in advance, as was required according to a municipal regulation.[5] The Court of Appeal took the same line of approach in a few cases of conscientious objection on the ground of religion of cattle farmers on the grounds of religion to provide the Agricultural authorities with information on their cattle.[6]

In a case, which did not involve religion, the question arose as to the meaning of the word "law" in Section 2 of Article 9 ECHR. Could the guaranteed rights only be restricted by parliamentary law or could any regulation in principle be a limitation of the guaranteed freedoms? In a 1963 ruling, the Supreme Court came to the conclusion that there was no reason to "interpret it in a restrictive sense as parliamentary legislation".[7] As stated earlier, the way of interpreting the limitation clause of Article 9, Section 2, of the Supreme Court in its 1962 'Procession-ruling' is now obsolete. However, the restrictive interpretation of what constitutes a "manifestation of religion" by and large still stands, as does the broad interpretation of the concept "law" in the limitation clause.

V. Freedom of Opinion, Belief, and Conviction

Article 9 ECHR is invoked in a wide variety of cases concerning thought, conscience, and religion. However, it is not at all easy to find an ear with the court. This will be illustrated with a few examples.

1. *Existing Alternatives and Voluntary Action*

If a regulation contains a possibility to be exempted, an individual should first apply for an exemption. In a 1966 ruling, the Supreme Court upheld this position taken by a lower court in a case of an individual with conscientious objection to the Motor Vehicles Insurance Act. The objections concerned the Act including the application for an exemption.[8]

The appeal to Article 9 ECHR by a Quaker who held a protest march without applying for the required permit (which was still necessary then) was also rejected by the Supreme Court in 1968. It was argued that the Quaker "had not made plausible that his opinions which led to holding the protest march necessitated this march knowing that he did not have

[5] HR 4 November 1969, NJ 1970, 127.

[6] Hof Leeuwarden, 13 April 1961, NJ 1964, 401. Hof Leeuwarden 1 November 1962, NJ 1964, 402.

[7] HR 25 June 1963, NJ 1964, 239.

[8] HR 22 July 1966, NJ 1967, 23.

a permit, it being impossible for him to refrain from this" (partly translated, partly paraphrased). Furthermore, he had not even applied for such permit, and his reasons for not doing so were not judged "so urgent, that it was absolutely impossible" to do so.[9]

The Supreme Court also stated that Article 9 ECHR does not entail an obligation for the parliamentary legislator to incorporate an exemption clause for conscientious objections. In a case which concerned the Emergency Watches Act, it stated that Article 9 ECHR:

> "does not give the right to be exempted from legal obligations on the grounds of a conscientious objection due to one's religion or belief, or not to comply with these obligations – also if these obligations (...) as such do not in any way concern the internal experience or the outward manifestation of religion or belief". (partly translated, partly paraphrased).

The Act, which contained obligations but no provision for conscientious objectors, was therefore not regarded to violate Article 9 ECHR. If an individual "brings himself voluntarily and consciously into a situation that places him for the choice either to commit an act which is morally wrong or to commit a criminal offence," an appeal to the ECHR is not fruitful. That was the reasoning of the Supreme Court in the case of an individual who appealed to Article 27 ECHR, and was convicted after refusing to undergo an obligatory blood test because of his religious conviction (in a traffic situation).[10]

The element of "voluntariness" was also at stake in a recent case concerning the (form of the) oath, a classical issue in Dutch church and state cases. A newly elected representative to the States Provincial wished to take an oath rather than to make a declaration/promise (a constitutive requirement for membership), but did not want to use the qualification "Almighty". The Chairman of the States Provincial did not permit this. According to the court, the relevant article of the Provincial Act did not violate Article 9 ECHR: it did not compel anyone to take an oath and thereby consent with its religious content but offered an alternative with the same legal validity.[11]

[9] HR 16 January 1968, NJ 1969, 2.

[10] HR 9 June 1987, VR 1988, 60.

[11] Afdeling bestuursrechtspraak Raad van State, 16 January 2002, AB 2002, 77. As Article 120 Const. denies the court the right to judge the constitutional validity of an Act of Parliament, the court did not discuss the constitutional guarantee of religious freedom (Art.6). See also the Dutch Contribution to the European Journal for Church and State Research over the year 2002.

The element of "voluntariness" sometimes plays a role as well in "horizontal" cases, cases between citizens amongst each other. Especially, if there is a contractual relationship such as between employer and employee, a court may argue that by entering this relationship one of the parties may have accepted certain limitations to one's freedom of religion.[12]

2. *The Limitation Clauses*

If the application of the law is challenged with an appeal to Article 9 ECHR, courts are often called to assess whether the applied law is a lawful restriction in the sense of Article 9, Section 2, ECHR. In this context, the Supreme Court regarded the provision on tort in the Civil Code as a restriction in the sense of Article 9, Section 2, ECHR. The case concerned a civil law suit against an evangelical couple for the alleged insulting remarks to homosexuals they made on the basis of their religious beliefs.[13] This is a fortiori the case with criminal provisions.

In a completely different case, the supreme administrative court ruled that municipal planning prescriptions based on the national building and planning Act (Wet ruimtelijke ordening) could be regarded as limitations necessary in a democratic society, for the protection of the interests mentioned in Article 9, Section 2 ECHR. The case concerned a spot were a Maria had appeared a few years ago; the spot had since become a pilgrimage for many people (allegedly tens of thousands). The municipal authorities had ordered to clear the place from religious paraphernalia, including a cross and a glass chapel, and to terminate the use of part of the place as a parking place and the use of a small office building as a chapel. The reason for this was that no building permit had been asked or obtained and that the use of the grounds were contrary to its designated argricultural destination.[14]

A recent case dealt Article 9, Section 2, ECHR. The case concerned a church, CEFLU Cristi-Céu de Santa Maria, which used a certain forbidden drug as a component in one of its sacraments (a tea). On the basis of expert advice, the court of first instance (Amsterdam) concluded that the

[12] For instance, in a case concerning a director of a Catholic school, who had (also) become a Baghwan adherent and started dressing in orange gowns. AB 1983/277

[13] HR 2 February 1990, NJ 1991, 289. The same line was taken in an earlier case against the same couple for their remarks on Jews, HR 5 June 1987, AB 1988, 276.

[14] AB 6 April 2005, AB 2005, 225.

organisation was indeed a church, its doctrine a religious belief, and the use of the tea, as the most important sacrament in its religious worship, an essential element of the religious experience of the worshippers. The prosecuted member of the clergy as well as the performance of the holy sacrament in which the conviction was expressed, therefore, enjoyed the protection of Article 9 of the ECHR in the eyes of the court.

After a detailed argumentation, the court concluded that the restriction to Article 9 of the ECHR could not be regarded as necessary in a democratic society.[15,16] The court was overruled by the Court of Appeal, which was subsequently supported by the Supreme Court. The Supreme Court concluded that the decision of the Court of Appeal to regard the prohibition of the drug incorporated on the list as mentioned in the Opium Act "necessary in a democratic society in the interest of protection of the public health" (Article 9 Section 2 ECHR) not incorrect or incomprehensible.[17]

In a rare case an appeal to the ECHR in a religion case was succesful. The appeal, however, did not concern Article 9, but Article 10 (freedom of opinion). A local authority regulation required from market salesmen either an insurance against legal liabilities as a condition for obtaining a permit, or the membership of an organisation that had concluded a collective insurance. The market salesman had religious objections against insurances. The supreme Administrative Court (then, the Afdeling rechtspraak van de Raad van State) argued that "even if the requirement would meet one of the interests mentioned in Article 10, Section 2, of the Treaty, the Court still cannot see why in this particular case the restriction to which no exception is created, is necessary".[18]

3. *A Manifestation of Religion or Belief?*

An anthroposophical medical doctor with conscientious objections (against only one particular form of insurance, though) against the obligatory participation in a professional retirement fund, was denied an

[15] An interesting detail is that the listing of the drug was a consequence of a Treaty obligation (Verdrag inzake Psychotrope Stoffen) based on which the court noted that the State's interest in upholding its Treaty obligation did not counterbalance the defendant's interest in religious freedom.

[16] See the Dutch Contribution to the European Journal for Church and State Research over 2002.

[17] HR 9 January 2007, (LJN: AZ 2497, Hoge Raad, 00810/06 B (rechtspraak.nl)).

[18] ARRvS 20 December 1982, AB 1983, 243); eerder Vz ARRvS 1 May 1981, AB 1982, 28.

exemption, even though exemptions were possible. His appeal to Article 9 ECHR was not successful with the supreme Administrative Court. In a 1983 ruling, the court pointed to the fact that the exemption admitted by the Act of Parliament was not enacted with an eye to conscientious objections. As to Article 9 ECHR, it stated that there was indeed "a connection" between the medical doctor's belief and his objection to participate in the fund, but that this objection "did not, according to objective standards, constitute a direct expression" of his religion or belief as guaranteed in Article 9 ECHR.

The question as to what convictions or actions can be considered a "manifestation of religion or belief" was also at stake in a case ruled upon in 2000 concerning an unemployed person who faced welfare benefit cuts.[19] These benefits are granted on the condition of availability for the labour market and the active pursuit of a job. The individual concerned refused to pursue a job on the grounds of his views of society, stating that it would be impossible for him to find a suitable position that he could hold in accordance with his conscience. According to the supreme Social Security Court [Centrale Raad van Beroep], his views constituted a moral conviction that had no relationship to religion or belief as defined in Article 9 ECHR. With reference to the European Court of Human Rights, the court stated that not every individual conviction or preference constitutes a "religion" or "belief". The court continued that the right protected by that Article "does not provide the individual with the right not to comply on the grounds of his subjective views with the general legislative requirements applicable to everyone".[20] The court went on to point out that not every conduct, even if motivated by religion or belief, can be classified as a "manifestation in practice" thereof. According to "objective standards", the conduct must constitute a "direct" expression of religion or belief.[21]

It also happens that a court does not give a judgment on whether a manifestation of religion is involved, but that it concludes that whatever the case, the limitation requirements of Article 9, Section 2, ECHR are met. An example of this was a case involving a person with conscientious objections to participating in (and contributing to) the National Health Benefit Fund, for the reason that certain actions or services, such as abortion, are paid for. As she did not object to the Fund as such, she was

[19] CRvB 23 May 2000, RSV 2000, 175.

[20] Free translation; the original text is in Dutch.

[21] See the Dutch Contribution to the European Journal for Church and State Research over 2000.

willing to pay her share, but with the exclusion of a percentage used for actions that were contrary to her conscience. In as far as she applied to Article 9 ECHR, the supreme Social Security Court dismissed her appeal. First, the Court stated that whatever amount she paid, even a reduced amount, a percentage would always be used for the actions that she disapproved of. Furthermore, the court stated that such an option would harm the system itself, since anyone with conscientious objections to certain actions could apply for a reduction of the contribution. In sum, this would undermine the "undifferentiated solidarity thought" of the law and would lead to a "relatively heavy premium" for those without conscientious objections. The court stated that upholding the law was "necessary for the functioning of the system established by the law, as well as necessary for the protection of public health in a democratic society, as meant in Article 9, Section 2 ECHR".[22]

4. *Equal Treatment*

An example of a case in which among other things Article 9 ECHR was invoked, in terms of equal treatment, concerned a humanistic counselor who objected against draft for military service. He had applied for exemption on the grounds of holding a spiritual or religious-humanitarian office or being educated to hold such an office. This exemption is provided for in the applicable law, but his office was not listed in the interpretative enumeration of such offices on a list. The competent ruling authority overturned the initial decision. It referred to the equal guarantee of religion and belief in among other things Article 9 ECHR.[23]

VI. Specific Areas

1. *Private and Family Life*

Religion can play a role in court cases concerning private and family life. Examples are provided, in order to illustrate the various ways in which such cases may be dealt with. Some cases concern divorce. For instance, the fact that the religion of one of the spouses prohibits divorce cannot play a role for the court ruling the case. But also the court does not force a former-spouse to deliver a 'get', a document required from one of the

[22] CRvB 29 December 1997, AB 1998, 125. Likewise, CRvB 18 August 1998, AB 1999, 23.

[23] Afd. GESCHILLEN VAN BESTUUR 3 April 1992, AB 1992, 483.

former spouses to obtain a Jewish religious divorce. It may also play a role in deciding a foster home for a child, or in decisions concerning the parent to hwom a child is primarily granted after a divorce.

A few cases deserve special attention. In one particular case, dated 1971, the Supreme Court directly reviewed a provision of a Parliamentary Act on its conformity with Article 9 ECHR. The Civil Code states that no religious ceremonies take place in relation to a marriage before a legally valid civil marriage is concluded. Article 449 of the Criminal Code makes it an offence for a clergy man to undertake such religious ceremonies without having issued a proof of a legally valid marriage. According to the Supreme Court, this Criminal Code Provision fell within the scope of the limitation clause of Article 9, Section 2, ECHR.

Article 9 ECHR was referred to in a non-specific way by a district court in a case of a minor who did not receive parental consent for her marriage, on the grounds that she and her prospective husband refused to register with a church. Taking freedom of religion into account as guaranteed in Article 9 ECHR, the court argued that this was an unreasonable ground for the refusal of consent. Instead, the court itself provided the consent.[24]

A married couple who were Jehova's Witnesses were denied the adoption of a foreign foster child by the junior minister of justice, based on the fact that their faith did not allow blood transfusion. The court argued that "adoption in itself is not a practical application of the right guaranteed in Article 9 ECHR". Therefore, a conflict with this Article could not be established.[25] In cases concerning religion and private and family life, there are not many appeals made to Article 9 ECHR. It is not unusual that religion plays a role in the interpretation of the applicable legal provisions.

2. *Education*

Issues concerning religion often arise in the field of education. The way these issues are dealt with should be seen in the context of the educational system at large. A characteristic feature of this system is the distinction between private and public education. In practice, private education is practically synonymous with confessional education (about two thirds of the elementary schools) and is financed by public means, on the

[24] Ktr. GORINCHEM 8 November 1982, NJ 1983, 383.
[25] ARRvS 20 January 1983, AB 1983, 389.

same footing as public education. Public education is neutral from the point of religion and belief; this is an "inclusive" neutrality. Signs of religion both from the side of teachers and pupils are not prohibited as a matter of principle. On a voluntary basis, public schools may provide (and pay) for the education in a religion by a teacher designated by the particular religion; equal treatment of religions is required here. Attendance by pupils is voluntary. The field of education is highly regulated by law (including the religious dimensions). In the Constitution, education is dealt with in the most elaborate Article. Therefore, cases concerning religion and education not always involve treaty provisions. A few examples of cases that do involve the ECHR follow below.

Probably the most eye-catching case concerning religion and education in the Netherlands, which involved the Supreme Court, in order to interpret the European Convention, is the case of a boy who was refused admission to an orthodox Jewish secondary school. The boy was the son of a Jewish father, who had formerly also attended the school, and a mother who was converted to the liberal-Jewish faith. The school admits Jewish pupils, according to the Halacha interpretation. By this, it means a pupil whose mother is Jewish (i.e. that in her ancestry line a jewish female is found), a pupil, who together with his/her mother, has entered the Jewish community. Liberal Jewish pupils who also fall within the scope of this definition are admitted as well.

The case finally came to the Supreme Court, which had to rule whether the Article 2 First Protocol of the ECHR gives parents the right to have their child educated according to a religious belief of their choice. The court ruled:

> "Article 2 First Protocol ECHR gives parents a fundamental right [aanspraak] vis-à-vis the State to respect their choice for education of a specific character [richting], but does not give a right that can be enforced vis-à-vis a private organisation that provides such education to have their children educated".[26]

In the field of education two other types of court cases concerning religion can be mentioned. The first type concerns cases in which religious objections exist to certain school practices, for instance gymnastic lessons or swimming lessons, especially if they are "mixed". These cases can arise both in private confessional schools or public schools. In private confessional schools parents may want to exempt their children from

[26] HR 22 January 1988, NJ 1988, 891.

religious education. The second type of cases deals with parents who keep their children from school because they do not find a school in a reasonable distance that provides education according to their religious belief. In those situations, it is not always the case that express appeals are made to freedom of religion as guaranteed in Article 9 ECHR.

3. *Religion in the Context of Procedural Rights*

A clear example of a case dealing with religion in the context of procedural rights is a case in which it was stated that a (business) dispute between two orthodox Jews should be dealt with by a rabbinical tribunal instead of a secular court. The court argued that even if the religion of the parties involved would imply that they would settle their disputes in the absence of a secular court, this would still not constitute a legally enforceable claim to such settlement. According to the court, this would also conflict with Article 6 ECHR and with Article 9 ECHR.[27] Incidentally, cases arise concerning the relationship between secular and ecclesiastical proceedings. The basic approach in these cases is that in the end nationally and internationally guaranteed fundamental rights always guarantee access to a secular court. Under special circumstances, a secular court may (temporarily) give precedence to an ecclesiastical proceeding.

Conclusion

Article 9 ECHR does play a role in domestic court proceedings. Together with other fundamental rights and guarantees, its role is manifested in many different ways. However, an appeal to Article 9 ECHR to argue the incompatibility of legislative acts with freedom of religion or belief is hardly ever successful.

[27] Rb. Amsterdam 16 March1994, NJ 1995, 701 (kna).

MICHAL RYNKOWSKI

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN POLAND

Introduction and General Remarks

The question of effective protection of human rights was a sensitive topic during the entire communist regime. It became even more significant after the Final Act of the Conference for Security and Co-operation in Europe had been signed in 1975, giving the opposition in Central European countries an important tool and – although not formally – a basis for action. Despite efforts undertaken by the Committee for Protection of Workers (Komitet Obrony Robotników –KOR, as of 1976) and the Solidarność (as of 1980), the government was for clear reasons not interested in higher standards of protection of human rights. It was only after the political change of 1989, and even after a couple of years which proved that the change was constant and stable, that Poland was allowed to join the Council of Europe and to ratify the European Convention for Protection of Human Rights and Fundamental Freedoms; that took place on 15 December 1992. The ratification instrument entered into force on 19 January 1993.[1] Therefore, the Polish experience with the Convention embraces merely 15 years, and not 56, as it is the case of many other Member States of the EU. Despite this relatively short period of time, the rank of the Convention and its influence on the Polish legal system should not be underestimated. Polish citizens are well aware of the existence of the court in Strasbourg. As a matter of fact, they decide to bring their cases to Strasbourg quite often. For instance, in 2006, the Court issued 115 judgements relating to Poland, while some 5100 applications were pending. In terms of figures, proving in this sense the activity of citizens, Poland is respectively the 4th and 5th state among all parties to the Convention.

[1] Published in in Polish Official Journal Dziennik Ustaw (Dz. U.) 1993, No. 61, item 284.

I. The System of Courts

The structure of Polish courts resembles the structures known from other Member States. There are the so-called common courts (sądy powszechne), existing at three levels: local (rejonowy), regional (okręgowy) and appeal (apelacyjny). These courts, divided into various departments, decide on almost all kinds of cases, including civil law, penal law, labour law, commercial law, etc. Apart from the aforementioned, there are also administrative courts at the level of the province (Wojewódzki Sąd Administracyjny), and also the Chief Administrative Court (Naczelny Sąd Administracyjny) at the national level. On top of that, there are two other courts, which -due to their particular role and importance- are mentioned separately in the Constitution: the Supreme Court (Sąd Najwyższy) and the Constitutional Court (Trybunał Konstytucyjny, hereinafter – the CC). The Constitutional Court, established already in 1982 and functioning since 1985 (the only such court in the East block under communist regime), is a highly respected body, playing a significant role in the Polish system of jurisdiction.[2] The Supreme Court is divided into four chambers: the criminal chamber, the civil chamber, the administrative, labour law and social security chamber and the military chamber.[3] As will be shown in the next part of this paper, mainly those two particular judicial bodies quote – although rather occasionally – the provisions of the European Convention on Human Rights and /or the judgements issued by the European Court of Human Rights. The lower courts do not refer to the Convention in their judgements, but assess the protection of human rights on the basis of relevant parts of the Polish constitution.

It is worth recalling that the judgements of courts, even those of the Supreme Court, are binding only in a given case and only between the parties. This, however, does not apply for the judgements of the CC, which according to Art. 190 of the Constitution shall be of universally binding application.

[2] The Constitutional Court has an excellent website, with substantial explanations and collection of judgements available in Polish, English and French (www.trybunal.gov.pl). The collection of judgements is only complete in Polish, whereas there is a summary available in other langages.

[3] The website of the Supreme Court (www.sn.pl) provides basic information in English, but is exhaustive in Polish.

II. The European Convention in the Polish Legal System

1. *The Position of the ECHR in the Legal System and the Human Rights in the Constitution*

The Convention was ratified in 1992. That was a peculiar time for Poland, with three constitutional statutes simultaneously in force, each of them referring to different issues. The new constitution of the Republic, adopted on 2 April 1997[4], refers to the international law twice: according to Art. 9, Poland shall respect international law binding upon it. Art. 87 states that the sources of universally binding law of the Republic of Poland shall be the Constitution, statutes, ratified international agreements, and regulations. Therefore, the European Convention, ratified in 1992, constitutes an integral part of the Polish legal system. It has a higher rank than statutes, yet lower than the Constitution itself.

The Constitution includes a separate chapter on "the freedoms, rights and obligations of persons and citizens". There is a number of rights foreseen (Articles 30 to 86), which are formulated in clear and generous – though a bit lengthy – way, Some of the most important rights are included in the first chapter, entitled "The Republic", which stresses their importance for the State and the entire law system (i.e. freedom of creation and functioning of political parties, trade unions, freedom of press, freedom of economic activity, etc.). Moreover, as Art. 8 stipulates, the provisions of Constitution shall apply directly, unless the Constitution provides otherwise. Lower courts usually refer to the Constitution and do not quote the Convention as a separate legal basis. Therefore, mainly the judgements of the Constitutional Court and of the Supreme Court will be analysed in the next part.

2. *The First Judgements of the Constitutional Court (1992-1993)*

Chronologically, the first judgement of the CC referring to the ECHR was issued already in 1992, in the case K 1/92[5] concerning the law on

[4] The English translation provided and published by the Chancellery of Sejm, Sejm Publishing Office, Warsaw 1999. The text in English is also available at: http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

[5] Case K 1/92, published in Orzecznictwo Trybunału Konstytucyjnego (Jurisprudence of the Constitutional Court, hereinafter: OTK) 1992/II, it. 23. The judgements of the CC, if they refer to the statutes or regulations, are published also in the Official Journal (Dz.U.). In frames of this paper, their publication in the collection of judgements of the CC (OTK) is mentioned.

foreigners, and more precisely, the legal possibility of their detention, if needed. The CC decided that the Polish statute, being subject to examination, although partly not compliant with the Polish Constitution, was complying with the requirements of the Convention in this area. The CC asked a well known Polish expert in the area of human rights to provide the CC with exhaustive information concerning obligations of Poland arising from the international law. In judgements issued later on (see below), the judges were basing the decisions on their own knowledge of the Convention and the jurisprudence.

The first judgement, after the ratification of the Convention, was issued just three months after the ratification instrument (statute) had entered in force. On 20 April 1993, the Constitutional Court ruled a case concerning some legal aspects of the re-introduced religious classes to public schools.[6] Its decision allowed for pupils to attend in parallel both the religious classes and the alternative lessons (ethics). Moreover, the school mark on religious classes was not judged to be causing discrimination, because it was impossible to derive from the school certificate whether those were classes of ethics or religious classes, or in case of religious classes, of which religion. The CC underlined that this understanding of laity was also common in other States, and was compliant with the international treaties, including "Art. 2 of the First Protocol of the recently ratified ECHR". Nevertheless, the Court did not mention the Convention as a benchmark, but merely referred to it in the text.

Interestingly, in a very similar case on the mark on the school certificate (K 11/90)[7], decided just 2 years earlier, on 31.01.1991, the Constitutional Court had not referred in any way to the Convention. The text of the Convention had definitely been well known among the judges, who however had not recalled its content in the text.

3. *Selection of Judgements of the Constitutional Court, Referring to the ECHR*

Some 30 judgements of the Constitutional Court can be divided and presented according to various criteria. As a matter of fact, none of them refers directly to Art. 9 of the Convention, which should constitute the essential part of this paper. The freedom of conviction (not even of religion) is mentioned only once, and only in the dissenting opinion of judge

[6] Case U 12/92, published in OTK 86-95, vol.4 and in OTK 1993,1 it. 9.
[7] OTK 1991 item 2.

B. Zdziennicki (case K 44/2002, OTK ZU 2003/5A it. 44). This case referred to the collaboration with the intelligence service of the communist era (the so called "lustration-process"; in Polish: lustracja). Judge Zdziennicki underlined that everyone had the freedom to express his or her opinion, also relating to the communist past and the regime of this time. As a result, nobody should be punished for his/her professional activity carried out in frames of public service, if that did not constitute a crime.

Other judgements of the CC primarily refer to the following articles:

a) Art. 8 – four cases: K 21/96 (access of tax administration to the bank data and trust funds v. the right for privacy, see below), K 18/02 (rights of biological father and the rights of children, quoting six relevant judgements of the ECHR and of the Commission, OTK ZU 2003/4A it. 32), K 17/05 (right to privacy of persons performing public functions vs. right to information, see below), SK 20/05 (right of the biological father to challenge the recognition of children by a man, who is not the biological father: CC quoted 7 judgements of the ECHR and of the Commission, published in 2007/4A it. 38);

b) Art. 10 – only one case, p 03/06, (insult of the official);

c) Art. 11 – three cases: K 39/97 (participation of parties involved in the so-called "lustration process"; Art. 6 of the Convention was mentioned by the Attorney General and by judges in their dissenting opinions, but was not used as a benchmark, OTK ZU 98/6 item 99), K 26/98 (establishment of trade-unions in the army compliant with Art. 11 (2) of the ECHR and not incompliant with Art. 14 and 17, OTK ZU 2000/2 it. 57), K 26/00 (number of statutes compliant with the Art. 11 of the ECHR, see below);

d) Art. 6 and 13 are definitely the most popular (basically the remaining cases);

e) Finally, in five other cases, the Constitutional Court referred to Articles of the Convention, which are not the subject of this paper (e.g. Art. 5 (4), Art. 2).

One of the rare cases, where the CC used the Convention as a benchmark, was the case K 26/00[8]. The Commissioner for Human Rights (Rzecznik Praw Obywatelskich) claimed that the provision prohibiting the soldiers, policemen, border guards, penitentiary officers, some highest officials of

[8] OTK ZU 2002/2A it. 18.

the Supreme Chamber of Control and officials of some other public bodies from being members of political parties did not comply with the Constitution, with Art. 22 of the International Covenant on Civil and Political Rights, nor with Art. 11 and 17 of the European Convention. The CC did not share this view and confirmed that in order to secure the nonpolitical functioning of these important bodies, the persons listed above could not be members of political parties. The CC referred to Art. 11 and 17 of the ECHR and to Art. 22 of the UN-Covenant on the Civil and Political Rights.

In case 21/96[9] the CC decided that the right of tax administration to access the bank data was generally compliant with the Constitution. However, the CC alluded to the fact, that as Art. 1 of the Constitution stipulates that the Republic is a democratic state respecting the rule of law, the Polish law should take account of international standards in this respect, incl. the ECHR, and in particular Art. 8 and 17. This wording – not a direct reference to the Convention, but via Art. 1 of the Constitution – seems to be an unusual solution. The CC deepened the international dimension by referring to judgements of the ECHR: cases Marck vs. Belgium, Malone vs. UK, Kruslin and Huving vs. France. Moreover, listing its own previous judgements, the CC underlined that all of them were in line with Art. 8 (2) of the ECHR.

4. *Quotation of judgements of the European Court for Human Rights*

It is interesting to notice that if the Convention is mentioned at all, it is usually quoted in the text of judgement, whereas it is never mentioned in the so-called "operative part of judgement", which is the main part. In other words, the Convention is used as an additional source of reference, while the Court itself checked compliance of legal acts with it only three times in the past. In some cases, and in order to better illustrate its reasoning, the Court quoted additionally the "Strasbourg" judgements. That resulted from the fact that the judges of CC are elected primarily among professors of law faculties (10 out of 15 judges). As it has already been demonstrated above, the judges of the CC present a sound knowledge of the ECHR and its judgements.

For instance, in the case K 17/05, decided on 20 March 2006, the Court agreed that the persons performing public functions had to accept the fact that the protection of their privacy was weaker than that of other people. The reason for the case was alleged incompliance between the

[9] OTK ZU 1997/2 it. 23.

protection of privacy and the right for information. Concerning the notion of "private life", the Constitutional Court referred to the case Rotaru vs. Romania as well as to the judgement Editions Plon vs. France. Nevertheless, recalling the case von Hannover vs. Germany, issued in 2004, the Court underlined that the State may not neglect its duties. In the above mentioned case K 17/05, the Constitutional Court quoted some other judgements, incl. Lingen vs. Austria, and even the judgement of the Court of First Instance in the case "Interporc II".

5. *A Case Brought to the Constitutional Court by a Church: No Reference to ECHR either*

So far, there has only be one case in which a church itself used its right (foreseen in Art. 191 (1) point 5 of the Polish Constitution of 1997 in connection with Art. 188 point 1) to bring a case to the Constitutional Court. The Polish Autocephalous Orthodox Church (PAOC) asked the Court to check the compliance of the provisions of the statute on relations between the State and the PAOC (hereinafter: the PAOC-statute) with the Constitution.[10] The PAOC underlined that the provisions on restitution of real estates in the above mentioned statute were formulated in a narrower way than it was in case of the statute on relations with the Catholic Church; the first of them did not mention the possibility of financial refund, if a given real estate as such could not be given back. The PAOC suggested infringement of Art. 25 (1) of the Constitution (equality of churches and religious communities), Art. 32 (non-discrimination) and Art. 64 (2) (protection of property).

The Constitutional Court in its judgement, issued on 2 April 2003, confirmed that the challenged provision of the statute was changed by a lower chamber of Parliament – the Sejm. Generally, a statute on relations between the State and a religious denomination was elaborated in cooperation with the representatives of a given church. In this case, the consensus with representatives of the PAOC was reached and the draft of statute was presented to the Sejm. However, the latter introduced a few changes, including one on restitution of real estates. Changes introduced by deputies during parliamentary work are not subject to renegotiations with the church. This concludes that churches can only challenge such a provision by asking the Constitutional Court to check the compliance of the statute with the Constitution, as it was in the presented case.

[10] Case K 13/02, published in OTK 2003/4A/28.

The Court stated that the principle of the autonomy of church and state (Art. 25 (1) of the Constitution of the Republic) was guaranteed by the PAOC-statute, but this statute did not satisfy requirements concerning the protection of property, set in Art. 64 of the Constitution. The Constitutional Court decided that the challenged provision was not in compliance with Art. 32 of the Constitution, prohibiting discrimination.

There is another part of the judgement, which should be underlined and commented: In a slightly hidden form, as one of the statements and not as a main conclusion, the Court stated that the principle of equality of churches and religious communities should be interpreted in such a way, that the denominations having common feature, should be equally treated by the State. That meant that the churches who do not share one feature which is considered important in a given case, may be treated differently. This interpretation, given occasionally by the Constitutional Court, may have a fundamental importance for the entire system of the Polish ecclesiastical law. It is worth noticing that the above mentioned judgement was issued by a great chamber composed of 12 judges (out of 15 statutory judges of the Constitutional Court). Interestingly enough, in the above mentioned case, neither the Church nor the representatives of the government referred to Art. 13 of the Convention; the legal dispute focused, instead, entirely on Art. 32 of the Constitution.

6. *The ECHR in Judgements of other Courts, in Particular in Judgements of the Supreme Court*

The Supreme Court, similarly to the CC, mainly quoted Art. 6 of the Convention, referring to different rights anchored in this Article. As regards the Convention, the most active is the penal chamber of the Supreme Court, often evoking the above mentioned Art. 6. Usually the cases relate to the right to have an interpreter or translator, free of charge, in the presence of the accused during the sitting of the appeal court, the prohibition of extradition of accused the person, if there is a risk of tortures and similar procedural issues.

The jurisprudence of the Civil Chamber of the Supreme Court is slightly more diversified, as the cases refer to the right of privacy (Art. 8 of the ECHR), freedom of speech (Art. 10) and rights of journalists, as an immanent part of this issue. As an example, in the case II CKN 321/99[11] relating to the annulations of the father's recognition of a child,

[11] Published in OSNC 2000/3 it. 49.

the Court expressis verbis denied the incompliance with Art. 8 of the ECHR. The least active seems to be the administrative chamber, which, however, issued important judgements. In the case IPZ 67/98 this chamber of the SC underlined that setting the minimum value of dispute as a requirement for the procedure of "cassation" did not impede the right to fair trial. The administrative chamber stressed that while registering an association, the registering body could not take into consideration fact, whether the members "deserved" to establish an association. In this particular case (I PRN, 54/93)[12], former German soldiers wanted to found an association in Poland; after the first negative decision of the Court, they successfully challenged that judgement at the level of Supreme Court, which referred to Art. 11 of the ECHR.

Nevertheless, it was the penal chamber, which in the case I KZP 37/96[13] confirmed and stressed that the provisions of the ECHR had "self-executive" character in the Polish legal system:

> 'There is no hindrance to state that the provisions of ratified treaties can be, or even should be, directly applicable in the Polish internal legal system – in particular in the area of rights and freedoms of individuals. This refers to all norms of the treaties, which due to their nature are eligible to be applied directly. In the doctrine they are called "self executing" and they directly create rights for the citizens and can be applied by the organs of the State, in particular by courts and organs of the administration (see: P. Hofmański: Konwencja Europejska a prawo karne, Toruń 1995, str. 48-52; judgement of seven judges of the Supreme Court of 17.10.1991, II KRN 274/91 OSNKW 1992/3-4 it. 19). These here recalled provisions of the ECHR and of the UN-Covenant on Civil and Political Rights definitely belong to the self-executing norms – therefore they should be applicable in the Polish legal system'.

In previous chapters, the fact that the Courts, including the Constitutional Court, prefer to base their judgements on the Constitution, rather than on the Convention has been raised a couple of times. In the case III RN 64/2000[14], the Administrative Chamber of the Supreme Court underlined in the operative part of judgement, that the Constitution set higher standards for the protection of the freedom of speech and access to the information than the Convention, and hence the Court did not see reasons to refer to the ECHR instead of the Constitution. Similarly, in the case SK

[12] Published in OSAiSN 1994/11-12, it. 8.
[13] Published in OSNKW 1997/3-4 it. 21.
[14] Published in OSNAPiUS 2001/6 it. 183.

38/2003[15], the Constitutional Court stated that Art. 45 (1) of the Constitution offered better protection than Article 6 of the Convention.

Last but not least, also appeal courts issued some significant judgements relating to the Convention. For example, the Appeal Court in Gdańsk (II Aka 243/99)[16] underlined that the Code of Penal Procedure should be applicable, as long as it did not infringe the international obligations of Poland. The Court reminded that according to Art. 91 (2) of the Constitution, the international treaties had higher ranks than national statutes, incl. the CPC.

In the case II AKr 28/95, the Appeal Court in Białystok stressed expressis verbis that mentioning in the judgement the name of a person which has not been found guilty violates Art. 6 (2) of the Convention.[17] The Chief Administrative Court (NSA) and the administrative courts of first instance (the latter created only on 1.1.2003) rarely refer to the Convention. In the case ISA/Gd 598/99 the Court reminded that although the tax administration was expected to help taxpayers, it was not obliged to carry out consulting and advising services for private entrepreneurs. Such an obligation could not be derived from Art. 6 (3) of the ECHR.

III. Summary

1. *Polish Cases before ECHR with Regard to Art. 9 of the ECHR*

Despite numerous claims brought to the ECHR by Poles, there have been so far only six cases which related to freedom of religion, and in particular to Art. 9 of the Convention. In the predominantly Catholic state, with influential (and allegedly almost almighty) clergy, one could expect more cases of discrimination. On the contrary, the review of the "repertoire" of the ECHR proves that the religious discrimination is from the legal point of view almost non-existing. In two cases, the religious aspects turn out on the margin; actually, it is difficult to explain why they were mentioned at all: one case referred to the intoxication of a miner, mainly referring to Art. 6 and 13; the other one was a very unclear divorce case. Two other cases referred to the question of mark from religious classes on the school certificate (23380/94 and 40319/98), but were both classified as inadmissible. Finally, after a popular weekly had published on the cover page the image of "Black Madonna" from Częstochowa with a

[15] OTK ZU 2004/5A it. 49.
[16] Published in OSA 2002/4 it. 33.
[17] Published in OSP 1996/7-8, it. 150.

gasmask, the readers asked the Court to react, as they felt insulted and discriminated (33490/96 and 35579/97). In those cases, the Court agreed with the publisher, that adding a gasmask was supposed to attract the attention of readers to the issues of environment, in particular of the polluted air in the region of Częstochowa, and found this application inadmissible. There has been so far no "Polish" judgement with reference to Art. 9 and – as a clear result of this – Poland has never been convicted on the basis of this Article.

IV. Human Rights Centres and Publications

At Polish universities there are a couple of Human Rights Centres, while a lot of publications concerning the jurisprudence of the Court in Strasbourg are available on the market. Some "Strasbourg judgements" have attracted wide attention (restitution of real estates, the question of the existence of the "Silesian nationality" or the recent case concerning the denial of the right to an abortion: Tysiąc vs. Poland). Therefore there are no doubts that the Convention is well known among the Polish lawyers, and that also the citizens in general are aware of its existence and functioning.

Conclusion

Merely 15 years after the ratification, the Convention is now well known in Poland and it is mentioned in numerous judgements of the courts, in particular in the decisions of the Constitutional Court and of the Supreme Court. Taking account of this relatively short period of time, it is indeed a remarkable result. The cases in which the Convention was used as a benchmark are quite rare, though. In terms of the religious freedom and the position of churches, Art. 9 of the Convention has been mentioned only in one dissenting opinion, and merely with the reference to "freedom of conviction". Similarly, there has been so far no case against Poland, with a basis on Article 9. This proves that although Polish courts are struggling with major problems due to their workload, mainly as regards delays, the freedom of religion or rights connected with it do not pose any significant problems and are not endangered.

José de Sousa e Brito

L'APPLICATION DES DISPOSITIONS DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME PROTÉGEANT LA LIBERTÉ DE RELIGION ET DE CONVICTION À PORTUGAL

La Convention européenne des Droits de l'Homme (CEDH) a été ratifiée par le Portugal le 9 Novembre 1978. Selon l'article 8, n° 2 de la Constitution, les conventions internationales sont applicables dans l'ordre interne pendant le temps qu'elles engagent l'État au niveau international. Elles ne peuvent donc être ni révoquées ni abrogées par la loi. D'autre part, peuvent faire l'objet d'un recours devant le Tribunal constitutionnel les décisions des tribunaux «qui refusent d'appliquer une norme figurant dans un acte législatif motif pris de ce qu'elle est contraire à une convention internationale, ou qui l'appliquent, mais pas conformément à ce qui a été précédemment décidé sur la question par le Tribunal constitutionnel» (article 70, n° 1, i) de la Loi du Tribunal constitutionnel). La doctrine dominante en déduit que les conventions internationales se situent dans la hiérarchie des normes entre la Constitution et la loi et c'est cette doctrine qui explique que ce même ordre soit suivi dans l'énumération des actes qui doivent être publiés dans le journal officiel (article 119 de la Constitution).[1]

Dans le cas de la CEDH il faut considérer que son texte s'inspire souvent et parfois coïncide avec celui de la Déclaration universelle des droits de l'homme et que celle-ci est intégrée dans la Constitution portugaise, dont l'article 16 n° 2 établit que «les normes constitutionnelles et légales relatives aux droits fondamentaux sont interprétées et appliquées en harmonie avec la Déclaration universelle des droits de l'homme». Cette disposition s'articule avec l'article 1 de la Constitution selon lequel la dignité de la personne est le fondement de la République séparément et au même titre que la volonté du peuple. Les droits de l'homme sont donc reconnus avec un contenu qui est aussi bien

[1] Voir J. J. Gomes Canotilho, V. Moreira, *Constituição da República Portugues Anotada*, (4A ed., Coimbra, Coimbra Editora, 2007), I, 254-263, J. Miranda, R. Medeiros, *Constituição da República Portuguesa Anotada*, (Coimbra, Coimbra Editora, 2005), I, 88-95.

déterminé par sa formulation dans le texte de la Constitution que par la Déclaration universelle et l'*opinio iuris* qui la soutient et se manifeste aussi dans les diverses juridictions internationales et nationales des droits de l'homme, parmi lesquelles celle de la CEDH se distingue par sa qualité et son étendue. Selon l'article 16 n° 1 de la Constitution, «Les droits fondamentaux consacrés dans la Constitution n'excluent pas les autres droits résultant des lois et des règles applicables du droit international».

Ce cadre constitutionnel explique la doctrine générale sur l'applicabilité de la CEDH dans les cas soumis à la Cour constitutionnelle (Tribunal Constitucional), qui a été formulée dans l'arrêt TC 99/88.[2] Le plaignant ayant invoqué aussi bien la CEDH que la Déclaration universelle, la cour, après avoir constaté que ces conventions n'ajoutaient rien dans la matière au contenu de la Constitution portugaise, a dit: «s'il en est ainsi, il est d'abord exclu que, dans la réponse à la question *sub* judice, il soit convenable de considérer la Déclaration et la Convention citées d'une façon autonome, c'est à dire, indépendamment des principes et des règles constitutionnels qui reviennent à être jugés pertinents. Par conséquent, ce n'est plus nécessaire de rechercher s'il était légalement possible de les considérer d'une telle façon dans l'affaire présente. Cela veut dire, d'un autre coté, que c'est plutôt à la lumière des principes et des règles indiqués qu'il faudra résoudre la question à apprécier. Et dans le contexte de ceux-ci on pourrait éventuellement prendre en compte les instruments internationaux invoqués, en tant qu'éléments aidant à la clarification du sens et de la portée de telles règles et principes. Cela serait cependant une chose différente de les considérer comme des critères autonomes d'un jugement de constitutionalité, mais sans doute une procédure non seulement tout à fait admissible mais en plus recommandable, en vue de l'indication contenue dans l'article 16 de la Constitution».[3] Il s'agissait alors de savoir si l'existence d'un délai pour agir en recherche de paternité violait le principe de légalité, ce qui fut nié par le Tribunal.

Par la suite, la jurisprudence de la CEDH a été invoquée par la Cour constitutionnelle (TC 222/90[4]) pour appuyer une interprétation de l'article 6 paragraphe 1 de la Convention et de l'article 10 de la Déclaration Universelle selon laquelle ces articles n'imposeraient pas une interprétation

[2] Acordãos do Tribunal Constitucional, 11, 785.
[3] TC 99/88, Acordãos do Tribunal Constitucional, 11, 785, 791-792.
[4] Acordãos do Tribunal Constitucional, 16, 635.

de la garantie d'accès au droit du n° 2 de l'article 20 de la Constitution qui imposerait une audience orale avant toute décision finale en procédure civile. La Commission européenne des Droits de l'Homme (décision du 24-9-1963, *Annuaire de la Convention Européenne des Droits de l'Homme*, VI, 521) avait dit qu'un procès écrit serait suffisant une fois que le caractère et la personnalité de la partie ne contribuent pas à la formation de l'opinion du tribunal. La Cour constitutionnelle a décidé que la règle du Code de procédure civile qui permet au juge de repousser la demande pour cause d'inexistence de personnalité judiciaire de l'auteur, sans audience préparatoire de la décision, n'était pas inconstitutionelle.

La jurisprudence des organes de Strasbourg sera souvent invoquée par la Cour constitutionnelle en ce qui concerne l'article 6 de la CEDH, quoique jamais comme «critère autonome d'un jugement d'inconstitutionalité». Mais la jurisprudence en matière de liberté de religion et de conviction, considérant que la CEDH, aussi bien que la Déclaration universelle, n'ajoutaient rien à la Constitution, n'en ont pas fait usage. Cependant la CEDH a influencé le droit portugais des religions par voie législative à travers la Loi de liberté religieuse.

Il est très rare que la CEDH ait été appliquée d'une façon autonome dans la jurisprudence portugaise.[5]

I. Liberté des Opinions, des Croyances et des Convictions

A. *Article 9: Liberté de Pensée, de Conscience et de Religion*

La constitution de 1976 a reconnu la liberté de conscience et de religion avec tous ses éléments, aussi bien en tant que liberté individuelle qu'en tant que liberté collective des Églises et communautés religieuses. Elle fait explicitement référence à la religion aux articles 13 n° 2, 41, 43 n° 2, 35 n° 3, 51, n° 3, 55, n° 4 et 288, alinéa c) (il est utile de transcrire entièrement les trois premiers articles, car le contexte des dispositions est aussi significatif):

[5] Notamment dans l'arrêt du Tribunal Colectivo de Cascais du 3-5-1982 (Colectânea de Jurisprudência, VIII, 1983, 349), reconnaissant le droit de l'accusé étranger à l'assistance gratuite d'un interprète. I. CABRAL BARRETO, *A Convenção Europeia dos Direitos do Homem Anotada*, (3A ed., Coimbra, Coimbra Editora, 2005), 45 refère encore l'opinion dissidente du juge Cardona Ferreira dans un arrêt du Tribunal Suprême de Justice (STJ 13/96, Diário da República, I-A Série, du 26-11-1996), qui invoque l'article 6 de la Convention contre la prohibition légale de condamner en valeur suspérieur à la demande, dans un cas où la non actualization de la dette serait clairement injuste.

Article 13. Principe de l' Egalité

1. Tous les citoyens ont la même dignité sociale et sont égaux devant la loi.

2. Nul ne peut être privilégié, avantagé, défavorisé, privé d'un droit ou dispensé d'un devoir en raison de son ascendance, de son sexe, de sa race, de son territoire d'origine, de sa religion, de ses convictions politiques ou idéologiques, de son instruction, de sa situation économique ou de sa condition sociale.

Article 41. Liberté de Conscience, de Religion et de Culte

1. La liberté de conscience, de religion et de culte est inviolable.

2. Nul ne peut être poursuivi, privé de droits, dispensé d'obligations ou de devoirs civiques en raison de ses convictions ou de ses pratiques religieuses.

3. Nul ne peut être interrogé, par aucune autorité, au sujet de ses convictions ou de ses pratiques religieuses, sauf pour le recueil de données statistiques qui ne permettront pas d'identifier les personnes auprès de qui elles ont été obtenues, ni subir de préjudice pour avoir refusé de répondre.

4. Les Églises et les communautés religieuses sont séparées de l'État et peuvent librement s'organiser, exercer leurs fonctions et célébrer leur culte.

5.La liberté de l'enseignement de toute religion est réalisée et garantie dans le cadre des confessions, ainsi que l'utilisation de leurs propres moyens de communication sociale pour l'exercice de leurs activités.

6. Le droit à l'objection de conscience est garanti, conformément à la loi.

Article 43. Liberté d' Apprendre et d' Enseigner

1. La liberté d'apprendre et d'enseigner est garantie.

2. L'État ne peut s'arroger le droit de déterminer l'éducation et la culture selon des lignes directrices philosophiques, esthétiques, politiques, idéologiques ou religieuses.

3. L'enseignement public ne sera pas confessionnel.

4. Le droit de créer des écoles privées ou des centres coopératifs d'enseignement est garanti.

Article 35. Utilisation de l' Informatique

3. L'informatique ne peut être utilisée pour le traitement de données concernant les convictions philosophiques ou politiques, l'adhésion à un

parti ou à un syndicat, la foi religieuse ou la vie privée, à moins qu'il ne s'agisse de données recueillies à des fins statistiques qui ne permettront pas d'identifier les personnes auprès desquelles elles ont été obtenues.

Article 51. Associations et Partis Politiques

3. Sans préjudice de la philosophie ou idéologie inspirant leur programme, les partis politiques ne peuvent utiliser une dénomination qui contienne des expressions évoquant directement quelque religion ou Église que se soit, ni des emblèmes susceptibles d'être confondus avec des symboles nationaux ou religieux.

Article 55. Liberté Syndicale

4. Les associations syndicales sont indépendantes du patronat, de l'État, des confessions religieuses, des partis et d'autres associations politiques, et la loi doit établir les garanties nécessaires à cette indépendance, fondement de l'unité des classes laborieuses.

Article 288. Limites Matérielles de la Révision

Les lois de révision constitutionnelle devront respecter:

c) La séparation des Églises et de l'État;

d) les droits, libertés et garanties fondamentales des citoyens

La Loi de liberté religieuse (Loi n° 16/2001 du 22 Juin) fait une liste non exhaustive des droits individuels (articles 8 à 13) compris dans la liberté de conscience, de religion et de culte, notamment (article 8) les droits de:

a) avoir, de ne pas avoir et de cesser d'avoir une religion;

b) choisir librement sa propre croyance religieuse, changer de croyance et abandonner celle qu'on avait;

c) informer et s'informer sur la religion, apprendre et enseigner religion;

d) professer sa propre croyance religieuse, chercher pour elle des nouveaux croyants, exprimer et divulguer librement, par des mots, des images ou quelqu'autre moyen sa pensée en matière religieuse;

e) produire des œuvres scientifiques, littéraires et artistiques en matière de religion;

f) se réunir, manifester et s'associer avec d'autres personnes conformément aux propres convictions en matière religieuse, avec les seuls

limites prévus dans les articles 45 [droit de réunion et de manifestation] et 46 [liberté d'association] de la Constitution;

g) pratiquer ou ne pas pratiquer les actes du culte, privé ou public, qui appartiennent à la religion que l'on professe;

h) se conduire ou ne pas se conduire selon les règles de la religion que l'on professe;

i) choisir pour ses enfants des noms qui appartiennent à l'onomastique religieuse de la religion que l'on professe.

Ce sont là des contenus déjà exprimés – quoique parfois d'une façon moins complète – dans la Déclaration universelle des droits de l'homme (article 18, n°s 1 e 2, pour les alinéas a), b), c), f), g) et h)), dans la Convention européenne des droits de l'homme et dans le Pacte international relatif aux droits civils et politiques (article 9, n° 1 de la Convention et 18 du Pacte, pour les alinéas a), b), d), f), g) et h)). Nouveau est le droit de choisir pour ses enfants les noms qui appartiennent à la religion que l'on professe, important pour les confessions non-chrétiennes, mais ce droit – comme les autres alinéas – peut se déduire de l'article 41, n° 1 de la Constitution conjugué cette fois avec le droit à l'identité personnelle (article 26°).

Aux libertés religieuses positives (avoir, choisir, professer, etc.) correspondent des libertés négatives de n'être pas obligé ou contraint (d'avoir, etc.). L'article 9 de la Loi en donne une formulation autonome de quelques unes pour des raisons parfois historiques, parce qu'elles ont été niées ou parce que l'on peut craindre qu'il y soit porté atteinte, ou parce elles on été mentionnées dans une déclaration internationale[6]:

Aucune Personne ne Peut:

a) être obligé de professer une croyance relieuse, de pratiquer ou d'assister à des actes de culte, de recevoir assistance ou propagande en matière religieuse;

b) être contrainte à faire partie, rester ou sortir d'une association, Église ou communauté religieuse, sans préjudice des règles de celles-ci sur l'adhésion ou l'exclusion de membres;

c) être interrogée par une autorité quelconque sur ses convictions ou sa pratique religieuse, sauf si c'est pour recueillir des donnés statistiques

[6] Ainsi l'exposé de motifs du projet de la Loi: Projecto de Lei n° 27/VIII: Diário da Assembleia da República, II série-A, 3-12-1999, 108-(5).

non identifiables individuellement, ni subir de préjudice en raison du refus de répondre.

d) être obligée de prêter un serment religieux.

Les droits de participation, dont l'exercice dépend des ministres du culte et des règles de l'Église ou de la communauté religieuse, sont énoncés à part (article 10):

a) droits d'adhésion à l'Église ou communauté religieuse de son choix, de participation à la vie interne et aux rites de la pratique religieuse commune et droit de recevoir l'assistance religieuse demandée.

b) droit de célébrer le mariage et d'avoir des funérailles selon les rites de sa propre religion;

c) droit de commémorer en public les fêtes religieuses.

Le droit des parents d'éducation de leurs enfants en cohérence avec leurs convictions en matière de religion est reconnu dans la Loi de liberté religieuse (article 11), conformément à l'article 25 de la Déclaration Universelle, l'article 2 du Protocole additionnel n° 1 de la Convention européenne et l'article 18, n° 4 du Pacte.

La Loi de liberté religieuse reconnaît l'égalité entre la liberté de religion et la liberté de conviction non religieuse, en tant que droits de l'individu liés à la liberté de conscience. La liberté de conviction athée ou agnostique est protégée par le droit d'avoir, de ne pas avoir et de cesser d'avoir une religion, d'abandonner la croyance qu'on avait, d'informer et s'informer sur la religion, d'exprimer et de divulguer librement, par des mots, des images ou quelqu'autre moyen sa pensée en matière religieuse, de produire des œuvres scientifiques, littéraires et artistiques en matière de religion, de se réunir, de manifester et de s'associer avec d'autres personnes conformément aux propres convictions en matière religieuse, dans les seules limites prévues dans les articles 45 [droit de réunion et de manifestation] et 46 [liberté d'association] de la Constitution, en plus de tous les droits négatifs de liberté religieuse de l'article 9, du droit des parents à l'éducation de leurs enfants en cohérence avec leurs convictions en matière de religion et de la possibilité d'être des objecteurs de conscience.[7] Mais en ce qui concerne les droits de participation religieuse et les droits collectifs de liberté religieuse, il y en a qui de par leur nature – ceux relatifs au culte, aux rites, aux jours fériés, etc.

[7] Exposé de motifs (supra note 6), 108 (5).

– ne sont pas applicables à des personnes ou des associations de conviction athée ou agnostique. La Loi de liberté religieuse n'a réglé que le statut des églises et des communautés religieuses, laissant aux personnes de conviction non religieuse le droit de constituer des associations sans ou avec personnalité juridique et laissant aussi ouverte la possibilité d'application analogique de ses dispositions à de telles personnes et associations.

La Cour Suprême de Justice (Supremo Tribunal de Justiça) (STJ arrêt du 16/05/2002, Procès 02B1290) a prononcé le divorce aux torts et griefs du mari dans un cas où celui-ci, qui était membre d'une église Maná (d'origine baptiste), non seulement a essayé de convertir sa femme catholique, mais lui a dit qu'elle était une brèche par où le diable entrait et a détruit des objets de la maison de famille qu'il considérait démoniaques. La Cour a considéré que la liberté de religion de l'article 41 de la Constitution avait des limites dans la liberté de religion de l'autre.

La Loi de liberté religieuse reconnaît (article 14) sous certaines conditions – dont la compensation de la période de travail – le droit des fonctionnaires et agents de l'État et des travailleurs à demander la suspension du travail dans les jours de repos, fêtes et périodes horaires prescrits par leur confession et aussi bien pour les élèves la dispense des classes et le report à une autre date des examens dans les mêmes occasions. Une avocate stagiaire adventiste du septième jour invoqua cette disposition, par analogie, pour demander le report à une autre date de son examen d'agrégation à l'Ordre des avocats, qui était prévu un samedi. L'Ordre ayant rejeté la demande, elle demanda ensuite le Tribunal administratif d'intimer[8] à l'Ordre des avocats d'agir en concordance avec sa demande. En deuxième instance le Tribunal (Tribunal Central Administrativo Norte, arrêt du 08-02-2007, procès 01394/06) a fait droit à la demande et condamné l'Ordre des avocats à fixer dans dix jours une nouvelle date avec délai non supérieur à trente jours pour l'examen. Le Tribunal a jugé que les articles 13 et 41 de la Constitution avaient été violés et que, quoique l'article 14 de la Loi ne soit pas applicable à des non-élèves, il devrait être utilisé pour combler la lacune. La décision invoque l'article 6 alinéa h) de la Déclaration sur l'élimination de toutes les formes d'intolérance et de discrimination fondés sur la religion ou la conviction (1981) des Nations Unies, qu'elle considère «reçu dans notre ordre juridique par force du n° 1 de l'article 16 de la Constitution», pour justifier

[8] Sur l'action d'intimation pour la protection de droits, libertés et garanties, voir infra, dans le texte, IV.

que la liberté religieuse comprend la liberté d'observer les jours de repos et de célébrer les fêtes et cérémonies conformément aux préceptes de sa religion.

La liberté religieuse a été invoquée par des accusés lors d'un recours devant le tribunal de seconde instance pénale de Porto (Tribunal da Relação do Porto, arrêt du 25-06-1997, Procès 9710063) comme justification de leur absence à l'audience en raison une promesse de pèlerinage à Fátima. La cour a répondu que selon l'article 41 de la Constitution nul ne peut être dispensé d'obligations ou de devoirs civiques en raison de ses convictions ou de sa pratique religieuse et a rejeté le recours.

La constitution portugaise (article 41 n° 6) reconnaît depuis la révision constitutionnelle de 1982 pour la première fois au monde[9], non seulement le droit à l'objection de conscience au service militaire, mais un droit général à l'objection de conscience conformément à la loi. Le renvoi à la loi que la norme constitutionnelle fait ne signifie pas une restriction, mais une autorisation explicite des lois configuratives du droit.

La loi a commencé par régler l'objection de conscience face au service militaire, depuis l'objection de conscience en matière d'avortement et dernièrement dans la Loi de liberté religieuse (art. 12) l'objection de conscience en général.

La cour constitutionnelle (Tribunal Constitucional) s'est prononcée plusieurs fois sur des normes de la loi du service militaire. L'arrêt n° 143/88[10] a jugé que la norme de la loi (loi n° 6/85 du 4.5, la première loi sur cette matière) qui donnait compétence à une commission administrative spéciale pour attribuer le statut d'objecteur, notamment à ceux qui avaient déclaré l'être avant l'existence d'une loi sur le sujet (en plus de la constitution), n' était pas inconstitutionnelle. Cette norme ne viole pas les règles sur la compétence exclusive des juges (réserve juridictionnelle), ni le principe d'égalité (dès lors que la délimitation des personnes soumises à la commission et de celles qui seraient soumises dans le futur aux tribunaux était raisonnable).

La loi n° 7/92 du 12.5 s'est substituée à la loi 6/85. Après son approbation par le Parlement et avant sa publication, quelques dispositions de cette loi ont été soumises, par initiative du Président de la République, au contrôle préventif de constitutionnalité de la Cour Constitutionnelle.

[9] La constitution du Cap Vert de 1992 (article 48 n° 8) l'a suivie.

[10] Acórdãos do Tribunal Constitucional, 11, 967, dans le même sens arrêt n° 410/98, Acórdãos cit., 13 – II, 1179.

La décision de la Cour (arrêt n 363/91[11]) a constaté trois causes d'inconstitutionnalité: celle consistant à faire perdre la qualité d'objecteur à celui qui aurait commis un délit par négligence ou un délit intentionnel qui ne serait pas le fait «d'une intention contraire à la conviction de conscience antérieurement manifestée par l'objecteur et aux devoirs y afférents»; celle de faire fonctionner, en cas de condamnation de l'objecteur pour certains délits, la situation d'objecteur comme circonstance aggravante; et celle de soumettre aux obligations militaires ceux qui auraient perdu la qualité d'objecteur, sans tenir compte de la période de service civique qu'ils auraient accomplie auparavant.

La promulgation et la publication de la loi n 7/92 ont ainsi eu lieu après le retrait ou la modification des dispositions déclarées inconstitutionnelles. Cette loi établit que le droit à l'objection de conscience comporte l'exemption du service militaire tant en temps de paix qu'en temps de guerre, et entraîne nécessairement, (...) le devoir d'accomplir un service civique «(article 1, n 2). L'objecteur de conscience est défini comme le citoyen qui a la conviction, pour des motifs d'ordre religieux, moral, humaniste ou philosophique, qu'il n'est pas légitime d'utiliser des moyens violents de quelque nature que ce soit contre son semblable, même pour des fins de défense nationale collective ou personnelle» (article 2). Le «service civique», de son côté, est caractérisé comme étant de nature exclusivement civile sans aucun rattachement à quelque institution militaire ou militarisée que ce soit, constituant «une participation utile aux tâches nécessaires à la collectivité» (article 4, n° 1) et d'une durée et contrainte équivalentes à celle du service militaire obligatoire (article 5, n° 1). Le refus du service civique ou l'abandon de celui-ci constituent comme un délit (article 9, n° 33).

Un aspect particulièrement important de la loi n° 7/92 est lié à la procédure établie pour être déclaré objecteur de conscience. Lorsqu'il demande la reconnaissance de la situation d'objecteur, l'intéressé doit présenter une «déclaration explicite de disponibilité (...) à accomplir le service civique alternatif» [(article 18, n° 3, al. d)], l'absence de cet élément entraînant le classement de la procédure (article 21); d'où, en pratique, la non-reconnaissance de l'objection de conscience et l'obligation de faire le service militaire. Cette règle a été mise en cause par les témoins de Jéhovah qui refusaient alors non seulement le service militaire mais aussi le service civique. La cour constitutionnelle a décidé, par

[11] Acórdãos do Tribunal Constitucional, 19, 79.

l'arrêt n° 681/95[12], par 7 voix contre 6, que cette règle ne violait pas la Constitution. Selon l'argument de la cour, la définition, dans la constitution, «cadre législatif dans lequel s'insèrent, de façon dialectique, le droit à l'objection de conscience et le devoir de prestation du service militaire comme une obligation inhérente à la défense de la patrie», qui impose, comme il est également dit dans l'arrêt, «en remplacement du service militaire (...) une forme d'observance des devoirs envers la communauté qui, n'impliquant pour sa prestation aucune contradiction avec cette liberté-là, se traduit dans une activité succédanée de ce service pour les objecteurs de conscience». Ainsi, l'interdiction d'obtention du statut d'objecteur au service militaire par l'objecteur dit «total» (ici représenté par le «témoin de Jéhovah») se justifie du fait que l'objecteur de conscience au service militaire s'oppose également au service civique. L'exigence d'observance du service civique conditionnerait le droit fondamental à l'objection de conscience, ne le restreignant pas.

La minorité de la cour est en désaccord, disant, entre autres choses, que «la constitution n'ayant pas subordonné le droit à l'objection de conscience au service militaire, à l'observance dans la pratique d'un service civique, il n'est pas légitime de subordonner l'exercice de ce droit à une déclaration d'engagement à la prestation de ce service» et qu' une condition qui empêche l'exercice d'un droit fondamental ne peut être comprise que comme une restriction et, dans cette mesure, ne peut pas se soustraire à une justification constitutionnelle.

Face à la décision de la cour constitutionnelle, le groupe le plus important des objecteurs de conscience est ainsi privé de statut correspondant. Cependant les témoins de Jéhovah ont changé peu après d'orientation doctrinale et acceptent désormais le service civique, ce qui a permis de dépasser dans la pratique la situation engendrée par l'arrêt de la cour.

La Loi de liberté religieuse règle la matière (article 12) dans les termes suivants:

1. La liberté de conscience comprend le droit de faire objection à l'exécution des lois qui imposent les commandements insurmontables de la propre conscience, dans les limites des droits et des devoirs imposées par la Constitution et conformément à la loi qui pourra régler l'exercice de l'objection de conscience.

[12] Acórdãos do Tribunal Constitucional, 32, 655.

2. On considère insurmontables les commandements de conscience dont la violation implique une grave atteinte à l'intégrité morale de l'individu, qui rend inexigible une autre conduite.

3. Les objecteurs de conscience au service militaire, sans excepter ceux qui invoquent aussi objection de conscience au service civique, ont droit à une organisation du service civique qui respecte, autant que ce soit compatible avec le principe d'égalité, les commandements de leur propre conscience.

Le n° 3 a révoqué la norme qui avait été discutée dans la décision de la Cour constitutionnelle dans un sens contraire à la doctrine de celle-ci sur l'objection au service civique.

La liberté de culte public est, dans la pratique, rendue très difficile aux religions minoritaires du fait que souvent elles ne sont pas propriétaires d'édifices destinés au culte et que les plans d'urbanisme ne prévoient pas d'espaces destinés à leur culte. Les fidèles se voient donc forcés de se réunir pour le culte dans des espaces destinés à l'habitation, des garages, etc., d'où ils peuvent être expulsés par des mesures administratives à caractère urgent. La Loi de liberté religieuse a suspendu ces mesures tant que l'autorité administrative ne trouve pas une solution adéquate, sans préjudice du droit civil. Selon l'article 29 de la Loi: «1. S'il y a le consentement du propriétaire ou de la majorité des copropriétaires de l'immeuble, l'utilisation à des fins religieuses de l'immeuble ou de la fraction destinés à une autre fin ne peut pas justifier des objections ou des sanctions de la part des autorités administratives ou locales, tant qu'une alternative adéquate pour les mêmes fins n'existe pas. 2. Les droits des copropriétaires d'intenter un recours en justice ne sont pas affectés par la règle du n° 1». La Cour Suprême Administrative a cependant considéré dans un arrêt du 07-12-2004 (procès 450/04), dans un cas où une association religieuse de la ville de Aveiro a invoqué l'article 29 de La loi de liberté religieuse et l'article 41 n° 1 de la Constitution pour éviter l'ordre de l'autorité municipale d'expulsion du lieu loué pour le culte mais licencié pour le commerce, que l'association religieuse avait la charge de preuve de l'inexistence d'alternative adéquate et n'avait pas fait cette preuve. La décision a clairement vidé l'article 29 de sa signification première.

B. *Article 8 – Vie Privée et Familiale*

La religion et la conviction sont des faits de la vie privée, avant d'être éventuellement des éléments de la vie publique. Dans leur dimension

privée, elles ont droit á la protection juridique de la vie privée, notamment à travers la protection pénale des sentiments religieux et la prohibition d'utilisation de l'informatique pour le traitement de données sur les convictions religieuses ou autres.

Les sentiments religieux sont protégés avant tout par le Code Pénal, qui punit d'un an d'emprisonnement ou d'une amende l'outrage à une personne en raison de sa croyance ou fonction religieuse, aussi bien que la profanation de lieu ou objet de culte ou vénération, dès que la paix publique est affectée (article 251); sont également punis le trouble, la perturbation et l'outrage à des actes de culte (article 252).

D'autre part, selon l'article 51, n° 3 de la Constitution l'informatique ne peut être utilisée pour le traitement de données concernant les convictions philosophiques ou politiques, l'affiliation à un parti ou à un syndicat, la foi religieuse ou la vie privée, à moins qu'il ne s'agisse de données recueillies à des fins statistiques qui ne permettront pas d'identifier les personnes auprès desquelles elles ont été obtenues.

C. *Article 2 du Protocole n° 1: Droit à l'Instruction: Education et Enseignement*

Le droit des parents d'éduquer de leurs enfants en cohérence avec leurs convictions en matière de religion a été l'objet d'une jurisprudence constitutionnelle qui porte également sur des principes de séparation des Églises et de l'État et de la non confessionnalité des écoles publiques. La jurisprudence constitutionnelle intervint trois fois, depuis 1982, sur la question de l'enseignement de la religion dans les écoles publiques:

– en 1982 la Commission constitutionnelle apprécia, dans le cadre d'un contrôle préventif de constitutionnalité, un décret-loi approuvé par le gouvernement qui prétendait réglementer l'article XXI du Concordat[13] et instituer l'enseignement de la religion et de la morale catholiques dans les écoles publiques.[14]

[13] Cet article détermine l'obligation de l'État de dispenser l'enseignement de la religion et de la morale catholiques dans les écoles publiques élémentaires, complémentaires et moyennes «aux élèves, dont les parents, ou leurs substituts, n'ont pas fait une demande contraire».

[14] Avis n° 17/82 (Pareceres da Comissão constitucional, 19, 253). Cet avis n'a pas réuni l'unanimité des voix: deux voix dissidentes et trois votes particuliers, dans un collège de neuf membres.

– en 1987, la Cour constitutionnelle a dû apprécier, à l'occasion d'un contrôle abstrait *a posteriori* le même décret-loi, après son entrée en vigueur.[15]

– en 1993, avec une composition différente de celle de 1987, la Cour constitutionnelle fut aussi appelée par 28 députés, à un contrôle abstrait *a posteriori*, pour apprécier la constitutionnalité des règles contenues dans deux ordonnances ministérielles (*portarias*) sur l'enseignement de la discipline de religion et morale catholiques dans le premier cycle de l'enseignement de base (enseignement primaire) et l'institution de cette matière dans les écoles supérieures d'éducation et dans les centres intégrés qui forment des éducateurs de l'enseignement maternel et des instituteurs de l'enseignement primaire.[16]

Dans l'avis n° 17/82 la Commission constitutionnelle ne se prononça pas sur l'inconstitutionnalité de l'acte soumis à son appréciation dans le cadre du contrôle préventif. La discussion porta surtout sur la question de l'inconstitutionnalité organique, la Commission ayant considéré qu'il n'y avait pas d'innovation législative et, par suite, qu'il n'y avait pas, de ce fait, violation de la compétence réservée au Parlement, car le décret-loi reprendrait le régime du concordat et de la loi sur la liberté religieuse.

En ce qui concerne la nécessité d'une demande de dispense des classes de religion et morale catholiques, l'avis n° 17/82 considéra que la meilleure interprétation de l'article 3 du décret-loi impliquait que cette demande fût conçue comme une simple déclaration, non-susceptible d'être accueillie ou rejetée (interprétation conforme à la constitution), ce qui permettrait d'éviter toute violation de la constitution.

L'avis écarta aussi les autres arguments en faveur de l'inconstitutionnalité des solutions consacrées dans l'acte – arguments tirés soit des principes de la séparation et de la non-confessionaité de l'enseignement public, soit de la liberté religieuse, celle-ci étant comprise dans ses composantes de liberté de choix de religion et de traitement égalitaire des personnes.

À propos du principe de séparation, la Commission a affirmé *expressis verbis* que celui-ci ne signifie pas que «l'État doive être absolument étrangers à la place que l'Église catholique occupe au sein de la société

[15] Arrêt n° 423/87 (Acórdãos do Tribunal Constitucional, 10, 77) avec cinq voix favorables et cinq voix contraires, le président utilisant sa voix prépondérante; voix dissidentes de tous les juges – sur différentes matières – sauf le rapporteur.

[16] Arrêt n° 174/93 (Acórdãos do Tribunal Constitucional, 24, 57).

portugaise» et que, en particulier en matière d'enseignement, l'État ne doit pas «pousser sa neutralité jusqu'à ce point extrême». Il n'y aurait, ainsi, aucune violation du principe de la non-confessionnalité de l'enseignement public, car l'État «se limite à créer les conditions permettant à la majorité des étudiants, dont l'ascendance est catholique, d'exercer le droit à la liberté religieuse». S'il en était ainsi, «la liberté religieuse de la majorité de la population portugaise serait gravement altérée: d'un côté, les parents voulant que leurs enfants reçoivent ce type d'éducation, devraient le chercher en dehors de l'école publique et le payer, ce qui serait trop cher pour beaucoup d'entre eux; d'un autre côté, cette solution entraînerait, au moins dans les grandes villes, des pertes de temps difficilement conciliables avec les emplois du temps scolaires».

Finalement, l'avis affirma encore que la liberté religieuse n'interdisait pas la différence de traitement entre les élèves catholiques des écoles publiques et les autres élèves, car la loi peut traiter de façon différente ce qui est différent. Or, tenant compte du poids social de l'Église et de la religion catholique, la différence de traitement serait conforme et proportionnelle, car adéquate à la représentativité de la confession catholique dans le pays.

La Cour constitutionnelle, par son arrêt n° 423/87[17], a cependant déclaré l'inconstitutionnalité, avec force obligatoire générale, de l'article 2, paragraphe 1, du décret-loi n° 323/83, du 5.7.1983 – le même décret-loi qui avait été objet d'un contrôle préventif, au sujet duquel avait été élaboré l'avis n° 17/82 de la Commission constitutionnelle – «en ce qu'il exige que ceux qui ne désirent pas recevoir l'enseignement de la religion et de la morale catholiques doivent faire une déclaration expresse en ce sens, en vertu des dispositions des articles 168, n° 1, alinéa b), et 41, n^{os} 1 et 3, de la constitution.

Outre l'inconstitutionnalité organique, cette disposition a été considérée inconstitutionnelle pour violation de la liberté religieuse, car «il faut une déclaration négative pour que cet enseignement ne soit pas obligatoire», le silence étant interprété comme une acceptation, quand bien même la personne souhaiterait «garder silence et se maintenir dans le domaine d'une stricte réserve personnelle» pour ses convictions religieuses. En fait, «toute la liberté de ne pas faire – dans ce cas, la liberté négative de religion – est violée quand on exige et impose un acte, un *facere* (la manifestation d'une déclaration de volonté), comme condition nécessaire et indispensable à sa jouissance».

[17] Acordãos do Tribunal Constitucional, 10, 77.

Le même arrêt n'a pas toutefois déclaré l'inconstitutionnalité de l'ensemble des règles d'application de l'article XXI du concordat, prévoyant l'enseignement de la religion et morale catholiques dans les écoles publiques, enseignement dispensé par des agents de l'État et payé par l'État.

La cour – faisant plusieurs fois appel au régime concordataire et reconnaissant même qu'aucune règle constitutionnelle ne mentionne le concordat – a considéré que le bannissement de l'enseignement religieux des écoles publiques conduirait, compte tenu du contexte historique et culturel de la société portugaise, à porter atteinte au principe de la liberté religieuse dans son aspcet positif, puisque cette dernière ne représente pas seulement une sphère d'autonomie face à l'État, mais qu'elle est aussi un pouvoir concret de réalisation propre à rendre plus facile aux élèves désireux de former leurs consciences la connaissance d'une religion ou même de doctrines athéistes.

La cour a énoncé trois conditions indispensables, pour que la solution ne soit pas contraire à la constitution: «1) que l'enseignement religieux soit assumé par les confessions elles-mêmes et non par l'État, encore que la matière puisse faire partie du programme scolaire; 2) que la définition des programmes et le recrutement des professeurs soit l'oeuvre des confessions, quoiqu'il puisse revenir à l'État de prendre en charge les frais correspondants; 3) que soit exigée une déclaration positive de volonté de recevoir l'enseignement religieux pour l' obtenir – et non pas de volonté positive pour en être dispensé – car l'exercice d'une liberté de *facere* peut dépendre de la pratique d'un acte donné (requête, déclaration, etc.)».

Finalement, la cour, considérant que l'État «a le devoir de mettre à la disposition des différentes confessions la possibilité de dispenser leur enseignement religieux, dans les écoles publiques» aux élèves qui déclarent le désirer, a affirmé en *obicter dictum* que l'inexistence d'un régime identique pour les confessions autres que le catholicisme pourrait avoir le caractère d'une inconstitutionnalité par omission.

Dans son arrêt n° 174/93, rendu à l'occasion d'un contrôle abstrait *a posteriori,* sur demande d'un groupe de députés, la cour ne déclara pas l'inconstitutionnalité de deux ordonnances ministérielles – la *portaria* 333/86, du 2 juillet 1986, et la *portaria* 831/97, du 16 octobre 1987, publiées respectivement en 1986 et en 1987.

La première de ces ordonnances prévoit que l'enseignement de religion et morale catholiques fait partie des programmes d'études de l'enseignement primaire (les quatre premières années de scolarité), «au même niveau que les autres disciplines», et est placé sous la responsabilité de l'Église catholique. L'enseignement de la discipline religieuse

peut être fait par l'instituteur lui-même, par le curé de la paroisse ou par une autre personne capable, la nomination appartenant de droit à l'autorité publique, sur proposition de l'évêque. Si c'est l'instituteur lui-même qui enseigne cette discipline, l'enseignement doit avoir lieu pendant les horaires normaux des cours, les élèves qui ne la fréquentent pas devant être répartis, le cas échéant, dans les autres classes pendant ce temps, si cela est possible. Si cette dernière solution s'avère impraticable, les élèves doivent être pris en charge par leurs parents.

La deuxième ordonnance établit l'enseignement optionnel de la religion et de la morale catholiques dans les écoles supérieures de formation de professeurs de l'enseignement de premier niveau (les neuf premières années de scolarité), pour que ceux-ci puissent obtenir l'aptitude nécessaire pour enseigner la religion à leurs futurs élèves. Selon l'ordonnance, le statut professionnel des enseignants de l'enseignement supérieur est applicable, aux professeurs de religion et morale catholiques des établissements scolaires en cause. Leur contrat est cependant soumis au consentement préalable de l'évêque du diocèse.

Dans la continuité de l'arrêt n° 423/87, la cour réaffirma que la liberté religieuse, dans sa dimension de liberté de conscience, comportait une valeur positive, impliquant de la part de l'État non seulement une attitude d'omission (un *non facere),* mais aussi une attitude positive, qui se traduit par le devoir d'assurer la pratique de la religion.

Ainsi, selon la cour, les principes de la non-confessionnalité de l'enseignement public et de la séparation des Églises et de l'État ne constituent pas un obstacle à ce que l'État puisse – et doive – coopérer avec les Églises pour assurer l'enseignement religieux dans les écoles publiques, le principe de laïcité n'impliquant pas un devoir pour l'État de s'abstenir de cette coopération (l'État ne doit pas être agnostique, athée ou laïciste). L'État a donc non seulement le devoir de «permettre aux Églises l'enseignement des religions dans les écoles publiques, mais encore le devoir de permettre aux différentes confessions religieuses de dispenser un enseignement religieux, dans les écoles publiques, aux élèves», qui déclarent le vouloir. La cour considéra encore que «les besoins religieux sont devenus un devoir juridique que l'État doit assurer et la liberté religieuse le critère de base de l'orientation de l'action des pouvoirs publics vis-à-vis du phénomène religieux».

Malgré cette lecture très floue, la cour a dû tenter plusieurs interprétations en conformité avec la constitution concernant certaines dispositions des arrêts. C'est ce qui s'est passé notamment avec celle qui prévoit une officialisation du programme des cours; ainsi que celle qui confie à l'État

le financement de ces cours et la formation des professeurs de la discipline religieuse. Dans les deux cas, la cour ne déclara pas l'inconstitutionnalité, jugeant que, de toute façon, l'autonomie de l'Église était assurée, puisque l'État était obligé d'accepter sans possibilité de choix les programmes élaborés par les autorités religieuses et les formateurs désignés par les évêques.

En ce qui concerne la règle qui admet que l'instituteur lui-même peut, dans l'enseignement de base ou primaire, assurer non seulement l'enseignement des matières du programme «général», mais aussi l'enseignement de la religion et morale catholiques, lorsqu'il a été désigné par l'autorité ecclésiastique, la cour l'a considérée également comme compatible avec la constitution, quoique dans ce cas l'instituteur doive accomplir simultanément les fonctions d'agent de l'État et d'agent d'une Église, avec toute la «charge symbolique» d'une double représentation – malgré le principe de séparation des Églises et de l'État – et nonobstant le fait – comme les cours de religion ont lieu pendant l'emploi du temps scolaire – que cette double fonction entraîne nécessairement, pour les élèves qui ne reçoivent pas l'enseignement de la discipline religieuse, soit de quitter la classe, soit de suivre des activités scolaires alternatives. Reconnaissant que la solution pourrait, d'une part, donner l'impression que l'instituteur d'enseignement religieux est imposé par l'État et, d'autre part, pousser les parents à inscrire leurs enfants aux cours de religion par crainte d'éventuelles représailles de l'instituteur, la cour a cependant considéré que l'instituteur devait toujours être désigné par l'Église et non par l'État. En effet, la double représentation n'est pas interdite par le texte constitutionnel.

Les voix dissidentes ont été très critiques, estimant que la majorité du Tribunal avait fait une «relecture» de la constitution, voire une révision inconstitutionnelle de la constitution, surtout en ce qui concerne l'enseignement de la religion par l'instituteur. En effet, elles n'ont pas admis que cet enseignement puisse encore être considéré comme un enseignement dans l'école et non de l'école, quand ledit instituteur le dispense «en tant que fonctionnaire public et sur le temps où il devrait être en train d'enseigner les autres disciplines du programme scolaire». Les mêmes voix dissidentes ont souligné que l'arrêt avait interprété le principe de séparation seulement comme empêchant les intrusions de l'État dans les confessions, alors que l'État doit en fait être un simple exécutant des décisions prises par les autorités ecclésiastiques. D'ailleurs, l'arrêt fut accueilli par des critiques généralisées de la part de la doctrine.[18]

[18] Voir sur ce point l'exposé de R. Mendes et N. De Almeida, 'L'Ecole, la Religion et la Constitution. Portugal', Annuaire International de Justice Constitutionnelle, 12, 1996, pp. 291 ss., pp. 305 et ss. que nous reproduisons avec peu de modifications.

La question a été tranchée par la Loi de liberté religieuse, qui disposa dans l'article 24 n° 4 que «les professeurs qui sont chargés de l'enseignement religieux ne le cumulent pas avec l'enseignement, aux mêmes élèves d'autres matières scientifiques ou de formation, sauf dans des situations dûment reconnues de difficulté manifeste pour l'application du principe».

D. *Article 10: Liberté d'Opinion et d'Expression*

Les libertés d'opinion, d'expression, de réunion et d'association en matière religieuse sont comprises dans les libertés de conscience, de religion et de culte, qui sont reconnues dans la constitution portugaise sans restrictions. De ce fait seules les dernières libertés sont applicables en cas de conflit entre les deux groupes de libertés.

II. Liberté de Réunion et d'Association des Personnes et des Institutions: Article 11

Les libertés de réunion et d'association pour des fins religieuses ou au service d'une conviction sont aussi comprises dans la liberté de conscience, de religion et de culte. La Loi de liberté religieuse prévoit quatre situations possibles, en fonction de la réalité sociale et de la volonté des personnes.

Un groupe de personnes peut s'associer et se réunir à des fins religieuses (article 8, alinéa f)), sans qu'il y ait besoin de personnalité juridique pour jouir des droits collectifs fondamentaux de liberté religieuse (articles 22 et 23). C'est la première situation possible.

Toutes les personnes juridiques avec des fins religieuses, qui ne sont pas catholiques, ont aujourd'hui le statut d'associations de droit privé. Elles ont tous les droits collectifs de liberté religieuse des groupes de personnes de la première situation et encore ceux qui dépendent pour son exercice de la personnalité juridique. Elles n'ont pas droit à la reconnaissance publique, donc automatique, de ces droits et pourront avoir besoin de faire preuve de leur nature religieuse pour pouvoir les exercer en face de tiers. Cette possibilité se maintiendra dans le futur aussi bien pour les associations religieuses actuelles qui ne veulent pas changer de statut, que pour tout nouveau groupe de personnes qui le souhaite.

Les Églises ou communautés religieuses qui font preuve de leur existence au Portugal, c'est-à-dire, d'une présence sociale organisée et d'une pratique religieuse dans le pays, avec leur doctrine et leur organisation personnelle et patrimoniale peuvent s'enregistrer comme personnes juridiques religieuses

et obtenir l'enregistrement de leurs instituts ou organisations religieuses et fédérations (articles 33 à 36). Elles ont alors le droit à la reconnaissance publique de leurs droits collectifs de liberté religieuse.

Finalement les Églises ou communautés religieuses enregistrées qui présentent une garantie de durée par le nombre de leurs croyants et par le fait d'avoir plus de 30 ans d'existence organisée dans le pays – ou moins s'il s'agit d'une Église ou communauté religieuse fondée il y a plus de 60 ans – peuvent être considérées comme enracinées dans le pays (article 37). Ce statut permet d'accéder à des formes de collaboration avec l'État qui ne découlent pas de la liberté religieuse mais qui sont compatibles avec elle et qui deviennent une exigence constitutionnelle par le principe d'égalité, par rapport au statut juridique de l'Église catholique (il y a alors un principe non constitutionnel mais simplement légal de coopération de l'État avec les églises et communautés religieuses enracinées dans le pays, selon l'article 5). Ce sont la célébration des mariages civils avec une forme religieuse (article 18), la collaboration dans des organes de conseil ou de gestion du secteur (Commission du temps d'émission des confessions religieuses – article 25, n° 3 et Commission de la liberté religieuse – article 56, n° 1, alinéa b)-), la conclusion d'accords avec l'État (article 45°) et la consignation de 0,5% de l'impôt sur le revenu – calculée en fonction des bénéfices fiscaux de l'Église catholique (article 32, n° 4). L'idée c'est que l'État neutre ne doit pas interférer dans la concurrence des confessions, en aidant à l'établissement dans le pays par le biais de l'admission à coopérer avec lui-même. C'est la quatrième situation.

La loi de liberté religieuse (article 22, n° 1, al. d)) reconnaît comme des droits collectifs de liberté religieuse le droit des églises et autres communautés religieuses d'adhérer ou de participer à la fondations de fédérations ou d'associations interconfessionnelles ayant leur siège au pays ou à l'étranger et ainsi que le droit de créer des fédérations et des associations de personnes juridiques religieuses (article 33, al. d)).

La Constitution portugaise prévoit un conflit possible entre la liberté d'association à des partis politiques et la liberté religieuse dans l'article 51, n° 3, qui détermine que les partis politiques, «sans préjudice de la philosophie ou de l'idéologie de leur programme, ne peuvent utiliser une dénomination qui contienne des expressions évoquant directement quelque religion ou Église que ce soit, ni des emblèmes susceptibles d'être confondues avec des symboles nationaux ou religieux». La compétence pour admettre l'inscription et pour l'appréciation de la légalité des dénominations, des sigles et des symboles des partis politiques est attribuée à la Cour constitutionnelle.

En 1995, la Cour constitutionnelle a été saisie d'une demande d'inscription d'un nouveau parti, dénommé «Parti social-chrétien», dont le symbole était un poisson de couleur blanche sur fond bleu et dont les statuts contenaient le passage suivant: «le Parti social-chrétien», d'inspiration chrétienne, a pour but de promouvoir et de défendre (...) la démocratie politique, sociale, économique et culturelle, inspirée par les valeurs de l'Etat de droit et par les principes éthiques, sociaux et démocratiques de la doctrine chrétienne.[19]

La cour, par son arrêt n° 107/95[20] a décidé, à l'unanimité des voix, que la dénomination et le sigle du parti en question ne respectaient pas l'interdiction constitutionnelle d'utilisation de dénominations et de sigles contenant des expressions liées à quelque religion que ce soit et, en ce qui concerne le symbole, a décidé, avec une seule voix discordante, que celui-ci, dans le contexte en question, ne respectait pas la même interdiction concernant les symboles religieux.

Selon l'arrêt, l'interdiction constitutionnelle avait pour but d'empêcher toute atteinte à la bonne foi des citoyens et de garantir des conditions de transparence à leur participation à la vie politique, écartant la possibilité de méprise des religions ou des Églises, en sauvegardant le principe de la non-confessionnalité de l'État et de la liberté de conscience. La «doctrine chrétienne» évoquée dans les statuts du parti ne constituait pas un patrimoine idéologique susceptible d'appropriation exclusive par tel ou tel parti.

En ce qui concerne le symbole, la cour, tout en considérant que le poisson ne constitue pas, de nos jours, «le symbole par excellence du christianisme», a toutefois estimé que celui-ci ne manquerait pas, eu égard à la liaison historique aux premiers chrétiens, d'être compris comme tel en certaines circonstances. Le juge qui a manifesté une opinion dissidente sur ce point a soutenu que l'interdiction constitutionnelle en ce qui concerne les symboles avait trait seulement à ceux qui, «à l'heure actuelle, peuvent induire les électeurs en erreur, du fait qu'ils sont utilisés pour identifier des religions ou qu'ils sont indéniablement des images religieuses» (ce qui, dans le cas du christianisme, serait le cas de la croix, du sacré-coeur de Jésus, de la Vierge Marie).[21]

[19] Des articles parus dans la presse d'alors associaient ce parti à l'Église universelle du royaume de Dieu, fondée au Brésil dans les années 70 et qui s'est répandue au Portugal vers la fin des années 80 (100.000 croyant estimés au Portugal).

[20] Acórdãos do Tribunal Constitucional, 30, 1123.

[21] L'enregistrement du parti serait finalement autorisé après le changement de dénomination en «Partido da Gente» (parti des gens), ayant comme symbole la lettre «G» et un «balai rouge» (Arrêt n 118/95 (Acórdãos do Tribunal Constitucional, 30, 1131).

III. Protection des Propriétés des Personnes et des Institutions: Protocole n° 1, article 1

Les personnes et les institutions religieuses possèdent le droit de propriété privée, garanti par la Constitution (article 62) sans aucune discrimination.

IV. Droits d' Ester en Justice des Personnes et des Institutions: Articles 6 et 13

L'influence de la CEDH sur la jurisprudence constitutionnelle portugaise en matière de procédure civile et administrative a été bien plus considérable qu'en matière de religion, notamment sur les droits de la défense, le principe de l'égalité des armes et la conception même d'un procès équitable.[22] Ce développement a été suivi par des réformes législatives et finalement par des altérations constitutionnelles. La révision constitutionnelle de 1997 a introduit les nouveaux numéros. 4 et 5, qui reprennent les concepts de la DEDH de «délai raisonnable» et de «procès équitable» et qui répondent aux problèmes soulevés par la jurisprudence de Strasbourg:

Article 20. L'accès au droit et au contrôle juridictionnel effectif

4. Tout personne a la faculté d'obtenir une décision de justice dans un délai raisonnable et grâce à un procès équitable.

5. Pour la défense des droits, libertés et garanties fondamentales personnelles, des procédures judiciaires caractérisées par la rapidité et la priorité, sont mises à la disposition des citoyens afin de permettre à ces derniers d'obtenir, en temps utile, un contrôle effectif contre des menaces ou contre des violations de ces droits.

Par la suite, le nouveau Code de procédure administrative de 2002 (Loi n° 15/2002 du 22 Février) a créer un nouveau procès administratif urgent, l'«intimation pour la protection de droits, libertés et garanties», dont la forme la plus générale est décrite dans l'article 109, n° 1 de cette loi: «L'intimation pour la protection de droits, libertés et garanties peut être demandée lorsque l'émission rapide d'une décision sur le fond, qui impose à l'administration l'adoption d'une conduite positive ou négative s'avère indispensable pour sauvegarder en temps utile un droit, une

[22] Voir la préface du juge Portugais à Strasbourg Ireneu Cabral Barreto à son commentaire à la CEDH, cité en haut note 5.

liberté ou une garantie, parce que dans les circonstances du cas il n'est pas possible ou il n'est pas suffisant de décréter une providence de précaution».

Nous avons vu plus haut (I, §1) un cas d'application de cette intimation pour le report d'un examen prévu le samedi à l'égard d'une personne adventiste (Tribunal Central Administrativo Norte, arrêt du 08-02-2007, procès 01394/06).

PATRICIU VLAICU

L'APPLICATION DES DISPOSITIONS DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME PROTÉGEANT LA LIBERTÉ DE RELIGION ET DE CONVICTION À ROUMANIE

Pour la situation de la Roumanie nous avons adapté le Plan proposé, en faisant une courte introduction pour mieux comprendre le régime roumain des cultes et ensuite nous avons observé les décisions de la Haute Cour de Cassation et de justice (Nommée avant 2004 Cour Suprême de Justice. Le changement d'appellation a été fait par la loi n°. 304 de 28/06/2004) et de la Cour Constitutionnelle en rapport avec le plan proposé.

Introduction

A. *Le Régime Roumain des Cultes*

Sans faire une analyse développée d'ordre sociologique de la situation des cultes en Roumanie pour ne pas nous éloigner du sujet de notre recherche, précisons simplement que, selon les données du recensement de 2002, en Roumanie il y avait 16 cultes reconnus par la loi et autour de 700 associations dont l'État reconnaît le caractère religieux.[1] Après l'adoption de la Loi pour la liberté religieuse 489/2006, on compte 18 cultes reconnus par la loi. Sur une population de 21 millions de Roumains, l'Église orthodoxe roumaine est largement majoritaire, représentant 87% de la population. Le deuxième culte est le catholicisme, avec 4,7% de catholiques romains et 0,9% de catholiques de rite oriental (gréco-catholiques). Les protestants représentent 3,4% de la population. 13843 personnes se sont déclarées sans religion et 9271 athées.[2]

La chute du régime communiste a provoqué de grands changements dans la société roumaine. Les années 1990-1991 ont été des années de

[1] Voir S. IONITA 'Particularitati ale vietii religioase in România, o perspectiva administrativă', in *Cultele si Statul în România*, (Editura Renasterea, Cluj-Napoca, 2003).

[2] Pour le tableau complet de la répartition de la population selon l'appartenance religieuse, voir les résultats du recensement de 2002 publiés par l'Institut national de Statistique, Bucarest, 2003.

consolidation des principes démocratiques et l'élaboration d'une nouvelle constitution était une première urgence, mais constituait en même temps un grand défi.

B. *Principes Constitutionnels*

La Constitution roumaine de 1991, modifiée en 2003, contient plusieurs articles qui font référence, directement ou non, à la liberté religieuse. Les plus importantes précisions constitutionnelles concernant notre sujet sont celles des articles 20, 29 et 30.

L'article 20 affirme que les pactes et les accords internationaux signés et ratifiés par la Roumanie font partie du droit interne et ont valeur supérieure aux autres normes[3]: «*Les dispositions constitutionnelles concernant les droits et les libertés des citoyens seront interprétées et appliquées en concordance avec la Déclaration universelle des droits de l'homme, avec les pactes et autres traités auxquels la Roumanie est liée*». Ainsi, s'il y a des discordances entre, d'un côté, les pactes et les traités concernant les droits fondamentaux et, d'un autre côté, les lois internes, ce sont les réglementations internationales qui ont l'emportent.[4] Selon les constitutionnalistes, «une loi incompatible avec les précisions d'un traité international concernant les droits de l'homme doit être révisée ou remplacée par une autre norme qui ne contrevient pas aux pactes ou aux traités dont la Roumanie est signataire».[5]

L'article 29 – relatif à la liberté de conscience – est le centre du dispositif constitutionnel concernant la vie religieuse. Il précise que:

«Art. 29 La liberté de conscience

(1) La liberté de pensée et d'opinion ainsi que la liberté de religion ne peuvent être rstreintes sous aucune forme. Nul ne peut être contraint à adopter une opinion ou à adhérer à une religion contraires à ses convictions.

(2) La liberté de conscience est garantie; elle doit se manifester dans un esprit de tolérance et de respect réciproque.

[3] Voir V. Duculescu, C. Calinoiu, G. Duculescu, *Constitutia Romaniei Comentată si Adnotată*, (Regia autonoma Monitorul Oficial, Bucarest 1997), p. 84. Voir aussi l'article 20 de la Constitution de la Roumanie.

[4] Ibidem, p. 84.

[5] Ibidem, p. 86.

(3) Les cultes religieux sont libres et ils s'organisent conformément à leurs propres statuts, dans les conditions fixées par la loi.

(4) Dans les relations entre les cultes, sont interdits toutes formes, tous moyens, tous actes et actions de discorde religieuse.

(5) Les cultes religieux sont autonomes par rapport à l'État et jouissent de son soutien, dont les facilités accordées pour donner une assistance religieuse dans l'armée, dans les hôpitaux, dans les établissements pénitentiaires, dans les asiles et dans les orphelinats.

(6) Les parents ou les tuteurs ont le droit d'assurer, en accord avec leurs propres convictions, l'éducation des enfants mineurs dont la responsabilité leur incombe».

L'article 30 (1) garantit la liberté d'expression des pensées ou des croyances, ainsi que la liberté de création sous toutes ses formes, que ce soit de vive voix ou par écrit, par des images ou des sons, ou d'autres moyens d'expression publique, en les déclarant inviolables. Le septième alinéa du même article affirme qu'il est «*interdit par la loi d'inciter à la guerre, à la haine raciale, de classe ou religieuse, d'inciter à la discrimination, ainsi qu'à des manifestations obscènes contraires aux bonnes mœurs*».

La loi en vigueur pour la liberté religieuse était, encore 16 ans après la chute du régime communiste, le décret-loi 177/1948. C'est seulement en décembre 2006 que la Roumanie s'est dotée d'une nouvelle loi sur la liberté religieuse, à savoir la loi 489 du 27 décembre 2006. Etant donné que cette loi est très récente, les décisions de la Cour Constitutionnelle et de la Haute Cour de Cassation et de Justice concernant la liberté religieuse n'y font pas référence.

I. Les Décisions des Juridictions Constitutionnelle et Suprême

A. *Liberté de Pensée, de Conscience et de Religion*

Pour cette première section, les plus importantes décisions concernent la liberté de conscience dans l'enseignement public, le respect du repos religieux et la reconnaissance des cultes.

1. *Décisions Concernant la Liberté de Conscience dans l'Enseignement Public*

Pour cette section, nous avons retenu une décision de la Cour Constitutionnelle, concernant la constitutionnalité de la loi de l'enseignement, qui introduit l'enseignement de la religion dans l'enseignement public.

Par la décision n° 72 de 1995, la Cour Constitutionnelle de Roumanie s'est prononcée sur la constitutionnalité de certains articles de la loi sur l'enseignement. La Cour a été saisie par 57 députés concernant la non constitutionnalité de l'article 9 premier alinéa de la loi sur l'enseignement, qui précise que les programmes de l'enseignement doivent contenir la discipline «religion» en tant que discipline obligatoire pour l'enseignement primaire, à option dans le collège et facultatif dans les lycées et dans les écoles professionnelles. La loi précise également que l'élève, avec l'accord des parents ou des représentants légaux, choisit s'il veut étudier la religion et la confession. La plainte des députés concerne seulement l'affirmation que dans l'enseignement primaire la matière «religion» est une discipline obligatoire. La Cour Constitutionnelle démontre que l'article 32.7 de la Constitution roumaine précise le fait que dans les Écoles d'État, l'enseignement de la religion est organisé et garanti par la loi. Conformément à l'article 29.1 de la même Constitution, personne ne peut être contraint d'adopter ou d'adhérer à une religion contrairement à ses propres convictions. Selon l'Article 29.6, «les parents et les tuteurs ont le droit d'assurer l'éducation des enfants selon leurs propres convictions». La Cour Constitutionnelle montre que cette précision est conforme à l'esprit de l'article 9 de la CEDH, 18 de la DUDH et de l'article 18.1 du Pacte international concernant les droits civils et politiques et l'article 13.3 du même document. La Cour Constitutionnelle précise que les prescriptions de l'Article 9.1 de la Loi sur l'enseignement ne peuvent pas être interprétées autrement que dans l'esprit de l'article 29 de la Constitution, en ce sens que nul ne peut être obligé d'adopter une opinion ou d'adhérer à une croyance contraire à ses propres convictions. L'article 9.1 de la loi sur l'enseignement permet, selon la Cour Constitutionnelle, une interprétation conforme à la Constitution, c'est-à-dire «l'élève, avec l'accord des parents ou du représentant légal, choisit l'étude de la religion et la confession». Le droit de choisir suppose aussi le droit de ne pas avoir de conviction religieuse et de ne pas suivre les cours de religion. La Cour montre que l'introduction dans l'enseignement primaire de l'enseignement obligatoire de la religion, ne veut pas dire que la religion est obligatoire en ignorant le droit des parents de décider sur l'éducation religieuse de leurs enfants. ..... L'exigence concerne seulement l'obligation d'inscrire cette discipline dans les programmes d'enseignement, la discipline et la confession étant choisies ou non par les parents. La Cour a décidé que les prescriptions de l'article 9.1 de la loi sur l'enseignement sont constitutionnelles à condition qu'elles soient appliquées dans le respect de l'article 29.1 et 29.6 de la Constitution.

Concernant l'enseignement de la religion et la présence des signes religieux dans les écoles publiques, nous attirons simplement l'attention sur la décision de la Cour d'Appel de Bucarest du 18 juin 2007 sur la contestation du Ministère de l'Éducation et de l'Enseignement concernant la Décision du Conseil National contre la discrimination (CNCD).[6] Par la Décision nr. 323/21.11.2006, le CNCD a sollicité du Ministère de l'Enseignement qu'il donne des directives internes pour réglementer la présence des icônes dans les écoles publiques. La Cour d'Appel a décidé que la recommandation du CNCD est justifiée. Le Ministère considère, à son tour, que la présence des symboles religieux dans les écoles ne doit pas être décidée par le Ministère mais que ce problème doit être clarifié, dans chaque école, par la direction en consultation avec les parents des élèves. Le Ministère de l'Éducation a décidé de faire appel à la Haute Cour de Cassation et de Justice. Il faut aussi mentionner que trois ONG ont attaqué devant la Cour d'Appel de Bucarest la même décision du CNCD.

2. *Décisions de la Haute Cour de Cassation et de Justice Concernant le Respect du Repos Religieux*

Pour le repos religieux, nous avons retenu deux décisions concernant les adventistes du 7ème jour.

a. Décision 1934 du 7 juillet 1999 – Examens dans l' Enseignement Public

Étant donné que l'Église adventiste du 7ème jour considère le samedi comme jour de repos, elle a demandé à l'État de ne pas programmer d'activités officielles à l'école, ni d'examens le samedi. L'État a pris en considération cette demande, mais deux incidents sont survenus aboutissant à des procédures en justice, allant jusqu'à la Haute Cour de Cassation et de Justice.[7]

En 1999, un examen d'admission au lycée a été fixé un samedi. Les représentants de l'Église adventiste sont intervenus auprès du ministère de

[6] Le CNCD est un organisme d'État qui peut donner des recommandations obligatoires pour les institutions publiques afin d'éliminer tout acte de discrimination. La recommandation faite par le CNCD en novembre 2006 a été provoquée par la plainte adressée par un enseignant, M Emil Moise, qui considérait que sa fille est discriminée à cause du fait qu'elle se trouve dans une école qui a sur les mûrs des icônes orthodoxes.

[7] Voir pour les détails, la Revue de Droit public, n°1/1999, pp. 95-98, où est commentée cette décision.

l'Enseignement pour changer la date de l'examen, mais ils n'ont pas été entendus; une semaine avant l'examen, 16 procédures judiciaires ont été ouvertes auprès de plusieurs Cours d'Appel. Les instances n'ont pas donné gain de cause à l'Église adventiste et 850 élèves ont donc refusé de participer à cet examen. La procédure a continué auprès de la Cour Suprême de Justice, où l'Église adventiste a obtenu satisfaction par la décision 1934 du 7 juillet 1997. Le Ministère de l'Enseignement a été obligé de réorganiser un examen pour les élèves qui, pour des raisons de conviction religieuse, n'ont pas pu participer à l'examen programmé le samedi.

La décision 1934 du 7 juillet 1999 de la Cour Suprême de Justice attire l'attention sur le fait que le non respect du jour de repos est contraire «non seulement au droit positif interne, en commençant avec la Constitution Roumaine, art. 20 et 32, mais aussi aux documents internationaux qui en Roumanie sont des normes juridiques obligatoires». Il s'agit de l'article 9 de la Convention Européenne des droits de l'Homme, de l'article 18 du Pacte international concernant les droits politiques et civils, de la Déclaration concernant l'élimination de toutes les formes d'intolérance et de discrimination pour des motifs d'ordre religieux ou de convictions.

Selon ces documents, «le droit à la liberté de pensée, de conscience et de religion implique aussi, parmi d'autres, la liberté de pouvoir profiter du jour de repos et de pouvoir participer aux cérémonies religieuses conformément a ses propres convictions».

Ainsi, «le refus du ministère de donner la possibilité aux élèves adventistes de passer leur examen un autre jour que le samedi, crée une situation d'injustice, et affecte leur possibilité de s'inscrire aux écoles où normalement ils ont le droit de s'inscrire. .... Pour cette raison, l'action en cause est partiellement admise et il est constaté que la disposition contenue dans l'ordre 4286/1998 du Ministère de l'Éducation Nationale qui a fixé l'examen en cause un samedi, le 5 juin 1999, est illégale. Il s'impose la constatation de l'illégalité partielle de l'acte administratif et non pas celle d'annulation, comme exigé, parce que l'ordre du Ministère a été déjà mis en application et il y a des effets juridiques de cette application». ... «L'autorité publique concernée est obligée de reprogrammer l'examen en cause avant le 30 juillet 1999, un autre jour que le samedi, et d'inscrire les élèves adventistes, conformément à leurs propres options».

b. Examens Professionnels

Le même type d'incident est survenu en 2005. Cette fois-ci, pour un examen fixé par le Conseil Supérieur de la Magistrature un samedi. La

Haute Cour de Cassation et de Justice, section du Contentieux administratif et fiscal, par la décision 1088/2006 pour le dossier 3638/2005 a donné raison au juge V.M., du Tribunal de Première instance de Vâlcea qui a sollicité la constatation de l'illégalité de la disposition du Conseil Supérieur de la Magistrature du 8 septembre 2005 concernant l'épreuve écrite fixée pour le concours de promotion, un samedi, jour de repos pour les membres de l'Église Adventiste du 7ème jour. Pour cette solution, la Cour Suprême de Cassation et de Justice a retenu l'article 1.3 de la Constitution de la Roumanie, l'article 16 de la Constitution et aussi l'article 20.1 de la Constitution de la Roumanie qui précise que «les dispositions constitutionnelles concernant les droits et les libertés des citoyens vont être interprétées et appliquées en concordance avec la Déclaration Universelle des Droits de l'Homme, avec les Pactes et les autres Traités auxquels la Roumanie est partie». L'instance suprême fait référence aux dispositions de l'art 2.1; art 7 et 18 de la Déclaration Universelle des Droits de l'Homme de 1948, et aux articles 2 et 18 du Pacte international de l'ONU concernant les droits civiles et politiques et l'article 6.h de la déclaration concernant l'élimination de toute forme d'intolérance et de discrimination pour des motifs de religion ou de convictions, et surtout les articles 9 et 14 de la CEDH. La cour reprend les principaux aspects de ces documents. La Haute Cour de Cassation et de Justice accepte le recours de MV et oblige le Conseil Supérieur de la Magistrature à organiser un autre concours pour que la personne en cause puisse participer sans que ses droits fondamentaux soient lésés. La Cour laisse au Conseil Supérieur de la Magistrature la charge de trouver la meilleure solution pour donner satisfaction au demandeur. Nous reproduisons en traduction française non officielle les passages de la Décision qui concernent le sujet de notre analyse:

> «Par une succincte énumération, peuvent être retenues comme significatives en cette cause les dispositions de l'art.2,1, art. 7 et 8 de la Déclaration Universelle des Droits de l'Homme de 1948, celles de l'article 2 et 18 du Pacte International de ONU concernant les droits civils et politiques et de l'article 6.h de la Déclaration concernant l'élimination de toute forme d'intolérance et de discrimination pour des motifs de religion ou de convictions et surtout les articles 9 et 14 de la CEDH. L'article 9.1 de la Convention affirme que toute personne a le droit à la liberté de pensée, de conscience et de religion, et ce droit inclut le droit de changer de religion, ou de conviction, mais aussi la liberté de manifester sa religion ou conviction individuellement ou collectivement, en public ou en privé, par culte, enseignement, pratiques ou rituels.'

> Conformément au 2ème paragraphe de l'article 9, «la liberté de manifester sa religion ou ses convictions ne peut faire l'objet d'autres restrictions que celles qui, prévues par la loi, constituent des mesures nécessaires, dans une société démocratique, à la sécurité publique, à la protection de l'ordre, de la santé ou de la morale publique, ou à la protection des droits et libertés d'autrui». Par l'article 14 de la convention intitulée «l'interdiction de la discrimination», il est prévu que «l'exercice des droits et des libertés reconnus par la présente convention doivent être assurés sans aucune discrimination basée sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la richesse ou toute autre situation».

La décision de la Haute Cour de Cassation et de Justice attire l'attention sur le fait que «le 26 juin 2000, le Conseil de l'UE a adopté le Protocole n° 12 à la Convention, concernant l'interdiction générale de toute forme de discrimination, protocole qui va être ratifié par la Roumanie. (La loi de ratification du Protocole a été publiée au Moniteur Officiel 375 / 2 mai 2006). De tous ces textes et de ceux qui les précèdent (concernant la Constitution et la législation interne nn.) résulte que le droit à la non-discrimination n'a pas une existence indépendante, parce qu'il ne peut pas être évoqué autrement que pour les droits et les libertés réglementés. Dans notre cas, on constate que les dispositions constitutionnelles et légales évoquées se retrouvent en bonne partie aussi dans les décisions attaquées. La différence entre les motifs présentés par le demandeur et les éléments des décisions attaquées résident dans la modalité d'interprétation de la différence de traitement. Cela peut être affirmé parce qu'on ne peut pas considérer que toute différence de traitement constitue automatiquement une discrimination et une transgression des dispositions légales et constitutionnelles ou de l'art 14 de la Convention. Il n'y a de discrimination que dans le cas où il existe des distinctions entre des situations similaires et comparables, sans que celles-ci soient basées sur une justification objective et raisonnable; c'est-à-dire qu'il faut démontrer l'existence d'un objectif pouvant rendre la distinction légitime, et les moyens utilisés doivent être adaptés et nécessaires. La Cour Européenne des Droits de l'Homme a décidé qu'un droit prévu par la Convention Européenne des Droits de l'Homme ne doit pas seulement avoir un but légitime, mais aussi que les dispositions de l'article 14 sont transgressées s'il apparaît clairement qu'il n'y a pas un rapport raisonnable de proportionnalité entre les moyens utilisés et l'objectif envisagé. (Affaire linguistique belge c/Belgique, Mc Michael c/Royaume-Uni, Larkos c/Chypre)».

3. *La Décision de la Cour Suprême de Justice Concernant la Reconnaissance de l'Organisation des Témoins de Jéhovah en tant que Culte Reconnu.*

Concernant la liberté de religion, une des plus importantes décisions est celle relative à l'Organisation les Témoins de Jéhovah qui a bénéficié d'une reconnaissance par une procédure inhabituelle, dans laquelle la décision de la Cour Suprême de Justice était décisive.

Les Témoins de Jéhovah, qui se sont organisés comme association en 1990, ont modifié leur statut en 1998 en affirmant dans l'article 1 paragraphe «b» que «l'organisation des Témoins de Jéhovah est un *culte chrétien*». Ils ont demandé au secrétariat d'État pour les Cultes de prendre acte de cette modification et de délivrer une attestation reconnaissant officiellement la qualité de culte de cette organisation. Le secrétariat d'État a refusé en précisant que la qualité de culte s'obtient après l'accomplissement d'une procédure administrative que les Témoins de Jéhovah n'avaient pas observée. Dans ce dossier, la procédure judiciaire est arrivée jusqu'à la Cour Suprême de Justice qui s'est prononcée par la décision n° 769 du 7 mars 2000. Nous n'allons pas nous arrêter sur les détails de la procédure, mais il nous semble important d'observer la position de la Cour Suprême de Justice dans ce dossier.[8]

Premièrement, nous observons que la Cour Suprême de Justice affirme que, par la modification apportée aux statuts, l'organisation des Témoins de Jéhovah obtient la qualité de *culte religieux*, institution distincte des associations cultuelles dans le droit roumain, en faisant référence à l'article 29 de la Constitution roumaine «*...Par les modifications apportées au statut, la réclamante est un culte religieux. Conformément à l'article 29.3 de la Constitution roumaine, les cultes sont libres et s'organisent conformément à leurs propres statuts, dans les conditions prévues par la loi*».

La Cour Suprême de Justice constate que l'organisation des Témoins de Jéhovah «a été organisée dans les conditions de la loi 21/1924 pour les personnes morales; loi qui était en vigueur le 9 avril 1990 quand elle a obtenu la personnalité juridique». L'organisation des Témoins de Jéhovah a préféré s'organiser comme *association de droit privé*[9],

[8] Pour pouvoir observer les aspects les plus importants de cette décision, nous allons intercaler en *italique* les précisions de la Cour Suprême de Justice que nous considérons importantes pour notre sujet.

[9] Conformément aux précisions du Directeur général du SEC, il y a environ 700 organisations à caractère culturel en Roumanie. Voir STEFAN IONITA, idem, p. 140.

conformément à la loi 21/1924 alors en vigueur pour les associations. Donc, l'organisation des Témoins de Jéhovah est entrée dans une catégorie juridique distincte, celle d'association à caractère culturel et non pas dans celle des cultes.

La décision de la Cour Suprême de Justice affirme *qu'en ce qui concerne le décret 177/1948, celui-ci contrevient à la Constitution.* Et elle constate sa non-constitutionnalité, conformément à l'article 150.1 de la Constitution... «*En conséquence, le décret 177/1948 ne peut pas être pris en considération en vue de la solution de cette affaire, parce qu'il contient des restrictions concernant la liberté d'opinion et de la foi religieuse, ce qui contrevient aux dispositions de l'article 29.1 de la Constitution*». Il faut préciser que ce décret n'a été abrogé que par la loi 489/2007.

La décision de la Cour Suprême de Justice affirme que le refus du ministère de la Culture et des Cultes de reconnaître le statut modifié en avril 1998 de l'organisation religieuse «les Témoins de Jéhovah» culte chrétien n'est pas justifié. Aussi est-il précisé que, tant que la réclamante a enregistré conformément à la loi les modifications apportées aux statuts auprès du Tribunal (Judecatoria) Sector 1 Bucuresti, conformément à la décision du 9 avril 1998, rectifiée par celle du 25 janvier 1999, décision définitive et irrévocable, le ministère de la Culture et des Cultes est obligé de reconnaître ce statut.

Cette décision de la Cour Suprême de Justice est définitive, et a obligé l'État roumain à reconnaître une association de droit privé en tant que culte reconnu, par une décision administrative. La nouvelle loi des cultes 489/2006 prévoit une procédure administrative claire pour la reconnaissance des cultes et les juristes considèrent que la procédure concernant la reconnaissance de l'Organisation religieuse «les Témoins de Jéhovah» comme suite à la Décision de la Cour Suprême de Justice a été possible à cause du vide législatif concernant le régime des cultes, existant jusqu'en 2006.

II. Décision Concernant la Protection de la Propriété

Concernant le droit de propriété, nous avons retenu la décision 23/1993 de la Cour Constitutionnelle qui a comme objet la constitutionnalité de l'article 3 du Décret loi 126/1990, concernant les modalités de la reconstitution du droit de propriété de l'Église gréco-catholique. L'article provoque une discussion car les fidèles de chaque Église doivent se prononcer en ce qui concerne le sort de ces bâtiments. La Cour argumente le

rejet de l'objection de non-constitutionnalité de cet article 3, en affirmant «qu'il institue le critère de l'option de la majorité des fidèles pour déterminer l'utilisation des lieux de culte et des maisons paroissiales». La Cour utilise les données du recensement de 1992 pour affirmer que dans une ville majoritairement uniate en 1948, seulement 6,64% de la population l'est encore en 1992. La Cour Constitutionnelle considère que les orthodoxes d'aujourd'hui qui proviennent des anciennes familles uniates, dans le cas où ils constitueraient la majorité des fidèles qui utilisent une église, ne peuvent pas en être exclus. La Cour précise que «dans un État de droit, un acte abusif de 1948 ne peut pas être remplacé par un autre acte qui ignore l'option de la majorité des fidèles à la date de l'adoption de l'acte normatif correspondant. Selon l'article 54 de la Constitution, les citoyens doivent exercer leurs droits et leurs libertés de bonne foi, sans ignorer les droits et les libertés des autres. D'un autre côté, en vertu de l'article 29 de la Constitution, personne ne peut être contraint d'adopter une opinion ou d'adhérer à une religion contraire à ses convictions et la liberté de conscience est garantie et doit se manifester dans un esprit de tolérance et de respect mutuel; les cultes sont libres et dans les relations entre les cultes sont interdits toutes formes, tous moyens, actes ou actions de provocation religieuse, les cultes étant autonomes devant l'État et en se réjouissant de son soutien».[10]

La Cour Constitutionnelle considère juste l'attitude de l'État de ne pas entendre régler, par la voie législative, la restitution des églises et des presbytères, parce qu'une telle loi pourrait être «une pression inadmissible»[11] et qui pourrait porter préjudice à la liberté religieuse, mais aussi à la paix interconfessionnelle. La Cour Constitutionnelle affirme que les instances judiciaires ne sont pas compétentes dans les situations conflictuelles concernant la rétrocession des églises ou des presbytères et dans l'organisation de l'utilisation en commun des bâtiments culturels. La procédure juridique peut être engagée seulement après l'accomplissement de la procédure de réconciliation par la commission mixte mentionnée dans l'article 3 de la loi 126/1990.[12]

Dans un autre cas où l'Église Unie à Rome a sollicité la rétrocession de l'Église de Târgu Mures, église gréco-catholique avant 1948, et où celle-ci n'a pas eu gain de cause, la Haute Cour de Cassation et de Justice

[10] Voir le MO n° 66 du 11 avril 1995.

[11] Ibidem.

[12] Voir la décision de la Cour Constitutionnelle n° 23 du 27 avril 1993, publiée dans le MO n° 66 du 11 avril 1995.

n'a pas accepté le recours de l'Église Unie à Rome, en se fondant sur le fait que le changement de propriétaire a eu lieu conformément à la loi et que la loi 126/1990 prévoit qu'une commission mixte étudie chaque cas conformément à la réalité du terrain. La décision 407/2005 de la Haute Cour de Cassation et de Justice concerne la revendication par une paroisse orthodoxe d'Oradea d'un immeuble nationalisé. Dans ce cas, une faute de procédure et dans l'administration des preuves a été invoquée et le jugement n'a pas été favorable à la paroisse orthodoxe.

Conclusion

En guise de conclusion, nous observons une évolution dans la jurisprudence de la Haute Cour de Cassation et de Justice et de la Cour Constitutionnelle en ce qui concerne l'uniformisation de la Jurisprudence roumaine avec la jurisprudence des autres États membres de l'Union Européenne. Les juristes et l'opinion publique attendent avec un grand intérêt de voir comment les instances suprêmes vont résoudre prochainement les dossiers concernant la présence des symboles religieux dans les Institutions publiques et les dossiers concernant le droit à la propriété des cultes de Roumanie.

JANA MARTINKOVA

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN SLOVAKIA

I. Refusal of Military Service

A. *Decision No. PL. ÚS 18/95 (24 May 1995)*

A provision of the Law on Civil Service was challenged before the Constitutional Court, setting a deadline for rejection of military service: if previously a person had rejected military service after the expiration of the deadline, he would have had no legal consequences. The claim was that this provision violated freedom of religion, since it made it impossible to abstain from military service for those who changed their religious conviction after the expiration of the respective deadline.

According to the Constitutional Court, freedom of religion and conscience has two dimensions: *forum internum*, which has an absolute character and cannot be limited by state, and *forum externum*, which may be limited if certain conditions are fulfilled (according to the Slovak Constitution, these conditions are essentially the same as those stipulated by Article 9 Section 2 of the European Convention of Human Rights). The first dimension includes also the right to change religion; however, the right to reject military service on the basis of religion or conscience belongs to the second dimension. Therefore, it can be limited in accordance with the Constitution. The challenged statutory provision can be considered as necessary in a democratic society for the protection of public order: if everyone were allowed to reject military service at any point, it would substantially endanger the effective fighting capacity of the national army. Quoting the Constitutional Court:

> 'No person may be denied the exercise of his or her constitutional right to change his or her religion or denomination. But if the change in one's religion or denomination has been publicly declared with a view to bringing about a legal effect under the Law on Civil Service No. 18/1992 as amended, such declaration must be made within the statutory time limits prescribed in the manner provided for in the aforesaid Act. No change in the religion or denomination gives entitlement to a special legal regime with the legally

relevant consequences of such a change, as opposed to the regime applied to persons who reported no such change'.

B. *Decision No. PL. ÚS 18/97 (3 June 1998)*

According to the Law on Weapons and Ammunition, if a person rejects military service, that constitutes a basis for either revoking or not granting this person a gun licence. The Constitutional Court ruled that this provision is contrary to Article 12 Section 4 of the Slovak Constitution which prohibits a "denial of one's rights" as a consequence of a previous exercise of a fundamental right or freedom: in this case, a person is "punished" for the exercise of his or her freedom of religion and conscience. The Court stated:

> 'The concept of the "denial of one's rights" under Article 12 Section 4 of the Constitution of the Slovak Republic does not refer only to an impossibility to exercise one's right that has already been acquired. The concept of "denial of one's rights" must therefore be construed as involving also any other restriction on acquiring a right, if such restriction has the form of violation of the constitutional principle of equality in rights set out in Article 12 Section 1 of the Constitution of the Slovak Republic, as an exclusive and single consequence of the previous exercise of a fundamental right or freedom. The "denial of one's rights" may also be claimed if the only reason which prevents the acquisition of a right is the previous exercise of a fundamental right or freedom'.

II. Labour-Law Issues and Independence of Churches from the State

A. *Decision No. II. ÚS 128/95 (10 October 1995)*

Two petitioners claimed a violation of their constitutional rights to human dignity and to public hearing in the proceedings before the courts of the Slovak Evangelical Church of the Augsburg Confession (these courts had first decided to suspend the petitioners from their clerical positions, and later entirely excluded them from the church). The Constitutional Court refused the petition, declaring that *"the constitutional principle stipulating that churches and religious societies are independent of the state means also that the state is not responsible for the conduct of entities representing the churches or religious societies towards their members in the course of application of their internal rules"*. Therefore, in the proceedings before the Constitutional Court it is not possible to claim a violation of the constitutional rights by church bodies.

B. *Decision No. III. ÚS 64/00 (31 January 2001)*

In this case, similar circumstances were decided in a different manner. The petitioner here was a Roman Catholic priest who had been discharged from his position by the church. He filed an action against the church through the local state courts, demanding his salary. Two levels of local state courts refused his claim, considering as a preliminary issue in their decisions whether the employment relationship between the petitioner and the church had been terminated validly. In that respect, they accepted the decision of internal church bodies adopted in accordance with the church law, arguing that questions of such nature may only be judged by internal church bodies; secular laws could be applied only if there was no relevant regulation in the church law.

The Constitutional Court declared that the local state courts violated the petitioner's right to judicial protection. The constitutionally guaranteed independence of churches from the state does not mean, according to the Court, that churches are not bound by state law. On the contrary, all activities of churches should be in conformity with secular law, including e.g. labour-law relations. The Court then continued:

> 'Courts in the Slovak Republic hear and decide cases on the basis of the Constitution and other laws, i.e. the legal system of the Slovak Republic. This means that their decision-making must abide by the norms established in the legal system or the norms for whose application the legal system specifically provides. Ordinary courts have the discretion to decide which of the norms established in the legal system or the norms for whose application the legal system specifically provides they will apply, and how they will interpret them in individual cases. The law gives every person the right to have an independent and impartial court decide about their case, on the basis of the legal system of the Slovak Republic and of the norms that the legal system specifically provides for (Article 46 Section 1 of the Constitution). Fundamental rights set out in Article 46 Section 1 of the Constitution also include the obligation of the courts to decide on petitioners' rights in accordance with the Slovak law in force and the norms that the legal system of the Slovak Republic specifically provides for. Religious authorities are not public administration bodies and, in their decision-making, they apply also other legal norms than those provided for in the legal system of the Slovak Republic'.

Therefore, if the right to judicial protection is to be preserved, decisions of church bodies cannot represent a basis for the decision of state courts. Moreover, there was also another provision of the Constitution violated in this case:

'Article 12 Section 2 of the Constitution lists "any other status" among prohibited grounds for discrimination. "Other status" also includes the status of a priest of any church; therefore, priests may not be discriminated against or favoured on any ground. Priests have the same right as other natural persons to have their disputes with the church heard and decided by an ordinary court in accordance with the legal system of the Slovak Republic, or the norms that the legal system specifically provides for according to Article 46 Section 1 of the Constitution'.

C. *Decisions No. III. ÚS 292/04-6, III. ÚS 361/04-8 and III. ÚS 156/05-5 (7 October 2004, 1 December 2004 and 1 June 2005, respectively)*

The petition in this case was submitted by a Roman Catholic parish, which claimed a violation of the constitutional principle of the independence of churches from the state. The reason was that a state grammar school had refused to prolong an employment contract to a particular teacher of religion who was supported by the parish. The school argued that the teacher did not fulfil the respective conditions set forth in a new state legislation on public service (namely, the university education in the given field). The Constitutional Court refused the petition, stating that the constitutional principle of the independence of churches from the state meant independence primarily in internal church matters, such as doctrinal issues, organizational structure and order, establishment of church institutions, appointment of church employees, as well as the teaching of religion in church schools. However, the situation is different when the churches perform services in public interest, including the teaching of religion in state schools. The Court continued that:

'...it cannot be derived from the principle of the independence of churches from the state that the authorization for the teaching of religion, issued by the respective church authority to a particular person (canonical mission), excludes the right of the school director to pass judgment on whether this person fulfils other requirements for the respective position, established by law (including professional and pedagogical qualification), and to decide on concluding, modifying or terminating the employment contract with this person. The exercise of this right cannot be considered as undue intervention of state into the autonomous position of churches'.

BLAŽ IVANC

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN SLOVENIA

Introduction

The Republic of Slovenia became a member of the Council of Europe on the 13th of May 1993 and ratified the European Convention for the protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR) on 28 June 1994 with no reservations.[1] Slovenia also acceded to all the Protocols to the ECHR. According to Art. 8 of the Constitution of the Republic of Slovenia (hereinafter: the Constitution)[2], statutes and regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Since the Constitution also provides that ratified and published treaties shall be directly applicable, all the Courts' decisions must be in consonance with the provisions of the ECHR. According to the principle of subsidiarity, it is up to the member states of the Council of Europe to provide for the application of the ECHR, while their courts have a special responsibility for its effective application.[3] *Ratione temporis* the discussion can only focus on the judicial decisions which were made after the ECHR had become legally enforceable in the Slovenian legal order.[4]

The Constitution provides for freedom of conscience and belief in Art. 41 (hereinafter: the right to religious freedom). It broadly protects the freedom of self-definition and it refers not only to religious beliefs, but also to moral, philosophical and other worldviews. This article gives the assurance of freedom of conscience (the positive entitlement), the right

[1] The ECHR was signed by the Republic of Slovenia on the 14th of May 1993.

[2] The Constitution of the Republic of Slovenia (1991).

[3] See P. VAN DIJK, and G.J.H. VAN HOOF, *Theory and Practice of the European Convention on Human Rights*, (3rd Edition, Kluwer Law International, The Hague, 1998), p. 22.

[4] See P. JAMBREK, 'Slovensko Ustavno Sodišče pod Okriljem Evropskih Standardov in Mehanizmov za Varovanje Človekovih Pravic' [Slovenian Constitutional Court under the Patronage of European Standards and Mechanisms for the Protection of Human Rights], in M. PAVČNIK, A. POLAJNAR-PAVČNIK, D. WEDAM-LUKIĆ, (ed.), Temeljne Pravice [Fundamental Rights] (Cankarjeva založba, edition Pravna obzorja, Ljubljana, 1997).

of a person not to have any religious or other beliefs, or not to manifest such beliefs (the negative entitlement), and the right of parents to determine their children's upbringing in the area of freedom of conscience.[5] Art. 41 of the Constitution also refers to other constitutional rights, such as, for instance, the right to personal dignity and safety (Art. 34 of the Constitution), the protection of the right to privacy and personality rights (Art. 35 of the Constitution), the protection of personal data (Art. 38 of the Constitution), the freedom of expression (Art. 39 of the Constitution), the right of assembly and association (Art. 42 of the Constitution), the right to conscientious objection (Article 46 of the Constitution) and the rights and duties of parents (Art. 54 of the Constitution). Also important for constitutional review and interpretation is Art. 7 of the Constitution, which enshrines: (1) the principle of separation of the state and religious communities, (2) the principle of equality among religious communities, and (3) the principle of free activity (autonomy) of religious communities within the legal order.[6]

I. The Jurisprudence of the Court

The scope of Slovenian jurisprudence is rather modest, but there are several important decisions, which relate to the freedom of religion and other convictions. Most of them were made by the Constitutional Court. Characteristic of the legal decisions regarding freedom of religion and other convictions referring to the ECHR in the Republic of Slovenia is the fact that: 1. they were made during the very short period of thirteen years, 2. the legal doctrines, which form a basis for legal argumentation, are in the early stage of development, and 3. the relevant case-law is developing progressively.

[5] Art. 41 of the Constitution:
(1) Religious and other beliefs may be freely professed in private and public life.
(2) No one shall be obliged to declare his religious or other beliefs.
(3) Parents have the right to provide their children with a religious and moral upbringing in accordance with their beliefs. The religious and moral guidance given to children must be appropriate to their age and maturity, and be consistent with their free conscience and religious and other beliefs or convictions. See I. OREHAR, 'Metoda: Commentary on Art. 41 of the Constitution of the Republic of Slovenia' in L. Šturm, (eds.), *Komentar Ustave Republike Slovenije* (Commentary on the Constitution of the Republic of Slovenia), (Faculty of Post-Graduate State and European Studies, Ljubljana, 2002), p. 444-459.

[6] Art. 7 of the Constitution:
(1) The state and religious communities shall be separate.
(2) Religious communities shall enjoy equal rights; they shall pursue their activities freely.

II. Decisions of the Constitutional Court

A set of important decisions of the Constitutional Court relate to the issue of property rights of religious communities. Under the Communist regime, the propriety of religious communities -especially of the Catholic Church- was nationalized by regulations on agrarian reform, nationalization and confiscation.[7] By the enactment of the Denationalization Act in 1991, the Legislator also tried to redress the injustices which were done against the religious communities in relation to their property rights. The return of the Church property was and still remains a highly politicized topic. Consequently, the Court has received frequent requests to review the constitutionality of the Denationalization Act, while the process of denationalization remains unfinished. As a rule, the issues of denationalization are closely related to the respect for equality (Art. 14 of the ECHR), as well as the protection of property of persons and institutions, as determined by Art. 1 of Protocol No. 1.

A. *The Denationalization of Church Property – Case No. U-I-107/96 (December 1996)*[8]

After the Denationalization Act had already been in force for two years, the Legislator introduced the Act on Partial Suspension of the Return of Property, which enforced a temporary suspension of property for three years in all those cases where the return of more than 200 hectares of farmland and forests was required by an individual claimant. As a petitioner, the Roman Catholic Diocese of Maribor *inter alia* argued that the challenged statute was discriminatory and thus inconsistent with Article 14 of the ECHR. Moreover, the Court established that there were no justified grounds to temporarily suspend the implementation of the Denationalization Act. An important argument of the Court, which made a distinction between the return of large estates of feudal origin or the property relations deriving from historic feudal relations, and between the

[7] See L. ŠTURM, 'Church-State Relations and the Legal Status of Religious Communities in Slovenia' (2004) 2 Brigham Young University Law Review, p. 638-640.

[8] Already in 1993 the Court had to clarify the legal status of religious communities, their institutions and orders, and it decided that their status had to be evaluated and interpreted according to the state regulations. The Court then explained that religious organizations were to be treated as domestic legal entities at the time of nationalization of their property, as well as during the entire period until the adoption of the Denationalization Act, and were as such defined also by positive law (the Legal Status Act). See the *Denationalization of Church Property* case No. U-25/92 (March 1993).

return of large estates belonging either to churches, religious communities, or to individuals as a result of their free enterprise initiative, is presented below:

> '... it is necessary to consider that large estate originating from the former feudal relationships is by nature not compatible with the notion of republic as a state arrangement and with the notion of a democratic state. Furthermore, it is important to know that churches and religious communities play the role of generally beneficial institutions and have a particular position within our legal system. Therefore in cases where they appear as denationalization claimants they cannot be equated with the large estates of feudal origin or the property relations deriving from historic feudal relations. Such views were presented during the National Assembly debates when the challenged statute was being enacted. Also, with the large estates of feudal origin those large estates resulted from a free enterprise initiative cannot be equalled. To protect the trust in law it is urgent that the legislator takes immediate measures and removes the uncertainty done to all those denationalization claimants who claimed the return of lands and forests over 200 hectares'.

B. *The Request for an Assessment of the Constitutionality of the Contents of a Demand to Call for a Referendum on the Law on the Changes and Additions to the Law on Denationalisation case No. U-I-121/97 (May 1997)*

A demand to call for a preliminary referendum on changes and additions to the Law on Denationalisation (with the same content as was the subject of judicial review in the case No. U-I-107/96) was initiated at the request of the National Assembly, calling upon the Constitutional Court to review its content. The Court *inter alia* decided that the first point of the question made in the demand to call for a preliminary referendum on changes and additions to the Denationalisation Act, which reads as follows: "not to return land, forests and other property of feudal origin", is not contrary to the Constitution, except insofar as it applies to cases where the bodies entitled to the denationalised property are churches and other religious communities, their institutions or orders. In the Courts' opinion the second point of the referendum question (which reads as follows: "that an individual entitled to the denationalised property is not returned land or forests larger than 100 hectares of comparable agricultural land") was contrary to the Constitution. In the decision, the Court also referred to the practice of the European Commission for Human Rights:

> 'The Commission on 4 March 1996 considered inadmissible a complaint in which the plaintiff alleged a violation of Article 1 of the Protocol, claiming

> that according to the agreements on the reunification of Germany he should have been given an option to have his property returned, or to receive compensation for the property confiscated between 1945 and 1949. The Commission in its decision referred to the permanent practice of the Court. Under Article 1 of the Protocol, property is considered to be the existing property, the property value or a claim which the claimant can prove has at least a reasonable chance of being fulfilled. In the case of *Pine Valley Development Ltd and others versus Ireland*, the European Court ruled that the right from Article 1 of the Protocol had been violated due to the existence of a legitimate expectation (l'esperance legitime) (ruling of 29 November 1991, Publications of the European Court of Human Rights, Series A, Vol. 222, point 51); in the case of *Pressos Campania Naviera S.A. and others versus Belgium*, the European Court considered the compensation claim to be an asset and possession was therefore protected under Article 1 of the Protocol (ruling of 20 November 1995, point 31).
> ... The above reasons are why the Constitutional Court, in the assessment of the constitutionality of point 2 of the referendum question, must take into account the fact that a legal change restricting the return of farmland and forests would interfere with the constitutionally protected entitlements of all those persons entitled to denationalised property who satisfy the conditions for the return of property, and such a change in the law would only be possible if the conditions and circumstances of the strictest constitutional court review, cited in the introduction of these reasons, had been satisfied. The proposer of the request to assess the constitutionality maintains that these circumstances and conditions do not exist'.

C. *The Denationalization of Church Property* – Bled Island *case No. Up-395/06, U-I-64/07 (June 2007)*

In a very recent case the Court dismissed the constitutional complaint of the Catholic Church for the return of the Bled Island. Differently than in the above mentioned cases, the Court was of the opinion that the decision not to return the Bled Island to the Church would not interfere with the constitutionally protected entitlements of all those persons entitled to denationalised property and would not be in violation of Art. 1 of Protocol No. 1 (point 57 of the Reasons). This case is highly controversial; the Court has based its decision on a different legal basis as the Supreme Court. At the same time, the plaintiff did not have the chance to present his arguments at the regular court, and will most probably present them at the Strasbourg Court, invoking *inter alia* also the violation of Art. 6 of the ECHR.[9]

[9] Because of the complexity of the case, it needs a special and very precise explanation, which cannot be presented in the framework of this contribution.

D. *The case* Mihael Jarc et al. *No. U–I–68/98 (November 2001)*

In the case *Mihael Jarc et al.* No. U–I–68/98 (November 2001) the Court reviewed the question of whether the provisions of the Education Act, which provide for the prohibition of denominational activities in public schools, interfere with the positive aspect of freedom of religion[10], the principle of equality[11], the right of parents[12] and the right to free education.[13] The Court first declared that the general prohibition of denominational activities in public schools[14] is not inconsistent with the Constitution and with the right of parents determined in Art. 2 of the Protocol to the ECHR. The only inconsistency with the Constitution is the prohibition of denominational activities in licensed kindergartens and schools, with regard to the denominational activities which take place outside the scope of the execution of a valid public program financed by State funds.[15] The Court instructed the National Assembly to remedy the established inconsistency in a time limit of one year. Hence the Legislator changed the provision of Art. 72 of the Education Act by allowing licensed kindergartens and schools to carry out denominational activities which take place outside the scope of the execution of a public service.

E. *The Principle of Separation v. the Right to Religious Freedom*

The Court first acknowledged that the Constitution "does not specially regulate denominational activities in (public and licensed) schools, which means that it neither prohibits nor requires such...". This would (rightly) suggest that the matter was left in the hands of the Legislator to be regulated. However, the Court then argued that the general principle of the separation of the State and religious communities (on the basis of which the State is bound to neutrality, tolerance and a non-missionary manner of operation)[16] means that in the school area the religious content cannot be part of public lessons (i.e. neither part of lessons in a public school, nor part of teaching in the framework of the public service of a licensed

[10] Par. 1 Art. 41. of the Constitution.
[11] Art. 14 of the Constitution.
[12] Par. 3 Art. 41. of the Constitution and Art. 2 of Protocol No. 1 to Convention for the Protection of Human Rights and Fundamental Freedoms.
[13] Art. 57 of the Constitution.
[14] Par. 4 Art. 72 of the Education Act.
[15] Par. 3 Art. 72 of the Education Act.
[16] Art. 7 of the Constitution.

private school). For the Court, teaching of religion *in* as well as *by* public schools would be intolerable.

As a consequence of the Courts' initial standpoint, a dilemma regarding the criterion for review turned up: whether the principle of separation should be interpreted in the light of the right to religious freedom or is the main criterion for the review of the right to religious freedom (which ought to be interpreted in the light of the principle of separation).[17] Since the constitutional right to religious freedom is one of few most hierarchically protected rights and unconditionally protected constitutional values (it may in no case be abolished and it can only be limited under very strict conditions),[18] there should not be any doubt that it cannot be outranked by to the principle of separation. Thus, the Court's above mentioned conclusion could not be deduced from the principle of separation alone. However, as the main criterion for judicial review of the general prohibition of denominational activities in public, kindergartens and schools served the principle of separation.[19]

In its review of the provision prohibiting the denominational activities in public kindergartens and schools, the Court did refer to the right of religious freedom, but failed to make a consistent test of proportionality, which includes a careful and profound balancing between the positive and the negative aspect of the right of religious freedom. The strict interpretation of the principle of separation prevailed in the Courts' argumentation, pushing aside a full-scale balancing of both the constitutionally protected aspects of the right of religious freedom.

> 'According to Art. 41.2 of the Constitution, citizens have the right not to declare their religious beliefs and to require that the State prevents any forced confrontation of the individual with any kind of religious belief. A democratic State (Art. 1 of the Constitution) is, on the basis of the separation of the State and the Church (Art. 7 of the Constitution), obliged in providing public services and in public institutions to ensure its neutrality and prevent one religion or philosophical belief from prevailing over another, since no one has the right to require that the State supports them in the professing of their religion. To reach this goal it is constitutionally

[17] M. Orehar Ivanc (2000), p. 48.
[18] Art. 16 of the Constitution.
[19] Judge Tresten opposed to the selected mode of review (Par. 1 Art. 7 of the Constitution) insofar as it referred to the premises of public kindergartens and schools. In his opinion, in the case of licensed kindergartens and schools, the freedom of the founders of these schools to profess the religion should also have been considered as a necessary criterion for review.

admissible that the State takes such statutory measures as are necessary to protect the negative aspect of freedom of religion and thereby realize the obligation of neutrality. [...] Furthermore, the interference with the positive aspect of freedom of religion cannot be considered inappropriate as thereby the forced confrontation of non-religious persons or persons of other denominations with a religion they do not belong to can be prevented. This interference is also proportionate, in the narrow sense of the word, in so far as it relates to the prohibition of denominational activities in public kindergartens and schools. These are namely public (State) institutions financed by the State and are as such the symbols which represent the State externally and which make the individual aware of it. Therefore, it is legitimate that the principle of the separation of the State and religious communities and thereby the neutrality of the State should be in this context extremely consistent and strictly implemented. Considering the fact that public kindergartens or public schools do not represent the State only in carrying out their educational and upbringing activities (public services) but also as public premises, the principled prohibition of denominational activities does not constitute an inadmissible disproportionality between the positive aspect of freedom of religion and the rights of parents to raise their children in accordance with their religious persuasion on one hand and the negative aspect of freedom of religion on the other hand'.

However, in reviewing the general prohibition of denominational activities in licensed kindergartens and schools which take place outside the scope of the execution of a valid public program financed from State funds, the Court relied on the right to religious freedom as the main criterion for review. In order to determine a proper balance between the negative and the positive aspect of religious freedom the Court now carried out the test of proportionality more accurately. According to the Constitution, human rights and fundamental freedoms are limited only by the rights of others and in such cases as determined by the Constitution.[20] The Court reviewed whether the interference, as enacted by the Education Act, with the positive aspect of the freedom of religion (conscience) of an individual and the right of parents is admissible to ensure the protection of the constitutional rights of others. The Court stressed that:

'in reviewing proportionality in the narrow sense we must weigh in a concrete case the protection of the negative aspect of the freedom of religion (or freedom of conscience) of non-believers or the followers of other religions on one hand against the weight of the consequences ensuing from an interference with the positive aspect of freedom of religion and the rights of parents determined in Art. 41.3 of the Constitution on the other. There is no such proportionality if we generally prohibit any denominational activity in a licensed kindergarten and school. By such prohibition the legislature respected only the negative freedom of religion, although its protection, despite the establishment of certain positive religious freedoms and the rights of parents to provide their children with a religious upbringing, could as well be achieved by a milder measure'.

[20] Art. 15 of the Constitution

For the Court, the teaching of religion *in* licensed schools as a matter of principle is tolerable. However, the teaching of religion *by* licensed schools is only tolerable when it is not performed in the scope of public service.

F. *The* Census *case No. U–I–92/01 (February 2002) (Act on the Census of the Population, Households, and Housing in the Republic of Slovenia in the Year 2001)*

The Constitutional Court also relied on the provision of Art. 9 of the ECHR in the *Census case*, when it had to decide whether collecting data on the religious beliefs of citizens by the state is consistent with: (a) the principle of the separation of religious communities and the state (Art. 7 of the Constitution), (b) the right to freedom of conscience -particularly the negative aspect of this freedom, *i.e.* that no one is obliged to declare his/her religion (Art. 41 Par. 2 of the Constitution), (c) the constitutional rights to privacy (Art. 34, 35 and 36 of the Constitution), and (d) the protection of personal data (Art. 38 of the Constitution).[21]

In the Court's opinion, the provision of collecting data on the religious beliefs of citizens by the state is not inconsistent with the principle of the separation of religious communities and the state (Art. 7 of the Constitution), as this provision in particular concerns the autonomy of the religious communities (in their field), the secularization of public life and the impartiality of the state toward religious communities. The Court (again) considered the provision of Art. 9 of the ECHR to be one of the relevant criteria of the judicial review, providing the following argument:

'The freedom of religion as *forum internum* includes the right to affiliation or non-affiliation with a particular religion, the right to change such affili-

[21] See points 16 and 17 of the Judgment.

ation, and the right to free choice of religion. The state may not interfere with the freedom of conscience. All the aforementioned imply that the state may not require anyone, either directly or indirectly, to accept a certain religious or other belief, it may neither use coercive measures, nor offer privileges regarding affiliation or non-affiliation with a particular religious or other belief. If this were not the case, such conduct by the state would be an interference with the freedom of conscience or religion. Art. 41.2 of the Constitution explicitly determines that no one shall be obliged to declare one's religious or other beliefs. The fact that one is not obliged to declare one's religious or other beliefs implies that the state is not allowed to force them to declare such. [...] The use of coercion to change individuals' religious beliefs, or disclose their religious beliefs, would interfere with the freedom of conscience. A statute which determined that individuals are obliged to declare their religious beliefs would violate the freedom of conscience, and would be unconstitutional (*i.e.* inconsistent with Art. 41.2 of the Constitution)'.

The Court first established that the Act on the Census of the Population, Households, and Housing in the Republic of Slovenia in the Year 2001 (hereinafter: Act on Census) in Art. 6 Par. 14 provides that the persons counted freely declare their religion, or decide whether at all to answer such question. It also precisely determines which data may be collected and processed, the purpose for which the data may be used, the supervision mechanisms of their collection, processing, and use, and the protection of the confidentiality of the collected personal data. Because the interference with the right to freedom of conscience is admissible as it is in compliance with the principle of proportionality (the Court made a strict proportionality test), the challenged provision of the Census Act is not inconsistent with the right to freedom of conscience (Art. 41 of the Constitution). The Court said that collecting data on religion by census is also not a disproportionate interference with the protection of information privacy in a narrower sense. The right of individuals to refuse to answer such a question and the duty of the people collecting data to inform individuals of this right are guaranteed. Furthermore, it is guaranteed that data on the religion of persons older than 14 years of age who are not present at the time the census is carried out, may only be collected on the basis of their written approval (Art. 10 of the Census Act). According to the Court, this provision ensures that individuals decide themselves whether to allow the interference with their privacy, *i.e.* whether or not to provide such data.

G. *Opinion (on the Agreement between the Republic of Slovenia and the Holy See) No. Rm-1/02 (dated 19 November 2003) (Official Gazette RS, No. 118/03 and OdlUS XII, 89)*

In 2003 the Court issued an opinion on the constitutionality of the Agreement between the Republic of Slovenia and the Holy See on Legal Issues (hereinafter the Agreement). In the Court's opinion the Agreement (according to which the Republic of Slovenia and the Holy See confirm the principle that the State and the Catholic Church are each within its own system independent and autonomous and according to which the Catholic Church acts in the Republic of Slovenia freely under cannon law and in conformity with the legal order of the Republic of Slovenia) is not inconsistent with the principle of sovereignty (Art. 3 of the Constitution), as well as with the principle of the separation of the State and religious communities (Art. 7 of the Constitution), in so far as it is interpreted that the Catholic Church will in its activities in the Republic of Slovenia respect the legal order of the Republic of Slovenia. The Court used the internationally recognized principles from the area of guaranteeing the freedom of religion, in particular the principles of EKČP for the interpretation of the contents of the preamble to the Agreement, yet mentioning only (as *obiter dictum*) the provision of Art. 9 of the ECHR in the Reasons of the Opinion (Point 10).

H. *The Referendum on the Location of a Mosque Case No. U–I–111/04 (July 2004)*

The Mayor of the Capital City of Ljubljana submitted a request to review the constitutionality of the Resolution on the Calling of a Subsequent Referendum on the Implementation of the Ordinance on the Amendments to the Ordinance on the Adoption of Land Use Planning Conditions for the V2 Trnovo – Tržaška cesta Planning Unit (for the VR-2/6 Ob Cesti dveh cesarjev area of regulation) and the Resolution on the Amendment to this Resolution (hereinafter: the Resolution on the Calling of a Referendum).[22] At that time the location was held to be a future location of a

[22] Item 2 of the Resolution calling a referendum determines: "The question posed at the referendum reads as follows: Do you agree that the Ordinance on the Amendments to the Ordinance on the Adoption of Land Use Planning Conditions for the V2 Trnovo – Tržaška cesta Planning Unit (for the VR-2/6 Ob Cesti dveh cesarjev area of regulation) be implemented?"

first mosque (a Muslim religious, cultural and educational centre) in Slovenia. The Court decided that the Resolution on the Calling of a Subsequent Referendum and the Resolution on the Amendment to this Resolution (Official Gazette RS, No. 41/04) were annulled *ab initio*.

Holding that Art. 41 Par. 1 of the Constitution ensures the free profession of religion in private and public life, the Court stressed:

> '...that freedom of religion ensures the individuals that they may freely profess their religion by themselves or together with others, publicly or privately, through lessons, by the fulfilment of religious duties, through worship and the performance of religious rites, which are designated as the so-called positive aspect of freedom of religion. Thereby the Constitution not only protects the individual but also the profession of religion in a community.[23]

In its interpretation the Court also emphasized the protection of the right to religious freedom by numerous international instruments which in comparison with Art. 41 of the Constitution determine in greater detail the contents and scope of this human right. The Court *expressis verbis* mentioned the provision of Art. 9 of ECHR and was of the opinion that:

> 'The case law of the European Court of Human Rights holds that by Art. 9 of the ECHR prior to the calling of a referendum, religious freedom is not only guaranteed to individuals, but also to religious communities which are "capable of having and exercising the rights contained in Art. 9.1'.

Traditionally, religious communities exist in the form of organized structures. In a democratic society they are as such an indispensable constitutive part of pluralism. Therefore, according to the position of the European Court of Human Rights, they are even the central subject of protection under Art. 9 of the ECHR.

> '[...] it is crucial for the exercise of the right to the free profession of religion that religious communities are allowed to build their own buildings which correspond to their way of religious worship, religious rites, and customs. Thereby it is necessary to take into consideration that the profession of a certain religion is not necessarily only focused on religious worship and the performance of religious rites, but can also be connected with social, educational and cultural activities. Profession of a religion in a manner that is usual and generally accepted for the profession of the individual religion is a pre-condition for the exercise of the free individual and community profession of religion, and thereby enjoys constitutional protection'.[24]

[23] Here the Court followed its interpretation from the case *Mihael Jarc et al.* No. U–I–68/98 (November 2001).

I. *The Conscientious Objection Case No. U–I–48/94 (May 1995)*

Although the Constitutional Court in the *Conscientious Objection* case did not make any reference to the ECHR, this case should also be mentioned because of its general importance for the judicial interpretation of the freedom of religion. The New democratic Constitution (1991) introduced the right to conscientious objection in Art. 46: "Conscientious objection shall be permissible in cases provided by law where this does not limit the rights and freedoms of others". In this particular case the Court decided that the provision of Art. 42 of the Act on Liability to Military Service is contrary to the Constitution in as far as it does not allow the exercise of conscientious objection also subsequent to conscription, throughout the period of the obligation to take part in the defence of the State. Consequently, the National Assembly had to change the provision of Art. 42 of the Act on Liability to Military Service.

IV. Decisions of the Supreme Court

There are very few judgments of the Supreme Court in which the Court used the provision of Art. 9 of the ECHR as a criterion for review. They were in most cases related to the issue of conscientious objection to military service.

A. *Conscientious Objection to the Military Service cases: Decisions No. I Ips 307/2003 (December 2003), No. I Ips 194/2003 (February 2004) and No. I Ips 39/2004 (December 2005)*

In three cases the Supreme Court decided on the conscientious objection to military service and referred to Art. 9 of the ECHR. In all three cases the applicants had been convicted by the Military Supreme Court in the former Socialist Federal Republic of Yugoslavia (in years 1980 and

[24] See points 27 and 28 of the Judgment. The Court referred to the decision of the European Commission of Human Rights in the case *X and Church of Scientology* v. *Sweden* (Council of Europe, Decisions and Reports, 16, Strasbourg, December 1979, Application No. 7805/77, p. 68) and to the decision of the ECHR in the case of *Hasan and Chaush* v. *Bulgaria*.

1986) on the basis of Art. 219 of the Penal Code of Yugoslavia, which sanctioned the refusal of conscientious objectors to enlist for compulsory military service. They had been twice – or in one case three times – condemned on the same legal charge, and had been sentenced to an eleven-month imprisonment – even an up to almost five-years imprisonment, in the latter case. The Commission of the Government of the Republic of Slovenia for Redress of Injustices granted the status of a political prisoner to all three objectors. In addition, the Commission made use of a special legal remedy (the *revision*), which was provided by the Redress of Injustices Act. According to Art. 22 of the Redress of Injustices Act, the judgment issued during the period from 15 May 1945 to 2 July 1990 can *inter alia* be annulled, if it was based on the application of the Criminal Laws or Regulations, which had been misused because of political, class or ideological reasons or had been applied contrary to the principles of the Rule of Law. The Supreme Public Prosecutor was in all three cases of the opinion that the petitioners should be acquitted. However, the Supreme Court established that the compulsory military service, which had been introduced in the former Socialist Federal Republic of Yugoslavia, was not by itself contrary to Art. 9 of the ECHR. The Supreme Court held that that:

> 'the provision of Par. 2 Art. 214 of the Penal Code of Yugoslavia incriminated a person who violated his duty in relation to the general military duty prescribed by Art. 241 of the Constitution of the Yugoslavia and the incrimination was not directed against a particular social group; its aim was only the general legal protection of the defence of the State. Without mentioning any specific Strasbourg case and knowing about the new tendencies in approach to conscientious objection[25] the Supreme Court stressed that the ECHR does not explicitly provide for the right to conscientious objection to military service and it cannot be considered as a right protected by the Convention. Thus, the Supreme Court decided to reject the applications. Those three cases are raising not only the (internal) question of appropriate interpretation of the Redress of Injustices Act and of the Criminal Legislation, but perhaps also a common European question about the appropriate legal protection of conscientious objectors, who had been forced to serve the military in a non-democratic state, where the military was also the protector of the State's official ideology and was used as an instrument of indoctrination'.

[25] See details in C. EVANS, *Freedom of Religion under the European Convention on Human Rights*, Oxford: Oxford University Press, 2001, p. 176.

B. *The Disclosure of a Membership in the Freemasonry Organisation Case – Decision No. II Ips 460/97 (October 1998)*

A name of a certain member of the Freemasonry Organisation had been disclosed in a book about the Freemasonry organization in Slovenia. The Supreme Court decided that the author and the publishing house should halt the dissemination of a book and that they were prohibited to mention his name in the book. The Court held that this was a violation of the right to privacy. The Court had to balance the right to privacy and the freedom of expression. Beside Arts. 35, 39 and 59 of the Constitution, the Court also took the provisions of Arts. 8 and 10 of the ECHR as a basis for the review. In the Court's opinion, "the application of the proportionality principle in this case leads to the result that the protection of privacy has priority over the freedom of information". The Court also stressed that the demand to disclose the list of members of an organization could be violation of the freedom of association and assembly as provided in Art. 11 of the ECHR.

V. Decisions of Other Courts

Among the decisions of Higher Courts and Courts of First Instance some decisions are relevant in relation to the constitutional guarantee of the freedom of religion, although, as a rule, they do not mention the provisions of the ECHR. There exist some exceptions in their decisions (already aforementioned), which were already the subject of review at the Supreme Court (See II.2). It should be noted that several decisions are still pending.

A. *The Legal Representative of the Muslim Community in Slovenia case – Decision of the Higher Court in Ljubljana No. I Cp 101/2006 (February 2006)*

The Higher Court in Ljubljana has recently decided in the case of a dispute about the legal representative of the Muslim Community in Slovenia. A former mufti of the Muslim Community in Slovenia, who had been replaced by another mufti, by the decision of the "Mešihat" or "Riaset" – High Council of the Muslim Community in Bosnia and Herzegovina (which has the jurisdiction over the Slovenian branch of the Muslim community), asked the Court to decide who the valid legal representative of the Muslim Community is in Slovenia. The Court decided

that this dispute related to the internal organization of the Muslim Community, which lay – due to the principle of autonomy and internal sovereignty of a religious community – outside the State jurisdiction. The Higher Court confirmed the decision of the Lower court, which contained the same argumentation. After the decision of the Higher Court the previous mufti founded a new Slovenian Muslim Community. Thus, it is unlikely that the dispute would be submitted to the Supreme Court or to the Constitutional Court.

B. *The Laicization and Compensation Case – Decision of the Higher Court in Ljubljana No. II Cp 490/2002 (May 2003)*

In May 2003 the Higher Court in Ljubljana annulled the decision of the Court of First Instance in a case of a claim for restitution of damage (app. 21.000 EUR) because of the violation of personality rights (Art. 35 of the Constitution) and returned the case to the Court of First Instance. A former priest of the Roman Catholic Church asked the Court to order the Congregation of Divine Worship and the Disciple of Sacraments in Rome to initiate the proceeding for his laicization. The plaintiff claimed that he was suffering psychical pains because the Church had not reacted to his request to start the above mentioned proceeding. In the meantime he could not enjoy certain sacraments (presumably the sacrament of holy marriage) and this was the cause for his psychical pains and a violation of his personality rights. The Court of First Instance first dismissed the part of the claim for the initialization of the laicization proceeding because of lack of jurisdiction and overruled the part of the claim which related to the restitution of damage. The Higher Court interpreted the provisions of the Obligation Code (of Arts. 175 and 200) differently. The Higher Court held that the protection of personality rights could extent also to this particular case. One of the main conditions for the civil liability of the Church must be an unlawful act of its representative according to the provisions of the Canon law. Because the Court of First Instance had not taken this into account, neither had it used the provisions of the Canon law as an autonomous law in order to determine if the Church violated its own law, the Higher Court returned the case to the Court of First Instance. It should be noted that the Higher Court did not pay any attention either to the provision of Art. 7 of the Constitution or to the relevant provisions of the ECHR.

C. The Church of Holy Simplicity Registration case – *Decision of the Administrative Court in Ljubljana No. U 1902/2004-13 (December 2005)*

The Office of the Government of the Republic of Slovenia for Religious Communities (hereinafter: the Office) had refused to register the Church of Holy Simplicity as a religious community. The Office had argued that the registration of the Church of Holly Simplicity would violate the constitutional principle of equality (Art. 14), because its statute determined that a member of the Church could only become a person with the high school diploma and ten years of working experience. The Administrative Court decided that this was not the case and stressed that the registration can only be denied to those applicants who do not perform religious activity. Consequently, the case was returned to the Office, which will have to decide on the registration in accordance with the provision of Art. 13 of the new Religious Freedom Act (February 2007).

Conclusions

The scope of Slovenian jurisprudence is rather modest, but there are several important decisions, which relate to the freedom of religion and other convictions. Most cases were decided by the Constitutional Court. The following are characteristic for legal decisions regarding the freedom of religion and other convictions referring to the ECHR in the Republic of Slovenia: 1. They were made in the very short period of thirteen years; 2. the legal doctrines, which form a basis for legal argumentation, are in the early stage of development; and 3. the relevant case-law is developing progressively. The relevant jurisprudence of the Constitutional Court is very unstable and in some cases falls into extreme interpretations, inspired more by political argumentation than by the clear legal argumentation (also taking into account the Strasbourg jurisprudence). For a long time the Strasbourg case-law has failed to recognize the importance of freedom of religion or belief.[26] A more developed jurisprudence of the European Court for Human Rights could provide more help to the national courts when deciding about issues of religious freedom.

Formalistic, superficial and legalistic approaches are characteristic of the decisions of the Supreme Court, in which the provision of Art. 9 of the ECHR has been used as a criterion for judicial review (the issues of

[26] Ibidem, p. 200

conscientious objection to military service). The application of the provisions of the ECHR by lower courts is critically seldom, slow, fragmented and non-transparent. It is true that there have only been rare cases directly related to the constitutional guarantee of the freedom of religion; nevertheless, almost as a rule, they do not mention the provisions of the ECHR. A very important decision of the Constitutional Court, which ought to consider all the dimensions of the relevant provisions of the ECHR, and which is pending at the moment of writing, is the decision about the constitutionality of the new Religious Freedom Act (2007). It is a basic demand of the democratic society to take the freedom of religion or belief very seriously. Consequently, the European Court for Human Rights, as well as the Slovenian courts, should give more comprehensive protection to the freedom of religion or belief.

ISIDORO MARTÍN SÁNCHEZ

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN SPAIN

I. Freedom of Opinion, Belief and Conviction: Domestic, for Private and Family Life and for Abroad

A. *Art. 9: Freedom of Thought, Conscience, and Religion*

1. *Concept and contents*

The Constitutional Court has referred to the European Convention on Human Rights (ECHR) with a view to defining both the concept and the contents of religious freedom. It has held that the right to religious freedom "implies the freedom to have or adopt the religion or beliefs of a person's choice, and to practise them through worship, the celebration of rites, customs and teaching, in accordance with the terms of the Convention for the Protection of Human Rights and Fundamental Freedoms Article 9)".[1]

This definition has been amplified in other rulings which indicate that religious freedom guarantees an internal space for beliefs, as well as an external dimension of *agere licere*, which allows people to act in accordance with their own convictions, and to maintain them with respect to others.[2] Furthermore, the Constitutional Court has referred specifically to some of the concrete aspects of religious freedom mentioned in Art. 2.1 of Constitutional Law no 7/1980, dated 5th July, on Religious Freedom (LORF).

The Court has pointed out that, in terms of Article 16.1 of the Spanish Constitution and Article 9.1 of the ECHR, the LORF delimits the content of religious freedom, which includes *inter alia* the rights to profess, change or abandon a religion or belief.[3]

The Court has also held that religious freedom implies – as indicated in Article 16.2 of the Constitution, in accordance with the provisions of

[1] Ruling no 180/1986, dated 21st February, FJ 2.

[2] Judgements nos 19/1985, dated 13th February, FJ 2; 46/2001, 15th February, FJ 4; 154/2002, 18th July, FJ 6; 101/2004, 2nd June, FJ 3.

[3] Judgement no 166/1996, dated 28th October, FJ 2.

Art. 18 of the Universal Declaration of Human Rights and Art. 9 of the ECHR – that noone should be obliged to declare their ideology or beliefs.[4]

Moreover, the Constitutional Court has held – with reference to the judgements of the European Court of Human Rights (EHRC) in the *Kokkinakis* case[5] and in the case of *Larissis, Mandalarides and Sarandis*[6] – that the *agere licere* protected by the right to religious freedom includes not only the right to profess certain beliefs and conduct oneself according to such beliefs, but also the right to proselytise in respect thereof.[7] Religious freedom guarantees – in terms of Article 16 of the Constitution and Art. 2.1 of the LORF, interpreted in accordance with Art. 9 of the ECHR – conduct in this field with full immunity from coercion on the part of the State or other social groups.[8] Finally, the contents of religious freedom include – as held by the Constitutional Court with reference to the ruling of the EHRC in the *Hoffmann* case[9] – "the right not to be discriminated against on the grounds of religion or belief, so that different beliefs cannot sustain differences in juridical treatment".[10]

Having set out the content of religious freedom, the Constitutional Court has also ruled on certain conduct that is not protected by it. Thus, it has held that such freedom does not cover the right to receive payment from the Department of Social Security of the costs of a surgical operation in a private clinic for a Jehovah's Witness, who went there because the doctors pertaining to the public health service did not guarantee him an operation without a blood transfusion. After delimiting the content of religious freedom in accordance with the provisions of the ECHR, the Constitutional Court then went on to hold that it cannot be deduced from the State's obligations directed towards facilitating the exercise of this right, which are laid down by law[11], that they include the duty to provide

[4] Ruling no 359/1985, dated 29th May, FJ 2.

[5] Judgement dated 25th May 1993, case *Kokkinakis* v. *Greece*.

[6] Judgement dated 24th February 1998, case *Larissis, Mandalarides and Sarandis* v. *Greece*.

[7] Judgement no 141/2000, dated 29th May, FJ 4.

[8] Rulings nos 46/2001, dated 15th February, FJ 4; 154/2002, dated 18th July, FJ 6.

[9] Judgement dated 23rd June 1993, case *Hoffmann* v. *Austria*.

[10] Judgement no 141/2000, dated 29th May, FJ 4.

[11] Article 2.3 of Constitutional Law no 7/1980, dated 5th July, on Religious Freedom, provides that "public authorities shall adopt the necessary measures to facilitate religious attendance in public military establishments, hospitals, assistance facilities, prisons and other public establishments under their supervision, as well as religious education in public teaching centres".

services of a different nature so that the worshippers of a particular religion can comply with the dictates imposed by their creed.[12]

Lastly, it must be pointed out that according to the Constitutional Court, protection in terms of criminal law of certain aspects of religious freedom cannot be considered contrary to the Spanish Constitution.[13] The Court has held that penal sanctions of offences against religion do not affect individual rights of religious freedom, as defined in Article 16 of the Constitution in accordance with Art. 9 of the ECHR and other international treaties. On the contrary, such penalisation "contributes to the creation of suitable conditions for the said right to be fully exercised and, at all events, the freedom to profess one's religion, convictions or beliefs is subject to the necessary limitations imposed by the law so as to protect the fundamental rights and liberties of others".[14] The Court further held in the same judgement that such penal sanctions cannot be deemed contrary to the principle of equality, since the criminal law is not there to protect a given single confession but rather all creeds.

2. *Holders of the Right*

Possession of the right of religious freedom corresponds both to natural persons and to legal persons. This follows clearly from the provisions of Article 16.1 of the Spanish Constitution, in terms of which the religious freedom "of individuals and communities" is guaranteed. Naturally, this had also been acknowledged by the Constitutional Court.[15] As far as natural persons are concerned, it must be borne in mind that possession of the right corresponds to all people and, accordingly, not only to Spanish citizens but also to foreigners. As the Constitutional Court has recognised, the latter possess the same rights and identical legal protection in religious affairs as do the Spaniards; rights which may be exercised in accordance with the provisions of Article 53.2 of the Spanish Constitution.[16]

A different matter is the question of when minors may exercise the right of religious freedom on their own behalf. Constitutional Law no

[12] Judgement no 166/1996, dated 28th October, FJ 4.

[13] Protection by the criminal law of religious freedom is governed by the provisions of Articles 522 to 525 of the Penal Code, as amended by Constitutional Law no 10/1995, dated 23rd November, on the Penal Code.

[14] Ruling no 180/1986, dated 21st February, FJ 2.

[15] Judgement no 64/1988, dated 12th April, FJ 2.

[16] Judgement no 107/1984, dated 23rd November, FJ 3.

1/1996 dated 15th January on Juridical Protection of Minors provides that "minors have the right to freedom of ideology, conscience and religion".[17] It goes on to establish that "the parents or tutors have the right and the duty to cooperate in order that the minor exercises this freedom in such a way as to contribute to his or her integral development".[18] The Constitutional Court has followed this same criterion, declaring that minors are full holders of the right to religious freedom. The Court has also held that the exercise of this right is to be modulated in accordance with the minor's maturity. Lastly, it has insisted – following the judgement of the EHRC in the *Hoffman* case – on the duty of public authorities to ensure that whoever has custody and control of a minor, exercises such power always in the interests of the child.[19] With respect to collective holding of the right to religious freedom, it should be pointed out that creeds and their institutions must register themselves in the Register of Religious Entities, which comes under the aegis of the Ministry of Justice, in order to acquire juridical personality and be fully protected by the LORF.

The Constitutional Court has held – taking into account the provisions of Article 9 of the ECHR with a view to determining the content of religious freedom – that registration of an institution in the Register of Religious Entities leads to the acquisition of a specific legal personality as a religious group and, furthermore, to the granting of a particular status that entails recognition of full regulatory and organisational autonomy, as well as other juridical benefits. The Constitutional Court therefore considers that the unjustified refusal by the administrative authorities of an application to be registered constitutes an obstacle which diminishes full exercise of the right to religious freedom.[20]

In addition, the Constitutional Court has held that the administrative authorities are not competent to control the religious beliefs of the entities that seek registration. On the contrary, all they can do is verify that the body making the application is not one of the entities excluded by virtue of Article 3.2 of Constitutional Law no 7/1980, dated 5th July, on Religious Freedom, and that the activities it carries out are not contrary to public order.[21]

[17] Article 6.1.
[18] Article 6.3.
[19] Judgements nos 141/2000, dated 29th May, FJ 5; 154/2002, dated 18th July, FJ 9.
[20] Judgement no 46/2001, dated 15th February, FJ 9.
[21] Judgement no 46/2001, dated 15th February, FJ 8; followed by the decision of the Special Division of the High Court [*Audience National*] dated 21st April 2005, FJ 2, which cites the judgements of the EHRC dated 26th September 1996 in the case *Manoussakis and others* v. *Greece* and of 26th October 2000 in the case *Hassan and Tchaouch* v. *Bulgaria*.

3. *Limits*

The Constitutional Court has held that there is an "absolute harmony" between Article 3.1 of Constitutional Law no 7/1980, dated 5th July, and Article 9.2 of the ECHR in respect of the limits to the exercise of religious freedom.[22] Citing the judgements of the EHRC in the *Kokkinakis* and the *Larissis, Mandalarides and Sarandis* cases, the Court distinguishes between the right to give convictions and the right to profess them. The first of these rights is subject only to the limits imposed by respect for the fundamental rights of others and other juridical interests protected by the Constitution. However, the right to profess one's beliefs in relation to other persons by way of public profession thereof or proselytism adds to these limits the further indispensable limits necessary to maintain public order protected by law.[23]

On the basis of these premises the Constitutional Court has tackled the question of determining the means necessary to safeguard public order protected by law in the ambit of a democratic society. In order to carry out such determination, the Court, citing the judgement of the EHRC in the *Handyside* case[24], has indicated the need to examine the principle of proportionality, that is to say, whether this principle "has been breached, from the point of view of fundamental rights and of the juridical interest that has limited its exercise, on the grounds that the measures adopted are disproportionate for the defence of the juridical good that has given rise to the restriction".[25] The Constitutional Court has also dealt with some of the elements that, according to Article 3.1 of the LORF, form part of public order.

Thus, with respect to the limit constituted by the rights of other persons, the Constitutional Court has held, with particular reference to the EHRC's decisions in the *Kokkinakis* and *Larissis, Mandalarides and Sarandis* cases, that one person's own religious freedom is limited by the right of others not to suffer acts of proselytism on the part of other people and their right to moral integrity.[26] The moral integrity limit has also been referred to by Criminal Court no 3 of Barcelona in a case which

[22] Judgement no 46/2001, dated 15th February, FJ 11.
[23] Judgement no 141/2000, dated 29th May, FJ 4.
[24] Judgement dated 7th December 1976, case *Handyside* v. *United Kingdom*.
[25] Judgement no 62/1982, dated 15th October, FJ 5.
[26] Judgement no 141/2000, dated 29th May, FJ 4.

involved a book entitled "La mujer en el Islam" [*Women in Islam*], written by an imam, which described how a husband ought to strike his wife when she is disobedient to him and, after being reprimanded, fails to obey him.[27] The court cited the decisions of the EHRC in the *Kokkinakis* and *Agga* cases[28], in terms of which religious freedom is the foundation of a democratic society. Nevertheless, it made clear that, in the confrontation between religious freedom and women's right to moral integrity, in this particular case the latter right should prevail insofar as it acts as a restriction on the former.[29] The court therefore found the accused guilty of a crime of provoking violence on the grounds of gender.[30]

With respect to health as a constitutive element of public order the Constitutional Court has specified that, in accordance with the terms of international treaties and, in particular, of Article 9.2 of the ECHR, this limit refers to public health – in other words, "to risks for health in general".[31]

Insofar as public morality is concerned the Constitutional Court has pointed out, with reference to international treaties on human rights, that this limit "must be surrounded by the necessary guarantees, so as to avoid a situation where an ethical concept, which has been incorporated into the ambit of law, insofar as an ethical minimum is necessary for the existence of social life, is used to produce an unjustified restriction on fundamental rights and public liberties".[32]

Lastly, it must be borne in mind that the Constitutional Court has accepted the exceptional use of the public order restriction, on a preventive basis, when there is a danger that the free development of someone's personality may be affected by the methods employed by certain sects in order to capture followers.[33]

4. *Conscientious Objection*

In defining the juridical nature of conscientious objection, the Constitutional Court has maintained two different criteria. At first, the Court sustained the opinion of considering conscientious objection as a fundamental right. Thus, with reference to conscientious objection to obligatory military service, the Court declared, basing its decision on the terms of Resolution 337 of the Consultative Assembly of the European Council, that conscientious objection is a fundamental right recognised in the Spanish Constitution both explicitly[34] and implicitly as a concretion of the religious and ideological freedoms guaranteed in Article 16 of the constitutional text.[35] This view was then confirmed with respect to conscientious objection to abortion, which we shall deal with below.

However, afterwards, the Constitutional Court modified the above view and came to consider conscientious objection as an autonomous constitutional right of a non-fundamental nature[36], though related to the freedoms of religion and ideology[37], which is not recognised in general.[38] Given the use of those two different criteria, the jurisprudence emanating from the Constitutional Court in relation to conscientious objection is far from being unanimous. In particular, it has only acknowledged the conscientious objection of health workers to the practice of abortions.

In line with its initial criterion, the Constitutional Court, mentioning that according to the European Commission on Human Rights the term "everyone" is not applicable to the *nasciturus*, recognised the fundamental right of health workers not to carry out abortions on the grounds of conscience. The Court held that "conscientious objection forms part of the fundamental right to religious and ideological freedom recognised in Article 16.1 of the Constitution and, as this tribunal has held on several occasions, the Constitution is directly applicable in matters of fundamental rights".[39]

However, after this judgement, the Constitutional Court followed the second criterion indicated above, having rejected the existence of a right to conscientious objection in all the cases it has examined. Among these may be cited cases of refusal of medical treatment[40], objection to swearing an oath to abide by the Constitution[41], failure to comply with employ-

[27] Judgement of Criminal Court no 3 of Barcelona, dated 12th January 2004.
[28] Judgement dated 17th October 2002, case *Agga* v. *Greece*.
[29] Judgement of Criminal Court no 3 of Barcelona, FJ 5.
[30] Penalised in Art. 510.1 of the Criminal Code.
[31] Judgement no 154/2002, dated 18th July, FJ 13.
[32] Judgement no 62/1982, dated 15th October, FJ 5.
[33] Judgement no 46/2001, dated 15th February, FJ 11, citing the decisions of the EHRC in the *Hoffmann* and *Kokkinakis* cases.
[34] In Article 30.2 of the Constitution, in relation to military service.
[35] Judgement no 15/1982, dated 23rd April, FJ 6.
[36] Judgement no 160/1987, dated 27th October, FJ 3.
[37] Judgement no 161/1987, dated 27th October, FJ 3.
[38] Judgement no 161/1987, dated 27th October, FJ 3.
[39] Judgement no 53/1985, dated 11th April, FJ 14.
[40] Ruling no 369/1984, dated 20th June; Judgements of the Constitutional Court nos 120/1990, dated 27th June; and 154/2002, dated 18th July.
[41] Judgements nos 101/1983, dated 18th November; and 119/1990, dated 21st June.

ment obligations[42] and refusal to take a course of a university curriculum.[43] The basic grounds for this rejection has been the Court's finding that conscientious objection is not expressly recognised in those cases brought before it.

B. *Art. 8: Private and Family Life*

1. *Privacy*

The right to personal intimacy includes *inter alia* the right to corporal intimacy.[44] The Constitutional Court has dealt with this matter in a case involving the publication of photographs in a magazine showing a naked person, in the context of an article entitled "Sex and business in the name of God. Barcelona: the Ceis Sect". According to the Constitutional Court the publication of this sort of photograph, without the consent of the interested party, constitutes unlawful intromission into their right to intimacy.[45]

Protection against the improper use of personal data is another aspect of the right to intimacy. In terms of Spanish law certain of these data – *inter alia* information relating to ideology, religion and beliefs – can only be processed if the person affected declares their consent expressly and in writing.[46] With respect to this matter, the Constitutional Court has held, following the decisions of the EHRC in the *Leander*[47] and *Funke*[48] cases, that the communication of personal data between public administration authorities, authorised by a regulation rather than by a law, and without the consent of the interested party, constitutes a breach of the right to intimacy.[49]

Sexual relations and orientation constitute another of the most intimate aspects of private life. The Supreme Court has authorised, following occasionally decisions of the EHRC[50], the change of name and sex of

[42] Judgement no 19/1985, dated 13th February.
[43] Ruling no 359/1985, dated 29th May.
[44] Judgement no 19/1985, dated 13th July, FJ 4.
[45] Judgement no 156/2001, dated 2nd July, FJ 5.
[46] Article 7.2 of Constitutional Law no 15/1999, dated 13th December, on Protection of Personal Data.
[47] Judgement dated 26th March 1987, case *Leander* v. *Sweden*.
[48] Judgement dated 25th February 1993, case *Funke* v. *France*.
[49] Judgement no 292/2002, dated 30th November, FJ 13 and 14.
[50] The decision of the Supreme Court, dated 2nd July 1987, FJ 3, cites the judgement of 4th October 1980 in the *Van Oosterwijck* v. *Belgium* case; the judgement of the Supreme Court, dated 6th September 2002, FJ 6, refers to decisions dated 17th October 1986 in the *Rees* v. *United Kingdom* case; 27th September 1990, case *Cossey* v. *United Kingdom*; 30th July 1998, cases *Sheffield and Horsham* v. *United Kingdom*; and 11th July 2002, case *Goodwins* v. *United Kingdom*.

transsexual persons in the Civil Register on the grounds of morphological and psychological criteria and with the argument that, if such change were not authorised, the free development of the interested parties' personalities would be impeded.[51] Nevertheless, the Court has denied to such persons the right to contract matrimony, with the argument that such marriages would be null and void on the grounds that they were celebrated between two persons of the same biological gender.[52] In other words, the Court has employed fundamentally the biological criterion in order to determine the gender of transsexuals in relation to matrimony. This situation was finally resolved by Law no13/2005, dated 1st July, which permits homosexual marriage.

2. *Family life*

The Constitutional Court has held that the term "family", referred to in Article 39.1 of the Spanish Constitution, undoubtedly includes families originating in marriage, which is the sort particularly taken into account by international texts and, specifically, by Article 12 of the ECHR[53] However, the family mentioned in the Spanish Constitution is not identified solely with the matrimonial kind. Thus, the stable, affective union of a couple or between a widowed, single, separated or divorced parent and his or her children are also deemed to constitute families.[54]

Nevertheless, the Constitutional Court has made it clear that only the class of matrimony expressly recognised by law can be considered marriage. Accordingly, the denial of a widow's pension to the survivor of a union celebrated according to gypsy rites cannot be held discriminatory on race or ethnic grounds, since it is not contrary either to Article 14 of the Constitution or to Article 14 of the ECHR. The reason is that this kind of union does not enjoy the legal consideration of marriage.[55]

[51] Decisions of the Supreme Court, dated 2nd July 1987, FJ 3; 15th July 1988, FJ 13; 3rd March 1989, FJ 3; and 19th April 1991, FJ 3.
[52] Decisions of the Supreme Court, dated 15th July 1988, FJ 11; 3rd March 1989, FJ 3; 19th April 1991, FJ 3; and 6th September 2002, FJ 7.
[53] Judgement no 45/1989, dated 20th February, FJ 4.
[54] Judgement no 184/1990, dated 15th November, with a dissenting judgement by Judge Gimeno Sendra, citing decisions of the EHRC dated 13th June 1979, case *Markcx* v. *Belgium*; and 18th December 1986, case *Johnston* v. *Ireland*.
[55] Judgement no 69/2007, dated 16th April, FJ 3 and 4.

With respect to relations between parents and children, the Constitutional Court has had the opportunity to decide on an appeal against a restriction of the access visit regime, which had been imposed on a father in a matrimonial separation case because the lower court had considered that the fact of his belonging to a group called the Universal Christian Gnostic Movement might affect his children, who were at that time below legal age. Citing the EHRC decision in the *Hoffmann* case, the Constitutional Court upheld the appeal on the grounds that the limitation appealed against was based solely on the father's membership of a religious association deemed to be allegedly dangerous. Accordingly, the Constitutional Court held that the restriction on access visits involved unfavourable treatment for the father due to his beliefs, which adversely affected his right to religious freedom.[56]

C. *Art. 2 P.1: Right to Education*

1. *Meaning of Freedom of Education*

The Constitutional Court has held – in line with the ECHR – that freedom of education is a projection of religious and ideological freedom and of the right to freely express one's thoughts, ideas and opinions.[57] Insofar as the meaning of freedom of education is concerned, the Constitutional Court has held – clearly in accordance with the jurisprudence laid down by the ECHR – that freedom of education comprehends the rights to create teaching institutions, academic freedom and the rights of parents to elect such religious and moral education as they may desire for their children.[58]

Public education tends to be characterised by its ideological neutrality. According to the Constitutional Court, following the EHRC judgement in the case of *Kjeldsen, Busk Madsen and Pedersen*[59], such neutrality imposes on teachers "an obligation to renounce any kind of ideological indoctrination".[60] Freedom of education also comprehends the right to set up and run private teaching centres of an ideological character[61], while

[56] Judgement no 141/2000, dated 29th May, FJ 7.
[57] Judgement no 5/1981, dated 13th February, FJ 7, citing Article 9 of the ECHR.
[58] Judgement no 5/1981, dated 13th February, FJ 7.
[59] Judgement dated 7th December 1976, case *Kjeldsen, Busk, Madsen and Pedersen* v. *Denmark*.
[60] Judgement no 5/1981, dated 13th February, FJ 9.
[61] Judgement no 5/1981, dated 13th February, FJ 8.

the teachers working there are bound to respect the educational ideology of such schools.[62] In this manner not only is the right of the academy's owner respected, but also are the rights of the parents who have chosen it because they deem it in accordance with the religious and moral education they wish for their children.[63]

2. *Parents' Rights to Ensure their Children's Education in Conformity with their own Religious and Philosophical Convictions*

One of the first questions raised by this aspect of freedom of education is whether parents may exercise on their own account the right to educate their children, without any kind of teaching centre, whether public or private. The Constitutional Court has upheld the right of all children to schooling and the obligation of those responsible for minors to carry it out.[64]

Another question raised is whether parents are entitled to insist that teaching in public educational centres is undertaken in the language of their choice. According to the Constitutional Court – citing the EHRC judgement in the *Belgian Linguistic Case*[65] – the provisions of Article 27 of the Constitucion do not include "the right of parents to the effect that their children receive education in the language of preference of their progenitors in the public educational centre of their choice".[66]

3. *Teaching of Religion and other Alternative Subjects*

Freedom of education in public schools does not prevent courses of religious education being organised therein in order to "put into effect the right of parents to elect for their children whatever religious and moral education may be in accordance with their own convictions". Naturally, according to the jurisprudence emanating from the ECHR in this field, such courses would be optional.[67] The Constitutional Court has declared

[62] Judgement no 5/1981, dated 13th February, FJ 10.
[63] In accordance with the ruling of the European Commission on Human Rights in Decision no 8010/77, case *X* v. *United Kingdom*.
[64] Judgement no 206/1994, dated 3rd October, FJ 2, citing Article 2, Protocol 1 of the ECHR.
[65] Judgement dated 23rd July 1968, *Belgian Linguistic Case*.
[66] Judgement no 195/1989, dated 27th November, FJ 3.
[67] Judgement no 5/1981, dated 13th February, FJ 9; in accordance with the ruling of the European Commission on Human Rights in Decision no 4733/71, case *Carnell and Hard* v. *Sweden*.

that the obligation to study alternative subjects does not constitute discrimination against those pupils that do not opt for classes of religion. The reason is that such courses are imparted with full respect for freedom of conscience and, in the same way as classes of religion, their objective is to educate students "in tolerance and respect for others' beliefs, which represent values without which a democratic society is not possible".[68]

D. *Art. 10: Freedom of opinion and expression*

The Constitutional Court has on certain occasions identified freedom of opinion and expression with ideological freedom, including non-ideological manifestations in the content of freedom of information.[69] Nevertheless, on other occasions, the Court has distinguished clearly between freedom of opinion and expression and ideological freedom.[70]

The latter opinion on the part of the Constitutional Court seems more appropriate since, among other reasons, the limits on freedom of opinion and expression are different from those on ideological freedom. This difference has been acknowledged by the Court itself, which has held that public order, which is the sole limit on religious and ideological freedom, cannot be made to coincide in absolute terms "with the limits imposed by clause 4 of Article 20 of the Spanish Constitution on the freedoms of expression and information recognised by paragraphs a) and d) of this Article".[71]

According to the Constitutional Court – citing the EHRC judgement in the *Handyside* case – freedom of expression includes not only inoffensive, indifferent or favourable information or news, but also instances which might upset the State or a sector of the population. This position is the result "of the pluralism, tolerance and openness without which a democratic society is not possible".[72]

However, freedom of opinion and expression is not unrestricted; it is rather subject to the limits laid down by Article 20.4 of the Spanish Constitution. Among those restrictions is the right to honour. In the case of

[68] Ruling no 40/1999, dated 22nd February, FJ 2, citing the EHRC judgement dated 7th December 1976, case *Handyside* v. *United Kingdom*.

[69] Judgement no 223/1992, dated 14th December, FJ 1, citing Article 10 of the ECHR; likewise decisions of the Constitutional Court nos. 76/1995, dated 22nd May, FJ 2; 34/1996, dated 11th March, FJ 4.

[70] Judgement no120/1990, dated 27th June, FJ 10.

[71] Judgement no 20/1990, dated 15th February, FJ 3.

[72] Judgement no 62/1982, dated 15th October, FJ 5.

certain anti-Semitic statements published in a magazine, the Constitutional Court, after having accepted the active legitimation of the petitioner to bring the appeal in accordance with the terms of Article 25.1 a) of the ECHR, held that "neither ideological freedom (Art. 16 of the Spanish Constitution) nor freedom of expression (Art. 20.1 of the Spanish Constitution) includes the right to make statements, expressions or campaigns of a racist or xenophobic nature, since according to the provisions of Article 20.4, there are no unlimited rights, while such declarations are contrary both to the right of honour of the person or persons directly affected and to other constitutional interests such as human dignity (Art. 10 of the Spanish Constitution)".[73]

Likewise, in a similar case the Constitutional Court has laid down – citing Article 10.2 of the ECHR and the judgement of the EHRC in the *Handyside* case – that racist declarations are also contrary to the respect of morality.[74]

II. Freedom of Assembly and Association

A. *Freedom of Assembly*

Freedom of assembly is a collective manifestation of freedom of expression undertaken by way of a transitory association of people. This link between freedom of expression and freedom of assembly has been pointed out by the Constitutional Court in accordance with the decisions of the EHRC.[75] The Constitutional Court has also held that the exercise of the right of assembly, which is guaranteed in Article 21 of the Spanish Constitution, is only subject to the requirement of prior notification to the competent authorities.[76] As the exercise of this right has direct, immediate effect[77], such notice cannot be deemed to be equivalent to an application for authorisation but rather as a declaration of acknowledgement, in order that the public administrative authorities concerned may adopt suitable measures to facilitate demonstrators' rights and protect third parties.[78]

[73] Judgement no 214/1991, dated 11th November, FJ 8.

[74] Judgement no 176/1995, dated 11th December, FJ 5.

[75] Judgement no 195/2003, dated 27th October, FJ 3, citing decisions of the EHRC dated 20th May 1999, case *Reckvenyi* v. *Hungary*; and 13th February 2003, and case *Stankov* v. *Bulgaria*.

[76] Judgements nos 36/1982, dated 16th June, FJ 6; 59/1990, dated 29th March, FJ 5.

[77] Judgements nos 59/1990, dated 29th March, FJ 5; 66/1995, dated 8th May, FJ 2.

[78] Judgements nos 66/1995, dated 8th May, FJ 2; 195/2003, dated 27th October, FJ 3.

In this context, the Constitutional Court has heard an appeal in a case concerning the rights and freedoms of foreigners in Spain, brought on the grounds of infringement of the Constitution. The appeal was lodged by the Ombudsman in charge of defending people's rights against certain articles of Constitutional Law no 7/1985, dated 1st July. The Ombudsman argued that the requirement contained in Article 7 of this Law to the effect that the holding "of public meetings in closed premises or in premises subject to public transit" organised by foreigners should be subject to prior administrative authorisation, represented a breach of Articles 16 and 21 of the Constitution and Articles 9, 11 and 14 of the ECHR. The Court held that the requirement for prior administrative authorisation distorted the right of assembly assured in the Constitution and declared that the provisions contained in the said Article on this matter were unconstitutional.[79]

As regards limits on the right of assembly, the Constitutional Court has held – citing the provisions of Article 12 of the ECHR and the judgement of the EHRC in the *Cisse* case[80] – that the ban imposed by an administrative ruling on the use of megaphones by a meeting in support of the Saharan people in a square adjacent to a Catholic church during the celebration of acts of worship therein, was not contrary to the terms of Articles 21 of the Constitution.[81] However, the Court has also held that a prohibition on installing some tables and a tent for the distribution of pamphlets represented a disproportionate restriction on the right of assembly. In the opinion of the Constitutional Court, this ban had deprived those attending the meeting from effective means of emitting the messages, which was the legitimate purpose of the demonstration.[82]

B. *Freedom of Association*

The Constitutional Court has determined that the right of association covers not only the positive freedom of association but also the negative right not to be associated. The positive freedom is recognised, within certain limits, by Articles 11 of the ECHR and 22 of the Constitution, which refer to a general concept – association – comprising of various particular modes[83]. Religious creeds and associations set up by them with

[79] Judgement no 115/1987, dated 7th July, FJ 2.
[80] Judgement dated 9th April 2002, case *Cisse* v. *France*.
[81] Judgement no 195/2003, dated 27th October, FJ 4 and 8.
[82] Judgement no 195/2003, dated 27th October, FJ 9.
[83] Judgement no 67/1985, dated 16th January, FJ 3,A and 5.

exclusively religious objectives are excluded from the general regime governing associations and are regulated by the provisions of the LORF.[84]

The Constitutional Court has considered this question and held that "communities with religious ends, in strict compliance with the Constitution, are not necessarily identified with the associations referred to in Article 22 of the Constitution. A community of believers does not need to formalise their existence as an association, in order for their fundamental right to profess a given creed to be acknowledged".[85]

Accordingly, as the Supreme Court has determined, the registration of a creed or an association with religious ends created by its members, in the Register of Religious Entities, removes its requirement to be registered in the General Register of Associations or in the corresponding registers of the Autonomous Regional Communities.[86] Associations with religious ends that are not registered in the Register of Religious Entities may do so in the General or Autonomous Regional Registers of Associations, in which case they will be subject to the applicable regulations governing associations and certain provisions of the LORF.[87]

III. Protection of Property of Persons and Institutions

The right to profess one's religion carries with it, among other aspects, the protection of property belonging to ecclesiastical institutions and that of their members.[88] With respect to urban leases, the Constitutional Court has declared the unconstitutional nature of a provision that established equivalence between the Catholic Church and the State and other public bodies for the purposes of rescission of leasing contracts over real estate property belonging to it.[89] In the Court's view the principle of separation

[84] Article 1.3 of Constitutional Law no 1/2002, dated 22nd May, which regulates the right of association, excludes these entities from its ambit; they fall to be governed by particular legislation, but without prejudice to the ancillary application of the provisions of this Constitutional Law.
[85] Judgement no 46/2001, dated 15th February, FJ 5, which mentions the special importance of the EHRC's jurisprudence for the interpretation of the fundamental rights recognised in the Constitution.
[86] Supreme Court Judgement, dated 9th December 1999, FJ 2.
[87] Those referring to the essential content of the right of religious freedom in its communal ambit, contained in Article 2.2 of the LORF.
[88] As the EHRC has held in a judgement dated 13th December 2001, case *Metropolitan Church of Besarabia and others* v. *Moldavia*.
[89] Article 76.1 of the Law on Urban Leases, promulgated by Decree no 4104/1964, dated 24th December.

of Church and State prohibits religious creeds to be put on the same level as the State.[90] Furthermore, the principle of equality disallows the attribution of this field to the Catholic Church of "a singular position with respect to any other private entity irrespective of its sociological projection or the nature of its goals".[91]

As regards control of the use of property, the courts have analysed the question of licences for the construction of places of worship. The Supreme Court has determined that it is a breach of religious freedom to require an administrative permit to open a place of worship in a private dwelling. In the Court's view such a requirement, which would hinder the exercise of this fundamental right, is not included among the limits of religious freedom, which largely coincide with those set out in Article 9.2 of the ECHR.[92]

However, the courts have held that a planning licence may be required to carry out certain non-religious activities in premises belonging to a religious body. Thus, they have declared that respect for different creeds has to be brought into harmony with service of the general interest goals referred to in Article 103.1 of the Constitution, which must not be forgotten by administrative authorities.[93]

With respect to social security benefits the Constitutional Court has held – reiterating its doctrine on the principle of equality, in line with the EHRC's jurisprudence on this matter – that the different legislative system that applies among priests and members of holy orders with respect to their integration in the Social Security system is not discriminatory. The reason for this is that such difference is justified due to the distinct activities carried out by each of them.[94]

Lastly, the Constitutional Court has referred to the different tax regimes applicable among the diverse religious confessions. In one case the Court rejected an appeal brought by an Evangelical community which considered their failure to enjoy the same fiscal benefits as the Catholic Church to be discriminatory. According to the Constitutional Court, that difference of treatment had an objective and reasonable justification, in that it was based on an agreement between the State and the Catholic Church – an agreement that the appellant Evangelical community did not possess

[90] Judgement no 340/1993, dated 16th November, FJ 4,D.
[91] Judgement no 340/1993, dated 16th November, FJ 4,A.
[92] Judgement of the Supreme Court, dated 24th June 1988, FJ 5.
[93] Judgement of the High Court of Justice of Madrid, dated 2nd June 2005, FJ 3.
[94] Judgement no 88/2005, dated 18th April, FJ 6.

– as well as on the special financial circumstances existing between the said Church and the Spanish State.[95] This criterion of the Constitutional Court has been confirmed by the European Commission on Human Rights, though with respect to a different case.[96]

IV. Procedural rights of persons and institutions

A. *Right to a fair trial*

The provisions of Article 6.1 of the ECHR guarantee everyone's right to a court "established by law". The Constitutional Court has referred to this right in a case where it held that, since the agreement between the Spanish State and the Holy See on juridical matters[97] had been entered into, without prejudice to the terms of the Second Transitory Provision thereof, only matrimonial separations decided by State national courts produced effects in civil law.[98] Accordingly, the execution by a civil court of the precise terms of a judgement of matrimonial separation in relation to custody and care of the children, exactly as decreed by the ecclesiastical court that issued the judgement, was held to constitute breach of the right to due protection by the courts guaranteed in Article 24.1 of the Spanish Constitution.[99]

Likewise, citing expressly the terms of Article 6.3 c) of the ECHR and the doctrine of the European Commission on Human Rights, the Constitutional Court has rejected an appeal in which it was averred that the presence of a lawyer was not required in a criminal case for failure to comply, due to conscientious objection, with the obligatory non-military alternative to military service.[100] According to the Constitutional Court, the rule that requires the assistance of a lawyer in this kind of case does not prevent the accused from "making such declarations as he may see fit in his own defence".[101]

Likewise, citing again the provisions of Article 6 of the ECHR, the Constitutional Court has held that it is not contrary to Article 24.2 of the

[95] Ruling no 480/1989, dated 2nd October, FJ 1 and 3.
[96] Decision no 17522/90, case *Iglesia Bautista "El Salvador" and Ortega Moratilla v. Spain*.
[97] Signed on 3rd January 1979.
[98] Judgement no 1/1981, dated 26th January, FJ 6.
[99] Judgement no 1/1981, dated 26th January, FJ 11.
[100] Judgement no 29/1995, dated 6th February, FJ 4, citing Decision no 5923/1972.
[101] Judgement no 29/1995, dated 6th February, FJ 6.

Constitution – which guarantees the right to a public trial – for a court to decide to celebrate a criminal trial in closed court for reasons of morality, provided that such a decision is duly justified on juridical grounds.[102]

Lastly, the Supreme Court has considered what relevance has a failure to appear by one of the parties to a process of nullity of marriage under canon law, in relation to the concession of civil efficacy to the ecclesiastical judgement in question. In the Supreme Court's view such non-appearance – whether voluntary or involuntary, due to failure to properly cite the party concerned – prevents the concession of effectiveness under civil law to matrimonial decisions emitted by ecclesiastical courts. The reason for this position is that involuntary non-appearance is covered by the principle of effective judicial protection in terms of Article 24.1 of the Constitution, whereas voluntary failure to appear is covered by the right to religious freedom and the principle of non-confessionality of the Spanish State.[103]

B. *Right to an Effective Remedy*

Firstly, it is necessary to point out in relation to appeals that the rules on human rights contained in international treaties, which are referred to in Article 10.2 of the Spanish Constitution, do not by themselves guarantee fundamental rights in the Spanish legal system and, accordingly, cannot be supervised by the Constitutional Court. The said Article is an adjectival provision that, as such, cannot therefore be breached directly, but only in relation to another constitutional provision that guarantees a particular fundamental right.[104]

Having made that clear, in another case where the Constitutional Court considered an appeal by certain persons associated with the Church of Scientology who were accused of alleged offences of unlawful association, the Court held – reiterating its previous doctrine – that a petition for a declaration of fundamental rights [*recurso de amparo*] is not admissible before the Constitutional Court unless and until all the prior judicial procedures in lower courts have been exhausted.[105] It should also be borne in mind that the nature of the constitutional protection process does not

[102] Judgement no 62/1982, dated 15th October, FJ 2 and 2,C.
[103] Supreme Court Judgement, dated 27th June 2002, FJ 1.
[104] Judgement no 36/1991, dated 14th February, FJ 5.
[105] Judgement no 155/2000, dated 12th June, FJ 2 and 3.

allow for a criminal sentence containing a declaration of acquittal to be revised once the original judgement has become final and binding.[106]

Moreover, the Constitutional Court has had the occasion to decide on the "double instance" requirement in criminal procedure. The case concerned two Jehovah's Witnesses who, after having had their applications for political asylum on the alleged grounds of religious persecution rejected, proceeded to falsify passports in order to travel from Spain to the United States: the result was that they were acquitted at first instance but declared guilty by the Appeal Court. In their appeal they claimed breach of the right to effective judicial protection on the grounds that Spanish law does not permit an appeal against conviction declared by a higher court at second instance.

This appeal was rejected by the Constitutional Court on the grounds that, in terms of Article 2 of Protocol no 7 of the ECHR, the right to a trial with full guarantees requires merely that the trial of criminal cases be carried out by two tribunals at different levels, and that there is no requirement for the existence of a possible appeal against a conviction declared by the appeal court.[107]

In addition, the Constitutional Court has dealt with the question of effective judicial protection in relation to the right of assembly. In this respect the Court has held that delay on the part of public organs – of the corresponding administrative body in adopting appropriate measures once the date and place of a meeting has been notified, and of the court or tribunal in resolving any appeal lodged against such measures – may deprive the exercise of the right to freedom of assembly of the corresponding prior, preventive juridical guarantee and thus breach such right.[108]

Lastly, mention should be made of the right to judicial protection in relation to cases of asylum petitions. The Supreme Court has dealt with many appeals presented against refusals on the part of both the Interior Ministry and courts of first instance to admit the processing of applications based on religious persecution. In resolving these appeals the Supreme Court has held that administrative authorities and the courts

[106] Judgement no 41/1997, dated 10th March, FJ 6 and 8, concerning an appeal lodged by persons captured by the Ceis sect, who were detained by the police in a hotel and submitted to a process of de-programming.
[107] Judgement no 296/2005, dated 21st November, FJ 2 and 3.
[108] Judgement no 195/2003, dated 27th October, FJ 11, in a case involving a proposed meeting in a place adjacent to a Catholic church and coinciding with a religious celebration.

ought not to judge such petitions at the phase of admission for processing, if sufficient evidence exists of the alleged persecution. Instead, they should examine solely whether the story told by the applicant describes a persecution and whether or not such story is manifestly false or unlikely. Accordingly, any doubts raised by the tale told cannot be resolved simply by refusal to admit the asylum petition for processing, but rather only by "processing the request and deciding finally whether the asylum sought should be granted or not".[109]

[109] Judgement of the Supreme Court, dated 31st January 2007, FJ 5; along the same lines, judgements of the Supreme Court, dated 20th October 2005, FJ 5; 23rd March 2006, FJ 5; 15th September 2006, FJ 5; and 25th January 2007, FJ 5.

KJELL Å MODÉER

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN SWEDEN

I. Ratification and Incorporation of ECHR in Sweden

The Swedish application of the European Convention for Human Rights (ECHR) has been consireded – from a legal historical perspective – both hesitating and reluctant. This is to a great extent related to the political geography into which Sweden was located as a national welfare-state in the mid 20th century. The Swedish legal way of thinking contributed with its representatives of the Uppsala School of Scandinavian legal realism, while intellectual discourses related to meta-physics, natural law and religion were dominated by secularization and extreme rationalism (Herbert Tingsten, Ingemar Hedenius). Sweden regarded itself as a so-called "neutral" country during the World War II and the postwar period. It then became an "outsider"country in relation to the Western European legal discourses related to the natural-law-renaissance, Gustav Radbruch and his "formula" addressing the conflict of positive law and justice, and "human dignity" as addressed e.g. in the German Basic Law 1949 and the ECHR 1950. Even if Sweden ratified the ECHR on February 4, 1952[1], which entered into force on September 3, 1953, the position of international public law was regarded as a limited legal source from a Swedish legal and political perspective, due to the strong position of the Scandinavian legal realists. Only in 1969 Sweden confirmed and – though reluctantly – ratified the protocol regarding the citizens' possibility to sue the state to the jurisdiction of the European Court.

Consequently, even if the context of cases regarding religion and belief in the postwar time included the ratified ECHR, still, the courts avoided implementing explicitly the convention, or involving human rights perspectives. The legal sources used by Swedish courts were increasingly defined by democracy, the Parliament and the people sovereignty principle in the new Instrument of Government 1974, which entered into

[1] Riksdagstrycket: prop. 1951:165, bet. 1951:UU11, rskr. 1951:2.

force on January 1, 1975. In this Basic law, there was no explicit chapter on "Courts and Judges". The Parliament regarded the judiciary as civil servants and the courts as public authorities. The separation of power principle became inherent, with the role of an autonomous judiciary declining. This cultural context is important, in order to appreciate the current transformation of the Swedish society from a national monolithic welfare-state into a member state of the European Union. This transformation resulted in claims for constitutional reform. A parliamentarian committee is currently revising this Basic law from the peak of modernity in the mid 1970s. This committee is expected to propose a new edition including a chapter on "Courts and Judges".

Sweden applied for membership in the European Union in 1993. As a result of this application Sweden also adopted a statute in 1994, which incorporated the ECHR as Swedish law. This statute entered into force at the same day when Sweden became a member of the EU, January 1, 1995.[2] Since that day, Swedish courts have been required to regard the ECHR as Swedish law; consequently, they have to make a judicial review when Swedish law in one way or another is in conflict with the ECHR. Even if the judiciary has to make such reviews, the lawyers are still the ones, as representatives of the parties, who plead for judicial review, thus speeding up this transformation of the Swedish legal culture.

To summarize, in the current Swedish legal culture the ECHR is valid in three forms, (1) as a ratified international public law convention, (2) as part of the European Community law, and (3) as domestic law.

Another interesting context is the transformation of the modern Swedish society as such, which took place in the late 20th century, from a homogeneous nation state into an heterogeneous, multi-cultural and multi-religious society. The first Swedish freedom of religion statute in 1951 had -to a great extent- to protect the negative freedom of religion, i.e. the right to be a non-religious citizen. Citizens belonging to so-called "foreign" (or alien) religions were not many in 1951. Today, they are increasingly entering the public square, and the legal protection of minorities is increasingly colliding with as well religious norms as the ECHR.

II. ECHR Article 9 in Relation to the Swedish Instrument of Government

Article 9 in the Convention gives the European citizen freedom of religion, freedom of thought and freedom of conscience. Freedom of religion

[2] Lag (1994:1219).

is also established in the Swedish Instrument of Government 1974 chapter 2, §1, p.6. It secures the Swedish citizen freedom of religion: a freedom, alone or together with others, to practice his/her religion.

ECHR Art. 9 section 2 also stipulates that freedom of religion by itself can be limited, if it is regulated by law, or if it is necessary for public security, or for protection of public order, health or moral, or of other persons' freedom of liberty or rights.

In recent times, the Swedish judicial culture has been challenged due to EHCR Article 9. As mentioned, since 1995, the Swedish judiciary has been required to make a judicial review in relation to the Swedish constitutional law and the Swedish statutory law. It took however ten years since the incorporation of ECHR into the Swedish law, to have the first landmark-case regarding the implementation of the ECHR in relation to the precedents in the European Court. And it related to an Art. 9 case.

III. Earlier Modern Cases Related to Freedom of Religion

Within labor law related legal praxis, Swedish courts had decided in a couple of cases involving freedom of religion, without the help of Art. 9 in the ECHR. In a case from the Swedish Labor Court (*Arbetsdomstolen*) in 1986, known as "the Turban Case", an employee at Gothenburg Tramways, Inderjit Singh Parmar, refused to wear a prescribed uniform cap when on duty as a tram-driver. He asked, instead, to wear a turban, arguing that it was the custom of the Sikhs to wear a turban; it was part of their religion.[3] Parmar refused to go to work if not allowed to wear the turban; on the other side, the employer told him that he could immediately go to work, as soon as he wore the uniform cap. After Parmar declined, he received a notice on dismissal due to labor refusal. The labor union agreed with the employer that Parmar's reaction had been in conflict with the collective agreement, hence it did not support the employee in court. When the case was decided in the Labor Court the argumentation was strictly bound to classical labor law principles. The court decided without dealing with the religious problem at all. Parmar had refused to obey an order from the employer and it was a legal argument for him to be quitted.[4] Professor Reinhold Fahlbeck gave the following comment regarding this case: "It is a perfect example on the division between 'the real reality' and 'the legal reality'. For a person like Parmar, who probably had no clue regarding Swedish labor law, the decision has reason

[3] Arbetsdomstolen 1986:11.

[4] R. FAHLBECK, *Ora et labora*, (Tidsskrift for Retsvidenskab 2002), 506.

for being regarded as scorn, a personal insult, even a conscious religious persecution." Even if this case in reality was the first case related to religious law in the Labor Court, in 1986 this perspective was not a part of the legal argumentation.

A second "Turban Case" appeared in the District Court of Stockholm (*Stockholms tingsrätt*) the following year, in 1987. In this case another Sikh, Bagh Singh, worked as a ticket collector at the Stockholm Underground (*Stockholms tunnelbana*). Singh started using a turban during work. The employer prohibited him to do so. Even if there existed a local regulation prescribing a uniform, it was not obligatory to wear a certain headgear (as a uniform cap). Singh was prepared to wear a turban in the same blue color as the company, even with its emblem. He refused, however, to work without a turban. After the employer transferred the ticket collector to another post, Singh sued Stockholm Underground. In its decision the Stockholm District Court argued: "The risk is small for a mistake regarding the position of a ticket collector, if he is dressed in this way. The Court is of the opinion that the Swedish society can afford to show that liberalism which is connected to this limited risk". The collective agreement, instead, ought to be interpreted in such a way, that Singh could not be transferred as had been decided by the employer. The employer had not even argued that "serious problems" could have occurred due to Singh's habit. Reinhold Fahlbeck's spontaneous comment was: "...it is easy to feel appreciation, even admiration for the Court's decision in this case". The Court put the religious question in focus. The balance between interests made by the Court, according to Fahlbeck, is exemplary, when looking at it from the perspective of freedom of religion.[5] This decision can be compared with a case from Great Britain in the European Court in 1981, regarding a Muslim teacher who wanted to be excused from school due to the Friday prayer.[6]

In his article, Fahlbeck elaborates on the question as to how those two "turban"-cases would have been decided, if the ECHR had already been incorporated into the Swedish law, when they were decided. In both cases it would not have caused "serious problems" for the employer if the employees had been allowed to wear the turban. And today the problem is even lesser than it was some 20 years ago, when the legal decisions were taken. The Swedish society of today has transformed into an increasingly multi-cultural and multi-religious society with much more experiences of not traditional behaviours, and other "customs and rituals" as far as the ECHR is concerned. The Labor Court did not as such make a "wrong"conclusion in 1986. Today, however, it would be very strange if the court neglected the aspect of freedom of religion. As the ECHR is valid in the Swedish law, it has to be implemented *ex officio* by the court due to the principle *jura novit curia*.[7]

[5] Fahlbeck, Ora et labora, 508.

[6] Commission nr 8160/78, decision March 12, 1981, D.R. 22, p. 27. – Fahlbeck, Ora et labora, 493.

IV. The Landmark Case: Prosecutor vs. Åke Green 2005

In July 2003, Åke Green, a minister in a Pentecostal community in Borgholm, held a sermon of more than 50 people in his church, where he "expressed disrespect to homosexuals with allusion to their sexual disposition, with the help of a lot of expressions and quotations." The local public prosecutor prosecuted Åke Green, stating that the sermon had had an insulting content and had attracted public attention. The Swedish criminal law had, in a recent amendment to the Penal Law regarding incitement to racial hatred on January 1 2003, extended its application also to discrimination of homosexuals.[8] The local district court sentenced Åke Green to prison for one month. The minister appealed to the Court of Appeal (*Göta hovrätt*), the decision of which, of February 11, 2005, acquitted the defendant. The Prosecutor General then brought the case to the Swedish Supreme Court; this high court unanimously approved the decision of the Court of Appeal on November 29, 2005.[9]

In the Åke Green Case (ÅGC) the Supreme Court established that the Minister's insulting expressions regarding homosexuals as such could be regarded as an incitement to racial hatred, but that he could not be sentenced for this crime, as it was in conflict with the ECHR articles regarding freedom of religion (Art. 9) and freedom of expression (Art. 10). The argumentation of the Supreme Court was based on precedents in the European Court. The decisive question for the Swedish high court was whether a limitation of Åke Green's freedom to give a sermon was necessary in a democratic society (taking into consideration the ECHR Art 9:2). To deal with this, the Court made a judgment of proportionality to decide if the limitation could be regarded as proportion to the protected interest. The answer to this question was no.

[7] Fahlbeck, ORA et labora, 524.

[8] Brottsbalken 16 kap. 8 §.

[9] HD Mål nr B 1050-05, NJA 2005:87, 805 ff.

If the Supreme Court had sentenced Åke Green, and the European Court were called, afterwards, to examine the limitation of his right to preach, it would find that this limitation was not proportionate, and thus should be an incitement of the ECHR, the court argued.[10] The Supreme Court stated, "at a composed judgment"(*vid en samlad bedömning*), that it did not believe the European Court should accept a verdict of guilt against Minister Green.

Interestingly enough, a couple of weeks earlier, the European Court had decided in an Art. 9 case (*Sahin vs. Turkey*, decision Nov. 10, 2005) regarding Leyla Sahin's right to exercise her freedom of religion by wearing an Islamic head cloth at a Turkish university. In this case, the European Court regarded the existing situation as an acceptable exception to the freedom of religion, due to Art. 9. The Court stated that the aim of this limitation, provided by law, was necessary to protect the public order and to protect the freedom and rights of other human beings.

The Supreme Court in its argumentation in the ÅGC also referred to Art. 10 of the ECHR and made a judgment as to what extent the expressions of the Minister regarding homosexuals were related to that article. Also, in this case the Supreme Court referred to cases in the European Court, finding that – if the case was brought to Strasbourg – the court would find that a limitation of Åke Green's freedom to give a sermon would also be an incitement of his freedom of expression and would thus be a crime against ECHR Art. 10. Moreover, the Supreme Court found with support from earlier European Court cases that the sermon given by Minister Green had not expressed what was meant by *hate speech*.

The Supreme Court's decision had received a lot of attention, resutling in several political and legal discourses. What was questioned in the media, was whether, as an effect of the ÅGC, it would be impossible for prosecutors to act against any inciting message about homosexuals as a group, unless they included direct threats of violence.

With regard to the case of *Leyla Sahin*, the European Court discussed the question about freedom of expression in Art. 10. It found that the Turkish prohibition was not in conflict with Art. 10. One of the discourses related to the ÅKG case regarded the decision of the Supreme Court to predict a hypothetical future decision by the European Court. That decision was regarded by some, as an effect of an appeasement policy in relation to supranational jurisdictions.[11] In addition, the recent

[10] HD B 1050-05, 15.

[11] I. Österdahl, *Åke Green och missaktande men inte hatiskt tal*, (Svensk Juristtidning 2006), 213 ff; – Hans Ytterberg, Har HD gett grönt ljus för hets mot folkgrupp? En kritisk granskning av Högsta Domstolen i målet om hets mot folkgrupp där en pingtpastor åtalats för hets mot homosexuella som grupp, Svensk Juristtidning 2006, 227 ff. – H. Danelius, *Högsta Domstolen och pastor Green. Några kommentarer till Inger Österdahls och Hans Ytterbergs artiklar*, (Svensk Juristtidning 2006), 240 ff..

Leyla Sahin case contributed to the questioning of the Court's argumentation. On the one hand, the main impact of the Supreme Court's decision was the increased consciousness, both in media and within the legal profession, about the Court's jurisdictional relation to the European Court. That was the first time the Court had ever made a judicial review with regard to freedom of religion in relation to the ECHR. On the other hand, the Supreme Court's same decision rose discussions about the limitations on freedom or religion and freedom of expression in the late modern society; argumentations parallel to those in Denmark after the Mohammed Cartoon crisis.

The decision in the ÅGC, however, has to be read from its very specific context, related to a Minister who had given a sermon interpreting the Bible in his Pentecostal church, his "holy room". The situation would not necessarily have been the same if the Minister had given his speech more implicitly in the public square, e.g. on the market square of his city, Borgholm.

V. Religious Education and Religious Schools in the Secular State

One of the main principles in the modern "Wall of Separation between Church and State" is the division between the state's responsibilities regarding education *on* religion and private education *in* religion. This question has recently been raised in Sweden as a result of the introduction of private, so called "free schools", as an alternative to the main public schools system, which dominated the modernity of the 20th century. A current Swedish discourse regarding "religious free schools" is an example of this division between State responsibilities to uphold a secular state, fulfilling at the same time its obligations regarding the ECHR art. 9., and also taking into consideration the UN Convention regarding children's rights art. 9 and 14.

Even if the present article is describing Swedish experiences regarding Art. 9, there is a need to refer to a recent Norwegian case, decided by the European Court on June 29, 2007, *Folgerø and Others v. Norway*. In a Grand Chamber decision 9 votes to 8, the Court decided to sentence Norway for not having given its citizens the possibility to an explicit opt-out from education on religion in accordance to the Norwegian Edu-

cational Act 1998. Even if the suing children and their parents had complained under the ECHR Art. 9, the Court argued merely with the help of Art. 2 of Protocol No 1 as the *lex specialis* in the area of education.[12] The decision, however, has an impact on the legal controversies related to education on religion in the late modernity of ours.

The Norwegian Educational Act stated in Section 1-2(1): The object of primary and lower secondary education shall be, in agreement and cooperation with the home, to help give pupils a Christian and moral upbringing, to develop their mental and physical abilities, and to give them good general knowledge so that they may become useful and independent human beings at home and in society.

The Act introduced a new discipline in Norwegian public schools on Christianity, Religion and Philosophy ("the KRL subject"). Sections 2-4 of the Act stated among other paragraphs: "Instruction in Christianity, Religion and Philosophy is an ordinary school subject, which should normally bring together all pupils. The subject shall not be taught in a preaching manner". The minor possibilities to opt out from this compulsory discipline in the Norwegian public schools, where 98 % of the pupils attend public education, urged Norwegian atheists, organized in the Norwegian Humanist Association (*Human-Etisk Forbund*), to take the case to the European Court. The decision of the court, formed by the majority, meant that Norway was obliged to open up to a more open-opt out possibility. "The KRL subject" as a challenge for religious education in a multi-cultural public school system has resulted in an important discourse in Norway, indicating the same process of adaptation to a plurality in cultures, as well as religions, as described previously in Sweden.[13]

The dominance of Christianity as the greater part of the curriculum for primary and lower secondary schools, than knowledge about other religions and philosophies, is from the Court's perspective not viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination. In *Folgerø* the Court actually in this point (p. 89) *mutatis mutandis* referred to an older Swedish case of 1983, *Angelini vs. Sweden.*[14]

[12] "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the rights of the parents to ensure education and teaching in conformity with their own religious and philosophical convictions".

[13] Regarding till "KRL"-subject: Peder Graven, KRL – et fag for alle? Oplandske Bokforlag Vallset 2004.

[14] *Angelini* v. *Sweden* (dec.), no 1041/83, 51 DR (1983).

Even if there is no recent case from Sweden, it may be predicted there will be one in the near future. In Sweden religious or confessional "free schools" with a religious profile are permitted. Out of 470 "free schools" 44 are confessional. Nevertheless, they are regularly controlled by a national authority, the Swedish Agency for Education (*Skolverket*).[15] The political conflict regarding religious or confessional "free schools" is increasing. The Swedish Humanist Association (Humanisterna) is very active as far as the religious schools are concerned, and claims that they shall be prohibited. The debate is dominated by contextual keywords like segregation, integration and plurality in the current society.[16] The Social-Democrats claim that confessional schools shall be prohibited. A recent investigation made by this national agency showed that "confessional 'free schools' are about as good or bad, and have about as many and similar shortages as other schools". About half of them, 20 out of 44, had no shortages at all.[17] In fall 2007, motions were submitted from the Social-Democrats and the Christian-Democrats in the Swedish Parliament, pro and against a prohibition of these confessional schools. The former chairman of the Christian-Democrats, Alf Svensson, stated in his motion: "The talk of 'the objective school' has, as far as I understand, not any longer many supporters. The concept 'common value base' (*värdegrund*) is today a prevailing one, even if the Swedish political debate and the content and the meaning of this concept is seldom debated. The 'value-neutral' society is an impossibility." The national Agency had to act and define the concept of "religious free school" (see Svensson).[18]

Concluding Remarks

This survey regarding the Swedish implementation of the ECHR Art 9 has demonstrated its relation to labour law, to freedom of speech and to education. The survey has demonstrated that since Sweden in 1995 adopted the ECHR as Swedish law, only one single case has been implicitly related to the praxis of the European Court, and that is the ÅKG Case 2005.

[15] SKOLVERKET, "Fristående skolor", [http://www.skolverket.se/sb/d/379]

[16] M. HÖRBERG, 'Himmel eller helvete? En studie om förekommande argument gällande konfessionella friskolor i dagstidningarnas debattsidor samt hur den praktiska verksamheten bedöms av Skolverket'. Rapport HT06-2611-078, Göteborgs universitet. Utbildnings- och forskningsnämnden för lärarutbildning.

[17] Religiösa friskolor är inte sämre än andra [http://www.sr.se/ekot/artikel.asp?artikel=1654313]

[18] Motion 2007/08:Ub407 [Alf Svensson (kd), Begreppet "religiös friskola"?]

What this survey, however, wants to demonstrate is that the Swedish legal culture during the almost twelve years since the ECHR entered into force as Swedish law, the consciousness of religious argumentation within the courts, legal doctrine, and parliamentarian legislative discourses has increased successively.

The legal and religious culture in the Scandinavian countries, however, is exceptional in relation to other European members of the European Council, especially of the Mediterranean. There is a big difference in the visibility of the religious legal culture in the public square in relation to the Scandinavian countries.[19] Due to well established customs within labour law, professor Fahlbeck is convinced that "the secularized, religious indifferent, environment in the Nordic countries is [also for the future] leading to a relatively big scope for following the call for 'ora et labora'".[20] The constitutional tradition of freedom of speech is older than that of freedom of religion in the Swedish debate. It explains the difficulties in the late modern society to make a balance between freedom of religion and freedom of speech. The secularized traditional nation-state of Scandinavian design will also have problems in finding a balance between public and private, secular and religious forms of education.

The deep structures related to law and religion are again increasingly made visible in the late modern Swedish society. It is predictable that the conflicts related to the ECHR Art. 9 will increase during this enduring process of establishing "European values".

[19] K. Å MODÉER, 'Harmonization or Separation? Deep Structures in Nordic Legal Cultures' Scandinavian Studies in Law, vol. 50 (2007). (in print)

[20] R. FAHLBECK, *Ora et Labora*, v. 4 above, 547.

MARK HILL

THE APPLICATION OF THE FREEDOM OF RELIGION PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE UNITED KINGDOM

Introduction

When considering, in a comparative context, the manner in which an international instrument such as the European Convention on Human Rights is implemented in domestic courts of individual states, an understanding of the particular constitutional conditions is first necessary. The United Kingdom has no written constitution, nor does it have a bill of rights or charter of fundamental freedoms. It is a liberal democracy in which Parliament is sovereign. It does not have a constitutional court in which legislation is scrutinised for its compliance or otherwise with any free-standing constitutional precepts or principles. Put simply, Parliament makes the law and the judges apply it. However, a significant shift has taken place following Tony Blair's Labour government coming into power in 1997. This can best be appreciated following a description of the traditional approach of English law.

I. The Traditional Approach of English Law

The legal approach to religion and religious liberty has differed over time and across societies. The current human rights era marks an abrupt shift from passive religious tolerance to the active promotion of religious liberty as a basic right. As such, the changes of the last decade need to be placed in historical context.[1] The ousting of papal jurisdiction marked by

[1] For a brief description of the historical development in England see: N. DOE, 'National Identity, the Constitutional Tradition and the Structures of Law on Religion in the United Kingdom' in *Religions in European Union Law*, Proceedings of the European Consortium of Church and State Research (Luxembourg, 1997) p. 107-110, and C. HAMILTON, *Family, Law and Religion* (London, 1996) chapter 1. For a more general overview see J. GUNN, 'Religious Liberty (Modern Period)' in E. Fahlbusch *et al.*, ed, *Encyclopaedia of Christianity* (WILLIAM B. EERDMANS, Michigan, 2005) Vol. 4, pp. 605-617 and J. WITTE, *God's Joust, God's Justice: Law and Religion in the Western Tradition* (WILLIAM B. EERDMANS Publishing Company, 2006).

the reformation statutes of the 1530s not only led to the formation of the Church of England but also resulted in religious intolerance. The predominance of a state church with the secular monarch as supreme governor led to the disadvantaging of other religions, most notably Roman Catholicism.[2] After 1689, this tradition eventually gave way to limited and piecemeal toleration.[3] The following centuries witnessed the widening of toleration and the limited introduction of legal freedoms. However, by the closing decades of the twentieth century there was some evidence of a move from mere toleration of religious difference to respect for religious liberty. From the 1950s onwards, international human rights treaties and the ideals they embodied began to influence the law. But the rigidity of international instruments posed problems for the judiciary in producing convincing, consistent, and coherent reasoning when interpreting and applying them in the domestic context.[4]

II. The Impact of the Human Rights Act 1998

The Human Rights Act 1998 brought about something of a legal revolution.[5] To assert that the Human Rights Act incorporated the European Convention on Human Rights (hereafter 'ECHR') into English law is a convenient – although slightly misleading – shorthand.[6] The ECHR was not an irrelevance prior to 1998 but a treaty obligation with status in

[2] With the exception of the period of Mary's reign when papal authority was restored (1553-1558) and the commonwealth period when dissenting protestant groups were tolerated (1648-1660).

[3] Whereby dissenters were permitted to have their own places of worship provided they gave notice to a Church of England Bishop and met with unlocked doors: Toleration Act 1689.

[4] See, for example, the comments of Mummery LJ in *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932; [2005] ICR 1789 at para 35 where he noted that Strasbourg principles are simply "repeated assertions unsupported by the evidence or reasoning that would normally accompany a judicial ruling", which "are difficult to square with the supposed fundamental character of the rights" and are inconsistently applied. In the same decision, RIX LJ suggested that Convention jurisprudence actually runs counter to the very needs for which a concern for human rights is supposed to exist (para 60).

[5] See M. HILL, ed, *Religious Liberty and Human Rights* (University of Wales Press, Cardiff, 2002). Under section 3 of the Act, courts are required to interpret United Kingdom legislation so far as is possible in a manner compatible with the rights outlined in the ECHR.

[6] A full discussion may be found in R. CLAYTON and H. TOMLINSON, *The Law of Human Rights* (Oxford, 2000) and an insightful and thorough reflection on the first twelve months during which the Act has been in force is contained in the First Annual Updating Supplement (Oxford, 2001).

international law.[7] As such, although it was not part of domestic law, its Articles, including Article 9, were regarded as 'an aid to interpretation' and English courts sought to ensure that their decisions conformed to the ECHR.[8] The short title of the Human Rights Act states that it is 'an Act to give *further effect* to the rights and freedoms guaranteed under the European Convention on Human Rights'.[9] Much more importance is now placed by domestic courts on Strasbourg jurisprudence.[10] It is clear that the Human Rights Act 1998 had two explicit purposes, and one pervasive effect.

1. *Statutory Interpretation*

The Human Rights Act requires the courts to interpret United Kingdom legislation so far as is possible in a manner compatible with Convention rights[11] and, in so doing, to take into account – though not necessarily follow – the decisions of the European Court of Human Rights at Strasbourg.[12] It must be remembered that the procedures of Strasbourg are subsidiary to the national systems. It has been observed, 'by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions'.[13] Thus not every Strasbourg decision is of direct application in the English courts.

Since the Church of England legislates by Measure and since such Measures are classified under the Act as primary legislation,[14] they are to be interpreted, wherever possible, in a manner compatible with Con-

[7] *R v DDP ex p. Kebeline* [2000] 2 AC 326, see the judgment of Laws LJ.

[8] *Ahmad v ILEA* [1977] 1 QB 36.

[9] Emphasis added.

[10] As required by section 2(1) of the Human Rights Act 1998, although it is not slavishly followed as the Court of Appeal's judgment in *Copsey v WWB Devon Clays Ltd* (above) makes plain.

[11] Section 3(1). In the event of there being an irreconcilable inconsistency, the domestic legislation prevails subject to a 'fast-track' system of executive action to bring English law into line with the Convention. See section 4 (declaration of incompatibility) and section 10 (remedial action).

[12] See section 2. The Court of Appeal, in its unanimous judgment in *Aston Cantlow Parochial Church Council v Wallbank* (reversed on other grounds) put the matter with disarming simplicity: 'our task is not to cast around in the European Human Rights Reports like black-letter lawyers seeking clues. In the light of s 2(1) of the Human Rights Act 1998 it is to draw out the broad principles which animate the Convention'.

[13] *Buckley v United Kingdom* (1996) 23 EHRR 101 at 1299.

[14] See section 21.

vention rights. Courts are obliged to use as the principal guide to the construction of all primary and subordinate legislation not parliamentary intention[15] but compatibility with Convention rights.[16] If no compatible reading of a piece of primary legislation is possible,[17] the court has power to make a declaration of incompatibility.[18] If it does so, a Minister of the Crown *may* by order make such amendments to the legislation as he considers necessary to remove the incompatibility.[19] Thus there is now provision for higher courts to scrutinise the compatibility of United Kingdom legislation with the provisions of the ECHR, but not to strike down such legislation as 'unconstitutional'. Parliament remains supreme.

2. *Regulation of Public Authorities*

The second effect of the Act was to render unlawful any act by a public authority which is incompatible with a Convention right.[20] Religious organisations are potentially 'public authorities' under the Act.[21] An early question to be decided under therefore, was whether the Church of England, as an established church in part of the United Kingdom was a 'public authority' for the purposes of the Act.[22]

3. *The Horizontal Effect of the Act*

Beyond these two explicit purposes the Act has a broader effect, the extent of which may not fully have been appreciated by its drafters. To the extent that a court is itself a public authority,[23] prohibited from acting in a way incompatible with Convention rights,[24] such rights will fall to

[15] Note the extent of the search for legislative intent as discussed in *Pepper v Hart* [1993] AC 593 HL.

[16] Human Rights Act 1998, s 3(1).

[17] A powerful indication has been given by the Judicial Committee of the House of Lords that courts will strain to find a compatible meaning even if that means reading down the statutory provision. See *R v A (No 2)* [2001] 2 WLR 1546 and, more particularly, *R v Lambert* [2001] 3 WLR 206.

[18] Human Rights Act 1998, section 4(4).

[19] Ibid, section 10(2). He is not *obliged* to do so. Note also that this fast track remedial action by ministerial intervention is not available in respect of Church of England Measures: see section 10(9).

[20] See section 6.

[21] See H. QUANE, 'The Strasbourg Jurisprudence and the Meaning of a "Public Authority" under the Human Rights Act' [2006] *Public Law* 106-123.

[22] *Aston Cantlow Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 A.C 546, discussed in detail below.

[23] Section 6(3)(a).

[24] Section 6(1).

be considered in resolving private disputes between individual litigants. The development of the common law in this manner has been styled the 'privatisation' of human rights.[25]

There has traditionally been a general reluctance to interfere with the regulation of religious bodies as identified in the Strasbourg jurisprudence and in the domestic courts.[26] This now finds expression in section 13 of the Act which provides that if a court's determination of any question arising under the Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, then the court must have particular regard to the importance of that right.[27] Whilst section 13 might give presumptive priority to religious freedom, it does not allow religious freedom to trump other rights such as Article 6.[28] Commentators seem divided as to the significance of the section.[29]

III. Decisions of the House of Lords

The highest appellate court is the Judicial Committee of the House of Lords, which is the closest the United Kingdom comes to a constitutional court. To date, three cases directly concerning religious liberty have

[25] See A. CLAPHAM, 'The Privatisation of Human Rights' [1995] EHRLR 20 and A. CLAPHAM, *Human Rights in the Public Sphere* (Oxford, 1993). For an example concerning exhumation see *Re Durrington Cemetery* [2001] Fam 33 *per* Hill Ch, followed in *Re Crawley Green Road Cemetery, Luton* [2001] Fam 308 *per* Bursell Ch.

[26] See M. HILL, 'Judicial Approaches to Religious Disputes' in R. O'DAIR and A. LEWIS (eds), *Law and Religion*, Current Legal Issues IV (2001, Oxford University Press) 409-420.

[27] See P. CUMPER, 'The Protection of Religious Rights under Section 13 of the Human Rights Act 1998 [2000] *Public Law* 265. Note also the ironic observation of Lord Nicholls of Birkenhead that were component institutions of the Church of England to be classified as public authorities, they would, by definition, lose their status of victim and with it any right of action in respect of a violation of Convention rights, including that of freedom of religion: see *Aston Cantlow Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 at para 15.

[28] *R(on the application of Ullah) v Special Adjudicator* [2002] EWHC 1584 (Admin) per HARRISON J.

[29] For Rivers the provision increases the 'interpretative discretion' of the judiciary while Cumper regards it merely as a symbolic political statement designed to placate religious opponents: see J. RIVERS, 'Religious Liberty as a Collective Right' in R. O'DAIR and A. LEWIS (eds), *Law and Religion*, Current Legal Issues IV (Oxford University Press, 2001) 246; J. RIVERS, 'From Toleration to Pluralism: Religious Liberty and Religious Establishment under the United Kingdom's Human Rights Act' in R. AHDAR, (ed) *Law and Religion* (Ashgate, 2000) p. 138 and CUMPER, above, p. 265. Hill concludes that it is 'at best an articulation and codification of the [pre-Human Rights Act] position': M. HILL, 'Judicial Approaches to Religious Disputes', above, at p. 418.

reached this court and there is an appeal pending in one other case.[30] This paper considers them in chronological order.

1. *Shakespearean Church*

A lay rector who owns land to which the obligation applies, is required to keep the chancel of the parish concerned in good repair. This common law liability existed long before the Reformation and its enforcement was a matter for the ecclesiastical courts. However, following the Chancel Repairs Act 1932, a procedure was introduced whereby the secular courts enforce the liability by way of an action for a sum of money representing the cost of repair. The Parochial Church Council of the ancient Warwickshire church of Aston Cantlow (where William Shakespeare's parents had married) sought to recover from the lay rector the cost of repair to the chancel. The lay rector conceded the existence of the common law obligation of which he had full knowledge at the time the land was acquired but argued that the enforcement of the obligation was in breach of the provisions of the Human Rights Act 1998.

The House of Lords considered this area of property law arcane and unsatisfactory, stating that the very language was redolent of a society long disappeared. However the importance of the decision for the Church of England lies not in provisions of the Chancel Repairs Act but rather in the discussion of the nature of Church itself and its place in society and government. The House of Lords enjoyed a rare opportunity to consider the constitutional status of the Church of England in contemporary jurisprudence.[31] Lord Nicholls of Birkenhead observed:

> 'Historically the Church of England has discharged an important and influential role in the life of this country. As the established church it still has special links with central government. But the Church of England remains essentially a religious organisation. This is so even though some of the emanations of the church discharge functions which may qualify as governmental. Church schools and the conduct of marriage services are two instances. The legislative powers of the General Synod of the Church of England are another. This should not be regarded as infecting the Church of England as a whole, or its emanations in general, with the character of a governmental organisation'.[32]

[30] One further case, in the field of extradition, contained a superficial treatment of Article 9: *R (on the application of Ullah) v Immigration Appeal Tribunal* [2004] UKHL 26.

[31] See *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank Parochial Church Council of Aston Cantlow v Wallbank* [2004] 1 AC 546; [2003] 3 All ER 1213, HL.

Having cited passages from the second edition of Hill, *Ecclesiastical Law*,[33] Lord Hope of Craighead stated that the Church of England as a whole has no legal status or personality.[34] Whilst acknowledging that the Church of England had regulatory functions within its own sphere of activity, he concluded that it could not be considered to be a part of government, observing that the State has not surrendered or delegated any of its functions or powers to the Church:[35] 'The relationship which the state has with the Church of England is one of recognition, not of the devolution to it of any of the powers or functions of government'.[36] Lord Rodger of Earlsferry, in a concurring speech, observed that 'the juridical nature of the Church [of England] is, notoriously, somewhat amorphous'.[37] He concluded:

> 'The mission of the Church is a *religious* mission, distinct from the secular mission of government, whether central or local. Founding on scriptural and other recognised authority, the Church seeks to serve the purposes of God, not those of the government carried on by the modern equivalents of Caesar and his proconsuls. This is true even though the Church of England has certain important links with the state. Those links, which do not include any funding of the Church by the government, give the Church a unique position but they do not make it a department of state: *Marshall v Graham* [1907] 2 KB 112, 126, per Phillimore J. In so far as the ties are intended to assist

[32] Ibid per Lord Nicholls of Birkenhead at para 13.

[33] Para 58 referring to M. HILL, *Ecclesiastical Law* (2nd edn, Oxford, 2001), paras 3.11 and 3.74.

[34] *Aston Cantlow* (supra) at para 61 per Lord Hope of Craighead. He continued 'There is no Act of Parliament that purports to establish it as the Church of England: *Sir Lewis Dibdin, Establishment in England: Essays on Church and State* (1932), p. 111. What establishment in law means is that the state has incorporated its law into the law of the realm as a branch of its general law. In *Marshall v Graham* [1907] 2 KB 112, 126 Phillimore J. said: "A Church which is established is not thereby made a department of state. The process of establishment means that the state has accepted the Church as the religious body in its opinion truly teaching the Christian faith, and given to it a certain legal position, and to its decrees, if rendered under certain legal conditions, certain civil sanctions." The Church of England is identified with the state in other ways, the monarch being the head of each.'

[35] Note, however, the Church of England Assembly (Powers) Act 1919 speaks in its preamble of powers in regard to legislation touching matters concerning the Church of England being 'conferred on' what is now the General Synod subject to the control and authority of the Monarch and of the two Houses of Parliament.

[36] *Aston Cantlow* (supra) at para 61 per Lord Hope of Craighead.

[37] Ibid at para 154 per Lord Rodger of Earlsferry.

> the Church, it is to accomplish the Church's own mission, not the aims and objectives of the Government of the United Kingdom'.[38]

These assertions may seem both obvious and self-evident, but the Court of Appeal had previously reached the opposite conclusion on the specific question of whether a parochial church council is a public authority for the purposes of the Human Rights Act 1998.[39] The Court of Appeal had regarded the established nature of the Church of England as imbuing its component institutions with a governmental function sufficient to render them public authorities. The analysis of the House of Lords is much to be preferred, being more cogent and more soundly argued. The consequent reversal of the Court of Appeal's ruling accorded with widespread academic opinion.[40] Thus, a parochial church council is *not* classified as a 'public authority' nor do its actions in enforcing chancel repair liability engage the ECHR.

2. *The Chastisement of Children*

In February 2005 the House of Lords, in *R (Williamson) v Secretary of State for Education and Employment*,[41] delivered a significant judgment on freedom of religion, parental rights, corporal punishment and children's welfare.[42] In parallel, the law redefined reasonable chastisement,

[38] Ibid at para 156 per Lord Rodger of Earlsferry.

[39] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2002] Ch 51, [2001] 3 All ER 393, CA, Sir Andrew Morritt V-C, Robert Walker and Sedley L JJ.

[40] See D. OLIVER 'Chancel Repairs and the Human Rights' [2002] *Public Law* 651; I. Leigh 'Freedom of religion: public/private, rights/wrongs' in M. HILL (ed) *Religious Liberty and Human Rights* (University of Wales Press, 2002) 128-158; I. DAWSON and A. DUNN, 'Seeking the principle: chancels, choices and human rights' (2002) 22 *Journal of Legal Studies* 238; S. WHALE, 'Pawnbokers and parishes: the protection of property under the Human Rights Act' [2002] EHRLR 67 at 78-79; and M. HILL's case note and editorial in the *Ecclesiastical Law Journal* at (2001) 6 Ecc LJ 173 and (2004) 7 Ecc LJ 246-249 respectively. Note, however, the partial dissent of Lord Scott of Foscote in the House of Lords on the public authority issue: *Aston Cantlow* (supra) paras 130-132.

[41] *Regina v Secretary of State for Education and Employment ex parte Williamson* [2005] UKHL 15; [2005] 1 FCR 498 noted at (2005) 8 Ecc LJ 237. For convenience, reference hereafter to the speeches in the House of Lords are simply prefaced *Williamson*.

[42] The Education Act 1996, s 548(1) provides: 'Corporal punishment given by, or on the authority of, a member of staff to a child ... for whom education is provided at any school ... cannot be justified in any proceedings on the ground that it was given in pursuance of a right exercisable by the member of staff by virtue of his position as such'. For a full discussion see S. LANGLAUDE, 'Flogging Children with Religion: A Comment on the House of Lords' Decision in *Williamson*' (2006) 8 Ecc LJ 339.

from the Education Act 1993, to the Children Act 2004. To be lawful, corporal punishment administered by a parent must now stop short of causing actual bodily harm. The Court of Appeal decided the case on narrow Article 9(1) grounds. It held that the legislation prevented the delegation by parents to teachers of the parental right to administer reasonable physical chastisement. The judges disagreed whether corporal punishment in this context was a manifestation of religion or belief under Article 9(1). However, they all agreed that the prohibition did not constitute an interference with freedom of religion, as it was possible for the applicants lawfully to manifest their belief in corporal punishment by alternative means. Accordingly, there was no breach of Article 9 or the Protocol.

The House of Lords rejected the further appeal, but took a more generous approach to freedom of religion and belief and closely followed the structure of Article 9. The prohibition, it held, constituted an interference with the manifestation of the parents' beliefs but one which was justified under Article 9(2). The House of Lords gave a wide scope to freedom of religion or belief, and Lord Nicholls recognised that 'it is not for the court to embark on an inquiry into the asserted belief and judge its "validity"'.[43] Lord Walker agreed that 'in matters of human rights the court should not show liberal tolerance only to tolerant liberals'.[44] The House of Lords accepted uncritically that the parents were manifesting their beliefs when they authorised a child's school to administer corporal punishment:[45]

> 'In the present case the essence of the parents' beliefs is that, as part of their proper upbringing, when necessary children should be disciplined in a particular way at home and at school. It follows that when parents administer corporal punishment to their children in accordance with these beliefs they are manifesting these beliefs. Similarly, they are manifesting their beliefs when they authorise a child's school to administer corporal punishment. Or,

[43] *Williamson*, paragraph 22.

[44] *Williamson*, paragraph 60. The Strasbourg judgments in *Refah Partisi (The Welfare Party) v Turkey* and *Şahin v Turkey* seem to suggest that there should be no tolerance for those who are intolerant, and no freedom for those who do not respect the freedoms of others; but this view has been rightly criticised: see M. EVANS, 'Believing in Communities, European Style' in N Ghanea (ed), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Martinus Nijhoff Publishers, Leiden & Boston 2004), 133-155, at 153-154; and K. BOYLE, 'Human Rights, Religion and Democracy: The Refah Party Case' (2004) 1(1) *Essex Human Rights Review* 1, at 12-14.

[45] *Williamson*, paragraphs 36-37. The rights of the parents (but not of the teachers) under the Protocol were also engaged.

> put more broadly, the claimant parents manifest their beliefs on corporal punishment when they place their children in a school where corporal punishment is practised. Article 9 is therefore engaged in the present case in respect of the claimant parents'.[46]

The House of Lords relied on the distinction established by the European Commission on Human Rights in *Arrowsmith v United Kingdom*.[47] In this case the Commission set up an important test to distinguish a 'practice' which is a manifestation of a religion or belief (falling under the protection of Article 9), from the broad range of actions which are merely motivated or inspired by them (not falling under the protection of Article 9). A direct link is needed between the belief and the action, and this has come to be interpreted as a 'necessity test'. The requirement is one of causal proximity. Strasbourg had been cautious in its approach, focusing on those elements of observance and ritual which are central to the lives of believers, rather than on activities that are merely motivated by the religious beliefs.[48]

The House of Lords was less restrictive than Strasbourg. Lord Nicholls said: 'I do not read the examples of acts of worship and devotion given by the European Commission [...] as exhaustive of the scope of manifestation of a belief in practice'.[49] This raises the question whether the distinction between manifestation and motivation is tenable. Shifting the discussion to the issue of justification is to be welcomed because this is the where the real battleground where the dispute must be addressed as a matter of social policy and jurisprudence.

The House of Lords then examined whether the restriction was justified under Article 9(2). After finding that the interference was prescribed by law, and was aimed at protecting children and promoting their wellbeing,[50] it found that the restriction on parental rights was not disproportionate:

> 'the legislature was entitled to take the view that, overall and balancing the conflicting considerations, all corporal punishment of children at school is undesirable and unnecessary and that other, non-violent means of discipline are available and preferable. On this Parliament was entitled, if it saw fit, to lead and guide public opinion. Parliament was further entitled to take the view that a universal ban was the appropriate way to achieve the desired end. Parliament was entitled to decide that, contrary to the claimants' submissions, a universal ban is preferable to a selective ban which exempts schools where the parents or teachers have an ideological belief in the efficacy and desirability of a mild degree of carefully-controlled corporal punishment [...] Parliament was entitled to take this course because this issue is one of broad social policy. As such it is pre-eminently well suited for decision by Parliament'.[51]

[46] *Williamson*, paragraph 35.
[47] Application 7050/75 (1978).
[48] M. EVANS, above, at 138.
[49] *Williamson*, paragraph 32.
[50] *Williamson*, paragraphs 48-49.

Lord Nicholls identified the conflict between parents and the State. He found that there was large support for the ban on corporal punishment, drawing on parliamentary debate, a number of reports in England, and ECHR caselaw, therefore Parliament was entitled to legislate on the issue. Baroness Hale outlined the issue from the perspective of children's rights and differed from the classic human rights approach adopted by Lord Nicholls. She said:

> 'This is, and has always been, a case about children, their rights and the rights of their parents and teachers. Yet there has been no-one here or in the courts below to speak on behalf of the children. No litigation friend has been appointed to consider the rights of the pupils involved separately from those of the adults. No non-governmental organisation, such as the Children's Rights Alliance, has intervened to argue a case on behalf of children as a whole. The battle has been fought on ground selected by the adults. This has clouded and over-complicated what should have been a simple issue'.[52]

She argued that the essential question had always been 'whether the legislation achieves a fair balance between the rights and freedoms of the parents and teachers and the rights, freedoms and interests, not only of their children, but also of any other children who might be affected by the persistence of corporal punishment in some schools'.[53] Strasbourg has already acknowledged in *Martins Casimiro and Cerveira Ferreira v Luxembourg*,[54] and *Çiftçi v Turkey*,[55] that when there is a conflict between the parents' right to respect for their religious convictions and the child's right to education, the interests of the child prevail. Accordingly, with 'such an array of international and professional support, it is quite impossible to say that Parliament was not entitled to limit the practice of

[51] *Williamson*, paragraphs 50-51.
[52] *Williamson*, paragraph 71.
[53] *Williamson*, paragraph 74.
[54] Application 44888/98 (1999).
[55] Application 71860/01 (2004).

corporal punishment in all schools in order to protect the rights and freedoms of all children'.[56]

There are problems with the approach adopted by Baroness Hale. Instead of being what she calls 'a simple issue', she makes it more complicated by re-characterising it as involving children's rights. One could argue that Lord Nicholls' approach is the simpler because it represents a straightforward claim between two competing views of the child's best interests – the State and the parents. In comparison with the lengthy – and at times contradictory – judgments in the Court of Appeal, the relative brevity and the clarity of the speeches in the House of Lords are welcome. In particular, the Law Lords used the framework of Article 9 overtly and comprehensibly, paying careful attention to freedom of religion and belief. The House of Lords' reasoning was clear, and it was only at the stage of the justification of the restriction that it found in favour of the State rather than the individual.

3. *The Muslim Veil in Schools*

In *R (on the application of Begum) v Headteacher and Governors of Denbigh High School*,[57] Shabina Begum, a Muslim, stopped attending Denbigh High School when the school refused to allow her to wear the jilbab,[58] which she described as the only garment that met her religious requirements since it concealed the contours of the female body, including the shape of her arms and legs.[59] At first instance,[60] Bennett J gave little prominence to Begum's alleged Article 9 right to manifest her religion by wearing the jilbab. He held that although her refusal to respect the school uniform policy was 'motivated by religious beliefs', there had been no interference with her Article 9(1) right since even if Begum had been excluded (which he held she was not) she would have been 'excluded for her refusal to abide by the school uniform policy rather than her beliefs as such'.[61]

[56] *Williamson*, paragraph 86.

[57] [2006] UKHL 15, [2006] 2 WLR 719.

[58] An item of clothing that was variously described by the House of Lords as 'a long coat-like garment'; 'a long shapeless back gown'; and 'a long shapeless dress ending at the ankle and designed to conceal the shape of the wearer's arms and legs': [2006] UKHL *per* Lord Bingham at para 10, Lord Hoffmann at para 46 and Lord Scott at para 79.

[59] See the Court of Appeal judgment of Brooke LJ, [2005] EWCA Civ 199 para 8 and 14.

[60] [2004] EWHC 1389.

[61] See paras 72-74.

The Court of Appeal judgment reversing the decision of Bennett J was subject to much academic criticism.[62] The flaw was not the treatment of Article 9(1), but rather the application of Article 9(2). The Court of Appeal followed Strasbourg jurisprudence to hold that Article 9(1) was engaged but, in deciding that the limitation of the right was justified under Article 9(2), Brooke LJ's interpretation of the Strasbourg jurisprudence was mistaken.[63] Rather than deciding whether the limitation could be justified as being necessary in a democratic society, he outlined the decision-making structure which the school should have used since, on his findings, the onus lay on the school to justify its interference with the Convention right.[64] This is unsupportable. Whilst courts apply such a procedural test in judicial review of decisions of public authorities, there is nothing in the Human Rights Act, the ECHR or Convention jurisprudence requiring public authorities to adopt a proportionality approach to the structuring of their own decision-making.[65]

Although the subsequent House of Lords' decision[66] was therefore welcome in that it corrected the Court of Appeal's overly formulaic approach to Article 9(2), and held that there was no breach of Article 9, the majority of their Lordships repeated and compounded an error originally made by Bennett J in relation to Article 9(1).[67] Lords Bingham of Cornhill, Hoffmann and Scott of Foscote held that there had been no interference with Begum's rights under Article 9(1) but their confused, and not always consistent, understanding of Convention case law evidences defective reasoning: Lord Scott even spoke of an Article 9(2) right to manifest one's religion.[68]

Their Lordships adopted the 'specific situation' rule and applied it as a gateway as if it had general effect.[69] Lord Bingham quoted selectively

[62] [2005] EWCA Civ 199. See, for example, T. POOLE, 'Of Headscarves and Heresies: The *Denbigh High School* Case and Public Authority Decision Making under the Human Rights Act' [2005] *Public Law* p.685.

[63] POOLE, above, p 689-690.

[64] Paras 75-76.

[65] POOLE, above, p 689-690.

[66] [2006] UKHL 15, [2006] 2 WLR 719.

[67] For a detailed analysis of this decision, see M. HILL and R. SANDBERG, 'Is Nothing Sacred? Clashing Symbols in a Secular World' [2007] *Public Law* 488-506.

[68] Para 85. This is erroneous in that the right is contained in Article 9(1); Article 9(2) simply contains the limitations to the exercise of the right.

[69] As discussed above, the 'specific situation' rule is derived from and has been elucidated by the European Court of Human Rights' determinations in the cases of *Dahlab v Switzerland* and *Sahin v Turkey*.

from numerous Strasbourg and domestic cases on the 'specific situation' rule but omitted to mention references to the caveats to the rule. No reason was given why the 'specific situation' rule ought to be applied to school pupils. Lord Bingham seemed to think that the application of Strasbourg case law to university students was justification enough, but this is to ignore the fact that unlike a university student, a school pupil has not voluntarily accepted an employment or role which might legitimately limit his Article 9 rights. In state schools there is no contractual relationship between school and pupil: thus the argument of waiver or voluntary surrender of rights can be of no application

The reasoning in the opinions of Lord Nicholls and Lady Hale (differing from the other three Law Lords but concurring in the ultimate disposal of the appeal) is correct in law and consistent with Strasbourg jurisprudence in that they recognised that Begum's right under Article 9 had been engaged but that this was justified under Article 9(2). However, the minority speeches did not explain why their approach was the consistent interpretation of Strasbourg jurisprudence. Lord Nicholls noted that he would prefer to state that there was interference with Article 9 and then to consider whether that interference was justified since this would require the public authority to 'explain and justify its decision'.[70] However, his Lordship did not find it necessary fully to elucidate this approach, which, had it been adopted by the whole House, would have produced a more satisfactory analysis.[71] The restriction of Article 9(1) by the majority was unnecessary given that legitimate limitations on the right are (and in this instance were) routinely justified under Article 9(2).[72]

IV. General Trends in the Lower Courts

In a common law jurisdiction such as the United Kingdom's, it is often possible to identify certain general trends in the lower courts. However, in view of the fact that the Human Rights Act has been in force for just seven years, and that it has not been consistently applied even in the House of Lords, the articulation of such trends can be, at best, only tentative.

[70] Para 41. Albeit not in the formulaic manner which had influenced the flawed reasoning in the Court of Appeal, discussed above.

[71] It is significant that Lords Bingham and Hoffmann still felt it necessary to consider Article 9(2) in depth anyway.

[72] For a more detailed analysis see M. HILL and R. SANDBERG, 'Muslim Dress in English Law: Lifting the Veil on Human Rights' (2006) Vol 1 *Derecho y Religión* 302-328.

1. *Religious Dress*

The decision and reasoning in *Begum* was held to constitute 'an insuperable barrier' to the claim for judicial review in *R (on the application of X) v The Headteacher of Y School.*[73] The claimant, a 12 year old Muslim girl, refused to attend school on the basis that the school would not permit her to wear a niqab veil, which covered her entire face save her eyes. Silber J held that there had been no interference with the claimant's Article 9 rights and, even if there had been, it would have been justified under Article 9(2). He implicitly accepted Lord Bingham's assertion that the 'specific situation' rule applied in the case of schools. The weakness of the approach of English law post-*Begum* was underlined by Silber J's comments commending the school on having in place a well-thought out policy, because the proper approach makes the quality of the policy irrelevant. Provided that the right to manifest can be exercised elsewhere, it seems that the court will be entitled, or even obliged, to find that there has been no interference. By giving general effect to a filtering device which has hitherto been used only by Strasbourg in a limited class of specific cases, and, in consequence, closing down the reach of Article 9(1), the domestic courts are applying too broad an approach.[74] This seems contrary both to the spirit of the ECHR as previously interpreted by the House of Lords in *Williamson*[75] and by the European Court of Human Rights in Strasbourg.[76] Collins notes that recent years have witnessed a 'profound reorientation' in interpretation towards an 'integrated approach' which 'involves an interpretation of Convention rights with reference to the rights contained in social and economic charters'.[77]

More recently, in *R (on the application of Playfoot) v Governing Body of Millais School*,[78] a student of Millais School, sought judicial review of the decision of the school's governing body not to permit her to wear a

[73] [2007] EWHC 298, [2007] All ER (D) 267, Silber J.

[74] The admirable analysis of Article 9(2) by SILBER J is entirely *obiter*, he having determined that Article 9(1) was not engaged in the first place.

[75] *R v Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15, [2005] 2 AC 246.

[76] Strasbourg has recognised that, 'The State's role as the neutral and impartial organiser of the practising of various religions, denominations and beliefs is conducive to religious harmony and tolerance in a democratic society': *Refah Partsi v Turkey* (41340/98) (31 July 2001).

[77] H. COLLINS, 'The Protection of Civil Liberties in the Workplace' (2006) 69(4) *Modern Law Review* p. 619-643.

[78] Michael Supperstone QC, sitting as a Deputy High Court Judge, (July 2007, unreported).

'purity' ring as a symbol of her Christian commitment to celibacy before marriage. She maintained that the school's prohibition of jewellery breached her right under Article 9 of the European Convention on Human Rights to manifest her religious belief of abstinence before marriage through the wearing of a ring, known as the 'silver ring thing'.[79] The court found there to be no manifestation of belief in this instance as the wearing of the ring was not 'intimately linked' to her belief in chastity before marriage. The applicant conceded that she was under no strict obligation to wear the ring but merely felt compelled to wear it. The judge held that there was no interference with the applicant's Article 9 right as she voluntarily accepted the uniform policy, the prohibition of jewellery being well known.

2. *Sacred Symbols*

In *R (on the application of Swami Surayanda) v The Welsh Ministers*,[80] The Welsh Assembly Government appealed a decision quashing a decision of the Welsh Minister of Sustainability and Rural Development which ordered the slaughter of a bullock (Shambo), kept by the Community of the Many Names of God at Skanda Vale Temple, Wales.[81] The Court of Appeal allowed the appeal. The Community comprised a Hindu sect at the temple complex in rural west Wales where Shambo was installed as the temple bullock and revered as sacred. The Community hold as a fundamental tenet of their beliefs the sanctity of all life; thus, the slaughter of Shambo would constitute a sacrilegious act and a serious desecration of the temple and its beliefs. Shambo tested positive for bovine tuberculosis in 2007 and the Minister made arrangements for Shambo's slaughter, which the Community sought to challenge on the basis that it infringed the Community's right to freedom of religion under Article 9 of the European Convention on Human Rights.

Lord Justice Pill categorised the litigation as 'the clash between the duties of the agriculture and health authority and the rights of the members of the Community to practise and manifest their religious beliefs and practices'. Applying Lord Bingham of Cornhill's analysis in *R (on the application of Begum) v Governors of Denbigh High School*,[82] the Court of Appeal was required to make an objective value judgement assessing the proportionality of the decision, which involved a careful analysis of expert evidence to determine whether interference with the Article 9 right was justifiable under the qualifications to the right: was the action prescribed by law? What was the legitimate objective? Was the proposed action proportionate in scope and effect to the achievement of that objective? The court considered the success of the surveillance and slaughter policy elsewhere in the EU, the need for post mortem tests to validate the infection of the disease and the subsequent difficulty in risk assessment for the rest of the herd, and the difficulty in providing facilities for biohazard free isolation of infected animals to be important considerations as to why the alternatives to slaughter, such as isolation, could not be justified.

3. *Religious Discrimination*

Since 2003, discrimination on the grounds of religion or belief has been unlawful. The Employment Equality (Religion or Belief) Regulations 2003[83] and Part 2 of the Equality Act 2006[84] outlaw direct and indirect discrimination and victimisation on the grounds of religion or belief in relation to employment, vocational training and the provision of goods, facilities and services.[85] Harassment on the grounds of religion or belief is outlawed only in relation to employment and vocational training.[86]

The effect of the new religious discrimination law upon this jurisprudence has, to date, only been tested in certain employment tribunals and occasionally in the Employment Appeal Tribunal.[87] Nevertheless, impor-

[79] The SRT Group, which operates as a not-for-profit corporation, was founded in the USA as a means of educating mainly teenagers on the benefits, spiritual or otherwise, of sexual abstinence until marriage through evangelical Christian messages. On successful completion of the 'SRT434' educational programme candidates are offered the chance to purchase a silver ring as an outward sign of their inner commitment, but with no obligation to wear the ring. See http://www.silverringthing.org.uk/FAQShow.asp?ID=14.

[80] Court of Appeal, July 2007.

[81] For the first instance judgment decided on 16 July 2007, see *R (on the application of Swami Suryananda) v The Welsh Ministers* [2007] EWHC 1736 (Admin).

[82] [2007] 1 AC 100, at paragraph 30.

[83] SI 2003/1660. See N. De Marco, *Blackstone's Guide to the Employment Equality Regulations 2003* (Oxford University Press, 2004).

[84] See Sandberg, above.

[85] For definitions of these terms see Equality Act 2006, s45 and Equality Act 2006: Explanatory Notes p. 20.

[86] For a definition see reg 5 of the Employment Equality (Religion or Belief) Regulations 2003.

[87] Such decisions do not serve as binding precedent for subsequent cases but give an impression of the early effect of the new law. *Secretary of State for Trade and Industry v Cook* [1997] ICR 288 at 292, per Morison P. See *Halsbury's Laws of England*, (4th ed) Vol 16: Employment (2000) para 684.

tant issues have arisen in relation to religious dress and symbols.[88] The early case law indicates that whilst employment tribunals employ a wide definition of religion, they use a narrow definition of belief.[89]

The Employment Appeals Tribunal has confirmed that religious discrimination cases follow the two-stage process outlined in *Wong v Igen Ltd (formerly Leeds Careers Guidance).*[90] The applicant has to prove facts from which the tribunal could conclude that unlawful discrimination has occurred before the burden of the proof passes to the respondent.[91] To date, claims relating to religious dress or symbols have been unsuccessful on the grounds that the applicant has not made such a case.[92] There have been three such cases at employment tribunal level: *Ferri v Key Languages Limited,*[93] *Mohmed v West Coast Trains Ltd,* [94] and *Azmi v Kirklees Metropolitan Council.*[95] In *Ferri,* for example, the Tribunal decided that a Roman Catholic who was told not to wear certain necklaces at work as they were rather loud and overtly religious, but who was dismissed as a result of alleged poor performance, had not established a *prima facie* case, given the cogent evidence that the Applicant was sacked for her poor performance and not her religious beliefs. Read together with *R (on the application of X v The Headteacher of Y School,*[96] *Azmi* may suggest the beginning of a trend whereby Article 9 is interpreted more strictly in English courts than it is in Strasbourg. It is a matter of concern that the general application erroneously given by the House of Lords to the Strasbourg 'specific situation' rule seems to be becoming the false orthodoxy of employment tribunals.

[88] R. SANDBERG, 'Flags, Beards and Pilgrimages: A Review of the Early Case Law on Religious Discrimination' (2007) 9 Ecc LJ 87.

[89] It has been decided, for example, that a rule banning the stitching of an American flag upon a reflective waistcoat did not support a claim for religious discrimination, despite the Applicant's insistence his loyalty to his native country amounted to a belief: *Williams v South Central Limited* ET, Case Number: 2306989/2003 (16 June 2004). See also *Baggs v Fudge* ET, Case Number: 1400114/2005 (23 March 2005) and compare *Hussain v Bhuller Bros* ET, Case Number: 1806638/2004 (5 July 2005), as discussed by SANDBERG, n 88 above.

[90] [2005] EWCA Civ 142.

[91] *Mohmed v West Coast Trains Ltd* EAT, (2006) WL 25224803 (30 August 2006).

[92] For discussion of successful cases on other employment issues, see SANDBERG, n 88 above.

[93] ET, Case Number: 2302172/2004 (12 July 2004).

[94] ET, Case Number: 2201814/2004 (12-14 October 2004; 20 May 2005); EAT, (2006) WL 25224803 (30 August 2006).

[95] ET, Case Number: 1801450/06 (6 October 2006). Affirmed on appeal.

[96] [2007] EWHC 298, [2007] All ER (D) 267, Silber J (discussed above).

4. *Sexual Orientation Discrimination*

In *R v Secretary of State for Trade and Industry ex parte Amicus and others,* Mr Justice Richards was asked to consider challenges brought by 7 public sector unions in relation to several of the regulations in the Employment Equality (Sexual Orientation) Regulations 2003. The challenges were targeted against regulations that allowed exceptions to the general prohibition against discrimination on the grounds of sexual orientation where employment or vocational training is for the purposes of an organised religion.[97] The Judge was being asked to rule on the correct balance to be struck between these two competing rights: the right of non-discrimination on the grounds of sexual orientation and the right to manifest one's religion or beliefs.

At the core of the case were submissions put evangelical Christian organisations who submitted that their ability to hold their religious beliefs and to carry on their teaching and practices would be undermined if forced to employ persons whose sexual practices and beliefs about those sexual practices were at odds with their own beliefs, teachings and practices. It was argued that employees working for Christian organisations were expected to behave in accordance with a Christian ethos and belief. Employing those who did not share this ethos would fatally undermine such an organisation's ability to achieve its objectives.

The Judge held that the exception was intended to be a very narrow one and, on its proper construction, was very narrow, affording an exception only in very limited circumstances. He said that the tests set out were objective not subjective and were going to be far from easy to satisfy in practice. He held it unlikely that this exception would apply to the various situations put forward on behalf of the Applicant unions to illustrate their concerns, such as a church unwilling to employ a homosexual man as a cleaner.

In *Reaney v Bishop of Hereford,*[98] the claimant had applied for the post of Diocesan Youth Officer, was short listed and interviewed for the post. In his application and in the interview he disclosed that he was homosexual and had been in a same gender relationship which had recently ended and did not intend to enter into a fresh one. He was unanimously recommended as the best candidate but the Bishop considered the claim-

[97] For a full discussion see L. SAMUELS, 'Sexual Orientation Discrimination and the Church: Balancing Competing Human Rights' (2005) 8 Ecc LJ 74.

[98] The decision in *Reaney v Bishop of Hereford* was handed down in July 2007. See (2008) 10 Ecc LJ 131.

ant's lifestyle a serious impediment to the post and he was not offered the post. The claimant claimed he had been harassed and discriminated against on account of his sexual orientation. The tribunal considered that the claimant would not have been required to convince the Bishop of his future intentions to the sort of standard that the Bishop required had he not disclosed his sexual orientation. The Bishop had therefore discriminated directly against the claimant.

A recent judicial review considered subsequent Northern Ireland regulations,[99] which outlaw direct and indirect discrimination and victimisation on grounds of sexual orientation in the provisions of goods and services. The regulations have various exemptions, including an exemption for 'organisations relating to religion or belief'.[100] Both provide a purposive definition of the term 'organisations relating to religion or belief'[101] and state that such organisations may lawfully restrict the provision of goods and services and membership or participation in the organisation on one of two bases. The first is 'if it is necessary to comply with the doctrine of the organisation', the second is 'so as to avoid conflicting with the strongly held religious convictions of a significant number of the religions followers'. Both regulations state that this exemption is lost if organisation makes provision with and 'on behalf of a public authority under the terms of a contract'.[102]

The enactment of the Northern Ireland Regulations proved controversial.[103] A number of Christian organisations and charities[104] sought a judicial review of the regulations.[105] In relation to procedure, Mr Justice Weatherup noted that although the consultation period was the shorter than that usual, it was adequate in the circumstances. However, he held that the absence of proper consultation on the harassment provisions, coupled by concern as to their extended reach, meant that the harassment provisions in the Regulations would be quashed.

On the substantive objections, Weatherup J did not accept any generalised complaints concerning the Regulations. In relation to Article 9, he noted that although the right to manifest religion or belief was engaged[106] and the introduction of the Regulations would result in 'instances of material interference' with the right,[107] these may be justified under Article 9(2): the Regulations were 'prescribed by law', had the legitimate aim of the protection of the rights of others and were proportionate.[108]

5. *Differentiation in the Right to Marry*

The Home Office introduced a scheme whereby a person who was not a citizen of the European Economic Area need a certificate of approval from the Secretary of State before he or she could marry. The policy operated by the Home Office was to refuse a certificate to anyone who did not have a valid right to enter or remain in the United Kingdom with at least three months unexpired. The issue for the court was whether this scheme was compatible with Article 12 of the European Convention for Human Rights – the right to marry.

The Court of Appeal concluded that although the legislative object of preventing sham marriages entered into so as to avoid immigration control was sufficiently important to justify limiting the Article 12 right, the scheme as it operated was not rationally connected to that legislative aim and it therefore failed on the grounds of proportionality. The Court of

[99] Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 SI 439.

[100] Equality Act (Sexual Orientation) Regulations 2007, reg 14; Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, reg 16.

[101] Compare this with the regulations prohibiting discrimination in relation to employment where exemptions are addressed to 'organised religions': see Sex Discrimination Act 1975, s 19 and Employment Equality (Sexual Orientation) Regulations 2003, reg 7(3). The definition of an 'organisation relating to religion or belief' differs from that used in religious discrimination in two respects: the fifth purpose of such an organisation ('to improve relations, to maintain good relations, between persons of different religions or beliefs') is omitted and it is also stated that the section does not apply to educational organisations: compare Equality Act 2006, s 57.

[102] This explains why the Roman Catholic objection to the Regulations focussed specifically on the need for an exemption for Catholic Adoption Agencies.

[103] In January 2007, after the Regulations had come into effect, Opposition peer Lord Morrow, moved a debate in the House of Lords (unsuccessfully) praying that they be annulled: House of Lords Hansard, 9 Jan 2007: Column 179.

[104] Namely: the Christian Institute, the Reformed Presbyterian Church in Ireland, the Congregational Union of Ireland, the Evangelical Presbyterian Church of Ireland, the Association of Baptist Churches in Ireland, the Fellowship of Independent Methodist Churches and Christian Camping International (UK) Limited.

[105] *The Christian Institute & Ors, Re Application for Judicial Review* [2007] NIQB 66.

[106] Since the orthodox Christian belief that the practice of homosexuality is sinful 'is a long established part of the belief system of the world's major religions' and 'is not a belief that is unworthy of recognition': at para 50.

[107] This generous interpretation of the Article 9 (1) right goes against the trend of the recent cases concerning religious dress and symbols in England and Wales: see M. HILL and R. SANDBERG, 'Is Nothing Sacred? Clashing Symbols in a Secular World' [2007] *Public Law* 488-506 and R. SANDBERG, 'Controversial Recent Claims to Religious Liberty' (2008) *Law Quarterly Review* (forthcoming).

[108] See R. SANDBERG, 'Gods and Services: Religious Groups and Sexual Orientation Discrimination' (2008) 10 Ecc LJ (forthcoming).

Appeal dismissed the appeal and affirmed the decision of Mr Justice Silber.[109] Silber J had described the discriminatory nature of the scheme (in not applying to Anglican marriages) as probably the most important reason for his decision. The Court of Appeal was denied the opportunity of addressing the question of the engagement of Art, because the Secretary of State told the court that 'legislation would be passed in due course to remove the discriminatory aspects of the present scheme'.

At first instance Silber J had stated that discrimination on grounds of religion requires very weighty reasons to justify it. He considered that the regime introduced by the Home Office constituted direct discrimination as the group being targeted by that scheme as requiring certificates of approval comprises those who because of their religious convictions or lack of them are unable or unwilling to marry pursuant to the rites of the Church of England while those who wish to marry pursuant to those rites are exempted from the scheme. He was satisfied that there was no evidence which explained why non-Anglican religious ceremonies should be treated differently from marriages pursuant to Anglican rites, although he concluded that 'there may be cases where for historical reasons, some special treatment of the established religion may be justifiable but that is not the justification relied on in this case by the Secretary of State'.[110]

Conclusions

In a study of this type it is difficult to postulate meaningful conclusions in relation to a jurisprudence which remains in its infancy. For the sake of discussion, I venture the following:

1. The time since the coming into force of the Human Rights Act 1989 has brought religious liberty more assertively into the public domain;

2. However, the academic debate lacks pragmatism whilst judicial decisions are yet to demonstrate a consistency of approach;

[109] *R(Baiai, Trzcinska, Bigoku & Tilki) v Secretary of State for the Home Department* [2007] 1 WLR 693, 2006] EWHC 823 [Admin], 10 April 2006, Silber J.

[110] A case is pending in the House of Lords which will consider whether the denial of an exemption to the Mormon church of a local tax exemption enjoyed by the Church of England and other religions whose worship is public, amounts to a violation of Articles 9 and 14 when read together. See the judgment of the Court of Appeal, sought to be impugned in *Church of Jesus Christ of Latter-day Saints v Gallagher* (2007) 9 Ecc LJ 241, CA, Mummery, Jacob and Neuberger LJJ. For reasons which are not obvious, the ECHR points were not argued in the lower courts.

3. The courts have made some unbelievably bad decisions, not least the Court of Appeal decisions in *Aston Cantlow* and *Begum*, but in both these instances the matter has been corrected in the House of Lords;

4. The courts have engaged in some remarkably ill-informed discussion, particularly the Court of Appeal in *Williamson*, although again the House of Lords has demonstrated greater sophistication in its argumentation;

5. A more mature analysis seems now to be developing thanks largely to the House of Lords in *Williamson* and *Begum*, but assisted by the contributions of academics;

6. A generous interpretation of 'manifestation' should be adopted so as to avoid the courts the unedifying task of assessing the validity of religious beliefs and practices;

7. The following approach ought to be of universal application:

(1) is there a relevant Convention right which qualifies for protection under Article 9(1)?

(2) has it been violated?

(3) was the interference prescribed by law?

(4) did the interference have a legitimate aim?

(5) was the interference necessary in a democratic society for the purpose of achieving that aim?

If so, the interference is justified under Article 9(2) and there is no infringement of the Convention right to freedom of religion. If not, the breach will be proved.

8. Some courts, however, are either not following this approach or are adopting an overly formulaic and legalistic approach in their analysis of the processes of individual decision makers.

9. The judiciary is coming much more into the political arena and decisions are becoming overtly policy-led. This leads to an unwelcome level of arbitrariness and a lack of predictability. The purposive sociology of Baroness Hale may be inspiring but it does little to assist the legal profession in giving meaningful advice to clients.

10. The Church of England might be considered to be somewhat naïve: it nearly threw away its own freedom of religion by not challenging the *Aston Cantlow* decision in the Court of Appeal. Even though the Church of England is an established church, it is not an organ of government. Any provision which appears to give preferential treatment to the Church of England will be regarded as discriminatory and a violation of Article 14.

MALCOLM D. EVANS

SYNTHESIS REPORT: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND DOMESTIC COURTS. THE CASE OF FREEDOM OF RELIGION

This paper offers a series of reflections arising out of the various Country Reports which are reproduced elsewhere in this volume. It does not seek to offer a 'summary' or a 'synthesis' of those Reports in the more traditional sense since this would add little to what a direct reading of them would convey. Rather than duplicate what has already been achieved, this paper seeks to do something rather different. The Country Rapporteurs have offered their perceptions and insights regarding the manner in which their respective domestic jurisdictions are now responding to the way that the freedom of religion and belief is currently being engaged with by the European Court of Human Rights. This paper seeks to build on this by offering a number of more general and overarching reflections which arise from the manner in which the approach of the Court to Article 9 of the ECHR has been engaged with by domestic jurisdictions. To that extent, this should perhaps be seen as more of an 'idiosyncratic', rather than a synthesis, report and should be seen as a series of personal impressions arising from the contents of the national reports, rather than an analytic overview of them.

I. Identifying the Key Point of Focus

A first reflection concerns the question of why this topic is considered sufficiently significant to warrant the focus that is being placed upon it. Whilst there has long been interest in the way in which domestic jurisdictions have received and interacted with the European Convention on Human Rights in general[1], there has previously been little interest in how domestic jurisdictions have responded to the freedom of religion or belief

[1] See, for example, A. DRZEMCZEWSKI, *The European Human Rights Convention in Domestic Law: A Comparative Study* (Oxford, Clarendon Press, 1983); R. BLACKBURN, and J. POLAKIEWICZ, *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford, Oxford University Press, 2001).

as an internationally protected human right. One of the reasons for this surely must lie in the fact that it is only in the last ten to fifteen years that the Court itself has begun to engage with Article 9 in a more systemic fashion,[2] the experience before this being limited to a relatively small number of decisions of the old European Commission on Human Rights which were highly context specific and which failed to provide an adequate platform against which to develop a more general jurisprudence. This is now changing, but one of the consequences of this is that there is still a broad range of possibilities open to states when it comes to determining how they are to engage with the freedom of religion and belief. This diversity is reflected in the various country Reports which present a remarkably variegated picture of what this exercise is intended to achieve and indicates the complexity of the task. Perhaps the major 'fault line' which runs through the Reports is whether domestic courts are interested in Article 9 as an obligation per se, and so are engaging with Article 9 as a matter of 'domestic obligation' or whether it is being engaged with as a means to assist in the resolution of disputes involving religious issues – as a source of, let us call it, 'external' guidance to the resolution of internal tensions?

II. Freedom of Religion and Belief or Article 9?

Perhaps the single most important means of addressing this question is to consider whether the chief point of interest lies in the manner in which domestic courts are responding the question of freedom of religion or belief per se, or whether it lies in the manner in which they are responding to the freedom of religion or belief as provided for in Article 9 of the ECHR and as interpreted by the convention organs? These are not the same thing, and whilst is it true that from a formal perspective the Reports are focussing on the latter question, it is clear that for many, it is the former which is the more important. At the very least, it seems that the question of how domestic courts respond to Article 9 of the ECHR cannot be considered in isolation from the broader question of how those systems engage with the freedom of religion or belief. What this suggests is that whilst the manner in which international treaty obligations in general – and international human rights obligations in particular – are received into the domestic legal system and used by domestic courts

[2] The first case to be determined by the Court on the basis of Article 9 was *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, 17 *EHRR* 397, para 31.

provides an essential element in an understanding of the domestic response to issues bearing upon the freedom of religion or belief, it is not determinative of the question. It is only when the outcome suggested by that formal relationship maps onto the domestic perceptions of the appropriate outcome that there is a high degree of reception. In short, it is not so much that domestic courts have recourse to the approach to Article 9 as set out in the ECHR jurisprudence and allow this to shape their own judicial output; rather, it is that they are prepared to draw on that jurisprudence to the extent that it either supports, or is compatible with, the dominant domestic conceptions. This places a high premium on the substantive approach taken to the freedom of religion or belief by the European Court, and there is evidence of a discernable shift in the manner in which it had been handling questions regarding Article 9 in recent times, and this has been largely in response to emergent domestic concerns rather than due to the development of any pan-European consensus or approach on the subject.[3] This positive reflexivity may go some considerable way to explain the willingness of at least some domestic jurisdictions to embrace the work of the Court in a more fulsome fashion than might otherwise have been the case.

III. Freedom of Religion and Belief: the Broader Context

From the perspective of international law more generally, the ECHR is a very important element in the framework of international human rights obligations. Moreover, Article 9 exemplifies what is by and large a common approach to the protection of freedom of religion or belief as a human right across the range of international human rights instruments[4] – but it is just that: an element. There are, however, other means of protecting such rights.

[3] See generally M. Evans, 'Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions' in P. Cane, C. Evans, and Z. Robinson, (eds) *Law and Religion in Theoretical and Historical Context* (Cambridge, Cambridge University Press, forthcoming).

[4] Both the structure and wording of Article 9 derive from Article 18 of the UDHR and which also formed the model for Article 18 of the ICCPR and so this congruence is should come as no surprise. Somewhat different wording is used in both the Inter-American Convention and the African Convention but the essence of the approach remains the same. It is only in documents such as the Arab Charter that the divergences from this model are sufficiently significant to amount to different conceptual approach. See further Malcolm D Evans, 'Human Rights, Religious Liberty and the Universality Debate' R. O'Dair and A. Lewis, *Law and Religion* (Oxford, Oxford University Press, 2001)

1. *Within the Human Rights Framework*

Other Rights within the ECHR: As the Reports all make clear, Article 9 is not the only article within the European Convention which is relevant to the enjoyment of the freedom of religion or belief. Indeed, in many situations, it is almost a matter of 'accident' whether Article 9 is at issue. The substance of many of the most well-known cases concerning the freedom of religion or belief might have come before the Court in a different guise had the underlying factual situation played out differently. This is well illustrated by the cases which raise a 'clash' between Article 9 and Article 10 (freedom of expression). For example, in the case of Otto Preminger v. Austria[5] the focus of the case was on the freedom of expression of the owners of a private cinema who had been prevented from screening a film as a result of the Austrian authorities having already chosen to intervene to protect religious sensibilities at the expense of the 'non religious'. Had they not done so, the substance of the matter would have been more 'Article 9' in nature, focussing on the issue from the perspective of believers who claimed that their beliefs had been offended to the point which engaged the responsibilities of the authorities under that article. Another area in which there is considerable scope for 'cross-over' concerns Article 11 (the Freedom of Assembly). For example, it is increasingly difficult to predict whether cases concerning the registration of religious communities will be addressed under Article 9 or 11 is as much a matter of 'taste' than of substance.[6]

Other International Instruments.

Other international human rights treaties also provide for the freedom of religion or belief and have equal potency as a matter of international law, the most significant of which is Article 18 of the International Covenant on Civil and Political Rights. However, there are some significant conceptual differences in its overall approach and, in addition, the jurisprudence of the Human Rights Committee relating to the freedom of religion or belief is not as highly developed as that of the European Court. Moreover, the formal role of the ICCPR in the domestic arena might also be

[5] *Otto-Preminger-Institut* v. *Austria*, judgment of 20 September 1994, Series A no. 295-A, 19 *EHRR* 34.

[6] For example, the doctrine of the margin of appreciation does not appear in the jurisprudence of the HRC whereas it is a critical element in the legal reasoning of the European Court.

different from that the ECHR in some countries where both are in force as a matter of international law.[7] There is much more that can be said about the complementary – and sometimes contradictory – approaches to the freedom of religion or belief that are to be found in other human rights instruments. However, enough has already been said to illustrate the point being made, which is that if the focus on concern is the enjoyment of that freedom, then the reception of ECHR Article 9, though important, is not decisive even from an international human rights lawyer's perspective.

2. *Outside of the Human Rights Framework*

This latter point is further emphasised when one looks outside of the human rights framework to international law more generally. Broadly stated, there is nothing inevitable about 'human right's being the premier conceptual approach to the protection of religious freedom. Space does not permit, nor current purposes require, an exhaustive exploration of the topic, but it is evident that many other means have been employed over the years to address concerns relating to what we now see as the enjoyment of the freedom of religion or belief. Other means employed have included (in various contexts and with varying degrees of legitimacy and success) out-right open warfare between nations on grounds of religious difference, humanitarian intervention, diplomatic protection and regimes of minority protection. Beyond this, certain other substantive areas of international law (many of which are now seen as inextricably intertwined with human rights law) have also addressed the freedom of religion or belief from their own particular perspectives, such as international humanitarian law, international criminal law, refugee law, etc. In addition to this lies EU law, freedom of movement, migrant workers, and so on.

Once again, without going into detail, the point is clear: if one is interested religious freedoms, then there are far more influences at work that Article 9. However, and crucially, Article 9 and the interpretation placed upon it by the European Court is without doubt the dominant influence at work both internationally and at the domestic level within

[7] In the UK, for example, not only is the right of individual petition to the HRC under the ICCPR still not recognised but under the 1998 Human Rights Act it is only the obligations under the ECHR which are referenced. It is, then, understandable that the focus within the UK is firmly upon ECHR jurisprudence. It is less obvious that this should be the case elsewhere where both the ICCPR and the ECHR enjoy a similar legal status.

contracting states, and so provides an *appropriate* focus through which to address that larger question, if that is the question which is to be addressed. This is because of the prominence of the Convention system and its relatively high degree of jurisprudential development compared with its comparators. In addition, whilst other bodies of law bear upon the freedom of religion and belief, the Article 9, and the approach which it encapsulates, retains its role as the ultimate touchstone against which enjoyment of that right is to be measured within the European theatre. Whilst one has to guard against the danger of seeing the freedom of religion or belief as only a question of Article 9, or only to be realised through the structures of human rights protection, it remains the bulwark of protection and can be analysed as such.

IV. The Relevance of the Formal Status of the ECHR within the Domestic System

The Reports, and the General Report, have illustrated at length the various legal routes through which the Convention takes effect within the domestic jurisdictions we are engaging with. The point I have made above is without prejudice to the question of the formal status of the ECHR within the domestic legal situation which, though important, is not as important. For example, numerous Reports reflect in some detail on the constitutional standing of the freedom of religion or belief in their respective countries but there is comparatively little evidence presented in support of the proposition that the freedom of religion or belief *per se* receives much by way of substantive support – as opposed to rhetorical buttressing – from these provisions alone. It goes without saying that the constitutional standing of the freedom of religion and belief provides an essential conceptual starting point for the reception of the freedom into the domestic system as well as providing an essential means by which the domestic legitimacy of the legal framework and of executive and judicial activity taken thereunder can be assessed, challenged and if necessary struck down, but that process is inevitably framed by the more over- aching approach to religion and belief which that constitutional framework reflects. No contracting state party resists the *idea* that is reflected in Article 9 of the ECHR – and it is both inevitable and appropriate that the realisation of that idea is reflected in a fashion which makes sense domestically. There is, I think, little to be gained by focussing on the differing approaches taken to the reflection of the ECHR in domestic systems except to ensure that they do indeed reflect the idea in an appropriate fashion (itself an important question and field of study for comparativists, but one which will not be pursued any further here). When they do not, then that is a cause of major concern but – as many of the Reports show – the mere fact that they do does *not* mean that the protection of religion or belief is to be assured – at least, from some perspectives.

V. What Does the Reflection of Article 9 in Domestic Law Signify?

The Reports show that the ECHR in general and Article 9 in particular are reflected and utilized within domestic jurisdictions in a variety of different fashions. Whether this is weakness or a strength depends upon what is meant to be achieved by securing that domestic law does indeed reflect convention obligations. Whilst it is easy to say that the desired outcome is one of 'compliance' with the international obligation, this begs the question of what 'compliance' entails.

Is the reflection of Article 9 in domestic law meant to lead to a situation in which like situations are responded to in a like fashion across the common European 'space' to which the Convention applies? For many, the answer to this question is a clear 'yes'. Why, for example, should an individual be allowed to publically espouse a particular set of religious beliefs in one country but not in another, and all that flows on from that? Indeed, the European Court itself has gone some way to encourage such thinking. Whilst it is true that it has always accepted that there States enjoy a significant margin of appreciation in relation to Article 9, it has in recent times moved in a direction which has the potential to reduce that margin considerably by declaring that the role of the State is to be the 'impartial and neutral' organiser of religious life within the state.[8] A common obligation upon all contracting states to act in an impartial and neutral fashion would seem to invite external scrutiny – by which, in this context, is meant European level scrutiny – and this paves the way for the imposition of a high degree of uniformity in relation to even the most sensitive of questions, as the Court has done in on numerous occasions in the past[9]. But even if there was a consensus that this is indeed the

[8] E.g. 'The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society', *Leyla Sahin* v. *Turkey* [GC]. no. 44774/98, para 107, ECHR 2005; 41 *EHRR* 8.

[9] Examples would include those decisions in which the existence of legislation criminalising homosexual conduct between consenting males was found to fail the proportion-

appropriate role of the state in relation to matters of religion or belief (and this is still a matter of some debate) that consensus breaks down very quickly when the broader social implications of such as approach becomes apparent. As has already been said, the Court has been keen to stress the breadth of the margin in appreciation in cases concerning Article 9, and particularly in cases which involve questions of morality and the protection of the rights and freedoms of others. The controversy surrounding Headscarves provides a good example of its approach in such cases.[10] The Courts' decisions concerning the legitimacy of restrictions on the wearing of Headscarves in Turkish Universities[11], and by teachers in Switzerland,[12] are not considered, even by the Court, to require that similar restrictions be in place in other states parties. Indeed, the Court itself stressed that it was the particular importance that secularism has in Turkey which justified the prohibition,[13] and that those circumstances would not necessarily be as weighty a factor in other polities within the European family. Whilst it is true that judgments of this nature tend to lend succour to those in favour of such policies since they do suggest that such action has the potential to be consonant with Article 9, such conclusions are not inevitable. For example, it seems inconceivable that the European Court could conclude that a ban on wearing headscarves in UK universities could fulfill the proportionality criteria in Article 9(2) in the light of contemporary practice and current mores (although it mist be accepted that these could change over time).

It is, then, clear that the purpose of reflecting Article 9 in domestic law is not to achieve common outcomes, even in like cases. Rather, it seems that what is intended is that there be a common approach to the resolution of cases involving the freedom of religion or belief. However, for reasons already considered in the previous section, that common approach is not only masked by the nature of the legal relationship between the European Convention and a particular domestic jurisdiction in a formal sense but it is also clouded by the differing patterns of church-state relations, and differing perceptions of the role of religion in the life of the community. This might be described as the 'unarticulated perturbation' at the heart of

ality test under Article 8(2). See, for example, *Dudgeon* v. *UK*, judgment of 22 October 1983, Series A no. 59; *Norris* v. *Ireland*, judgment of 26 October 1988, Series A no. 142; *Modinos* v. *Cyprus*, judgment of 22 April 1993, Series A no. 259.

[10] See generally D. Mcgoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford, Hart Publishing, 2006).

[11] *See Leyla Sahin* v. *Turkey* [GC]. no. 44774/98; ECHR 2005; 41 *EHRR* 8.

[12] See *Dahlab* v. *Switzerland*, no. 42393/98, ECHR 2001- V.

[13] *Leyla Sahin* v. *Turkey* [GC]. no. 44774/98, paras 114-116; ECHR 2005; 41 *EHRR* 8.

the matter, and appealing to Article 9 and the freedom of religion or belief in the abstract simply does not begin the touch this far bigger and ultimately far more important question than what might be termed the 'human rights' dimension of the issue. This is not to say that the human rights dimension is not an important element within the overall equation. But just as we have already been reminded that human rights approaches are not the only approaches that can be adopted in furtherance of religious liberty, the 'human rights' dimension does not exhaust the range of legitimate influences which bear upon the role which patterns of religious thought or beliefs may play in framing the conception of the public good which is to be reflected within and respected by the legal system. The 'human rights' question which needs to be factored into that broader debate might reasonably be framed in a rather narrow fashion, and as follows: 'in the outworking of the interplay between religion and belief and the governance of society by the public authorities, are the interests of individuals regarding the holding and manifesting of their beliefs protected to the fullest degree that is consonant with that framework and are the minimum guarantees offered by Article 9 respected'?

Reflecting on the Country Reports in the light of a 'human rights' question framed in this fashion immediately reveals a difficulty: in some States the nature of that relationship is itself at issue, since the State not only seems to privilege one form of religion (which may or may not be acceptable) but does so at the expense of others, and this done in good faith since it is considered to be a faithful reflection of the political will of the community as a whole. It is in situations of this nature that one might except to find the most direct use of the European Convention and of Article 9 language, as individuals (and religious communities) drew on these powerful tools in their struggle to assert their basic claims within the general societal framework of which they formed a part. Even this, however, is not necessarily to be assumed. In States where there might be out and out persecution of religion in general, particular forms of religion or belief, or of particular groups of religious believers,[14] it would be unusual, and almost certainly unwise, to couch ones claim in terms of the freedom of religion since this might exacerbate the very problem that they are seeking to address.

In other words, there is only a comparatively narrow range of instances in which one might reasonably expect to see Article 9 at play in domes-

[14] For the avoidance of doubt, it should be stressed that this is not a situation reflected in any of the Reports currently being surveyed.

tic courts. Given its level of generality, it is unlikely to be particularly useful in situations where there is a well-established system of church-state relations and a domestic framework for the resolution of tensions which flow from it (and this will often by through legislative rather than judicial channels). The issues which arise within such systems are likely to be 'beyond the threshold' at which Article 9 operates. Whilst it may well have a valuable role as a background factor, and as a backstop, it is unlikely in itself to be of direct assistance in generating an outcome. Article 9 is really only likely to figure – and, arguably, need only figure – in those comparatively rare instances in which (a) individuals and religious groups are being excluded from participation in public life in a fashion which negatively impacts upon their capacity to enjoy the 'minimum level guarantees' found in the European Convention and Article 9, or – and most critically today – (b) in situations in which there is pressure within a State for a fundamental re-alignment of the relationship between the religious and the public spheres, when Article 9 can provide a mechanism at the domestic level through which such a debate can be framed and mediated. Although such situations *could* be presented in other terms, the very point is that the substance of the situation actually concerns that broader societal question, rather than the narrower (one might call, technical) issue which might appear to be at stake.

This might be usefully illustrated by looking the cases which Professor Hill focusses upon in his Country Report on the United Kingdom. The first case which he considers is *Aston Cantlow*.[15] This is an example of what might be described as an 'above the threshold' case: although it is ostensibly about the public nature of the Church of England, it actually says nothing about the underlying issues of church and state: In order to resolve the substance of the case in hand (which concerned who might be required to bear the cost of renewing the roof of parish church) it was necessary to determine whether the Church of England was or was not a public body for the purposes of the 1998 UK Human Rights Act. It was not actually considering in a substantive sense the nature of the Church of England as a public body. The second case which Professor Hill considers is Williamson[16] and this is rather different. That case concerned a potential clash of rights – the right of a parent to have a child educated

[15] *Aston Cantlow Parochial Church Council* v. *Wallbank* [2003] UKHL 37, [2004] 1 A.C. 546.

[16] *R* v. *Secretary of State for Education and Employment ex parte Williamson*, [2005] UKHL 15.

in accordance with their religious or philosophical convictions (in this case, an educational environment which included corporal punishment as a disciplinary measure) and the right of a child not to be subject to torture, inhuman of degrading treatment or punishment. In case the domestic court drew upon the European Convention to help it address this 'clash of rights'. The whilst the judgement draws on the European jurisprudence relating to the freedom of religion or belief in order to help determine the outcome of the particular case in hand, this is an 'inward facing' determination, in which Article 9 provides a backcloth to an 'adjudicative moment' which whilst clearly of intrinsic significance, has no broader ramifications: the case is 'about' what it says it is 'about', and no more. In contrast, the third of the cases Professor Hill considers, the Begum case[17], might properly be seen as a judgment the significance of which extended beyond its formal substance and was engaging with more generic questions. This case concerned the legitimacy of a School enforcing its dress code which forbade a girl from waring a jilbab. The dynamics surrounding this case became such as to ensure that the decision of the Court was seen as – and surely was understood by the Court as being seen as – a contribution to a broader debate concerning the religiously inspired dress, and religiously significant symbolism, in the public arena.[18]

In the light of this, it may well be that rather than ask why Article 9 is used more in Country X than in Country Y, it is more interesting to think about what the use of Article 9 within a particular jurisdiction, at a particular time and by a particular Court or particular set of litigants *signifies* (if anything). In doing so, it may be necessary to differentiate between those situations in which the use of Article 9 by the domestic courts is something of a 'byproduct' of a claim (no matter how significant) and in which reference to it is necessary for the sake of the completeness of the legal argument, and those cases which are at least in part reflective of more general questions and in which recourse to Article 9 has a more systemic significance. It is, then, not surprising to find that it is in those States of central and Eastern Europe which have been undergoing political transition that there has been the most use of Article 9 at the highest judicial levels. What, then, is one to make of the increasing

[17] *Begum* v. *Denbigh High School*, [2006] UKHL 15.

[18] It should be stressed that the litigants in each of these cases would not have seen their claims in these terms, but that it is now possible to understand the overall significance of these cases in this fashion.

prevalence of such cases and such usages in western European jurisdictions? It may be that there are processes of transition as regards the public perceptions of the role of religion in public life occurring which are beginning to be tested out in the fashion. It must, of course, be remembered that domestic court proceedings of this nature will be only one, relatively minor manifestation of a broader debate on this question and, given the length of the litigation process, domestic courts are unlikely to be in the vanguard of change. However, that very fact may give even greater significance to such cases and to judicial determinations since they will be speaking to a broader, and more developed, debate than might at first sight appear to be the case.

What, then, might be expected is that the domestic cases featured in these Reports would, indirectly, give some indications of the level to which the 'baseline' freedom of religion or belief as reflected in Article 9 is being enjoyed within the States concerned (with the caveat that in the most egregious situations of denial of that right it may not be capable of being reflected at all) and an indication of those areas of tension within States related to the enjoyment of the freedom of religion. What should *not* be expected are any particularly important insights relevant to an understanding of the European Convention and Article 9 in terms of the key questions it poses: questions such as 'what is a protected form of religion or belief'? What is the scope of the *forum internum*,? What is a manifestation? What are the acceptable forms of restriction upon the manifestation of religion or belief are acceptable?, etc.[19] These are all vital questions which need to be addressed by domestic courts and tribunals. It is obvious that the decisions of domestic courts on these questions will be of real importance at the national level, and the practice of such domestic bodies will be of relevance to the European Court when exercising its own judicial oversight and in determining the existence of any 'Europe-wide' consensus. Beyond this, one must be cautious in drawing more general conclusions concerning the understanding of the parameters of the human rights approach to the freedom of religion or belief as

[19] For detailed considerations of these questions, see the standard works on Article 9, including, M. D. EVANS, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997); C. EVANS, *The Freedom of Religion under the European Convention on Human Rights* (Oxford, Oxford University Press, 2001), pp. 57-59. JC. RENUCCI, *Article 9 of the European Convention on Human Rights*, Human Rights Files No 20 (Strasbourg, Council of Europe, 2005); P. TAYLOR, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge, Cambridge University Press, 2005).

encapsulated in Article 9. Whilst Article 9 is a source of legal obligation which has direct legal impact in many States, it is best understood from a practical perspective as providing an evaluative tool, based upon a commonly endorsed approach, rather than as a source of substantive benchmarks against which the realisation of the right to freedom of religion or belief can be measured. In the domestic context, there are better indicators and often better tools available.

Indicative Areas and Concluding Observations

It is one thing to understand the nature and purpose of a tool, it is quite another to wield it. The purpose of this comment has been to highlight why it may not be appropriate to offer what must inevitably be relatively simplistic comparisons of the manner in which the various Country Reports have identified the manner in which Article 9 has been used and to compare those usages with its key terms and concepts. However, it does not seem to be entirely inappropriate to seek to identify some key issues of systemic concern which the country reports have raised. It must be appreciated that these issues will differ in significance from one jurisdiction to another, and what may be a 'significant marker' of problems in terms of the realisation of the freedom of religion or belief in one country might, because of the differing social and legal framework, not have the same significance in another, albeit that it is a matter of some importance: for example, the question of whether a church was a 'public body', such as the question regarding the Church of England in Aston Cantlow, would have a different level of significance if it were being considered in a country which did not have an established church as opposed to one in which were was. This caveat aside, the following issues appear to emerge from the Country Reports matters of systemic concern which would merit further and focussed reflection:

- access to legal personality for religious bodies
- internal organisational autonomy of religious organisations
- property rights (particularly the re-acquisition of property expropriated by the state)
- the public display of religion or belief
  (a) within state organs
  (b) in the context of state -regulated activities (including education)
  (c) by religious bodies
  (d) by individuals (including conscientious objection to military or alternative service

– The protection offered to the religious sensibilities of believers
– The availability, provision and regulation of religious education and opt-outs from religious education.
– Religion and belief within custodial settings.[20]

In the light of all that has been said, it is perhaps surprising how high a degree of commonality there appears to be among the Reports regarding the issues which have arisen and have been addressed by domestic courts which seem to raise systemic issues. Although these may take somewhat different forms across the various domestic jurisdictions, and have a differing intensity, the emergent picture is one of increasingly similar issues being raised (albeit that they are often answered in different ways). It is an interesting question whether this is in any way due to the increased use of Article 9 as a medium through which these issues are addressed, and whether having more frequent recourse to the jurisprudence of the European Court has the effect of 'importing' or 'exporting' issues from one jurisdiction to another. If so, then it may be that this provides a more potent means through which a form of 'pan European consensus' might eventually emerge. Whatever the case, there is a clear need for further study to be undertaken on the interplay between the European Convention, Article 9 and domestic decision-making on matters relating to the freedom of religion and belief and the Country Reports surveyed in this comment provide an excellent resource for this enterprise.

[20] This may strike some as a surprising inclusion. However, it is arises with surprising frequency within the Country Reports, and is an important indicator of the general approach to freedom of religion or belief, since it may possibly reflect the basic 'impulses' of a state with regard to that freedom given the totality of State control over all external influences.

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