

---

---

# THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND CHURCH-STATE RELATIONS: PLURALISM VS. PLURALISM\*

*Françoise Tulken*\*\*

## INTRODUCTION

### *Key Provisions*

1. There are three key provisions of the European Convention on Human Rights (ECHR) that deal with religion. Article 9 provides the basic framework for freedom of religion.<sup>1</sup> Article 14 ensures that ECHR-acknowledged rights should be free from religious discrimination.<sup>2</sup> Article 2 of the first Protocol gives parents the right to regulate the religious education of their children. The first and most central is Article 9. As in many international treaties, Article 9 of the ECHR guarantees to everyone the right to freedom of thought, conscience and religion.<sup>3</sup> This right implies, among others, freedom either alone or in community with others and in public or private, to manifest one's religion or belief in worship, teaching, practice and observance; but this external expression of religion may be subjected under Article 9, Section 2 to limitations prescribed by law and necessary in a democratic society in the interests of public safety and for the protection of public order, health, morals and the rights and

---

\* The judgments and decisions of the European Court of Human Rights referred to in the text are available on the Court's website, in the *Hudoc* database located at <http://www.echr.coe.int/echr/en/hudoc>.

\*\* Judge of the European Court of Human Rights, President of the Second Section. This article reflects my personal view, and not that of the Court.

<sup>1</sup> Eva Brems, *The Approach of the European Court of Human Rights to Religion*, in THILO MARAUHN, *DIE RECHTSSTELLUNG DES MENSCHEN IM VÖLKERRECHT 1* (Mohr Siebeck 2003).

<sup>2</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, Europ. T.S. 177, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/177.htm>, which contains a general non-discrimination provision, could have a significant effect on Church-State relations.

<sup>3</sup> Carolyn Evans, *Religious Freedom in European Human Rights Law: The Search for a Guiding Conception*, in RELIGION AND INTERNATIONAL LAW 385-86 (Mark W. Janis & Carolyn Evans eds., 2004).

freedoms of others.<sup>4</sup> As we see, there is a substantial dividing line between freedom of religion (internal conviction, inner sphere) and freedom to manifest one's religion in the public sphere (the expression of that conviction). At the same time, freedom of religion has an individual as well as a collective aspect.

### *An Indirect Regulation*

2. As rightly pointed out by Carolyn Evans, the ECHR “does not deal directly with the relationship between [C]hurch and [S]tate in European countries. . . . The ECHR does, however, indirectly regulate the permissible forms of relationship between religious institutions and the [S]tate by reference to religious freedom.”<sup>5</sup> In her paper, Evans compares “the strengths and weaknesses of a purely religious-freedom focused approach to the relationship between [C]hurch and [S]tate, as allowed by the ECHR, to that of the establishment-oriented case law of countries such as the United States.”<sup>6</sup>

### *The Court is Not a Constitutional Court*

3. The European Court of Human Rights is the only European-level jurisdiction exclusively charged with adjudicating human rights complaints. Could it be regarded as assuming the role of a Constitutional Court of Europe? My answer is clearly no—but I will not discuss this issue here.<sup>7</sup> Nevertheless, as pointed out by J. Ringelheim, “analysis of the Court's case law can shed an important light on the debate on religion and European constitutionalism.”<sup>8</sup> Why? Because the role of the Court (which is a supranational judicial body) is

---

<sup>4</sup> Article 9 does not belong to the provisions included in the second paragraph of Article 15 as non-derogable. On this point the Convention differs from the International Covenant on Civil and Political Rights, where in Article 4, Section 2 the freedom of thought, conscience, and religion laid down in Article 18 is declared non-derogable. See CLARE OVEY & ROBIN C.A. WHITE, JACOBS & WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 441 (4th ed. 2006).

<sup>5</sup> Carolyn Evans & Christopher A. Thomas, *Church-State Relations in the European Court of Human Rights*, 2006 BYU L. REV. 699. See also Jean-Paul Jacqué, *A Propos de Deux Arrêts de la Cour Suprême des Etats-Unis sur les Relations Entre L'Etat et la Religion*, L'EUROPE DES LIBERTES, Sept. 2005, at 5, available at [http://leuropedeslibertes.u-strasbg.fr/article.php?id\\_article=1&id\\_rubrique=3](http://leuropedeslibertes.u-strasbg.fr/article.php?id_article=1&id_rubrique=3).

<sup>6</sup> Evans & Thomas, *supra* note 5, at 701.

<sup>7</sup> Cf. Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 MOD. LAW REV. 183 (2008).

<sup>8</sup> Julie Ringelheim, *Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?*, in LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS (forthcoming 2010) (manuscript at 2, on file with author).

to “define common standards on religious freedom in a religiously diverse Europe,”<sup>9</sup> that is, a Europe characterized by religious diversity. Furthermore, conventional Europe today is the enlarged Europe of 47 States—all countries of the continent, except Belarus and Vatican City (which is not a democratic State but a theocratic one). As far as religion-State relations are concerned, we are therefore faced in Europe with many different legal models: from one extreme (confusion of Church and State with a national Church in Great Britain, Denmark and Greece) to the other (complete or moderate separation of the Church from State under the concept of secularism in Turkey, of *laïcité* in France or neutrality in Belgium),<sup>10</sup> all of them being highly ambiguous terms.<sup>11</sup> Nevertheless, in its Recommendation 1804 (2007) on *State, Religion, Secularity and Human Rights*, the Parliamentary Assembly of the Council of Europe “reaffirms that one of Europe’s shared values, transcending national differences, is the separation of [C]hurch and [S]tate. This is a generally accepted principle that prevails in politics and institutions in democratic countries.”<sup>12</sup>

#### *Judicial Restraint*

4. Quite often, the Court observes that “it is not possible to discern throughout Europe a uniform conception of the significance of religion in society; even within a single country such conceptions may vary.”<sup>13</sup> Accordingly, where questions concerning the relationship between State and religion are at stake, “on which opinion in a democratic society may reasonably differ widely,”<sup>14</sup> the role of national decision-making bodies has to be given special consideration and domestic authorities should

---

<sup>9</sup> *Id.*

<sup>10</sup> Leszek Lech Garlicki, *Perspectives on Freedom of Conscience and Religion in the Jurisprudence of Constitutional Courts*, 2001 BYU L. REV. 467, 469. For more information, see JONATHAN FOX, *A WORLD SURVEY OF RELIGION AND THE STATE* (Cambridge University Press 2008).

<sup>11</sup> Cf. Eur. Parl. Ass., *Colloquy on Questions related to State and Religion* (Feb. 27, 2007), available at <http://assembly.coe.int/Conferences/2007ReligionPolitics/Summary.pdf>; RENATA UITZ, *FREEDOM OF RELIGION* (Council of Europe 2007); RELIGION AND DEMOCRACY IN CONTEMPORARY EUROPE (Gabriel Motzkin & Yochi Fischer eds., 2008). See also Eur. Comm’n for Democracy Through Law (Venice Comm’n), *Comments on the Draft Law on Churches and Religious Organisations of the Republic of Serbia*, Doc. No. 379/2006 (June 13, 2006), available at [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)024-e.pdf](http://www.venice.coe.int/docs/2006/CDL-AD(2006)024-e.pdf); Eur. Comm’n for Democracy Through Law (Venice Comm’n), *Comments on the Draft Law on Freedom of Religion, Religious Organisations and Mutual Relations with the State of Albania*, Doc. No. 429/2007 (Nov. 30, 2007), available at [http://www.venice.coe.int/docs/2007/CDL\(2007\)107-e.asp](http://www.venice.coe.int/docs/2007/CDL(2007)107-e.asp).

<sup>12</sup> Eur. Parl. Ass., Recommendation 1804: *State, Religion, Secularity and Human Rights*, 27th Sess., Doc. No. 11298, at 1.

<sup>13</sup> *Otto-Preminger-Inst. v. Austria*, App. No. 13470/87, 19 Eur. H.R. Rep. 34, 57-58 (1995).

<sup>14</sup> *Şahin v. Turkey*, 44 Eur. H.R. Rep. 99, 101 (2005); see also *Wingrove v. United Kingdom*, App. No. 17419/90, 24 Eur. H.R. Rep. 1, 20 (1996).

enjoy a large margin of appreciation.

*A Vision of Religious Freedom*

5. Nevertheless, as pointed out by some commentators, “this attitude of judicial restraint is counterbalanced by an opposite tendency within the jurisprudence” and “the Court demonstrates an increasing willingness to go beyond the diversity of facts specific to each case and articulate general principles stemming from religious freedom . . . .”<sup>15</sup> After a rather slow start, the Court has begun to fashion a concept of institutional freedom of religion free from unnecessary regulation by the State.<sup>16</sup> So, despite contextual argumentation, the Court is trying to build “a consistent vision of religious freedom and of its implications for the relations between [S]tate and religions in a democratic society, valid across Europe.”<sup>17</sup> According to Alessandro Ferrari, “a common European law of religious freedom has been established, which is characterised by the primary position of the freedom of individual conscience, the autonomy of churches and by increasing cooperation between States and religious groups.”<sup>18</sup>

*Institutional Dimension of Religious Freedom*

6. Finally, as rightly pointed out by Lech Garlicki, “[m]ost religions cannot be exercised in a proper manner if the believers are deprived of the possibility to act collectively. Thus, individual freedom of religion cannot be guaranteed unless there is a collateral guarantee for the freedom to found and to operate a church or other religious community.”<sup>19</sup> So the Court has been faced, quite often recently and under various forms, with this “collective aspect of religious freedom.” In this area, as we will see, Article 9 and Article 11 (freedom of association) are interrelated.

7. In this paper, I submit that if pluralism is the main model of the

---

<sup>15</sup> Ringelheim, *supra* note 8, at 6-7.

<sup>16</sup> OVEY & WHITE, *supra* note 4, at 300.

<sup>17</sup> Ringelheim, *supra* note 8, at 3. See also Ingvill Thorson Plesner, *The European Court on Human Rights Between Fundamentalist and Liberal Secularism*, STRASBOURG CONSORTIUM, June 15, 2006, <http://www.strasbourgconsortium.org/essays/?p=12>.

<sup>18</sup> Alessandro Ferrari, *Religions, Secularity and Democracy in Europe: For a New Kelsenian Pact 5* (N.Y.U. Sch. of Law, The Jean Monnet Program, Working Paper No. 03/05), available at <http://www.jeanmonnetprogram.org/papers/05/050301.pdf>.

<sup>19</sup> Lech Garlicki, *Collective Aspects of the Religious Freedoms: Recent Developments in the Case Law of the European Court of Human Rights*, in CENSORIAL SENSITIVITIES: FREE SPEECH AND RELIGION IN A FUNDAMENTALIST WORLD 218, 219 (Andras Sajó ed., 2007).

Court's case law related to freedom of religion and the core principle which organizes Church-State relations (I), it has also lately developed, in relation to recent sensitive issues, counter-models which could conflict with pluralism (II). Pluralism vs. Pluralism.

## I. MODELS

8. The principle of pluralism seems to be the main—the core—principle in this field:

As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and of their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.<sup>20</sup>

We find an echo of this in another context, concerning racial discrimination and hate crime. “[T]he authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of its enrichment.”<sup>21</sup>

9. In other words, “[t]he Court constructs freedom of religion (also in its collective or/and institutional aspect) upon the whole system of values established by the Convention.”<sup>22</sup> Fundamentally, what does it mean? Diversity of beliefs or convictions is a common good for the whole society. The *Refah Partisi (The Welfare Party) v. Turkey* case (concerning the freedom of association) is the one where the Court expresses the substance of its position regarding the relations between State and Church.<sup>23</sup> Freedom of conscience is a “precious asset” for the believers but also for the non-believers because it allows expression of one’s own identity. This freedom is one of the elements of pluralism, which is a part of democratic societies. Against this background, the State is a “neutral and impartial organiser of the exercise of various religions, faiths and beliefs” and its “role is conducive to public order, religious harmony and tolerance in a democratic society.”<sup>24</sup>

10. We see in the recent case law of the Court the developments of

---

<sup>20</sup> *Kokkinakis v. Greece*, App. No. 14307/88, 17 Eur. H.R. Rep. 397, 418 (1993).

<sup>21</sup> *Nachova v. Bulgaria*, 42 Eur. H.R. Rep. 933, 963 (2006).

<sup>22</sup> *Garlicki*, *supra* note 19, at 220-21.

<sup>23</sup> *Refah Partisi v. Turkey*, 37 Eur. H.R. Rep. 1, 33 (2003).

<sup>24</sup> *Id.*

the principle of pluralism going in two main directions.<sup>25</sup>

*No Arbitrary State Interference*

11. As the Court ruled in *Hasan & Chaush v. Bulgaria*:

Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. Seen in this perspective, the believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.<sup>26</sup>

Moreover, the Court establishes a relation between the community and the individual: "[wh]ere the organisational life of the community is not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable."<sup>27</sup>

12. There are numerous examples in various situations. In *Svyato-Mykhaylivska Parafiya v. Ukraine*, the Court decided that the State cannot impose rules on admissions or exclusion of membership.<sup>28</sup> It follows that members of established religions must be allowed to freely choose to stay within or to leave that religion.<sup>29</sup> In the *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) v. Bulgaria*, the applicants, who represent one of the two competing groups within the Orthodox Church, complained that by the Religious Denominations Act of 2002 and in the following years, the Bulgarian Government forced the Orthodox community to reunite under the leadership of Patriarch Maxim and deprived the applicant organization (the rival leadership) of any control over part of the community's affairs and property.<sup>30</sup> The Court found a violation of Article 9 of the Convention.

---

<sup>25</sup> On the permissible scope of State support for religion, see Evans & Thomas, *supra* note 5, at 713-15; E. & G.R. v. Austria, App. No. 9781/82, 37 Eur. Comm'n H.R. Dec. & Rep. 42 (1984); Darby v. Sweden, App. No. 11581/85, 31 Eur. Comm'n H.R. Dec. & Rep. 1 (1989) (Commission Report); X & Y v. United Kingdom, App. No. 9461/81, 31 Eur. Comm'n H.R. Dec. & Rep. 210 (1982); Angeleni v. Sweden, App. No. 10491/83, 51 Eur. Comm'n H.R. Dec. & Rep. 41 (1986).

<sup>26</sup> *Hasan & Chaush v. Bulgaria*, 34 Eur. H.R. Rep. 1339, 1359 (2000).

<sup>27</sup> *Id.*; see also *Church of Scientology Moscow v. Russia*, 46 Eur. H.R. Rep. 304 (2007).

<sup>28</sup> *Svyato-Mykhaylivska Parafiya v. Ukraine*, 2007 Eur. Ct. H.R. 478.

<sup>29</sup> *Kokkinakis v. Greece*, App. No. 14307/88, 17 Eur. H.R. Rep. 397, 409-10 (1993).

<sup>30</sup> *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) v. Bulgaria*, App. No. 35677/04, 2009 Eur. Ct. H.R., <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (locate the case by entering the application number).

Indeed, neither the unity of the Church, even though it was a matter of the utmost importance for its adherents and for Bulgarian society in general, nor the Government's purported aim of securing respect for the precepts of religious canon could justify State action imposing such unity by force and disregarding the position of numerous Christian Orthodox believers in Bulgaria who supported the applicant organization.<sup>31</sup>

13. *A contrario*, the refusal of the State to give official recognition to a Church with the consequence that its priests cannot officiate or its members cannot meet to practice their religion was found to constitute an interference in *Metropolitan Church of Bessarabia v. Moldova*. Withholding legal recognition of a schismatic Church for reasons of religious unity must be regarded as a disproportionate restriction of religious freedom.<sup>32</sup> Moldova refused to recognize the Metropolitan Church of Bessarabia in circumstances where only those religions recognized by the Government may be practiced in Moldova. In finding a violation of Article 9, the Court took the opportunity to restate both the role of the State in the regulation of religious activities, and the relationship of the freedom protected by Article 9 with certain other freedoms.

14. In *Religionsgemeinschaft der Zeugen Jehovas v. Austria*, the Court held that there had been a violation of Article 9 on account of Austrian authorities only having granted the Jehovah's Witnesses religious community legal personality twenty years after their request and that, during that period, the Jehovah's Witnesses had had no legal personality in Austria.<sup>33</sup> The Court reiterated that the right of a religious community to an autonomous existence was indispensable for pluralism in a democratic society and thus it is at the very heart of the protection which Article 9 affords.<sup>34</sup> Even the creation of auxiliary associations with legal personality could not compensate for the authorities' prolonged failure to grant legal personality. In addition:

[O]ne of the means of exercising the right to manifest one's religion, especially for a religious community, in its collective dimension, is the possibility of ensuring judicial protection of

---

<sup>31</sup> *Id.* §§ 149, 155.

<sup>32</sup> *Metro. Church of Bessarabia v. Moldova*, 2001-XII Eur. Ct. H.R. 860, at §§ 129-30. *See also* *Moscow Branch of the Salvation Army v. Russia*, 44 Eur. H.R. Rep. 912 (2006). In *Lajda v. Czech Republic* decision of March 3, 2009, the Court declared the application inadmissible precisely because the applicants could ask for a new registration according to a law that had been enacted, *Lajda v. Czech Republic*, App. No. 20984/05, 2009 Eur. Ct. H.R., <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (locate the case by entering the application number).

<sup>33</sup> *Religionsgemeinschaft der Zeugen Jehovas v. Austria*, App. No. 40825/98, 2008 Eur. Ct. H.R., <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (locate the case by entering the application number).

<sup>34</sup> *Id.* § 61.

the community, its members and its assets, so that Article 9 must be seen not only in the light of Article 11, but also in the light of Article 6 . . . . Given the importance of this right, the Court considers that there is an obligation on all of the State's authorities to keep the time during which an applicant waits for conferment of legal personality for the purposes of Article 9 of the Convention reasonably short. The Court appreciates that during the waiting period the first applicant's lack of legal personality could to some extent have been compensated by the creation of auxiliary associations which had legal personality, and it does not appear that the public authorities interfered with any such associations.<sup>35</sup>

### *State Neutrality and Impartiality*

15. In many cases, the Court has repeatedly insisted on the fact that the role of the State must be “the neutral and impartial organiser of the exercise of various religions, faiths and beliefs.”<sup>36</sup> Why? Because it is not the State's role to determine whether religions or beliefs are legitimate. In this sense, as pointed out by Karl-Heinz Ladeur, “the [S]tate is principally neither allowed to favour nor to discriminate against certain professions of faith. This concept of equidistance is known as the principle of [S]tate neutrality . . . . In this context, [S]tate neutrality merely functions as a *chiffre* for indifference.”<sup>37</sup> In *Manoussakis v. Greece*, the Court held that the freedom of religion “excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.”<sup>38</sup>

16. *A contrario*, as pointed out by Karen Reid:

[W]here a State has a bias to a particular religion (for example, constitutional protection) there is potential for issues arising as regards the effect of this preference on other religious groups. It is questionable to what extent in multi-ethnic Europe one group can justifiably be given preferential treatment over another and what weight should be given to the history and

<sup>35</sup> *Id.* §§ 63, 79.

<sup>36</sup> *Şahin v. Turkey*, 44 Eur. H.R. Rep. 99, 125 (2005); *see also* *Hasan & Chaush v. Bulgaria*, 34 Eur. H.R. Rep. 1339, 1362-63 (2000); *Metro. Church of Bessarabia v. Moldova*, 2001-XII Eur. Ct. H.R. 860, at § 116; *Church of Scientology Moscow v. Russia*, 46 Eur. H.R. Rep. 304, 320-21 (2007).

<sup>37</sup> Karl-Heinz Ladeur & Ino Augsberg, *The Myth of the Neutral State: The Relationship Between State and Religion in the Face of New Challenges*, 8 GERMAN L.J. 143, 143-44 (2007) (emphasis in the original), available at [http://www.germanlawjournal.com/pdf/Vol08No02/PDF\\_Vol\\_08\\_No\\_02\\_143-152\\_Articles\\_Augsberg\\_Ladeur.pdf](http://www.germanlawjournal.com/pdf/Vol08No02/PDF_Vol_08_No_02_143-152_Articles_Augsberg_Ladeur.pdf).

<sup>38</sup> *Manoussakis v. Greece*, App. No. 18748/91, 23 Eur. H.R. Rep. 387, 400-01 (1996).

traditions of the particular country. The arrival on the scene of other “religions” with differing cultural and social dimensions, poses special problems where practices conflict with expected ways of doing things.<sup>39</sup>

17. From this principle of neutrality and impartiality flows that the State should not take sides in religious conflicts within and between religious communities. For instance, refusal of legal recognition of a schismatic church for reasons of religious unity must be regarded as a restriction of religious freedom.<sup>40</sup> Likewise, State action favoring one leader or group 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 the freedom of religion.<sup>41</sup> The Court observed also that tensions between competing religious groups was an unavoidable consequence of pluralism but that the role of the authorities in such a situation is not to remove the cause of the tensions by eliminating pluralism, but instead, to ensure that the competing groups or rival factions tolerate each other.<sup>42</sup> They may act as *mediator* between religious groups and endeavor to ensure pacific relations.<sup>43</sup> Public authority should indeed foster religious harmony and tolerance in a democratic society.<sup>44</sup>

18. In *Verein der Freunde der Christengemeinschaft v. Austria*, [t]he applicants complained that the Austrian authorities had refused to grant the first applicant legal personality in the form of a religious society under the 1874 Recognition Act, whereby it would have acquired the status of a public-law entity, and had merely granted it legal personality as a publicly registered religious community under the 1998 Religious Communities Act, thereby conferring on it the inferior status of an entity under private law.<sup>45</sup>

In this case, “the Federal Minister’s refusal to recognise the applicant as a religious society was based on the same ground—non-fulfilment of the ten-year waiting period”—as in the case of *Religionsgemeinschaft*

---

<sup>39</sup> Karen REID, A PRACTITIONER’S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 514 (3rd ed., 2008).

<sup>40</sup> *Metro. Church of Bessarabia*, 2001-XII Eur. Ct. H.R. at § 105.

<sup>41</sup> *Serif v. Greece*, App. No. 38178/97, 31 Eur. H.R. Rep. 561, 572-73 (1999); *Hasan & Chaush*, at 1362-63; *Supreme Holy Council of Muslim Cmty. v. Bulgaria*, App. No. 39023/97, 41 Eur. H.R. Rep. 23, 37-40 (2004).

<sup>42</sup> *See Ouranio Toxo v. Greece*, App. No. 74989/01, 45 Eur. H.R. Rep. 277, 285 (2005); *Serif v. Greece*, 31 Eur. H.R. Rep. at 573.

<sup>43</sup> *Supreme Holy Council of the Muslim Cmty.*, 41 Eur. H.R. Rep. at 38.

<sup>44</sup> *97 Members of Gldani Congregation of Jehovah’s Witnesses v. Georgia*, App. No. 71156/01, 46 Eur. H.R. Rep. 613, 646 (2007).

<sup>45</sup> *Verein der Freunde der Christengemeinschaft v. Austria*, App. No. 76581/01, 2009 Eur. Ct. H.R., § 38, <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (locate the case by entering the application number).

*der Zeugen Jehovas v. Austria*.<sup>46</sup> The Court further observed:

[T]he Government, in their own submissions, acknowledged the applicant's existence in Austria in the form of an association from 24 August 1945 onwards. Thus, it can hardly be seen as a newly established and unknown religious group but rather as one which is long established in the country and therefore familiar to the competent authorities. For such a religious group a ten year waiting period is not justified. This being so, the Court must arrive at the same conclusion as in the case of *Relionsgemeinschaft der Zeugen Jehovas and Others*, namely that the difference in treatment was not based on any "objective and reasonable justification." Accordingly, there has been a violation of Article 14 of the Convention taken in conjunction with Article 9.<sup>47</sup>

19. Which are the main implications of this neutrality obligation as to the conformity with the Convention of the various legal regimes governing relations between State and religion in European countries? There are three.

20. Firstly, different systems can be compatible with religious freedom; a State Church is not *per se* incompatible with Article 9 if there are specific safeguards for the individual's freedom of religion.<sup>48</sup> Some recent cases attest a stricter attitude on the part of the Court in respect to official or dominant church systems. In *Folgerø v. Norway*, the Court holds with a tight majority of nine to eight that Norway's refusal to grant the applicants' children a full exemption from the subject of Christianity, Religion and Philosophy at primary school, entails a violation of the obligation to respect parents' religious and philosophical convictions when assuming education and teaching functions (Article 2 of the first Protocol to the Convention).<sup>49</sup> While this subject is described in the law as designed to transmit knowledge about Christianity and other world religions in a spirit of intercultural dialogue, the Court highlights that in fact the curriculum is characterized by a significant preponderance of Christianity, and more especially, of the Evangelical-Lutheran faith—*i.e.*, Norway's official religion.

21. In *Alexandridis v. Greece*, the Court expresses criticism at the Greek Orthodox Church's privileged position in public institutions.<sup>50</sup>

---

<sup>46</sup> *Id.* § 44.

<sup>47</sup> *Id.* §§ 44-45.

<sup>48</sup> For the historical reasons thereof, see Evans & Thomas, *supra* note 5, at 706.

<sup>49</sup> *Folgerø v. Norway*, App. No. 15472/02, 46 Eur. H.R. Rep. 1147, 1187-88 (2007).

<sup>50</sup> *Alexandridis v. Greece*, App. No. 19516/06, 2008 Eur. Ct. H.R., § 38, <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (locate the case by entering the application number). The Court specifies that the right to religious freedom includes the right not to manifest one's religious convictions. In this regard, see also the Court's observations in *Folgerø v. Norway*, 46 Eur. H.R. Rep. at 1191-92.

The fact that a lawyer's professional oath, required to be entitled to practice law, has to be taken normally on the Gospels, and that those willing to opt for a "solemn declaration" instead have to reveal their religious affiliations, is found to be in breach of freedom of religion. Importantly, what the Court mainly criticizes, is that the procedure at stake relies on the assumption that every lawyer in Greece is a Christian Orthodox and wishes to take the religious oath.<sup>51</sup>

22. Secondly, public authorities are under no obligation to provide an identical legal status to each community.<sup>52</sup> Nevertheless, the Court will control with severity the conformity with the Convention of advantages granted exclusively to one religious community. Any advantage conferred to a religious community to the exclusion of the others must rest on a legitimate justification and remain proportionate.<sup>53</sup>

23. In *Religionsgemeinschaft der Zeugen Jehovas v. Austria*, the Court observed "that under Austrian law religious societies enjoyed privileged treatment in many areas," notably taxation.<sup>54</sup> In view of those privileges, it was up to the authorities to remain neutral and to give all religious groups a fair opportunity to apply for a specific status, using established criteria in a non-discriminatory manner.<sup>55</sup> That duty to remain neutral and impartial also raised delicate questions when imposing a qualifying period on a religious association which had legal personality before it could obtain a more consolidated status as a public-law body. The Court accepted that making a religious community wait for ten years before granting it the status of a religious society could be necessary in exceptional circumstances, such as in the case of newly established and unknown religious groups. However, it hardly appeared justified with respect to religious groups that were well-established both nationally and internationally and therefore familiar to the relevant authorities, as was the case with the Jehovah's Witnesses. In the case of such religious groups, the authorities should have been able to verify within a considerably shorter period whether the requirements of the relevant legislation had been fulfilled. Indeed, the Court noted the example submitted by the applicants of the Coptic Orthodox Church which had been recognized in 2003 as a religious society although,

---

<sup>51</sup> *Alexandridis*, 2008 Eur. Ct. H.R., § 36. In *Vergos v. Greece*, App. No. 65501/01, 41 Eur. H.R. Rep. 913, 921 (2004), a system of prior authorization (e.g. to build a church) depending on the authorization by a recognized ecclesiastical authority of the dominant religion is irreconcilable with Article 9, Section 2.

<sup>52</sup> *The Canea Catholic Church v. Greece*, App. No. 25528/94, 27 Eur. H.R. Rep. 521, 534 (1997).

<sup>53</sup> See *Cha'are Shalom ve Tsedek v. France*, 2000-VII Eur. Ct. H.R., where alleged discrimination between two Jewish associations was at stake.

<sup>54</sup> *Religionsgemeinschaft der Zeugen Jehovas v. Austria*, App. No. 40825/98, 2008 Eur. Ct. H.R., § 92, <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (locate the case by entering the application number).

<sup>55</sup> *Id.*

having been established in Austria since 1976, it had only been registered as a religious community in 1998. In contrast, the Jehovah's Witnesses had existed in Austria for considerably longer but still only had the status of a religious community. That showed that Austria did not consider it essential for its policy in the field to apply the same ten-year qualifying period to all. Accordingly, the Court concluded that the difference in treatment had not been based on any "objective and reasonable justification," in violation of Article 14 taken in conjunction with Article 9.<sup>56</sup>

24. In this respect, we could also mention *Hasan & Eylem Zengin v. Turkey*, where the Court found a violation of Article 2 of the first Protocol where in a public school the applicants' children, belonging to the Alevis confession, were obliged to follow obligatory lessons in morals and religious culture. The State cannot express any preference for a specific religion or belief.<sup>57</sup>

25. Finally, neutrality does not have to be equivalent to indifference. Positive obligations may arise requiring the State to take steps to protect the exercise of religious freedom from others. A violation of Article 9 arose when the authorities failed to take any steps against a fanatical group that had attacked a congregation of Jehovah's Witnesses, assaulting them and burning books. The Court stated that the State was under an obligation to ensure that the group of orthodox extremists tolerated the applicants and allowed them freely to manifest their religion.<sup>58</sup>

26. Before moving to my second part, I would like to make a last comment. Very often, pluralism entails a problem of conflicting human rights,<sup>59</sup> which demands a serious and contextual examination. The conflict can be described as one between, on the one hand, the accommodation of religious freedom claims, and on the other hand, individual liberties and fundamental rights of others, such as for example the right to be treated equally.<sup>60</sup>

---

<sup>56</sup> *Id.* §§ 97-99; see also *Verein der Freunde der Christengemeinschaft v. Austria*, App. No. 76581/01, 2009 Eur. Ct. H.R., §§ 44, 45, <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (locate the case by entering the application number).

<sup>57</sup> *Hasan & Eylem Zengin v. Turkey*, App. No. 1448/04, 46 Eur. H.R. Rep. 1060, 1077 (2007).

<sup>58</sup> *97 Members of Gldani Congregation of Jehovah's Witnesses v. Georgia*, App. No. 71156/01, 46 Eur. H.R. Rep. 613, 645-46.

<sup>59</sup> See Olivier De Schutter & Françoise Tulkens, *Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution*, in *CONFLICTS BETWEEN FUNDAMENTAL RIGHTS* 169 (Eva Brems ed., 2008).

<sup>60</sup> On the conflict between an individual exercise of religious freedom and the protection of gender equality, see Titia Loenen, *Freedom of Religion Versus Sex Equality and State Neutrality: The Difference the Method of Review Can Make*, in *CONFLICTS BETWEEN FUNDAMENTAL RIGHTS* 421 (Eva Brems ed., 2008).

## II. COUNTER-MODELS

27. While most would agree with the Court's view, expressed in *Serif v. Greece*, that in circumstances of religious tension governments should work to promote pluralism and

“ensure tolerance between the rival factions,” it may frequently be the case that allowing one person complete freedom to manifest his religion or belief would be to impinge—sometimes with dangerous consequences—on the rights of others. It would therefore perhaps be understandable if, in certain cases, the Court were to allow a wide margin of appreciation to place restrictions of the freedom to manifest religion or belief.<sup>61</sup>

However, some argue “that the Court has demonstrated a certain lack of empathy for the believer, and has appeared only to pay lip-service to the commitment to religious freedom proclaimed . . . .”<sup>62</sup> Others go further and submit that (especially) “when faced with contestations touching upon the issue of expression of religion in the public sphere,” the Court has adopted stances that are questionable from the viewpoint of the principles it has itself identified as central for religious freedom—the protection of pluralism being first and foremost.<sup>63</sup>

28. In the case law of the Court today, I also observe that the main limitations to the right of religious freedom (and also the freedom of thought or conscience) are motivated by the need to protect democratic societies from the danger of Islam and sects.

*Islam*

29. The examination of the merits of *Refah Partisi (the Welfare Party) v. Turkey* case did not occur in reference to religious freedom (Article 9 of the ECHR) or the right of members of minority groups to live according to their own traditions (Article 8 of the ECHR), but within the framework of the freedom of assembly and association (guaranteed by Article 11 of the ECHR). In its Grand Chamber judgment of February 13th, 2003, the Court found that there was no violation of the applicants' freedom of association; that is to say, there was certainly an interference with the freedom of association (dissolution of a political party which at that time was the governing

---

<sup>61</sup> OVEY & WHITE, *supra* note 4, at 316 (quoting *Serif v. Greece*, App. No. 38178/97, 31 Eur. H.R. Rep. 561, 572-73 (1999)).

<sup>62</sup> *Id.*

<sup>63</sup> Ringelheim, *supra* note 8, at 16.

party by means of free and democratic elections), but the dissolution was found legitimate according to the second paragraph of Article 11. The Court decided that “[t]aking into account the importance of the principle of secularism for the democratic system in Turkey,” the dissolution pursued several of the following legitimate aims: “protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others.”<sup>64</sup> Two of the key rights that the dissolution was supposed to protect were those of freedom of religion and belief and non-discrimination on the basis of religion. The reasoning that the dissolution was “necessary in a democratic society” is particularly relevant, because the Court held that the Refah Party’s plan to introduce legal pluralism and the sharia was in contradiction with “fundamental democratic principles”:

Like the Constitutional Court, the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. . . . In the Court’s view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.<sup>65</sup>

30. In fact, as pointed out by Karen Meerschaut and Serge Gutwirth, “the Refah judgment implies a radical denial of any legal pluralism that pursues the accommodation of Islamic law and human rights: it leaves no place [or] space for ‘compatibilisation’ of different legal traditions.”<sup>66</sup>

---

<sup>64</sup> Refah Partisi v. Turkey, 37 Eur. H.R. Rep. 1, 28 (2003).

<sup>65</sup> *Id.* at 44.

<sup>66</sup> Karen Meerschaut & Serge Gutwirth, *Legal Pluralism and Islam in the Scales of the European Court of Human Rights: The Limits of Categorical Balancing*, in CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 431, 439 (Eva Brems ed., 2008).

*Sects*

31. I will refer here to the case of *Leela Förderkreis E.V. v. Germany*. The applicants, all associations registered under German law in the 1960s and 70s, are religious associations or meditation associations belonging to the Osho movement, formerly known as the Shree Rajneesh or Bhagwan movement. In 1979, State agencies had issued warnings against movements including that of the applicants, and the German Government launched an information campaign in which it referred to the applicants' associations as "sects," "youth sects," "youth religions" and "psycho-sects." The focus of concern was the potential danger that these groups could pose to adolescents' personal development and social relations, leading to: their dropping out of school and vocational training, radical changes in personality, individual forms of dependence, lack of initiative and difficulties of communication (often aggravated by the group structure characteristic of certain communities), material losses and psychological harm. In October 1984, the applicants, claiming to be part of an authentic religious movement, brought proceedings against the Government in the administrative courts. Judgments were given by the Cologne Administrative Court (January 1986), the Administrative Court of Appeal of North Rhine-Westphalia (May 1990) and the Federal Administrative Court (March 1991). The applicants lodged a constitutional appeal with the Federal Constitutional Court in May 1992, which on June 26, 2002, gave judgment upholding the applicants' appeal in part but holding for the remainder that the Government was entitled to refer to the applicants' movement as "sect," "youth sect," "youth religion" and "psycho sect" because these impugned terms correspond to the general understanding of new religious movements and do not have defamatory connotations.

32. The applicant associations complained that the Government's information campaign constituted an unjustified interference with their right to manifest their religion as provided in Article 9 of the Convention. In particular, the associations were of the view that the information campaign used to describe their movement demonstrated a failure by the Government to remain neutral in the exercise of its powers.<sup>67</sup> The Helsinki Foundation, which presented a written third party submission, observed that the labeling of religious groups as "sects" or "cults" was widespread in Poland and other European

---

<sup>67</sup> *Leela Förderkreis E.V. v. Germany*, App. No. 58911/00, 2008 Eur. Ct. H.R., § 83, <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (locate the case by entering the application number).

countries. "They considered that the term 'sect' had an unclear meaning and a clearly negative connotation and should be regarded as defamatory when used by public officials."<sup>68</sup>

33. In its assessment, the Court deemed that "[t]he State had to observe neutrality in religious or philosophical matters and was forbidden from depicting a religious or philosophical group in a defamatory or distorted manner."<sup>69</sup> So, it accepted that there was interference. But, as to the legitimate aim:

The Court observes that the purpose of the Government's warnings was to provide information capable of contributing to a debate in a democratic society on matters of major public concern at the relevant time and to draw attention to the dangers emanating from groups which were commonly referred to as sects. Considering also the terms in which the decision of the Federal Constitutional Court was phrased, the Court considers that the interference with the applicant associations' right was in pursuit of legitimate aims under Article 9[1, Section 2], namely the protection of public safety and public order and the protection of the rights and freedoms of others.<sup>70</sup>

Finally, as far as the necessity test is concerned, "the Court has to weigh up the conflicting interests of the exercise of the right of the applicant associations to proper respect for their freedom of thought, conscience and religion, and the duty of the national authorities to impart to the public information on matters of general concern."<sup>71</sup> Balancing these competing interests, the Court continued:

Having regard not only to the particular circumstances of the case but also to its background, the Court notes that at the material time the increasing number of new religious and ideological movements generated conflict and tension in German society, raising questions of general importance. The contested statements and the other material before the Court show that the German Government, by providing people in good time with explanations it considered useful at that time, was aiming to settle a burning public issue and attempting to warn citizens against phenomena it viewed as disturbing, for example, the appearance of numerous new religious movements and their attraction for young people. The public authorities wished to enable people, if necessary, to take care of themselves and not to land themselves or others in difficulties solely on account of lack of knowledge. The Court takes the view that such a power of *preventive intervention* on

---

<sup>68</sup> *Id.* § 78.

<sup>69</sup> *Id.* § 90.

<sup>70</sup> *Id.* § 94.

<sup>71</sup> *Id.* § 96.

---

---

the State's part is also consistent with the Contracting Parties' positive obligations under Article 1 of the Convention to secure the rights and freedoms of persons within their jurisdiction. Those obligations relate not only to any interference that may result from acts or omissions imputable to agents of the State or occurring in public establishments, but also to interference imputable to private individuals within non-State entities . . . .<sup>72</sup>

The Court concluded by observing that the

Federal Constitutional Court, in its decision given on 26 June 2002, carefully analysed the impugned statements and prohibited the use of the adjectives 'destructive' and 'pseudo-religious' and the allegation that members of the movement were manipulated as infringing the principle of religious neutrality. The remaining terms, notably the naming of the applicant associations' groups as 'sects,' 'youth sects' or 'psycho-sects,' even if they had a pejorative note, were used at the material time quite indiscriminately for any kind of non-mainstream religion. The Court further notes that the Government undisputedly refrained from further using the term 'sect' in their information campaign following the recommendation contained in the expert report on 'so-called sects and psycho-cults' issued in 1998 . . . . Under these circumstances, the Court considers that the Government's statements as delimited by the Federal Constitutional Court, at least at the time they were made, did not entail overstepping the bounds of what a democratic State may regard as the public interest. In the light of the foregoing and having regard to the margin of appreciation left to the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole, the Court finds that the interference in issue was justified in principle and proportionate to the aim pursued. There has accordingly been no violation of Article 9 of the Convention.<sup>73</sup>

Personally, I fail to see the active role of the State in a pluralistic society as a participant in the public discussion of beliefs. This last decision of the Court seems to me, far from *Kokkinakis*, one of the firsts.

---

<sup>72</sup> *Id.* §§ 98-99 (emphasis added).

<sup>73</sup> *Id.* §§ 100-01.