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## Perspectives on Religious Freedom from the Vantage Point of the European Court of Human Rights

*Willi Fuhrmann\**

### I. INTRODUCTION

The European Court of Human Rights (“ECHR” or “the Court”) was established in 1959 to interpret and apply the European Convention for the Protection of Human Rights and Fundamental Freedoms (“Convention”), which opened for signature in 1950 and entered into force in 1953. The Convention has now been ratified by forty-one European states, including most recently Russia, Ukraine, and Georgia. The ECHR’s jurisdiction covers a geographical area with a population of some 800 million.

The Convention was designed to give binding effect to some of the rights and freedoms set out in the United Nations’ Universal Declaration of Human Rights. It was unprecedented in international law in three important respects. First, it empowered states to bring before an international tribunal other states alleged to have violated the rights of their own citizens. Second, it recognized individuals as subjects of international law by giving them the right to petition directly an international body with complaints directed against a state or states. Finally, it set up an enforcement mechanism to ensure that the contracting parties to the Convention respected their engagements.<sup>1</sup>

Before going into an analysis of the Convention case law relating to freedom of religion as protected in Article 9, I should just say a word about the nature of the ECHR’s jurisdiction. The Convention system is a subsidiary one; as the Court has often repeated, it is primarily for the national authorities to secure the protection of the

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\* Judge, European Court of Human Rights. I thank the Symposium organizers for inviting me as a representative of the European Court of Human Rights to participate in this Symposium.

1. I will not go into the original structure of that machinery. Suffice it to say that since November 1, 1998, a new full-time Court has been in place.

rights and freedoms set forth in the Convention. There are two main aspects to this. One is practical: an international Court cannot act as a court of first instance or even a court of appeal, or it runs the risk of being submerged by a massive case load. Moreover, national authorities are often better placed to make the initial assessment of what is necessary.

The second aspect is more directly related to the philosophy underlying the Convention. The Convention is predicated on the existence of a community of democratic states governed by the rule of law. Within this system, the Court operates as a fail-safe to catch those violations of fundamental rights that escape the scrutiny of the national review bodies. In so doing, it owes a degree of deference to the decisions of democratically elected bodies, sometimes expressed as a margin of appreciation accorded to the national authorities. The margin is variable in the sense that the closer you get to the core values of democracy, the narrower the margin will be. Thus, for example, in relation to the freedom of expression, interference with political expression will attract a narrow margin, whereas interference with artistic expression on grounds of morality will qualify for a much wider margin of appreciation. In other words, we could say that while a democratic society cannot, consistent with the Convention, restrict the pure exercise of democracy, it can legitimately decide within reason where art crosses over the line of obscenity or blasphemy. This margin operates in particular in relation to the rights and freedoms set out in Articles 8 to 11 of the Convention, which include the right to a private family life and the freedoms of expression, religion, and association.

## II. THE ARTICLES OF THE EUROPEAN CONVENTION

The articles of the Convention (and Protocol No. 1 to the Convention) that expressly refer to freedom of religion—the so-called “religious” articles—are Article 9, which guarantees freedom of thought, conscience, and religion; Article 14, which prohibits discrimination on any ground, such as sex, race, color, language, or religion, political or other opinion, national or social origin, association with a national minority, property, birth, or status; and Article 2 of Protocol No. 1 to the Convention, which safeguards the right to education.

Religious freedom under the Convention is protected by Article 9, which reads:

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 in 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.<sup>2</sup>

Among Articles 8 through 11, Article 9 stands out in several ways. Within Article 9 are enshrined the two main elements of the freedom of thought, conscience, and religion. The first is the internal element, namely, the freedom of an individual to be free in his own thoughts and conscience and to join a religion. The second element is the external element, namely, the freedom to express to the outside world one's religion or beliefs. Only the second element of this freedom, the aspect of external manifestation, may be subject to limitations. No interference by the state is allowed with regard to the internal element, which is an absolute and unlimited freedom. This is clearly reflected in the wording of the permissible restrictions.

### III. CASE LAW ON THE FREEDOM OF THOUGHT, CONSCIENCE, AND RELIGION

There is a relatively small amount of case law on the question of freedom of thought, conscience, and religion, because, for a long time, the ECHR did not have the occasion to give any rulings on the matter.

#### A. *Kokkinakis v. Greece*

The first case that gave the Court the opportunity to consider the application and interpretation of Article 9 was *Kokkinakis v. Greece*,<sup>3</sup> which involved the conviction of a Jehovah's Witness for

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2. [European] Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 9, 312 U.N.T.S. 221. The first paragraph of Article 9 reproduces Article 18 of the Universal Declaration of Human Rights.

3. 260 Eur. Ct. H.R. (ser. A) (1993).

proselytism because he had “engaged in discussion” the wife of the cantor of the local orthodox church. The Court stated the following principle:

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 [religious] believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.<sup>4</sup>

The fundamental nature of the rights guaranteed in Article 9, paragraph 1 were thus recognized by the Court. The Court also accepted, in principle, that the right to try to persuade one’s neighbor as to religious belief is included in the “right to manifest one’s religion.” Further, the Court found it necessary to draw a distinction between bearing witness and improper proselytism in order to not make the right to change one’s religion or belief a dead letter. In *Kokkinakis*, the right to change one’s religion was also indirectly in question. The right to change one’s religion is part of the internal element of freedom of religion, but it is also inherently part of the external element, namely, the freedom to manifest one’s religion and the right to preach. In the seven years since *Kokkinakis*, approximately fifteen cases have come before the Court, most of which concern the religious component of Article 9.

#### B. Manoussakis and Others v. Greece

Another Greek case, *Manoussakis and Others v. Greece*,<sup>5</sup> involved the prosecution and conviction of Jehovah’s Witnesses for establishing and operating a place of worship in Greece without the required authorizations from the Minister of Education and Religious Affairs and from the ecclesiastical authorities required by a law enacted in 1938.<sup>6</sup>

The Court found that the Greek legislation that led to the applicants’ convictions was aimed at restricting the activities of religious

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4. *See id.* at 17.

5. 1996-IV Eur. Ct. H.R. Rep. Judgments & Dec. 1346 (1996).

6. *See id.* at 1351-53.

faiths outside of the Greek Orthodox Church<sup>7</sup> and “had such a direct effect on the applicants’ freedom of religion that it cannot be regarded as proportionate to the legitimate aim pursued, nor, accordingly, as necessary in a democratic society.”<sup>8</sup> The Court accordingly found a violation of Article 9.

The Court went quite far in this case, holding that “[t]he right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.”<sup>9</sup> If the first part of that affirmation is consistent with the absolute nature of the internal element of Article 9, I submit that the second part should be read narrowly, so as not to conflict with the restrictions that are permissible under the second paragraph of Article 9, in relation to the external element of freedom of belief.

C. Case of *Kjeldsen, Busk Madsen and Pedersen, Valsamis v. Greece, and Efstratiou v. Greece*

Article 2 of Protocol No. 1 provides: “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 and teaching in conformity with their own religious and philosophical convictions.”<sup>10</sup>

The religious dimension of Article 2 of Protocol No. 1 lies in its guarantees of the right of parents to have their religious and philosophical convictions respected where the education of their children is concerned. In this context, one can find two judgments in which the Court found no violation of Article 2 of Protocol No. 1. First, in *Kjeldsen, Busk Madsen and Pedersen*,<sup>11</sup> parents with strong Christian beliefs objected to compulsory sex education lessons in Danish state schools and challenged the policy before the Court.<sup>12</sup>

In affirming that Article 2 of Protocol No. 1 enjoined the state to respect parents’ religious and philosophical convictions in their

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7. It should be noted that the Greek Orthodox Church enjoys a special relationship with the Greek government.

8. *Id.* at 1366.

9. *Id.* at 1365.

10. Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, art. 2.

11. 23 Eur. Ct. H.R. (ser. A) (1976).

12. *See id.* at 7, 18-20.

children's education, the Court explained that the state is obligated to ensure the communication of information and knowledge in an objective and pluralistic manner. States are not allowed to seek to indoctrinate.<sup>13</sup> However, the sex education lessons, which the legislation had intended to be imparted to pupils, did not amount to indoctrination or advocacy of a specific kind of sexual behavior.<sup>14</sup>

Second, in *Valsamis v. Greece*<sup>15</sup> and *Efstratiou v. Greece*,<sup>16</sup> two students were suspended from school for their failure to attend a school parade commemorating the war between Greece and Italy in 1940. This refusal was based on the religious beliefs of the students and their parents, who were Jehovah's Witnesses.<sup>17</sup> The Court held that the applicants' pacifist convictions could not have been offended by the parade, its purpose, or the arrangements for it and observed that pacifist objectives and the public interest were served in such commemorations of national events. Accordingly, the obligation to take part in the parade did not offend the parents' religious beliefs, and the penalty of suspension did not amount to an interference with the students' freedom of religion.<sup>18</sup>

In this context, the primary obligation imposed by Article 2 of Protocol No. 1 on states is found in the first sentence, namely the right to education. It appears that the "respect" referred to in the second sentence is of a "qualified" nature. There will no doubt be some reluctance on the part of the Court to impose solutions on states which would entail excessive expenditure.

#### D. Hoffmann v. Austria

Article 14—the Article prohibiting discrimination of any kind—is also one of the Convention's "religious" articles. A case from 1993, *Hoffmann v. Austria*,<sup>19</sup> illustrates this point very well. The applicant, a Jehovah's Witness, alleged violations of Articles 8, 9, and 14 of the Convention and Article 2 of Protocol No. 1<sup>20</sup> because the Austrian

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13. *See id.* at 24-27.

14. *See id.* at 28.

15. 1996-VI Eur. Ct. H.R. Rep. Judgments & Dec. 2312 (1996).

16. 1996-VI Eur. Ct. H.R. Rep. Judgments & Dec. 2347 (1996).

17. *Efstratiou*, 1996-VI Eur. Ct. H.R. Rep. Judgments & Dec. at 2352; *Valsamis*, 1996-VI Eur. Ct. H.R. Rep. Judgments & Dec. at 2317.

18. *Efstratiou*, at 2357-62; *Valsamis*, at 2322-25.

19. 255 Eur. Ct. H.R. (ser. A) (1993).

20. *See id.* at 57-60.

Supreme Court refused to grant her custody of her children after her divorce. The Austrian Supreme Court awarded custody of her two children to their Catholic father.<sup>21</sup> The Court concluded that “the children’s welfare” would be better served if they stayed with their Catholic father because Jehovah’s Witnesses refuse to authorize blood transfusions, and it was likely that they would become “social outcasts” as Jehovah’s Witnesses.<sup>22</sup> The Court considered the case from the standpoint of Article 8, read in conjunction with Article 14, and held that a distinction based essentially on religious considerations was unacceptable. The means employed were not proportional to the legitimate aims pursued by the Austrian Supreme Court.<sup>23</sup>

*E. Darby v. Sweden*

A violation of Article 14, read in conjunction with Article 1 of Protocol No. 1, which guarantees the right of property, was found by the Court in *Darby v. Sweden*.<sup>24</sup> In *Darby* the applicant claimed that his obligation to pay a tax to the Church of Sweden, although he was not a member, violated Article 9 and infringed upon his freedom of religion. He worked in Sweden but was not entitled to the partial exemption accorded to residents under the Dissenters Tax Act because he was a nonresident.<sup>25</sup> The Court did not find it necessary to examine the applicant’s complaint of a violation of Article 9, taking the view that the case was about discrimination with regard to a tax and that there had been a violation of Article 14 in conjunction with Article 1 of Protocol No. 1.<sup>26</sup>

*F. Otto-Preminger-Institut v. Austria and Wingrove v. UK*

Another question that the Court had to decide was to what extent interference with the freedom of expression, secured under Article 10, may be justified to protect the religious beliefs of others. Two cases are relevant here: *Otto-Preminger-Institut v. Austria*<sup>27</sup> and

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21. *See id.* at 53-54.

22. *Id.* at 54.

23. *See id.* at 58-61.

24. 187 Eur. Ct. H.R. (ser. A) (1990).

25. *See id.* at 7.

26. *See id.* at 12-13, 15.

27. 295 Eur. Ct. H.R. (ser. A) (1994).

*Wingrove v. UK*.<sup>28</sup> In both cases, the applicants came into conflict with blasphemy laws. In the *Otto-Preminger* case, the applicant institute tried to show a film that offended the Catholic religion and the religious feelings of the people of Tyrol, a region that consists of a large majority of Catholics in whose lives religion plays a very important role.<sup>29</sup> The authorities had banned the showing of the film in an art cinema and confiscated the film. The Court held:

Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.<sup>30</sup>

Therefore, in the opinion of the Court, the Austrian Courts had not overstepped their margin of appreciation.<sup>31</sup> The Austrian authorities had been entitled to act to prevent what might be perceived as unwarranted and offensive attacks on the religious beliefs of the overwhelming majority of religious believers in Tyrol—Roman Catholics. Under these circumstances, there had been no violation of Article 10.<sup>32</sup>

In *Wingrove* the applicant challenged the refusal of British authorities to grant a distribution certificate for a videotape. The authorities determined that the videotape, which portrayed the crucified Christ in acts of a sexual nature with a nun,<sup>33</sup> violated blasphemy laws. The Court noted that, although blasphemy laws are still in force in various European countries, the application of these laws has

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28. 1996-V Eur. Ct. H.R. Rep. Judgments & Dec. 1937 (1996).

29. See *Otto-Preminger*, 295 Eur. Ct. H.R. at 8-9.

30. *Id.* at 18.

31. See *id.* at 22.

32. See *id.* at 21.

33. See *Wingrove*, 1996-V Eur. Ct. H.R. Rep. Judgments & Dec. at 1943-44.

become exceedingly rare and strong arguments have been advanced in favor of abolishing them.

However, there is as yet not sufficient common ground in the legal and social orders of the member states of the Council of Europe to conclude that a system whereby a state can impose restrictions on the propagations of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and, thus, incompatible with the Convention.<sup>34</sup>

This does not mean that any blasphemy law, irrespective of its content, or every measure repressing antireligious sentiment or every penalty relating to the same will be compatible with Article 10.<sup>35</sup> There must exist a balance of proportionality between the manner in which the antireligious sentiment is expressed and the state's repressive measures and penalties.<sup>36</sup>

One may be tempted to conclude from these cases that where there are competing Convention interests, considerable weight is attached to the Article 9 interest. The *Otto-Preminger* case seems to indicate that freedom of expression will give way to the freedom of majority religious beliefs. This appears to be at odds with the emphasis that the Court has placed on the pluralism in a democratic society of religious belief encompassing skepticism and agnosticism, which was demonstrated, for example, in the *Kokkinakis* case. Thus, *Otto-Preminger* should perhaps be seen in the light of its particular facts and the wide margin of appreciation accorded in consequence of those facts. In essence, the Court seems to indicate in these cases, particularly in *Wingrove*, that the relationship between freedom of expression and freedom of religion should be decided by democratic governments and, hence, the especially wide margin of appreciation granted by the Court.

#### G. Buscarini & Others v. San Marino

The Court had the opportunity to develop its analysis of the meaning of religious freedom in a more recent case, *Buscarini & Others v. San Marino*.<sup>37</sup> This case concerned the obligation imposed

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34. *See id.* at 1957.

35. *See id.* at 1958-59.

36. *See id.* at 1959.

37. 1999-\_\_ Eur. Ct. H.R. Rep. Judgments & Dec. \_\_ (1999) (*available at* <<http://www.echr.coe.int>> (visited Mar. 29, 2000)).

on newly-elected members of the General Grand Council (parliament) of the Republic of San Marino to swear an oath of loyalty on the Holy Gospels. The General Grand Council ruled that the oath sworn by two new members, without referring to the Gospels, was invalid and ordered them, on pain of forfeiting their parliamentary seats, to retake the oath on the Gospels.<sup>38</sup> The new members complied with the order but applied to the Court claiming an infringement of their freedom of religion and conscience. The Court held that there had been a violation of Article 9 because freedom of thought, conscience, and religion also implies the freedom to hold or not to hold religious beliefs and the freedom to practice or not to practice a religion. Therefore, the obligation to swear an oath on the Gospels was a limitation within the meaning of the second paragraph of Article 9; requiring elected representatives of the people to swear allegiance to a particular religion was not compatible with Article 9.<sup>39</sup>

#### IV. CONCLUSION

Let me try to draw some conclusions from this brief survey of the Court's case law. Because of the dearth of cases, the Court's case law on the question of freedom of religion is less extensive than case law concerning other rights guaranteed by the Convention. But the Court has, in these small number of decisions, established that freedom of thought, conscience, and religion are fundamental to the Convention. The Court's approach in these cases follows the philosophy, which runs throughout the Convention, of securing pluralism and tolerance as the hallmarks of democratic society and of respecting the values of a pluralist society and the individual's right to self-identification and self-determination.

Guided by this concern, the Court has, in its case law, protected the rights of minority religious groups when confronted with a dominant religion, but it has also had to recognize the responsibility of states to protect the religious sensibilities of the majority. A balance had to be found in cases where this led to a potential conflict with other Convention rights. Perhaps in the future the Court will have to define precisely the different elements of Article 9 and, in particular, what amounts to "religion," given the growth in the

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38. *See id.* at 3-4.

39. *See id.* at 8-9.

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number of sects and measures taken in different states to restrict their activities.

