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Freedom of Religion under the European Convention on Human Rights: A Precious Asset

*Françoise Tulkens**

I would like to begin by saying that I am very grateful to your prestigious university and its law school, as well as to the International Center for Law and Religion Studies, for this invitation. It is an honor and a pleasure to be here with such an outstanding audience of judges, scholars, lawyers, NGOs, and public officials from all over the world. Let me also say that I am really moved by your hospitality and kindness and how grateful I am to all of you, especially to the volunteer students. Many thanks from the bottom of my heart.

As the voice coming from Europe and as a modest contribution to the work of this conference, I shall touch on two issues, which are of course interrelated. First, how, in the European Convention on Human Rights, freedom of religion has built itself as a fundamental human right, and how this right has been interpreted by the case law of the European Court of Human Rights in the context of our contemporary society. Secondly, I will address the question of conflicting rights and the various approaches used by the European Court of Human Rights to judge them.

As we know, the European Convention on Human Rights was drafted and adopted on November 4, 1950, in the aftermath of World War II, and it entered into force in September 1953. It has just celebrated its sixtieth anniversary.¹ Today, it has been ratified by forty-seven State Parties, and it has become the fundamental charter (*magna carta*) of the “common home Europe.” As far as the key elements of the Convention are concerned, its preamble is highly significant. It traces the outlines of a European *ordre public*. The rights and freedoms guaranteed by the Convention “are the

* Former Judge and Vice President of the European Court of Human Rights, Professor emeritus at the University of Louvain (Belgium), and Associate Member of the Académie Royale de Belgique. This keynote address was given at the Twentieth Annual Law and Religion Symposium at Brigham Young University on October 6, 2013.

1. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5; 213 UNTS 221 [hereinafter ECHR].

foundation of justice and peace in the world” and are best maintained “by an effective political democracy.”² Democratic society is the focal point of human rights, the unifying force within a Europe of human rights in which the Convention acts as a basic law. Democracy is the central value of European *ordre public*. It would be a mistake to see the preamble as merely rhetorical. In interpreting and applying the Convention, the European Court of Human Rights relies heavily on these principles not only as a source of inspiration but also as a basis for its action.

There are three key provisions of the European Convention on Human Rights that deal with religion. Article 9 provides the basic framework for freedom of religion. Article 14 ensures that the rights acknowledged by the Convention should be free from any discrimination. Article 2 of the First Additional Protocol to the Convention gives parents the right to regulate the religious education of their children. If the first and most central is Article 9, the two others are gaining importance, especially Article 14.³

As a matter of fact, the “new” European Court of Human Rights set up in 1998 has received a growing number of applications concerning freedom of religion. As observed by Clare Ovey and Robin C.A. White, “[t]his increase in applications is seemingly attributable to factors such as the expansion of the Council of Europe eastwards, the contemporary importance of religion on the global political arena, and the changing religious demography of Europe.”⁴

I. FREEDOM OF RELIGION AS A FUNDAMENTAL RIGHT

A. A Precious Asset

As in many international treaties, Article 9, section 1 of the European Convention on Human Rights guarantees to everyone (every person) the right to freedom of thought, conscience and religion.⁵ As Malcolm Evans has pointed out, the idea that freedom

2. *Id.* at preamble.

3. See *ANALYSE COMPARÉE DES DISCRIMINATIONS RELIGIEUSES EN EUROPE [A COMPARATIVE APPROACH TO RELIGIOUS DISCRIMINATION IN EUROPE]* (Elisabeth Lambert Abdelgawad & Thierry Rambaud eds., 2011).

4. CLARE OVEY & ROBIN C. A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 439 (4th ed. 2006).

5. Carolyn Evans, *Religious Freedom in European Human Rights Law: The Search for a*

of religion is for everyone is essential.⁶ In a nutshell, this right includes freedom to change religion and belief either alone or in community with others and in public or private and also freedom to manifest one's religion or belief in worship, teaching, practice and observance. But only the last one may be subjected under Article 9 section 2 to limitations (interferences) 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 freedoms of others.⁷ 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). Finally, as Renáta Uitz rightly observes, unlike the case of other civil and political rights, freedom of religion has an individual as well as a collective aspect.⁸ The freedoms guaranteed are closely related to freedom of expression (Article 10 of the Convention) and to freedom of association (Article 11) since many religious and belief systems expect some form of community worship or association.

Against this background, the Court has been called upon to address the scope and content of Article 9 in a wide variety of cases, involving matters as diverse as proselytism, the grant of registration of religious bodies, the refusal of authorizations for places of worship, prohibition on the wearing of religious dress or symbols in public places, and conscientious objection. In its case law the Court has reiterated the central importance played by religious and philosophical beliefs in European society.

Before examining some of these elements, let's get back to the "fundamentals" (*fondamentaux*). In 1993, in its first judgment under Article 9, the Court established the principle: "freedom of

Guiding Conception, in RELIGION AND INTERNATIONAL LAW, 385, 385–86 (Mark W. Janis & Carolyn Evans eds., 2004). See also MALCOM EVANS, RELIGIOUS, LIBERTY AND INTERNATIONAL LAW IN EUROPE (2007).

6. Malcom Evans, *Advancing Freedom of Religion or Belief: Agendas for Change*, 1 OXFORD J. L. RELIG. 5, 6 (2012).

7. 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 OVEY & WHITE, *supra* note 4, at 441.

8. RENÁTA UITZ, FREEDOM OF RELIGION IN EUROPEAN CONSTITUTIONAL AND INTERNATIONAL CASE LAW 12 (2007).

thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."⁹ Article 9 protects both religious and non-religious beliefs. This freedom entails, *inter alia*, the freedom to hold or not to hold religious beliefs and to practice or not to practice religion.

Pluralism obviously, or implicitly, transcends all the Article 9 jurisprudence.¹⁰ So pluralism, and especially its practical application, is perceived both with respect to the collective dimension of freedom of religion and with regard to its individual aspect. As a matter of fact, the idea of pluralism is found throughout the entire Convention and constitutes one of its interpretative principles. As stressed in the *Gorzelik and Others v. Poland* judgment of February 17, 2004, "pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion."¹¹

What does the Court mean by religion and belief? The protection of Article 9 extends to a wide range of convictions and philosophies, not limited to religious belief. However, the Court did not offer a definition of religion or belief; it merely said that not all opinions or convictions constitute beliefs in the sense protected by Article 9 section 1. In reality, for the article to apply, a belief must "attain a certain level of cogency, seriousness, cohesion and importance,"¹² and also be such as to be compatible with human dignity and democracy. The same position is held by the United

9. *Kokkinakis v. Greece*, App. No. 14307/88, 260-A Eur. Ct. H.R. (ser. A) 18, § 31 (Eur. Ct. H.R. 1993).

10. For an enunciation of the primordial importance of religious pluralism as one of the foundations of a democratic society, see *Nolan and K. v. Russia*, App. No. 2512/04, § 73 (Eur. Ct. H.R. 2009).

11. *Gorzelik and Others v. Poland*, App. No. 44158/98, § 92 (Eur. Ct. H.R. 2004).

12. *Campbell and Cosans v. United Kingdom*, No. 48, 4 Eur. H.R. Rep. (ser. A) 293, ¶ 36 (Eur. Ct. H.R. 1982).

Nations Human Rights Committee under the International Covenant on Civil and Political Rights.¹³ This means that mere ideas or opinions will not constitute a belief. The line is difficult to draw since belief is, of course, inherently subjective.

Some may criticize the Court for failing to interpret Article 9 in such a way as to realize its full potential by not engaging with what is meant by the word “religion.” But, as observed by Nicolas Bratza, it is difficult to achieve a definition that is flexible enough to embrace the immense range of world faiths but, at the same time, precise enough to be capable of practical application.¹⁴ This wide protection has enabled the Court to hold the provision to be applicable not merely to traditional and long-established religions (Hinduism, Christianity, Islam, Judaism, Buddhism, Sikhism), but also to other forms of religious movements, including Druidism and Scientology, as well as to a wide range of philosophical beliefs (pacifism, atheism, etc.).¹⁵ Where there has been controversy as to whether a particular set of beliefs qualified as a religion, the Court has more recently taken the cautious view that it is not its task to rule in the abstract on such matters; in the absence of a European consensus, it stated that it would look to the domestic system for the nature of classification.¹⁶ It may not, in any event, be a crucial matter, since even if not a religion, a suitably conscientious system of beliefs or thoughts could still fall under Article 9.

B. Individual Aspect

The internal dimension, the *forum internum*, has been described by the former European Commission on Human Rights as one “largely exercised inside an individual’s heart and mind.”¹⁷ What is important is that this internal aspect of the right is an absolute one—no limitation, no restriction, no interference or control by the State.

13. See U.N. Human Rights Comm., International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

14. Nicolas Bratza, *The Precious Asset: Freedom of Religion under the European Convention on Human Rights*, 14 ECCLESIASTICAL L. J. 256 (2012).

15. *Id.*

16. *Kimlya v. Russia*, App. No. 76836/01, 32782/03, ¶¶ 79–81, (Oct. 1, 2009 Eur. Ct. H.R.).

17. DONNA GOMIEN, *SHORT GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 95 (3d ed. 2000).

So this provision prohibits persecution of a person on the grounds of his or her religion. In this respect, a very important judgment of the Court is *M.E. v. France* of June 6, 2013.¹⁸ The Court was called upon to decide if the expulsion of a Christian Copt to Egypt would expose him to inhuman or degrading treatment contrary to Article 3 of the Convention. And the answer of the Court, for the first time, was yes. This judgment sends today a strong message to all European states that are faced with the expulsion of a member of a religious community at risk and that are confronted, in asylum seekers cases, with assessing the risk of religious persecutions.¹⁹ Nevertheless, the very fact that somebody belongs to such a community is not enough; the risk of persecution in the individual case, the case at hand, must be established on a personal basis. Now what remains to be decided by the Court is the exact or precise meaning of “religious persecutions.”²⁰

But Article 9 also forbids the use of physical threats or sanctions to compel a person to deny, adhere to, or change his or her religion or belief. It also prohibits any form of coercion sufficiently strong so as to amount to indoctrination by the State.

This internal dimension has been held to go further and to include a guarantee against a requirement to manifest or disclose the nature of one’s religion. In the case of *Sinan Isik v. Turkey* of February 2, 2010, the applicant’s complaint related to the reference to religion in his identity card, a public document that was frequently in use in daily life.²¹ In the view of the Court, it was no answer to the complaint that the space for religion in identity cards could be left blank, since persons with identity cards not containing information about religion would be distinguished against their wishes and on the basis of interference by the public authorities from those whose identity cards contained such an entry. A request for such information not to be included was held by the Court to be closely bound up with an individual’s most deeply held and private conviction.²²

18. *M.E. v. France*, App. No. 50094/10 (June 6, 2013 Eur. Ct. H.R.).

19. Michael Kagan, *Refugee Credibility Assessment and the “Religious Imposter” Problem*, 43 VAND. J. TRANSNAT’L L. 1233 (2010).

20. Nicolas Hervieu, *Une progression sans révolution dans l’appréhension européenne des persécutions religieuses*, Lettre “Actualités Droits-Libertés” du CREDOF (2013).

21. *Sinan Isik v. Turkey*, App. No. 21924/05 (Feb. 2, 2010, Eur. Ct. H.R.).

22. *Wasmuth v. Germany*, App. No. 12884/03 (Feb. 17, 2011 Eur. Ct. H.R.).

Recently, the Court had to decide a very sensitive case concerning the relation between freedom of religion and discrimination, even if the applicant's discrimination complaint on the basis of religion was examined under Article 14 and Article 8 of the Convention. As Lourdes Peroni rightly pointed out, "after leaving aside the 'freedom to resign' doctrine in the *Eweida and Others v. the United Kingdom* judgment of 15 January 2013, the Court has just made another move towards greater recognition of the importance of freedom of religion. In the *Vojnity v. Hungary* judgment of 12 February 2013, the Court clearly recognizes religion as a 'suspect' ground of differentiation. As a result—and just like distinctions based on race, sex, and sexual orientation—states must give 'very weighty reasons' if they wish to justify differences based on religion."²³ In this case, the applicant's religious convictions were decisive in the removal of his access rights to his children. Then—and after asserting that only "very weighty reasons" could justify a difference of treatment based on religion—the Court found that there was actually no such reason in this case and concluded that the applicant had been discriminated on the basis of his religious belief, in his right to respect for family life.²⁴ In my view, the move is certainly positive. It is hard to deny that religion has historically worked as a category of discrimination and persecution, and it therefore makes sense to apply heightened scrutiny to differences based on this ground.²⁵

23. Lourdes Peroni, "Very Weighty Reasons" for Religion: *Vojnity v. Hungary*, STRASBOURG OBSERVERS BLOG (Feb. 27, 2013), <http://strasbourgoobservers.com/2013/02/27/very-weighty-reasons-for-religion-vojnity-v-hungary/>.

24. *Vojnity v. Hungary*, § 38, App. No.29617/07 (Feb. 12, 2013 Eur. Ct. H.R.).

25. See the partly dissenting opinion of Judges Bratza, Hirvelä, and Nicolaou annexed to *Redfearn v. the United Kingdom*, § 12, App. No. 47335/06 (2012 Eur. Ct. H.R.). See also Kristin Henrard, *Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality*, [hereinafter *Duties of Reasonable Accommodation*], 5 ERASMUS L. REV. 71, 71–72 (2012). Henrard, however, observes: "The supervisory practice of the Court is . . . rather ambivalent about the suspect nature of religion." Henrard, *supra*, at 71. See also Kristin Henrard, *Libertad de religion y minorias religiosas: una adaptacion adecuada de la diversidad religiosa? [Freedom of Religion and Religious Minorities: an Adequate Accommodation of Religious Diversity?]*, in DERECHOS HUMANOS Y DIVERSIDAD RELIGIOSA 247 (E.J. Ruiz Vieytez and G. Urrutia Asua eds., 2010). In the same direction, see *Federal Republic of Germany v. Y and Z*, where the Court of Justice of the European Union held that certain forms of serious interference with the public manifestation of religion may constitute persecution for reasons of religion. Joined cases C-71/11 & C-99/11, (April 19,

Moving now to the external dimension of freedom of religion, the distinction between the holding of a religion and its manifestation is a difficult one. As a matter of fact, the Court draws a distinction between an act or practice that manifested a religion or belief and one that is merely motivated by a religion. Nevertheless, the approach could bring the Court dangerously close to deciding whether a particular practice is formally required by a religion—a task the judges are unable to decide given the relevant theological issues.

The Court has been confronted with *different aspects* of the manifestation of the freedom of religion: religious holidays;²⁶ ritual slaughter;²⁷ refusal to perform duties;²⁸ religious symbols at work,²⁹ at school³⁰, and in public.³¹

The *Ahmet Arslan and Others v. Turkey* judgment of February 23, 2010 concerned the criminal conviction (and prison sentence of two to three months, commuted to a fine) of members of a religious group for their dress code (turban, black tunic, and stick) in public places (first outside a mosque in Ankara, then in the streets of the city), pursuant to an act of 1935 prohibiting the wearing of religious clothing except in places of worship and at religious ceremonies.³² The Court found a violation of Article 9 of the Convention. This is the first judgment concerning the wearing of religious clothing in public space. This judgment is for me very important because religious intolerance is a daily reality in Europe. How can minority

2012 E.C.R.).

26. *Kosteski v. the Former Yugoslav Republic of Macedonia*, App. No. 55170/00 (April 13, 2006 Eur. Ct. H.R.).

27. *Cha'are Shalom Ve Tsedek v. France*, App. No. 27417/95 (June 27, 2000 Eur. Ct. H.R.).

28. *Ladele and McFarlane v. the United Kingdom*, App. No. 51671/10, 36516/10 (Jan. 15, 2013 Eur. Ct. H.R.).

29. *Eweida and Chaplin v. the United Kingdom*, App. No. 48420/10, 59842/10 (Jan. 15, 2013 Eur. Ct. H.R.). See Megan Pearson, *Article 9 at a Crossroads: Interference Before and After Eweida*, 13 HUM. RTS. L. REV. 580 (2013).

30. *Leyla Sahin v. Turkey*, App. No. 44774/98 (Nov. 10, 2005 Eur. Ct. H.R.).

31. *Ahmet Arslan and Others v. Turkey*, App. No. 41135/98 (Feb. 23, 2010 Eur. Ct. H.R.). Concerning diverging views among human rights bodies on this aspect, see Françoise Tulkens and Sébastien Van Drooghenbroeck, *The Domestic Courts' Response to Divergent Views among International Human Rights Bodies Thoughts Prompted by the Singh v. France Case in LIBERAE COGITATIONES: LIBER AMICORUM MARC BOSSUYT 733* (André Alen, Veronique Joosten, Riet Leysen, & William Verrijdt eds., 2013).

32. *Ahmet Arslan v. Turkey*, App. No. 41135/98 (Feb. 23, 2010, Eur. Ct. H.R.).

religions be protected in public space in this context? Today, mainly targeted at Muslims, attacks on religious pluralism focus on refusing to share public space with the non-majority or only tolerating practices seen as secular.³³

C. Collective Aspect

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.”³⁴ 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.

“While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to ‘manifest [one’s] religion’ alone and in private or in community with others, in public and within the circle of those whose faith one shares. Bearing witness in words and deeds is bound up with the existence of religious convictions.”³⁵

Religious freedom has several important manifestations which commit believers to exercise their rights in community with others, very often within the framework of a religious organisation or association. Freedom of religion as an individual right is discussed typically as being a liberty interest or negative right, where the

33. On November 27, 2013, the Grand Chamber held a hearing in the case of *S.A.S. v. France* concerning the ban on wearing the burqa and the niqab in the public space in France. See Saïla Ouald Chaib, *S.A.S. v. France: A Short Summary of an Interesting Hearing*, STRASBOURG OBSERVERS BLOG (Nov. 29, 2013), <http://strasbourgoobservers.com/2013/11/29/s-a-s-v-france-a-short-summary-of-an-interesting-hearing>. The Grand Chamber delivered its judgment in the case on July 1, 2014; the Court found no violation of Article 8 and no violation of Article 9 of the Convention on the basis of margin of appreciation and proportionality. See, however, the joint dissenting opinion of Judges Nussberger and Jäderblom annexed to the judgment.

34. Leszek 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, 218–19 (A. Sajo ed. 2007).

35. *Metropolitan Church of Bessarabia and Others v. Moldova*, § 114, App. No. 45701/99 (Dec. 13, 2001 Eur. Ct. H.R.).

primary obligation of the state is to leave individuals undisturbed in the exercise of various aspects of religious freedom. When collective aspects of religious freedom are in the focus of attention, European scholars and lawyers instinctively turn to discuss the positive aspect of the right, namely, the obligation of the state to entrench or promote the enjoyment of religious freedom.

Pluralism is the main model of the Court's case law related to freedom of religion and the core principle which organizes church-state relations. We see in the recent case law of the Court the developments of the principle of pluralism going in two main directions: no arbitrary State interferences, and State neutrality and impartiality.³⁶

As Robin White and Clare Ovey rightly observe, "the pursuit of multiculturalism and peaceful co-habitation of different religious groups within society has frequently proved challenging. The history of Europe is littered with examples of extreme religious intolerance and, indeed, the European Convention on Human Rights was conceived in the immediate aftermath of the persecution and genocide of the adherents of one religion, Judaism, in the hope that it would help to prevent such an atrocity ever taking place again. For many believers, religious faith is central to their existence and their most important defining characteristic. The Court is correct, therefore, to stress in its case law the duty of the State as a guarantor of pluralism and the fundamental nature of the rights to freedom of belief and freedom to manifest religion."³⁷

As summarized by Nicolas Bratza, "cases reflecting this vital element of autonomy have tended to relate to state interference in one of three key areas: the internal organisation of the religious community, including the selection of its leaders; the grant or refusal of official recognition to certain faiths in national law; and the regulation by the state of places of worship. In each area the Court has consistently stressed the need for state neutrality."³⁸

Is there an obligation to protect against "dangerous religions"? While most would agree with the Court's view expressed in *Serif v. Greece* that in circumstances of religious tension governments should

36. For further analysis, see Françoise Tulkens, *The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism*, 30 CARDOZO L. REV. 2575 (2009).

37. See OVEY & WHITE, *supra* note 4, at 423–24.

38. Bratza, *supra* note 14, at 262.

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.”³⁹ 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”⁴⁰ Others are going 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, first and foremost, the protection of pluralism.⁴¹ 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 Islam⁴² and sects.⁴³

II. CONFLICTS OF RIGHTS

Here the sensitive question is the conflict (or potential conflict) between freedom of religion and other rights,⁴⁴ in particular freedom

39. *Serif v. Greece*, App. No. 38178/97 (Dec. 14, 1999, Eur. Ct. H.R.). See also OVEY & WHITE, *supra* note 4, at 423–24.

40. *Serif*, App. No. 38178/97.

41. 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 283 (Lorenzo Zucco & Camil Ungureanu eds., 2012).

42. *Refah Partisi and Others v. Turkey*, App. No. 41340/98, 41342/98, 41343/98, 41344/98 (Feb. 13, 2003 Eur. Ct. H.R.) (Grand Council Judgment).

43. *Leela Förderkreis E.V. and Others v. Germany*, App. No. 44774/98 (Nov. 6, 2008 Eur. Ct. H.R.).

44. See also, but on different aspects, Ian Leigh, *Balancing Religious Autonomy and other Human Rights under the European Convention*, 1 OXFORD J. L. RELIG. 1 (2012); Carolyn Evans & Anna Hood, *Religious Autonomy and Labor Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights*, 1 OXFORD J. OF L. RELIG. 23 (2012); Lourdes Peroni, *U.S. Supreme Court and ECHR: Conflicts Between Religious Autonomy and Other Fundamental Rights*, STRASBOURG OBSERVERS BLOG (Feb. 2, 2012), <http://strasbourgoobservers.com/2012/02/02/u-s-supreme-court-and-ecthr-conflicts-between-religious-autonomy-and-other-fundamental-rights/>.

of expression. How are these two rights, equally protected by the Convention, to be reconciled? Even though the problem of conflicts of law is a classic problem that has long preoccupied jurists and philosophers,⁴⁵ such conflicts are becoming increasingly frequent in many fields, as both the rights protected by the Convention and states' obligations have evolved. So how are we to judge, how should we assess, these situations of conflict between fundamental rights?⁴⁶ The Court has, if I may say, the choice between different approaches, each of them having potentialities and limits.

A. *The Necessity Test*

One of the most common ways of resolving conflicts of law is suggested by the actual structure of certain provisions of the Convention—the very ones which concern us here, Articles 9 and 10—which, on the one hand, recognise a right or a freedom and, on the other hand, add that limitations are allowed on certain conditions. So we are in the field of limitations on the rights secured, which confronts us with the general problem that, in a democratic society, hardly any rights are totally absolute. Moreover, these limitations or restrictions illustrate the classic dialectic, where fundamental rights are concerned, between safeguarding the individual right and defending the general interest. For example, as regards Article 9, freedom to manifest one's religion or one's religious beliefs is not an absolute right. It may be set against the rights and freedoms of others, which implies, *inter alia*, respect for everyone's beliefs in relation to proselytising⁴⁷ and protection of minors,⁴⁸ or the protection of public order,⁴⁹ security,⁵⁰ or public health.⁵¹

45. See Robert Alexy, *Balancing Constitutional Review and Representation*, 3 INT'L J. CONST. L. 572, 572–81 (2005); Steven Greer, *Balancing and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate*, 63 CAMBRIDGE L. J., 412, 417 (2004).

46. Here I base myself mainly on Olivier De Schutter and 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).

47. *Kokkinakis v. Greece*, § 33, App. No. 14307/88 (May 25, 1993 Eur. Ct. H.R.); *Larissis and Others v. Greece*, App. No. (February 24, 1998 Eur. Ct. H.R.).

48. *Dahlab v. Switzerland*, App. No. 42393/98 (Feb. 15, 2001 Eur. Ct. H.R.); *Ciftci v. Turkey*, App. No. 71860/01 (June 17, 2004).

49. *Vergos v. Greece*, § 33, App. No. 65501/01 (June 24, 2004 Eur. Ct. H.R.), (rational urban planning).

50. *Phull v. France*, § 21, App. No. 35753/03 (January 11, 2005 Eur. Ct. H.R.) (wearing of the turban and security at airports).

The method employed by the Court when called upon to judge what are known as relatively protected rights is well known. It proceeds in three stages: interference may be justified if it is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society, which implies a pressing social need. The combination of these three conditions opens the way to the irresistible rise of the principle or criterion of proportionality.⁵²

One significant recent example: in the case of *Giniewski v. France*, the applicant, a journalist, sociologist and historian, had written a newspaper article on John-Paul II's encyclical "The splendour of truth."⁵³ An association complained that the article was defamatory of the Christian community, and the domestic courts found that interference with freedom of expression was justified by the need for "protection of the reputation or rights of others."⁵⁴ In its judgment of January 31, 2006, the Court observed that, although the applicant's article did indeed criticise a papal encyclical and thus the position of the Pope, such an analysis could not be extended to the whole of Christianity, which comprises various strands. It considered above all that the applicant was seeking to develop an argument about the scope of a specific doctrine and its possible links with the origins of the Holocaust. In so doing he had made a contribution, which by definition was open to discussion, to a wide-ranging and on-going debate, without sparking off any controversy that was gratuitous or detached from the reality of contemporary thought. By considering the detrimental effects of a particular doctrine, the article in question contributed to a discussion of the various possible reasons behind the extermination of the Jews in Europe, a question of indisputable public interest in a democratic society. The Court noted that the search for historical truth is an integral part of freedom of expression and that the article written by the applicant was in no way "gratuitously offensive" or insulting and did not incite disrespect or hatred.⁵⁵ Consequently, the applicant's

51. *X. v. United Kingdom*, App. No. 7992/77 (July 12, 1978 E. C. H. R.) (obligation on motor-cyclists to wear a helmet).

52. Paul Martens, *L'irrésistible ascension du principe de proportionnalité*, in *PRESENCE DU DROIT PUBLIC ET DES DROITS DE L'HOMME: MELANGES OFFERTS A JACQUES VELU* 51 (1992).

53. *Giniewski v. France*, App. No. 64016/00 (Jan. 31, 2006, Eur. Ct. H.R.).

54. *Id.* at § 32; *see also* Eur. Conv. on H.R., art. 10, § 2.

55. *Id.* §§ 49–53.

conviction on the charge of public defamation of the Christian community did not meet a pressing social need

B. Balancing of Interests

Where two opposing provisions of one and the same instrument—Articles 9 and 10 in this case—contradict each other, the principle of proportionality is irrelevant. In this situation, the Court takes a different approach—that of the balancing of interests—to check whether the right balance has been struck between two conflicting freedoms or rights.⁵⁶ Looking at it in another way, we are no longer dealing with a freedom and the exceptions to it, but with an interpretative dialectic that must seek to reconcile freedoms. Where does the point of equilibrium lie between freedom of expression and freedom of thought, conscience, and religion?

The *I.A. v. Turkey* judgment of September 13, 2005 concerned the prosecution of the author of a novel, *The Forbidden Phrases*, which contained “an abusive attack on the Prophet of Islam.”⁵⁷ The Court observed that it was not disputed that the applicant’s conviction had amounted to interference with his right to freedom of expression. The interference had been prescribed by law and had pursued the legitimate aims of preventing disorder and protecting morals and the rights of others. As to deciding whether the interference had been necessary, this involved weighing up the conflicting interests relating to the exercise of two fundamental freedoms, namely the applicant’s right to impart his ideas on religion, on the one hand, and the right of others to respect for their freedom of thought, conscience, and religion, on the other. Certain passages in the novel in question had attacked the Prophet Muhammad in an abusive manner. Therefore, the measure at issue had been intended to provide protection against offensive attacks on matters regarded as sacred by Muslims and could reasonably be regarded as meeting a “pressing social need.”⁵⁸ In addition, the authorities had not exceeded their margin of appreciation, and the reasons given by the domestic courts to justify the measure taken

56. See François Rigaux, *Logique et droits de l'homme in* PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE, STUDIES IN MEMORY OF ROLV RYSSDAL 1197–1211 (Paul Mahoney et al. ed., 2000).

57. *I.A. v. Turkey*, § 29, App No. 42571/09 (Dec. 13, 2005, Eur. Ct. H.R.).

58. *Id.* at § 30.

against the applicant had been relevant and sufficient. As to whether the conviction had been proportionate, the Court noted that the national courts had not seized the book in question, and that the small fine imposed appeared to be proportionate to the aims pursued and accordingly found no violation.

There are those who believe that balancing interests is more a matter of rhetoric than of method. What is the real meaning of this balance metaphor? It is a question of weighing up rights in relation one to another and giving priority to the one to which greater value is attached. Three quite particular difficulties arise here. The first is what we call incommensurability of rights. The very image of the balance presupposes the existence of a common scale against which the respective importance or the weight of different rights could be measured, which is highly unrealistic. For example, finding the balance between a Church's freedom of religion and its followers' freedom of expression "is more like judging whether a particular line is longer than a particular rock is heavy."⁵⁹ The second is that of subjectivity. By using the metaphor of the balance, in fact one leaves the court great freedom of judgment and this can have formidable effects on judicial reasoning.⁶⁰

The third difficulty lies in the fact that the parties are not in symmetrical positions and so the importance attributed to each of their rights may depend on their relative positions. The *Otto-Preminger-Institut v. Austria* judgment of September 24, 1994 is a good example of this. The Austrian authorities objected to the showing of a satirical film by a cinema club in Tyrol on the ground that it ridiculed the Christian faith in general. Whereas it was a private association that invoked freedom of expression, the freedom of religion was that of all persons of the Catholic faith who might feel offended by the images in the film that were considered blasphemous. On the one hand we have a private individual, and on the other a community of believers: the possibility cannot be ruled out that the balance of rights was influenced, more or less consciously, by the impression that an individual's freedom of expression had to be measured or weighed against the interests of all

59. *Bendix Autolite Cort. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., dissenting). See e.g., INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON (Ruth Chang ed., 1997); BENOÎT FRYDMAN, *LE SENS DES LOIS* 436 (2005).

60. *White v. Sweden*, App. No. 42435/02 (September 19, 2006 Eur. Ct. H. R.).

Catholics in the Austrian province of Tyrol. “The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.”⁶¹ In fact, Roscoe Pound largely anticipated this danger as long ago as 1921 when he wrote: “When it comes to weighing or valuing claims or demands, we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest, we may decide the question in advance of our very way of putting it.”⁶²

C. The Choice of Priorities

As is emphasised by P. Ducoulombier, hierarchy is sometimes taboo in legal thinking, either for philosophical reasons relating in particular to the principle of indivisibility of fundamental human rights or on more methodological or practical grounds, some people thinking that such an approach is naive or pointless;⁶³ other writers

61. *Otto-Preminger-Institut v. Austria*, § 56, App. No. 13470/87 (September 24, 1994 Eur. Ct. H.R.). See also *Wingrove v. the United Kingdom*, App. No. 17419/90 (November 25, 1996 Eur. Ct. H.R.), where the applicant complained of the British authorities’ refusal to authorise the distribution, even limited to part of the public, of a video film containing erotic scenes involving St Theresa of Avila and Christ. According to the authorities, the film should be regarded as an insulting or offensive attack directed against the religious beliefs of Christians and therefore constituted an offence against the blasphemy laws. The Court also considered that the state could legitimately have limited the applicant’s freedom of expression in order to protect the rights of others, in this case their right of religious freedom. Thus it extends its interpretation of Article 9 by stating that this provision implies the right of believers to be protected from provocative representations of objects of religious veneration. In this case the applicant also stressed that the offence of blasphemy only covered attacks on the Christian faith, and more specifically the Anglican faith, and argued that this offence should therefore be seen as discriminatory. Here, however, the Court refrained from answering that argument, merely pointing out that the degree of protection afforded by the law to other beliefs is not at issue before the Court (§ 50). However, the reality is indeed the fact that the film in question was an attack on the dominant religion. As François Rigaux observes, “it is not freedom of religion but the power of a religion that is threatened.” See *La liberté d’expression et ses limites*, *Revue trimestrielle des droits de l’homme*, 411 (1993).

62. Roscoe Pound, *A Survey of Social Interest*, 57 HARV. L. REV. 1 (1943).

63. PHILIPPE FRUMER, *LA RENONCIATION AUX DROITS ET LIBERTES. LA CONVENTION EUROPEENNE A L’EPREUVE DE LA VOLONTE INDIVIDUELLE* (2001); Sébastien Van Drooghenbroeck, *L’horizontalisation des droits in LA RESPONSABILITE, FACE CACHEE DES DROITS DE L’HOMME* 381–82 (Hugues Dumont et al. eds., 2005).

are in favour.⁶⁴ Personally, I do not think one can escape the need to try and establish criteria by which this exercise might be guided.⁶⁵

For example, a distinction can be drawn between core rights, those at the heart or centre, and those on the periphery. Freedom of religion has an inner and an outer aspect. Its inner dimension—that is to say, the right of everyone to have a religion and to change it, or to have none at all—would be among the core rights. No limitation or restriction could be placed on it, even if linked to freedom of expression when, for example, the latter entails incitement to hate speech, violence, or discrimination, on the basis of religious allegiance.

The limits, or the difficulty, of this approach lie in the fact that, over and above certain obvious factors (in particular inalienable rights), it is no easy matter to identify the hard core. On the one hand, doctrinal attempts to establish a hierarchy among the various rights have to date largely failed.⁶⁶ On the other hand, the same is true of attempts to identify exactly what the European Court regards as the inviolable essence of each of the rights secured by the Convention.

D. Practical Concordance

This approach based on practical concordance between conflicting rights has been subjected to the most detailed theoretical treatment, by the German constitutionalist K. Hesse,⁶⁷ and is to be

64. Dinah Shelton, *Mettre En Balance Les Droits: Vers Une Hiérarchie Des Normes En Droit International Des Droits De L'homme*, in *CLASSER LES DROITS DE L'HOMME* 153 (Emmanuelle Bribosia & Ludovic Hennebel eds., 2004). See also Dinah Shelton, *Normative Hierarchy in International Law*, 100 *AM. J.INT'L L.* 291 (2006); Dominique Breillat, *La hiérarchie des droits de l'homme*, in *DROIT ET POLITIQUE A LA CROISEE DES CULTURES: MELANGES PHILIPPE ARDANT* 353 (1999); Frederic Sudre, *Droits intangibles et/ou droits fondamentaux: y a-t-il des droits prééminents dans la Convention européenne des droits de l'homme?*, in *LIBER AMICORUM MARC-ANDRE EISSEN* 381 (1995); Olivier Jacot-Guillarmod, *Rapport entre démocratie et droits de l'homme*, in *DEMOCRATIE ET DROITS DE L'HOMME* 49, 69 (1990) (referring to a material hierarchy constructed by European case law, via the concept of democratic society); ELISABETH LAMBERT ABDELGAWAD, *LES EFFETS DES ARRETS DE LA COUR EUROPEENNE DES DROITS DE L'HOMME. CONTRIBUTION A UNE APPROCHE PLURALISTE DU DROIT EUROPEEN DES DROITS DE L'HOMME* 323 (1999).

65. See Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 *N.Y.U J. INT'L. L. & POL.* 795 (1992).

66. FRUMER, *supra* note 63, at 522–27.

67. See KONRAD HESSE, *GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND*, nos. 71 et seq. (20th ed., 1995). On this practical

seen in numerous decisions of the Bundesverfassungsgericht. The starting-point for this approach is the outright refusal to move in the direction of sacrificing one right to another. In other words, where rights are in conflict, it is not appropriate to turn straightaway to the balance in order to decide which right weighs heavier and deserves to be upheld at the expense of all its competitors. On the contrary, the aim should be, in an imaginative dialectical perspective involving mutual concessions that attenuate contradictory requirements, to delay the inexorable sacrifice until the last possible moment. The novel character of this approach lies in the fact that it fosters solutions that preserve the two conflicting rights to the maximum rather than simply finding a point of balance between them.

An example of this is seen in the *Öllinger v. Austria* judgment of June 29, 2006. The applicant notified the Salzburg Federal Police Authority that on November 1, 1998, he would be holding a meeting at the municipal cemetery in front of the war memorial in memory of the Jews killed by the SS during the Second World War. He stressed that the meeting would coincide with the gathering of Comradeship IV (*Kameradschaft IV*) to commemorate the SS soldiers killed during the Second World War. The Salzburg police authority banned the meeting and the public security authority dismissed the applicant's appeal against that decision. Both the police authority and the public security authority considered it necessary to prohibit the meeting planned by the applicant in order to avoid any disturbance to the commemorative meeting organised by Comradeship IV, which was regarded as a popular ceremony for which no authorisation was required. In these circumstances, the Court was "not convinced by the Government's argument that allowing both meetings while taking preventive measures, such as ensuring police presence in order to keep the two assemblies apart, was not a viable alternative which would have preserved the applicant's right to freedom of assembly while at the same time offering a sufficient degree of protection as regards the rights of the cemetery's visitors."⁶⁸ In other words, the government presented the

concordance, see also FRIEDRICH MÜLLER, DISCOURS DE LA MÉTHODE JURIDIQUE 285–87 (O. Jouanjan trans. 1996), and SEBASTIEN VAN DROOGHENBROECK, LA PROPORTIONNALITE DANS LE DROIT DE LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME 212, 709–10 (2001).

68. *Öllinger v. Austria*, App. No.76900/01 (June 29, 2006 Eur. Ct. H.R.).

conflict as necessary, whereas it could also be regarded as accidental and as originating in the attitude of the authorities.

The limitation on the practical concordance approach is that it lacks a constructive dimension: it does not include the need to try and change the context in which the conflict arose. In other words, it takes no account of the need to develop imaginative solutions in order to limit the conflict itself and prevent it from arising again in the future.

E. A Constructive Procedural Approach

This final approach operates in two stages. First of all, it takes account of the fact that, in many situations, the conflict between fundamental rights has its origin in the existence of a certain context that creates the conditions for conflict. Conflicts appear inevitable as long as these conditions are not taken into account and those that can be changed are not identified. In concrete terms, the state must explore all avenues that may enable the conflict to be overcome before pleading that it is facing a dilemma—and perhaps also recognize its responsibility in creating the context that gave rise to the conflict.

In the area of concern to us here, the *Otto-Preminger-Institut v. Austria* judgment of September 20, 1994 strikes me as a perfect counter-example. In fact, all the conditions seemed to be present for the persons likely to be offended by the works at issue not to be exposed to them. The film was intended for showing in a film club to a select audience, its subject had been announced in the programme, and access was denied to minors under the age of seventeen. So there was no reason for persons who might have been offended to go to the club and see it. The Court states that the very fact of advertising the screening of the film and the nature of it was a sufficiently “public” expression to give offence.⁶⁹ Nevertheless, as P. Wachsmann says, that analysis means that in the Court’s view the offence lies “not in the fact of exposing them directly to images such as to offend their faith, but in the mere fact of drawing their attention to the existence of a work which they would consider blasphemous,” and “ultimately turns against the association the

69. *Otto-Preminger-Institut v. Austria*, App. No. 13470/87, § 56 (Eur. Ct. H.R. 1994).

legitimate precautions which it had taken to prevent anyone who might feel his beliefs to be under attack from seeing the film.”⁷⁰

The same holds true of the *Wingrove v. the United Kingdom* judgment of 25 November 1996. The possibility was open to the authorities of limiting distribution of the video to licensed sex shops or to persons above a certain age.⁷¹ In the circumstances, one may question the proportion of the measure chosen by the authorities, that is to say, the total prohibition on the film’s distribution.

Then—this is the second stage—once every step has been taken to avoid a conflict, procedures for settling it should be openly debated. The important thing in this connection, to my way of thinking, is not so much to apply predefined arithmetical formulae or to invent architectural structures of some sort to guide judicial reasoning, but to bring about the conditions for a debate in which all interested parties without exception can express their views, so that everyone’s interests can be taken into account and into consideration in the discussion. This is precisely the free-ranging discussion whose prerequisites were stated by Habermas in his *Éthique de la communication*: “Everyone must be able to raise the problem inherent in any statement, whatever it be; everyone must be able to express his views, wishes and needs; no speaker should be prevented by authoritarian pressure, whether from inside or outside the discussion, from exercising his rights [of free discussion].”⁷² Furthermore, such procedures offer the advantage of fostering an on-going re-assessment of provisions, which might make it possible for different rights to be reconciled. This question of reconciliation of rights is to my mind essential, and I believe that open, public debates on issues linked to religion and religious beliefs, in complete objectivity and impartiality, can certainly assist it.

70. Patrick Wachsmann, *La Religion Contre La Liberté D’expression: Sur Un Arrêt Regrettable De La Cour Européenne Des Droits De L’homme*, 12 REVUE UNIVERSELLE DES DROITS DE L’HOMME 445, 445–46 (1994).

71. *Wingrove v. the United Kingdom*, App. No. 17419/90 (Eur. Ct. H.R. 1996).

72. Jürgen Habermas, *Notes Programmatiques Pour Fonder En Raison Une Éthique De La Discussion*, in MORALE ET COMMUNICATION 110–11 (1986).

CONCLUSION

As legal theorists have observed, “the law must be stable yet it cannot stand still.”⁷³ Adaptation and modification have been constant features of the Convention since 1950 and continue to be so today. The Convention is now sixty years old and the Court’s case law has been evolving for fifty years, alongside profound changes that have occurred in Europe over recent decades. The Convention has become a pan-European instrument of protection of human rights and, in many countries, has made it possible to achieve a level of respect for fundamental rights that would have been hardly imaginable in 1950 when the Convention was drafted. It would probably not have survived if it had not been regarded as a living instrument that has to be interpreted in line with developments in the society in which we live. The development of law is inseparable from the development of society.

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. Nevertheless, as pointed out by Julie Ringelheim, “analysis of the Court’s case law can shed an important light on the debate on religion and European constitutionalism.”⁷⁴ Why? Because the role of the Court, as a supranational judicial body, is to “define common standards on religious freedom in a religiously diverse Europe,”⁷⁵ i.e., a Europe characterized by religious diversity. It is a challenging task but indispensable for the protection of human rights.

As observed by the former president of the Court, Nicolas Bratza, “it is worth emphasising that there have always been two challenges for the Court in protecting the rights guaranteed by Article 9, which will not necessarily be felt by national courts charged with the same task. First, it is readily apparent that the 47 Contracting States have very different religious and cultural

73. Attributed to Roscoe Pound in his book *INTERPRETATIONS OF LEGAL HISTORY* (1923).

74. Ringelheim, *supra* note 41.

75. *Id.*

backgrounds, and the Convention seeks to ensure that, as far as possible, all such traditions are respected. Second, the Convention does not endorse or indeed require any particular model of Church-state relations. The Court must therefore strike a balance between, on the one hand, the effective protection of individual rights and, on the other, the need to respect very different constitutional traditions among the Contracting States.”⁷⁶

76. Bratza, *supra* note 14, at 257–58.