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Freedom of religion under the European Convention on Human Rights "A precious asset"

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1. 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 honour and a pleasure to be here with such an outstanding audience of judges, scholars, lawyers, and public officials from all over the world.

2. As the voice coming from Europe and as a modest European contribution to the work of this conference, I shall touch on two issues which are of course interrelated: how, in the European Convention on Human Rights, has freedom of religion built itself as a fundamental human right? How has this right been interpreted by the case-law of the European Court of Human Rights in the context of our contemporary society?

3. As we know, the European Convention on Human Rights was drafted and adopted on 4 November 1950, in the aftermath of World War II, and it entered into force in September 1953. It has just celebrated its 60th anniversary. Today, it has been ratified by 47 States 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, the Preamble of the Convention is highly significant. It traces the outlines of a European *ordre public*. The rights and freedoms guaranteed by the Convention "are the foundation of justice and peace in the world" and are best maintained "by an effective political democracy". 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 Court relies heavily on these principles not only as source of inspiration but also as a basis for their action.

4. 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 religious discrimination. Article 2 of the First Additional Protocol to the Convention gives parents the right to regulate the religious education of their children. It the first and most central is Article 9, we will see that the two others are gaining importance, especially Article 14.

I. "A precious asset"

5. As in many international treaties, Article 9 of the European Convention on Human Rights guarantees to everyone (every person) the right to freedom of thought, conscience and religion[1]. As Malcolm Evans pointed it out, the idea that freedom of religion is for everyone is essential[2]. In a nutshell, this right implies, among others, freedom either alone or in community with others and in public or private, to change one's religion or belief and also freedom to manifest one's religion or belief in worship, teaching, practice and observance. But only this external expression of religion may be subjected under Article 9 § 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[3]. 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, unlike the case of other civil and political rights, freedom of religion has an individual as well as a collective aspect. 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.

1. C. EVANS, "Religious Freedom in European Human Rights Law: The Search for a Guiding Conception", in M.W. Janis & C. Evans (eds.), Religion and International Law, 2004, pp. 385-386; M.D. EVANS, *Religious, Liberty and International Law in Europe*, Cambridge University Press, 2007.
2. M. EVANS, "Advancing Freedom of Religion or Belief: Agendas for Change", *Oxford Journal of Law and Religion*, vol. 1, no. 1 (2012), p. 5.
3. 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 § 2 the freedom of thought, conscience and religion laid down in Article 18 is declared non-derogable. *See* C. OVEY & R.C.A. WHITE, *The European Convention on Human Rights*, Oxford University Press, 4th ed., 2006, p. 441.

6. As you will know, in the first judgment of the Court under Article 9 in 1993, the Court established the principle: "… freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."[4] 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.

7. 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 and prohibition on the wearing of religious dress or symbols in public places. In its case-law the Court has reiterated the central importance played by religious and philosophical beliefs in European society.

8. Pluralism obviously, or implicitly, transcends all the Article 9 jurisprudence and constitutes one of its interpretative principles. In my opinion, 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. 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 …[5]". 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 have 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[6]. 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 for the State to protect democratic societies from the danger of Islam (*Refah Partisi and Others v. Turkey*, judgment of 13 February 2003) and sects (*Leela Förderkreis E.V. and Others v. Germany,* judgment of 6 November 2008).

4. EurCtHR, *Kokkinakis v. Greece*, judgment of 25 May 1993, § 31.
5. *Ibid*.
6. J. RINGELHEIM, "Rights, Religion and the Public Sphere: the European Court of Human Rights in Search of a Theory?", in C. Ungureanu and L. Zucca (eds.), *A European Dilemma: Religion and the Public Sphere*, Cambridge University Press, 2012, p. 283.

Individual aspect

Forum internum – Internal dimension

9. 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". 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. So this provision prohibits persecution of a person on the grounds of his/her religion.

10. In this respect, a very important case of the Court is the *M.E. v. France* judgment of 6 June 2013 (not final). The Court was called 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 today is a strong message to all European States which are faced with the expulsion of a member of a religious community at risk and which are confronted, in asylum seekers cases, with assessing the risk of religious persecutions[7].

11. 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[8]. Now what remains to be decided by the Court is the exact / precise meaning of "religious persecutions".

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

13. This internal dimension has been held to go further and to include a guarantee against a requirement to manifest or disclose the nature of his religion. In the case of *Sinan Isik v. Turkey* of 2 February 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. 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

7. M. KAGAN, "Refugee Credibility Assessment and the 'Religious Imposter' Problem", *Vanderbilt Journal of Transnational Law*, vol. 43, no. 5 (2010), p. 1233.
8. N. HERVIEU, "Une progression sans révolution dans l'appréhension européenne des persécutions religieuses", *Lettre "Actualités Droits-Libertés" du CREDOF* (online), 11 June 2013.

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.

14. What do we mean by religion? The protection of Article 9 extends to a wide range of convictions and philosophies, not limited to religious belief. However, for the article to apply, a belief must "attain a certain level of cogency, seriousness, cohesion and importance", and also be such as to be compatible with human dignity and democracy. This means that mere ideas or opinions will not constitute a belief. The borderline car frequently be difficult to draw, since belief is, of course, inherently subjective.

15. But 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 § 1. The same position is held by the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights (1966). 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".

16. 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. 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, Judaïsm, Budhism, Sikkhism) but also to other foms of religious movements including Druidism, Scientology, as well as to a wide range of philosophical beliefs (pacifism, atheism, etc.). 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[9]. 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.

17. Recently, the Court had to decide a very sensitive case concerning the relation between freedom of religion and discrimination (Article 9 in conjunction with Article 14). As Lourdes Peroni rightly pointed out, "after leaving aside the 'freedom to resign' doctrine in the *Eweida and Others v. the United*

9. EurCtHR, *Kimlya v. Russia*, judgment of 1 October 2009, §§ 79-81.

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"[10]. The applicant's discrimination complaint was examined under Article 14 and Article 8. The Court found that the applicant was discriminated against on the basis of his religious beliefs in the exercise of his right to respect for family life. First, it established that there was a difference of treatment between the applicant and other parents in an analogous situation: the applicant's religious convictions were decisive in the removal of his access rights. 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 a reason in this case. "The Court observes that in the present case there is no evidence that the applicant's religious convictions involved dangerous practices or exposed his son to physical or psychological harm"[11]. If there were any doubts about the suspect nature of religion as a ground of differentiation in the Court's non-discrimination case law, *Vojnity* dissipates them all: religion is "suspect." 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[12].

External dimension

18. 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 / belief and one that is merely motivated by a religion. Nevertheless, the approach could bring the Court dangerously close to decide on whether a particular practice is formally required by a religion – a task the judges are unable to decide given the relevant theological issues.

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10. L. PERONI, "'Very Weighty Reasons' for Religion: Vojnity v. Hungary", *Strasbourg Observers* (online), 27 February 2013.
11. EurCtHR, *Vojnity v. Hungary*, judgment of 12 February 2013, § 38.
12. See the partly dissenting opinion of Judges Bratza, Hirvelä and Nicolaou annexed to the *Redfearn v. the United Kingdom* of 6 November 2012, at paragraph 4. See also, K. 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," *Erasmus Law Review*, vol. 5, no. 1 (2012), pp. 71-72. Henrard, however, observes: "The supervisory practice of the Court is … rather ambivalent about the suspect nature of religion." (*ibid*., p. 71). See also K. HENRARD, "Freedom of religion and religious minorities: an adequate accommodation of religious diversity?", published in Spanish ('Libertad de religion y minorias religiosas: una adaptacion adecuada de la diversidad religiosa?', in E.J. Ruiz Vieytez & G. Urrutia Asua (eds.), *Derechos humanos y diversidad religiosa*, Alberdenia 2010, pp. 247 et seq. In the same direction, see the judgment of the Court of Justice of the European Union of 5 September 2012 in the joined cases C-71/11 and C-99/11, *Federal Republic of Germany v. Y and Z*, where the Court held that certain forms of serious interference with the public manifestation of religion may constitute persecution for reasons of religion.

19. The Court has been confronted with *different aspects* of the manifestation of the freedom of religion. Religious holidays (*Kosteski v. "the former Yugoslav Republic of Macedonia"* judgment of 13 April 2006); ritual slaughter (*Cha'are Shalom Ve Tsedek v. France* judgment (GC) of 27 June 2000); refusing specific action (blood transfusion; refusal to perform duties; etc.); religious symbols at work (*Eweida and Chaplin v. the United Kingdom* judgment of 15 January 2013), at school (*Leyla Sahin v. Turkey* judgment (GC) of 10 November 2005)[13], in public (*Ahmet Arslan and Others v. Turkey* judgment of 23 February 2010).

20. The *Ahmet Arslan and Others v. Turkey* judgment of 23 February 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. 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 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 non-majority or only tolerating practices seen as secular.

Collective aspect

21. 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"[14]. 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.

13. On 27 November 2013 the Grand Chamber will hold 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.

14. L. GARLICKI, "Collective Aspects of the Religious Freedoms: Recent Developments in the Case Law of the European Court of Human Rights", in A. Sajo (ed.), *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World*, Utrecht, Eleven International Pub., 2007, pp. 218 and 219.

22. "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 hose whose faith one shares. "Bearing witness in words and deeds is bound up with the existence of religious convictions" (*Metropolitan Church of Bessarabia and Others v. Moldova* judgment of 13 December 2001, § 114).

23. 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 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. Such accounts tend to put state-church relations in the centre of attention[15].

A. The model of pluralism

24. 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. 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 17 February 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"[16].

25. 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; State neutrality and impartiality.

26. 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

15. For an enunciation of the primordial importance of religious pluralism as one of the foundations of a democratic society, see the *Nolan and K. v. Russia* judgment of 12 February 2009, § 73.
16. EurCtHR (GC), *Gorzelik and Others v. Poland* judgment of 17 February 2004, § 92.

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. The case-law can, however, be criticized as lacking in any detailed formulation of principles and concepts. The Strasbourg Court has yet to define 'religion' or to elaborate any guidelines as to how mainstream or established a religion has to be before it requires recognition by the State. While the Court has accepted that restrictions might be permissible to prevent religious pressure being placed on individuals by their superiors in hierarchical structures, it has not attempted to elaborate any general guidelines as to when attempts at conversion become abusive, what constitutes a "cult" or when the State should step in to protect children or other vulnerable individuals from violations of human rights carried out in the name of religion. In addition, the case-law regarding the extent to which restrictions can be placed on the manifestation of religious belief is not consistent. These are all difficult questions, but that is why the Court's guidance is needed. Following the attack on the United States of 11 September 2001 and the ensuing 'war on terror' which has been joined by America's European allies, many of the 100 million Muslims living within the Convention States have felt themselves to be the targets of prejudice and suspicion. It is therefore extremely regrettable that the Court has, in its judgments on the Islamic headscarf, shown a lack of understanding of the meaning of this symbol and has left itself open to the charge of perpetuating, rather than dispelling, prejudices and misunderstandings about Islam. It is noteworthy that there was no third party intervention in any of the key 'Islamic' cases to date. It is to be hoped that, the next time such a question comes before the Court, it actively seeks expert advice from one or more Muslim organizations to prevent it making the same mistakes again"[17].

In an oft-repeated statement in the case of *Hasan and Chaush v Bulgaria*, the Court observed that, where the organisation of religious communities is at issue, Article 9 must be interpreted in the light of Article 11, which protects freedom of assembly and association[18]. The Court went on to say this: "Seen in that 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

17. R.C.A. WHITE and C. OVEY, *The European Convention on Human Rights*, Oxford University Press, 5th ed., 2010, pp. 423-424.
18. EurCtHR (GC), *Hasan and Chaush v Bulgaria*, judgment of 26 October 2000, § 62.

autonomous existence of religious communities is indispensible for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords"[19].

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.

27. As to the first of these areas, the Court's case law has frequently involved the intervention by the state in internal disputes within a religious community. In the *Hasan and Chaush* case itself, following a dispute within the Bulgarian Muslim community as to who should be its national leader, the Government's intervention effectively to replace the applicant who had been elected to the office with another, previous holder of the post was held to be in violation of Article 9, the intervention being found to have been arbitrary and based on legal provisions that allowed an unfettered discretion to the executive[20]. Violations have been found even where the aim of the intervention was one of avoiding intra-faith conflict, the Court emphasising that the existence of tensions within a divided religious community is one of the 'unavoidable consequences of pluralism' and that the role of the authorities in such circumstances is not to intervene to remove the cause of tension by eliminating pluralism but to ensure that the competing groups tolerate each other[21] – something, I am afraid, that experience has sometimes shown to be easier said than done.

28. Similarly, the grant of official recognition, including the requirement of registration of religious communities, has been a source of much case law. The Court has emphasised that, while the imposition of a requirement of state registration is not in itself incompatible with freedom of religion, despite the risk of the discriminatory treatment of minority faiths, the state must remain neutral and impartial and must not appear to be assessing the comparative legitimacy of different beliefs[22].

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19. *Ibid.*
20. See, in particular, *ibid*., §§ 86 and 87.
21. See EurCtHR, *Serif v Greece*, judgment of 14 December 1999, § 53. See also EurCtHR, *Agga v Greece (no. 2)*, judgment of 17 October 2002; EurCtHR, *Supreme Holy Council of the Muslim Community v Bulgaria*, judgment of 16 December 2004.
22. EurCtHR, *Metropolitan Church of Bessarabia and Others v Moldova*, judgment of 13 December 2001, §§ 116 and 117.

II. Conflicts of rights

29. Here the sensitive question is the conflict (or potential conflict) between freedom of religion and other rights – such as freedom of expression (including artistic expression) and the right to education. 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[23], 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?[24]

The necessity test

30. 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 proselytising[25] and protection of minors[26], or the protection of public order[27], security[28] or public health[29] (Article 9 § 2).

31. 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

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23. See V. SAINT JAMES, *La conciliation des droits de l'homme et des libertés publiques en droit français*, Paris: PUF, 1995; R. ALEXY, "Balancing constitutional review and representation", *International Journal of Constitutional Law*, October 2005, pp. 572-581; S. GREER, "Balancing and the European Court of Human Rights: a contribution to the Habermas-Alexy debate", *Cambridge Law Journal*, vol. 63, no. 2, July 2004, pp. 412-424, in particular p. 417.
24. See O. DE SCHUTTER and Fr. TULKENS, "Rights in Conflict: the European Court of Human Rights as a Pragmatic Institution", in E. Brems (ed.), *Conflicts between Fundamental Rights*, Antwerp, Intersentia, 2008, pp. 169 et seq.
25. EurCtHR, *Kokkinakis v. Greece* judgment of 25 May 1993, § 33; EurCtHR, *Larissis and Others v. Greece* judgment of 24 February 1998.
26. EurCtHR, *Dahlab v. Switzerland* decision of 15 February 2001; EurCtHR, *Ciftci v. Turkey* decision of 17 June 2004.
27. EurCtHR, *Vergos v. Greece* judgment of 24 June 2004, § 33 (rational urban planning).
28. EurCtHR, *Phull v. France* judgment of 11 January 2005, § 21 (wearing of the turban and security at airports).
29. European Commission of Human Rights, *X. v. United Kingdom*, application 7992/77, decision of 12 July 1978 (obligation on motor-cyclists to wear a helmet).

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/criterion of proportionality[30].

32. 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". 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" (Article 10 § 2). In its judgment of 31 January 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 writ- ten by the applicant was in no way "gratuitously offensive" or insulting and did not incite disrespect or hatred[31]. Consequently, the applicant's conviction on the charge of public defamation of the Christian community did not meet a pressing social need

Balancing of interests

33. 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[32]. 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

[30].P. MARTENS, "L'irrésistible ascension du principe de proportionnalité", in Présence du droit public et des droits de l'homme. Mélanges offerts à Jacques Velu, Brussels, Bruylant, 1992, pp. 51 et seq.

[31]. EurCtHR, *Giniewski v. France* judgment of 31 January 2006, §§ 49-53.

[32]. See F. RIGAUX, "Logique et droits de l'homme" in P. Mahoney, F. Matscher, H. Petzold and L. Wildhaber (eds.), *Protecting Human Rights: The European Perspective, Studies in memory of Rolv Ryssdal*, Cologne/Berlin/Bonn/Munich, Carl Heymanns Verlag KG, 2000, pp. 1197-1211.

reconcile freedoms. Where does the point of equilibrium lie between freedom of expression and freedom of thought, conscience and religion?

34. 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" [33]. 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[34].

35. 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 24 September 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 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"[35]. In fact, Roscoe Pound largely anticipated this danger as long ago

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33. *Bendix Autolite Cort. v. Midwesco Enterprises, Inc., et al.*, 486 U.S. 888, 897 (1988) (Scalia, J., diss.). See, inter alia, R. CHANG (ed.), *Incommensurability, Incomparability and Practical Reason*, Cambridge, MA: Harvard University Press, 1997; and B. FRYDMAN, *Le sens des Lois*, Brussels-Paris, Bruylant-LGDJ, 2005, p. 436.
34. EurCtHR, *White v. Sweden*, judgment of 9 September 2006.
35. EurCtHR, *Otto-Preminger-Institut v. Austria*, judgment of 24 September 1994, § 56. See also EurCtHR, *Wingrove v. the United Kingdom*, judgment of 25 November 1996, 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

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" [36].

The choice of priorities

36. 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[37]; other writers are in favour[38]. Personally, I do not think one can escape the need to try and establish criteria by which this exercise might be guided[39].

37. 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.

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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 in 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 F. Rigaux observes, "it is not freedom of religion but the power of a religion that is threatened" ("La liberté d'expression et ses limites", *Revue trimestrielle des droits de l'homme*, special issue, 1993, p. 411).

36. R. POUND, "A survey of social interest", *Harvard Law Review*, vol. 57, nos. 1/2 (1943).

37. Ph. FRUMER, *La renonciation aux droits et libertés. La Convention européenne à l'épreuve de la volonté individuelle*, Brussels, Bruylant, 2001; S. VAN DROOGHENBROECK, "L'horizontalisation des droits" in H. Dumont, F. Tulkens and S. Van Drooghenbroeck (eds.), *La responsabilité, face cachée des droits de l'homme*, Brussels, Bruylant, 2005, pp. 381-382.

38. D. SHELTON, "Mettre en balance les droits: vers une hiérarchie des normes en droit international des droits de l'homme", in E. Bribosia and L. Hennebel (eds.), *Classer les droits de l'homme*, Brussels, Bruylant, 2004, p. 153 et seq; see also D. SHELTON, "Normative hierarchy in international law", *American Journal of International Law*, Vol. 100, No. 2, April 2006, p. 291 et seq; D. BREILLAT, "La hiérarchie des droits de l'homme", in *Droit et politique à la croisée des cultures. Mélanges Philippe Ardant*, Paris, LGDJ, 1999, pp. 353 et seq; F. 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-André Eissen*, Brussels-Paris, Bruylant-LGDJ, 1995, p. 381 et seq; O. JACOT-GUILLERMOD, "Rapport entre démocratie et droits de l'homme" in *Démocratie et droits de l'homme*, Kehl/Strasbourg, N.P. Engel, 1990, pp. 49-72 (the author refers to a material hierarchy constructed by European case law, via the concept of democratic society, p. 69); E. LAMBERT-ABDELGAWAD, *Les effets des arrêts de la Cour européenne des droits de l'homme. Contribution à une approche pluraliste du droit européen des droits de l'homme*, Brussels, Bruylant, 1999, p. 323.

39. D. J. SULLIVAN, "Gender equality and religious freedom: toward a framework for conflict resolution", *New York University Journal of International Law and Politics* (1992), pp. 795 et seq.

38. 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[40]. 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.

Practical concordance

39. This approach based on practical concordance between conflicting rights has been subjected to the most detailed theoretical treatment, by the German constitutionalist K. Hesse[41], and is to be 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 which 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.

40. An example of this is seen in the *Öllinger v. Austria* judgment of 29 June 2006. The applicant notified the Salzburg Federal Police Authority that on 1 November 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

40. Ph. FRUMER, *La renonciation aux droits et libertés. La Convention européenne à l'épreuve de la volonté individuelle*, *op. cit.*, pp. 522-527.

41. See K. HESSE, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, Heidelberg, C.F. Müller, 20th ed., 1995, No. 71 et seq. On this practical concordance, see also F. MÜLLER, *Discours de la méthode juridique*, transl. O. Jouanjan [from German], Paris: PUF, 1996, pp. 285-287, and S. VAN DROOGHENBROECK, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme*, Brussels, Bruylant-FUSL, 2001, pp. 212, 709-710.

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" [42]. In other words, the government presented the conflict as necessary, whereas it could also be regarded as accidental and as originating in the attitude of the authorities.

41. 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.

A constructive procedural approach

42. 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 which 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 recognise its responsibility in creating the context which gave rise to the conflict.

43. In the area of concern to us here, the *Otto-Preminger-Institut v. Austria* judgment of 20 September 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 17. 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[43]. 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",

42. EurCtHR, *Öllinger v. Austria*, judgment of 29 June 2006.
43. EurCtHR, *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994.

and "ultimately turns against the association the legitimate precautions which it had taken to prevent anyone who might feel his beliefs to be under attack from seeing the film" [44].

44. 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[45]. In the circumstances, one may question the proportionateness of the measure chosen by the authorities, that is to say, the total prohibition on the film's distribution.

45. 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 *Ethique 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]" [46]. 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.

44. P. WACHSMANN, "La religion contre la liberté d'expression: sur un arrêt regrettable de la Cour européenne des droits de l'homme", *Revue universelle des droits de l'homme*, no. 12 (1994), pp. 445-446.
45. EurCtHR, *Wingrove v. the United Kingdom*, judgment of 25 November 1996.
46. J. HABERMAS, "Notes programmatiques pour fonder en raison une éthique de la discussion" in *Morale et communication*, Paris, Cerf, 1986, pp. 110-11.

Conclusion

46. As legal theorists have observed, "the law must be stable yet it cannot stand still"[47]. 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.

47. 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 J. Ringelheim, "analysis of the Court's case law can shed an important light on the debate on religion and European constitutionalism"[48]. Why? Because the role of the Court (which is a supranational judicial body) is to "define common standards on religious freedom in a religiously diverse Europe"[49], i.e. a Europe characterized by religious diversity. 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"[50].

48. As observed by the former president of the Court, N. 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 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

47. Attributed to Roscoe POUND in his book *Interpretations of legal history*, New York, MacMillan, 1923.
48. J. RINGELHEIM, "Rights, Religion and the Public Sphere: the European Court of Human Rights in Search of a Theory?", *op. cit.*
49. *Ibid*.
50. EurCtHR, *Otto-Preminger-Institut v. Austria*, judgment of 24 September 1994, §§ 57-58.

rights and, on the other, the need to respect very different constitutional traditions among the Contracting States"[51].

51. N. BRATZA, "The 'precious asset': freedom of religion under the European Convention on Human Rights", *Ecclesiastical Law Journal*, vol. 14, no. 2 (2012), pp. 257-258.