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Manual on the Wearing of Religious Symbols in Public Areas

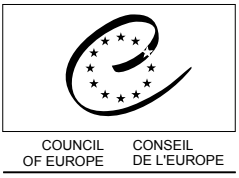
Council of Europe Manuals

HUMAN RIGHTS IN CULTURALLY DIVERSE SOCIETIES

Manual on the Wearing of Religious Symbols in Public Areas

by

Malcolm D. Evans



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Annexes

#1 General Introduction

The origins of this Manual lie in the increasing interest and importance of questions concerning the manner in which the freedom of religion and belief is to be enjoyed in Europe today. Issues concerning religion and belief have arisen in different ways at different times, reacting to the overall social and political context and the responses to this have differed greatly from one country to another. It is, then, not surprising that as social and political contexts evolve, new questions concerning the enjoyment of the freedom of thought, conscience and religion come to the fore and call for reflection and response. European history is closely intertwined with evolving patterns of religious and non-religious belief.[1] Indeed, the system of sovereign states which characterises the composition of modern Europe owes its origins to the struggle to separate political governance from religious governance and affiliations. Tragically, European history is punctuated by many instances of conflict between followers of various religious beliefs, and of persecution by both the religious and by the non-religious of those who either did not share or who rejected the belief systems of the dominant groups within the societies of which they formed a part.

There have been a variety of responses to instances of this nature over time. An early response was to seek to 'solve' the problem by working towards a situation in which each political community was religiously heterogeneous – an approach reflected in the Latin maxim 'cuius regio, eius religio', perhaps more easily understood as the proposition that the religious beliefs of the people should be the same as the religious beliefs of their rulers. In fact, such an approach negated the very idea of belief for most of the people, since

1 For an overview see Malcolm Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997, reprinted 2008).

it meant that their beliefs depended on the beliefs of others: if their rulers were to change their beliefs, the people would have to change theirs as well. Naturally, for those who took their beliefs seriously this was an impossible state of affairs and inevitably gave rise to conflict. In order to reduce tensions, a further development came about with states recognising the legitimacy of a limited number of beliefs which they would allow to be practised within their territories. However, for as long as the governance of a state was premised upon the primacy of a particular pattern of religious belief, this always carried with it the risk of persecution should minority beliefs cease to be tolerated. Moreover, for as long as religious affiliation was seen as a marker of 'belonging' to the state itself, those who chose not to adhere to the dominant religious tradition(s) would inevitably be seen as presenting a potential threat to the political elites, and even when they presented no threat at all, were capable of being portrayed as posing a potential threat when it suited the interests of those in authority to do so, rendering them permanently vulnerable.

As long ago as the early seventeenth century, however, powerful voices called for a different approach. The influential international jurist, Alberico Gentili, writing shortly before the onset of the 30 Years War that tore apart central Europe and, through the Peace of Westphalia in 1648 gave birth to the modern system of European statehood, argued that:

> 'Religion is a matter of the mind and of the will, which is always accompanied by freedom.... Religion ought to be free. (I)f truly the profession of a different form of religious belief by their subjects does not harm princes, we are ... unjust... if we persecute those who profess another religion than our own.'[2]

This is a plea that still resonates today and which is yet to be fully realised. Ever since the triumph of the Enlightenment as reflected in the writings of Locke and in its realisation in the Revolutions of the late Eighteenth century, the idea that individuals should exercise the freedom of thought and of conscience in matters of religion and of belief has become increasingly well established and is now universally acknowledged. The more pressing difficulty became how this

2 Alberico Gentili, *De Iure Belli Libri Tres*, book I, Chapter IX.

might be realised in an age which recognised the right of states to regulate their own affairs free from pressure from others.

Once again, a variety of approaches were drawn upon. Some states continued the old tradition of entering into treaty relations which permitted them to exercise a degree of oversight and even intervention of the manner in which particular forms of believers were treated. Others insisted that the rights of believers continue to be respected when territory was transferred from sovereignty of one state to that of another. These practices came together in the mid to late nineteenth century when it became increasingly common to require newly constituted states to make commitments regarding their treatment of potentially vulnerable groups at the time of their recognition as members of the international community. But how to enforce such commitments without embroiling states in strife remained an unsolved challenge. The beginnings of a solution emerged after the First World War when many of the newly created or territorially reconfigured states in Central and Eastern Europe entered into a series of undertakings concerning minority populations – including commitments regarding their freedom of religion and beliefs – which were to be overseen and guaranteed not by other states but by the international community in the guise of the League of Nations. Tragically, these measures proved inadequate to prevent the horrors that culminated in the Second World War but they did lay the foundations for the emergence of the modern system of human rights protection which now provides the means and mechanisms for the protection of the rights not just of certain minorities in some countries within Europe, but of all those within the jurisdiction of member states of the Council of Europe. Moreover, whilst historically the focus has been very much on questions concerning religion and religious believers, the human rights framework adopts a different approach.

Human rights look to the person as a whole and at their place in the society of which they form a part. They do not seek to differentiate one person from another, or to value one group – or any one set of beliefs (religious or otherwise) – more than others. They seek to provide a means by which to reconcile the various conflicting interests which inevitably exist within any democratic state in which different understandings and different points of view co-exist

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side by side. They seek to protect the individual from overly intrusive state activities, whilst at the same time requiring that the state provides a balanced framework that permits everyone to enjoy their rights to the fullest extent that is compatible with the rights and freedoms of others. Whilst recognising that this is, first and foremost, a responsibility of the state itself, human rights are nevertheless a product of an international understanding of the basic rights and obligations of persons within a democratic political community and are properly subject to international scrutiny and, in contested cases, determination. The European Convention on Human Rights provides the premier means through which these aims are to be achieved within the community of European states as formed by the Council of Europe.

The need to find a means of accommodating religious diversity has played a significant role in the shaping of not only modern Europe but of the international legal system itself. In addition, the manner in which such accommodations have been achieved has varied over time, and has left its own historical legacy which still has reverberations today. Thus some still may hanker for the religiously homogenous state, in which a single belief system holds sway. Some may seek to manage religious life through the recognition of a limited number of authorised religions with whom they have a working relationship, denying legitimacy to those not officially approved. Others may seek to adopt an approach which insulates the apparatus of the state from matters of religion and belief, separating the spheres of the religious and spiritual from that of the political governance of society altogether. All of these – and other – approaches to the question have their roots in historical experiences and practices which reflected the dominant conceptual understandings of their times. Although these may still echo down the ages, the legitimacy of such approaches must today be assessed in the light of the requirements of the human rights framework to which they must either conform, or yield. This is the situation which is found in Europe today and forms the background to this Manual.

Different approaches to accommodating religious diversity have their roots in historical experiences. The legitimacy of such approaches must today be assessed in the light of the requirements of international human rights law.

The framework of the Convention in general, and the manner in which it relates to the freedom of thought, conscience and religion in particular, will be considered in detail in Section II of this Manual. Section III will identify the key concepts which have been identified in the juris-

prudence of the Court and Sections IV and V will consider the role and responsibilities of the state and of individuals. These Sections are essential to properly understand the central issues which this Manual seeks to address – the wearing of religious symbols in public areas. Section VI will then look at a number of key definitional issues which need to be addressed. Section VII then sets out in summary fashion the essential questions which policy makers need to ask when addressing issues concerning the wearing of religious symbols. The final section of the Manual, Section VIII, seeks to apply these principles and approaches to a number of key areas and issues. For readers with limited time, Sections VII and VIII might be read separately. For the reader with very little time, Section VII (b) offers a succinct statement of the essential issues which need to be considered.

#11 The Freedom of Thought, Conscience and Religion: An Introduction

Article 9 provides that

1. Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice or observance.
2. Freedom to manifest one's religion shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

This is a classic human rights formulation, found in all the major human rights instruments, and sets out a very clear right which is to be enjoyed by the individual person, whilst subjecting it to a range of potential limitations intended to safeguard the interests of other individuals or a variety of community interests. This section looks at how Article 9 is constructed and operates in practice in order that a better understanding can be had of how it applies in the context of religious symbols,[1] which will be explored in detail in the later sections of this Manual.

1 There are now numerous monograph length works which examine Article 9 in some detail, including, Malcolm Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 2007, reprinted 2008); Caroline Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001); Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005); Renata Uitz, *Europeans and their Rights: Freedom of Religion* (Strasbourg: Council of Europe Publishing, 2007). For a valuable work exploring the practice relating to a form of religious clothing see Dominic

(A) The *'Forum Internum'*

Article 9(1) opens by stating that 'everyone enjoys the freedom of thought, conscience and religion'. This provides an essential starting point, and the Convention bodies have frequently emphasised that 'Article 9 primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*'. It represents the sphere of 'inner conviction' and as such is absolutely inviolable. This makes it clear that individuals are free to adhere to any form of belief that they wish. The reason for this, as the Court acknowledged in the case of *Kosteski v. the former Yugoslav Republic of Macedonia*[2] is that 'the notion of the state sitting in judgment on the state of a citizen's inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions'. Believing what one wishes does not, however, carry with it the right to act as one wishes and the second element of Article 9(1) moves beyond the '*forum internum*' to address the situation which arises when a person wishes to act in accordance with what they understand their pattern of thought, conscience or religion to mean for them. First, it expressly protects the right of a person to change their religion or belief – something which arises naturally from the first part of the Article allowing unfettered freedom of thought, conscience and religion. Secondly, it expressly recognises that individuals have the right to 'manifest' their religion or belief. However, the 'manifestation' of religion or belief is not unfettered and may be subject to limitations, provided such restrictions are in accordance with the provisions of Article 9(2).

Personal beliefs and religious creeds represent the sphere of 'inner conviction' and as such are absolutely inviolable.

It is, then, essential to understand what falls within the scope of the '*forum internum*' and what falls beyond. This is a particularly important question when considering issues concerning religious symbols but since it can only be properly considered once the general scheme of Article 9 has been looked at, it will be returned to later. Apart from frequently re-iterating its view that the protection of the *forum internum* is the primary purpose of Article 9, the Court has said relatively little about it. As a result of this, it is only possible to discern its scope by examining what falls

McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford: Hart Publishing, 2006).

2 *Kosteski v. the former Yugoslav Republic of Macedonia*, no. 55170/00, para 39, 13 April 2006

within the ambit of the so called '*forum externum*', perhaps better described as the sphere of external manifestation, to which considerable attention has been paid.

(B) The Manifestation of Religion or Belief

Understanding what is meant by the 'manifestation' of religion or belief lies at the heart of the proper application of Article 9 and it presents a series of difficult questions, which will be considered in turn.

(a) What is a 'religion or belief' for the purposes of Article 9?

The protection of the '*forum internum*' extends to all patterns of 'thought, conscience and religion' whereas it is the manifestation of 'religion or belief' which is protected (and limited by) the second part of Article 9(1) and by Article 9(2). Does this mean that patterns of thought and conscience of a non-religious nature are not covered by the 'freedom to manifest'; that is, is the word 'belief' a synonym for 'religion', or does it also extend the freedom to manifest to all forms of thought and conscience? This question was considered by the European Commission on Human Rights in the case of *Arrowsmith v. the United Kingdom* in which the Commission was of the view that 'pacifism as a philosophy .... falls within the ambit of the right to freedom of thought and conscience. This attitude of pacifism may therefore be seen as a belief ("conviction") protected by Article 9(1)'.[3]

This broad, inclusive approach which places all forms of belief on an equal footing has been followed consistently ever since. Nevertheless, this does not mean that any form of belief will 'qualify' for the purposes of Article 9(1). First, there are some forms of belief which might be considered incompatible with Convention values altogether and so cannot benefit from its protection at all. For example, Article 17[4] of the Convention expressly seeks to prevent its

Understanding what is meant by the 'manifestation' of religion or belief lies at the heart of the proper application of Article 9 and it presents a series of difficult questions: i. What is a 'religion or belief' for the purposes of Article 9?; (ii) What is a manifestation?; (iii) When is an 'interference' attributable to the state?

3 *Arrowsmith v. UK*, no. 7050/77, Commission Report of 12 October 1978, Decisions and Reports 19, p. 5, para 69.

4 Article 17 provides: 'Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any

provisions being used to undermine essential convention values. Although the Court has not used Article 17 to remove the protections offered by Article 9 to believers, this remains possible in appropriate cases.[5] This will always be exceptional, however, and the more common situation will be one in which the nature of the belief in question, whilst fully consonant with Convention values, is not of a nature which attracts the direct protection of Article 9. For example, under Article 10 of the Convention the freedom of expression is extended to 'opinions' and 'ideas'. 'Manifestation' is, however, a broader notion than 'expression' and so it is necessary to consider what is needed to elevate an 'opinion' or an 'idea' which might be expressed under Article 10 into a 'belief' which may be manifested under Article 9.[6]

The Court has studiously avoided saying whether it considers particular forms of 'belief' to be religious in nature and since it is not necessary for it to do so in order to be able to apply Article 9 this is a wise approach. It is, however, clear that it considers that what might reasonably be described as the 'mainstream' religious traditions – such as Buddhism, Christianity, Hinduism, Islam, Judaism, Sikhism – all fall within its scope and it has acknowledged that it embraces Jehovah's Witnesses, the Church of Scientology and many others besides. Its applicability to cogent bodies of thought

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of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention'.

5 For example, in *Norwood v. the United Kingdom*, the Court found that the display of a poster by a member of an extreme right wing party that identified Islam as a religion with terrorism amounted to a 'vehement attack on a religious group' was 'incompatible with the values proclaimed and guaranteed by the convention, notably tolerance, social peace and non-discrimination' and, as such, could not benefit from the protection of Article 10, the freedom of expression. *Norwood v. the United Kingdom* (dec.), no. 23131/03, ECHR 2004-XI.

6 In the *Arrowsmith* case the European Commission implicitly endorsed the view of the respondent UK Government that whilst 'ideas' and 'opinions' were indeed protected under Article 10, the use of the term 'belief' in Article 9 indicated a somewhat higher threshold and this was confirmed by the Court in the case of *Campbell and Cosans v. the United Kingdom* where it said that 'the term 'belief' denotes views that attain a certain level of cogency, seriousness, cohesion and importance'. See *Campbell and Cosans v. the United Kingdom*, judgment of 25 February 1982, Series A no. 48, para 36.

of a non-religious nature, such as atheism and pacifism, is also well attested. More difficulty has been occasioned by less well established patterns of thought, or by beliefs which, though sincerely held, do not offer up an overall 'guiding outlook' of a similarly encompassing nature.

The difficulties that may be faced are well illustrated by the case of *Pretty v. the United Kingdom*.[7] The applicant in this case suffered from a terminal illness and wished to die but needed assistance in order to commit suicide. Her husband was in principle willing to assist in this, but in practice was unwilling to do so as this would involve him committing what was a criminal offence under the domestic law. Mrs Pretty argued that this breached her rights under Article 9 since she 'believed in and supported the notion of assisted suicide'. The Court rejected this here, taking the view that 'not all opinions and convictions constitute beliefs in the sense protected by Article 9(1) of the Convention'. In order to determine whether the belief was of a nature which attracted that protection, the Court looked to see if an act of 'worship, teaching, practice or observance' was at issue, and concluded that it was not.[8] It chose to see the issue as being one of personal autonomy, properly protected under Article 8 of the Convention (concerning respect for family and private life). This suggests that largely personally-held ideas, opinion and beliefs, no matter how seriously taken, will not fall within the scope of Article 9 although they may qualify for protection under other provisions of the convention.[9] The critical point, however, is that they then do not benefit from the particular protections offered to the 'manifestation' of religion or belief by Article 9.

(b) What is a 'manifestation'?

Once it has been determined that a form of belief does indeed 'qualify' for the purposes of Article 9, the next question to be asked is whether the activities or behaviour which have been undertaken on the basis of that form of belief are to be considered as amounting to a form of mani-

7 *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III.

8 *Ibid*, para 81.

9 But see *Plattform "Arzte fur das Leben" v. Austria,* judgment of 21 June 1988, Series A no. 139, in which Article 9 was said to extend to the members of an association of doctors opposed to abortion.

festation. The Convention itself lists four particular forms of manifestation: worship, teaching, practice and observance. The Court has hinted on several occasions that this is not necessarily a definitive list and as will be seen later, it has interpreted Article 9 in a way which offers protection to interests which lie beyond this 'illustrative list'. Nevertheless, it will usually be necessary for applicants to be able to demonstrate that there has been an impediment placed upon their ability to engage in one of these activities in order to claim that their freedom to manifest their religion or belief has been infringed.

The Convention lists four particular forms of manifestation: worship, teaching, practice and observance. It will usually be necessary for someone to be able to demonstrate that there has been an impediment placed upon his or her ability to engage in one of these activities.

One difficult issue concerns who is to decide whether a form of action is to be understood, in a *prima facie* sense, as a manifestation of a religion or belief at all. If the applicant asserts that something they have done was as a result of their religion or belief, is it open to the Court simply to deny that this is so on the basis of its scrutiny of the facts, or is it bound to accept the applicant's 'subjective' characterisation of their actions? This question arose in the case of *Valsamis v. Greece*, in which a child was excluded from school as a result of her parents' refusal to allow her to participate in a parade commemorating the national day of independence. The parents argued that the parade commemorated war (and was preceded by an official Mass and followed by military parades) and so was incompatible with the family's pacifist beliefs as members of the Jehovah's Witnesses. The Court (as had the Commission before it) rejected this contention, arguing that 'it can discern nothing, either in the purposes of the parade or in the arrangements for it, which could offend the applicants' pacifist convictions...'[10] and concluded that 'the obligation to take part in the school parade was not such as to offend her parents' religious convictions.[11] This approach is problematic since it is difficult to see on what basis a Court can determine that a person does not understand an issue to be of a religious nature if they say that, for them, it is.

This does not mean that an applicant's characterisation of an act as a manifestation must be accepted in an unquestioning fashion. For example, if a person is seeking to take advantage of a privilege or exemption which is available

10 *Valsamis v. Greece*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, para 31.

11 *Ibid*, para 37.

only to adherents of a particular religious tradition or belief system it may be necessary to consider whether that person genuinely is an adherent of the belief system in question.[12] However, particular care needs to be taken when adopting such an approach in the context of the wearing or religious symbols. Compelling a person to prove their religious allegiance might indeed become oppressive, and will almost certainly be oppressive if the 'the privileges' in question are intimately connected with the practice of one's belief. It could be argued that by wearing a religious symbol a person is not only acting in a fashion which they consider to be consonant with their belief system, but that that very act itself demonstrates their *bona fides* adherence to that belief and so no further exploration of the question is necessary. However, the need to determine whether a particular form of jewellery, clothing, etc is indeed being worn as a religious symbol or in a religious sense or whether it is being worn for other reasons, such as comfort, social conformity, fashion, – or even disrespect of religion – may indeed need to be explored in order to determine whether an issue arises under Article 9.

Even when it is clear that the activity in question is to be taken as a *bona fide* form of manifestation by the applicant, this does not necessarily mean that it is to be taken as a form of manifestation *for the purposes of Article 9*. For example, the *Arrowsmith* case concerned a pacifist who had been distributing leaflets outside an army camp which gave information on how soldiers might claim exemption from serving in a situation of conflict. As far as the applicant was concerned, she was engaged in the practice of pacifism

12 For example, in the case of *Kosteski v. the former Yugoslav Republic of Macedonia*, op.cit., the applicant argued that his '*forum internum*' had been violated by his being required to prove his status as a practising Muslim before he could take advantage of the right enjoyed by all Muslims in the former Yugoslav Republic of Macedonia to absent himself from work in order to attend a religious festival. The Court accepted that 'the notion of the state sitting in judgement on the state of a citizen's inner and personal beliefs is abhorrent'. However, it went on to say that 'it is not oppressive or in fundamental conflict with freedom of conscience to require some level of substantiation when the claim concerns a privilege or entitlement not commonly available' (para 39). This reflects the approach taken in cases concerning conscientious objection to military service, and it is obviously appropriate to confirm that those claiming to be manifesting a belief are doing so *bona fides*.

and as such her actions fell within the protective reach of Article 9. The Commission took the view that whilst the manifestation of pacifism was indeed protected by Article 9 the distribution of leaflets such as those at issue in the case in hand was not. It accepted that the applicant had been 'motivated by her pacifist beliefs' when she distributed them but it did not think that this amounted to a 'manifestation', observing that 'it is true that public declarations proclaiming generally the idea of pacifism and urging the acceptance of a commitment to non-violence may be considered as a normal and recognised manifestation of pacifist belief. However, when the actions of individuals do not actually express the belief concerned they cannot be considered to be as such protected by Article 9(1)'.[13] In consequence, and in a passage still regularly cited by the Court, the Commission concluded that 'the term "practice" as employed in Article 9(1) does not cover each act which is motivated or influenced by a religion or a belief'.[14] Thus not all activities undertaken which are motivated or inspired by a belief are necessarily protected since not only might they not be related to the '*forum internum*' and the sphere of 'inner conviction' but they may also be considered not to amount to a *manifestation* of that belief for the purposes of Article 9(1).

(c) When is an 'interference' attributable to the state?

An additional question is whether a person's inability to manifest their religion or belief is something for which the state is responsible, or whether it is largely attributable to choices which those individuals have freely made for themselves. For example, a number of cases have considered the question of whether employees may be required to work on days or at times which prevent them from fulfilling their religious obligations. In the case of *X v. the United Kingdom*[15] it was decided that there had been no interference with the freedom of religion or belief by requiring the applicant, a Muslim teacher, to work at a given time on a Friday afternoon when he believed he ought to be at prayer since he remained free to renegotiate his contract, or change his employment altogether. His inability to attend prayers was

13 *Arrowsmith v. UK*, op.cit., para 71.

14 *Ibid.*

15 *X. v. the United Kingdom*, no 8160/78, Commission decision of 12 March 1981, Decisions and Reports 22, p. 27, para 36.

a result of his choosing to accept a full time position as a teacher rather than as a result of a restriction placed upon him. A similar approach was taken in the case of *Konttinen v. Finland*,[16] where the applicant was a Seventh Day Adventist who objected to being required to work after sunset on a Friday on the grounds that this was forbidden by his religious beliefs, and also (*inter alia*) in *Stedman v. the United Kingdom,*[17] where the applicant's employer, following a change in national legislation, required the applicant to work on Sunday. In all these cases there was no doubt that the applicants were either unable to engage in acts of worship or to engage in a form of religious observance but the Court (or Commission) was of the view that this was attributable not to the actions of the state but to choices made voluntarily by the applicants. In short, the solution to their difficulties lay in their own hands. If they wished to prioritise their religious observance above their contractual commitments as employees, they could do so by changing the nature of their employment.

The Court will examine whether a person's inability to manifest their religion or belief is something for which the state is responsible, or whether it is largely attributable to choices which those individuals have freely made for themselves.

Similar outcomes have been reached in different contexts. For example, in *Pichon and Sajous v. France*,[18] the applicants were pharmacists who objected on religious grounds from being required to sell contraceptives. The Court took the view that since they were free to take up a different profession there was no interference with their freedom to manifest their religion.[19] In the case of *Cha'are Shalom Ve Tsedek v. France*[20] the Court decided that there had been no interference with the right of the applicant association in prohibiting its members from engaging in ritual slaughter of animals in order to ensure that the meat produced was religiously acceptable since such meat could be acquired in and imported from Belgium. Finally, in *Kalaç v. Turkey,* in which a military judge was dismissed from his position on account of his membership of a religious community whose

16 *Konttinen v. Finland*, no. 24949/94, Commission decision of 3 December 1996, Decisions and Reports 87, p. 68.

17 *Stedman v. the United Kingdom,* no 29107/95, Commission decision of 9 April 1997, Decisions and Reports 87- A, p. 104.

18 *Pichon and Sajous v. France* (dec.), no 49853/99, ECHR 2001-X.

19 The Court might also have considered whether their desire not to sell contraceptives amounted to a manifestation at all, or whether it was a stance which was merely 'motivated' by their beliefs.

20 *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, ECHR 2000-VII.

views were, in the view of the military authorities, inimical to the proper functioning of a judge, the Court concluded that 'His compulsory retirement was not an interference with his freedom of conscience, religion or belief but was intended to remove from the military legal service a person who had manifested his lack of loyalty to the foundation of the Turkish nation, namely secularism, which it was the task of the armed forces to guarantee'.[21]

Thus whilst the Convention protects the freedom to manifest one's religion or belief, applicants may be expected to take whatever steps are available to them to ensure that they can act in accordance with their beliefs – even if this is at some personal cost to them – before the Court will conclude that an interference attributable to the state has occurred. There are, however, limits to this approach. If the burdens placed on an applicant are particularly onerous, they might amount to a form of pressure which affects their very ability to adhere to the pattern of thought, conscience and religion of their choice. Such a degree of pressure could amount to a form of coercion which would be incompatible with the requirements of Article 9(1). Similarly, it may be that if the burdens placed on adherents of some beliefs are greater than those placed on others, and there is no objective justification for this difference, then questions of discrimination in the enjoyment of the right will come into play and may result in a violation of the Article. This will be considered in greater detail later, but the approach can be illustrated at this point by looking at the decision of the European Commission in the case of *Choudhury v. the United Kingdom*[22] in which an application concerning the failure of the blasphemy laws in the United Kingdom to extend protection to the Islamic faith was declared inadmissible. The Commission was of the view that the inability of the applicant to ensure that criminal proceedings were brought against the author and publisher of a book which, in his view, amounted to a 'scurrilous attack' on his religion did not give rise to a claim under Article 9 since there had been no interference with his ability of manifest his freedom of religion of belief. Moreover, it thought that no issue was raised in relation to Article 14 of the Convention

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21 *Kalaç v. Turkey*, judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, paras 25 and 30.

22 *Choudhury v. the United Kingdom,* no. 17439/90, Commission decision of 5 March 1991, unreported.

(non discrimination in the enjoyment of a convention right) since nothing had occurred that fell within the scope of the rights recognised by Article 9. As will be seen below, the Court subsequently adopted a different approach to this latter point in the case of *Otto-Preminger Institut* v. *Austria,* in so far as it decided that the Article 9 rights might indeed be violated by 'provocative portrayals of objects of religious veneration' and that 'a state may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct .... judged incompatible with the respect for the freedom of thought, conscience and religion of others'.[23] In light of this, it would seem that the failure of the state to offer the same degree of legal protection against the 'provocative portrayal of objects of religious veneration' to one form of religion or belief as it offers to another would now amount to a violation of the Convention. This too has important consequences as regards the wearing of religious symbols, and will be explored further below.

(C) Restrictions upon the Manifestation of Religion or Belief

Although actions which amount to a manifestation of a religion are belief are protected under Article 9(1), they may be subject to limitations from two sources. First, Article 15 permits states to derogate from their obligations under a number of Convention Articles, including Article 9, 'in times of war or other public emergencies threatening the life of the nation' but only 'to the extent strictly required by the exigencies of the situation'. In theory, this could be taken to suggest that in such emergency situations the state might be able to act in a manner which even impinged upon the '*forum internum*' – for example, seeking to persuade or coerce individuals to abandon forms of thinking or of belief which were considered inimical to national security. However, given the primarily personal and private scope of the *forum internum*, it is difficult to see how such intrusions could ever be 'strictly required'.[24] Although Article 15 does

23 *Otto-Preminger Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A, para 47.

24 Moreover, Article 3 of the Convention prohibits 'inhuman or degrading treatment' in absolute terms and is not subject to the limitations of Article 15 and it is difficult to see how activities capable of coercing a change in private patterns of thought would not fall foul of this provision.

provide a possible means of restricting the 'manifestation' of religion or belief to a degree beyond that permitted by Article 9(2) no state has yet considered there to be a need of such a nature in the few emergency situations which have given rise to notices of derogation and so it is unnecessary to do more than note that this is a theoretical possibility.

Article 9(2) is the most significant source of possible restrictions on freedom to manifest one's religion or beliefs. Limitations must be 'prescribed by law', follow a 'legitimate aim' and be 'necessary in a democratic society'.

The second and most significant source of limitation is Article 9(2). In common with similar clauses in the Convention, it requires that limitations be both 'prescribed by law' and 'necessary in a democratic society', but with the state enjoying a certain margin of appreciation, each of which will be briefly considered.

(a) 'Prescribed by law'

The essence of the 'prescribed by law' requirement is captured in two ideas: first, that 'the law must be adequately accessible; the citizen must be able to have an indication that is adequate in the circumstances' and secondly, that the law must be 'formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able to foresee to a degree that is reasonable in the circumstances, the consequences which a given action may entail.'[25] Both of these criteria call for a reasonableness-based assessment which can only be determined on the facts of each case, although the Court in *Hasan and Chaush v. Bulgaria* made it clear that, in combination, this means that in matters concerning fundamental rights 'it would be contrary to the rule of law ... for a legal discretion granted to the executive to be expressed in terms of an unfettered power.'[26]

Hasan and Chaush was one of the first cases concerning Article 9 in which it was decided that a restriction had not been 'prescribed by law'. The provisions at issue permitted the authorities to replace the chosen leader of the Muslim community in Bulgaria with a leader of their choice. The Court noted that 'the relevant law does not provide for any substantive criteria on the basis of which [the authorities] register denominations and changes of their leadership'

25 Sunday Times v. the United Kingdom (no. 1), judgment of 26 April 1979, Series A no. 30, para 49.

26 *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, para 84, ECHR 2000-XI.

and that there were 'no procedural safeguards ... against arbitrary exercise of the discretion left to the executive'.[27] A further illustration of this approach is provided by *Kuznetsov v. Russia*, in which the Chair of a regional Human Rights Commission broke up a meeting of a group of Jehovah's Witnesses in a fashion which was attributable to the state (in that she had purported to be acting in her official capacity, and was accompanied by uniformed police officers). The Court noted that 'the legal basis for breaking up a religious event conducted on the premises lawfully rented for that purpose was conspicuously lacking' and so had not been 'prescribed by law'.[28]

(b) *'Necessary in a democratic society'*

Once it has been determined that a restriction has been 'prescribed by law' for the purposes of Article 9(2), it is then necessary to determine whether it is 'necessary in a democratic society'. The Court has often stressed that 'the freedom of thought, conscience and religion is one of the foundations of a 'democratic society' and the necessity of any restriction will depend upon whether it fulfils a number of requirements.

The first is that the restriction pursues a legitimate aim as set out in article 9(2), these being public safety, the protection of public order, health or morals and the protection of the rights and freedoms of others. Though important, this is not a difficult hurdle to surmount.[29]

The second, and arguably more critical question, is whether the nature of the interference is proportionate to the legitimate aim which is being pursued, since it is this which will determine whether the interference could be considered as 'necessary'. The European Commission said that 'the "neces-

27 *Ibid*, para 85.

28 *Kuznetsov v. Russia,* no. 184/02, para 74, 11 January 2007.

29 For example, in *Casimiro v. Luxembourg* (dec.), no. 44888/98, 27 April 1999, the Court decided in a case brought by his parents that requiring a child who was a Seventh Day Adventist to attend state schooling on a Saturday, their religious day of rest, could be justified on the basis that it was aimed at securing the rights and freedoms of others; in that case, their own child's right to education.

sity test" cannot be applied in absolute terms but requires the assessment of various factors. Such factors include the nature of the right involved, the degree of interference, i.e. whether it was proportionate to the legitimate aim pursued, the nature of the public interest and the degree to which it requires protection in the circumstances of the case.'[30] This, then, sets up a complex factual matrix which has to be applied by the Court when assessing the necessity of an interference.

(c) The margin of appreciation

It is at this point that the doctrine of the 'margin of appreciation' comes into play. The rationale for the 'margin of appreciation' was set out in the case of *Handyside v. the United Kingdom* in the following terms:[31]

> 'By reason of their direct and continuous contact with the vital forces or their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.'

However, the Court has made it clear that the 'margin of appreciation' goes hand in hand with European oversight and that the breadth of the margin of appreciation accorded to states will vary depending on the rights and interests at stake, and that is very much a question for the Court itself to decide. In some areas, the Court has decided that very little, if any margin of appreciation is given to states. This is particularly true as regards matters in which it considers there to be a 'pan-European' consensus. However, there is no such consensus as regards Article 9. In the case of *Otto-Preminger Institut v. Austria* the Court said 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'.[32] The Court sees this as an area in which there is considerable variation

30 See *X and the Church of Scientology v. Sweden*, no 7805/77, Commission decision of 5 May 1979, Decisions and Reports 16, p. 68.

31 *Handyside v. the United Kingdom,* judgment of 7 December 1976, Series A no. 24, para 48.

32 *Otto-Preminger Institut v. Austria*, op.cit., para 56.

in practice and, in consequence, it grants states a relatively broad margin of appreciation. Thus in the case of *Leyla Şahin v. Turkey* – concerning the wearing of headscarves by students in universities in Turkey – the Court said 'Where questions concerning the relationship between state and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision making body must be given special importance ... Rules in this sphere will consequently vary from one country to another according to national traditions .... Accordingly the choice of the extent and form such regulations should take must inevitably be left up to a point to the state concerned, as it will depend on the domestic context'.[33]

It cannot be overemphasised, however, that this does not give the state an unfettered discretion to determine whether a restriction is proportionate to the aim pursued. It has been persuasively argued that the margin of appreciation is a second order principle and that the state is constrained by an overarching primary principle of ensuring that there is a 'priority to rights'[34] and the Court itself has stressed that although the state enjoys considerable leeway – it does so only 'up to a point'. Not only is the national assessment subject to European scrutiny in order to ensure that it does indeed meet the requirements of proportionality on the facts of the case, but it is always open to the Court to narrow that margin should a more general consensus on the relationship between the state and the manifestation of religion or belief emerge. In the meanwhile, it also follows from this that different responses to similar situations will be acceptable within the Convention framework, providing that they properly reflect a balancing up on the particular issues in the contexts in which they emerge. This means that the decisions of the Court in relation to Article 9(2) must be treated with extreme caution: for example, just because a restriction on the wearing of a religious symbol has been upheld in one case does not mean that a similar restriction will be upheld in another, where the context may be very different.

Where questions concerning the relationship between state and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance. However, this does not give the state an unfettered discretion to determine whether a restriction is proportionate to the aim pursued.

33 *Leyla Şahin v. Turkey* [GC], no. 44774/98, para 109, ECHR 2005-XI.

34 See S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press, 2006), pp. 201-213.

(D) The Education of Children

The place of religion in the educational system raises many difficult and delicate questions.

Children, as autonomous individuals, enjoy the freedom of religion or belief in their own right, as do adults. However, given the special interests of parents and legal guardians regarding the religious and philosophical upbringing of their children, the rights of the child in the sphere of education are often exercised by parents in their own right rather than in the name of the child. Thus Article 2 of the First Protocol to the European Convention provides that:

> 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'

Of course, there will come an age at which children may seek to assert their own rights in this regard, and one can expect that the rights enjoyed by the parents regarding the education of their children in accordance with their religious or philosophical convictions will transfer to the children themselves in a fashion commensurate with their evolving capacities.

As the child matures, the nature of the claim changes from the perspective of the freedom of religion or belief, since children do not have any greater rights than anyone else to be shielded from teaching not in accordance with their own religious or philosophical convictions. Therefore, their claims must be assessed in accordance with the more general approach of ensuring that the state, through its teachers, does not take undue advantage of the position that it enjoys *vis-à-vis* pupils to influence their views in an inappropriate fashion.

A number of definitional questions need to be briefly considered. Article 2 of the Protocol refers to parental, 'religious or philosophical convictions' whereas Article 9 of the Convention refers to 'religion or belief'. The meaning of this was explored in the case of *Campbell and Cosans* v. *the United Kingdom.* As has already been seen, the Court took the view that the word 'convictions' was to be equated with

'belief', both requiring 'a certain level of cogency, seriousness, cohesion and importance', thus differentiating them from mere 'ideas' or 'opinions'.[35] However, it is only such convictions (or beliefs) which are religious or philosophical in nature which attract the protection of the Article. The Court has never defined the word 'religion', but it has fleshed out its understanding of what is meant by 'philosophy'. In *Campbell and Cosans* the Court accepted that 'the word "philosophy" bears numerous meanings: it is used to allude to a fully fledged system of thought or, rather loosely, to views on more or less trivial matters'. However, it thought that 'neither of these two extremes can be adopted for the purposes of interpreting Article 2' and concluded that '"Philosophical Convictions" in the present context denotes ... such convictions as are worthy of respect in a "democratic society" and are not incompatible with human dignity.'[36] Thus the Court adopts a rather subjective approach to this important question.

A second point concerns what is meant by 'respect' for parental convictions. The Court has said that 'The verb "respect" means more than "acknowledge" or "take into account" ... in addition to a primarily negative undertaking, it implies some positive obligation on the part of the state'.[37] Article 2 does *not* mean that a state is bound to provide a system of education that accords with parental beliefs, but it *does* mean that parents can object to the nature and content of the education and teaching given to their children where religious instruction is predicated upon, intended to or has the effect of projecting the truth (or falsity) of a particular set of beliefs.

Whilst states have considerable latitude with respect to providing religious instruction, they may not seek to encourage pupils in a particular worldview through the educational system against the wishes of the pupils' parents. In consequence, parents must have the right to withdraw their children from such forms of teaching. As the Court reiterated in *Folgerø v. Norway*, 'the state, in fulfilling the functions assumed by it in regards to education and teaching, must take care that information or knowledge included

35 *Campbell and Cosans v. the United Kingdom*, op.cit., para 36.

36 *Idem*.

37 *Idem*. See also *Folgerø and Others v. Norway* [GC], no. 15472/02, para 84 (c), ECHR 2007.

in the curriculum is conveyed in an objective, critical and pluralistic manner. The state is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded.'[38]

The state is required to respect parental convictions, whether religious or philosophical, throughout the entire education programme.

It must also be stressed that Article 2 is not only of relevance to the teaching *of* religion or philosophical convictions in schools: it also applies to teaching *about* religions and philosophies in schools. Moreover, as the Court emphasised in the case of *Kjeldsen, Busk Madsen and Pederson* v. *Denmark*,[39] no distinction is to be drawn between religious instruction and other subjects: the state is required to respect parental convictions, whether religious or philosophical, throughout the entire education programme. Indeed, illustrative examples of decisions already drawn on in this Manual show that the scope of this right extends beyond the educational curricula itself and concerns matters of educational organisation – such as teaching on holy days[40] and participation in school parades.[41] It also goes further to include the ethos of the educational establishment itself and this raises important issues regarding religious symbols which will be explored later.

38 *Folgerø and Others v. Norway* [GC], ibid., para 84 (h).

39 *Kjeldsen, Busk Madsen and Pederson v. Denmark*, judgment of 7 December 1976, Series A no. 23, para 53.

40 *Casimiro v. Luxembourg* (dec.), op.cit.

41 *Valsamis v. Greece*, op.cit.

#III The Key Concepts Emerging from the Practice of the European Court of Human Rights

The previous Section set out the structural elements of Article 9 of the Convention and Article 2 of the First Protocol in a fairly schematic fashion with the intention of introducing the 'basic building blocks' of the legal framework relevant for and preparatory to a detailed consideration of human rights approaches to the wearing of religious symbols. It also sought to illustrate how the Court has interpreted these elements. Important though this is, it is even more important to understand how this framework applies in practice. Once it has been decided that there has been an interference with a *bona fide* manifestation of religion or belief, the essential question becomes whether that interference is justified in accordance with Article 9(2). This, ultimately, calls for a balancing of the rights and interests at stake and although the state enjoys a generous margin of appreciation in this regard, it is not unfettered. Whilst there may be no common European conception of the role of religion and belief in public life to inform the outcome, a number of key concepts have emerged which, reflecting core Convention values, provide clear benchmarks against which to assess the legitimacy of any restriction. Moreover, approaching Article 9 from this conceptually oriented fashion has had the additional effect of broadening its scope to embrace fact situations which might not otherwise easily 'fit' within the rather rigid, structural approach outlined above. In consequence, these concepts might be said to represent the 'spirit' rather than the 'letter' of Article 9 and they have proven to be particularly significant to issues regarding religious symbols.

Whilst there may be no common European conception of the role of religion and belief in public life to inform the outcome, a number of key concepts have emerged: (a) the principle of respect; (b) that of individual and community responsibility; and (c) non-discrimination in the enjoyment of rights.

Moreover, the Court has indicated in the case of *Kokkinakis v. Greece* that whilst there may not be a common European approach sufficient to narrow the breadth of the margin of appreciation, there is a general underlying principle drawn from general convention values which must be adhered to, this being that:

> 'As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and 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.'[42]

This key statement is routinely reproduced in almost all cases concerning Article 9 and provides the essential background to the principles identified in this section, and which both flow from and further refine its implications. In this statement, the Court acknowledges the significance of the freedom of thought, conscience and religion to the individual and the role it plays in their sense of personal identity; it also recognises how important it is to ensure that there is space for this to be recognised if there is to be a flourishing of a democratic society. At the same time, it underlines the need to ensure that a democratic society is open and inclusive by highlighting the importance of pluralism. Rather than calling for a balancing between the public and the private, it calls for a balancing of interests within the 'public' sphere that reflects both the importance of rights enshrined in Article 9 to both the individual and to democratic society, with the implication that when these interests appear to conflict, a resolution is to be sought which seeks to maximise both, to the extent that this is possible.

(A) the Principle of Respect

Perhaps the most important of all the principles to have emerged from the Convention case-law has been the principle of respect. 'Respect' for parental wishes in matters concerning the education of their children is expressly referred to in Article 2 of the First Protocol but it is not directly referred to in Article 9 of the Convention. Its centrality to the practical operation of the Convention framework was, however, made clear in the very first case which was decided by the Court on the basis of Article 9, this being *Kokkinakis v. Greece*. This case concerned a member of the

42 Kokkinakis v. Greece, judgment of 25 May 1993, Series A no. 260-A, para 31.

Jehovah's Witnesses who had been convicted for unlawful proselytism, a criminal offence under Greek law. At the heart of the case lay the question of balancing the right of the applicant to practice his religion by seeking to share his faith with others against the right of the state to intervene to protect others from unwanted exposure to his point of view. Although on the facts of the case it was decided that the interference had not been shown to be justified, the Court argued that it may be 'necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and to ensure that everyone's beliefs are respected'.[43] The key, then, is to ensure that when exercising its responsibilities the state adopts an approach which reflects the degree of respect which is to be accorded to the beliefs in question, which may of course be religious or non religious in nature.

This approach was confirmed in the subsequent case of *Larissis and others v. Greece*, in which the applicants who were members of a Pentecostal church and were officers in the Greek Air Force were convicted of various offences connected with their attempts to convert both a number of junior airmen and a number of civilians (in their free time) to their beliefs. The Court noted that whilst the authorities were 'justified in taking some measures to protect the lower ranking airmen from improper pressure'[44] the applicants' conviction for seeking to convert the civilians could not be justified on the basis of Article 9(2) since 'the civilians whom the applicants attempted to convert were not subject to the pressure and constraints of the same kind as the airmen.[45] Both the *Kokkinakis* and the *Larissis* cases show that in a democratic society it is necessary to ensure that believers are able to manifest their beliefs by bringing them to the attention of others, and by trying to persuade others to their point of view or else the exchange of ideas which underpins a vibrant and plural democracy would be undermined. At the same time, both cases show that the state pursues a legitimate aim when it seeks to limit proselytising activities which run the risk of subjecting individuals to pressure which they might find it difficult to resist. As the Court said when distinguishing between the situation of the

43 *Ibid*, para 33.

44 *Larissis and others v. Greece*, judgment of 24 February 1998, *Reports of Judgments and Decisions*, 1998-I, para 54.

45 *Ibid*, para 59.

airmen from that of the civilians in the *Larissis* case, 'it is of decisive significance that the civilians whom the applicants attempted to convert were not subject to pressure and constraints of the same kind as the airmen.'[46]

This might be loosely characterised as meaning that the role of the state in such situations is to ensure that there is a 'level playing field' between all concerned; the one side free to present their points of view, the other to reject them. More precisely, it might be said that in order to justify a restriction being placed upon a person who seeks to present their views to another what is needed is a nexus or relationship that places one party in a position in which they are unable, or feel unable, to exercise an appropriate degree of thought or reflection before adopting or expressing adherence to the belief placed before them; or that their decision to adopt or express such adherence flows not from an assessment or response to the belief itself but from a perception that it would be prudent to agree, or to be seen to be agreeing, with the person who presented those beliefs to them. The underlying principle is that of ensuring respect for the beliefs of others, given effect in this instance by ensuring that those who enjoy 'superiority' over others, educationally, socially, politically or in any other fashion, are not unduly advantaged in an exchange of ideas.

The idea of 'respect' is even more evident in those cases which have concerned the behaviour of non-believers which has caused offence to believers. The leading case remains that of *Otto-Preminger-Institut* v. *Austria* which concerned the seizure and forfeiture of a film considered to be blasphemous under Austrian law. In a case brought under Article 10 (freedom the expression) the Commission had considered the film to be predominantly satirical in nature and felt its prohibition 'excludes any chance to discuss the message of the film'. The Court, however, saw matters differently. It thought that the state has a 'responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines' but at the same time it noted that 'Those who choose to exercise the freedom to manifest their religion.... cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to

46 *Idem*.

their faith'.[47] This must indeed be true, or else the rights of believers to manifest and propagate their beliefs, as set out in the *Kokkinakis* and *Larissis* cases would be undermined. Indeed, quoting the *Handyside* case, the Court recalled that the freedom of expression embraced ideas which 'shock, offend or disturb the state or any sector of the population', this being one of the demands of maintaining a plural, tolerant and broadminded society.[48] However, the Court, quoting *Kokkinakis*, also observed that 'a state may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judgement incompatible with the respect for the freedom of thought, conscience and religions of others' and in a passage now regularly found in its jurisprudence, the Court then went on to say that:

> 'The respect for the religious feelings of believers as guaranteed by Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration: and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society'.[49]

Indeed, in the case of *Wingrove v. the United Kingdom*, which also concerned a refusal to authorise the release of an allegedly blasphemous film, the Court not only reiterated this but spoke of 'a *duty* to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profanatory',[50] a view which it confirmed in the later case of *Murphy v. Ireland.*[51]

Believers and non-believers are entitled to the respect of those who hold to other forms of belief - even though, of course, there may be profound disagreement regarding the content of those views.

The idea that the state is under a duty to ensure that the deeply held views of believers (both religious and non-religious) are both tolerated and respected has the practical effect of expanding the scope of Article 9 quite considerably. If one were to limit oneself to the rather 'mechanical'

47 *Otto-Preminger-Institut v. Austria*, op.cit., para 47.

48 *Ibid*, para 49, quoting *Handyside v. the United Kingdom,* op.cit., para 49.

49 *Otto-Preminger Institut v. Austria*, op.cit., para 47.

50 *Wingrove v. the United Kingdom*, judgement of 25 November 1995, *Reports of Judgments and Decisions* 1996-V, para 52 (emphasis added).

51 *Murphy v. Ireland*, no. 44179/98, para 65, ECHR 2003-XI (extracts).

approach to Article 9 which was outlined in Section II of this Manual (but which still forms the basis of its interpretation and application) it might be argued that since even the most virulent comments or the most offensive portrayals of the beliefs of others do not prevent them from continuing to hold to their beliefs and to manifest them in worship, teaching, practice and observance, there had been no interference with their rights at all. However, the Court has wisely understood that it is difficult to maintain to one's beliefs and practices in a hostile environment since, as was said in the Chamber's judgment in the case of *Refah Partisi v. Turkey*, 'where the offending conduct reaches a high level of insult and comes close to a negation of the freedom of religion of others it loses the right to society's tolerance'.[52]

In conclusion, the we can see that through these cases the Court has developed the principle of 'respect' as a key factor when balancing the respective interests which are engaged by Article 9. Accordingly, believers and non-believers are entitled to the respect of those who hold to other forms of belief – even though, of course, there may be profound disagreement regarding the *content* of those views since respect for the believer does not necessarily entail respect for what is believed. This principle is to be taken into account when the necessity of any interference with the manifestation of a religion or belief is being assessed. There is, however, a reciprocal obligation on believers to show respect for the beliefs (religious or non religious) of others in what they do and say. Finally, it should be noted that whilst the principle of respect guides the assessment of the Court in weighing up the proportionality of an interference with the enjoyment of the right, the adoption of what the Court has itself described as a 'rather open-ended notion'[53] has the practical effect of reinforcing the need for European supervision of the margin of appreciation that is accorded to states.

(B) The Principle of Individual and Community Autonomy

Although less well developed than the principle of respect, the Convention also acknowledges a principle of autonomy,

52 *Refah Partisi (the Welfare Party) and* Others *v. Turkey*, nos. 41340/98, 41342/98, 41343/98 and 41344/98, para 75, 31 July 2001.

53 *Murphy v. Ireland*, op.cit., para 68.

which itself must be understood in the light of the dual nature of Article 9 as both an individual and as a community right. In its early practice, the Commission suggested that the freedom of thought, conscience and religion could only be enjoyed in an individual capacity and only by a human person but this position has been abandoned over time. The first step was in the case of *X and the Church of Scientology v. Sweden* which confirmed that religious organisations could bring claims on behalf of their members, bundling up (so to speak) their members' individual claims.[54] This was then further developed so that it is now fully accepted that legal entities are themselves entitled to the protection of Article 9 in their own right, as is shown by the plethora of cases brought by religious organisations challenging state decision-making concerning their legal status. Thus in the case of the *Metropolitan Church of Bessarabia and Others v. Moldova*, in which the applicant was challenging the refusal of the state to register them as a religious entity under the relevant domestic law, the Court said[55]

> '...since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified state interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary state intervention.'

It underlined this by going on to emphasise that 'the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.'[56] The Court has adopted the same approach in cases brought under Article 11, in which the applicant bodies claim that it is their freedom of association which has been breached, rather than their freedom of religion. The close synergy between these Articles is now well established, and in the case of the *Moscow Branch of the Salvation Army v. Russia*, the Court, after quoting the above passage from the Metropoli-

54 *X and the Church of Scientology v. Sweden*, op.cit.

55 *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, para 118, ECHR 2001-XII.

56 *Idem*.

tan Church case, confirmed that 'While in the contest of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes, including those proclaiming or teaching religion, are also important to the proper functioning of democracy'.[57]

As associations with legal personality, religious and non-religious organisations within the scope of Article 9 not only enjoy the protection of Article 11 (freedom of association) but also enjoy all other convention rights applicable to legal entities, such as the right of access to a court in *Canea Catholic Church v. Greece*[58] and the freedom of expression in *Murphy v. Ireland*.[59]

Just as individuals are entitled to have their sphere of inner beliefs – their '*forum internum*' – respected absolutely, so likewise is there a degree of enhanced protection for what might be called the '*forum internum*' of the associative life of an organisation. Thus the state is not to intrude into what are properly considered to be essentially internal issues. Just as it is not for the state to pass judgement on the beliefs of an individual, the state is not to take a view on the beliefs of the community: the Court has frequently said that 'the right to freedom of religion ... excludes any discretion on the part of the state to determine whether religious beliefs or the means used to express such beliefs are legitimate' .

The right to freedom of religion excludes any discretion on the part of the state to determine whether religious beliefs or the means used to express such beliefs are legitimate'. Likewise, the state is not to intrude into matters of internal governance of faith communities.

Likewise, the state is not to intrude into matters of internal governance. For example, in a number of cases the Court has made it clear that the state should not seek to influence internal decision-making concerning matters of leadership. In the case of *Hasan and Chaush* v. *Bulgaria* the applicants claimed that the state had wrongfully involved itself in a dispute between two rivals for the leadership of the Muslim Community in Bulgaria by refusing to register a breakaway group, thus lending its support to the claim of another to the leadership of the whole community. As the Court said, 'Their effect was to favour one faction of the Muslim community... The acts of the authorities operated... to deprive

57 *Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, para 61, ECHR 2006-XI.

58 *Canea Catholic Church v. Greece*, judgment of 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, para 41.

59 *Murphy v. Ireland*, op.cit., para 61.

the excluded leadership of any possibility of continuing to represent at least part of the Muslim community and of managing its affairs according to the will of that part of the community. There was therefore an interference with the internal organisation of the Muslim religious community and with the applicant's right to freedom of religion as protected by Article 9 of the Convention.'[60] In the subsequent case of the *Supreme Holy Council of the Muslim Community v. Bulgaria* the Court again stressed that 'state measures favouring a particular leader or group in a divided religious community.... would constitute an infringement of the freedom of religion.'[61]

Similarly, the state is not to intervene in other situations of doctrinal or internal dispute within a belief community and in those instances in which an applicant believes that the church or organisation is itself acting in a fashion which has infringed their freedom of religion or belief, the Court has stressed that all that is needed is to ensure that the person is free to leave should they wish to do so – as in the case of *Knudsen v. Norway* [62] where a minister of the state church objected to his being dismissed for refusing to carry out certain functions required of him because of his opposition to the Norwegian abortion laws. However, this does not mean that the communal life of the organisation is beyond scrutiny. Just as the state is entitled to satisfy itself that individuals genuinely hold the beliefs which they claim, so may the state seek to satisfy itself that the patterns of belief which a religious organisation claims to espouse are those which it actually espouses: the Court has acknowledged 'that "an associations" programme may in certain cases conceal objectives and intentions different from the ones it proclaims. To verify that it does not, the content of the programme must be compared with the actions of the association's leaders and the positions they embrace.'[63] It follows from this that it is open to the Court to determine whether those beliefs qualify for the protection of Article 9 (or Article 11), in both cases the decision ultimately turning on whether those beliefs are consonant with the principles

60 *Hasan and Chaush v. Bulgaria* [GC], op.cit., para 82.

61 *Supreme Holy Council of the Muslim Community v. Bulgaria*, no 39023/97, para 77, 16 December 2004.

62 *Knudsen v. Norway,* no 11045/84, Commission decision of 8 March 1985, Decisions and Reports 41, p. 247.

63 *Moscow Branch of the Salvation Army v. Russia*, op.cit., para 93.

of democratic governance which the Court has clearly identified as underpinning the Convention system.

The relevance of this dual dimension for the wearing of religious symbols flows from the fact that Article 9 expressly acknowledges that the individual's right of freedom of religion and belief is to be enjoyed 'in community with others' and both 'in public and in private'. As the case-law of the Court shows, the community element of the right goes beyond the mere coming together of individuals in the collective enjoyment of their individual freedom and extends to the recognition of an associative life which is to be protected as a necessary expression of that freedom. Within that religious associative life, individuals will be bound by its rules and the primary protection for their right to freedom of thought, conscience and religion lies in their being able to leave and disassociate themselves from the community. The state is to avoid entering into religious or doctrinal questions within that associative life, other than to test them for compatibility with the foundational convention values of democratic governance, pluralism and tolerance. It is not for the Court to comment on the practices of the religious community, although they may of course be limited in accordance with Article 9(2).

In the case of *the Moscow Branch of the Salvation Army* v. *Russia* the Court made it clear that the need to respect the internal affairs of a religious organisation extended not only to its organisational structures but also to the clothing worn by its members. It said that 'It is undisputable that for the members of the applicant branch, using ranks similar to those used in the military and wearing uniforms were particular ways of organising the internal life of their religious community and manifesting the Salvation Army's religious beliefs.'[64]

In this way, the internal and external and the individual and the community combine to permit a religious organisation to adopt particular forms of religious symbols and clothing, and for its members to manifest their beliefs by wearing them in the public space as well as in the private. Though always subject to proportionate restriction on legitimate grounds, the case-law of the Court supports a right for individuals and associations to be able to freely determine

64 *Moscow Branch of the Salvation Army v. Russia*, op.cit., para 92.

what symbols and what clothing their beliefs require of them and a prima facie right to display them both in public and in private. This view is further reinforced by the way in which Article 9 expressly links worship, practice teaching and observance with public as well as private acts. The idea of 'observance', in particular, includes forms of religiously inspired acts such as parades, etc, which are intrinsically public in their nature. Moreover, the clear recognition that activities intended to encourage a change of religion through teaching, proclamation, public worship, etc, are also legitimate forms of manifesting beliefs once again clearly locates the practice of religion in an open as opposed to a closed environment. Given that organisations are entitled to determine the proper forms of organisation and of dress for adherents, it would amount to an intrusion into the internal life of the organisation, as well as being a limitation of the freedom of the individual to manifest their religion or belief, to seek to restrict the public display of religious symbols and clothing in situations which are clearly foreseen by the Convention as having an intrinsically public dimension.

(C) Non-discrimination in the Enjoyment of the Rights

A third principle is that of non-discrimination and is derived from a number of separate, though interlocking, strands which will be looked at in turn.

(a) ECHR Article 14

The first of these strands is Article 14 of the Convention which provides that:

> 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

As is well known, Article 14 'has no independent existence' and has effect 'solely in relation to the "enjoyment of the rights and freedoms" safeguarded by these provisions'. At the same time, it is not necessary for there to have been an actual breach of another Convention provision in order

for there to have been a breach of Article 14: otherwise, all that Article 14 would do is add a second violation to the first, rather than extending the scope of protection. What is needed is a nexus between the alleged discriminatory act and a Convention right. As the Court put it in *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 'Although the application of Article 14 does not necessarily presuppose a breach of those provisions – and to this extent is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.'[65] It may well be that the facts not only suggest that there has been a violation of a substantive right but that the violation was also discriminatory in nature and so might also give rise to a violation of Article 14 in conjunction with Article 9. In many cases in which there has been both a violation of Article 9 and discriminatory treatment, there is something of a 'choice' as to whether the gist of the case is so closely connected with one of these aspects that a finding of a violation under that one heading renders it unnecessary to consider the other. It is not necessary to pursue this further here, but there will also be cases in which both elements are so in evidence as to justify finding a violation under both the substantive Article and Article 14.

When it comes to discrimination regarding the freedom of religion or beliefs, there can be no room for the application of Article 14 unless the facts at issue fall within the ambit of Article 9.

The first question to be asked, then, is whether the alleged discriminatory behaviour falls within the ambit – within the scope – of a Convention right. If it does, the next question is whether a similarly situated group has been treated in a more favourable fashion. Finally, if this is indeed the case, the final question to be asked is whether there this difference in treatment is justified: the Court has said that a difference in treatment is discriminatory if it 'has no objective and reasonable justification', that is if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality' between the means employed and the aim sought to be realised.

As regards the freedom of religion or belief, the first question becomes whether the matter at issue is an exercise of that freedom. In the early case of *Choudhury* v. *the United Kingdom*, the Commission decided that the freedom to manifest religion or belief in worship, teaching, practice or observance did not embrace a right to see actions brought for blas-

65 *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, para 71.

phemy and so even though such actions were only available in respect of Anglican Christianity and not in respect of the Islamic faith, such discrimination fell outside the ambit of Article 9 with the result that there could be no question of its giving rise to an issue under Article 14.[66] If however, the state offers a protection which goes beyond what the minimum requirements of substantive rights require, then that too comes within the ambit of the right. It has already been seen that the requirement to offer minimum protection to the sensibilities of believers means that such protections as are offered should be non-discriminatory in nature.

The emergence of the principle of 'respect' as a substantive aspect of the right, as outlined above, takes this further and suggests that any state-sponsored activities which potentially cast a negative light over a particular form of religion or belief would fall within the ambit of Article 9 and so need to be justified in order to avoid violating Article 14. The *Case of 97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia* illustrates the coming together of these principles. In that case the supporters of a radical priest of the Orthodox Church in Georgia, Father Basil, had been involved in violently disrupting a service of worship by members of the Jehovah's Witnesses, resulting, inter alia, in serious physical injuries to a considerable number of the congregation. The evidence showed that the authorities had not intervened to try to prevent this from occurring, nor had they properly investigated or taken action against those involved, and so the responsibility of the state was engaged. Similar incidents had subsequently occurred, involving other faith communities as well as the Jehovah's Witnesses. There was no doubt that the facts showed there to have been a violation of Article 9, since there had been an unjustified interference with the exercise of the freedom of religion. The Court framed that finding in the following fashion:

> 'the Court considers that, through their inactivity, the relevant authorities failed in their duty to take the necessary measures to ensure that the group of Orthodox extremists led by Father Basil tolerated the existence of the applicants' religious community and enabled them to exercise freely their rights to freedom of religion.'[67]

66 *Choudhury v. the United Kingdom,* op.cit.

67 *Case of 97 Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, no. 71156/01, para 134, ECHR 2007-

We shall return to the question of the duty of the state later, but at this point it should be stressed that the finding of a violation was presented in terms of the state's overall failure to maintain a climate of toleration and of respect (though that word was not used) for the rights of others. Against this background, there will almost always be a powerful argument concerning the discriminatory behaviour of the state in the exercise of its obligation under the Convention and, in this case, the Court did indeed decide that there had been a violation of Article 14 in conjunction with Article 9 in addition to the violation of Article 9 itself. In a passage worth quoting at length, the Court said that:

> 140. ... in the instant case, the refusal by the police to intervene promptly at the scene of the incident in order to protect the applicants ... from acts of religiously-motivated violence, and the subsequent indifference shown towards the applicants by the relevant authorities, was to a large extent the corollary of the applicants' religious convictions. The Government has not adduced any counter-arguments. In the Court's opinion, the comments and attitude of the state employees who were alerted about the attack or subsequently instructed to conduct the relevant investigation cannot be considered compatible with the principle of equality of every person before the law .... No justification for this discriminatory treatment in respect of the applicants has been put forward by the Government.
>
> 141. The Court considers that the negligent attitude towards extremely serious unlawful acts, shown by the police and the investigation authorities by the police on account of the applicants' faith, enabled Father Basil to continue to advocate hatred through the media and to pursue acts of religiously-motivated violence, accompanied by his supporters, while alleging that the latter enjoyed the unofficial support of the authorities ... .

Not only was there a clear violation of Article 9 but there was also sufficient evidence to support the conclusion that the state, through its tacit support for the violence used against the applicants, was treating them in a discriminatory fashion.

(b) Positive obligations

A second strand of development concerning non-discrimination in the enjoyment of the freedom of religion or belief concerns positive obligations and both flows from, and is illustrated by, the judgment of the Court in the case of *Thlimmenos v. Greece*. This case concerned a Jehovah's Witness who had been convicted because of his unwillingness to wear a military uniform and serve in the armed forces. Some years later he passed the examinations necessary to become a Chartered Accountant but was barred from being able to do so because of his having this prior criminal conviction. The Government argued that this was a rule of general application which served the public interest whereas the applicant argued that the law ought to distinguish between those convicted of offences committed as a result of their manifesting their religion or belief and those convicted of other offences. The Court pointed out that whilst a violation of Article 14 occurred when states treat differently persons in analogous situations without providing an objective and reasonable justification, it was not limited to such situations. It said that:

> 'The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.'[68]

The Court felt that those convicted for offences related to the manifestation of their beliefs might indeed be a different situation from those convicted for other reasons. It argued that 'a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession. Excluding the applicant on the ground that he was an unfit person was not, therefore, justified.'[69]

The significance of this approach for questions concerning the wearing of religious symbols is evident. Should there be a generalised restriction on the wearing of any particular

68 *Thlimmenos v. Greece* [GC], no. 34369/97, para 44, ECHR 2000-IV.

69 *Ibid*, para. 47.

type of clothing or symbol which is of religious significance to some but not to all, it will raise the question of whether the state is responsible for a failure to 'treat differently persons whose situations are significantly different'. Should this be the case, there will be a violation of Article 14 in conjunction with Article 9 unless an objective and reasonable justification can be given.

(c) Protocol No. 12

A third strand of development relates to Protocol No. 12 to the European Convention on Human Rights[70] which was adopted in 2000 and entered into force on 1 April 2005. At the time of writing, 17 of the 47 Member states of the Council of Europe have ratified the Protocol and so are bound by it, these being: Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxembourg, Montenegro, The Netherlands, Romania, San Marino, Serbia, Spain, the Former Yugoslav Republic of Macedonia and the Ukraine. A further 20 states have signed but have yet to ratify the Protocol.

Article 1 of the Protocol provides that:

> '1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.'

This moves beyond Article 14 by removing the need for a nexus with another substantive convention right, replacing this with a right not to be subjected to discrimination in the enjoyment of any right 'set forth by law', whether national or international in origins. The idea of 'set forth by law' embraces not only legislative provisions but also rights inferred from obligations under national law, by the exercise of discretionary powers or by other acts of omissions attributable to a public authority.

70 CETS no. 177.

To the extent that the wearing of religious clothing and symbols represents a manifestation of religion and so is within the ambit of Article 9 such discrimination is already addressed by Article 14 and so Protocol 12 adds little to the protections which are already in place. However, Protocol 12 does offer a residual protection for unusual situations which, for whatever reason, might fall beyond the ambit of Article 9. In such circumstances, this more general 'equality' provision would come into play and offer a degree of protection to religious believers against discriminatory treatment which was attributable to public authorities in ratifying states.

(D) Living Instrument

A final overarching principle should also be highlighted and although it may be dealt with briefly it is of considerable importance. The Court has stressed on numerous occasions that the Convention is a 'living' instrument' which is to be interpreted in the light of present day conditions. As a result the Court cannot but be influenced by the developments and commonly accepted standards operable within member states of the Council of Europe and, drawing on this approach, the Court has said that 'the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies'.[71]

The Court has stressed on numerous occasions that the Convention is a 'living instrument' which is to be interpreted in the light of present-day conditions.

Two important points flow from this. First, the Convention is not static and through the processes of interpretation and application it is capable of evolving to address newly emergent concerns or to reappraise existing approaches in the light of new insights into the nature of the democratic societies which it addresses. Secondly, and as an inevitable corollary, the approaches set out in the Court's jurisprudence are not immutable but are open to re-appraisal over time. This is particularly true in areas in which states have traditionally enjoyed a considerable margin of appreciation, including the freedom of religion or belief, since the emergence of a common European approach would have the effect of limiting its breadth and be a precursor to the emergence of a Convention-wide normative approach. It

71 *Selmouni v. France* [GC], no. 25803/94, para 101, ECHR 1999-V.

may well be that the 'living instrument' principal might provide a conceptual means through which the Convention can respond to the increasing interest in, and importance of, the manifestation of religion and belief within the democratic societies of the Council of Europe.

#IV The Role and Responsibilities of the State

The previous section identified a number of key conceptual principles which underpin the approach to the freedom of religion and belief within the Convention framework. Some of these were specific to Article 9, others were of a more general nature but which had a particular relevance for the realisation of that freedom. This section continues the theme of identifying core strands in the approach of the Court to the freedom of religion or belief but, rather than looking at more general and overarching principles, it looks at how those principles work themselves out in practice.

This section identifies core strands in the approach of the Court to the freedom of religion or belief by examining how the following principles work in practice: (a) neutrality and impartiality; (b) fostering pluralism and tolerance; (c) protecting the rights and freedoms of others.

(A) Neutrality and Impartiality

There has been a subtle, but significant, shift in the perception of the role of the state in relation to the freedom of religion and belief. We have already seen that the individual rights approach outlined in section II has been developed by the principle of 'respect' and by the recognition of the communal aspects of the rights as outlined in Section III. Whilst approaching Article 9 from the perspective of an individual works well when an individual is challenging the manner in which the state has acted in relation to their personal enjoyment of a particular aspect of that right, it works less well in situations in which what is really at stake is the approach of the state either to religion or belief generally or to a particular form of religion or belief. In recent times, the Court has increasingly been called on to consider cases of this nature and, indeed, a number of the cases previously considered from the perspective of the 'individual' might in reality be best viewed from this more community oriented perspective.

The response of the Court, echoing the principle of respect, has been to call on the state to act in a neutral fashion as between religions and as between religious and non

The response of the Court, echoing the principle of respect, has been to call on the state to act in a neutral fashion as between religions and as between religious and non-religious forms of belief.

religious forms of belief. In *Hasan and Chaush* v. *Bulgaria*, for example, it emphasised that the role of the state was not to 'take sides' by endorsing one religious community at the expense of another but was to act in an even-handed fashion, concluding that 'a failure by the authorities to remain neutral in the exercise of their powers .... must lead to the conclusion that the state interfered with the believers' freedom to manifest their religion'.[1] Unsurprisingly, the same approach has been taken in cases which have been brought not by individuals but by religious communities themselves. The leading case remains that of the *Metropolitan Church of Bessarabia v. Moldova*, which concerned the refusal of the Moldovan authorities to grant official recognition to the applicant Church which had the practical effect of making both the Church as an organisation and the religious activities of its adherents unlawful. The Court said that 'in exercising its regulatory power in this sphere and in its relations with the various religions, denominations and beliefs, the state has a duty to remain neutral and impartial'.[2] The duty to remain neutral and impartial has now been re-iterated on many occasions and it is clear that any evidence that the state has failed to act in such a fashion in its dealings with religious bodies will require justification under Article 9(2) if it is not to amount to a breach of Article 9.

This duty has a number of facets, perhaps the most important being that 'the state's duty of neutrality and impartiality is incompatible with any power on the state's part to assess the legitimacy of religious beliefs or the ways in which they are expressed'.[3] This is of particular importance for issues concerning religious clothing and religious symbols since it underscores the need to permit individuals themselves to determine whether the wearing or display of any particular items is of religious significance to them, and the state will be in breach of its duty of neutrality and impartiality if it imposes its interpretation of their significance at the expense of that of the believer.

So far, the case-law considered has established that the state must remain neutral and impartial when it has deal-

1 *Hasan and Chaush v. Bulgaria* [GC], op.cit., para 78.

2 *Metropolitan Church of Bessarabia and Others v. Moldova*, op.cit., para 116.

3 *Manoussakis and Others v. Greece*, judgment of 26 September 1996, *Reports of Judgments and Decisions* 1996-IV, para. 47.

The state's duty of neutrality and impartiality is incompatible with any power on the state's part to assess the legitimacy of religious beliefs or the ways in which they are expressed.

ings with religious believers and religious organisations. In some cases, however, the Court has gone even further and suggested that states are under a variety of positive obligations with regard to the freedom of religion and belief and in the case of *Leyla Şahin v. Turkey* it referred to its having 'frequently emphasised the state's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs'.[4] Just as cases such as *Kokkinakis* and *Larrisis* emphasised that the role of the state was to ensure that there was a 'level playing field' between believers (and between believers and non-believers), so it was that in *Leyla Şahin* the Court saw the role of the state as being to ensure that this was the case *ab initio* by emphasising the state's responsibilities as the neutral and impartial *organiser* of the exercise of religions, faiths and beliefs. This puts the state in a rather different position from that which it previously occupied. Rather than being required to ensure that it remains neutral and impartial in its dealings with religions and with believers, its role becomes one of ensuring that religious life within the state is neutral and impartial, which is a subtle, but important difference.

This can play out in a number of different ways. Neutrality and impartiality means that the state ought to have no interest in internal organisational issues unless the results are such as to endanger the public order, health, morals or the rights and freedoms of others. Short of this, it should refrain from engaging with internal affairs, thus reinforcing the principle of autonomy. For example, in the case of *Serif v. Greece*, the Court said that 'in democratic societies the state does not need to take measures to ensure that religious communities are brought under a unified leadership'.[5] Such an approach casts the role of the state as a 'facilitator' of organisational and individual religious freedom. It is enough if believers are able to function as a religious community within the state in a manner which allows them, as believers, the rights which flow from Article 9 and, of course, Article 14 of the ECHR.

An alternative model – and the now dominant model – takes a different approach, emphasising the responsibility of the state to ensure the realisation of all convention rights and, drawing on the key statement of principle in the *Kokki-*

4 *Leyla Şahin v. Turkey* [GC], op.cit., para 107.

5 *Serif v. Greece*, no 38178/97, para 52, ECHR 1999-IX.

nakis case, emphasising the need for the freedom of religion and belief to be seen and understood in the broader context of democratic society. In the *Kokkinakis* case the Court said that 'the freedom of thought, conscience and religion is one of the foundations of a "democratic Society" ... the pluralism indissociable from a democratic society ... depends on it'. It also said that 'in democratic societies ... it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected'.[6] On the one hand, this offers a recognition of the public value of the freedom of religion and belief and means that when exercising its role as the 'neutral and impartial organiser' of religious life the state does so in a fashion which respects and reflects this. On the other hand, it emphasises the extent to which it is legitimate for the state to allow the broader needs of society to impact upon the activities of religious bodies and believers in order to secure a proper balance between the rights of all within the broader community which comprises the democratic society as a whole. When combined with the newly emergent responsibility of the state, the goals of neutrality and impartiality become clear, these being the fostering of pluralism and tolerance and the protection of the rights and freedoms of others, both of which will now be looked at in a little more detail.

(B) Fostering Pluralism and Tolerance

The application of the principles already identified will have the practical effect of fostering a climate of pluralism and tolerance. If, for example, the state is to remain neutral in its dealings with religious organisations and with believers, not express any preference for, or pass comment upon, any particular form of belief, respect the internal autonomy of not only individuals but of belief communities as well (to the extent that this is compatible with the rights and freedoms of others), ensure that there is a 'level playing field' and, whilst doing all of this, be animated by an overarching principle of 'respect' for the beliefs of others – then it is difficult to see how this can fail to help foster a climate of pluralism and tolerance. However, the Court sees the fostering of pluralism and tolerance as more than an 'incidental outcome' but as a goal which is to be achieved by

6 *Kokkinakis v. Greece,* op.cit., paras. 31 and 33.

the application of the principles and approaches which have already been identified.

This raises some difficult and delicate issues. Most religious belief systems advance truth claims which are, in varying degrees, absolutist in nature and reject at least elements of the validity of others. In addition, the need to allow for the 'market place' of ideas requires that there be exchanges of views, expressions of beliefs, ideas and opinions and forms of manifestation which may be unwelcome and, perhaps, offensive, to others. This is both necessary for the realisation of pluralism and tolerance yet at the same time runs the risk of compromising it. We have already seen that the Court expects believers to cope with a fairly high degree of challenge to their systems of belief in the pursuit of the more general goals of securing pluralism and tolerance: in the *Otto-Preminger-Institut* case, for example, the Court said that:

> 'Those who choose to exercise the freedom to manifest their religion .... cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.'[7]

Whilst respect for the freedom of religion and belief cannot require others to respect the doctrines and teachings of faith traditions other than one's own (if any) it can, and does, require that one be respectful of them. The role of the state in such cases is to ensure that the believer, or non-believer, is able to continue to enjoy their convention rights, albeit that they may be troubled or disturbed by what they see and hear around them. As the *Otto-Preminger-Institut* case itself suggests, it is only when the manner in which the views, ideas or opinions are expressed are akin to a 'malicious violation of the spirit of tolerance'[8] that it is for the state to intervene.

This approach has been reflected in a variety of other situations. For example, in the case of *Serif v. Greece* the applicant argued that his freedom of religion had been violated by his being convicted to assuming the functions of the leader of the Muslim community in Rodopi, the leadership

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7 *Otto-Preminger Institut v. Austria*, op.cit., para 47.

8 *Ibid.*

of which was in dispute. The Court said that 'Although [it] recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other'.[9] Taken at face value, this approach is not unproblematic since it suggests that the state is not only entitled but may be required to exercise a form of oversight over the internal life of religious communities in the interests of ensuring pluralism and tolerance. At the same time, it is not the role of the state to 'step in' and 'sort out' the problem since doing so would not only fail to respect the principle of autonomy but would also fail to demonstrate the degree of neutrality and impartiality which the state must show in its dealings with believers. Balancing these concerns – the need to promote pluralism and tolerance whilst respecting the beliefs and autonomy (personal and organisational) of others is a delicate task and can be approached in a number of ways.

For example, in the case of the *Metropolitan Church of Bessarabia v. Moldova* the Government had argued that by recognizing the Applicant church as a legal entity it would be broadening the rift within the Orthodox community and that the impartial response to the situation would be to encourage the applicant church to 'settle it's differences with the already recognised church from which it wishes to split'.[10] The Court rejected this argument, saying that 'the state's duty of neutrality ... is incompatible with any power ... to assess the legitimacy of religious beliefs, and requires the state to ensure that conflicting groups tolerate each other, even when they originated in the same group. In the present case ... [by] taking the view that the new group was not a new denomination and making its recognition depend on the will of an ecclesiastical authority that had been recognised ... the Government failed to discharge their duty'.[11] One can see the force of both arguments. However, the former argument views the role of the state as being ultimately passive in nature – avoiding conduct which gives

9 *Serif v. Greece*, op.cit., para 53.

10 *Metropolitan Church of Bessarabia and Others v. Moldova*, op.cit., para 123.

11 *Idem*.

the appearance of endorsing a particular form of religion or belief, the validity of which is contested by others. This fails to do justice to the more activist approach to the promotion of pluralism and tolerance which the Court has called for, although this too may operate in a variety of directions. In the *Metropolitan Church* case, the promotion of pluralism seems to have been given enhanced weight when construing the content of the obligation to ensure that 'conflicting groups tolerate each other' and the result seeks to support the presence of varied and diverse bodies of thought co-existing and interacting with each other within the broader political community. This might be contrasted with the case of *the Supreme Holy Council of the Muslim Community v. Bulgaria*, in which the Court placed more emphasis on the role of the state as the promoter of tolerance. In that case the Court, whilst re-iterating that the state should not favour a particular leader or faction within a divided community, also commented that the state was 'under a constitutional duty to secure religious tolerance and peaceful relations between groups of believers' (which it did not find objectionable) and that ' ... discharging it may require engaging in mediation. Neutral mediation between groups of believers would not in principle amount to state interference with the believers' rights ..., although the state authorities must be cautious in this particularly delicate area.'[12]

These comments relate to the role of the state in respect of internal matters of religious organisations and they suggest that the positive elements of the state's duty to promote tolerance and pluralism may permit it to work alongside such bodies in order to realise those objectives. In other words, neutrality and impartiality does not mean that the state must distance itself from religion and religious bodies. On the contrary, it suggests that the state may engage with them on a non-partisan basis in order to assist in the realisation of these goals.

There are implications for the wearing of religious symbols which flow from this more dynamic approach to fostering pluralism and tolerance. It has already been seen that the pursuit of pluralism means that believers may have to be exposed to ideas and arguments which they may find personally unpalatable. It also means that believers must

12 *Supreme Holy Council of the Muslim Community v. Bulgaria*, op.cit., para 77.

accept the legitimacy of there being a divergence of views on matters of fundamental significance to them within the broader society of which they form a part. The pursuit of tolerance implies that believers must accept the legitimacy of this diversity as a necessary consequence of there being a flourishing democratic society and it falls to the state to ensure that this is the case, limited only by what is necessary to protect the rights and freedoms of others. This, of course, works in both directions and it is equally applicable to non-believers who are faced with the manifestation of forms of belief which they might find unwelcome or unpalatable and which might include the presence of religious symbols in the public space. In such situations, the same goal of fostering pluralism and tolerance would apply and, drawing on the words on the Court in *Serif v. Greece* (and repeated on numerous occasions since) the role of the state is not to remove the cause of tension by eliminating pluralism, but through its actions seek to ensure toleration.

(C) Protecting the Rights and Freedoms of Others

In both *the Metropolitan Church of Bessarabia* case and in the case of the *97 Members of the Gladini Congregation* cases the Court made it clear that 'neutrality' and 'impartiality' cannot be used to justify a failure to protect the rights of believers under Article 9. Likewise, cases such as *Otto-Preminger-Institut v. Austria* show that the need to foster pluralism and tolerance cannot be used to justify such failings either. The point at which the limits of state abstention in the interests of neutrality and impartiality and state intrusion in the interests of fostering pluralism and tolerance are re-connected is in the overarching need to protect the rights and freedoms of others, believers and non-believers, both within religious bodies and within the broader political community. This, of course, take us back to the limitations on the enjoyment of the right permitted on the basis of Article 9(2) and which can only be determined on a case-by-case basis.

The point at which the limits of state abstention in the interests of neutrality and impartiality and state intrusion in the interests of fostering pluralism and tolerance are re-connected is in the overarching need to protect the rights and freedoms of others, believers and non-believers.

Later sections of this Manual will look in detail at how the Court has conducted this exercise as regards the wearing of religious symbols. It is, however, appropriate to identify at this point a particular aspect of this balancing exercise which, although usually addressed within the framework of Article 9(2) as a legitimate ground of restriction, is better

seen as a reflection of a more overarching goal – this being the protection of the general rights and freedoms of others through the preservation of the democratic nature of the state. This sets the 'outer limits' of what neutrality and impartiality and the promotion of pluralism and tolerance might require of a state and of a society. We have already noted that Article 15 permits states to derogate from Convention rights in times of national emergency threatening the life of the nation, and that Article 17 requires that convention rights are not used to undermine the rights of others. Our concern at this point is with sets of circumstances in which it is argued that, by their actions, individuals or organisations are negatively impacting upon the democratic framework which the Convention is to uphold.

In the case of the *Metropolitan Church of Bessarabia* v. *Moldova* the government argued that its refusal to register the applicant church was justified on the grounds of preserving the territorial integrity of the state, maintaining that recognition would 'revive old Russo-Romanian rivalries within the population, thus endangering social stability and even Moldova's territorial integrity'.[13] The Court accepted that this was a 'legitimate aim' for the purposes of Article 9(2) in that it sought to protect public order and public safety, although it decided that no evidence has been presented which supported such a conclusion. Such claims are likely to be rare – though there are echoes of this approach in the case of the *Moscow Branch of the Salvation Army v. Russia*, where the Court, noted that although the applicant's members wore military style uniforms, on the evidence presented 'It could not seriously be maintained that the applicant branch advocated a violent change of constitutional foundations or thereby undermined the integrity or security of the state'.[14] Where there is such evidence, however, there can be little doubt that the state would be entitled to restrict the activities of believers to the extent necessary to address the risk.

The Court has said on numerous occasions that democracy is the only political model compatible with the Convention and in a series of cases concerning Article 11 (the freedom of association) the Court has also made it clear that it is

13 *Metropolitan Church of Bessarabia and Others v. Moldova*, op.cit., para 111.

14 *Moscow Branch of the Salvation Army v. Russia*, op.cit., para 92.

entitled to act in order to preserve the integrity and proper functioning of the internal democratic structures of the state. However, the threshold for such intervention is high. Thus in a series of cases the Court rejected claims by Turkey that it had been entitled to ban political parties whose policies were allegedly antithetical to Turkish democracy, arguing that:

> 'The fact that such a political project is considered incompatible with the current principles and structures of the Turkish state does not mean that it infringes democratic rules. It is of the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way in which a state is currently organised, provided that they do not harm democracy itself.'[15]

In the case of *Refah Partisi v. Turkey,* the Court addressed a situation in which a political party whose policies embraced aspects of Islamic thought and which had been a partner in Government was dissolved, primarily on the grounds that prominent members of the party had called for the introduction of elements of Shar'ia law which, it was claimed, would be incompatible with the principle of secularism which undergirded Turkish democracy. For the avoidance of any doubt, the Court confirmed that a 'political party animated by the moral values imposed by a religion cannot be regarded as intrinsically inimical to the fundamental principles of democracy, as set forth in the Convention'[16] and recalled that in its previous case-law it had said that 'there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the state's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.'[17] This, then, highlights the fact that religious believers and religious communities are to be welcomed as participants in the public life of the state, including participation in the democratic process should they wish to do so.

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15 *Socialist Party of Turkey (STP) and Others v. Turkey*, no 26482/95, para 47, 12 November 2003 (emphasis added).

16 *Refah Partisi (the Welfare Party) and* Others *v. Turkey* [GC], op.cit., para 100.

17 *Ibid*, para 97, quoting *Case of Freedom and Democracy Party (ÖZDEP)* v. *Turkey* [GC]. no. 23885/94, para 57, ECHR 1999-VIII.

In the *Refah Partisi* case the Court also said that 'a political party may promote a change in the law or the legal and constitutional structures of the state on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles'.[18] These two propositions will be considered separately. The first proposition is unproblematic since it merely confirms that, in common with all other participants in the democratic process, the religiously motivated participation in public life must respect the principles of democratic governance. For example, the Court has said, 'a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds'.[19] It has also made it clear that 'The freedoms guaranteed by Article 11, and by Articles 9 and 10 of the Convention, cannot deprive the authorities of a state in which an association, through its activities, jeopardises that state's institutions, of the right to protect those institutions'.

The Court's second proposition in the *Refah Partisi* case raises the slightly different point of whether such participation must respect what might be called the 'culture' of a particular democratic polity. Where that change in culture may be such as to undermine the essence of that particular polity, the answer is once again clear and, in the case of religious groups, the Court has noted that 'in the past political movements based on religious fundamentalism have been able to seize political power in certain states and have had the opportunity to set up the model of society which they had in mind. It considers that, in accordance with the Convention's provisions, each Contracting state may oppose such political movements in the light of its historical experience'. It is not to be assumed, however, that every religiously inspired political platform will necessarily be of a fundamentalist nature and have such an influence or impact and the more difficult question is whether the state is entitled to act in order to buttress elements of its foun-

18 *Refah Partisi (the Welfare Party) and* Others *v. Turkey* [GC], op.cit., para 98.

19 *Yazar* and others *v. Turkey*, no. 22723/93, 22724/93 and 22725/93, para 49, ECHR 2002-II.

dational assumptions where they are challenged through a democratic process in a fashion which neither threatens the integrity of the democratic system or runs the risk of imposing extremism on others, but which nevertheless offer a substantially different vision of the nature of the state, from which legislative consequences would inevitably flow. In the case of Turkey the Court has said that 'the principle of secularism is certainly one of the fundamental principles of the state which are in harmony with the rule of law and respect for human rights and democracy'[20] and so, therefore, it thought that Turkey was entitled to take a range of measures – including placing restrictions on the wearing of religious clothing and the display of religious symbols – which it, Turkey, considered to be necessary to preserve that element of the political culture of Turkish democracy – provided, always, that those restrictions were legitimate and proportionate under Article 9(2).

This same approach has also been taken to uphold the ethos of state-run institutions which, it is presumed, can legitimately be expected to exemplify the same overarching principles. The case of *Leyla Şahin* v. *Turkey*, for example, concerned the legitimacy of a ban on the wearing of Islamic headscarves in a state-run university in Turkey, a ban which had been upheld by the Constitutional Court. The Court observed that:[21]

> 'it is the principle of secularism, as elucidated by the Constitutional Court (see paragraph 39 above), which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.'

This case will be considered in more detail later, but at this point it may be used to illustrate the point that the state is entitled to look to the character of its institutions as well as

20 *Refah Partisi (the Welfare Party) and* Others *v. Turkey* [GC], op.cit., para 93.

21 *Leyla Şahin v. Turkey* [GC], op.cit., para 116.

to the functioning of its democratic system and ensure that they are consonant with the national ethos. It is important to emphasise however, that the Court has not said in these cases that either the state or state-run institutions must be secular in nature. It has said that since secularism is compatible with pluralism and democracy it is legitimate for a state to project a secularist ethos whilst respecting the rights and freedoms of others. It has *not* said that secularism is the *only* concept of governance which is compatible with pluralism and democracy. Indeed, were it to do so, it would not only call into question the legitimacy of the state Churches which are to be found in a number of member states of the Council of Europe but it would also run the risk of falling foul of its own jurisprudence by privileging one form of belief system – secularism- at the expense of others. This might be difficult to reconcile with its role of exercising judicial oversight of the manner in which states fulfil the role of the neutral and impartial organiser of religion and belief.

Pluralism, secularism, respect of the rights of others, and gender equality are important values taken into account by the Court when examining restrictions to the wearing of religious symbols.

It might be concluded that whilst the state remains free to determine its guiding organisational principles and whilst it remains open to the state to take steps to preserve the nature of its democracy and associated institutions, it may only do so in pursuit of Convention aims of democratic governance informed by pluralism and tolerance. Likewise, those who engage in public life and life in the 'public square', including believers and belief communities, may do so on the condition that they respect the principles of democracy and human rights, of tolerance and pluralism.

#V The Role and Responsibilities of Individuals and Religious Communities

Having looked at the role and responsibilities of the state, we can consider the role and responsibilities of individuals and of belief communities quite quickly since they are largely the natural corollaries of what has already been said. There are, however, a number of points which need to be stressed, and which flow from their different relationship to the right as set out in the Convention. Simply stated, the individual and religious or belief communities are the beneficiaries of the right and not its guarantor. Thus whilst it is the responsibility of the state to ensure the full enjoyment of that right to all who are subject to their jurisdiction, the responsibilities of the individual are chiefly to ensure that in their enjoyment of that right they do not abuse the freedom which it offers. The legitimacy of the various limitations on the manifestation of the freedom of religion or belief may ultimately all be traced back to an assessment of whether or not this is the case.

The Court has frequently said that the freedom of religion and belief is primarily a matter of individual conscience. The absolute nature of the '*forum internum*', the sphere of personal belief, means that the overarching principles identified in the previous section and which guide the state are not directly applicable to the individual and to the religious community in the same fashion. Thus it is not necessary for them to be neutral and impartial in their dealings with others, nor is it for them to *foster* pluralism and tolerance – though it is of course necessary that they accept a pluralist approach and display tolerance in the context of the plural society of which they form a part. Similarly, it is not the role of individuals and religious organisations to seek to 'protect' the rights of others in the Convention sense of the terms, though they may of course seek to vindicate their own rights and freedoms though its processes.

Individuals and belief communities should conduct themselves in a fashion which respects the structures and systems of pluralist democracy, the Convention itself, the rights and freedoms of others and which honours the particular obligation to show proper respect for the objects of religious veneration of others.

Ultimately, then, what the Convention expects is that individuals and belief communities should conduct themselves in a fashion which respects the structures and systems of pluralist democracy, respects the Convention itself, is properly respectful of the rights and freedoms of others and, which honours the particular obligation to show proper respect for the objects of religious veneration of others. It should be clear that these are the same expectations which apply to everyone touched by the Convention system.

#VI The Wearing of Religious Symbols in Public Areas: Definitional Issues

Having set out the Convention framework relevant to the wearing of religious symbols in public areas, we are now in a position to look at a number of definitional issues which need to be addressed before that framework can be applied to the subject matter of this Manual, these being: 'what is a 'religious symbol'? what is meant by the 'wearing' of religious symbols'? and 'what is a 'public area'? The following sections will look at each of these questions but it needs to be stressed at the outset that these terms cannot be understood in isolation from each other and, indeed, from the broader context of Article 9.

(A) The 'Visibility' of Religions and Beliefs in Public Life and in the Public Sphere

Whilst the issue of wearing religious symbols in public areas is clearly a contentious issue, it is very important to realise that it is merely a sub-set of a more general question concerning what might be termed the 'visibility of religion' and it is necessary to explore this a little in order to avoid making errors when looking at the key terms which define the scope of this Manual. For example, it is clearly the case that not all of the things which are of symbolic significance to religious believers are things which can be worn or displayed, even when they concern what might be called the 'public space'. To take an extreme example, the underlying issue in the cases such as *Stedman v. the United Kingdom*[1] and *Casimiro v. Luxembourg*[2] is not so much the narrow question of whether the applicants have the right to avoid working or schooling on their holy days but the more general question of the special significance of those days to believers being recognised by the State. state recognition of

1 *Stedman v. the United Kingdom,* op.cit.

2 *Casimiro* v. *Luxembourg* (dec.), op.cit.

the special status of a religious day or festival can be seen as having symbolic status. However, the symbolism here is not the symbolism *of* the religion but a symbolic statement by the state regarding the *status* of the religion.

Some see this as tantamount to state endorsement or sponsorship of the religions in question and argue against the recognition of such days and festivals by the state at all. It is, however, difficult to reconcile this reaction with the acknowledged role of the state as the neutral and impartial organiser of religious life and, more particularly, the need to ensure that religious groups have access to legal personality. In the cases concerning registration of religious organisations, the Court repeatedly says that 'a refusal by the domestic authorities to grant legal-entity status to an association of individuals may amount to an interference with the applicants' exercise of their right to freedom of association .... Where the organisation of the religious community is at issue, a refusal to recognise it also constitutes interference with the applicants' right to freedom of religion under Article 9'.[3] Although this is, strictly speaking, functional in its significance, it cannot be denied that in the granting of such status to groups of religious believers and by permitting them to function as legal entities in the public sphere the state is according them a degree of recognition which has a symbolic as well as practical relevance by recognising them 'as' religious. This is not to say, of course, that those groups of believers which, for whatever reason, might *not* be accorded official recognition are not religious in nature or that individual adherents are not free to enjoy their freedom of religion or belief, since the Court has made it abundantly clear that the state is not to make judgements of this kind. However, through its regulatory activities the state is involved – and cannot avoid being involved – in decision-making which is symbolically significant.

Once seen from this perspective, a whole host of other regulatory activities take on a similar significance, the most obvious of which concern planning laws, which convert what might be termed 'conceptual' symbolic visibility into more 'tangible' symbolic visibility. One of the clearest manifestations of religion within a community are the presence of religious structures. The freedom of religion or

3 *Church of Scientology Moscow v. Russia*, op.cit., para 81, 5 April 2007.

belief clearly encompasses the right to have and to maintain places of worship and their presence is a powerful marker within a community. It goes without saying that religious buildings are a symbolic presence in and of themselves and their distinctive architecture and adornment, as well as the activities which take place in and around them, again take on a symbolic meaning which is at once both 'conceptual' and 'tangible': the presence of a minaret or church tower dominating the skyline in a town or village is more than the mere physical display of a symbol but is a statement of a physical presence within the community, with the size and location of such buildings being similarly significant.

Many other examples could be given but enough has already been said to make the point that the state is intimately involved in many matters which are symbolically significant from a religious perspective. Two points need to be made which flow from this. First, since it is engaging with such issues on an ongoing basis from a variety of public law perspectives there is no reason for a state to shy away from regulating matters concerning religious symbols. When religious believers and organised religion enter the public arena their activities, in common with those of all other participants, are subject to the legislative and regulatory powers of the state (which are of course to be exercised in accordance with human rights law). Secondly, it shows that it cannot be seriously maintained that the duty of neutrality and impartiality means that religious symbolism is to be removed from the public space, generally understood. Article 9 itself makes it clear that the freedom of religion includes the freedom to manifest beliefs 'in public' and this, of necessity, requires that the state facilitates rather than frustrates this through its regulation of the public domain. The critical question is not so much whether there is a religious symbol, or a matter which is of religious symbolic significance, which is at sake: rather, it is the context in which it occurs which matters most.

This can be illustrated by looking at two contrasting cases. The first is *Buscarini v. San Marino* in which the applicant, who had been elected to Parliament, argued that his freedom of belief had been infringed by his being required to swear an oath of allegiance 'on the Holy Gospel'. The Court endorsed the view that 'it would be contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a

It is beyond doubt that an individual has the right to make a public declaration of their faith – but it is equally the case that the state may place restrictions on when, where and how – context is vital.

prior declaration of commitment to a particular set of beliefs'.[4] Clearly, a person swearing an oath underwritten by a religious pledge carries with it a high degree of symbolic meaning. This may be entirely appropriate when voluntarily undertaken by the person concerned in order to emphasise the seriousness of the commitment being undertaken *by them* in public settings. But is it completely inappropriate when it is a requirement of participation in democratic governance. The second is *Sofianopoulos v. Greece*, in which the applicants argued that they should be able to record their religious affiliation on their official Identity Cards if they wished to do so, in order that they be able to make their beliefs known publicly. In declaring the application inadmissible, the Court noted that it was for the state to determine what information was appropriate and said that 'the purpose of an identity card is not to bolster its bearer's religious feelings'.[5] Once again, it is beyond doubt that an individual has the right to make a public declaration of their faith – but it is equally the case that the state may place restrictions on when, where and how. As both these examples show, context is vital.

(B) What Is a 'Religious Symbol'?

Since determining what comprises a religious symbol is not a straightforward task, it might seem appropriate to seek some objective benchmarks. These, however, are difficult to come by.

(a) 'Objects of religious veneration'

In the *Otto-Preminger-Institut* case the Court spoke of 'objects of religious veneration' and, as we have seen, provocative portrayals of such objects by others may amount to a 'malicious violation of the spirit of tolerance'.[6] As a class of object receiving a specific and heightened form of protection within the Convention system, it might be thought that some guidance as to what might fall within the category

4 *Buscarini and others v. San Marino* [GC], no 24645/94, para 39, ECHR 1999-I.

5 *Sofianopoulos and Others v. Greece (dec.)*, nos. 1988/02, 1997/02, 1977/02, p. 8, ECHR 2002-X.

6 *Otto-Preminger-Institut v. Austria*, op.cit., para 47.

of 'religious symbols' might be had by looking at what is meant by an 'object of religious veneration'? This, however, is problematic for a number of reasons.

It is possible to understand this term in a narrower or a broader fashion. The *Otto-Preminger-Insitut* case concerned a film, 'Das Liebeskonzil' which portrayed 'the God of the Jewish, the Christian and the Islamic religion as an apparently senile old man .... a degree of erotic tension between the Virgin Mary and the Devil [and] the adult Jesus Christ ... as a low grade mental defective'.[7] The film at the centre of the subsequent *Wingrove* case, 'Visions of Ecstasy' portrayed 'a female character astride the recumbent body of the crucified Christ engaged in an act of an overtly sexual nature' and national authorities considered the film to be primarily pornographic in nature, with 'no attempt ... to explore the meaning of the imagery beyond engaging the viewer in a "voyeuristic erotic experience"'.[8] The 'objects of religious veneration' at issue in both of these cases might perhaps have been better described as 'figures of religious devotion', since the focus was on the personage of the deity and others to whom religious homage was paid. It is, therefore, possible to understand these cases in a narrow fashion in which only portrayals of such figures themselves would be addressed.

A broader view would be to see an 'object of religious veneration' including all those things which form an element in the religious life of a believer and contribute to the exercise of the freedom to manifest their religion or belief in worship, teaching, practice and observance. This might embrace items as diverse as forms of clothing, utensils, written materials, pictures, buildings and a whole host of additional items impossible to specify. For example, the early case of *X and the Church of Scientology* v. *Sweden* concerned an injunction that had been awarded against the applicants prohibiting them from advertising the sale of an 'E Meter', described a 'A religious artefact used to measure the state of the electrical characteristics of the "static field" surrounding the body and believed to reflect or indicate whether or not the confessing person has been relieved of the spiritual impediment of their sins.' The Commission considered the advertisement to be more commercial than

7 *Ibid*, para 22.

8 *Wingrove v. the United Kingdom*, op.cit., para 61.

religious in nature, but the religious nature of the artefact was not contested.[9] Clearly, the E-meter was not an object of religious veneration although it was seen as playing a role in the religious life of the believer.

The concept of 'objects of religious veneration', then, would seem to be broader than the narrowly focussed idea of the 'deity' and narrower than the broad-based notion of those objects which are connected with the act of religious observance. It is not possible, however, to define this term of art with any greater precision. Therefore, whilst this concept does offer a 'benchmark' against which to assess whether something is a religious symbol – since objects of religious veneration would be considered as religious symbols – and whilst symbols of this nature attract an assured level of protection under the Convention system, it is unhelpful to seek to understand what is to be taken to be a religious symbol solely by reference to it. Moreover, the idea of a 'symbol' is broader than that of an 'object of veneration' since it may include those things which, whilst not themselves objects of veneration, are representations of objects of veneration. An obvious example would be a crucifix or an icon. Of course, it is possible for representations of objects of veneration to become objects of veneration, thus making any classificatory approach impossible.

(b) Religious symbols: An objective or subjective matter?

The impossibility of determining *a priori* what is to be taken as a religious symbol for all Convention purposes is underscored by combination of the private dimension of the freedom of religion or belief and the principle of neutrality and impartiality. The Court has said on numerous occasions that 'the freedom of religion ... excludes any discretion on the part of the state to determine whether religious beliefs or the means used to express such beliefs are legitimate'.[10] It would seem to follow from this that it is for the individual, rather than for the state or for the Court, to determine whether something is, for them, a religious symbol. It is difficult to see on what basis the state or the Court could deny the symbolic significance of something

9 *X and the Church of Scientology v. Sweden*, op.cit.

10 See, for example, *Moscow Branch of the Salvation Army v. Russia*, op.cit., para 92.

which had been identified as being of such significance to them by the person concerned.

it is for the individual, rather than for the state or for the Court, to determine whether something is, for them, a religious symbol. But simply because something is considered to be a religious symbol does not mean that there is a right for it to be publicly visible.

However, it cannot be emphasised enough that simply because something is considered to be a religious symbol does not mean that there is a right for it to be publicly visible. Indeed, whether something is or is not a religious symbol has relatively little relevance in and of itself when the question at issue is whether that symbol may be displayed in some fashion *by the believer*. The reason is that this is subsumed within the more general question of what is to 'count' as a 'manifestation' of religion or belief. If, for example, the question concerns whether an individual may wear a prayer shawl, a cross, a turban or a headscarf in a public setting, it does not matter whether those items are or are not religious symbols: the relevant question is whether that person is manifesting their religion or belief by the wearing or the displaying of it. This is clear from those cases which have dealt with issues concerning religiously-inspired clothing. For example, in the case of the *Moscow Branch of the Salvation Army v. Russia* the Court accepted that 'It is indisputable that for members .... wearing uniforms were particular ways of ... manifesting The Salvation Army's religious beliefs'[11] and in *Leyla Şahin v. Turkey* the Grand Chamber endorsed the view of the Chamber that:[12]

> 'The applicant said that, by wearing the headscarf, she was obeying a religious precept and thereby manifesting her desire to comply strictly with the duties imposed by the Islamic faith. Accordingly, her decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief and, without deciding whether such decisions are in every case taken to fulfil a religious duty, the Court proceeds on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's right to manifest her religion.'

Once again, the Court approached the matter on the basis of the wearing of the headscarf being a 'manifestation' of religion or belief. Indeed, it might be noted in passing that the Court chose not to draw on the distinction drawn in the *Arrowsmith* case between acts which are motivated by

11 *Idem*.

12 *Leyla Şahin v. Turkey* [GC], op.cit., para 78.

religion or belief but which fall short of being a manifestation of religion or belief. Rather, it proceeded on the basis that the refusal to allow the applicant to wear attire which she considered to be warranted by her religious beliefs was sufficient to amount to an interference with the freedom to manifest those beliefs. It was irrelevant as far as the Court was concerned whether others of her religious persuasion took a similar view. It was also irrelevant whether the headscarf was or was not a 'religious symbol' at this point in the judgment. What mattered was whether it was a *bona fide* manifestation of her religious beliefs. It might be concluded that, from the point of view of the persons wishing to display a religious symbol, what matters is that they are manifesting their beliefs, not that they are manifesting them through the display of a religious symbol.

(c) The role of the third party

Perhaps surprisingly, the real significance of something being a religious symbol lies in the response of others to that symbol. There are two dimensions to this. We have already seen how that sub-set of symbols which comprise objects of religious veneration may be protected from being the subject of 'provocative portrayals' since such portrayals may amount to a 'malicious violation of the spirit of tolerance'. When seen from this perspective, it becomes clearer why there is a tendency to focus on a narrower rather than a broader approach to what is to be considered as an 'object of religious veneration'. What is necessary for the purposes of fostering pluralism and tolerance is that respect be shown to the religion or belief in question, rather than that respect be shown to those things which particular individuals might consider to be invested with personal religious significance. A related situation occurs when non-believers use signs or items in a fashion which may cause offence to believers for whom they have a religious significance. For example, not every turban or headscarf, cross, knife or bracelet has a religious significance for the wearer. Such objects might, however, have a religious significance for someone else who might consider their use or display by non-believers to be offensive. Although there is no interference with the manifestation of religion or belief in such situations there may be a lack of respect sufficient to warrant some form of response by the state, particularly if there is a lack of 'parity' in the relationship. Just as in *Larrisis* v.

Greece,[13] discussed above, the Court decided that the state was entitled to take action to prevent officers in the Greek airforce from proselytising to junior airmen, so would the state be entitled to take action if a person in a position of power or dominance used that position to abuse or besmirch the religious symbols of another. In such situations, the state is not 'protecting' the religion from criticism but it is fulfilling its role as the neutral and impartial organiser of religious life by taking steps to ensure that there is a 'level playing field'.

A second dimension concerns the impact which a symbol has on others who are not believers. In many ways this raises more difficult questions since it might result in the same symbol being invested with a different symbolic meaning by different observers, thus complicating the balancing of the conflicting rights which needs to be undertaken. For example, in the *Şahin* case it was taken as read that the wearing of the Islamic headscarf was of religious significance to the applicant and a means through which she manifested her religious beliefs. It was also accepted that 'there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts.'[14] The Court also recalled that in the *Refah Partisi* case it had noted that 'in the past political movements based on religious fundamentalism have been able to seize political power in certain states and have had the opportunity to set up the model of society which they had in mind. It considers that, in accordance with the Convention's provisions, each Contracting state may oppose such political movements in the light of its historical experience.'[15] Whether the applicant was or was not involved in such a political movement was of secondary importance to the outcome of the case. What for the applicant might be a matter of personal piety might have a high degree of political significance for others and, irrespective of whether that political implication is justified or not, this alone might require that the state respond to the emergent situation in order to resolve any resulting tensions. The example of re-routing religious processions in areas of inter-religious hostility might provide an example of such a

13 *Larissis and others v. Greece*, judgment of 24 February 1998, *Reports of Judgments and Decisions*, 1998-I.

14 *Leyla Şahin v. Turkey* [GC], op.cit., para 115.

15 *Ibid.*, para 124.

situation. The key point is that what justifies the response of the state to the display of religious affiliation is not so much that display in itself, but the responses to that display in that particular context *by others*.

What justifies the response of the state to the display of religious affiliation is not so much that display in itself, but the responses to that display in that particular context by others.

There are, then, some symbols which are so closely associated with a particular form of religion or belief that any form of display of them might reasonably be associated with the faith in question – the Hijab and a Crucifix might immediately be thought of – although on close examination of the facts it might turn out that they were not being displayed for religious reasons at all. Likewise there are many markers of religious affiliation which might be invested with a degree of religious symbolism by non-believers irrespective of whether the bearer considers them to be a 'religious symbol'. In all cases, the assessments may be context driven. In short, it is difficult to offer any categoric answers to the abstract question of 'what is a religious symbol' as the answer may change from time to time and vary from place to place. In many – perhaps in most – cases it will not be a difficult question to answer, but the foregoing discussion has tried to emphasise the need to think beyond the question of 'what is a religious symbol' and consider the larger question of 'what is understood to be religiously symbolic' in a given situation. This makes the matter more contextually rooted and, as will be seen in the final section of this Manual, it is the context which drives the determination of when it is legitimate to restrict the wearing of a religious symbol.

(C) 'Wearing' Symbols and the Scope of the Manual

If one were to take the title of this Manual literally, it would only be concerned with a very small subset of instances in which the visibility of religious symbols requires consideration from a Convention perspective – occasions on which religious symbols were being 'worn'. The previous section has drawn attention to the need to ensure that the expression 'religious symbol' is approached and understood in context and it is equally important to ensure that the approach taken to the 'wearing' of religious symbols is similarly congruent with the more general policies regarding religious symbolism in the public arena. Because of this, it is probably unwise as well as unnecessary to dwell at length on what is meant by 'wearing' a religious symbol. It

does, however, need to be stressed that the linkage between 'wearing' and 'symbols' for the purposes of this Manual must not influence an understanding of what a religious symbol is: many things which are religiously symbolic are not necessarily capable of being described as being religious symbols and it would be doubly unfortunately if emphasis was placed upon the 'wearing' of 'symbols' rather than placing this debate within the broader context of regulating matters of religious symbolic significance.

For example, it might be possible to prevent teachers and school children from wearing religious clothing (as will be discussed in the final section of this Manual). However, if the school itself is run by a religious body or along confessional lines, then it may be exuding an ethos which is equally, if not more, significant in terms of the practical impact it may have on the children, irrespective of whether teachers or pupils wear religious symbols or not. Likewise, the educational curriculum in a school may be such as to lend a degree of emphasis to a particular form of belief. We have already seen how Article 2 of the First Protocol to the Convention requires that the state respects the rights of parents to have their children educated in accordance with their religious or philosophical convictions. In the case of *Zengin v. Turkey*, the Court noted that:

> 'the syllabus for teaching in primary schools and the first cycle of secondary school, and all of the textbooks drawn up in accordance with the Ministry of Education's decision no. 373 of 19 September 2000, give greater priority to knowledge of Islam than they do to that of other religions and philosophies. In the Court's view, this itself cannot be viewed as a departure from the principles of pluralism and objectivity which would amount to indoctrination ... having regard to the fact that, notwithstanding the state's secular nature, Islam is the majority religion practised in Turkey.'[16]

The Court did in fact conclude that the nature of the syllabus strayed beyond the bounds of what was legitimate since as it appeared to include elements of doctrinal instruction adequate and effective opt-out mechanisms needed to be in place which, on the facts of the case, were lacking. However, what needs to be stressed for current purposes

16 *Hasan and Eylem Zengin v. Turkey*, no. 1448/04, para 63, ECHR 2007.

is the simple point that it would be strange to be overly concerned with the wearing of religious symbols by pupils or teachers in a classroom setting if the curriculum which is being delivered within that classroom can legitimately give priority to a dominant faith tradition provided appropriate opt-outs are in place.

The focus on the 'wearing' of a religious symbol has the capacity to distort our understanding of what a religious symbol actually is, and arguably extend its scope further than is necessary. As has been seen, the Court has accepted without hesitation the claim that wearing a headscarf may be a manifestation of Islamic belief. It is certainly the case that for many of other faiths and of none the wearing of a headscarf is understood to be religiously significant for Muslims. It is also the case that wearing the headscarf may be symbolically significant in numerous ways: for the wearer, it may be an assertion of their religious identity; to the observer, it may be a means of recognition; to society, it may be an indicator of the existence of religious pluralism and tolerance. Others may see the practice as symbolising more negative features. But it must be noted that a headscarf (like many other indicia) may fulfil all of these roles simultaneously but still not necessarily be a 'religious symbol'. What converts it into a symbol is the nature of the significance with which it is invested and, as we have seen, this may be context driven. There is a danger in equating all those things which people might wear, or the manner in which they choose to present themselves, as religious symbols rather than as forms of manifestation of religion or belief: doing so may result in their becoming invested with a greater significance than is appropriate, making it at the same time both more desirable and yet more difficult to place limitations on them.

It should also be recalled that insofar as the Manual is focussing on the visibility of religious symbolism in the public arena, the question of whether or not a religious symbol is being 'worn' may be a wholly artificial distinction. For example, it follows from previous discussion that there is little sense in prohibiting a judge from wearing religious insignia if their judicial function is carried out against the trappings of religiosity (e.g. in the nature of oaths to be sworn, etc), unless there is evidence to suggest that the personal views

of the judge may be unduly influenced by their beliefs.[17] Likewise, if crosses may be physically present in classrooms, it is more difficult to see why those working in them should be prohibited from wearing them. Of course, it may well be that both ought to be prohibited but the point is that the broader context needs to be taken into account when determining the matter.

The focus on wearing symbols can also result in some rather bizarre outcomes. For example, a girl with an Islamic headscarf or a boy with a skull-cup might reasonably be described as 'wearing' a symbol of their religious commitment. Likewise with a piece of jewellery. It is less obvious that a male Sikh carrying a kirpan in his belt is 'wearing' as opposed to 'carrying' a symbol of his religiosity. It is probable that one 'wears' a beard, though one does not generally 'wear' one's hair. It is, however, difficult to see the reason for differentiating facial from non-facial hair growth. Whilst it might reasonably be claimed that some Rastafarians, Jews and Sikhs (*inter alia*) 'wear' their hair in a particular fashion for religiously motivated reasons, it strains the normal use of language somewhat to say that those who 'shave' their heads are 'wearing' a bald head. Advancing the argument in this fashion again raises the question of whether a shaved head really is properly characterised as a 'religious symbol' and, if it is it not, then it is not clear why objects which cover the head or body are a religious symbol *per se*, as opposed to a mark of a person's religious devotion which may be invested with a symbolic significance by others. If a further example be needed, a number of religious traditions call for male circumcision. It can hardly be said that one 'wears' a circumcised penis, nor can a circumcised penis be fairly described as a religious symbol; yet for believers the practice is it undoubtedly a manifestation of belief (though admittedly rarely – legally – in public).[18]

Since it has chosen to focus on whether something is or is not a manifestation of religion or belief rather than on

17 See, for example, *Kalaç v. Turkey*, op.cit, paras 25 and where the Court agreed with the Government that 'by taking and carrying out instructions from the leaders of the sect Group Captain Kalaç had breached military discipline'.

18 Changing rooms in publicly-run schools and sports facilities provide an example, however. The question of what is meant by a 'public' area will be considered further below.

the question of whether something is or is not a religious symbol, the European Court has not yet allowed itself to be confused by these difficulties. There have, however, been examples of such confusion within domestic jurisdictions. For example, the case of *Playfoot* v. *Governing Body of Millais School*[19] centred on the desire of a young teenage Christian girl to wear a silver ring at school 'as a symbol of her commitment to celibacy before marriage' and which she considered to be a sign of her beliefs as a Christian. Wearing rings was contrary to the School's uniform policy which did not permit jewellery to be worn. The domestic Court, following the approach in *Arrowsmith* v. *the United Kingdom,*[20] took the view that whilst the wearing of the ring was motivated by her beliefs, it was not a manifestation of them and so Article 9 was not engaged. It seems, however, that the Court reached this conclusion because it thought there was no evidence that her beliefs as a Christian 'required' her to wear the ring, which was sufficient to distinguish it from cases in which Sikh girls had been permitted to wear bracelets and Muslim and Plymouth Brethren girls had been permitted to wear headscarves, and it endorsed the view that the ring was not a 'Christian symbol'. This seems to equate the manifestation of belief with the wearing of a symbol, which, for reasons already given, is questionable. Moreover, when considering the issue of the proportionality of the restriction the domestic Court noted that there were other options open to her since she could 'attach her rings, or a keyring or other visible sign, to her bag'.[21]

This suggests that the Court was really focussing on the very narrow question of whether an exception should be made to the policy of not allowing girls to wear jewellery and it set a very high threshold: only in those instances in which jewellery (or clothing) is required to be worn as a matter of religious obligation might an exception be necessary. Interestingly, and crucially, there was no difficulty about displaying the ring in other ways – such as on her bag – and so the restriction was more to do with the means of display rather than the fact of display. The symbolic significance of a ring worn on a finger is potentially much greater than that of a ring displayed on a bag and it is difficult to

19 *Playfoot* v. *Governing Body of Millais School,* [2007] EWHC 1698 (Admin).

20 *Arrowsmith v. UK*, op.cit.

21 *Playfoot* v. *Governing Body of Millais School,* op.cit., para 38 (iii).

see why wearing a ring is more problematic than displaying a ring, save for the existence of the policy at issue.

Either way, the justification for the policy and the restriction has little relevance to the question of whether or not the display of such a ring is religiously motivated, religiously symbolic or, indeed, whether the ring is or is not a religious symbol. Indeed, seen in this light, the question of whether the ring was or was not a religious symbol (as opposed to a practice motivated by, reflective of, or even required by ones beliefs) is, strictly speaking, irrelevant. This is not to say that there are not religious symbols which may be worn, – the Christian cross being a clear example and one to which we will return – but to focus the debate upon questions of whether something is or is not a religious symbol a requirement of religious observance and then to juxtapose this upon the question of its being worn, is to run the risk of missing the broader and more significant issue which is at stake. That broader, underlying question concerns the visibility of religion within the public sphere and how to reconcile the need to permit believers to enjoy the freedom to manifest their religion or belief in public whilst respecting the rights and freedoms of others in a fashion which is respectful of the rights of all concerned, is neutral and impartial and fosters a climate of pluralism and tolerance. The key to determining whether a restriction is or is not justified turns less on whether something is or is not a religious symbol or on whether it is or is not being worn (though this is not to say these are unimportant issues) than on the application of these wider desiderata to the specifics of a particular situation within the public realm. The final part of this section will, then, look at this third definitional issue that flows from the focus on this Manual, the 'public area'.

The underlying question concerns the visibility of religion within the public sphere and how to reconcile the need to permit believers to enjoy the freedom to manifest their religion or belief in public whilst respecting the rights and freedoms of others in a fashion which fosters a climate of pluralism and tolerance.

(D) What is a 'Public Area'?

The title of this Manual focusses attention on the wearing of religious symbols in 'public areas'. This is not a 'term of art' and there is no generally agreed understanding of what is meant by 'public area' within the European Convention system. As with the other definitional issues already considered, a number of different approaches are possible.

(a) The pitfalls of a literalist approach

One approach would be to take the words 'public area' literally and limit the scope of the Manual to those places which are public in the sense of being open and accessible to all, such as streets, parks, etc. If combined with a narrow view of what was meant by a 'religious symbol' and by the term 'wearing', so narrow an approach would empty the subject of much of its interest and address very few practical issues. Should a broader view be taken of what comprises a 'religious symbol', so as to include those things which are a marker of religious affiliation rather than 'symbols' *per se*, this would permit situations in which certain forms of religious dress are prohibited from being seen in public at all to be included within its scope. However, since it is only in the most exceptional circumstances that such a complete prohibition could be justifiable under Article 9(2) this would also be too narrow an approach to make a Manual worthwhile.

Taking an overly broad approach to these terms is, however, equally problematic and over-extends the scope of the Manual. If, for example, a broad approach was taken to what comprises a religious symbol which focussed on the idea of visibility, or display, rather than on the 'wearing' of a religious symbol, then taking a similarly broad approach to what is to be understood as a 'public area' – such as, for example, any situation in which a religious symbol might be seen by a member of the public – the result would be a situation in which the public visibility of anything which was representational of religion or belief would fall within its scope. Adopting such a broad-ranging approach produces very real problems. Although any restrictions on the public visibility of religion would still need to be justified in terms of Article 9(2), it would have the practical effect of requiring religious believers and religious bodies to account for their presence in the community in a fashion which fails to respect the basic principles regarding the freedom of religion or belief set out in the *Kokkinakis* case,[22] which emphasises the significance of religion and religious diversity as an essential component of a flourishing plural democratic society rather than as something which needs to be explained and justified. It would also mean that the Manual would have to address a whole host of additional questions,

22 *Kokkinakis v. Greece,* op.cit.

such as issues concerning planning law and the location and design of religious buildings, which might fairly be considered as lying well beyond its scope.

(b) An alternative approach: the 'public domain'

It is, then, necessary to steer a path between these two extremes. Moreover, both of these approaches tend to emphasise the physical dimension of the expression 'public area' rather than its more conceptual dimension. It seems to be more appropriate to focus on the idea of the 'public' rather than on the idea of the 'area' or 'place' when dealing with this issue. This receives powerful support from the *Otto-Preminger-Institut* case which, as we have seen, concerned the legitimacy of the seizure and destruction of a film which was considered to be offensive in its disrespect for objects of religious veneration. The film was to have been shown in a private cinema, accessible to the public only on a fee-paying basis and this, the applicant argued, was sufficient to prevent unwarranted offence. The Court disagreed, saying that

> 'although access to the cinema to see the film was subject to payment of an admission fee and an age limit, the film was widely advertised. There was sufficient public knowledge of the subject matter and basic contents of the film to give a clear indication of its nature; for this reason, the proposed screening of the film must be considered to have been an expression sufficiently 'public' to cause offence.'[23]

This suggests that what is to be taken as comprising the 'public' domain should be approached in a purposive rather than a literalist fashion. Therefore, this Manual focuses not so much the wearing of religious symbols in public or in public places but on the presence of religious symbolism in what might be called the 'public arena' or, more generally, in 'public life'; that is, in the areas of public engagement which fall to be conducted or regulated by the state.

This approach is reflected in the case-law of the Court. The Court emphasises that the role of the state is to be the 'neutral and impartial organiser' of the exercise of various religions, beliefs and faiths, this being 'conducive to public

This Manual focusses on the presence of religious symbolism in the areas of public engagement which fall to be conducted or regulated by the state.

23 *Otto-Preminger Institut v. Austria*, op.cit., para 54.

order, religious harmony and tolerance in a democratic society'.[24] According to Article 9 itself, the freedom of religion or belief may be manifested 'in public or in private' and restricted only in pursuit of the legitimate aims of preserving certain public goods, including the rights and freedoms of others. None of this has any direct connection with the nature of the 'place' as being a public area in a literal sense of the word. Rather, they are concerned with the manner in which states respond to situations in which the presence of religious symbols, or of things which are considered to be symbolic of religion, give rise to questions. For example, *Leyla Şahin v. Turkey* concerned a prohibition on the wearing of headscarves and of beards to lectures, courses or tutorials at Istanbul University based on a circular issued by the University's Vice-Chancellor in the light of a ruling of the Constitutional Court. Students with beards or who wore headscarves to lectures or tutorials were required to leave and were not to be registered as students. Only registered students were entitled to attend lectures or tutorials. The Court noted that Universities were 'public-law bodies by virtue of Article 130 of the Constitution, they enjoy a degree of autonomy, subject to state control, that is reflected in the fact that they are run by management organs .... with delegated statutory powers'.[25] Nevertheless, they were certainly not 'public' in the sense of being generally accessible: Universities were 'public' by virtue of the manner in which they were constituted and because of the nature of the function – public education – which they fulfilled.

A similar point can be made in respect of cases in which restrictions have been placed on those working for the state. Public servants may reasonably be expected to be subject to such regulations even when their work does not bring them into contact with 'the public' or is undertaken in a 'public setting': it is the public nature of their employment which is the starting point for there being a restriction, the context or nature of that employment then being a factor which might influence a decision on whether a restriction is or is not justified. It is clear that the public nature of employment is not sufficient to justify a restriction *per se*. Indeed, cases such as *Knudsen* v. *Norway*[26] remind us that in some

24 *Refah Partisi (the Welfare Party) and* Others *v. Turkey* [GC], op.cit., para 91.

25 *Leyla Şahin v. Turkey* [GC], op.cit., para 54.

26 *Knudsen v. Norway,* op.cit.

countries ministers of religion are themselves state employees, or are employed by the state to fulfil public functions in a religious capacity. Moreover, in many countries both the state itself and other public bodies employ members of religious communities to work in a religious capacity, such as in hospitals and the armed forces. Given the nature of their employment it would be bizarre if such employees were prohibited from wearing religious symbols whilst fulfilling their duties as public servants as this would contradict the very reason for their employment. This, then reinforces the need to assess each situation carefully on its particular facts and in the light of the overall context.

(c) Positive obligations and the public domain

A further issue arises from the 'positive' dimension of the obligations upon the state. On a general level, the Court has said that:

> 'In determining the scope of a state's positive obligations, regard must be had to the fair balance that has to be struck between the general interest and the interest of the individual, the diversity of situations obtaining in Contracting states and the choices which must be made in terms of priorities and resources. Nor must these obligations be interpreted in such a way as to impose an impossible or disproportionate burden.'[27]

It is important to bear this in mind when considering what might be required of a state in this regard. Nevertheless, as has been seen the Court has made it clear that whilst states must not intrude into the '*forum internum*' of the individual, or into the internal life of a religious or belief community, they are under a duty to ensure that there is a 'level playing field' in the contestation of ideas between believers and also between believers and non-believers. The relevant question is whether this only applies in the 'public' sphere or whether it also extends to the 'private'.

It should also be recalled that the Court has said that it is not the role of the state to remove causes of tension within divided communities, and although this was said in the

It is the role of the state to take steps to ensure that there is a degree of mutual respect between competing groups and in the presentation of different ideas and opinions.

27 *Ilaşcu and others* v. *Moldova and Russia* [GC], no 48787/99, para 332, ECHR 2004-VII.

context of state involvement in the resolution of leadership struggles within religious organisations, this may fairly be taken as also applying to divided political communities; divided in the sense of being plural in their composition and offering different conceptions of life, in accordance with democratic principles. However, we have also seen that it is the role of the state to take steps to ensure that there is a degree of mutual respect between competing groups and in the presentation of different ideas and opinions. This, then, may not only legitimate state activism but may mandate it in cases where there is a lack of toleration and or respect. In short, there are clearly instances in which the state might not only choose to involve itself but may be in breach of its convention obligations if it does not take purposive action, as is seen by the case of *97 Members of the Gldani Congregation v. Georgia*,[28] discussed previously.

(d) The difficulty of distinguishing the 'public' from the 'private' domain

The *Gldani* case is important for another reason. In the earlier case of *Kuznetsov v. Russia*[29] the state was held responsible for the actions of its agents who had acted in a private capacity when breaking up a service of worship. The *Gldani* case takes this further since the state was held responsible for its failure to prevent acts of violence meted out by one group of believers upon another group of believers, rather than because of any direct action taken by the state. The Court said that, 'through their inactivity, the relevant authorities failed in their duty to take the necessary measures to ensure that the group of Orthodox extremists led by Father Basil tolerated the existence of the applicants' religious community and enabled them to exercise freely their rights to freedom of religion.'[30] Thus the state was considered responsible for ensuring that private persons show respect and tolerance in matters of religion or belief in what might be considered private as well as in public settings, though the general caveats concerning the extent of that duty set

28 *Case of 97 Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, op.cit., para 134.

29 *Kuznetsov v. Russia,* op.cit.

30 *Case of 97 Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, ibid.

out in *Ilascu and others* v. *Moldova and Russia* and quoted above moderate the practical implications of this.

At one level, this is not surprising since a very clear breach of public order was involved in the *Gldani* case, and a very clear breach of the freedom to worship in the *Kznestov* case and it would be more remarkable if the state had not been found responsible under such circumstances. But the point of this for current purposes is that they again demonstrate that there is no very clear dividing line to be drawn between the 'public' and the 'private' space: what matters is the degree of interference with a convention right within the overall context of the Convention system. It is the failure to secure the convention right, as understood and interpreted by the jurisprudence of the Court, which is the relevant factor and the scope of the 'public sphere', or the 'public area' is ultimately bound up with that question. The development of 'positive obligations' and the duty to ensure toleration may carry this a long way into what generally might be thought to be the 'private' arena.[31]

Does this mean that the state might even be entitled to restrict the wearing or display of religious symbols in what might be considered to be private settings, such as meeting rooms belonging to religious of belief societies, or even in private homes? The short answer is yes, if that restriction is justified within the Convention system: the nature of the 'place' may affect the balancing act to be undertaken and make the restriction more difficult to justify but it does not exclude the possibility. There will, of course, be a very high threshold. In the case of *Laskey, Jaggard and Brown v. the United Kingdom*[32] the Court was faced with the question of whether the state might criminalise sadomasochistic

31 Although not made explicit at the time, this is apparent from the very earliest cases concerning the scope of Article 9 and the obligation to show 'respect' for objects of religious veneration. For example, this is evident from the *Otto-Preminger-Institut* case, quoted above, and also from the subsequent case of *Wingrove v. the United Kingdom*, op.cit., para 63 where the Court rejected the view that the limited distribution of a film in video form through a controlled network reduced the risk of its causing offence, saying that 'it is in the nature of video works that ... they can in practice be copied, lent, rented sold and viewed in different homes thereby easily escaping any form of control by the authorities'.

32 *Laskey, Jaggard and Brown v. the United Kingdom,* judgment of 19 February 1997, *Reports of Judgments and Decisions* 1997-I.

sexual practices undertaken by consenting adults in private. It concluded that it was, largely on the grounds that the state was entitled to take steps to prevent the infliction of physical harm. In cases not involving such harm it has still taken the view that it is only where there is an emergent common European consensus that it might intervene in order to prevent the prohibition of private activities which the state considers to be contrary to the broader public interest. Thus in *Dudgeon* v. *the UK* the Court, commenting on the continued criminalisation of consensual homosexual conduct in Northern Ireland, said that 'Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual act, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.'[33]

We have already seen that the Court does not consider there to be a common European consensus regarding the place of religion or belief in public life. What it does recognise is that states may take account of the nature of their political structures and their sense of national identity and that judgments in cases such as *Refah Partisi v. Turkey* point to the limits of religious influence in the political life of the community. Where it is clearly established on the facts that the display of religious symbols even in a purely private setting is indicative of beliefs and activities which threaten the rights and freedoms of others, then the possibility of their being prohibited cannot be entirely excluded. In the case of *Laskey, Jaggard and Brown v. the United Kingdom* the European Court agreed with the domestic court that 'in deciding whether or not to prosecute, the state authorities were entitled to have regard not only to the actual seriousness of the harm caused – which as noted above was considered to be significant – but also .... to the potential for harm inherent in the acts in question.'[34]

All of this combines to suggest that where the knowledge of the use of religious symbolism even within a private setting is such as to pose a genuine threat to the integrity of the democratic structures or to public morals, health or order, or to the rights and freedoms of others, then the state may,

33 *Dudgeon v. the United Kingdom,* judgment of 22 October 1981, Series A no. 45, para 60.

34 *Laskey, Jaggard and Brown v. the United Kingdom*, op.cit., para 46.

subject to rigorous European supervision, take proportionate measures to restrict their use. It also combines to reinforce the point that not only is the idea of a public 'area' too limited a context within which to understand the legitimacy of restraints upon the utilisation of religious symbolism but that the entire notion of the public/private divide is exceedingly porous when the wearing of religious symbols is at issue.

(E) Conclusion

The previous subsections have explored the key definitional issues that emerge from the title of this Manual in the light of the jurisprudence of the Court relating to the freedom of religion or belief, these being what are 'religious symbols' and what is meant by the expressions 'wearing' and the 'public area'. It has been seen that none of these terms have been defined in a clear fashion by the Court and they can all be interpreted in a variety of different ways. It is suggested that the most appropriate way forward is to consider these terms in a purposive fashion, which itself reflects the idea that the Convention is not static but is a 'living instrument'. A purposive approach to these terms – and, therefore, to the scope of the Manual as a whole – allows for the inter-dependencies between these terms to be recognised and allows for a holistic approach to be taken. Rather than consider whether the definitional requirements are met in any given situation, it is more appropriate to step back and to see if that situation as a whole is one which raises questions concerning the exercise of the freedom of religion which can best be addressed through considering the issue of the display of religious symbolism. This will vary from case to case, and reinforces the idea that resolution requires a contextual assessment. This contextual assessment takes place when the Court is called on to consider the legitimacy of any restriction placed upon the enjoyment of the freedom of religion or belief and it is to be informed by the principles identified and outlined earlier in this Manual, notably those of neutrality and impartiality, respect and the positive duty to foster pluralism and tolerance.

This manual suggests taking a purposive approach to the notion of "wearing religious symbols in public areas" which requires making a contextual assessment.

#VII The Wearing of Religious Symbols: The practical Application of the Principles Identified

The conclusions reached in the previous section give some guidance as to how the jurisprudence of the court is to be understood and how cases in which applicants argue that their freedom to manifest their religion or belief has been trenched upon as a result of their being unable to display or wear items of symbolic significance to them may be resolved by the Court. The previous section also indicated the potential breadth of the topic and emphasised that it is not wise to make any *a priori* assumptions regarding the meaning of the key terms and issues upon which this Manual focusses. Although these are important conclusions, it must be acknowledged that they do not offer as much practical assistance to domestic policy makers as they might wish to be given. Domestic policy makers are likely to want specific guidance on the extent to which they are able to regulate the wearing of religious symbols either in general or in particular contexts, rather than an understanding of how the Court is likely to determine whether their decisions are compliant with the Convention and the principles and approaches it will draw on whilst doing so. Moreover, for all its possible ambiguities and extensions, there remains a very clear core to the question which involves items of clothing or religiously significant objects which mark out a person as being an adherent of a particular form of religion or belief system. The purpose of the final sections of this Manual is to offer such guidance, based on examples provided by the case-law of the European Court of Human Rights.

It needs to be stressed at the outset that this cannot be taken as offering 'definitive' guidance in relation to any particular heading since, in the final analysis, what is or is not appropriate will be context driven. The Court has made it clear that the state enjoys a broad margin of appreciation in determining how to give effect to its responsibilities as the neutral and impartial organiser of religious life whilst

ensuring the fullest possible enjoyment of the freedom of religion or belief that is consistent with respect for the rights and freedoms of others. Moreover, conceptions of the proper balance to be struck have changed over time, and will continue to do so. The Court has itself recognised this, summing up the situation as follows:

> '... the meaning or impact of the public expression of a religious belief will differ according to time and context. Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order'.[1]

It follows from this not only that the approaches adopted in some earlier cases may be less pertinent today but that even contemporary approaches may not necessarily be relevant in other states and in other contexts. However, bearing in mind these caveats, it is possible to identify categories of situations in which some common approaches are discernable and which either directly or by analogy offer some illustrative guidance to those setting domestic policy or implementing generic guidance in an operational setting.

(A) The Basic Framework: A Brief Recapitulation

Since this section of the Manual may be read in its own right, it is prudent to begin by re-iterating the basic elements of the Article 9 framework relevant to this exercise. The first is that everyone has the right to manifest their religion or belief in teaching, worship, practice and observance. Although this does not expressly refer to the right to manifest religion or belief through the wearing or display of items of religious significance, the Court has been reluctant to dismiss claims on this basis. Thus in the case of the *Moscow Branch of the Salvation Army v. Russia* the Court accepted without question that the wearing of militaristic style uniforms was a manifestation of their beliefs.[2] In *Leyla Şahin v. Turkey* the Court proceeded on a slightly different basis, noting that the applicant claimed that, 'by wearing the headscarf, she was obeying a religious percept and thereby manifesting her desire to comply strictly with

1 *Leyla Şahin v. Turkey* [GC], op.cit., para 109.

2 *Moscow Branch of the Salvation Army v. Russia*, op.cit., para 92.

the duties imposed by the Islamic faith'. In its judgment the Court said that it 'proceeds on the assumption that the regulations in issue ..... constituted an interference with the applicant's right to manifest her religion',[3] rather than accept that this was indeed the case and it took a similarly contingent view in its subsequent inadmissibility decision in the case of *Köse v. Turkey*.[4] However, the Court had tended to accept the view of the applicant when it comes to determining whether they are manifesting their beliefs in the manner of their clothing or apparel, irrespective of what others might consider to be the case. The Court also seems reluctant to conclude that applicants are merely 'motivated' by their beliefs when doing so since were it to do so this would mean that they would fall outside the scope of the protections offered by Article 9, though it has been willing to do so as regards other forms of behaviour which individuals might undertake on the basis of their beliefs.[5]

This approach is to be welcomed, as it recognises the autonomy of the individual and the essentially personal nature of the freedom of religion or belief. It also respects the overarching principle that it is not for the Court, or the state, to pass upon the legitimacy of any particular form of religion, or the manner in which a person seeks to manifest their faith. In short, if an individual believes that in wearing a particular form of clothing or by adorning themselves in a particular fashion they are following the dictates of their beliefs, then this self-assessment ought to be respected by others. Of course, this does not mean that it may not be subjected to restrictions and restraint, but if the freedom of religion embraces the right to wear religiously inspired clothing (and it clearly does) then it is not for others to say that an individual's personal perceptions of what their beliefs require of them is wrong.

If an individual believes that in wearing a particular form of clothing or by adorning themselves in a particular fashion they are following the dictates of their beliefs, then this self-assessment ought to be respected by others. Of course, this does not mean that it may not be subjected to restrictions and restraint.

The restrictions which may be placed upon the wearing of religiously inspired attire will usually need to be justified in accordance with Article 9(2), although there may be rare cases in which restrictions may also be justified in accordance with Articles 15 and 17. Since such instances are so unlikely no further consideration will be given to them

3 *Leyla Şahin v. Turkey* [GC], op.cit., para 78.

4 *Köse and Others v. Turkey* (dec.), no. 26625/02, ECHR 2006-II.

5 See, for example, *Arrowsmith v. UK*, op.cit., and *Kosteski v. the former Yugoslav Republic of Macedonia*, op.cit.

here. When considering the legitimacy of restrictions, it is necessary to ensure that the restriction is prescribed by law and is 'necessary in a democratic society' to protect a range of public interests, notably the rights and freedoms of others. In some instances, questions may fall to be considered under other Articles of the Convention, such as Article 8(2) (private and family life), 10(2) (freedom of expression) or 11(2) (freedom of association) where the heads of restraint are slightly different and – more significantly – weight given to various factors the breadth of the margin of appreciation might differ. Nevertheless, focussing on the application of Article 9(2) is adequate for the purposes of gauging a general sense of what is permissible.

As has been seen, the Court accepts that states have a broad margin of appreciation which, in this context, has two dimensions. First, it means that since there is no common approach within Europe, 'where questions concerning the relationship between state and religions are at stake .... the role of the national decision-making body must be given special importance'.[6] This, then, permits the state to respond to such questions in a fashion which reflects its own particular understanding of that relationship, to the extent that this is compatible with the Convention as a whole. Secondly, having exercised this latitude in determining the overall context, it follows that '... the choice of the extent and form such regulations should take must inevitably be left up to a point to the state concerned, as it will depend on the domestic context concerned.'[7] It is at this point that the Court is to involve itself by determining whether the measures taken 'were justified in principle and proportionate'.[8] This brings us to the heart of the difficulties which this subject matter presents us with: the court says that in making this determination it 'must have regard to what is at stake'[9] and this is a question on which parties in dispute are likely to differ greatly. For example, in the case from which these citations are taken, *Leyla Şahin v. Turkey*, the applicant argued that she was simply seeking to follow the dictates of her religious beliefs and expressly declared that 'she was not seeking a legal recognition of a right for all

6 See, for example, *Leyla Şahin v. Turkey* [GC], op.cit., para 109.

7 Idem.

8 Ibid., para 110.

9 *Idem*.

women to wear the Islamic headscarf in all places.'[10] For the Court, however, what was at stake was 'the need to protect the rights and freedoms of others, to preserve public order and to secure civil peace and true religious pluralism.'[11] Given this assessment of what was at stake in the case, it is not difficult to see why the Court upheld the validity of the restriction. Determining what is at stake is, then, key to the task of assessing the proportionality of the measure in question and, of course, can only be determined on the facts of each case.

(B) The Key Questions to Be Considered

When conducting this exercise decision-makers should be mindful of the basic principles and policies which have been identified and outlined earlier. When placing restrictions on the wearing of religious clothing and artefacts, the questions to be thought about might include the following:

- is this restriction reflective of a general approach which is neutral and impartial as between all forms of religion or belief or does it seek to prioritise a particular conception of the good?
- is this restriction discriminatory in that it bears more directly or more harshly on the followers of one religion or belief than of another?
- is the restriction directly aimed at the protection of a 'legitimate interest' as set out in the Convention, and notably the protection of the rights and freedoms of others?
- is there a pressing reason why that interest needs to be protected?
- are there alternatives to the restriction which would secure the realisation of those interests and which would not involve a greater diminution of the freedom to manifest one's beliefs through the wearing of such religiously inspired clothing or artefacts?
- assuming there to be no other viable alternative approach, is the restriction limited to the minimum that is necessary to realise the specific legitimate aims identified?

10 *Ibid*, para 73.

11 *Ibid*, para 110.

– is the imposition of the restriction compatible with the principles of respect and or the need to foster tolerance and pluralism?

The relevant question is not whether a restriction is 'reasonable' in all the circumstances of the case, but whether it is 'necessary'.

Above all else, it should be emphasised that the relevant question is not whether a restriction is 'reasonable' in all the circumstances of the case, but whether it is 'necessary' – which is a very different question and which sets a much higher threshold of legitimacy.

Should domestic policy and decision-makers address these questions when considering issues concerning restrictions upon the wearing of religious symbols, then it will be more likely that their decisions will be compliant with the Convention and be properly respectful of the freedom of religion whilst striking a fair balance between the competing interests at stake.

#VIII The Approach in Action: Areas of Practical Application

Having restated the guiding approach and the fundamental principles, and having distilled them into a number of key questions to be asked by policy and decision-makers in situations which arise from time to time, this final section will look at a number of key areas in which the core issue of religiously inspired clothing or attire has given rise to dispute, and at how this has been resolved. For all the reasons given previously, the primary focus will be on the jurisprudence of the European Court of Human Rights, though illustrations from other international fora and domestic jurisdictions will also be drawn on.

(A) Restrictions Flowing from Laws of General Application

The first category of restrictions is in some ways the most difficult to pin down, seemingly the least controversial but in practice may be the source of the most serious restrictions upon the wearing of religious symbols. Since it is something of a 'catch-all' it may seem odd to address it first but as the more specific areas considered in the following subsections are in some senses little more than specific applications of these more general restrictions it seems appropriate to deal with them in this order.

The law will often require that everyone acts or refrains from acting in a particular fashion. Such laws of general application may not raise any issues for some but may well do so for others and particularly for those who wish to act otherwise as a result of their religion or belief. These laws are not 'aimed at' or intended to address issues of religious clothing or symbols. There may have been no prior thought of their impact upon religious believers and it is laws such as these which often generate the 'classic' case of a violation of the Convention right, to which the solution may well

lie in granting a special 'opt out' for a particular group of believers should this be considered justified.

(a) The example of public safety

An excellent example of this approach concerns the compulsory wearing of crash helmets whilst riding motorbikes and hard hats whilst at work on building sites. Such regulations are intended to ensure that both workers in general and the general public benefit from appropriate health and safety legislation. In an early case involving the United Kingdom a Sikh, whose beliefs required him to wear a turban, had been convicted for offences under the Road Traffic Acts for failing to wear a crash-helmet. The Commission decided that although there had been an interference with his freedom of religion, this interference was justified under Article 9(2) as a necessary safety measure.[1] The UN Human Rights Committee adopted a similar approach in its views in *K. Singh Bhinder v. Canada*[2] when it upheld the legitimacy of legislation requiring employees of the Federal-owned state railway company to wear protective headgear whilst at work. Prior to the Commission's decision in *X. v. the United Kingdom*, however, the United Kingdom had already decided to exempt Sikhs from this requirement by amending the Road Traffic Act expressly to exclude turban-wearing Sikhs from its scope of application and many states have adopted similar legislation with respect to head-gear in other contexts. For example, Canada subsequently permitted members of the Royal Canadian Mounted Police to wear turbans instead of the traditional stetson hat (this giving rise to a challenge before the Human Rights Committee from those opposed to such a change in *Riley v. Canada,*[3] which will be touched on later).

Although not expressed in these terms, whilst the human rights bodies have been prepared to accept the legitimacy of such restrictions on the basis that the state has a legitimate interest in ensuring the general health and safety of those

1 *X. v.* the *United Kingdom,* no . 7992/77, Commission decision of 12 July 1978, Decisions and Reports 14, p. 234.

2 *K. Singh Bhinder v. Canada,* Communication no. 208/1986 (views of 9 November 1989), UN Doc. A/45/40 vol. 2(1990), p. 50.

3 *Riley v. Canada*, Communication No. 1048/2002 (decision of 21 March 2002), UN Doc. A/57/40 Vol. 2 (2002), p. 256.

for whom it is responsible and is best placed to make that determination, in the absence of any evidence of unjustified direct or indirect discrimination, it is prepared to leave the striking of that balance to the state itself. If the state feels that it is able to make an adjustment in order to accommodate the needs of believers, then it is of course free to do so. However, it is then important that a similar consideration be given to the needs of all other similarly placed believers of other religious persuasions. Some care is needed in making this assessment since it might require some potentially controversial consideration of the nature of the beliefs at issue. For example, if turban-wearing Sikhs are permitted to ride motorcycles without wearing crash helmets, should headscarf- or Burqa-wearing Muslim women be allowed to do likewise? To exempt one group of believers but not another from the same legislative requirement without an objective and reasonable justification would be discriminatory. It is, however, possible to discern relevant differences, not least that is it is not impossible for a Muslim women to wear protective headgear whilst wearing her religiously inspired attire, whilst this is simply not the case for turban-wearing men. Though the drawing of such distinctions may not be welcome, it is both acceptable and, indeed, necessary and, once again, can only be undertaken in the light of the provision at issue and the believers and belief system in question.

Without being prescriptive, it is likely that there will be less scope for such accommodations to be made when the legislation at issue is not directed so much at the health and safety of the wearer, but at the protection of the health or safety of others. Thus restrictions on wearing or carrying forms of traditional weaponry which may have a religious significance to the bearer (such as ceremonial daggers or swords) may be legitimately restricted if this is considered necessary to preserve public safety and public order in situations in which others might reasonably be in fear of their safety, though once again it would be quite acceptable to seek to provide accommodations if this is possible.

(b) The example of public security

Unsurprisingly, there is likely to be little room for accommodation when issues of more general public security is at issue, as it shown by the decision of the Court in case of

Phull v. France. The applicant was a Sikh and was required by his beliefs to wear a turban which security staff at Entzheim Airport, Strasbourg, compelled him to remove for the purposes of a routine security inspection when entering the departure lounge. He argued that this had been unnecessary, especially as he had gone through a walk-through scanner and had been checked with a hand-held detector. Nevertheless, the Court, quoting *X v. the United Kingdom*, said:

The state is accorded a very broad margin of appreciation when issues of general public safety are at issue.

> 'Firstly, security checks in airports are undoubtedly necessary in the interests of public safety within the meaning of that provision. Secondly, the arrangements for implementing them in the present case fell within the respondent state's margin of appreciation, particularly as the measure was only resorted to occasionally.'[4]

Thus the state is accorded a very broad margin of appreciation when issues of general public safety are at issue. However, the manner in which the request to remove the turban and the circumstances in which it might be removed and the passenger screened are all matters which might be taken into account in determining whether the interference with the applicant's freedom of religion was proportionate. For example, it should be possible to arrange for such checks to be carried out in private or relatively discreetly. Similarly, it might be questioned whether an absolute ban on the wearing of turbans, or of other forms of religiously inspired attire, by air passengers would be as acceptable.

(c) The question of 'public order'

This leads on to an altogether more controversial situation in which the law restricts the wearing of particular forms of religious symbols or attire in public altogether on the basis that this is necessary for preserving public order. Although the legitimacy of such prohibitions cannot be ruled out *a priori*, it should be recalled that the Court has spoken out in strong terms against any generalised linkages between religious groups and violence threatening peace and security. In its decision in the case of *Norwood v. the United Kingdom* the Court, when declining to allow the applicant to proceed with a claim concerning his being convicted for

4 *Phull v. France* (dec.), no. 35753/03, ECHR 2005-I.

having put in his window a poster linking Islam with the 9/11 bombings, said that 'Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably, tolerance, social peace and non-discrimination.'[5]

On the other hand, although in the case of the *Metropolitan Church of Bessarabia v. Moldova* the Court dismissed the state's argument that recognition of the applicant church would constitute a danger to national security and threaten its territorial integrity, it did so on the basis that this was 'a mere hypothesis which, *in the absence of corroboration*, cannot justify a refusal to recognise it'.[6] A similar approach was taken in the case of the *Moscow Branch of the Salvation Army v. Russia* where the Court, dismissing the claim that the applicant was to be likened to a 'paramilitary' organisation, said that restrictions on members of the Salvation Army for wearing military-style uniforms could not be justified, *inter alia,* because 'It could not seriously be maintained that [they] advocated a violent change of constitutional foundations or thereby undermined the integrity or security of the state. *No evidence to that effect had been produced*'.[7] In both these cases, then, the Court hints that restrictions on believers, including general restrictions on the wearing of religious symbols and clothing could be justifiable if there were a proper evidential basis to support that contention.

This approach finds some support in the judgment of the Grand Chamber of the Court in the case of *Refah Partisi* v. *Turkey*, where it said that:

> 'the acts and speeches of Refah's members and leaders cited by the Constitutional Court were imputable to the whole of the party, that those acts and speeches revealed Refah's long-term policy of setting up a regime based on sharia within the framework of a plurality of legal systems and that Refah did not exclude recourse to force in order to implement its policy and keep the system it envisaged in place. In view of the

5 *Norwood v. the United Kingdom* (dec.), op.cit.

6 *Metropolitan Church of Bessarabia and Others v. Moldova*, op.cit., para 126 (emphasis added).

7 *Moscow Branch of the Salvation Army v. Russia*, op.cit., para 92 (emphasis added).

> fact that these plans were incompatible with the concept of a "democratic society" and that the real opportunities Refah had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants by the Constitutional Court .... may reasonably be considered to have met a "pressing social need".'[8]

Here, the Court carefully examined the material presented to it and found that it did indeed provide sufficient evidence of a threat sufficient to warrant restrictions being imposed, in this instance, upon a political party. Putting this together, it might be concluded that where there is solid and tangible evidence that a particular individual or religious group present a real and present danger to the security and integrity of a plural democratic society or to public security and safety, restrictions on the activities of religious believers may be permissible. Such restrictions may, of course, include restrictions on the display of religious symbols and the wearing of religious attire. Indeed, such restrictions may be required in such circumstances in order to preserve the rights and freedoms of others. As the Court said in the case of *97 Members of the Gldani Congregation* v. *Georgia*,

> '... on account of their religious beliefs, which were considered unacceptable, the 96 applicants were attacked, humiliated and severely beaten during their congregation's meeting ... Having been treated in this way, the applicants were subsequently confronted with total indifference and a failure to act on the part of the authorities [which] ...opened the doors to a generalisation of religious violence throughout Georgia by the same group of attackers ... [T]hrough their inactivity, the relevant authorities failed in their duty to take the necessary measures to ensure that the group of Orthodox extremists .... tolerated the existence of the applicants' religious community and enabled them to exercise freely their rights to freedom of religion.'[9]

In circumstances such as these, the state is required to curb the excesses of religious believers and the use of proportionate restrictions on the wearing or display of religious symbols or clothing not only may offer a proportionate

8 *Refah Partisi (the Welfare Party) and* Others *v. Turkey* [GC], op.cit., para 132.

9 *Case of 97 Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, op.cit., paras 133- 134.

means of doing so but may also provide a means of giving effect to the state's obligation to ensure that believers tolerate each other.

Of course, general restrictions on the wearing of religious symbols can only be justified against an objectively discernable and specific danger. The wearing of a religious symbol or attire is not only an exercise of the freedom of religion or belief, it is also an exercise of the freedom of expression and in a classic statement of the scope of that right the Court has said that the freedom of expression 'is applicable not only to 'information' or ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the state or any sector of the population. Such as the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic' society.[10] It follows from this that it is unacceptable to place general restrictions on the display of certain forms of symbols or attire simply because sections of the population find them unwelcome or offensive. Christian Nuns wearing full length habits and headgear in public places may offend some sections of the community, as might the wearing of saffron robes by male followers of Hare Krishna and both may appear out of kilter with the prevailing *mores* of a secular society. That, however, provides no more reason for restricting such forms of dress in public than would a prevailing religious ethos within society justify the imposition of dress codes forbidding the showing of parts of the body, the face or hair in public.

It may be necessary for the state to take steps to preserve public order. However, rarely will general restrictions focussed upon the wearing or display of religious symbols or attire be compatible with Convention principles.

It may be concluded that the Court clearly recognises that it may be necessary for the state to take steps to preserve public order in situations where the display of religious symbolism places it under threat. However, rarely will general restrictions focussed upon the wearing or display of religious symbols or attire be compatible with Convention principles. Such limitations may be justified – or even required – in order to address well evidenced and specific concerns but these are likely to persist for only a limited period of time and in relation to particular situations and the restrictions should be similarly modulated.

10 *Handyside v. the United Kingdom,* op.cit., para 48.

There are, however, a range of particular contexts in which more general restrictions may be legitimate and a number of these will be explored in the sections which follow.

(B) The Wearing of Religious Symbols by those in General State Employment

The first of these contexts concerns those in state employment. The range of situations in which issues concerning the wearing of religious symbols might arise is of course enormous and maps onto the nature of the functions which each state considers appropriate to perform, as opposed to those it considers appropriate to regulate. Some of these relate to specific contexts and give rise to particular issues which will be considered separately. The concern at this point is for those in the general service of the state, rather than teachers, doctors, etc. It is axiomatic that an individual cannot be dismissed from their employment because of their beliefs.

As usual, the starting point must be that individual employees are free to manifest their religion or belief through the wearing of religious clothing or artefacts but this may be subject to restrictions which are in accordance with Article 9(2). At one level, it is arguably difficult to see why it is necessary for the state to restrict the wearing of religious symbols or clothing of its employees at all: if they are not fulfilling their contractual obligations in a satisfactory manner, or abusing their position as servants of the state in order to project their beliefs, then relevant action may be taken against them. If they are fulfilling their duties as state servants in an appropriate fashion, then it might be argued that unless there are more particular reasons for intervention, then restrictions cannot be justified. This approach was confirmed in the context of political beliefs in the case of *Vogt v. Germany*,[11] a case brought under Article 10, in which applicant had been dismissed from her employment as a teacher (a civil service position in Germany) as a result of her being an active member of the communist party, albeit it that this had no impact on her work as a teacher. In the case of *Ivanova v. Bulgaria*, the Court was faced with a similar situation, and in which it found that the applicant, a

11 *Vogt v. Germany*, judgment of 26 September 1995, Series A no, 323.

swimming pool attendant at a state run school, had lost her job because of her religious beliefs and this amounted to a violation of Article 9, 'there being no credible accusations that the applicant had proselytised at the School'.[12] In the *Vogt* case, the Court summed up the relevant approach in the following terms:

> 'Although it is legitimate for a state to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention. It therefore falls to the Court, having regard to the circumstances of each case, to determine whether a fair balance has been struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic state in ensuring that its civil service properly furthers the purposes enumerated in Article 10 para. 2. In carrying out this review, the Court will bear in mind that whenever civil servants' right to freedom of expression is in issue the 'duties and responsibilities' referred to in Article 10 para. 2 assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim.'[13]

The Court has made it clear that the same approach is to be taken in cases concerning Article 9, stressing that in such cases it may be necessary to accept an even greater margin of appreciation in determining how that balance is to be struck.[14]

Whilst this is true, it is equally the case that the state must be neutral and impartial and in many of its dealings it will, through its employees, come into contact with believers of many faith traditions and of none. It is, then, legitimate to seek to ensure that the public-fronting 'face of the state' does not project a particular religious ethos if this is considered necessary to protect the rights and freedoms of others by ensuring that there is general confidence that the state is acting in an objective and even-handed fashion in its functional capacity.

12 *Ivanova v. Bulgaria,* no. 52435/99, para 82, ECHR 2007.

13 *Vogt v. Germany*, op.cit., para 53.

14 See *Kurtulmuş v. Turkey* (dec.), no. 65500/01, ECHR 2006-II.

However, this does not mean that all state employees need be subjected to such restrictions. Rather, it means that the context needs to be considered in order to see whether it is necessary for the state to ensure that a neutral and impartial image is presented in the situation in question. Certainly, a general appeal to 'secularism' is unlikely to be sufficient to justify a general restriction upon state employees manifesting their beliefs in dress: for example, in *Ivanova v. Bulgaria*,[15] the Court rejected the Government's argument that the secular nature of the education system in Bulgaria justified the limitation on a person's freedom of religion *per se*. At the other end of the spectrum, in the case of *Kalaç* v. *Turkey,*[16] the Court made it clear that when a judicial function is at issue, the state is certainly entitled to take steps to ensure the absence of any perception of religiously motivated bias, and this could extend to the wearing of religious symbols by members of the judiciary and those employed in the court services. It is, then, appropriate to focus on the function of the state employee rather than on the fact of state employment when determining the legitimacy of any restriction.

If one takes this approach, there is an immediate distinction to be drawn between those who through their employment come into direct contact with the public and those who do not. Many state employees work in closed working environments, such as accountants, managers, administrators, general office staff, building service workers, etc and do not come into contact with the public in the natural course of their day to day work. It is more difficult to justify restrictions on the wearing of religious symbols in such contexts. The potential impact of such symbols is limited and primarily affects relations between the employees themselves who, understanding the nature of their mutual employment, might reasonably be expected to respect the choices of their colleagues provided this does not impact on their working relationships. Although one cannot dismiss the possibility that the mere fact of wearing a religious symbol may be inimical to the ethos of state employment, and so justify a restriction, this would need very careful and critical scrutiny.

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15 *Ivanova v. Bulgaria,* no. 52435/99, ECHR 2007.

16 *Kalaç v. Turkey*, op.cit.

For those whose state employment brings them into regular contact with the public, a greater range of restrictions may be justifiable. Since those of all faiths and of none may be required to have dealings with a wide range of state employees there may be a greater need to ensure that the neutrality and impartiality of the state in matters of religion or belief is manifested in the manner in which those servants present themselves to the general public. This would apply not only to those working in the public space, such as the police, but those who provide services in the community, such as health and social workers, and also those who fulfil public-facing functions in official buildings, such as receptionists, etc. Once again, neutrality and impartiality does not demand that this be the case, but it is within the margin of appreciation of the state to determine that this be so. For example, it might reasonably be decided that it would be inappropriate for a social worker to conduct a visit wearing religious symbols or clothing and so be the subject of a legitimate restriction since it could inhibit his or her ability to properly fulfil their professional functions. However, in some situations, it may well facilitate the performance of that function by encouraging an empathetic relationship, particularly where minorities and vulnerable groups are involved. Of course, even then there is a proportionality requirement and it may be that a religious symbol or item of clothing may be so obviously a personal matter that it could not reasonably be considered to be associated with the official persona of the state employee. Thus whilst one would not expect to see a religious symbol on a police car or an ambulance, it may be quite reasonable for a social worker to have a religious symbol or sticker on a privately owned vehicle even if it were being used in the course of their employment to visit members of the public.

The sheer number of variety of settings makes it impossible to consider them all. However, more will be said about two particular contexts since they underline some of the complexities involved.

(a) Hospitals and medical services.

The origins of many medical facilities lie in the voluntary sector and a large number of these were originally religious foundations, a fact that often remains reflected in their very names. It is axiomatic that state-provided medical

services must be available on a non-discriminatory basis and must not be offered under the guise of religion, though this does not mean that it is necessary to abandon or deny the heritage of its provenance. Nor does it mean that the state may not take advantage of the continued volunteer contributions of those offering their assistance and service as an action motivated by their religious beliefs. It also flows from what has already been said that medical workers must properly fulfil their professional roles and must not allow their personal beliefs to influence their clinical judgement or affect the carrying out of their professional responsibilities. For example, it was already seen that the Court rejected a claim made by Catholics working in a pharmacy in France that they ought not be required to dispense contraceptives.[17] It may similarly be expected that medical workers may be required to refrain from wearing religious symbols or clothing which might legitimately cause the sick and the vulnerable, and their relatives, to be apprehensive as to their professionalism and objectivity. This does not mean that a person of a given religious persuasion may be barred from some medical roles: what it does mean is that if those of a given religious view choose to be employed in such a position, then they might expect to be required to act in accordance with the relevant professional standards rather than with their personal belief systems, should the two differ in any respect.[18]

At the same time, it is recognised that as places of healing and caring, hospitals must cater for the spiritual as well as physical needs of those patients which desire it. To that end, the state may employ, or permit access to, clergy or other religious personnel and it goes without saying that, since their function is religious in nature then there ought to be no restriction upon their wearing or displaying religious clothing or symbols: it is what they are there to do. It is equally clear that the demands of state neutrality and impartiality does not extend to preventing patients from

17 *Pichon and Sajous v. France* (dec.), op.cit.

18 It may, of course, be possible for the respective positions to be reconciled through the use of sympathetic practical arrangements since there is no need to compel public servants to undertake tasks which run counter to their conscientiously held beliefs. Indeed, the demands of pluralism and tolerance may require that these options be explored. In the face of fundamental conflict, however, the position remains as stated.

displaying religious symbols which may be a comfort to them, though some restrictions may be necessary in order to ensure mutual respect and the rights and freedoms of others from time to time in particular situations where such symbols may impede the recovery or quietude of other patients.

It is clear that the complexities of the medical setting preclude the application of a rigid approach to the wearing of religious symbols by both employees and by patients and that specific issues can only be resolved in the light of the principles identified in the earlier sections of this Manual.

(b) Military settings

A similar range of issues applies in the military setting. The Court made it clear as long ago as the *Engel* case[19] that, whilst certainly able to benefit from the enjoyment of Convention rights, members of the armed forces might expect to be subject to a greater number of limitations than civilians. Thus in the case of *Kalaç v. Turkey*, the Court noted that 'in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account' and that 'In choosing to pursue a military career Mr Kalaç was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians. States may adopt for their armies disciplinary regulations forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service.'[20]

Once again, this legitimates placing restriction on the wearing of religious symbols but it does not *require* that there be such restrictions. Once again, this falls within the margin of appreciation of the state and its decision must be consonant with the concepts of neutrality and impartiality. Given the security function of the armed forces, the need for them to project the values of pluralism and tolerance are likely to merit particular weight and it is clear from the case-law

19 *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22.

20 *Kalaç v. Turkey*, op.cit., paras 27-28.

of the UN Human Rights Committee that the wearing of religious symbols or clothing is not necessarily inimical to the military function when doing so reflects the personal beliefs of the members of the armed forces, rather than a manifestation of the ethos of the military as an institution. Thus in its views in *Riley* v. *Canada*[21] the Human Rights Committee rejected the argument put forward by the applicant that the wearing of a turban by a member of the Royal Canadian Mounted Police (the 'Mounties') would both raise an apprehension of bias in the minds of civilians and also that, since the state should be secular, it was a violation of their Covenant right to freedom of religion or belief to have the security forces of the state present a religious face. By deciding that the wearing of religious symbols by security forces did not interfere with the rights of the applicant, the Committee in effect rejected the legitimacy of both these arguments.

As in the hospital settings, the state may also employ staff to minister to the spiritual needs of its security forces and such staff will, as a natural consequence of their functions, wear and display religious clothing and symbols in the course of their employment without in any sense raising questions regarding the neutrality or impartiality of the state. This would only be at issue if the state were to respond to the spiritual welfare of only one group of its employees and the principles of non-discrimination requires that the legitimate needs of all its servants be met in this fashion. The closed nature of the armed forces, particularly in operational settings, means that there may be no alternative source of religious services available to the serving soldier. This makes it all the more important that the state offer that provision in order to ensure that military personnel can enjoy their freedom of religion or belief, whilst recognising that where military service is voluntary, the scope for legitimate restrictions on the enjoyment of the right will be greater than in those instances in which it is not.

21 *Riley v. Canada*, op.cit.

(C) The Wearing of Religious Symbols in Public Educational Institutions

The context in which the wearing of religious symbols and clothing has received the most attention is that of public[22] educational institutions. In many states, education is not only directly provided by the state but is also provided in privately run educational institutions under a general regulatory scheme. Moreover, state education may sometimes be directly provided through educational facilities provided by private bodies, many of which are religious in origins or remain religious in both name and ethos. In the light of this diversity of approach within member states of the Council of Europe, and the diversity of provision available within each state itself, it is to be expected that the state will enjoy a considerable margin of appreciation in determining the balance to be struck between the right of the individual to manifest their religion or belief and the need to protect the rights and freedoms of others and to avoid such institutions becoming places of indoctrination rather than of education.

In the light of this diversity of approach within member states of the Council of Europe, the state will enjoy a considerable margin of appreciation in determining the balance to be struck between the right of the individual to manifest their religion or belief and the need to protect the rights and freedoms of others and to avoid schools becoming places of indoctrination rather than of education.

In conducting this balancing act, the state must be mindful of the need to be neutral and impartial in its approach, but at the same time it should be acting in a fashion with encourages pluralism and tolerance. The tension between these latter considerations is particularly problematic in the educational context. On the one hand, children and young adults need to be free to make up their own minds on matters of belief, yet in order to do so they need to be introduced to those beliefs and receive an education which, whilst not biassed in favour or against a particular form of religious belief or for or against religion in general, acknowledges the role of religion in the life of believers and its relationship with democratic pluralism. It is helpful to

22 In many Council of Europe countries it is impossible to make a clear distinction between public and private schools. A 'public school' refers to a school whose organisation, financing and management are primarily the responsibility of, or under the primary oversight of, a public body (state, regional, municipal, etc). A 'private' school is a school in which, irrespective of whether it may receive degrees of support (including financial support) from public sources, matters of organisation, financing and management are primarily the responsibility of the School itself, or of a non- public sponsoring body. (Definition adapted from the OSCE's *Toledo Guiding Principles on Teaching about Religions and Belief in Public Schools* (2007)).

consider the situation of teachers and pupils separately and different considerations are relevant.

(a) The teacher

The teacher, as an individual, enjoys the freedom of thought, conscience and religion and teachers may manifest their religion or belief in accordance with the general human rights framework. It is also axiomatic that teachers must approach their task in a balanced and professional fashion and must not exploit their teaching position to impose personal beliefs that are inconsistent with conscientious beliefs of their pupils. Being in a position of authority over children and young people may give their views a particular weight. Moreover, by virtue of their having chosen to work in an educational environment, a range of restrictions may legitimately be placed upon teachers when they are working in the classroom in order to ensure that an educational environment appropriate to the school in question is maintained and that the human rights of parents and children are respected.

The manner in which these factors come together is illustrated by the case of *Dahlab v. Switzerland*. The application was a primary School teacher and a convert to Islam who, after having worn a headscarf at work without this occasioning any comment for a number of years was asked to stop doing so in order to ensure that the religious beliefs of pupils and parents were respected, it being argued that this was undermined by a teacher wearing a 'powerful religious symbol ... Directly recognisable by others'. The applicant contested this, arguing, *inter alia*, that the mere fact of wearing a headscarf was not likely to influence the children's beliefs. In a passage which merits being reproduced at length, the Court said that

> 'it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect .... It therefore appears difficult to reconcile the wear-

> ing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.
>
> Accordingly, weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Court considers that, in the circumstances of the case and having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the state, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable.[23]

Is the balance to be struck in a different fashion when the teaching of older children or young adults is at issue? Much will depend on the contextual circumstances but, once again, the state has a wide margin of appreciation in determining the necessity of any restriction. For example, in *Kurtulmus* v. *Turkey*[24] the Court dismissed an application from an associate professor at Istanbul University who had been subjected to disciplinary procedures for wearing a headscarf at work, endorsing the approach adopted in the *Dahlab* case and in the case of *Leyla Şahin* v. *Turkey*,[25] considered below. Given the particular sensitivity of the educational context, teachers may legitimately be subjected to restrictions upon their wearing religious symbols and clothing by the state, provided this can be shown to be compatible with the underlying ethos of the educational system, is applied in a non-discriminatory fashion and is a proportionate response on the facts of the case. In determining whether such restrictions are legitimate, the principles of respect and tolerance must also be taken into account.

(b) Students

The importance of the principles of toleration and respect also explains the significance of the increasingly important issue of whether children can manifest their religious beliefs

23 *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V.

24 *Kurtulmuş v. Turkey* (dec.), no. 65500/01, ECHR 2006-II.

25 *Leyla Şahin v. Turkey* [GC], *ibid.*, para 109.

through the wearing of religiously inspired clothing or symbols while attending lessons, and whether restrictions on such clothing or symbols are compatible with the notion of 'respect'. Once again, the resolution of such questions must depend on the facts of each case, but it will always remain important to ensure that any restrictions placed upon the manifestation of religion or belief by pupils are strictly necessary and in the pursuit of legitimate aims of public safety, health, order, or the protection of the rights and freedoms of others, the latter informed by the importance of fostering a tolerant and inclusive educational environment.

A further complexity is that the younger the child, the greater may be the impact of preventing that child from wearing a symbol or item of clothing which they habitually wear as they may be less able to understand the effect which it might have on others and the reasonableness of a restriction in the interests of fostering mutual tolerance, such understandings being more accessible to the older child or young adult.

In the *Dahlab* case, for example, the Government made it clear that the prohibition on religious symbols and clothing did not extend to pupils, as they did not think this was necessary in order to maintain the secular nature of its schools and to preserve the separation of church and state. In the case of *Leyla Şahin v. Turkey*, however, the Court accepted that such restrictions might legitimately be placed on students at University if this were motivated by the desire to uphold the secular nature of the institution (the assessment of whether this was necessary largely being a matter that fell within the margin of appreciation of the state). Endorsing the position of the state, in its judgment the Court said 'it is the principle of secularism ... which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of other and, in particular equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution considered and so consider it contrary to such values to allow religious attire'.[26] The Court subsequently adopted the same approach in upholding the legitimacy of a ban on headscarves imposed on

26 *Leyla Şahin v. Turkey* [GC], op.cit., para 116.

younger teenagers at a lycée in Istanbul in the case of *Köse and others v. Turkey*.[27]

Restrictions, then, may be imposed upon pupils as well as teachers. There is, however, an additional factor to be taken into account. Attendance at schools is usually compulsory. Moreover, it may not be possible to avoid a prohibition on the wearing of religious symbols and clothing in one institution by the expedient of moving to a different institution where different rules might apply. For example, in the domestic case of *R (ex parte Begum) v. Denbigh High School*[28] a number of UK judges in the House of Lords took the view that there had been no interference with the applicants' freedom of religion which was attributable to the state since although the School's uniform policy did not permit her to wear a jilbab to School, there were other Schools that she might have transferred to which would have allowed her to do so. They were, however, clear that had there been no alternative, matters would have been different (although on the facts of the case the Court was still of the view that had there been an interference attributable to the state then it would have been justified). Where the state compels attendance at secular institutions and prohibits in absolute terms the wearing of religious symbols and clothing, there is an enhanced danger that this will itself foster intolerance of religious diversity and inhibit the advancement of pluralism, and so particular care must be taken when exercising European scrutiny of the domestic margin of appreciation to ensure that the core convention principles of democracy, respect, pluralism and tolerance are being properly reflected in the regulatory scheme.

(c) Administrators and others

Schools are places of work for many besides teachers and pupils, such as administrators, secretaries, cooks, caretakers, cleaners, etc and their position was touched upon in the case of *Ivanova v. Bulgaria*. The applicant was a swimming pool manager at a school and also a member of the 'Word of Life', a Christian Evangelical group. Following a change in leadership at the school the job description for

27 *Köse and Others v. Turkey* (dec.), op.cit.

28 *R (ex parte Begum) v. Denbigh High School,* [2006] UKHL 15; [2007] 1 AC 100.

her post was rewritten and she was subsequently dismissed from her post. The Court ultimately decided that she had been dismissed on account of her unwillingness to abandon her religious beliefs and that this amounted to coercion and thus violated Article 9. In the course of argument the respondent state had suggested that 'the secular nature of the system of education .... applied both to the teaching activities of the School and to its premises'.[29] Although the case did not address the issue of non teaching staff wearing religious clothing or symbols, the Court did make reference to the previous decisions is cases such as *Knudsen v. Norway*,[30] *Konttinen v. Finland*[31] and *Vogt v. Germany*[32] saying that these cases showed that 'In the context of complaints under article 9 ... for dismissal from service ... pressuring an individual to change his religious beliefs or preventing him from manifesting them would be an interference'.[33] This suggests that the principles to be applied in such cases will be those outlined in the previous section concerning state employees and that whilst the educational context is relevant to that determination, it does not preclude the wearing of such clothing and such symbols *per se*. Nor should it be assumed that limitations which might be appropriately placed upon teachers with prolonged direct contact with students would necessarily be appropriate for those whose work is ancillary to the teaching role.

(D) The Private Sector

The previous sections have focussed on the public sector but the issues addressed above will also arise in the context of the private sector. Where the private sector is being used by the state to fulfil what would otherwise be state functions – such as the use of private security guards to transport prisoners – then the same considerations as are relevant to the public sector will apply in equal measure and no further examination is necessary. There are, however, two particular areas which do require further considera-

29 *Ivanova v. Bulgaria,* op.cit, para 74.

30 *Knudsen v. Norway,* op.cit.

31 *Konttinen v. Finland*, op.cit.

32 *Vogt v. Germany*, op.cit.

33 *Ivanova v. Bulgaria,* op.cit., para 80.

tion, these being general employment in the private sector and private education.

(a) General private sector employment

Those working in the private sector remain free to enjoy their freedom of religion or belief and the state is obliged to ensure that restrictions that might be placed upon them by their employers are compatible with convention standards.

Although the state is not directly responsible for the actions of private employers, those working in the private sector remain free to enjoy their freedom of religion or belief and the state is obliged to ensure that restrictions that might be placed upon them by their employers are compatible with convention standards. Private sector employment is of course subject to the general provisions of employment law which, as a form of law which is of general application, may be the source of legitimate restrictions upon the wearing of religious symbols in the workplace. The scope of such laws has been considered above and does not need to be repeated here. Likewise, it is beyond the scope of this Manual to consider the compatibility of employment law in general with Convention standards. Nevertheless, private employment is very different to state employment. Whilst private employers must conform to laws of general application, they are not bound to project the values of neutrality, respect and tolerance in the same manner as the state. Provided that they are operating within the parameters set by the more general legal framework, they may encourage and promote the wearing of religious symbols or clothing if they consider this appropriate (as might many religious or religiously inspired organisations). Likewise, private employers might choose to restrict their employees from doing so if they wish- again, provided that this is within the limits provided by law for the proper protection of the rights of employees, including human rights protections and anti-discrimination legislation. In other words, private employers enjoy a greater degree of latitude when formulating their policies on religious symbols and clothing in the workplace than is the case within the public sector, provided that the result remains compatible with domestic law. The reason for this is twofold: first, the employee's freedom of religion and belief is considered to be adequately protected by their right to terminate their contract of employment, as illustrated by those cases concerning time off work for attendance at services or wor-

ship or religious festivals.[34] Second, there is not the same need to maintain 'neutrality' in the private workplace and in the delivery of private services as there is in the public sector and in the delivery of public services.[35]

(b) Private education

It has already been pointed out that many educational institutions are religious in origin. The close intermingling of education and faith-based institutions in a considerable number of Council of Europe states has resulted in a situation in which many public educational establishments are run by faith traditions. Although faith-inspired, they nevertheless remain part of the public educational system and so are subject to the same considerations as have been considered above. In many countries, however, there are alternatives to the public educational system in the form of private schools, many of which are also faith based, either in origin or in their contemporary ethos and orientation. Since Article 2 of the first protocol to the ECHR expressly enjoins states, to 'respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions' in the 'exercise of any functions which it assumes in relation to education and to teaching', it might be argued that in the private educational sector there is even greater freedom for schools to pursue their own approaches. Moreover, and by analogy with private sector employment, since no-one is compelled to attend private schools this further re-enforces their ability to adopt approaches to religious symbols and religious clothing which might differ from those in the public sector: if parents choose to send their children to a privately run school which has a clear policy with regard to religiously

34 See, for example, *Stedman v. the United Kingdom*, op.cit., and *Kosteski v. the former Yugoslav Republic of Macedonia*, op.cit., para 39.

35 It is important to note that different considerations may apply in situations where private employers might seek to insist upon employees being adherents of a particular faith, or insist on their wearing religious clothing in order to be offered a contract of employment in the first place. The comments made here relate only to the situation in which an employee seeks to exercise a personal wish to wear a religious symbol or religiously inspired clothing, and is prevented from doing so by a corporate policy.

inspired attire, then that is a matter for them – indeed, it might be the very reason why they choose to do so.

Both of these arguments are only valid to a limited degree. The Court has made it clear that the state remains responsible for the conduct of private as well as public schools. For example, in a case concerning the use of corporal punishment in a private school in the United Kingdom, the government argued that 'whilst ... the state exercised a limited degree of control and supervision over independent schools ... the Government denied that they were directly responsible for every aspect of the way in which they were run; in particular, they assumed no function in matters of discipline'.[36] The Court rejected this, noting first that 'the state has an obligation to secure children their right to education under Article 2 of Protocol No. 1' and that ' ... Functions relating to the internal administration of a school, such as discipline, cannot be said to be merely ancillary to the educational process'.[37] Secondly, it observed that 'in the United Kingdom, independent schools co-exist with a system of public education' and so 'the fundamental right of everyone to education is a right guaranteed equally to pupils in state and independent schools, no distinction being made between the two'.[38] It also noted that 'the state cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals'.[39] In the light of this, the Court concluded that 'in the present case, which relates to the particular domain of school discipline, the treatment complained of, although it was the act of a headmaster of an independent school, is none the less such as may engage the responsibility of the United Kingdom under the Convention'.[40]

As school dress codes are seen as intimately linked to more general questions of school order and governance it seems clear that the Court would be prepared to consider the responsibility of the state engaged were such policies inimical

36 *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no, 247-C, para 25.

37 *Ibid*, para 27.

38 *Ibid*, quoting *Kjeldsen, Busk Madsen and Pederson* v. *Denmark*, op.cit., para 50.

39 *Ibid*, quoting *Van der Mussele v. Belgium*, judgment of 23 November 1983, Series A no. 70, paras 28-30.

40 *Ibid*, para 28.

to the overarching Convention values which the state education system must promote. Thus, just as within the state system itself, there will be a margin or appreciation which may be exercised in such a way as to allow for a proper balancing of the ethos of the institution with the need to ensure that children are educated in an environment which properly respects the freedom of religion and belief of all. In conclusion, it can be said that whilst the nuance of application may differ, there is no fundamental difference in the approaches to be applied between the public and the private educational sectors, since the Court has made it clear that there are no 'bright lines' to be drawn between them as regards the application of the Convention.

(E) The Wearing of Religious Symbols and the Criminal Justice System

A final area which merits particular consideration concerns the criminal justice system. Some of the very earliest cases involving the freedom of religion and belief considered under the Convention system concerned the rights of prisoners and there is increasing interest in how religious authorities respond to the perceived requirements of religious believers at all phases of the criminal justice process. We are not concerned here with the wearing of religious symbols or religiously inspired clothing by members of the law enforcement agencies or the presence of religious symbols in police stations, courts and prisons. Since such personnel are state employees (or are to be considered as state employees) exercising a quintessential state function, the principles already considered above will apply. Rather, we are concerned with the situation of those who are brought into contact with the criminal justice system, as suspects, witnesses, the accused and the convicted.

The starting point must be that such individuals enjoy the right to manifest their religion or belief and this includes the wearing of religious symbols or clothing in exactly the same fashion as anyone else. We have, however, already seen that this may be restricted in the interests of national security and it is reasonable to permit the security forces to insist on the removal of religiously inspired symbols and clothing where this is necessary on security grounds.[41]

41 See, for example, *Phull v. France* (dec.), op.cit.

This may reasonably be extended to situations in which it is necessary in order to secure the proper administration of justice, both in court and in the execution of custodial sentences. In practice, this is likely to mean that there is something of a 'sliding scale'. For example, it may be necessary to allow the security forces to remove objects or items of clothing in order to take a person into custody if they are resisting arrest, or if it hampers identification. This, however, is likely to be a temporary expedient and should not be prolonged for longer than is strictly necessary.

Whilst a person is in pre-trial detention, the European Prison Rules expressly provide that 'Untried Prisoners shall be allowed to wear their own clothing if it is suitable for wearing in prison'[42] and when a case comes to Court, there is no general need to prevent the accused and witnesses from displaying religious symbols or wearing religiously-inspired clothing unless this threatens the integrity of the judicial process. For example, it may be that by displaying a particular religious symbol or by wearing religious clothing an individual might be attempting to influence the court in their favour, making it more difficult to secure a conviction or to discount their evidence. Under such circumstances, a restriction may be justifiable. Likewise, where religious clothing may make identification or communication difficult, or prevent a person's response to questioning from being observed (and thereby hampering the fair conduct of a case), restrictions may again be justifiable.

Once a person has been convicted of an offence and sentenced to a term of imprisonment, limitations upon their ability to wear religious symbols or clothing become progressively more difficult to justify, though the nature of prison life may inevitably require a greater degree of limitation than would otherwise be acceptable. The UN Human Rights Committee has said that 'persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint.'[43] The difficultly lies in assessing that degree of compatibility. In assessing the legitimacy of such restrictions a strict approach to their necessity is needed and

42 Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Rule 97(1).

43 UN HRC General Comment No. 22, para 8.

regard should be had to the European Prison Rules which provide in regard of sentenced prisoners that 'Prisoners' freedom of thought, conscience and religion shall be respected' and 'The prison regime shall be organised so far as is practicable to allow prisoners to practice their religion and follow their beliefs'.[44]

It is not permitted under any circumstances to use the removal of, or restrictions upon, the wearing of religious symbols or clothing as a means of coercing or punishing a suspect, witness or prisoner.

In its early jurisprudence, the European Commission on Human Rights took a fairly robust approach, seemingly willing to justify restrictions on prisoners having access to religious artefacts or following religiously-inspired modes of personal attire on relatively insubstantial grounds. For example, in one very early case the Commission accepted that 'public order' considerations justified the prison authorities' refusal to allow a practising Buddhist to grow a beard on the grounds that it would hinder identification.[45] In a subsequent case, the Commission concluded that there had been no violation of Article 9 where a Sikh had been required to wear prison clothing which, he claimed, violated his religious beliefs (albeit on the grounds that this claim was not substantiated).[46] It is likely that a somewhat stricter approach would be taken by the Court today, as it has been by the UN Human Rights Committee which considered the forced removal of the beard of a Muslim prisoner to violate his freedom of religion or belief.[47] One thing is, however, absolutely clear. It is not permitted under any circumstances to use the removal of, or restrictions upon, the wearing of religious symbols or clothing as a means of coercing or punishing a suspect, witness or prisoner. Indeed, the removal of religious symbols or clothing might amount to a form of 'inhuman or degrading' treatment or punishment and render the state in breach of Article 3 of the ECHR.

44 Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Rule 29(1) and (2).

45 *X v. Austria*, no. 1753/63, Commission decision, 1965, Yearbook of the European Commission on Human Rights 8, p. 184.

46 *X v. the United Kingdom*, no. 8231/78, Commission decision of 6 March 1982, Decisions and Reports 28, p. 5 at p. 27. The European Prison Rules do not require or preclude that sentenced prisoners be made to wear prison uniform, but they do require that any such prison clothing 'shall not be degrading or humiliating', Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Rule 20(2).

47 *Boodoo v. Trinidad and Tobago*, Communication no. 721/1997 (views of 2 August 2002, UN doc. A/57/40, vol 2 (2002), p. 76.

annexes

annex I

Relevant Applicable international Human Rights Instruments

Relevant Rights / Instruments	*Freedom of religion and to manifest one's religion*	*Prohibition of discrimination based on religion*	*Freedom of expression*	*Right to education*	*Respect for private life*
Universal Declaration of Human Rights	– Article 18 – Article 29 (conditions for limitations to be acceptable)	– Article 2 – Article 7	Article 19	Article 26	Article 12
International Covenant on Civil and Political Rights[1]	– Article 18 – Article 27	Article 26	Article 19		Article 17
International Covenant on Economic, Social and Cultural Rights[2]				Article 13	
European Convention on Human Rights[3]	Article 9	– Article 14 – Article 1, Protocol No. 12	Article 10	Article 2, Protocol No. 1	Article 8
European Social Charter (revised)[4]		Article E			
Framework Convention for the Protection of National Minorities[5]	– Article 5 – Article 7 – Article 8	Article 4	Article 9	Article 12	
UN Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief	– Article 1 – Article 6				

1 The International Covenant on Civil and Political Rights is legally binding on all member states.

2 The International Covenant on Economic, Social and Cultural Rights is legally binding on all member states.

3 Protocol No. 1 to the ECHR has been ratified by all member states except Andorra, Monaco and Switzerland. Protocol No. 12 to the ECHR has been ratified by the following member states: Albania, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxembourg, Netherlands, Romania, San Marino, Serbia, "the former Yugoslav Republic of Macedonia", Ukraine.

4 The European Social Charter (revised) has been ratified by the following member states: Albania, Andorra, Armenia, Azerbaijan, Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Georgia, Ireland, Italy, Lithuania, Malta, Moldova, Netherlands, Norway, Portugal, Romania, Slovenia, Sweden.

5 The Framework Convention on the Protection of National Minorities has been ratified by all member states except Andorra, Belgium, France, Greece, Iceland, Luxembourg, Monaco and Turkey.

annex II

Thematic index

annex III

List of judgments and decisions cited (by alphabetical order)

European Court of Human Rights

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Canea Catholic Church v. Greece, 16 December 1997

Case of 97 Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia, 3 May 2007

Case of Freedom and Democracy Party (OZDEP) and others v. Turkey [GC], 8 December 1999

Casimiro v. Luxembourg (dec.), 27 April 1999

Cha'are Shalom Ve Tsedek v. France [GC], 27 June 2000

Church of Scientology Moscow v. Russia, 5 April 2007

Costello-Roberts v. the United Kingdom, 25 March 1993

Dahlab v. Switzerland (dec.), 15 February 2001

Dudgeon v. the United Kingdom, 22 October 1981

Engel and Others v. the Netherlands, 8 June 1976

Folgerø and Others v. Norway [GC], 29 June 2007

Handyside v. the United Kingdom, 7 December 1976

Hasan and Chaush v. Bulgaria [GC], 26 October 2000

Hasan and Eylem Zengin v. Turkey, 9 October 2007

Ilascu and others v. Moldova and Russia [GC], 8 July 2004

Ivanova v. Bulgaria, 12 April 2007

Kalaç v. Turkey , 1 July 1997

Kjeldsen, Busk Madsen and Pederson v. Denmark, 7 December 1976

Kokkinakis v. Greece, 25 May 1993

Köse and Others v. Turkey (dec.), 24 January 2006

Kosteski v. the former Yugoslav Republic of Macedonia, 13 April 2006

Kurtulmus v. Turkey (dec.), 24 January 2006

Kuznetsov v. Russia, 11 January 2007

European Commission of Human Rights

Other bodies and courts

Boodoo v. Trinidad and Tobago, 2002 (Human Rights Committee of the United Nations)

K. Singh Bhinder v. Canada, 1989 (Human Rights Committee of the Office of the United Nations)

Playfoot v. *Governing Body of Millais School,* 2007 (England and Wales High Court)

R (ex parte Begum) v. Denbigh High School, 2006 (United Kingdom House of Lords)

Riley v. Canada, 2002 (Human Rights Committee of the United Nations)

annex IV

Glossary

Applicant

Any person, non-governmental organisation or group of persons that brings a case before the European Court of Human Rights. The right to do so is guaranteed by Article 34 of the European Convention on Human Rights. It is subject to the conditions set out in Article 35 of the Convention.

European Convention on Human Rights

The full title is the "Convention for the Protection of Human Rights and Fundamental Freedoms", usually referred to as "the ECHR" or "the Convention". It was adopted in 1950 and entered into force in 1953. The full text of the Convention and its additional Protocols is available in 30 languages at http://www.echr.coe.int/. The chart of signatures and ratifications as well as the text of declarations and reservations made by State Parties can be consulted at http://conventions.coe.int.

European Court of Human Rights

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights. Since 1 November 1998 it has sat as a full-time Court composed of an equal number of judges to that of the States party to the Convention. The Court examines the admissibility and merits of applications submitted to it. It sits in Chambers of 7 judges or, in exceptional cases, as a Grand Chamber of 17 judges. The Committee of Ministers of the Council of Europe supervises the execution of the Court's judgments.

Fair balance

The ECHR provides for the limitation of certain rights for the sake of the greater public interest. The European Court of Human Rights has held that when rights are restricted there must be a fair balance between the public interest at stake and the human right in question. The Court is the final arbiter on when this balance has been found. It does however give States a 'margin of appreciation' in assess-

ing whether the public interest is strong enough to justify restrictions on certain human rights. See also margin of appreciation; public interest.

Interference

Any instance where the enjoyment of a right set out in the Convention is limited. Not every interference will mean that there has been a violation of the right in question. Many interferences may be justified by the restrictions provided for in the Convention itself. Generally for an interference to be justified it must be in accordance with the law, pursue a legitimate aim and be proportionate to that aim. See also legitimate aim; prescribed by law; proportionality.

Legitimate aim

This expression is used by the Court in connection with a number of Articles of the Convention: Article 8 (right to respect for private and family life and for home), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression), Article 11 (freedom of assembly and association). While the Convention seeks to safeguard the freedom to manifest one's religion or beliefs, The Court does recognise that, in certain specific circumstances, restrictions may be acceptable. However, the measures imposing such restrictions should meet a number of requirements for the Court not to find a violation of the right in question. One of them is that they should be necessary in a democratic society, which means that they should answer a pressing social need and pursue a legitimate aim. Article 9 lists the broad categories of aims which can be considered as legitimate to justify an interference with the right to freedom of thought, conscience and religion: public safety, public order, health or morals, the protection of the rights and freedoms of others.

Margin of appreciation

The protection offered by the Convention with regard to certain rights is not absolute and provides for the possibility for States to restrict these rights to a certain extent. This is true in the case of the rights covered by Article 9 of the Convention. However, the measures which are taken by the authorities to restrict these rights should meet certain requirements: they should be prescribed by law, necessary in a democratic society and thus pursue a legitimate aim (such as the protection of health or the economic well-being of the country), they should also be proportionate to the aim pursued. Once it establishes that these measures are prescribed by law and are necessary in a democratic society in pursuing a legitimate aim, it has to be examined whether

the measures in question are proportionate to this legitimate aim. For this purpose, the Court weighs the interests of the individual against those of the community to decide which prevail in particular circumstances and to what extent the rights encompassed in the Convention could be curtailed in the interests of the community. It is in the context of this examination that the idea that the authorities enjoy a certain "margin of appreciation" has been developed. Indeed, the Court has established that authorities are given a certain scope for discretion, i.e. the "margin of appreciation", in determining the most appropriate measures to take in order to reach the legitimate aim sought. The reason why the Court decided that such leeway should be left to the authorities is that national authorities are often better placed to assess matters falling under the Articles concerned. The scope of this margin of appreciation varies, which means that authorities often have a certain scope for discretion in their actions. However, in no way should this margin of appreciation be seen as absolute and preventing the Court from any critical assessment of the proportionality of the measures concerned.

Positive obligations

The Court's case-law in respect of a number of provisions of the Convention states that public authorities should not only refrain from interfering arbitrarily with individuals' rights as protected expressly by the Articles of the Convention, they should also take active steps to safeguard them. These additional obligations are usually referred to as positive obligations as the authorities are required to act so as to prevent violations of the rights encompassed in the Convention or punish those responsible.

Prescribed by law (in accordance with the law)

The term used in Article 8 paragraph 2 of the Convention is "in accordance with the law" but this is taken to mean the same as the term "prescribed by law" which is found in paragraphs 2 of Articles 9, 10 and 11. The purpose of the term is to ensure that when rights are restricted by public authorities, this restriction is not arbitrary and has some basis in domestic law. The Court has stated for a restriction to meet the requirement it should be adequately accessible and its effects should be foreseeable.

Proportionate measures

By proportionate measures the Court means measures taken by authorities that strike a fair balance between the interests of the community and the interests of an individual.

Religious symbols

Refer to Section VI (b)-(d) of the manual for this notion as well as the wearing of religion symbols in public areas.

Subsidiarity (principle of)

The principle of subsidiarity is one of the founding principles of the human rights protection mechanism of the Convention. According to this principle it should first and foremost be for national authorities to ensure that the rights enshrined in the Convention are not violated and to offer redress if ever they are. The Convention mechanism and the European Court of Human Rights should only be a last resort in cases where the protection or redress needed has not been offered at national level.

Manuel
sur le discours de haine

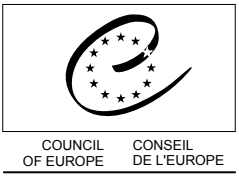
Council of Europe Manuals

HUMAN RIGHTS IN CULTURALLY DIVERSE SOCIETIES

Manuel sur le discours de haine

par

Anne Weber



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#1 Introduction

Dans les sociétés multiculturelles, caractérisées par une diversité de cultures, de religions et de modes de vie, il apparaît parfois nécessaire de concilier le droit à la liberté d'expression avec d'autres droits, tels le droit à la liberté de pensée, de conscience et de religion ou le droit de ne pas subir de discrimination. Cette conciliation peut être source de difficultés, dans la mesure où ces droits sont autant d'éléments qui fondent une « société démocratique ».

Ainsi la Cour européenne des droits de l'homme (ci-après la Cour) a-t-elle affirmé que la liberté d'expression, garantie par l'article 10 de la Convention européenne des droits de l'homme (ci-après la Convention ou CEDH) « constitue l'un des fondements essentiels d'une société démocratique, l'une des conditions primordiales de son progrès et de l'épanouissement de chacun » [1].

Si la liberté d'expression est en conséquence particulièrement étendue, il peut dans certains cas néanmoins s'avérer nécessaire d'imposer des restrictions à son exercice. Contrairement au droit à la liberté de pensée (liberté interne ou *forum internum*), le droit à la liberté d'expression (liberté externe ou *forum externum*) n'est en effet pas absolu : l'exercice de ce droit entraîne des devoirs et des responsabilités et est soumis à certaines limites, prévues à l'article 10 paragraphe 2 CEDH, qui peuvent notamment tenir à la protection des droits d'autrui.

La Cour européenne a toujours affirmé qu'elle « se rend pleinement compte qu'il importe au plus haut point de lutter contre la discrimination raciale sous toutes ses formes et

1 *Handyside c. Royaume-Uni,* nº 5493/72 arrêt du 7 décembre 1976, série A nº 24, § 49.

manifestations »[2]. Elle a ainsi souligné dans plusieurs arrêts « que la tolérance et le respect de l'égale dignité de tous les êtres humains constituent le fondement d'une société démocratique et pluraliste. Il en résulte qu'en principe on peut juger nécessaire, dans les sociétés démocratiques, de sanctionner, voire de prévenir, toutes les formes d'expression qui propagent, incitent à, promeuvent ou justifient la haine fondée sur l'intolérance (y compris l'intolérance religieuse), si l'on veille à ce que les 'formalités', 'conditions', 'restrictions' ou 'sanctions' imposées soient proportionnées au but légitime poursuivi »[3].

Le défi auquel les autorités doivent faire face est donc de trouver un juste équilibre entre les droits et intérêts concurrents en jeu.

Droits concurrents et intérêts en jeu

Plusieurs droits, également garantis par la Convention, peuvent à cet égard entrer en concurrence. Le droit à la liberté d'expression peut ainsi trouver ses limites dans le droit à la liberté de pensée, de conscience et de religion. En présence d'attaques contre des croyances religieuses, la Cour européenne des droits de l'homme a mis en évidence que la question qui se pose implique « une mise en balance des intérêts contradictoires tenant à l'exercice des deux libertés fondamentales : d'une part, le droit, pour le requérant, de communiquer au public ses idées sur la doctrine religieuse, et, d'autre part, le droit d'autres personnes au respect de leur liberté de pensée, de conscience et de religion »[4]. Dans certaines circonstances, la liberté d'expression peut également constituer une menace au droit au respect de la vie privée. Enfin, il existe un risque de conflit entre la liberté

2 *Jersild c. Danemark* [GC], nº 15890/89 arrêt du 23 septembre 1994, série A nº 298, § 30. Afin de souligner cette affirmation, la Cour va, dans sa décision *Seurot c. France* (déc.), nº 57383/00, 18 mai 2004, renvoyer au statut de l'ECRI, plus précisément « au texte de la résolution Res(2002)8 du Comité des Ministres, relative au statut de la Commission européenne contre le racisme et l'intolérance (ECRI) et qui vise à renforcer l'action de celle-ci, compte tenu de la nécessité de mener à l'échelle européenne une action ferme et soutenue pour lutter contre les phénomènes de racisme, de xénophobie, d'antisémitisme et d'intolérance ».

3 *Gündüz c. Turquie,* nº 35071/97, § 40 , CEDH 2003-XI, et *Erbakan c. Turquie*, nº 59405/00, § 56, 6 juillet 2006.

4 *Aydın Tatlav c. Turquie*, nº 50692/99, § 26, 2 mai 2006.

d'expression et l'interdiction de toute forme de discrimination, lorsque l'exercice de cette liberté sert à l'incitation à la haine et revêt les caractéristiques d'un « discours de haine ».

Notion de discours de haine

En dépit de son utilisation fréquente, il n'existe aucune définition universellement admise de l'expression « discours de haine ». Si la plupart des Etats ont adopté une législation pour interdire les expressions relevant de ce qu'on appelle le « discours de haine », les définitions retenues diffèrent légèrement pour déterminer ce qui est interdit. Seule la Recommandation 97(20) du Comité des Ministres du Conseil de l'Europe sur le discours de haine le définit comme suit : « le terme 'discours de haine' doit être compris comme couvrant toutes formes d'expression qui propagent, incitent à, promeuvent ou justifient la haine raciale, la xénophobie, l'antisémitisme ou d'autres formes de haine fondées sur l'intolérance, y compris l'intolérance qui s'exprime sous forme de nationalisme agressif et d'ethnocentrisme, de discrimination et d'hostilité à l'encontre des minorités, des immigrés et des personnes issues de l'immigration ». En ce sens, le discours de haine s'entend de propos nécessairement dirigés contre une personne ou un groupe particulier de personnes.

Cette expression se retrouve dans la jurisprudence européenne, bien que la Cour n'en ait jamais donné de définition précise. La Cour se réfère simplement dans certains arrêts à « toutes les formes d'expression qui propagent, incitent à, promeuvent ou justifient la haine fondée sur l'intolérance (y compris l'intolérance religieuse) »[5]. Il s'agit pourtant d'une notion « autonome », dans la mesure où la Cour ne s'estime pas liée par les qualifications du juge interne : il lui arrive par conséquent de réfuter cette qualification, retenue au niveau national, par le juge interne[6], ou au contraire de qualifier de la sorte certains propos, alors même que cette qualification avait été écartée par le juge interne[7].

Selon le Comité des Ministres le discours de haine couvre toutes formes d'expression qui propagent, incitent à, promeuvent ou justifient la haine raciale, la xénophobie, l'antisémitisme ou d'autres formes de haine fondées sur l'intolérance.

5 *Gündüz c. Turquie*, précité, § 40 ; *Erbakan c. Turquie*, précité, § 56.

6 A titre d'exemple, cf. arrêt *Gündüz c. Turquie* : contrairement aux juridictions internes qui avaient qualifié les déclarations du requérant de discours de haine, la Cour est d'avis que les propos tenus ne sauraient passer pour un discours de haine (précité, § 43).

7 En ce sens, arrêt *Sürek c. Turquie* [GC], nº 26682/95, CEDH 1999-IV : la Cour conclut en l'espèce à l'existence d'un discours de

Cette notion recouvre alors une diversité de situations :

– l'incitation à la haine raciale d'abord, c'est-à-dire à la haine dirigée contre des personnes ou des groupes de personnes en raison de leur appartenance à une race ;
– l'incitation à la haine fondée sur des motifs religieux ensuite, à laquelle on peut assimiler l'incitation à la haine sur la base d'une distinction entre croyants et non-croyants ;
– enfin, pour reprendre les termes de la Recommandation du Comité des ministres du Conseil de l'Europe sur le discours de haine, l'incitation à une autre forme de haine fondée sur l'intolérance, « qui s'exprime sous forme de nationalisme agressif et d'ethnocentrisme ».

Bien que la Cour n'ait pas encore été saisie de cette question, le discours homophobe[8] constitue également une catégorie de discours de haine.

La qualification de « discours de haine » entraîne certaines conséquences. Ainsi, selon la Cour, « il ne fait aucun doute que des expressions concrètes constituant un discours de haine, qui pourrait être insultant pour des individus ou groupes spécifiques, ne bénéficient pas de la protection de l'article 10 de la Convention »[9]. A l'inverse, selon de récents arrêts, le fait que certaines expressions ne constituent pas un « discours de haine » est un élément essentiel à prendre en considération lorsqu'il s'agit de décider si des atteintes au droit à la liberté d'expression se justifient dans une société démocratique[10]. Le concept de « discours de haine » permet ainsi de tracer la ligne de partage entre les expressions qui

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haine, alors que le requérant n'avait pas été condamné pour incitation à la haine mais pour propagande séparatiste, les tribunaux internes ayant estimé qu'il n'existait aucun motif de condamnation pour incitation à la haine.

8 V. sur ce point le rapport de l'Agence des droits fondamentaux de l'Union européenne intitulé « Homophobie et discrimination fondée sur l'orientation sexuelle dans les Etats membres de l'UE, Partie I – Analyse juridique » ("Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis") de juin 2008, et le Livre blanc sur le dialogue interculturel adopté lors de la 118e session du Comité des Ministres, 7 mai 2008, § 133.

9 *Gündüz c. Turquie*, précité, § 41.

10 *Ergin c. Turquie (n° 6)*, n° 47533/99, § 34, 4 mai 2006.

se trouvent exclues du champ de l'article 10 CEDH et ne sont pas couvertes par la liberté d'expression et celles qui, n'étant pas considérées comme constitutives d'un « discours de haine », sont dès lors protégées par le droit à la liberté d'expression.

Dans la mesure où le « discours de haine » est donc un élément que la Cour prend en compte, la question se pose de savoir à partir de quand des propos peuvent être qualifiés de « discours de haine ». Or, en l'absence de définition précise, comment identifier de tels propos ?

Critères d'identification

L'identification d'actes pouvant être qualifiés de « discours de haine » apparaît d'autant plus difficile que ce type de discours n'implique pas nécessairement l'expression d'une « haine » ou d'émotions. Le discours de haine peut se dissimuler sous des déclarations qui, à première vue, paraissent rationnelles ou normales. Il est néanmoins possible de dégager de l'ensemble des textes applicables en la matière et des principes découlant de la jurisprudence de la Cour européenne des droits de l'homme, ou d'autres organes, certains paramètres, permettant de distinguer les expressions qui, bien qu'insultantes, sont pleinement protégées par le droit à la liberté d'expression de celles qui ne bénéficient pas de cette protection.

#II Instruments applicables

(A) Traités

(a) Traités du Conseil de l'Europe

Si la Convention européenne des droits de l'homme, et en particulier son article 10 garantissant la liberté d'expression, reste la référence en la matière, d'autres traités ont été adoptés au sein du Conseil de l'Europe et méritent à ce titre d'être mentionnés. La Charte sociale européenne, dans le domaine des droits économiques et sociaux, et la Convention-cadre pour la protection des minorités nationales contiennent des dispositions visant à la protection contre toutes formes de discrimination. La Charte sociale européenne révisée prohibe ainsi toute discrimination fondée notamment sur la race, la couleur, la religion ou l'ascendance nationale, dans la jouissance des droits qu'elle reconnaît. Les Etats parties à la Convention-cadre, qui interdit toute discrimination fondée sur l'appartenance à une minorité nationale, s'engagent pour leur part à adopter des mesures adéquates en vue de promouvoir une égalité pleine et effective entre les personnes appartenant à une minorité nationale et celles appartenant à la majorité. Les Etats parties à la Convention-cadre s'engagent également à promouvoir l'esprit de tolérance et le dialogue interculturel, ainsi qu'à prendre des mesures efficaces pour favoriser le respect et la compréhension mutuels et la coopération entre toutes les personnes vivant sur leur territoire, quelle que soit leur identité ethnique, culturelle, linguistique ou religieuse.

Le Protocole additionnel à la Convention sur la cybercriminalité, relatif à l'incrimination d'actes de nature raciste et xénophobe commis par le biais de systèmes informatiques, adopté le 28 janvier 2003 et entré en vigueur le 1er mars 2006, revêt une importance particulière s'agissant de la diffusion de messages de haine par Internet. Les Etats

parties à ce Protocole s'engagent ainsi à adopter les mesures législatives et autres qui se révèlent nécessaires pour ériger en infractions pénales, dans leur droit interne, lorsqu'ils sont commis intentionnellement et sans droit, les comportements suivants :

– la diffusion ou les autres formes de mise à disposition du public, par le biais d'un système informatique, de matériel raciste et xénophobe ;
– la menace, par le biais d'un système informatique, de commettre une infraction pénale grave, telle que définie par le droit national, envers (i) une personne en raison de son appartenance à un groupe qui se caractérise par la race, la couleur, l'ascendance ou l'origine nationale ou ethnique, ou la religion dans la mesure où cette dernière sert de prétexte à l'un ou l'autre de ces éléments, ou (ii) un groupe de personnes qui se distingue par une de ces caractéristiques ;
– l'insulte en public, par le biais d'un système informatique, (i) d'une personne en raison de son appartenance à un groupe qui se caractérise par la race, la couleur, l'ascendance ou l'origine nationale ou ethnique, ou la religion dans la mesure où cette dernière sert de prétexte à l'un ou l'autre de ces éléments, ou (ii) d'un groupe de personnes qui se distingue par une de ces caractéristiques ;
– la diffusion ou les autres formes de mise à disposition du public, par le biais d'un système informatique, de matériel qui nie, minimise de manière grossière, approuve ou justifie des actes constitutifs de génocide ou de crimes contre l'humanité, tels que définis par le droit international et reconnus comme tels par une décision finale et définitive du Tribunal militaire international, établi par l'accord de Londres du 8 août 1945, ou par tout autre tribunal international établi par des instruments internationaux pertinents et dont la juridiction a été reconnue par cette Partie.

(b) Autres traités

En dehors du Conseil de l'Europe, il existe d'autres instruments internationaux ou régionaux relatifs aux droits de

l'homme qui se révèlent directement pertinents pour la question du discours de haine[1].

La liberté d'expression est énoncée à l'article 19 de la Déclaration universelle des droits de l'homme. Ce texte étant juridiquement non contraignant, le droit à la liberté d'expression a été repris et précisé dans l'article 19 du Pacte international relatif aux droits civils et politiques. L'article 19, paragraphe 3, du Pacte précise que ce droit peut être soumis à des restrictions « qui doivent toutefois être expressément fixées par la loi et qui sont nécessaires: (a) au respect des droits ou de la réputation d'autrui ; (b) à la sauvegarde de la sécurité nationale, de l'ordre public, de la santé ou de la moralité publiques ».

Parmi les instruments internationaux et régionaux en matière de droits de l'homme, seul le Pacte international relatif aux droits civils et politiques (article 20 paragraphe 2), sur le plan universel, et la Convention américaine relative aux droits de l'homme (article 13 paragraphe 5), sur le plan régional, interdisent explicitement l'incitation à la haine nationale, raciale ou religieuse[2]. Ainsi, l'article 20 du Pacte dispose que « tout appel à la haine nationale, raciale ou religieuse qui constitue une incitation à la discrimination, à l'hostilité ou à la violence est interdit par la loi », tandis que l'article 13 de la Convention américaine prévoit explicitement l'interdiction de « toute propagande en faveur de la guerre, tout appel à la haine nationale, raciale ou religieuse, qui constituent des incitations à la violence, ainsi que toute autre action illégale analogue contre toute personne ou tout groupe de personnes déterminées, fondée sur des considérations de race, de couleur, de religion, de langue ou d'origine nationale, ou sur tous autres motifs ». L'article 4 de la Convention internationale pour l'élimination de toutes les formes de discrimination raciale prohibe quant à lui la propagande en faveur de la discrimination raciale.

1 Le texte complet de ces dispositions se trouve à l'Annexe I.

2 Plus spécifiquement, l'article 3 de la Convention pour la prévention et la répression du crime de génocide énumère, parmi les actes punis en vertu de la Convention, l'incitation directe et publique à commettre le génocide.

(B) Recommandations et autres instruments

(a) Conseil de l'Europe

Afin d'harmoniser le droit des Etats membres, le Conseil de l'Europe a recours non seulement aux traités mais aussi aux recommandations, instruments juridiques non contraignants, par le biais desquelles le **Comité des Ministres** peut en effet définir des lignes directrices pour la politique ou la législation des Etats membres. Le Comité des Ministres peut ainsi préconiser que les Etats adoptent, dans leur système juridique, des normes qui s'inspirent de règles communes décrites dans une recommandation. Parmi les recommandations les plus pertinentes, l'on peut citer les suivantes :

- La **Recommandation (97)20 sur le « discours de haine »**, adoptée par le Comité des Ministres le 30 octobre 1997, fournit une définition du « discours de haine »[3], condamnant tout type d'expression qui incite à la haine raciale, à la xénophobie, à l'antisémitisme et à toutes les formes d'intolérance. Le texte fait notamment observer que ces formes d'expression peuvent avoir un impact plus important et plus destructeur lorsqu'elles sont diffusées par le canal des médias. Toutefois, il y est déclaré que la pratique et le droit national devraient clairement faire la distinction entre la responsabilité de l'auteur d'expressions de haine et celle des médias qui est de les diffuser en raison de leur mission publique de communication des informations et des idées touchant à des questions d'intérêt général (paragraphe 6 de l'annexe).
- La **Recommandation (97)21 sur les médias et la promotion d'une culture de la tolérance,** également adoptée par le Comité des Ministres le 30 octobre 1997, fait observer que les médias peuvent apporter une contribution positive à la lutte contre l'intolérance, en particulier lorsqu'ils encouragent dans la société une culture de la compréhension entre des groupes ethniques, culturels et religieux différents. Ce document vise différents acteurs sociaux chargés de la défense de la culture de la tolérance.
- Enfin, la **Déclaration du Comité des Ministres sur la liberté du discours politique dans les médias**,

3 Cf. *supra*.

adoptée le 12 février 2004, souligne que la liberté du discours politique n'inclut pas la liberté d'exprimer des opinions racistes ou des opinions qui incitent à la haine, à la xénophobie, à l'antisémitisme et à toutes formes d'intolérance. Elle indique de plus que la diffamation ou l'insulte par les médias ne devrait pas entraîner de peine de prison, sauf si cette peine est strictement nécessaire et proportionnée au regard de la gravité de la violation des droits ou de la réputation d'autrui, en particulier si d'autres droits fondamentaux ont été sérieusement violés à travers des déclarations diffamatoires ou insultantes dans les médias, comme le discours de haine.

L'Assemblée parlementaire, organe délibérant du Conseil de l'Europe composé de parlementaires en provenance des parlements nationaux des Etats membres, est à l'origine de plusieurs initiatives ayant trait à l'incitation à la haine, qui ont abouti à l'adoption de textes (recommandation ou résolution) destinés à fournir des orientations au Comité des Ministres, aux gouvernements nationaux ainsi qu'aux parlements nationaux.

- Dans la Résolution 1510(2006) sur **la liberté d'expression et le respect des croyances religieuses**, adoptée le 28 juin 2006, l'Assemblée parlementaire estime que la liberté d'expression, telle qu'elle est protégée en vertu de l'article 10 de la Convention européenne des droits de l'homme, ne doit pas être davantage restreinte pour répondre à la sensibilité croissante de certains groupes religieux. Dans le même temps, l'Assemblée rappelle fermement que les discours incitant à la haine, à l'encontre de quelque groupe religieux que ce soit, ne sont pas compatibles avec les droits et libertés fondamentaux garantis par la Convention européenne des droits de l'homme, tels qu'interprétés par la Cour européenne des droits de l'homme.
- Dans la Recommandation 1805(2007) sur le **blasphème, les insultes à caractère religieux et l'incitation à la haine contre des personnes au motif de leur religion**, adoptée le 29 juin 2007, l'Assemblée parlementaire réaffirme la nécessité d'ériger en infraction pénale les déclarations qui appellent à la haine, à la discrimination ou à la violence envers une personne ou un groupe de personnes en raison de leur apparte-

nance religieuse ou pour tout autre motif. L'Assemblée considère que les législations nationales doivent sanctionner les discours sur les questions de religion seulement si de tels discours troublent intentionnellement et gravement l'ordre public et appellent à la violence publique ou appellent à la haine, à la discrimination ou à la violence à l'encontre d'une personne ou d'un groupe de personnes.

A la demande de l'Assemblée parlementaire, la **Commission européenne pour la démocratie par le droit (Commission de Venise)**, qui est un organe consultatif du Conseil de l'Europe sur les questions constitutionnelles, a été amenée à rédiger **un rapport préliminaire sur les législations nationales d'Europe relatives au blasphème, aux insultes à caractère religieux et à l'incitation à la haine religieuse**[4]. Dans ce rapport, la Commission estime que, dans une société démocratique, les groupes religieux doivent, tout comme les autres groupes, tolérer les critiques dans les déclarations publiques et les débats relatifs à leurs activités, à leurs enseignements et à leurs croyances, à condition que ces critiques ne constituent pas des insultes délibérées et gratuites ou des discours de haine, ni une incitation à la perturbation de l'ordre publique ou à la violence et à la discrimination à l'encontre des personnes adhérant à une religion donnée. La Commission note à cet égard que pratiquement tous les Etats membres du Conseil de l'Europe ont adopté des lois de lutte contre l'incitation à la haine, ce qui englobe la haine au motif de la religion, et en conclut que ces Etats ont une législation potentiellement à même de protéger tant la liberté d'expression que le droit au respect des croyances religieuses.

Par ailleurs, le Conseil de l'Europe a établi la **Commission européenne contre le racisme et l'intolérance (ECRI)** dont la mission est de combattre le racisme et la discrimination raciale au niveau de la grande Europe et sous l'angle de la protection des droits de l'homme. L'ECRI élabore notamment des recommandations de politique générale adressées à tous les Etats membres fournissant des lignes directrices pour le développement de politiques et de stratégies nationales dans différents domaines. L'ECRI publie également des rapports pays-par-pays sur les situations

4 Rapport adopté par la Commission à sa 70e Session plénière (16-17 mars 2007)

nationales. Dans le cadre de sa Recommandation de politique générale n° 7, l'ECRI a défini le racisme comme « la croyance qu'un motif tel que la race, la couleur, la langue, la religion, la nationalité ou l'origine nationale ou ethnique justifie le mépris envers une personne ou un groupe de personnes ou l'idée de supériorité d'une personne ou d'un groupe de personnes » et s'est penché sur la question du discours raciste :

- Ainsi la **Recommandation de politique générale n° 7 sur la législation nationale pour lutter contre le racisme et la discrimination raciale** demande aux Etats membres du Conseil de l'Europe d'adopter des dispositions de droit pénal visant à lutter contre certaines expressions racistes. Il s'agit de l'incitation publique à la violence, à la haine ou à la discrimination, les injures ou la diffamation publiques et les menaces contre une personne ou un ensemble de personnes en raison de leur race, leur couleur, leur langue, leur religion, leur nationalité ou leur origine nationale ou ethnique. Doivent également être sanctionnées pénalement l'expression publique dans un but raciste d'une idéologie raciste ou la négation dans un but raciste des crimes de génocide, de crimes contre l'humanité ou de crimes de guerre. Enfin, la diffusion publique dans un but raciste de matériels contenant des expressions racistes du type de celles visées ci-dessus doit également pouvoir faire l'objet de sanctions pénales. L'ECRI insiste sur le fait que toutes ces dispositions de droit pénal doivent prévoir des sanctions efficaces, proportionnées et dissuasives ainsi que des peines accessoires ou alternatives.

En outre, à la lecture des rapports pays-par-pays de l'ECRI, il est évident qu'il existe un consensus en Europe sur la nécessité de combattre les expressions racistes, notamment par le biais de dispositions pénales. Toutefois ces dernières années, l'ECRI a de plus en plus été confrontée à des arguments invoquant la liberté d'expression pour tenter de justifier l'absence d'action, notamment au travers de mesures pénales, pour lutter contre les expressions racistes. L'ECRI considère que l'exercice de la liberté d'expression doit être limité pour lutter contre le racisme, notamment au nom des droits et de la réputation d'autrui et dans le but de garantir la dignité humaine des victimes du racisme. De telles limitations doivent respecter les conditions posées

par l'article 10 de la Convention européenne des droits de l'homme, tel qu'interprété par la Cour européenne des droits de l'homme. L'ECRI souligne toutefois l'importance de la liberté d'expression en tant que l'un des piliers d'une société démocratique et de la nécessité de protéger tous les droits de l'homme tout en assurant éventuellement l'équilibre entre des droits concurrents.

Constatant que le discours raciste, loin de disparaître, s'est plutôt intensifié ces dernières années, en particulier dans le discours politique, l'ECRI a adopté le 17 mars 2005 une **Déclaration sur l'utilisation d'éléments racistes, antisémites et xénophobes dans le discours politique** : l'ECRI condamne l'utilisation de tels éléments dans le discours politique et juge que de tels discours « sont éthiquement inacceptables ». Enfin, à l'occasion de l'Euro 2008, l'ECRI a publié une **déclaration sur la lutte contre le racisme dans le football** le 13 mai 2008.

(b) Nations Unies

Certaines dispositions des traités susmentionnés, en particulier le Pacte international relatif aux droits civils et politiques et la Convention internationale pour l'élimination de toutes les formes de discrimination raciale, ont été explicitées par les organes de contrôle compétents, à savoir le Comité des droits de l'homme et le Comité pour l'élimination de la discrimination raciale.

- **Comité des droits de l'homme, Observation générale nº 10**, adoptée le 29 juin 1983, Article 19 – Liberté d'expression, § 4 :

  « Le paragraphe 3 prévoit expressément que l'exercice de la liberté d'expression comporte des devoirs spéciaux et des responsabilités spéciales, et c'est pour cette raison que certaines restrictions à ce droit sont permises, eu égard aux intérêts d'autrui ou de la communauté dans son ensemble. »

- **Comité des droits de l'homme, Observation générale nº 11**, adoptée le 29 juillet 1983, Article 20 – Interdiction de la propagande en faveur de la guerre et de l'incitation à la haine nationale, raciale ou religieuse, § 2 : (au sujet des rapports entre les articles 19 et 20)

« L'article 20 du Pacte dispose que toute propagande en faveur de la guerre et tout appel à la haine nationale, raciale ou religieuse qui constitue une incitation à la discrimination, à l'hostilité ou à la violence sont interdits par la loi. De l'avis du Comité, ces interdictions sont tout à fait compatibles avec le droit à la liberté d'expression prévu à l'article 19, dont l'exercice entraîne des responsabilités et des devoirs spéciaux. L'interdiction prévue au paragraphe 1 s'étend à toutes les formes de propagande menaçant d'entraîner ou entraînant un acte d'agression ou une rupture de la paix, en violation de la Charte des Nations Unies, tandis que le paragraphe 2 vise tout appel à la haine nationale, raciale ou religieuse qui constitue une incitation à la discrimination, à l'hostilité ou à la violence, que cette propagande ou cet appel ait des objectifs d'ordre intérieur ou extérieur par rapport à l'Etat intéressé. (…) Pour que l'article 20 produise tous ses effets, il faudrait qu'une loi indique clairement que la propagande et l'appel qui y sont décrits sont contraires à l'ordre public, et prescrive une sanction appropriée en cas de violation. (…) »

- **Comité pour l'élimination de la discrimination raciale, Recommandation générale XV**, adoptée le 23 mars 1993, Violences organisées fondées sur l'origine ethnique (article 4) :

« Le Comité rappelle sa Recommandation générale VII dans laquelle il a expliqué que les prescriptions de l'article 4 sont impératives. Pour y satisfaire, les Etats parties doivent non seulement promulguer des lois appropriées mais aussi s'assurer qu'elles sont effectivement appliquées. Etant donné que les menaces et les actes de violence raciale mènent aisément à d'autres actes de même nature et créent une atmosphère d'hostilité, une intervention prompte est indispensable pour satisfaire à l'obligation d'agir efficacement. » (§ 2)

« Le Comité est d'avis que l'interdiction de la diffusion de toute idée fondée sur la supériorité ou la haine raciale est compatible avec le droit à la liberté d'opinion et d'expression, tel qu'il est énoncé dans la Déclaration universelle des droits de l'homme (article 19) et rappelé à l'alinéa viii) du paragraphe d) de l'article 5 de la Convention internationale sur l'élimination de toutes les formes de discrimination raciale. Le rapport entre ce droit et l'article 4 est indiqué dans l'article lui-même. Son exercice comporte pour tout citoyen les devoirs et les responsabilités spéciales précisés au paragraphe 2 de l'article 29 de la Déclaration universelle, notamment

l'interdiction de diffuser des idées racistes, qui revêt une importance particulière. » (§ 4)

- **Comité pour l'élimination de la discrimination raciale, Recommandation générale XXX**, adoptée le 1er octobre 2004, Recommandation générale concernant la discrimination contre les non-ressortissants :

Le Comité recommande aux Etats d'adopter différentes mesures de protection contre l'incitation à la haine et la violence raciale, en particulier :

– prendre des mesures pour lutter contre les attitudes et les comportements xénophobes à l'égard des non-ressortissants, en particulier l'incitation à la haine et la violence raciales, et promouvoir une meilleure compréhension du principe de non-discrimination en ce qui concerne la situation des non-ressortissants (§ 11)
– prendre des mesures énergiques pour combattre toute tendance à viser, stigmatiser, stéréotyper ou caractériser par leur profil les membres de groupes de population « non ressortissants » sur la base de la race, la couleur, l'ascendance et l'origine nationale ou ethnique, en particulier de la part des politiciens, des responsables, des éducateurs et des médias, sur Internet, dans d'autres réseaux de communication électroniques et dans la société en général (§ 12).

(c) Union européenne

A l'image de la Convention européenne des droits de l'homme, la Charte des Droits fondamentaux consacre la liberté d'expression (article 11), ainsi que le droit à la non-discrimination (article 21).

La lutte contre les discriminations constitue en effet un des domaines d'action privilégiés de l'Union européenne. Ceci se reflète dans la stratégie engagée au sein de l'Union pour lutter contre le racisme.

La proposition de décision-cadre du Conseil européen concernant la lutte contre le racisme et la xénophobie fait suite à l'Action commune du 15 juillet 1996, adoptée par le Conseil sur la base de l'article K.3 du traité sur l'Union européenne, concernant l'action contre le racisme et la

xénophobie. En vue de renforcer la coopération entre les autorités judiciaires et les autres autorités des Etats membres au sujet des infractions relevant du racisme et de la xénophobie, elle prévoit notamment, dans son article 4, que les Etats membres doivent faire en sorte que les comportements intentionnels suivants, commis par tous moyens, soient punissables en tant qu'infraction pénale :

(a) l'incitation publique à la violence ou à la haine dans un but raciste ou xénophobe ou à tout autre comportement raciste ou xénophobe susceptible de causer un préjudice substantiel aux individus ou groupes visés ;
(b) les insultes ou menaces publiques envers des individus ou des groupes dans un but raciste ou xénophobe ;
(c) l'apologie publique dans un but raciste ou xénophobe des crimes de génocide, crimes contre l'humanité et crimes de guerre tels que définis aux articles 6, 7 et 8 du Statut de la Cour pénale internationale ;
(d) la négation publique ou la minimisation des crimes définis à l'article 6 de la Charte du Tribunal militaire international annexée à l'accord de Londres du 8 avril 1945, d'une manière susceptible de perturber la paix publique ;
(e) la diffusion ou la distribution publiques d'écrits, d'images ou d'autres supports contenant des manifestations racistes ou xénophobes ;
(f) la direction d'un groupe raciste ou xénophobe, le soutien de ce groupe ou la participation à ses activités dans l'intention de contribuer aux activités criminelles de l'organisation.

D'autre part, dans sa **Résolution sur la liberté d'expression et le respect des convictions religieuses**, adoptée le 16 février 2006, le Parlement européen a notamment souligné « que la liberté d'expression doit toujours s'exercer dans les limites imposées par la loi et coexister avec la responsabilité et le respect des droits de l'homme, ainsi que des sentiments et des convictions religieux, que ceux-ci soient liés à la religion musulmane, chrétienne, juive ou à toute autre religion ».

(d) Organisation pour la sécurité et la coopération en Europe

Plusieurs engagements des Etats participants de l'Organisation pour la sécurité et la coopération en Europe (OSCE)

sont directement pertinents en matière de lutte contre le discours de haine. Si les Etats participants ont reconnu le caractère primordial de la liberté d'expression à de nombreuses reprises[5], ils ont également exprimé leur ferme engagement contre le discours de haine et les autres manifestations de nationalisme agressif, de racisme, de chauvinisme, de xénophobie, d'antisémitisme et d'extrémisme violent, ainsi que les phénomènes de discrimination fondés sur la religion ou la croyance, et ont souligné que la promotion de la tolérance et de la non-discrimination pouvait contribuer à éliminer le fondement des discours de haine[6].

5 Par exemple, voir le Document de Copenhague, Réunion de la Conférence sur la dimension humaine de la CSCE (Conférence sur la sécurité et la coopération en Europe), 29 juin 1990.

6 Décision nº 6 sur la tolérance et la non-discrimination, 10e réunion du Conseil ministériel, Porto, décembre 2002.

#III Principes tirés de la jurisprudence de la Cour européenne des droits de l'homme

Confrontée à une situation de conflit entre le droit à la liberté d'expression et un autre droit garanti par la Convention, la Cour européenne dispose de deux voies. Elle peut tout d'abord décider d'exclure les expressions en cause de la protection offerte par la Convention, en faisant application de l'article 17 CEDH. Mais elle peut également examiner s'il était légitime de restreindre la liberté d'expression à la lumière de l'article 10 § 2 CEDH. Une mesure qui constitue une « sanction » ou une « restriction » à la liberté d'expression ne viole en effet pas la Convention du seul fait qu'elle porte atteinte à cette liberté, l'exercice de celle-ci pouvant être limité dans les conditions définies au second paragraphe de l'article 10.

Le conflit de droits est donc résolu tantôt par la négation, par la déchéance du droit d'invoquer l'article 10, en application de l'article 17 de la Convention, tantôt par la conciliation, la Cour procédant à une balance des intérêts en présence.

Après avoir rappelé les principes généraux dégagés par la Cour européenne en matière de droit à la liberté d'expression, il conviendra d'exposer ces deux voies.

(A) Principes généraux relatifs au droit à la liberté d'expression (article 10 CEDH)

La liberté d'expression, consacrée par l'article 10 de la Convention européenne, dispose au sein des droits protégés par ce texte d'un statut particulier. En effet, cette liberté n'est pas seulement une conséquence de la démocratie mais elle fonde et nourrit celle-ci. Sans débats libres, sans liberté d'exprimer ses convictions, la démocratie ne pourrait progresser ou tout simplement continuer d'être.

Cette place prééminente de la liberté d'expression a été consacrée par la Cour européenne dans son arrêt *Handy-*

side, dans lequel elle affirme que « la liberté d'expression constitue l'un des fondements essentiels d'une société démocratique, l'une des conditions primordiales de son progrès et de l'épanouissement de chacun » et, selon une formule depuis régulièrement reprise, que « sous réserve du paragraphe 2 de l'article 10, elle vaut non seulement pour les 'informations' ou 'idées' accueillies avec faveur ou considérées comme inoffensives ou indifférentes, mais aussi pour celles qui heurtent, choquent ou inquiètent : ainsi le veulent le pluralisme, la tolérance et l'esprit d'ouverture sans lesquels il n'est pas de 'société démocratique' »[1].

La liberté d'expression, et en particulier la liberté de la presse, occupe une place prééminente dans la Convention européenne des droits de l'homme. L'exercice du droit à la liberté d'expression ne va cependant pas sans devoirs et obligations.

Le champ d'application de l'article 10 de la Convention est très vaste. Au sens de l'article 10, le droit à la liberté d'expression vaut pour « toute personne », physique ou morale, et comprend à la fois la liberté d'opinion et la liberté de recevoir ou de communiquer des informations ou des idées. La notion d'« information » a fait l'objet d'une interprétation extensive, puisqu'elle recouvre non seulement les faits et les données bruts ou les questions d'intérêt général traitées par la presse, mais également les photographies et les émissions de radio ou de télévision. La Cour a de plus estimé que ce droit englobe « la liberté d'expression artistique – notamment dans la liberté de recevoir et communiquer des informations et des idées – qui permet de participer à l'échange public des informations et idées culturelles, politiques et sociales de toute sorte »[2] et celle de diffuser des informations de caractère commercial[3]. En outre, il concerne non seulement le contenu des informations mais aussi les moyens de transmission ou de captage, dans la mesure où « toute restriction apportée à ceux-ci touche le droit de recevoir et communiquer des informations »[4].

La Cour a particulièrement insisté sur le rôle de la presse dans une société démocratique. Elle a ainsi souligné :

> « Ces principes revêtent une importance particulière pour la presse : si elle ne doit pas franchir les bornes fixées en vue,

1 *Handyside c. Royaume-Uni*, précité, § 49.

2 *Müller et autres c. Suisse*, nº 10737/84 arrêt du 24 mai 1988, série A nº 133, § 27.

3 *Markt intern Verlag GmbH c. Allemagne*, nº 10572/83 arrêt du 20 novembre 1989, série A nº 165.

4 *Autronic AG c. Suisse*, nº 12726/87 arrêt du 22 mai 1990, série A nº 178, § 47.

> notamment, de préserver la 'sécurité nationale' ou de 'garantir l'autorité du pouvoir judiciaire', il lui incombe néanmoins de communiquer des informations et des idées sur des questions d'intérêt public. A sa fonction qui consiste à en diffuser s'ajoute le droit, pour le public, d'en recevoir. S'il en était autrement, la presse ne pourrait jouer son rôle indispensable de 'chien de garde' »[5].

La Cour a ajouté que :

> « En outre, la liberté de la presse fournit à l'opinion publique l'un des meilleurs moyens de connaître et juger les idées et attitudes des dirigeants. Plus généralement, le libre jeu du débat politique se trouve au cœur même de la notion de société démocratique qui domine la Convention toute entière »[6].

Selon la Cour, la protection des sources journalistiques constitue « l'une des pierres angulaires de la liberté de la presse »[7]. En l'absence d'une telle protection, la presse pourrait être moins à même de fournir des informations précises et fiables.

Enfin, la Cour a précisé les devoirs et obligations de ceux qui exercent leur droit à la liberté d'expression. Elle considère à ce propos que le droit des journalistes de communiquer des informations sur des questions d'intérêt général est protégé à condition toutefois qu'ils agissent de bonne foi, sur la base de faits exacts, et fournissent des informations « fiables et précises » dans le respect de l'éthique journalistique[8].

(B) Discours tombant sous le coup de l'article 17 CEDH

L'article 17 de la CEDH est ainsi libellé :

> « Aucune des dispositions de la présente Convention ne peut être interprétée comme impliquant pour un Etat, un

5 *Observer et Guardian c. Royaume-Uni*, nº 13585/88 arrêt du 26 novembre 1991, série A nº 216, § 59. V. également *Lingens c. Autriche*, nº 9815/82arrêt du 8 juillet 1986, série A nº 103, § 41.

6 *Lingens c. Autriche*, précité, § 42.

7 *Goodwin c. Royaume-Uni* [GC], nº 17488/90 arrêt du 27 mars 1996, Recueil des arrêts et décisions 1996-II, § 39.

8 *Pedersen et Baadsgaard c. Danemark* [GC], nº 49017-99, § 78, CEDH 2004-XI.

> groupement ou un individu, un droit quelconque de se livrer à une activité ou d'accomplir un acte visant à la destruction des droits ou libertés reconnus dans la présente Convention ou à des limitations plus amples de ces droits et libertés que celles prévues à ladite Convention ».

Cette disposition s'adresse non seulement aux Etats, mais également à tout groupement ou à tout individu. Il ne s'agit pas d'une limitation supplémentaire aux droits énoncés dans la Convention ; au contraire, l'article 17 vise à garantir le maintien durable du système de valeurs démocratiques qui sous-tendent la Convention. Cet article tend notamment à empêcher que des groupements totalitaires puissent exploiter en leur faveur les principes posés par la Convention. Pour atteindre ce but, il ne faut cependant pas priver de tous les droits et libertés garantis par la Convention les individus dont on constate qu'ils se livrent à des activités visant à détruire l'un quelconque de ces droits et libertés. L'article 17 couvre essentiellement les droits qui permettraient, si on les invoquait, d'essayer d'en tirer le droit de se livrer effectivement à des activités visant à la destruction des droits ou libertés reconnus dans la Convention.

Déjà dans l'affaire *Lawless*, la Cour a clairement établi le rapport existant entre l'article 17 et les autres articles en ces termes:

> « Considérant que, de l'avis de la Cour, l'article 17 (art. 17), pour autant qu'il vise des groupements ou des individus, a pour but de les mettre dans l'impossibilité de tirer de la Convention un droit qui leur permette de se livrer à une activité ou d'accomplir un acte visant à la destruction des droits et libertés reconnus dans la Convention; qu'ainsi personne ne doit pouvoir se prévaloir des dispositions de la Convention pour se livrer à des actes visant à la destruction des droits et libertés ci-dessus visés ; que cette disposition, qui a une portée négative, ne saurait être interprétée *a contrario* comme privant une personne physique des droits individuels fondamentaux garantis aux articles 5 et 6 (art. 5, art. 6) de la Convention »[9].

Le but de cet article est donc d'empêcher que les principes posés dans la CEDH soient détournés au profit de requérants dont l'activité vise en réalité à la destruction de ces

9 *Lawless c. Irlande (n° 3)*, n° 332/57 arrêt du 1er juillet 1961, série A3, § 7.

mêmes principes. Il s'agit, en somme, d'éviter un abus de droit. Tout d'abord, la Cour va donc vérifier que les propos dont elle est saisie ne rentrent pas dans le champ d'application de l'article 17, ce qui aurait pour effet de les exclure de la protection de l'article 10. Comme le souligne la Cour, « il ne fait aucun doute que tout propos dirigé contre les valeurs qui sous-tendent la Convention se verrait soustrait par l'article 17 à la protection de l'article 10 »[10].

Quels propos sont alors considérés comme étant « dirigé contre les valeurs qui sous-tendent la Convention » ? Le recours à l'article 17 a été variable dans le temps : largement sous-exploité au départ, et ne visant que les hypothèses mettant en cause une doctrine totalitaire jugée contraire à la Convention, ses potentialités sont désormais pleinement exploitées, notamment lorsque la Cour est confrontée à un « discours de haine » non couvert par l'article 10.

Par le jeu de l'article 17, certains propos, incitant par exemple à la violence ou la haine raciale, peuvent être exclus de la protection de l'article 10 CEDH.

◈ La condamnation d'une doctrine totalitaire contraire à la Convention

Appliquant pour la première fois l'article 17 dans le contexte de la guerre froide, dans la décision d'irrecevabilité *Parti communiste d'Allemagne*, la Commission européenne des droits de l'homme en a donné une interprétation large, estimant que l'établissement de « l'ordre social communiste par la voie de la révolution prolétarienne et la dictature du prolétariat » était contraire à la Convention. Bien que les moyens d'action politique utilisés par ce parti au moment de sa requête étaient constitutionnels, la Commission parvenait à la conclusion que celui-ci n'avait pas renoncé à ses buts révolutionnaires[11].

Au cours des décennies qui ont suivi, les organes de Strasbourg ont eu à répondre à de nouveaux défis auxquels la démocratie européenne s'est trouvée confrontée. La crainte d'une résurgence du national-socialisme en tant qu'idéologie totalitaire contraire à la Convention a notamment amené la Commission et la Cour à appliquer plus souvent l'article 17. A plusieurs reprises, a Commission a ainsi affirmé que :

10 *Seurot c. France* (déc.), n° 57383/00, 18 mai 2004.

11 *Parti communiste d'Allemagne et autres c. R.F.A.*, n° décision du 20 juillet 1957, annuaire 1, p. 222.

> « le national socialisme est une doctrine totalitaire incompatible avec la démocratie et les droits de l'homme et ses défenseurs poursuivent sans aucun doute des buts du type de ceux auxquels il est fait référence à l'article 17 de la Convention »[12].

En conséquence, toute activité s'inspirant des idées national-socialistes sera jugée incompatible avec la Convention.

◈ La condamnation du négationnisme

L'article 17 a également été appliqué afin d'empêcher que la liberté d'expression soit utilisée pour promouvoir des propos négationnistes ou révisionnistes. Parmi les propos racistes, le négationnisme constitue une catégorie particulière dans la mesure où il s'agit à la fois d'une contestation de crimes contre l'humanité, en l'occurrence l'Holocauste nazi, et d'une incitation à la haine envers la communauté juive.

Cette idée de condamner non seulement des expressions qui constituent une dénégation ou une justification de crimes mais incitent également à la discrimination raciale et religieuse a fait son apparition progressivement. On trouve une telle référence dans la décision *Honsik c. Autriche* de la Commission européenne :

> « Concernant les circonstances de l'affaire présente, la Commission prend en particulier acte des conclusions de la Cour d'assises et de la Cour suprême selon lesquelles les publications du requérant niaient d'une façon tendancieuse et polémique, éloignée de toute objectivité scientifique, le massacre systématique des Juifs par l'utilisation de gaz toxiques dans les camps de concentration nazis. La Commission a antérieurement jugé que des déclarations du type de celles faites par le requérant allaient à l'encontre des principes fondamentaux de la Convention, tels qu'énoncés dans le préambule, à savoir la justice et la paix, et qu'elles étaient en outre le reflet d'une discrimination raciale et religieuse »[13].

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12 *B.H., M.W., H.P. et G.K. c. Autriche*, nº 12774/87, décision de la Commission du 12 octobre 1989 ; également *Nachtmann c. Autriche*, nº 36773/97, décision de la Commission du 9 septembre 1998, et *Schimanek c. Autriche* (déc.), nº 32307/96, 1 février 2000.

13 *Honsik c. Autriche*, nº 25062/94, décision de la Commission du 18 octobre 1995, DR 83, pp. 77-85, également *Marais c. France*, no 31159/96, décision de la Commission du 24 juin 1996, DR 86,

Dans l'arrêt *Lehideux et Isorni*, la Cour européenne a précisé à ce sujet « qu'à l'égal de tout autre propos dirigé contre les valeurs qui sous-tendent la Convention (…), la justification d'une politique pronazie ne saurait bénéficier de la protection de l'article 10 »[14]. Ainsi, il existe « une catégorie [de] faits historiques clairement établis – tel l'Holocauste – dont la négation ou la révision se verrait soustraite par l'article 17 à la protection de l'article 10 »[15].

L'affaire *Garaudy* constitue un tournant dans l'utilisation de l'article 17, la Cour appliquant pour la première fois clairement ces principes pour conclure à l'irrecevabilité d'une requête. Dans cette affaire, la Cour affirme :

> « Ainsi, la contestation de crimes contre l'humanité apparaît comme l'une des formes les plus aiguës de diffamation raciale envers les Juifs et d'incitation à la haine à leur égard. La négation ou la révision de faits historiques de ce type remettent en cause les valeurs qui fondent la lutte contre le racisme et l'antisémitisme et sont de nature à troubler gravement l'ordre public. Portant atteinte aux droits d'autrui, de tels actes sont incompatibles avec la démocratie et les droits de l'homme et leurs auteurs visent incontestablement des objectifs du type de ceux prohibés par l'article 17 de la Convention. »

De manière intéressante dans cette décision, la Cour associe la lutte contre le racisme et l'antisémitisme aux valeurs fondamentales protégées par la Convention et se réfère expressément à l'atteinte portée aux droits d'autrui. Considérant que « la plus grande partie du contenu et la tonalité générale de l'ouvrage du requérant, et donc son but, ont un caractère négationniste marqué et vont donc à l'encontre des valeurs fondamentales de la Convention », la Cour sanctionne en l'espèce le requérant en lui refusant le bénéfice de la protection de l'article 10 qu'il invoquait pour mettre en cause le bien-fondé de condamnations pénales pour contestation de crimes contre l'humanité.

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p. 184, à propos d'une publication par laquelle le requérant visait en réalité, sous couvert d'une démonstration technique, à remettre en cause l'existence et l'usage de chambres à gaz pour une extermination humaine de masse.

14 *Lehideux et Isorni c. France* [GC], n° 24662/94 arrêt du 23 septembre 1998, Recueil des arrêts et décisions 1998-VII, § 53.

15 *Ibid.*, § 47.

◈ La condamnation du discours de haine raciale

La Cour européenne a d'autre part eu recours à l'article 17 lorsque la liberté d'expression était invoquée pour inciter à la haine ou à la discrimination raciale au-delà des hypothèses de négationnisme. La Commission européenne des droits de l'homme d'abord, la Cour européenne ensuite, ont ainsi, dès le stade de la recevabilité de la requête, opposé l'article 17 à des requérants ayant tenu des propos clairement racistes, constitutifs d'un discours de haine raciale.

Dans sa décision d'irrecevabilité *Glimmerveen et Hagenbeek c. Pays-Bas*[16], la Commission a estimé que des requérants poursuivant une politique contenant manifestement des éléments de discrimination raciale ne pouvaient pas se prévaloir des dispositions de l'article 10. En l'espèce, les requérants avaient été condamnés pour avoir été trouvés en possession de tracts qui s'adressaient aux « Néerlandais de race blanche » et tendaient notamment à faire en sorte que toutes les personnes qui n'étaient pas de race blanche quittent le territoire néerlandais.

La Cour a profité de certains arrêts sur le fond pour réitérer fermement sa position en la matière. Dans l'arrêt *Jersild*, s'agissant des propos tenus par un groupe dits des « blousons verts », il ne fait pas de doute pour la Cour que « les remarques qui ont valu leur condamnation aux blousons verts (…) étaient plus qu'insultantes pour les membres des groupes visés et ne bénéficiaient pas de la protection de l'article 10 »[17]. Les auteurs de ces propos insultants n'étant toutefois pas partie à l'affaire devant la Cour européenne, celle-ci n'a en l'espèce pas eu à se prononcer plus avant sur l'application de l'article 17.

Dans l'affaire *Norwood c. Royaume-Uni*, la Cour va appliquer pour la première fois l'article 17 au sujet d'une atteinte dirigée contre la communauté musulmane. La Cour était

16 *Glimmerveen et Hagenbeek c. Pays-Bas*, nos 8348/78 et 8406/78, décision de la Commission du 11 octobre 1979, D. R. 18, p. 187.

17 *Jersild c. Danemark*, précité, § 35. Utilisant une formule plus générale dans l'arrêt *Gündüz*, la Cour affirme que « des expressions concrètes constituant un discours de haine (…), pouvant être insultantes pour des individus ou des groupes, ne bénéficient pas de la protection de l'article 10 de la Convention » (*Gündüz c. Turquie*, précité, § 41).

confrontée à la condamnation du requérant pour avoir accroché à sa fenêtre une grande affiche du BNP (Parti national britannique), sur laquelle figurait une photo des tours du World Trade Center en flamme, avec cette phrase : « L'Islam dehors – Protégeons le peuple britannique », et le symbole d'un croissant et d'une étoile dans un panneau d'interdiction. La Cour va juger qu'« une attaque aussi véhémente, à caractère général, contre un groupe religieux, qui établit un lien entre l'ensemble du groupe et un acte terroriste grave, est contraire aux valeurs proclamées et garanties par la Convention, à savoir la tolérance, la paix sociale et la non-discrimination. Le fait pour le requérant d'exposer l'affiche à sa fenêtre s'analyse en un acte qui relève de l'article 17 et ne bénéficie donc pas de la protection des articles 10 et 14 ». La Cour déclare en conséquence la requête irrecevable pour incompatibilité *ratione materiae* avec les dispositions de la Convention. Dans l'affaire *Pavel Ivanov c. Russie*[18], la Cour a conclu que le requérant ne pouvait se prévaloir de la protection de l'article 10 car les publications dont il était l'auteur, et qui avaient occasioné sa condamnation par les juridictions internes, avaient pour résultat d'attiser la haine envers le peuple juif et étaient donc contraires aux valeurs de tolérance, de paix sociale et de non-discrimination qui sous-tendent la Convention.

Face à un discours clairement raciste, la Cour va donc soustraire les propos en question de la protection de l'article 10 CEDH. Le recours direct à l'article 17 reste cependant rare, la Cour préférant parfois l'utiliser de manière indirecte, comme « principe d'interprétation », afin d'apprécier la nécessité d'une limitation à la liberté d'expression, s'agissant de propos pour lesquels des hésitations sont permises. Dans cette hypothèse, la Cour va entamer l'examen du respect de l'article 10, « dont elle appréciera toutefois les exigences à la lumière de l'article 17 »[19].

18 *Pavel Ivanov c. Russie* (déc.), nº 35222/04, 20 février 2007.

19 *Ibid.*, § 38.

Cas pratique nº 1

Faits

L'Etat de Wonderland est membre du Conseil de l'Europe et partie à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales depuis 1994. Une importante communauté d'origine étrangère y vit depuis plusieurs années et continue d'augmenter.

T. et N., deux citoyens du Wonderland, sont à l'origine d'une initiative tendant à la création d'une « association nationale et patriotique de défense des Wonderlandiens ». Le 9 décembre 2006, l'annonce de cette création imminente est faite lors d'une conférence de presse tenue à Miracle-City, la capitale du Wonderland. Au cours de la conférence de presse, T. et N., expliquant les raisons de cette création, soutinrent que les Wonderlandiens étaient menacés par la minorité étrangère et alléguèrent à plusieurs reprises l'existence d'une inégalité entre Wonderlandiens et personnes immigrées.

En réaction à ces déclarations, le 11 décembre 2006, deux organisations nationales non-gouvernementales de lutte contre le racisme déposèrent plainte, en se constituant partie civile, pour provocation à la discrimination et à la haine raciale. Le 16 janvier 2007, le procureur requit l'ouverture d'une information judiciaire. Le 9 avril 2007, un juge d'instruction du tribunal de grande instance de la capitale mit en examen T. et N., qui furent par la suite renvoyés devant le tribunal correctionnel pour provocation à la discrimination et à la haine raciale, ainsi que pour avoir injurié, en raison de leur race, un groupe de personnes d'origine étrangère.

Par jugement du 10 septembre 2007, le tribunal correctionnel jugea que les faits de discrimination et d'injure reprochés aux prévenus ne rentraient pas dans le strict cadre de la poursuite telle que circonstanciée par le réquisitoire introductif. En conséquence, T. et N. furent relaxés. Les parties civiles interjetèrent appel de ce jugement.

Par arrêt du 20 janvier 2008, la cour d'appel de Miracle-City, estimant n'être valablement saisie que du seul délit d'incitation à la haine raciale, prévue en droit interne, déclara les prévenus coupables et les condamna à cinq mille euros d'amende. T. et N. se pourvurent en cassation. Par arrêt du 7 mai 2008, la Cour de cassation rejeta les pourvois, estimant que la cour d'appel avait valablement qualifié

les faits et motivé sa décision pour déclarer le délit caractérisé en son élément intentionnel.

En conséquence, T. et N. ont saisi la Cour européenne le 9 mai 2008, en vertu de l'article 34 CEDH, d'une requête dirigée contre l'Etat de Wonderland, en alléguant une violation de leur droit à la liberté d'expression, garanti par l'article 10 de la Convention.

Solution envisageable

Il convient d'envisager cette affaire à la lumière de l'article 17 CEDH.

Les attitudes racistes des requérants ressortent clairement de la teneur des propos, mettant en avant une menace émanant de la communauté d'origine étrangère et soutenant l'existence d'une inégalité des races. Ces idées peuvent passer pour raviver la xénophobie.

Les éléments de preuve disponibles en l'espèce devraient en conséquence suffire à justifier le recours à l'article 17 CEDH, dans la mesure où les requérants cherchent essentiellement à utiliser l'article 10 pour fonder sur la Convention un droit de se livrer à des activités qui sont contraires à la lettre et à l'esprit de la Convention, droit qui, s'il était accordé, contribuerait à la destruction des droits et libertés énoncés dans la Convention.

Conclusion

En conséquence, la Cour estimerait sans doute, eu égard aux dispositions de l'article 17 de la Convention, que les requérants ne peuvent pas se prévaloir de l'article 10 en l'espèce pour contester leur condamnation.

Comp. : *W.P. et autres c. Pologne* (déc.), nº 42264/98, 2 septembre 2004.

Seurot c. France (déc.) nº 57383/00, 18 mai 2004.

(C) Restrictions à la liberté d'expression (article 10 § 2 CEDH)

(a) Remarques générales

i Approche générale de la Cour

Saisie par des requérants ayant été condamnés à raison de certains propos tenus, ou d'autres formes d'expression, et qui allèguent une violation de l'article 10 de la Convention européenne, la Cour doit vérifier quatre éléments successifs, après s'être assurée que ces propos entraient dans le champ d'application de l'article 10 : l'existence d'une ingérence, qui doit être prévue par la loi, poursuivre un ou des buts légitimes énoncés dans l'article 10 paragraphe 2, et être nécessaire dans une société démocratique pour atteindre ces buts.

Sur le terrain de l'article 10 § 2 de la CEDH, la Cour européenne va successivement vérifier s'il existe une ingérence dans la liberté d'expression, si celle-ci est bien prévue par la loi et poursuit un but légitime, et enfin si elle apparaît comme nécessaire dans une société démocratique, ce qui implique que l'ingérence soit proportionnée au but poursuivi.

Le second paragraphe de l'article 10 de la Convention prévoit en effet que l'exercice du droit à la liberté d'expression comporte des devoirs et des responsabilités et peut être soumis à des « formalités, conditions, restrictions, ou sanctions prévues par la loi, qui constituent des mesures nécessaires dans une société démocratique, à la sécurité nationale, à l'intégralité territoriale ou à la sûreté publique, à la défense de l'ordre ou à la prévention du crime, à la protection de la santé ou de la morale, à la protection de la réputation ou des droits d'autrui, pour empêcher la divulgation d'informations confidentielle ou pour garantir l'autorité et l'impartialité du pouvoir judiciaire ». La Cour européenne a toujours rappelé que la liberté d'expression, telle que la consacre l'article 10, est assortie d'exceptions qui appellent une interprétation étroite, et le besoin de la restreindre doit se trouver établi de manière convaincante.

Une fois établie l'existence d'une ingérence dans le droit garanti, la Cour va alors procéder à un triple examen :

- **L'ingérence est-elle prévue par la loi ?**

Selon la Cour, « les mots 'prévue par la loi' (…) veulent d'abord que la mesure incriminée ait une base en droit interne, mais ils ont trait aussi à la qualité de la loi en cause : ils exigent l'accessibilité de celle-ci à la personne concernée, qui de surcroît doit pouvoir en prévoir les conséquences pour elle, et sa compatibilité avec la prééminence du

droit »[20]. La Cour considère ainsi qu'est une « loi », au sens de l'article 10 § 2, une norme énoncée avec assez de précision pour permettre au citoyen de régler sa conduite : en s'entourant au besoin de conseils éclairés, il doit être à même de prévoir, à un degré raisonnable dans les circonstances de la cause, les conséquences de nature à dériver d'un acte déterminé, sans qu'elles aient besoin cependant d'être prévisibles avec une certitude absolue. Cette notion de prévisibilité dépend dans une large mesure du contenu du texte dont il s'agit, du domaine qu'il couvre ainsi que du nombre et de la qualité de ses destinataires.

- **L'ingérence poursuit-elle un but légitime ?**

L'ingérence doit ensuite poursuivre l'un des buts énumérés à l'article 10 § 2. A ce titre, trois catégories de restrictions à l'exercice de la liberté d'expression sont autorisées : pour protéger l'intérêt général (sécurité nationale, intégralité territoriale, sûreté publique, défense de l'ordre ou prévention du crime, protection de la santé ou de la morale), pour protéger d'autres droits individuels (protection de la réputation ou des droits d'autrui ou prévenir la divulgation d'informations confidentielles), ou, en dernier lieu, pour garantir l'autorité et l'impartialité du pouvoir judiciaire.

- **L'ingérence est-elle « nécessaire dans une société démocratique » ?**

Si les deux autres conditions ne posent en général pas de problème, l'appréciation de la « nécessité dans une société démocratique » appelle quant à elle de plus longs développements : elle revient, selon la jurisprudence européenne, à déterminer si les motifs invoqués par les autorités nationales pour justifier l'ingérence apparaissent « pertinents et suffisants », en d'autres termes si elle correspond à un « besoin social impérieux », et si les moyens employés étaient proportionnés au but légitime poursuivi. Pour ce faire, la Cour reconnaît une « marge d'appréciation » aux autorités nationales.

ii La « marge d'appréciation » des Etats et le contrôle exercé par la Cour

La Cour européenne a dégagé la notion de « marge d'appréciation » en se fondant sur le caractère subsidiaire du

20 *Kruslin c. France*, arrêt du 24 avril 1990, série A n° 176-A, § 27.

mécanisme de la Convention par rapport aux systèmes nationaux de garantie des droits de l'homme. Dans l'arrêt *Handyside*, elle précise ainsi que c'est aux autorités nationales, en contact direct et constant avec les forces vives de leur pays, qu'il appartient en premier lieu de juger de la réalité du « besoin social impérieux » qu'implique le concept de « nécessité »[21]. Dès lors, « la Cour n'a point pour tâche de se substituer aux juridictions internes compétentes, mais d'apprécier sous l'angle de l'article 10 les décisions qu'elles ont rendues dans l'exercice de leur pouvoir d'appréciation »[22]. L'examen, par la Cour, de la conformité des restrictions à la Convention, et en particulier de l'adéquation des moyens utilisés pour atteindre le but légitime poursuivi, sera plus ou moins strict, la marge d'appréciation accordée aux Etats étant fluctuante selon les affaires. Cette marge n'est toutefois pas illimitée et va « de pair avec un contrôle européen »[23]. La marge d'appréciation des Etats se réduit d'autant que le contrôle opéré par la Cour sera étendu.

Plusieurs éléments président à la détermination de l'étendue de cette marge d'appréciation et, partant, de l'intensité du contrôle européen. Dans l'ensemble, le contrôle opéré par la Cour est des plus stricts dès lors que des propos incitant à la haine semblent en cause. A l'inverse, « une plus grande marge d'appréciation est généralement laissée aux Etats contractants lorsqu'ils réglementent la liberté d'expression sur des questions susceptibles d'offenser des convictions intimes, dans le domaine de la morale et, spécialement, de la religion »[24], en raison de l'absence, dans les pays européens, de conception uniforme des exigences afférentes à 'la protection des droits d'autrui' s'agissant des attaques contre des convictions religieuses. La Cour estime en effet que c'est en premier lieu aux autorités nationales qu'il revient d'évaluer s'il existe un besoin social impérieux susceptible de justifier une ingérence dans ce cas et, à cette fin, elles jouissent d'une marge d'appréciation « élargie » lorsque est en cause la liberté d'expression dans des domaines susceptibles d'offenser des convictions personnelles intimes relevant de la morale ou de la religion.

En l'absence de consensus européen sur certaines questions, comme en matière de morale ou religion, une plus grande marge d'appréciation est laissée aux Etats pour décider de restrictions à la liberté d'expression.

21 *Handyside c. Royaume-Uni*, précité, § 48.

22 *Ibid.*, § 50.

23 *Ibid.*, § 49.

24 *Wingrove c. Royaume-Uni*, n° 17419/90 arrêt du 25 novembre 1996, Recueil des arrêts et décisions 1996-V, § 58.

(b) Eléments pris en compte par la Cour

Face à une restriction du droit à la liberté d'expression, la Cour estime qu'il lui faut considérer l'ingérence litigieuse « à la lumière de l'ensemble de l'affaire ». La Cour va donc toujours fonder sa décision sur les circonstances particulières de l'affaire. Il n'existe dès lors pas un facteur décisif, permettant de tracer la ligne de partage entre ce qui est permis et ce qui ne l'est pas, mais bien plutôt un ensemble d'éléments, qui doivent être combinés au cas par cas.

Le critère essentiel utilisé par la Cour est celui du but poursuivi par le requérant. Ce critère apparaît néanmoins délicat à mettre en œuvre, tant il est difficile de déterminer ce qui relève du for interne de l'individu. Ceci explique que la Cour se réfère, de manière souvent détaillée, à la teneur des propos incriminés et au contexte dans lequel ils ont été diffusés.

Afin de déterminer si une expression est constitutive d'un « discours de haine », la Cour européenne examine le but poursuivi par le requérant, ainsi que la teneur de l'expression et le contexte dans lequel elle a été diffusée.

i. But poursuivi par le requérant

La question fondamentale que se pose la Cour est celle de savoir si le requérant avait pour but de propager des idées et opinions racistes en proférant un discours de haine ou s'il cherchait à informer le public sur une question d'intérêt général. La réponse à cette question devrait permettre de distinguer les expressions qui, bien que choquantes ou offensantes, relèvent de la protection de l'article 10, de celles qui ne sauraient être tolérées dans une société démocratique.

Ainsi, dans l'arrêt *Jersild*, la Cour justifie le constat de violation de l'article 10 par le fait que, contrairement aux « blousons verts » qui avaient été interviewés par le requérant et avaient tenus des propos ouvertement racistes, le requérant, condamné pour complicité de diffusion de propos racistes, cherchait quant à lui à traiter « d'aspects spécifiques d'une question qui préoccupait déjà alors vivement le public »[25]. Elle considère ainsi que « pris dans son ensemble, le reportage ne pouvait objectivement paraître avoir pour finalité la propagation d'idées et opinions racistes »[26]. En réalisant le reportage en cause, le requérant ne poursuivait donc pas, d'après la Cour, un objectif raciste. Sa condamnation n'apparaissait dès lors pas « nécessaire dans une société

25 *Jersild c. Danemark*, précité, § 33.

26 *Ibid.*

démocratique ». Dans cette affaire, l'absence d'intention raciste joue donc un rôle-clé dans la constatation par la Cour d'une violation du droit à la liberté d'expression.

Le but recherché est crucial : s'agissait-il de propager des idées et opinions racistes en proférant un discours de haine ou d'informer le public sur une question d'intérêt général ?

De même, dans l'arrêt *Lehideux et Isorni*, la Cour parvient à la conclusion que la France a violé l'article 10 de la Convention en condamnant les requérants pour apologie des crimes ou délits de collaboration en soulignant qu'« il n'apparaît pas que les requérants aient voulu nier ou réviser ce qu'ils ont eux-mêmes appelé, dans leur publication, les 'atrocités' et les 'persécutions nazies', ou encore la 'toute-puissance allemande et sa barbarie' »[27]. Selon la Cour, les requérants ont ainsi « moins fait l'éloge d'une politique que celle d'un homme, et cela dans un but dont la cour d'appel a reconnu, sinon le moyen, du moins la pertinence et la légitimité : la révision de la condamnation de Philippe Pétain »[28].

A l'inverse, dans la décision *Garaudy c. France*, la Cour, examinant les condamnations prononcées à l'encontre des requérants pour diffamation raciale et provocation à la haine, sous l'angle de l'article 10 § 2, met en avant « l'objectif raciste avéré » des propos du requérant, qui ne se limitent pas, selon la Cour, à une critique de l'Etat d'Israël, pour conclure à l'irrecevabilité de la requête. En outre, s'agissant de la condamnation pour contestation de crimes contre l'humanité, la Cour souligne que « l'objectif et l'aboutissement d'une telle démarche sont totalement différents, car il s'agit en fait de réhabiliter le régime national-socialiste, et, par voie de conséquence, d'accuser de falsification de l'histoire les victimes elles-mêmes ».

Pour chaque affaire, la Cour tente donc de discerner quelle était l'intention du requérant : cherchait-il à informer le public sur une question d'intérêt général[29] ? Si oui, la Cour conclut en général à la non nécessité de l'ingérence litigieuse. Par contre, lorsque les propos en question visent à stigmatiser des personnes ou à attiser la violence et la haine, les autorités nationales jouissent d'une marge d'appréciation plus large dans l'imposition des restrictions à l'exercice de la liberté d'expression[30]. A titre d'exemple, dans l'arrêt *Halis*

27 *Lehideux et Isorni c. France*, précité, § 47.

28 *Ibid.*, § 53.

29 En ce sens : *Gündüz c. Turquie*, précité, § 44.

30 *Lindon et autres c. France* [GC], nos 21279/02 et 36448/02, 22 octobre 2007. *Sürek c. Turquie*, précité, § 61. *Contra* : voir par

Doğan, le constat par la Cour que les articles en question constituaient une incitation à l'apologie de la violence – la Cour note que « les propos exprimés [réveillaient] des instincts primaires et [renforçaient] des préjugés déjà ancrés qui se sont exprimés au travers d'une violence meurtrière »[31] – l'amène à conclure à la non violation de l'article 10.

ii. Contenu de l'expression en cause

◈ **Discours politique ou de questions d'intérêt général**

La Cour accorde un poids particulier au discours politique ou de questions d'intérêt général, domaine dans lequel l'article 10 § 2 « ne laisse guère de place pour des restrictions à la liberté d'expression »[32]. Dès lors que les propos peuvent être classés dans ceux relevant d'un débat public, la Cour va plus difficilement admettre la nécessité de l'ingérence. Ainsi, la Cour « accorde la plus haute importance à la liberté d'expression dans le contexte du débat politique et considère qu'on ne saurait restreindre le discours politique sans raisons impérieuses »[33]. Dans l'affaire *Erbakan* par exemple, la Cour a jugé que la sanction infligée au requérant, à raison d'un discours public tenu lors de la campagne pour les élections municipales, n'était pas conforme à l'article 10 § 2 de la Convention.

La Cour admet difficilement les restrictions à la liberté d'expression touchant au discours politique ou les questions d'intérêt général.

◈ **Discours à caractère religieux**

Le discours à caractère religieux occupe une place à part dans la jurisprudence européenne, dans la mesure où la Cour octroie traditionnellement dans cette matière une large marge d'appréciation aux Etats[34]. La Cour européenne souligne ainsi que « dans le contexte des opinions et croyances religieuses peut légitimement être comprise une obligation d'éviter autant que faire se peut des expressions qui sont gratuitement offensantes pour autrui et constituent donc une atteinte à ses droits et qui, dès lors, ne contri-

exemple *Incal c. Turquie*, arrêt du 9 juin 1998, Recueil des arrêts et décisions 1998-IV, § 50.

31 *Halis Doğan c. Turquie (n° 3)*, n° 4119/02, § 35, 10 octobre 2006.

32 V. notamment *Erbakan c. Turquie*, précité, § 55.

33 *Ibid.*

34 *Infra.*

buent à aucune forme de débat public capable de favoriser le progrès dans les affaires du genre humain »[35].

◈ Distinction entre déclarations factuelles et jugements de valeur

Selon la Cour, « il y a lieu de distinguer entre déclarations factuelles et jugements de valeur. Si la matérialité des faits peut se prouver, les seconds ne se prêtent pas à une démonstration de leur exactitude. L'exigence voulant que soit établie la vérité de jugements de valeur est irréalisable et porte atteinte à la liberté d'opinion elle-même, élément fondamental du droit garanti par l'article 10. (…) Toutefois, même lorsqu'une déclaration équivaut à un jugement de valeur, elle doit se fonder sur une base factuelle suffisante, faute de quoi elle serait excessive »[36].

Une distinction doit être faite entre déclarations factuelles, dont l'exactitude peut être établie, et jugements de valeur, pour lesquels ce n'est pas possible, mais qui doivent toutefois reposer sur une base factuelle suffisante.

La Cour attache donc une importance particulière à la véracité des propos en question. Elle distingue ainsi entre les questions qui relèvent « d'un débat toujours en cours entre historiens » et les faits « historiques clairement établis »[37]. Alors que pour les premières, le contrôle de la Cour est strict, la contestation de la réalité des seconds est en principe exclue de la protection de l'article 10, dans la mesure où cette contestation vise des objectifs prohibés par l'article 17 de la Convention. Dans la décision *Garaudy*, la Cour souligne qu'« il ne fait aucun doute que contester la réalité de faits historiques clairement établis, tels que l'Holocauste, comme le fait le requérant dans son ouvrage, ne relève en aucune manière d'un travail de recherche historique s'apparentant à une quête de la vérité » ; le requérant ne peut dès lors prétendre à l'invocation de l'article 10. A l'inverse, dans l'arrêt *Incal*, la Cour met l'accent sur le fait que le tract litigieux exposait des « faits avérés présentant un certain intérêt pour l'opinion publique »[38], à savoir les mesures administratives et municipales prises par les autorités, notamment contre les marchands ambulants de la ville d'Izmir, ce qui vient conforter la Cour dans son constat de violation de l'article 10 de la Convention.

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35 *Gündüz c. Turquie*, précité, § 37 ; également *Erbakan c. Turquie*, précité, § 55.

36 *Pedersen et Baadsgaard c. Danemark*, précité, § 76.

37 *Lehideux et Isorni c. France*, précité, § 47.

38 *Incal c. Turquie*, précité, § 50.

iii. Contexte de l'expression en cause

Statut / fonction du requérant dans la société

◈ Le requérant est un homme politique

La marge d'appréciation des Etats est sensiblement plus étroite lorsque le requérant est un homme politique, en raison du caractère fondamental du libre jeu du débat politique dans une société démocratique. Dans l'arrêt *Incal*, qui concernait la condamnation pénale d'un membre du bureau du Parti du travail du peuple du fait de sa contribution à la préparation de tracts, saisis pour propagande séparatiste, la Cour a ainsi réitéré que la liberté d'expression, « précieuse pour chacun », l'est « tout particulièrement pour les partis politiques et leurs membres actifs (…). Ils représentent leurs électeurs, signalent leurs préoccupations et défendent leurs intérêts. Partant, des ingérences dans la liberté d'expression d'un homme politique, membre d'un parti de l'opposition, comme c'est le cas du requérant, commandent à la Cour de se livrer à un contrôle des plus stricts »[39]. Cette liberté ne revêt cependant pas un caractère absolu : la Cour tient à souligner que, la lutte contre toute forme d'intolérance faisant partie intégrante de la protection des droits de l'homme, « il est d'une importance cruciale que les hommes politiques, dans leurs discours publics, évitent de diffuser des propos susceptibles de nourrir l'intolérance »[40]. La Cour se montre donc également exigeante à l'égard des hommes politiques et insiste sur leur responsabilité particulière dans la lutte contre l'intolérance.

◈ Le requérant est un journaliste ou membre de la presse en général

Il convient ici d'opérer une distinction selon que le requérant est auteur des propos litigieux ou intermédiaire dans la diffusion de ces propos, distinction qui entraîne des conséquences variables selon les affaires. Il s'avère en effet que le requérant a parfois été condamné en raison de ses fonctions et de son lien avec la diffusion des propos en question, en tant que journaliste, éditeur, directeur de la rédaction ou propriétaire d'un journal. Dans l'arrêt *Jersild*, la Cour a ainsi clairement distingué entre les propos tenus par les « blou-

39 *Incal c. Turquie*, précité, § 46.

40 *Erbakan c. Turquie*, précité, § 64.

sons verts » et le rôle du journaliste, auteur du reportage qui leur était consacré. Aux yeux de la Cour, cette affaire renfermait « un élément de grand poids : l'intéressé n'a pas proféré les déclarations contestables lui-même, mais a aidé à leur diffusion en sa qualité de journaliste de télévision responsable d'une émission d'actualités »[41]. S'appuyant sur la fonction de journaliste du requérant, la Cour va appliquer les principes relatifs à la liberté de la presse, conférant une marge d'appréciation restreinte aux autorités nationales. La Cour ne va toutefois pas donner le même poids à cette distinction dans l'affaire *Sürek*, où le requérant avait été condamné en tant que propriétaire d'une revue qui avait fait paraître deux lettres, dans le courrier des lecteurs, critiquant de manière virulente les actions militaires des autorités dans le Sud-est de la Turquie. Dans cet arrêt, la Cour estime que « s'il est vrai que le requérant ne s'est pas personnellement associé aux opinions exprimées dans les lettres, il n'en a pas moins fourni à leurs auteurs un support pour attiser la violence et la haine »[42]. Pour la Cour, le requérant avait, en tant que propriétaire de la revue, « le pouvoir de lui imprimer une ligne éditoriale » et il partageait par conséquent « indirectement les 'devoirs et responsabilités' qu'assument les rédacteurs et journalistes lors de la collecte et de la diffusion d'informations auprès du public, rôle qui revêt une importance accrue en situation de conflit et de tension »[43].

La Cour tient compte du fait que le journaliste soit auteur des propos litigieux ou intermédiaire dans leur diffusion pour déterminer dans quelle mesure l'Etat pouvait restreindre sa liberté d'expression.

◆ Le requérant est un fonctionnaire

La Cour octroie une marge d'appréciation substantielle aux Etats lorsque des restrictions à la liberté d'expression des fonctionnaires, ou des personnes qui leur sont assimilées, sont en cause. Dans l'affaire *Seurot*, elle a ainsi accordé une attention particulière au statut d'enseignant – « au demeurant en histoire » – du requérant, auteur d'un texte insultant envers les maghrébins et publié dans le bulletin d'in-

41 *Jersild c. Danemark*, précité, § 31.

42 *Sürek c. Turquie*, précité, § 63. V. également *Halis Doğan c. Turquie* (n° 3), précité, § 36.

43 *Sürek c. Turquie*, précité, § 63. Dans son opinion en partie dissidente, Mme la Juge Palm considère au contraire que le requérant n'était pas directement responsable de la publication du courrier des lecteurs : elle souligne ainsi le fait qu'il « n'était que l'actionnaire principal de la revue ; il n'était ni l'auteur des lettres incriminées ni même le rédacteur en chef de la revue chargé de la sélection des articles à publier ».

formation de son établissement scolaire. La Cour rappelle à cette occasion les « devoirs et responsabilités particuliers » qui incombent aux enseignants, « ceux-ci étant symbole d'autorité pour leurs élèves dans le domaine de l'éducation »[44]. La Cour en profite pour préciser que l'« éducation à la citoyenneté démocratique, indispensable pour lutter contre le racisme et la xénophobie, suppose la mobilisation d'acteurs responsables, notamment des enseignants »[45].

Statut des personnes visées par l'expression en cause

La Cour tient compte du statut de la victime de l'expression d'une opinion. De façon générale, elle considère que « les limites de la critique admissible sont plus larges à l'égard d'un **homme politique**, visé en cette qualité, que d'un **simple particulier** : à la différence du second, le premier s'expose inévitablement et consciemment à un contrôle attentif de ses faits et gestes tant par les journalistes que par la masse des citoyens ; il doit, par conséquent, montrer une plus grande tolérance »[46]. Ceci est d'autant plus vrai si les critiques visent le **gouvernement**, dans la mesure où, dans un système démocratique, « ses actions ou omissions doivent se trouver placées sous le contrôle attentif non seulement des pouvoirs législatif et judiciaire, mais aussi de la presse et de l'opinion publique. En outre, la position dominante qu'il occupe lui commande de témoigner de retenue dans l'usage de la voie pénale, surtout s'il a d'autres moyens de répondre aux attaques et critiques injustifiées de ses adversaires ou des médias »[47].

En revanche, les limites de la critique admissible apparaissent plus étroites s'agissant de critiques dirigées contre des **fonctionnaires**. Dans l'affaire *Pedersen et Baadsgaard*[48],

44 *Seurot c. France*, précitée.

45 *Ibid*. V. sur ce point la Recommandation du Comité des ministres Rec(2002)12 relative à l'éducation à la citoyenneté démocratique, qui rappelle qu'une telle éducation, tout au long de la vie et à chaque niveau de scolarité (primaire, secondaire, supérieur, formation des adultes), « est une composante majeure de la mission première du Conseil de l'Europe, qui est de promouvoir une société libre, tolérante et juste ».

46 *Lingens c. Autriche*, précité, § 42, mais voir aussi *Lindon et autres c. France*, précité, S 57-58.

47 *Castells c. Espagne*, nº 11798/85 arrêt du 23 avril 1992, série A nº 236, § 46.

48 *Pedersen et Baadsgaard c. Danemark*, précité, § 80.

la Cour a ainsi estimé que, bien qu'un officier de police de haut grade doive tolérer un niveau plus élevé de critique qu'un quelconque individu, il ne peut pas être mis sur un pied d'égalité avec les politiciens lorsqu'il s'agit de débats publics portant sur son action professionnelle.

La Cour a également inclus dans son évaluation **le comportement** de la personne visée préalablement à l'expression de l'opinion dont elle a été victime. A titre d'exemple, dans l'affaire *Nilsen et Johnsen*,[49] elle a estimé que le fait que la partie défenderesse ait dépassé l'exercice de ses fonctions d'expert gouvernemental, en participant à un débat public et en publiant un livre critiquant sévèrement les méthodes de travail de la police, était un élément important.

Diffusion et impact potentiel de l'expression en cause

L'impact potentiel du moyen d'expression utilisé constitue un facteur important auquel il est fait référence dans la jurisprudence de la Cour européenne. Afin de mesurer l'influence éventuelle d'un discours, la Cour se réfère en particulier à la forme d'expression employée et au support utilisé pour sa diffusion, mais également au cadre dans lequel cette diffusion a eu lieu.

- **Presse écrite**

Eu égard à l'importance particulière accordée à la liberté de la presse et au rôle essentiel des publications dans une société démocratique, la Cour opère en la matière un contrôle très strict.

Dans l'arrêt *Halis Doğan*, la Cour rappelle ainsi que « si toute publication ne doit pas franchir les bornes fixées en vue, notamment, de la protection des intérêts vitaux de l'Etat, telles la sécurité nationale ou l'intégrité territoriale, contre la menace du terrorisme, ou en vue de la défense de l'ordre ou de la prévention du crime, il lui incombe néanmoins de communiquer des informations et des idées sur des questions politiques, y compris sur celles qui divisent l'opinion. A sa fonction qui consiste à en diffuser s'ajoute le droit, pour le public, d'en recevoir. La liberté de recevoir des informations ou des idées fournit à l'opinion publique

49 *Nilsen et Johnsen c. Norvège* [GC], n° 23118/93, § 52, CEDH 1999-VIII.

l'un des meilleurs moyens de connaître et juger les idées et attitudes des dirigeants »[50].

◈ Médias audiovisuels

Pour évaluer l'impact potentiel d'un discours litigieux, la Cour tient compte notamment du support utilisé pour sa diffusion (presse écrite, médias audiovisuels ou œuvres d'art).

Bien que les principes relatifs à la liberté de la presse aient d'abord été formulés pour la presse écrite, « ces principes s'appliquent à n'en pas douter aux moyens audiovisuels »[51]. En conséquence, l'importance particulière accordée au rôle de la presse se trouve encore accrue lorsque des médias audiovisuels sont en cause.

En particulier, la Cour souligne, dans l'arrêt *Jersild*, que « les médias audiovisuels ont des effets souvent beaucoup plus immédiats et puissants que la presse écrite (…). Par les images, les médias audiovisuels peuvent transmettre des messages que l'écrit n'est pas apte à faire passer »[52]. Dès lors que des médias audiovisuels sont en jeu, la Cour aura alors égard au format des émissions au cours desquelles les propos litigieux ont été diffusés, afin d'apprécier l'impact probable du sujet de l'émission sur le public. La Cour relève ainsi que, dans l'affaire *Jersild*, le sujet « fut projeté dans le cadre d'une émission d'actualités danoises sérieuse et était destiné à un public bien informé »[53] et était précédé d'une introduction par le présentateur de l'émission, se référant aux récents débat public et commentaires de la presse sur le racisme au Danemark. La Cour en déduit que tant « l'introduction du présentateur de télévision que le comportement du requérant au cours des entretiens démarquèrent clairement celui-ci des personnes interrogées »[54]. Ces précautions n'ont toutefois pas été jugées suffisantes pour les juges de la minorité, qui déplorent l'absence d'une « déclaration claire de réprobation »[55] des propos racistes tenus par les personnes interrogées.

D'autre part, dans l'arrêt *Gündüz*, la Cour insiste sur le fait que le requérant participait activement à une « discus-

50 *Halis Doğan c. Turquie (n° 3)*, précité, § 32.

51 *Jersild c. Danemark*, précité, § 31.

52 *Ibid.*

53 *Ibid.*, § 34.

54 *Ibid.*

55 Opinion dissidente commune aux Juges Ryssdal, Bernhardt, Spielmann et Loizou, § 3.

sion publique animée » : les propos tenus par le requérant avaient pu être contrebalancés par les interventions des autres participants au cours de l'émission en question et ses idées étaient exprimées dans le cadre d'un débat pluraliste. Pour justifier certains propos tenus par le requérant qui peuvent passer pour insultants, la Cour relève qu'« il s'agissait de déclarations orales faites lors d'une émission télévisée en direct, ce qui a ôté la possibilité au requérant de les reformuler, de les parfaire ou de les retirer avant qu'elles ne soient rendues publiques »[56].

◈ Formes d'expression artistique

Selon la Cour, l'impact potentiel est beaucoup moins important dans les formes d'expression artistique, telles des **poèmes**, que dans les mass médias, les poèmes n'étant par nature accessibles qu'à un groupe restreint d'individus. Dans l'arrêt *Karataş*, s'agissant de poèmes, la Cour relève que « ces textes constituent une forme d'expression artistique qui s'adresse à une minorité de lecteurs qui y sont sensibles »[57]. Ceci constitue « une limite notable à leur impact potentiel sur la 'sécurité nationale', l' 'ordre public' ou l' 'intégrité territoriale' »[58]. Dans cette affaire, la Cour est parvenue à la conclusion que le requérant concerné n'avait pas pour intention d'appeler à la révolte ni à la violence, mais souhaitait seulement exprimer sa profonde détresse face à la situation politique.

Par ailleurs, la Cour a souligné que la **satire** constitue une forme d'expression artistique et de commentaire social qui, par l'exagération et la distorsion de la réalité, revêt un caractère délibérément provocateur. Aussi toute atteinte au droit d'un artiste à recourir à pareil mode d'expression doit-elle être examinée avec un soin particulier[59].

◈ Lieu de diffusion

La situation particulière de la région et le lieu dans lesquels les propos ont été tenus ou diffusés ont également leur importance. A plusieurs reprises, la Cour s'est réfé-

56 *Gündüz c. Turquie*, précité, § 49.

57 *Karataş c. Turquie* [GC], nº 23168/94, § 49, CEDH 1999-IV.

58 *Ibid.*, § 52.

59 *Vereinigung Bildender Künstler c. Autriche*, nº 68354/01, § 33, 25 janvier 2007.

rée aux « difficultés liées à la lutte contre le terrorisme », pour conférer une marge d'appréciation plus large à l'Etat impliqué dans une telle lutte, en l'occurrence la Turquie. Par ailleurs, dans l'affaire *Seurot*, le risque avéré de diffusion du texte litigieux au sein d'un établissement scolaire amène un contrôle plus strict de la part de la Cour.

Nature et gravité de l'ingérence

Selon la Cour, la nature et la lourdeur des peines infligées sont aussi des éléments à prendre en considération lorsqu'il s'agit de mesurer la proportionnalité de l'ingérence au but poursuivi. Il s'avère toutefois que ce paramètre n'est pas toujours déterminant mais bien plutôt accessoire puisque, à l'occasion, la Cour se dispense d'examiner cet élément, ou ne l'évoque que brièvement ou partiellement, parvenant à un constat de violation au vu des autres éléments de l'affaire. Dans l'arrêt *Gündüz* par exemple, la Cour estime que le constat auquel elle vient de parvenir, à savoir que l'atteinte portée au droit à la liberté d'expression du requérant ne se fondait pas sur des motifs suffisants au regard de l'article 10, la dispense « de poursuivre son examen pour rechercher si la sanction de deux ans d'emprisonnement infligée au requérant, qui revêtait une sévérité extrême même avec la possibilité de libération conditionnelle qu'offre le droit turc, était proportionnée au but visé »[60]. Dans l'arrêt *Jersild*, le faible montant de l'amende infligée au requérant n'entre pas en ligne de compte : aux yeux de la Cour « ce qui importe, c'est que le journaliste a été condamné »[61].

Il arrive cependant que ce facteur apparaisse essentiel dans la conclusion à laquelle parvient la Cour. C'est ainsi qu'elle peut considérer que, bien que la restriction du droit à la liberté d'expression était nécessaire dans son principe, la sanction infligée est disproportionnée et emporte par conséquent violation de l'article 10 CEDH. Plusieurs éléments entrent ici en ligne de compte.

La nature et la lourdeur des peines infligées sont des éléments que la Cour peut prendre en compte pour mesurer la proportionnalité d'une ingérence dans la liberté d'expression au but poursuivi.

- **Nature des sanctions**

De manière générale, la Cour prend en compte l'importance et la nature des mesures constitutives d'une ingérence dans la liberté d'expression. Dans l'arrêt *Incal*, la condamnation

60 *Gündüz c. Turquie*, précité, § 54.

61 *Jersild c. Danemark*, précité, § 35.

du requérant à diverses peines, dont une interdiction d'accès à la fonction publique et l'exercice de plusieurs activités politiques, associatives et syndicales, alors qu'il s'agissait d'un membre du bureau d'un parti de l'opposition, est jugée disproportionnée au but visé et, partant, non nécessaire dans une société démocratique. Par contre, la résiliation du contrat d'un enseignant dans un collège privé n'a pas été jugée disproportionnée par la Cour, en dépit de sa gravité, eu égard aux autres circonstances de l'affaire[62].

Le Cour opère un contrôle particulièrement strict lorsqu'une **peine d'emprisonnement** est en cause. Dans l'arrêt *Erbakan*, la Cour note, qu'outre sa condamnation à une amende, le requérant s'est vu infliger une peine d'un an d'emprisonnement, assortie de l'interdiction d'exercer plusieurs droits civils et politiques. Pour la Cour, « il s'agissait là assurément de sanctions très sévères pour un homme politique notoire »[63]. La Cour ajoute qu'il « convient en particulier de noter que, par sa nature même, une telle sanction produit immanquablement un effet dissuasif, et le fait que le requérant n'a pas exécuté la sienne ne saurait rien changer à cette conclusion »[64]. De même, dans l'arrêt *Karataş*, la Cour est « frappée par la sévérité de la peine infligée au requérant – plus de treize mois d'emprisonnement notamment – et par l'insistance des poursuites à son égard »[65], dans la mesure où l'amende prononcée à l'encontre du requérant fut plus que doublée à la suite de l'entrée en vigueur d'une nouvelle loi.

La condamnation au versement d'une **amende**, y compris lorsque celle-ci se limite à une somme symbolique, ou de dommages intérêts, peut être jugée comme une sanction excessive par la Cour à partir du moment ou cette condamnation entraîne un effet dissuasif pour l'exercice de la liberté d'expression.

Enfin, une **restriction préalable** appelle un examen en principe scrupuleux de la part de la Cour[66]. Elle estime en effet qu'une telle restriction présente un danger particulier,

62 *Seurot c. France*, précitée.

63 *Erbakan c. Turquie*, précité, § 69.

64 *Ibid.*

65 *Karataş c. Turquie*, précité, § 53.

66 *Observer et Guardian c. Royaume-Uni*, précité,§ 60.

en ce qu'elle empêche la transmission d'informations et d'idées *ex ante*. Pour la Cour, « il en va spécialement ainsi dans le cas de la presse: l'information est un bien périssable et en retarder la publication, même pour une brève période, risque fort de la priver de toute valeur et de tout intérêt »[67].

◈ **Existence de moyens alternatifs**

Pour apprécier la proportionnalité de la sanction, la Cour peut prendre en compte l'existence de moyens alternatifs à cette sanction et qui seraient moins attentatoires à la liberté d'expression. Dans l'arrêt *Lehideux et Isorni*, la Cour, insistant sur « la gravité d'une condamnation pénale pour apologie des crimes ou délits de collaboration », se réfère à « l'existence d'autres moyens d'intervention et de réfutation, notamment par les voies de droit civiles »[68] avant de conclure que la condamnation pénale subie par les requérants était disproportionnée, eu égard aux buts poursuivis. Dans le même ordre d'idée, la Cour va estimer, dans l'arrêt *Incal*, que les autorités auraient pu exiger la modification du tract litigieux, dans la mesure où une demande d'autorisation préalable à sa diffusion avait été déposée à la préfecture, avant d'avoir recours à une sanction pénale. A défaut, la Cour relève la radicalité de l'ingérence litigieuse et souligne que « son aspect préventif soulève à lui seul des problèmes sur le terrain de l'article 10 »[69].

◈ **Nécessité de cohérence dans l'attitude des Etats**

La Cour exige de la part des Etats une certaine cohérence dans les restrictions imposées. Les autorités nationales ne peuvent en effet pas sanctionner des propos ou des activités qu'elles ont antérieurement autorisées, ou du moins tolérées. Dans l'affaire *Erbakan*, la Cour n'admet en conséquence pas que des poursuites pénales soient engagées quatre ans et cinq mois après la diffusion des propos incriminés : ceci ne représente pas un moyen raisonnablement propor-

67 *Ibid.*

68 *Lehideux et Isorni c. France*, précité, § 57. Dans leur opinion dissidente commune, les Juges Foighel, Loizou et Sir John Freeland notent pour leur part, sur la question de la proportionnalité, que la sanction se limitait au paiement d'un franc symbolique aux associations qui s'étaient constituées parties civiles et à la publication dans *Le Monde* d'extraits de l'arrêt les condamnant (§ 7).

69 *Incal c. Turquie*, précité, § 56.

tionné aux buts légitimes visés. La Cour semble donc mettre à la charge des Etats contractants une certaine obligation de diligence dans l'engagement des poursuites pénales. Le raisonnement de la Cour dans l'arrêt *Lehideux et Isorni* semble procéder de la même idée, lorsqu'elle fait référence au fait que la publication litigieuse se situait dans le droit fil de l'objet des associations que dirigeaient les requérants, associations qui avaient par ailleurs été légalement constituées et qui n'avaient jamais fait l'objet de poursuites en raison de cet objet[70].

70 *Lehideux et Isorni c. France*, précité, § 56.

Cas pratique nº 2

Faits

L'Etat d'Amarland est membre du Conseil de l'Europe et partie à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales depuis 1990.

M. John Lagart, ressortissant de cet Etat, était, à l'époque des faits, rédacteur en chef du journal *La voix d'Amarland*, un quotidien local, diffusé dans le Nord du pays à environ 10000 exemplaires. Il publia, à la page 10 du numéro 275 de ce journal paru le 16 juin 2006, deux caricatures mettant en scène la minorité ***amye***, présente dans le Nord : ces caricatures critiquaient la politique « d'assimilation » menée par le Gouvernement dans cette région et décrivaient la manière dont certaines mesures récemment mises en œuvre par le Gouvernement avaient pour effet de « museler » les membres de cette minorité, jugés trop revendicatifs. La minorité ***amye*** est en effet connue pour sa volonté d'autonomie, certains groupes autonomistes ayant déjà eu recours ou appelé à la violence afin de défendre leurs idées.

Par un acte du 28 juin 2006, le procureur de la République près la cour de première instance, en vertu du code pénal amarlandien, inculpa le requérant d'incitation du peuple à la haine sur la base d'une distinction fondée sur l'appartenance à une race, du fait de la publication des deux caricatures. M. Lagart n'ayant pas déclaré l'identité de l'auteur des caricatures, il a en outre été fait application de la règle de droit interne, en vertu de laquelle la responsabilité concernant les articles ou caricatures dont l'identité de l'auteur est inconnue et non déclarée par le rédacteur en chef incombe audit rédacteur en chef, comme s'il en était lui-même l'auteur.

Par un arrêt du 6 décembre 2006, la cour de première instance condamna M. Lagart à une peine de prison de deux ans et à payer une amende de 1800 euros. Elle décida également d'interdire la parution du journal pendant une semaine. M. Lagart se pourvut en cassation contre cette condamnation. Dans les motifs de son pourvoi, il mentionna l'article 10 de la Convention européenne des droits de l'homme. Par un arrêt du 21 septembre 2007, la Cour de cassation débouta le requérant de sa demande et confirma l'arrêt rendu en première instance.

En conséquence, M. Lagart a saisi la Cour européenne, en vertu de l'article 34 CEDH, d'une requête dirigée contre l'Etat d'Amarland le 18 octobre 2007.

Solution envisageable

A la lumière de la jurisprudence de la Cour européenne des droits de l'homme et des principes généraux applicables en matière de liberté d'expression, la condamnation litigieuse constitue sans nul doute une ingérence dans le droit du requérant à la liberté d'expression, protégé par l'article 10 § 1. Cette ingérence était prévue par la loi et poursuivait un but légitime, à savoir la protection de la sécurité et de l'ordre publiques (protection de l'intégrité territoriale) au sens de l'article 10 § 2. Mais était-elle « nécessaire dans une société démocratique » ?

Facteurs à prendre en considération

Il faut porter une attention particulière au contenu des caricatures ainsi qu'au contexte dans lequel elles ont été publiées. A cet égard, il faut ici tenir compte :

- du contenu : critique certes virulente, mais s'agit-il d'un « discours de haine » ? L'expression en cause constitue-t-elle une incitation à la violence à l'encontre d'individus, de groupes d'individus ou d'une partie de la population ? On peut en douter. Une caricature a certes un impact en général plus fort qu'un texte, surtout dans la région concernée, mais le trait est volontairement exagéré, s'agissant de caricatures.
- des circonstances entourant le cas, en particulier la menace « séparatiste »
- du requérant : rédacteur en chef, et non directement auteur des caricatures
- de la diffusion du journal
- de la condamnation (nature et lourdeur des peines infligées) : peine de prison, amende et suspension de la diffusion du journal pour une semaine. Cela semble assez sévère en l'espèce.

Conclusion

Il ressort de l'ensemble de ces éléments que la condamnation semble disproportionnée au but poursuivi et non nécessaire dans une société démocratique. La condamnation constituerait donc une violation de l'article 10 CEDH.

Comp. : *Ergin c. Turquie (n° 3)*, n° 50691/99, 16 juin 2005.

(c) Cas particulier des attaques contre des convictions religieuses

Les facteurs précédents n'interviennent pas ou très peu dans les affaires liées à l'expression d'opinion de nature religieuse.

La Cour a énoncé à plusieurs reprises que « ceux qui choisissent d'exercer la liberté de manifester leur religion, qu'ils appartiennent à une majorité ou à une minorité religieuse, ne peuvent raisonnablement s'attendre à le faire à l'abri de toute critique. Ils doivent tolérer et accepter le rejet par autrui de leurs croyances religieuses et même la propagation par autrui de doctrines hostiles à leur foi »[71]. Cependant, dans le cas d'attaques jugées offensantes et concernant des questions considérées comme sacrées par les croyants, la Cour reconnaît la possibilité pour les Etats d'adopter des mesures restrictives de la liberté d'expression. A cet égard, elle considère que les sentiments religieux d'autrui constituent sans nul doute des « droits d'autrui » au sens de l'article 10 § 2 de la Convention.

C'est par une affirmation de principe que la Cour européenne s'est positionnée en faveur de la reconnaissance d'une large marge d'appréciation aux Etats contractants, dès lors que des attaques contre des convictions religieuses sont en jeu :

> « L'absence de conception uniforme, dans les pays européens, des exigences afférentes à la protection des droits d'autrui s'agissant des attaques contre des convictions religieuses élargit la marge d'appréciation des États contractants lorsqu'ils réglementent la liberté d'expression dans des domaines susceptibles d'offenser des convictions personnelles intimes relevant de la morale ou de la religion »[72].

71 *Otto Preminger Institut c. Autriche,* nº 13470/87 arrêt du 20 septembre 1994, série A nº 295-A, § 47.

72 Cette formule se retrouve dans plusieurs arrêts, avec une variante dans l'arrêt *Murphy c. Irlande*, qui précise : « Il n'existe apparemment pas de conception uniforme des exigences afférentes à 'la protection des droits d'autrui' dans le contexte de la réglementation de la diffusion des annonces à caractère religieux » (*Murphy c. Irlande*, nº 44179/98, § 81, CEDH 2003-IX).

La Cour reprend ici la logique déjà adoptée dans le domaine de la morale, où l'absence de « dénominateur commun » l'avait conduite à reconnaître aux Etats une marge d'appréciation substantielle. En l'espèce, la Cour justifie l'existence d'une importante marge d'appréciation en arguant de l'impossibilité « d'arriver à une définition exhaustive de ce qui constitue une atteinte admissible au droit à la liberté d'expression lorsque celui-ci s'exerce contre les sentiments religieux d'autrui ». La Cour insiste ici sur la grande diversité des conceptions liées à la religion[73], semblables conceptions pouvant même varier au sein d'un seul pays[74].

La Cour européenne admet qu'un Etat puisse adopter des mesures restreignant la liberté d'expression lorsque des propos sur des croyances religieuses sont gratuitement offensants, injurieux envers les croyants, portent atteinte au droit de ces derniers d'exprimer leur religion, ou incitent à la haine ou la violence à leur égard.

Ce facteur de diversité explique que la Cour n'accorde que peu de poids aux autres éléments de l'affaire et abandonne entièrement l'évaluation de la situation générale à l'Etat défendeur. Elle estime en effet que les autorités nationales « se trouvent en principe mieux placées que le juge international pour se prononcer sur le contenu précis de ces exigences »[75]. Cette large marge d'appréciation amène la Cour à mettre l'accent sur le contexte particulier des affaires soumises à son examen.

Par conséquent, dans la majorité des affaires relatives à des attaques contre des convictions religieuses soumises à la Cour, celle-ci a conclu à la non violation de l'article 10, jugeant l'ingérence nécessaire à la protection des droits d'autrui, en raison de la très large marge d'appréciation octroyée aux Etats en la matière. Elle a ainsi jugé que :

- le respect des sentiments religieux des croyants, tel qu'il est garanti à l'article 9 de la Convention, pouvait être violé par des représentations provocatrices d'objets de vénération religieuse, ajoutant que « de telles représentations peuvent passer pour une violation malveillante de l'esprit de tolérance, qui doit aussi caractériser une société démocratique »[76] ;

73 Dans l'arrêt *Wingrove c. Royaume-Uni*, la Cour note à cet égard que « ce qui est de nature à offenser gravement des personnes d'une certaine croyance religieuse varie fort dans le temps et dans l'espace, spécialement à notre époque caractérisée par une multiplicité croissante de croyances et de confessions » (précité, § 58).

74 *Otto Preminger Institut c. Autriche*, précité, § 50.

75 *Wingrove c. Royaume-Uni*, précité, § 58.

76 *Otto Preminger Institut c. Autriche,* précité, § 47.

- le seuil élevé de profanation incluse dans la définition du délit de blasphème en droit anglais constituait une garantie[77], l'ampleur de l'insulte aux sentiments religieux devant être importante pour entraîner une condamnation pour blasphème ;
- lorsqu'il ne s'agit pas seulement de propos qui heurtent ou qui choquent, ou d'une opinion « provocatrice », mais aussi d'une attaque injurieuse contre la personne du Prophète de l'Islam, les croyants peuvent légitimement se sentir attaqués, de manière injustifiée et offensante, par la critique des dogmes religieux[78].

A l'inverse, dans certaines affaires, la marge d'appréciation des Etats devient plus étroite, aboutissant à des constats de violation de l'article 10 CEDH :

- dans l'arrêt *Giniewski*, l'accent est mis sur l'importance de la liberté de la presse et du débat sur les questions d'intérêt général. La Cour ne se place donc pas sur le terrain des attaques contre des convictions religieuses[79], bien que l'article litigieux mette en cause certains principes de la religion catholique, mais estime que cet article participait à une réflexion que le requérant a voulu exprimer en tant que journaliste et historien, au sujet d'une question relevant incontestablement de l'intérêt général dans une société démocratique, à savoir les diverses causes possibles de l'extermination des Juifs en Europe. La Cour souligne par ailleurs que l'article rédigé par le requérant n'avait aucun caractère gratuitement offensant ni injurieux et qu'il n'incitait ni à l'irrespect ni à la haine[80] ;
- dans l'arrêt *Aydın Tatlav*, l'absence de cohérence dans l'attitude de l'Etat, qui engage des poursuites à l'occasion de la cinquième réédition d'un ouvrage alors qu'il avait autorisé les quatre premières, semble emporter la conviction de la Cour. En outre, la Cour « n'observe pas, dans les propos litigieux, un ton insultant visant directement la personne des croyants,

77 *Wingrove c. Royaume-Uni*, précité, § 60.

78 *I.A. c. Turquie*, nº 42571/98, § 29, CEDH 2005-VIII .

79 *Giniewski c. France*, nº 64016/00, § 51, 31 janvier 2006 : « l'analyse de l'article litigieux montre qu'il ne s'agit pas d'un texte comportant des attaques contre des convictions religieuses en tant que telles ».

80 *Giniewski c. France*, ibid.,§ 52.

ni une attaque injurieuse pour des symboles sacrés, notamment des Musulmans, même si, à la lecture du livre, ceux-là pourront certes se sentir offusqués par ce commentaire quelque peu caustique de leur religion »[81] ;

- dans l'arrêt *Klein*, la Cour a conclu que la Slovaquie avait violé l'article 10 pour avoir condamné un journaliste, auteur d'un article qui critiquait un archevêque pour avoir proposé sur une chaîne de télévision d'interdire la distribution du film « *Larry Flint* », de même que l'affiche promotionnelle de celui-ci. La Cour est d'avis que l'article en question n'avait « ni porté atteinte au droit des croyants d'exprimer et de pratiquer leur religion, ni dénigré leur foi » : la Cour considère que les termes forts employés ne concernaient que l'archevêque et que le requérant, dans son article, « n'a pas discrédité et rabaissé une partie de la population en raison de sa foi catholique », même si, par ses critiques, le journaliste a pu offenser des fidèles[82] ;
- enfin, la Cour a jugé dans l'arrêt *Nur Radyo Ve Televizyon* que certains propos « si choquants et offensants qu'ils puissent être » pouvaient être admis à partir du moment où « ils n'incitent nullement à la violence et ne sont pas de nature à fomenter la haine contre les personnes qui ne seraient pas membres de la communauté religieuse en question »[83], et ce en dépit du caractère prosélytique, « de nature à insuffler superstition, intolérance et obscurantisme »[84], des propos en question, qui attribuaient une signification religieuse à un tremblement de terre.

Ainsi, même dans le contexte de croyances religieuses, la Cour admet des expressions « **choquantes** » et « **offensantes** », à condition toutefois que :

- **ces expressions ne sont pas gratuitement offensantes ;**
- **le ton insultant ne vise pas directement la personne des croyants ;**

81 *Aydın Tatlav c. Turquie*, précité, § 28.

82 *Klein c. Slovaquie*, n° 72208/01, § 52, 31 octobre 2006.

83 *Nur Radyo Ve Televizyon Yayıncılığı A.Ş. c. Turquie*, n° 6587/03, § 30, 27 novembre 2007.

84 *Ibid.*

- **ces expressions ne sont injurieuses ni pour les croyants, ni pour des symboles sacrés ;**
- **elles ne portent pas atteinte au droit des croyants d'exprimer et de pratiquer leur religion et ne dénigrent pas leur foi ;**
- **surtout, elles n'incitent ni à l'irrespect ni à la haine ou à la violence.**

Cas pratique nº 3

Faits

L'Etat de Micronie est membre du Conseil de l'Europe et partie à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales depuis 1998.

La *Micronie Art Gallery* est une galerie d'art indépendante figurant parmi les plus connues de Micronie. Elle est située dans un quartier populaire de la capitale, où vit une population très religieuse, et se consacre exclusivement à des expositions d'art contemporain. Elle est gérée par le biais d'une association, l'association *Micron'Art*.

Dans le cadre des célébrations de son dixième anniversaire, cette association organisa, du 2 mai au 21 juin 2000, une rétrospective des peintres les plus célèbres de Micronie. Parmi les œuvres exposées figuraient des tableaux prêtés par le peintre Leonard D.

Plusieurs de ces tableaux ont suscité une grande controverse en Micronie, dans la mesure où certaines œuvres érotiques du peintre, figure majeure du surréalisme, pouvaient choquer la population fortement religieuse du quartier populaire où est installée la galerie d'art. Ces tableaux mettaient en effet en scène plusieurs personnages religieux, dans des postures sexuelles non équivoques.

Une association du quartier, trouvant ces tableaux « sulfureux » et évoquant le fait qu'il apparaissait mal placé de les exposer à la *Micronie Art Gallery*, étant donné que le quartier abrite des populations très croyantes, organisa plusieurs manifestations devant la galerie pour demander le retrait de ces tableaux, sans succès.

Le 15 juin 2000, l'association de quartier attaqua en conséquence l'association *Micron'Art* sur le fondement de la loi sur les droits d'auteur de Micronie, sollicitant une ordonnance faisant interdiction à l'association d'exposer les tableaux en question. Alors que le tribunal de première instance rejeta cette action, la cour d'appel estima que les tableaux revêtaient un caractère offensant et délivra une injonction faisant interdiction à l'association de montrer trois de ces tableaux dans l'exposition en question de cette galerie aux dates prévues. L'association *Micron'Art* interjeta vainement appel de cette décision : le pourvoi en cassation fut rejeté le 1er février 2006.

En conséquence, l'association *Micron'Art* a saisi la Cour européenne, en vertu de l'article 34 CEDH, d'une requête dirigée contre la Micronie le 11 février 2006.

Solution envisageable

Cette affaire touche indéniablement au droit à la liberté d'expression artistique, qui est couvert par l'article 10 CEDH. L'interdiction faite à l'association requérante d'exposer les tableaux litigieux s'analyse sans nul doute en une atteinte au droit à la liberté d'expression de l'intéressée. En outre, cette atteinte était « prévue par la loi » et poursuivait le but légitime que constitue la « protection des droits d'autrui », plus précisément la protection des sentiments religieux d'autrui.

En ce qui concerne la nécessité de l'ingérence, plusieurs éléments sont à prendre en considération :

– la nature et la gravité de l'ingérence : l'injonction des tribunaux micronésiens est limitée dans le temps et dans l'espace. Elle n'interdit à l'association requérante d'exposer trois tableaux litigieux que dans un endroit déterminé, sans préjuger d'une exposition potentielle dans le futur.
– de plus, eu égard au contexte de croyances religieuses dans lequel s'inscrit cette affaire, il est probable que la Cour accorde à l'Etat défendeur une très large marge d'appréciation : les tableaux peuvent constituer des attaques gravement offensantes concernant des questions considérées comme sacrées pour les croyants.
– en outre, une attention particulière peut être accordée au contexte de l'affaire : la religion mise en scène dans les tableaux litigieux est celle de l'immense majorité des habitants du quartier.

Conclusion

Si la Cour choisit de se placer sur le terrain de la protection des sentiments religieux d'autrui, et eu égard au caractère limité de l'ingérence, elle conclurait probablement que l'injonction litigieuse était proportionnée au but poursuivi et donc nécessaire dans une société démocratique. En conséquence, il y aurait non violation de l'article 10 CEDH.

Comp. : *Müller et autres c. Suisse*, arrêt du 24 mai 1988, série A nº 133. Vereinigung Bildender Künstler c. Autriche, no 68354/01, CEDH 2007-...

Wingrove c. Royaume-Uni, arrêt du 25 novembre 1996, Recueil des arrêts et décisions 1996-V

IV. Facteurs tirés d'autres sources

D'autres organes internationaux ou régionaux, en particulier le Comité des droits de l'homme, le Comité pour l'élimination de la discrimination raciale et l'ECRI, ont eu à se pencher sur les limites du droit à la liberté d'expression en matière de « discours de haine », précisant certains facteurs d'identification de ce type de discours.

But de l'expression

- Dans sa décision *Faurisson c. France*, le Comité des droits de l'homme a conclu que la restriction imposée à la liberté d'expression de l'auteur, condamné sur le fondement de la « loi Gayssot » pour des propos négationnistes, était permise en vertu du paragraphe 3 a) de l'article 19 du Pacte international relatif aux droits civils et politiques. Pour ce faire, le Comité a souligné que « les propos tenus par l'auteur, replacés dans leur contexte intégral, étaient **de nature à faire naître ou à attiser des sentiments antisémites** » et que en conséquence « la restriction visait à faire respecter le droit de la communauté juive de ne pas craindre de vivre dans un climat d'antisémitisme »[85].
- Cette affirmation a été reprise par le Comité des droits de l'homme dans l'affaire *Malcolm Ross c. Canada* : après avoir rappelé que « les droits ou la réputation d'autrui pour la protection desquels des restrictions peuvent être autorisées en vertu de l'article 19 peuvent être les droits ou la réputation d'autrui ou de la communauté dans son ensemble », le Comité réaffirme que « des restrictions peuvent être autorisées à l'égard de déclarations qui sont de nature à susciter ou à renforcer un sentiment antisémite, afin de préserver le droit des communautés juives d'être protégées contre la haine religieuse »[86].

Le Comité des droits de l'homme estime que des restrictions à la liberté d'expression peuvent être autorisées et même nécessaires lorsque des propos incitent à la haine raciale ou religieuse.

85 Comité des droits de l'homme, *Faurisson c. France*, Communication n° 550/1993, 8 novembre 1996, § 9.6.

86 Comité des droits de l'homme, *Malcolm Ross c. Canada*, Communication n° 736/1997, 18 octobre 2000, § 11.5.

Contenu de l'expression

Les discours constitutifs d'une incitation à la haine sont unanimement condamnés par les organes de contrôle internationaux et ne sont pas couverts par la liberté d'expression. C'est ce que rappelle par exemple le Comité des droits de l'homme : dans sa décision *J. R. T. et W. G. Party c. Canada*, il déclare une communication, relative à la diffusion de messages antisémites par téléphone, irrecevable pour incompatibilité *ratione materiae* avec les dispositions du Pacte international relatif aux droits civils et politiques, en se fondant sur le fait que « les opinions que M. T. cherche à diffuser par téléphone constituent nettement **une incitation à la haine raciale ou religieuse**, que le Canada est tenu d'interdire en vertu du paragraphe 2 de l'article 20 du Pacte »[87].

Le Comité pour l'élimination de la discrimination raciale a également été confronté à la question de savoir quelles déclarations étaient protégées par la clause de sauvegarde qui figure à l'article 4 de la Convention internationale sur l'élimination de toutes les formes de discrimination raciale. Dans l'affaire *Communauté juive d'Oslo et autres c. Norvège*, il a dû s'exprimer au sujet d'un discours prononcé à l'occasion d'un défilé organisé en mémoire du dirigeant nazi Rudolf Hess par un groupe répondant au nom de « Bootboys ». Le Comité a noté à cette occasion que « le principe de la liberté d'expression a bénéficié d'un faible niveau de protection dans les affaires de propos racistes et haineux examinées par d'autres organes internationaux et que le Comité lui-même, dans sa Recommandation générale n° 15, dit clairement que l'interdiction de la diffusion de toute idée fondée sur la supériorité ou la haine raciales est compatible avec le droit à la liberté d'opinion et d'expression »[88]. En l'espèce, le Comité estime que les déclarations en cause « contiennent des idées fondées sur la supériorité ou la haine raciales » et que « la référence à Hitler et ses convictions et l'appel à suivre ses traces doivent (…) être considérés comme **une incitation, sinon à la violence, du moins**

87 Comité des droits de l'homme, *J. R. T. et W. G. Party c. Canada*, Communication n° 104/1981, 6 avril 1983, § 8.

88 Comité pour l'élimination de la discrimination raciale, *Communauté juive d'Oslo et autres c. Norvège*, Communication n° 30/2003, 15 août 2005, § 10.5.

à la discrimination raciale »[89]. Le Comité a conclu que ces déclarations, en ce qu'elles étaient « exceptionnellement/manifestement agressives », n'étaient pas protégées par la clause de sauvegarde et que, de ce fait, l'acquittement de leur auteur par la Cour suprême de Norvège avait entraîné une violation de l'article 4 de la Convention internationale sur l'élimination de toutes les formes de discrimination raciale.

De manière générale, l'ECRI a considéré que la loi devait ériger en infractions pénales les propos suivants, s'ils sont intentionnels[90] :

- l'incitation publique à la violence, à la haine ou à la discrimination ; les injures ou la diffamation publiques ; ou les menaces à l'égard d'une personne ou d'un ensemble de personnes, en raison de leur race, leur couleur, leur langue, leur religion, leur nationalité ou leur origine nationale ou ethnique ;
- l'expression publique, dans un but raciste, d'une idéologie qui prône la supériorité d'un ensemble de personnes en raison de leur race, leur couleur, leur langue, leur religion, leur nationalité ou leur origine nationale ou ethnique, ou qui calomnie ou dénigre un tel ensemble de personnes ;
- la négation, la minimisation grossière, la justification ou l'apologie publiques, dans un but raciste, de crimes de génocide, de crimes contre l'humanité ou de crimes de guerre.

Selon l'ECRI, l'incitation publique à la violence, à la haine ou à la discrimination à l'égard d'une personne ou d'un ensemble de personnes en raison, par exemple, de leur religion ou leur origine ethnique, devraient constituer des infractions pénales.

Contexte de l'expression

- **Statut de l'auteur des propos**

Dans sa décision *Malcolm Ross c. Canada*, qui concernait un enseignant s'étant vu privé de son poste en raison de déclarations publiques, jugées discriminatoires à l'égard des personnes de religion et d'ascendance juives, l'auteur dénigrant notamment la religion et les convictions des juifs, le Comité des droits de l'homme a pris en considération

89 *Ibid.*, § 10.4.

90 Recommandation de politique générale n° 7 de l'ECRI sur la législation nationale pour lutter contre le racisme et la discrimination raciale, adoptée le 13 décembre 2002, partie IV (droit pénal), point 18 (a) à (e).

les fonctions de l'auteur des propos. Il a ainsi souligné que les devoirs et responsabilités que comporte l'exercice de liberté d'expression « ont une importance particulière dans le cadre du système scolaire, notamment lorsqu'il s'agit de l'enseignement destiné à de jeunes élèves ; (…) l'influence qu'exercent **les enseignants** peut justifier l'imposition de restrictions afin de veiller à ce que le système scolaire n'accorde pas de légitimité à l'expression d'opinions qui sont discriminatoires »[91].

D'autre part, dans l'affaire *Kamal Quereshi c. Danemark*, le Comité pour l'élimination de la discrimination raciale a attiré « l'attention de l'Etat partie sur la nécessité d'établir l'équilibre entre la liberté d'expression et les prescriptions de la Convention [internationale sur l'élimination de toutes les formes de discrimination raciale] imposant d'empêcher et d'éliminer tous actes de discrimination raciale, en particulier dans le cadre de déclarations faites par **les membres de partis politiques** »[92].

Déjà dans son Programme d'action adopté en 2001, la Conférence mondiale contre le racisme, la discrimination raciale, la xénophobie et l'intolérance qui y est associée soulignait « le rôle capital que **les politiciens et les partis politiques** peuvent jouer dans la lutte contre le racisme, la discrimination raciale, la xénophobie et l'intolérance qui y est associée, et encourage les partis politiques à prendre des mesures concrètes pour promouvoir l'égalité, la solidarité et la non-discrimination dans la société, notamment en se dotant volontairement de codes de conduite qui prévoient des mesures disciplinaires internes en cas de violation de leurs dispositions, de façon que leurs membres s'abstiennent de toutes déclarations et actions publiques qui invitent ou incitent au racisme, à la discrimination raciale, à la xénophobie et à l'intolérance qui y est associée »[93].

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91 Comité des droits de l'homme, *Malcolm Ross c. Canada*, Communication nº 736/1997, 18 octobre 2000, § 11.6.

92 Comité pour l'élimination de la discrimination raciale, *Kamal Quereshi c. Danemark*, Communication nº 27/2002, 19 août 2003, § 9.

93 Programme d'action adopté le 8 septembre 2001 par la Conférence mondiale contre le racisme, la discrimination raciale, la xénophobie et l'intolérance qui y est associée à Durban (Afrique du Sud), § 115.

Dans le même ordre d'idées, l'ECRI a souligné que « **les partis politiques** peuvent jouer un rôle essentiel dans la lutte contre le racisme en formant et en orientant l'opinion publique d'une manière positive » et les a appelé « à formuler un message politique clair favorable à la diversité et au pluralisme dans les sociétés européennes »[94].

- **Nature et gravité de la sanction**

Toujours dans l'affaire *Malcolm Ross c. Canada*, le Comité des droits de l'homme a estimé que « la décision de démettre l'auteur de ses fonctions d'enseignant peut être considérée comme une restriction nécessaire à la protection du droit et de la liberté des enfants juifs de bénéficier d'un système scolaire à l'abri des partis pris, des préjugés et de l'intolérance »[95]. En l'occurrence, l'auteur, privé de son poste d'enseignant, avait été mis en congé sans solde pendant une semaine, avant d'être transféré à un poste de non-enseignant. Prenant cet élément en compte, le Comité note que « l'auteur a été assigné à un poste de non-enseignant après seulement une courte période de congé sans solde et que la restriction n'a ainsi pas été appliquée au-delà de la durée nécessaire pour qu'elle exerce son rôle de protection »[96], concluant en conséquence à la non violation de l'article 19 du Pacte international relatif aux droits civils et politiques.

94 Déclaration de l'ECRI sur l'utilisation d'éléments racistes, antisémites et xénophobes dans le discours politique, adoptée le 17 mars 2005. V. également sur ce point la Déclaration sur la liberté du discours politique dans les médias, adoptée par la Comité des Ministres du Conseil de l'Europe le 12 février 2004.

95 Comité des droits de l'homme, *Malcolm Ross c. Canada*, Communication nº 736/1997, 18 octobre 2000, § 11.6.

96 *Ibid.*

Cas pratique nº 4

RT1 est la chaîne de télévision la plus populaire de l'Etat de Normanrie. Cet Etat est membre du Conseil de l'Europe et partie à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales depuis 2002.

Parmi les programmes les plus regardés de RT1 figure une émission hebdomadaire intitulée « La Parole est à vous » : elle permet aux téléspectateurs de donner leur avis sur l'actualité des dernières semaines en envoyant un courrier à la chaîne. La présentatrice sélectionne ensuite une série de courriers qui sont lus et commentés en direct à l'antenne.

Au printemps 2006, lors de la diffusion de « La Parole est à vous », la présentatrice de l'émission mentionna un courrier qui avait retenu son attention et l'avait « troublée » : un téléspectateur y exprimait son « dégoût » à l'égard de la récente décision, largement commentée dans les médias, du gouvernement normanrin d'accueillir des réfugiés lowetiens fuyant la guerre civile de leur pays. Ce téléspectateur précisait « qu'ils restent chez eux, ils n'ont que ce qu'ils méritent ! ».

En juin 2006, en raison des passages lus lors de l'émission, la Haute Autorité de l'Audiovisuel de Normanrie décida de suspendre pour cinq jours les programmes de RT1 et d'adresser un avertissement à la présentatrice. Selon cette décision, l'émission avait un contenu de nature à inciter la population à la violence, à la haine et à la discrimination raciale. La décision relative à la suspension et à l'avertissement fut notifiée à la société propriétaire de la chaîne de télévision ainsi qu'à la présentatrice le 21 juin 2006.

Le 22 juin 2006, la société et la présentatrice saisirent le tribunal administratif compétent d'un recours en vue d'obtenir l'annulation de la décision. Dans son jugement, le tribunal administratif conclut que la société et la présentatrice, en raison des passages cités lors de l'émission en question, n'avaient pas respecté la loi sur l'audiovisuel et confirma la décision.

Le 4 juillet 2008, la société et la présentatrice formèrent donc un recours auprès du Conseil d'Etat, qui les débouta et confirma le jugement rendu en première instance.

La société et la présentatrice saisirent en conséquence la Cour européenne, en vertu de l'article 34 CEDH, d'une requête dirigée contre l'Etat de Normanrie le 12 juillet 2008.

Solution envisageable

A la lumière de la jurisprudence de la Cour européenne des droits de l'homme et des principes généraux applicables en matière de liberté d'expression, la condamnation litigieuse constitue sans nul doute une ingérence dans le droit à la liberté d'expression, protégé par l'article 10 § 1. Cette ingérence était prévue par la loi et poursuivait un but légitime, à savoir la protection des droits d'autrui au sens de l'article 10 § 2. Mais était-elle « nécessaire dans une société démocratique » ?

Facteurs à prendre en considération

Il faut prêter attention aux termes employés dans l'émission incriminée et au contexte dans lequel ils ont été diffusés. En particulier, il faut ici tenir compte :

- du rôle éminent que joue la presse dans une société démocratique : cette importance spéciale vaut non seulement pour la presse écrite, mais aussi pour les médias audiovisuels ;
- du contenu des propos : ces propos touchaient une question d'intérêt général largement débattue, il s'agissait d'un débat public actuel ;
- du fait que, au cours de l'émission, la présentatrice avait pris la précaution de préciser qu'il s'agissait d'une citation et de se distancer du contenu du courrier lu.
- de la nature de la sanction : si l'avertissement peut sembler peu sévère, la suspension apparaît quant à elle disproportionnée par rapport au but poursuivi.

Conclusion

Il ressort de l'ensemble de ces éléments que la condamnation semble non nécessaire dans une société démocratique. Dans cette affaire, la Cour européenne conclurait probablement à la violation de l'article 10 CEDH par l'Etat de Normanrie.

Comp : *Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. c. Turquie*, nos 64178/00, 64179/00, 64181/00, 64183/00, 64184/00, 30 mars 2006.

Annexes

Annexe I

Dispositions pertinentes des instruments internationaux et régionaux

Droits concernés / Instruments	*Liberté d'expression*	*Interdiction de discrimination*	*Liberté de religion et de manifester sa religion*	*Respect de la vie privée et familiale*	*Interdiction de l'abus de droits*	*Interdiction de la promotion de la haine ou de l'incitation à la discrimination*
Déclaration universelle des droits de l'homme	article 19	– article 1 – article 2 – article 7	– article 18 – article 29	article 12		
Pacte international Relatif aux droits civils et politiques [1]	article 19	– article 2 § 1 – article 26	– article 18 – article 27	article 17	article 5	article 20
Convention internationale sur l'élimination de toutes les formes de discrimination raciale	article 5 d) viii)	article 1	article 5 d) vii)			article 4[2]
Convention européenne des droits de l'homme [3]	article 10	– article 14 – article 1, Protocole Nº. 12	article 9	article 8	article 17	
Convention Américaine Relative aux Droits de l'Homme	article 13	– article 1 §1 – article 24	article 12	article 11		article 13 (§5)
Charte sociale européenne (révisée) [4]		article E				
Convention-cadre pour la protection des minorités nationales [5]	article 9	article 4	– article 5 – article 6 – article 7 – article 8		article 21	
Charte des droits Fondamentaux de l'Union européenne	article 11	article 21	– article 10 – article 22	article 7	article 54	

1 Le Pacte international relatif aux droits civils et politiques est juridiquement contraignant pour l'ensemble des Etats membres.

2 Quelques Etats membres du Conseil de l'Europe ont formulé des réserves et déclarations concernant l'article 4, concernant la conciliation des obligations imposées par cet article avec le droit à la liberté d'expression et d'association. Voir plus particulièrement les réserves ou déclarations faites par l'Autriche, la Belgique, l'Irlande, l'Italie et le Royaume-Uni, qui soulignent l'importance accordée au fait que l'article 4 de la CERD stipule que les mesures établies par les sous-paragraphes (a), (b) et (c), devraient être adoptées en tenant compte des principes énoncés dans la Déclaration universelle des droits de l'homme et les droits exposés expressément par l'article 5 de la Convention. Ces Etats considèrent donc que les obligations imposées par l'article 4 de la CERD doivent être conciliées avec le droit à la liberté d'opinion et d'expression et le droit à la liberté de réunion pacifique et d'association.

3 Le Protocole N° 1 à la CEDH a été ratifié par l'ensemble des Etats membres excepté Andorre, Monaco et la Suisse. Le Protocole N° 12 à la CEDH a été ratifié par les Etats suivants : Albanie, Andorre, Arménie, Bosnie-Herzégovine, Croatie, Chypre, Espagne, Finlande, Géorgie, Luxembourg, Monténégro, Pays-Bas, Roumanie, Saint Marin, Serbie, « l'ex-République yougoslave de Macédoine », Ukraine.

4 La Charte sociale européenne (révisée) a été ratifiée par les Etats membres suivant : Albanie, Andorre, Arménie, Azerbaïdjan, Belgique, Bulgarie, Chypre, Estonie, Finlande, France, Géorgie, Irlande, Italie, Lituanie, Malte, Moldova, Norvège, Pays-Bas, Portugal, Roumanie, Slovénie, Suède, Turquie, Ukraine.

5 La Convention-cadre pour la protection des minorités nationales a été ratifiée par l'ensemble des Etats membres excepté les Etats suivants : Andorre, Belgique, France, Grèce, Islande, Luxembourg, Monaco et Turquie.

Déclaration universelle des droits de l'homme

Article premier

Tous les êtres humains naissent libres et égaux en dignité et en droits. Ils sont doués de raison et de conscience et doivent agir les uns envers les autres dans un esprit de fraternité.

Article 2

Chacun peut se prévaloir de tous les droits et de toutes les libertés proclamés dans la présente Déclaration, sans distinction aucune, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique ou de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation.

De plus, il ne sera fait aucune distinction fondée sur le statut politique, juridique ou international du pays ou du territoire dont une personne est ressortissante, que ce pays ou territoire soit indépendant, sous tutelle, non autonome ou soumis à une limitation quelconque de souveraineté.

Article 7

Tous sont égaux devant la loi et ont droit sans distinction à une égale protection de la loi. Tous ont droit à une protection égale contre toute discrimination qui violerait la présente Déclaration et contre toute provocation à une telle discrimination.

Article 12

Nul ne sera l'objet d'immixtions arbitraires dans sa vie privée, sa famille, son domicile ou sa correspondance, ni d'atteintes à son honneur et à sa réputation. Toute personne a droit à la protection de la loi contre de telles immixtions ou de telles atteintes.

Article 18

Toute personne a droit à la liberté de pensée, de conscience et de religion; ce droit implique la liberté de changer de religion ou de conviction ainsi que la liberté de manifester sa religion ou sa conviction, seule ou en commun, tant en

public qu'en privé, par l'enseignement, les pratiques, le culte et l'accomplissement des rites.

Article 19

Tout individu a droit à la liberté d'opinion et d'expression, ce qui implique le droit de ne pas être inquiété pour ses opinions et celui de chercher, de recevoir et de répandre, sans considérations de frontières, les informations et les idées par quelque moyen d'expression que ce soit.

Article 29

1. L'individu a des devoirs envers la communauté dans laquelle seul le libre et plein développement de sa personnalité est possible.
2. Dans l'exercice de ses droits et dans la jouissance de ses libertés, chacun n'est soumis qu'aux limitations établies par la loi exclusivement en vue d'assurer la reconnaissance et le respect des droits et libertés d'autrui et afin de satisfaire aux justes exigences de la morale, de l'ordre public et du bien-être général dans une société démocratique.
3. Ces droits et libertés ne pourront, en aucun cas, s'exercer contrairement aux buts et aux principes des Nations Unies.

Pacte international relatif aux droits civils et politiques

Article 2 § 1

Les Etats parties au présent Pacte s'engagent à respecter et à garantir à tous les individus se trouvant sur leur territoire et relevant de leur compétence les droits reconnus dans le présent Pacte, sans distinction aucune, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique ou de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation.

Article 5

1. Aucune disposition du présent Pacte ne peut être interprétée comme impliquant pour un Etat, un groupement ou un individu un droit quelconque de se livrer à une activité ou d'accomplir un acte visant à

la destruction des droits et des libertés reconnus dans le présent Pacte ou à des limitations plus amples que celles prévues audit Pacte.

2. Il ne peut être admis aucune restriction ou dérogation aux droits fondamentaux de l'homme reconnus ou en vigueur dans tout Etat partie au présent Pacte en application de lois, de conventions, de règlements ou de coutumes, sous prétexte que le présent Pacte ne les reconnaît pas ou les reconnaît à un moindre degré.

Article 17

1. Nul ne sera l'objet d'immixtions arbitraires ou illégales dans sa vie privée, sa famille, son domicile ou sa correspondance, ni d'atteintes illégales à son honneur et à sa réputation.
2. Toute personne a droit à la protection de la loi contre de telles immixtions ou de telles atteintes.

Article 18

1. Toute personne a droit à la liberté de pensée, de conscience et de religion; ce droit implique la liberté d'avoir ou d'adopter une religion ou une conviction de son choix, ainsi que la liberté de manifester sa religion ou sa conviction, individuellement ou en commun, tant en public qu'en privé, par le culte et l'accomplissement des rites, les pratiques et l'enseignement.
2. Nul ne subira de contrainte pouvant porter atteinte à sa liberté d'avoir ou d'adopter une religion ou une conviction de son choix.
3. La liberté de manifester sa religion ou ses convictions ne peut faire l'objet que des seules restrictions prévues par la loi et qui sont nécessaires à la protection de la sécurité, de l'ordre et de la santé publique, ou de la morale ou des libertés et droits fondamentaux d'autrui.
4. Les Etats parties au présent Pacte s'engagent à respecter la liberté des parents et, le cas échéant, des tuteurs légaux de faire assurer l'éducation religieuse et morale de leurs enfants conformément à leurs propres convictions.

Article 19

1. Nul ne peut être inquiété pour ses opinions.

2. Toute personne a droit à la liberté d'expression; ce droit comprend la liberté de rechercher, de recevoir et de répandre des informations et des idées de toute espèce, sans considération de frontières, sous une forme orale, écrite, imprimée ou artistique, ou par tout autre moyen de son choix.
3. L'exercice des libertés prévues au paragraphe 2 du présent article comporte des devoirs spéciaux et des responsabilités spéciales. Il peut en conséquence être soumis à certaines restrictions qui doivent toutefois être expressément fixées par la loi et qui sont nécessaires:
    a) Au respect des droits ou de la réputation d'autrui ;
    b) A la sauvegarde de la sécurité nationale, de l'ordre public, de la santé ou de la moralité publiques.

Article 20

1. Toute propagande en faveur de la guerre est interdite par la loi.
2. Tout appel à la haine nationale, raciale ou religieuse qui constitue une incitation à la discrimination, à l'hostilité ou à la violence est interdit par la loi.

Article 26

Toutes les personnes sont égales devant la loi et ont droit sans discrimination à une égale protection de la loi. A cet égard, la loi doit interdire toute discrimination et garantir à toutes les personnes une protection égale et efficace contre toute discrimination, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique et de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation.

Article 27

Dans les Etats où il existe des minorités ethniques, religieuses ou linguistiques, les personnes appartenant à ces minorités ne peuvent être privées du droit d'avoir, en commun avec les autres membres de leur groupe, leur propre vie culturelle, de professer et de pratiquer leur propre religion, ou d'employer leur propre langue.

Convention internationale sur l'élimination de toutes les formes de discrimination raciale

Article premier

1. Dans la présente Convention, l'expression « discrimination raciale » vise toute distinction, exclusion, restriction ou préférence fondée sur la race, la couleur, l'ascendance ou l'origine nationale ou ethnique, qui a pour but ou pour effet de détruire ou de compromettre la reconnaissance, la jouissance ou l'exercice, dans des conditions d'égalité, des droits de l'homme et des libertés fondamentales dans les domaines politique, économique, social et culturel ou dans tout autre domaine de la vie publique.
2. La présente Convention ne s'applique pas aux distinctions, exclusions, restrictions ou préférences établies par un Etat partie à la Convention selon qu'il s'agit de ses ressortissants ou de non-ressortissants.
3. Aucune disposition de la présente Convention ne peut être interprétée comme affectant de quelque manière que ce soit les dispositions législatives des Etats parties à la Convention concernant la nationalité, la citoyenneté ou la naturalisation, à condition que ces dispositions ne soient pas discriminatoires à l'égard d'une nationalité particulière.
4. Les mesures spéciales prises à seule fin d'assurer comme il convient le progrès de certains groupes raciaux ou ethniques ou d'individus ayant besoin de la protection qui peut être nécessaire pour leur garantir la jouissance et l'exercice des droits de l'homme et des libertés fondamentales dans des conditions d'égalité ne sont pas considérées comme des mesures de discrimination raciale, à condition toutefois qu'elles n'aient pas pour effet le maintien de droits distincts pour des groupes raciaux différents et qu'elles ne soient pas maintenues en vigueur une fois atteints les objectifs auxquels elles répondaient.

Article 4

Les Etats parties condamnent toute propagande et toutes organisations qui s'inspirent d'idées ou de théories fondées sur la supériorité d'une race ou d'un groupe de personnes d'une certaine couleur ou d'une certaine origine ethnique, ou qui prétendent justifier ou encourager toute forme de

haine et de discrimination raciales; ils s'engagent à adopter immédiatement des mesures positives destinées à éliminer toute incitation à une telle discrimination, ou tous actes de discrimination, et, à cette fin, tenant dûment compte des principes formulés dans la Déclaration universelle des droits de l'homme et des droits expressément énoncés à l'article 5 de la présente Convention, ils s'engagent notamment :

a) A déclarer délits punissables par la loi toute diffusion d'idées fondées sur la supériorité ou la haine raciale, toute incitation à la discrimination raciale, ainsi que tous actes de violence, ou provocation à de tels actes, dirigés contre toute race ou tout groupe de personnes d'une autre couleur ou d'une autre origine ethnique, de même que toute assistance apportée à des activités racistes, y compris leur financement ;
b) A déclarer illégales et à interdire les organisations ainsi que les activités de propagande organisée et tout autre type d'activité de propagande qui incitent à la discrimination raciale et qui l'encouragent et à déclarer délit punissable par la loi la participation à ces organisations ou à ces activités ;
c) A ne pas permettre aux autorités publiques ni aux institutions publiques, nationales ou locales, d'inciter à la discrimination raciale ou de l'encourager.

Article 5

Conformément aux obligations fondamentales énoncées à l'article 2 de la présente Convention, les Etats parties s'engagent à interdire et à éliminer la discrimination raciale sous toute ses formes et à garantir le droit de chacun à l'égalité devant la loi sans distinction de race, de couleur ou d'origine nationale ou ethnique, notamment dans la jouissance des droits suivants :

a) Droit à un traitement égal devant les tribunaux et tout autre organe administrant la justice ;
b) Droit à la sûreté de la personne et à la protection de l'Etat contre les voies de fait ou les sévices de la part soit de fonctionnaires du gouvernement, soit de tout individu, groupe ou institution ;
c) Droits politiques, notamment droit de participer aux élections -de voter et d'être candidat – selon le système du suffrage universel et égal, droit de prendre part au

gouvernement ainsi qu'à la direction des affaires publiques, à tous les échelons, et droit d'accéder, dans des conditions d'égalité, aux fonctions publiques ;

d) Autres droits civils, notamment :
   i) Droit de circuler librement et de choisir sa résidence à l'intérieur d'un Etat ;
   ii) Droit de quitter tout pays, y compris le sien, et de revenir dans son pays ;
   iii) Droit à une nationalité ;
   iv) Droit de se marier et de choisir son conjoint ;
   v) Droit de toute personne, aussi bien seule qu'en association, à la propriété ;
   vi) Droit d'hériter ;
   vii) Droit à la liberté de pensée, de conscience et de religion ;
   viii) Droit à la liberté d'opinion et d'expression ;
   ix) Droit à la liberté de réunion et d'association pacifiques ;
e) Droits économiques, sociaux et culturels, notamment :
   i) Droits au travail, au libre choix de son travail, à des conditions équitables et satisfaisantes de travail, à la protection contre le chômage, à un salaire égal pour un travail égal, à une rémunération équitable et satisfaisante ;
   ii) Droit de fonder des syndicats et de s'affilier à des syndicats ;
   iii) Droit au logement ;
   iv) Droit à la santé, aux soins médicaux, à la sécurité sociale et aux services sociaux ;
   v) Droit à l'éducation et à la formation professionnelle ;
   vi) Droit de prendre part, dans des conditions d'égalité, aux activités culturelles ;
f) Droit d'accès à tous lieux et services destinés à l'usage du public, tels que moyens de transport, hôtels, restaurants, cafés, spectacles et parcs.

Convention européenne des droits de l'homme

Article 8 – Droit au respect de la vie privée et familiale

1. Toute personne a droit au respect de sa vie privée et familiale, de son domicile et de sa correspondance.
2. Il ne peut y avoir ingérence d'une autorité publique dans l'exercice de ce droit que pour autant que cette

ingérence est prévue par la loi et qu'elle constitue une mesure qui, dans une société démocratique, est nécessaire à la sécurité nationale, à la sûreté publique, au bien-être économique du pays, à la défense de l'ordre et à la prévention des infractions pénales, à la protection de la santé ou de la morale, ou à la protection des droits et libertés d'autrui.

Article 9 – Liberté de pensée, de conscience et de religion

1. Toute personne a droit à la liberté de pensée, de conscience et de religion ; ce droit implique la liberté de changer de religion ou de conviction, ainsi que la liberté de manifester sa religion ou sa conviction individuellement ou collectivement, en public ou en privé, par le culte, l'enseignement, les pratiques et l'accomplissement des rites.
2. La liberté de manifester sa religion ou ses convictions ne peut faire l'objet d'autres restrictions que celles qui, prévues par la loi, constituent des mesures nécessaires, dans une société démocratique, à la sécurité publique, à la protection de l'ordre, de la santé ou de la morale publiques, ou à la protection des droits et libertés d'autrui.

Article 10 – Liberté d'expression

1. Toute personne a droit à la liberté d'expression. Ce droit comprend la liberté d'opinion et la liberté de recevoir ou de communiquer des informations ou des idées sans qu'il puisse y avoir ingérence d'autorités publiques et sans considération de frontière. Le présent article n'empêche pas les Etats de soumettre les entreprises de radiodiffusion, de cinéma ou de télévision à un régime d'autorisations.
2. L'exercice de ces libertés comportant des devoirs et des responsabilités peut être soumis à certaines formalités, conditions, restrictions ou sanctions prévues par la loi, qui constituent des mesures nécessaires, dans une société démocratique, à la sécurité nationale, à l'intégrité territoriale ou à la sûreté publique, à la défense de l'ordre et à la prévention du crime, à la protection de la santé ou de la morale, à la protection de la réputation ou des droits d'autrui, pour empêcher la divulgation d'informations confidentielles ou pour garantir l'autorité et l'impartialité du pouvoir judiciaire.

Article 14 – Interdiction de discrimination

La jouissance des droits et libertés reconnus dans la présente Convention doit être assurée, sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation.

Article 17 – Interdiction de l'abus de droit

Aucune des dispositions de la présente Convention ne peut être interprétée comme impliquant pour un Etat, un groupement ou un individu, un droit quelconque de se livrer à une activité ou d'accomplir un acte visant à la destruction des droits ou libertés reconnus dans la présente Convention ou à des limitations plus amples de ces droits et libertés que celles prévues à ladite Convention.

Protocole nº 12 à la Convention européenne des droits de l'homme

Article 1 – Interdiction générale de la discrimination

1. La jouissance de tout droit prévu par la loi doit être assurée, sans discrimination aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation.
2. Nul ne peut faire l'objet d'une discrimination de la part d'une autorité publique quelle qu'elle soit fondée notamment sur les motifs mentionnés au paragraphe 1.

Convention américaine relative aux droits de l'homme

Article 1 – Obligation de respecter les droits

1. Les Etats parties s'engagent à respecter les droits et libertés reconnus dans la présente Convention et à en garantir le libre et plein exercice à toute personne relevant de leur compétence, sans aucune distinction fondée sur la race, la couleur, le sexe, la langue, la religion, les opinions politiques ou autres, l'origine

nationale ou sociale, la situation économique, la naissance ou toute autre condition sociale.
2. Aux effets de la présente Convention, tout être humain est une personne.

Article 11 – Protection de l'honneur et de la dignité de la personne

1. Toute personne a droit au respect de son honneur et à la reconnaissance de sa dignité.
2. Nul ne peut être l'objet d'ingérences arbitraires ou abusives dans sa vie privée, dans la vie de sa famille, dans son domicile ou sa correspondance, ni d'attaques illégales à son honneur et à sa réputation.
3. Toute personne a droit à la protection de la loi contre de telles ingérences ou de telles attaques.

Article 12 – Liberté de conscience et de religion

1. Toute personne a droit à la liberté de conscience et de religion. Ce droit implique la liberté de garder sa religion ou ses croyances, ou de changer de religion ou de croyances, ainsi que la liberté de professer et de répandre sa foi ou ses croyances, individuellement ou collectivement, en public ou en privé.
2. Nul ne peut être l'objet de mesures de contrainte de nature à restreindre sa liberté de garder sa religion ou ses croyances, ou de changer de religion ou de croyances.
3. La liberté de manifester sa religion ou ses croyances ne peut faire l'objet d'autres restrictions que celles qui, prévues par la loi, sont nécessaires à la sécurité publique, à la protection de l'ordre, de la santé ou de la morale publics, ou à la sauvegarde des droits ou libertés d'autrui.
4. Les parents, et le cas échéant, les tuteurs, ont droit à ce que leurs enfants ou pupilles reçoivent l'éducation religieuse et morale conforme à leurs propres convictions.

Article 13 – Liberté de pensée et d'expression

1. Toute personne a droit à la liberté de pensée et d'expression; ce droit comprend la liberté de rechercher, de recevoir et de répandre des informations et des idées de toute espèce, sans considération de frontières, que ce soit oralement ou par écrit, sous une forme

imprimée ou artistique, ou par tout autre moyen de son choix.

2. L'exercice du droit prévu au paragraphe précédent ne peut être soumis à aucune censure préalable, mais il comporte des responsabilités ultérieures qui, expressément fixées par la loi, sont nécessaires:
   a) au respect des droits ou à la réputation d'autrui, ou
   b) à la sauvegarde de la sécurité nationale, de l'ordre public, ou de la santé ou de la morale publiques.
3. La liberté d'expression ne peut être restreinte par des voies ou des moyens indirects, notamment par les monopoles d'Etat ou privés sur le papier journal, les fréquences radioélectriques, les outils ou le matériel de diffusion, ou par toute autre mesure visant à entraver la communication et la circulation des idées et des opinions.
4. Sans préjudice des dispositions du paragraphe 2 ci-dessus, les spectacles publics peuvent être soumis par la loi à la censure, uniquement pour en réglementer l'accès en raison de la protection morale des enfants et des adolescents.
5. Sont interdits par la loi toute propagande en faveur de la guerre, tout appel à la haine nationale, raciale ou religieuse, qui constituent des incitations à la violence, ainsi que toute autre action illégale analogue contre toute personne ou tout groupe de personnes déterminées, fondée sur des considérations de race, de couleur, de religion, de langue ou d'origine nationale, ou sur tous autres motifs.

Article 24 – Egalité devant la loi

Toutes les personnes sont égales devant la loi. Par conséquent elles ont toutes droit à une protection égale de la loi, sans discrimination d'aucune sorte.

Charte sociale européenne (révisée)

Article E – Non-discrimination

La jouissance des droits reconnus dans la présente Charte doit être assurée sans distinction aucune fondée notamment sur la race, la couleur, le sexe, la langue, la religion, les opinions politiques ou toutes autres opinions, l'ascendance

nationale ou l'origine sociale, la santé, l'appartenance à une minorité nationale, la naissance ou toute autre situation.

Convention-cadre pour la protection des minorités nationales

Article 4

Les Parties s'engagent à garantir à toute personne appartenant à une minorité nationale le droit à l'égalité devant la loi et à une égale protection de la loi. A cet égard, toute discrimination fondée sur l'appartenance à une minorité nationale est interdite.

Les Parties s'engagent à adopter, s'il y a lieu, des mesures adéquates en vue de promouvoir, dans tous les domaines de la vie économique, sociale, politique et culturelle, une égalité pleine et effective entre les personnes appartenant à une minorité nationale et celles appartenant à la majorité. Elles tiennent dûment compte, à cet égard, des conditions spécifiques des personnes appartenant à des minorités nationales.

Les mesures adoptées conformément au paragraphe 2 ne sont pas considérées comme un acte de discrimination.

Article 5

Les Parties s'engagent à promouvoir les conditions propres à permettre aux personnes appartenant à des minorités nationales de conserver et développer leur culture, ainsi que de préserver les éléments essentiels de leur identité que sont leur religion, leur langue, leurs traditions et leur patrimoine culturel.

Sans préjudice des mesures prises dans le cadre de leur politique générale d'intégration, les Parties s'abstiennent de toute politique ou pratique tendant à une assimilation contre leur volonté des personnes appartenant à des minorités nationales et protègent ces personnes contre toute action destinée à une telle assimilation.

Article 6

1. Les Parties veilleront à promouvoir l'esprit de tolérance et le dialogue interculturel, ainsi qu'à prendre des mesures efficaces pour favoriser le respect et la compréhension mutuels et la coopération entre toutes les personnes vivant sur leur territoire, quelle que soit leur identité ethnique, culturelle, linguistique ou religieuse, notamment dans les domaines de l'éducation, de la culture et des médias.
2. Les Parties s'engagent à prendre toutes mesures appropriées pour protéger les personnes qui pourraient être victimes de menaces ou d'actes de discrimination, d'hostilité ou de violence en raison de leur identité ethnique, culturelle, linguistique ou religieuse.

Article 7

Les Parties veilleront à assurer à toute personne appartenant à une minorité nationale le respect des droits à la liberté de réunion pacifique et à la liberté d'association, à la liberté d'expression et à la liberté de pensée, de conscience et de religion.

Article 8

Les Parties s'engagent à reconnaître à toute personne appartenant à une minorité nationale le droit de manifester sa religion ou sa conviction, ainsi que le droit de créer des institutions religieuses, organisations et associations.

Article 9

Les Parties s'engagent à reconnaître que le droit à la liberté d'expression de toute personne appartenant à une minorité nationale comprend la liberté d'opinion et la liberté de recevoir ou de communiquer des informations ou des idées dans la langue minoritaire, sans ingérence d'autorités publiques et sans considération de frontières. Dans l'accès aux médias, les Parties veilleront, dans le cadre de leur système législatif, à ce que les personnes appartenant à une minorité nationale ne soient pas discriminées.

Le premier paragraphe n'empêche pas les Parties de soumettre à un régime d'autorisation, non discriminatoire et fondé sur des critères objectifs, les entreprises de radio sonore, télévision ou cinéma.

Les Parties n'entraveront pas la création et l'utilisation de médias écrits par les personnes appartenant à des minorités nationales. Dans le cadre légal de la radio sonore et de la télévision, elles veilleront, dans la mesure du possible et compte tenu des dispositions du premier paragraphe, à accorder aux personnes appartenant à des minorités nationales la possibilité de créer et d'utiliser leurs propres médias.

Dans le cadre de leur système législatif, les Parties adopteront des mesures adéquates pour faciliter l'accès des personnes appartenant à des minorités nationales aux médias, pour promouvoir la tolérance et permettre le pluralisme culturel.

Article 21

Aucune des dispositions de la présente Convention-cadre ne sera interprétée comme impliquant pour un individu un droit quelconque de se livrer à une activité ou d'accomplir un acte contraires aux principes fondamentaux du droit international et notamment à l'égalité souveraine, à l'intégrité territoriale et à l'indépendance politique des Etats.

Charte des Droits fondamentaux de l'Union européenne

Article 7 – Respect de la vie privée et familiale

Toute personne a droit au respect de sa vie privée et familiale, de son domicile et de ses communications.

Article 10 – Liberté de pensée, de conscience et de religion

1. Toute personne a droit à la liberté de pensée, de conscience et de religion. Ce droit implique la liberté de changer de religion ou de conviction, ainsi que la liberté de manifester sa religion ou sa conviction individuellement ou collectivement, en public ou en privé, par le culte, l'enseignement, les pratiques et l'accomplissement des rites.
2. Le droit à l'objection de conscience est reconnu selon les lois nationales qui en régissent l'exercice.

Article 11 – Liberté d'expression et d'information

1. Toute personne a droit à la liberté d'expression. Ce droit comprend la liberté d'opinion et la liberté de recevoir ou de communiquer des informations ou des idées sans qu'il puisse y avoir ingérence d'autorités publiques et sans considération de frontières.
2. La liberté des médias et leur pluralisme sont respectés.

Article 21 – Non-discrimination

1. Est interdite, toute discrimination fondée notamment sur le sexe, la race, la couleur, les origines ethniques ou sociales, les caractéristiques génétiques, la langue, la religion ou les convictions, les opinions politiques ou toute autre opinion, l'appartenance à une minorité nationale, la fortune, la naissance, un handicap, l'âge ou l'orientation sexuelle.
2. Dans le domaine d'application du traité instituant la Communauté européenne et du traité sur l'Union européenne, et sans préjudice des dispositions particulières desdits traités, toute discrimination fondée sur la nationalité est interdite.

Article 22 – Diversité culturelle, religieuse et linguistique

L'Union respecte la diversité culturelle, religieuse et linguistique.

Article 54 – Interdiction de l'abus de droit

Aucune des dispositions de la présente Charte ne doit être interprétée comme impliquant un droit quelconque de se livrer à une activité ou d'accomplir un acte visant à la destruction des droits ou libertés reconnus dans la présente Charte ou à des limitations plus amples des droits et libertés que celles qui sont prévues par la présente Charte.

Annexe II

Exemples de mesures et initiatives nationales

La liste ci-dessous regroupe un certain nombre d'initiatives pratiques axées sur la prévention du « discours de haine » et la promotion de la tolérance. Les exemples ont été extraits des réponses fournies par les Etats membres en 2006[97]. Ces exemples ne constituent pas une liste exhaustive de toutes les initiatives prises par chaque pays mais illustrent certains types d'actions menées.

Le récapitulatif de ces initiatives/meilleures pratiques nationales a permis de recenser sept catégories différentes :

a) plans et programmes d'action ;
b) collecte, enregistrement et transmission de données ;
c) éducation ;
d) initiatives de formation et de politique générale axées sur les services répressifs, les personnels judiciaires et autres fonctionnaires ;
e) déontologie et codes de conduite ;
f) médias et Internet (autres que codes de conduite) ;
g) société civile et campagnes d'information.

1. Plans et programmes d'action

La Déclaration et Programme d'action de Durban (Conférence des Nations Unies contre le racisme, la discrimination raciale, la xénophobie et l'intolérance qui y est associée – 31 août-7 septembre 2001) engageait vivement les Etats « à établir et mettre en œuvre sans tarder des politiques et des plans d'action nationaux pour lutter contre le racisme, la discrimination raciale, la xénophobie et l'intolérance qui y est associée, y compris leurs manifestations sexo-spécifiques » (paragraphe 66) et aussi « à mettre au point et à

97 Toutes les réponses se trouvent dans le document du Conseil de l'Europe GT-DH-DEV A(2006)008 Addendum.

appliquer des politiques et des plans d'action, à rendre plus strictes et à mettre en application les mesures de prévention et à favoriser l'harmonie et la tolérance entre migrants et société d'accueil, en vue d'éliminer les manifestations de racisme, de discrimination raciale, de xénophobie et d'intolérance qui y est associée, y compris les actes de violence commis dans beaucoup de sociétés par des particuliers ou des groupes » (paragraphe 30 de la Déclaration et Programme d'action). Le Comité pour l'élimination de la discrimination raciale (CERD) réaffirme également de façon régulière la nécessité pour les Etats Parties de mettre en œuvre de tels plans.

L'opinion N° 5-2005 du Réseau d'experts indépendants de l'Union européenne en matière de droits fondamentaux fournit un panorama détaillé des plans d'action nationaux et de leur mise en œuvre au sein des **Etats membres de l'Union européenne**.

Parmi les Etats non membres de l'Union européenne, la **Croatie** a mentionné plusieurs plans et programmes d'action :

- Plan national d'activités axé sur les Roms (La Décennie de l'intégration des Roms – 2005-2015) ;
- Plan national d'activités pour la prévention de la violence parmi les enfants et les jeunes (2004) ;
- Plan national de prévention de la traite des enfants (2005-2007) ;
- Stratégie nationale pour une politique unifiée des handicapés (2003-2006) ;
- Politique nationale de promotion de l'égalité entre les sexes (2001) ;
- Plan d'action pour la promotion de l'égalité entre les sexes (2001-2005) ;
- Programme de prévention du SIDA ;
- Programme de prévention des troubles du comportement chez les enfants et les jeunes ;
- Stratégie nationale de prévention de la discrimination (en cours d'élaboration).

2. Collecte, enregistrement et transmission des données

Plusieurs Etats membres collectent des données statistiques sur les crimes raciaux et les incidents avec violence dont la

motivation pourrait être raciste. S'agissant des **Etats membres de l'Union européenne**, il convient de citer l'Agence des droits fondamentaux de l'Union européenne (FRA), qui a succédé à l'Observatoire européen des phénomènes racistes et xénophobes (EUMC), ainsi que le Réseau d'information européen sur le racisme et la xénophobie (RAXEN) qui collecte également des données et des informations sur les crimes à connotation raciste.

3. Education

Andorre a été à l'origine de plusieurs initiatives de sensibilisation des jeunes à la diversité des religions et des cultures et à la tolérance. Des projets ont vu le jour pour résoudre les conflits par la médiation, la promotion des droits de l'enfant et l'organisation de campagnes contre la violence domestique.

La **Belgique** a lancé le projet « Des écoles pour la démocratie » qui est axé sur le lien entre la tolérance et le respect. Dans les établissements scolaires du pays, le **Luxembourg** accorde une importance toute particulière à l'éducation aux droits de l'homme. **Saint-Marin** propose des programmes de formation aux arguments en faveur de l'éducation multiculturelle et du respect de la diversité, à l'intention de diverses catégories professionnelles, dont les enseignants. Les écoles et les collèges ont mis en œuvre de nombreux projets interculturels et sur les droits de l'homme.

Dans le cadre de son plan d'action national relatif à la Décennie de l'intégration des Roms (2005-2015), la **Slovaquie** est très active dans la promotion de programmes éducatifs axés sur la communauté rom marginalisée.

4. Initiatives de formation et de politique générale axées sur les services répressifs, les personnels judiciaires et autres fonctionnaires

En **Autriche**, les services de police sont activement impliqués dans l'application de mesures de sensibilisation axées sur le public jeune. Au moins une fois par semestre, elles prennent contact avec les enseignants, les directeurs d'établissements, les inspecteurs d'académie et d'autres personnes qui ont des responsabilités dans le domaine de

l'éducation afin de les aider dans les efforts qu'ils déploient pour lutter contre les idéologies racistes, xénophobes et antisémites. Une attention toute particulière est également accordée au racisme et à la xénophobie dans la formation de base des officiers de police. En outre, un projet Internet a été lancé en 1996 par l'ancien Intelligence Service (actuel Office fédéral pour la protection de la Constitution et la lutte contre le terrorisme) en vue d'assurer la surveillance de certains sites web, groupes de discussion et listes de diffusion ; il s'agit, à terme, de pouvoir tirer des conclusions relatives aux tendances manifestées par les groupes extrémistes. Ces informations sont collectées et font l'objet d'une double évaluation par le BVT et, individuellement, par les services répressifs.

La **France** a créé un corps de magistrats spécialisés qui veille à la cohérence des politiques locales de lutte contre le crime et qui assure le contact avec la société civile (associations, représentants des églises et des groupes religieux). En 2004, des stages de citoyenneté ont été mis sur pied, à la fois à titre préventif et en tant que mesure de substitution à la sanction pénale. Ils ont pour objectif de rappeler les valeurs républicaines et la nécessité du respect de la personne humaine.

En **Norvège**, la Direction de l'immigration et l'Ecole de police ont élaboré un projet commun pour développer la méthodologie et le contenu d'un programme éducatif permanent axé sur la compréhension de la diversité culturelle et des lois sur l'immigration. Pendant la période 2001-2004, des méthodes, des stratégies et des programmes de formation ont été mis sur pied afin d'améliorer l'attitude des employés du service public à l'égard des minorités.

5. Déontologie et codes de conduite

La Fédération internationale des journalistes a adopté une déclaration de principes sur la conduite des journalistes[98]. Aux termes du principe 7 : « le journaliste prendra garde aux risques d'une discrimination propagée par les médias

98 Adoptée par le second congrès mondial de la Fédération internationale des journalistes (FIJ) à Bordeaux (25-28 avril 1954) et modifié par le 18e Congrèsmondial de la FIJ à Helsingör (2-6 juin 1986)

et fera son possible pour éviter de faciliter une telle discrimination, fondée notamment sur la race, le sexe, les mœurs sexuelles, la langue, la religion, les opinions politiques et autres et l'origine nationale ou sociale ».

L' « Association autrichienne des fournisseurs d'accès à Internet (ISPA) » a élaboré un code de conduite. Les membres de l'ISPA sont tenus, dans toute la mesure du possible, de s'opposer à la diffusion de contenus illicites. Lorsqu'ils ont connaissance de la diffusion d'un tel contenu, ils le signalent au service d'assistance téléphonique (hotline) et aux services de police. L'ISPA a créé un site web (www.stopline.at) spécialisé dans la surveillance des contenus néonazis.

A **Chypre**, le Commissariat à l'Administration élabore des recueils de bonnes pratiques qui s'imposent à la fois au secteur privé et au secteur public, en vue de faire cesser, notamment, toute forme de discrimination en raison de la religion, de la nationalité ou de l'origine ethnique. Il est également chargé de procéder à des enquêtes et d'élaborer des statistiques dans ces domaines.

En **Finlande**, des directives sur les conventions de bienséance (« étiquette du net ») ont été rendues publiques par les acteurs commerciaux de l'Internet. Ces directives interdisent notamment toute forme de racisme et d'incitation au racisme. Des instructions ont également été élaborées à l'intention des journalistes par le Conseil des médias (voir www.jsn.fi) qui stipulent notamment : « La dignité humaine de chaque individu doit être respectée. L'origine ethnique, la nationalité, le sexe, l'orientation sexuelle, les convictions et toutes autres caractéristiques personnelles de cette nature ne peuvent être présentées de façon inappropriée ou désobligeante » (§ 26).

En **Hongrie**, les codes de déontologie de plusieurs organes, chambres, associations professionnelles et grandes organisations d'entreprises comportent des règles relatives au « discours de haine ».

En **Norvège**, l'Association de la presse a élaboré un code de déontologie à l'intention de la presse écrite, des radios et de la télévision.

En **Suisse**, la Déclaration des droits et obligations du journaliste comporte un point 8, intitulé : « Déclaration des

obligations », ainsi libellé : « Respecter la dignité humaine ; le/la journaliste doit éviter toute allusion, par le texte, l'image et le son, à l'appartenance ethnique ou nationale d'une personne, à sa religion, à son sexe ou à l'orientation de ses mœurs sexuelles, ainsi qu'à toute maladie ou handicap d'ordre physique ou mental, qui aurait un caractère discriminatoire ; le compte rendu, par le texte, l'image et le son, de la guerre, d'actes terroristes, d'accidents et de catastrophes trouve ses limites dans le respect devant la souffrance des victimes et les sentiments de leurs proches ».

6. Médias et Internet (autres que codes de conduite)

En **Belgique**, CYBERHATE réunit des organismes publics et privés tels que la FCCU (unité de la police fédérale belge spécialisée dans la cybercriminalité), l'ISPA (Association belge des fournisseurs d'accès à Internet) et des magistrats du parquet. Le site www.cyberhate.be reçoit et centralise les plaintes.

En **Grèce**, la Radio-Télévision grecque (Hellenic Radio and Television, S.A. – ERT SA) diffuse un nombre croissant de programmes d'information relatifs à la protection des droits de l'homme (protection des mineurs, problématique des réfugiés, violences faites aux femmes et aux enfants, racisme et xénophobie, traite des êtres humains, etc.) et prouve ainsi, non seulement la sensibilisation des médias professionnels grecs à ces questions, mais également l'intérêt croissant que leur porte le public.

En **Lettonie**, les initiatives de différentes ONG visent à lutter contre le discours de haine dans le cyberespace letton. La plus importante de ces initiatives concerne une nouvelle bibliothèque en ligne (www.tolerance.lv) (voir http://www.iecietiba.lv/index.php?lang=2). La bibliothèque est structurée autour de différents thèmes relatifs aux divers problèmes soulevés par la tolérance. Un autre projet, du nom de « Internet – free of hate » (« L'Internet sans haine »), conduit par un groupe letton de cybermédias, se consacre à la lutte contre le discours de haine sur Internet. Des informations détaillées sur ce projet peuvent être téléchargées à partir du site www.dialogi.lv.

7. Société civile et campagnes d'information

Plusieurs Etats membres financent des projets qui émanent de la société civile et qui visent à favoriser la tolérance et la compréhension entre les minorités et la population majoritaire (voir, à ce propos, **République tchèque, Danemark, Allemagne, Pays-Bas** et **Suède**).

Le **Danemark** a créé un prix à l'intention des entreprises privées qui ont plus particulièrement contribué à développer la diversité du recrutement sur le lieu de travail. La campagne « Show Racism the Red Card » (« Carton rouge au racisme ! ») a été lancée en 2006 et devrait se poursuivre pendant trois ans. L'initiative danoise s'inspire de campagnes similaires dans d'autres pays européens et a débuté dans le monde du football. Cela dit, cette campagne danoise n'est pas limitée aux phénomènes racistes liés au football ; elle va également porter sur toute une série d'initiatives axées sur les établissements scolaires et les entreprises. La campagne est pilotée par un Secrétariat mais des joueurs de football professionnels danois s'y sont impliqués et sont supposés bénéficier d'une forte autorité dans le groupe cible.

En **Allemagne**, une série d'initiatives vise la prévention du discours de haine ; c'est le cas de « Primary Prevention of Violence against Members of Groups – In particular Young People » (Prévention primaire de la violence à l'encontre de membres de groupes – et particulièrement des jeunes) ou de « Forum against Racism » (« Forum contre le racisme ») qui favorise le dialogue entre les instances gouvernementales et les ONG ou encore de « Young People for Tolerance and Democracy – against Right-Wing Extremism, Xenophobia and Anti-Semitism » (« La jeunesse en faveur de la tolérance et de la démocratie – contre l'extrémisme de droite, la xénophobie et l'antisémitisme »), initiative lancée par l' « Alliance for Democracy and Tolerance – Against Extremism and Violence » (« Alliance pour la démocratie et la tolérance – contre les extrémismes et la violence ») qui regroupe des initiatives gouvernementales et non gouvernementales.

En **Grèce**, l'Agence de presse macédonienne a participé activement à une initiative de la communauté du nom de « EQUAL DREAM » ; elle a défendu l'idée de ce programme

qui favorise la lutte contre le racisme et la xénophobie dans les médias.

La Croix-Rouge islandaise a mis en œuvre le programme « diversité et dialogue » concernant les individus, les entreprises, les organisations et les collectivités locales. Il s'agit d'un programme axé sur des processus qui utilise la dynamique de groupe pour un travail de sensibilisation. Son objectif est de lutter contre toutes les formes d'intolérance, de préjugés et de discrimination fondées sur la race ou l'ethnie, et d'œuvrer pour la participation, la représentation et le respect de tous les membres de la société. A l'issue de chaque séminaire, les participants préparent un plan d'action concret sur la manière de lutter contre le racisme dans leur vie quotidienne au sein de la communauté locale, sur le lieu de travail, dans les écoles, les églises, etc.

En **Lituanie**, des organisations non gouvernementales jouent un rôle considérable dans la prévention du discours de haine et la promotion de la tolérance. En voici des exemples : le « Centre lituanien pour les droits de l'homme » a organisé un séminaire intitulé : « Organisation des capacités de la société civile dans sa lutte contre la discrimination » qui est destiné aux représentants des ONG ; le centre a également publié des ouvrages dans ce domaine. Le projet de recherche : « Prévention de la haine ethnique et de la xénophobie : une réponse citoyenne dans les mass médias » développé par le Centre des études ethniques de l'Institut de recherches sociales est un autre exemple de ces initiatives.

Aux **Pays-Bas**, le gouvernement a une politique active de promotion de la tolérance et du respect entre les différentes cultures. Au niveau national, l'initiative intitulée « &-campaign » est parvenue à faire reconnaître la valeur ajoutée des personnes issues de milieux culturels différents qui travaillent et vivent ensemble. Au niveau local, le conseil municipal d'Amsterdam organise plusieurs événements et a créé des réseaux destinés à jeter des ponts entre les différents groupes présents dans la ville. Le projet global porte le nom de « Wij Amsterdammers » (« Nous, habitants d'Amsterdam ») et il comporte, entre autres initiatives, une Journée du Dialogue tous les deux ans, un Réseau d'échange entre juifs et marocains et bien d'autres activités.

En **Suède**, le gouvernement contribue à la mise sur pied d'une organisation à but non lucratif : le Centre contre le racisme. Le Conseil suédois pour l'intégration – chargé de veiller à ce que les représentations d'ensemble et les objectifs des politiques d'intégration aient un impact effectif en Suède dans les différents secteurs de la société – a débloqué des financements pour cet organisme et supervise ses activités. L'objectif global de cet organisme consiste à renforcer et à développer les actions de la société contre le racisme, la xénophobie, l'homophobie et la discrimination. Le Living History Forum (Forum d'histoire vivante) – qui œuvre contre l'antisémitisme, l'islamophobie et l'homophobie – est une autre initiative du gouvernement. Cet institut a notamment procédé à une enquête parmi les étudiants à propos de leurs attitudes envers les musulmans. Des séminaires ont été préparés à l'intention des enseignants et des débats ont été organisés avec le public en général, les jeunes, les enseignants et les décideurs. L'institut a pour approche systématique la discussion et le dialogue sur toutes ces questions. Des enquêtes sur l'opinion du public à l'égard des juifs et des musulmans sont également réalisées en permanence.

En **Suisse**, l'organisation « Aktion Kinder des Holocaust » gère un projet intitulé : « Education de rue sur Internet » qui vise à prendre contact avec les auteurs de déclarations pro-nazis ou antisémites.

Au **Royaume-Uni**, le gouvernement a publié en 2005 une initiative baptisée : « Improving Opportunity, Strengthening Society » (« Développer les opportunités, renforcer la société ») dont la stratégie vise à favoriser l'égalité raciale et la cohésion des communautés en Grande-Bretagne. Ce texte matérialise la volonté du gouvernement de mettre l'accent sur la promotion du sens de l'appartenance et de la cohésion entre les divers groupes, afin de dessiner les contours d'une société britannique où l'intégration soit effective et dans laquelle le racisme apparaisse totalement inacceptable. Il existe également un certain nombre d'initiatives locales telles qu'une nouvelle ligne téléphonique pilote pour permettre aux habitants du Yorkshire et du Humberside de signaler les faits et incidents à connotation raciste à toute heure du jour et de la nuit.

Annexe III

Liste des arrêts et décisions cités

(par ordre alphabétique)

Les arrêts et décisions de la Cour européenne des droits de l'homme, ainsi que les décisions de l'ancienne Commission européenne des droits de l'homme, peuvent être consultés sur le site Internet suivant : www.echr.coe.int

Cour européenne :

Autronic AG c. Suisse, 22 mai 1990
Aydın Tatlav c. Turquie, 2 mai 2006
Castells c. Espagne, 23 avril 1992
Erbakan c. Turquie, 6 juillet 2006
Ergin c. Turquie (n° 3), 16 juin 2005
Ergin c. Turquie(n° 6), 4 mai 2006
Giniewski c. France, 31 janvier 2006
Goodwin c. Royaume-Uni, 27 mars 1996
Gündüz c. Turquie, 4 décembre 2003
Halis Doğan c. Turquie (n° 3), 10 octobre 2006
Handyside c. Royaume-Uni, 7 décembre 1976
I.A. c. Turquie, 13 septembre 2005
Incal c. Turquie, 9 juin 1998
Jersild c. Danemark, 23 septembre 1994
Karataş c. Turquie, 8 juillet 1999
Klein c. Slovaquie, 31 octobre 2006
Kruslin c. France, 24 avril 1990
Lawless c. Irlande, 1er juillet 1961
Lehideux et Isorni c. France, 23 septembre 1998 (Grande Chambre)
Lindon, Otchakosvsky-Laurens et July c. France, 22 octobre 2007
Lingens c. Autriche, 8 juillet 1986
Markt intern Verlag GmbH c. Allemagne, 20 novembre 1989
Müller et autres c. Suisse, 24 mai 1988
Murphy c. Irlande, 10 juillet 2003

Commission européenne :

Autres instances :

Annexe IV

Index thématique

Annexe V

Glossaire

Convention européenne des droits de l'homme

Le titre complet est « Convention de sauvegarde des droits de l'homme et des Libertés fondamentales », connue sous le nom de « CEDH » ou « la Convention ». Elle a été adoptée en 1950 et est entrée en vigueur en 1953. Le texte intégral de la Convention et de ses protocoles additionnels est disponible en 30 langues sur le site suivant : http://www.echr.coe.int/. L'état des signatures et ratifications, ainsi que le texte des réserves et déclarations faites par les Etats parties peut être consulté à l'adresse suivante : http://conventions.coe.int.

Cour européenne des droits de l'homme

La Cour européenne des droits de l'homme a été instituée par les Etats membres du Conseil de l'Europe en 1959 pour statuer sur les allégations de violation de la Convention européenne des droits de l'homme de 1950. Depuis le 1er novembre 1998 la Cour siège de façon permanente, elle est composée d'un nombre de juges égal à celui des Etats parties à la Convention. La Cour examine la recevabilité et le fond des requêtes qui lui sont présentées. Elle siège en Chambres de 7 juges ou, dans des cas exceptionnels, en une Grande Chambre de 17 juges. Le Comité des Ministres du Conseil de l'Europe contrôle l'exécution des arrêts rendus par la Cour.

Discours de haine

Voir dans l'introduction du manuel, « notion de discours de haine ».

Ingérence

Tous les cas dans lesquels la jouissance d'un droit reconnu par la Convention est limitée. Toute ingérence n'équivaut pas à la violation du droit en question. Nombre d'ingérences peuvent être justifiées par les limitations prévues dans la Convention elle-même. En règle générale, pour qu'une ingérence soit justifiée, elle doit être prévue par la loi, poursuivre un but légitime et être proportionnée à cet objectif. Cf. également « but légitime », « prévu par la loi », « proportionnalité ».

Juste équilibre

La Convention prévoit la limitation de certains droits dans le souci de l'intérêt général majeur. La Cour européenne des droits de l'homme a précisé que lorsque des droits sont restreints, il doit exister un juste équilibre entre l'intérêt public et le droit en question. La Cour décide en dernier ressort si cet équilibre a été ménagé. Cependant elle laisse aux Etats une marge d'appréciation pour déterminer si l'intérêt général est suffisamment sérieux pour justifier des restrictions sur certains droits de l'homme. Cf. également « marge d'appréciation », « intérêt général ».

Marge d'appréciation

La protection offerte par la Convention au regard de certains droits n'est pas absolue et laisse aux Etats la possibilité de les limiter dans une certaine mesure. Toutefois, les mesures prises par les autorités pour limiter ces droits doivent satisfaire à certaines exigences : être prévues par la loi, nécessaires dans une société démocratique et poursuivre un but légitime (tel que la protection de la santé ou le bien-être économique du pays), elles doivent également être proportionnées au but poursuivi. Lorsqu'il est établi que ces mesures sont prévues par la loi et nécessaires dans une société démocratique tout en poursuivant un but légitime, il convient d'examiner si lesdites mesures sont proportionnées à ce but légitime ; à cette fin la Cour apprécie les intérêts individuels et ceux de la communauté pour déterminer ce qui prévaut dans les circonstances précises et la mesure dans laquelle les droits couverts par la Convention peuvent être restreints dans l'intérêt de la communauté. C'est dans le contexte de cet examen que l'idée d'une certaine « marge d'appréciation » des autorités s'est fait jour. En effet, la Cour a établi que les autorités disposent d'une certaine latitude, c'est-à-dire d'une « marge d'appréciation », pour déterminer les mesures les plus appropriées à la réalisation de l'objectif légitime poursuivi. Le motif pour lequel la Cour a décidé de laisser cette latitude aux autorités tient au fait que les autorités nationales sont souvent mieux placées pour apprécier les questions relevant des articles concernés. L'étendue de cette marge d'appréciation varie en fonction du problème posé. Néanmoins, en aucune manière cette marge d'appréciation ne doit être considérée comme absolue et interdisant à la Cour toute appréciation critique de la proportionnalité des mesures concernées.

Mesures proportionnées

Par l'expression « mesures proportionnées » la Cour signifie les mesures prises par les autorités qui ménagent un juste

équilibre entre les intérêts de la communauté et ceux des individus.

Objectif légitime

Cette expression est utilisée par la Cour en relation avec un certain nombre d'articles de la Convention : l'article 8 (droit au respect de la vie privée et familiale et du domicile), l'article 9 (liberté de pensée, de conscience et de religion), l'article 10 (liberté d'expression), l'article 11 (liberté de réunion et d'association). Tout en cherchant à sauvegarder ces droit, la Convention reconnaît que, dans certaines circonstances particulières, des restrictions peuvent être acceptables. Néanmoins, les mesures imposant les dites restrictions doivent satisfaire à un certain nombre de critères pour que la Cour ne conclue pas à une violation du droit en question. L'un d'eux stipule que les mesures sont nécessaires dans une société démocratique, ce qui signifie qu'elles répondent à un besoin social impérieux et poursuivent un but légitime. L'article 10 cite les grandes catégories d'objectifs qui peuvent être considérés comme légitimes pour justifier une ingérence dans l'exercice du droit d'expression, dont la sécurité nationale, l'intégrité territoriale ou la sûreté publique, la défense de l'ordre et la prévention du crime, la protection de la santé ou de la morale, la protection des droits et libertés d'autrui.

Obligations positives

Au regard de nombreuses dispositions de la Convention, la jurisprudence de la Cour affirme que les autorités publiques ne doivent pas seulement s'abstenir de s'ingérer arbitrairement dans l'exercice des droits des individus tels qu'ils sont expressément protégés par les articles de la Convention, elles doivent également prendre des mesures actives pour les sauvegarder. Ces obligations supplémentaires sont généralement appelées « obligations positives », car il est demandé aux autorités d'agir de manière à empêcher toute violation des droits protégés par la Convention ou à punir les responsables.

Prévu par la loi

L'expression utilisée à l'article 8 § 2 de la Convention se retrouve aux articles 9 § 2, 10 § 2 et 11 § 2. La finalité de l'expression est d'assurer que lorsque des droits sont limités par des autorités publiques, cette restriction ne soit pas arbitraire et se fonde dans le droit interne. La Cour a précisé que pour qu'une limitation réponde aux exigences, elle doit être suffisamment accessible et ses effets prévisibles.

Requérant

Toute personne physique, organisation non gouvernementale ou tout groupe de particuliers qui saisit la Cour européenne des droits de l'homme d'une requête. Le droit de saisir la Cour est garanti par l'article 34 de la Convention européenne des droits de l'homme. Il est soumis aux conditions définies à l'article 35 de la Convention.

Subsidiarité (principe de)

Le principe de subsidiarité est l'un des principes fondateurs du mécanisme de protection des droits de l'homme de la Convention. Selon ce principe, il revient d'abord et avant tout aux instances nationales de veiller à ce que les droits inscrits à la Convention ne soient pas violés et d'offrir une réparation s'il y a lieu. Il importe également que le mécanisme de la Convention et la Cour européenne des droits de l'homme soit le dernier recours lorsque les instances nationales n'ont pas offert la protection ou la réparation requises.