

# The Protection of Religious Freedom under the *European Convention on Human Rights*

Javier Martínez-Torrón et Rafael Navarro-Valls

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Résumé de l'article

La protection internationale de la liberté de religion et de croyance a subi d'importantes améliorations au cours de la seconde moitié de ce siècle. La *Convention européenne sur les droits de l'homme* (1950) fait partie des avancements importants des organisations internationales. Le système de la Convention européenne a souvent été présenté comme étant un modèle d'efficacité pour la protection internationale des droits de l'homme, principalement pour son appareil judiciaire créé pour protéger les droits inclus dans la Convention et ses Protocoles. Son appareil judiciaire principal est la Cour européenne des droits de l'homme (Strasbourg). Le système européen, toutefois, est loin d'être parfait, du moins en ce qui concerne la protection de la liberté de religion, de conscience et de pensée. Cet article tente de décrire les principales forces et déficiences de la jurisprudence de la Cour européenne en ce qui concerne la liberté de religion et de croyance. La Cour a fait preuve de respect envers les traditions historiques de chacun des pays et a clairement affirmé que tous les groupes religieux avaient droit à la véritable liberté — pas seulement la tolérance. En pratique, cependant, la Cour n'a pas su protéger complètement la dimension strictement individuelle de la liberté de religion et par conséquent, les droits de certaines minorités religieuses semblent être en danger — particulièrement les minorités qui défendent des idées qui contreviennent avec les choix de la majorité. Cet article se termine avec certaines conclusions sur les aspects de la doctrine de la Cour européenne qu'elle devrait changer si elle veut être considérée comme un exemple qui devrait être suivi en droit international.

# DROIT COMPARÉ

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## The Protection of Religious Freedom under the *European Convention on Human Rights*\*

JAVIER MARTÍNEZ-TORRÓN

Professor, University of Granada Law School, Spain

RAFAEL NAVARRO-VALLS

Professor, Complutense University Law School, Madrid, Spain

### ABSTRACT

*The international protection of the freedom of religion and belief has experienced substantial improvements during the second half of this century. One of the important steps that has been taken by international organizations is the European Convention on Human Rights (1950). The system of the European Convention has often been presented as a model of efficiency in the international protection of human rights, above all for the judicial machinery created to enforce the rights included in the Convention and its Protocols, whose center is the European Court of Human Rights (Strasbourg). The European system, however, is far from perfect, at least as far as the protection of the freedom of religion, conscience and thought is concerned. This article attempts to*

### RÉSUMÉ

*La protection internationale de la liberté de religion et de croyance a subi d'importantes améliorations au cours de la seconde moitié de ce siècle. La Convention européenne sur les droits de l'homme (1950) fait partie des avancements importants des organisations internationales. Le système de la Convention européenne a souvent été présenté comme étant un modèle d'efficacité pour la protection internationale des droits de l'homme, principalement pour son appareil judiciaire créé pour protéger les droits inclus dans la Convention et ses Protocoles. Son appareil judiciaire principal est la Cour européenne des droits de l'homme (Strasbourg). Le système européen, toutefois, est loin d'être parfait, du moins en ce qui concerne la protection de la liberté de religion, de conscience et de pensée.*

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*describe the main strengths and deficiencies of the case-law of the European Court in regard to the freedom of religion and belief. The Court has showed respect for the historical tradition of each country, and has explicitly affirmed that every religious group is entitled to true freedom — not merely toleration. In practice, however, the Court has failed to fully protect the strictly individual dimension of religious liberty, and consequently the rights of some religious minorities seem to be in danger — specially those minorities which defend ideas openly contrasting with the ethical choices assumed by the majority. The article ends with some conclusions on the aspects of the European Court's doctrine that will be advisable to change if it wants to be considered as an example that should be followed in the international environment.*

*Cet article tente de décrire les principales forces et déficiences de la jurisprudence de la Cour européenne en ce qui concerne la liberté de religion et de croyance. La Cour a fait preuve de respect envers les traditions historiques de chacun des pays et a clairement affirmé que tous les groupes religieux avaient droit à la véritable liberté — pas seulement la tolérance. En pratique, cependant, la Cour n'a pas su protéger complètement la dimension strictement individuelle de la liberté de religion et par conséquent, les droits de certaines minorités religieuses semblent être en danger — particulièrement les minorités qui défendent des idées qui contreviennent avec les choix de la majorité. Cet article se termine avec certaines conclusions sur les aspects de la doctrine de la Cour européenne qu'elle devrait changer si elle veut être considérée comme un exemple qui devrait être suivi en droit international.*

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## INTRODUCTION

The international protection of the freedom of religion and belief has greatly improved during the second half of this century.<sup>1</sup> Religious liberty has progressed since it was solemnly recognized by the *Universal Declaration of Human Rights* in 1948. Since then, the United Nations has taken two important steps to promote the respect of religious liberty around the world. The first is the 1966 *International Covenant on Civil and Political Rights* (especially article 18). The second is the focus of this Conference: the 1981 *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*.

Together with the UN initiatives, and impelled by the 1948 Universal Declaration, other important steps have been taken by other smaller international organizations. Among them we could mention: the 1950 *European Convention on Human Rights* (especially article 9, and article 2 of the First Protocol); the 1969 *American Convention on Human Rights* (especially article 12); the 1981 *African Charter on Human and Peoples' Rights*; and some of the documents produced by the Conference (today Organization) for Security and Cooperation in Europe, in particular the Vienna Concluding Document of 1989 (especially principles 16-17).<sup>2</sup>

The system of the European Convention has often been presented as a model of efficiency for the international protection of human rights, not only for its description of the rights, but also — and above all — for the judicial machinery created to enforce the rights included in the Convention and its Protocols, whose centre is the European Court of Human Rights (Strasbourg), and whose structure and functioning has been recently changed.<sup>3</sup>

If we compare the existing systems of international protection of human rights, the above statement is probably accurate. The European system, however, is far from perfect, at least as far as the protection of the

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1. A good exposition of the history of the international efforts to guarantee the protection of religious freedom can be found in B.G. TAHZIB, *Freedom of Religion or Belief. Ensuring Effective International Legal Protection*, Martinus Nijhoff, Dordrecht, 1995, pp. 63-247; and M.D. EVANS, *Religious Liberty and International Law in Europe*, Cambridge University Press, 1997, pp. 6-171. For a summary description of the concept of religious freedom as it appears in international documents, see J. DUFFAR, "La liberté religieuse dans les textes internationaux", in the collective volume *La libertad religiosa. Memoria del IX Congreso Internacional de Derecho Canónico*, México, UNAM, 1996, pp. 471-497.

2. For a more detailed analysis of these documents, see J. MARTÍNEZ-TORRÓN, "La protección internacional de la libertad religiosa" in *Tratado de Derecho Eclesiástico*, Eunsa, Pamplona, 1994, pp. 141-239; see also the bibliography there cited. For the purposes of this article, I have kept the bibliographical references to a minimum. Further references can be found in my writings cited here, and in the book by TAHZIB and EVANS cited in the precedent note.

3. The change is a result of *Protocol no. 11 to the Convention*, which was done in May 1994, and came into force by November 1998.

freedom of religion, conscience and thought is concerned.<sup>4</sup> In the following pages we will attempt to describe what, in our opinion, constitutes the main strengths and deficiencies of the case-law of the European Court in regard to the freedom of religion and belief (Sections I and II). We will end with some conclusions on certain doctrines that the European Court should change in order to be considered as an example to be followed in the international environment.

## I. THE ATTITUDE OF THE STATE AND SECULAR LAW TOWARDS THE CHURCHES

The most positive factor about international actions concerning religion is probably the effort to implant the idea that any religious confession is entitled to freedom of religion, no matter if it is a traditional major church or a recent and atypical group. In other words, the notion that all religious denominations can act freely in any country, without being the object of unjustified restriction or persecution, even if they are minority groups, and even if they defend moral values that conflict with the values widely accepted by a certain society.

Although the 1981 Declaration against intolerance formally endeavors to intensify the enforceability of a right that properly belongs to individuals, the "collective" dimension of religious liberty is the actual leit-motif of the document, and can be traced along its entire text, especially in article 6. The same direction has been subsequently followed by other documents produced in the European international environment — especially, *Recommendation 1086* (1988), 6 October 1988, of the Parliamentary Assembly of the Council of Europe to the Committee of Ministers, and the 1989 *Vienna Concluding Document of the Conference for Security and Cooperation in Europe* (principles 16-17).

If we divert now to the case-law of the European Commission and Court of Human Rights, we can see that the jurisprudence of the Court has pointed out some legal consequences of the right to religious freedom that must be recognized for religious confessions.

### A. THE POSITION OF THE MAJORITY CHURCHES

One of the important assertions made by the Court of Strasbourg relates to the political principles that determine the relationship between State and religion.

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4. A recent and succinct analysis of the case-law of the European Court and Commission of Human Rights can be found in F. MARGIOTTA BROGLIO, "Religione e Stato in alcuni sistemi costituzionali atipici: il caso della Convenzione Europea del 1950" in J. MARTÍNEZ-TORRÓN (ed.), *La libertad religiosa y de conciencia ante la justicia constitucional. Actas del VIII Congreso Internacional de Derecho Eclesiástico del Estado*, Comares, Granada, 1998.

The Court has implicitly admitted that cooperation can exist between the State and the religious confessions, even when this cooperation is not carried out according to the rules of strict equality. Equality (article 14 of the European Convention) must rigorously be applied to freedom, but not necessarily to cooperation. Not even the situations of a privileged collaboration between the State and a certain church, in the form of a hidden confessionality of the State (as in Greece), or in the form of State churches (as in England or in the Scandinavian countries), have been considered contrary to religious freedom because of the protection offered by the European Convention. What is important — in the view of the Court — is that the relationship of privileged collaboration do not produce, as a side effect, any unjustified harm to the freedom to act that the rest of the groups and individuals must enjoy in religious and ideological matters.

In other words, the judicial bodies in charge of the application of the *European Convention on Human Rights* have made clear that article 9 is aimed at providing an adequate protection of the right to freedom of religion and belief. Its purpose is not to establish certain uniform criteria for Church-State relations in the Council of Europe member States, nor — even less — to impose a compulsory secularism (*laïcité*). The backcloth of this approach is the idea that the State's attitude towards religion is primarily a political issue, and is the result — to a large extent — of the historical tradition and the social circumstances of each country. Thus in the *Kokkinakis* case,<sup>5</sup> after a careful scrutiny of the Greek policy related to the legal restrictions on religious proselytism — and notwithstanding the fact that the Greek government received a condemnatory judgment — the European Court did not question the fact that the particular legal situation of the Greek Orthodox Church, which has a close connection with the State, is a legitimate political choice.

Furthermore, the Commission has explicitly affirmed that a system of State church does not itself constitute a violation of article 9 of the Convention, as long as membership to the official church is not mandatory.<sup>6</sup> The Commission has also accepted that some expressions of State cooperation with religious bodies do not have to respond to the principle of equality in order to be considered legitimate from the point of view of the European Convention. For example : to grant financial aid to the churches in the form

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5. *Kokkinakis v. Greece*, 25 May 1993. The same conclusion can be obtained from the report of the Commission in the case of *The Holy Monasteries v. Greece*, which ended with a peaceful arrangement (*Rep. Com. 13092/87 and 13984/88*, 14 January 1993; the decision of the Court, accepting the fairness of the arrangement, was delivered on 1 September 1997).

6. *Rep. Com. 11581/85 (Darby case)*, no. 45. It has been even admitted that in a system of State church like Sweden, the government can dismiss a minister for intentionally neglecting the civil duties attached to his religious office (*Dec. Adm. 11045/84, 42 Decisions and Reports 247*).

of tax exemptions,<sup>7</sup> or in the form of assigning some of the taxes collected to sustain the official church<sup>8</sup> or the church to which the tax payer belongs;<sup>9</sup> to grant the churches the ability to sue their followers before the State courts in order to enforce the payment of religious taxes;<sup>10</sup> and to collaborate with the official church in order to teach the Christian doctrine in public schools, as far as this is done in an objective and pluralist manner, and assuming that this collaboration of the State can not be qualified as "indoctrination".<sup>11</sup>

The position of the traditional major churches has been so notably respected that the European Court has held that the protection of the religious feelings of their faithful must prevail over certain forms of freedom of expression which can be qualified as blasphemy. In the recent cases of *Otto-Preminger-Institut* and *Wingrove*, the Court upheld the ban on the commercial distribution of some films that had been considered offensive to the feelings of Christian people by the Austrian and British authorities respectively.<sup>12</sup>

## B. THE MINORITY RELIGIOUS GROUPS

However, the Strasbourg case-law has not limited itself to affirming that article 9 of the European Convention is compatible with some traditional privileges of the major churches. In the last few years the Court has stressed that the Convention requires the real protection of the rights of minority religious groups — they are entitled to a true freedom to act, not merely to toleration.

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7. *Dec. Adm. 17522/90* (the "El Salvador" Baptist Church argued that it was being discriminated against because its places of worship were not exempted from the real property taxes in Spain, as Catholic premises were).

8. *Rep. Com. 11581/85* (*Darby* case, concerning the payment of local taxes aimed at financially supporting the Swedish Lutheran Church).

9. *Dec. Adm. 10616/83*, 40 *Decisions and Reports* 284 (concerning the ecclesiastical tax in a Swiss town, aimed at financially supporting the churches which are legally recognized; the tax had to be paid by the people who figure as members of the respective church in the civil register).

10. *Dec. Adm. 9781/82*, 37 *Decisions and Reports* 42 (the Catholic Church in Austria took a Catholic married couple to the civil courts to claim the payment of the ecclesiastical tax that Catholics must pay in every Austrian diocese).

11. *Dec. Adm. 4733/71*, 14 *Yearbook of the European Convention* 664, and *Dec. Adm. 10491/83*, 51 *Decisions and Reports* 41 (concerning religious education in Swedish public schools).

12. *Otto-Preminger-Institut v. Austria*, 13 July 1995, and *Wingrove v. United Kingdom*, 25 November 1996. The former related to a satiric movie entitled *Council in Heaven*, in which God was presented as a senile man prostrated before the devil and Jesus Christ as a mentally retarded person; an erotic relationship between the devil and the Virgin was also insinuated. The latter was concerning a video of 18 minutes duration containing a peculiar interpretation of St Teresa of Avila's ecstasy, in a pornographic setting with homosexual connotations.

One of the consequences of this statement is that every religious group has the right not only to be accepted as existing *de facto*, but also to be granted, under fair conditions, legal personality. According to the decision in the recent case of *Canea Catholic Church*, governments cannot unreasonably discriminate between different religious confessions in regard to the requirements they must comply with in order to be acknowledged as legal persons, above all when legal personality is indispensable to fight for their rights before the civil courts.<sup>13</sup>

Religious groups also have the right to own places of worship. In the cases of *Manoussakis* and *Pentidis*, the Court held that it was contrary to the European Convention to try to prevent religious groups from possessing and managing their own places of worship and meeting. Both cases were the result of lawsuits brought by Jehovah's Witnesses, who claimed that the Greek law on places of worship had been applied to them in a discriminatory and hostile manner. The Greek legislation requires an explicit permission on the part of civil authorities before opening a public place of worship. The alleged aim — in the interpretation of the Court of Cassation — is to ensure that the place is not run by secret sects, that there is no danger to public order or morals, and that the place of worship will not be used as a cover for acts of proselytism, that are explicitly forbidden by the Greek Constitution.<sup>14</sup>

Other important assertions by the European Court with regard to religious minorities relate to proselytism, and have been pronounced in two other cases against Greece. In the *Kokkinakis* case, the Court held that article 9 of the Convention includes the right for individuals and religious groups to spread their doctrines and to gain new followers through proselytism,

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13. *Canea Catholic Church v. Greece*, 16 December 1997. The case related to the Roman Catholic Church of the Virgin Mary in Canea, built in the 13<sup>th</sup> century, which is the cathedral of the Roman Catholic diocese of Crete. Two people living next to the church had demolished one of the surrounding walls, and opened a window looking onto the church in the wall of their own building. The Greek courts denied legal standing to the church, as it had not complied with the formal requirements generally stated by the Civil Code to acquire legal personality. This denial contradicted an abundant administrative and judicial practice in Greece in relation to the Roman Catholic Church. Furthermore it constituted a discrimination with regard to the Greek Orthodox Church and to the Jewish communities, which were granted legal personality and legal standing to sue without having to follow the civil formalities common to all associations.

14. *Manoussakis and others v. Greece*, 26 September 1996; *Pentidis and others v. Greece*, 9 June 1997. In *Manoussakis*, the plaintiffs had asked for the government permission to set up a place of worship, and they began to utilize the place as the permit had not been granted within a period of time that they considered to be excessive. The Court held that there had been a violation of article 9, after evaluating especially three facts: the excessive discretion that Greek authorities had to estimate the need to open a place of worship, the lack of a specified term to decide on the permit — which could perpetuate the proceedings indefinitely —, and the fact that the Greek Orthodox Church intervened in the decision-making process.



provided that they do not use abusive, fraudulent or violent means.<sup>15</sup> More recently, in the *Larissis* case, the Court added new elements to this thesis when proselytism is carried out in certain special environments, such as the armed forces. More precisely, it was held that restrictions to proselytism are legitimate when they are related to a superior-subordinate relationship, *i.e.* when a superior tries to convert a subordinate, even if it is done through respectful conversations on religious topics. This restriction is justified by the need to avoid abuse of a subordinate by a superior. However, the restrictions on proselytism are not justified when respectful conversations on religious topics take place between an officer of the armed forces and a civilian, even if the latter also belongs to the military environment, for then there is no subordinate relationship.<sup>16</sup>

## II. THE INSUFFICIENT PROTECTION OF THE RELIGIOUS LIBERTY OF INDIVIDUALS AND OF SOME RELIGIOUS MINORITIES

The international documents on human rights and the 1981 Declaration against intolerance consider the freedom of thought, conscience and religion as a right belonging primarily to individuals — on a conceptual level, the right of religious groups appears as a “product” derived from the individual’s right. Paradoxically, however, the strictly individual dimension of this right has received a deficient protection by the bodies in charge of applying international conventions, while its collective dimension has received a more correct treatment, as we have seen in the previous paragraph.

### A. THE MEANING OF THE TERM *PRACTICE* IN THE INTERNATIONAL DOCUMENTS

The problem arises from the terminology utilized by the international texts that describe the content of the freedom of religion and belief. To continue within the environment of the *European Convention on Human Rights*, let us analyze its article 9.1. Among the aspects that deserve protec-

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15. *Kokkinakis v. Greece*, 25 May 1993. An elderly man, a follower of the Jehovah’s Witnesses, had been arrested, and subsequently sentenced by the Greek courts, under the law that declares proselytism a crime, which in turn follows the constitutional ban on proselytism. Both provisions are aimed at protecting the social status of the Greek Orthodox Church. For a detailed comment on this decision — the first to be decided by the European Court according to article 9 of the Convention — see J. MARTÍNEZ-TORRÓN, “Libertad de proselitismo en Europa. A propósito de una reciente sentencia del Tribunal europeo de derechos humanos”, (1994) 1 *Quaderni di diritto e politica ecclesiastica* 59-71. On the problems involved in determining a concept of proselytism in international law, see N. LERNER, “Proselytism, Change of Religion, and International Human Rights”, (1998) 12 *Emory International Law Review* 477-561.

16. *Larissis and others v. Greece*, 24 February 1998. The case involved three officers of the Greek Air Forces who belonged to the Pentecostal Church.

tion, the text mentions the right to manifest one's religion or belief in worship, teaching, practice and observance. If we direct our attention to the term *practice*, we see that its most obvious interpretation seems to be that article 9 concedes a guarantee to the right of individuals to behave in accordance with the prohibitions and dictates of their own conscience, no matter whether or not they correspond to the tenets of a determined institutional religion<sup>17</sup> — of course it is a necessarily limited guarantee (article 9.2), as the freedom to act is never absolute.

This broad construction of the rights of the individual conscience — be it a religious or a non-religious conscience — has been proposed by the General Comment of the Committee of Human Rights on article 18 of the 1966 *International Covenant on Human Rights*.<sup>18</sup> However, we are afraid that the attitude of the European Court and Commission has been very different in regard to article 9 of the *European Convention on Human Rights*. We will try to summarize their approach on this question.<sup>19</sup>

The case-law of Strasbourg has stressed the necessity to distinguish between the internal and external aspects of religious liberty. The former is the freedom to believe, which embraces the freedom to choose one's beliefs — religious or non-religious — and the freedom to change one's religion.<sup>20</sup> The latter consists in the freedom to manifest one's religion or beliefs. The internal dimension of religious freedom is absolute and can not be restricted, while the freedom to act is relative by its very nature, and can be limited by virtue of article 9.2 of the Convention.<sup>21</sup> All of this seems indisputable. It is obvious that no direct action can be taken — or permitted — by public authorities to impel citizens to believe or not to believe in something. For the same reason, in 1976, in the *Kjeldsen* case,<sup>22</sup> the Court held

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17. It does not seem accurate to interpret the term *practice* as the mere practice of rites, considering that the ritual dimension of religious freedom is alluded to in other words used in article 9 of the European Convention (and article 18 of the *International Covenant on Civil and Political Rights*), in particular the terms *worship* and *observance*.

18. The General Comment on article 18 was adopted by the Committee in July 20, 1993. For an analysis of the text, see B.G. TAHZIB, *op. cit.*, note 1, pp. 307-375.

19. See also, on this subject, M.D. EVANS, *op. cit.*, note 1, pp. 293-314.

20. It is well known that Islamic countries have usually been opposed to the inclusion of this point in the international documents on human rights.

21. *Dec. Adm. 10358/83, 37 Decisions and Reports* 147, in which the Commission utilizes the expression "forum internum". The same doctrine is reiterated in *Dec. Adm. 10678/83, 39 Decisions and Reports* 268, and *Dec. Adm. 14049/88*. See also *Rep. Com. 11581/85 (Darby case)*, no. 44. The Court, following the Commission's approach, has subsequently alluded to this double side of religious freedom, and has emphasized that the limits stated in article 9.2 are applicable only to the freedom to *manifest* one's religion or belief, but not to the freedom to *choose* one's religion or belief (*Kokkinakis v. Greece*, 25 May 1993, nos. 31 and 33).

22. *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976. The case related to the implementation of a new system of sex education in public schools, with the purpose of preventing undesired pregnancies among teenagers. Some parents alleged conscientious objection to this teaching, as they considered that sex education was in the exclusive domain of parents.

that the State, in the organisation of the educational system, was not allowed to develop any activities that amount to indoctrinating the students on a particular religious or moral view of life contrary to the convictions of their parents.

The crucial question is how we understand the relative freedom of individuals to act according to the dictates of their own conscience, an issue closely connected with the problem that arises from the conflicts between law and conscience, between legal and moral duties. In our opinion, the European jurisdiction has not chosen the most adequate interpretation.

Indeed its approach has consisted mainly in drawing a line of separation between the concepts of *manifestation* and *motivation*. The European Convention does not necessarily guarantee the right to follow any sort of external behavior adapted to one's belief. In fact, the Commission has stated that the term *practice* does not include each and every act motivated or influenced by a religion or belief.<sup>23</sup>

#### B. "NEUTRAL" LAWS AND MORAL OBLIGATIONS : THE INDIRECT RESTRICTION OF RELIGIOUS FREEDOM

In abstract, this approach seems reasonable, for the behavior *obliged* by conscience — which seems to be the one taken into account by article 9 — is very different from the behavior simply *permitted* by conscience. Nevertheless, the truth is that the case-law of the Commission and the Court reveals that they have adopted a fairly restrictive attitude. They have tended to consider that the protective umbrella of article 9 does not extend to the individual's behavior which is impelled by his own conscience.<sup>24</sup>

In their view, the European Convention offers protection only against the interference of the State which is *directly* aimed at restricting the worship or the expansion of certain religions (this was indeed the situation in the *Kokkinakis* case, cited above<sup>25</sup>). Contrarywise, article 9 offers no protec-

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23. *Rep. Com. 7050/75, 19 Decisions and Reports 19-20 (Arrowsmith case, concerning a British pacifist, sentenced to a term of imprisonment for having distributed illegal leaflets among English soldiers in Northern Ireland). This doctrine has been subsequently reaffirmed in several decisions. For instance: Dec. Adm. 10358/83, 37 Decisions and Reports 147 (conscientious objection to paying taxes, in the percentage of the State budget aimed at military costs); Dec. Adm. 10678/83, 39 Decisions and Reports 268 (conscientious objection to contributing to the public system of pensions); Dec. Adm. 11579/85, 48 Decisions and Reports 255 (conflict between religious and civil marriage laws); Dec. Adm. 14049/88 (conscientious objection to paying taxes, in the percentage of the State budget aimed at financing legal abortions in France).*

24. For further details on this approach of the Strasbourg jurisdiction, see J. MARTÍNEZ-TORRÓN, "La giurisprudenza degli organi di Strasburgo sulla libertà religiosa", (1993) *Rivista internazionale di diritti dell'uomo* 335-379.

25. *Supra*, note 15 and accompanying text.

tion against interference that is the result of a “neutral” law, *i.e.* a law that pursues legitimate secular goals. The problem arises when the legal duties imposed by the “neutral” law collide with the moral obligations of some individuals,<sup>26</sup> who see their right to practice their religion or belief restricted *indirectly* but nonetheless unavoidably. The immediate consequence of this is that a moral burden is placed upon the shoulders of these people, who must choose between disobedience of the law and disobedience of their conscience — one receives a worldly punishment, the other entails a spiritual sanction.

This way of reasoning was already taken into account in the *Kjeldsen* decision, in 1976. The Court held that the State was free to organize the educational system, and particularly the *curricula* of public schools, even if the religious or philosophical convictions of parents were actually disregarded. The aim of indoctrination of students, as we noted before, was the only limit that could not be exceeded.<sup>27</sup>

The same criteria were reaffirmed twenty years later in two cases that also related to problems arisen within the educational environment. The twin decisions of *Efstratiou* and *Valsamis* (1996) concerned two followers of the Jehovah’s Witnesses who were students in secondary schools in Greece. They refused, for religious reasons, to participate in the school parades organized in the national feast to commemorate the outbreak of war between Greece and Fascist Italy, in 1940.<sup>28</sup> They argued that their conscience prohibited them to be present in a civic celebration in which a war was remembered, and in which military and ecclesiastical authorities took part. Permission to be absent from the parade was denied to both students, and failure to attend was punished by one day’s suspension from school. The Court sustained the punishment, considering that article 9 does not grant the right to get any exemption from rules which apply generally and in a neutral manner.

In our opinion, this interpretation of article 9 by the European Court virtually reverses its logical purpose. It is universally accepted that human rights must be construed broadly. Therefore, in order to understand the exact meaning of the freedom to manifest one’s religion or belief in “practice”, it seems that we should approach the question in a double

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26. This is the case of the different types of conscientious objection (which must not be restricted to the most frequent case, *i.e.* conscientious objection to military service). An extensive analysis of conscientious objections in international and comparative law, with numerous bibliographical and case-law references, can be found in R. NAVARRO-VALLS/J. MARTÍNEZ-TORRÓN, *Las objeciones de conciencia en el derecho español y comparado*, Madrid, McGraw-Hill, 1997. Within the law of the United States, this topic has been widely analyzed by a Spanish scholar: R. PALOMINO, *Las objeciones de conciencia. Conflictos entre conciencia y ley en el derecho norteamericano*, Madrid, Montecorvo, 1994.

27. *Supra*, note 22 and accompanying text.

28. *Efstratiou v. Greece*, 18 December 1996, and *Valsamis v. Greece*, 18 December 1996. The texts of both sentences are almost identical, as indeed were the facts in issue.

sequence, as follows : i) freedom to practice one's religion or belief must be understood as protecting, in principle, every act of the individual when he obeys the dictates of his own conscience; ii) paragraph 2 of article 9 — the limits to religious liberty — will be utilized, when necessary, as a corrective element for a freedom which, by its own nature, tends to be exercised in an undefined and unpredictable way.

In this way, we manage to grant the maximum degree of initial acknowledgment of the freedom of belief, without causing any harm to the security that the general legal order demands. Furthermore, we introduce an important assumption : the State has the burden of proof in regard to the necessity to impose a restrictive measure, *i.e.* it must affirmatively prove that, in a particular case of conflict, it is necessary, "in a democratic society", to restrict the exercise of religious freedom. Following this approach would obstruct the development of policies which ignore the needs for religious freedom and which are especially harmful for minority groups.

### C. SUBSTITUTING THE INDIVIDUAL'S JUDGMENT OF CONSCIENCE

In the *Efstratiou* and *Valsamis* decisions, the Court made another questionable finding. When the judges examined the arguments of the plaintiffs, they declared that the parades were merely civic acts with no particular ideological connotation, so that they could not offend the pacifist convictions of the Jehovah's Witnesses.<sup>29</sup> Thus the Court virtually substituted the judgment of conscience of the individuals involved, as it was defining what was "reasonable" for them to believe with regard to their participation in a national commemorative ceremony.

In our opinion, this is a grave mistake, and a dangerous step taken by the Court of Strasbourg. It could be the beginning of an unacceptable way of thinking if a court starts determining which beliefs are "reasonable" and which beliefs are not. Naturally, it is necessary to verify — as much as possible — the facts of every case to make sure that nobody is deceitfully alleging untrue moral convictions in order to avoid performing a legal duty. But it is a very different thing to sustain that a secular court is competent to elucidate when the beliefs of a person are sufficiently consistent, from an "objective" point of view, to be considered "normal". This is a slippery surface. In the Western legal culture, there is a deeply-rooted notion that public authorities, in a secular society, must refrain from determining what could or could not be true in a religious dogma or moral conviction.

In the decisions mentioned above, the European Court seemed unaware of something that is essential in regard to the protection of religious liberty in our civilization. The reason why the free conscience of each indi-

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29. See especially nos. 31 and 37 of the *Valsamis* decision, and nos. 32 and 38 of the *Efstratiou* decision.

vidual must be respected is not that it is objectively correct — the courts would then have to judge the truth of the alleged beliefs, as a sort of a new Inquisition. Freedom of conscience must be respected because in modern democratic societies it is considered an essential part of the individual's autonomy, and consequently the legal systems have determined that they will not interfere with the individual's conscience as far as it does not endanger other prevailing juridical interests. What freedom of religion and belief protects is namely the right to choose the truths in which one is willing to believe. Hence, article 9.2 of the European Convention states that the power of control of the State is limited: it can only restrict the exercise of religious freedom when it is "necessary in a democratic society".

In other words, the government is not obliged to respect — and protect — the freedom of religion and belief because it considers the convictions of its citizens to be correct, or because it is simply convenient to do so. It is obliged to protect the freedom to believe, and the freedom to act accordingly, because they constitute an essential element of a democratic system. The protection of that freedom is a paramount *public* interest, and not just a *private* interest of individuals and groups. This is something that is easily understood with regard to other liberties — for instance, the freedom of expression, or the freedom of association —, but is sometimes inexplicably ignored when dealing with religious liberty.

On the other hand, it is important to note that the outcome of the aforementioned approach of the Strasbourg jurisdiction does not remain in the individual sphere. We said before that the European Court had positively impelled the acknowledgment of the rights of minority groups.<sup>30</sup> Now we feel obliged to add that its restrictive doctrine on the individual's rights is destined to produce negative effects also for some religious minorities. This is particularly true for the minorities who defend ideas that contrast openly with the ethical choices assumed by the majority of people in a certain society.

In effect, the laws considered "neutral" usually conform — as does any law — to the ethical values dominant in a determined social environment at a certain moment. "Neutral" laws will rarely conflict with the morals of the major churches,<sup>31</sup> but they can more often conflict with minority religious groups that are socially atypical (for instance, Muslims or Jehovah's Witnesses). The fact that the "neutral" law will automatically prevail, and that the State is under no obligation to justify that its refusal to grant exemptions from the general application of the law is a measure "nec-

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30. See *infra*, Section I.B.

31. Naturally, there are exceptions, especially when the party or parties in power propose to change some of the ethical patterns of society through legislation — in which they often succeed after a few years. Good examples are the laws decriminalising abortion in the Western world, and the introduction of divorce in Ireland.

essary in a democratic society" (article 9.2 of the Convention), constitutes a significant risk for the rights of minorities.

### CONCLUSION : RELIGIOUS AND SECULAR INTOLERANCE

If we analyze the different problems with the protection of religious liberty around the world, we can affirm that, from the point of view of the law of the State, the main problem is intolerance. In this regard, we must distinguish between two forms of intolerance.

The first is a religion-oriented intolerance. In this case, the legal and constitutional structure of a State is designed according to the dictates of a religion. Other religions or beliefs are either disregarded or persecuted, depending on how hostile the government and the hierarchy of the official religion are. This is currently the case, for example, in many Islamic countries, and in some countries where a strong Christian Orthodox Church is established (as occurs in a great part of Eastern Europe).

The second is a secularism-oriented intolerance. The State decides to be positively secular or laic (according to the French sense of *laïcité*), and establishes a line of separation between State and religion. This choice is normally justified either for historical reasons (*e.g.* France), or because some find it necessary to preserve the reciprocal autonomy of the State and the churches (*e.g.* the United States), or because some claim that it is indispensable to keep the State free from the religious intolerance of a significant part of the population (*e.g.* Turkey). In any event, experience shows that these States frequently adopt an aggressive secularism, and endeavor to remove any actual reference to religious beliefs and practice from social public life. Secularism becomes a sort of official "religion".

Religious intolerance transforms a religious dogma into the law of the State. Secular intolerance transforms the law of the State into a religious dogma. None of them seems to be an adequate solution to guarantee the respect of the freedom of religion and belief.

If we return to the case-law of the European Court of Human Rights, we can conclude that it has been willing to condemn religion-oriented intolerance, but it has failed to realize that by affirming the automatic predominance of "neutral" laws over the freedom of conscience, there may be an implied and dangerous justification of secularism-oriented intolerance.

We Europeans are usually proud of the system we have built to protect human rights. We tend to think that our system is not only a good system but the *best* system. We believe that it is a model that should be followed everywhere. This is probably fairly accurate if we refer to the existing supranational judicial machinery used to enforce the rights included in the European Convention. But our conclusions might be less positive if we focus instead on the substantive meaning of some of the rights, according to the case-law of the Court.

As far as religious liberty is concerned, the case-law of Strasbourg certainly shows a very positive side : its emphasis on the idea that the concession of privileges to the major churches must be accompanied by an acknowledgment, and a real protection, of the rights of religious minorities.<sup>32</sup> There may be different levels of State cooperation with churches, but the freedom of religious groups must be understood according to strict equality. Cooperation can be different, freedom can not. This is indeed an idea that can be “exported” to other countries and cultures.

The negative side of the Strasbourg case-law, as we have seen,<sup>33</sup> is its tendency to enshrine the principle of the absolute supremacy of “neutral” laws over the rights of individual conscience. The effects of this approach are harmful not only for individuals, but also for those minority religious groups who defend moral values that differ from the traditional Western heritage — *i.e.* the values of the Judæo-Christian tradition, amalgamated with other values typical of secularism. One of the main problems that Europe has in this regard is the increase in the Islamic population caused by migration.

This is, of course, an idea that is difficult to “export” — and should not be exported — to other countries. It seems that our supranational judicial system has failed to design an appropriate legal framework to make possible the integration of non-Western cultures and religions into Europe.

Furthermore, it is an example of what should not be done. If the European Court continues to affirm the unconditional supremacy of “neutral” laws over the freedom of conscience, it is in a bad position to argue against the parallel supremacy of “religious” laws in the States of religion-oriented intolerance. After all, both are laws coming from the legislative authority of the State.

It could certainly be discussed whether it is possible to integrate non-Western religions and cultures into Europe without disruptions in the social and political framework which is characteristic of our concept of democracy. Most people believe that this can be achieved, although others do not agree. In any event, if we Europeans really do want to be an example of respect for human rights to other continents, the least we can do is try.

Javier Martínez-Torrón  
Catedrático  
Universidad de Granada  
Facultad de Derecho  
E-18001 GRANADA — Spain  
Tel. : (34) 958 243417  
Fax : (34) 958 248935  
E-mail : jmtorron@goliat.ugr.es

Rafael Navarro-Valls  
Catedrático  
Universidad Complutense  
Facultad de Derecho  
E-28040 MADRID — Spain  
E-mail : rnavarro@eucmax.sim.ucm.es

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32. See Section I.

33. See Section II.