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Religion and beliefs: fundamental rights guaranteed by the ECHR and EU law

by

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Freedom of religion, equality and non-discrimination based on religion or belief are fundamental rights firmly enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the Council of Europe in 1950. The European Court of Human Rights in Strasbourg has progressively built a strong case-law in defence of those principles. The European Union has drawn heavily on the Council of Europe in its endeavour to promote fundamental rights, which it has done most notably in adopting binding anti-discrimination directives; control over the respect of such directives by legislation enacted by national states can be exerted by the Court of Strasbourg, given the relative passivity of the Court of Justice of the European Union so far.

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The modern era has led the European states to a process of secularisation that ultimately gave rise to the redefinition of the place of religion in the public sphere. At the same time, the development of the human rights to freedom of religion **(1)** and to equality in the field of religious beliefs **(2)** has allowed a guarantee, within certain limits, to the external manifestations of beliefs. The establishment of these two fundamental rights in the European legal orders made it possible to take into account the diverse beliefs that are likely to be expressed, in spite of a present tendency to privatise religious activities.

On the European level, this judicial protection has primarily developed within the framework of the Council of Europe, which was specifically established with a view to ensuring "*the maintenance and further realisation of human rights and fundamental freedoms*."[1] Only more recently, the European Union – at the outset conceived as an economic and political organisation – has also taken up the task of promoting and guaranteeing fundamental rights, notably the freedom and equality in the field of religion or beliefs.[2] To this end, the European Union largely referred to the instruments developed within the framework of the Council of Europe, more specifically the European Convention on Human Rights and the case law of its protecting bodies.[3]

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[1] Statute of the Council of Europe, signed in London on 5 May 1949, art. 1(b).

[2] The Treaty of Amsterdam, signed on 2 October 1997 and having entered into force on 1 May 1999, has amended Article F of the Treaty on the European Union so that it stipulates that "*The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms*." Henceforth Article 2 of the Treaty on the European Union specifies that "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*." On 12 October 2012, the European Union received the Nobel Peace Prize on account of its contribution to the promotion of peace, reconciliation, democracy and human rights in Europe (see the list of the Nobel Peace prize winners (available at the following link: http://la-paix.org/les-nobels-de-la-paix.htm).

[3] The Treaty on the European Union specifies that "*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*" (art. 6(3)). The Treaty also foresees the European Union's accession to the European Convention on Human Rights (art. 6 (2)). The practical modalities of this accession still need to be defined more precisely, especially with regards to the control exercised by the authorities protecting the Convention. In this respect, see A. POPOV, "L'avis 2/13 de la CJUE complique l'adhésion de l'Union européenne à la CEDH," *La Revue des droits de l'homme*, Actualités Droits-Libertés, 23 February 2015 (available at the following link: http://revdh.revues.org/1065).

1. Freedom of religion[4]

Beyond the institutional framework of certain States, freedom of religion has been recognised at the international level in the aftermath of World War II.[5] Within the Council of Europe, this freedom has been recognised since 1953, following the entry into force of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) signed in Rome on 4 November 1950. Article 9 of the Convention stipulates that "*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 and observance*."[6]

This provision is directly applicable in the State Parties that have developed a monist approach with respect to the integration of international law, such as France or Belgium. However, this is not the case as far as countries are concerned that adopted a dualist position in this matter, such as the United Kingdom.[7] In this way, even though the European Convention on Human Rights has been binding upon the United Kingdom since 1953, it can only be invoked before the British courts since the adoption of the Human Rights Act 1998, which entered into force in 2000. Nonetheless, irrespective of this incorporation into national law, individuals claiming to be a victim of a violation of the Convention can submit their case to the European Court of Human Rights in Strasbourg, once they have exhausted all internal legal remedies.[8] These applications can only be lodged against the State Parties of the Convention. Nevertheless, it is now accepted that the rights guaranteed therein do not only pertain to the vertical relationships with the public authorities, but also, indirectly, to the horizontal relations between private individuals. Indeed, the States have an obligation to ensure that the private relationships develop with due respect for the

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[4] In terms of the present study, freedom of religion refers both to the freedom of conscience and thought in the field of religious and philosophical convictions and to the right to free exercise of worship and public expression of faith.

[5] See in particular the Charter of the United Nations, adopted in San Francisco on 26 June 1945 and which entered into force on 24 October 1945, art. 1(3); Universal Declaration of Human Rights (UDHR), proclaimed in Paris on 10 December 1948, United Nations General Assembly Resolution 217, art. 18; International Covenant on Civil and Political Rights (ICCPR), concluded in New York on 16 December 1966, United Nations General Assembly Resolution 2200 A (XXI), and which entered into force on 23 March 1976 following the ratification by 35 states, art. 18.

[6] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, art. 9. The Convention entered into force in the United Kingdom on 3 September 1953, in France on 3 May 1974 and in Belgium on 14 June 1955. Nevertheless, as regards the United Kingdom, the Convention could only be invoked before British courts after the adoption of the Human Rights Act 1998 that entered into force in 2000. See the first judgment pronounced by the European Court on the basis of Article 9 of the Convention: ECtHR, judgment *Kokkinakis v. Greece*, 25 May 1993, appl. no. 14307/88, par. 31 ("*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*").

[7] SIR J. DINGEMANS, C. YEGINSU, T. CROSS and H. MASOOD, *The Protections for Religious Rights. Law and Practice*, Oxford, Oxford University Press, 2013, p. 19. For more extensive developments on the monist and dualist approaches, see J. CRAWFORD, *Brownlie's Principles of Public International Law*, Oxford, Oxford University Press, 8th ed., 2012, pp. 48-50.

[8] European Convention on Human Rights, Art. 34 and Art. 35.

Convention rights.[9]

More recently, the European Union equally adopted a Charter of Fundamental Rights recognising freedom of religion.[10] This treaty – which is directly applicable before the national authorities since 1 December 2009 – is aimed at the European institutions, or at the Member States when they implement EU law.[11] Within this framework, freedom of religion has the same meaning and the same scope as those of the European Convention on Human Rights.[12] Therefore, in Europe, Article 9 of the European Convention on Human Rights and the case law of its protecting bodies,[13] have constituted an important resource for the development of freedom of religion.[14]

The European Convention on Human Rights distinguishes between, on the one hand, the absolute right to the autonomy of conscience in religious matters (internal dimension) and, on the other, the right to manifest one's convictions (external dimension).[15] The first dimension

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[9] See notably D. SPIELMANN, "Obligations positives et effet horizontal des dispositions de la Convention," *in* F. SUDRE (eds.), *L'interprétation de la Convention européenne des droits de l'homme*, Bruxelles, Bruylant, 1998, pp. 133-174 ; P. VAN DIJK and G. J. H. VAN HOOF, *Theory and Practice of the European Convention*, The Hague, Kluwer Law International, 3rd ed., 1998, pp. 22-26 ; S. VAN DROOGHENBROECK, "L'horizontalisation des droits de l'Homme," *in* H. DUMONT, F. OST and S. VAN DROOGHENBROECK (eds.), *La responsabilité, face cachée des droits de l'homme*, Bruxelles, Bruylant, 2005, pp. 355-390.

[10] Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000, entry into force on 1 December 2009, art. 10 ("*Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance*").

[11] Charter of Fundamental Rights of the European Union, Art. 51 – Note that certain States have obtained a special status the outlines of which still have to be determined. See the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom, *O.J.E.U.*, no. C 306, 17 December 2007, pp. 156-157.

[12] Charter of Fundamental Rights of the European Union, Art. 52(3) ("*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection*"). CJEU (Grand Chamber), *Bundesrepublik Deutschland v Y and Z*, 5 September 2012, Cases C-71/11 and C-99/11, par. 56 ("*The right to religious freedom enshrined in Article 10(1) of the Charter corresponds to the right guaranteed by Article 9 of the ECHR*").

[13] In the beginning, the judicial system established by the European Convention on Human Rights was made up of, on the one hand, the European Commission of Human Rights, and, on the other, the European Court of Human Rights. The Commission was active from 1954 to 1999. It heard applications introduced on the basis of the Convention. Once admissible, and if no settlement was reached, the application was transmitted to the Court. Consequently, the applications the Commission found to be inadmissible did not reach the Court. Since the Court sits permanently (1 November 1998), the Commission has been abolished and applications are directly addressed to the Court. See R. BERNHARDT, "Reform of the Control Machinery under the European Convention on Human Rights: Protocol No. 11," *The American Journal of International Law*, 1995, Vol. 89, no. 1, pp. 145-154. On the protection mechanism currently offered by the European Court of Human Rights, see J.-Fr. RENUCCI, *Introduction à la Convention européenne des Droits de l'Homme, Les droits garantis et le mécanisme de protection*, Strasbourg, Éditions du Conseil de l'Europe, 2005, pp. 101-132.

[14] This is especially the case in the United Kingdom where the sole explicit foundation of freedom of religion is in Article 9 of the European Convention on Human Rights, such as incorporated following the adoption of the Human Rights Act 1998. Conversely, France and Belgium had already explicitly recognised this right in their constitutional system before the entry into force of the European Convention. Nevertheless, the case law of the European Court of Human Rights influenced the interpretation of these rights by the national courts.

[15] ECtHR, judgment *Kokkinakis v. Greece*, 25 May 1993, appl. no. 14307/88, par. 31. See also J. VELU et R. ERGEC, *La Convention européenne des Droits de l'Homme*, Bruxelles, Bruylant, 1990, p. 584 ; P. MEYER-BISCH et J.-B. MARIE (eds.), *La liberté de conscience dans le champ de la religion*, Institut interdisciplinaire d'éthique et des droits de l'homme, Documents de travail no. 4, Université de Fribourg, 2002, p. 5 ; J.-Fr. RENUCCI, *L'article 9 de la Convention européenne*

concerns the personal convictions and does not tolerate any exception, whereas the second dimension relates to practices and can be restricted under certain conditions.[16] Consequently, not all actions motivated by conscience are protected by freedom of religion. Therefore, the question arises as to what behaviours are guaranteed and which, on the contrary, can be excluded from the scope of this freedom.

If freedom of religion primarily provides a protection for the individual, it also has a collective dimension which allows it to be mobilised by a variety of Churches or religious communities. As a continuation of Article 11 of the Convention, which guarantees the freedom of assembly and association, Article 9 recognises an organisational autonomy to religious communities. Besides, within the framework of the European Union, Article 4(2) of the Directive 2000/78/EC allows for an exception to the prohibition of discrimination on the grounds of religion or belief for the benefit of Churches and other public or private organisations of which the ethos is based on religion or belief ("ethos-based organisation"). The Court of Justice of the European Union has not yet clarified the meaning of this provision, but the European Court of Human Rights has referred to it on several occasions in order to interpret the organisational autonomy that it concedes to the different religious communities.

In the case of *Sindicatul Păstorul*, decided in 2013, the Grand Chamber of the European Court of Human Rights considered that the Romanian Orthodox Church could oppose the formation of a trade union by a group of orthodox priests and of laypersons that it employed.[17] Although admitting that members of the clergy did not escape the internal norms of labour law and that they accomplished their missions within the framework of an employment relationship within the scope of Article 11 of the Convention (freedom of association), the Grand Chamber considered that the balance established between the fundamental rights at stake (on the one hand, the freedom of religion of the Orthodox Church and, on the other hand, the freedom of association of its employees) did not contravene the Convention.

This case law was confirmed in 2014 in the judgment *Fernández Martínez*. Here, the Grand Chamber of the European Court of Human Rights found the dismissal of a priest, teaching a class in catholic religion within a Spanish public secondary school, to be in line with the Convention.[18] In this case, the ecclesiastic authorities had stated a "risk of scandal" because of Mr Fernández Martínez's marital situation. He was married and father of five children and he had participated at a demonstration of the "Movement for Optional Celibacy" which had been spread by the local press. The ministry of Education had dismissed the teacher following a note

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des droits de l'homme. La liberté de pensée, de conscience et de religion, Dossiers sur les droits de l'homme, no. 20, Strasbourg, Éditions du Conseil de l'Europe, 2004, p. 10.

16 Article 9 of the European Convention stipulates that these limitations have to be foreseen by the law and to be "*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*." According to a similar wording, Article 18 of the United Nations Covenant specifies that these restrictions must be foreseen by the law and must be "*necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others*." As for the Charter of Fundamental Rights of the European Union, the general limitation clause, provided for in Article 52, makes the validity of the limitations to the rights recognised in the Charter dependent on the existence of a law and to the fact that they are "*necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*."

17 ECtHR, judgment *Sindicatul "Păstorul cel Bun" v. Romania*, Grand Chamber, 9 July 2013, appl. No. 2330/09.

18 ECtHR, judgment *Fernández Martínez v. Spain*, Grand Chamber, 12 June 2014, appl. No. 56030/07.

transmitted by the Diocese of Cartagena. In this case, the European Court balanced the freedom of religion invoked by the Catholic Church, on the one hand, and the right to the respect of private and family life put forward by the discharged employee, on the other. In this respect, the Court held, by a very narrow majority, that the exclusion of the catholic priest was justified within the scope of the autonomy that Article 9 of the Convention grants the religious organisations.

In general, when an individual or a religious organisation invokes Article 9 of the Convention, the European Court of Human Rights first has to assess whether there is an infringement of the freedom of religion. This first step presupposes the establishment of the existence of a religion or a belief protected by the Convention, as well as the manifestation of the said religion or belief. If the Court considers that Article 9 of the Convention applies, it then needs to examine whether the established restriction is justified. That is, whether it is prescribed by law and pursues a legitimate objective in a proportionate manner.

At the first stage of the analysis, the European Court has developed a relatively broad definition of the notion of "religion or belief". This allowed the Court to include religious beliefs, non-religious beliefs, or the absence of beliefs on an equal footing, and, beyond the traditional religions of the majority, to touch upon the currents that are recently established, in minority, marginal or even in complete isolation.[19] In this way, the protecting bodies of the Convention have recognised the religious or convictional status of several movements, such as Jehovah's Witnesses,[20] Druidism,[21] Krishna Consciousness,[22] the Moon sect,[23] the Osho movement,[24] the Divine Light Zentrum,[25] pacifism,[26] atheism[27] or veganism[28].

Once the existence of a protected belief is established, a manifestation of this belief needs to be present for the Convention to be breached. Article 9 aims explicitly at "worship, teaching, practice and observance." Traditionally, the European case law considered this provision to protect only those acts directly expressing a religion or a belief, to the exclusion of those that were merely motivated or inspired by these. Thus, in the case of *Arrowsmith*, the European Commission of Human Rights decided that pacifism was a belief protected by Article 9 of the Convention in the form of freedom of thought and conscience; however, the distribution of

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[19] Relating to this, see J. MURDOCH, *La protection du droit à la liberté de pensée, de conscience et de religion par la Convention européenne des droits de l'homme*, Série des précis sur les droits de l'homme du Conseil de l'Europe, Strasbourg, Conseil de l'Europe, 2012, pp. 19-20.

[20] ECtHR, judgment *Kokkinakis v. Greece*, 25 May 1993, appl. no. 14307/88, par. 32.

[21] European Commission of Human Rights, decision *A.R.M. Chappell v. the United Kingdom*, 14 July 1987, appl. no. 12587/86; European Commission of Human Rights, decision *Pendragon v. the United Kingdom*, 19 October 1998, appl. no. 31416/96.

[22] European Commission of Human Rights, decision *ISKCON and others v. the United Kingdom*, 8 March 1994, appl. No. 20490/92.

[23] European Commission of Human Rights, decision *X v. Austria*, 15 October 1981, appl. no. 8652/79.

[24] ECtHR, judgment *Leela Förderkreis E.V. and Others v. Germany*, 6 November 2008, appl. no. 58911/00.

[25] European Commission of Human Rights, decision *Omkarananda and the Divine Light Zentrum v. Switzerland*, 19 March 1981, appl. no. 8118/77.

[26] European Commission of Human Rights, decision *Arrowsmith v. the United Kingdom*, 12 October 1978, appl. no. 7050/75.

[27] ECtHR, judgment *Lautsi and others v. Italy*, 3 November 2009, no. 30814/06, par. 55; European Commission of Human Rights, decision *Angeleni v. Sweden*, 3 December 1986, no. 10491/83.

[28] European Commission of Human Rights, decision *C.W. v. the United Kingdom*, 10 February 1993, no. 18187/91.

leaflets to British soldiers in order to convince them not to go fighting in Northern Ireland was not considered a manifestation of this belief, even though there was a link.[29]

For a long time, the decisions of the Strasbourg bodies proved to be rather restrictive in their appraisal of this question. In several cases, they have attempted to assess the imperative or necessary character of the examined practice in the eyes of the invoked belief. On this basis, they have notably considered that there was no manifestation of belief when a person wished to observe a weekly day of rest or a religious festival.[30] Furthermore, the European bodies have judged that the existence of a religious manifestation could be influenced by the applicants' situation and, more specifically, the fact that they have deliberately entered into a contractual or statutory relationship.[31] They decided likewise with regards to the choice of a university the regulations of which banned religious clothing.[32]

The Convention's protecting bodies have thus had little inclination to accept the existence of a violation of Article 9. This so-called case law of "non-interference" has been criticised on the grounds that it would lead to a "contractualisation" of freedom of religion, without the acceptance of the right to change one's belief and without the position of weakness of the worker or the student being taken into account.[33] Besides, this case law questions the contours of the judge's discretionary power with respect to the essential or accessory character of a practice in the light of a system of beliefs, but also the limits of freedom of religion and of the law in general so as to take charge of the diversity and subjectivity of religious or philosophical behaviours. Finally, the European approach has not always been coherent over the years. It has led to a certain confusion between the determination of the acts expressing a belief and the question of the acceptable limits to these.

Nevertheless, the European Court of Human Rights has progressively broken away from that classic case law. For instance, in the cases of *Dahlab*[34], *Leyla Sahin*[35] and *Dogru*[36], which concerned the wearing of a headscarf respectively by a primary school teacher, a university student, and a secondary school pupil, the Court did not examine the question as to whether wearing the *hijab* was an imperative of the Muslim faith. Likewise, in the judgments *Bayatyan*[37] and *Erçep*[38], it held

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[29] European Commission of Human Rights, decision *Arrowsmith v. the United Kingdom*, 12 October 1978, appl. no. 7050/75.

[30] European Commission of Human Rights, decision *Konttinen v. Finland*, 3 December 1996, appl. no. 24949/94; European Commission of Human Rights, decision *Stedman v. the United Kingdom*, 9 April 1997, appl. no. 29107/95; ECtHR, judgment *Kosteski v. the former Yugoslav Republic of Macedonia*, 13 April 2006, appl. 55170/00, par. 38; ECtHR, judgment *Francesco Sessa v. Italy*, 3 April 2012, appl. no. 28790/08.

[31] European Commission of Human Rights, decision *X. v. the United Kingdom*, 12 March 1981, appl. no. 8160/78, par. 9-12.

[32] European Commission of Human Rights, decision *Karaduman v. Turkey*, 3 May 1993, appl. no. 16278/90.

[33] See notably, P. EDGE, "Current Problems in Article 9 of the European Convention on Human Rights," 1996, *Juridical Review*, pp. 42-47; S. KNIGHTS, *Freedom of Religion, Minorities and the Law*, Oxford, Oxford University Press, 2007, esp. p. 45; SIR J. DINGEMANS, C. YEGINSU, T. CROSS et H. MASOOD, *The Protections for Religious Rights. Law and Practice*, *op. cit.*, pp. 90-91.

[34] ECtHR, decision *Dahlab v. Switzerland*, 15 February 2001, appl. no. 42393/98.

[35] ECtHR, judgment *Leyla Sahin v. Turkey*, Grand Chamber, 10 November 2005, appl. no. 44774/98, par. 78.

[36] ECtHR, judgment *Dogru v. France*, 4 December 2008, appl. no. 27058/05, par. 47-48.

[37] ECtHR, judgment *Bayatyan v. Turkey*, Grand Chamber, 7 July 2011, appl. no. 23459/03, par. 110-111. In this judgment pronounced by the Grand Chamber, the Court decided to abandon the European Commission's classic

that the refusal of the Jehovah's Witnesses to complete a military service was a manifestation of beliefs protected by the Convention. Since then, the Court has gradually favoured a subjective approach resting on the applicant's sincerity to find an interference with Article 9 of the Convention.

The European Court abandoned its traditional approach in respect of the violation of freedom of religion even more clearly in its judgment *Eweida and others*, rendered on 15 January 2013. On the one hand, this judgment has decided the cases of a British Airways employee (Eweida) and of a nurse in a public hospital (Chaplin) wishing to wear a crucifix around their neck, and, on the other hand, the situation of a civil official (Ladele) and of a marriage counsellor (MacFarlane) refusing to providing their services to homosexual couples on account of their Christian beliefs. In the four cases, the Court considered that there was an interference with Article 9 of the Convention. In this respect, it clarified that the qualification of the "manifestation", within the meaning of this provision, implied the existence of a sufficiently close link between the act and the underlying belief. However, the applicant was in no way required to establish that he had acted in compliance with a commandment of the religion in question.[39] Moreover, the Court considered that the engagement in a professional relationship did not necessarily imply a relinquishment of the freedom of religion and that the possibility to change the employment was an element to be balanced with the other circumstances at stake.[40] Accordingly, the European Court favoured a pragmatic assessment of the proportionality of the invoked interferences, rather than an analysis of the religious nature of the prevented practice.

At the second stage of the analysis, when the Court has found that Article 9 applies, it needs to assess whether the restriction is imposed by a law and is necessary in a democratic society with a view to realising a legitimate objective; in other words, whether the contentious measure answers to a pressing social need in a proportionate manner.[41] The European Convention features an exhaustive list of goals that justify these type of limitations (protection of public safety, of public order, health or morals, or of the rights and freedoms of others), but its protecting bodies interpret these motives rather broadly.[42] The same applies with respect to the requirement of a

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approach according to which the refusal to complete a military service for reasons of conscience was not protected by Article 9 of the Convention (see the aforementioned judgment *Bayatyan*, par. 98-111).

[38] ECtHR, judgment *Erçep v. Turkey*, 22 November 2011, appl. no. 43965/04, par. 47-48. In this sense, still with regards to the Jehovah's Witnesses, ECtHR, decision *Feti Demirtaş v. Turkey*, 17 January 2012, appl. no. 5260/07, par. 96-97; ECtHR, decision *Buldu and others v. Turkey*, 3 June 2014, appl. no 14017/08, par. 82-83. See also ECtHR, decision *Savda v. Turquie*, 12 June 2012, appl. no. 42730/05, par. 96-101 (pacifist and antimilitarist philosophy); ECtHR, decision *Tarhan v. Turquie*, 17 July 2012, appl. no. 9078/06, par. 58-63 (pacifist and antimilitarist philosophy).

[39] ECtHR, judgment *Eweida and others v. the United Kingdom*, 15 January 2013, appl. no. 48420/10, 59842/10, 51671/10 and 36516/10, par. 82. For a commentary, see in particular M. PEARSON, "Article 9 at a Crossroads: Interference Before and After Eweida," *Human Rights Law Review*, 2013, Vol. 13, no. 3, pp. 580-602.

[40] The aforementioned judgment *Eweida*, par. 83.

[41] See ECtHR, judgment *Handyside v. the United Kingdom*, 7 December 1976, appl. no. 5493/72, par. 48-49; European Commission of Human Rights, decision *X and Church of Scientology v. Sweden*, 5 May 1979, appl. no. 7805/77 – See also, S. VAN DROOGHENBROECK, *La proportionnalité dans le droit de la convention européenne des droits de l'homme. Prendre l'idée simple au sérieux*, Bruxelles, Bruylant, 2001; P. MUZNY, *La technique de proportionnalité et le juge de la Convention européenne des droits de l'homme. Essai sur un instrument nécessaire dans une société démocratique*, Aix-Marseille, PUAM, 2005.

[42] On this point, see notably P. M. TAYLOR, *Freedom of religion. UN and European Human Rights Law and Practice*, Cambridge, Cambridge University Press, 2005, pp. 301-302; SIR J. DINGEMANS, C. YEGINSU, T. CROSS and H. MASOOD, *The Protections for Religious Rights. Law and Practice*, *op. cit.*, pp. 104-106.

"law", which is generally satisfied when there is a rule of behaviour sufficiently accessible and precise, even if it is non-written.[43] As regards the appraisal of the proportionality of the means applied in order to achieve the pursued objectives, the European Court of Human Rights traditionally grants a wide margin of appreciation to the national decision-makers when religion or beliefs are at stake.[44] This margin often translates into a rather abstract control, consisting in allowing formally pronounced state objectives without confronting them with the conditions in the field. This approach was sometimes opposed to the one applied by the UN Human Rights Committee in cases that were nevertheless utterly similar.[45] Thus, with respect to the French prohibition of the Sikh turban on official identification documents or in public secondary schools, the UN Human Rights Committee found a violation of the freedom of religion,[46] whereas the European Court of Human Rights considered these limitations justified.[47]

In more recent judgments, the Court has proceeded to more contextualised examination of the proportionality of the breaches of Article 9 of the Convention. In the case of *Jakóbski*, the refusal of the Polish prison authorities to provide for vegetarian menus to a Buddhist inmate was found to be contrary to the freedom of religion.[48] The applicant's situation of detention certainly was an important element in the Court's assessment, but its approach has proved to be more pragmatic than its prior decisions based on Article 9.[49] In this way, it has underlined the relatively low burden that represented a meat-free diet and the fact that no alternative had been suggested to it.

This reasoning was reiterated in the case of *Eweida and others*, decided on 15 January 2013, which this time was regarding the field of employment. The European Court of Human Rights insisted on the importance to substantially balance the rights and interests at stake in this type of litigation.[50] As regards to the balance between an employee's wish to wear a visible cross around the neck and the desire of an airline to convey a brand image, the Court judged that too greater

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[43] See in particular ECtHR, judgment *Sunday Times v. the United Kingdom*, 26 April 1976, appl. No. 6538/74, esp. par. 49.

[44] See notably ECtHR, judgment *Leyla Sahin v. Turkey*, Grand Chamber, 10 November 2005, appl. no. 44774/98, par. 109 – See also E. BREMS, *Human Rights: Universality and Diversity*, Leiden, Martinus Nijhoff Publishers, 2001, esp. p. 360; T. LEWIS, "What not to wear: religious rights, the European Court, and the margin of appreciation," *International and Comparative Law Quarterly*, 2007, Vol. 56, no. 2, pp. 395-414.

[45] For a comparison of the UN and the European guarantees of the freedom of religion, see P. M. TAYLOR, *Freedom of religion. UN and European Human Rights Law and Practice*, Cambridge, Cambridge University Press, 2005.

[46] Human Rights Committee, observations *Shingara Mann Singh v. France*, 19 July 2013, communication no. 1928/2010, CCPR/C/108/D/1928/2010 (passport); Human Rights Committee, observations *Ranjit Singh v. France*, 27 September 2011, communication no. 1876/2009, CCPR/C/102/1876/2009 (permanent resident card); Human Rights Committee, observations *Bikramjit Singh v. France*, 1 November 2012, communication no. 1852/2008, CCPR/C/106/D/1852/2008 (public school).

[47] ECtHR, judgment *Shingara Mann Singh v. France*, 13 November 2008, appl. no. 43563/08 (driving licence); ECtHR, judgment *Jasvir Singh v. France*, 30 June 2009, appl. no. 25463/08 (public school); ECtHR, decision *Ranjit Singh v. France*, 30 June 2009, appl. no 27561/08 (public school). On this dissonance between the case law of the European and UN jurisdictions, see E. BREMS, E. BRIBOSIA, I. RORIVE, S. VAN DROOGHENBROECK, "Le port de signes religieux dans l'espace public : vérité à Strasbourg, erreur à Genève?," *J.T.*, 2012, pp. 602-603; E. BRIBOSIA, G. CACERES and I. RORIVE, "Les signes religieux au cœur d'un bras de fer : la saga Singh," *Rev. trim. dr. h.*, n° 98/2014, pp. 495-513.

[48] ECtHR, judgment *Jakóbski v. Poland*, 7 December 2010, no. 18429/06, par. 42-55.

[49] See E. BRIBOSIA and I. RORIVE, "Chronique – Droit de l'égalité et de la non-discrimination," *J.E.D.H.*, 2013, Vol. 2, p. 151; SIR J. DINGEMANS, C. YEGINSU, T. CROSS and H. MASOOD, *The Protections for Religious Rights. Law and Practice*, *op. cit.*, p. 108.

[50] The aforementioned judgment *Eweida and others*, par. 83.

weight had been attached to the second to the detriment of the first. In particular, the Court took into consideration the fact that wearing other religious symbols, such as the Islamic headscarf or the Sikh turban, was authorised within the company. Conversely, concerning the nurse of a geriatric service, the Court held that the requirements with respect to health and security had carried more weight in the balance than the desire to wear a visible crucifix around the neck. The circumstance that the hospital had proposed alternatives, like wearing a cross in the form of a brooch attached to the uniform or tucked under a high-necked blouse, played a role in the weighing of the respective claims. Thus, the Court seems to favour looking for measures that are less detrimental to freedom of religion albeit allowing to attain the pursued objective.[51]

In relation to the refusal of a registrar to officiate at the union between persons of the same sex and that of a marriage counsellor to guide homosexual couples with regards to sexual questions, the Court decided that the dismissals of those persons were justified by the pursuit of an anti-discriminatory policy that aimed to protect the rights of others. In this regard, it considered that the British authorities had not exceeded their margin of appreciation in their balancing of conflicting rights. Following this decision, religious beliefs cannot serve as a pretext to adopt a discriminatory behaviour based on sexual orientation. In this case, the Court confirmed that the States have a positive obligation to protect freedom of religion in the relations between private individuals, notably through the intervention of their judiciaries, which is, however, not without limits.[52]

[51] The European Court of Human Rights has not always favoured this approach. For example, in the case of *James and others v. the United Kingdom*, it declared that "*the availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a "fair balance". Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way*" (ECtHR, judgment *James and others v. the United Kingdom*, 21 February 1986, appl. no. 8793/79).

[52] The aforementioned judgment of *Eweida and others*, par. 84.

2. Equality and non-discrimination based on religion or belief

Apart from freedom of religion, the European instruments of human rights protection also consolidate the right to equality and non-discrimination in the field of religion or beliefs. Article 14 of the European Convention on Human Rights requires the respect for this principle in the enjoyment of the rights guaranteed by the Convention.[53] Hence, in order to denounce an unjustly differential treatment based on beliefs, Article 14 of the Convention needs to be invoked in combination with another provision, such as Article 9 that establishes freedom of religion.[54] This is notable in the case when a religious organisation considers itself victim of a discrimination relating to its recognition or to the attribution of certain advantages.

In the case of *Church of Jesus Christ of Latter-Day Saints*, decided on 4 March 2014, the European Court of Human Rights found that a Mormon Church was not the subject of discrimination because the British authorities refused to grant a total exemption from the council tax for one of its temples that was not open to the public.[55] In the case at hand, the temple benefited from a tax exemption to the amount of 80 % because of it was used for charitable purposes. It did not enjoy a total tax exemption, which was reserved for places of "public religious worship." Indeed, the temple in question was only open to the most fervent members of this Church, those holding a "recommend". The Court judged that the Mormon Church did not suffer a differential treatment in relation to the other religious organisations in the same situation, since these fiscal rules applied to all the types of worship, including the Church of England (concerning its private chapels). The Court also held that the condition of public access to benefit from the total exemption was justified by reasonable and objective grounds. Consequently, the European Court considered with unanimity that there was no violation of Article 14 of the Convention.

By contrast, in the case of *Vakfi*, decided on 2 December 2014, the European Court of Human Rights regarded the exemption scheme concerning the payment of electricity bills – that is available to worship sites under Turkish law – to be discriminatory with respect to the Alevist community, a heterodox minority branch of Islam.[56] In this case, the Turkish courts had refused to grant an exemption foreseen by the law as they considered that the Alevist confession was not a religion and that the *cemevis* – in which the Alevists gathered for praying – were not places of worship. After having observed that the *cemevis* met the same conditions as the places of worship to which Turkish law granted an exemption, the European Court of Human Rights judged that the refusal to allow them this qualification constituted a difference of treatment that was not

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[53] Protocol no. 12 to the European Convention on Human Rights aims at extending the non-discrimination clause contained in Article 14 of the Convention to every right prescribed in a law, but it has not been ratified, in particular by the United Kingdom, France and Belgium.

[54] The Charter of Fundamental Rights of the European Union likewise establishes this principle (Art. 20-21), but it only pertains to the European institutions and the Member States when they implement the law of the Union (art. 51), to the exclusion of Poland and the United Kingdom (Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom, *O.J.E.U.*, no. C 306, 17 December 2007, pp. 156-157).

[55] ECtHR, judgment *Church of Jesus Christ of Latter-Day Saints v. the United Kingdom*, 4 March 2014, appl. no. 7552/09.

[56] ECtHR, judgment *Cumhuriyetçiegtim Ve Kültür Merkezi Vakfi v. Turkey*, 2 December 2014, appl. no. 32093/10.

objectively and reasonably justified. Therefore, it held unanimously that there was a violation of Article 14 (non-discrimination) in combination with Article 9 (freedom of religion).

In another case, decided two months earlier, the Court also gave its view on the question of the recognition of religious associations. In the case of *Church of Scientology of St Petersburg*, decided on 2 October 2014, it found that the condition that a religious organisation had to have existed for at least 15 years on Russian territory in order to obtain the status of a legal entity presented a violation of Article 9 (freedom of religion), interpreted in the light of Article 11 (freedom of association).[57] The Court stated that this long waiting period only affected the religious groups that were recently set up and were not a part of a hierarchical ecclesiastic structure. It judged that such a differential treatment was not justified. Even if these different judgments were passed with respect to specific States, all the Council of Europe Member States, including those that are also members of the European Union, have to comply with this case law when applying the European Convention on Human Rights.

The European Convention prohibits religious discriminations in relatively general terms. Nonetheless, the European Court has advanced this legal term by prohibiting not only the attitudes openly directed against religion or any other reason for discrimination, but also those that, although resulting from seemingly neutral measures, are liable to harm certain individuals or groups on account of their religion or any other prohibited criterion.[58] Going beyond the classic discriminatory intention, the Strasbourg Court has strived to avoid that natural persons and legal entities unjustly become victims of the discriminatory effects of rules or practices that are not specifically aimed at their religion. According to this transformation of the right to equality, initiated by the American courts[59] and then followed by the Canadian courts,[60] it is not any more a matter of guaranteeing strict theoretical or procedural equality between individuals and ensuring a uniform application of the law with regard to everybody. Rather, it is about the establishment, in a more concrete and equitable manner, of a substantial or substantive equality tolerating certain differential treatments with a view to combatting the societal inequalities.[61] The

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[57] ECtHR, judgment *Church of Scientology of St Petersburg v. Russia*, 2 October 2014, appl. no. 47191/06, esp. par. 47-48. See also, ECtHR, judgment *Church of Scientology Moscow v. Russia*, 5 April 2007, appl. no. 18147/02, par. 64; ECtHR, judgment *Kimlya and others v. Russia*, 1 October 2009, appl. no. 76836/01 and no. 32782/03, par. 79.

[58] See ECtHR, judgment *Thlimmenos v. Greece*, 6 April 2000, no. 34369/97, par. 44-48; ECtHR, decision *Hoogendijk v. the Netherlands*, 6 January 2005, no. 58641/00; ECtHR, judgment *D.H. and others v. the Czech Republic*, 13 November 2007, no. 57325/00, par. 184 (see É. DUBOUT, "L'interdiction des discriminations indirectes par la Cour européenne des droits de l'homme : rénovation ou révolution ?," *Rev. trim. dr. h.*, no. 75/2008, pp. 821-856) – It has to be noted that, in Europe, the concept of indirect discrimination has first been developed by the Court of Justice of the European Union, see esp. CJEU, *Jenkins v. Kingsgate*, 31 March 1981, case 96/80; CJEU, *Bilka-Kaufhaus GmbH v. Weber von Hartz*, 13 May 1986, case 170/84; CJUE, *Danfoss*, 17 October 1989, case 109/88; CJEU, *Nicole Seymour Smith*, 9 February 1999, case C-167/97.

[59] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[60] *Re Attorney General for Alberta and Gares et al.* (1976), 67 D.L.R. (3rd) 635; *Ishar Singh v. Security and Investigation Services Ltd.*, decision not published, 31 May 1977, Tribunal of Ontario/Board of Inquiry; *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143.

[61] See B. WILLIAMS, "The Idea of Equality," *in* P. LASLETT and W. G. RUNCIMAN (eds.), *Philosophy, Politics and Society*, Second Series, Oxford, Blackwell, 1962; W. BLACK, "From Intent to Effect: New Standards in Human Rights," *Canadian Human Rights Reporter*, Vol. 1, 1980, pp. C/1-C/6; I. M. YOUNG, "Polity and Group Difference: A Critique of the Universal Citizenship," *Ethics*, Vol. 99, No. 2, 1989, pp. 250-274; L. POJMAN and R. WESTMORELAND (eds.), *Equality: Selected Readings*, New-York, Oxford University Press, 1997; S. FREDMAN, *Discrimination Law*, Oxford, Oxford University Press, 2nd ed., 2011, pp. 1-38; C. MCCRUDDEN, "The New Concept

prohibition of indirect discrimination[62] as well as positive actions[63] or the legal concept of "reasonable accommodation,"[64] are in line with this new dimension of the right to equality.

In Europe, the fight against discrimination has developed chiefly within the framework of the European Union. The EU institutions have progressively prohibited direct as well as indirect discrimination in diverse areas of community life, and this regards both vertical and horizontal relationships. This fight against discrimination has become a reality thanks to the successive amendment of treaties,[65] the adoption of specific directives,[66] and the judicial work of the Court of Justice.[67] In the beginning, it was essentially a matter of avoiding the distortions of competition

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of Equality," *Conference proceedings of 'Fight Against Discrimination: The Race and Framework Employment Directives*,' ERA Congress Centre, Trier, 2-3 June 2003, pp. 10-22; C. TOBLER, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Antwerpen/Oxford, Intersentia, 2005, pp. 17-35; S. FREDMAN, *Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India*, European Network of Legal Experts in the non-discrimination field, Luxembourg, Office for Official Publications of the European Communities, 2012, pp. 50-53.

[62] See European Union Agency for Fundamental Rights, *Handbook on European non-discrimination law*, Luxemburg, Publications Office of the European Union, 2011, pp. 29-31; C. TOBLER, *Limites et potentiel du concept de discrimination indirecte*, Réseau européen des experts juridiques en matière de non-discrimination, Luxemburg, Office des publications officielles des Communautés européennes, 2009, pp.16-17; É. DUBOUT, "L'interdiction des discriminations indirectes par la Cour européenne des droits de l'homme : rénovation ou révolution?," *op. cit.*, pp. 824-826; F. AST, "Les cadres légaux européens répondant à la diversité et au besoin de changement institutionnel. La discrimination indirecte comme outil de protection du pluralisme : enjeux et limites," *in Accommodements institutionnels et citoyens : cadres juridiques et politiques pour interagir dans des sociétés plurielles*, Tendances de la cohésion sociales no. 21, Strasbourg, Éditions du Conseil de l'Europe, 2010, pp. 89-93; D. SCHIEK, "Indirect discrimination," *in* D. SCHIEK, L. WADDINGTON et M. BELL (eds.), *Nondiscrimination law*, Oxford, Art publishing, 2007, pp. 323-475.

[63] For an in-depth comparative analysis of the positive action, see M. DE VOS, *Au-delà de l'égalité formelle. L'action positive au titre des directives 2000/43/CE et 2000/78/CE*, Réseau européen des experts juridiques en matière de non-discrimination, Luxemburg, Office des publications officielles des Communautés européennes, 2008.

[64] E. BRIBOSIA, I. RORIVE and J. RINGELHEIM, "Aménager la diversité : le droit à l'égalité face à la pluralité religieuse," *Rev. trim. dr. h.*, no. 78/2009, p. 323; P. BOSSET, "Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable," *in* M. JÉZÉQUIEL, *Les accommodements raisonnables : quoi, comment, jusqu'où? Des outils pour tous*, Cowansville, Yvon Blais, 2007, pp. 3-10; J. J. PREECE, "Emergence de normes en matière d'accommodement raisonnable en faveur des minorités en Europe ?," *in Accommodements institutionnels et citoyens : cadres juridiques et politiques pour interagir dans des sociétés plurielles*, Publications du Conseil de l'Europe, Tendances de la cohésion sociale, no. 21, 2009, p. 118; K. HENRARD, "Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights : A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality," *Erasmus Law Review*, Vol. 5, no. 1, 2012, p. 62.

[65] See in particular, Treaty establishing the European Economic Community, signed on 25 March 1957, by France, the Federal Republic of Germany, Italy, Belgium, the Netherlands and Luxemburg, Art. 119 (equal payment, without discrimination based on sex).

[66] Council Directive 75/117/EEC of 10 February1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, amended by Council Directive 96/97/EC of 20 December 1996; Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex; Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

[67] See notably CJEU, *Gabrielle Defrenne v. Sabena*, 15 June 1978, case 149/77 (general principle of non-discrimination based on sex); CJEU, *Schnorbus v. Land Hessen*, 7 December 2000, case C-79/99 (indirect discrimination based on

by introducing equal payment for men and women, but this principle, little by little, has stretched out to other areas than employment and to grounds other than gender.

The major evolution took place in 1997 with the conclusion of the Treaty of Amsterdam which allowed the EU institutions to adopt directives "*to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*."[68] In a climate influenced by the rise of the extreme right in Austria, two anti-discriminatory directives were adopted in 2000. Directive 2000/78/EC of 27 November 2000 establishes a general framework for equal treatment in employment and occupation regardless of religious beliefs, disability, age or sexual orientation[69] and Directive 2000/43/EC of 29 June 2000 implements the principle of equal treatment between persons irrespective of racial or ethnic origin in the field of employment, social protection, education as well as goods and services.[70] Directive 2000/78/CE requires States to prohibit religious discrimination in the professional sector in the broad sense,[71] which notably includes the training courses that provide access to employment or the affiliation at a trade union.[72] However, certain national transpositions extended this prohibition to other domains. Thus, in the United Kingdom and Belgium, anti-discrimination law also applies to education and the access to goods and services.[73] On the other hand, in France, this prohibition is limited to the field of employment.[74]

Directive 2000/78/EC compels the Member States to transpose the prohibition of direct and indirect discrimination into their legislation, notably on the basis of religion or beliefs. According to the Directive, direct discrimination occurs when, on the basis of a protected criterion, "*one person is treated less favourably than another is, has been or would be treated in a comparable situation*." For instance, a person is denied an employment or a promotion because of his or her religion. This differential treatment can nevertheless be justified "*where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a*

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sex); CJEU (Grand Chamber), *Mangold v. Helm*, 22 November 2005,case C-144/04 (principle of non-discrimination relating to age as a general principle of Community law).

[68] Treaty on the Functioning of the European Union, Art. 19 (formerly, Treaty Establishing the European Community, Art. 13).

[69] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[70] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[71] It has to be noted that the prohibition of discrimination included in the Charter of Fundamental Rights of the European Union (Art. 21) relates to every situation within the scope of the Union law. Besides, the Court of Justice of the European Union recognised the existence of a principle of non-discrimination based on age as a general principle of EU law (the aforementioned judgments *Mangold* and *Kücükdeveci*) which could be applied to other reasons of discrimination such as religion or beliefs (see E. BRIBOSIA and T. BOMBOIS, "Interdiction de la discrimination en raison de l'âge. Du principe, de ses exceptions et de quelques hésitations. Réflexions autour des arrêts Wolf, Petersen et Kücükdeveci de la Cour de justice de l'Union européenne," *Rev. trim. dr. eur.*, 2011, pp. 41-84).

[72] Directive 2000/78/EC, Art. 3 – In several cases, the Court of Justice considered that the term "vocational training" refers to "*any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment (…) whatever the age and the level of training of the pupils or students, and even if the training programme includes an element of general education*" (CJEU, *Gravier v. City of Liège*, 13 February 1985, case 293/83, par. 30-31; see also CJEU, *Commission v. Belgium*, 1 July 2004, case C-65/03, par. 12; CJEU, *Commission v. Austria*, 7 July 2005, case C-147/03, par. 33).

[73] Equality Act 2010 (United Kingdom); Loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination (Art. 5(1)) (Belgium).

[74] Code du travail, Art. L. 1132-1 et seq. (France).

genuine and determining occupational requirement" and as far as the objective is legitimate and the requirement is proportionate. Furthermore, Directive 2000/78/EC provides that "*in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.*"[75]

This ground of justification refers to the situation of the so-called "ethos-based organisations", mainly the Churches and faith schools that can require their personnel to adopt an attitude of good faith towards the ethos on which they rest. On the part of the Council of Europe, the European Court of Human Rights has developed this notion as well. In a number of cases, it ruled that "*an employer whose ethos is based on religion or on a philosophical belief may impose specific duties of loyalty on its employees*" taking into account the nature of the position in question and effectively balancing the interests at stake in the light of the principle of proportionality.[76] Yet, this is a notion of which the interpretation gives rise to controversy. Some consider that, in order to enjoy the status of "ethos-based organisation," an organisation must have as an objective to promote a specific belief. Others hold that it is sufficient that the organisation is founded on a specific belief even though pursuing another objective, notably profit. The first, more restrictive definition – it essentially aims at the Churches, faith schools, political parties, trade unions – was favoured in the initial project of the European Commission Directive.[77] The second definition, which is much broader, was formally integrated into the Directive 2000/78/EC, even though the Court of Justice of the European Union has not yet clarified the meaning of this provision.[78] On the other hand, the European Court of Human Rights has also developed a body of case law on the notion of "ethos-based organisation," repeatedly denying an organisation with a view to profit from the invocation of Article 9 of the European Convention on Human Rights.[79]

As to indirect discrimination, it refers to a seemingly neutral provision, criterion, or practice that is liable to bring about a particular disadvantage for the persons of a certain religion or belief in

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[75] Directive 2000/78/EC, Art. 4(2) – The States can only have recourse to this exception if it follows from legislation in force or national practices in place at the moment of the adoption of the Directive.

[76] ECtHR, judgment *Schüth v. Germany*, 23 September 2010, appl. no. 1620/03, par. 69. See also ECtHR, judgment *Obst v. Germany*, 23 September 2010, appl. no. 425/03, par. 27; ECtHR, judgment *Lombardi Vallauri v. Italy*, 20 October 2009, appl. no. 39128/05, par. 41; ECtHR, judgment *Siebenhaar v. Germany*, 3 February 2011, appl. no. 18136/02, par. 46; ECtHR, judgment *Fernández Martínez v. Spain*, Grand Chamber, 12 June 2014, appl. no. 56030/07, par. 143. See E. BRIBOSIA and I. RORIVE, "Chronique – Droit de l'égalité et de la non-discrimination," *J.E.D.H.*, 2015, Vol. 2, pp. 237-240.

[77] See Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, 2000/C 177 E/07, COM(1999) 565 final, presented by the Commission on 6 January 2000, Art. 4(2) ("*Member States may provide that, in the case of public or private organisations which pursue directly and essentially the aim of ideological guidance in the field of religion or belief with respect to education, information and the expression of opinions, and for the particular occupational activities within those organisations which are directly and essentially related to that aim, a difference of treatment based on a relevant characteristic related to religion or belief shall not constitute discrimination where, by reason of the nature of these activities, the characteristic constitutes a genuine occupational qualification.*" emphasis added).

[78] This second interpretation was also favoured by the American Supreme Court in its judgment *Hobby Lobby*, rendered on 30 June 2014. See *Burwell* v. *Hobby Lobby*, 573 U.S. (2014).

[79] On this point, see G. CALVÈS, "Devoir de réserve imposé aux salariés de la crèche Baby Loup. Quelle lecture européenne du problème ?," *Revue de droit du travail*, 2014, no. 2, pp. 94-100.

relation to other individuals. For example, the internal regulation of a hospital could prohibit its employees to wear any headgear, or require them to wear a specific headgear, when being in the surgery suite. This measure does not aim specifically at the individuals on the basis of their beliefs but, in practice, it can be detrimental to those whose faith implies wearing a distinctive symbol, such as the Islamic headscarf, the Sikh turban, or the Jewish kippah. This kind of provision can nevertheless be objectively justified, in case of the pursuit of a legitimate objective through appropriate and necessary means. In the previous example, the clothing requirement could be justified by security reasons and be judged proportionate, in particular if there is no less harmful measure allowing to realise the security objective.[80] Directive 2000/78/EC also requires the Member States to recognise the principle of "reasonable accommodation" in favour of persons with disabilities, in the specific field of employment.[81] In the United Kingdom and Belgium – but not in France – this obligation has been extended to other sectors, especially to education and the access to goods and services.

The Court of Justice of the European Union has not yet ruled on the notions of direct or indirect discrimination included in Directive 2000/78/EC regarding the ground of religion or beliefs. The application of these concepts in the religious field is thus largely dependent on the interpretation by the national courts. Nonetheless, the Court of Justice has received two references for a preliminary ruling on this issue. The first one, transmitted on 9 March 2015 by the Belgian Court of Cassation, seeks to determine whether prohibiting a Muslim from wearing the headscarf at the workplace would not constitute a direct discrimination when the employer has prohibited all the workers from wearing external political, philosophical, or religious symbols at the workplace.[82] The second one, submitted on 9 April 2015 by the French Court of Cassation, has the objective to clarify whether a customer's desire not to be served by a company's employee wearing an Islamic headscarf can be considered a genuine and determining occupational requirement, by reason of the nature of the occupational activity or the context in which they are carried out.[83]

Pending an answer to these questions, the only decision of the Court of Justice in the field of religious discrimination dates back to the case of *Vivien Prais*, decided in 1976. At the time, the statute of European officials provided that these should be chosen without distinction of race, faith, or sex. On this basis, the Court of Justice had refused to follow up on the request to adjourn an exam which coincided with the Jewish holiday of Shavuot. This was because the applicant had not informed the responsible authorities in due course, that is, before the notification of the other candidates.[84] However, the Court had maintained that it was "*desirable that an appointing authority informs itself in a general way of dates which might be unsuitable for religious reasons,*

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[80] See E. BRIBOSIA, J. RINGELHEIM and I. RORIVE, "Aménager la diversité : le droit de l'égalité face à la pluralité religieuse," *op. cit.*, pp. 361-362.

[81] Directive 2000/78/EC, Art. 5 ("*In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer*").

[82] Cass., 9 March 2015, no. S.12.0062.N (Belgium) ("*l'interdiction pour une musulmane de porter le foulard sur le lieu du travail ne constitue pas une discrimination directe lorsque l'employeur a prévu une interdiction pour tous les travailleurs de porter sur le lieu du travail des signes extérieurs d'appartenance politique, philosophique ou religieuse*").

[83] Cass. soc., 9 April 2015, appeal no. 13-19.855, *SA Micropole Univers* (France).

[84] CJEU, *Vivien Prais*, 27 October 1976, case 130-75, par. 18.

and seeks to avoid fixing such dates for tests."

To conclude, at present, the articulation between the sources stemming from the Council of Europe and those from the European Union allow to guarantee a large organisational autonomy to the worship groups and to ensure, within certain limits, the public manifestation of numerous beliefs. The proliferation of legal concepts aiming to protect religion or beliefs (indirect discrimination, ethos-based organisation, etc.) and case law that refers to these (especially that of the European Court of Human Rights, and of the Court of Justice of the European Union) can give rise to the challenge of their coherence.[85] On the whole, the European Union drew heavily on the Council of Europe in its endeavour to promote fundamental rights, but it was the former that eventually obliged the States to adopt legislation to fight discrimination. Nevertheless, the Court of Justice of the European Union has remained relatively silent with respect to the interpretation of these instruments, at least concerning the motives for the religious or philosophical beliefs. Hence, the European Court of Human Rights has itself taken over the concepts stemming from European Union law, sometimes replacing the Luxemburg case law. In this respect, the recent judgments *Fernández Martínez* (2014) and *Eweida* (2013)[86] seem to reveal a willingness to strengthen the protection of religion in Europe, be it in its collective or individual dimension. Nevertheless, it has to be observed that the case law of the different European States is not always in agreement with that of the European Court of Human Rights and that the latter has for a long time granted an important margin of appreciation to the Member States in this matter.

[85] As far as the articulation between the case law of the United Nations Human Rights Committee and the European Court of Human Rights of the Council of Europe are concerned, in relation to the French prohibition of the Sikh turban, on the official identification documents or in public secondary schools, see E. BREMS, E. BRIBOSIA, I. RORIVE and S. VAN DROOGHENBROECK, "Le port de signes religieux dans l'espace public : vérité à Strasbourg, erreur à Genève?," *J.T.*, 2012, pp. 602-603 ; E. BRIBOSIA, G. CACERES and I. RORIVE, "Les signes religieux au cœur d'un bras de fer : la saga Singh," *Rev. trim. dr. h.*, no. 98/2014, pp. 495-513.

[86] In the case of *Fernández Martínez*, the European Court of Human Rights has given its view on the organisational autonomy granted to worship groups from the angle of Article 9 of the European Convention which guarantees freedom of religion. To this end, it has explicitly referred to Article 4(2) of the Directive 2000/78/EC introducing the exception of "ethos-based organisations." In the case of *Eweida*, the European Court of Human Rights had to judge applications concerning cases decided in the United Kingdom from the angle of anti-discrimination legislation, and, more specifically, of the concept of indirect discrimination in religious matters. By way of a subjective and individualist interpretation of what amounts to a belief protected by Article 9 of the Convention (freedom of religion), resting on the sincerity of the invoked belief, the European Court has influenced the interpretation of the concept of indirect discrimination based on religion or belief.

L'Observatoire

ORELA, pour Observatoire des Religions et de la Laïcité (http://www.o-re-la.org/), est un projet du Centre interdisciplinaire d'Etude des Religions et de la Laïcité (CIERL) de l'Université libre de Bruxelles.

Il s'agit d'un portail Internet d'information et d'analyse sur l'actualité des religions et des relations Eglises/Etats, opérationnel depuis février 2012. Il propose une revue de presse quotidienne relative aux religions et à la place des convictions dans l'espace public et diffuse des analyses, des études, des expertises et des synthèses de résultats de recherche relatifs aux religions et convictions et aux relations Eglises/Etats, rédigées par des experts scientifiques issus de l'ULB et de plusieurs universités européennes.

ORELA a obtenu le Prix Wernaers 2012 du Fonds national de la Recherche scientifique (FNRS). Le fonds international Wernaers pour la recherche et la diffusion des connaissances a pour objet de se consacrer à des actions de promotion de la recherche et de diffusion des connaissances scientifiques, au sens large, y compris leurs aspects culturels.

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