

# Freedom of Thought, Conscience and Religion and the European Court of Human Rights

by Françoise Thonet

How much religious freedom do we have in Europe today? Looking at jurisprudence from the European Court of Human Rights can reveal a side of Europe that some choose to overlook. There are cases regarding the veil, the burqa and the freedom to wear other religious symbols in public, but also cases of Christians accused of infringing anti-discrimination laws, which threaten the right to religious freedom. It seems the scope of freedom of religion is wider than Article 9 of the European Convention on Human Rights. We will consider the different aspects of religious freedom in Europe today.

# 3 foundational texts for human rights valid in Europe:

- **Déclaration des Droits de l'Homme et du Citoyen, France, 1789**
- **Universal Declaration of Human Rights, New York, 1948 ( UDHR)**
  - **2 additional Covenants 16/12/1966:**
    - **Civil and Political Rights (ICCPR)**
    - **Social and Economic Rights (ICESR)**
  - **Declaration of Principles on Tolerance, UNESCO 16/11/1995**
- **European Convention on Human Rights, Rome, 4/11/1950**



## THE UNIVERSAL DECLARATION OF Human Rights

**Preamble** Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of justice, justice and peace in the world.

**Article 1** All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

**Article 2** No one shall be subjected to discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

**Article 3** Everyone has the right to life, liberty and security of person.

**Article 4** No one shall be held in slavery or servitude; slavery or the trade in slaves shall be prohibited in all its forms.

**Article 5** No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

**Article 6** Everyone has the right to recognition as a person before the law.

**Article 7** All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal treatment before the law.

**Article 8** Everyone has the right to an effective remedy by the competent national authorities for the violations of his fundamental rights proclaimed in this Declaration.

**Article 9** No one shall be subjected to arbitrary arrest, detention or exile.

**Article 10** Everyone is entitled at equal intervals to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him.

**Article 11** Everyone charged with a penal offence has the right to a fair and public hearing by an independent and impartial tribunal in the presence of the accused and of his defence.

**Article 12** No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

**Article 13** Everyone has the right to freedom of movement and residence within the borders of each state.

**Article 14** Everyone has the right to leave any country, including his own, and to return to his country.

**Article 15** Everyone has the right to a nationality.

**Article 16** Everyone has the right to marry and to found a family, which is the basis of the peace and stability of society.

**Article 17** Everyone has the right to own property alone as well as in association with others.

**Article 18** Everyone has the right to freedom of thought, conscience and religion.

**Article 19** Everyone has the right to freedom of opinion and expression.

**Article 20** Everyone has the right to peaceful assembly and to associate with others in any form and to join or to form trade unions.

**Article 21** Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

**Article 22** Everyone has the right to social security.

**Article 23** Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

**Article 24** Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

**Article 25** Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, medical care and social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

**Article 26** Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and vocational education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

**Article 27** Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and vocational education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

**Article 28** Everyone has the right to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

**Article 29** Everyone has duties to the community in which alone the free and full development of his personality is possible.

**Article 30** Nothing shall be done to limit the exercise of the rights and freedoms set forth in this Declaration, other than in so far as is necessary for the promotion and attainment of these rights.

**Article 31** No one shall be subjected to arbitrary arrest, detention or exile.

**Article 32** This Declaration is proclaimed in English, French, Russian, Chinese, Spanish and Arabic, all texts being equally authentic.





Relevant  
texts

## Article 9 ECHR

### Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of other.

- **Article 18 ICCPR**

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

- **Article 26 ICCPR**

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

- **ARTICLE 9 ECHR ( European Convention of Human Rights)**
- **Freedom of thought, conscience and religion**
- 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
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## Relevant texts on the subject of intolerance and discrimination

**UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief**, proclaimed by General Assembly resolution 36/55 of 25 November 1981

### **Protocol 12 ECHR on Discrimination**

Applies the current expansive and indefinite grounds of prohibited discrimination in [Article 14](#) to the exercise of any legal right and to the actions (including the obligations) of public authorities.

The Protocol entered into force on 1 April 2005 and has (as of March 2018) been ratified by 20 member states. Several member states—[Bulgaria](#), [Denmark](#), [France](#), [Lithuania](#), [Monaco](#), [Poland](#), [Sweden](#), [Switzerland](#), and the [United Kingdom](#)—have not signed the protocol.<sup>[52]</sup>

- **Main foundational principle is ethical: Dignity and freedom of humans**
- 4 fundamental rights, as mentioned in the second paragraph of the UDHR 1948 Preamble : « ... **the advent of a world in which each human being shall enjoy freedom of speech and belief and freedom from fear and want... »:**

Freedom of speech

Freedom of belief

Freedom from terror

Freedom from want



## Statement and problems

- Persistence of the phenomenon of religious intolerance globally
- Many religions in the world don't accept principles of freedom of religion when state law is confronted in cases such as:
  - Heresy
  - Apostasy
  - Conversion
  - Personal statute
  - Mixed marriage

Theocratic regimes, especially where Quranic Law prevails, identify themselves by the supremacy of «the Book», faith and law, in contrast to secular countries.

\*Emblematic case of Asya Bibi and anti-blasphemy Law in Pakistan: article 295c, introduced in 1986 in Penal Law



# 3 main ways of limiting freedom of religion

## 1) Limitation by agreements or discriminatory measures for organization, education, financing /funding, taxes

Different pretexts are used to cover up religious interference: political, economical and cultural factors

## 2) Deviation of the qualifications and definitions of religions

## 3) Incitement to intolerance

- «When the State throws an anathema on an ideology, belief or religion, it behaves like a dominant religion which tries to exclude in the name of truth another religion considered subversive from all freedom of exercise” (notably in USSR before 1985) L.- E.PETTITI, 1992
- « It is discriminatory to forbid changing one’s religion in national law, which is the case in Islamic countries except Lebanon, and which is more serious for women with regards to social consequences» (ibid)

## The example of Sects

-Difficulty to give a definition of a sect

-How do States react?

-in Belgium, art 442 quater Penal Code ( law 26/11/2011)

-In France , law 12/06/2001 (art. 223-15-2 Penal Code ) penalizes fraudulent abuse of ignorance or weakness

Remarks:

-religious activity is not specifically mentioned

-It could be taking advantage of discredited sects in order to reduce religious activities more widely.

- 2 example:

-Jehovah's Witnesses: is it a sect? who refuse blood transfusions

-Scientology Church

-Some States can take advantage of discreditation towards cults to forbid certain religious activities. Ex. In Russia: Yarovaya Anti-terrorist Law ( 2016) retrains freedom of religion, especially missionary activities

-Some dominant churches can accuse other « concurrent churches » ex: Orthodox Church (other denominations are discriminated against in Russia, even if it is a laic State) accuses Protestant churches of being sects, bringing Western influence into the State, and proselytising in Muslim regions

Different  
general types  
of violations  
of religious  
freedom that  
are not always  
identifiable in  
national law

1 Infringement  
of

The right to profess and practice

The right to establish an institution

The right to use items of worship and places of public  
worship

Freedom of press, education

Freedom of financial power, to designate leaders or  
executive officers

Freedom of observation of religious festivals

Freedom to communicate

2  
Discriminatory  
treatment

Justice, employment, education, housing

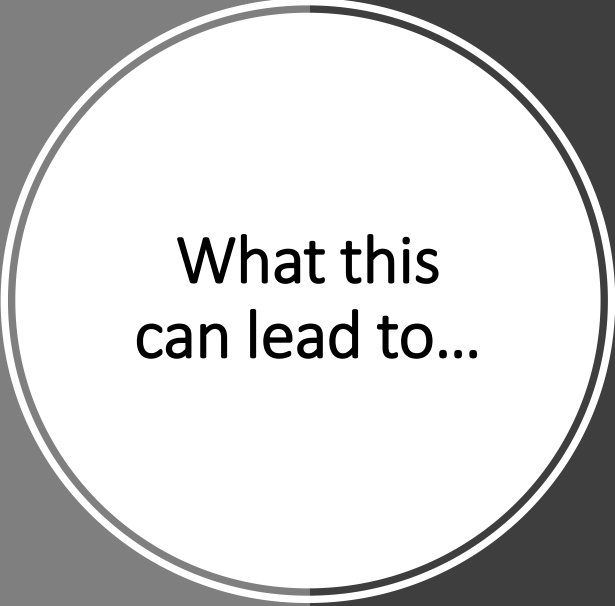
# Examples in Islamic and atheist non- democratic states

Islamic countries reject certain parts of the UN Declaration on the Elimination of all forms of Intolerance (1981), even if there are 81 signatory countries.

- Mainly, the right to change religion is not accepted. Even if some of those states are not theocratic, they are bound by the thinking of theocratic leaders or Muslim majority pressure.

Pressure from dominant Islamic theocracy has blocked discussion, which is a step backward for the universality of the fundamental principles.

The question is: Do general principles of international law apply to religious institutions?



What this  
can lead to...

- Infringing tolerance and freedom of religion leads to religious persecution masked by:
  - Use of penal incriminations of common law or law of exception (for example, detaining religious or philosophical books was banned in ex-USSR.) It is the same debate since Sophocles's tragedy « Antigone ». Juridical statute of associations can also be a way to sue associations who don't receive agreement from the State (i.e. in China).
  - Religious texts can be interpreted in a discriminatory way in order to justify infringement of fundamental rights. For example, gender discrimination is mainly in Islamic States, but also the case in some Christian countries, where gender discrimination can appear under biblical justification. What is the limit to respect?
- Question is: where does it begin? ( ex: how to interpret Belgian CP 442 quater article) Exercice

# In Europe, general situation

Freedom of religion is accepted by democratic MS (but see graph 1)

Before 2004, problems were mainly about

- Religious practice of detainees
- Conscientious objection
- Right to equality of treatment in private education
- Some decisions related to Scientology church, who claimed discrimination
- Nowadays, majority of ECHR jurisprudence is about veiling by Muslim women in the public domain, schools and university, and in administration as well as in private companies

Territorial scope of European Convention on Human Rights From Wikipedia, the free encyclopedia

Member States and Sovereign Territories	Extent of <a href="#">ECHR</a>	Right of petition to <a href="#">ECtHR</a>	Protocol 1 (Rights to property, education and elections)	Protocol 4 (Civil imprisonment, freedom of movement, expulsion)	Protocol 6 (Prohibition of death penalty in peacetime)	Protocol 7 (Fair trial rights, spousal equality)	Protocol 12 (Right of non-discrimination)	Protocol 13 (Prohibition of death penalty in all circumstances)
<a href="#">Albania</a>	Full	Yes	With Reservations	Yes	Yes	Yes	Yes	Yes <sup>[1]</sup>
<a href="#">Andorra</a>	With Reservations	Yes	No	No	Yes	No	No	Yes
<a href="#">Armenia</a>	With Reservations	Yes	Yes	Yes	Yes	Yes	Yes	No
<a href="#">Austria</a>	With Reservations	Yes	With Reservations	With Reservations	Yes	Yes	No	Yes
<a href="#">Azerbaijan</a> , except:	With Reservations	Yes	Yes	Yes	Yes	Yes	No	No
- <a href="#">Nagorno-Karabakh</a>	With Reservations (through <a href="#">Armenia</a> <sup>[2]</sup> )	Yes	Yes	Yes	Yes	Yes	Yes	No
<a href="#">Belgium</a> ●	Full	Yes	Yes	Yes	Yes	No	No	Yes
<a href="#">Bosnia and Herzegovina</a>	Full	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<a href="#">Bulgaria</a>	Full	Yes	With Reservations	Yes	Yes	Yes	No	Yes

# European Court of Human Rights



- Strasbourg
- Access to Court (Individuals under certain conditions/ Member States/Associations)
- Effect of Judgements: morally binding by MS
- Some relevant cases:
  - [Kokkinakis v. Greece](#) [1993] ECHR 20
  - [Universelles Leben e.V. v. Germany](#) [1996] (app. no. 29745/96)
  - [Buscarini and Others v. San Marino](#) [1999] ECHR 7
  - [Pichon and Sajous v. France](#) [2001] ECHR 898
  - [Leyla Şahin v. Turkey](#) [2004] ECHR 299
  - [Leela Förderkreis E.V. and Others v. Germany](#) [2008] ECHR
  - [Lautsi v. Italy](#) [2011] ECHR 2412
  - [S.A.S. v. France](#) [2014] ECHR 695
  - [Eweida v United Kingdom](#) [2013], ECHR 2013



# Jurisprudence main streams 1/7

1999-2001/2002-2004

→ Freedom of religion has an institutional aspect (I) and an individual aspect (II)

- **I. Institutional aspect (external forum)**
  - **Refah Partisi v/Turkey:** → limitation of freedom in order to conciliate interests of different religious groups and ensure respect for each other's convictions (§90) → State has a responsibility to be neutral organizer of different religions in order to guarantee public order, religious peace, and tolerance without any bias.
  - Organisational autonomy, which represents a direct interest for an organisation itself and also for members to fully enjoy their rights → for example, a state cannot replace the leader of a community (interference)
  - Limitations from Article 9 § 2 can be preventive or repressive: the Court is not against, however, a regime of prior authorization under Art 9 § 2, but it cannot arbitrarily refuse to recognize a denomination

# Jurisprudence main streams 2/7

1999-2001/2002-2004



- **I. Institutional aspect (external forum) 2/2**
- **Interreligious conflicts**
  - States must be neutral and impartial: right to religious freedom means states have no right to pass opinion on legitimacy of religious beliefs or ways to express them, BUT they must make sure that different religious groups live together peacefully → it can be useful to limit freedom of religion in order to conciliate different groups → balance between excessive interventionism and passivity.
  - *«Those who choose to freely exercise their religion, whether they belong to a religious majority or minority, cannot reasonably expect to shield their faith from all criticism. They must tolerate and accept the rejection of their religious belief by others and even their spreading teachings which are hostile to their faith. However, the manner in which beliefs and religious teachings are used as opposition or denial can become the state's responsibility.» (CEDH, Otto-Preminger Inst c/Austria , 20/9/1994, § 47)*

# Question of proselytism 3/7

Greek Council of State has defined proselytism as « effort intense et insistance illicite, condamnée par la morale, qui sont employés dans le but de séparer l'adepte de sa religion et de le convertir à une autre » (n°2276/1953)

Greek Supreme Court has considered an act of proselytism free distribution of books and booklets by Gedeonnites to orthodox illiterate Christians (n°2011961)

European Commission has condemned these decisions in application of Article 9.2 of EDHR

# Jurisprudence main streams 4/7

1999-2001/2002-2004



## • II. Individual aspect

- Article 9 guarantees the right to choose one's own religion and change it (*forum internum* of freedom of religion) as well as the right to express and manifest one's convictions (*forum externum*)
- Article 9, however, doesn't prevent any action motivated by religious conviction (Refah partisi/Turkey). It guarantees the right of citizens to mention their religion on their ID card.
- Question of conscientious objectors – penalty for those refusing military service.
- Oath of allegiance (case of Sinn Fein against UK)
- Ritual slaughtering and wearing of distinctive clothes or symbols as well as the right to access places considered holy are covered by Article 9

# Jurisprudence main streams 5/7

1999-2001/2002-2004



- Limitations to freedom of religion not justified unless provided by domestic law. Ex: denying building permit for a house of prayer, prohibition to wear religious symbols (Leyla Sahin) or for a detainee to meet a priest or attend a religious service.
- **Examples**
- wearing of Islamic headscarves:
- **Leyla Sahin v. Turkey (29/6/2004):** Wearing Islamic scarf in the university context
- CEDH confirms letting states decide which attitude to adopt (and having laws about it), for there is a lot of diversity in the different nations
- Some principles must be kept, however
  - Respect for human rights and democratic principles
  - Gender equality
  - Keeping the secular character of the institution

Jurisprudence  
main streams  
6/7

## Situation in 2018-2020



- What has changed?
  - Decay of the rule of law and of individual freedom
  - Comeback of sovereignism, xenophobia, and racism
  - Surge of violent phenomena
- EU
  - Activation of Article 7 TFEU against Poland & Hungary for allegations of violations of fundamental values of EU (independence of justice, refugees...)
- EUHR
- Brexit ...

# Jurisprudence main streams 7/7

## Situation in 2018-2020



- Religious symbols in the courtroom:
  - Hamidovic vs Bosnia ( 5/12/2017)
  - Lachiri vs Belgium (18/9/2018): ECHR has decided that exclusion from the courtroom for a woman wearing Islamic clothing constitutes an interference in her freedom to express her religion and is not justified by respect for public order or safeguard of secular and democratic values
- Burkini debate
- ECJ cases include:
  - Association with Article 10: wide interpretation of freedom of religion associated with freedom of conscience and personal data protection: Jehovah's Witnesses case (arrest CJUE, B. Fathi, 4/10/2018 C-56/17)
  - Discrimination: (Protestant diaconate in Germany offers jobs only to people belonging to a Protestant church) - Vera Egenberger, without denomination, calls on discrimination
  - Ritual slaughter without stunning: Liga van Moskeen en Islamische organisaties provincie Antwerpen

- **UN decisions about burqa and headscarf: France has been condemned 1/3**

- **Fatima A. c. France**, 16 juillet 2018, *Seyma Türkan c. Turquie*, 17 juillet 2018 et *Sonia Yaker c. France*, 17 juillet 2018
- **S.A.S. V. France**(1/7/2014. question of compatibility with (I.C.C.P.R.) P.I.D.C.P of French Law no 2010-1192 11 October 2010 «banning hiding of the face in the public space

→ Question of contradiction between Article 18 (freedom to manifest one's religion right) and Article 26 ICCPR (non-discrimination right)

→ 3 different contexts: university, workplace in a private company, or public space

→ France has been systematically fined



- **UN decisions about burqa and headscarf: France has been condemned 2/3**

- ECHR and UN committee (Geneva) don't have the same approach. UN Committee requires from MS justification of any restriction in freedom of religion, whereas ECHR, due to principle of subsidiarity, gives more space to legitimate law principles like « live together in harmony ».

- « fragmentation of HR » versus universalism of rights

- questioning universalism: Saudi Arabia, Bahreïn or Egypt put reserves on Convention against discrimination against woman (due to their religious law) and they have adopted Arab Charter of HR 2004, vig 2008

- risk of « forum shopping »

- **UN decisions about burqa and headscarf: France has been condemned 3/3**
  - « What is a religious symbol? » means « How does the individual or the society perceive a scarf or niqab as a religious sign »?
  - **Motivation in 3 steps:** legality of restrictions, legitimate goal, and necessity (here the subsidiarity principle is not applicable, but proportionality principle is)
  - **Conclusion:** the answer is not clear, in the long-term view

# Conclusion

Wedding cake case

Balance is needed. As Christians, how do we balance loving our neighbours, accepting those who are different from us (as Jesus did), while simultaneously boldly speaking up for what is right and taking care not to violate our conscience (i.e. Daniel)?

With what many call “tolerance” being progressively less tolerant in practice, it is important that we go back to the law and teach Christians what their rights are (i.e. you do have a right to share your faith and try to convince others).

The law can guide us, but we need divine wisdom as to how to live in society without being “of the world” and how to be distinctive (salt and light).

Thank you  
for your  
attention!

