



# **Comparative Analysis of Mutual Limitations under Freedom of Religion and Freedom of Expression**

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## **Abstract**

In the last decade ethnic and religious contradictions became a matter of growing concern and the issue of preserving the balance between the rights and interests of different groups of people comes to the forefront. Freedom of expression is a right without which realisation of other rights is hard to achieve as this right is the basis for political rights, and for the freedom of creation. The freedom of religion also is a fundamental right, the fight for which has a long and controversial history.

There are many examples when freedom of expression is in opposition to freedom of religion. Two recent cases, the cartoons in the Danish newspaper and the recent parody of the Prophet Mohammed show the importance of this issue. However the notion of manifestation of religious beliefs, which in the paper is considered primary as a part of freedom of expression, is also very problematic.

The paper considers models of coexistence of both freedoms adopted in three national jurisdictions: France, Turkey, and the Russian Federation. The analysis is given from the point of view of international law and from the European Court of Human Rights perspective. The first chapter considers general approaches towards balancing of fundamental rights, including approaches of the Human Rights Committee and the European Court. The second chapter discovers national regulation and specific problematic cases in France, Turkey, and the Russian Federation. The third chapter analyses the ECHR case law against these three states.

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## Introduction

In the last decade when ethnic and religious contradictions became a matter of growing concern, the problem of preserving balance between rights and interests of different groups of people comes to the forefront. Indeed, how to determine the point where unalienable rights of some conflict with the same rights of others? The issue is getting more problematic when freedom of religion and freedom of expression are involved. Freedom of expression is one of the cornerstones of self-development, of realisation of a person. At the same time freedom of expression is the most effective mean of individual protection from governmental abuses. Freedom of religion is another fundamental right, fight for which has long and controversial history. The importance of this right is highlighted, for instance, in the International Covenant on Civil and Political Rights, where the right is stated as non-derogable, *i.e.* an absolute right to which no limitations are allowed.<sup>1</sup>

There are many examples when freedom of expression is in opposition to freedom of religion. Two striking examples, the cartoons in the Danish newspaper and the recent parody of the Prophet Mohammed show the importance of this matter.

The problem gets more complicated when internal and international policies are getting involved. The notable example is the situation with Russian punk-band “Pussy Riot” which split the society in Russia in two parts: one, orthodox believers, claim that the action of the band in the Cathedral insulted their religious feelings. Others connect the outrageous sentence

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<sup>1</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, art. 18; UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, available at: <http://www.unhcr.org/refworld/docid/4672bc122.html> [accessed 15 January 2013]. *See also:* Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art.9; Organization of American States, American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, available at: <http://www.unhcr.org/refworld/docid/3ae6b36510.html>, art. 12 [accessed 15 January 2013].

rendered to the three girls as an act of pressure on the political opposition, the act which violates freedom of expression. This situation is a litmus test what has shown the public sentiment towards close relations between the Government and the Orthodox Church, their interpenetration and fusion. Many people ask whether the real aim of the “Pussy Riot” process was protection of freedom of religion or it was something different what resulted in another suppression of freedom of expression.

The problem of mutual relations and mutual limitations which exercise of freedom of expression and freedom of religion impose to each other is crucial, especially in the light of Russian building of the civil society based on the Constitutional principles of democracy and state of law, where human rights are proclaimed to be the primary value. The civil and political rights in my country became actually real only two decades ago. This is one of the reasons why the necessary system of social balances, social compromises is not yet properly established. Thus Russian society is full of misunderstandings, misinterpretations and abuses of constitutional rights. Thus the thesis is aimed at finding the ways of better interaction between the fundamental freedoms in question and possible application of these ways to the practice of states.

The paper is based on the comparative method of research. The model of constitutional regulation in the Russian Federation is compared with the regulation in France and Turkey. France is interesting from the point of view of its two centuries history of constitutional regulation of human rights, especially the civil and political ones. As a result of this long development one of the main foundations of the French state – the principle of *laïcité*<sup>2</sup> was

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<sup>2</sup> See: Georges Burdeau, Francis Hamon, Michel Troper, *Droit constitutionnel*, 23e édition, Paris: Librairie generale de droit et de jurisprudence (1993).

designed.<sup>3</sup> Moreover, France is a multicultural society where many people belonging to different religions and cultures co-exist with each other. Hence the experience of France in balancing rights to the freedom of expression and the freedom of religion is very interesting and useful. Turkey is a secular state<sup>4</sup> where the position of the traditional religion is still strong and within the last years is getting even stronger. At the same time Turkey has problems in realisation of the right to free speech – the situation which is very similar to the Russian one. Hence for Turkey the problem of balancing fundamental rights is crucial.

The thesis is limited by analysis of legal norms and court practice concerning freedom of religion and freedom of expression in the chosen jurisdictions. Possible collisions between both freedoms and other fundamental rights are not covered by the paper. Also inner regulation of the subjects of the Russian Federation is not considered in the thesis: firstly due to the division of the competence in the Federation,<sup>5</sup> and secondly because of the unified policy towards human rights in the Russian Federation.

When analysing the topic I will address primary sources of international law,<sup>6</sup> commentaries of the UN Human Rights Committee,<sup>7</sup> practice of the European Court of Human Rights,<sup>8</sup> inner regulation in France<sup>9</sup>, Turkey<sup>10</sup> and the Russian Federation.<sup>11</sup>

<sup>3</sup> *Id*; see also: Michel Troper, *Sovereignty and laïcité*, Cardozo Law Review, vol., 30:6 (2009), pp. 2560-2574.

<sup>4</sup> Constitution of the Republic of Turkey [Turkey], 7 November 1982, available at: <http://www.unhcr.org/refworld/docid/3ae6b5be0.html>, art.2, [accessed 15 January 2013].

<sup>5</sup> The Constitution of the Russian Federation, 12 December 1993 art. 71. Available at: <http://www.ksrf.ru/en/Info/LegalBases/ConstitutionRF/Pages/Chapter3.aspx> [accessed 15 January 2013].

<sup>6</sup> e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms; General Assembly resolution 2200A (XXI) International Covenant on Civil and Political Rights.

<sup>7</sup> UN Human Rights Committee (HRC), *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, available at: <http://www.unhcr.org/refworld/docid/4ed34b562>, [accessed 15 January 2013]; UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, available at: <http://www.unhcr.org/refworld/docid/453883fb22.html>, [accessed 15 January 2013]; UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10, available at: <http://www.unhcr.org/refworld/docid/4670fca12.html>, [accessed 15 January 2013]; UN Human Rights Committee (HRC), *CCPR General Comment No. 11: Article 20 Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred*, 29 July 1983, available at: <http://www.unhcr.org/refworld/docid/453883f811.html>, [accessed 15 January 2013].

The first chapter of this paper considers general approaches towards constitutional interpretation of conflicting fundamental rights. It discovers international standards inspired by the International Bill of Rights and developed by the UN Human Rights Committee. In the third section of the chapter the general approach of the European Court of Human Rights, as the most progressive body in Europe which develops standards of human rights protection, towards balancing of the fundamental rights is discussed. Moreover, all three countries are parties to the ECHR what makes terms of comparison more clear. The second Chapter studies historical background and national regulation of freedom of religion and freedom of expression in France, Turkey and the Russian Federation. It examines reception of the international standards, their development in accordance with national constitutional tradition, and problems arising when cases, where both freedoms are involved, are considered by domestic courts. The third chapter analyses approach of the ECtHR to the position of national courts. The research is done in several fields: defamation of religions, collision between freedom of religious manifestation and national security, collision between freedom of religious manifestation and the rights and interests of others, and limitations applicable in the practice of the European Court towards religious speech (with the accent to prohibition of religious garments).

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<sup>8</sup> e.g... Case of *Leila Şahin v. Turkey*, Application No. 44774/98, Council of Europe: European Court of Human Rights, 10 November 2005; Case of *Incal v. Turkey*, Application No. 22678/93, Council of Europe: European Court of Human Rights, 9 June 1998; Case of *Arslan v. Turkey*, Application No. 23462/94, Council of Europe: European Court of Human Rights, 8 July 1999; *Affaire Vincent c. France*, Requête No 6253/03, La Cour européenne des Droits de l'Homme, 24 octobre 2006; Case of *Novaya Gazeta v Voronezhe v. Russia*, Application No. 27570/03, Council of Europe: European Court of Human Rights, 21 December 2010; Case of *Wingrove v. the United Kingdom*, Application No. 17419/90, Council of Europe: European Court of Human Rights 25 November 1996 etc.

<sup>9</sup> e.g... Penal Code, available at <http://legislationline.org/documents/section/criminal-codes>. [accessed 15 January 2013].

<sup>10</sup> e.g... Criminal Code, Law Nr. 5237 Passed On 26.09.2004, Official Gazette No. 25611 dated 12.10.2004.

<sup>11</sup> Federal'nyi zakon ot 26.09.1997 N 125 – FZ “O Svobode Sovesti I o Religioznyh Ob'edineniyah” 29.09.1997, “Sobranie Zakonodatel'stva RF”, N 39, st. 4465. [Federal law from 26.09.1997 No. 125 “On the freedom of conscious and religious associations”, “Sobranie Zakonodatel'stva RF”, 29.09.1997 N 39, st.4465]; “Ugolovnyi Kodeks Rossiyskoy Federacii” ot 13.06.1996 N 63-FZ, “Sobranie Zakonodatel'stva RF”, 17.06.1996, N 25, st. 2954 [“Criminal code of the Russian Federation” from 17.06.1996 No. 63, “Sobranie Zakonodatel'stva RF”, 17.06.1996, N 25, st. 2954].

# **Chapter I. General approach and international standards of treatment of the conflict between freedom of expression and freedom of religion**

## **1. Constitutional interpretation of fundamental rights**

To establish the meaning and content of fundamental rights and to find a balance between them it is necessary to use the method of constitutional interpretation towards these rights. Under constitutional interpretation, generally, is understood a logical operation which helps to define the meaning of a constitutional provision (in terms of this thesis, it is the meaning and content of the provisions dealing with freedom of expression and freedom of religion).<sup>12</sup> For the purposes of the paper the category of comparative interpretation needs to be discussed. Under comparative interpretation of fundamental rights it is understood a reference made by judges of a constitutional court or an international tribunal to the provisions originating from other legal systems.<sup>13</sup> Comparative interpretation in the practice of the European Court of Human Rights gets another name – i.e. “European Consensus” – or uniform understanding of certain conventional provisions by the member states.<sup>14</sup> In this section I will discuss the main theoretical approaches towards interpretation of conflicting rights.

The conflict between fundamental rights is difficult to solve on the following grounds: these rights are equal in their nature, they have the same level of protection, nearly the same

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<sup>12</sup> See: George Burdeau, Francis Hamon, Michel Troper, *Droit Constitutionnel op.cit.* P. 69; Hanneke Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System: An analysis of the European Court of Human Rights and the Court of Justice of the European Union*, School of Human rights Research Series, Volume 46 (2011) p. 7.

<sup>13</sup> Hanneke Senden *op.cit.*, p. 112.

<sup>14</sup> The Court quite often uses the notion of European consensus. For example when the Court defined whether it is permissible to make defamation a criminal offence. See: *Dynk v. Turkey*, Application No. 2668/07, 6102/08, 30079/08, 7072/09, 7124/09, Council of Europe: European Court of Human Rights, 14 September 2010; *Wingrove v. The United Kingdom* etc.



guarantees; generally it is impossible to apply the test of proportionality when dealing with these rights, the only applicable is the balancing test which *per se* is not a panacea since in any case its application would be vague. The balancing test is understood in the way as it is understood by the European Court of Human Rights. The balancing test constitutes “weighing the rights in conflict against one another and affording a priority to the right which is considered to be of greater value”.<sup>15</sup>

Taking into account preliminary remarks, I will move to the main theories which deal with the interpretation of the conflicting rights. The first one is the approach of John Rawls. He claims that when there is a conflict between fundamental liberties, “they must be mutually adjusted”<sup>16</sup> while the balancing test is not applicable.<sup>17</sup> Moreover, Rawls writes that fundamental liberties may not be denied on such grounds as national security or proportionality between two evils,<sup>18</sup> they can only be restricted “solely for the sake of one or more other basic liberties”.<sup>19</sup> According to this approach when there is a clash between interests of, say, religious groups one of which is dominant in the society and the other is a minority, the government may not apply the balancing test between the rights of both groups since it will denigrate the core meaning of liberty.<sup>20</sup> In the same way, the decision of the ECtHR in *Otto Preminger Institut v. Austria* is incorrect.<sup>21</sup> Instead Rawls offers the model of regulation of the fundamental liberties. The Government may and have to establish certain frames and rules in accordance to which fundamental rights should be realised. Thus, in Rawls’ view a conflict between fundamental rights would be impossible. This approach is not without advantages as it allows eradication of the negative aspect of the balancing test.

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<sup>15</sup> Eva Brems (ed.), *Conflicts between fundamental rights*, Antwerp – Oxford – Portland: Intersentia (2008) p. 191

<sup>16</sup> *Id.* p. 33.

<sup>17</sup> *Id.*

<sup>18</sup> John Rawls, *Political Liberalism*, New York: Columbia University Press (1993) p. 295.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* pp. 310-311.

<sup>21</sup> The case is discussed in the third section of this chapter.

However, this approach is good only when the government is not abusing its regulating power which is hardly imaginable.

The second approach to the constitutional interpretation of conflicting rights is that of Habermas, which is also very sceptical towards balancing. According to him, balancing is a deprivation of these rights of their “constitutional power”.<sup>22</sup> The solution offered is that courts (constitutional courts) should find a right which is most suitable for the case and decide the case solely on the ground of this right.<sup>23</sup>

The third approach is a value judgement offered by Ely. This doctrine is opposite to the two described above. Ely’s main idea is that the original meaning of the text of the Constitution, the historical context which leads to incorporation of some of the fundamental rights in the body of the Constitution and a value - interpretation of the text given by the legislature is not sufficient.<sup>24</sup> Thus it is a constitutional court which can interpret constitutional provisions concerning fundamental rights and, what is the most important, this interpretation should be given in accordance with the “democratic will-formation”.<sup>25</sup> Thus according to Ely in the conflict of fundamental rights a right which contributes more to the establishment of the democratic will of the people will prevail.

The last concept is the moral reading of the Constitution supported by Ronald Dworkin.<sup>26</sup> This implies that the constitutional text “must be understood in the way that their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on [governmental] power”.<sup>27</sup> Hence when there is a conflict between fundamental rights of the same value, an interpreter must take into account the real moral

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<sup>22</sup> Eva Brems *op.cit.* p. 84.

<sup>23</sup> *Id.*, p.85.

<sup>24</sup> John Hart Ely, *Democracy and Distrust: A theory of Judicial Review*, Cambridge, Massachusetts and London, England: Harvard University Press (1980).

<sup>25</sup> Eva Brems *op.cit.* p. 92.

<sup>26</sup> See: Ronald Dworkin, *Law’s Empire*, Cambridge, Massachusetts: The Belknap Press of Harvard University Press (1986) pp. 45-86.

<sup>27</sup> Ronald Dworkin, *Freedom’s Law*, Oxford: Oxford University Press (1996) p.19. The book is cited by Eva Brems (ed.), *Conflicts between fundamental rights op.cit.*, pp. 92-93.

value of these rights and somehow balance it from the point of view of their social significance.

Of course theories of constitutional interpretation are not limited by the theories described above. Although, these theories illustrate the main approaches to the problem. Constitutional courts or international human rights courts when facing the conflict of rights of the same importance every time have to choose a certain approach to cope with the problem. The methodology is different. For example the ECtHR applies the balancing test, the Constitutional Court of the Russian Federation uses a methodology which is similar to Dworkin's approach. All the theories discussed in this section are not ideal but an interpreter can take certain elements from each of these theories. However one cannot disagree that the main method applicable to the interpretation of the conflict of rights is the balancing test, which is the main focus in the following chapters.

To address the conflict of rights we also have to take into account several notions which can influence the treatment of these rights. Firstly, the real conflict between rights exists when these rights have the same level of protection, i.e. stated in the same legal documents, upheld by the same authorities etc. While there is a conflict between a conventional right from the European Convention of Human Rights and the other interest (even legal one) which is not stated, there it is impossible to treat the situation as a conflict of rights.<sup>28</sup> Secondly, and the most important, is that the conflict of rights gets another character when the rights of absolute character and the rights which can be subjected to limitations are involved.<sup>29</sup> This leads to the conclusion that when there is a conflict, for example, between freedom of thought and

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<sup>28</sup> This is connected with the idea of Rawls who claims that human rights may not be endlessly expanded. According to him such an expansion has a negative effect to protection of "really fundamental rights". [John Rawls *op.cit.*] See also: Eva Brems *op.cit.* pp. 175-178.

<sup>29</sup> The idea of hierarchy of norms is upheld in the ECtHR practice, for example in the case of *Chahal* [Case of *Chahal v. the United Kingdom*, Application No. 22414/93, Council of Europe: European Court of Human Rights, 15 November 1996].

freedom to express certain ideas, the latter in any case will be limited.<sup>30</sup> But it is not the case when there is a clash between two rights which can be subjected to limitations, for example freedom to manifest religious beliefs and freedom of expression.

The conflict between freedom of expression and freedom to manifest religious beliefs usually has two forms. The first is when religious speech is offensive itself. For example when in the Russian Federation the Orthodox believers protest against homosexuality or certain liberal freedoms it is a clear violation of non-discrimination provisions of the Constitution, and thus, it is an abuse of their right to free speech. And the second type is when the expression insults religious feelings. For example in many pieces of contemporary art religious motives are interpreted in a possibly offensive way.<sup>31</sup>

When discussing the conflict between freedom of expression and freedom to manifest religious beliefs I have to address an overlap between the terms “manifestation” and “expression”. Generally international documents use the term “manifestation” towards expression of religious beliefs.<sup>32</sup> Consequently some commentators claim that “manifestation” should be “reserved” only for the expression of religious beliefs because it is a specific form of such an expression, a kind of *lex specialis*.<sup>33</sup> They develop this thought claiming that it implies special status and special protection, different from the protection guaranteed to expression in ordinary sense.<sup>34</sup> The ECtHR stressed in this respect in *Kokkinakis* that “the exercise of the right to freedom of expression consists in the freedom to manifest one’s

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<sup>30</sup> See: ECHR, art 9 and art. 10.

<sup>31</sup> See: W. Cole Durham, Jr., Brett G. Schraffs, *Law and Religion National, International and Comparative Perspective*, New York: Wolters Kluwer, Law and Business, Aspen Publishers (2010) pp. 183-184.

<sup>32</sup> e.g. ICCPR, art. 18; ECHR, art. 9.

<sup>33</sup> See: Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice*, Cambridge: Cambridge University Press (2005) p. 207; M.D. Evans, *Religious Liberty and International Law in Europe*, Cambridge: Cambridge University Press (1997) p. 285.

<sup>34</sup> *Id.*

religion or belief through worship, teaching, practice and observance, it is primary the right guaranteed by art. 9 of the Convention”.<sup>35</sup>

But from my point of view this approach is vague. How should be interpret the fact that, say, a person is a pacifist and he/she expresses some views, teaches or contributes leaflets? Is it a religious manifestation or an act of expression? Or another example which will be discussed in the third chapter in more detail: how do we evaluate the wearing of the headscarf by Muslim women in Europe? Is it also only a manifestation of religion? These actions follow many goals, among which one can find political expression. Once a political element or certain social significance is involved (which happens almost every time) it is impossible to draw the line between “manifestation” and “expression”. Hence my main claim is that “manifestation” is totally within the scope of “expression”, and, hence, the standards of protection applicable to both notions should be the same.<sup>36</sup>

## 2. International law on the conflict of rights

Nowadays international human rights law (IHRL) is recognised as one of the main achievements of international law, even *jus cogens* (peremptory norms of international law).<sup>37</sup> This means that human rights under international law are considered as the highest value, and in case of their violation all the international community should protect those rights.<sup>38</sup> The

<sup>35</sup> *Kokkinakis v. Greece*, Application No. 14307/88, Council of Europe: European Court of Human Rights, 25 May 1993, para. 79.

<sup>36</sup> This approach is not generally recognised, for example Evans claims that any expression which is not connected with religious beliefs is protected under article 10 of the ECHR while the expression takes the form of religious manifestation and protected under article 9 as a particular form of expression. However, Evans fails to prove that such type of expression has any specific features which make it so much different from the expression in the meaning of article 10. See: M.D. Evans *op.cit.*

<sup>37</sup> For further discussion see: Malcolm M. Shaw, *International law*, Sixth edition, Cambridge: Cambridge University Press (2008) pp. 265-276; James Crawford, *Brownlie's principles of public International Law* 8<sup>th</sup> edition, Oxford: Oxford University Press (2012) pp. 634-638.

<sup>38</sup> On obligations *erga omnes* in human rights see: Malcolm M. Shaw *op.cit.* pp. 265-276.

main source of international human rights law is the International Bill of Rights,<sup>39</sup> which includes the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights [ICCPR], and the International Covenant on Economic, Social and Cultural Rights. The International Bill of Rights is the most universal means of human rights protection<sup>40</sup> which has its own approach towards balancing and limiting fundamental rights. In this section I will consider the practice of the UN Human Rights Committee concerning freedom of expression and freedom of religion.

Both freedoms are stated in the ICCPR. Article 18 states that:

Everyone shall have the right to freedom of thought, con science 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.<sup>41</sup>

Freedom of expression according to the Covenant

Shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.<sup>42</sup>

Whereas art. 18 states that freedom of religion *per se* cannot be restricted; it is only freedom to manifest religious beliefs which can be subjected to certain limitations.<sup>43</sup> This is the key

<sup>39</sup> The Bill of Rights includes three main sources of international human rights law: UN General Assembly, Universal Declaration of Human Rights; UN General Assembly, International Covenant on Civil and Political; UN General Assembly, International Covenant on Economic, Social and Cultural Rights.

<sup>40</sup> Whereas one can argue that different parts of the Bill have different nature. For example The Declaration – is not binding document for the UN members. Another example is the Covenant on Economic, Social and Cultural rights which is not ratified by the United States.

<sup>41</sup> ICCPR, art. 18 para. 1.

<sup>42</sup> *Id.* Art. 19 para.1.

covenantal difference between freedom of religion and freedom of expression, while the first cannot be limited the latter can be (on the ground of the rights or reputation of others, national security, public order, public health and public morals).<sup>44</sup> It follows from the wording of the Covenant that the right to freedom of religion is logically divided into inner and external aspects,<sup>45</sup> while freedom of expression is always considered as aimed at achievement of external goals. It is notable to compare this approach with the Practice of the European Court on Human Rights which recognises both external and inner aspects of the freedom.<sup>46</sup>

The Human Rights Committee had a several occasions to consider cases where the conflict between freedom of expression and freedom of religion was involved. In 2000 the Committee decided the case of *Raihon Hudoyberganova v. Uzbekistan*, the case is a good illustration of the general approach of this international body.<sup>47</sup> The applicant was a student of a university in Uzbekistan. In 1996 she joined the Islamic Affairs Department of the Institute. She claimed to be a practicing Muslim and she has to follow all the Islamic canons including wearing the Hijab. Within the following two years the University Administration took measures limiting student's wearing of the garment and the freedom to manifest her beliefs. For example, the access to praying rooms was limited; wearing of religious symbols at the University was prohibited. Ms. *Hudoyberganova* did not succeed in the domestic courts. As a

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<sup>43</sup> *Id.* Art. 18 para. 3.

<sup>44</sup> *Id.* art. 19 para. 2.

<sup>45</sup> *Leading cases of the Human Rights Committee*, Compiled by Raija Hanski and Martin Schein, institute for Human Rights, Abo Academi University Turku / Abo (2007) p. 278. See also: Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, 2<sup>nd</sup> edition, Kehl, Germany: N.P. Engel, Publisher (2005) p.412.

<sup>46</sup> *e.g. Orban and others v. France*, , Application No. 20985/05, Council of Europe: European Court of Human Rights, 15 January 2009.

However it does not necessarily mean that the inner aspect of the freedom of expression can preclude the Court from finding limitation proportionate (for example in the hate – speech case of *Norwood [Anthony Norwood v. United Kingdom]*, Application No. 23131/03, Council of Europe: European Court of Human Rights, 16 November 2004] the Court found that limitation of the speech reflected beliefs of the applicant was permissible).

<sup>47</sup> *Raihon Hudoyberganova v. Uzbekistan*, Communication No. 931/2000, U.N. Doc. CCPR/C/82/D/931/2000 (2004).

result, she applied to the Committee claiming that her rights under articles 18 and 19 of the ICCPR were violated.<sup>48</sup>

The Committee decided in favour of the applicant. It was found that freedom of religion can include freedom to wear religious symbols or religious clothes. Moreover, prohibition from wearing these symbols is illegal interference in the right to adopt and exercise religion. Also the Committee stressed that the Government did not show any compelling reasons for interference in the right.<sup>49</sup> Thus, a violation of article 18 para. 2 of the Covenant was found.

The argumentation of the Committee in the case was not clear. Firstly, and the most crucial from the methodological point of view, the Committee mixed rights provided in the 18<sup>th</sup> article. It found that freedom to manifest beliefs (external aspect) is an integral part of the freedom to adopt religion. In this way the international body granted these rights with the same level of protection, whereas the ICCPR is clear about the fact that it is not so.<sup>50</sup> Secondly, the Committee ignored the state's margin of appreciation in the case of prohibition of religious symbols in public. According to the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, Uzbekistan had a right to limit certain conventional rights due to the notion of public order.<sup>51</sup> In this case it was possible to explain with the secular nature of the state.

Paragraph 3 of art. 19 of the ICCPR permits only two types of limitations towards freedom of expression, i.e. "respect of the rights or reputations of others; and for the protection of national security or of public order (*ordre public*), or of public health or

<sup>48</sup> *Raihon Hudoyberganova*, paras. 2.1 – 2.5, 3.

<sup>49</sup> *Id.* Para. 6.2.

<sup>50</sup> See also: UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, available at: <http://www.unhcr.org/refworld/docid/4672bc122.html>, [accessed 23 February 2013].

<sup>51</sup> *Id.* Para.22.



morals”.<sup>52</sup> In any case limitations should be necessary and proportionate.<sup>53</sup> For example, the UN Human Rights Committee considered the case of a Canadian teacher who was fired by the Government on the grounds that he had published certain materials stirring up religious hatred. The Committee found that limitations were necessary to protect the interests of believers.<sup>54</sup>

The Human Rights Committee in its 102<sup>nd</sup> session adopted General Comment No. 34, where among other issues it explained the Committee’s view towards correlation between art. 18 and art. 19 of the ICCPR.<sup>55</sup> This commentary is a good illustration of the current state of international law towards these principles. It is worth noting that the Committee recognised that freedom of expression and freedom of religion have much in common, and expression can be guaranteed *inter alia* by art. 18.<sup>56</sup> The Committee also addressed the most controversial issue: freedom of expression and blasphemous laws:

Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, section 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, section 3.

The Committee reiterated that restrictions or limitations of free speech in favour of one or another religion are absolutely impermissible. Moreover, it is not in consistence with the

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<sup>52</sup> ICCPR, Art. 19 (3).

<sup>53</sup> UN Human Rights Committee (HRC), *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, available at: <http://www.unhcr.org/refworld/docid/4ed34b562.html>, paras. 33 – 34, [accessed 23 February 2013].

<sup>54</sup> *Malcolm Ross v. Canada*, CCPR/C/70/D/736/1997, UN Human Rights Committee (HRC), 26 October 2000, available at: <http://www.unhcr.org/refworld/docid/3f588efc0.html> [accessed 23 February 2013].

<sup>55</sup> UN Human Rights Committee (HRC), *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, available at: <http://www.unhcr.org/refworld/docid/4ed34b562.html>, [accessed 23 February 2013].

<sup>56</sup> *Id.*, para. 4. It is a positive development because in its previous cases the Committee was usually silent about intercourse of both freedoms.

Covenant to prohibit critics of religious leaders, or to make commentaries interpreting religion and faith.<sup>57</sup>

Hence, practice of the UN Human rights Committee towards intercourse of freedom of religion and freedom of expression has two main aspects significant for the current research. Firstly, the Committee is not very careful when it gives an interpretation to obligations of states under article 18, in particular provisions concerning freedom to believe and freedom to manifest beliefs (whereas it is a positive notion that the Committee considers freedom to manifest religious beliefs as a way of realisation of freedom of expression). The second important detail is that the Committee had formulated a test clear enough for establishing unconventionality of a free speech limitation – these are limitations in favour of particular religion, religious leader or doctrine.

The last statement is significant from the comparative perspective. The ECtHR has not developed the same standard. In several of its cases the Strasbourg Court protected religions<sup>58</sup> or beliefs of a particular group,<sup>59</sup> which in those cases could be considered as a disproportional limitation of the artistic expression and, moreover, as a discrimination of one religion (religious group) in favour of the other. This practice would be addressed in more detail in the next section.

From my perspective, the Committee's understanding of the guarantee of freedom of expression through the means of art. 18 is correct and crucial for defying international standards in this field. However, the Committee did not go so far as to recognise freedom of religion as an integral part of freedom of expressions,<sup>60</sup> while in principle it would be a great

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<sup>57</sup> *Id.*, para. 48.

<sup>58</sup> *e.g. Wingrove v. the United Kingdom*, application no. 17419/90, Council of Europe: European Court of Human Rights 25 November 1996. In that case the Court stated that the government legitimately restricted demonstration of the movie with the aim to protect the Anglican Church.

<sup>59</sup> *e.g. Otto Preminger Institute v. Austria*, application no. 13470/87, Council of Europe: European Court of Human Rights, 20 September 1994. Protection of religious feeling of the majority of the population of Tyrol.

<sup>60</sup> For further details concerning two theories of understanding of freedom of religion as a right of expression or as a right of identity see: Anat Scolnicov, *The right to Religious Freedom in International Law: Between*

step forward and would help to design universal judicial standards and approaches to both these rights and it would be a universal mechanism of justiciability of possible collisions between these rights. However, once we decide to consider freedom of religious as an aspect of freedom of expression, another problematic issue arises here: what are acceptable limitations towards a religion speech. Although there are no clear standards towards these limitations, in principle they could be divided into four groups:<sup>61</sup>

- Prohibition of proselytism;
- Inner regulation within a religious group, prohibiting certain expression of its members (this issue will not be addressed later, because the object of the research is limited by state regulation);
- Prohibition of blasphemy speech;
- Prohibition of religious hate speech.

This international standard is applicable both on the level of the state – parties to the ICCPR (including France, Russia and Turkey) and it is also can be found in the practice of the European court of Human Rights which is considered in the next section.

### **3. General approach of the ECtHR towards conflicting rights**

Cases where fundamental rights to the freedom of religion and the right to freedom of expression were discussed by the European Court of Human Rights separately or together are quite often. The Court in every case has to apply the following criteria: the interference must

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*Group Rights and Individual Rights*, London and New York: Routledge, Taylor & Francis Group (2011) pp. 194-218.

<sup>61</sup> Anat Scolnicov *op.cit.*, p. 194 – 195.

be prescribed by law,<sup>62</sup> it must fulfil a legitimate aim,<sup>63</sup> the interference must be necessary in a democratic society,<sup>64</sup> the interference must be proportionate.<sup>65</sup>

The practice of the Court demonstrates that there are certain standards designed by the Court and which govern the Court in its decisions.

As to concern, freedom of expression (including freedom of the press, freedom of artistic expression) the Court established the following:<sup>66</sup>

- The Court “must determine whether the reasons adduced by the national authorities to justify the interference were “relevant and sufficient”, and whether the measure taken was “proportionate to the legitimate aims pursued”;<sup>67</sup>
- The Court takes into account the role which the press has in a democratic society, the role of “public watchdog”, contribution of the press into political debates, solving of questions of political importance;<sup>68</sup>
- It is not for the Court to establish methods of the press’ work;<sup>69</sup>
- Freedom of expression implies that information which shocks, provokes and is disturbing also has the right to be delivered;<sup>70</sup>

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<sup>62</sup> See: *Foka v. Turkey*, Application No. 28940/95, Council of Europe: European Court of Human Rights, 24 June 2008.

<sup>63</sup> See: *Gorzelik and others v Poland* Application No. 44158/98, Council of Europe: European Court of Human Rights.

<sup>64</sup> *Handyside v the United Kingdom*, Application No 5493/72, Council of Europe: European Court of Human Rights, 7 December 1976, at para 49.

<sup>65</sup> See: *Vajnai v. Hungary*, Application No. 33629/06, Council of Europe: European Court of Human Rights, 8 October 2008.

<sup>66</sup> Criteria cited by the ECtHR decision on the case of *Mosley v. United Kingdom*, Application No. 48009/08, Council of Europe: European Court of Human Rights 10 May 2011.

<sup>67</sup> See: *UJ v Hungary*, Application No. 23954/10, Council of Europe: European Court of Human Rights, 19 July 2011; *Chauvy and Others v. France*, Application No. 64915/01, Council of Europe: European Court of Human Rights, 29 June 2004, para. 70.

<sup>68</sup> See: *Financial Times Ltd and Others v. the United Kingdom*, Application No. 821/03, Council of Europe: European Court of Human Rights, 15 December 2009, para. 59; *De Haes and Gijssels v. Belgium*, Application No.19983/92, Council of Europe: European Court of Human Rights, 24 February 1997, para. 37.

<sup>69</sup> See: *Times Newspapers Ltd v. United Kingdom (nos. 1 and 2)*, Application No. 3002/03 and 23676/03, Council of Europe: European Court of Human Rights, 2009, para. 42; *Jersild v. Denmark*, Application No. 15890/89, Council of Europe: European Court of Human Rights, 23 September 1994, para. 31.

<sup>70</sup> See: *Gündüz v. Turkey*, Application No. 35071/97, Council of Europe: European Court of Human Rights 4 December 2003; *Handyside v. The United Kingdom*, Application No. 5493/72, Council of Europe: European Court of Human Rights 7 December 1976.

- The Court makes a distinction “between reporting facts – even if controversial – capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations”.<sup>71</sup>

The ECtHR designed certain standards towards treatment of the freedom of religion:<sup>72</sup>

- The ECtHR believes that freedom to exercise religious beliefs is one of the foundations of a democratic society;<sup>73</sup>

- Usual approach towards possible limitations of freedom to manifest religious beliefs: “any limitation placed on a person’s freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims”;<sup>74</sup>

- The Court stresses the necessity for the states-parties to be neutral and impartial as concerns treatment of religions;<sup>75</sup>

- For an act to be protected “as a “manifestation” within the meaning of Article 9, the act in question must be intimately linked to religious or belief”;<sup>76</sup>

- The Court leaves to the states – parties quite wide margin of appreciation for defining whether interference is necessary in a democratic society.<sup>77</sup>

All the standards described above are applied by the Strasbourg Court when it deals with cases where there is a conflict between fundamental rights. When requirements towards these

<sup>71</sup> *Mosley v. United Kingdom*, para. 114.

<sup>72</sup> Criteria cited by the ECtHR decision on the case of *Eweida and others v. The United Kingdom*, Applications Nos. 48420/10, 59842/10, 51671/10 and 36516/10, Council of Europe: European Court of Human Rights, 15 January 2013.

<sup>73</sup> See: *Kokkinakis v. Greece*, para. 31,

<sup>74</sup> *Eweida and others v. The United Kingdom*, para. 80. See also: *Leyla Şahin v Turkey*, Application No 44774/78, Council of Europe: European Court of Human Rights, 10 November 2005. para. 105.

<sup>75</sup> See: *Bayatyan v. Armenia* [GC], Application No. 23459/03, Council of Europe: European Court of Human Rights, 2011 para. 110; *Jakóbski v. Poland*, Application No. 18429/06, Council of Europe: European Court of Human Rights, 7 December 2010, para. 44; *Anoussakis and Others v. Greece*, Council of Europe: European Court of Human Rights, 26 September 1996, para. 47.

<sup>76</sup> *Eweida and others v. The United Kingdom*, para. 82.

<sup>77</sup> See: *Leyla Şahin*, para. 110; *Otto-Preminger-Institut v. Austria* para. 47.

cases are strict enough the Court has to apply balancing approach<sup>78</sup> towards both freedoms. And this application is not always proper and reasonable which will be illustrated by the following cases.

The first case is the case concerning prohibition of the film *Visions of Ecstasy* in *Wingrove v. The United Kingdom*. The applicant, Mr. Wingrove is a film director. He wrote the shooting script for, and directed the making of, a video work entitled *Visions of Ecstasy*. According to the applicant, the idea for the film was derived from the life and writings of St Teresa of Avila, the sixteenth-century Carmelite nun and founder of many convents, who experienced powerful ecstatic visions of Jesus. *Visions of Ecstasy* was submitted to the British Board of Film Classification in order that it might lawfully be sold, hired out or otherwise supplied to the general public or a section thereof. The Board rejected the application for a classification certificate.<sup>79</sup>

The case touched upon the issue of blasphemy. The ECtHR in its decision found no violation of Mr. Wingrove's right on freedom of artistic expression. Firstly, the Court stressed that there is no universal European understanding of what constitutes blasphemy: "national authorities must therefore be afforded a degree of flexibility in assessing whether the facts of a particular case fall within the accepted definition of the offence".<sup>80</sup> Then the Court held that the interference in the Applicant's rights was legitimate as it was aimed at protection of interests of Christians.<sup>81</sup> The main argument of the Court was that a blasphemy law in principle does not prohibit views or statements which are contrary to the religious doctrine,

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<sup>78</sup> It is interesting that even among the judges of the ECtHR there is no a uniform approach towards tests which should be applied when two fundamental rights are involved: the problem is whether application of the proportionality test is appropriate to such cases or not. However generally it is recognised that the balancing test is the best solution.

<sup>79</sup> *Wingrove v. The United Kingdom*, Application No. 17419/90, Council of Europe: European Court of Human Rights.

<sup>80</sup> *Id*, para. 41.

<sup>81</sup> *Id*, para. 45.

the law prohibits (restricts) the manner in which such an expression is made.<sup>82</sup> The last argument is connected with the possibility of the movie to be widely distributed once it appeared on the market.

The second case which I want to discuss is the case of *Otto Preminger Institut v. Austria*. The applicant is an association intended to screen the film *Das Liebeskonzil* (Council in Heaven). Following a request by the Innsbruck diocese of the Catholic Church, the public prosecutor instituted criminal proceedings against the applicant association's manager three days before the film was due to be shown on suspicion of attempted criminal offence of disparaging religious precepts. The Regional Court ordered the forfeiture of the film, considering that the severe interference with religious feelings caused by the provocative attitude of the film outweighed the freedom of art.<sup>83</sup>

Like in the previous case the Court found no violation. Firstly, the Court reiterated that states have a certain margin of appreciation when there is a matter of protection of public order and the interest of the society.<sup>84</sup> Secondly, the Court took into account the fact that the Roman Catholic religion was the dominant religion in the Tyrol region of Austria. When the movie was prevented from screening the Austrian authorities were searching prevention of offensive effect of it towards religious feelings of the Tyroliennes.<sup>85</sup> And the last argument of the Court was that article 10 cannot be interpreted as prohibiting forfeiture of the movie.<sup>86</sup>

Both cases were much criticised and still are.<sup>87</sup> Since the Court left the states – parties very wide margin of appreciation towards balancing two fundamental rights. Article 9 states

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<sup>82</sup> *Id*, para. 57-58.

<sup>83</sup> *Otto Preminger Institut v. Austria*, application no. 13470/87, 20 September 1994.

<sup>84</sup> *Id*, para. 55.

<sup>85</sup> *Id*, para. 56.

<sup>86</sup> *Id*, para. 57.

<sup>87</sup> See, for example, Sir Patrick Elias and Jason Coppel, *Freedom of expression and freedom of religion: Some Thoughts on the Glenn Hoddle case in Freedom of Expression and Freedom of Information. Essays in Honour of Sir David Williams* (edited by Jack Beatson and Yvone Crips) Oxford: Oxford University Press (2000) pp. 51-63.

that “Everyone has the right to freedom of thought, conscience and religion...”.<sup>88</sup> It does not say that religions themselves have certain rights. But in both cases the Court took the position of protecting religions.<sup>89</sup> The Court went from protection of religious freedom and moved out of the conventional frames towards protection of religious feelings. Moreover, in these judgments the Court belittled the protection of artistic freedom, which potentially can have negative consequences in the future process on the Pussy Riot case before the ECtHR.

However, in the case of *Choudhury v. the UK*,<sup>90</sup> where the issue was whether the UK failed to protect religious feelings of the Muslims after publication of the book by Salman Rushdie *The Satanic Verses* the Commission did not find a violation of the state’s positive obligations.

In the current section I also have to regard permissible limitations towards freedom to manifest religion. The first issue here is the notion of legal certainty.<sup>91</sup> In several of its decisions the Court upheld prohibition of proselytism,<sup>92</sup> while the formulation of the law prohibiting these actions was vague. Later the Court changed its position and applied stricter scrutiny towards the nature of a state’s act in question.<sup>93</sup> Very interesting in terms of the thesis is the ban upheld by the ECtHR towards advertisements of a sect on a private commercial radio station.<sup>94</sup> The Court in this case upheld a prohibition because the impact of this way of realisation of freedom of expression towards the public was crucial and very strong. Thus the

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<sup>88</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>89</sup> See, for example, joint dissenting opinion to *Wingrove*.

<sup>90</sup> *Choudhury v. United Kingdom*, Application No. 17439/90, Council of Europe: European Court of Human Rights, 1991.

<sup>91</sup> See: Paul M. Taylor, *Freedom of Religion: UN and European Human Rights law and Practice*, Cambridge: Cambridge University Press (2005) p. 294.

<sup>92</sup> See: *Larissis and others v. Greece*, Application No. 140/1996/759/958–960, Council of Europe: European Court of Human Rights, 24 February 1998.

<sup>93</sup> See: *Hasan and Chaush v Bulgaria*, Application No. 30985/96, Council of Europe: European Court of Human Rights, 26 October 2000.

<sup>94</sup> *Murphy v. Ireland*, Application No. 44179/98, Council of Europe: European Court of Human Rights, 3 December 2003. See also: Paul M. Taylor *op.cit.* p. 309.



case is a curious example where both freedom to manifest religion and freedom of expression were limited at the same time.

In conclusion of this chapter I have to admit that in spite of the fact that there exist international standards in the field of interaction between freedom of expression and freedom of religion, international regulation is not complete and uniform. Because of the practical reasons international tribunals and other instruments of human rights protection leave to the states wide margin of appreciation which is not necessarily the best decision. One of the problems which will be discussed in the third chapter is such a ground of limitation as the secular nature of a state. This ground is not stated in international documents, however, either the UN Human Rights Committee or the European Court of Human Rights use it as a justification for states' actions. The next problem is silence of international law towards procedural aspects of the conflict between rights. This lacuna troubles regulation and protection of the fundamental rights.

## **Chapter II. Historical context and national regulation in France, the Russian Federation and Turkey**

When discussing the current practice of France, Turkey and the Russian Federation it is necessary to consider the historical particularities and legal provisions which govern the relations between freedom of expression and freedom of religion. However, firstly I will briefly address common features which are applicable towards balancing freedom of religion and freedom of expression.

It is an undisputable fact that freedom of expression (and freedom of the press as its part) and freedom of religion are fundamental constitutional values.<sup>95</sup> These rights are related and may both cooperate or concur with each other. In all three states which are considered in the paper an individual or the press possess freedom to choose a topic or express an opinion which criticises any confession or religion. Nevertheless, under domestic legislation in the case of defamation or libel of religion or causing of religious hatred and intolerance, court proceedings against a person (a newspaper etc.) expressed such an opinion is permissible.<sup>96</sup> These proceedings can even have a criminal character.<sup>97</sup> It also has to be stressed that in all three jurisdictions the crime of blasphemy *per se* does not exist under criminal law (some specific domestic cases involving blasphemy will be discussed later).

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<sup>95</sup> See: Norman Doe, *Law and Religion in Europe. A Comparative Introduction*, Oxford: Oxford University Press (2011) p. 157.

<sup>96</sup> *Id.*, p. 159.

<sup>97</sup> e.g. Article R. 625-7 of the French Criminal Code.

## 1. France: freedom of thought and the principle of *laïcité*

Article 1 of the French Constitution of 1958 describes France as a secular state.<sup>98</sup> This principle has a long history in this state which originates at the time of the 1789 revolution and adoption of the Declaration of Rights of Man and the Citizen in 1791,<sup>99</sup> which started the schism between the state and the Catholic Church. The principle of secularism is very specific in France. It constitutes one of the baselines of society and the state, and it has some specific features. For defining secularism in France, French constitutional law uses the term *laïcité*. *Laïcité* is characterised by the absence of religions' influence towards the state; separation between both institutions;<sup>100</sup> and, what is more important, it is “an attitude of the state towards religion, decided unilaterally by the state”.<sup>101</sup> This decision of the state is considered a sovereign decision. Relations between the state and religion under the principle of *laïcité* are not mutual, the state distanced itself from religion<sup>102</sup> – that is why French secularism is so different from the usual understanding.

When discussing the special attitude of France towards religion, two concepts<sup>103</sup> are necessary to be taken into account: that is *laïcité* which is described above and the doctrine of sovereignty.<sup>104</sup> When talking about sovereignty in France one has to address not only the

<sup>98</sup> 1958 French Constitution, art. 1.

<sup>99</sup> The Declaration in article 10 provides: “No one should be disturbed on account of his opinions, even religious, provided their manifestation does not upset the public order established by law”.

<sup>100</sup> Troper, Michel, *Sovereignty and laïcité. (Constitutionalism and Secularism in an Age of Religious Revival: The Challenge of Global and Local Fundamentalisms)*, Cardozo Law Review, June, 2009, Vol.30(6), p.2561-2574.

<sup>101</sup> *Id.*, p.2.

<sup>102</sup> See: Hana van Ooijen, *Religious Symbols in Public Functions: a Comparative Analysis of Dutch, English and French Justifications for Limiting the Freedom of Public Officials to Display Religious Symbols*, Cambridge: Intersentia Ltd. (2012) pp. 175 - 178.

<sup>103</sup> However special attitude of the French people towards the French citizenship is also should be taking into account. The French citizenship is universal and it does not depend on the origin of a person or his religious beliefs. For further details see: Deirdre Golash (ed.), *Freedom of expression in a Diverse World*, Dordrecht Heidelberg London New York: Springer Science-Business Media B.V. (2010) pp. 135-137.

<sup>104</sup> For further details on the understanding of sovereignty and its connection with secularism see: Louis Favoureu et al. *Droit Constitutionnel* 12e édition, Paris: Dalloz (2009) pp. 42-49; Francis Hamon, Michel Troper, *Droit Constitutionnel*, 31e edition, Paris: Librairie generale de droit et de jurisprudence (2009).

content of this category (which generally has nothing particularly different from other states), but the origins of the doctrine. And here is the key point for the Fifth Republic. In France sovereignty is based *inter alia* on the power of the state to regulate religion, and the separation from religion.<sup>105</sup> These two notions create a power of the state to regulate religion, even to interfere in its affaires without opposite influence from the side of religion. The Government interferes in religious affairs actively. For example, in France there exists the post of Minister of Three Religions who is responsible for management of relations between the state and confessions, the National Assembly adopted certain statutes prohibiting wearing of religious symbols and signs in public places (this problem will be considered in much detail later). Thus the state of France has a sovereign constitutional power to regulate religion.

Current relationships between the state and religion in France, except for some provisions and principles designed by the *Conseil Constitutionnel*,<sup>106</sup> are regulated by the Statute from 1905 about Separation of the Church and the State,<sup>107</sup> the Statute from 31 December 1959 (the statute regulates questions of education); practice of the *Conseil d'état*.<sup>108</sup> In addition, in 2004 the National Assembly adopted the bill prohibiting wearing of the religious symbols in public educational institutions.<sup>109</sup> The Law raised controversies and protests which *inter alia* resulted in the proceeding before the ECtHR.

As to concern freedom of expression, freedom of thought, freedom of religious and freedom to manifest religious beliefs, in France the classification and subordination of these

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<sup>105</sup> Troper, Michel, *Sovereignty and laïcité*. P. 5. See also: Raymond Carré de Malber, *Contribution a la théorie générale de l'État* (1962) p.79.

<sup>106</sup> e.g. The decision of the *Conseil Constitutionnel* from 15 July of 1976, 76-67 DC.

<sup>107</sup> Loi du 9 décembre, 1905 concernant la séparation des Églises et de l'État, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070169&dateTexte=20080306> [accessed 26 February 2013].

<sup>108</sup> e.g. The decision of the *Conseil d'état* No.346.893 from 27 November 1989.

<sup>109</sup> Loi No. 2004-228 du 3 Mars, 2004, Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], March 17, 2004, p. 5190

freedoms is much more established and strict. Freedom of expression and freedom to manifest religion beliefs are part of a wide right to freedom of thought.<sup>110</sup>

The Declaration of the Rights of Man and the Citizen provides:

The free communication of ideas and opinions is one of the most precious of the rights of man; every citizen can then freely speak, write, and print, subject to responsibility for the abuse of this freedom in the cases determined by law<sup>111</sup>.

Later this constitutional provision was developed in the practice of the *Conseil Constitutionnel*. For example it confirmed that the freedom of the press is a fundamental liberty which is a basis for realisation of all other freedoms.<sup>112</sup> Moreover, the *Conseil* found that freedom of the press is a common constitutional value of the primary meaning.<sup>113</sup> Also there are a number of statutes which deal with freedom of expression, for example the statute for the press of 1881, the statute of 1982 proclaimed liberty of audio – visual information etc.

From first sight collisions between these fundamental rights, at least on the levels of governmental regulation and constitutional adjudication concerning freedom of religion and freedom of expression, are impossible. However this is not completely true. In France as in many other Western Countries there is a revival of religious beliefs. It leads to changing of the position of the state towards balancing of the conflicting rights. For example in the case of *Giniewski*, which later was considered by the ECtHR, the French Court decided to protect a religious citizen who was offended by a certain speech.<sup>114</sup> Moreover, the former President of

<sup>110</sup> Louis Favoureu *op.cit.* p. 921.

<sup>111</sup> *Declaration of the Right of Man and the Citizen* [France], 26 August 1789, available at: <http://www.unhcr.org/refworld/docid/3ae6b52410.html> [accessed 28 March 2013].

<sup>112</sup> The decision of the *Conseil Constitutionnel* No. 84-181 DC prec.

<sup>113</sup> *Id.*

<sup>114</sup> Case of *Giniewski v. France*, Application No. 64016/00, Council of Europe: European Court of Human Rights, 31 April 2006.

the Fifth Republic, Nicolas Sarkozy argued for the deeper incorporation of religious feelings and religious values in French society.<sup>115</sup>

Whereas now in France the specific offence of blasphemy does not exist, an individual can be penalised on the ground of “insult, defamation and incitement to discrimination, hate or violence against individuals”.<sup>116</sup> This is not the case with the press: the statute on press’ freedom of 1881 established very strict procedural guarantees aimed at the protection of the press.<sup>117</sup> However, the practice of France concerning the clash of religious feelings and freedom of the press is wide enough. Later in this section I will address two domestic cases which had a great resonance in French society. The First case is *L’affaire de l’affiche Girbaud* which was considered by the *Cour de cassation* in 2005. A huge advertisement poster of the clothes brand *Girbaud* was placed in the city centre of Paris. The poster parodied the famous picture “The last supper” in the spirit of the book “The Da Vinci Code”. After displacement of the advertisement *L’Association Croyances et Libertés* applied to the court claiming prohibition of the billboard on the ground that the parody was offensive for religious feelings. The Court of the first instance and the *Cour d’appel* of Paris found that the advertisement was offensive and violated religious feelings since the statute on the freedom of the press penalises insult towards group religious feelings.<sup>118</sup>

However, the decision was reconsidered by the *Cour de cassation* which found that the parody in the given form was neither able to insult religious feelings of the Catholics nor constituted an attack on the group or individual religious feelings for reasons connected with

<sup>115</sup> Nicolas Sarkozy, *La République, les religions, l’espérance*, Paris: Éditions du Cerf, coll. «Pocket» (2004) p.209.

<sup>116</sup> Esther Janssen, *Limits to expression on religion in France*, Agama & Religiusitas di Eropa, Journal of European Studies, Volume V – nr. 1 (2009) p. 22-45.

<sup>117</sup> Loi du 29 juillet 1881 sur la liberté de la presse, available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722&dateTexte=20080312>, [accessed 27 February 2013].

<sup>118</sup> *L’affaire de l’affiche Girbaud: un symptôme de l’air du temps*, available at: <http://plunkett.hautetfort.com/archive/2006/11/17/l-affaire-de-l-affiche-girbaud-un-symptome-de-l-air-du-temps.html>, [accessed 27 February 2013].

their religious beliefs. The *Cour d'appel* violated the norms of the statute on press freedom and article 10 of the European Convention on Fundamental Rights.<sup>119</sup>

The decision of the *Cour de cassation* is reasonable and corresponded to French values. Nevertheless, it raised debates in the society towards the necessity and introduction *de facto* of the offence of blasphemy in the French legal system.

The next example is the case of *Charlie Hebdo*. In 2005 when a Danish newspaper published caricatures of the Prophet Muhammad, it faced an avalanche of criticism and protests. Many newspapers and magazines from all over the world re-published these cartoons as a symbol of free journalism and support for the Danish newspaper. The French magazine *Charlie Hebdo* also reproduced these drawings. *La Mosquée de Paris* initiated court proceedings against the magazine. The *Cour de cassation* found no violation of rights of the applicants in the case. The *Cour* applied an argumentation similar to the approach of the United States Supreme Court.<sup>120</sup> It held that the cartoons contributed to the political debate, the aim of the drawings was not to insult a particular religious group but to raise a problem which has great social significance. Moreover, the *Cour* held that even if the pictures were not tolerant towards particular Islamic fundamentalist groups the speech is still protected.<sup>121</sup>

Thus, generally speaking, the French courts are much more aimed at the protection of freedom of expression and maintenance of the doctrine of *laïcité*. However the French legislation which potentially is able to breach religious rights is usually in conformity with the national constitutional order and the state's margin of appreciation under the ECHR.

<sup>119</sup> Cass. civ. 1ère 14/11/2006, pourvoi n° 05-15822.

<sup>120</sup> See, for example, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

<sup>121</sup> Cour d'appel de Paris 12 March 2008, *Légipresse* n° 252 - June 2008.

## 2. Secularism and expression in Russia

Secular tradition in the Russian Federation is not as long as in France. Russia became a secular state with the adoption of the first Russian Constitution in 1918<sup>122</sup> after the October revolution (almost the same time as Turkey started its transformation). However, secularism in Russia during soviet times took different forms than it had in France. The USSR was a God-fighting state, where temples were being destroyed, priests were being killed. From this perspective the religious renaissance which occurs now in Russian society is astonishing.<sup>123</sup>

The Russian Constitution establishes that the “Russian Federation is a secular state. No religion may be established as a state or obligatory one” and, a provision which is very important but *de facto* is constantly violated: “religious associations shall be separated from the State and shall be equal before the law”.<sup>124</sup> In 1997 the federal statute on “Freedom of Conscience and Religious Associations”<sup>125</sup> was adopted by the state Duma. The statute was much criticised and is still criticised.<sup>126</sup> Firstly, the preamble of the statute proclaims special ties and a special role of the Christian Orthodox Church in the Russian Federation.<sup>127</sup> This provision is a clear deviation from the Constitutional provision about separation and equality

<sup>122</sup> Constitution (Fundamental Law) of the RSFSR Adopted by the Fifth All-Russia Congress of Soviets 10 July 1918, art. 13, English version is available at: <http://www.departments.bucknell.edu/russian/const/18cons01.html#chap05>, [accessed 27 February 2013].

<sup>123</sup> See: Irina Budkina, *Religious Freedom since 1905 – any progress in Russia?*, Religion in eastern Europe, XXVI, 2 (May 2006) page 24; Vladimir Feodorov, *Religious Freedom in Russia Today*, The Ecumenical Review, p.449-460; Dr. Nicolas K. Gvozdev, *Religious freedoms – Russian constitutional principles: Historical and Today*, Brigham Young University Review (2001) pp. 511-536. Tatyana Titova, *Precarious Future for half-finished Taganrog Mosque*, Keston News Sev. (Dec. 8 2000). On the relations between the Orthodox Church and human rights see: John A. McGuckin, *the Issue of Human Rights in Byzantium* in John Witte, Jr. and Frank S. Alexander, *Christianity and Human Rights*, edited by, Cambridge University press (2010) p. 173-189

<sup>124</sup> The Constitution of the Russian Federation, art. 14. Available at: <http://www.ksrf.ru/en/Info/LegalBases/ConstitutionRF/Pages/Chapter3.aspx>, [accessed 28 February 2013].

<sup>125</sup> Federal’nyi zakon ot 26.09.1997 N 125 – FZ “O Svobode Sovesti I o Religioznyh Ob’edineniyah” 29.09.1997, “Sobranie Zakonodatel’sstva RF”, N 39, st. 4465. [Federal law from 26.09.1997 No. 125 “On the freedom of conscience and religious associations”, “Sobranie Zakonodatel’sstva RF”, 29.09.1997 N 39, st.4465].

<sup>126</sup> e.g. Irina Budkina *op.cit.*

<sup>127</sup> Federal law “On the freedom of conscience and religious associations”, the preamble.



of all religious organisations from the state. At the same time the law established very strict conditions for the registration of a new religious organisation.<sup>128</sup> However, these restrictions are within the margin of appreciation of the state.<sup>129</sup>

The current situation in the Russian Federation concerning the relationships between the state and the Orthodox Church is strongly criticised.<sup>130</sup> Moreover, discriminative practice of the Russian authorities towards different confessions was considered by the ECtHR.<sup>131</sup>

The situation with freedom of expression during Russian history was probably even sadder than the situation with the relationships between the state and religion. After a short period of relative freedom of speech, freedom of the press in the period of 1917 – beginning of the twenties in the XXth century was replaced by totalitarian control over the press and freedom of expression. The situation started to change with the policy of *glasnost*’ announced by Gorbachev.

The Russian Constitution states that “Everyone shall be guaranteed the freedom of ideas and speech”.<sup>132</sup> The main sources of regulation of the issue are the federal statutes on the media<sup>133</sup>, on information, technologies and protection of information.<sup>134</sup> The legal regulation in this field is in conformity with international standards. Nevertheless, interpretation of these normative provisions by courts and authorities is very controversial.

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<sup>128</sup> *Id.*, art. 11.

<sup>129</sup> Johan D. van der Vyver, *Freedom of Religion and other Human rights* in Tore Lindholm *et al*, *Facilitating Freedom of religion and Belief: a Desktop*, Martinus Nijhoff Publishers (2004) pp. 104-105.

<sup>130</sup> See: “Na glazah u rossiyan gosudarstvo I Cerkov’ Sblijautsya” [The Russians see how The state and the Church are getting closer] Inopressa, 1 November 2012, available at: <http://inopressa.ru/article/01Nov2012/nytimes/orthodox.html>, [accessed 28 February 2013].

<sup>131</sup> *e.g. Case of Jehovah’s Witnesses of Moscow v. Russia*, Application No. 302/02, Council of Europe: European Court of Human Rights, 22 November 2010.

<sup>132</sup> The Constitution of the Russian Federation, art. 29.

<sup>133</sup> Federal Law No.191-FZ from 1 December 1995 on the State Support of the Mass Media and Book-Publishing in the Russian Federation, English version available at: [http://www.democracy.ru/english/library/laws/eng\\_1991-1/index.html](http://www.democracy.ru/english/library/laws/eng_1991-1/index.html), [accessed 28 February 2013].

<sup>134</sup> Federal Law No. 24-FZ from 1 February 1995, “On Information, Informatisation, and the Protection of Information”, English version available at: [http://www.fas.org/irp/world/russia/docs/law\\_info.htm](http://www.fas.org/irp/world/russia/docs/law_info.htm), [accessed 28 February 2013].

It is worth admitting that in recent years the situation with regulation, proposed amendments and court practice dealing with constitutional rights and freedoms became an issue of big public concern.<sup>135</sup> The Criminal Code of the Russian Federation (the only source of criminal law in Russia) does not contain the crime of blasphemy. Nevertheless, there are some *corpus delicti* which make it possible to find a person *de facto* liable for the crime of blasphemy.<sup>136</sup>

Of course the most striking example in the last two years is the case of the punk-band Pussy Riot. The Pussy Riot is a well-known counter-culture group which acted within the last years in Russia. The band consists of women, supporters of the feminist movement. Their political views are characterised as socialists. The punk-band made a number of political actions and performances in different Russian cities, including Moscow, the performances were held in significant places of those cities (for example, Red Square in Moscow).<sup>137</sup> On the 21<sup>st</sup> of February 2012 the punk-band made a performance in the main Cathedral of the Russian Orthodox Church, the Cathedral of Christ the Savior. The girls were wearing masks covering their faces (*balaclavas*); they had special equipment and musical instruments. The performance lasted about one minute. The aim of the action was a political protest against the third term of Putin who was the main candidate at the Presidential elections and the close relationship of the Orthodox Church and the Russian Government, which according to the band's view violated the Constitution. At the time of the action there was no religious service. Immediately after the action the participants of the Pussy Riot were arrested.<sup>138</sup> The women

<sup>135</sup> See: "Punk-moleben god spustya: jaloba v ESPCH I pros'ba o miloserdii" [Punk-preying one year later: application to the ECtHR and ask for mercy], available at: <http://top.rbc.ru/politics/21/02/2013/846146.shtml>, [accessed 28 February 2013].

<sup>136</sup> See: Criminal code of the Russian Federation, art 213 (b).

<sup>137</sup> The history of the Punk band is available at: <http://freepussyriot.org/about>, [accessed 28 February 2013].

<sup>138</sup> Human Rights' Foundation, Russia's Violation of the Right to Freedom of Expression: The Case of the Punk Rock Band Pussy Riot Legal Report New York August 16, 2012 (updated August 17, 2012), available

were accused under art. 213 (b) of the Russian Criminal Code, prohibiting hooliganism motivated by religious hatred.<sup>139</sup> On 17 August of 2012 the three participants of the band were sentenced to two years imprisonment. Later the appeal of the band's members was dismissed.<sup>140</sup>

The process illustrates the approach of the Russian judiciary towards balancing the fundamental rights. In the case, the Courts found that the action was motivated by religious intolerance, which offended religious feelings of the Orthodox believers. The Court analysed only the objective element of the *corpus delicti*, whereas the subjective element was totally ignored. The Court failed to establish the aim of the performance. As NGOs<sup>141</sup> correctly observed, the act of expression was politically motivated. It was totally within the scope of protection under article 10 of the ECtHR and art. 19 of the ICCPR. The issue raised by the performance had a great social value and contributed to a political debate. Moreover, the punishment for the girls was disproportionate as it overstepped the frames of the international consensus concerning such actions.

The case of Pussy Riot illustrates the application of the balancing test by the Russian judiciary. It is clear that the European Court of Human Rights will find violations in the case.

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at: <http://humanrightsfoundation.org/reports/Pussy-Riot-Case-Report-08-16-2012.pdf>, [accessed 28 February 2013].

<sup>139</sup> Summary of the process in English: Forum 18, Russia: Pussy Riot, blasphemy, and freedom of religion or belief, 15 October 2012, available at: <http://www.unhcr.org/refworld/docid/5087d9b42.html> [accessed 28 February 2013].

<sup>140</sup> *Id.*

<sup>141</sup> See: Forum 18, Russia: *Pussy Riot, blasphemy, and freedom of religion or belief*; Statement of the "Article 19" from 21 August of 2012, *Russia: Prison sentences for Pussy Riot violate freedom of expression*, available at: <http://www.article19.org/resources.php/resource/3418/en/russia:-prison-sentences-for-pussy-riot-violate-freedom-of-expression> [accessed 28 February 2013].

### 3. Secular state and freedom of expression in Turkey

As a secular state Turkey was established in 1923. It was the first Muslim country which did so. Whereas in different periods the meaning of the Turkish secularism varied, one can find two key aspects which were stable over 90 years. Firstly, it is a strong and centralised secular state. And, secondly, the guarantee of secularism is provided by the army.<sup>142</sup> The secular state (or the principle of *laiklik*) in Turkey means “a certain disposition of civil authority to religion in which the state itself actively embraced and fostered a nonreligious worldview in the public realms”.<sup>143</sup> Thus the principle of *laiklik* in Turkey is different from *laïcité* in France. While in the latter the state is neutral, with some exceptions described above, and does not interfere in religious matters, in Turkey the state takes a position of “active secular state”.

Commentators observe that starting from the last decade of the XXth century Turkey moved to “fundamentalist secularism”.<sup>144</sup> It led to prohibition of wearing of the religious symbols in Universities, limitations which touched upon schools providing religious education.<sup>145</sup> As a result the European Court of Human Rights faced a huge amount of cases from Turkey concerning limitation of religious expression.<sup>146</sup>

To illustrate the attitude of Turkey towards manifestation of religions I will address the parliamentary crisis of 2007. The elections which were held in the country in 2004 and 2007 showed a great support of the Justice and Development Party which shares conservative and

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<sup>142</sup> JamesW. Warhola and Egemen B. Bezci, *Religion and State in Contemporary Turkey: Recent Developments in Laiklik*, Journal of Church and State vol. 52 no. 3, pages 427–453; doi:10.1093/jcs/csqs052 Advance Access publication (20 July 2010); Jeffrey Haynes, *Politics, identity and religious nationalism in Turkey: from Atatürk to the AKP*, Australian Journal of International Affairs Vol. 64, No. 3, pp. 312 - 327 (June 2010).

<sup>143</sup> JamesW. Warhola and Egemen B. Bezci, *op.cit.* p. 428.

<sup>144</sup> Metin Toprak & Nasuh Uslu, *The Headscarf Controversy in Turkey*, Journal of Economic and Social Research 11(1) (2009) 43-67, p. 47.

<sup>145</sup> *Id.*

<sup>146</sup> Those cases are considered in the 3<sup>rd</sup> chapter.

pro-Islamists ideology. One of the reasons for such popularity was the intervention by the Turkish military forces in the process of the Presidential elections in 2007. The military attempted to prevent the election to the post of the President the candidate whose wife was wearing a headscarf. The effect of the intervention was the opposite and resulted in the growth of support to the Justice and Development Party. The candidate (Abdullah Gül) was elected as the President, the bill permitting wearing of a headscarf at universities was introduced in parliament. However, it was not the end of the conflict. Year later the Constitutional court “annulled the law on the ground that it violated the principle of secularism in the constitution”.<sup>147</sup> Thus in Turkish society the issue of religious expression is of great importance and public concern.

The Constitution of Turkey is precise when it concerns regulation of fundamental rights and limitations to them. In the light of the secular nature of the Turkish state,<sup>148</sup> the Constitution establishes that freedom of expression can be limited “for the purposes of protecting national security, public order and public safety, the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation, preventing crime...”.<sup>149</sup> Religious speech, however, is subjected to more limitations. The Criminal Code prohibits religious leaders from denigrating Turkish government or the state itself.<sup>150</sup> Under the current Turkish criminal code there is no such a crime as blasphemy as it is understood under traditional Islamic doctrine.<sup>151</sup>

<sup>147</sup> Metin Toprak & Nasuh Uslu *op.cit.* 48.

<sup>148</sup> Article 14 of the Constitution gives the state a power to restrict fundamental rights when they are exercised in a manner contrary to the secular nature of the state.

<sup>149</sup> Constitution of Turkey, art. 25.

<sup>150</sup> Amos N. Guiora, *Freedom from Religion. Rights and National Security*, Oxford: Oxford University Press (2009) pp. 49-53. International Religious Freedom Report 2008, available at: <http://www.state.gov/j/drl/rls/irf/2008/108476.htm>, [accessed 1 March 2013].

<sup>151</sup> For detailed analysis of the crime of blasphemy under Islam see: Kamran Hashemi, *Religious Legal Traditions, International Human Rights Law and Muslim States*, Leiden: Martinus Hijhoff Publishers (2008) pp. 85-92.

## **Chapter III. Analysis of the European Court of Human Rights case law against Turkey, France and the Russian Federation**

In this Chapter I will study the national practices towards balancing freedom of expression and freedom of religion (the main to be discussed is that of the freedom to manifest religious beliefs) in the case law of the European Court of Human Rights against the Russian federation, France, Turkey.

### **1. Defamation of religion**

Defamation cases are not rare in the practice of the ECtHR. This practice includes also defamation against religion cases. These cases generally are the most controversial and usually approaches taken by the Court is criticised either by the liberals or by religious believers. The best illustration of the recent developments is *Giniewski* against France.

Mr. Gineiewski is a journalist, writer and historian. On 4 January 1994, in the newspaper *Le quotidien de Paris* he published an article “entitled “The obscurity of Error” analysing from the critical perspective the papal encyclical “The Splendour of Truth”.<sup>152</sup> After the publication the association “General Alliance against Racism and for Respect for the French and Christian Identity” brought a civil proceeding in the French courts claiming that the article in question was defamatory towards the Catholic Church and the Christian Community as such.<sup>153</sup> The applicant lost in all domestic instances.

The journalist appealed to the ECtHR, claiming that his right to freedom of expression was violated by the French authorities on the following grounds. Firstly, he disagreed with the

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<sup>152</sup> Case of *Gineiewski v France*, para. 13.

<sup>153</sup> *Id.* Para. 14.

interpretation which the domestic court gave to his article. Secondly, he argued that since his article was discussing a sensitive religious matter, the strictest way of protection had to be given to his speech. The main argument of the applicant was that in the domestic proceedings the courts judged not the form of the article, but the idea, and that was impermissible (the applicant cited the ECtHR practice in *Wingrove* and *Otto-Preminger*).<sup>154</sup>

In its judgement the European Court upheld the arguments of the applicant. The Court stressed that whereas the aim of the Government was legitimate, i.e. to protect the interests of the religious community, the interference in the applicant's right to freedom of expression was disproportionate. The interpretation of the article by the domestic courts was incorrect since its arguments cannot be extrapolated towards all the Christian Community, the article develops specific doctrine considering a link between the Holocaust and "contributed to a discussion of the various possible reasons behind the extermination of the Jews in Europe, a question of indisputable public interest in a democratic society". Further the Court notes that the doctrine, criticised by the article was designed "by the Catholic Church, and a religious matter, an analysis of the article in question shows that it does not contain attacks on religious beliefs as such, but a view which the applicant wishes to express as a journalist and historian". Thus the state exceeded its margin of appreciation.<sup>155</sup>

*Gineiewski* shows a positive interpretation by the ECtHR of journalists' freedom and the value of freedom of expression. However, the most significant part of the Court's reasoning is the distinction which it made between defamation of a religious community and defamation of a religion as an institution. It is clear that religions *per se* should not be subjected to the protection within the ECHR system. From this perspective the decision of the Strasbourg court is reasonable and it can serve as a model for future similar cases.

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<sup>154</sup> *Id.* Paras. 27-28.

<sup>155</sup> *Id.* Paras. 48-55.

## 2. Religious speech: the nature and applicable limitations in the practice of the ECtHR

In this section I will consider a controversial issue towards the nature of religious speech. Under religious speech generally is understood “that [speech] which is verbally spoken or written, and defines conduct as that which falls under the category of “exercise” of religion”.<sup>156</sup> I would add to this definition another feature – religious speech can also be expressed in a non-verbal form. The non – verbal form is much more complicated, and this form of religious expression very often is the basis for collision between interests of individuals and governments. From the one hand this speech has all the characteristics of usual speech contributing to a public discussion or a matter of general public concern, thus the speech should be guaranteed at the necessary level. But from the other hand, since the speech has religious grounds and, from this point of view, constitutes a manifestation of religious beliefs, it should be granted with all mechanisms protecting freedom to manifest. Thus in the current situation we see an overlap between two fundamental rights: freedom of expression and freedom of religion.<sup>157</sup> This problem was discussed in much detail in the first chapter.

The best example of the abovementioned problem is the ECtHR practice concerning the veil bans and prohibition of extreme religious dress. The veil was a symbol of resistance to colonial authorities,<sup>158</sup> nowadays it is a symbol of political expression of the second generation of immigrants from the Muslim countries to Europe. In this section I will discuss cases against Turkey (*Leyla Sahin v Turkey*)<sup>159</sup> and France.

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<sup>156</sup> Amos N. Guiora *op.cit.*, p. 31.

<sup>157</sup> I would like to thank Prof. Sejal Parmar for useful remarks in this part.

<sup>158</sup> Dominic McGoldrick, *Extreme religious dress: Perspectives on Veiling Controversies* in *Extreme Speech and Democracy*, edited by Ivan Hare and James Weinstein, Oxford: Oxford University Press (2010) p.401.

<sup>159</sup> *Leyla Sahin v Turkey*, Application No 44774/78, Council of Europe: European Court of Human Rights, 10 November 2005.



In France the National assembly adopted a bill prohibiting wearing a veil which covers the whole face of a woman. Later the statute was considered by the Conseil Constitutionnel which found the statute partly unconstitutional: women should be permitted to wear the garment in places of worship because in the opposite it can violate their freedom of religion.<sup>160</sup>

The First case against Turkey which concerned the veil ban was the famous *Karaduman v. Turkey*.<sup>161</sup> In the case the Commission found no violation since article 9 of the Convention “does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief”.<sup>162</sup> Later this approach was confirmed by *Sahin*.

Leyla Sahin was a medical student at the Faculty of Medicine in Istanbul. In 1998 the University’s authorities issued a decree based on the secular provisions of the Constitution, which prohibited wearing of the Islamic headscarf. The applicant was denied access to lectures because due to religious reasons she was wearing such a headscarf. Her applications to the authorities were unsuccessful.<sup>163</sup> The case was considered by the Grand Chamber of the European court which found no violation of the Applicant’s right to manifest her religious beliefs. The court based its assessments on the following grounds. While the interference in the right to manifest religion took place, it was legitimate because it was based on the constitutional provisions protecting secular nature of the state and it was aimed at protecting public order and rights and interests of others.<sup>164</sup> The Court also stressed that there was no discrimination because “various forms of religious attire” were also forbidden in the University.<sup>165</sup>

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<sup>160</sup> Article 19, Legal Comment. Bans on the Full Face Veil and Human Rights: A Freedom of Expression Perspective (December 2010) para. 11.

<sup>161</sup> *Karaduman v. Turkey*, Application. No. 16278/90, Council of Europe: European Court of Human Rights, (1993).

<sup>162</sup> *Id.* Para. 108.

<sup>163</sup> *Leyla Sahin v Turkey*.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* Para. 118.

In terms of the current thesis the case is significant from two points. Firstly, the Court applied the balancing test towards individual religious freedoms and rights and interests of others and found that the latter should enjoy protection. But Turkey failed to prove which collective rights it was protecting. Secondly, as was reasonably noted in the report of Article 19: “[the Court] simply declined to scrutinise the facts for infringement of freedom of expression under Article 10”.<sup>166</sup> Once the Court considers the behaviour of the Applicant from the point of view of her political expression, the outcome of the case would be different. The Court had to apply the highest standard of protection which would impose on the Government a burden of proving compelling reasons of the ban in case. And it is doubtful that such facts took place.<sup>167</sup> And, moreover when mentioning the effect which wearing of the headscarf would have on society, the ECtHR stayed silent in terms of the effect which this ban would have towards those who wear it.<sup>168</sup>

Two French cases which I will discuss next use the same approach as *Sahin* case. The Court also applied the balancing test and granted the state wide margin of appreciation. The Cases of *Kervanchi*<sup>169</sup> and *Dogru*<sup>170</sup> have similar facts and were decided by the Court in the same way. Both applicants are Muslims. They were students at a state secondary school in Flers. On several occasions while attending classes of physical education the girls refused to take off their headscarfs. They were removed from the classes and after consideration of their cases by the disciplinary committee they were excluded from the education for “breaching the

<sup>166</sup> Article 19, Legal Comment. Bans on the Full Face Veil and Human Rights, para. 41.

<sup>167</sup> Also disproportionality of the state’s actions was highlighted in the dissenting opinion of the judge Tulkens.

<sup>168</sup> Javier Martínez-Torrón, *The (Un)protection of Individual Religious Identity in the Strasbourg Case Law*, Oxford Journal of Law and Religion, available at: <http://ojlr.oxfordjournals.org/content/early/2012/01/12/ojlr.rwr021.full>, [accessed 23 February 2013].

<sup>169</sup> *Affaire Kirvanchi c. France*, Requête no 31645/04, 4 Mars 2009.

<sup>170</sup> Case of *Dogru v. France*, Application no. 27058/05, 4 March 2009.

duty of assiduity by failing to participate actively in physical education and sports classes”. The parents of the applicants appealed.<sup>171</sup>

The Government put its submissions basing on the *Sahin* ruling of the ECtHR. They claimed that the limitation in question was in accordance with the law, it followed the legitimate aim of protecting the rights and interests of others, and the measure was necessary in a democratic society since it was “based on the constitutional principles of secularism and gender equality”.<sup>172</sup>

The Strasbourg Court decided in favour of the Government. Firstly, the requirements of removing headscarfs were motivated by the reasons “health, safety and assiduity which were applicable to all pupils without distinction”.<sup>173</sup> Then the Court, more generally, observed the notion of secularism which was the cornerstone of the French state, the same as the Turkish state. Then, the Court noted that the authorities correctly applied the balancing test towards the applicants while the girls breached school rules of obedience seven times before they were dismissed.<sup>174</sup>

Since the argumentation and position of the court in the French cases was in the line with *Sahin*,<sup>175</sup> there are several comparative remarks which are significant for the topic. Firstly, the notions of expression / manifestation in *Sahin* and in *Kervanchi* and *Dorgu* were different. While in the Turkish case, the applicant had a clear and well defined intention to express not only her religious beliefs but also her social position, in the French cases the acts of the girls hardly constitute an expression which has social meaning. An interesting problem appears here: whether the refusal to remove headscarfs was an expression of the parents’

<sup>171</sup> *Dogru case*, paras. 5-16; *Kirvanchi case*, paras. 5-16.

<sup>172</sup> *Dogru*, paras. 34-37.

<sup>173</sup> *Id.* Para. 69.

<sup>174</sup> *Id.* Paras. 68-77.

<sup>175</sup> See also cases against France: *Aktas v. France*, Application No. 43563/08, Council of Europe: European Court of Human Rights, 25 May 2010; *Bayrak v. France*, Application No. 14308/08, Council of Europe: European Court of Human Rights 30 June 2009; *Gamaleddyn v. France*, Application No. 18527/08, Council of Europe: European Court of Human Rights, 30 June 2009.

position. From this point of view this manifestation has the same value as in the case of *Sahin*. Secondly, the following passage of the Court is notable: “[w]ith regard to the applicant's proposal to replace the headscarf by a hat... the question whether the pupil expressed a willingness to compromise, as she maintains, or whether – on the contrary – she overstepped the limits of the right to express and manifest her religious beliefs... falls squarely within the margin of appreciation of the State”.<sup>176</sup> The reference of the Court to the “willingness to compromise” seems to be extremely vague. The conclusion from this passage is that once a pupil who manifests his/her beliefs can compromise, it means that these beliefs are not so deep and the government may interfere and such an interference would be legitimate.

The last case which I want to discuss in this section is an example of limitation towards religious expression which was even broader than in the veil cases. In *Kalac v Turkey* an officer was fired from military service on the ground that his behaviour inspired by religion violated the secular nature of the Turkish state.<sup>177</sup> The Court overruled the Commission's decision. The ECtHR found that “[a]rticle 9 does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account.”<sup>178</sup> The Strasbourg Court wrote that the Applicant was able to practice his religion and the limitations which were imposed by the military authorities were proportionate and corresponded to the goals of military service.<sup>179</sup> Hence the Court again confirmed that religious expression can be subjected to limitations and the list of these limitations is wide enough and it leaves to the states a very broad margin of appreciation.

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<sup>176</sup> *Dogru*. Para. 75.

<sup>177</sup> *Kalac v Turkey*, Application No. 20704/92, Council of Europe: European Court of Human Rights, 1 July 1997.

<sup>178</sup> *Id.* Para. 26

<sup>179</sup> *Id.* Paras. 26-29.

### 3. Religious speech and national security

The European convention does not contain such a limitation as national security as a ground for restrictions of the freedom of religion or the freedom to manifest religion.<sup>180</sup> Thus, the application of this ground would be illegal. This was found by the ECtHR in its case *Nolan and K. v. Russia*.<sup>181</sup> The applicant was a US citizen who entered the Unification church and came to the Russian Federation as a missionary in 1994. In 2002 after travelling to Cyprus the Applicant was refused entry to the territory of Russia. The decision of the Authorities was motivated by reasons of national security since in the Concept of the National Security there was a provision which stated that “the national security of the Russian Federation includes also the protection of its spiritual and moral heritage”.<sup>182</sup> Mr. Nolan applied to the ECtHR claiming inter alia that his right to express his religious beliefs was violated by the Russian authorities.

The Court found that the Government failed to provide sufficient grounds according to which the activities of the applicant constituted a risk to national security.<sup>183</sup> Next the Court reiterated that applicable limitations “must be narrowly interpreted” and “their enumeration is strictly exhaustive”.<sup>184</sup> And article 9 does not contain such a ground for limitation as national security. This formulation stresses the importance of religious pluralism and impermissibility of the dictate by the state. Hence there was a violation of the Applicant’s right to manifest his religion.<sup>185</sup>

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<sup>180</sup> The ECHR, arts. 9.

<sup>181</sup> *Nolan and K. v. Russia*, Application No. 2512/04, Council of Europe: European Court of Human Rights, 12 February 2009.

<sup>182</sup> Cole Durham, Jr., Brett G. Schraffs *op.cit.* p. 238.

<sup>183</sup> *Nolan and K. v. Russia*, paras. 69-72.

<sup>184</sup> *Id.* Para. 73.

<sup>185</sup> *Id.*

The case is significant in the context of Russia, where national security often serves as a ground for justification of human rights limitations or even their violation. The position of the European Court based on international norms is another guarantee for individuals.

#### **4. Protection of public order and rights and interests of the others**

From the time of *Wingrove* and *Otto-Preminger* more than 15 years have passed, but the Strasbourg Court is still in the line of those cases. However, positive changes are present. For example in the case *I.A. v. Turkey*<sup>186</sup> which did not overrule previous practice of the Court, but shown the discussion among the ECtHR judges: dissenters claimed that now it is a time to overrule *Wingrove*.<sup>187</sup>

The first case which I will discuss here is *Refah Partisi (Welfare Party) v. Turkey*, the case where the Court did not find a violation, but where the analysis of the facts of the case was significant because the Court shown a proper analysis of the Turkish context. Moreover, the case is significant because here the Court was trying to protect people from the religious expression – this is an important difference with *Wingrove* and *Otto-Preminger*.

Refah (Welfare party) was a prominent Turkish party which took part in several national elections. In 1996 the Welfare Party became the biggest party in parliament and formed a leading coalition. In 1997 the Principal State Council at the Court of Cassation applied to the Constitutional Court of Turkey claiming prohibition of the Party on the ground that it violates the principle of secularism. After the decision of the Constitutional Court the

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<sup>186</sup> *I.A. v. Turkey*, Application No. 42571/98, Council of Europe: European Court of Human Rights, 13 December 2005.

<sup>187</sup> *Id.*

party was dissolved and its leaders were prohibited from holding office in any different political party.<sup>188</sup>

The European Court agreed with the Constitutional Court that there was a legitimate aim in the actions of the Government: protection of national security, and the rights and freedoms of others. It was particularly necessary from the point of view of secularism in Turkey.<sup>189</sup> The decision is significant for the current paper because of the analysis made by the Court with regard to democracy and manifestation of religion under the conventional system. The ECtHR reiterated that in a democratic society it could be “necessary to place [certain] restrictions in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected”.<sup>190</sup> Further the Court said that while the Convention protects various forms of religious manifestation, “it does not protect every act motivated or influenced by a religion or belief”.<sup>191</sup> In *Refah* the idea of introducing the sharia in the country became the main argument which justified the dissolution. The Court cited the Commission:

Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention.<sup>192</sup>

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<sup>188</sup> *Refah Partisi (Welfare Party) v. Turkey* and others, Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, Council of Europe: European Court of Human Rights, 13 February 2003.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* Para. 91.

<sup>191</sup> *Id.* Para. 92

<sup>192</sup> *Id.* Para, 123.

And Further the Court observed that such a manifestation constitutes a clear and present danger to society based on democratic principles.<sup>193</sup> Thus, commentators say that the Court limited freedom to express and manifest religious beliefs which “do not respect the rule of law, human right or democracy”.<sup>194</sup>

The issue of religious hate speech was considered by the Court in *Gündüz v. Turkey*.<sup>195</sup> The Applicant was the leader of the community which called itself an Islamic sect. In this capacity he took part in a TV program which was broadcasted on one of the channels. During the show the applicant expressed certain ideas that later were found to violate the Turkish Criminal code which prohibited incitement of “the people to hatred and hostility on the basis of a distinction founded on religion”.<sup>196</sup>

The Court decided, the case was not in a line with its previous jurisprudence and found a violation of the applicants’ freedom of expression.<sup>197</sup> Firstly, I would like to pay attention to the interpretation given by the Court to its position in *Otto-Preminger-Institut* and *Wingrove*. The ECtHR wrote that among duties and responsibilities which art. 10 of the Convention implies, “there is an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs”.<sup>198</sup> The words about public debates, as I have already stressed, were ignored in the decisions which the Court cited. But here the Court went back to this notion and based its argumentation primarily on the necessity of public debates. The Strasburg Court observed that the speech had public concern, since society was interested in the sect in question; the format

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<sup>193</sup> *Id.* Paras. 124-125.

<sup>194</sup> Jacobs, White and Ovey, *The European Convention on Human Rights*, Oxford: Oxford University press (2010) p.407.

<sup>195</sup> *Gündüz v. Turkey*, Application No. 35071/97, Council of Europe: European Court of Human Rights 14 June 2006.

<sup>196</sup> *Id.* Para. 13.

<sup>197</sup> That was criticised, for example, in the dissenting opinion of judge Turmen.

<sup>198</sup> *Gündüz v. Turkey*, para. 37.



of the program was designed to include debates on important issues. Moreover, the ECtHR compared the situation in the case of the Applicant with *Refah Partisi* and found that in the current case the applicant's words did not have any present danger<sup>199</sup> and "cannot be construed as a call to violence or as hate speech based on religious intolerance".<sup>200</sup> Thus the criminal sanction imposed on the applicant was disproportionate.

The next case I would like to discuss is *Jehovah Witnesses v. Russia*.<sup>201</sup> The Association of Jehovah Witnesses has a long history in Russia, however officially registered for the first time only in 1992. Later, beginning from 1995 the Organisation started facing difficulties with re-registration in Moscow. The decision of the authorities was based on the grounds that proselytism of the members of the Association violates the rights and interests of others: "[it] was necessary to prevent it from breaching the rights of others, inflicting harm on its members, damaging their health and impinging on the well-being of children."<sup>202</sup>

In 2010 the European Court found that the rights of the applicant community were violated by the authorities' actions and ordered compensation. Whereas the Court reiterated that in principle the limitation of the freedom to manifest religion on the ground of protection of the rights of others is permissible, in the current case these limitations were disproportionate. The Court was not convinced by the arguments of the Government that members of the Community interfere in the family affairs of its members, that they violate constitutional rights to privacy and free choice of occupation.<sup>203</sup> Next the Court paid attention to the proselytism argument. It was found that the finding of the Russian court that the methods of the Community were violent was found a "conjecture".<sup>204</sup>

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<sup>199</sup> *Gündüz v. Turkey*. Para. 51.

<sup>200</sup> *Id.* Para. 48.

<sup>201</sup> *Jehovah Witnesses v. Russia*, Application No. 302/02, Council of Europe: European Court of Human Rights, 21 November 2010.

<sup>202</sup> *Id.* Para. 206.

<sup>203</sup> *Id.* Paras. 109-127.

<sup>204</sup> *Id.* Para. 130.

In every jurisdiction such a notion as protection of the rights and interests of others is very sensitive. Thus the Court has to be very careful when considering these cases. The best solution which is illustrated by two the cases described above is to take into account the factual situation in a state. Here the role of the balancing test is very important.

## Conclusion

The paper considered the problem of mutual relationships and possible limitations between freedom of expression and freedom of religion. While under international law limitations towards freedom of religion *per se* are impermissible, international instruments allow restrictions of the right to manifest religious beliefs. The right to manifest religious beliefs is a right which lies on the border between freedom of religion and freedom of expression, that is why it raises legal problems concerning the treatment of this right. In this paper I offered to consider the right to manifest as a part of freedom of expression with all the standards applicable to protection of freedom of expression. The application of the same standards will protect rights of religious groups which express their position, for example, through wearing religious garments.

In France Turkey and the Russian Federation freedom to manifest religious beliefs faces certain problems and is not always treated properly. There are many domestic cases and cases of the European Court of Human Rights where priority was given to the secular nature of states instead of protection of the freedom of religious expression. This was done due to the very wide margin of appreciation which states possess as concerns treatment of these rights. In international law and in the practice of the Strasbourg Court limitations are permissible on the ground of protection of the rights and interests of others, public order, health and morals, and public safety. At the same time limitations of the religious manifestation are impermissible on the ground of national security.

The second main problem is defamation of religions. In all three countries such a crime as defamation of religions officially does not exist, however there are domestic cases which introduce such an offence de facto. This practice is inspired *inter alia* by the case law of the European Court of Human Rights, which in a number of its cases recognised the right of

states to proscribe certain speech, including artistic speech, which is able to offend religious feelings. The problem is getting more serious with the Renaissance of religions which occurs all over the world. This makes it more difficult to apply the balancing test towards fundamental rights in question. And that is why in the recent case law one can notice the tendency of better protection of freedom of religion.

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