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Protection of European Values at the International Level: The European Court of Human Rights and Freedom of Religion.

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Abstract
Fundamental values and principles such as rule of law, democracy and human rights are at the heart of growing concerns within Europe and its Institutions — from the European Union to the Council of Europe. This Article explores how the European Court of Human Rights protects European fundamental values through its main instrument—the European Convention on Human Rights—, with a special focus on article 9 and religious freedom. Religion is a powerful social force, it is still at the heart of social dynamics and henceforth, through the values it tends to endow individual behavior with, is at the heart of the value frameworks structuring societies. A chronological reading of the Court's judgments in religious cases shows the Court has developed, through the years, a specific reasoning that spins around a set of values said to underly the whole Convention, for being the fundamental values and principles of the European Society as a whole. The Article argues this approach tends to favor the latter values and principles sometimes over religious behaviors. It amounts, therefore, to consecrating a European value order on which the Convention is said to rest, from which it is said to rise, and at the conservation of which its application aims.

Keywords: *ECHR, Values, Pluralism, Christian, Secular, Oligopoly*

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Introduction

Values, society and law may sound as three distinct concepts, quite independent from one another. Society is the abstraction of a mass of individuals, gathered into a limited space, into one concept that encompasses them all. Law is the set of rules that organizes their interactions. And values are intangible principles unifying the interactions, as regulated by law or as emerging from practice, into one global system of 'meaning'. The realm of society may therefore appear to be distinct than that of values—which is closer to philosophy—and that of law. But this appearance is a mere appearance, as the two latter concepts are emanations of one single reality, the first—society. Furthermore, law and values are quite intertwined concepts, interrelated, and can sometimes even merge together and become one with one another. Both values and law are sets of principles to be followed by individuals, or any entity engaged in an interaction, in their interactions with others; values may become legal principles when they be enacted as such by the competent authorities…

It is in this intellectual stream that the European Court of Human Rights (the Court) seems to be comprising both concepts. Throughout its case-law, it has regularly been affirming that some articles of the European Convention on Human Rights (the Convention) are values *per se*, unifying the 'behavior' of its member states around 'behavioral constants' endowed with a legal dimension.

So is, for example, article 3 of the Convention, which 'enshrines one of the most fundamental values of democratic societies' (ECHR 1999, para. 95). and henceforth prohibits torture in absolute terms. So is article 2 also, which '[t]ogether with Article 3 (…) also enshrines one of the basic values of the democratic societies making up the Council of Europe' (ECHR 1995, para. 147). And so seems the Court to consider all articles of the Convention: the latter enshrine the deepest values structuring the democratic societies composing its jurisdiction[1].

[1] For example, in ECHR 2015a, the Court was examining a case where several articles were conflicting with each another. Precisely, the case involved a demonstration, which was protected by article 11 of the Convention, against a religious gathering for worshipping purposes, consequently protected by article 9. Instead of referring to the articles of the Convention as such, the Court rather states that two values of the latter were at stake. In its words: 'as is always the case when a Contracting State seeks to protect two values guaranteed by the Convention which may come into conflict with each other, in the exercise of its European supervisory duties, the Court's task is to verify whether the authorities struck a fair balance between those two values'. *See* ECHR 2015a, para. 95. The *obiter dictum* suggests the Court considers the legal provisions of the Convention to be values as such to be protected by its states parties.

But despite sharing the same substantial nature, articles of the Convention differ widely on other dimensions as they do not have the same impact upon application. Unlike operational articles, such as article 6 which concerns the functioning of the state and its institutions, other articles such as article 9 impact directly the daily life of individuals and the way they behave in society. As a consequence, their impact on the latter, its configuration and its values, is greater than that of the aforementioned operational articles, for they touch upon individual behavior directly. In other words, such articles as article 9 of the Convention do not only draw the limits of state action; they also suggest ways of behaving for individuals. In that, they ultimately participate—or at least contribute—to shaping the social landscape of societies on which they apply, where said individuals evolve.

In other words, the Court's elaborations on the law may entail an impact on social values, and even amount to shaping the social configuration of a society. Contrasting with their appearance of impermeability, values and law and society are closely related concepts, as any action on one of them amounts ultimately to impacting the two others. The Court's—legal—developments provide an abundant example thereof, despite the limits of their scope. This aspect of the Court's impact does not seem to be addressed by legal, sociological or socio-legal scholarship. Despite sparking studies on its effects and impact on the 'grassroots level' (Fokas 2017, 249-267) and some other aspects of society (Fokas and Richardson 2017; Richardson 2015; Richardson 2019; Richardson 2021; Richardson 2011; Richardson 2006), scholarship on its impact on the social configuration of societies appears to be in its incipient beginnings. Research seems to be more concerned with the Court's impact in its micro dimension; research on said impact on the macro level seems still to be lacking. In other words, scholarship still does not reach the concrete impact of the law, as elaborated by the Court, on the features and characteristics of the society(ies) under its jurisdiction: it still focuses mainly on the legal treatment of issues, and their impact on the legal condition of the social categories making its litigants—whether states, communities, minorities, etc. It still focuses on the legal ties and relationships between these actors, leaving aside the bigger picture they materialize.

The European Court of Human Rights, indeed, is a Court of law. As such, when assessing a case, it only examines the arguments brought forth by the litigants (Barnabe 2016; Frost 2009). Then, after balancing the different interests at stake in the case, it rules and gives its judgment accordingly. If the Court remains the master of the legal qualification to be given to the facts of the case[2], the latter operation is the limit it does not exceed. If the

[2] The Court is the only master of their legal qualification. In its proper words: 'the Court is

legal qualification of the facts, *i.e.* the determination of which articles the latter trigger, is the mandate of the Court, the actual content of the litigation is that of the litigants themselves and the arguments, strategies and legal narratives they bring forth. In other words, the field of the litigation is for the Court to determine; the precise issues to examine are for the litigants to elaborate.

The variety of issues it has accordingly faced along the years has brought the Court to build a substantial, complex and nuanced edifice concerning religious freedom. In this contribution, analysis of the Court's jurisprudence will be conducted on judgments issued on the basis of article 9 of the Convention, either individually or in connection with corresponding articles such as article 11 and article 2 of Protocol n° 1. Second, it also dwells on judgments involving other articles than article 9, but only when claims made by litigants in the latter clash or contradict their counterparts' article 9 rights. This situation occurred for example, as it will be discussed in section I, in *Otto Preminger Institut v. Austria*, where the litigant's article 10 rights clashed with believers' article 9 rights in Austria's particular context of the time (ECHR 1994). In such cases where article 9 rights be conflicting with those at the heart of the litigation, the Court's final findings have indeed a direct impact on article 9 rights. Third, the judgments thus analyzed cover the entire period of the Court's religious jurisprudence, with a special focus on the last 10 years in order to be most in line with the evolution of the European social context. In other words, the sample of the study is composed of all judgments issued in this area from early 2011, alongside the basic cases dating back to the previous decades such as *Kokkinakis v. Greece* (ECHR 1993), *Dahlab v. Switzerland* (ECHR 2001), *Refah Partisi (Welfare Party) v. Turkey* (ECHR 2003)…

Eventually, the sample includes only those cases endowed with a 'social' dimension. More precisely, as a set of regulations, religious freedom has several dimensions which include individual behavior in society, treatment of religious minorities and communities, public education and teachings, the exercise of religious rights in specialized institutions—which, by their

master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by the applicant or the Government'. *See*, ECHR 2009, para. 54; ECHR 1990, para. 29; ECHR 1998, para. 44. In other words, it is the Court who determines which are the articles of the Convention that the facts of a case trigger, in which they fall. Illustrating this idea, its quote goes on to say that '[b]y virtue of the *jura novit curia* principle, it has, for example, considered of its own motion complaints under Articles or paragraphs not relied on by the parties and even under a provision in respect of which the Commission had declared the complaint to be inadmissible while declaring it admissible under a different one. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on'. *See* ECHR 2009, para. 54.

very nature, limit individual freedom—such as prisons and hospitals, rules applicable within religious associations endowed with legal personality… As the present contribution focuses on the dialectics in between values and religious freedom within the European human rights jurisdiction, it dwells on how religious freedom is regulated in society. It considers the religious condition of individuals as members of society, thus focusing on the 'social' dimension thereof.

In that, it considers the manifestations that religious freedom leads to, whether stemming from religions or non-religious beliefs[3]. It explores the dynamics of religious Pluralism as developed by the Court, emphasizing religious freedom as lived and exercised by individuals in society—that is, where it receives its largest expression. Specific contexts such as specialized institutions, army or prisons, are therefore out of the scope of this contribution. The latter contexts obey to distinct dynamics which raise, from the viewpoint of religious freedom, issues of a distinct nature. Their proper features entail that religious freedom be adapted to their specific configurations and purposes. Consequently, resulting issues upon religious freedom evolve around their nature as institutions and their proper requirements, rather than Pluralism or religious freedom in society as such. The example of conscientious objection, for instance, illustrates abundantly this idea as it is the origin of an abundant set of judgments within the European realm. This issue concerns less Pluralism in society as such than the obligation to abide by state law, equality of treatment between citizens, sovereign powers of states regarding national defense, and the exercise of religious rights before state sovereign institutions. The issues at the heart of litigations on conscientious objection are, by their very nature, aside the realm of religious Pluralism in society—and even society itself. They impact the latter only indirectly, marginally, and in their specific circumstances.

Henceforth, analyzing the Court's case-law in the matter of religious freedom, in the light of the above, tends to show a three-steps evolution. More precisely, the chronological reading of its judgments, from the foundations of the middle of 1990 decade, tends to show a *pro religio* stance in the beginnings (I) that later became *ad valorem* (II), to finally narrow down to European values only, leaving aside other value-related questionings that fall under the exclusivity of states' domestic jurisdiction (III).

Substantiating this view, the cases cited and put forth in the following sections are the most salient examples among the Court's judgments. For the facts they contain, they have given way to statements that show

[3] The terms 'religion' and 'belief' are, in human rights systems, conceived as synonyms. As regards the European Convention on Human Rights, *see* ECHR 1982, para. 36.

expressis verbis the approach of the Court, and the bases on which the latter relies when ruling upon issues of a value nature. The explicitness of the Court's wordings and the facts making the legal issues of the selected cases draw explicitly, using the Court's own words, the approach followed and the rationale at work in other cases bringing forth similar questionings.

The value approach applied to religious freedom has proven to be acutely penetrating, reaching far beyond state obligations. Indeed, touching concretely upon individual behavior, it impacts directly how individuals behave in society. And, as a consequence, it also participates to shaping the social landscape of the global society composing the jurisdiction of the Court[4]. This approach, though, touches only upon those values the Court considers as the basis of the Convention, the *raison d'être* of its action, the heart of its mandate. These values being, according to the Court, the ones shared by its member-states.

Eventually, 'religion' and 'values' are not grounds on which can be pronounced limitations to any right of the Convention. The limitation clause contained in such articles as article 9, 10 or 11 do not provide for religion as a potential ground for limiting the rights they contain. More precisely, in the case of article 9, the Convention states such limitations can only be enacted for safeguarding 'public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'[5].

The key element with these grounds, nevertheless, is the broadness of their meaning (Chaibi 2017, 28-34). Their application by states calls, by nature, for a further substantiation and concretion. They can only be applied when factually concreted, as facing acts they intend to limit. In other words, they call for a further interpretation in order to be operational when facing facts they seek to regulate. They need to be endowed with the factual substance that would allow them to face the facts at stake in a case, and the manifestations, acts, or behaviors they intend to limit. When interpreting these grounds, the Court tends to include social values as components thereof, especially as constitutive parts of the 'rights and freedoms of others' (*ibid.*).

1. The Origins: *Pro Religio*

The first religious cases elevated before the Court date back to the middle of the 1990s, three decades after the ratification of the Convention[6]. It is only

[4] That is, the society formed-up of its 47 member-states.

[5] *See*, article 9, para. 2. Also, the same provision states that they must be prescribed by law and necessary in a democratic society.

[6] Before that period, it had examined some cases relating to narrow dimensions of religious freedom, the main of which was parent's rights in their children's school education. *See*,

then that the Court started building its legal edifice on religious freedom. It is only then that it started to address religions and their manifestations in Society.

In *Otto Preminger Institut v. Austria*, for example, the Court had to examine the seizure of a film by the Austrian authorities. The film was an adaptation of German Oskar Panizza's play, *The Council of Love*, and portrayed Christianity's sacred religious figures, namely God, Jesus-Christ and the Virgin Mary, in a way that was deemed as overtly provocative (ECHR 1994, paras. 20-22). After its publication in 1894, the play lead its writer to be tried and sentenced to imprisonment for crime against religion, and was later banned in Germany (*Ibid.*, para. 20). Its cinematographic adaptation, which was at the heart of the case before the European Court, was accordingly seized by the authorities. The Austrian courts found the seizure justified, as the film was such as 'to offend the religious feelings of an average person with normal religious sensitivity'(*Ibid.* para. 13)[7].

When facing the facts, the European Court of Human Rights applied its traditional balancing of the competing interests at stake. It was facing, on one side of the balance, the right of the Institute Otto Preminger to freely communicate a piece of art, and that of any third party wishing to know the content of the latter. On the other side, it had to consider the religious feelings of those persons who embraced the ideas subject to satire. Weighing the claims, the Court found that holding religious beliefs does not preclude from being subject to critique—those who hold such beliefs 'must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith' (ECHR 1994, para. 47). But, the Court added, the state also remains bound by its responsibility to ensure the peaceful enjoyment of freedom of religion by individuals (*Ibid.*). In other words, the state remains responsible of ensuring that the way ideas and doctrines directed against any set of beliefs, as mere critiques or properly hostile to them, be communicated in a way that does not prevent the ones who hold them from willingly holding and exercising them. In fact,

inter alia, ECHR 1976; Commission, (Decision on the Admissibility) 1979; Commission (Decision on the Admissibility) 1981; ECHR 1982.

[7] In fact, as it appears in the ECHR's judgment, the 'Court of Appeal considered that artistic freedom was necessarily limited by the rights of others to freedom of religion and by the duty of the State to safeguard a society based on order and tolerance. It further held that indignation was "justified'' for the purposes of section 188 of the Penal Code only if its object was such as to offend the religious feelings of an average person with normal religious sensitivity. That condition was fulfilled in the instant case and forfeiture of the film could be ordered in principle, at least in "objective proceedings.'' The wholesale derision of religious feeling outweighed any interest the general public might have in information or the financial interests of persons wishing to show the film'. *See ibid.*

the Court goes even further: it states that these ideas must not be such as to '*inhibit* those who hold such beliefs from exercising their freedom to hold and express them' (*Ibid.*) [emphasis added]. That is, the critiques must not cause the believers to feel any sort of pernicious pressure likely to get them to hide, limit, or renounce to their beliefs or to any manifestation thereof. Consequently, given the characteristics of the film at stake, the ideas it conveyed and the particular contextual features of the society where it was seized, the Court concluded the seizure did not infringe the rights of its makers and broadcasters[8].

The Court, in this case, determined first how the believers following the religion criticized by the film would receive the critics. In finding that a critique, of any idea, must not inhibit anyone from embracing it or manifesting it in practice, it put itself in the situation of the believers and examined from that stance whether the critique at stake was likely to have such an effect on them. It did not consider the issue of seizing the film from the point of view of the organization broadcasting the film, nor from that of the filmmaker. Rather, it examined the case from the abstracted perspective of how believers would feel when facing such a critique. More precisely, it did not examine the case from the point of view of its alleged victim—the applicant—which was seeking the protection of the Convention, but rather from that of the religion at stake. Therefore, the seizure of the applicant's film would have amounted to a violation only if the critiques were not virulent enough, if they did not go beyond what the religion at stake could suffer as a critique, given the context.

In other words, the Court put the concerned religion in the center of its assessment, and conducted the assessment accordingly. This *modus operandi* had been already deployed in an earlier case involving Jehovah's Witnesses: *Kokkinakis v. Greece*.

In this case, indeed, the Court had to examine the conformity, with the Convention, of acts of proselytism. Precisely, the applicant—Mr Kokkinakis—was a Jehovah's Witness, he had been carrying acts of proselytism ever since he converted to this religion and was accordingly arrested and sentenced for imprisonment on several occasions (ECHR 1993, para. 7). Therefore, he went

[8] The Courts left indeed the issue of assessing the quality of the ideas expressed and their impact on believers to the margin of appreciation of the Austrian authorities, given that it was impossible for it to discern any common conception or practice within its state-parties on that matter. *See*, ECHR 1994, para. 50. In addition, the characteristics surrounding the religiosity of Tyroleans as a society caused their religious feelings to weigh more, on the balance of interests, than the film as an artistic production or an expression of the ideas it contained. *See*, *ibid.*, paras. 55-56.

on to the European Court of Human Rights to seek the protection of the Convention's article 9 (*Ibid.*, para. 29).

When delving into the case, the Court starts emphasizing the importance of article 9, stressing, in particular, that 'pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it' (*Ibid.*, para. 31). Then it declares, regarding the precise issue of proselytism, that freedom of religion as protected by Article 9 'includes in principle the right to try to convince one's neighbour (…) failing which (…) "freedom to change [one's] religion or belief"', enshrined in Article 9 (art. 9), would be likely to remain a dead letter' (*Ibid.*).

As in *Otto Preminger Institut v. Austria*, the Court, in this case, put religion in the centre of its analysis and ruled accordingly. In other words, it placed religion at the heart of the case, and ruled according to the needs of the latter. That need being, in the case at hand, the possibility for it to be spread. The Court considered indeed this aspect as a core component of freedom of religion, and consequently of article 9. Put in other words, it is by definition that a religion seeks to be spread; therefore, to forbid any possibility for its believers to spread it amounts to a violation of freedom of religion as enshrined in article 9 of the Convention.

Henceforth, it appears that the *modus operandi* of the Court, when assessing religious cases, is characterized by a special focus on the religion or the belief at stake. More so, it appears that the Court puts the religion in question in the centre of its examination, and rules by what it sees fit to the latter. In the case under examination, it even resorted, in order to assess the acts before it, to the distinction drawn by the World Council of Churches in between 'true evangelism' and 'improper proselytism' (*Ibid.*, para. 48). Likewise, eventually, and following the same logic, it found legitimate for members of a religion to disobey state laws preventing them from practicing their religion (ECHR 1996, paras. 12, 52-53).

This way of proceeding is particularly favorable to religions and beliefs, and amounts to a *pro religio* interpretation of the Convention (Chaibi, 2017, 21-28). Being the central focus of its examination, being the core interest of a case, religions benefit from a larger protection of the Convention. Furthermore, adopting this *modus operandi* amounts also to adopting religions' concepts and conceptualizations as heuristics to face the realities involved in the cases. For example, as mentioned in the above *Kokkinakis v. Greece* judgment, the Court drew its distinction between legitimate and improper proselytism from a report established by the World Council of Churches, a Christian religious organization (ECHR 1993, para. 48).

Therefore, the *modus operandi* that the Court has followed from the incipient beginnings of its religious jurisprudence seems to be structured

by a will to endow religions with the maximal degree of liberty to manifest. Its interpretation, as stems from the first foundations of its religious jurisprudential edifice, seems to have been *pro religio*. Yet, in its later developments, a slight change emerged, moving its focus from religions specifically to what could be their secularized emanations—social values.

2. The Aftermath: *Ad Valorem*

After the founding judgments, the Court was faced with manifestations which appeared to be rooted in other religions that the traditionally Christian religions. It is from that period that the Court were to fully face diversity[9]. As a consequence, when assessing such cases, it appeared to slightly adjust its *modus operandi*: it tended to put social values as main focus of its reasoning in lieu of Religion (A). Its *modus operandi* went, consequently, to be more *ad valorem* than *pro religio* as in the previous cases (B).

2.1. From Religion to Values

After the religious edifice of the Court received its first pieces in the early years of the 1990 decade, the number of cases involving religions, religious freedom, and religious manifestations grew quickly and significantly. In fact, if the 1990 decade was that of the bases of the edifice, the 2000 decade was that of its building and shaping. It confronted the Court, indeed, with a wide range of religious issues that provided the legal regime set in the founding judgments with further nuances stemming from religious diversity.

In 2001, for example, the Court had to examine the case of a public school teacher who, after converting to Islam, decided to wear the headscarf. Given the religious nature of said manifestation was deemed to be contrary to the legal regime governing state-Church relationships in Switzerland, which is a *Laïcité* system, the applicant was forbidden from wearing the headscarf (ECHR 2001, p. 2). Therefore, the applicant went to court arguing the interdiction she was opposed to wear her religious garment infringed upon her religious freedom (*Ibid*., p. 9), ultimately reaching the European Court of Human Rights which gave its decision on the 15th of February 2001.

[9] In actual facts, the Court had already started facing diversity of beliefs and their manifestations such as Veganism, Pacifism, Secularism, etc. *See*, *inter alia*, Commission (Decision on the Admissibility) 1997; Commission (Decision on the Admissibility) 1993… Nevertheless, these cases did not give way to substantiated judgments. The first spark of complexity, through diversity, was therefore in the early decade of 2000 with the following cases.

In this decision, the Court considered the applicant's claim inadmissible. Her claim, in other words, did not enter into the scope of Article 9. When assessing the facts of the case, the Court found the measure opposed to the applicant was prescribed by law and seeking to protect 'the rights and freedoms of others, public safety and public order' (*Ibid.*, p. 12). Furthermore, it found it 'necessary in a democratic society [in that, given the factual characteristics of the case,] the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which (…) is hard to square with the principle of gender equality' (*Ibid.*, p. 13). Then, concluding, it added that it was 'difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils' (*Ibid.*).

In other words, insofar as the applicant's headscarf was irreconcilable with such fundamental values as gender equality, non-discrimination, tolerance and respect for others, authorities could find to prohibit its wearing without infringing the Convention.

In this case again, the Court shows the same kind of approach as the one it followed in the founding judgments. It seems to have resorted to the religion commanding the wearing of the headscarf, as it stated the commandment stems from the Koran, in order to subsequently rule on the facts. But this time, it found article 9 of the Convention did not encompass the religious manifestation; it found the latter did not form part of the scope of article 9, as it infringed the set of values it went on listing. The religious manifestation involved in this case was the expression of a set of values that were not those on which the Convention, and its article 9, rest. Therefore, falling outside its scope, it could not benefit from the Convention's protection.

The very same logic was followed in cases provided before the Court in the following years. Albeit differences of facts and precise issues at the heart of each litigation, which would ultimately make the nuances of the Court's religious jurisprudence, the *modus operandi* followed by the Court was identical. In *Refah Partisi v. Turkey* (ECHR 2003)[10], the Court had to examine

[10] The case was examined under Article 11 of the Convention, which guarantees the right to freedom of expression. Nevertheless, the 'expressions' and statements at the heart of the litigation had a religious substance making them verbal manifestations of a religious nature. Furthermore, they were performed by members of parliament and members of a political Party, whose political program was based on religious teachings and ideas extracted from a religion. So much so, the litigation was of a religious substance. Albeit examined through Article 11, as the litigants opted for the latter provision, the issue of the case seems to have been a religious manifestations that took place in a verbal form.

the dissolution of a political Party, the Refah Partisi (Welfare Party), by the Turkish Constitutional Court (ECHR 2003, paras. 22-26). Based on some of its members' declarations, the latter found the Party had become a 'centre of activities contrary to the principle of secularism' (*Ibid.*, para. 23)[11]. Hence the Party was dissolved and some of its members deprived from their political rights (*Ibid.*, paras. 23-24).

Regarding the dissolution measure, strictly speaking, the European Court of Human Rights found it was 'prescribed by law'—in that it was a direct application of constitutional provisions (*Ibid.*, paras. 56-63)—and pronounced for protecting national security and public safety, preventing disorder or crime, and protecting of the rights and freedoms of others (*Ibid.*, para. 67). When assessing its lawfulness regarding the Convention, it recalls its previous position that 'in a democratic society the State may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety'[12]. Accordingly, it examined whether the religious manifestations at stake—the verbal declaration of the Party members and the program defended by the latter—were of such a nature as to justify their limitation by the pronounced dissolution. And to that regard, it states that

> '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 taken as a whole. It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values (…). In the Court's view, a political Party whose actions seem to be aimed at introducing sharia in a state party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention' (*Ibid.*, para. 123).

Consequently, it found the dissolution in keeping with Article 11 requirements.

In other words, the Court says that the Convention rights calls for a pluralistic approach: it 'considers that there can be no democracy without

[11] Among the measures defended in its program, the Party advocated for installing a multi-level legal system based on religious affiliation. That is, according to their affiliation, citizens could claim the application of one legal system or another. Sharia was one of the sub-systems considered, and seems to have been considered by the Court as the main system advocated for by the Party.

[12] This finding was set, as recalled in the Judgment, in the Court's aforementioned *Dahlab v. Switzerland* decision. *See* ECHR 2003, para. 92.

pluralism' (*Ibid.*, para. 89). Given that the Party's program, based on Sharia, overtly contradicts such principles as pluralism and constant evolution of public freedoms, it diverges from the Convention values and the democratic ideal that underlies the whole of it (*Ibid.*, para. 123). Therefore, its dissolution was in keeping with Article 11 of the Convention. As in *Dahlab v. Switzerland*, the Court found the religious manifestation at stake to fall outside the scope of the Convention for contradicting the values on which the latter rests, by which it is structured. As a consequence of which it could not benefit from the protection of the Convention.

The Court seems to have adopted this *modus operandi* in all the cases it had to examine. Whenever a religious manifestation deviated from, rested on values other than those underlying the Convention or was found to contradict them, the Court seems to have denied them the benefit of its protection. This way of proceeding appears to be slightly distinct from that that Court had relied on in previous cases, especially in the founding judgments of its religious jurisprudence. If it adopted the same *modus operandi*, consisting in delving into the religion involved by the case and ruling accordingly, it appears that it relied on more precise aspects of the religion faced, in its later judgments. These precise aspects were not considered in the founding judgments.

In cases such as the ones presented, indeed, the Court delved into the religion at stake and considered it from a value perspective. It ruled on the case after determining the values by which the religious manifestation was structured. It went beyond the religion involved, strictly speaking, to see the axiological system that structures it. Then, arbitrating in between these values and those of the Convention, it ruled on the case.

In 2017, the Court was faced with parents' claim to dispense their daughters from swimming classes for religious reasons (ECHR 2017a). After assessing the case, it found that children's 'interest in an all-round education, facilitating their successful social integration according to local customs and mores, takes precedence over the parents' wish to have their daughters exempted from mixed swimming lessons' (*Ibid.*, para. 97)[13]. In other words, abiding by the social values facilitating their integration was more important for the children than following their parents' will to be raised according to their religious views.

[13] Indeed, the Court noted that 'a child's interest in attending those lessons lies not merely in learning to swim and taking physical exercise, but above all in participating in that activity with all the other pupils, without exception on the basis of the child's origin or the parents' religious or philosophical convictions'. *See*, ECHR 2017a, para. 98.

Such an approach seems to modify substantially the way the Court used to approach religious manifestations and religious cases. If its first judgments showed a *pro religio* reasoning, the later ones suggest it rather operates *ad valorem*.

2.2. From *Pro Religio* to *Ad Valorem*

The first decade of religious jurisprudence was marked with a predominance of Christian religions in case law; the following decade confronted the Court with diversity. Out of this confrontation, new issues were to emerge, new regulations, and an adjustment of the *modus operandi* which was to become more value-centered.

To that regard, the Court's approach does not seem to have changed. The Court always delves into the religion involved and looks for endowing it with the maximal degree of liberty. The value narrative on the practices and religious manifestations involved in the litigations were mainly developed regarding extra-Christian religions—mainly Islam for the number of cases[14]. Therefore, the impact of the value narrative on the classic *modus operandi* appears to be an additional operation: before examining the facts strictly speaking, the Court seems to first determine on which values the religious manifestation at stake rest (Burgorgue-Larsen and Dubout 2006, 197)[15]. Said values become, as a consequence, a filter for the deployment of article 9 guarantees. They become the factor which triggers its application to the case and the religious manifestation involved. In other words, the first operation to be carried out by the Court would be valuing the religious manifestation and comparing the values that structure it with those underlying the Convention, only deploying the protection provided by the latter when there be coincidence in between the two. As consequence, the concrete facts, the litigants, and the contextual features of the litigation would be left to a second analytical degree, stuck behind a veil of abstract developments on values[16] (Burgorgue-Larsen and Dubout 2006, 197).

[14] *See*, *inter alia*, ECHR 2003; ECHR 2005; ECHR 2006; ECHR 2008a; ECHR 2015b; ECHR 2017a; ECHR 2018.

[15] Also, Judge Tulkens' dissenting opinion *in* ECHR 2005, para. 17.

[16] Even in such cases as those involving *Laïcité* systems, the Court had a tendency not to dwell on the concrete condition of the litigants. Rather, it examined the legitimacy of the application of the system requirements. That is, instead of examining the contextual features of a case, what was the position of the litigant, what was required from them and whether the measure adopted by the authorities infringed any of their rights in that position, the Court rather dwelled on whether the system itself coincided with the Convention. And, in order to sort whether the system was in keeping with the Convention, it resorted to examining whether it was in keeping with its values and ideals. *See*, *inter alia*, ECHR 2005; ECHR 2006; ECHR 2008a; ECHR 2015b. In another context, involving also the application

Such a way of judicial assessment gives the foreground preference to social values selected as being the basis of the legal text to apply. Social values, in this perspective, are more important than acts resulting rom individual freedom. The Court's interpretation becomes therefore an *ad valorem* interpretation, rather than *pro religio* only. An approach that further corresponds to its global interpretation of the Convention as set in cases such as *Soering v. The United Kingdom* (ECHR 1989), *Selmouni v. France* (ECHR 1999)[17], *McCann and Others v. The United Kingdom* (ECHR 1995)[18], or *Tyrer v. The United Kingdom* (ECHR 1978)…

In *Soering v. The United Kingdom*, the Court was confronted with the situation of an inmate who was pending extradition to the United States of America in order to serve his sentence, which was capital punishment. The applicant was arguing that, by extraditing him, the United Kingdom would violate his right to not be subjected to torture or cruel and inhuman treatment as protected under Article 3 of the Convention. In its judgment, the Court found that 'any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society"' (ECHR 1989, para. 87). And has therefore concluded that, were the United Kingdom to extradite the applicant, the state would indeed violate his right under Article 3.

In *Tyrer v. The United Kingdom*, the applicant, who was a teenager at the time of the facts, had been sentenced and subjected to corporal punishments which he argued to be a violation of Article 3 of the Convention prohibiting torture and inhuman or degrading treatments or punishments. When assessing the case, the Court declared 'that the Convention is a living instrument which (…) must be interpreted in the light of present-day conditions' (ECHR 1978, para. 31)—and accordingly found the punishment to be a breach of Article 3 of the Convention.

Thus, it appears the *ad valorem* approach developed by the Court is neither new nor circumscribed to religious freedom and religious manifestations. Rather, it appears to be a more transcendental approach that irradiates the whole Convention. Only the concrete modalities of its execution and

of Sharia principles but as recognized by the state-party through its legal system, *see* ECHR 2018.

[17] In para. 95 of this judgment, The Court states indeed that 'Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment'.

[18] In para. 147 of this judgment, the Court finds that article 2 'enshrines one of the basic values of the democratic societies making up the Council of Europe'.

development vary according to the article considered, its characteristics, structure, context of application and the obligations it conveys. Article 2 protects the right to life, for example, when article 3 protects individuals from torture or degrading treatments, and article 9 protects individuals in the daily practice of their religion or spirituality. As these three, Convention articles apply in different contexts, aim at safeguarding different goods, and their structure may therefore vary albeit resting on similar conceptual premises.

In the case of article 9, which is directly connected to Society through individual behavior, the configuration and scope it receives participate directly to shaping the social landscape of a society—in its religious dimensions and beyond. Narrowing its scope to a certain set of values would therefore participate to structuring society through said values. In other words, by protecting only such acts which correspond to certain values, states come to be in a situation where they be likely to forbid any manifestation that does not coincide with them. Doing so delimits the visible sphere of society to what said values allow, hence shaping the society they make-up.

Given its wide jurisdiction, covering 47 member states, the Court often finds itself in the situation of assessing manifestations and general issues on which no common practice unifies the states under its jurisdiction[19]. As the practice of a state regarding an issue tends to depend on the way society views, values and considers it, cases were submitted to the Court's examination which brought forth the issue of disparity of values among them. So much so, regarding values, the Court shows a double approach.

[19] This discrepancy between states approaches has given way to the doctrine of national margin of appreciation, which the Court has been using on many occasions involving several articles of the Convention, including in religious matters and regarding article 9. For example, in ECHR 2016, para. 112, in which the Court states that 'Contracting States must be left a margin of appreciation in choosing the forms of cooperation with the various religious communities.' Also, *ibid*., para. 132, in which 'the Court acknowledges that (…) where questions concerning the relationship between the State and religious movements are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight (…). Respondent States therefore have some margin of appreciation in choosing the forms of cooperation with the various religious communities. It is clear in the present case that the respondent State has overstepped its margin of appreciation in choosing the forms of cooperation with the various faiths.' Other examples in ECHR 2014b, para 130, and ECHR 2013, para. 13, where the Court found that 'where questions concerning the relationship between State and religions, on which opinion in a democratic society may reasonably differ widely, are at stake, the role of the national decision-making body must be given special importance (…). This will be the case in particular where practice in European States is characterised by a wide variety of constitutional models governing relations between the State and religious denominations'.

3. Values: between Domestic and European Realms

As argued *supra*, values are abstract principles unifying a system of diverse elements. In the legal realm, they are therefore the principles that unify all the laws and legal norms into a unique global consistent construct called 'the legal system'. In the realm of societies, they are the common principles structuring the latter, that is, the set of principles on which individuals or groups rely when behaving in the different spheres of everyday life. Henceforth, they are also the principles which unify different mores, behaviors and practices taking place in a society into one global consistent—social—system.

By definition, therefore, values suppose a limited scope. For they only unify different elements into a system, they are enshrined within the system they consequently build. In the realm of law, it is the legal order that comprises the system, the limits within which the latter is contained. In the realm of societies, it is the boundaries of the latter, whichever their criterion of definition—culture, state's frontier, 'civilization'…

The European Court of Human Rights has a limited jurisdiction. Geographically, it is contained within the outer frontiers of its state-parties, which compose—according to its jurisprudence—a space of 'common values and ideals'[20] (A) without erasing the nuances and particularities of each society they represent (B). Diversity remains, even within the unity of values and ideals. The Court has considered and confronted this aspect in its case-law[21].

3.1. A European Space of Guarantee

Using social values to assess practices and behaviors, in order to endow them with legal protection, amounts, as stated *supra*, to filtering which practices and behaviors be allowed in society. It is delimiting the socially acceptable, protecting a certain image or state or ideal concerning society. Using social values to assess and direct the application of the Convention ultimately yields in shaping the global society that its state-parties compose altogether. In other words, when the Court makes use of values in assessing

[20] As recalled in ECHR 1989, para. 87, the Convention is 'an instrument designed to maintain and promote the ideals and values of a democratic society'.

[21] Its approach on this issue goes in line with its doctrine of national margin of appreciation, thus confirming the conception that the Court holds of its mandate, which appears to be that of a crystalizer aggregating the common patterns shared by its state-parties into one complex construct—the European Human Rights system—and emanating from freely determined tendencies and dynamics. In that, the Court participates to building a wide European society through a freely chosen convergence of state practices and conceptions.

and legally treating behaviors and practices, it tends to favor a certain type of society at the detriment of another[22].

When, in *Dahlab v. Switzerland*, the Court found the applicant's headscarf

> 'to be imposed on women (…) and (…) hard to square with the principle of gender equality' (ECHR 2001, p. 6), and therefore 'difficult to reconcile (…) with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils' (*Ibid.*),

the Court was accordingly stating that any practice or behavior contradicting the latter were at odds with the Convention and could not benefit from its protection. As a consequence, the Court was denying protection for behaviors that contradict the set of values stated in order to preserve them as the structures governing the functioning of the society under its jurisdiction. In other words, not offering the Convention's protection to the practices that contravene said values amounts, by way of consequence, to protecting those which are structured by them, and further the social dynamics they engender. Denying protection for behaviors contradicting the values set by the Court as the Convention's core consequently protects the social state that yields from the latter's daily practice.

Likewise, the Court found Sharia system 'stable and invariable' (ECHR 2003, para. 123), in *Refah Partisi v. Turkey*, hence not leaving room for 'pluralism in the political sphere or the constant evolution of public freedoms' (*Ibid.*), and accordingly supported the dissolution measures pronounced by the domestic authorities. Endorsing the dissolution for the party's program did not respect pluralism and constant evolution of public freedoms amounts to making mandatory on any political party to abide by these principles, and consequently favoring diversity of views in society and constant public debate and social change. Is it, in other words, protecting a social state which guarantees free speech leading to change and evolution, and to constant adaptation to the new realities of society.

Lastly, when stating, in *Osmanoglu and Kocabac v. Switzerland*, that 'the children's interest in an all-round education, facilitating their successful social integration according to local customs and mores, takes precedence over the parents' wish to have their daughters exempted from mixed swimming lessons' (ECHR 2017a, paras. 97-98), the Court found that abiding

[22] When the Court renders a judgment, it is a state's obligation to implement it, and adopt the suitable measures for that end. A judgment constitutes a mandate for the state to act. Consequently, its judgments are followed by domestic legal measures reinforcing or forbidding individual practices (Fokas 2015, 55). In addition, individuals themselves tend to be more and more cognizant of the Court's regulations and findings, and act accordingly (Fokas, 2017).

by the structures and patterns of integration as they existed in Switzerland was more important, in the context of the case, than abiding by religious beliefs. The Court was referring also, in this case, to a certain social state, a social configuration, that it favored over religious freedom requirements.

As stems from these three examples, the Court conceives the social values it uses to delimit the scope of the Convention as the expression of the European society as it conceptualizes it. The Convention only applies to practices and behaviors that these values encompass in that they represent the social ideal for which the Convention exists, for which it applies, in which it is rooted and that it aims to safeguard. In other words, these values appear to be the modalities of a certain social order that the Court seeks to protect. A social order grounded in individual freedom, gender equality, pluralism and democracy, but not only.

In fact, if the Court states some of the values at heart of the Convention in these—selected—examples, its case-law seems to suggest they are not the only ones relied upon. Rather, values tend to represent a whole set through which the Court views the realities it be facing. In a 2014 case (ECHR 2014a), the Court was faced with the claims of a Dutch applicant and the religious association—enjoying legal personality under Dutch law—she was part of (*Ibid.*, para. 1). The association was the Dutch component of a religious organization based in Brazil, whose aims was to 'research, study and practise the teachings of the Holy Daime and to incite with its works and rituals its godly spark with a view to its integration with the divine' (*Ibid.*, para. 4). For that purpose, it was making use of a substance forbidden under Dutch law (*Ibid.*, paras. 7-8). The first applicant was found guilty of the corresponding offense and criminally charged accordingly (*Ibid.*, para. 9).

The applicants were arguing, before the Court, that use of the controversial substance—Ayahuasca (*Ibid.*, para. 5)—was necessary for their religious practices, as such use 'was part of their core beliefs' (*Ibid.*, para. 43). In other words, use of the banned substance was a manifestation of their religious freedom as guaranteed by article 9. In order to better illustrate their claim, they brought forth, as a comparison, the ritual of using wine in certain religious denominations—adding the findings of Dutch domestic Courts regarding the misconceived 'perception of ayahuasca as harmful when used sacramentally in limited quantities' (*Ibid.*, paras. 32, 52)[23]. But despite these precisions, the Court did not dwell on the arguments brought forth: it only considered the authorities were entitled to prohibit the use of the substance in accordance with article 9 requirement (*Ibid.*, para. 48). The comparison with the use of wine by other religious denominations was considered

[23] Also, for the domestic Court's findings, paras. 44, and 23-24.

irrelevant (*Ibid.*, paras. 52, 54)[24]. In other words, the Court did not dwell on the comparison, nor did it consider the substances themselves, their characteristics, the regulations followed for their use. It did not consider the concrete effects they would cause their users, or their effects on the latter. It only considered the use as toxic (*Ibid.*, para. 54), without further elaboration. Consequently, it quashed the applicants' arguments and comparisons for exposing two situations which 'differ significantly' (*Ibid.*, para. 54) from one another.

Such an absence of concrete substantiation, in the Court's judgment, amounts to projecting its conceptual categories on the reality it be facing, and ruling accordingly. Despite the similarities in the use and effects of both substances brought forth by the applicants, the Court did not consider these latter elements. In other words, the Court seems to have discarded the possibility of any comparison between wine, a mainstream beverage, and the exotic substance used by the applicants. For ignoring the applicants' arguments on this issue, it appears it was relying on what it perceived as 'normal' and ruled accordingly. In other words, despite the similarities brought forth by the applicants regarding both substances, in terms of their nature, their use, and the regulations governing their use; despite these similarities called for an in-depth analysis, the Court relied on its perception only to give its ruling. And, unlike such substances as the applicants' ayahuasca, the use of wine appears to be well established in European religious—and social—practices[25].

Therefore, the *modus operandi* followed by the Court in this case appears to be quite the same as the one followed in the aforementioned cases. As in the previously discussed cases, it referred to the social dynamics of European society in order to examine—somewhat new—religious manifestations taking place within the latter. It resorted to the values and patterns structuring European society to confront the manifestations, examine their meaning and the principles or values on which they rest[26], and then rule accordingly.

[24] Precisely, paragraph 54 of the decision reads: 'the rites referred to differ significantly from those practised by the applicants, most notably – for present purposes – in that participants neither intend nor expect to partake of psychoactive substances to the point of intoxication. The applicants are therefore not in a position relevantly similar to that of the churches with which they compare themselves'. Therefore, the Court did not delve into the arguments raised.

[25] Several cases of a same nature have been animating courtly debates and judgments around the world, starting with domestic Courts. One of the most famous of these cases being United States Supreme Court's Peyote case. The latter's treatment of the issue contracts with the Court's treatment in the details and depth of its analyzes. As a legal issue, use of such substances seems to be developing, has even reached the human rights field and human rights protection bodies. For example, *see* HRC 2007, Caiuby and Cavnar 2016, 45-131.

[26] *Cf. supra,* part II.

This matrix of values that stems from its reasoning appears to be its heuristic tool for examining, qualifying and ruling upon the religious manifestations presented to its assessment. The values of which is it made appear to be the patterns governing the European society, in its religious dimension, as shaped by the long historical dynamics governing its relationships with Religion.

Such a conception amounts to consecrating a European social order—at least in the religious sphere—in which each state develops its own features, and adds to the common European ground a touch of its particular diversity. The Court is indeed aware of the diversity reigning among its member states[27], and avoids, by way of consequence, to rule on matters that bring it forth. Therefore, when religious manifestations put forth considerations which fall into the realm of state particularities, the Court relinquishes to rule upon them, preferring to leave for each state the responsibility to act as it sees fit (ECHR 2014c; ECHR 2017c; ECHR 2014d). That is what occurs, for example, when the state considers a matter to infringe upon its 'sociability space'.

3.2. A National Space of Sociability

A space of sociability is a space where individuals are able to meet and interact in order to make bonds with one another. Such interactions constitute a specific social dynamic, they rely on intangible principles shared by individuals who follow them implicitly, and can manifest in a variety of ways. In short, such a space supposes a value order that enables individuals to implicitly understand each other when interacting, therefore facilitating the creation of bonds between them. In as much as individual behavior is a key feature in such a concept, religious manifestations can have an impact on the process of socializing.

In some cases brought before the Court, involving religious manifestations forbidden by domestic authorities, the defending governments were arguing the restriction was enacted in order to maintain such a space of a social interactions. In *Gough v. The United Kingdom*, the applicant, who firmly held 'belief in the inoffensiveness of the human body' (ECHR 2014d, para. 6), was prosecuted and convicted several times for walking bare naked in public (*Ibid.*, paras. 8-99) under the offense of 'breach of peace' (*Ibid.*, para. 146, 171). Delving into the case, the Court first stated that issues of a moral nature give way to a wide margin of appreciation since there is no consensus on the matter in between its state parties (*Ibid.*, para. 166, 172).

[27] As argued in footnote 19, it is the *raison d'être* of the Court's doctrine of national margin of appreciation.

Then, it added that, still, expressing one's belief[28] 'does not go so far as to enable individuals, even those sincerely convinced of the virtue of their own beliefs, to repeatedly impose their antisocial conduct on other, unwilling members of society' (ECHR 2014d, para. 176). In other words, the applicant's behavior strongly disturbed the social order, and was executed in a way that clashed frontally with society's premises. It clashed so frontally with what society would have been able to accept as an expression that it amounted to an 'antisocial conduct' (*Ibid.*, para. 176). Being so, it was in contradiction with the values at work in the social space, and, consequently, was found to be legitimately forbidden by state authorities (*Ibid.*)[29].

In two later cases (ECHR 2014c; ECHR 2017c), where applicants were claiming a breach of their rights by the law prohibiting wearing of full-face veil in public, the defending government was more precisely arguing the prohibition was necessary to maintain a spirit of 'living together' (ECHR 2014c, para. 82)[30] in society. In other words, the particular configuration of society impeded such behavior from taking place, for the reigning values of the one were incompatible with the other. When assessing these arguments, the Court, which could not find any commonality in the regulation of religious issues among state parties, stated accordingly that the latter fell into their margin of appreciation (*Ibid.*, para 130). In this case, the margin of

[28] The litigation was mainly conducted under Article 10.

[29] Prior to its conclusion, the Court made a statement affirming the importance of respect by the State of the views of minorities, which 'ensures cohesive and stable pluralism and promotes harmony and tolerance in society'. The limit being, it its words, that such views and consequent conducts ought to not be '*per se* incompatible with the values of a democratic society or wholly outside the norms of conduct of such a society'. *See*, ECHR 2014d, para. 168.

[30] More precisely, the argumentation developed by the government was three-layered. Under the umbrella of 'respect for the minimum set of values of an open and democratic society,' as consecrated by the Court in previous cases, it advocated that the prohibition was enacted for '[f]irstly, the observance of the minimum requirements of life in society. In the Government's submission, the face plays a significant role in human interaction: more so than any other part of the body, the face expresses the existence of the individual as a unique person, and reflects one's shared humanity with the interlocutor, at the same time as one's otherness. The effect of concealing one's face in public places is to break social ties and to manifest a refusal of the principle of "living together" (*le "vivre ensemble"*). The Government further argued that the ban sought to protect equality between men and women, as to consider that women, solely on the ground that they were women, must conceal their faces in public places, amounted to denying them the right to exist as individuals and to reserving the expression of their individuality to the private family space or to an exclusively female space. Lastly, it was a matter of respect for human dignity, since the women who wore such clothing were therefore "effaced" from the public space. In the Government's view, whether such "effacement" was desired or suffered, it was necessarily dehumanising and could hardly be regarded as consistent with human dignity'. *See* ECHR 2014c, para. 82.

appreciation was wide, given what was at stake is a choice of society (*Ibid.*, paras. 153, 155).

In other words, it is not the mandate of the Court, as it conceives it, to make any finding which could impact the specific configuration of a society. Such an impact exceeds the scope of its jurisdiction; it only makes statements or findings of such a nature when thee issues or their regulation be shared by its state-parties. That is, when a consensus emerges from them on the latter[31]. Therefore, the argument consisting in defending precise modalities of interaction between individuals is so particular to each society that it neutralizes the jurisdiction of the Court and the its mandate to rule[32].

Through these cases, the Court seems to have reached a third step in the development of its religious jurisprudence. If it previously affirmed and used social values as legal principles by which to interpret the Convention, it seems the latter cases brought it before the limit of such an approach. Its classic *modus operandi* appears therefore to be limited by the particular—

[31] The first spark of this 'consensus' doctrine dates back to ECHR 1984, para. 40, where the Court declares the 'scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States'.

[32] That is why its scope was limited by the Court in the Judgment, and by Judges through separate opinions. In addition, it appears to be an equivocal notion, unlikely to bear any precise and concrete meaning as necessary for legal purposes. Judges Nussberger and Jäderblom, for example, argued in their dissenting opinion following ECHR 2014c, that it is not clear 'what may constitute "the rights and freedoms of others'' outside the scope of rights protected by the Convention. The very general concept of "living together'' does not fall directly under any of the rights and freedoms guaranteed within the Convention. Even if it could arguably be regarded as touching upon several rights, such as the right to respect for private life (Article 8) and the right not to be discriminated against (Article 14), the concept seems far-fetched and vague'. *See*, Dissenting opinion, para. 5. Following ECHR 2017c, Judge Spano—joined by Judge Karakas—restated these ideas and further added some elaborations on these of such notion that could ultimately hamper democracy and human rights in the name of majority's will. In his own words: 'it is difficult to define which "concrete rights of others within the meaning of Article 8 § 2 and Article 9 § 2 of the Convention could be inferred from the abstract principle of 'living together' or from the 'minimum requirements' of life in society'' (…). In other words, the substance of the "living together'' principle is so malleable and unclear that it can potentially serve as a rhetorical tool for regulating any human interaction or behaviour purely on the basis of a particular view of what constitutes the ''right way'' for people to interact in a democratic society. That is anathema to the fundamental values of the autonomy of self, human dignity, tolerance and broadmindedness which are the foundations of the Convention system (…). History has amply demonstrated that there is an inherent risk in democratic societies that majoritarian sentiments, subsequently translated into legislative enactments, are formed on the basis of ideas and values which threaten fundamental human rights (…). It follows that public animus and intolerance towards a particular group of persons can never justifiably restrict Convention rights'. *See*, Concurring opinion, paras. 6, 9, 13. The same considerations were developed by the same judges in a Concurring opinion in ECHR 2017c.

national—features of the societies that compose its jurisdiction. Whenever an issue raised by a party to the litigation touches upon a choice of society, the Court seems to relinquish enacting any regulation which could have an impact thereon. Instead, it only consecrates what would be the object of a consensus among its state parties. In other words, its classic *modus operandi*, as discussed previously, consists in enacting a sort of umbrella of values under which national societies evolve and mutate with their own characteristics and features. An umbrella that only integrates more elements, more values and basic principles, when the latter be consecrated domestically, and come to be subject to a wide consensus across the society formed by its state-parties.

Conclusion

Chronologically read, from the foundations of the middle of 1990 decade to the late years of 2010, the Courts' judgments tend to show an evolution of its approach on religious freedom, going from a *pro religio* stance in the beginning to an *ad valorem* one in the aftermath.

Religious diversity has indeed shown that its stance was not *pro religio* strictly speaking. It appears indeed that the Court was constantly relying on values, as a heuristic matrix, when assessing religious claims and manifestations[33]. It conceived them as constitutive elements of the limitation clause set forth in the second paragraph of article 9 and related articles—particularly in the 'rights and freedoms of others'[34]. The values used—pluralism, gender equality, tolerance, open-mindedness…—do not appear to be religious; but they appear to be a product of the continuous contacts between religion and society as they took place historically within the European realm[35]. Their origin could, therefore, explain that the Court's *modus operandi* appeared as *pro religio* in its early beginnings: as they participated to their elaboration, the religions at the heart of those cases,

[33] The values were not religious, as religious claims based on notorious religious precepts were not automatically protected. As an example, *see* Commission (Decision on the Admissibility) 1997. The case dealt with demonstrating against abortion.

[34] Public order, public safety, rights and freedoms of others and other limitation grounds set by the limitation clause appear to be quite broad concepts which need further elements likely to concrete their actual substance. From the interpretation of the Court, the values discussed in this article appear to be some of these concrete elements (*see* Chaibi 2017, 30-34).

[35] Also, there might be other reasons, of a sociological nature, at work in the process. The Court is indeed a—plural and collective—body, composed of Judges: professionals made of their own experience and ideas, their own considerations on reality and own way of relating to the various elements composing the latter—including Religion as a social phenomenon. These elements may warrant further research on the subject.

and their emanations and manifestations, did not question the stated values. It is religious diversity which brought them under light, as, according to the Court's jurisprudence, it questioned them directly.

As evolving around values, this *modus operandi* shows two outcomes, two impacts on European society. On the one hand, on the strictly legal dimension, it seems to sketch a value public order which the Court considers its duty to protect. Indeed, if the Convention is the instrument laying down the most fundamental individual rights and freedoms, it serves as basis for other legal document and instrument—including national Constitutions. In other words, Convention rights are the basis on which the European legal order rests; it is a legal requirement for any legal edifice in the building to take them into account. The fact that the Court applies an axiological interpretation (Blanc-Fily 2016) thereof induces that not only these individual rights and freedoms be at the basis of the European legal order, but equally so are the values on which they rest themselves. In fact, given the intricate dialectics in between rights and values, the latter seem to be the fundamental basis from which the legal edifice of the whole Convention stems. In other words, the Convention is the basis of the legal order insofar as it is the emanation of these values, which consequently become the components of a European pubic order materialized—in its legal dimension—in the Convention and its articles.

On the other hand, on the more sociological dimension, it sketches the Court's conception of Pluralism, which takes the traits of a Christian-secular oligopoly (Jelen 2002; Giordan and Pace 2012, 49-61). That is, a form of Pluralism resting on values constructed through a long historical dialectical process of constant interactions between society and Christian religions. A pluralistic system that impacts directly individual behaviors[36], favoring some, restricting others, and henceforth questioning the dynamics of European society as it seems to be evolving towards more and more diversity.

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