

Limiting Human Rights for Religious Reasons: Rationale and Boundaries, a Perspective from Europe's Human Rights Court

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Abstract

Human rights and religion can very often be seen as reinforcing one another. Therefore, religion plays a primordial role in promoting respect for human rights and fundamental freedoms. For example, moral imperatives like “do not take any human being's life” or “you shall not steal” can be found in all major religions of the world, and have acted as an inspiration for the fundamental laws made by man.

None the less, religious laws can also contradict man-made laws and human rights treaties. Just to take one example, according to the Christian faith it is impossible for a woman to become a priest, while multiple human rights treaties clearly prohibit discrimination between the sexes.

It is precisely in such contentious matters that the national State will often intervene, granting preferential treatment to either religious laws or man-made treaties. The State, however, when it does interfere, has to do so in a very careful way, for one fundamental right is the right to religious freedom. The State will therefore frequently have to try to strike a balance between this right and other human rights concerned.

One regional convention safeguarding both religious rights like freedom of religion and religious practice, as other fundamental rights, is the European Convention of Human Rights, which we will explore in this paper. States that are members of the

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Council of Europe and parties to this convention will have to try to find a balance while being watched by an observant European Court of Human Rights. Thus the task of finding a balance between these rights has in Europe ultimately been given to the European Court, and its case-law is especially illuminating on the very relation between these rights. Looking at this jurisprudence will enable us to find out how the relationship between religious rights and other fundamental freedoms is perceived in the European Human Rights system. One essential question that arises, is in what manner and to what extent the Court allows for limitations and exceptions on/to other human rights when it comes to religious matters. For example, can one's personal freedom be limited in order to preserve someone else's religious beliefs? Does the European Court deviate from its normal course of action when faced with religious cases? Does such a religious context constitute "special circumstances" that allow for a different treatment, and if so, can this be justified? And on the other hand, what are the ultimate boundaries that other human rights put on religion, religious rights and traditions? Where is the line drawn?

The purpose of this study is to explore the case-law of the European Court of Human Rights in search of an answer to this fundamental question. Rather than solely concentrating on the right to freedom of religion of article 9 ECHR, this paper will focus more on those other human rights contained in the Convention when they seem to conflict with the said right to religious freedom, and in a broader scope, with other religious rights, laws and practices. The jurisprudence of the Court, which seems to take a very nuanced position in such matters, will be examined. A study of this case-law will not only be helpful to explore the status of religious rights as compared to other fundamental rights, but may also be a source of inspiration for the international human rights system to promote concord between the different religions. Studying the way in which the European Court handles such cases will also lead us to new ideas on how to implement human rights in different religious cultures, while respecting diversity and religious freedom. In sum, exploring this human rights system will provide answers to the above posed questions, which shall lead us to new ideas on the tremendous important right to be protected in one's religious freedom.

Keywords: Human Rights; Religion; Europe's Human Rights Court; Fundamental Freedoms.

1. Introduction: Religion, Human Rights and a Pluralistic Society

Every society is founded on a philosophical and ideological basis, which is often of a religious nature as history illustrates. Religion and society are intertwined. Even in secular states, the social fabric is riddled with religious thoughts, trends, structures and concepts. A human culture cannot exist if no room is left to believe. As fundamental rights, at least the core rights that are universally acknowledged, protect those aspects of life that are deemed essential, it is natural that conviction and human rights find each other on a fundamental level in religious freedoms. The European Court of Human Rights ('ECtHR') and the former European Commission of Human Rights ('ECnHR'), whose views and statements will form the center of attention of this paper, have endorsed and illustrated these principles in their jurisprudence. On multiple occasions, the European Court of Human Rights has stressed that the freedom of thought, conscience and religion as it is enshrined in Article 9 of the European Convention on Human Rights ('ECHR') constitutes one of the foundations of a democratic society, as a crucial part of the life of human beings is formed by their beliefs:

‘It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life (...)’¹

This freedom does not only guarantee the right to believe, it guarantees one may believe in whatever he wants. Pluralism, which is in the opinion of the Court indissociable with a democratic society, forms a direct consequence thereof.² The peaceful coexistence of different religions, beliefs and denominations, with respect for everyone’s viewpoints, lies at the centre of democratic societies. The role of the State is to be the guarantor of this pluralism. In its relations with religions, denominations and beliefs, it is in principle bound to abstain from interfering and has a duty to remain neutral and impartial. However, as the Court has pointed out on various occasions, this does not mean that public authorities cannot intervene at all. On the contrary, on these authorities lies the duty to ensure the protection of this pluralism:

‘What is at stake here is the preservation of pluralism and the proper

1. See: ECtHR, No. 45701/99, Metropolitan Church of Bessarabia and others / Moldova, 13 December 2001, § 114; ECtHR, No. 72881/01, The Moscow Branch of the Salvation Army / Russia, 5 October 2006, § 57; ECtHR, No. 42393/98, Dahlab / Switzerland, 15 February 2001. See also ECtHR, No. 50776/99 and 52912/99, Agga / Greece, 17 October 2002, § 56; ECtHR, No. 37178/97, Serif / Greece, 14 December 1999, § 49.

2. See: ECtHR, No. 45701/99, Metropolitan Church of Bessarabia and others / Moldova, 13 December 2001, § 114; ECtHR, No. 50776/99 and 52912/99, Agga / Greece, 17 October 2002, § 56; ECtHR, No. 37178/97, Serif / Greece, 14 December 1999, § 49.

functioning of democracy, one of the principle characteristics of which is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other'.¹

If there is to be a (worldwide) society in which different religions and denominations coexist in a peaceful manner, there should be the fundamental right of every member of that society to believe what he or she wants. Taken from the viewpoint of the *individual*, the right under Article 9 ECHR firstly encompasses the freedom to choose his beliefs, be it religious or non-religious. Should one be a religious believer, he may adhere to whatever faith he desires and thus select the religious beliefs of his choice. Article 9§1 of the Convention clearly stipulates that this right also includes the freedom of the individual to change his mind: he may alter his beliefs, change faith or stop believing at all. The focus of this discussion paper is on one particularly interesting aspect of the right to freedom of religion as it is commonly interpreted: the freedom of dissidence. Under the system of the European Convention on Human Rights, a person has the right to criticize the contents of his religion and he may develop new theological points of view.

However, a religious *community* as such also falls under the protection of this provision.² As the former European Commission stated in its decision in *X. / Denmark* of 8 March 1976, a community – *in casu* a church – is itself

‘through the rights granted to its members under Art. 9 (...) protected in its rights to manifest its religion, to organise and carry out worship, teaching practice and observance (...)’.(ECnHR, No. 7374/76, X./Denmark, 8 March 1976, § 1)

The individual's right to choose and change his religion or beliefs forms the internal dimension of religious freedom. This so-called *forum internum* is deemed absolute, meaning that it may not be restricted.³ *States* are therefore

1. See: ECtHR, No. 45701/99, Metropolitan Church of Bessarabia and others / Moldova, 13 December 2001, § 116. See also ECtHR, No. 50776/99 and 52912/99, Agga / Greece, 17 October 2002, § 60 ECtHR, No. 37178/97, Serif / Greece, 14 December 1999, § 53.

2. See: ECnHR, No. 13712/88, Serbisch-Griechisch-Orientalische Kirchengemeinde zum Heiligen Sava in Wien / Austria, 2 April 1990. See also ECtHR, No. 45701/99, Metropolitan Church of Bessarabia and others / Moldova, 13 December 2001.

3. See: Dijk and Hoof, 1998: 541-542; Torrón, 2005: 587, 590.

absolutely prohibited to impel citizens to believe or not to believe in something, since this is the exclusive choice of individuals. Yet the question poses itself what happens if the right of the community conflicts with the right of the individual member when the latter voices his dissident opinions within and against the community.

2. The Individual's Freedom of Dissidence against the Religious Rights of the Community - a Perspective from Europe's Human Rights Courts

Although the European case-law with regard to the right to dissidence is quite scarce, it clearly illustrates that the European organs give preference to the rights of the community over the rights of the individual when the latter becomes dissident. As will be shown below, there is one unambiguous limit to the protected right to dissidence: one cannot demand to be and remain dissident within the community in question. Article 9 of the Convention does not entail the right to voice or to experience dissident thoughts within the sphere of the community against which the individual directs his dissidence. Religious communities are themselves not required to have a democratic structure with room for pluralism. When it comes to their internal organization, religious groups and communities are entitled to autonomy, since:

‘The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords’.¹

The case-law of the former Commission makes clear that in cases of dissidence the latter freedom of the community prevails over the personal freedom of individuals. A community must not allow dissident thoughts within its own sphere. As the Commission put it in *X. / Denmark*, ‘*the church is not obliged to provide religious freedom to its servants and members*’. (Torrón, 2005: 618-619)

Restrictions imposed in order to ‘*preserve the purity of the doctrine and to guarantee unity in religious profession*’² can therefore be considered to be in conformity with Article 9. This, however, depends on the fulfillment of one condition: pluralism cannot be enforced *within* one religious group or

1. See: ECtHR, No. 45701/99, Metropolitan Church of Bessarabia and others / Moldova, 13 December 2001, § 118; ECtHR, No. 72881/01, The Moscow Branch of the Salvation Army / Russia, 5 October 2006, § 58; ECtHR, No. 39023/97, Supreme Holy Council of the Muslim Community / Bulgaria, 16 December 2004, § 93.

2. See: Dijk and Hoof, 1998: 547.

community, as long as pluralism exists *within* society. An individual must indeed be handed the right not to be a part of the said community. As was stated above, one has got an absolute right to choose and change his beliefs. In the case at hand, this necessarily entails the right not to be forced to remain a member of the community. Thus the community has a right not to allow dissident thoughts, as long as the dissident has the right to leave the community. The right to freedom of religion of the individual would then be guaranteed by the right to withdraw from that community. In those circumstances, a community as a whole has the right to punish or even expel the deviating members.¹ The interference with the right of the individual would then be protected under the corporate right to freedom of religion of the community.

As said, such can be deducted from the jurisprudence of the former Commission. This body has dealt with a number of cases in which clergymen of State churches ran counter to the official leadership of their churches, be it as regards theological views or as regards the execution of their tasks. In these cases, the Commission examined the scope of the freedom of religion of an individual dissident clergyman when acting within his community.

The first time the European Commission decided on such issue, was in 1976 in the previously mentioned case of *X. / Denmark*.² The applicant was a clergyman in the State church of Denmark (*Folkekirchen*) and the incumbent of a particular parish. He made it a condition for christening children that the parents attended five religious lessons. The Church Ministry, however, was of the opinion that the applicant could not impose such conditions, and therefore advised him to abandon this practice or to hand in his resignation. As the applicant refused to follow the opinion of his Church leaders, he was fired.

According to the applicant, his dismissal for disobedience violated his rights to freedom of religion, including the freedom to manifest his religion or belief in worship, teaching, practice and observance. The Commission however did not follow his reasoning. The right to freedom of religion was already exercised by the applicant at the moment he decided to join the State church as a clergyman:

“...in a State church system its servants are employed for the purpose of applying and teaching a specific religion. Their

1. See: Torrón, 2005: 619.

2. See: ECnHR, No. 7374/76, X./Denmark, 8 March 1976, § 1.

individual freedom of thought, conscience or religion is exercised at the moment they accept or refuse employment as clergymen, and their right to leave the church guarantees their freedom of religion in case they oppose its teachings” (ECnHR, No. 7374/76, X./Denmark, 8 March 1976, § 1)

The right to freedom of religion of a religious community, which, according to the Commission is a community based on identical or at least substantially similar views, also implies for this community the possibility “to enforce *uniformity*”. In the Commission’s view, the Church itself is protected by Article 9 ECHR to enforce uniformity in all matters of worship, teaching, practice or observance. This led the Commission to conclude that a religious community is under no obligation to tolerate *internally* any dissidence; the church is not obliged to provide religious freedom to its servants and members, unlike the State must do for everyone within its jurisdiction.¹ Therefore, an individual member cannot rely on the protection of Article 9 ECHR in circumstances of internal dissident behavior. That article does not include the right of a clergyman, to set up conditions for baptizing which are contrary to the directives of the highest administrative authority within that church.

This case-law has been confirmed in multiple later proceedings. In *Karlsson/Sweden*, the Commission reiterated that a community must not grant religious freedoms to their members or servants.

‘The freedom of religion thus does not include the right of a clergyman, within the framework of a church in which he is working or to which he applies for a post to practise a special religious conception. If the applicant’s views on women priests and thus his intentions regarding co-operation with female colleagues is found to be incompatible with the view generally held by the church in question the latter is not obliged to accept the applicant as its servant. On the other hand if the requirements imposed upon a person should be in conflict with his convictions he should be free to leave his office, and the Commission regards this as an ultimate guarantee of his right to freedom of thought, conscience and religion’. (ECnHR, No. 12356/86, *Karlsson / Sweden*, 8 September 1988, § 1)

These propositions were further affirmed in *inter alia* the cases of *E. and G.R. /*

1. See: ECnHR, No. 7374/76, X./Denmark, 8 March 1976, § 1.

*Austria*¹, *Gottesmann / Switzerland*², *Spetz et al. / Sweden*³ and *Williams / United Kingdom*.⁴ More recently, the European Court itself was confronted with a case in which dissident behavior within a church had led to criminal prosecution and conviction.⁵ A priest in the Greek Orthodox Church, who was involved in the advocacy of greater cultural rights for Macedonian Greeks, was prosecuted for disrupting religious congregations. As a consequence, he was sentenced to forty months' imprisonment. The applicant argued that this conviction undermined his position as a priest, and that accordingly his right to manifest his religion in worship and practice had been infringed. The Commission however decided that this sentencing did not interfere with his religious freedom. Therefore, it can be concluded that even the criminalization of the dissident behavior within a Church does not suffice to make such prohibition of that behavior a violation of the individual right to religious freedom. On the contrary, it is the *collective* right which is being protected here, as the individual exercises his right and is protected in his right to religious freedom at the moment he accepts or refuses to become part of a religious community or Church, and his right to leave the Church guarantees his freedom of religion in case he opposes its teachings.⁶

3. Concluding Thoughts

The constant case-law of the European Commission and Court provides that Article 9 of the Convention does not oblige States to ensure that religious groups or communities within their jurisdiction grant religious freedom to their members and servants. A community is free to enforce uniformity in religious matters, and it is not obligated to accept an individual as its servant or to allow him to carry out certain duties. A servant's or member's right to freedom of thought, conscience and religion *vis-à-vis* the community is guaranteed by his right to leave that community. This right to leave is essential in the European jurisprudence, in order to both ensure the collective, as the individual right to freedom of religion. As long as this right is granted, internal coercion towards uniformity cannot be illegitimate. Such is also essential in the protection of a pluralistic society, where dissidence may lead to the creation of new congregations with the right to organize their own religion freely, and where these different religious communities coexist peacefully with each other.

1. See: ECnHR, No. 9781/82, E. and G.R. / Austria, 14 May 1984.

2. See: ECnHR, No. 10616/83, Gottesmann / Switzerland, 4 December 1984.

3. See: ECnHR, No. 20402/92, Spetz et al. / Sweden, 12 October 1994, § 2.

4. See: ECnHR, No. 27008/95, Williamson / United Kingdom, 17 May 1995.

5. See: ECtHR, No. 45629/99, Tsarnikias / Greece, 30 March 1999, § 2.

6. This of course presupposes the right to leave a Church or religious community.

This case-law is nevertheless disputed. Firstly, by dissidents themselves who want to be able to manifest in worship and practice their divergent religion or belief, *within* their community. Secondly, religious communities often take a different point of view. For example, the question of the converts, or as they were traditionally referred to, apostates, is a highly debated issue. In Christianity, the traditional concept regarding conversion was formulated by Thomas Aquinas in his *Summa Theologica*. Accordingly, every person was free to adopt a faith and should not be forced to believe, but once a person had adopted the Christian faith, he was not free to leave this faith. In Islam, we may in this regard turn to the frequently cited Koranic verse 2: 256 '*No compulsion in questions of religion*', in which a more tolerant perspective may be discovered, although this is to date disputed and forms the subject of heated debates among Muslims.¹ This ambiguity has left its marks on international human rights law. Where it is clear that the right to change religion is established under article 18 of the Universal Declaration of Human Rights, later texts are more reserved. The International Covenant on Civil and Political Rights for example only speaks about the rights '*to have or to adopt a religion or belief of his choice*', where the UN Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief totally lacks any implicit or explicit mentioning of a right to change religion. In both cases, this was the consequence of objections by certain religious groups to binding conventions which include the right to change religion.² On the other hand, the UN Human Rights Committee in General Comment No. 22 explicitly stated that the right to change religion is part of religious freedom.³

Therefore it should be concluded that the above described European perspective, not lacking in clarity, does not enjoy universal acceptance. The interpretation of some religious rights in international human rights systems clearly does not comply with the perspective of religious communities.

Nevertheless, history has shown that not only human rights and religion are entwined, but also mutually influencing. It is as a consequence of this that religious rights have always been protected by universal human rights treaties, which consider these rights to be essential for the well-being of human kind. Such is the best proof for the fact that there can be no fundamental conflict between human rights and religion, but only a difference of opinion; a divergence of views that can only be sorted out through dialogue.

1. See: Lassen, 2006: 635.

2. See: Lassen, 2006: 630-631.

3. Adopted by the UN Human Rights Committee on 20 July 1993. UN Doc. CCPR/C/21/Rev.1/ Add.4 (1993).

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