

THE EUROPEAN COURT ON HUMAN RIGHT'S PERSPECTIVE ON FREEDOM OF RELIGION

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INTRODUCTION

Throughout the history of the humanity, the religious paradigm has been one of the phenomena with significant influence in shaping humanity's course. Society and religion have a parallel evolution process, historically emerging as concepts with reciprocal subject matter. The right to religious freedom is a logical corollary of the legitimacy of a democratic state. The Right of Religious Freedom consists of the "*right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance*"¹. This precept portrays the multiple-faceted aspects of religious freedom and its ambiguousness, as individual or collective demonstration of devotion to determined religion. In fact, this fundamental basic right has been causing more public awareness and media attention than any other, predominantly concerning (i) constant religious conflicts; (ii) difficulties in the consideration of opposite interests, on one hand the secular state, and on the other hand the freedom of demonstrating one's religion; and (iii) the civilisation clash incited by the events of September 11th2001. One's Faith, for its intrinsic private matters involved, is difficult to regulate on a juridical level: When is the collective interest superior to an individual interest? Where do the State's secularisation finish and the violation of the free religious option of each individual, particularly the right to freely demonstrate it, begins?

This paper intends to unveil the challenges faced by the protection of the right to religious freedom, enlightened by the European Court on the Human Rights' jurisprudence (ECHR – jurisdictional body, specifically created in the context of the European Convention on Human Rights).

¹ Article 18 of the Universal Declaration of Human Rights – UDHR.

CONCEPTUAL EVOLUTION OF THE RELIGIOUS FREEDOM

The right to religious freedom encountered its foundation in the principle of the separation of the religious confessions in the Constitutional State, being, as we now know it, a construction of the modern times. Since its origin, back to Maurya Empire in the III century B.C. up to its drafting, in the XX century on international conventions, this right has evolved according to the legal-theoretical conceptions dominant in each era and culture.

Even in Roman Law, this Right had deserved attention of Tertullian. As a pagan converted to Christianity, Tertullian wrote: "*We offend the Romans, as well as we are excluded of the rights and privileges that they fit, because we do not venerate the Gods of Rome*"². He questioned the unequal treatment based on his statute while belonging to a minority religion. Other individualities³ of his time also promoted religious freedom. Nevertheless, the origin of this basic right lies in the reaction, through Protestant's criticism, of the repressive excesses operated by the Inquisition considering the theological authoritarianism that characterized medieval Christianity. Around 1250 A.D., philosophers like Saint Tomas Aquinas, raised question of freedom, as the kernel of their reflections. In addition, the reaction to absolute monarchism, expressed in the ecclesiology exclusivism, in which theological truth was depicted as unilateral, it placed this matter in the core of the discussion. As the religion was imposed in the absolute monarchies, the people possessed no option to freely choose a religion. As a matter of fact, it was attributed to «freedom's» concept the idea of licentiousness. The religious truth was recognised as being absolute, and should not be questioned.

The philosophical and theoretical ideals of the American Revolution made a great advance towards the recognition and consecration of the right to the religious freedom possible. It acquired the statute of «fundamental right» in the Bill of Rights⁴, and in the clauses of religious freedom and separation of religious confessions from the State in the

² Tertuliano, 25.

³ Such as Eusébio de Cesareia, Hipólito Romano or Ireneu de Lyon.

⁴ Signed in Virginia in 1776, in which its 16th Article stated the following: "That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other".

First Amendment of the American Federal Constitution of 1787. In this way, it was recognised to all people, individually considered, the right of deciding freely on all aspects of their spiritual dimension, without any influence in this way practiced by the State (autonomy of the governing activity). The French Revolution also gave a worldwide important contribution for the protection of religious freedom, although the religious-political cleavage remained since that time up to the first half of the twentieth century. The French Revolution was philosophically inspired by the American Revolution, given the direct influence that American democratic principles of the XVIII century operated in all Europe⁵. From here, the religious freedom obtained consecration, albeit in a mitigated form, in all the Constitutions directly influenced by the Revolution.

The international movement for the protection of human rights emerged during the twentieth century - more precisely after the Second World War - given the evolvement of extremely dramatic circumstances, mainly the Holocaust: the biggest genocide noted in the History of Mankind. These dramatic events offered a favorable atmosphere for a (almost) universal defense of human rights. The general conscience that the violation of human rights, *maxime*, and the right to religious freedom could reach such a serious level, led Nations to commit on its defense, expressed in the famous “*never again*”. The international instruments, in which the defence of the human rights is based, assume the form of Declarations and Principles, by itself, deprived of effectiveness in their application. We cannot deny these instruments’ contribution in raising consciousness and recognition on certain fundamental rights common to all human beings. For the simple fact of being, regardless subjectivisms or considerations of any order, there are logical corollaries of the inherent human dignity. Moreover, the proliferation of these Declarations and Conventions on Human Rights came to take part in an effort carried out by the Constitutions emerged in the second half of the twentieth century that embodied the Welfare State. In 1945 the Charter of the United Nations⁶ was signed, which reiterates the forbiddance of any discrimination based on the religious option⁷. It was followed by the Universal Declaration

⁵ By the time of the Revolution, Thomas Jefferson was an ambassador in Paris.

⁶ Signed on 26 June of 1945 in San Francisco, USA by the representatives of 50 countries. Poland, which was not represented at the Conference, signed it later and became one of the original 51 member states.

⁷ Articles 1, § 3, 13, § 1, 55, (c), and 76, (c).

on Human Rights (UDHR), passed by the United Nations General-Assembly on December 10th1948. It refers «freedom» in its preamble as a value to guarantee in the future and condemns the discrimination based on one's religion⁸. And it establishes the right to religious freedom as an inalienable right of all individuals⁹. The universal nature of the UDHR allowed for the above mentioned advancements. However, we cannot ignore that this also represented a solemn proclamation of rights rather than a serious compromise on its effective protection.

And this is why we must consider the emergence of Conventions such an important advancement (in which we include the control mechanisms, their effectiveness and application methods and procedures). On November 4th1950 the European Convention on Human Rights (ECHR) was signed in Rome by State members of the Council of Europe. Religious freedom is contemplated in Article 9. Later, on December 16th 1966 the International Covenant on Civil and Political Rights was signed. Another important event on this matter was the fact that in 1981, the General-Assembly's Resolution n. 36/55 approved the Declaration of the Elimination of All Forms of Intolerance, and of Discrimination Based on Religion or Belief.

This wave of recognition and legal consecration of fundamental rights, either in the constitutional law post-Second World War, or in the international law, developed as a “conscious reaction against the legal positivism and the negation of a natural justice above the nations”¹⁰.

GENERAL ASPECTS OF THE ECHR'S JURIPRUDENCE ON RELIGION FREEDOM

The jurisprudence of international courts has an important role in helping to consolidate rules of International Law. In the part in which Article 9 §1 of the Convention transcribes Article 18 of the UDUR, it has been an object of interesting jurisprudence by the EUCHR. The right to religious freedom, despite its consecration in the main

⁸ Article 2.

⁹ Article 18.

¹⁰ See, MACHADO, Jónatas “A jurisprudência constitucional portuguesa diante das ameaças à liberdade religiosa”, (2006), p.68.

constitutional and international instruments, and the tendency for some secularisation meets, in theoretically-legal-level, hostile times¹¹.

The Welfare State's secularity does not have to mean ostracism of religious phenomenon. In this aspect, the ECHR's jurisprudence has not been very fortunate. In all its decisions, the ECHR reiterates its subsidiary nature in the appreciation of these questions. It delegates to the aimed States the obligation of offering protection to the conventionally recognised rights and fundamental freedoms, because the effective application of the principles comprised in the convention is easier by the State itself. It is thus worthy to acknowledge each country as having specific social-historical aspects that need to be considered. There are cultural specificities that involve necessary sensibility in the concrete case treatment by the ECHR. Therefore, the country in question is in a better position to pay attention to attend variants, and to apply in the best form what is established by the Convention. Appealing to this Court must be considered as a last resort, when all national jurisdictional means have been found insufficient.

The events of September 11th further disturbed the relations between the West and the Middle West, and had perverse effects on the perceptions of religious freedom. A suspicious atmosphere regarding Muslims was installed. This not only obstructed advancement in the consolidation of the right to religious freedom, but also obstructed its protection. The ECHR's jurisprudence regarding the religious freedom is not as wide in the consideration of other rights and fundamental freedoms, and notoriously, with less jurisprudential harmony of its decisions. A case is rarely judged as a direct violation of Article 9. In most cases, ECHR considers a consequential indirect violation of other UDHR standards and fundamental principles that as a whole offer a crossed protection to the right of religious freedom¹².

¹¹ See, Machado, Jónatas, "A jurisprudência constitucional portuguesa diante das ameaças à liberdade religiosa", 2006, p. 124.

Regarding this matter take the example of France, for instance, and its secular education's implementation.

¹² Whenever this is regarded as secondary in structuring the interpretation of those rules' content. This enables a more profitable analysis of the violation or inviolability of the rule *sub judice*.

THE ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS UNDER THE PERSPECTIVE OF THE EUROPEAN COURT ON HUMAN RIGHTS (ECHR)

Article 9 of the European Convention on Human Rights (from here on, referred to as Convention) is inspired in the original text by Article 18 of the Universal Declaration of Human Rights (UDHR), which explicitly guarantees the freedom of thought, conscience, and religion.

Article 9 of the Convention articulates that:

1. *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
2. *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.*

Firstly, it is necessary to point out that Article 9 protects, the «thought», the «conscience» and the «religious belief»: in this way, the atheism, as well as the agnosticism have the same kind of protection by the Convention. In the case of *Kokkinakis v. Greece*, the ECHR interpreted Article 9 as a general and broad right, so that the religious belief and freedom of conscience would be recognised as vital parts of an individual's identity. Thus, although the religious dimension is one of the basic elements of an individual's formation, structuring his conception about life, the same right or guarantee, is also a precise resource to legitimise agnostics, atheists, or even disinterested individual's freedom of thought. In accordance with Article 9, the ECHR already specified which «belief», in this rule's terms, includes all the discernment about one's life orientation conceptions (for instance vegetarianism). Moreover, two religious minorities - Scientologists and Jehovah's Witnesses – are frequent victims of prejudice by other religious groups. However, they also attain the benefit as being recognised and accepted as a religion. Nonetheless, we must underline that the «religious demonstration» protected by Article 9 assumes only the tenor

of worship, teachings, practice, and participation. The ECHR established that the Article in question protects only the acts that by its nature are intimately connected with one's belief, thought or devotion, inherent to known religious forms. Conversely, the same Article does not protect those individual acts influenced by religious feeling. In the case of *Arrowsmith v. U.K.*, the destruction (by the petitioner) of flyers that promoted the exit of the military force from Northern Ireland was forbidden. The ECHR underlined that it is necessary to consider the concrete case, in order to understand if the petitioner acted simply for pacifism or for personal reasons.

Additionally, it is necessary to unveil the four general principles of ECHR, which are related to the religious freedom guaranteed by Article 9. (i) The first principle is very important for defining what freedom religious practices in a democratic society concerns. The ECHR highlighted that the freedom of thought, conscience and religious practice, consists of the foundations of a democratic society, as stipulated by the Convention. The pluralism inherent to a democratic society (advanced throughout the centuries) depends on the feeling of freedom. (ii) The second principle establishes the idea that it is inherent to religious freedom, the right of an individual to opt for any religion, and to be able to alter his way, whenever he chooses. If this faculty was not recognised, Article 9 would be inadequate and deprived of content. (iii) The third principle refers to the idea that religious freedom means no discrimination between two or more religious groups. Often, the Court highlights States' figure as a "neutral and fair organizer of different religions' demonstrations, faith and belief". Therefore, any form of discrimination among religious groups will constitute an infraction to what the Convention stipulates. Besides, it is not up to the Government to establish any value or judgment on one's beliefs or religion. (iv) Finally, the fourth principle establishes that the freedom for the religious practice is also associated with the protection against the arbitrariness of States' intervention, as well as to the free choice for social leadership, and with respect to pluralism. The Court has determined that the right to religious freedom comprises the person's expectation regarding the pacific society function and the absence of any arbitrary intervention by the State. In fact, the autonomous existence of religious communities is essential for the effectiveness of pluralism in a democratic society and, in this way, to put to use the directives contained in Article 9.

In the case of *Metropolitan Church of Bessarabia and others v. Moldavia*, the Court reaffirmed the principles mentioned above, underlining the importance of the non State interference on the religious practices, and the legal protection of the religious communities by stating that, from the moment religious traditional communities started to exist in a legally organised form, any reading of Article 9 must take in consideration Article 11 of the Convention, protecting the social life of possible State's arbitrary interventions.

CONCLUSION

Given the diversity of legal-politically contexts which characterise States that ratified the ECHR and, therefore, the different level of consciousness raising and the effective protection of the fundamental rights among them, the ECHR has been looking for the balance between the innovation, in one hand, and the restriction, in the other (in what one doctrine denominates as «*calculated audacity*»). So, the different treatment given to the defence of some fundamental rights by this institution, particularly the religious freedom has been criticised by part of the doctrine. There is jurisprudential continuity logic of the ECHR in relation to domestic Courts.

The ECHR reiterates that the State's role as a coordinator of the practicing of several religions or beliefs among a society must be neutral and fair, and that it should carry its role to pursue objectives as maintaining public order, religious harmony and tolerance in a democratic society. However, is it not precisely the opposite that is being perpetuated by this lack of common principle in its decisions? Does this not represent a mechanism of separatism or segregation of the positive demonstration of one's religious choice? The right to religious freedom is a right doctrinally widely recognised, but jurisprudentially narrowed.

The ECHR considers that the use of strong religious symbols (such as the headscarf) in public schools is likely to have a certain effect of proselytism. In addition, it is referred to that the use of the Islamic veil cannot be easily reconcilable with a message of tolerance, respect for the neighbor and, above all, equality and indiscrimination, which all teachers must pass onto their pupils. This understanding has been responsible for the proliferation, in progressively more areas, of proposals and attempts towards the restriction of practicing one's religion either in its individual or in its collective aspect, putting in

question the dimensions of the right to freedom of religion that already were considered acquired and irreversible. Nevertheless, the fact of recognition of a subsidiary function to ECHR's jurisprudence has been considered as a general criterion for the interpretation of the rights and fundamental freedoms in the States' national courts that ratified the European Convention.

The pluralism which characterise current societies must be preserved as a conquest of democratic States. The States' secularity must represent an opportunity to meet, and offer a setting for plural dialog between all individuals interested in the settling of those conquests. Therefore, the relation between «State» and «religion» must not be reciprocally excluding, but rather complementary, providing the effort junction in the promotion of common interest, since both, though in different ways, take as an aim the satisfaction of human needs.

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