

Freedom of Religion as a European Value

Abstract

The article discusses freedom of religion perceived as a European value. The cooperation between the European states that is becoming broader and broader causes the sharp divisions between them disappear. Meanwhile, the internal legal acts formulate objectives that create a relationship between the internal domestic intentions and the community goals, also in the area of common values and beliefs. The European law recognizes freedom of religion (Article 9 of CEDH; Article 2 of TEU; Article 10 of the Charter of Fundamental Rights of the European Union) and offers a mechanism guaranteeing freedom of conscience and religious pluralism. The internal autonomy of an individual demands a guarantee of freedom of “thought, conscience and religion or belief”, and thus the international documents ascribe an absolute profile to that freedom. A separate legal nature shall be ascribed to “externalization” of beliefs or religion. The axiological foundation for freedom of creating the religious communities stems from the ideas of pluralism, democracy and peaceful dialogue. The listed values shall be perceived on the background of general axiology of the European community of law taking into account the primary feature of a democratic society: pluralism.

Keywords: European values, freedom of religion, democratic society, pluralism.

1. Introduction

In the 21st Century, there’s a common belief that only a democratic state remains able to ensure compliance with the human rights within its boundaries. This happens in situations in which, at the very same time, it may be noted that democracies pretending to follow this belief have a problem with achieving a satisfactory level of respect for the human rights, within the full range of those rights. However, situation as such should not be surprising, especially when one takes the whole historical and contemporary context of liberal democracy into

account. This type of democracy is tied to a variety of political traditions, including ones that are differing or even contradictory of one another¹.

1. Axiological foundation for individual autonomy and for the autonomy of religious communities

Protection of fundamental human rights in the EU is a result of long-running evolution of the Court of Justice case-law². The Court of Justice, on the basis of Treaty competencies to ensure compliance with the law (Article 19 of the TEU), has deployed certain basic guarantees for individual protection, in a form of “unwritten” rules of the law, the importance of which, within the hierarchy of the EU law norms, is equal to the importance of the Treaties³.

The internal autonomy of an individual demands a guarantee of freedom of “thought, conscience and religion or belief”, and thus the international documents ascribe an absolute profile to that freedom. A separate legal nature shall be ascribed to “externalisation” of beliefs or religion⁴. The axiological foundation for freedom of creating the religious communities stems from the ideas of pluralism, democracy and peaceful dialogue, as autonomous existence of religious communities is required for the pluralism to exist in democratic society⁵. This provides the religious communities with an appropriate protection from the public authorities getting involved, but it also imposes additional obligations on those communities. As the religious communities constitute an ingredient of a democratic society, they also need to respect the basics of this society⁶. This justifies formation of limitations that may be stemming either from the state’s competency to protect its integrity, security and public policy⁷, or from the obligation to protect values

¹ Morange, 2007, 73-74.

² Apps. 29/69 Stauder, LexPolonica no. 413528; 11/70 Internationale Handelsgesellschaft, LexPolonica no. 346428; 4/73 Nold, LexPolonica no. 1247716; 44/79 Hauer, LexPolonica no. 348678.

³ Opinion issued by the Advocate General 18.3.2004, C36/02 Omega case, section 49.

⁴ Renucci, 2013, 165-166.

⁵ ECtHR 26.10.2000 Hasan and Chausch v. Bulgaria, app. no. 30985/96, section 62; ECtHR 12.12.2004 the Supreme Holy Council of the Muslim Community v. Bulgaria, app. no. 39023/97, section 93; Garlicki, 2010, 577.

⁶ P. Cumper, 2014, 597-600.

⁷ ECtHR 13.12.2001 the Metropolitan Church of Bessarabia and others v. Moldova, app. no. 45701/99, section 125.

of general nature, constituting an ideological foundation for the Convention⁸. It is an absolute obligation for the public authorities to maintain neutrality and remain impartial through actions “exercised its discretion reasonably, carefully and in good faith”⁹. Neutrality does not equal isolation, as the state shall not have a character of negative secularism, it should adopt positive secularism instead. Thus, the state may act as an “organiser of the exercise of various religions, faiths and beliefs”¹⁰. This is not synonymous with the order to treat all of the religious community in an equal manner. The historical and cultural factors, as well as the actual difference between the number of believers may justify a certain separation – in legal sphere and in the actual existence. This pertains especially to the model of a relationship between a country and the religious communities¹¹.

The cooperation between the European states that is becoming broader and broader causes the sharp divisions between them disappear. Meanwhile, the internal legal acts formulate objectives that create a relationship between the internal domestic intentions and the community goals, also in the area of common values and beliefs. The European law recognises freedom of religion (Article 9 of CEDH; Article 2 of TEU; Article 10 of the Charter of Fundamental Rights of the European Union) and offers a mechanism guaranteeing freedom of conscience and religious pluralism¹².

2. Freedom of thought, conscience and denomination as one of the foundations for a democratic society

Article 9. of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as ECHR)¹³ pertaining to freedom of thought, conscience and religion, adopts a solution which is reminiscent of other international documents. Freedom of religion includes the freedom to change religion or beliefs and freedom to externally express them – individually or jointly with other people, publicly or privately, by cultivating the religion, spreading it,

⁸ ECtHR 13.2.2003 *Refah Partisi and Others v. Turkey*, app. no. 41340/98, 41342/98, 41343/98 and 41344/98, section 99; Garlicki, 2010, 577-578.

⁹ ECtHR 5.4.2007 *the Church of Scientology Moscow v. Russia*, app. no. 18147/02, section 87.

¹⁰ ECtHR 13.2.2003 *Refah Partisi and Others v. Turkey* case, app. no. 41340/98, 41342/98, 41343/98 and 41344/98, section 91.

¹¹ Garlicki, 2010, 579.

¹² Chopin, 2018, 3-4.

¹³ ECHR, Dz.U. [Journal of Laws] 1993.61.284. with further amendments.

practicing it and conducting rituals. The Court indicates four basic elements: freedom of thought, freedom of conscience and freedom of denomination all constitute one of the foundations of the democratic society; implementation of this freedom constitutes “one of the most basic elements defining the identity of the believers and of their life concepts”¹⁴; this freedom constitutes a precious value for atheists, agnostics, sceptics and non-involved people, and their existence, and taking advantage of this freedom constitute a necessary premise for the “The pluralism indissociable from a democratic society, which has been dearly won over the centuries” to exist¹⁵.

Freedom of “thought, conscience and religion” refers to a state of human mind, and only a natural person may be a subject to this freedom¹⁶. Freedom of “thought” refers to being in possession of and shaping opinions and views pertaining to any matters possible and having any content¹⁷. “Thoughts” do not have to form any holistic or coherent system for perceiving the world, they are a form of intellectual reaction of a human being to the surrounding reality. Thoughts constitute a basis and premise to formulate a more organised view of this world and the values, adopting a form of “conscience”, “beliefs”, “faith”¹⁸.

Freedom of conscience refers to being in possession of and shaping of a set of opinions and beliefs corresponding with a specific system of values based upon the definition of “good” and “evil”. The conscience, considering its very nature, has an objective connotation, and despite its individual character it remains outside the scope of individual control, dictating proper assessment of the undertaken actions. The conscience’s feelings constitute an axiological foundation for empirical or perfect perception of the world taking on a form of beliefs.

The beliefs have a definition which is narrower than “thoughts” and “conscience” and “opinions” or “views”. However, it is somewhat close to the definition of “religious and philosophical beliefs”¹⁹. Formally, the “beliefs” need to form a system

¹⁴ Renucci, 2012, 228-229.

¹⁵ ECtHR 25.5.1993 *Kokkinakis vs Greece*, app. no. 14307/88, section 31; ECtHR 13.2.2003 *Rafah Partisi and others vs. Turkey*, apps. no. 41340/98, 41342/98, 41343/98 and 41344/98, section 90; ECtHR 10.11.2005 *Leyla Sahin v. Turkey*, app. no. 44774/98, section 104.

¹⁶ Garlicki, 2010, 556.

¹⁷ Renucci, 2013, 160-161.

¹⁸ Garlicki, 2010, 556.

¹⁹ F. Sudre, 2008, 510-512.

that achieves a certain degree of “cogency, seriousness, cohesion and importance”²⁰ and they shall constitute a coherent view of a problem of basic character²¹. Within the material aspect, the issue of “beliefs” refers to the views that deserve respect in a democratic society and that do not contradict the human dignity, pertaining to the relevant and serious aspect of human life and conduct²².

We had to wait quite some time for the important judgment issued by the ECtHR on May 23rd 1993, with regards to the *Kokkinakis v. Greece* case²³. The ECtHR emphasised freedom and its meaning decisively here. This is especially important as even though the content of this judgment was later being adopted in case-law, it then had a form which was milder and more cautious. The ECtHR frequently decided to refer to other articles of the European Convention, rarely reaching out to Article 9 of the said Convention²⁴. The European Court assumed that the states make use of a wide margin of appreciation in defining their relationships with churches, also referring to lack of a common standards within that domain, when it comes to Europe. This means that the European Court turned out to be very tolerant towards the states, getting involved in their legal solutions that often took into account solely a liberal perspective which has not always been right and effective²⁵.

It shall be noted though that the European Court of Human Rights was not hesitant in criticising the direct violation of freedom, both in case of individuals, as well as in case of religious minorities. The Court was also assuming an opposing stance, when it comes to the states getting involved in resolving the religious communities internal disputes, recalling the fact that the communities shall be making use of actual autonomy. Meanwhile, the state shall remain impartial and neutral within that regard²⁶.

Freedom of religion, even though this is not explicitly included in Article 9, includes an expectation, on the part of the believers, to be able to gather in a free

²⁰ ECtHR 25.2.1982 *Campbell and Cosans v. The United Kingdom*, app. no. 7511/76 and 7743/76, section 36; Garlicki, 2010, 557.

²¹ Decision ECtHR 18.3.2008 *Blumberg v. Germany*, app. no. 14618/03.

²² ECtHR 25.2.1982 *Campbell and Cosans v. The United Kingdom*, app. no. 7511/76 and 7743/76, section 36; Garlicki, 2010, 557.

²³ ECtHR 25.5.1993, *Kokkinakis v. Greece*, app. no. 14307/8.

²⁴ Morange, 2007, 258.

²⁵ Morange, 2007, 259.

²⁶ ECtHR 13.12.2001 *the Metropolitan Church of Bessarabia and others v. Moldova*, app. no. 45701/99, sections 113-114.

manner, i.e. free from an arbitrary involvement of the state authorities²⁷. And thus, the freedoms indicated in the Article 9 of the European Convention shall only be considered on the background of general Convention axiology, not only oriented towards guaranteeing of individual rights, but also oriented collectively and towards establishment of a “democratic society”. Considering the above, one should note that pluralism is a basic and necessary feature of a society as such²⁸.

3. European value of human autonomy and subjectivity, based upon the inherent personal dignity

The fundamental rights guaranteed by the European Convention (despite the lack of formal joining of the EU to the Convention) are complied with by the EU, on the basis of Article 6 section 3 of the TEU. This is because they constitute general rules of the law. In practical terms, the Court of Justice of the European Union is driven towards maintaining compliance of its case-law with the interpretation of the European Convention as done by the Strasbourg Court²⁹. Charter of Fundamental Rights of the European Union is a legally binding document that constitutes the EU’s primary law. However, most of the rights contained within that Charter are not valid solely on the basis of the Charter itself, the rights in question already exist, since they constitute general rules of the law. The Charter only confirms them³⁰.

The first sentence of the preamble to the Charter of Fundamental Rights of the EU reads as follows: “The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values”³¹. This sentence indicates that the EU does not want to be perceived solely as a body of common interest, as it is also to be a community based upon common beliefs, a strong axiological foundation and on a spiritual, cultural and civilisation-derived community³². This is clearly confirmed by the following sentence of the preamble:

²⁷ ECtHR 26.10.2000 *Hasan and Chausch v. Bulgaria*, app. no. 30985/96, section 62; ECtHR 13.12.2001 *the Metropolitan Church of Bessarabia and others v. Moldova*, app. no. 45701/99, section 118; Garlicki, 2010, 577.

²⁸ Garlicki, 2010, 553.

²⁹ Barcz, Górka, *Wyrozimska*, 2012, 329.

³⁰ Barcz, Górka, *Wyrozimska*, 2012, 333.

³¹ Charter of Fundamental Rights of the EU, EU Official Journal 2007, C. No. 303, p.1.

³² Zoll, 2016, 42.

“Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law”³³.

The Charter of Fundamental Rights lists the human dignity within the Preamble alongside freedom, equality and solidarity as one of the indivisible and common values upon which the European Union has been founded. Article 1 of the charter reads: “Human dignity is inviolable. It must be respected and protected.” The Charter makes an attempt at ascribing a double meaning to the human dignity. On one hand it classifies dignity, alongside freedom, equality and solidarity, as one of the fundamental rules of civilisation. On the other hand, it treats the human dignity as one of the values that are a subject to protection. It seems that lack of a clear emphasis placed on the fact that the human dignity constitutes a source of all freedoms and rights and also acts as a justification for any freedom, equality and solidarity is a certain deficiency of the Charter. The human dignity shall constitute a model for the law introduced, it shall also act as a criterion for eliminating the solutions breaching the human dignity from the legal system. No type of freedom and no right can be protected, if they attack the human dignity. The freedom cannot be a value that stands beside the human dignity, as it is not placed at the same level in the hierarchy of values. Only human dignity is innate and inalienable. All of the other values are often limited, to a varying extent. This also applies to all of the freedoms and fundamental rights³⁴.

The Article 2 of the TEU lists the values upon which the EU is based. The values correspond with the rules and principles recognised by the EU and contained in the detailed provisions of treaties and case law of the EU courts, including: human dignity, freedom, democracy, equality, the rule of law and respect for human rights and fundamental freedoms. The problem of axiological foundation of human rights makes it possible to assume that value of the human dignity shall be viewed as a basis for their existence and as their content³⁵.

Defining the basic values within the article 2 of the TEU has to shape the community’s European identity (alongside the identity of the nation member states), that would lead towards emergence of a feeling of European solidarity. Human dignity and freedom can be listed among the fundamental principles of

³³ Charter of Fundamental Rights, Preamble.

³⁴ Zoll, 2016, 46-47.

³⁵ Piechowiak, 1999, 370-371.

the EU. Freedom is a value that is worthy of being protected, as it makes it possible to expand and reinforce the sphere of freedom in an individual dimension. This is a principle of ownership, since it is based on recognition of autonomy and subjectivity of a human being through a reference to a concept of a person whose dignity is innate. The human dignity is ranked at the top within the EU axiology, as a value of a fundamental meaning³⁶. The freedoms listed need to be perceived on the background formed by general axiology of a community of law that recognizes pluralism as a basic feature of a democratic society.

The regulation of Article 1 section 1 of the Charter of Fundamental Rights of the EU explicitly copies the Article 1 section 1 of the ECHR³⁷. Even though the Article 10 of the charter does not repeat the statement made in Article 9 section 2 of the ECHR that reads as follows: “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.” Meanwhile, section 2 of the Article 10 of the charter has been added that reads as follows: “The right to conscientious objection is recognized, in accordance with the national laws governing the exercise of this right.”³⁸. The Secretariat of the Convention preparing the textual layer of the Charter suggests that the right mentioned in Article 10 section 1 of the Charter corresponds with the right guaranteed by Article 9 section 1 of the ECHR, and in line with Article 52 section 3 of the charter, it covers a similar scope and has a similar meaning. It was established *expressis verbis* that limitation of freedom of thought, conscience and religion shall correspond with the limitations resulting on the grounds of

³⁶ Gilowski, 2010, 85-88.

³⁷ A similar content is included in Article 18 of the Universal Declaration of Human Rights, that reads as follows: “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 teaching, practice, worship and observance.” Universal Declaration of Human Rights, issued on Dec. 10th 1948. A similar content is contained in the Article 18, section 1 of the International Covenant on Civil and Political Rights, within which it is stipulated that: “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.” International Covenant on Civil and Political Rights, Dz. U. 1977, vol. 38, item 167.

³⁸ R. McCrea, 2014, 298-300.

Article 9 section 2 of the ECHR. Furthermore, the clarification notes that the rights guaranteed by Article 10 section 2 of the Charter corresponds with the domestic constitutional traditions and evolution of national legislation within that regard³⁹.

The provisions contained in the Charter of Fundamental Rights, as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms, particularly in the light of the case-law of the European Court of Human Rights and the Court of Justice, resolve numerous European problems within the scope of the right to religious freedom. Ascribing a legal character (Article 6 section TEU) to the Charter of Fundamental Rights, and the will of the EU to join the Convention for Protection of Human Rights and Fundamental Freedoms (Article 6 section 2 of the TEU) are even more relevant, in the light of the above⁴⁰.

4. Conclusion

Freedom of religion seen as a European value shall be perceived on the background of the general axiology of the European community of law, taking into account pluralism as a basic feature of a democratic society. Recognition of the European values is compatible with ideological neutrality of the organisation. Adopting a system of values extends beyond the area of ideology, since the human rights are not dependent on the system of ideology. They are rather dependent on the reality of the human existence. And thus, the internal autonomy of an individual demands a guaranteed freedom of “thought, conscience and religion”, hence the absolute character of that freedom. Meanwhile the axiological foundation for freedom of creating religious communities is formed by the ideas of pluralism, democracy and peaceful dialogue.

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³⁹ J. Sobczak, W. Sobczak, 2013, 346.

⁴⁰ Barcz, Górka, Wyrzymska, 2012, 51.

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