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## **FREEDOM OF CONSCIENCE AND RELIGION IN THE DOCUMENTS OF THE COUNCIL OF EUROPE – SELECTED ISSUES**

### ***Abstract***

*The aim of the text is to present the evolution of the system of the Council of Europe in the field of the protection of the freedoms of conscience and religion.*

*The article's theses are: at first the Council of Europe focused on matters connected with individual rights; later, however, the organisation laid strong emphasis on the protection of religious minorities' rights; in the 1990s the Council of Europe became an important platform for discussions on religion as a phenomenon and world-view-motivated speech; after 2001 a debate flared up over the concept of counteracting so-called defamation of religion.*

**Key words:** *religious policy, the Council of Europe, freedom of conscience and religion, the protection of religious minorities' rights, religion and democracy, defamation of religion*

### **1. Basic regulation**

The Convention for the Protection of Human Rights and Fundamental Freedoms (CPHR) is the principal document in the system of the Council of Europe addressing the protection of an individual's rights. It should be stressed that the convention draws on The Universal Declaration of Human Rights (UDHR) – it also states that “the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms” [11].

Article 9 section 1 of the document stipulates that “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]. Nevertheless, section 2 of the article in question outlines possible and permissible constraints on those freedoms. Under the regulation “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”<sup>1</sup> [2].

As Lech Garlicki said, the regulations “were subject to no far-reaching controversies in the course of the preparatory work on the convention.” To some extent it was a consequence of “adopting – practically in its entirety – article 18 of the UDHR in order to establish the scope of protected human rights and freedoms.” It helped to avoid disputes which arose when the Declaration was being drafted.

Article 9, similarly to its equivalent in the UN system, stems from the premise that within freedom of thought, conscience and religion two areas should be distinguished: interior and exterior. *Forum internum* is defined as “the right to have and freely express one’s thoughts and views instilled by either ethical or religious value system.” *Forum externum*, in turn, where individuals act alone or in group, refers to “the right to manifest religion or beliefs, which implies social interaction through communication with other people and social institutions.” The interior area includes absolute, non-restrictable rights whereas the exterior rights and freedoms can be subject to curtailment in accordance with article 9 section 2.

Garlicki remarked that under article 9 of the Convention, the limits for freedom of thought, conscience and religion are determined according to the standard formula for liberty laws. It means, in the analyst’s view, that all acceptable restrictions should comply with three requirements: they have to be formally legal,<sup>2</sup>

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<sup>1</sup> Article 14 is equally essential, it stipulates that “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status” [2]. However, under Protocol 1 of ECHR (Article 2) “no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions” [2].

<sup>2</sup> In Garlicki’s opinion, this means that they should be prescribed by law. However, drawing on Jacek Sobczak’s remarks, it needs to be noticed that the English text uses the expression “prescribed by law”. The expression should be interpreted taking

materially legal<sup>3</sup> and indispensable.<sup>4</sup> Moreover, the state's authorities, which are given some leeway, use it to alter the constraint by factoring in the local political, social and cultural backdrop. Finally, it needs to be remembered that the respect for freedom of thought, conscience and religion requires the state to be not only passive but also active [4, p. 552]. Therefore, not only should the authorities not infringe upon the freedoms stipulated in article 8, they should also safeguard them from disrespect from private entities [4, pp. 552-553].

Garlicki commented on two other aspects of the interpretation of article 9 CPHR. Firstly, it needs to be remembered that "in extraordinary circumstances the state citing article 15 CPHR may claim suspension of the regulations stated in article 9 and consequently be temporarily exempt from adhering to it." Nevertheless, doubts arise as to whether that suspension also includes the interior area of freedom of thought, conscience and religion, which, as specified earlier, encompasses absolute rights and liberties [3, p. 552]. Secondly, the liberties specified in article 9 serve not only the individual. Complying with them promotes a democratic axiology which forms a sound basis for the ECHR. This perspective leads to the conclusion that freedom of thought, conscience and religion is particularly significant. Therefore, it should be allowed as ample a scope as possible, provided it complies with the values which the European Court of Human Rights (ECHR) defined as "foundations for a democratic society."

Consequently, it is notable that article 9 cannot be easily interpreted. The ambiguity of the terms applied therein and, above all, the complexity and sensitivity of the issues it addresses, put its interpretation and application at a constant risk of being inconsistent and arbitrary. Therefore the

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into full account the ruling in the *Sunday Times v the United Kingdom* case. The word "law" in the expression "prescribed by law" was ruled to refer not only to statutory law but also to common law. Therefore, the expression "prescribed by law" lays down two requirements. First, the legal norm has to be accurately applicable – the citizen has to be able to properly follow indications in the norm proper to a given case. Secondly, a norm cannot be treated as "law" if it is not "sufficiently precise to enable citizens to adjust their behaviour. They have to be offered the possibility – if needed through counseling – to foresee, to a reasonable extent and in certain circumstances, consequences that are brought by a given conduct. Those consequences do not need to confirm the prediction accurately, experience has proved it impossible" [9, pp. 7-8].

<sup>3</sup> That is to say "interconnected with one of the lawful objectives" enumerated in Art. 9 section 2 [4, p. 552].

<sup>4</sup> That is to say "needed in a democratic society" [4, p. 552].

commentaries on this article often prove to be a bundle of entangled, interconnected, vague and emotive references such as “democratic society” or “democratic rule of law.” It all classifies article 9 as not only a tempting tool of argument, but it is also resorted to in order to persuade, often through manipulation. Each time its use carries great risk, and can lead to insoluble and highly socially divisive conflicts. For those reasons, over the years the ECHR *de facto* avoided citing the regulations in its rulings. Cases dealing with freedom of thought, conscience and religion were most likely to fall within the scope of article 10. This refers to freedom of expression including the right to hold opinions and to receive and impart information and ideas without government interference, and regardless of a country’s borders. The Court’s attitude towards religious issues is, therefore, prudent.

However, as Garlicki noticed, this situation has been changing for some time now and the ECHR increasingly often cites article 9 in its justifications [4, p. 555]. This change should be seen not only as an indication of the development of Strasbourg case law. It is also a peculiar sign of the times, when religious conflicts escalate and religious hatred runs deep, which undermines the thesis that in a democratic society religions or belief systems can, and have to, coexist peacefully. Furthermore, it should be noted that the ECHR’s courage may mean that, after years of existence, the institution has developed a set of beliefs, forming a certain worldview which, though not directly expressed, is easily perceptible and held by the judges and administration in Strasbourg. The system regulates the activity of the Council of Europe, as well as makes up a set of opinions and beliefs which the ECHR firmly furthers. As a result of the Court’s activity, greater emphasis is placed on the education of young Europeans, which results in a more persuasive discourse.

## **2. The relation between religion and democracy**

The UN and, similarly, the system of the Council of Europe has been showing a growing interest in not only freedom of conscience and religion as rights to which an individual is entitled, but also religion itself and its influence on political and social life. The thesis is supported by the Recommendation 1396 (1999) Religion and democracy [6]. The document explains that the Council of Europe under its statute is an “essentially humanistic” organisation and “at the same time, as a guardian of human rights, it must ensure freedom of thought, conscience and religion as af-

firmed in Article 9 of the European Convention on Human Rights.” The document also mentions that “manifestations of religion should comply with the limitations set out in the same article.” Moreover, an interest in religions was expressed, and it was admitted that “their co-existence and interaction have considerably enriched the European heritage” [6].

Interestingly enough, in the same document the Parliamentary Assembly stated that “even in a democracy, there are still certain tensions between religious expression and political power.” The so-called ‘religious aspect’ has given rise to numerous threats to democracy, including intolerant fundamentalist movements, terrorism acts, racism, xenophobia, ethnic conflicts and gender discrimination<sup>5</sup> [6].

According to the document, politicians should not decide on religious matters, however, religions should not replace democracy, either. They should comply with the rulings of the ECHR and the rule of law. Additionally, it has been held as untrue that democracy and religion are mutually exclusive. There was even an attempt to prove that democracy creates a perfect breeding ground for freedom of thought, conscience and religion, while religions are “a valuable partner for a democratic society.”

According to the authors of the text, states may either implement the model of the separation of church and state, or may choose to inter-relate the two. Whatever the policy, they are bound by the ECHR to ensure fair development conditions for all religions<sup>6</sup> [6].

Under the resolution, religion-related stereotypes can be eliminated through education, if properly designed and implemented. Therefore, it is recommended to overhaul the curricula at schools and at universities in order to promote “a better understanding of the various religions.”<sup>7</sup>

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<sup>5</sup> It was stressed, however, that “[e]xtremism is not religion itself, but a distortion or perversion of it.” It was also countered that “[n]one of the great age-old religions preaches violence. Extremism is a human invention that diverts religion from its humanist path to make it an instrument of power.”

<sup>6</sup> The resolution states that problems emerge when the authorities treat religion like an object and vice versa. Conflicts also arise from “mutual ignorance, the resulting stereotypes and, ultimately, rejection.” The authorities are pledged to counteract the entanglement of religion in activities of “fanatical religious minorities.” Nevertheless, “[r]eligious extremism that encourages intolerance, prejudice and/or violence is also the symptom of a sick society and poses a threat to a democratic society,” so it can be combated provided “the authorities tackle society’s real problems” [6].

<sup>7</sup> It was stressed that “religious instruction should not be given at the expense of lessons about religions as an essential part of the history, culture and philosophy of

The above-mentioned remarks encouraged the governments of member states to engage in activities in four areas. Firstly, they committed to guaranteeing all citizens freedom of conscience and religious expression as stipulated in the UDHR. Secondly, they embraced religious education. Thirdly, better inter-religion relations were fostered. Lastly, they agreed to promote social and cultural means of religious expression.

The resolution comes across as more severe than its equivalents in the UN documents. The Council of Europe generally appreciates religious activity, treating it as a source for numerous social, political and cultural inspirations. Nevertheless, the organisation follows an agenda which takes a harder line on the deep-rooted, negative religious potential which poses a threat to human rights and democracy. As a result, the document is based on a dichotomy – either states and citizens will ensure the proper fostering of religion, or it will trigger conflicts and tragedies. In order to convince citizens to adopt the former stance, the authors of the resolution introduce some of the theses as axioms. It is a foregone conclusion then, that there are peace-loving religions and militant fundamentalisms, that religion and democracy are not mutually exclusive, that religious extremism does not exist in a healthy society and that a well-designed education rids a society of religious radicalism. The document was meant to raise its addressees' hopes and mobilise them to work towards cooperation between governments and religions. The resolution, whereby it is desirable and feasible that countries and religions come together to safeguard the right therein contained, is seen as a common and unquestionable good [6].

### **3. Rights and liberties of religious minorities**

The Council of Europe does not ignore the problems related to the rights and liberties of religious minorities either. The evolution of this matter also runs parallel to how it developed in the UN system. Namely, originally within the Council of Europe the focus was on freedom of thought, conscience and religion as a set of rights granted to an individual, but often exercised by communities. The Framework Con-

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humankind.” It was remarked that religious leaders also should join the fight against prejudice and that more importance should be given to ecumenical movement and interfaith dialogue [6].

vention for the Protection of National Minorities [3] was not adopted until 1995.

The document stresses that an individual's affiliation with various communities is also beneficial. The affiliation, depending on the nature of the group, shapes the individual's ethnical, cultural, linguistic and religious identity accordingly<sup>8</sup> [8, pp. 127-133].

Under article 8, it was decided that "every person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organisations and associations." In turn, article 9 stipulates that within their legal framework the signatory states should allow for easy media access for national minorities "in order to increase democracy and disseminate cultural pluralism"<sup>9</sup> [3].

It is worth noticing that the Convention was meant to be a cast-iron guarantee (unlike other documents in force at that time) of minority rights and liberties, including rights and liberties of a religious nature. Additionally, it was based on an inexplicit premise, whereby protection of national minorities does not contradict the protection of an individual. It coincides with the view expressed by John Rawls who in the 1980s drew a distinction between the comprehensive and political liberalism, at the

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<sup>8</sup> The sense of being part of a minority was recognised as a good which deserves respect. It was also stated that the parties of the Convention should strive so that the representatives of minority communities be able to "express, preserve and develop" their identity. According to Article 5, the signatory states are obliged "to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage." Moreover, the Convention binds states to "encourage a spirit of tolerance and intercultural dialogue," take effective measures, "promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media" and protect citizens "who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity" [1, pp. 209-225; 10, pp. 25-61].

<sup>9</sup> The convention also includes decisions on the development of education and scientific research, so as "to foster knowledge of the culture, history, language and religion" of national minorities and the majority of people living in individual countries. Finally, under Art. 17, "[t]he Parties undertake not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage" [3].

same time embracing the latter [5, p. 283]. Comprehensive liberalism is founded on the idea that individual autonomy is the highest value, and that human rights are its embodiment. Political liberalism argues that tolerance, which rejects the vision of society that calls for a “reasonable revision of views,” is more important. In Will Kymlicka’s opinion, political liberalism holds as intolerant, and thus illiberal, any pressure under which non-aggressive and non-individualistic religious or ethnic minorities are made to follow the “liberal rules of individual freedom” [5, p. 283]. Moreover, the concept in question demands acceptance of small communities – on the one hand voluntary and harmless to the democratic order, and on the other hand – inward-looking and impeding the potential secession of its members (most oft-quoted setbacks may range from expropriation and no right to education for girls, to limited access to education and no access to media) [5, p. 282].

Kymlicka highlights that Rawls, being an advocate of political liberalism, argued in favour of reconciling the principle of individual autonomy with the virtue of tolerance towards communities. This balance is meant to be struck in the process of overlapping consensus, whose feasibility is best pictured by the debate on the freedom of conscience. According to Kymlicka’s interpretation, Rawls is believed to have said that this freedom is indispensable from the point of view of a liberal who champions individual rights [10, p. 286]. However, it is also upheld by a member of an isolationist minority who, first and foremost, demands respect for the rights and liberties of a community [5, p. 287]. Thus, J. Rawls said, liberal democracy does not need to resist separatist religious groups, as both parties care about the freedom of conscience.

Nevertheless, the way Kymlicka sees it, this view has been elaborated under a false notion. He conceded that the conclusions drawn from the liberal and communitarian protection of religious freedom may at times overlap (both of them reject the imposition of standards by the dominant community), but their outlook on religious freedom differs widely. Liberals, unlike communitarians, advocate not only freedom of belief but also the freedom to criticise and reject “inherited convictions.” In other words, under liberal ideology “heresy, proselytism and apostasy” should be protected, as they are manifestations of an individual’s right to self-definition and revision of their views. A communitarian will criticise this perception as inimical and destructive to a tradition, therefore it should be warded off [5, p. 287].

The arguments put forward by W. Kymlicka are, to a large extent, convincing. The view that freedom of conscience and religion for individuals



and groups need not coincide rings especially true. The extension of an individual's rights may restrict a community's rights, and the other way round. Such being the case, both Rawls's concept and the Framework Convention prove to be too optimistic. They *a priori* assume a possible harmony between the rights or liberties of individuals and communities, which – at least partially – is a counterfactual claim. The fact may demonstrate, and probably does, that the policy makers set out to create something more than a legal tool. They also devised a measure to shape opinions and perceptions about the role minorities occupy in a democratic society. The framework convention serves to persuade that minorities are friendly to individuals. Of course, the message is to convince the citizens of the signatory states; however, first and foremost it carries a suggestion for minorities that they should tailor their rules to those of a liberal democracy. Consequently, the question arises as to whether such modifications mean the communities unambiguously renouncing their often isolationist identity.

#### **4. Freedom of conscience and religion in the documents of the Council of Europe after 2001**

The international debate on freedom of conscience and religion was reignited and intensified in the first decade, and at the beginning of the second, of the 21<sup>st</sup> century. Undoubtedly, the most spectacular reason for that was provided by the 9/11 terrorist attack. Furthermore, as time goes by, the Euro-Atlantic world has been leaving behind the totalitarian past with its lack of respect for human dignity and its derivatives – individual rights and liberties. Technological advancement has also played a significant role and made us revisit the existing judgments of human nature and consequently of what is important, or in fact, essential.

The UN then started to call on the international community to vigorously oppose increasingly numerous cases of defamation of religion. The council of Europe fiercely criticised those cases, recognising them as a serious threat, especially to freedom of speech, but also to freedom of thought, conscience, religion and beliefs.

For instance, in 2007 the Parliamentary Assembly of the Council of Europe adopted Recommendation 1805 (2007) on blasphemy, religious insults and hate speech against persons on grounds of their religion [7]. The document was an expression of approval for the creation by the UN of the Alliance of Civilizations (section 7), understood as a platform to

“study and support contacts between Muslim and so-called western societies” [7]. It also stated, however, that blasphemy and religious insults cannot be classified as a criminal offence [7].

According to section 10, “in the past, national law and practice concerning blasphemy and other religious offences often reflected the dominant position of particular religions in individual states” [7]. Modern Europe, it was stated, has been marked by a growing religious variety. For this reason and also in order to incorporate “the democratic principle of the separation of state and religion” an overhaul of the existing regulations on blasphemy is needed [7].

The Parliamentary Assembly stressed in section 13 that under article 9 ECHR religions may develop their own value systems for their followers. It means that “they are free to penalise in a religious sense any religious offences.” However, a stipulation was made about the punishment administered within each religious system – it “must not threaten the life, physical integrity, liberty or property of an individual, or women’s civil and fundamental rights” [7].

According to the recommendation, member states should act on four postulates in accordance with national law and practice. Firstly, open debate on religion- and belief-related issues has to be allowed and no religion should be favoured in a way that would not be in keeping with article 10 and 14 ECHR. Secondly, all opinions which incite hatred, discrimination or violence towards a person or a group of people on religious grounds or for other reasons, should be penalised. The third postulate states that there should be a ban on actions which “intentionally and severely disturb the public order and call for public violence by references to religious matters.” In accordance with the fourth postulate, national law and practice should be overhauled in order to “decriminalise blasphemy as an insult to a religion.”

## **5. Conclusion**

International regulations on freedom of conscience and religion abound, also within the Council of Europe.

An increasing number of documents favours the creation of new terms that denote religion-related issues and in particular determine liberties and rights, as well as their violations and threats to them. Unfortunately, however abundant the terms, they do not translate into the clarity of the documents. On the contrary, numerous, emotionally-charged expressions form a tangled web which can be interpreted accurately only with great effort, if at all.

The analysis of selected texts also leads to the conclusion that religion is hardly ever denied within the Council of Europe. It is regarded as a significant area of human activity, even though it is difficult to say whether it is treated as part of a culture, or as a non-cultural element. It is often said that all religions have a positive influence on the development of humankind. It is true that at times the authors of the quoted articles point out that, many times, religious hatred sparked large conflicts and tragedies; however, they immediately remark that no religion instigates hatred.

Older documents on religious matters convey a sense of post-war trauma. Therefore, those texts are, to a large extent, inspired by a fear of the possible reemergence of religious frictions. This explains why the texts are written in broad generalities – out of concern for anyone who might feel offended. Moreover, the texts deal with individual liberties, and do not compare or characterise religious communities and their beliefs.

Nevertheless, it is evident that over several decades of its existence, the Council of Europe has undergone an evolution. With time, the documents concerning freedom of conscience and religion have changed. The focus has shifted from individual rights to minority rights, and then attention was drawn to religion itself and the way it is spoken about. This resulted in more fierce debate and harsher language used to draft international documents. This was further exacerbated after 2001, as a consequence of the growing discord around the concept of international law on the defamation of religion.

All this hinders progress in policy on freedom of conscience and religion, also on a national level. Member states appear to be more and more disoriented and confused about the direction in which the European protection of religious and non-religious liberties is heading. The only thing that is certain is that the Council of Europe is more apprehensive than ever before about setting standards for internal regulations. Thus, the latter is gaining importance in the area of solving religion- and worldview-related conflicts. Provided it is precise and compatible with local culture, this can actually help relieve some tensions. Otherwise it will contribute to disintegrating relations built on opposing values.

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### **Резюме**

*Цель статьи – презентация эволюции системы Совета Европы в сфере защиты свободы совести и религии.*

*Тезисы текста: изначально Совет Европы концентрировал свое внимание вокруг вопросов, связанных с правами личности; однако с течением времени эта организация начала делать значительный упор на защиту прав религиозных меньшинств; в 90-х годах XX в. множество дискуссий на форуме Совета Европы касалось религии как феномена и высказываний, мотивированных мировоззрением; после 2001 года разгорелась дискуссия вокруг концепции противодействия так называемому оскорблению религии.*

**Ключевые слова:** *Политика вероисповедания, Совет Европы, свобода совести и религии, защита свободы и прав религиозных меньшинств, религия и демократия, оскорбление религии*