

European Union's standards concerning freedom of religion*

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First of all I would like to give you an overview of the different statutes in the EU law that specifically relate to religious freedom. Following that I will speak a little more detailed about Article 9 of the European Convention on Human Rights and Fundamental Freedoms. Finally, I will focus on the question in which matter these statutes of EU law could influence the domestic law of the EU member states.

I.

For now nearly 20 years, the existence of religious freedom in EC law has been recognized. For a more detailed and structured overview, I will introduce to you the relevant statutes of written EU law. Afterwards, I will also consider the jurisdiction of the European Court of Justice in Luxembourg.

With regard to the written EU law, one should differentiate between primary and secondary legislation: The first one results from the foundation treaties signed by the member states as well as from their later amendments. Secondary legislation means the written law settled by the competent EU organs, in praxi: the Ministers' Council. Both types of written EU law own a higher normative level than the domestic law of the member states, even than their constitutional law.

Concerning religious freedom, primary legislation contains some correspondent statutes since the Maastricht Treaty was signed in 1992. However, these statutes deal with that materia partly in an indirect matter and partly only in relation to some aspects of it:

- According to Article F para. 2 of the European Union Treaty (in the consolidated version of the Treaty of Amsterdam: Article 6 para. 2) the „Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law.“ So the EU law refers to Article 9 of the European Convention on Human Rights to which I shall return later. Furthermore, the guarantee of religious freedom is contained in all national constitutions: That fact gives a strong indicator that religious freedom is a constitutional tradition common to all member states.
- Introduced by the Treaty of Amsterdam in 1997, the Treaty establishing the European Community contains an explicit provision to religious freedom in EU law: According to Art. 13, the Council may take appropriate action to combat discrimination based on, inter alia, religion or belief. The important restriction

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„within the limits of the powers (of this Treaty)“ should be noted. However, Article 13 deals only with one aspect of religious freedom, that of non-discrimination. Furthermore, it is no self-executing norm, but needs to be translated into a directive by the Council. I shall return to that point in a few moments.

As opposed to primary legislation, secondary legislation contains many provisions which can be understood as guarantee of religious freedom in EU law. If one tries to classify them, three dimensions should be distinguished:

- The first dimension is non-discrimination: A good example is Article 27 (2) of the Statute on civil servants which was enacted in 1962. Therein is prescribed that the selection of EU civil servants is done with no respect to race, religion or sex. That provision played an important role in the only case in which the European Court of Justice dealt with the question of religious freedom. I will return to this issue, too.
- The second dimension is a couple of exemption clauses which refer to means of religion. These exemptions are in some cases motivated by the classical function of Human Rights as protection against the State or a public authority. In other cases, the main motive is the recognition of specific particularities of religion. I would like to illustrate this by giving you two examples:
 - * On principle, the Directive on the protection of animals from 1993 prohibits slaughter of animals without previous stunning. But there is an exemption for ritual slaughter if it is required by any religion.
 - * Now back to Article 13 of the Treaty establishing the European Community: Based on this provision, the Council has enacted a „Directive ... establishing a general framework for equal treatment in employment and occupation“. On principle, that Directive bans both public and private employers from any discrimination based on the employee's religion and faith. But the member states are entitled to maintain or enact national legislation which allows to the Churches and religious communities to set up personal requirements of a person's religion or belief for their occupational activities. As a result, in practice, would be that a school with a religious ethos could not be obliged to employ a teacher who does not share the school's ethos.
- The third dimension is constituted by provisions setting up some positive rights with respect to public institutions by means of religion. According to the Television Broadcast Directive of 1997, the insertion of advertising in any broadcast of a religious service or religious programmes in general is not allowed if their scheduled duration is less than 30 minutes. Another example: Religious instruction is part of the basic curriculum at European Schools (where the children of EU civil servants are taught) and is taught in correspondence with the religious community concerned.

To complete that overview, I would like to mention two more provisions which are (actually) not legal binding, but which can influence the interpretation of other statutes:

- The member states have added a „Declaration on the status of churches and non-confessional organisations“ to the Treaty of Amsterdam. It provides:

„The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The EU equally respects the status of philosophical and non-confessional organisations.“

- On December 8th of 2000, the „Charter of fundamental rights of the European Union“ was solemnly proclaimed. It contains a guarantee of the freedom of thought, conscience and religion which is corresponding to the provision of Article 9 ECHR nearly literally.

Both provisions should have been integrated in the so called European constitutional treaty and, by this way, become part of primary legislation. But as you know, the project failed for the moment in December 2003.

Now, as indicated, I shall come to the only one case in which the European Court of Justice has dealt with religious freedom in 1976:

The British *Vivien Prais* applied for an employment as translator to the EC Council and was invited to participate a written selection procedure. She replied that she would be of Jewish faith and that the day of the exam would be the first day of a Jewish feast on which she was not allowed neither to travel nor to write. Her request for another date was rejected. It was argued that it was indispensable that every candidate passed the selection procedure on the same day with the same tasks. Miss *Prais* claimed for the breach of Article 27 para. 2 of the the Statut on civil servants and for breach of religious freedom as guaranteed by the EC law.

It would go too far to analyse the judgment in detail. To me, three aspects of the judgement seem to be specifically remarkable: First, at least individual religious freedom is recognised as a fundamental right by the EC law. Secondly, it gives protection at least against action of the organs of the EC organs. And finally, religious freedom has to be interpreted in a positive rather than in an indifferent and rigorously neutral sense.

II.

Article 9 (1) of the European Convention on Human Rights and Fundamental Freedom provides:

„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."

The term „religion“ means every religion, either of majority or minority, either of established or new, either being of this culture or of a foreign one. Recognition of a religious community by the State is not a necessary condition for using religious freedom.

Concerning the content, Article 9 para. 1 ECHR gives protection to religion itself, to teaching and to practice. There is a positive aspect as well as a negative. The last means for example:

- not to pay church tax to an established church while not being member of it;
- not to accept religious indoctrination in a public school;
- not to take a religious oath as a member of Parliament;
- especially: to be free to change his own religion.

Corresponding to the last point, there is also a positive aspect: Normally the change of religion will be caused by an external impulse as a meeting, a discussion or a reading of religious books. So the freedom to change the religion means also the freedom of religious mission. Taking account the present tendencies of internationalisation and pluralisation in Europe, this aspect is gaining more relevance than most people are aware of, even lawyers. To illustrate this, I just want to mention two examples:

- Some Christian churches of Orthodoxy in Eastern Europe regard every religious activity of other, particularly Christian, religious communities, as proselytism. In Greece, it is even a criminal offence.
- On the other hand, some Muslim law tradition denounces change of religion as apostasy which should be punished by death. This point would be an important topic of future dialogue with the Muslim world, as Islamic Human Rights Declarations exempt the change of religion from the content of religious freedom.

Another part of religious freedom guaranteed by the ECHR is the obligation of each Member State to take some positive effort in religious affairs. This is especially relevant in circumstances where an individual can not exercise his religious freedom without support by the State. A classical example is the regime in prison: If possible, the prisoner is to be allowed to contact a minister of his religious community and to assist religious services. In the same matter requires for special food should be respected.

Concerning the protected persons, the literal meaning of Article 9 ECHR gives protection to individuals. This has been widened up to religious communities by the organs of the convention (the former European Commission on Human Rights and, now, the European Court of Human Rights) in the past 25 years. Religious

communities enjoy especially autonomy in their own affairs as i.e. the practice, teaching and personal matters in which the State may not intervene.

However, religious freedom is not guaranteed unlimitedly in the ECHR. According to subsection 2, any restriction may be justified if it is prescribed by law, if it is for one of the mentioned purposes (public safety and order, health or morals, protection of the rights and freedoms of others) and if it is necessary in a democratic society. For this the organs of the convention concede a margin of appreciation to the treaty states which allows to respect the different legal systems and national particularities. A well known example from recent time is the case of a female muslim teacher in Geneva (Switzerland), decided in 2001. The European Court of Human Rights has upheld her dismissal for wearing a headscarf arguing with the principle of laicism in the Cantonal Constitution of Geneva.

So far to the main topics of religious freedom in the ECHR. Let me add some short remarks how they are relevant for the EC law. It is important to note that the ECHR is not legally binding to the EU: Nor has the EU signed the Convention nor does the EU law incorporate the ECHR in a strict sense. Article 6 (2) of the Treaty on the European Union does not provide: „The Union shall respect the ECHR“, but: „The Union shall respect fundamental rights, as guaranteed by the ECHR“. Finally, the relationship between the European Court of Justice and the European Court of Human Rights is far from being clear.

Most important, there is one fundamental difference between the legal systems of EU law and the ECHR: As the ECHR is an international treaty, the first one a supranational legal system *sui generis*. This could lead to two consequences relating to religious freedom:

- EC law does guarantee both individual and corporative religious freedom. This results from the interpreting effect of the „Declaration on the status of churches“ added to the Treaty of Amsterdam.
- For EC law there will be no margin of appreciation concerning national particularities. The EC law is binding, which makes a huge difference to the Convention system, not some dozens of treaty states of very different legal systems and traditions rather than either the EC itself or the member states by executing the common law.

III.

Until now especially the religious freedom as guaranteed in the ECHR has influenced the domestic law of the treaty states. On the one hand, this results from the activity of national courts – particularly if the ECHR owns constitutional or supra-statutory status. On the other hand the jurisprudences of the European Court of Human Rights has influence on domestic law, especially in cases where a treaty state has been convinced for a breach of the convention. Concerning reli-

gious freedom, that has happened several times to Greece: The constitutional prohibition of proselytism was applied to circumstances of private discussions about religious matter in practice.

Even more spectacular have been some amendments of national legislation caused by the convention:

- A Swedish order of 1873 stated that to abandon the established protestant church was only permitted if the concerned person joined another Christian denomination. That provision was repealed in 1951 when Sweden signed the ECHR.
- The Norwegian constitution of 1814 suppressed the religious order of Jesuits. When Norway joined the convention in 1952, a reservation concerning to Article 9 ECHR was made. In 1956 the suppression was completely abolished and the reservation was withdrawn.
- A clear breach of Article 9 ECHR would also have been a Swiss provision of the 1870s which suppressed the Jesuits and prohibited any religious convent. These statutes were repealed in 1973, one year before Swiss signed the convention.

All these examples may illustrate the remarkable implications of the ECHR to the legal systems as well as to the jurisprudence in the past. Those influences will probably rise in the future when the process of European integration gets closer.

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