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THE OTHER SIDE OF THE COIN: THE NEGATIVE ASPECT OF FREEDOM OF RELIGION

Abstract:

It is beyond doubts, that the framework of freedom of religion, as a positive right, entitles people to conduct a wide range of activities. However, what is the proper assessment, when one refrains from a legal duty due to religious reasons, or one refuses to participate in compulsory commitments on religious grounds?

It should be highlighted, that freedom of religion influences almost all areas of life worldwide, the issues which are raised, are quite similar in the different countries. As for demonstration, it is broadly accepted, that the free exercise of religion shall not violate disproportionately the fundamental rights of others. The definition of religion and church shall be precised. It is also questionable, whether there is a right to convert someone to one's religion. Our contribution is dedicated to these issues.

Keywords:

freedom of religion, negative aspect, comparatice research, protection of fundamental rights, religious exemptions, human rights, definition of religion

JEL Classification: K00, K10, K39

Introduction

In our view, almost each fundamental right is based on two key theoretic strands, which entail practical consequences also. On the one hand, fundamental rights mean a positive aspect, when the fundamental right is exercised through explicit activities. On the other hand, one may refrain from certain activities, or one may refuse to participate in a particular conduct as the expression of a fundamental right. This theoretic framework is also applicable to freedom of religion respectively.

In the reality, within the positive aspect, a believer participates in religious ceremonies, expresses his/her faith regularly alone or with others, or he/she tries to convince other individuals to access to the church. The permitted scope of these activities are bound by the fundamental rights of others,¹ and by the general policies of the state for the maintenance of public order, safety or health. On the other hand, a religious view may lead to such consequences, that an individual could not act in compliance with the state regulations without breaching his/her religious conviction.

The negative side of freedom of religion covers such tensions, when the ignorance of a legal norm is the mere consequence of a religious conviction, therefore, the rejection of state policies constitutes the exercise of a fundamental right. In this study, we will focus on the careful assessment of such incidents: how shall we define the negative aspect of freedom of religion? What kind of public interest would be so compelling, which could be referred as a proper ground for the limitation of the negative aspect? Within which circumstances shall the state respect the individual religious faith, and when is it acceptable in a democratic society to prefer other fundamental rights, values or interests to treat these tensions? How far could the state reach to provide exemptions under the scope of generally applicable, seemingly religion-neutral laws? Are there considerable differences between the main regions of the world in this regard, and how could we demonstrate this diversity?

Our analysis will conceptualize such issues, and a deeper understanding will be provided from similar conflicts of rights, values and interests. Our primary purpose is to create a theoretic framework, a system of criteria, which might be a proper tool to find a suitable balance between the competing interests. For this reason, the main branches of the social life will be enumerated and analysed, where these conflicts entail the most considerable impact, and a brief comparison will be provided from the main regions of the Earth from this regard. On the ground of this comparison, a scale will be rumoured, which might outline, how broad is the protection of negative religious freedom in the different continents.

¹ CASE OF OTTO-PREMIINGER-INSTITÜT v. AUSTRIA, ECTHR, 1994, Application No. 13470/87

I. Definition

Freedom of thought, conscience and religion is a fundamental right which is enshrined in a wide range of national, international and European texts and conventions: this right is recognised in all the major human rights treaties.² The religion is a definable and significant sphere of human affairs, therefore it is necessary to get acquainted with its nature and its different aspects, especially to get closer to its negative side.

The importance of a relevant definition is beyond doubt, but that distinction should not be overrated, because the terms of conscience, belief and religion are essentially broad. But a definition is needed to determine the coverage of what is being protected and to decide what deserves protection as religion and what does not, since religious activities are entitled to be treated differently, as other fields of human commitments.

The U.N. Human Rights Committee has formulated in the spirit of broad interpretation, *“Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community.”*³

Usually it is seemingly not so difficult to decide whether something is covered by the term of religion or not, but the laying of exact theoretical and precise boundaries of religion constitute a completely different case. Many scholars have held that it is impossible to define religion, it has been considered “almost an article of methodological dogma.”⁴, while others reject the term as too vague and ambiguous.⁵ Further contributions point out that “religion” maybe just a European phenomena and it is emphasized that its application to other cultures misrepresent them necessarily.⁶ The Islamic definition is very elusive, because the Islam considers itself not only a religion but as a way of life, other religions and types of beliefs are defined in relation to Islam.⁷

² Art. 18. of the International Covenant on Civil and Political Rights; art. 14. of the International Convention for the Rights of the Child; art. 12. of the American Convention of Human Rights; art. 10. of the Charter of Fundamental Rights of the European Union

³ United Nations Human Rights Committee, General Comment 22, Article 18 (para. 2) (Forty-eighth session, 1993).

⁴ Brian C. Wilson [1998]: From the Lexical to the Polythetic: A Brief History of the Definition of Religion, in Thomas A. Idinopulos and Brian C. Wilson [1998]: What Is Religion? Origins, Definitions, and Explanations, Leiden, Brill. Pp. 141.

⁵ Nathaniel Stinnet [2005]: Note, Defining Away Religious Freedom in Europe: How Four Democracies Get Away with Discriminating Against Minority Religions. Available at: <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1066&context=iclr>; last accessed: 28.02.2018.

⁶ Benson Saler [1993]: Conceptualizing Religion: Immanent Anthropologists, Transcendent Natives, and Unbounded Categories. Brill, ISBN13: 9789004095854. Pp. 24.

⁷ Khaled Abou El Fadl [2002]: The Place of Tolerance in Islam. Beacon Press, 2002. ISBNN: 9780807002292. Pp. 18-22.

Definitions are crucial for lots of reasons, including that in some countries the government requires a religion to have been present in the country for a remarkable period of time, before it is accorded legal status as a “religion”. This status entails often significant legal and even financial benefits.⁸ Two problems are identified concerning any effort to identify groups as religious. The first one is the problem of over-inclusive definitions, when a definition is too broad and things will count as religion that should not be counted. The other one is the issue of under-inclusive concept, in this case the term is too narrow and certain aspects will be unjustifiably excluded from the scope of religion.

Four primary approaches of religion have been classified. Firstly “substantive” approaches shall be mentioned, which seek to identify the essence or distinctive character of religious belief. Secondly “functional” approaches focus on the role that beliefs or practices play in an individual’s life. Apart from this “analogical” approaches this concept looks for sets of characteristics that are indicative for religious belief, although no particular characteristic will be necessarily applied to all branches of religion. And lastly “deferential” approaches focus on the self-understanding of the adherent as the baseline for defining what is and what is not religious. Sometimes it could be difficult to determine, which approach is being used.⁹

It doesn’t matter from which approach we are talking about, this freedom incorporates two essential parts. Once the freedom of religion implies the freedom to “manifest one’s religion”, alone and in private or in community with others, in public. The forms of the manifestation are different, namely worship, teaching, practice and observance¹⁰, and the state is obliged to protect these manifestations. This part may be described as a positive side of the freedom of religion.¹¹ This freedom involves also negative rights that is to say the freedom not to belong to a religion and not to practice it.¹² That means the state cannot require a person to conduct an act, which might be seen reasonably as swearing allegiance to a given religion, individuals cannot be required to reveal their religious affiliation or beliefs, nor can they be forced to adopt behavior from which it might be inferred that they hold – or do not hold – such beliefs. The main features of the two sides of the freedom of religion and the relevant case law will be clarified in the following pages.

⁸ United States Bureau of Democracy, Human Rights and Labor. Belgium: International Religious Freedom Report (2007), available at: <http://www.state.gov/j/drl/rls/irf/2007/90166.htm>; last accessed: 28.02.2018. (listing criteria, including existing for a long period of time).

⁹ CHURCH OF THE NEW FAITH V COMMISSIONER OF PAY-ROLL TAX, High Court of Australia, 1983, 154 CLR 136.

¹⁰ CASE OF METROPOLITAN CHURCH OF BESSARABIA AND OTHERS V. MOLDOVA, ECTHR, 2001, Application No. 45701/99; par. 114.

¹¹ Case Perry v. Latvia, ECHR, 2007, application no. 30273/03, § 55.

¹² Penny Edgell; Joseph Gerteis; Douglas Hartmann [2006]: Atheists As "Other": Moral Boundaries and Cultural Membership in American Society". American Sociological Review. Vol. 71 ed. (2): Pp. 211–234.

II. Aspects, role and protection of freedom of religion

For providing the deeper understanding of the freedom of religion, first of all internal and external aspects shall be identified. According to the internal aspect, freedom of religion is described as an absolute right.¹³ Regarding deeply held ideas and convictions which are rooted in a person's individual conscience and cannot therefore in themselves prejudice public order, therefore these cannot be the subject of restrictions on the part of the state authorities. Nevertheless, with regard to the "external" aspect this freedom is rather relative, when the manifestation one's beliefs may be affected or even threatened the public order and the other people's rights.

Another categorisation could be the individual and collective aspects of freedom of religion.¹⁴ Most of the rights recognised under the freedom of thought, conscience and religion are individual rights, however, some of these rights may have a collective aspect also,¹⁵ for instance the internal autonomy of religious communities.¹⁶

After the definition and the different aspects of the freedom of religion we have to shift our attention to the question why it deserves protection. Many scholars criticize the notion that a religion should receive special protection or that it should be a preferred freedom.¹⁷ The justifications for religious freedom are various, often complementary, and occasionally contradictory.¹⁸ In our study, we are able to conceptualize only a few of the main arguments. Many of these arguments tend to be made when constitutional provisions are adopted, and are simply assumed in the context of adjudicating constitutional cases.¹⁹

Many of the classical arguments for religious freedom derive from Lockean thought.²⁰ The early American arguments justify various dimensions of religious freedom.²¹ In particular, Patrick Henry's assessment bill, James Madison's Memorial and Remonstrance, and Thomas Jefferson's religious liberty statute are the most important documents leading up to the adoption of the First Amendment.²² This critical document outlines some of the most forceful arguments in support of church-state separation, many of which remain highly relevant and persuasive in protection of the religion. The major allegation set forth that religion is a matter of conviction and conscience and the

¹³ Case Pichon and Sajous v. France, ECTHR, 2001, application no. 49853/99,

¹⁴ Research Division of the ECTHR [2013]: Overview of the ECHR case-law on freedom of religion. ECHR, 31 October 2013. http://www.echr.coe.int/documents/research_report_religion_eng.pdf; last accessed: 21.02.2017.

¹⁵ Research Division of the ECTHR [2013]: cited above.

¹⁶ Case Chaush v. Bulgaria, ECTHR, 2000, no. 30985/96, § 62; Svyato-Mykhaylivska Parafiya v. Ukraine, ECTHR, 2007, application no. 77703/01.

¹⁷ Steven G. Gey [1990]: Why Is Religion Special? Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment, 52 U. Pitt. L. Rev. 75

¹⁸ Steven D. Smith [1991]: The Rise and Fall of Religious Freedom in Constitutional Discourse, 140 U. Pa. L. Rev. 149

¹⁹ W. Cole Durham, Jr. and Brett G. Scharffs [2010]: Law and Religion: National, International and Comparative Perspectives, Aspen/Wolters Kluwer, Pp. 56.

²⁰ The idea was that "an established homogeneous religion ... could serve as a kind of social glue and ultimate motivation for loyalty and obedience to the regime." in John Locke [1796]: A Letter Concerning Toleration (William Popple, trans., Huddersfield, 1796.

²¹ ²¹ Ellis Sandoz [1996]: Religious Liberty and Religion in the American Founding Revisited, in Noel B. Reynolds and W. Cole Durham, Jr [1996]: Religious Liberty in Western Thought, Scholars Press, Pp. 245-275.

²² Clifton E. Olmstead [1960]: History of Religion in the United States, Prentice-Hall, Englewood Cliffs, Pp. 99-105.

true religion does not need state support, because civil magistrate not competent to judge religious truth.

An other circle of arguments come from contemporary empirical justifications.²³ This theory highlights that religious freedom correlates with a number of indicators of socio-economic well being.²⁴ For the protection of the freedom of religion another major strand of the reasoning flows from the tradition of natural law and natural rights. These ideas are based on the belief that certain values, rights, and principles of morality are universally applicable and can be identified through movers of human actions. The classic example of such thought is found in the opening lines of the American Declaration of Independence.²⁵ The famous Norwegian scholar Tore Lindholm considers human dignity to be a justification for religious freedom both basic and broad enough to encompass many justifications of religious freedoms. Even religious arguments in important statements about religious freedom have been made to justify both coercion and freedom.²⁶

Many people see religion as one of the most dominant source of bad and wrongdoing in the world. These views are mostly oversimplified and the role of the religion in political and economic events has been overrated. Most religion and religious traditions are complex and have multiple sources, and the believers think their own traditions as being rooted in love and respect of each other. Two fundamental theory- the overlapping consensus and incompletely theorized agreements-protect the religious freedom rights in practice.²⁷ With these believers can continue to affirm their beliefs as the most important part of their lives while living and participating in society, tolerating others.

III. The negative and positive side of religious freedom

After having analysed the scope of the term of religion, now we turn to the distinction between the positive and the negative side of this concept. Firstly, the main actors, and the competing interests and rights in negative religious situations shall be outlined. The particular highlight is attached to the lack of an individual activity, which is motivated by a well-founded religious faith. Those legal exemptions, which constitute preferential

²³ Brian J. Grim [2010]: *Religious Freedom: Good for What Ails Us?* Cambridge University Press, 2010. available at: <https://doi.org/10.1080/15570274.2008.9523330>; last accessed: 24.02.2018.

²⁴ "Where religious freedom is high, there tends to be fewer incidents of armed conflict, better health outcomes, higher levels of earned income, and better educational opportunities for women. Moreover, religious freedom is associated with higher overall human development, as measured by the human development index."(Brian J. Grim: *Religious Freedom: Good for What Ails Us?*)

²⁵ „When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.”

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” (Brian J. Grim: *Religious Freedom: Good for What Ails Us?*)

²⁶ Baptist World Alliance, World Council of Churches, Vatican II, *Declaration on Religious Freedom, Dignitatis Humanae* (1965)

²⁷ Cass R. Sunstein [1995]: *Incompletely Theorized Agreements*. Harvard Law Review, Vol. 108, No. 7, p. 1733.

treatment from the state for certain churches means a merely different issue.²⁸ In this point, one may refer to the considerations, which have been presented in the preliminary chapter, to make a distinction between a religious, and a laic conviction. The issue is caused by the fact, that the rejected individual activity is mandatorily prescribed by the law for all citizens, therefore, the individual, who for instance does not participate in a mandatory commemorative parade, formally violates a legal duty prescribed by the state, and might be subject to severe sanctions.²⁹

However, this activity constitutes not only a breach of law, but also the mere expression of a religious view, consequently, it should be protected as a fundamental right. Conversely, the broad interpretation of the negative side would cover also exemptions under general bans on religious grounds (for instance: to consume certain prohibited drugs, legally). The background of the limitation is a generally protected public interest, which is deemed to be more important, than the individual right for the free expression of religion. The social interest for the promotion of public order, safety and health shall be balanced with the claim of the individual to manifest his/her religion with the rejection of a particular activity. When we aim to take into consideration all relevant circumstances, the public interest and the fundamental right compete with each other. Furthermore, apart from the state policies, the negative side of freedom of religion might be in conflict with the individual rights of others.³⁰ The overarching values, which are behind the policies of the state, protect always the fundamental rights of others.³¹

Now we concentrate on those fields of the society, where the negative side of freedom of religion occurs regularly, and it faces with the legal order of the state. Especially, the role of education, health care, and military service shall be highlighted as concerned areas. Firstly, in an educational institution, one might be obliged to participate at prayers before classes, or there might be mandatory classes from religion, or someone shall sit in the class before a religious symbol, which is not in compliance with his/her conviction.

A similar case might be the religiously-motivated rejection of wearing an uniform, or consuming certain foods in the school. In school prayer cases, freedom of religion faces with the inherent function of these common ceremonies.³² The issue will be, whether the prayer at the beginning of the school is a mandatory engagement of a religious view, or even a symbolic step to strengthen the cohesion and the unity of the institution, and the loyalty of the students and staff members to the fundamental values of the community, and to each other. From the other side, it shall be also taken into account, how intensive is the impact of the ceremony to the religious sensitivity of a „rational” person? To set an example, when the prayer is addressed to a lessly defined „God”, who is the central figure in different forms of each religion, and during the prayer, only

²⁸ case *Savez crkava "Riječ života" and Others v. Croatia*, ECTHR, 2010, no. 7798/08; *Ortega Moratilla v. Spain*, ECTHR, 1992, application no. 17522/90; *Texas Monthly, Inc. v. Bullock*, Supreme Court of the United States, 1989, 89 U.S. 1

²⁹ *Kokkinakis v. Greece*, ECTHR, 1993, application No. 14307/88.

³⁰ For the boundaries between the protection provided by Art. 8. and 9. please see: *Evans v. the United Kingdom*, ECTHR, 2007, application no. 6339/05, §§ 75-76.

³¹ *Brandenburg v Ohio*, Supreme Court of the United States, 1969, 395 U.S. 444.

³² *Wallace v Jaffree*, United States Supreme Court, 1985, 472 U.S. 38

the general well-being of the community is mentioned as the subject of the prayer, the overrated reaction, for instance, the whole rejection of this commitment might be objectively unjustifiable. Nevertheless, when the text or the form of the prayer in a laic institution is clearly attached to a particular religion, and the common activity is a mandatory prescription of a religious act, rather than the part of the identity of the educational institution, such requirement shall not be allowed in a democratic society.³³

Similarly, when classes from religion are concerned, the teaching of religion, and the teaching on religion shall be distinguished clearly.³⁴ When as part of the education, the main characteristics of the major religions are concerned, one may not withdraw from the class on religious grounds, since this knowledge is transmitted as part of the inherent function of the school. However, when in a laic school, the education targets to confer the students to a certain religion, or merely try to prefer particular convictions, the students could claim validly, that this practice would interfere unjustifiably to their freedom of religion, consequently, they would leave the classroom reasonably.³⁵ Proseitism is even unacceptable within the military order, especially on behalf of the commander towards his/her subordinated.³⁶

Further tensions are generated by religious symbols, for instance, when a cross is found in each classroom. The issue is again, whether the symbol represents the unity of the community, or it is a traditional decoration of the space, or it is generally considered as an explicit expression of religious engagement. On the one side, in the first case, that symbol should not constitute a breach on freedom of religion, but the second approach is unacceptable in a democratic, and laic surrounding. The relevant cases from Italy³⁷ and Germany³⁸ demonstrate well, that these are really sensible issues, which shall be assessed extremely carefully, and the outcome of each case is almost unforeseeable. Interestingly, similar argumentations were used in the United States³⁹ to decide, whether state funding for the students of religious schools to circulate between their home and school constitutes an excessive entanglement between the government and certain churches.

A further relevant aspect is the role of uniforms within the educational context. Although the fact, that there is a crucial interest to create a self-identity within the institution, and to express continuously the attachment between the members of the community, in a laic school, this interest is not so compelling, which could justify the mandatory wearing of a religious symbol, for instance, a cross, or a half moon. The similar assesment in the police forces demonstrates well, that the outcome of the analysis depends strongly on the actual context. In an armed force, the demand for a strict internal hierarchic order, a clear self-identity, and a strongly unified structure. In the light of these considerations,

³³ Lee v Weisman, Supreme Court of the United States, 1992, 05 U.S. 577

³⁴ WIDMAR v. VINCENT, Supreme Court of the United States, 1981, 454 U.S. 263.

³⁵ Epperson v Arkansas, United States Supreme Court, 1968, 393 U.S. 97

³⁶ Case Larissis et al v. Greece, ECTHR, 1998, application no. 140/1996

³⁷ Case Lautsi and others v Italy, ECTHR, 2011, application no. 30814/06.

³⁸ Germany Crucifix II. Case, Constitutional Court of Germany, 1987, BVerfGE 93, 1 1 BvR 1087/91.

³⁹ Everson v Board of Education, Supreme Court of the United States, 1947, 330 U.S. 1.

the negative side of freedom of religion shall not prevail within the context of armed forces. As the result of the balancing process, the interest of the armed forces shall be preferred over the negative side of freedom of religion. Accordingly, any members of the armed forces may not refuse on religious grounds to wear the uniform, except from an extremely narrow circle of strongly justified cases.

Healthcare constitutes an other field, where generally applicable policies and religious views may conflict with each other. One may refuse to neglect certain higienic rules,⁴⁰ or to be vaccinated against an illness. There is an on-going discussion from this issue: whether certain kids could be removed from vaccination by their parents on religious grounds? This would constitute a remarkable risk factor not only for that particular kid, but also for other children, who might be also infected by the illness. If the neglect of the general health regulation is based on a deep religious conviction, one may argue, that this should be a stronger consideration, than the public interest for the protection against virulent illnesses. But this is applicable only to religious faiths, a mere personal opinion shall be insufficient to overturn the overarching protection of public health. Similarly, one may claim, that he/she has the right to refuse the medical treatment due to religious considerations. This issue outlines again the scope of the negative side: has anybody the right to prefer his/her religious faith to his/her life, and should the state respect such a religious view? This conflict emphasises, that the generally applicable law must be followed in most of the cases, only such exceptions are permissible, which could not undermine the legitime purpose of that particular law.

Finally, the special circumstances of the military service shall be taken into consideration. The military order, the potential killing of other people shall breach seriously the essence of several religions, such as budhism, and other minor churches. As a consequence, citizens have the claim to refrain from mandatory military service on religious grounds. The state must determine, within which circle, on the basis of which grounds, and what kind of procedure could be certain citizens exempted from military service? It is also questionable, with which service could these citizens fulfil their duties towards the state? Obviously, the exemption on phisical grounds are not included within this concept, we focus only on religious motivations. In this case, the primary consideration is, whether the character of the alleged religious conviction is sufficiently convincing to justify the rejection of the military service. The comparison between the educational and the military context declares well the two different aspects of the negative religious freedom. On the one hand, someone has the right not to be involved in a religious activity; while on the other hand, a citizen may refrain from such activities, which are clearly against his/her deep religious convictions. This ambiguity shows, that negative religious freedom may not be described easily, diverse cases and tensions might be classified within this overarching category.

After having analyzed the fundamental logic of negative religious freedom, in the next chapter, the main jurisdictions of the world will be assessed: within which circle they

⁴⁰ Case Jewish Liturgical Association Cha'are Shalom Ve Tsedek v. France, ECTHR, 2000, application no. 27417/95

protect negative religious freedom, and are there considerable differences between the approaches of the main continents?

IV. Case law

The most difficult problem in the majority of religious freedom cases is determining whether particular religious freedom claims should be protected, or which interests of interference will result a limitation of the right. Usually the main task is to outline where the boundaries of religious freedom lie and how could they been determined.⁴¹ Under any theory of religious freedom, some limitations must exist.⁴² Without limitation, those who kill in the name of religion, or someone who estimates that others deserve because of their beliefs slavery, would be entitled to absolute protection which would clearly infringe on the rights and freedoms of others.

What fall within the scope of religious manifestation is not always ease. Some actions are familiar, such as rules and rituals attending marriage and divorce, religious service, proselytism. But other religious actions may be strange or suspicious (at least to some of us in certain places). Such manifestations could be dietary restrictions or rules of appearance.

IV.1. The case law of the European Court of Human Rights

The most significant tension between the law and religion is based on the evolution of the standards of review applicable to claims of freedom of religion or belief.⁴³ The central issue in the field of law and religion relates to the evolution of the standards of review applicable to claims of freedom of religion or belief.⁴⁴

The European Court of Human Rights (hereinafter: ECTHR) has applied a proportionality test that examines interference with Article 9 of the European Convention on Human Rights (hereinafter: ECHR).⁴⁵ Article 9 encompasses a limitation clause.⁴⁶ According to the clause, permissible limitations are “prescribed by law,” further one of a

⁴¹ Research Division of the ECTHR [2013]: cited above.

⁴²W. Cole Durham, Jr. and Brett G. Scharffs [2010]: cited above, Pp. 227.

⁴³ Research Division of the ECTHR [2013]: cited above.

⁴⁴ Kathleen M. Sullivan [1992]: Religion and Liberal Democracy, 59 UNIV. CHI. L. REV. 195, p. 197–198,

⁴⁵ 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.” (ECHR Article 9. (1))

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 for the protection of the rights and freedoms of others.” (European Convention on Human Rights Article 9. (2)).

⁴⁶ Johnston v. Ireland. In: M. Janis – R. Kay – A. Bradley [2000]: European Human Rights Law. 2nd ed., Oxford, Oxford University Press, pp. 227-232

circumscribed set of legitimating aims -public safety, public order⁴⁷, security,⁴⁸ health or morals, or the rights and freedoms of others-, and in addition are “necessary in a democratic society” to further one or more of the legitimate aims.⁴⁹ The “necessity” test has been held to require the contracting states to justify any restrictions with convincing and weighty reasons demonstrating that there is a “pressing social need” that is “proportionate to the legitimate aim pursued.”⁵⁰ Moreover, the ECTHR is always interpreted as a living instrument, therefore the social, historical and cultural context and development is highly influential to the jurisprudence.⁵¹ An other key concept in the jurisprudence of the ECHR is the complementary character of the margin of appreciation of the member states and the European supervision.⁵² The margin of appreciation of the member states is considered as broad in Freedom of Religion cases,⁵³ especially where the relationship between the state and the church is concerned.⁵⁴

The religious freedom involves also negative rights.⁵⁵ It includes the freedom not to belong to a religion and not to practice it,⁵⁶ or to leave freely a religious community.⁵⁷ That means that the state cannot require a person to conduct an act which might be seen reasonably as swearing allegiance to a given religion. In the case *Alexandridis v. Greece* the ECTHR held that obligation to swear on oath in court proceedings a violation of Article 9. The main issue in the case was the applicant’s allegation that when taking the oath of office he had been obliged to reveal that he was not an Orthodox Christian. In a similar case the ECTHR found that there had been a violation as a result of a legal requirement on the applicants to take the oath on the Gospels on pain of forfeiting their parliamentary seats.⁵⁸ The ECTHR concluded that *“requiring the applicants to take the oath on the Gospels was tantamount to requiring two elected representatives of the people to swear allegiance to a particular religion, a requirement which is not compatible with Article 9. of the ECHR. As the ECtHR rightly stated in its report, it would be contradictory to make the exercise of a mandate intended to represent different views*

⁴⁷Carolyn Evans [2001]: *Freedom of Religion Under the European Convention of Human Rights*, Oxford Univ. Press, Pp. 150.

⁴⁸ *CASE OF NOLAN AND K V. RUSSIA*, ECTHR, 2009., Application No. 2512/04.

⁴⁹ For further details, please see: Pieter van dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (ed.) [2009]: *Theory and practice of the European Convention on Human Rights*, 4th edition, Antwerpen –Oxford.

⁵⁰ *CASE OF CHURCH OF SCIENTOLOGY MOSCOW v. RUSSIA*, ECTHR, 2007, Application No. 18147/02.

⁵¹ M. Janis – R. Kay – A. Bradley [2008]: *European Human Rights Law*. 3rd ed., Oxford, Oxford University Press, pp. 206-209.

⁵² Jeffrey A Baruch [2004]: ‘The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law’. 11 *Columbia Journal of European Law*, Pp. 113

⁵³ *Case Jewish Liturgical Association Cha’are Shalom Ve Tsedek v. France*, ECTHR, 2000, no. 27417/95, § 84.

⁵⁴ *Case Leyla Şahin v. Turkey*, ECTHR, 2005, application no. 44774/98, § 109.

⁵⁵ *Buscarini and Others v. San Marino*, ECTHR, 1999, application no. 24645/94, § 34.

⁵⁶ For a detailed analysis of the Article 9. jurisprudence of the ECTHR, please see, Jean-François Renucci [2005]: *ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS. Freedom of thought, conscience and religion*. Council of Europe Publishing, Strasbourg, ISBN 92-871-5626-3

⁵⁷ *Case Karlsson v. Sweden*, ECTHR, 1988, application no. 12356/86.

⁵⁸ *CASE KOKKINAKIS v. GREECE*, ECTHR, 1993., Application No. 14307/88, para. 49;

of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs."⁵⁹

The negative aspect of religious freedom means also, that individuals could not be required to reveal their religious affiliation or beliefs, state authorities have to take into consideration that it is not allowed to interfere in individuals freedom of conscience by asking them about their religious beliefs or forcing them to express those beliefs. In connection with the same issue in *Alexandridis, in Dimitras v. Greece* the ECTHR examines whether the Greek legislator gives the possibility to witnesses to opt for the solemn declaration instead of taking the oath, taking into account the negative aspect of the religious freedom protected by Article 9.

Furthermore the interference could be indirect. In the judgment *Sinan Işık v. Turkey* the applicant alleged, in particular that the denial of his request to have the word Islam on his identity card replaced by the name of his faith Alevi violated Article 9. of the ECHR. The ECTHR has ruled that the indication -whether obligatory or optional- of religion on such card is contrary to the ECHR. The ECTHR reiterated that the freedom to manifest one's religion or beliefs had a negative aspect, namely an individual's right not to be obliged to disclose his or her religion or to act in a manner that might enable conclusions to be drawn as to whether or not he or she held such beliefs.⁶⁰ This principle was confirmed in a Bulgarian⁶¹ and in a German⁶² case, which was based on religiously motivated dismissals of employees.

However Article 9. of the ECHR does not explicitly mention the right not to act contrary one's conscience and convictions, the ECTHR pronounced that the opposition to military service is covered by the guaranties of Article 9. When it is motivated by a serious, insuperable conflict between compulsory service in the army and an individual's conscience or his or her sincere and deeply-held religious or other convictions.⁶³ Nevertheless that, what falls within the scope of Article 9 will vary according the specific circumstances of each case. In the case *Bayatan v. Armenia* the ECTHR estimated that there had been a violation of Article 9, caused by the conviction of the applicant, a Jehovah's Witness for having evaded compulsory military service, whereas no alternative civilian service was provided for by law.⁶⁴ Similarly, in a Greek case, the unlawful detention of two jehova witnesses, who refused the military service on religious grounds amounted to the violation of the ECHR.⁶⁵

On the contrary, the ECTHR found no violation of Article 9 in the case of two Jehova Witnesses student, who were suspended from school for two days, since they refused

⁵⁹ CASE ALEXANDRIDIS v. GREECE, ECTHR, 2008, application no. 19516/06.

⁶⁰ CASE OF SINAN ISIK V TURKEY, ECTHR, 2010, Application No. 21924/05.

⁶¹ Case *Ivanova v Bulgaria*, ECTHR, 2007, application no. 7513/07.

⁶² Case *Obst v. Germany*, ECTHR, 2010, application no. 425/03; Case *Schüth v. Germany*, ECTHR, 2010, application no. 1620/03.

⁶³ Research Division of the ECHR [2013]: cited above.

⁶⁴ CASE OF BAYATAN v. ARMENIA, ECTHR, 2011, Application No. 23459/03.

⁶⁵ Case of *Tsirlis And Kouloumpas v Greece*, ECTHR, 1997,, application no. 19234/91.

to participate in a national parade for the commemoration of the outbreak of the war between Greece and the fascist Italy. The applicants had informed the headmasters of their schools that their religious view, pacifism forbade them joining in the commemoration. The argument for the decision was that the school has already showed sensitivity, and the national parade was not so offensive to violate religious beliefs.⁶⁶ The ECTHR have elaborated a set of principles of preventive and punitive measures against sectarian movements.⁶⁷

IV.2. US Supreme Court

Similarly to the Strasbourg jurisprudence, the US Supreme Court has dealt often also with the issue of conflicts between generally applicable state policies and religious exemptions.⁶⁸ It seems, that in parallel with the overall weight of freedom of religion, the negative religious freedom would be a less effective argument before the US Supreme Court, than in Strasbourg. Nevertheless, the negative argumentation is sometimes accepted by the Supreme Court, therefore, it is even valid from a lawyer to cite these considerations during the assessment of a particular case. It shall be also highlighted, that the American protection of negative religious freedom is based on a federal constitution, not on an international treaty, and the strict scrutiny analysis, or the Lemon test differs considerably from their European counterparts. For instance, strict scrutiny reviews, whether there is a compelling governmental interest behind the limitation of a fundamental right; and whether the limitation is sufficiently narrowly-tailored.⁶⁹

The first relevant issue in the United States was the scope of the first amendment of the United States Constitution, which was applied originally only for the federal government.⁷⁰ The Supreme Court elaborated during a long-term process, that the relevant constitutional provisions are binding not only for the federal government, but also for the member states.⁷¹ The US Supreme Court outlined in a relatively old ruling (*Braunfeld v Brown*) the potential scope of religious exemptions under facially neutral laws.⁷² According to this judgement, an even indirectly religiously discriminative law is unconstitutional, however, if the generally applicable law promotes a legitimate secular purpose of the state, the indirect religious impact may be acceptable, unless a less restrictive solution may also exist.⁷³ The jurisprudence clarified further the possible

⁶⁶ CASE OF EFSTRATIOU V. GREECE, ECTHR, 1996, Application No. 24095/94.

⁶⁷ Case *Fédération chrétienne des témoins de Jéhovah de France v. France*, ECTHR, 2001, application no. 53430/99.

⁶⁸ For more details on the history of freedom of religion in America please see: Adams, David K., and Cornelis A. Van Minnen, eds [1999]: *Religious and Secular Reform in America: Ideas, Beliefs and Social Change*. New York: New York University Press.

⁶⁹ Allen Weinstein, David Rubel [2002]: *The Story of America: Freedom and Crisis from Settlement to Superpower*, DK Publishing, Inc., New York, N.Y., ISBN 0-7894-8903-1, pp. 58-63

⁷⁰ *Barron v. City of Baltimore*, Supreme Court of the United States, 1833, 32 U.S. (7 Pet.) 243.

⁷¹ *Cantwell v Connecticut*, Supreme Court of the United States, 1940, 310 U.S. 296.

⁷² *Braunfeld v Brown*, Supreme Court of the United States, 1971, 366 U.S. 599.

⁷³ *Bilhartz, Terry D.* [1986]: *Urban Religion and the Second Great Awakening*. Madison, NJ: Fairleigh Dickinson University Press. p. 115.

religious exemptions from the scope of generally applicable laws in the Lemon case.⁷⁴ The so-called Lemon test is based on three prongs: firstly, a law must have a secular purpose; secondly, it shall not advance or inhibit religion; and thirdly, it do not result an excessive entanglement between the government and a particular religion.

This test provides such a framework, which is broadly acceptable to solve the issues of generally applicable laws. This jurisprudence has had a considerable impact on the legal development of other countries also.⁷⁵ It is also worth-contemplating, that historical traditions are often treated as a proper ground to outweigh the negative side of freedom of religion. In the *Town of Greece v Galloway* case, the Supreme Court held, that local council members shall tolerate a sectorian prayer at the beginning of the sittings, since this practice is a deeply established part of the American political and constitutional tradition.⁷⁶ This approach means from our current perspective, that the symbolic and historical content of the prayer prevails over the negative religious freedom of the council members, and over the alleged entanglement of the state and the church. This example demonstrates well the narrow interpretation of negative religious freedom in the United States.

Similarly, the Supreme Court confirmed the constitutionality of state-supported prayers at the beginning of the sittings of the Nebraska Senate.⁷⁷ The Court argued, that the inherent function of these ceremonies are secular, to express and strenghten the common values of the delegates over their regular, sometimes even sharp discussions. In the *Wisconsin v Yoder* case, the negative religious freedom of Amish parents and their right to determine the upbringing of their children won against the demand of the state to require from each citizen to participate in an unitary education.⁷⁸ This case outlines a completely different interpretation of negative religious freedom, than the European approach. The religious sensitivity, the entanglement between the church and the state was neglected in the prayer cases, however the Supreme Court decided in favour of the religious freedom vis a vi such a fundamental civic obligation, as the mandatory participation at the lower education. The right of parents to ensure the religious education of their children is protected also explicitly by the ECTHR.⁷⁹

This case based on such form of the negative religious freedom, when someone seeks exemptions from a civic obligation on religious grounds. It is perceptible, that such exemptions are allowed in the United States only under exceptional circumstances, when the Lemon test has been met. Nevertheless, this ruling constitutes an excellent example to demonstrate, that although the fact, that certain tests have been elaborated to treat certain forms of negative religious freedom, the outcome of the particular analysis depends strongly on the circumstances, and on the actual composition of the

⁷⁴ *Lemon v Kurtzman*, Supreme Court of the United States, 1971, 403 U.S. 602.

⁷⁵ For instance: *Kakunaga v. Sekiguchi*, Supreme Court of Japan, 1977, 533, no. 69.

⁷⁶ *Town of Greece v. Galloway*, Supreme Court of the United States, 2014, 572 U.S.

⁷⁷ *Marsh v. Chambers*, Supreme Court of the United States, 1983, 463 U.S. 783.

⁷⁸ *Wisconsin v Yoder*, Supreme Court of the United States, 1972, 406 U.S. 205.

⁷⁹ Protocol 1. art. 2. of the ECHR

Court. Consequently, it is worthy for a layer to rely on negative religious arguments before the Supreme Court, since these considerations are often influential in the reasonings of the Supreme Court.⁸⁰ A further ambiguity supports also this point.

Firstly, in *Employment Division v Smith*, a prohibition of sacramental peyote was upheld by the Supreme Court.⁸¹ The ruling provided, that neutral laws of general applicability do not violate the Free Exercise Clause of the First Amendment, even if they are disadvantageous for certain religions. On the contrary, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, a church was properly granted an injunction under the Religious Freedom Restoration Act against criminal prosecution for its sacramental use of a hallucinatory substance, because the federal government had failed to demonstrate a compelling interest in prohibiting that use under the Controlled Substances Act.⁸²

IV.3. Case law of Asia and Africa

In Asia, in comparison with other continents, the scope of negative religious freedom is extremely narrow, and in this point, the difference between the two sides of the coin are easily noticeable. The Indonesian Blasphemy Law case provides free exercise of religion for the members of the six established churches, but those, who are deviant from these six religions, are subject to ban, or even prosecution.⁸³ The Indonesian Supreme Court noted expressly, that it falls within the regulatory competence of the government to impose sanctions on those, who are not attached to any religion. Accordingly, the state expects an active religious behavior from the citizens, and the citizens shall not be exempted from the general regulation on the basis of religious convictions. Consequently, this interpretation of Freedom of religion does not include not to be engaged to a particular religion. This narrow approach of freedom of religion was confirmed also in India.⁸⁴

In South Africa, the current constitution came into force in 1997, this was drawn up by the first post-apartheid South African Parliament. It is generally considered as a model of a contemporary human rights-based constitution. The South African Constitutional Court has also a very crucial rule and become highly influential across the continent of Africa. One of the most important cases of the South African Constitutional Court has been the *Prince v. President, Cape Law Society (2002)* in respect of human rights, especially the freedom of religion. Although the fact, that the Prince cases are relatively old, they provide some sense from the South African interpretation of the other side of the coin.

⁸⁰ Gervais, Will M.; Shariff, Azim F.; Norenzayan, Ara [2011]: Do You Believe in Atheists? Distrust Is Central to Anti-Atheist Prejudice. *Journal of Personality and Social Psychology*. Vol. 101. ed. (6): Pp. 1189–1206.

⁸¹ *Employment Division v Smith*, Supreme Court of the United States, 1990, 494 U.S. 872.

⁸² *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, Supreme Court of the United States, 2006, 546 U.S. 418.

⁸³ Crouch, Melissa A. [2012]: "Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law," *Asian Journal of Comparative Law*: Vol. 7: Iss. 1, Article 3.

⁸⁴ *Rev. Stanilaus v. Madhya Pradesh & Others*, Constitutional Court of India, 1977, SCR (2) 611

Several religions require from the believers to consum certain drugs, therefore, the general prohibition on drugs are often undermined by religious convictions. It is widely accepted that many religious practices include the use of psychotropic substances. The applicant in this case was a member of a religious group (Rastafari), and he was hindered to go in a bar due to his religious use of cannabis. According to the applicant, this prohibition was a disproportionate infringement on the religious freedom of the Rastafari. The applicant lost by 5-4, as the Constitutional Court found, that the limitation on freedom of religion was proportionate. The Court used a similar test as the proportionality test of the Human Rights Committee.

To pass constitutional muster, the limitation on the constitutional rights must be justifiable in terms of the Constitution. The analysis conceptualize that whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This framework involves the weighing up of competing values and ultimately an assessment based on proportionality. During the weighing-up and evaluation process, the Court must measure the three elements of the government interest, namely, the importance of the limitation; the relationship between the limitation and the underlying purpose of the limitation; and the impact that an exemption for religious reasons would have on the overall purpose of the limitation.⁸⁵ This argumentation may lead to the consequence that negative religious freedom is a highly contested issue in South Africa, but it is accepted, that the purpose of the state could prevail over the claim for exemption under the scope of a generally applicable state policy. The negative religious freedom would not authorize the followers of certain religions to ignore binding legal prescriptions in South Africa.

Conclusion

Our contribution has not only scientific significance, but also entails consequences for the ordinary life of a great number of people. The framework of the negative religious freedom covers a wide range of activities, it generates considerable impact in the crucial fields of public education, public service, healthcare, and military order. According to our hypotheses, the role of negative religious freedom has been underestimated even in the scientific level and in the jurisprudence, therefore further clarifications are needed to outline the proper interpretation of this concept. It has been demonstrated, that negative religious freedom, so the religiously motivated refrain from a legally required activity, could be a valid legal argument in several controversies.

It is perceptible, that the scope of negative religious freedom described by the above-outlined scale amongst the different continents. On the top of the scale, the European approach provides a relatively broad interpretation of negative religious freedom. In America and Africa, the scope of this concept is remarkably narrower, while it is extremely tight in certain Asian countries, especially in comparison with the European

⁸⁵ Prince v President of the Law Society of the Cape of Good Hope, Constitutional Court of South Africa, 2002, CCT36/00, ZACC 1; SA 794; BCLR 231

jurisprudence. The background of these differences might be the diverse conceptual frameworks of the ECTHR and the US Supreme Court.⁸⁶ In Europe, the negative religious freedom is protected inherently as a fundamental right, any measures, which force individuals to act against their religious conviction is considered as a limitation of freedom of religion. By contrast, in the United States, a generally applicable law shall comply with certain constitutional requirements, amongst these, free establishment or exercise shall not be restricted unjustifiably.⁸⁷ The basic consideration is a general purpose of the state, which shall be promoted by taking into account religious sensitivities reasonably. Furthermore, the ECTHR enumerates possible grounds of restriction, while the United States Constitution provides a general clause to prohibit severe limitations on freedom of religion. These different logical frameworks are inspired by the social, cultural and constitutional context of those societies, in which they are applied.

On the basis of this analysis, one may foresee, whether it would be worthy to give greater highlight to the argument of negative freedom of religion before a particular judicial body. The relevant cases through the different conceptual filters contributes not only a richer understanding on the range of questions that need resolution, but also provide a more profound comparative insight into various judicial methods. By practical terms, the outcome of similar researches may launch useful orientations for lawyers, involved in cases potentially concerning negative religious freedom.

This study outlined the basic idea of the aforementioned scale from the main configurations of the “other side of the coin”, however, several details are still to be clarified. Our study opens new perspectives in the field of freedom of religion, but further extensive professional discussion is necessary to provide the deeper understanding of the negative aspect of this fundamental right.

⁸⁶ Luzius Wildhaber [2004]: ‘The European Court of Human Rights in Action’ (2004) 21 *Ritsumeikan Law Review* Pp. 83,84

⁸⁷ Clifton E. Olmstead [1960]: cited above, Pp. 74-75, 113-115

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