

## THE FUNDAMENTAL RIGHT TO FREEDOM OF RELIGION (Freedom of belief)

Peter Krömer

### Summary

*The freedom of belief (religion) for each individual – one of the oldest of the fundamental and human rights – was one of the most significant breakthroughs in recognising the individual spiritual freedom of the human being. The legal framework protecting this right essentially ensures that any state coercion in the religious or philosophical sphere is out of the question – and at the same time offers certain guarantees for religious practice (of a community of believing individuals). This article explores the legal and conceptual provisions at European level – and the different UN and European levels of protection afforded.*

### 1. Introduction

In the field of fundamental human rights, the fundamental human right of the individual to freedom of religion (freedom of belief) is connected to the right of the individual to freedom of thought, conscience and religion. The right of individuals to be free to choose to practice their religion (faith) without state interference is one of the oldest of the fundamental and human rights even if it is not the oldest. Freedom of belief (religion) for each individual was one of the most significant breakthroughs in recognising the individual spiritual freedom of the human being and the development of fundamental and human rights.

### 2. Legal sources

The fundamental and human right to freedom of religion (freedom of belief) – individual freedom of religion and collective (corporate) freedom of religion – is laid down in European states according to their respective constitutions and also in their respective national state Church laws or religious legal systems – along with their respective corresponding national protection of rights systems.

Council of Europe member States are contractual parties to the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup> of 4<sup>th</sup> May 1950 (ECHR) plus in the meantime a number of additional protocols. European States – and consequently their citizens are thus part of an international human rights protection system with the European Court for Human Rights in Strasbourg as an independent monitoring mechanism and judicial body.

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<sup>1</sup> Also: European Convention on Human Rights; ECHR

Freedom of thought, conscience and religion is laid down in Article 9 of the ECHR. Article 2 of the first supplementary protocol to the ECHR lays down the right to education including parents' right to religious education for their children.

Almost all European states are, as members of the United Nations, also party to the International Pact on citizens' and political Rights (UN Human Rights Pact II). Freedom of thought, conscience and religion – plus the right of parents to religious education for their children – are laid down in Article 18 of the UN Human Rights Pact II. European states are furthermore members of the OSCE – the organisation that succeeded the CSCE – and thus also accept the corresponding CSCE or OSCE documents relative to fundamental and human rights especially the Document of the Vienna meeting of the CSCE in 1986, often referred to as the final document of Vienna 1989. Many European states as members of the Council of Europe are automatically parties by international law to agreements on protection of minorities with stipulations concerning freedom of religion.

These international legal frameworks – especially the ECHR – constitute an agreed basic standard in fundamental and human rights concerning freedom of religion (freedom of belief) throughout Europe<sup>2</sup>.

For EU member states ratification of the Lisbon Treaty entails increased significance for the Charter for Fundamental Rights of the European Union, whose Article 10, concerning freedom of thought conscience and religion, follows the same line as the European Convention on Human Rights.

### **3. Concept of Religion**

To look at the substance of freedom of religion (freedom of belief) and its protection, it is important to know the meaning of "religion" in the juridical sense first..

Historically, the fight for freedom of religion was long and protracted, and yet there is no positive legal definition of religion. Neither the General Declaration of Human Rights of 1948 nor the UN Human Rights Pact II nor in the ECHR with all its supplementary protocols, nor the ECHR offer a universally recognised definition of religion. It is generally accepted that "a religion" has to comprise at least a profession of faith, precepts for a way of life and some form of service of worship. The profession of faith in this sense would posit a comprehensive interpretation of the world and the position of man therein and some reference to the transcendental. Typical features of a concept of religion – and these are recognised as such by the highest courts in European states as well as in the United States of America – basically comprise an all-encompassing sense of meaning of the world and the position of man therein, a sense of the transcendental and corresponding guidelines for behaviour. The reference to the transcendental is the decisive criterion distinguishing religion from philosophical convictions.

### **4. Substance of the fundamental right to freedom of religion (freedom of belief)**

The following description of the substance of the fundamental and human right of freedom of religion (freedom of belief) is grounded in the legal sources given in international law for fundamental and human rights, point 2 – particularly in Article 9 of the ECHR and relevant case law of the European Court of Human Rights. The following explanations are brief and simplified for non-jurists.

The Fundamental and Human Right to freedom of religion as formulated in Article 9 of the ECHR, Article 18 of the UN Human Rights Pact II and Article 10 of the Charter of Fundamental Rights of the European Union is primarily directed at deterring the state

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<sup>2</sup> Except for Belarus which is not a member of the Council of Europe

from exercising any influence. The essence of freedom of religion (freedom of belief) lies in excluding any state coercion in the religious or philosophical sphere.

The right to freedom of religion (freedom of belief) as cited earlier, not only justifies keeping the state at bay, however, but also endows it with the obligation to assure certain guarantees, such as guaranteed protection of religious practice from interference from third parties.

The right to freedom of religion (freedom of belief) covers first and foremost the so-called inner freedom of religion (*forum internum*), and sometimes also freedom of faith in the narrow sense of the term. It protects above all the freedom to hold an inner conviction in the face of any kind of ideological influence or investigation by the state, including notably the freedom to **have** a religion or philosophical conviction – or not to have one – or to change it. This inner freedom inevitably implies however the freedom to practice one's religion (*forum externum*), sometimes called freedom to worship. This freedom to practise a religion includes the right to freedom of private and public practice of one's religion or of a philosophical conviction and in that respect, to profess this faith (religion) or conviction in private or in public, on one's own or in the company of others.

**The right to freedom of religion is first of all an individual right for all individuals – and Article 9 of the ECHR, Article 18 of the UN Human Rights Pact II and Article 10 of the Charta of Fundamental Rights of the European Union are drafted accordingly. It has become accepted as incontrovertible, that in addition to individuals, religious communities such as Churches and associations are also included in the provisions for freedom of religion (freedom of faith). Ultimately this is valid, too, for philosophical convictions. The fundamental right to freedom of religion (freedom of belief) cannot however be enforced by legal persons whose primary interest is one of profit, and where questions of religion (or faith) or conviction play a subsidiary role.**

Article 9 of the ECHR, Article 18 of the UN Human Rights Pact II and Article 10 of the Charta of Human Rights of the European Union do not afford absolute protection of the fundamental right to freedom of religion (freedom of belief). They are limited to Article 9 para 2 of the ECHR, Article 18 para 3 of the UN Human Rights Pact and Article 52 of the Fundamental Rights Charter of the European Union. It should be pointed out that one's inner religious freedom (*forum internum*) cannot be limited by the state, only the right to practice one's religion or conviction (*forum externum*, freedom to practice) and then only to a relative degree.

Freedom of religion (freedom of belief) is first and foremost the right of the individual to decide upon a specific religion/faith or conviction and to profess allegiance to this choose a faith/religion or conviction, and, hand in hand with this, the right to alter one's religious allegiance or conviction at any time. Freedom of religion (freedom of belief) comprises - as a negative freedom - the right also not to believe, or to hold disbelief. As with regard to freedom of thought and conscience, the state cannot exercise coercion of any kind in the previously cited spheres which largely touch on one's inner religious freedom. In the same vein, the state has to not only guarantee the possibility for individuals to leave a Church, religious community or philosophical conviction, it must actually facilitated it. The state may not therefore enforce the practice of religious customs or entry into a religious community. Similarly there is no duty to take part in religious manifestations or events, and it must consequently be possible to claim exemption from religious instruction in schools – in keeping with one's inner freedom of religion. Negative freedom of religion (freedom of belief) also means that a religious declaration when swearing an oath or making a vow does not have to be uttered. To a limited extent the state is obliged to give some guarantee that third persons acting inadmissibly cannot make it impossible for any individual to commit to a particular religion/faith or conviction, profess a faith or conviction and in all events to change allegiance to a religion (faith or

conviction). In this respect let it be explicitly stated that recruitment for a faith (religion and Church/religious community) is always admissible in the framework of freedom of religion, however any such recruitment for a faith (religion and religious community or Church) cannot be carried out in such a legally abusive manner that the other can no longer freely commit to or profess his/her religion. Incidentally it should be noted that the state can and must institute and provide legal procedures whereby individuals can protect themselves against defamation in this faith or commitment of faith – although a degree of criticism must always be tolerated in the framework of the fundamental right to freedom of expression.

The fundamental right to freedom of religion (freedom of belief) as an individual right of the individual also covers the freedom to practice a religion whether in private or in public, and to profess one's faith (religion) or conviction alone or in the company of others. Thus the freedom to have a faith (religion or conviction) and to profess it also means being able to practice one's religion and conviction as cited above. Article 9 of the ECHR, Article 18 of the UN Human Rights Pact II and Article 10 of the Fundamental Rights Charter of the European Union list forms of practice in this connection such as services of worship, instruction, prayer, religious customs, rituals. Such lists are merely indicative – it is left up to each individual to decide in which form he or she wants to practice his/her faith or conviction. It should be made clear that this right to practice one's religion in the framework of the fundamental and human right to freedom of religion (freedom of belief) is left up to the individual quite independently of adherence to a Church or religious community or conviction (constituted as a legal *persona*).

Recruitment for the faith (religion or conviction) and consequently to a Church and religious community or conviction in public also features under the heading of public practice of one's religion, Services of worship are acts of religious proclamation as well as religious worship and so forth. Instruction in this particular instance means the transmission of religious doctrine or the tenets of faith of a Church or religious association. Religious customs and rituals can take the form of processions, pilgrimages, but also bell ringing and the call to prayer. Wearing specific types of clothes, adopting a particular hairstyle or adhering to dietary regulations also fall into this category in certain circumstances (these cannot be set forth in detail in the context of this paper). However, every act of an individual that is influenced by religion or faith is necessarily protected by the fundamental right to freedom of religion. Refusal to act in conformity with general civic duties such as refusing to pay taxes for example cannot be justified through freedom of religion (freedom of belief).

Judgements of the European Court of Human Rights endorse certain civic obligations and guarantees in connection with an individual's public and private practice of religion. The state has to ensure that inmates of prisons and also members of the armed forces – especially in the context of performing national service – have the possibility of practising their religion in a particular, albeit somewhat limited, manner and some pastoral care by clergy must be provided. In countries with different Churches and religious communities the state has to make sure there is peace between religions in order to enable the individual believer to practice his or her religion in a climate of social tolerance. The state, as a neutral and unbiased organising power, must make it possible for a variety of religions and convictions to be practised amongst its citizens in the framework of their religious freedom without implying any kind of relative value judgement. This latter point also means that the state must ensure that no Church, religious community or philosophical conviction exercises any form of influence over the religious practice of members of another Church/religion or conviction or in any way seeks to control them. Recruiting for one's own Church/religion does not however qualify as such.

Exercising one's freedom of religion as an individual typically occurs in the company of others – and is protected by the fundamental right of freedom of religion (freedom of belief) in this respect, too. European states, the European Court for Human Rights and,

common law generally, recognise that in the context of collective religious practice adherents of a religion or confession of faith can form an association and thus become a legal *persona*, which is independent and separate of the individual believers or members. The legal format and its arrangements for Churches and religious associations have to make it possible for them to organise and constitute themselves legally in such a way that they can practice their religion, faith and philosophical conviction in public with and through their members and others. Accordingly, Churches, religious associations and philosophical convictions are collective agents of their respective congregations and thus also representatives of religious freedom – especially collective (corporate) religious freedom.

It is therefore an incontrovertible fact in the aforementioned sense relative to collective religious freedom – especially in the field of the ECHR but also the UN Human Rights Pact II - that on the basis of the Fundamental and Human Right of freedom of religion, members of a particular faith community or religion or conviction can come together in some form of religious community (Church, religious association) and attain an autonomous legal *persona* whereby the shape of this Church or religious community in the form of a legal *persona* has to take into consideration the possibility for public practice of this religion or collective freedom of religion. This has to take place according to state legal procedure.

In the case of an official State Church, the state must ensure that adherents of other confessions or religions can constitute themselves as religious communities with juridical *personae* with sufficient organisational facility to be able to implement public religious practice for and with their believers. For this to happen these Churches and religious communities – alongside the state Church – must be granted certain minimum rights to public common practice of their religion. In conjunction with the above-mentioned common law obligations, states are not impeded from providing for two different procedures of constituting Churches and religious associations (two types of legal *personae*) – one of these entailing more rights but also more responsibilities than the other. Such schemes would comprise both legally recognised Churches and religious associations and non-recognised Churches and religious communities in the form of confessing communities. In view of the neutrality that was described earlier, states are urged, not to make it impossible for Churches and religious associations to change in time from one legal form to the other (especially to the form of special legal recognition with more extensive rights and responsibilities) especially if these are only at the basic stage of being a Church or religious association. Even this basic or initial stage of being constituted as a Church or religious association must bestow on the Church or religious association in question certain minimum rights for free public exercise of this religion.

The collective (cooperative) freedom of religion borne above all by Churches and religious associations also requires that the state allows a degree of self-rule for the legal *personae* of Churches and religions, so that they can carry out their religion and faith publicly together in the framework of a Church or religious association and legally responsible in their own right. Hence it is not allowed – particularly by Article 9 of the ECHR - for states to interfere in the internal affairs of Churches and religious communities. Internal affairs signify above all definition of content of faiths/confessions of faith and their forms of expression, but also the organisation of the Church/religious community itself and the designation of responsible officers and organs.

For Churches and religious communities as legal *personae* and representative bodies of collective freedom of religion, identical stipulations are valid for the sphere of collective and public practice of religion as for an individual – even with to some extent some wider rules for the purpose of collective religious practice in the form of congregations. The state must act as a neutral and non-partisan facilitator for the practice of different religions, faiths and convictions without itself passing any kind of value judgement on content. It must not proceed in a discriminatory way even where state Churches or

systems with two kinds of Churches and religious associations may exist. The state must moreover offer the possibility for Churches and religious associations to protect themselves from defamation, in particular anti-religious utterances or anti-religious art – or if necessary enable the Church or religious associations to embark on legal proceedings. However, taking into account the right of freedom of expression and the right of art, a certain degree of criticism of Churches and religious associations can be expressed, even if this be anti-religious in nature.

Churches and religious associations and philosophical convictions as legal bodies in their own right and thereby bearers of the collective right to freedom of religion must (as already stated) be in the position to practice religious faith and conviction in public in all manner of expressive forms and also to recruit for their religion faith or conviction.

In a context where majority Churches, majority religious associations or state Church exist in many Council of Europe member States, it is necessary to look into the minimum rights pertaining to other Churches and religious associations. This question is too detailed for this essay. From a common law point of view reference can be made to points 16 and 17 of the final document of the 1986 Vienna Meeting (follow-up meeting) of the Conference for Security and Cooperation in Europe (now OSCE), also known as the 1989 final document.

Right to freedom of religion (freedom of belief) is not granted limitless. Both Article 18 para 3 of the UN Human Rights Pact II and Article 9 para 2 of the ECHR – and to some extent Article 52 of the Fundamental Rights Charter of the European Union - make provision for possible limitations to the fundamental and human right to freedom of religion. This concerns only the practice of freedom of religion and not the so-called inner freedom of religion (*forum internum*). Encroachments on freedom of religion (or belief) can only be made through legislation by member states, with a legitimate goal, and with the incursion or limitation being proportional to the goal in question. Such restrictions may be justified by the interest of public security, public order, morality and decency, but above all the rights and freedoms of others – implying here fundamental rights and fundamental freedoms. In the context of the ECHR reference is made to the measures required in a democratic society to maintain proportionality.

In line with Article 9 para 2 of the ECHR , Article 52 of the Fundamental Rights Charter of the European Union refers the very essence of fundamental rights and fundamental freedoms which shall never be assailed.

According to Article 15 of the ECHR, in case of war or another public state of emergency which threatens the life of the nation, the fundamental and human rights protected by the ECHR may be suspended to a limited extent. While this applies to a certain extent to Article 9 of the ECHR (fundamental right to freedom of religion/freedom of belief), it may never affect inner freedom of religion. Where Article 4 para 2 of the UN Human Rights Pact is in Force, however, freedom of religion (freedom of belief) may not be suspended.even in case of public emergency (including war).

## **5. Protection of rights**

**European states must respect and implement the fundamental and human right to religious freedom through their constitutions and legal systems.**

**Over and above this, Council of Europe member States, by ratifying the ECHR, are party to a highly effective international human rights protection system, including the fundamental and human right of freedom of religion (freedom of belief). If domestic law has been exhausted without producing a result commensurate with the provisions of the ECHR, the European Court of Human**

**Rights in Strasbourg can be invoked within six months by means of a formal complaint. Any individual, any legal *persona*, any Church or religious community or philosophical body can do this. The opposition party in this complaints procedure is the individual state concerned. In cases where the ECHR or its additional protocols is deemed to have been infringed the European Court for Human Rights can condemn the state in question to pay damages and costs to a limited extent, and to amend the legal system with a view to avoid further human rights violations.**

The optional protocol to the UN Human Rights Pact II makes provision in the form of a quasi-legal protection scheme for human rights, for individuals to invoke the Human Rights Committee by means of a written communication to plead human rights infringements once all internal legal channels have been exhausted.

**Note**

*The present paper was originally written in German and is the summary of a detailed article in German with bibliographical references. The full version of this paper can be found on the CEC/CSC website [www.cec-kek.org](http://www.cec-kek.org).*