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The scope and limitations of religious autonomy

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Abstract

Freedom of Religion or Belief, or FoRB, provides for autonomy of religious communities, including freedom to organise themselves, to train their leadership, and to educate their members, without government interference. Tensions between the tenets of the religious community and the wider society are inevitable. In this article, we justify religious autonomy through three lenses: transactional, traditional FoRB, and minorities. If people are free to join and leave the community, religious autonomy should prevail. We then analyse European cases that illustrate the tension between religious autonomy and non-discrimination.

Keywords

FoRB, religious autonomy, non-discrimination, religious minorities.

1. Introduction

Freedom of thought, conscience and religion is well established in international law, e.g. in article 18 of the Universal Declaration of Human Rights (United Nations 1948), in article 18 of the International Covenant on Civil and Political Rights (ICCPR) (UN General Assembly 1966), and in article 9 of the European Convention on Human Rights. (European Court of Human Rights, Council of Europe 1998). FoRB is a multidimensional right that includes an internal and an external dimension as well as a private and a public dimension. A key dimension of FoRB is religious autonomy, which refers to the freedom of religion and belief communi-

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ties to organise themselves, to train their leadership, and to educate their members, without government interference. The importance of religious autonomy is confirmed by the European Court for Human Rights (ECtHR), for example in paragraph 118 of its ruling in the case of the Metropolitan Church of Bessarabia and others v. Moldova: "The autonomous existence of religious communities is indispensable for pluralism in a democratic society" (Metropolitan Church of Bessarabia and Others v Moldova 2001). Even though human rights are individual and universal, most human rights are not absolute.

Notwithstanding the importance of religious autonomy, tensions may arise with other human rights. Recently, the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity explored the tensions between FoRB and the right to non-discrimination of sexual minorities (UN Human Rights Council 2023). One of his conclusions was that FoRB is at times "instrumentalized to nurture, perpetuate or exacerbate violence and discrimination against lesbian, gay, bisexual, and trans and gender diverse persons." Another example of such tensions is when FoRB is perceived as contradictory to the equality between men and women (UN General Assembly 2013).

It is well known that tensions between human rights are inevitable. Sometimes, human rights compete with one another, sometimes individual claims to one right compete with the right of someone else. Eventually, it could be up to the court to strike the right balance between these competing rights and claims.

In this article, which aims to be educational and informative, we explore the scope of religious autonomy. We first discuss religious autonomy through three different lenses: a transactional lens, a traditional FoRB lens, and a minorities lens. We then present European cases that illustrate the tensions between religious autonomy and the non-discrimination principle. We end with some concluding remarks.

2. Understanding religious autonomy

2.1. The transactional lens

Human rights are individual rights. Together, they guarantee each and every human being as a rights bearer their autonomy. Individual autonomy is an idea that is generally understood to refer to the capacity to be one's own person, to live one's life according to reasons and motives that are taken as one's own and not the product of manipulative or distorting external forces, to be in this way independent (Christman 2020). But as we all know, human autonomy is never absolute. Whenever we enter into a relationship with another human being, we deliberately sacrifice some of our individual autonomy to accommodate the other.

That happens in friendships, love, or family, but also when joining a sports club or a more or less formally organised religion or belief community. Consciously or unconsciously, we weigh the autonomy costs against the (expected) gains. While handing over some of our individual autonomy to a collective, the collective starts to obtain some sort of autonomy of its own. In a relationship or a family, certain patterns evolve over time. A larger community formally or informally develops ways to organise themselves. When these patterns or structures go wrong, and they can go awfully wrong, the expected gains no longer outweigh the sacrifices and members of the collective review or break up the ties they regard no longer worthwhile or important. These might be difficult and painful decisions, but they should be possible. When we don't have the freedom to make these decisions any longer, individual autonomy no longer exists.

When people join a community of like-minded people,[2] they temporarily hand over some individual autonomy to the collective and decide to adhere to some set of rules set by the community of choice. Joining the community will cost them some autonomy but this will be offset by some (expected) gains. This also applies to groups sharing a religion or belief. Provided this is a free and individual decision, it should be respected as a clear manifestation of one's FoRB.

We might be stating the obvious but the freedom to choose does not mean that one can just join any community they like, assuming that the community will adjust their teachings and rules to accommodate any new member. It is the collective that jointly shapes the teachings and rules, not the individual.

We are well aware that leaving a group may have serious economic and social consequences, especially in community-oriented societies. It is not the responsibility of the community, however, to care for dissenters. It is the national authorities who are to honour their human rights commitments. This includes the freedom to leave a faith or belief community.

2.2. The FoRB lens

The ICCPR lists the following manifestations of the right to FoRB: worship, observance, practice, and teaching. For many religions or beliefs, this will require renting or establishing and maintaining a house of worship. This is also explicitly mentioned in the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (UN General Assembly 1981; art. 6(1)).

2 Whether people join a formal or informal community is of limited significance here as even informal communities will over time develop their own 'ways of doing things'.

The right to teaching of any religious or belief community includes "acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications." (UN Human Rights Committee 1993; art. 4)

The teachings of a religion or belief are not necessarily shared by those who chose not to join the community and even within the community there will be a variety of opinions. The interpretation and application of spiritual texts, often written in a different time and culture, is never straightforward and will inevitably lead to differences in and between groups, even though they might all self-identify as adherents of the same religion or belief. It should be remembered that religious communities are never homogenous blocks. There is a wide variety of opinions both between religious communities and within these communities. Therefore, the doctrine and teachings of religious communities are constantly evolving. The concept of religious autonomy creates a safe space for candid debates on the interpretation of foundational documents. Racism and slavery were once defended with reference to the interpretation of religious scripture. The same religious scriptures, however, motivated many to fight the abolition of these inhumane practices.

FoRB is an individual human right that can be enjoyed in community with others. This collective element of FoRB is not without its challenges, especially where practice and teaching of a religion or belief diverges from the dominant discourse in society. However, without the collective element, individuals would not be free to fully enjoy their individual right to FoRB.

Religious groups play an essential role in shaping the beliefs that individuals hold as they teach and transmit ideas from one generation to the next, and they are also the vehicles for the formation and development of religious doctrine (Brady 2004; Brady 2006).

Many religions or beliefs organise regular meetings for their own followers or adherents. Christians, Muslims, and Jews organise at least weekly meetings for worship, prayer, and preaching. Further, they organise certain rituals and festivals. These meetings, rituals and festivals are an inherent part of the spiritual tradition of the religion or belief and usually require participation of one or more other believers. Therefore, limiting these collective manifestations would seriously limit the individual's right to FoRB. Often, these ceremonies are celebrated by designated officials and in designated places like churches, mosques, synagogues, temples, or pagodas. Appointing officials and establishing and maintaining sacred places require a minimal level of organisation. Therefore, without

religious institutions, it would not be possible to fully enjoy the individual freedom of religion or belief (Fox 2021).

Notwithstanding the "far-reaching and profound" nature to the right of freedom of religion, as stressed in General Comment 22, it is not absolute and can be restricted "if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others" (UN Human Rights Committee 1993). If these morals are exclusively and voluntarily applied to adherents only, there is no need for authorities to interfere unless these morals are in flagrant breach of the law of the country.

General Comment 22, article 8 warns that "freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition" (UN Human Rights Committee 1993). This article requires all states to treat all religions or beliefs equally and even though one religion or belief might be dominant in society, their morality cannot be forced upon others with a reference to any of the limitation grounds mentioned in article 18 ICCPR. This rule applies to confessional as well as non-confessional organisations.

The ECtHR, ruling in the case Handyside v United Kingdom, stresses the importance of freedom of expression in any democratic society. The protection thereof includes "those that offend, shock or disturb the State or any sector of the population" (Handyside v United Kingdom 1976: para 49). Both FoRB and freedom of expression are limited by the protection of morals. Morals are hard to define but as General Comment 22 stresses that morals cannot be derived from a single tradition, it is almost inevitable that 'a sector of society' might be offended, shocked, or disturbed by some manifestations of the right to FoRB. This, in itself, is no compelling reason to infringe religious autonomy.

ICCPR article 20(2) prohibits "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." This principle of non-discrimination is also clearly expressed in article 2 of the Universal Declaration of Human Rights:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (United Nations 1948)

The relationship between religious autonomy and individual members is not just a matter of religious liberty but a matter of freedom of expression (ECHR 1998: art. 10). As Judge De Gaetano stated:

> Respect for the autonomy of religious communities implies, in particular, that the state should accept the right of such communities to react, in accordance with their own internal canons, rules and other interests, to any dissent or dissident movement, in much the same way as a member of any non-religious organisation or club will be dealt with according to the statutes of that organisation or club. (De Gaetano 2020)

Some religious communities exclude women and/or LGBTIQ+ persons from leadership positions in the community. That is no doubt disturbing to some both from inside and from outside faith communities. As a personal conviction, this is covered by freedom of thought, conscience, and religion. But should people and faith-based communities be allowed to practice it as a manifestation of their religion or belief? ICCPR article 18(3) stipulates that the right to manifest religion "may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." That brings the question down to whether forcing a faith or belief community to change their internal rules and regulations would be necessary to protect the fundamental rights and freedoms of others. We are not convinced. The limitation on leadership positions clearly applies to members of the community only. Based on FoRB, members are free to join or leave the group and thereby escape the rules and regulations they cannot accept. That would protect both the autonomy of the religious community and the fundamental rights and freedoms of its members.

The ECtHR, interpreting article 9 of the ECHR, emphasised, however:

> [I]n cases of conflict with other Convention rights, a fair balance must be struck. Other Convention rights – including rights against discrimination – can justifiably be infringed in order to protect religious group autonomy, but only when the infringement is shown to be a proportional means of achieving the legitimate end of collective religious liberty. (Billingham 2019)

Critical questions about the religious doctrine should always be possible, both from inside and outside the religious community. No religious group or individual should be shielded against criticism. Or in the worlds of the ECtHR:

> Those who choose to exercise the freedom to manifest their religion … cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and

> even the propagation by others of doctrines hostile to their faith. (Otto-Preminger-Institut v Austria 1994)

Based on ICCPR 20(2), criticism cannot include incitement to discrimination, hostility, or violence though.

In sum, although religious autonomy is an important element of FoRB, it is not without limits. The limitations provided for in article 18(3) ICCPR would still apply. Whenever the health of members of a faith or belief community is at stake, action by legal authorities is justified. Further, any community that limits the religious freedom of its members and denies them the right to leave the group, violates one of the core principles of FoRB and should be challenged in court. These groups are often called sects or cults. In these communities, a free and candid discussion about doctrine and teaching is seriously limited or no longer possible at all.

2.3. The minority lens

In several Western European countries, like The Netherlands and the United Kingdom, most people no longer regard themselves believers. As such, one could argue that people adhering to a religion or belief in countries where they are a minority, can claim minority rights as well as FoRB, (Ghanea 2012a), under article 27 of the ICCPR.

The ICCPR, nor General Comment 23 (UN Human Rights Committee 1994), nor the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN General Assembly 1992) provide a clear definition of a minority. The UN Special Rapporteur on Minority Issues, Dr Fernand de Varennes, addresses the issue in a report to the General Assembly (UN General Assembly 1992). In paragraph 59 of this report, the Special Rapporteur suggests a very broad and general definition: "An ethnic, religious or linguistic minority is any group of persons which constitutes less than half of the population in the entire territory of a State whose members share common characteristics of culture, religion or language, or a combination of any of these."

In his last interim report to the General Assembly, the UN Special Rapporteur on Freedom of Religion or Belief, Dr Ahmed Shaheed, zooms in on Indigenous Peoples (UN General Assembly 2022). This report, quoting from various contributions of organisations representing indigenous minorities, affirms the holistic nature of indigenous beliefs. Their spirituality is not limited to certain rituals. It is fully integrated in their way of life (e.g. para 12). To improve the protection of minorities, Shaheed supports the working definition of minorities in the context of article 27 ICCPR as proposed by De Varennes.

Minority rights are to be enjoyed in addition to existing rights (Ghanea 2012a). They provide an extra protection against discrimination. As Dr De Jong emphasises in his dissertation, article 27 does not provide an unlimited right to profess and practice one's own religion. According to the Third Committee on the elaboration of the ICCPR, "article 18 was of a general nature and applies to "everyone", minorities and majorities alike" (cited in De Jong 2000:255). Based on his research of the genesis of the ICCPR, De Jong concludes that article 27 protects the rights as a group "in a more direct and explicit manner than under the community aspect of the freedom of thought, conscience, and religion" (De Jong 2000:255-257).

Culture and religion are closely linked. Ghanea describes culture as:

> An umbrella for a minority's literature, symbols, cumulative manifestation and practise of relevant rites, customs, observances – for example holidays, dietary codes, fasting, pilgrimage, worship and a separate calendar – … especially when these differ from those of wider society and more particularly of a dominant majority. (Ghanea 2012b)

In paragraph 6(2), General Comment 23 on minorities presents the opportunity for positive measures by states to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with other members of the group (UN Human Rights Committee 1994).

Although article 27 ICCPR applies to persons belonging to religious minorities rather than to minorities as such, with the emphasis on religion, culture, and language, there is an obvious appreciation and burden of protection of the collective. Limiting this protection to indigenous peoples, living in remote rural areas, would severely undermine the universality, indivisibility, and interdependence of all human rights.

In light of the broad definition of a minority and its culture, religious communities in Western societies could claim protection under ICCPR article 2. One could even argue that there might come a time where these communities could be entitled to positive measures by states to protect their identity.

3. European cases illustrating the tension between religious autonomy and non-discrimination

Considering the various lenses through which religious autonomy can be understood, we now turn to the discussion of European cases that illustrate the tension between the religious autonomy of a faith or belief community and especially the principle of non-discrimination.

3.1. Fernández Martínez v Spain

Spanish citizen, José Antonio Fernández Martínez (1937), was ordained a Roman Catholic Priest in 1961 (Fernández Martínez v Spain 2014). In 1984, he applied to the Vatican for dispensation from the obligation of celibacy but did not get an answer. In 1985, Martínez was married in a civil ceremony. From October 1991 onwards, Martínez was employed as a teacher of Catholic religion and ethics in a State-run secondary school of the region of Murcia, Spain, under a renewable one-year contract. Candidates for this position are proposed by the diocese and appointed and paid for by the administrative authority.

In November 1996, Martínez was mentioned in an article in a local newspaper, covering a meeting of the Movement for Optional Celibacy for priests (MOCEOP). In the same article, MOCEOP advocated for responsible paternity and family planning and, in that context, did not rule out abortion.

On 15 September 1997, Martínez was notified that he was dispensed from celibacy and was no longer regarded a priest. The Pope left it to the discretion of the local Bishop whether Martínez could continue his work as a teacher. The Diocese of Carthagena subsequently informed the authorities that Martínez could no longer be a teacher of Catholic religion and ethics, and his contract was cancelled, effective 29 September 1997.

Martínez contested his dismissal which resulted in a series of court cases up to the Spanish Constitutional Court and then the European Court of Human Rights.

The Grand Chamber of the ECtHR weighed the rights of Martínez in article 8 of the European Convention on Human Rights (ECHR) (European Court of Human Rights 1998) against the rights of the Diocese in articles 9 and 11 of the ECHR. In para 126, the court emphasised the importance of religious autonomy. Further, it considered that the church as the (indirect) employer of Martínez, could expect him to honour the "special bond of trust that was necessary for the fulfilment of the tasks entrusted to him." By joining MOCEOP and by explicitly or implicitly accepting the publication of a news article including a picture of him and his family, he lost the trust necessary to perform his job.

Martínez was totally free to express his dissenting views on contraception, abortion, and celibacy. The court observed however, "that does not mean that the Catholic Church was precluded from acting on them, in the enjoyment of its autonomy." (Fernández Martínez v Spain 2014: para 139). Considering alternatives, the court concluded that "a less restrictive measure for the applicant would certainly not have had the same effectiveness in terms of preserving the credibility of the Church." (Fernandez Martínez v Spain 2014: para 145).

The ruling of the ECtHR is important as it confirms the importance of religious autonomy resulting from articles 9 and 11 ECHR. Further, by considering the re-

sponsibility of the complainant, it supports the reasoning given under the sociological lens. The position as teacher of religion brings certain responsibilities, especially while teaching adolescents who might not fully grasp the difference between the private opinions of a teacher and the official position of the church the teacher represents in the classroom.

The court made it clear that the position and responsibility of the teacher, was an important factor in their final verdict. Adding to that the fact that the decision was only supported by the smallest majority possible, it is clear that religious autonomy is by no means without limits.

3.2. Schüth v Germany

The interest of the individual cannot be neglected. That is also illustrated by the case of Schüth v Germany (Schüth v Germany 2010). In this case, the ECtHR held that Bernhard Schüth, an organist in a Roman Catholic church, who, after a divorce begot a child with another woman, could not be dismissed. The Court took note of the claim by the church that an organist plays an important role in the Eucharist, which was the Roman Catholic Church's central act of liturgy (Schüth v Germany 2010: para. 52, 61). According to the court, however, as an organist, Schüth was not bound by heightened duties of loyalty. Finding a new position outside the church would not be easy, and a life of abstinence would be too high a price to pay after a divorce. Therefore, the impact of the annulment of the employment contract on the private life of Schüth would be too high. The court took into account that (in contrast to the case of Martínez v Spain) the applicant neither publicly nor privately opposed the teachings of the church even though he had not been able to obey them himself.

Even though, in the case of Schüth v Germany, both religious autonomy and the transactional lens would support the Roman Catholic church, the court weighed these against the personal interest of Schüth in favour of the latter.

3.3. Civil parties v Jehovah's Witnesses

In Belgium, 11 citizens and a foundation filed a court case against the Christian community of Jehovah's Witnesses (Civil parties v Jehovah Witnesses 2022). They all claimed discrimination on religious grounds, segregation, and/or incitement to hatred and violence. The claimants all left or were forced to leave the community of Jehovah's Witnesses. The community was publicly informed about the situation and was then strongly advised to distance themselves from these ex-members to protect the sanctity of the community.

The regional court claimed sufficient evidence and convicted the Jehovah's Witnesses. Both the Jehovah's Witnesses and the public prosecutor appealed to the Court of Appeal in Ghent.

As Jehovah's Witnesses are encouraged to limit their social interactions to members of the community, the impact of the practice of shunning former members is significant.

The Court of Appeal confirmed both the right to non-discrimination and the right to organise oneself based on a religion or belief. According to the verdict, the latter implicitly includes that the group can decide who belongs to the community of believers, and who does not (para 2.5).

With reference to e.g., Handyside v United Kingdom (Handyside v United Kingdom 1976), the court confirmed that pluralism and freedom of expression include expressions that might be irritating, painful or shocking. Therefore, non-discrimination cannot be interpreted as forcing a faith or belief community to organise and manifest themselves in a way that would make them invisible and would not touch the lives and opinions of others in society (para 2.6.4).

With reference to ECtHR Case of Jehovah's Witnesses of Moscow and others v Russia (Jehovah's Witnesses of Moscow v. Russia 2010), the Court accepted that one's adherence to a faith or belief community can impact the relations with family and friends. The Court further confirmed that religions set the doctrinal standards for their members, including their private lives.

With reference to ECtHR Sindicatul 'Păstoral Cel Bun' v Romania (Sindicatul "Păstoral Cel Bun" v. Romania 2013), the Court observed that the right to FoRB does not include the right to dissent. Dissenters can practice their right to FoRB by leaving the community (para 2.6.6).

Claimants argued that the isolation of former members of the community of Jehovah's Witnesses exerts such pressure on members that it limits their right to choose a religion or belief of their choice (para 2.7.1). The court observed that as all the claimants were ex-Jehovah's Witnesses, this argument could not be accepted.

According to the Court, the teachings of the community don't literally call for discrimination or violence. Further, the community does not interfere with ex-members establishing a new social network outside the community (para 2.12.3).

The Court accepted that based on rulings of the ECtHR, the margin of appreciation for getting involved in religious matters is limited. The Court concluded that the shunning practice of the Jehovah's Witnesses does not equal discrimination or incitement to hatred and therefore should be accepted as protected under article 9 ECHR. The Court of Appeal confirmed the religious autonomy of faith or

belief communities and stated that FoRB does not include a right to dissent other than a right to leave the community.

Further, with its emphasis on the freedom to choose and the right of the religion or belief community to set certain rules for its members, the Court of Appeal seems to confirm the transactional lens, the voluntary transaction of some individual autonomy to the collective. One could even argue that this ruling of the Ghent Court of Appeals protects the Jehovah's Witnesses as a minority, allowing them to set their own rules setting the community apart from others in society.

4. Concluding remarks

Community religious autonomy is an important element of FoRB. Over time, this has been supported by various rulings of the European Court of Human Rights. Faith or belief communities are allowed to set their own rules based on their doctrine and teaching. When people disagree, or no longer agree with these rules, they can exercise their religious freedom by leaving the community. That might have unpleasant consequences as illustrated by the case against the Jehovah's Witnesses, but these social consequences have been no reason to limit the religious autonomy of the community. When leaving or being expelled from the group also has financial consequences, the court will weigh these individual consequences against the interests of the faith or belief community. In these cases, the role and attitude of the individual towards the community that is his or her employer has been an important factor.

Although we are not yet aware of any cases of women or LGBTIQ+ persons against faith or belief communities, e.g., for not being eligible for leadership positions, based on the principle of religious autonomy and current jurisprudence of the ECtHR, we have no reason to believe the court would take a different approach. In these cases, at least in more individualistic societies, the right to FoRB would be exercised by leaving the community for another, which adheres to a different set of rules.

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