

Freedom of Religion in the Practice of the European Commission and Court of Human Rights*

Jochen Abr. Frowein

I. General Remarks

It has long been recognized that freedom of opinion is an essential precondition for political democracy¹. Freedom of opinion first developed in the nature of freedom of religion. Against the powerful church and against its important ally the State, the claim to freedom of religion was first launched as attack to protect the individual in one of the most personal spheres of human identity².

Georg Jellinek has argued that the natural law theory which came to recognize freedom of religion is at the basis of the movement towards the strife for civil and fundamental rights. This theory has not met with general approval but it cannot be overlooked that freedom of religion was at the basis of some of the most influential political moves to establish early democratic governments³.

Within the system of the European Convention on Human Rights, the only international system protecting human rights which has brought

* This article is based on a paper submitted to the Bilateral Conference of the Max Planck Institutes in Hamburg and Heidelberg and the Tel-Aviv University Faculty of Law which took place in June 1985 at Schloss Ringberg.

¹ *Handyside*, European Court of Human Rights (ECHR) Vol.24, p.23.

² For a brief historical review see E.-W. Böckenförde, *Das Grundrecht der Gewissensfreiheit* (Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 28) (1970), pp.33, 36 et seq.

³ G. Jellinek, *Die Erklärung der Menschen- und Bürgerrechte* (1919), and *idem*, *Allgemeine Staatslehre* (3rd ed.1959), p.411.

about a case-law developing and clarifying the guarantees enshrined in the Convention, freedom of religion has not played a prominent role yet. Even freedom of opinion has long lived in the shade of articles which from the beginning were in the centre of the cases brought before the Convention-organs. It took a long time until the *Sunday Times Case* was decided by a narrow majority in the Commission and in the Court, thereby finding the first violation of freedom of opinion guaranteed by Art.10⁴. The first real issue concerning freedom to express political opinions in the form of value judgments is pending before the Court at present. The Commission came to the unanimous conclusion that the Austrian courts convicting a journalist for libel, who had described Chancellor Kreisky as behaving in an immoral way and showing ugly opportunism, had violated Art.10⁵. The courts in Austria had surprisingly enough based their holding not on a theory that those expressions are unacceptable under all circumstances but rather on the finding that the journalist could not prove that his judgments were true⁶.

During recent years a certain number of cases concerning freedom of religion has been brought before the European Commission of Human Rights. It is my intention to analyse these cases here and to present a picture of how the system of the European Convention on Human Rights works in practice. I shall first deal with the notions used by Art.9 to circumscribe what is mostly called freedom of religion in an abbreviation. I shall then try to clarify what sort of "practice" is protected by that article which entitles everybody "to manifest his religion or belief, in worship, teaching, practice and observance". Specific problems concerning religious organizations will be dealt with also.

II. Freedom of Thought, Conscience and Religion

1. General scope

Art.9 is drafted in a very careful way. Not only does the first part guarantee freedom of thought, conscience and religion, thereby protecting on an equal level those who base themselves on philosophy, personal convictions or religious doctrines. Indoctrination by the State is excluded through that article. In the *Danish Sex Education Case* the Court has rightly stressed:

⁴ ECHR Vol.30.

⁵ *Lingens v. Austria*, Report of 11 October 1984; cf. EuGRZ 1983, p.547

⁶ *Ibid.*

“The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions”.

The Court based its reasoning on Art.2 of the First Protocol especially protecting the parents but also on Arts.8 to 10 and on the general spirit of the Convention⁷.

The Convention does not exclude a system of State-Church as it still exists in the United Kingdom as well as in the Scandinavian countries but membership must never be compulsory. As the second half sentence of Art.9 expressly clarifies a change of religion is part of the freedom. Nobody can be forced to remain a member of a State-Church⁸.

The freedom of conscience is guaranteed alongside the freedom of religion in Art.9. It follows from this independent guaranty that the Convention protects conscience influenced by religious beliefs as well as conscience not based on any such doctrines. A difficult problem arises as to the scope of this right, well-known in many national legal orders from the distinction between conscientious objectors to military draft and others.

The specific question as to conscientious objectors is clear under the Convention because Art.4 para.3 b shows that the Convention leaves it to the States whether they recognize conscientious objectors or not. The wording is unambiguous according to which the term “forced labour” shall not include “in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service”. The Commission has confirmed that States as Switzerland who do not admit conscientious objection to military service do not violate the Convention⁹.

The question as to what can be seen as conscience in the sense of Art.9 has not yet come up before the Convention-organs. The Commission has for instance held that IRA-prisoners cannot derive any right of refusal to put on prison clothes bearing the insignia of the United Kingdom of Great Britain and Northern Ireland from Art.9. The Commission has not discussed whether the act in question could be seen as an act based on conscience. It seems that the Commission has rejected the position that privileges concerning behaviour in prison could be claimed on the ground of conscience¹⁰.

⁷ *Kjeldsen and others*, ECHR Vol.23, p.26 et seq.

⁸ The State must provide for procedures to leave a church, European Commission of Human Rights (EComHR) Decision 10616/83 of 4 December 1984.

⁹ Collection of Decisions (CD) 43, 161.

¹⁰ Decisions and Reports (DR) 20, 44, 76 et seq.

2. Freedom to manifest one's religion or belief

Art.9 of the Convention expressly includes the right to manifest one's religion or belief in the fundamental right guaranty. This manifestation may occur in worship, teaching, practice and observance. It may be performed alone or in community with others and in public or private. Certainly, as the wording of the methods envisaged here show, it is mainly the religious performance which will be protected by the article. But the French text excludes any misunderstanding as to whether non-religious practices may be covered. By combining «sa religion ou sa conviction» it is made clear that the article does not limit the manifestation to religious motivations. But what sort of practice is then covered by Art.9? How far does Art.9 overlap with Art.10 protecting freedom of expression?

The Commission has briefly dealt with some of these questions in the case of *Arrowsmith* against the *United Kingdom* where a well-known pacifist had distributed leaflets asking British soldiers to leave the army instead of being sent to Northern Ireland¹¹. She was convicted on the basis of the Incitement to Disaffection Act to 18 months' imprisonment. The English Court held that the leaflet in question was the "clearest incitement to mutiny and to desertion".

The Commission recognized that pacifism is a "belief" in the sense of Art.9. However, the Commission explained that the term "practice" does not cover each act which is motivated or influenced by a religion or a belief. Although it was prepared to accept public declarations proclaiming generally the idea of pacifism and urging the acceptance of a commitment to non-violence as a "manifestation of pacific belief" it could not see that the leaflets distributed were of such a nature. The Commission summarized its views as follows¹²:

"The leaflets were not addressed and distributed to the public in general but to specific soldiers who might shortly be posted to Northern Ireland. The soldiers were, according to the contents of the leaflets given the advice to go absent without leave, or openly refuse to be posted to Northern Ireland. This advice was not clearly given in order to further pacifist ideas".

More recently the Commission has had to consider whether a question arose under the Convention where a religious Jew had been convicted by the French courts to pay damages to his former wife because, although the divorce under civil law had become final, he refused to deliver the so-called

¹¹ DR 19, 5.

¹² DR 19, 5, 19 et seq.

“Guett” which is necessary to allow remarriage under Jewish religious law. The applicant claimed a violation of his right under Art.9 because under mosaic law the delivery of the letter be purely discretionary. A careful analysis of the decision by the Commission may show that the Commission was faced with more difficult problems than might appear at first reading. The Commission stated at the outset that the applicant objected to the delivery only because he would then lose the right to remarry his former wife since being a member of the “Cohen”-family he could not marry a divorced wife. The Commission goes on to explain that it is common practice to deliver the “Guett” and that the applicant had been asked to explain his position by the «Tribunal Rabbiniq ue de Paris». The Commission concluded from there that the refusal was not a practice of his religion in the sense of Art.9 and the application was dismissed as being manifestly ill-founded¹³.

One may say that the case was too trivial to merit our attention. But as matter of principle it is not easy to accept the State interfering with the performance of a clearly religious act by a conviction to pay damages because of the refusal to abide by what may be a religious custom or law. The holding of the Commission seems to be that the applicant had not really established why his refusal had anything to do with religion. Since the refusal had very damaging effects for his former wife who wanted to remarry according to religious rules, the Commission may have assumed that it was a case of malicious intent. Somebody coming from a country with a long and difficult history of religion-State relationship as Germany may have more problems here than those originating from countries with a less troublesome history in that respect.

It may also be mentioned that in a case well-known in Germany – because it went several times through different German courts – the Commission refused to see the wish to be buried on the applicants’ own land as a manifestation of his beliefs. The Commission said this:

“The desired action has certainly a strong personal motivation. However, the Commission does not find that it is a manifestation of any belief in the sense that some coherent view of fundamental problems can be seen as being expressed thereby”¹⁴.

Although it is always difficult to make judgments concerning those matters it would seem to be correct that not every sort of behaviour can be claimed as being a manifestation of beliefs.

¹³ Dec.10180/82 of 6 December 1983.

¹⁴ DR 24, 137 et seq.

III. Freedom of Conscience and Religion and the Law of the Land

Art.9 para.2 justifies the limitation of the freedom enshrined in para.1 to protect specific values of the society, especially public order and the rights of others. However, before a meaningful discussion as to a possible interference with this freedom can begin one must verify how far the freedom guaranteed in para.1 can be used to refuse abiding by the general law of the land. This is one of the most difficult issues in many constitutional systems.

The Commission has had to deal with this argument not unfrequently. Several applicants brought cases against different Dutch insurance-systems arguing that compulsory insurance violated their freedom of conscience. The Commission relied sometimes on para.2 of Art.9 but mainly emphasized that the payment as such is quite neutral and that nobody is forced to accept any payments from the insurance¹⁵.

The problem became even more visible when Art.9 was invoked by a tax-payer who withheld taxes in the amount of 40% because she objected to the use of her money for armament. The Commission rejected her application with a rather detailed reasoning¹⁶:

“Article 9 primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*. In addition, it protects acts which are intimately linked to these attitudes, such as acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognised form.

However, in protecting this personal sphere, Article 9 of the Convention does not always guarantee the rights to behave in the public sphere in a way which is dictated by such a belief: – for instance by refusing to pay certain taxes because part of the revenue so raised may be applied for military expenditure. The Commission has so held in Application No.7050/75 (*Arrowsmith v. the United Kingdom*, Report DR 19, p.5 at para.71) where it stated that ‘the term ‘practice’ as employed in Article 9 (1) does not cover each act which is motivated or influenced by a religion or a belief’.

The obligation to pay taxes is a general one which has no specific conscientious implications in itself. Its neutrality in this sense is also illustrated by the fact that no tax payer can influence or determine the purpose for which his or her contributions are applied, once they are collected. Furthermore, the power

¹⁵ Yearbook of the European Convention on Human Rights (Yb) 5, pp.278, 282 et seq.; 5, 286, 298; Yb 8, pp.266, 270; Yb 10, pp.472, 476.

¹⁶ Dec.10358/83 of 15 December 1983; see also Dec.10295/83 of 14 October 1983.

of taxation is expressly recognised by the Convention system and is ascribed to the State by Article 1, First Protocol.

It follows that Article 9 does not confer on the applicant the right to refuse on the basis of her convictions to abide by legislation, the operation of which is provided for by the Convention, and which applies neutrally and generally in the public sphere, without impinging on the freedoms guaranteed by Article 9.

If the applicant considers the obligation to contribute through taxation to arms procurement an outrage to his conscience he may advertise his attitude and thereby try to obtain support for it through the democratic process.

The Commission concludes that there has been no interference with the applicant's rights guaranteed by Article 9 (1) of the Convention and it follows that this aspect of the applicant's complaint is manifestly ill-founded within the meaning of Article 27 (2) of the Convention".

It would seem to be clearly settled by these decisions that freedom of religion and conscience can never be relied upon to take leave from the observation of those general laws which in themselves have nothing touching the sphere of conscience and religion. It is the idea of a certain neutrality of the law which is at the basis of this analysis. One may find certain parallel developments in the constitutional law of some countries. In German constitutional law the notions of *allgemeines Gesetz* or *für alle geltendes Gesetz* come to one's mind. In two cases the Commission was confronted with the argument that a legislation was based on religious motives. That was put forward in the German case concerning abortion and in the Irish case concerning divorce. In both cases the Commission found that this did not change the neutral character of the law itself¹⁷.

IV. Freedom of Religion and Religious Organizations

1. The right to found religious organizations

When Art.9 refers to the possibility to manifest religion in community with others it contains already an indirect guaranty to found religious organizations. Since the freedom of religion as it developed over the centuries cannot be separated from the organizations, be they called churches, congregations or else, these conditions for any freedom of religion must be seen as guaranteed by Art.9 interpreted properly. The Commission has recognized that and has furthermore drawn the conclusion that such an

¹⁷ *Brüggemann and Scheuten v. Germany*, DR 10, 100, 114 et seq.; *Johnsten v. Ireland*, Report of 5 March 1985, pending before the ECHR.

organization may rely on freedom of religion itself. Although the Commission spoke of a church as "capable of possessing and exercising the rights contained in Art.9 para.1 in its own capacity as a representative of its members"¹⁸ it would seem to be more correct to see such an organization as a medium through which freedom of religion is exercised.

When the Moon sect complained about the Austrian legislation concerning religious associations the Commission was careful to stress that the Austrian Act was applied in such a way as to allow in principle for the establishment even of religious organizations as associations under the Act, although the wording seems to exclude that at first. The decision is based on Art.11 concerning freedom of association but the same right must be seen as protected by Art.9 already¹⁹.

2. The right to leave a religious organization

Freedom of religion must exclude any possibility of compulsory membership in religious organizations. Art.9 expressly includes the freedom to change religion or belief and this right must be guaranteed by the State in an effective way. Where a religious organization does not permit people to leave the group the State must make that possible. Sweden introduced that possibility before ratifying the Convention²⁰.

As many national courts the Commission has had to deal with cases where people argued that they objected to paying church taxes but did not want to leave the church. In a case against Austria the Commission held that a system by which the State compels people to pay contributions for a church is not objectionable where it is clear that a person can leave the church whenever it wants. The Commission said²¹:

"The obligation can be avoided if they choose to leave the church, a possibility which the State legislation has expressly provided for. By making available this possibility, the State has introduced sufficient safeguards to ensure the individual freedom of religion".

The internal legislation can lay down rules for leaving a church and especially require an unequivocal declaration in that respect²².

¹⁸ DR 16, 70.

¹⁹ DR 26, 92.

²⁰ K.J. Partsch, Die Rechte und Freiheiten der europäischen Menschenrechtskonvention, in: Bettermann/Neumann/Nipperdey, Die Grundrechte, Bd.1 (1966), p.428.

²¹ Dec.9781/82 of 14 May 1984.

²² Dec.10616/83 of 4 December 1984.

3. Freedom of religion against a church, especially a State-Church

Sometimes people claim that their freedom of religion should be protected against their church. A clergyman in the State-Church of Denmark had been requested by the Church Ministry to abandon a certain practice of christening. The Commission held as follows²³:

“A church is an organized religious community based on identical or at least substantially similar views. Through the rights granted to its members under Art.9, the church itself is protected in its right to manifest its religion, to organize and carry out worship, teaching practice and observance, and it is free to enforce uniformity in these matters. Further, in a State church system its servants are employed for the purpose of applying and teaching a specific religion. The individual freedom of thought, conscience or religion is exercised at the moment they accept or refuse employment as clergymen, and their right to leave the church guarantees their freedom of religion in case they oppose its teachings.

In other words the church is not obliged to provide religious freedom to its servants and members, as is the State as such for everyone within its jurisdiction.

The Commission therefore holds that freedom of religion within the meaning of Art.9 (1) of the Convention does not include the right for a clergyman, in his capacity of a civil servant in a State church system, to set up conditions for baptizing, which are contrary to the directives of the highest administrative authority within that church, i.e. the Church Minister”.

One must admit that a case of that sort causes problems for someone used to a separation of church and State but that is a doctrine not included in the Convention²⁴.

The Commission had to deal with a State-Church problem again recently. A Norwegian clergyman in the State-Church who objected to the abortion legislation refused to carry out certain functions that were duties of his office. They had no relation to the Abortion Act but concerned his obligations when performing marriages etc. By judgment of a court the applicant was dismissed. He then brought an application to the Commission.

The Commission rejected the application holding that the applicant had accepted certain obligations and that his refusal to fulfil them could not be

²³ DR 5, 158.

²⁴ This follows from the existence of State-Churches in several Convention-countries (Great Britain, Scandinavian States).

justified by Art.9²⁵. The Commission stressed that he could clearly express his beliefs and opinions as to abortion and that nobody had tried to bring pressure upon him to change his opinions.

Again, a procedure by which State organs dismiss a priest is unheard of in many constitutional systems²⁶. But here the Convention must be seen in the light of the fact that some of the countries drafting and signing it have State-Churches.

In the German context clergymen sometimes complain that they have no judicial remedies against the church. Indeed, the autonomy of the church under German constitutional law is interpreted as excluding the jurisdiction of State courts from the internal matters of churches. The Commission has held that Art.6 does not include the right of a minister of the church in the difficult notion of "civil rights" which give the right to have access to a normal court of law²⁷.

V. Positive Obligations of the State created by Art.9

The Commission has recognized that positive obligations flow from Art.9. In prisons there must be a priest available for those prisoners who want to contact him²⁸. In a German prison no obligation exists to have a minister of the English High Church but there must be a protestant priest. Religious rules concerning the food must be respected. Although the Commission had doubts about that rule earlier, it seems to be accepted today²⁹. Of course, there may be limits as to what is possible.

In a case a Muslim who had been employed as a teacher in England claimed the right to be absent from school every Friday afternoon for about one hour to pray in the Mosque. The Commission recognized a certain obligation for the authorities to have due regard to the specific situation of a Muslim. But taking into account the fact that the applicant had not claimed such a right when he was first employed the Commission dismissed the case on the facts because no lack of disregard could be shown³⁰.

In an interesting application against Sweden, where the so-called Church

²⁵ Dec.11045/84 of 8 March 1985, *Knudsen v. Norway*.

²⁶ According to German constitutional law the State may never interfere with the right of a church to appoint or dismiss their ministers.

²⁷ Dec.10901/84 of 8 May 1985.

²⁸ CD 23, 1, 8; DR 1, 41 et seq.

²⁹ DR 5, 8 et seq.

³⁰ DR 22, 27

of Scientology claimed lack of protection against criticism, the Commission did "not exclude the possibility of criticism or 'agitation' against a church or religious group reaching such a level that it might endanger freedom of religion and where a tolerance of such behaviour by the authorities could engage State responsibility"³¹. No real problem arose in that case but it would seem to be important that the Commission has recognized the right of a church to be protected by the law of the land. Indeed, positive obligations to respect religious freedom may arise in different contexts.

VI. Restrictions under Art.9 para.2

It is not without interest that real cases of limitations of freedom of religion under the restrictive clause of para.2 of Art.9 have been quite rare so far. Some early decisions would certainly not be upheld today. A good example of that sort is the one where the prison administration prohibited a Jew who had converted to Buddhism to grow a beard. The Commission relied on the protection of order in prison, the Government having stressed the necessity to identify prisoners easily³². Of a different character was the decision to refuse a Buddhist a religious book which contained instructions for self-defense³³. Here, para.2 may clearly be invoked to protect the order in prison.

Of some interest in that context is the decision concerning a Sikh who complained that he had been fined twenty times for failing to wear a crash helmet when riding his motor cycle. The Commission noted that Sikhs were later granted exemption from these rules by United Kingdom legislation but had no difficulty to accept the regulation as such as being covered by the protection of health³⁴. The case raises more difficult issues than the Commission admitted since only the drivers' health was at issue here.

A case where the Commission could have used para.2 but on purpose and – I submit – rightly stayed within para.1 concerned again the so-called Church of Scientology which was restricted by Swedish courts from advocating the E-meter, a religious Electrometer, in a specific way³⁵. The Commission interpreted the advertising as being merely of a commercial nature, therefore not really coming within the ambit of Art.9. Taking into

³¹ DR 21, 111.

³² Yb 8, 184.

³³ DR 5, 100.

³⁴ DR 14, 235.

³⁵ DR 16, 68, 72.

account the price, the context and the sort of advertisement this seems to be quite correct although one must admit that advertisements for instance for the water of Lourdes or trips to Lourdes clearly have also a commercial aspect without leaving the sphere of Art.9 para.1 as acts covered by freedom of religion.

The Commission today rightly sees the application of the restrictive clause in para.2 of Art.9 as something much more serious than the application of the same rule in Art.10 concerning freedom of opinion and the press. This approach seems to be based on the correct view that freedom of religion is of a very delicate nature and restrictions of what really belongs to that sphere need indeed very good justification³⁶.

VII. Neutrality of the State

Must the State be neutral towards religions? As we have already seen the Convention must be interpreted on the background of the existing State-Churches in several member countries. This excludes an interpretation which would accept the American doctrine of separation of church and State or the German one of the autonomy of the churches or religious groups³⁷. However, except for the rather formal position of the State-Church it would seem that indeed some principles developed under the doctrine of neutrality should also apply under the Convention. The State must not grant legal privileges to those belonging to one but not the other religious group. Art.14 expressly excludes discrimination on the ground of religion³⁸. This would seem to be a very important safeguard. There have not been any practical issues of that sort before the Convention-organs.

VIII. Conclusion

Freedom of religion is not severely threatened in the European States who are members of the European Convention on Human Rights. We may hope that the principles developed here for the implementation of this really fundamental right which is not only to be found in Art.9 of the European Convention on Human Rights but in all human rights instruments may in the long run be of influence also in those areas of the world where they are not respected today.

³⁶ Cf. Frowein-Peukert, EMRK-Kommentar (1985) Art.9 No.22 et seq.

³⁷ Cf. Friesenhahn / Scheuner, Handbuch des Staatskirchenrechts der Bundesrepublik Deutschland, 2 vols. 1974/75.

³⁸ In one case the Commission had to deal with the position of a priest who claimed discrimination; see *Demeester v. Belgium*, DR 25, 210, 212 et seq.