FREEDOM OF RELIGION IN THE DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SLOVENIA ON THE CONSTITUTIONALITY OF THE RELIGIOUS FREEDOM ACT

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1. Introduction

Through its decision U-I-92/07-23 dated 15 April 2010 on the constitutionality of individual provisions of the Religious Freedom Act, the CCRS presented a comprehensive and systematic interpretation of freedom of religion. The CRS ensures and protects religious freedom in its Article 41 (freedom of conscience). This provision belongs among the relatively few and exhaustive human rights...
and fundamental freedoms, which may in no case be temporarily suspended or restricted, not even in a state of war or a state of emergency (Article 16). Numerous rights and freedoms are related to or derived from freedom of religion: the principle of democracy (Article 1), the separation of the state and religious communities (Article 7), equality before the law (Article 14), the right to personal dignity and safety (Article 34), the protection of the rights to privacy and personality rights (Article 35), the protection of personal data (Article 38), freedom of expression (Article 39), the right of assembly and association (Article 42), the right to conscientious objection (Article 46), the rights and duties of parents (Article 54), the freedom of education and schooling (Article 57), the prohibition of incitement to discrimination and intolerance and prohibition of incitement to violence and war (Article 63) and the duty to participate in the national defence (Article 123). Due to its contentual exhaustiveness and systematic presentation, this decision will be able to be of assistance to the state and religious communities in the settlement of their common open issues (e.g. religious spiritual care in public institutions, the army and police forces; maintaining and taxation of sacral cultural monuments). It will also guide the work of the legislator in the preparation of amendments of the invalidated provisions of the Religious Freedom Act. In this context, the CCRS imposes the regulation of criteria for the registration of religious communities and an eventual different organisation of religious spiritual care in prisons and public hospitals.

2. Content of the right

The CCRS states that religious freedom, as defined by Article 41 of the CRS, encompasses the right to have a religion, the right to freely choose ones religion, the right not to have a religion and the right to freely change ones religion. At the first level, this represents freedom of belief, which is an internal reflection and an internal decision of an individual on religious issues (forum internum). This level cannot be legally regulated or restricted and belongs only to natural persons. At the second level, the rights of the freedom of religion represent the manifestation of internal personal decisions from the field of religion outwards, outside of oneself (forum externum). Such a manifestation includes the right to the free profession of religion, which means an oral or written expression and exercise of religion. It also includes a general freedom of action, which encompasses worship and ritual, other practices in accordance with religious teachings and uniting into religious communities. The free profession of religion and the general freedom of action are granted to individuals as well as to religious communities.

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5 Ibidem, pt. 81.
3. Method of the implementation of the right

3.1. Individual and collective aspect

In accordance with the systematisation of the CCRS, religious freedom is exercised individually or collectively. The collective aspect represents the right of individuals to establish religious communities and unite into such communities. In this regard, religious communities have the right to a sovereign and independent (autonomous) regulation of their internal affairs, which concern their functioning and the internal status of their members. The collective aspect of freedom of religion ensures religious communities their own freedom of conscience. This is reflected in their right to profess religious beliefs and perform religious practices freely and in accordance with their own rules.

3.2. Positive and negative aspect

In the opinion of the CCRS, it is important to separate the positive and negative aspect of the implementation of religious freedom, whether individual or collective. The positive aspect represents the right to have religious beliefs and in this context the possibility to unite into a religious community. The individual freely professes his religion alone or jointly with others, in public or in private, through teaching, the fulfilment of religious duties, worship and the performance of religious rites. This aspect allows all kinds of ways (oral or written, private or public) to express religion, including prayers and spreading religious truths. This also protects actions that represent compliance with religious rules (worship, rites, rituals, processions, use of religious clothing and symbols, etc.). In sum, the positive aspect of freedom of religion includes outwardly perceptible actions that are significantly correlated with an individual's religious beliefs. In contrast, the negative aspect of religious freedom represents the right not to have religious beliefs and the option not to unite into a religious community. An individual is not required to have a religion or to declare himself/herself with regard to it; he/she may not be punished, discriminated against or disregarded due to this fact; he/she may not be compelled to profess religion; he/she also has the right to refuse to participate in actions that represent an exercise of religion.

3.3. Relationship between the positive and the negative aspect

The CCRS points out that the negative aspect of freedom of religion does not have a priori precedence over the positive aspect. In each individual case, it is necessary to carry out a weighting on the basis of Article 2 and the third paragraph of Article 15 of the CRS to assess, in accordance with the principle of

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6 Ibidem, pt. 90.
7 Ibidem, pt. 88.
8 Ibidem, pt. 1.
11 Ibidem, pt. 89.
12 Ibidem, pt. 84.
13 Ibidem, pt. 82.
14 Ibidem, pt. 89.
proportionality, which aspect of religious freedom should be awarded the current priority\textsuperscript{16}. This means that the aim of an encroachment upon a human right needs to be constitutionally admissible and materially justified. Such an encroachment must be necessary (inevitable) and appropriate for the attainment of the objective pursued, while the weight of the consequences of the assessed encroachment needs to be proportional to the value of the objective pursued or the resultant benefits\textsuperscript{17}. The CCRS states as examples of appropriate encroachments in order to ensure the negative aspect of freedom of religion the prohibition of a mandatory attendance of religious instruction and the organisation of religious instruction before the beginning or after the end of school in order for students that do not wish to attend religious instruction to be able to go home undisturbed\textsuperscript{18}.

According to the point of view of the CCRS, each perception by an individual of profession or exercise of religion does not represent such a confrontation with religious beliefs that this would constitute an encroachment upon his/her negative religious freedom. Thus, a visible or audible perception of religious features (e.g. a view of a church or a mosque, of a religious procession, of a believer in religious clothing, singing of the muezzin or the sound of church bells) cannot by itself constitute an unlawful forced confrontation with religion\textsuperscript{19}.

According to the CCRS, the collection of data on religion within the framework of a population census also represents an admissible encroachment upon the negative aspect of freedom of religion, as it is ensured that the respondent is free (not) to declare himself/herself in this respect\textsuperscript{20}. For members of the armed forces, negative religious freedom is fully guaranteed already by the fact that it is left to their free choice whether they wish to assert their right to religious spiritual care or not\textsuperscript{21}.

Examples of an inadmissible encroachment upon the negative freedom of religion are e.g. a compulsory oath on a Bible when taking public office, the installation of crosses in classrooms of public schools as well as prayer and blessings at graduation ceremonies in public schools\textsuperscript{22}. Children are namely still developing their personality, their will ability is usually not yet complete and their responsiveness to impulses from the environment is not predictable\textsuperscript{23}. Children are easier influenced than adults\textsuperscript{24}. In the case of children in the public space, the relationship between the positive and the negative aspect of religious freedom therefore needs to be considered in a significantly different way than in the case of responsible adult persons with will ability\textsuperscript{25}. Ensuring the religious

\textsuperscript{16} Ibidem, pt. 86.
\textsuperscript{17} Ibidem, pt. 122.
\textsuperscript{19} Ibidem, pt. 170.
\textsuperscript{21} Ibidem, pt. 170.
\textsuperscript{23} Ibidem, pt. 167.
upbringing of their children is the right of parents\textsuperscript{26}, which for example, in case of a census, enables them to answer the question of the census taker regarding the religion of their children\textsuperscript{27}. It can therefore be inferred that there is no inadmissible encroachment upon the negative aspect of freedom of religion when the state does not require the addressee to perform an action, deed or expression of affiliation to a particular religion and when the individual's freedom of choice is maintained, taking into account the age and the maturity of the person\textsuperscript{28}.

4. Duty of the state in providing this right

4.1. Passive attitude
According to the statements of the CCRS, religious freedom is primarily a defensive right. This means that the state, local communities and other holders of public powers may not inadmissibly encroach upon this right. The state is prohibited from: deciding on matters related to religious instruction or the internal autonomy of religious communities; demanding declarations with regard to religious issues; rewarding or punishing acts that constitute a profession of religion; discriminating with regard to human rights and fundamental freedoms; unjustifiably differentiating (favouring or discriminating against) individuals due to their religion\textsuperscript{29}.

4.2. Active conduct
Freedom of religion also demands positive action on the side of the state\textsuperscript{30}. The CRS requires that an effective and actual implementation of human rights and fundamental freedoms must be ensured. The contribution of the state thereby depends on its capability. However, this support must be of such a quantity and such a kind in order to enable an actual implementation of this right\textsuperscript{31}. In this regard, the state needs to prevent any kind of forced (unsolicited) confrontation of an individual with any kind of religious beliefs\textsuperscript{32}. Religious contents in public schools may not be prescribed as mandatory for all students. At classes in a public school, one religion or irreligion should not prevail over another\textsuperscript{33}. The state needs to build up and ensure tolerance between members of different religions, prevent undue discrimination based on religion among individuals (e.g. with regard to employment, unless this should be required by

\textsuperscript{26} Ibidem, pt. 86.
\textsuperscript{29} Ibidem, pt. 94.
\textsuperscript{30} Ibidem, pt. 94.
\textsuperscript{32} Ibidem, pt. 86.
its very nature), establish a framework for the acquisition of legal personality for
religious communities, as well as enable, in certain circumstances (e.g. the
army, prisons, etc.), the access to religious spiritual care. According to the CCRS, active conduct by the state needs to be present especially in circumstances, in which the implementation of freedom of religion is made considerably difficult or even impossible for individuals and where circumstances provoke an especially intense experience of issues and dilemmas, encompassed by the term of religious beliefs. These are mainly closed environments (the army and prisons) as well as open environments, where the individuals are significantly hindered or prevented from exercising their religious freedom outside of the institution due to physical and other characteristics (hospitals and social welfare institutions). In such cases, the state needs to enable individuals to perform individual acts of a religious nature (e.g. the individual use of religious symbols), to have an access to books with a religious content and an access to a priest as well as to allow the performance of religious rites. Since the religious rite, as a medium between the believer and transcendence, represents an essential element of the exercise of religion, which is usually performed in a group in special consecrated premises, it is a positive duty of the state to enable the use of suitable premises for the collective exercise of religion in prisons and public hospitals. However, the provision of legal protection of freedom of religion encompasses only those practices that are reasonably related to the nature of religious beliefs and without which religious freedom becomes curtailed for an individual. In this context, a pharmacist’s refusal to sell contraceptive pills is not considered as an exercise of religion.

5. Actions of the state in ensuring this right

5.1. Principle of separation of the state and religious communities

The CCRS explains that freedom of religion from Article 41 of the CRS is protected especially by the principle of separation of the state and religious communities, determined by Article 7 of the CRS. The aim of this principle is to ensure true freedom of conscience and equality of individuals and religious communities. The intention of the principle of separation is not to protect the state from religious communities and declarations, but to ensure full freedom of conscience and equality of all believers and unbelievers. The high wall between the state and religious communities provides a protection in both directions from influence and identification, which is important with regard to the respect of the individual’s religious freedom. In sum, the principle of separation, which does not represent a human right, must be interpreted in the light of freedom of religion, which is being classed by the CRS among human rights.

36 Ibidem, pt. 84.
39 Ibidem, pt. 147.
rights and fundamental freedoms. Religious freedom is namely one of the few rights and freedoms, which enjoys absolute protection in accordance with Article 16 of the CRS and which may in no case be suppressed or may be limited only in very limited circumstances. Even though the legislature’s view is based on the standpoint that religious communities cannot perform functions that are reserved to the state (e.g. performing marriage ceremonies, keeping register books, issuing public documents), this does not preclude, according to the legislature, the inclusion of certain institutions of religious communities in various public institutions (e.g. theological faculties in public universities, subject to relevant legislation). The principle of separation of the state and religious communities includes three elements: religious neutrality (secularity) of the state, freedom (autonomy) of religious communities in their own field and an equitable attitude of the state towards religious communities.

5.2. The element of neutrality (secularity) of the state
Neutrality (secularity) from the first paragraph of Article 7 of the CRS binds the state not to introduce religious elements in its activities, to be impartial, to neither assume nor reject (not support as well as not hinder) religious opinions and not to demand the exclusion of religion from public life. Neutrality does not dictate the state to be indifferent towards the religious needs of the people. It is the constitutional duty of the state to also take into account, to a certain extent, the religious problems of individuals and religious communities as well as to actively create conditions for the implementation of freedom of religion as a human right. However, no symbolic identification of the state with religion or religious communities may occur thereby. This would happen in the case if an institutional link was established between the state and religious communities and this link was also recognisable externally, in the eyes of third persons or in the relation towards third persons (comparable to the constitutional case law of the United States, which assesses whether an action of the state, in the eyes of a reasonable observer, places a person of another religion or an unbeliever in a position of a less desirable member of the community).

5.3. The element of freedom of action (autonomy) of religious communities
According to the CCRS, freedom (autonomy) of religious communities from the second paragraph of Article 7 of the CRS represents the protection of the activities of religious communities against government intervention. This means a guarantee of autonomy in the internal affairs of religious communities. With regard to the content, this represents freedom of: establishment of religious communities; organisation and performance of religious rites and other religious

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44 Ibidem, pt. 104.
46 Ibidem, pt. 147.
affairs; organisation and autonomous decision-making about their internal structure, composition, internal competencies, the functioning of their bodies, the appointment and duties of priests and other representatives, the rights and duties of their adherents as well as the connection with other organisations or religious communities. Religious communities may not be forced to adopt internal democracy (as applies, to a certain extent, for example for associations with regard to the election of their bodies and the decision-making of their general meetings). Internal decisions of religious communities may not be subject to supervision by the state (e.g. decisions of bodies of religious communities cannot be disputed before a state court). It is prohibited for the state government to act as arbiter in disputes of a religious nature. Freedom of action is ensured to religious communities in the private and the public life. In spite of their autonomy, religious communities are not absolved of the duty to act in accordance with state law.

5.4. The element of equality of religious communities

The equality of religious communities from the second paragraph of Article 7 of the CRS provides for an equal treatment of religious communities. According to Aristotle, this principle includes the assessment of distributive equity and represents the proportional equality of treatment or the assignment of rights and duties according to the value, number, ability, necessity, etc. Later on, Ulpian expressed this with the saying “to each his own” (suum cuique), which is a precondition for peaceful coexistence among people and the assurance of the effectiveness of a legal system. Therefore, where unequal is treated in proportion to the inequality that exists in the unequal, there is no legally unacceptable inequality. Such an idea of distributive equity represents the rejection of equity as numerical equality.

Where this is materially justified, even differential treatment of religious communities is by itself not opposed to the principle of equality. However, on the basis of Article 2 and the third paragraph of Article 15 of the CRS, differential treatment of religious communities in the implementation of any human right or fundamental freedom, which is based on religion, needs to be assessed according to a strict proportionality test. In binding different legal consequences on a similar actual condition, an admissible objective must thereby be pursued. Other types of distinctions, namely either those whose distinctive basis is not religion or any other personal circumstance or those that are not related to the enjoyment of human rights and fundamental freedoms, are already constitutionally permissible if they do not infringe the general principle of equality before the law, referred to in the second paragraph of

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48 Ibidem, pt. 106.
49 Ibidem, pt. 119.
50 Ibidem, pt. 106.
51 Ibidem, pt. 108.
56 Ibidem, pt. 135.
Article 14 of the CRS. In this case, the distinction between religious communities with regard to a specific issue is admissible, if there is a reasonable and objective reason for it that is founded on the nature of things\(^{57}\).

In this way, individual religious communities may be eligible to obtain special rights in comparison with others (e.g. financial aid by the state)\(^{58}\). Such a reason is for example constituted by the historical fact of the Holocaust, which allows a waiver of the condition of the number of faithful\(^{59}\). Moreover, due to a role in national history and tradition, states may emphasise the standing of an individual religious community above others\(^{60}\). In this regard, we must probably also understand and treat as a reasonable and objective reason for distinction the statement in the preamble to the Agreement between the Republic of Slovenia and the Holy See on Legal Issues, which emphasises the centuries-old historic relationship between the Slovenian people and the Catholic Church\(^{61}\).

6. State financial aid to religious communities

The principle of separation of state and religious communities does not prevent the state to establish positive relationships, forms of co-operation and joint efforts, such as the ones that it has in this respect with other civil society organisations, with those religious communities that also perform generally beneficial activities\(^{62}\). The modern perception of religious freedom includes a close collaboration of the state with religious communities, the protection of the positive aspect of freedom of religion as well as a state intervention in the segment of the public activities of religious communities, if necessary for the protection of public order\(^{63}\). Even though no one has the right to demand state support in the expression of religion, the CCRS points out a contexual connection between freedom of religion and the principle of democracy\(^{64}\). The modern democratic and social state actively participates in numerous social fields, which are being directly or indirectly promoted in different ways. Since religious communities, on the basis of their beliefs, perform tasks in these fields, the state cannot ignore them or even eliminate them with regard to encouraging and promoting various activities within society. Religious neutrality of the state does not mean pushing religion aside in society, as this could lead to discrimination based on religion and the denial of neutrality. Already through their basic mission, i.e. the care for religious freedom as a human right, religious

\(^{57}\) Ibidem, pt. 109.
\(^{58}\) Ibidem, pt. 124.
\(^{59}\) Ibidem, pt. 207–208.
communities can perform an important and useful role in terms of strengthening human dignity in the modern democratic society, which goes beyond the mere pursuit of individual goals.\textsuperscript{65}

According to the CCRS, the state may therefore materially support any registered religious community, which corresponds to the description of a generally beneficial organisation. The general benefit consists of two elements. The first one is the commitment to spirituality and human dignity in the private and the public life as well as the striving to give a meaning to existence in the field of religious life (\textit{res spirituales}). This is the so-called internal general benefit, which needs to be understood as an implied feature of all registered religious communities. The other element, which needs to be presented cumulatively with the first, is the direct wider social contribution of religious communities, when the activities of the latter go beyond the scope of purely internal religious life, so that they also perform cultural, educational, solidarity, charity and other activities in the field of welfare (\textit{res mixtae}), in which the state has its own jurisdiction\textsuperscript{66}. An example of providing a constitutionally permissible financial “compensation” to religious communities is the payment for the work that is carried out by priests in providing religious spiritual care for believers in prisons and public hospitals\textsuperscript{67}. According to the CCRS, public funds may be granted to religious communities exclusively through public tenders by an individual act\textsuperscript{68}.

7. Conclusion

The basic message of the CCRS can be summarised in the legal and systemic argument that everything, which belongs within the framework of exercising the right to freedom of religion from Article 41 of the CRS, cannot be inconsistent with the principle of separation referred to in the first paragraph of Article 7 of the CRS\textsuperscript{69}. The principle of separation of the state and religious communities is not statist, but rather humanistic. A neutral state respects the right of individuals to a free personal or collective profession of religion.\textsuperscript{70} Slovenia is therefore subject neither to the anticlerical model of separation (formerly called “French”), which wanted to deliver the state from church and push religion out of public life into the privacy of the individual, nor the liberal (American) model, which basically only saw in the principle of separation the

\begin{thebibliography}{99}
\bibitem{68} Ibidem, pt. 137.
\bibitem{69} Ibidem, pt. 104.
\bibitem{70} Ibidem, pt. 102.
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protection of “the garden of the church” against “the wilderness of the world”71. From the constitutional perspective, collaboration between the state and religious communities is in itself not inadmissible, even if it exceeds the extent required by freedom of religion from Article 41 of the CRS. This holds true as long as the state thereby remains religiously neutral and does not identify itself with religion or religious communities72. Religion is namely an integral part of public life and society. No one can be affected in his/her freedom of (non-)belief merely due to the fact that the activity of a free democratic society also includes the religious aspect through citizens, who are committed to their religion as believers73.

The existence of religious beliefs or religious communities is therefore an indispensable constituent part of pluralism in a democratic society74. If religious beliefs and practices are completely separated from the public and the political life, political ideas, values and institutions are weakened. They cannot win the sympathy of a large number of citizens of a democratic state, who are active mainly through their religious motivation75. Religion represents the most profound human passions, which can be channelled towards the common good. A government, which strives for an all-inclusive objective of a common good, simply cannot force religion out of the public space76. Any policy that respects the dignity of the human person must in any case accept people such as they are. A consensus and individual policies in the society cannot be enforced in the expectation that people will in any way radically change77.

Religion sets the subject of human desire beyond and above worldly goods. It imposes duties towards the human race on every person, here and there discouraging this person from self-infatuation78. It leads to the general habit for a man to act with an eye fixed on the future. Such a habit is generally beneficial both for happiness in this life and blissfulness in the next one. This is one of the greatest political consequences of religion79. “When, therefore, any religion has struck its roots deep into a democracy, watch it carefully as the most precious bequest of aristocratic ages”80.

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73 Ibidem, pt. 83.
76 Ibidem, p. 29.
80 Ibidem, p. 149.