CHAPTER 4

Regulating religious proselytism: The views from Strasbourg and Luxembourg

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Abstract

The right to proselytize is encompassed within the scope of Freedom of Religion or Belief (FoRB) in international law. The European Convention specifically refers to "teaching" as a form of "manifestation" of religion. It is also supported by the reference to "change religion or belief". As part of the *forum externum*, it is not an absolute right, and may be limited by the State. Domestic law might seek to protect individuals considered in some sense vulnerable against inappropriate pressure to change a religious belief. As a result, domestic and international courts are called on to decide whether an alleged interference was or was not justified in the particular circumstances. This article analyses how the European Court of Human Rights and the Court of Justice of the European Union have ruled on domestic laws and practices that prohibit or restrict religious proselytism, and the consequences of such decisions to religious minorities. We argue that both Courts have too readily accepted state justifications for measures that impact negatively on the ability of religious minorities to share their beliefs. By using a case-by-case balancing approach, they have missed the chance to provide predictable principles about the extent to which restrictions on proselytism are in accordance with the international human rights regime.

1. Definition of Proselytism

"Proselytism" is a term that often remains undefined while typically carrying negative connotations in its common use. We adopt a working definition of proselytism: expressive conduct undertaken with the purpose of trying to change the religious beliefs, affiliation, or identity of another (Stahnke, 1999, p. 255).

The definition stresses that proselytism is intentional, undertaken with a particular goal in view, and does not necessarily entail a religion to the agent/source. Although unusual, proselytism includes attempts to persuade individuals to abandon their current religious beliefs or affiliation without necessarily replacing them with those of the agent. Heiner Bielefeldt adds a "non-coerciviness" element to the definition, meaning the attempt to convert others by means of non-coercive persuasion (Bielefeldt, 2013, p. 48). In this sense, the right to proselytism is related to the right of changing one's religion, which will be addressed further in this text.

It is worth mentioning that in proselytizing religions, sharing the faith is a religious duty, rather than a matter of choice (Rivero & Moutouh, 2006, p. 523-524). As posed by Arcot Krishnaswami (1960), "while some faiths do not attempt to win new converts, many of them make it mandatory for their followers to spread their message to all, and to attempt to convert others. For the latter, dissemination is an important aspect of the right to manifest their religion or belief" (p. 32).

Therefore, for many creeds, proselytism is not something accessory, but essential to the believer's adherence to its faith. Given the centrality of proselytism in many religious traditions, conflicts are likely to arise when that component of the religious practice is excluded.

2. Proselytism in International Law

With the exception of the American Convention, which states in article 12(1) that the right to freedom of religion includes the freedom to "disseminate one's religion or beliefs," neither proselytism nor the freedom to disseminate a religion is explicitly mentioned in international instruments.

Nonetheless, the right to proselytize is encompassed within the scope of Freedom of Religion or Belief (FoRB as a shorthand) in international law. The ICCPR specifically refers to "teaching" as a form of "manifestation" of religion. If that were not the case, the "freedom to change [one's] religion or belief", which is part of the Article 18 of the Universal Declaration of Human Rights, would be likely to remain a dead letter. It is intertwined with other human rights, like freedom of association, freedom of conscience, and the principles of tolerance and pluralism.

Proselytism can also represent a clash between aspects within the scope of the same right, as freedom of religion encompasses both the freedom to legitimately disseminate religious views and the right to be protected against religious coercion. It is also a precious asset for atheists or agnostics, and for the unconcerned.

Regarding the importance of FoRB and the discretionary margin given to the States, the United Nations Human Rights Committee has stated, in its general comment n. 22, that "paragraph 3 of article 18 [limitations on FoRB] is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security" (U.N., 1993).

Specifically on the European Level, the most important religious freedom guarantee enforced by the ECtHR is Article 9 of the European Convention:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

In 2000, the European Union adopted the Charter of Fundamental Rights of the European Union, and Article 10 of the Charter echoes Article 9 of the Convention, while adding an express conscientious objection clause.

3. Proselytism in the European Court of Human Rights' Jurisprudence

Historically, cases regarding violations of FoRB were exclusively dealt by the European Commission, with an emphasis in the distinction between two dimensions of this right: "whereas its internal dimension, namely the right to have or change religion or belief, cannot be subject to any limitation whatsoever, its external aspect, *i.e.*, 'the freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance' may be restricted in some circumstances, under the conditions set forth in the second paragraph of Article 9" (Ringelheim, 2012, p. 285).

Since 1993, many cases regarding FoRB have been object of judgment by the European Court of Human Rights, which followed, generally, the same principles applied by the Commission. Some advancements have been made, as when the Court *in Hasan and Chaush v. Bulgaria* (2000) recognised that the internal dimension of FoRB does not refer uniquely to the individual, but also includes the right to take part in a religious community. For the community itself, it expresses the right to freely decide on matters concerning its doctrine, choose its leaders, and criteria for membership. Nonetheless, albeit the Court expanded the internal dimension from individuals to religious communities, it still maintains the distinction between both spheres and deems that FoRB entails a weaker protection when the religion is expressed outside the context of a community of faith (Ringelheim, 2012, p. 285).

The international courts are often called on to decide whether an alleged interference on the exercise of religion was or was not justified in the particular circumstances. This is determined according to a three part test by which the Court assesses whether the action was (1) prescribed by law, (2) had a legitimate aim, and (3) was necessary in a democratic society. Considering this threefold framework, we move on to the relevant case law.

Kokkinakis vs Greece

A Leading case on religious proselytism was *Kokkinakis* and dealt with the criminalization of proselytism in Greece.

Mr Kokkinakis, a Jehova's Witness, was convicted and arrested over an act of "proselytism", something criminalised under Greek constitutional and criminal law. He and his wife called at Mrs. Kyriakaki's home and engaged in a religious discussion with her. Her husband, a cantor at an Orthodox Church, informed the police and the Kokkinakis were arrested.

They were found guilty for attempting "[...] to proselytize (...) by taking advantage of their inexperience, their low intellect and their naivety. In particular, they went to the home of Mrs. Kyriakaki (...) and told her they brought good news; by insisting in a pressing manner they gained admittance to the house and began to read a book from the Scriptures (...) encouraging her by means of their judicious, skillful explanations (...) to change her Orthodox Christian beliefs" (ECtHR, 1993, para. 9).

It is important to note that Kokkinakis "served a total of 31 months in prison for convictions relating to acts of proselytism, conscientious objection, and holding a religious meeting in a private house" (Ringelheim, 2012).

The ECtHR found a violation of Mr. Kokkinakis' rights, but the reasoning and conclusion by the Court did not touch on the alleged abusive and illegitimate provisions of the Greek legislation. Rather, "[t]he Court reasoned that Greece's ban on proselytism had a foundation in the law, that it may have served the legitimate aim of protection of the rights and freedoms of others, but, under the circumstances of the case, the ban could not be deemed necessary in a democratic society" (Editorial, 2017, p. 79).

Therefore, the majority's decision was based on factual particularities and legitimated the law itself as providing the certainty and foreseeability required to guide potential infringers. Although in Mr. Kokkinakis favor, the decision was not celebrated as a major victory for freedom of religion or belief; most scholars perceived it as a failure of the Court to take FoRB seriously.

Larissis v. Greece

Five years later, the ECtHR found no violation of the Article 9 rights when military officers were convicted for proselytizing their subordinates. In this case, the officers were Pentecostal Christians; their subordinates were Greek Orthodox.

The Court argued that "the hierarchical structures which are a feature of life in the armed forces may color every aspect of the relations between military personnel, making it difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him. Thus, what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power" (1998, para. 51).

The court's reasoning differentiates proselytism between civilians and between military subordinates, in the sense that the principle of free exercise or free manifestation of religion can be limited when the question of relative power and vulnerability arises. Therefore, the ECtHR found that proselytism to persons who are "obliged to listen" can be qualified as improper proselytism.

There is no doubt that vulnerability is multi-faceted, and coercion or undue pressure to change one's religion or belief should not be considered as a legitimate exercise of FoRB. However, this decision suggests that every discussion about religion or other sensitive matters between individuals of unequal rank will fall within the category of coercion.

In assessing cases like this, it is crucial to notice that (1) most activities related to teaching, preaching or evangelizing – and the responses to them – are voluntary and optional – in other words, do not seek to impose any religious

influence or conversion, and (2) part of promoting pluralism, tolerance and harmonious coexistence in a society involves encouraging the individual's agency in the realm of philosophical, political and religious ideas.

Court of Justice of the European Union

In 2018, a group of Jehovah's Witnesses challenged a Finnish privacy law that prohibited them from keeping unregistered personal data gathered during their door-to-door visits. The national Finnish court eventually asked the CJEU to determine whether the data collected in door-to-door evangelism fell under the umbrella of the privacy directive and whether the Jehovah's Witness could be considered a data controller and therefore subject to the EU Directive.

The Court stated that European Union Data Protection Directive must be interpreted as meaning that the collection of personal data by members of a religious community in the course of door-to- door preaching and the subsequent processing of those data does not fall under the exemptions to the scope provided by the first or second item of that article, which excluded data from public security, defence, state security, criminal law, or "purely personal or household" activities.

In sum, the Court decided that the practice of keeping notes about the families and private parties they visited during the proselytism endeavours did not amount to "personal data," such as diaries; therefore, the data protection rules applied to the Jehovah's Witnesses' proselytizing activities.

For instance, the Witnesses kept a list of contacted people who did not want to be contacted again. Following the decision, the religious community was not exempt from compliance with the EU directive just because the data were collected as part of their missionary work. According to Pin and Witte Jr (2021), this case "demonstrates the spillover effects of privacy regulations on religious organizations" and "reaches more deeply into a core component of the Jehovah' Witnesses' activities, namely keeping track of visits in order to facilitate later religious activities within a certain area where there is no tangible harm to a victim" (p. 259).

4. Critical analysis

In this last chapter, we focus on two commonly (even though implicitly) evoked reasons for restriction of religious expression, with the objective of developing a critical analysis of those.

Secularization Thesis

It seems that the secularization thesis has great influence over the Courts' case-law. As argued by Ringelheim (2012), "Underlying the Court's case law is the idea that religion is primarily an inward feeling; a 'matter of individual conscience'. It can be exteriorised through rites and acts of cults, but these are in principle accomplished within the family and 'the circle of those whose faith one shares'. The case law strongly suggests that manifestations of religion outside this domain are considered as of secondary importance. Faith is normally expressed in a specific, discrete, domain, which is distinct from the rest of social life" (p. 291).

Proponents of the secularization thesis have been increasingly arguing not only in favour of acknowledging the necessity for the State to be conducted by public reason, but also that religion would be banished to the private sphere of individual conscience, becoming irrelevant to the society as a whole (Casanova, 1994). Nonetheless, empirical researches developed on modern societies widely defy this assumption of the inevitable privatization of faith (Berger, 1999).

Moreover, this thesis is intensely rooted in John Rawls' idea that all discussion occurring in the public sphere should be dictated by norms of public reason, and not of morality or religion. However, it is relevant to observe that Rawls himself, in a later moment of his life, adjusted his claim and conceded that, in some situations, religious reasons could be presented in the public sphere, in informal public spheres (Rawls, 1997). In a similar line, Habermas proposes the idea of a "post-secular society", claiming that, in non-official settings, if religious citizens are not able to find secular translations for their ideals, it must be allowed for them to communicate those through a religious language (Habermas, 2006).

Thus, "privatization of religion is not necessary to modernity: provided certain conditions are met, religious groups may enter the public sphere and assume the role of civil society actors without endangering individuals' freedom and modern differentiated structures" (Ringelheim, 2012). Bielefeldt (2013) highlights the need for a distinction between political secularism and doctrinal secularism.

This idea also assumes a clear and distinct line between the private and public spheres, intimately related with the aforementioned distinction between the external and internal dimensions of FoRB. However, both these assumptions have been often questioned by modern scholars in the field of sociology of religion. In the view of several religious groups, the external manifestation of the faith – through proselytism, preaching and conducts dictated by certain moral values –, is intrinsically inseparable from its internal dimension.

For a considerable amount of creeds, religious practices, like clothing or dietary requirements, affect the whole believer's life, wherever they might be (Asad, 2003). The more restricting notion that FoRB only entails one's right to

believe, and not to practice, is very questionable, since the sphere of the mind is, by its own nature, inescrutable to the State. As posed by Martin Scheinin (1992), the difficulty found by states is not their citizens' freedom of thought, but to allow them to act in accordance with those thoughts.

Lastly, one must not ignore that blanket laws that prohibit proselytism tend to maintain the status quo, preserving "a certain pattern of religious affiliation by limiting the opportunities for conversion", and, therefore, "such a provision will naturally favor the majority religious group (Stahnke, 1999, p. 268).

Protection of the target

The protection of the rights of the target of proselytism is also usually evoked as a basis for restriction on FoRB. In this context, it is frequently claimed that people should have the right to be "left alone", in the sense of not being exposed to religious proselytism.

The point is: many still confuse freedom *of* religion as freedom *from* religion (Guiora, 2009). Freedom of religion certainly has a negative component, as do other freedoms such as association, assembly or speech. "The reason is that one is not free to do something unless he is also free not to do it" (Bielefeldt, 2013, p. 50). Nonetheless, when its negative dimension is maximized isolatedly from its broader meaning, it tends to authoritarian postures incompatible with pluralist societies. It is not a human right to be protected from the exposure to any other religion.

It is common, for example, to limit proselytism when the target is part of a minority group, such as indigenes, based on the notion that these groups' religions are part of their own cultural identity and, therefore, proselytism would violate their right to identity preservation. This is something important to ponder, and the particularities of minority groups must be acknowledged, since universalistic laws may, indeed, suppress minority religions (Rosenblum, 2000). Similarly, some researchers argue for the State intervention to protect minorities especially against universalistic religions' proselytism (Mutua, 2004).

One must also take into consideration, though, that "limiting the source may also restrict the target as the target is entitled to the freedom to change religion and the freedom to receive information", which can "move a state in contradictory directions" (Stahnke, 1999, p. 281). Similarly, the European Court has already stated that the right of a person to adopt some views implies the right to "take cognisance" of those views (ECtHR, 1994. *Otto-Preminger-Institut v. Austria*, para. 55).

Once more, it seems that religious ideologies tend to be considered, contradictorily, as less relevant and more dangerous than other cultural values. "If people are continually confronted with information designed to influence their political opinions, their moral values, and even their consumer choices, it might be inconsistent to otherwise overly restrict information designed to influence their religious choices (Stahnke, 1999, p. 287).

It is also worth questioning whether the criminalization of proselytism, be it general or specific, is the most humanitarian and reasonable way of protecting minority groups from cultural violation. When faced with a collision of human rights, the decision must attempt to preserve both rights as much as possible.

Moreover, considering the centrality of the duty to share the faith to the believer's identity, it is often observed that religious groups will not refrain from the activity regardless of criminal consequences, as noted in Kokkinasis' case. Therefore, criminal sanctions tend to not restrain believers nor protect the minority communities.

Conclusion

We argue that both Courts have too readily accepted state justifications for measures that impact negatively on the ability of religious minorities to share their beliefs. So far, the Strasbourg Court has issued much more substantial case law on FoRB, than the Luxembourg one.

Since the first case, in 1993, Kokkinakis case, the Strasbourg Court has missed the chance to provide a coherent response about the extent to which restrictions on proselytism are in accordance with the Convention. Moreover, the Court has drawn a distinction between "proper" and "improper" proselytism, but has not defined what acts of proselytism constitute an illegitimate exercise of FoRB.

Since 2017, however, the Luxembourg Court has issued landmark rulings on FoRB, and has exchanged the controversial "margin of appreciation" for decisions that touch on longstanding church-state relations in the European Union.

It is worth bearing in mind the structure and jurisdiction of both Courts. The ECtHR, sitting in Strasbourg, has jurisdiction over the forty-seven European countries of the Council of Europe. The Court of Justice of the European Union, sitting in Luxembourg, has jurisdiction over the twenty-seven Member States in the European Union (EU).

Unlike the European Court of Human Rights, the Court of Justice's has a distinctive feature; its decisions immediately bind all EU Member States and preempt conflicting local laws. Moreover, as happened with the Finland's case mentioned before, local state courts may and regularly seek advisory opinions from the latter on prevailing EU law before resolving local cases before them.

The CJEU has often started with relevant ECtHR case law, picking up where the ECtHR left off and then casting its rulings in the "hard law" terms with which it operates. If this pattern continues, the CJEU will play an increasingly vital role in shaping religious freedom protections and informing religion-state relations in Europe.

We agree with John Witt Jr and Andrea Pin (2021) that "balancing countries with very different sensitivities on the topic has led to a case-by-case balancing approach, rather than a set of broader and predictable principles on proselytism" (p. 624).

The lack of a legal comprehensive framework on proselytism is likely to be filled by the Luxembourg Court in the coming cases. For instance, whether the very principle of applying a criminal statute to proselytism is compatible with Article 9 of the Convention is a question still unanswered in the realm of international human rights law.

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