

*Working Session 15*

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### **Comparative Approach to the Freedom of Thought, Conscience, Religion or Belief**

Distinguished participants,

The right to freedom of thought, conscience and religion or belief is recognized today in nearly all areas of the world and in same time in many places of the world is violated. There are different reasons for that; however, in some OSCE member countries quite frequently the wish of the secular power to introduce its adjustments, motivated with the "special, specific approach" of the state, combatting terrorism, retaining the indivisibility of the state, etc. can be observed. As Kazakhstan researcher Yevgeny Zhovtis recognised a couple of months ago, international law and international practice in the field of human rights is the right of, first of all, principles rather than norms. This is the implementation of the fundamental principles of human rights in law enforcement practice within specific legal situations; this is again a conceptual, value approach or orientation. The international legal acts that constitute fundamental rights provide the general direction to the party applying law, whereas on the national level, the constitution, which is something more than the statute organising the state, apart from the institutionally political role has also the function of being the source of general principles. The right to freedom of thought, conscience and religion or belief could be briefly characterised as the principle of religious freedom, needed by everybody, alongside the prohibition of discrimination and the freedom of speech, association and other freedoms and rights. They are not needed by OSCE or other supra-national organisations, everyone needs them, in order to feel human.

Those countries that list the catalogue of human rights define in their constitutions also the principle of religious freedom. The principle of religious freedom is differently reflected both as to its scope and content in the legal systems of various countries.

In every country the constitutional norms are often worded on a high level of abstraction. This – to a certain extent – allows applying the constitution to the constantly changing societal needs. Scrutiny of the provisions made in the constitutions of various democratic states with regard to the rights of religious organisations and individuals to practice religious freedom allows identifying a number of rights and freedoms that reveal the wide range that the principle of religious freedom covers. Even though the classification presented below has been obtained by analysing the constitutions of individual countries, it must be taken into consideration that:

First, the parties that interpret and apply the constitution of a particular state have broad possibilities in interpreting the constitution. I want to draw your attention to the fact that the OSCE member states, as any other states, must interpret the provisions of their constitution in compliance with the spirit of the age and the legal findings of a contemporary, democratic legal system.

Secondly, even though the constitutional norms of other states are not binding upon any other state, it is clear that a comparative look at the constitutions of other states may provide to anyone applying the law a more extensive and exhaustive answer as to what their own constitution says. Comparative law, in particular, Comparative constitutional law, strives to reveal the regularities that exist in the constitutionalism of the contemporary law and the shared trends. This, in particular, applies to the regulation on fundamental rights, in the application of which not only the legal practice of one's own country, but various guidelines and standards issued by various bodies such as UN, OSCE, which follow from the current understanding of the right that is enshrined in the International Covenant on Civil and Political Rights and other international treaties on human rights, must be taken into consideration.

Before enumerating these rights and freedoms, it must be noted that these apply both to individuals and to religious organisations:

- (1) **an individual's right to the freedom of religion** (Constitution of Switzerland, the second part of Article 15; Constitution of Estonia, the first and the second part of Article 40, Constitution of



Lithuania, the second part of Article 26; Constitution of Finland, Article 11; Constitution of Poland, the first part of Article 53 and the second part of Article 25; Basic Law of Germany, Article 4);

- (2) **the right to religious education** (Constitution of Switzerland, the third part of Article 15; Constitution of Poland, the fifth part of Article 53);
- (3) **the right to receive religious assistance (care) in the place, where they are situated** (Constitution of Poland, the third part of Article 53);
- (4) **the right to not disclose one's religious belief or worldviews** (Constitution of Poland, the eighth part of Article 53, Weimar Constitution, the third part of Article 136);
- (5) **the right to serve in the army without carrying arms** (Basic Law of Germany, Article 4);
- (6) **the right to perform religious rituals without interference** (Constitution of Estonia, the fourth part of Article 40; Constitution of Lithuania, the second part of Article 26; Constitution of Poland, the second part of Article 53);
- (7) **the right to refuse to participate in religious rituals** (Constitution of Finland, the second part of Article 11; Constitution of Poland, the seventh part of Article 53; Weimar Constitution, the fifth part of Article 136);
- (8) **the prohibition of forced proselytism** (Constitution of Switzerland, the fourth part of Article 15; Constitution of Estonia, Article 41; Constitution of Lithuania, the third part of Article 26);
- (9) **the parents' (guardians') right to religious upbringing of their children** (Constitution of Lithuania, the fourth part of Article 26; Constitution of Poland, the fourth part of Article 53);
- (10) **the right of legal persons to religious freedom** (Constitution of Switzerland, the first and the second part of Article 15; Constitution of Lithuania, the second part of Article 26, Constitution of Poland, the second part of Article 53);
- (11) **the right of religious organisations to religious activities in the army, hospitals, penitentiary institutions and other public**

**institutions** (part of Basic Law of Germany – Article 141 of Weimar Constitution);

- (12) **the right of religious institutions to autonomy of decisions** (part of Basic Law of Germany – the fourth part of Article 137 in Weimar Constitution, Constitution of Poland, the third part of Article 25);
- (13) **the right of religious organisations to act in accordance with their internal law – canons** (Constitution of Lithuania – the second part of Article 43);
- (14) **the right of religious organisations to own property, *inter alia*, places of worship** (Constitution of Lithuania, the second part of Article 43; Constitution of Poland, the third part of Article 53);
- (15) **the right of religious organisations to schools for training of the clergy** (Constitution of Lithuania, the second part of Article 43);
- (16) **the right of religious organisations to charity institutions** (Constitution of Lithuania, the second part of Article 43).

I would like to underscore that singling out the rights of individuals to the freedom of religion is not pragmatically correct, since, essentially, it is only and solely an individual who is or is not able to exercise his freedom. Irrespectively of the fact, whether the individual is alone or together with others, it is the matter of implementing the principle of religious freedom. It is not my intention to show disrespect to the institution of registering religious organisations or to question in any other way the important institution of legal persons, based upon the system of state registers. The system of registration has turned into the pillar for the functioning of contemporary society. However, permit me to note that the registration takes place to grant to a certain totality of information, a fact, a legal relationship of a phenomenon legal force or, to put it differently, to presume the existence of a certain legal fact. [By the way, it is interesting that the first registrar was the church, which could pass information from its registers to the sovereign. The civil registry, without which citizenship would have been impossible, used to be the prerogative of the church]. Turning back to the principle of religious freedom, it must be said that the understanding of religious organisations of the need to legally record their activities is a relative concept even for recognised religious denominations. The institution of



registration is not a mandatory pre-requisite for activities, but it is a confirmation that the state recognises it and that unfounded restriction of its activities will not occur. Religious freedom, first of all, is applicable to the sphere of an individual's internal consciousness; however, it does not pertain only to reflections and feelings of religious nature, since various concrete aspects of social life are covered. For example, people with different religious beliefs might experience inconvenience when gathering jointly. The freedom of religion means an individual's right to freely express his faith not only when being alone, but also when being together with others, in public space and together with others expressing their religion. Following key developments affecting freedom of religion or belief in the OSCE area, abiding by the following provisions is essential.

As we see, the principle is rather extensively revealed in constitutions, part of it may be applied to the rights vested in an **individual**, but another – in **legal persons**, religious organisations. It is worth noting here that the protection of religious freedom applies both to natural persons (every believer, irrespectively of his relationship with the state) and to legal persons (associations of persons, religious organisations, if it concerns religion, or associations, if it concerns worldview). As regards legal persons, it must be taken into account, that the applicability of the clause is relative, but with regard to natural persons – absolute. The existence of their registration, type, and the purpose indicated in the articles of association and the participants' will are important for legal persons.

### **The principle of religious freedom in interaction with other human rights**

As "Guidelines on the Legal Personality of Religious or Belief Communities" published by OSCE Office for Democratic Institutions and Human Rights (ODIHR) a couple of years ago, provide, the freedom of religion or belief is closely linked to other human rights and fundamental freedoms, such as, in particular, the freedom of expression, the freedom of assembly and association and the right to non-discrimination. The principle of religious freedom incorporates (absorbs) also other human rights, which interact and overlap. The right to perform religious rituals in

public spaces and restriction thereof cannot be examined in isolation from the right to association and assembly, as well as the right to practice religious rituals individually –a in isolation from private life, or the right of religious organisations to own property, *inter alia*, to own places of worship, in isolation from the right to own property. Likewise, the right to engage in religious propaganda must be viewed in context with the freedom of expression, but the right to religious education must be viewed from the vantage point of the right to education. The right to change one's religious belief means also the right to retain one's religious belief and, in case of violent pressure, the right to receive the state's protection against such pressure (*proselytism*). The freedom of religion protects a person from forced external influence (for example, forced ideological indoctrination, forced administration of psycho-pharmacological substances, drafting a pacifist into military service). In religious matters no one can be forced to against his conscience, nor be hindered from acting, within limits of reason, in accordance with one's conscience – both in private and in public, both alone and in association with others.

The right to religious freedom (..) is a person's personal right to civic liberty, which means to be protected, within reasonable limits, from external coercion exerted by political power in the field of religion. This natural right should be recognised in the legal system of society in such a way as to make it part of civil law. The constitutional safeguards to keep (or change) religious belief, as well as the condition that religious belief cannot be the grounds for criminal liability, have been *expressis verbis* defined in constitutions of many countries (for example, Constitution of Estonia, Article 41).

The right to perform religious rituals should be recognised as one of the most fundamental expressions of religious freedom. The opinion has been expressed in legal science that the obligation to protect religious rituals is the reason why religious freedom is a separate human right and cannot be covered by other human rights. Some countries (for example, Constitution of Italy, Article 19) envisage the right to express religious belief, also by performing religious rituals (*inter alia*, in public). Religious rituals and ceremonies comprise the elements of the respective faith or belief, and their manifestations comprise religious cult. The cult, essentially, means a system of rituals and ceremonies in the framework of certain religion or faith, and is to be considered as one of the basic elements of the church as institutionalised religion.



## **The protection of religious freedom and restriction on the freedom of religion**

The question of effective protection of human rights is a sensitive topic. The right to protection of one's religion (religious belief) (for example, symbols, etc.) can be interpreted broadly as the right to religious rituals. The state has the obligation to ensure to individuals and/ or religious organisations a field of activities, where the worldview can evolve and be protected from attacks or restrictions by supporters of other trends of belief or competing religious groups. Clearly, the right to religious education are included in this right, it comprises a sub-group of rights (the right to receive education in one's religion, the right to have teaching of religion ensured, the right to education of the clergy, the right to print and disseminate religious educational literature, etc.).

Restriction on the freedom of religion. Even in those countries, which have provided in their constitutions (for example, Constitution of Lithuania, the first part of Article 27) that religious freedom is absolute (unrestrictable), it can, nevertheless, be restricted "by law, if necessary for the protection of public safety, public order, human rights and morality, as well as for the protection of other persons' fundamental right and freedoms" (Constitution of Lithuania, the fourth part of Article 26). The freedom of restriction is to be limited to reconciling controversially opposing views of the supporters of various religions and groups. In a state, which declares itself to be democratic, it must be assumed that when a number of religions co-exist, the manifestations of religious freedom can be subject to certain reasonable restrictions. It is necessary to harmonize the interests of different religious groups and to ensure that the belief of every person is respected. The restriction upon religious freedom must be established by law and must have a legitimate aim. It should be commensurate to the legitimate aim and must serve a certain objective – to safeguard other values of constitutional level or other important interests, for the protection of which the restriction is necessary. Religious belief cannot be used to justify crimes or for ignoring laws. Religious freedom cannot serve as a justification for an infringement of law, therefore such manifestations should be restricted in public interests.

Thank You for Your Attention!