LIMITATIONS TO FREEDOM TO MANIFEST RELIGION: WHEN THEY ARE "PRESCRIBED BY THE LAW" ?

Freedom to manifest religion or belief is subject to a general and some special limitations. According to human rights treaties, these limitations on the manifestation of beliefs should fulfill the three following conditions in order to be justified:

a) be prescribed by law,
b) serve a public or private interest, and particularly (i) public safety, (ii) protection of public order, (iii) health, (iv) morals, and (v) protection of the rights and freedoms of others,
c) be necessary in a democratic society.

According to the relevant case-law, the "prescribed by law" condition means that

(a)the relevant law should be accessible to the concerned person,
(b)this person should also be capable of foreseeingthe consequences, and for that,
(c)the law should be compatible with the principle of rule of law.

In a 2009 Joint Opinion, Venice Commission and OSCE/ODIHR, emphasized the importance of this condition:

> *"The "prescribed by law" condition of the limitations clause is crucial as it safeguards commitments to the rule of law, including the value of legal certainty. It aims to ensure that only those limitations can be imposed on the freedom to manifest religion or*

belief, that have a basis in domestic law, and it furthermore requires that the law itself be adequately accessible and foreseeable, and contain sufficient protection against arbitrary application".

In the next minutes I will try to analyze the three necessary elements of any law provision which imposes a limitation to the freedom to manifest religion or beliefs.

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The first element is the accessibility of the law provision. The law provision should be open to public and, therefore, accessible to the concerned persons. Let's give an example:

In a 2011 joint Opinion, Venice Commission and OSCE/ODIHR examined the compatibility of a member-state law on religious freedom with the human rights standards. This law didn't indicate which national body, other that the Ministry of Justice, was competent to decide restrictions on freedom of religion, how a decision of this body was to be communicated to the concerned persons and how person affected could engage in the process and be heard.

Venice Commission and OSCE/ODHIR stated that

In the absence of these arrangements being set out it would be possible for arbitrary decision-making to occur in restricting a

fundamental freedom[…] The process should also be open to the public.

Let me give a second example from the European Court of Human Rights case-law. In a 2003 case the Court controlled whether the prohibition of contact between a prisoner sentenced to death and a priest as well as the interdiction of his participation to the weekly religious services with others prisonerswere based on public and accessible regulations of prison rules. The Court ruled that the legal basis of the prohibition was an Instruction which was not open to the prisoners and,that's why, it did not satisfy the requirement of the accessibility of the law.

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The second element is the foreseeability of the law provision. Any concerned person should be capable of foreseeing the consequences of a provision which restricts the freedom to manifest a religion.

Let's give two examples:

In a 2010 joint Opinion, Venice Commission and OSCE/ODIHR examined the compatibility of another member-state law on religious freedom with the human rights standards. They focused to a provision which stipulated that state registration of religious communities shall be rejected if, inter alia, "the submitted statute contradicts the Constitution and laws of the Republic and other legal acts".

Venice Commission and OSCE/ODHIR stated that

> *"Such vague reference to virtually the entire body of legislation leaves broad discretion to the implementing authorities and arguably renders the provision insufficiently foreseeable. It is recommended to specify with greater precision which particular laws should a religious organization's statute comply with in order to satisfy registration requirements".*

The Court of Strasbourg has, also, held that a similar provision from a third state, providing that "[t]he registration of an association may be refused if its articles of association or other documents submitted for the registration contravene the national legislation" allowed for a "particularly broad interpretation" and was "too vague to be sufficiently 'foreseeable' for the persons concerned.

Second example:

In *Kokkinakis* case, the first case of religious freedom in Strasbourg, the European Court examined whether the penal regulation of proselytism fulfilled the "prescribed by law" condition. Despite the applicant's contrary claims, the Court realised that the legislative drafting deficiencies of the Greek provision had been settled by the case-law of the Court of Cassation. In order to reach this conclusion, the Court was based on Court of Cassation's judgment of 1975, which accepted that the enumeration of the ways to commit the offence of proselytism was exhaustive.

In a 2011 joint Opinion, Venice Commission and OSCE/ODIHR examined the compatibility with the human rights standards of an amendment of a national criminal code, concerning again the “proselytism”.

Venice Commission and OSCE/ODHIR observed that

> *“the definition of “proselytism”given in article A of the criminal code does not require the purpose of the act to be the conversion of others to another religion, which is contained in the definition provided by article B of the same code. In the interests of foreseeability, it is recommended that the two definitions be aligned and made consistent”.*

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The last element is the compatibility of the limitations with the principle of rule of law, or, in other words, the test of “rule of law constraint”.

Just one example from Strasbourg:

In the case of*Hasan and Chaush* of the European Court of Human Rightsthe question that arose was whether the national legislation concerning religious minorities fulfilled the “prescribed by law” condition. According to this legislation, a minority acquired legal status only after the Council of Ministers had approved its statute and its leadership had been registered with the competent directorate of religious denominations of the Council of Ministers.

Within this legislative framework, the directorate of religious denominations could have an unlimited facility to choose the leaders of the religious minorities, because

(a) there was an absence of more specific provisions regarding the way of approving the minority and the way of registering its leadership, something necessary in case of internal dispute,

(b) there was no way of contesting the Council of Ministers' decision, given that it was excluded from administrative justice's control,

(c) there was an absence of a public register of approved religious minorities and their approved leadership, and

(d) the directorate of religious denominations was conceding at will the leadership's legalisation documents, without respecting the internal regulations of the minority.

The Court (sitting as a Grand Chamber) decided that the limitation to the applicants' freedom of religion was not "prescribed by law"… First, it was based on legal provisions which allowed a vague discretion to the executive and did not meet the required standards of clarity and foreseeability". And second, the judicial control of the executive was insufficient because the last had never complied with the national judgments.

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To sum up, limitations can only be imposed by law, and in particular, by laws that comport with the rule of law ideal.

Thus, limitations may not imposed by laws that are so vague that it is unclear which actions will be permissible and which will not, and leave room for arbitrary enforcement. Limitations should be accessible, open to public, and sufficiently ‘foreseeable’ to the concerned persons.

Due process considerations, such as the rights to prompt decisions and to appeals, also reflect these basic rule of law requirements.