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History

About the Freedom of Religion and the Laicity. Some Considerations on the Juridical and Philosophical Doctrine

Nicolae V. Dură

Full Member of the Academy of Romanian Scientists, Foreign Member of the Georgian National Academy of Sciences

ABSTRACT. From the Edict of Milan (in the year 313) – which provided the right to freedom of Religion – until the European Convention on Human Rights (Rome, 1950), both the notion of "liberty" and the syntagme "religious liberty" were perceived and defined differently by the jurists, the philosophers, the theologians, the political scientists, the sociologists, etc. In some countries of Europe, the religious liberty is understood only in terms of reporting it to the concept of "laicization", defined as a state neutrality in matters of religious faith, and, ipso facto, as an assumption by the religious Cults of the ban imposed on them by the state to intervene in secular life. Our study – with an interdisciplinary content – brings an effective contribution to the knowledge of the manifestation of the two realities, id est, the Religious Liberty and the Laicization.

Key words: Edict of Milan, European Convention, religious liberty, laicization

Among the fundamental human rights – provided both by "*Jus naturale*" [1] and "*Jus gentium*" [2: 64] (the Law of Nations), i.e. the international law – the right to the freedom of religion plays a key role.

From the Edict of Milan (313) [3], and until to the European Convention for the Protection of Human Rights and Fundamental Freedoms – adopted on 4th November 1950, in Rome, and entered into force on 3rd September 1953 – the notion of "freedom" was perceived and defined differently by jurists, philosophers, theologians, political scientists, sociologists, etc.

Among others, this realty explains the fact that, over the centuries, some fundamental freedoms, such as the freedom of religion [4], experienced different approaches and definitions, usually perceived and expressed both through the philosophical and juridical thinking and the political ideology of the time [5-7].

The Roman jurists of the second and third centuries AD considered the notion of "*libertas*" (freedom) as a right inherent to the human nature, which "naturalis ratio" (natural reason) has given to all men (omnes homines) (Gaius, *Institutiones*, lb. I, 1). Therefore, in accordance with the norms of the natural law, people were "... *liberi vocantur*" (called free), hence the perception of this right as "*naturalis facultas eius quod cuique facere libet,*

nisi si quid aut vi aut jure prohibetur" [8: 16] (the possibility of the human being to do whatever he/she wants, unless stopped by force or by law).

The Edict of Milan (313) – which had a very important role and influence on the relations between the State and the Church [9-11] – provided the right to the freedom of religion for all the subjects of the Roman Empire, including Christians. It was actually the first time in the history of the Roman Empire when the Christians acquired the freedom to profess their faith and to manifest it publicly.

However, it was a long way from the freedom of religion, provided by the Edict of Milan, and to the right to the freedom of religion laid down by the EU law and by the democratic states today. This path was marked by the different stages of evolution, and, in terms of legislation, it gave an evident expression to the assertion of the socio-political ideologies of those times.

This evolutionary process – expressed over a period of 1700 years, i.e. from the promulgation of the Edict of Milan and until nowadays – is testified both by some laws and by the works of some famous jurists, who actually contributed to the assertion of a European legal thinking [12, 13] on the fundamental rights and freedoms.

The United Nations Charter – signed in San Francisco, on 26th June 1945, and entered into force on 24th October 1945 – expressly provides that one of the United Nations' purposes is to promote and encourage "the respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" (article 1, paragraph. 3; article 55, paragraph c.; article 76, paragraph c.), and to assist "... in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion" (article 13, paragraph 1b.).

The Universal Declaration of Human Rights [14], proclaimed by the United Nations General Assembly on 10th December 1948, intended also to ensure and guarantee the universal and effective recognition of the rights which it has set, including the right to "... the freedom of thought, conscience and religion; ..." (article 18).

For the Universal Declaration of Human Rights, the right to religion is not, therefore, an inherent right of the freedom of thought or of the freedom of conscience, much less a corollary of the latter. On the contrary, this right is recognized and presented as a right by itself, with its own identity and content, and not as a right falling within the manifestation scope of the freedom of conscience, as perceived, and still presented as such, by some constitutionalists, who are still under the impact of the juridical doctrine expressed in the terms of the political ideology of two revolutions, i.e. the French Revolution of 1789 and the Bolshevik Revolution of 1917.

And, as it is already well known, these two events also disrupted and distorted the European juridical thinking about Law and its nature, about the right to Religion, ipso facto, about the freedom of religion and the laicity, about the freedom of conscience, the relationship between the State and the Church, about the sacred and the profane etc.

The Convention for the Protection of Human Rights and Fundamental Freedoms [15] – adopted in Rome, on 4th November 1950, and entered into force on 3rd September 1953 – provided expressly for the requirement that the contracting parties take practical and effective measures in order to ensure the compliance with, and application of, the fundamental human rights, including the right to the freedom of religion (cf. article 9).

According to the opinion of some European jurists, the article 9 of the European Convention "guarantees individuals the right to choose their religion, and, therefore, the religious pluralism. In addition, it guarantees, *inter alia*, the freedom to manifest one's religion in public, and, therefore, the freedom of Churches. However, it does not require any Church form. It does not exclude any state church system according to the British or Scandinavian models. It does not require the

separation of the Church and the State *à la française* or the church autonomy, *à l'Allemande*. But it does require state neutrality towards religion and implies certain rights of existence and operation" [16: 193].

Therefore, according to the statement of the French jurist, we could speak only about the "neutrality" of the State, and not about so-called "separation" of this one from the Church (id est the religious Cults) as, unfortunately, it is still perceived and assessed also some Romanian constitutionalists, who wrote indeed that, in the Romanian Constitution, "it was consecrated the separation of the State from the Church" [17: 59]. But, it is sufficient to read the text of the Romanian Constitution that to realize that this kind of assertion it is not true.

As regards the rights of Churches – or, better said, of religious Cults, including the religious Associations and Groups recognized by the State (Law 489/2006 in Romania) – to exist and operate within those States do not imply (on their part) a neutrality regime, but a regime of collaboration, with the sole purpose of achieving the common good of its citizens, regardless of their religious beliefs.

In fact, even the Court of Strasbourg arrived to the conclusion that, if the religious manifestations of a group of persons are in accordance with "... the framework of the organizatorical shape", recognized by the State, they have in their quality of juridical persons the right to operate according to the provisions of the Article 9" [18: 525] (of the Convention).

At international level, the right of every human being to confess a religious faith, individually and publicly, through the events and ceremonies of a religious Cult, was guaranteed in 1976 by the International Covenant on Civil and Political Rights [19] (article 18).

The International Covenant on Civil and Political Rights – which entered into force on 23rd March 1976 – expressly reaffirmed that "everyone has the right to the freedom of thought, conscience and religion. This right includes the freedom to have or adopt a religion or belief of one's own, and the freedom to manifest one's religion or belief, individually or jointly, both in public and in private, in worship, observance of rites, practice and teaching (article 18, i.) [20: 11].

As already noted, the Universal Declaration of Human Rights, the European Convention on Human Rights and the International Covenant on Civil and Political Rights – to mention only the main international instruments regarding the human rights – stated explicitly the right to the freedom of religion, and highlighted that it is a fundamental human right, which involves complete freedom of religious belief and "public" manifestation, i.e. by public profession, religious rituals and public religious education.

In 1981, the United Nations General Assembly published the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Religious Belief. All forms of intolerance and discrimination based on religion or religious belief became, therefore, prohibited and punishable.

"The Charter of Fundamental Rights of the European Union" [21], which entered into force in 2000, also provides that "everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance" (article 10, paragraph 1) [22: 117].

This text fully and literally reproduces the text of article 9 of the European Convention on Human Rights. However, the Charter brings a novelty in article 10, paragraph 2, stating that "the right to conscientious objection is recognized, in accordance with the national laws governing the exercise of this right" [22: 117]. Thus, in countries where "the conscientious objection", on grounds of religion, is recognized as legitimate, this right must be respected.

According to some jurists, by asserting this right – provided by the Charter – there was put an end to a gap "not by the Convention, but also by the Charter, whose authors took into account the evolution of ideas and laws" [22: 119].

The Charter of Fundamental Rights of the European Union took indeed into account the evolution of ideas and laws, but, moreover, it took also into account the natural right of the human being of not being compelled to commit acts contrary to his/her religious beliefs, underlined the right of the parents to ensure the education and the teaching of their children in conformity with their religious convictions or beliefs.

Article 14 of the Charter states that "the freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right" (article 14, paragraph 3) [22: 129].

In their comments, left-wing jurists and politicians noted only that in the text, "the pedagogical beliefs are treated equally with the religious and philosophical beliefs that are still – they finally admit – placed at a higher level" [22: 132].

The same jurists believe that "the freedoms granted to parents by this article (14) should be reconciled with the children's rights recognized by article 24 ..." [22: 132]. On the other hand, article 24 provides only that children's opinion should be taken "... into consideration on matters which concern them in accordance with their age and maturity". Therefore, until the age of majority, the right to choose the school that suits their children, according to their own religious beliefs, belongs exclusively to their parents.

Article 21 of that Charter prohibits "all discrimination" based on "religion or belief". Similarly, article 22 provides that "the Union shall respect cultural, religious and linguistic diversity" [22: 157].

Referring to *religious diversity*, jurists think that it is "the natural complement of religious freedom and reinforces the status of the religions in the Charter. It was – they add – already mentioned in the Statement no. 11 annexed to the Treaty of Amsterdam, referring to the status of non-confessional churches and organizations; ..." [22: 159].

In the comments to the text of the Charter of Fundamental Rights of the European Union, the same European jurists admitted also the fact that "... some individual projects have alluded to the Judeo-Christian heritage" or to "the religious roots and faiths of Europe" [22: 73].

Certainly, it would be desirable to acknowledge this reality not only by those individual projects – such as those of René Cassin or of Pope John Paul II – but also in the legally binding documents of the United Nations or of the European Union.

Some Christians MEPs wanted to enter in the Charter the expression "being inspired by its cultural, humanist and religious heritage, the European Union is based on ..." [22: 73].

However, some French jurists reacted vehemently, saying that France cannot accept it, because it is contrary to the "secular nature of its Constitution ...", and suggested replacing the word "*religious*" by the word "*spiritual*", "adjective which, in France – the French jurist Guy Braibant assures us – is analogous to a more moderate connotation" [22: 73].

In turn, Pierre Moscovici – the deputy minister of France in Brussels at that time – categorically stated that France would not sign the text of the Charter if, in its Preamble, reference is be made "to the religious heritage of Europe" [22: 74].

Some members of the European Convention, "*especially socialists*", asked the Presidium, in writing, to waive the words "*religious heritage*" [22: 74], and some left-wing jurists and politicians openly stated that, by removing these words, "the laicity (secularity) of Europe" is defended [22: 77]

(sic). Moreover, they remind that "... the European Treaties contain no allusion to Religions, except for the assertion – they state – of the respect for their freedom and diversity, and that this silence is the expression of a total separation of Churches from the European institutions, which is the very definition of secularism" (sic.) [22: 77].

Therefore, this is how they perceive and define concretely "laicity" or "secularism" in the terms of the French Revolution of 1789, by which they sought and enforced the separation of the two basic European institutions, i.e. the State and the Church, the latter being forcibly exiled from the public sphere yet from "illo tempore" in some European countries.

Nevertheless, the victory of French left-wing politicians enter in clear contradiction with the Constitutions of several Member States, which make it clear that this religious heritage is the source of fundamental human rights, which, moreover, are asserted and protected by constitutional texts.

This reality is actually recognized even by some jurists of left-wing political and philosophical thinking, when they say that most European countries "are not themselves secular and some of their Constitutions make references to God. This is why – they admit – secularism could not be accepted among the shared values of Europe. It was not possible – they conclude – even to obtain, to refer to the neutrality of education, as under article 14 on the right to education ..." [22: 77].

Indeed, there are many EU States whose Constitutions make express reference to God, even to the Holy Trinity, as was the case of Greece until two years ago, and it is still provided in the Irish, Danish Constitutions, etc. In these states, the religious-Christian values and the religious and Christian humanist heritage of Europe are in fact openly stated and promoted [23].

A special role in promoting these values, and, above all, in asserting the freedom of religion, is played, of course, by Christian churches [24] whose contribution to the construction of Europe [25] and, *ipso facto*, to the respect for freedom and human dignity [26], remains an indisputable fact.

In fact, due to the contribution of several exceptional spirits of humanist culture, of Christian origin, Churches have contributed to the "freedom of thought" [27: 39], propagated both by some great thinkers and Fathers of the Church since its ecumenical era of the first millennium [28-30], and by some exceptional theologians of the last century, such as Nikolai Berdyaev, who had a solid philosophical formation.

Among other things, Berdyaev held to clarify that "grace" "led to faith" and that he lived "this grace" in a full liberty, hence his indubitable finding that "those who converted to Christianity through freedom, brought it the spirit of freedom" [31: 14].

Therefore, this is why Christians want to live in freedom and to bring to their religion an open spirit of freedom, because "the Spirit – Berdyaev tells us – is freedom", and "the religious pathos of freedom is a pathos of spirituality", and, therefore, "the achievement of true freedom means the entry into the spiritual world" [31: 137].

The same Christian philosopher believes that freedom must be sought not only in the natural world, hence the dissociation he makes between the freedom granted by our "Spirit" and the Freedom of the natural world, and, *ipso facto*, his refusal to accept "*Jus naturale*" as a source of freedom. "Freedom is – wrote Nikolai Berdyaev – the freedom of spirit and it is illusory and chimerical to search for it only in the natural world. For the order of freedom and the order of nature – he said – are opposed to each other ... Nature has always an amount of determinism, and my own nature cannot be the source of my freedom" [31: 137].

In the same paper, entitled "Spirit and Freedom. Essay of Christian Philosophy" – published in Tubingen, in 1930 – Nikolai Berdyaev stated that "spiritual freedom", of religious connotation, "must not be confused with the problem of free will.

Freedom – he wrote – is not rooted in our will, but in the spirit; and the human being frees himself/herself not by the effort of abstract will, but by the effort of the entire consciousness" [31: 138].

In other words, freedom is not based on human will, but on human consciousness. Therefore, according to Berdyaev, "the understanding of the (human) being depends on freedom, which precedes the being", hence the conclusion that "freedom is a spiritual and religious category, not a naturalistic and metaphysical one" [31: 139].

By his words, Berdyaev was referring, of course, to the "liberty of consciousness", that is to "the liberty of spirit", which can not be identified with "the freedom of religious conscience", that it was claimed "by the apologists and doctors of the Church" [31: 171] since the Ante-Nicene period, when it was in fact created even a "Theology of Conscience" and a Christian "Philosophy of Conscience" [32].

On 1st May 2001, the Regulations of the Inter-American Commission on Human Rights [33] entered into force, which also provides for the right to the freedom of religion and its inherent consequences.

The Treaty establishing a Constitution for Europe [34], alias the European Constitution – whose first version was published in Rome, in 2004 – also refers to religious and moral values and to the right to religious freedom. In the second version, published in Lisbon, in 2007, the Treaty removed the adjective "religious" and replaced it – at the request of the representatives of France – by the adjective "spiritual"; nevertheless, the right of every human being to religious freedom was asserted therein.

According to some European Christian jurists, the European Union "became aware of the importance of religion", which explains the fact that it inspired itself – they say – "from the religious heritage of Religion" [35: 2].

If we reported ourselves only to the principles enunciated by the documents produced by the EU on human rights and freedoms, we could certainly say that they are right. However, if we take into account the European reality, we can say that some EU countries are not inspired by this religious heritage. Moreover, as we know, even the adjective "religious" had to be – at the persistent intervention of France – removed from the text of the Treaty establishing a Constitution for Europe, signed in Lisbon, in 2007.

The fact that the European Union has become aware of the importance of religion, and, *ipso facto*, of its humanist, cultural and spiritual-religious heritage, especially of Christian origin, is confirmed by the fact that the Treaty establishing a Constitution for Europe – which ensures "religious freedom and non-discrimination" – makes explicit reference to "... religious diversity" and to the obligation to maintain a "dialogue with Churches, with religious communities ...". However, EU countries have committed to respect the "Status of these Churches ... according to the Law of the Member States" [35: 5].

For the European Court in Strasbourg, "... the organization by the State of the exercise of a religious Cult contributes to the achievement of social peace and tolerance ..." [36: 710]. In fact, the Edict of Milan [37, 38] had already expressed such a perception about seventeen centuries ago, in 313.

Indeed, the "artisans" of this Edict were aware that, in order to achieve "*pax romana*", they first had to achieve the peace of the State with its Religions, its people, who professed and who confessed different religious beliefs. Afterwards, they had to establish a climate of tolerance between the different Religions of the Roman Empire.

Instead of conclusions, we would like to point out that, by the juridical doctrine and philosophical considerations – on the freedom of religion and secularism – which we highlighted in the pages of our study, we wanted to offer to our readers both an overview of two contemporary realities, i.e., "the freedom of religion" and "laicity", and an

assessment of their contents and forms of expression, and, *ipso facto*, of their legal and philosophical basis.

The reader of our study could also understood that the "laicity", known also under the name of "secularism", can't be accepted by the shared values of Europe, since the main source of the fundamental human rights still remains the religious value and the spiritual heritage.

Therefore, it is impossible to speak not only about the neutrality of education, but also about so-called neutral attitude of State towards the religious Cults.

Finally, it is worthy to be also mention the fact that there are still many EU Stats [39] whose Constitutions make express reference to God, even to the Holy Trinity, and in which religious Christian values and Christian humanist heritage of Europe are openly stated and guaranteed, which proves "à l'évidence" just "the liberty of the spirit" (Berdyaev) which has to prevail in Europe.

ისტორია

რელიგიის თავისუფლებისა და სეკულარიზმის შესახებ. იურიდიული და ფილოსოფიური დოქტრინის განხილვა

ნ. ვ. დურა

რუმინეთის მეცნიერთა აკადემიის სრულუფლებიანი წევრი, საქართველოს მეცნიერებათა ეროვნული აკადემიის უცხოელი წევრი

313 წელს რჯულშემწყნარებლობის შესახებ მიღებული მილანის ედიქტიდან 1950 წლის 4 ნოემბერს რომში ხელმოწერილ ადამიანის უფლებათა ევროპულ კონვენციამდე, თავისუფლების ცნებასა და სიტყვათშეთანხმებას „აღმსარებლობის თავისუფლება" სხვადასხვაგვარად იაზრებდნენ და განმარტავდნენ სამართალმცოდნეები, ფილოსოფოსები, ღვთისმეტყველები, პოლიტიკის მეცნიერები, სოციოლოგები და ა. შ. ევროპის ზოგიერთ ქვეყანაში აღმსარებლობის თავისუფლება მხოლოდ „ლაიციზაციის" კონტექსტში ესმით, ლაიციზაცია არის სახელმწიფოს ჩაურევლობა რელიგიური აღმსარებლობის საკითხებში, რაც, თავის მხრივ, გულისხმობს კონფესიების წარმომადგენელთა ჩაურევლობას საერო ცხოვრებაში. ჩვენ მიერ ჩატარებული ინტერდისციპლინური კვლევა კიდევ უფრო ნათლად წარმოაჩენს რელიგიის თავისუფლებისა და ლაიციზაციის თავისებურებებს.

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