

Religious pluralism and democratic society. Unsuccessful attempts of modernizing national legislation in the field of gender. Examples from the case-law of the European Court of Human Rights

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Abstract

Religious pluralism is an essential prerequisite of a democratic society as religious liberty is an essential prerequisite of expressing religious pluralism. Article 9 of the European Convention on Human Rights and Fundamental Freedoms, states freedom of thought, conscience and religion and lays down, in both its paragraphs, the rule that must be respected and also the exceptions that may be allowed by referring to the general rule. Article 9 of the European Convention is the bearer of a powerful juridical symbolism as it does not only resume to enunciating the general aspects that relate to human conscience but it also extends its content to those features that are connected to culture and to the definition of cultural identity. In the present paper we aim to prove, by means of a hermeneutics methodology, two main hypothesis : (1) the margin of appreciation that States possess with regard to religious freedom cannot breach the European desiderata that establish the cultural and religious integration and harmonization between Peoples; (2) the gender issue mustn't be neglected in the endeavour of ensuring religious pluralism; in this sense, we must resort to a non-partizan and non-stereotypical analysis of the manner in which religious symbols approach gender roles within society.

Keywords : *gender, religious pluralism, margin of appreciation, freedom of thought, conscience and religion.*

Study prerequisites

One of the most important European desideratum resides in ensuring a common space of the Peoples within which the different cultural collective and individual identities would be harmonized. Religious freedom enshrined in article 9 of the European Convention on Human Rights and Fundamental Freedoms upholds this objective because it establishes the premises of co-existence between various religions thus promoting religious pluralism. If in theory religious pluralism entails the celebration of various cultural identities, in practice, religious pluralism is more likely to act as a fragmentation factor than as a unifying factor. The idea of segregating the European community as a consequence of promoting religious pluralism comes from the cultural

perspective; the promotion of a religious idea that is applied within a certain community upon the dogma that exists within another community is an aspect that creates conflict between Peoples because it defies the cultural identity of a certain community and, at a peculiar level, it defies the cultural identity of the individuals. Within the legal framework, the situation is merely nuanced but it is not different. The European Convention on Human Rights and Fundamental Freedoms ensures the freedom of the religious component along with the freedom of conscience and the freedom of thought-nevertheless, if we analyse the decisions of the European Court of Human Rights, it is obvious the interest manifested towards respecting the legal national context and respecting the principles of secularism. In the cases Şahin, Dahlab or Dogru, the European Court of Human Rights has opted for granting preeminence to the secular principles that are endorsed by means of national politics to the detriment of religious freedom stated in article 9 of the European Convention. The aforementioned aspect brings into discussion both a problem of non-synchronization between national and European politics in the field of ensuring religious pluralism and also a problem of law that is build upon article 9, paragraph 2 of the Convention and upon the doctrine of the State's margin of appreciation.

As we have already foreseen in the lines above, religious freedom enshrined in article 9 of the European Convention is not absolute as it is submitted to the limits that are expressly stated in paragraph 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 another token, issues like religious liberty or the cultural identity of the individual are mostly placed in the decisional sphere of the States as the doctrine of the margin of appreciation has preeminence. We find natural this kind of attitude if we understand the fact that is rationally exposed in doctrinaire studies [1] according to which, the application of the European Convention on Human Rights and Fundamental Freedoms does not give an exclusive competence to the European Court of Human Rights but it represents a joint effort between the national and the European level. It is true that, the national law system cannot be excepted from the effort made for protecting religious

freedom and the individual cultural identity as the nation-State is the first actor that is directly involved if we take into account the fact that, the resort to the jurisdiction of the European Court is admissible only when all the domestic legal remedies are exhausted. In the same token, it is clear the fact that, nation-State is the most aware actor of the socio-cultural reality that is manifested within its community and the aspects that relate to the religious option and to cultural identity are even more clearly highlighted at the national level.

The juridical issue that is exposed in the lines above represents a genuine dilemma in the hypothesis of bringing into discussion gender. Combining the gender factor with the cultural factor entails a more complex approach that is expressed by means of another autonomous juridical doctrine – that of reasonable accommodation. More precisely, there is a juridical difficulty in reconciling the need of reasonable accommodation that exists at the European level in order to achieve cultural diversity and harmonization with the need of nation-States of preserving their national peculiarities and of maintaining the policy of religious neutrality. The latter is validated by the preference for standard-making, by banning religious symbols and by tendencies of assimilation.

A just argument implies, from our point of view, the explaining of the issues that are related to the margin of appreciation doctrine.

Some comments regarding the margin of appreciation of the States. Implications brought upon the gender factor and upon the religious factor through the lens of promoting laicity

The doctrine of the States' margin of appreciation was built as a mechanism whose scope was to promote cultural and religious pluralism within the European space. The rationale that upheld this conception was the following : national minorities manifest their cultural peculiarities within nation-State so that, when there are legal issues connected to the implications brought upon the conflict between the right of minority communities to cultural identity, the right of nation-State to promote its secular politics and the European desideratum of ensuring cultural diversity, the nation-State will provide the most real answer. Scientific studies [2] have distinguished between two manners of understanding the doctrine of States' margin of appreciation : (1) the

volunteer manner of understanding according to which the margin of appreciation of the States is based upon the idea that the European Court of Human Rights is an international body with subsidiar competence and with derived legitimacy by comparison to the legitimacy of nation States,- in this context, the European Court of Human Rights endorses granting normative power to the principle of subsidiarity; (2) the rational manner of understanding does not lay down an assumption in favor of the manner in which nation States approach the issue; the Court examines if the measure imposed by nation States ensures a fair balance between individual rights and democratic values. For a holistic approach of both manners of understanding, some additional explanations are in order. The volunteer manner of understanding the margin of appreciation of the States gives expression to the principle of State sovereignty and to the power that States have of assessing sensible social aspects like morals or religion. In the words of McGoldrick [3], the States' margin of appreciation must be broadly construed because the optimal juridical solution adopted at the European level is the one that is legitimated by resorting to the trust that individuals put in it; when the interpretations of the European Court of Justice are different from the beliefs that individuals have that means that they will start to question the legitimacy of the decisions that were adopted. On the other hand, the rational understanding of the States' margin of appreciation requires an exercise of proportionality. In this sense, State's will of deciding upon specific issues exists but it is manifested in a limited manner and under the careful analysis of the Court. We deem that, between the two manners of understanding the margin of appreciation of the States, the rational manner corresponds more easily to the European idea of solidarity. Furthermore, from the legal point of view, the boundaries that are imposed in the process of guaranteeing the right to religious freedom, of freedom of conscience or thought are expressly mentioned within article 9, paragraph 2; they express proportionality. The European Court of Human Rights cannot establish a monolith interpretation on the theme of the rights comprised within the European Convention but it is necessary to accept a counterweight that comes from the part of the signatory States.

As we have observed from the case-law analysis of the causes Şahin, Dahlab and Dogru, nation-States have argued the ban of the islamic veil for considerations

that refer to the politics of State laicity, - a policy which is highlighted in particular by resorting to the French legislation. Law number 228 of 15th of March 2004 is suggestive through its title : the law refers to the application of the laicity principle regarding the signs and clothing that manifest a certain religious belonging if they are worn in schools, colleges or public highschoools. From our point of view, the simple statement of the laicity politics within the legal framework is not enough in order to impose an objective and coherent conduct upon law subjects. It is at least problematic to enunciate a lax principle (the principle of laicity) by relating to a complex problem (that of religion and culture) without offering some additional specifications. Doctrine has observed this shortcoming and has interpreted the idea of laicity in two divergent directions, following that a certain sense be accommodated depending of the concrete circumstances of each case. Thus, doctrine [4] has distinguished between neutral laicity and militant secularism. Between the two, the latter meaning of laicity corresponds to the formula of cultural diversity that is promoted at the European level. Neutral laicity represents the tolerance and the acceptance of different religious opinions so that the individuals that share them may live together meanwhile, militant laicity adopts an aggressive attitude in relation with expressing different religious opinions. [5]

In light of the information expressed above, it is clear that the margin of appreciation of the States and the doctrine of laicity are concepts that exert mutual influence one upon the other. As long as States acknowledge the idea of laicity in the sense of admitting religious symbols and in the sense of accepting religious manifestations in the dimension of forum externum then, their margin of appreciation will be exerted in compliance with the previously evoked manner of conceiving the problem. If religious freedom is construed in the domestic field as being granted as long as it is in compliance with the principles of laicity and those are conceived in a lax sense in compliance with neutrality then, the accommodation of achieving cultural diversity at the European level will be an achievable goal.

The pseudo-convergence between religious freedom mentioned in the European Convention on Human Rights and Fundamental Freedoms and neutrality promoted by the politics of nation-State. Implications upon gender

In France, the issue of laicity is of pressing importance as it is enshrined in the legal framework of the French Constitution of 1958, in Law of 15th of March 2004 and in the Educational Code – that was amended as a consequence of adopting the aforementioned law. Initially, the issue of laicity was formulated in a neutral and inclusive manner that concedes the possibility of free religious manifestation from the part of the individuals. The wearing of the islamic veil was formulated as an autonomous problem in November 1998 when the Minister of Education Lionel Jospin has requested to the French State Council to assess the compatibility of the islamic veil with the principles of laicity as they are established in the French legislation. Following the intimation through the report of Jospin, the French State Council has responded in the sense in which laicity- that is consecrated at the constitutional level- is compatible with the public wearing of religious signs, including with the wearing of the islamic veil. Furthermore, the French State Council has adopted and promoted through its answer, the neutral version of laicity, making a distinction between the public sphere and the private sphere as an area of manifesting religious freedom. In the understanding of the French State Council, in the public sphere, laicity is one of the essential principles of the State which translates into the neutrality of public services and that advances the idea that neutrality decomposes into (1) the respect for neutrality in the process of formulating school curricula and (2) the respect for neutrality in the activity of the professors; additionally, neutrality in the school environment includes the student's freedom of conscience, banning discrimination regarding the accession to school services of students according to their religious beliefs. [6] Subsequently, the opinion of the French State Council regarding the issue of the islamic veil was shaded, including amid the adoption of Law no. 228 of 15th March 2004 that regulated the application of the laicity principle to those cases that concern the wearing of clothing symbols that attest the religious belonging of the individual in schools or in public institutions. The Educational Code, modified through the Laicity Law mentions, in article L.141-5-1 the following resolution for the problem of religious clothing in public institutions : in schools, colleges or public institutions, the wearing of symbols or clothing that ostensibly manifest the religious belonging is forbidden. The interior regulation reminds us that, the application of a disciplinary punishment is preceded by a previous dialogue with the student. In order

to address directly the problem of wearing the islamic veil, it was later calrified by means of a report issued after the modification of the Educational Code that : the symbols that determine the immediate recognition of the religious belonging of the individual like the islamic veil – redardless of the denomination under which it is used, - are expressly forbidden thus being in compliance with the prohibition established through the Educational Code.

Approaching laicity in the manner that was worded and presented by Law of 15th March 2004 was an aspect that was applied at the national level in solving the Dogru case, subsequently this was reiterated at the European level, by means of the case-law of the European Court of Human Rights. [7] The ban of the wearing the islamic veil at national level by the students belonging to the Muslim minority during the hours of physical education was not assessed by the European Court of Human Rights as a violation of the principle of religious freedom nor as a violation of the principle of gender equity. On the contrary, the wandering away from the premises of religious pluralism was sustained by the non-absolute character of religious freedom provided in article 9 paragraph 1 of the European Convention and by means of justifying the limits of religious freedom by resorting to the hypothesis mentioned in paragraph 2 of the same article 9. In particular, it is deemed that, the ban of wearing the islamic veil is an imperative limitation of religious freedom, this foldens on the reason of necessity that is specific for a democratic society. We do not subscribe to the opinion expressed by the European Court of Human Rights because, if we admit as an undeniable truth the fact that, religious pluralism entails tolerance towards the exterior manifestation (forum externum) of the religious faith towards which the individual manifests its adhesion then, the ban on wearing the islamic veil would not be in consens with this undeniable truth. On the other hand, the European Court accepts, as an undeniable given, the idea according to which the wearing of the islamic veil represent a way of maintaining the fundamentalist islamic tendencies, the submission of woman and her removal from the public sphere. But, if we assess the effects of the ban of wearing the islamic veil in public learning institutions we will observe that,- the main effect has consisted in removing from the educational system of the girls that wear the islamic veil (followers of

the islamic religion), - thus, the decision does not have a visible effect upon men-students. [8]

In the case Dahlab against Switzerland [9] the factual hypothesis is identical to the one described in the Dogru case- the single difference (but of main importance) consisted in changing the quality of the plaintiff. Mrs. Dahlab has the quality of a professor who teaches at an institution of State education and, who has converted to the Muslim religion thus wearing the islamic veil as a symbol that reminds her belonging to the aforementioned religion. Subjected to the decision adopted by school authorities – that was materialized in baning the professors to wear visible religious symbols, -Mrs. Dahlab has resorted to national courts of justice invoking the violation of her religious freedom as it is stated in article 9 paragraph 1 of the European Convention on Human Rights and Fundamental Freedoms. After using all the domestic legal remedies, Mrs. Dahlab has resorted to the European Court of Human Rights and the latter has maintained the decision adopted by national court of justice – by virtue of which, religious freedom in its outer manifestation (forum externum) is not and cannot be thought in absolute terms as it is mandatory the compliance to the limits imposed by paragraph 2 of article 9. The main idea sustained in the argument of the national court of justice has brought into discussion religious pluralism and State neutrality as principles enshrined in the Constitution of the Ginebra canton. The European Court has assumed the argument exposed at the national level, integrating it within a more broad paradigme – that of the necessity that exists within a democratic society. The correlation between the limitation of religious freedom and the demandings of a democratic society seems dilemmatic because, at the theoretical level, the two mutually reject each other. Nevertheless, at the practical level, the European Court of Human Rights explains the request of limiting the religious freedom in a democratic society by invoking two factual states : (1) the quality of being a professor who teaches at the State primary education system implies the adoption of a conduct that is ment to upheld the climate of religious peace within schools; on the other hand, the wearing of islamic religious symbols determines the creation of a tense atmosphere, violating the principles of neutrality and pluralism; (2) the professional quality of the plaintiff cannot authorize her to show a cultural (religious) conduct that would have effect upon young students as she

represents a model for them. From our point of view, both factual states start from the hypothesis that the European Court considers correct *ex abrupto*, without further demonstration. *Exempli gratia*, the arguments which endorses the violation of religious peace by means of wearing the islamic veil were not demonstrated; on the contrary, there were not records regarding any complaints coming from part of students or from part of the students'parents regarding the religious conduct of Mrs. Dahlab although her conversion to the islamic religion was made 5 years before the official banning of wearing the islamic veil. In another token, it is contradictory to discuss the problem of the manner in which the wearing of the islamic veil would affect the religious peace of Switzerland as long as Switzerland has highlighted the neutrality regime (including the religious neutrality) in the context of the wearing of the islamic veil that was practised before its banning in public schools. With regard to the argument referring to the manner in which the religious conduct of professor Dahlab influences the religious conduct of the students of primary school (as they are susceptible of indoctrination following the proselytism undertaken by professor through the wearing of the islamic veil), we can claim that, there are some differences between the religious manifestation of the individual in *forum externum* and the undertaking of actions with proselyte character. Consequently, we feel that, the argument according to which, the wearing of the islamic veil would have as effect the indoctrination of students, is vitiated because the action of indoctrination must be accompanied by the intention of converting the auditorium composed of students to the islamic religion; as long as the conduct of professor Dahlab is neutral, the wearing of the islamic veil becomes a symbol of in *externum* manifestation of her religious faith, without qualifying it as an act that unjustly interferes with the principles of Swiss secularism.

In the cause *Şahin against Turkey* [10] the ban of the islamic veil addressed the case of a medical student amid the desire of preserving the values of State neutrality and national laicity. Similar to the two cases presented above, the main argument of the university authorities for justifying the ban of wearing the islamic veil consists of protecting the secular background in universities. We must make the mention that, the manner of conceptualizing Turkish laicity presents some peculiarities by comparison to the conceptualization of Swiss or French laicity as the first one is in strict connection to

moving away from the remainings of teocracy and of the fundamentalist tendencies of Islam. Within this context, the sanctions imposed at the national level upon the student Leyla Şahin (we refer to her subjection to disciplinary procedures and to her removal from the written examinations as well as her suspension for a period of a semester) were accepted by the European Court of Human Rights by virtue of the mechanism of the margin of appreciation of the States and in compliance with the needs of the Turkish State of promoting the image of woman and the partnership between sexes.

In the lines above we pursued to demonstrate the incongruity between the manner in which the European Court conceptualizes religious freedom in article 9 and the manner in which nation States understand, by virtue of the margin of appreciation, to conceptualize State neutrality. We feel that, in order to produce just effects, State neutrality must be understood under the guise of State tolerance towards religious diversity as long as it does not violate public order or safety, public morals of health. This idea is reiterated by paragraph 2 of article 9 of the European Convention on Human Rights and Fundamental Freedoms : 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. If we would resume our reasoning to this argument it would mean that the logic of things would lead to a full convergence between the State manner of conceptualizing neutrality and the conventional manner of conceiving religious freedom. In the concrete reality, the factual and juridical situation bears some nuances. Laicity and its way of being conceived is the prerogative of nation State but, if the manner of concetualizing laicity that is used at the domestic level proves to be contrary to respecting human rights and, in particular, proves to be contrary to respecting the right to identity of women belonging to the islamic culture, the case law intervention of European Court must be felt. In front of the decisions pronounced at the national level, the European Court intervenes, observing the violation of religious freedom guaranteed under its auspices but accepting it under the reserve of the necessity that exists in a democratic society. From our point of view, by its attitude, the European Court gives full power to nation State in exerting the control of the given situation by means of the mechanism of the margin of

appreciation but the European court of justice undertakes a pseudo-control, agreeing ab initio to the opinion that is expressed at the national level, without assessing the situation. The European Court accepts de plano the establishment of a direct causal link between the wearing of islamic veil and the situation of Muslim women, without taking into account the idea according to which, the wearing of the islamic veil may represent a symbol of manifesting the right to cultural identity of Muslim women. Form our point of view, an implicit connection may be established between the interdiction of wearing the islamic veil and indirect discrimination of Muslim women. Indirect discrimination may be explained by means of adopting, at the national level, of some apparently neutral measures (in the cited causes, the measure of banning the wearing of the islamic veil is apprently neutral because it is justified by upholding religious pluarlism and State nautrality) that, in concrete, produce negative effects by limiting the rights of a peculiar category of individuals (in the given causes it is restricted the right to cultural identity pertaining to Muslim women). [11]

On the other hand, the European Court leaves unquestioned the interpretation offered by national authorities according to which, the wearing of the islamic veil represents a symbol of women subordination and of violation of the principle of gender equality. In order to achieve the hypothesis expressed at the State level and to apply it, the hypothesis must be proven; on the contrary, we discuss the re-assessment of a stereotype that derives from the manner in which the western doctrine qualifies the religious manifestations undertaken by the islamic religion.

In the title of the present section of the paper we used the expression pseudo-convergence in order to show the manner in which nation States understand laicity is discordance with the manner in which religious freedom is applied by virtue of the spirit of the European Convention. We feel that State laicity – enshrined within the margin of appreciation of the States is improperly interpreted by nation States -is able to violate individual rights although there isn't the danger of undermining national security, public order or public health nor of undermining the moral beliefs of society. On the other hand, the agreement of the European Court of Human Rights to the reasoning promoted by nation States is inexact given the fact that, the latter is not the product of an autonomous analysis – as we already have shown in the lines above.

Replacing conclusions : the failure of nation States in the process of modernizing national legislation in the context of promoting pluralism and a democratic society

The cases discussed in the lines above demonstrates the lack of conformism of nation States with the thesis of religious pluralism- as a condition of existence for democratic society. Establishing the fact that, wearing the islamic veil represents an act that is contrary to a democratic society is an idea that must be argued for validity reasons by resorting to the objective and reasonable motives that are comprised in paragraph 2 of article 9 of the European Convention. Consequently, we feel that, the banning of the islamic veil is more likely to represent the expression of a peculiar interpretation that evokes the western stereotype conception concerning the treatment applicable to women in the islamic religion rather than a measure that was adopted for objective and reasonable reasons as endangering state's safety, the rule of law or public morals or health. The policy that is applied at the level of nation States reminds of the restricted form of neutrality or the form of militant laicity according to which any manifestation of a religious belief that, in some circumstances, was assessed as a bringer of fundamentalism, must be removed, regardless if its followers are not practitioners of islamic fundamentalism and does not pursue the subversion of the public power of the State. Furthermore, by means of national politics of banning the islamic veil, gender inequity was implicitly promoted (as we have previously argued, the banning of the islamic veil may be construed as a peculiar case of indirect discrimination) and women's right to cultural identity was violated (the conceptualization of the right to cultural identity was demonstrated in the present paper as being the prerogative of every woman to opt for some cultural values and to promote them by means of specific actions while respecting the legal provisions of the host-State).

Considering the analytical assertions made above, the arguments that we deem able to demonstrate the lack of adhesion of nation-States to the values of religious pluralism and democracy may be resumed as follows : (1) the cases Dogru, Şahin and Dahlab highlight the replacement of the islamic stereotype concerning the manner of conceptualizing the female condition with a western stereotype; (2) State neutrality is

not the equivalent of the ban – that was adopted at the national level, - of all religious practices/symbols that are visible (per a contrario, as long as these do not touch fundamental values which exist within a democratic society, religious manifestations of any kind must be encouraged); (3) State's attitude towards religious variety and its external manifestations is bound to be exerted in the sense of tolerance and acceptance within the functional democratic limits and not in the sense of banning them- in the absence of proving, beyond any reasonable doubt, the menacing character that this attitude may bring upon democratic values; (4) religious pluralism does not exclude rather it entails a open and tolerant State neutrality in relation to external religious manifestations; (5) likewise, the application of religious pluralism and State neutrality foresees the tensions that may appear between religious groups or between different cultural communities but it promises their resolution through tolerance, respect for cultural diversity, without prioritising cultures/religious manifestations and without establishing the inferiority or superiority of one or the other; (6) nation States have not responded to the impulses given by religious pluralism and State neutrality, stating ab initio the fact that, the wearing of the islamic veil is contrary to a democratic society without engaging in a rigorous demonstration.

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