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Looking for a Legal Concept of Religious Freedom as Much as Possible Ad Includendum and as Little as Possible Ad Escludendum: Italian and Albanian Constitution Compared

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Abstract

Since ancient times, human beings have sought the spiritual and supernatural dimension, in fact it is believed that freedom of religion can be found in the twelfth edict on stone of Ashoka, which dates back to 250 B.C. ([1]). The search for the transcendent has been continuous and has crossed the entire history of man, consequently also the freedom of religion. But what is freedom of religion? With the changes and evolution of modern societies, the concept of religious freedom has also taken on different facets, such as the freedom not to believe, or active atheism, transforming in this way from the freedom of the believer in the freedom of the non-believer. In the Albanian and Italian Constitution, freedom of religion is integrated with freedom of thought, freedom of assembly, etc., since it alone is unable to protect such a broad concept. All this has made it even more difficult to identify the concept. Any attempt to define from the outside the category of religion worthy of protection would go against the provisions of the Constitution which establishes the right of everyone to profess their faith. The analysis carried out will aim to identify who is competent to outline this notion.

Keywords: Freedom of religion, Freedom to profess one's faith, Legal concept, Italian Constitution, Albanian Constitution

Introduction

Capogrossi writes to Giulia "freedom must be the principle of freedom, it must be a human freedom, the one that frees us, the one that frees us (..) only man can be happy

([1])Translation of C. FORMICHI, *Apologia del Buddhismo*, Formìggini, Rome, 1925, p. 91.

or unhappy, good or bad, hate or love, at your choice" (G. CAPOGRASSI,1981, pp. 149, 599.). Therefore "true freedom is that of the soul" (V. FAGIOLO, 1990, p. 166).

Undoubtedly, freedom of religion is a need that "concerns humanity in its entirety, therefore it runs through the whole constitutional spirit" (P. CONSORTI, pp. 20, 21; Cf. M. OLIVETTI, 2004, p. 40).

For this reason it has been recognized with priority over others since, as Grossi points out, "it is the first to be invoked since the end of the ancient world when the clash between Christianity and paganism occurs" (P. GROSSI, p. 105; Cf. A. C. JEMOLO, 1961, p. 131; T. MARTINES, 1990). For this reason, today it is considered as the archetype of modern freedoms (S. FERLITO, 2003, p. 20).

The right to freedom of religion "in the purity of its realization represents a good in and of itself and is the crowning achievement of a fundamental and irrepressible human aspiration" (P. GROSSI, 2008, p. 105).

In law books it was conceived as "the freeing of the human spirit from any dogmatic or confessional concept: for others, on the contrary, as the faculty of conforming one's life, not only private, but also public, to the precepts of one's religion. Both of these extreme positions have historically led to positions of intransigence and intolerance".

But "true religious freedom consists in making possible a situation in which every individual - whether he believes or does not believe - can enjoy the same freedom. In other words, religious freedom is not a philosophical or theological concept, but essentially a juridical one"(F. M. BROGLIO, 1991; Cf. F. RUFFINI, Milano, 1967, p. 7).

His intent, according to Ruffini, "is not, as in faith, beyond worldly salvation; it is not, as with free thought, scientific truth. His intent is subordinated instead to these, and is much more modest and all practical".

It emerges from his thought that the true intent of religious freedom as an essentially juridical principle lies "in creating and maintaining in society a condition of things such that each individual can continue and attain those two supreme ends in his own right, without the other men, either separated or grouped into associations or even personified in that supreme collectivity which is the State" (F. RUFFINI, 1967, p. 7) ([1]).

Freedom of religion is a legal freedom founded on natural human freedom, according to De Luca (P. DE LUCA, 1969, p. 15), which distinguishes between the concept of "religious freedom" considering it a theological concept and "right to religious freedom" as a juridical concept. The latter, in fact, is nothing other than "legal freedom in religious matters and activities, that is with regard to a special object, that is, the faculty of the will to self-determine in religious affairs within the sphere of religious

([1]) For the A. freedom of religion is configured only in the juridical category, excluding the theological and philosophical ones. See ID., Religious freedom as a subjective public right, cit.

purposes and juridical-religious norms, without any legal, constricting or impeding coercion ". (P. DE LUCA, 1969, p. 45)

With the changes and evolution of modern societies, the concept of religious freedom has also taken on different facets, such as freedom not to believe, or active atheism, transforming itself in this way from the freedom of the believer into the freedom of the non-believer.

Thus the freedom of religion provided for in Article 19 of the Italian Constitution is integrated with the freedom of thought, assembly, etc. since it alone is unable to protect such a broad concept. All this, as has been highlighted, has made it even more difficult to identify the concept itself (Cf. M. MANETTI, 2007, p. 854).

The same difficulty also results in defining freedom of religion in associated form, since the Constitution fails not only to define the concept but also to outline the elements that constitute it. That is why, in this way, art. 8 of the Constitution is considered an open norm (In these terms also R. BOTTA, 1994, p. 100), also capable of adapting to modern times (Cf. A. C. JEMOLO, Lezioni di diritto ecclesiastico, Giuffrè, Milano, 1963, p. 104) ([1]).

Even the Albanian constitution in Article 24 outlines a more detailed protection of religious freedom, but even in it there is no notion of religion.

Furthermore, from a legal point of view, there is a real difficulty in defining the concept of religion and religious denomination, not to say that it is "not possible", as some authors believe. (S. FERRARI, 1995, pp. 20, 22. Also in note 5 of p. 22 also lists the Authors, who consider it impossible to define the concept of religious freedom).

Over the years the notion of religion has been understood and defined in a different way ([2]), but every attempt in legal doctrine - and not only - has failed as it has been shown that the functional and content elements are not capable of leads to a legal definition (S. FERRARI, 1995, pp. 20, 30) ([3]).

State, Individual or Judicial Recognition?

In the absence of a concept, even those who are competent to delineate this notion appear very difficult. Is it the state, the jurisprudence or the individual? ([4])

([2])The Author believes that this concept is not even legal, but sociological.
([3])In the Bible, faith is defined as "the salt of the earth". Bible, Mt, 5, 3.
([4])The Author believes that the difficulty of defining freedom of religion can lead us to two solutions, the first to self-qualify it, and the second to apply a special discipline to it (p. 30). It also reminds us of the principle of state incompetence, in the sense that "*public bodies have no competence to make an evaluation - positive or negative - on the contents of a religion or, ultimately, to declare whether or not it is a religion*"(p. 35).
([1]) Interesting in this regard is the story of the Harrisburgers, who found a very ingenious way to avoid paying taxes. Taking advantage of the gap in the definition of religion and religious denomination, they decided to affiliate with a Californian Church to be ordained ministers of worship, thus evoking the tax exemptions for this category. The local authorities who were not able to define the religious phenomenon, when in doubt applied the most favorable laws.

Ferrari notes that it is not up to the state to say what a religion is and what is not, because this would involve a violation of art. 19 of the Constitution (S. FERRARI, pp. 30, 35).

Furthermore, article 19 of the Italian Constitution, in establishing that everyone has the right to profess their religious faith, reminds us that the term "their religious" indicates not only the individual as the holder of freedom of religion, but that it is him to estimate what it is, and whether it is a religion. It should be emphasized that is an absolute possessive adjective. Therefore, there can be no external evaluation of the individual in the qualification, positive or negative, of a belief as a religious value.

Instead in Article 24 of the Albanian constitution the term "their religious" is missing, but the individual character of believing or not believing in religion is highlighted with the term “each”.

The fact that the term "their religious" is not mentioned in the Albanian Constitution does not imply that the constitution does not recognize it as such but it implies that faith is linked to something very personal and that faith is what everyone feels is their own.

The adoration of a tree or other inanimate object as a fideistic element cannot be considered by anyone to be insufficient to constitute an element of worship, if it is considered as such by a subject.

This means that a ranking of religions does not exist or must exist, nor the supremacy of one cult over another, this means that, without prejudice to reasons of public order and common morals, no one else, if not the holder of the feeling can or is entitled to attribute the dignity of religion to a given creed.

Furthermore, if the judgment did not derive from the holder of liberty but from the state, this fact would historically take us back in time, that is, to the admissibility review on cults.

Thus, according to this thesis, in the light of Article 19 of the Italian Constitution ([1]) and Article 24 of the Albanian Constitution, the incompetence of the State in assessing what is religious or not is affirmed, and a form of individual and collective self-qualification is deduced. Moreover, in matters of freedom of conscience this solution appears to be the best (N. COLAIANNI, 2000, pp. 30, 31), because, as Bin also maintains, "the only position that the State can take with regard to religious

The story, quoted by S. FERRARI, *La nozione giuridica di confessione religiosa (come sopravvivere senza conoscerla)* (The juridical notion of religious confession (how to survive without knowing it), p. 19-20, and taken in turn by R. L. BEEBE, *Tax Problems Posed by pseudo-Religious Movements*, in *The Annals of the American Academy of Political and Social Science*, November, 1979, pp. 101-103.

([1]) Furthermore, also the Italian Constitution Court in the sentence. n. 467 of 1991 defined freedom of conscience as a “creative principle that makes the reality of fundamental freedoms possible as a realm of the virtualities of expression of the inviolable rights of the individual in the life of relationships. (…) In other words, “thematic areas with which a man can identify himself in his behavior”. Consequently, not only art. 19 of the Constitution but also art. 21 of the Constitution.

sentiments and freedom of conscience is one of perfect indifference as to 'vertical' relationships, and of intransigent protection of the individual right of negative freedom, as to 'horizontal' relationships". (R. BIN, 1996, p. 44)

The doctrine, but also the Italian and Albanian Constitutional jurisprudence, has not found a definitive solution and has not fully resolved the interpretative problem on the concept of religion and religious confession (Cf. B. RANDAZZO, 2008, pp. 22 and the following;), because "it is undecidable without hurting constitutional principles". (R. BIN, p. 41)

This is because, also on the basis of what is stated in the epigraph, any attempt to define from the outside the category of religion worthy of protection would go in contrast with the provisions of Article 19 of the Italian Constitution and Article 24 of the Albanian Constitution, they sanction the right of everyone to profess their faith, thus attributing to individual feeling the role of conferring the dignity of religious worship on a given creed.

This concept inevitably leads to the consequence of unconstitutionality any state intervention in defining what a cult worthy of protection is or is not.

In the same way, recognition in the courts would appear to be an “elastic” solution (So S. FERRARI, 1998, pp. 53 and following) above all dictated by a certain personal conviction of the judges (B. RANDAZZO, p. 23; Cf. ID., 2001, pp. 180 and following). In essence, the law would shift from the ownership of the individual to that of a third party, the judge, who inevitably takes a decision on the basis of his religious sensitivity. It is evident how a solution of this type contrasts sharply with Article 19 of the Italian Fundamental Charter ([1]) and with Article 24 of the Albanian Constitution.

Ultimately the choices are two, tertium non datur (See. L. OLIVIERI, 1996, p. 202), in the sense that either the concept is determined by the state or by the individual (in the case of the definition of religious denomination, by themselves).

The first solution appears more convincing from a legal point of view ([2]), because what is qualified by the state is also recognized by the rules, by the individual and by the judges. However, the question remains whether this constitutes a vulnus of Article 19 of the Italian constitution and Article 24 of the Albanian one which we have dealt with up to now. Obviously, the question remains open, but it is difficult to hypothesize

([2]) See also sentence no. 467 of 1992, in which the Italian Court took an intermediate position, declaring the religious attribution of the Dianetics Institute association unfounded, and ruled that, "the Court of Turin considered, on the basis of a preliminary non-disputable assessment, that enforce the rules whose constitutional legitimacy is questioned. It is not possible, here, to assess whether the "Dianetics Institute" is to be qualified as a religious association or an organization of a different nature, nor can a different logical sequence be imposed on the judge of merit in the order of the checks necessary to affirm that the concrete elements exist to qualify, in application of the abstract provision of the law, an association as religious or as an organization of a different nature ”.

([1]) Also the European Parliament in 1984, with a Resolution recommended to outline some elements and criteria to verify the legitimacy of religious confessions.

that any strand of faith can assert itself as worthy of protection when it is not recognized as such by the state body.

Conclusion

If, from a strictly constitutional perspective, the law should be traced back to the individual, from the point of view of legal protection, there can be no other subject than the State to define the canons that should characterize a cult that deserves such protection.

This concept has in itself the characteristic of an erga omnes guarantee that is based on species and not gender profiles without going into the merits of the fideistic contents. In this way a juridical norm is crystallized which as such has a general value.

Obviously, since it is a very delicate matter and which involves different and personal sensitivities, in defining the canons at the basis of protection, the State must take into account all the elements that contribute to forming the concept of religion in a logic that is as inclusive as possible. In other words, it is necessary to move according to an interpretation that is as much as possible ad includendum and as little as possible ad escludendum.

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