

Religious freedom in Russia as a European problem

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The concept of freedom - one of the most important, if not the most important of the political language, of philosophy and of ethics - is closely linked to the relations between individuals or social groups and the *powers*, especially those of the State. The *universalization* of human rights and the wide-ranging debate, especially the legal one, on the possibility of their effective protection, has put brought forth the exact definition of the freedoms that are to be guaranteed.

It is well known that fundamental human rights are, as a category, a recent legal *discovery*, and freedom of religion exercises, within them, a particular function: it indicates everything related to the transcendent and intimate individual consciousness. The study of this concept - historical-philosophical rather than a legal one - has undergone many doctrinal discussions, never agreed, given the heterogeneity of definitional formulas, the rights strictly dependent on it, the problems of linking with the space-time coordinates that its analysis implies, the different attitude assumed by the *great* religions and the changed cultural attitude that *new religious movements* have imposed¹.

At present, new religious phenomenon in democratic political contexts, imply a further rethinking of secular ethics in the modern State, in which the consideration of individual religious identities must be guaranteed their full participation in social and political life, with the only evaluation that these values must respect the fundamental and

¹ Cf. *Résolution du Parlement Européen sur la situation des droits fondamentaux dans l'Union européenne*, A5-0223, 2001, in www.unadfi.otg/actio_etat, reads, at point n. 49, the recommendation to the Member States to focus on the physical and psychological aspects of the person, in particular by means of careful information and awareness-raising activities, but above all through legal, fiscal and criminal provisions capable of preventing the illegal conduct of sects. Cfr. *Religion ans Secularism in the European Union. State of Affairs and Current Debates*, J. NEILS, C. SÄGESSER, J.P. SCHREIBER (ed.), Peter Lang, Oxford, 2017. Cf. also M. INTROVIGNE, *Rapporti parlamentari e governativi sulle "sette" in Europa occidentale, 1996-1999*, in *Quad.dir.pol. eccl.*, 1999, 2, pp. 397-421.

indispensable principles of society itself.

In current European law, having gone beyond the transition phase - from the so called "first generation" of human rights, modelled on the paradigm of individual rights and structured on the basis of the opposing subject - public powers - there is a phase of expansion and dilation of protection expectations, linked to a perception of the inadequacy of traditional legal formulation tools. The evolution of the European supranational community, therefore, requires a rethinking of the traditional dynamics of citizens - State, especially with reference to the delicate sector of the fundamental freedoms of the individual².

Human rights doctrine, developed in a complete way, has the "subversive" character of a revolution in international relations, because it involves overthrowing the dogma of State sovereignty. *In primis*, the traditional conception of international law, the relationship between sovereignty and the so-called safeguarding of *domestic jurisdiction*. The activation of political or judicial control instruments, in fact, undermines the position of a State, since human rights can be claimed on the world stage irrespective of the relationship with their State of affiliation. The transition from the guarantee *inside* the State to that *against* the State has come about.

It is well known that the European system of human rights has been built with the codification of the European Convention, whose art. 9 is specifically devoted to the protection of freedom of thought, conscience and religion and is effectively guaranteed by the right granted to individuals and groups to engage in a judicial, autonomous and independent body, such as the European Court, to complain of violations. The whole

² Cf. M. T. BITSCH, *Histoire de la construction européenne de 1945 à nos jours*, Bruxelles, 1999; *The European Union and Human Rights*, ed. by N. NEUWAHL, A. ROSAS, Nijhoff, The Hague-Boston-London, 1995; *The European Union and Human Rights*, ed. by P. ALSTON, Oxford, 1999; J.H.H. WEILER, *I diritti umani nello spazio giuridico europeo*, in B. BEUTLER, R. BIEBER, J. PIPKORN, J. STREIL, J. H. H. WEILER, *L'Unione Europea. Istituzioni, ordinamento e politiche*, IL Mulino, Bologna, 1998, p. 346 ss.; F. MARGIOTTA BROGLIO, *La tutela della libertà di religione nell'Unione Europea*, in *Iglesias, confessiones y comunidades religiosas en la Unión Europea*, Bilbao, 1999, p.69 ss.; ID., *Il fenomeno religioso nel sistema giuridico dell'Unione Europea*, in F. MARGIOTTA BROGLIO, C. MIRABELLI, F. ONIDA, *Religioni e sistemi giuridici*, Giuffré, Milano, 2000, p.162 ss.; V. MARANO, *Unione Europea ed esperienza religiosa. Problemi e tendenze alla luce della Carta dei diritti fondamentali dell'Unione Europea*, in *Dir.Eccl.*, 3, 2001, pp. 862- 904.

dynamic of fundamental freedoms is based, in fact, on the effectiveness of guarantee systems. This involves the need for a concrete protection of the rights solemnly attributed to individuals, also through the recognition of the collective entities/social formations in which the individual decides to realize his rights of liberty. Failure to protect them, in turn, becomes a collective problem that involves not only the concerned individual country, but calls into question the democratic systems of all European states. This is why the European Court's actions on discrimination are particularly interesting due to the lack of recognition of the *status* of religious organizations which, unfortunately and with a certain frequency, have been pronounced against Russia in recent years in cases involving Scientology and Jehovah's Witnesses.

It is interesting to note that Russian history of the last century has highlighted a particular approach to the religious phenomenon, in a profoundly different sense than those of various other European States.

The Constitution of the Soviet State, in fact, brought about, in 1918, the promulgation of a Decree on the separation of the Church from the State which recognized to all citizens the freedom of conscience, both as a faculty of professing a religious faith but above all not professing at all and to engage in atheistic propaganda. This was the beginning of a particularly difficult period that led to multiple attempts to separate various Churches, favoured by the Soviet government that, through a division of the Orthodox Churches raised the possibility of annihilating the Patriarchal Church.

Furthermore, the 1977 Constitution established the obligation to respect 'socialist living standards', transforming the right to atheism into a duty of the Soviet *civis bonus*, in that it must actively contribute to curing believers of the disease of religious faith³. The

³ See art. 59 of the same: the exercise of duties and freedoms is inseparable from the fulfillment of the duties of the citizen. The U.S. citizen has an obligation to respect the USSR Constitution, Soviet laws and the rules of socialist coexistence. Cf., *inter alia*, N. BERDJAEV, *Le fonti e il significato del comunismo russo*, La casa di Matriona, Milano, 1976.; Cf. C. CARDIA, *Libertà religiosa, marxismo, comunismo reale*, in *Coscienza e libertà*, I-II sem. 1990, pp. 129-139 who emphasizes that this ideology has been transformed into a totalitarian conception that, excluding the others, could generate everything: denial of human rights; marginalization and discrimination of believers; and then, in the darkest periods of Soviet history, persecution and repression (p. 138).

total identification of the State with the Communist Party had in fact transformed Marxist ideology by taking on the character of a *Weltanschauung*, which deeply influenced every sector of the individual life.

Adherence to new legislative models on freedom of conscience began only after the political opening of Gorbachov, in the *perestrojka* phase, which led to the adoption of the law of 1990, which guaranteed perfect equality of all confessions and the full exercise of the right to freedom of conscience⁴. It has therefore represented a sort of Copernican revolution, leading to the overcoming of the State=party=divinity equation and a complete semantic revolution⁵.

In Russia, however, the next phase of the so-called "religious awakening" did not bring about any major changes, especially for the particular weighting given to the Orthodox Church within the political and social milieu⁶. The principle of secularism, solemnly invoked in art. 14 of the current Constitution of 1993 has never been questioned, as well as the ideal of State-Church separation. The implosion of Communist ideology has, however, no longer allowed to identify this ultimate concept in the exclusion of religious phenomena from the social life of the country, but as a correct principle of neutrality/indifference of the political power toward a citizen's individual right.

⁴ Cfr. G. CAROBENE, *La recente legge sovietica sulla libertà di coscienza e organizzazioni religiose*, in *Il Diritto Ecclesiastico*, 1991, 2-3, pp. 428-452, which contains in the appendix the text of the 1990 law. This text is also in G. BARBERINI, *La legge sulla libertà religiosa in Unione Sovietica*, in *Aggiornamenti sociali*, 5, 1991, pp. 383-392, preceded by a comment to the same, pp. 377-382.

⁵ Cf. J. P. WILLAIME, *Sociologia delle religioni*, Il Mulino, Bologna, 1996. For the author, declaring that religious misery is, on the one hand, an expression of the real misery and, on the other, the protest against it, Marx has nevertheless recognized the protestant dimension of religion but, considering it as the illusory happiness of people, never took it seriously and denied that in certain circumstances it could contribute to the 'real happiness' of the people. This is due, according to a. to the philosophical assumptions weighing on Marxian analysis, in fact, considering religion as a supra-structural reality that has little autonomy in relation to the material basis of social life, Marx did not think the religious as an autonomous symbolic system it results in a downsizing of the fact religious (cf. p. 12).

⁶ In his Preamble, we read: recognizing the special contribution of orthodoxy to the history of Russia and the formation and development of Russian spirituality and culture. This statement does not seem to be completely mitigated by the immediately following: in respect of Christianity, Islam, Buddhism, Judaism, and other religions and cultures which constitute an ineliminable part of the historical heritage of the Russian people. The 1990 legislation did not limit any restrictions on foreign religious organizations or the most recent cults.

The last law, approved by the Duma, the Russian Parliament, in 1997, to the contrary, brought back the protection of religious freedom to the period of Church's submission to temporal power⁷. In fact, it was argued that only those associations that had been legally established in the territory for at least fifty years - that is during the dictatorship of Stalin⁸ - could be defined 'Russian' associations, at a time when the survival of the churches was tied to the acceptance of clandestinity. It was also established that the right to establish a community for religious reasons is related to the physical presence of believers in the territory and thus a group formed in a certain territorial sphere cannot carry out its missionary work outside of it. A foreign association has the right to have its own representation but it cannot do any kind of religious activity. Local associations, whatever religion they belong to, must show their presence on the territory for at least fifteen years⁹. In the absence of such recognition, they cannot carry out any kind of activity and, if they do not obtain a new registration, they are doomed to be

⁷ The Law on Religious Associations of 19 Sept. 1997 was published on *Il Regno – documenti*, n. 19, a. XLII, n. 802, 1 nov. 1997. Cf. T. SINURAYA, *Constitutional Foundation of the Religious Freedom in Russia vs Registration of Religious Associations under the Law of 1997*, in *European Journal for Church and State Research*, 1999, vol. 6, pp. 247-264. Cf. A. KRASSKOV, *Sconfitta della libertà e dell'ortodossia*, in *Il Regno – attualità*, 18, a. XLII, n.801, 15 oct. 1997, pp. 538-539 who defines it as an authentic scam law, the main purpose of which is to place religious life in the country under strict control by the overwhelming majority of atheists who decided the fate of believers during the Soviet era. It, however, states in Art. 4 that the Russian Federation is a secular state" and "no religion can be defined as a State. Religious associations are separate from the state and are equal before the law. Also L. SIMKIN, *Chiesa e Stato in Russia*, in *Diritto e religione nell'Europa post-comunista*, S. FERRARI, W. COLE DURHAM jr., E. A. SEWELL (eds.), particularly p. 355 ss. who emphasizes that this law violates "the rights of believers who do not belong to the Russian Orthodox Church and contain discriminatory provisions on religious minorities (p. 356). The restrictions imposed on the free exercise of religious freedom, as outlined in art. 3.2 - the protection of the constitution, morality, health, the rights and other legal interests of others, the defense of the defense and the security of the State - are also excessive in comparison to the provisions of the second part of Article 9 of the European Convention.

⁸ Article. 8.5 of the law stipulates that a central religious organization, whose structure has been active in the territory of the Russian Federation, is legally recognized for at least fifty years at the time when it submits to the appropriate registration body the application for state registration, has the right to use in its own name the words 'Russia', 'Russian', and words derived from these derivatives.

⁹ Art. 13.2: "A representation of a foreign religious organization may not engage in liturgical activities or other religious activities, and does not receive the status of religious association." For the establishment of local religious organizations it is necessary for the religious group to exist "in the territory for at least fifteen years" or to be part of a central religious organization: art. 9.1. A ruling by the Constitutional Court took place on this issue, which in 1999 did not formally declare the unconstitutionality of art. 27 acknowledged the possibility of registration without this time requirement and recognized the status of religious organization even to those local structures that are not part of a central organization and active for less than fifteen years, provided that they register before 1997. This to avoid the annual registration obligation required by law: cf. L. SIMKIN, *Chiesa e Stato...cit.*, primarily p. 362 ss.

“liquidated by criminal law”¹⁰.

The approval of this law, and the endorsement by the highest hierarchies of the Orthodox Church, has therefore demonstrated its will to put itself in a position of supremacy over all the other confessions existing in the country that, after the collapse of the regime, had acquired greater penetration power, without worrying, however, about the situation of the enslavement to the temporal power that derives from it and which brings back centuries the role of the Church. In fact, the rights of Orthodox people who do not recognize the Patriarchate of Moscow, of the non-Orthodox Christians and of those belonging to “new religious confessions” are very limited.

Therefore, such a law, in a clear way, has provided innumerable benefits to the Patriarchate of Moscow, eager to strengthen ties with the political power by strengthening its dominant position and avoiding an opening towards religious minorities, unlike what foreseen in the foregoing legislative document. It also favoured the representatives of power who were wandering on a unique national ideology able to bring together 'orthodoxy', 'national spirit' and 'autocracy', taking a dangerous step back in time.

From a formal point of view, religious freedom in Russia is still in force. It applies to the four religions that the 1997 law defined as "respectful" (non-Orthodox Christianity, Islam, Buddhism and Judaism) and to the other "religious organizations" that are registered with the authorities. In the 2017 US Commission Report on Religious Freedom¹¹, however, the case of Russia is cited among those of “particular concern”, and entered in the list of the most dangerous countries for freedom of religion. There are numerous legal rulings on religious organizations that are labelled as sectarian and considered dangerous.

With reference to the Church of Scientology, on which I would like to focus in my brief intervention, the first ruling of the European Court of Human Rights was a 2007

¹⁰ Article 26 of the Law. A subsequent Federal Law of 25 July 2002 also established other assumptions in which the judicial authority may impose the dissolution of a religious organization: the violation of public security and public order, the offense of public morality, the threat health, suicidal tendencies, barriers to the instruction and the minors, instigating the sale of assets to the association and limiting their freedom of departure. On the point cf. L. SIMKIN, *Chiesa e Stato...cit.*, primarily pp. 365-366.

¹¹ <http://www.uscirf.gov/sites/default/files/2017.USCIRFAnnualReport.pdf>.

decision that stemmed from the refusal of the Department of Justice to re-register it in the register of religious organizations¹². It should be noted that this church was originally registered in 1994 but, following the amendment of the 1990 law, had to file a new application for registration, which was rejected by the Russian authorities.

The European Supreme Court, in its decision, referred to a well-established case-law that reaffirmed, referring to art. 9, that the freedoms of thought, conscience and religion form the foundations of a 'democratic society', as foreseen by the 1950 Convention¹³. The compression or limitation of such fundamental rights can only be legitimately invoked in the case of "necessary conditions" (as explicitly outlined in the second paragraph of that article). In the case *de quo*, however, the Court imposed a more careful assessment of such limitations in discontinuity with its previous jurisprudence and extended its purview decisively intervening in the domestic law of the country. In particular, it stated that, in denying such registration, the Moscow authorities "had not acted in good faith and had neglected their duty of neutrality and impartiality vis-à-vis the applicant's religious community".

In 2009, another important ruling to protect the freedom of religion was issued by the European Court, with reference to the Church of Scientology (Kimlya and others vs. Russia)¹⁴. The Court unanimously voted in favour of two religious groups, considering that they had the right to be enrolled as religious organizations under the Russian law of

¹² European Court of Human Rights, first section, Church of Scientology Moscow v. Russia, no. 18147/02, 5 Apr. 2007, in *Diritto e Religioni*, 2007, 2, pp. 663 -679. In this case law the Court declared the violation of artt. 9 e 11 Conv.: "the Court observes that the religious nature of the applicant was not disputed at the national level and it had been officially recognised as a religious organisation since 1994" (par.64) Cf. G. CAROBENE, *L'affaire di Scientology. La qualificazione in via giudiziaria di una confessione nel contesto 'europeo' della libertà di religione*, in *Diritto e Religioni*, 1, 2008, pp. 774 - 791.

¹³ "The Court refers to its settled case-law to the effect that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it» (par. 71).

¹⁴ In this case law the problem was linked to the recognition of Scientology as a religion: CEDH, Kimlya et al. c. Russie, 1 ott. 2009, par. 32 but also X et Church of Scientology c. Suède, 5 mag. 1979 in which the request of the Church of Scientology was declared inadmissible; CEDH, Church of Scientology et 128 de ses fidèles c. Suède, 14 lugl. 1980 in which the Commission had recognized the applicability of art. 9 Conv. to the Church of Scientology.

1997. This ruling reiterated that both these groups and the founders of two Churches of Scientology (of Surgut and Nizhnekamsk), enjoyed the freedom of religion and association, in accordance with art. 9 and 11 of the European Convention.

Finally, in late 2015, the European Court rejected the appeal of the Russian Federation (Church of Scientology of St. Petersburg and others against Russia¹⁵) seeking to revise a previous ruling of 2014 favourable to the Church of Scientology in St. Petersburg, with which it was confirmed that the refusal to register that Church represented a violation of art. 9 and 11 of the Convention. In the case *de quo*, the Russian Government had refused to register that group as a religious organization because of its absence on the territory during the fifteen years prior to the application for registration, as required by the 1997 law. Such denial was not considered justified by the Supreme European Court. It was established that the restrictive *status* of religious groups, which were unable to register on the basis of that last law, "did not allow members of that group to effectively enjoy their right to freedom of religion, making this illusory and theoretical rather than practical and effective". The Court in the case *de quo* did not want to comment on the religious or otherwise of Scientology, explicitly acknowledged as a confession in its previous statements, always with reference to Russia. This is in the Court's free appreciation, and in its legitimate use of self-restraint. However, the context in which the decision has matured leaves us perplexed. Let it be understood that states subject to the jurisdiction of the Court may consider the same association whether religious or not, or that a change of opinion in the space of a few years does not require motivation is a point that deserves a more careful reflection, because it does not concern only Russia but involves the whole European system of protection of religious freedom. The Court declares that Scientology can not be considered a religion because in Europe has not yet formed a "consensus" on the issue but, at same time recognizes, at least incidentally, that a group of legally associated and non-dangerous individuals should not be submitted to harassing limitations.

Such jurisprudence makes it possible, therefore, to emphasize that the religion of Scientology and its organizations enjoy the same rights and protections as other religions or any legitimate association, philosophical or religious, under international treaties and that such a church must be correctly framed as a religious community.

In this regard, the substantial profile of significant legal interest is linked, *in primis*, to the definition of the concept of 'religious confession', with obvious and important legal effects. In view of the impossibility of a semantic delimitation of the concept of religion in

¹⁵ www.legislationline.org/.../ECHR_CASE%20of%20Scientology.

a univocal way, it is necessary to think in terms of multiple legal traditions, normative structures that define a model but which, as multiple, allow the coexistence of multiple models in the name of democratic tolerance¹⁶.

The definition of religion is currently an etymologically complex concept, expanding and changing, compared to the classic setting associated with a monocultural universe. It has also recently invested, in the European context in which it is currently stressed, that every definition presupposes the ability to identify the essence of the phenomenon analyzed, that is, one or more characters which are at the same time sufficient and necessary to qualify it, but, in this respect, all attempts by the legal doctrine (and not just legal: think of history and sociology of religion) have largely demonstrated the impossibility to reach this result in relation to the definition of religion. In this regard, it has been proposed to find a paradigm model within which to identify the characters that must be present in each group that intends to qualify itself as a religious confession.

However, the difficulties of framing the religious phenomenon is evident, since instead of being separated by a clear line of fracture, capable of being identified with certainty, the areas of religious and non-religious are united by a large gray area in which realities lay that, without violating the principles of legal logic, may be defined as religious or non-religious depending on the interpretive nuances assumed by this term. These structurings are particularly problematic and contradictory, especially in social structures centred on an essentially traditional concept of religion, as is commonly the case in Europe.

¹⁶ Cf. N. COLAIANNI, *Eguaglianza e diversità culturali e religiose. Un percorso costituzionale*, il Mulino, Bologna, 2006; M. VENTURA, *La laicità dell'Unione Europea. Diritti- Mercato- Religioni*, Giappichelli, Torino, 2002, emphasized that the competitive approach of the Community to the religious phenomenon consists in denying the juridical relevance to the specificity of the religious element itself, in enhancing the principle of equality and non-discrimination and highlighting how in this scheme the community treatment inevitably entails the loss of religious specificity and the terminological and categorical assimilation of the religious phenomenon to the economic phenomenon (pp.149 - 152). Cf. also G. DAMMACCO, *Diritti umani e fattore religioso nel sistema multiculturale euromediterraneo*, Cacucci, Bari, 2000; V. TOZZI, *Società multiculturale, autonomia confessionale e questione della sovranità*, in *Dir. Eccl.*, 1, 2000, pp. 124-147; W. KYMLICKA, *La cittadinanza multiculturale*, Il Mulino, Bologna, 1999; P. CAVANA, *Nuove dimensioni della cittadinanza e pluralismo religioso: premesse per uno studio*, in *La cittadinanza. Problemi e dinamiche in una società pluralistica*, G. DALLA TORRE, F. D'AGOSTINO (eds.), Giappichelli, Torino, 2000, pp. 59-150.

The possibility of identifying a 'true' religion involves the necessity of defining *a priori* and definitively a specific paradigm of characteristics in order to verify, at a later stage, whether a particular movement may be included, by doing, in short, an assessment of the internal convictions of the members of the group¹⁷. This value judgment at the same time points to its indefinability - being linked to precise space/time coordinates, to internal policy choices - and at the same time its dangerous arbitrariness, resulting in intense intrusion into the intimate sphere of individual consciousness. In attempting to reconcile the opposing demands, it was preferred to emphasize the need to adopt a mechanism to verify the 'real nature' of the group, respecting the freedom of conscience of the people who adhere to it, starting from the self-qualification of the movement, to be evaluated in a relative manner, to arrive to a necessary, but subsequent, verification step. It is therefore of paramount importance to associate an objective analysis with a 'subjective' assessment, also emphasizing the self-referential and self-qualifying characteristics of the group and/or movement. Only the use of the tolerance parameter can make it possible to understand the complexity of the concept, avoiding unnecessary normative berths, but limiting itself to the acceptance of differences and of relativism. It's therefore necessary simply to acknowledge and accept the conceptual multivalence of the term religion and to use as a legal parameter the doctrine of "margin of appreciation" or discretion, as elaborated by

¹⁷ Cf. S. FERRARI, *Stato e Chiesa in Italia, on Stato e Chiesa nell'Unione Europea*, G. ROBBERS (ed.), Milano-Baden-Baden, 1996, indicates belief in a transcendent reality (not necessarily a God), capable of answering the fundamental questions about the existence of man and things that is capable of providing a moral code and of generating an existential involvement of the faithful that manifests itself (among other things) in the cult and in the presence of an even minimal organization (p. 189). The extravaluation method is characterized by the 'inversion of the burden of proof', so it is up to the competent person to demonstrate that the group is not a confession, in the absence of which the self-qualification will remain valid: G. DI COSIMO, *Privilegi per le confessioni religiose*, cit., p. 4244. Also N. COLAIANNI, *Sul concetto di confessione religiosa*, in *Foro It.*, 1995, part II, c. 2992, stresses that there is no doubt about the possibility of controlling self-qualification, but it is possible and happens at a later stage, the procedural one. This analysis begins with two judgments on Scientology, Italian Appeal and Italian Cassation, respectively, in 1993 and 1995. About Italian case law: Court of Milan (Procura della Repubblica), 13 July 1988, in *Dir.Eccl.*, 1988, p. 590 ss.; Court of Milano, I, 2 July 1991, in *Dir.Eccl.*, 1991, p. 419 ss., with note of F. FINOCCHIARO, *L'organizzazione di Scientology e i suoi fini*; Court of Cassation 9 Feb. 1995 and Court of Appeal of Milano 5 Nov. 1993, in *Foro it.*, II, 1998, p. 395 ss., with note of N. COLAIANNI, *La via giudiziaria alla religiosità: la vicenda di "Scientology"*; Court of Appeal of Milano, 5 Oct. 2000, n. 4780, on *Giur.It.*, 2001, p. 1408 with note of P. COLELLA, *Ancora a proposito di Scientology*. Cf. also G. CASUSCELLI, *Ancora sulla nozione di "confessione religiosa": il caso Scientology*, on *Quad.dir.pol.eccl.*, 1998, p. 816 ss.

the European Court of Human Rights¹⁸.

This principle is, in fact, a statement of judicial impartiality of the claims of State sovereignty and of the freedoms solemnly enunciated by the Convention. Applied to our ambition, implies that the concept of religion should take the utmost possible expansion within a democratic and multicultural society, with the limits associated with respect for the imperative and indispensable rules of the order. The qualification of a movement as a religious must, in fact, be properly assessed in the light of the constitutional principle of religious freedom, typically present in all democratic systems, which is not a boundless right, but subject to very specific limits: the fundamental ones that constitute the necessary conditions for the realization of a peaceful coexistence of individuals in the social organization, those imposed by civilization itself, its essential and indispensable values. The liberal model can't and doesn't have to point out to the subjects the "right way", but must be the actual guarantor of the freedom granted to the subjects, between formal liberties and socio-psychological determinism¹⁹.

In Europe, the European Commission for Democracy through Law, also known as the Venice Commission, a Council of Europe Advisory Board, published in 2004 the Guidelines for Legislative Reviews of Laws Affecting Religion or Belief that have established some firm points, not only in legislative drafting but also in the interpretation of the right to religious freedom in European countries. In particular, it has been stressed that States should not legally sanction the term "religion", especially with reference to the concept of God/deity. It has also been argued that the protection of freedom of religion goes hand in hand with the neutrality and impartiality of the State, which are necessary for a guarantee without discrimination and arbitrary violations of liberty. Still, reference has been made to the multi-faceted dimension, underlining the role and importance of collective organizations and their autonomy. In this sense, it is necessary for States to fairly

¹⁸ Cf. Y. ARAI-TAKAHASHI, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, Antwerpen, 2002.

¹⁹ Cf. D. HERVIEU-LÉGER, *La religion en miettes ou la question des sectes*, Calmaun-Levy, Paris, 2001; S. FERRARI, *Le droit européen en matière religieuse et ses conséquences pour les sectes*, F. CHAMPIONS, M. COHEN (dir.), *Sectes et démocratie*, Seuil, Paris, 1999, p. 369 ss.

regulate any administrative procedures for registering them.

The analysis of the various national jurisprudences in Europe, however, highlights the particular legal problems in relation to some of the so-called "new religious movements", with difficulty qualified as "religious confession", but also the necessity, felt in an increasingly pressing form, of the creation of a common right, at least at European level and, at least, with regard to the recognition of the fundamental rights of the individual and of the groups. In this sense, the recent European Court interventions offer interesting reflections and pave the way for a progressive interpretations of *domestic jurisdiction*, which, in the past would have been absolutely unthinkable.

With reference to the European framework for the protection of human rights, the progressive outline of a so-called 'European Law of Religion' can be observed, which could find its own legal reference paradigm in Art. 9 of the European Convention, reproduced, even partially, by art. 10 of the Nice Charter. The legislative evolution of the right to freedom of thought, conscience and religion, which does not reproduce the second paragraph - with reference to restrictions on grounds of public order, health, public morality or the protection of others' rights and freedoms and without, therefore, leaving a margin of appreciation to the States - would seem to widen the range of European action. The case-law analysis had for the past highlighted a considerable space left to the *marge d'appréciation* of the individual States in domestic matters, also by carrying out historic and/or political assessments.

The control measures set out in art. 9.2 to the restrictions of the right to freedom of thought, conscience and religion - the being, that is, those "necessary measures in a democratic society" - has often suffered a "fading" in favour of restrictive actions by the States. Although the statements of principle mean that any interference must correspond to a pressing social interest and that the term "necessary" does not have the flexibility of terms such as "desirable", "usual", in practice the case law in the past had justified restrictions understandable from the point of view of the political history of the States, but obviously unnecessary, as instead required by the rule, in a democratic society.

In the various cases against Russia, the European judges did not seem to have considered worthy of evaluation of opportunity - neither political nor legal – the refusals of the internal organs to recognize the Church of Scientology among the recognized associations, in accordance with the 1997 law. It is stressed, in fact, that since religious communities traditionally exist in the form of organized structures, art. 9 must be interpreted in the light of art. 11 of the Convention, which protects the associative life against unjustified interferences of the State.

Viewed in this perspective, the right of believers to religious freedom, including the right to manifest their religion in community with others, includes the expectation that believers will be allowed to associate freely without the abuse of State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and it is therefore a central issue for the protection, under art. 9. The duty of neutrality and impartiality of the State, as defined in the case-law of the Court, is therefore incompatible with any power it may have to assess the legitimacy of religious beliefs.

Moreover, it is underlined - and this is the most important and innovative aspect of these European instruments - the need to impose limits on the individual States' assessments also as regards freedom of association. Certainly, States have the right to ascertain that a group's objectives and activities are in line with the rules laid down by law, but must do so in a manner consistent with their obligations under the Convention and subject to review by the institutions of the Convention itself. The restrictions imposed by the Russian authorities in this area are particularly hateful and harassing because they do not respect three fundamental principles: the safeguard of freedom of religion and belief; the limited State competence in this field; finally, the respect for the self-definition of the religious community.

These judgments therefore imposed an extension of the European concept of freedom of religion with interesting reflections within the various State laws, consolidating this fundamental right and extending it to all religions, not only the established ones, but also those in a phase of organization, in the our continent.

A resolution by the Supreme Court of the Russian Federation in 2015 has ruled that Russia might disapply the European Court of Justice if this was a chance to avoid violating the principles and fundamental norms of the Constitution. This resolution was subsequently transformed into a federal law and the excessive year, in 2016 for the first

time it was applied. The extreme danger of these statements is evident, which question the European system of protection of fundamental rights with characteristics of neutrality and impartiality²⁰.

If the domestic rules can assume an influence also in the European context, then it is particularly interesting to rethink the recent Russian declination of religious freedom. The rules of this law, the jurisprudential proceedings against Scientology (but also against the Jehovah's Witnesses), with the addition of the anti-terrorism law passed in 2016²¹, has greatly aggravated the situation of non-Orthodox Christian churches and other faiths. In fact, it forbids any pastoral or missionary activity for those who have only a tourist visa, for unregistered organizations, for foundations that do not have an immediate religious purpose. In addition, propaganda (catechism, formation, liturgical celebrations) carried out in private apartments is also forbidden. Orthodox people continue to preserve a privileged position but only in the perspective of the Church-institution, functional and subjugated to political power. For the NGO Human Rights Watch, the anti-terrorism law, the Yarovaya law, is “an attack on freedom of expression, freedom of conscience and right to privacy”²². It has been defined “unconstitutional” and it is feared that such new measures will provide the basis for mass persecution of believers, as in Soviet times.

It's important to emphasize that the creation of supranational structures, such as the European one for the protection of fundamental human rights, is not necessarily a weakening of the dogma of State sovereignty but involves a change in the concept of State and, above all, of international dynamics. In the current international scene, it is no longer correct to refer only to relations between *States* but between *systems* and this is the only prospective view that allows to understand the development of current regulations. This new, open, freedom of conscience imposed on today's democratic societies would, however, seem to impose more complex assessments on the part of the legislator, which

²⁰ Cf. Resolution of the Supreme Court of the Russian Federation no. 21 of 14 July 2015. Federal Law no. 7- FKZ of 14 dec. 2015; the judgment of the European Court dismissed is Anchugov and Gladkov v. Russia.

²¹ Cf. https://en.wikipedia.org/wiki/Yarovaya_law.

²² Cf. <https://www.hrw.org/news/2017/02/24/briefing-shrinking-space-civil-society-russia>.

must also necessarily consider that from a normative point of view, the integrity of a single person cannot be guaranteed unless the intersubjectively shared life contexts are also protected by the intersubjectively shared life contexts in which the person (socializing) has formed his identity, fundamental to the building of a European ethic of a democratic nature.