

A Constitutional Proposal on Religious Freedom in Greece

Konstantinos Margaritis*

Then He called the crowd to Him along with His disciples and said: "If anyone would come after me, he must deny himself and take up his cross and follow me"

Mark, 8:34

Introduction

The 21st century is widely perceived as being the era of globalization. In an attempt to briefly describe the concept, globalization "pertains to the increasing ease with which somebody on one side of the world can interact, to mutual benefit, with somebody on the other side of the world".¹ More and more people choose or are even forced by the circumstances, to live in another country willing to participate in all aspects within society. In the above described social environment, the protection of fundamental rights faces new challenges. The increasing number of people residing in another state generally represents a different cultural background and as individuals, different perceptions and beliefs, all of which are elements that compose the notion of personality.

One of the most significant elements, integral to the human personality, is the approach towards religion and the subsequent rights to express and manifest religious (or atheistic, sceptic, agnostic) beliefs. This explains the characterization of the right to religious freedom as fundamental and its insertion in all legal texts of constitutional nature in Europe and the US even from the 16th century.² Accordingly, freedom of religion has been included to all international human rights treaties, the UN Universal Declaration of Human Rights (article 18) and the European Convention on Human

* LLM, PhD candidate National and Kapodistrian University of Athens, School of Law, Attorney at Law, Associate at the Centre for Law and Religion, Cardiff University.

¹ T. Larsson, *The Race to the Top: The Real Story of Globalization*, CATO Institute, 2001, p. 9.

² Part XIII of the Union of Utrecht (1579) stated that "each person shall remain free in his religion and that no one shall be investigated or persecuted because of his religion". However the first attempt of guaranteeing religious freedom is much earlier; Roman Emperors St Constantine and Licinius declared in the Decree of Milan, in 313 that: "we might grant to the Christians and others full authority to observe that religion which each preferred", C. D. Munro, E. Bramhall, "Decree of Milan" in C. D. Munro, E. Bramhall, E. K. Mitchell, E. P. Cheyney, A. C. Howland, M. Whitcomb (eds.), *Translations and Reprints from the Original Sources of European History*, University of Pennsylvania, Department of History, 1898, p. 29.

Rights (article 9), as well as to the legally binding EU Charter of Fundamental Rights (article 10). The importance of religious freedom has been consistently underlined by the European Court of Human Rights which illustrated religious freedom as “one of the foundations of a “democratic society”... 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”.³

Due to historical reasons, a special provision regarding State and Church relations has been included to every constitutional text of the Modern Greek state; this provision grants to Orthodoxy the status of “prevailing religion”. Throughout the country’s constitutional history, the interpretation of the term “prevailing” triggered the discussion with reference to certain advantages that the prevailing religion could enjoy in conjunction to the fundamental right of religious freedom. On the ground of “prevailing religion”, the worship of other religions was not always guaranteed as free, but was simply tolerated by state authorities, even directly, in the majority of Greek Constitutions.

In the current Constitution the State and Church relations are covered by article 3 and freedom of religion is guaranteed in article 13. Although, it has been argued⁴ that the modern aspect of the term “prevailing religion” reflects a statistical fact, the religion of the overwhelming majority within society without granting any form of privilege to any religion, the existence of such term in a separate constitutional article, symbolically put in the beginning of the Constitution, substantially limits to some extent the concept of protection of religious freedom,⁵ since it provides an interpretative tool for provisions that manifestly interfere with the enjoyment of certain rights for reasons of religious beliefs.⁶ In this regard, the aim of this paper is to provide the framework for a structural reform of articles 3 and 13 in the context of

³ ECtHR case *Kokkinakis vs. Greece*, app. no. 14307/88, par. 31.

⁴ P. D. Dagtoglou, *Constitutional Law: Human Rights*, Ant. N. Sakkoulas Publishers, 2nd revised edition, 2005, p. 440 (in Greek), S. Troianos, *Ecclesiastical Law*, Ant. N. Sakkoulas Publishers, 2nd edition, 1984, pp. 68-69; *contra* G. A. Poulis, *Legal Texts of Ecclesiastical Law*, Sakkoulas Publications, 5th edition, 2002, p. 40 (in Greek).

⁵ A. I. Manesis, *Constitutional Rights vol. a: Individual Liberties*, Sakkoulas Publications, 3rd edition, 1981, p. 256 (in Greek), S. Minaidis, *Religious Freedom of Muslim in the Greek Legal Order*, Ant. N. Sakkoulas Publishers, 1990, p. 134 (in Greek).

⁶ For example, the Christian form of oath that the President of the Republic is obliged to take according to article 33 of the Constitution. See I. Konidaris, “The Oath of the President”, *To Vima*, 15-6-1997 (in Greek).

secularization and at the end, rephrase religious freedom as described in the Constitution. The major argument lies upon the institutional balance among the protection of religious freedom and the historically integrated to society Orthodox tradition.

Church-State relations in the Constitution of Greece

Article 3 describes the relations between church and State and grants the status of “prevailing religion” to the Orthodox Church; it dictates that:

“1. The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions. It is autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850 and the Synodal Act of September 4, 1928.

2. The ecclesiastical regime existing in certain districts of the State shall not be deemed contrary to the provisions of the preceding paragraph.

3. The text of the Holy Scripture shall be maintained unaltered. Official translation of the text into any other form of language, without prior sanction by the Autocephalous Church of Greece and the Great Church of Christ in Constantinople, is prohibited”.

This approach towards the Orthodox Church may be acknowledged throughout the constitutional history of modern Greece. The term “prevailing religion” was inaugurated from the very beginning, at the first constitutional text in 1822 after the successful Revolution of Independence from the Ottoman Empire. However this perception could be reasonable given the period of time and the impact of religion in the historical continuity of Greeks.⁷ During the period of the Byzantine Empire, Orthodoxy played an important role in both social and institutional aspects. In that

⁷ For a complete analysis, R. Clogg, *A Concise History of Greece*, Cambridge University Press, 2nd edition, 2002, pp. 7-45.

sense, throughout the Ottoman ruling, Orthodoxy inevitably became an element of coherence among Greeks to the extent that the terms “nation” and “religion” became almost identical in people’s conscience forming the so called Greek-Orthodox tradition.⁸ As a result, this perception was embedded in the highest legal norm to guarantee coherence within society, coherence absolutely necessary especially during the first decades of a new State. This approach has been continued throughout the constitutional history of Greece.

However, the situation is very different nowadays. Although Orthodoxy still plays an important role in the majority of Greeks’ cultural background, religion shall not be considered a source of inspiration for the nation. The difficult periods of independence and then recognition and definition of the characteristics of a newly established State that could justify religion as a common point in society have passed. As a result, the connection among Church and State as underlined in a separate detailed article of the Constitution is unnecessary. Religion shall be perceived as a personal decision reflecting individual beliefs and not interfering with State policy; in that sense the principle of secularisms shall fully apply, distinguishing the roles of the Church and the State.

Freedom of religion

1. Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual’s religious beliefs.
2. All known religions shall be free and their rites of worship shall be performed unhindered and under the protection of the law. The practice of rites of worship is not allowed to offend public order or public morality. Proselytism is prohibited.
3. The ministers of all known religions shall be subject to the same supervision by the State and to the same obligations towards it as those of the prevailing religion.
4. No person shall be exempt from discharging his obligations to the State or may refuse to comply with the laws by reason of his religious convictions.
5. No oath shall be imposed or administered except as specified by law and in the form determined by law.

⁸ P. Barker, *Religious Nationalism in Modern Europe: If God Be For Us*, Routledge, 2009, p. 112.

The complete protection of religious freedom has two basic aspects: religious conscience and worship that are in principle interrelated, since the development of religious conscience is a prerequisite for worship. Both aspects are guaranteed in the first two paragraphs of article 13. Given the importance of both aspects, they could be included in a single paragraph.⁹ In addition, paragraph 2 sets limits to religious freedom on three occasions: offence of public order and public morality and actions of proselytism.

Public order is a set of principles, values and perceptions, common within society, that reflect its special characteristics and designate the acceptable form of behavior; as such, they are embodied in the laws of the state. In that sense, the protection of public order is entrenched in law which provides the necessary means for this protection.¹⁰ For example, religions whose rites of worship include suicide are not permitted¹¹ as violating the notion of public order, but ultimately, such practices are contrary to the laws of the state. As a result, sufficient measures already exist in Greek legal order for protection of public order, so that the constitutional provision is to a large extent implicit.

With reference to public morality, the term dictates a broad legal notion, not adequately elucidated. In general, public morality has an ethical dimension; it symbolizes behavioral perceptions and habits which derive from the prevailing social morality, undefined in legal terms, but applicable for social harmony not to be disrupted. With reference to freedom of religious worship, public morality is inevitably related to the social perception towards religion and in the case of Greece, taking into account the historical state and church connection and the extensive social embracement of the Christian Orthodox traditions; the public morality is to a large extent affected by the Orthodox principles.¹² As a result, religious worship may be subject to limitations posed on the ground of *credenda* of a specific religion. In this context, the rules of Orthodoxy end up to substantially interfere to the worship of other religions establishing a situation of non compliance with religious freedom.¹³

⁹ The first paragraph of article 13 belongs to the non-revisable provisions according to article 110, par. 1 of the Constitution.

¹⁰ The 7th chapter of the Criminal Code is dedicated to crimes against public order.

¹¹ E.g. the Heaven's Gate includes suicide in their belief system; this led to the mass suicide of 39 of its followers on 26 March 1997.

¹² A. G. Raikos, *Constitutional Law: Fundamental Rights*, Ant. N. Sakkoulas Publishers, 2nd edition, 2002, p. 409 (in Greek), A. Marinos, *Religious Freedom*, Doctoral Dissertation, National and Kapodistrian University of Athens, 1972, pp. 173-174 (in Greek).

¹³ This was the case with the Jehovah Witnesses in Greece.

Another reason for abolishing the term public morality from the constitutional text pertains to its added value in the interpretation of religious freedom. The Constitution expresses clauses usually formulated in an abstract way that encapsulate moral principles with political essence; for example, allowing free application of every religion is primarily a political action on a moral basis which defends that every person is entitled to develop and express his/her religious beliefs. In practice, those abstract constitutional clauses are interpreted on understanding whether they have been infringed or not on the basis of actual incidents. For instance, to answer whether imposing criminal sanctions to people who try to convert others by reading and differently interpreting texts of the Holy Bible infringes the right to manifest religion as an aspect of religious freedom or not,¹⁴ demands an opinion that delineates the right at stake and finally decides on whether the case falls into the scope of the right. The rationale of this opinion derives from the interpreter's own understanding of the right in its entirety, as Dworkin emphasizes, his/her *moral reading*.¹⁵ In that sense, a broad term such as the public morality can be interpreted at will with reference to when it is offended by religious rites. Hence, except of certain extreme cases where public morality is particularized,¹⁶ but can be solved at the level of formal law, the added value of the term is very limited.

Greece has drawn much European-wide attention because of the relatively high number of cases that reach the ECtHR regarding the third limitation of religious freedom in the Greek Constitution, proselytism. Proselytism is the act of attempting to convert people to another religion. In principle, freedom of religion includes the right to manifest religion, a right that "is not only exercisable in community with others, "in public" and within the circle of those whose faith one shares". Moreover, "it includes in principle the right to try to convince one's neighbor, for example through "teaching", failing which, "freedom to change one's religion or belief," enshrined in article 9 (ECHR) would be likely to remain a dead letter".¹⁷ The Strasbourg Court basically held that convincing people to change their religion (proselytism) falls under

¹⁴ These were the facts of the landmark ECtHR case *Kokkinakis vs. Greece*, application no. 14307/88.

¹⁵ R. Dworkin, "The Moral Reading of the Constitution", *The New York Review of Books*, 43 (5), 1996, available at <http://www.nybooks.com/articles/archives/1996/mar/21/the-moral-reading-of-the-constitution/>.

¹⁶ See the examples given by B. Vermeulen, "The Historical Development of Religious Freedom", paper delivered in the International Coalition for Religious Freedom Conference on "Religious Freedom and the New Millennium" in Washington DC, 17-19 April 1998, available at http://www.religiousfreedom.com/index.php?option=com_content&view=article&id=378&Itemid=57.

¹⁷ *Kokkinakis vs. Greece*, *op. cit.*, par. 32.

the scope of religious manifestation; especially in cases of newly established religions, proselytism is the only mean for approaching members.

On the other hand, several methods of proselytism may be abusive. The Strasbourg Court has acknowledged cases of improper proselytism which described as “the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a church”.¹⁸ The characterization of a proselytism method as improper is decided on a case by case basis always under the principle of proportionality to the legitimate aim pursued.¹⁹ The general clause “proselytism is prohibited” of article 13, par. 2 seems to confuse the notion with the methods. Proselytism is principally allowed; certain of its methods can be prohibited. The improper proselytism methods could be outlined in a modern criminal law provision and inserted in the criminal code. From this standpoint, the limitation on the ground of proselytism is not in compliance with freedom to religious manifest.

To sum up, all three limits set in article 13, par. 2 of the Constitution shall be abolished, either as practically useless or as essentially contrary to aspects of the right to religious freedom.

Article 13, par. 3 addresses the equality of the ministers of all religions with reference to their supervision and obligations towards the state. Although in non-direct terms, paragraph 3 dictates the equal treatment of all religions by state authorities as far as acts of their ministers are concerned.²⁰ This is a more specialized issue that can be solved in a formal law level. The same approach shall be applied with reference to paragraph 5. The matter of oath is not of such importance as to be included in a constitutional provision; instead a formal law may address issues of oaths and their form when necessary.

Nevertheless, the issue of “prevailing religion” remains. What should be firstly observed is that the existence of the term *per se* does not automatically lead to violation of religious freedom. There is a distinction between prevailing religion as interfering with state policy and as depending on its statistically measured impact within society. As long as specific safeguards for the individual’s freedom of religion are included, in particular the right not to be forced to enter or prohibited from leaving

¹⁸ ECtHR case Larissis and Others vs. Greece, application nos. 23372/94, 26377/94 and 26378/94, par. 45.

¹⁹ This is the position of the Strasbourg Court expressed in various cases. See among others ECtHR case Wingrove vs. the United Kingdom, application no. 17419/90, par. 53, ECtHR case Masaev vs. Moldova, application no. 6303/05, par. 24.

²⁰ Dagtoglou, *op. cit.*, p. 483.

the prevailing religion, the requirements of religious freedom are satisfied.²¹ In this regard, freedom of religion is sufficiently protected within the Greek legal order; therefore there is no need to totally abolish the relevant term.

Instead, attention should be drawn to the interpretation of prevailing religion, which needs to be strictly restricted to the historical significance and considerable level of acceptance of Orthodoxy within the Greek society. Therefore, the issue of prevailing religion may enter as paragraph 2, after the concept of freedom of religion. Symbolically, this approach highlights the priority of protecting religious freedom which prevails over any possible limitation on the ground of “prevailing religion” and on the other hand it confirms the religious history of the country and reflects a cultural event and a major social aspect towards religion.²² For reasons of certainty, an explanatory line stating that “nothing in this paragraph shall be interpreted as limiting religious freedom” may be added. The rest of article 3 shall be repealed.

Conclusion

The aim of this paper is to propose a new form of the constitutionally recognized fundamental right of religious freedom. Based on the above mentioned, there shall be a single article, reading as follows:

1. Freedom of religious conscience, religious manifestation and worship are inviolable in compliance with the laws of the State.
2. The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. Nothing in this paragraph shall be interpreted as limiting religious freedom or the enjoyment of civil rights and liberties.

²¹ See EComHR case *Darby vs. Sweden*, application no. 11581/85, par. 45.

²² J.-M. Piret, “Limitations of Supranational Jurisdiction, Judicial Restraint and the Nature of Treaty Law” in J. Temperman (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom*, Brill, 2012, pp. 68-69; *contra* N. K. Alivizatos who argues that the major challenge of the coming decades is the transformation of Greece to a multicultural society, see *The Tentative Modernization and the Blurry Constitutional Amendment*, Polis, 2001, p. 260 (in Greek). Still, this transformation is not prevented by the provision of prevailing religion itself, but by its interpretation.