

**ASYLUM AND RELIGIOUS FREEDOM.
THE ECJ POSITION**

ALMUDENA RODRÍGUEZ MOYA

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ASYLUM AND RELIGIOUS FREEDOM. THE ECJ POSITION

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1. RELIGIOUS FREEDOM IN THE EU

Issues related to the legitimacy of public expressions of religion have been part of the European legal debate and have, on occasions, received considerable attention¹. A review of the European legislation on religious freedom is necessary in order to understand the meaning and limits of that debate.

The process of European integration represented a historic milestone whereby countries in the same geographical area, previously enemies, chose to unite, basically for economic reasons. Gradually, the economic motivation started to open the door to something very different: a political project².

It should not be forgotten, as per the judgement³, that ideological freedom and religious freedom are fundamental rights⁴. The founding Treaties of the

¹ Remember the important debate about “Europe’s Christian roots”, the inclusion or not of this sentence in the treaties aroused extensive comment.

² IBÁN, I. C., *Los grupos religiosos en el ordenamiento*, en *Derecho y religión en la Europa occidental*, IBÁN, I. C., FERRARI S., Madrid, 1998, p. 31.

³ For example: “*The right to freedom of religion enshrined in section 10, paragraph 1, of the Charter corresponds with the right guaranteed by section 9 of the ECHR.*” (item 56).

“*The freedom of religion is one of the pillars of a democratic society and is a fundamental human right.*” (item 57).

“*...from the fundamental right to freedom of religion...*” (item 60).

⁴ On this, see: CASTRO JOVER A. (2011): “La tutela de la libertad religiosa en la Unión Europea y su incidencia en el ordenamiento interno español”, en VACAS FENÁNDEZ F., CELADOR

European Communities did not contain provisions relating to fundamental rights.

It is a well-known fact that the European project starts with a clear economic purpose, which is the state of affairs when in 1957 the Treaty establishing the European Economic Community was signed. However, barely a year after this signature Paul Henri Spaak sent to the President of the Council of the ECSC a draft treaty whose purpose was to establish a political European Community. This community would aim to safeguard Human Rights, ensure the security of Member States against external aggressions and ensure the coordination of their foreign policies and gradually set up a common market.

As the initial approach was purely economic, no reference was made to fundamental rights, so the ECJ, via a praetorian system, was the body that gradually ensured recognition and protection of such rights. Step by step, the Court determined the content of the sources of fundamental rights by referring to the traditions of Member States and to international treaties to which they had adhered.

Until the European Charter of Human Rights was adopted in December 2000, fundamental human rights were those acknowledged in Rome in 1950 by the members of the Council of Europe, the fundamental social rights referred to in the European Social Charter, also within the framework, the Council of Europe, and those enshrined in the Community Charter of Workers' Fundamental Social Rights.

The first time that a Treaty referred to fundamental rights was in 1986, in the Single European Act. The Maastricht Treaty (1992) created the political union between Member States. The Treaty of Amsterdam (1996) was the first text that responded to the need to have clear legal texts with a manifest respect for fundamental rights as a basic principle of the European Union. One should add that it was the Treaty of Amsterdam that formally and explicitly empowered

ANGÓN O. y BARRANCO AVILÉS M.^a del C. (coords.), *Perspectivas actuales de las fuentes del Derecho*, Dykinson, Madrid, pp. 95-119; EMILIANIDES, A. (Ed.) (2011), *Religious freedom in the European Union*, Peeters, Leuven, 2011.; Ibán, I. C. (2006), "La protección de la libertad religiosa en la Unión Europea", *Revista jurídica Universidad Autónoma de Madrid*, n.º 14, pp. 296-305; MARTÍN RETORTILLO L.(2010): "La libertad religiosa en la reciente jurisprudencia del Tribunal Europeo de Derechos Humanos", *Anuario de Derecho Eclesiástico del Estado*, vol. XXVI, pp. 287-332.; RODRIGUES ARAÚJO A. M. (2012), *Iglesias y organizaciones no confesionales en la UE: artículo 17 TFUE*, Pamplona, Eunsa y TORRES GUTIÉRREZ, A. (2005), "La libertad de pensamiento, conciencia y religión (art. 9 CEDH)", AAVV- *La Europa de los derechos: el Convenio Europeo de Derechos Humanos* (coord. por Pablo Santolaya Machetti y Francisco Javier García Roca), Centro de Estudios Políticos y Constitucionales, Madrid, pp. 509-528, Zucca, L. (2012), *Law, State and Religion in the New Europe*, Cambridge, Cambridge University Press.

the ECJ as the body to ensure respect for fundamental rights and freedoms by the European institutions.

Since December 2000, there is no need to refer back to earlier decisions to establish a list of fundamental rights, but to the Charter of fundamental rights of the European Union, especially since this became binding following the entry into force of the Treaty of Lisbon. The project of adopting a European Constitution, of which the Nice Charter of 2000 was an integral part, was abandoned, and a new European Union Treaty was signed in Lisbon. For this to be successful, respect for the Human Rights enshrined at the Rome Convention (1950) as adopted by the Charter in 2000, and also the constitutional traditions common to Member States had to be reconciled.

2. THE EU JUDICIAL ROAD TOWARDS RELIGIOUS FREEDOM. THE HISTORY

As explained before, due to its economic origin, the founding treaties of the European Communities did not contain provisions relating to fundamental rights. This means that from the beginning its recognition and guarantee corresponded to the ECJ, giving rise to what the doctrine has called praetorian protection. This system, far from being pre-structured, is characterized by progressive realization through the impetus of critical judgments that have developed in different stages. This offers the possibility of entering into a study of the legal tradition of Common Law, which is stimulating from lawyers trained in the continental legal tradition. The ECJ has defined the content of fundamental rights by referring to the traditions of the Member States and international treaties to which they are signatories.

The first occasion a case of violation of fundamental rights was referred to the ECJ was the Stork case. In 1969, in the Stauder case, the Court decided that human rights were an integral part of the general principles of Law, which should be preserved by the law itself. To ensure these rights, the ECJ resolved that these should be based on constitutional traditions common to all Member States. Shortly afterwards the ECJ started referring to religious freedom. Although in his first statement, in the Yvonne van Duyn case (1974), the Court considered that it is not for the European Community to establish the

model of church-state relations but for the States to set the policy, two years later, in the *Vivien Prais* case, the Court is forced to rule on religious freedom, because the cause alleged by the applicant is a breach of the principle of equality for religious reasons. In the case at hand we note that the applicant stated that, as the European Convention on Human Rights has been ratified by all the Member States, the rights enshrined in that instrument may be regarded as being among the fundamental rights to be protected by Community law. The Community institutions are accordingly bound to respect freedom of religion and such respect must imply a readiness to make the necessary administrative arrangements to enable candidates to take examinations in accordance with their religious convictions.

And as the judgement clarifies, the plaintiff claims that religious discrimination is prohibited by Community law as being contrary to the fundamental rights of the individual, respect for which the Court is bound to ensure. The plaintiff also relies on Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, paragraph (2) of which provides as follows: 'Freedom to manifest one's religions 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'. Since the European Convention has been ratified by all the Member States the rights enshrined in it are, according to the plaintiff, to be regarded as included in the fundamental rights to be protected by Community law⁵.

It is true that in this case the ECJ did not consider that the authorities were under the obligation to move the examination date. However, the religious requirement of the candidate was declared as an interest to be protected, and that religious freedom includes, therefore, together with a right of refusal against active attacks by the authorities in the religious sphere, a positive obligation to take the necessary organizational measures to provide an adequate assurance framework for religious interests.⁶ The Court was compelled to manifest on religious freedom in the light of the principle of non-discrimination that should govern the selection process of European officials, according to the terms of Article 27 of the Staff Regulations of the European Communities.

⁵ *Vivien Prais v Council of the European Communities*. – C. 130-75. 27 October 1976.

⁶ ETTMUELLER, E. U. (2007), "El presente y futuro de la libertad de conciencia y de religión en la Unión Europea", en *UNISCI Discussion Papers*, n.º 14, p. 99.

The religious sphere, whose regulation is still nascent in terms of EU legislation, has come to adopt a clear interstate basis, presenting problems that need an EU response. This is the case, for example, of the belligerent religious fundamentalism and strong migration flows. This creates an influx of very diverse human beings who practice highly different religions and reach the European territory in search of an economically and politically more favorable destination society. Therefore, it seems not only desirable but necessary to develop a unified European Community regime capable of addressing the relevant issues.

The role of the Luxembourg Court will be increasingly important for the recognition of human rights. This can be seen in the judgment of the Court (Grand Chamber) 5 September 2012 in which the Court determined the content of religious freedom in the light of the figure of asylum for religious reasons.

The judgement dated 5 September 2012, which shall be analyzed here, does not include any special developments with regard to the common European asylum system. However, it has opened up discussion on the interpretation of how to understand the right of religious freedom and its manifestations within the framework of the EU. It is true that after the *Vivien Prais v. Council of the European Communities* judgement, the Luxembourg Court was able to make a few changes regarding religious freedom, although from an equality perspective and without using the content and manifestations of the law itself as references⁷. Therefore the Luxembourg judgement is, without doubt, a document of vital interest for the interpretation of religious freedom within the EU.

⁷ CIÁURRIZ LABIANO, M. J., *La libertad religiosa en el ámbito europeo*, The autor wishes to thank Professor Ciáurriz Labiano for letting her use the manuscript of her work in the article. Until 2012 “the only one case in which the European Court of Justice has dealt with religious freedom was in 1976: The British Vivien Prais applied for an employment as translator to the EC Council and was invited to participate a written selection procedure. She replied that she would be of Jewish faith and that the day of the exam would be the first day of a Jewish feast on which she was not allowed neither to travel nor to write. Her request for another date was rejected. It was argued that it was indispensable that every candidate passed the selection procedure on the same day with the same tasks. Miss Prais claimed for the breach of section 27 para. 2 of the the Statut on civil servants and for breach of religious freedom as guaranteed by the EC law. ... three aspects of the judgement seem to be specifically remarkable: First, at least individual religious freedom is recognised as a fundamental right by the EC law. Secondly, it gives protection at least against action of the organs of the EC organs. And finally, religious freedom has to be interpreted in a positive rather than in an indifferent and rigorously neutral sense. MÜKL, S., *European Union's standards concerning freedom of religion*, en <http://bibliotecanonica.net/docsad/btcadm.pdf>.

3. THE JUDGEMENT OF THE COURT (GRAND CHAMBER)
5 SEPTEMBER 2012

3.1 *Religious Asylum*

Asylum is a legal term that is studied within various branches of law. The content of the term asylum has been fully developed within the realms of public international law, private law, and constitutional law, amongst others. One of the purposes of this article is to look at the above-mentioned legal concept from a different viewpoint; asylum based on religion as part of the legal protection covered by citizens' fundamental rights to religious freedom. It should be noted that this investigation is not exclusive to the term asylum.

The Luxembourg Court judgement dated 5 September 2012 marks a before and after by acknowledging as religious persecution serious restrictions made on citizens regarding their display of religion in public. The Court is faced with the recognition of asylum "based on religion", as a State right. This refers to the protection that a State offers people who are not citizens of the country, and whose life or freedom are threatened by acts, threats or persecution from the authorities of another State.

The link between asylum and religion is undeniable. In fact, although it is clear that the right to asylum has changed over time, asylum was originally an essentially religious institution.

Part of the scholarly doctrine considers asylum to be as old as humanity itself, as it is based on the preservation instinct of seeking protection wherever it is offered. However, protection as such, although it may be thought of as the beginning of what asylum stands for, cannot be recognised as asylum, as it is not an institutional figure. Asylum is not solely the pursuit of protection, of putting oneself out of danger; protection has to be given to individuals who transgress the law and, for moral, humanitarian, even political or ideological reasons, are granted protection. In this way, asylum involves a dispute regarding jurisdiction, power and sovereignty. The asylum-seeker seeks to escape the action of the law. As a legal institution, asylum has its own history.

The right to religious asylum precedes territorial asylum. This protection, in principle granted to offenders, was already in use in Jewish and Greek temples, reaching a peak in Imperial Rome and in the Middle Ages, due to the influence of Christianity. This type of asylum, religious or ecclesiastical asylum, maintains its religious character as an institution of canon law, as it involves seeking to avoid punishment generally handed out by civil law authorities. Although it must be pointed out that ecclesiastical asylum is transitory.

Beccaria was very critical of this type of asylum “within a country’s frontiers, there should be no place that is outside the law. Its power should follow every citizen like a shadow. Impunity and asylum differ only in degree, and since the certainty of punishment makes more of an impression than its harshness, asylum invites men to commit crimes more than punishment deters them from them. To increase the number of asylums is to create many little sovereign states, because where the law has no authority, new laws can be created there opposed to the common ones and there can arise a spirit opposed to the whole body of society”. Its decline began in the Renaissance period, with the start of Roman Law and it disappeared in the eighteenth century, as a result of the secularization process during the Enlightenment period. Diplomatic asylum arose during the early years of the Modern Era, when stable diplomatic representations were established in the various European monarchies.

The direct precedent of asylum within current international law is the so-called asylum between States. This type of asylum is the right that a State has to express its sovereignty, and to offer protection to a person from another State. Therefore, at present, protection is granted by the power of the State and those seeking shelter are being persecuted for various reasons, religion being one of them.

As with the recognition of fundamental rights, the original Treaties of the European Communities did not include provisions relating to asylum, as the main purpose of the 1957 Treaty of Rome was economic integration. However, the idea of creating an area with no internal frontiers was a decisive factor for the first community measures on asylum. The abolition of internal borders came hand in hand with measures which reinforced controls at external borders, although the definition of a common asylum and immigration policy did not develop until a few years later. In effect, the first steps that transferred the control of third country citizens from internal borders to external borders can be found in the Schengen Agreements. The Dublin Convention intended to end the phenomenon known as refugees in orbit. The Convention did not achieve this aim, although, as a general rule, refugee status is acknowledged by those who comply, in particular, with the requirements set forth in the Convention on the Status of Refugees established in Geneva in 1951. The Dublin Convention (1990) successfully advanced the process of harmonisation of asylum policies in the EU, even though it was the Treaty of Amsterdam which gave asylum and protection of displaced persons a legal basis for their international protection. The Treaty of Nice of 26 February 2001, modified once again the TEU and TEC, but did not affect the system previously mentioned. The Treaty of Lisbon of 13 December 2007, even though it amended the EU’s institutional structure

and gave the Court of Justice new powers and other relevant aspects, did not make any substantial alterations to the Area of Freedom, Safety and Justice. The Common European Asylum System (CEAS) was set up to achieve a “higher level of protection and greater equality of protection across the whole territory of the EU and to guarantee greater solidarity between the Member States of the EU”. These principles were reflected in the consolidated legislation of June 2013, whose primary focus is on the protection objectives which govern the CEAS and on improving the various regulatory frameworks and existing practices⁸. Although we should point out that the decision which is the object of this study is governed by the previous legislation to June 2013⁹.

As asylum is a legal precept by which a person accused or convicted of criminal offences can avoid criminal prosecution or the execution of a sentence, the reader may ask if this can possibly occur on the grounds of religion. The right to freedom of religion is constantly under revision and, in some cases, many countries around the world are dealing with an increasing number of issues. More than one-half of the world’s population lives under regimes that severely restrict or prohibit the freedom of their citizens to study, believe, watch, and freely practice the religious faith of their choice. Religious believers and communities suffer both government-sponsored and government-tolerated violations of their rights to religious freedom.

Thus, if we were to look back a few hundred years, we could find that churches were shelters for those persecuted by law. At the time, they could have been common criminals looking for protection and playing the “sacred” card. All of the above may be true, but this study does not address the historical term known as “religious asylum” but “asylum for religious reasons”. Although sometimes the reader may encounter the expression religious asylum, this is purely to avoid repetition from a grammatical point of view.

⁸ VARGAS, M. (2013), “Advances in the Common European Asylum System (2013 recast)” in: *Social Interventions and Legal Bases for the Integration of Immigrants in the European Union and Spain, Vol 1*, Instituto de Estudios Ibéricos e Iberoamericano de la Universidad de Varsovia, Polonia, p.1. The autor wishes to thank Professor Vargas for letting her use the manuscript of her work in the article.

⁹ The amended legislation (consolidated “asylum package”⁵) includes the recast of the Directive on procedures for granting international protection and asylum⁶ and the Reception Directive⁷, the Dublin Regulation⁸ and the EURODAC⁹, in addition to the consolidated Qualification Directive in 2011. It must be applied in accordance with the governing principles of the CEAS. Its transposition into national legislations should make it possible for the coexistence of asylum systems in the different Member States to be more effective and function with quality standards and legal certainty. *Ibidem*.

To try to analyse what is meant by asylum for religious reasons in just a few pages is virtually impossible. Moreover, as already pointed out and is now reiterated, the aim is not to define the term refugee, nor describe the basic features of the European asylum system. Although, as is logical, these issues will not be avoided, if need be. Our study is situated within the framework of the EU and on the analysis of asylum for religious reasons and has its focus on the recent judgement of the ECJ of 5 September 2012. In the above-mentioned court decision the Court ruled, favourably, in the case of two Pakistanis who sought asylum in Germany, and whose requests were denied.

3.2 *Religious freedom in Pakistan*

The freedom of ideology and religion, as already mentioned, is understood to be a right, and as such, it must be subject to consideration by the State. The State regulation of ideological and religious freedom *requires the prior determination of the legal position of the State with regard to the ideological-religious phenomenon within its territory*.¹⁰ The relationship between the States and religion has given rise to the various models of relationships: identity; exclusivity; utility in the form of a Confessional State or State religion; and finally, neutrality.

Pakistan emerged in 1947 on a secular basis, although Ali Yinnah considered it “a land for Muslims”¹¹. The second section of the Constitution established that “Islam shall be the State religion of Pakistan”. However, at the beginning it was not founded as an Islamic state governed by Sharia law, this being difficult to reconcile with the tenth part of the constitutional text devoted specifically to “Islamic provisions”¹² “and with the creation of the Federal Court of the Sharia which set the wheels in motion to establish a sole doctrine

¹⁰ FERNÁNDEZ-CORONADO, A. A. FERNÁNDEZ-CORONADO (Dir.); J. A. RODRÍGUEZ; M. MURILLO y P. PARDO. (2012), *El derecho de libertad de conciencia en la Unión Europea. Pluralismo y minorías*. Colex. Madrid.

¹¹ As mentioned in the preamble “Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah”.

¹² 227. Provisions relating to the Holy Qur’an and Sunnah.

(1) All existing laws shall be brought in conformity with the strength of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the strength of Islam, and no law shall be enacted which is repugnant to such strength.

[242] [Explanation:- In the application of this clause to the personal law of any Muslim sect, the expression “Quran and Sunnah” shall mean the Quran and Sunnah as interpreted by that sect.]

(2) Effect shall be given to the provisions of clause (1) only in the manner provided in this Part.

(3) Nothing in this Part shall affect the personal laws of non- Muslim citizens or their status as citizens.

228. Composition, etc. of Islamic Council

(1) There shall be [243] constituted” should be changed within a period of ninety days from the commencing day Council of Islamic Ideology, in this part referred to as the Islamic Council.

(2) The Islamic Council shall consist of such members, being not less than eight and not more than [244] [twenty], as the President may appoint from among persons having knowledge of the principles and philosophy of Islam as enunciated in the Holy Quran and Sunnah, or understanding of the economic, political, legal or administrative problems of Pakistan.

(3) While appointing members of the Islamic Council the President shall ensure that:

(a) so far as practicable various schools of thought are represented in the Council;

(b) not less than two of the members are persons each of whom is, or has been, to judge of the Supreme Court or of a High Court;

(c) not less than [244A] [one-third] of the members are persons each of whom has been engaged, for a period of not less than fifteen years, in Islamic research or instruction; and

(d) at least one member is a woman.

[245] [(4) The President shall appoint one of the members of the Islamic Council to be the Chairman thereof.]

(5) Subject to clause (6) a member of the Islamic Council shall hold office for a period of three years.

(6) A member may, by writing under his hand addressed to the President, nearing his office or may be removed by the President upon the passing of a resolution for his removal by a majority of the total membership of the Islamic Council.

229. Reference by Majlis-e-Shoora (Parliament), etc., to Islamic Council.

The President or the Governor of a province may, or if two-fifths of its total membership requires so, a house or a Provincial Assembly shall, refer to the Islamic Council for advice any question as to whether a proposed law is or is not repugnant to the strength of Islam.

230. Functions of Islamic Council.

(1) The functions of the Islamic Council shall be,

(a) to make recommendations to [246] [Majlis-e-Shoora (Parliament)] and the Provincial Assemblies as to the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Quran and Sunnah;

(b) to advise a House, a Provincial Assembly, the President or a Governor on any question referred to the Council as to whether a proposed law is or is not repugnant to the Injunctions of Islam;

(c) to make recommendations as to the measures for bringing existing laws into conformity with the Injunctions of Islam and the stages by which such measures should be brought into effect; and

(d) to compile in a suitable form, for the guidance of [246] [Majlis-e-Shoora (Parliament)] and the Provincial Assemblies, such Injunctions of Islam as can be given legislative effect.

(2) When, under section 229, a question is referred by a House, a Provincial Assembly, the President or a Governor to the Islamic Council, the Council shall, within fifteen days thereof, inform the House, the Assembly, the President or the Governor, as the case may be, of the period within which the Council expects to be able to furnish that advice.

to be used by the authorities with regard to what acts are to be considered an attack on Islam. The Sharia Court was established in 1980, and was incorporated into the Constitution¹³. The Court is a unique institution, unparalleled in the Muslim world¹⁴. The preamble to the Constitution explicitly states that sovereignty over the entire universe can only belong to God Almighty, and the authority exercised by the people of Pakistan within the limits prescribed by God, is to be considered a duty. In a clear allusion to section 227¹⁵, the Court is empowered to decide whether any law is incompatible with the precepts of Islam as laid down in the Holy Quran and the Sunnah of the Prophet, with this excluding Non-Muslim citizens.

Pakistani Prime Minister Zulfikar Ali Bhutto started the new “era” for the Ahmadi faith, right after the May 1984 violence¹⁶. The father of who was also Prime Minister Benazir Bhutto, *declared the Ahmadis to be a “Non-Muslim minor-*

(3) Where a House, a Provincial Assembly, the President or the Governor, as the case may be, considers that, in the public interest, the making of the proposed law in relation to which the question arose should not be postponed until the advice of the Islamic Council is furnished, the law may be made before the advice is furnished:

Provided that, where a law is referred for advice to the Islamic Council and the Council advises that the law is repugnant to the Injunctions of Islam, the House or, as the case may be, the Provincial Assembly, the President or the Governor shall reconsider the law so made.

(4) The Islamic Council shall submit its final report within seven years of its appointment, and shall submit an annual interim report. The report, whether interim or final, shall be laid for discussion before both Houses and each Provincial Assembly within six months of its receipt, and Majlis-e-Shoora (Parliament) and the Assembly, after considering the report, shall enact laws in respect thereof within a period of two years of the final report.

231. Rules of procedure.

The proceedings of the Islamic Council shall be regulated by rules of [247] procedure to be made by the Council with approval of the President.

¹³ Art. 203C y ss.

¹⁴ For further information: <http://www.federalshariatcourt.gov.pk/>

¹⁵ 227. Provisions relating to the Holy Qur’an and Sunnah.

(1) All existing laws shall be brought in conformity with the strength of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the strength of Islam, and no law shall be enacted which is repugnant to such strength.

[242] [Explanation:- In the application of this clause to the personal law of any Muslim sect, the expression “Quran and Sunnah” shall mean the Quran and Sunnah as interpreted by that sect.]

(2) Effect shall be given to the provisions of clause (1) only in the manner provided in this Part.

(3) Nothing in this Part shall affect the personal laws of non- Muslim citizens or their status as citizens.

¹⁶ Next lines are entirely based on: ANDREASSEN B. A. AND A. EIDE (1988), eds. *Human Rights in Developing Countries 1987/1988*, Copenhagen, Akademisk Forlag, p. 240.

ity". Special restrictive provisions for the Ahmadis were further enacted by General Zia in 1984, when Ordinance XX decreed the Qadiani Group (named after Mirza Ghulam Ahmed's birth place), the Labori Group and the Ahmadis to conduct "anti-islamic" activities, (that is, to declare themselves Muslims, to refer orally or in a written manner to the Prophet Mohammed or to his wife, to enter a mosque, etc.)¹⁷. The sanctions imposed on Ahmadis range from several years' imprisonment to a range of fines.

Since 1984, the Ahmadis have been victims of diverse forms of harassment (legalized by Ordinance XX), including the right to proclaim themselves Muslim (they do not accept their classification as "Non-Muslims" and consider themselves only as members of a Muslim group) and to practice Islamic rituals¹⁸. The Ahmadis are obliged to declare themselves Non-Muslims in order to exert their right to vote and to bury their dead in segregated cemeteries, which have been desecrated in the past. Fifteen Ahmadis were condemned to five years in prison in Mardan in 1986 because they had written sacred words on their business receipts. In March 1986, 26 Ahmadis were arrested for wearing a religious insignia called "kalmia". Some Ahmadis of Karachi were assassinated in 1986. Students registering for university were refused access to post-secondary studies when they indicated that their religion was "Islam (Ahmadi)" instead of "Non-Muslim". The use of the Muslim greeting "Assalam-o-Alaikum" is deemed to be blasphemous if said by so-called "Non-Muslims", and has led to the arrest of numerous Ahmadis. Ahmadis are in general excluded from government positions¹⁹.

After this brief summary, and although it may be of some concern, it should be pointed out that the Pakistani Constitution acknowledges religious freedom which is, apparently, reinforced by other constitutional precepts. These include articles 21, 22, 26 and 27 which deal with non-discrimination on the grounds of religion, religious education and the financing of the various religions by the believers, among other facets relating to the exercise of religious freedom²⁰.

¹⁷ Ministry of Law and Parliamentary Affairs, "Ordinance No. XX of 1984", The Gazette of Pakistan (Islamabad: Government of Pakistan, 26 April 1984), p. 8.

¹⁸ ANDREASSEN B. A. *Human*, op. cit., p. 240.

¹⁹ Immigration and Refugee Board of Canada, Pakistan: Information on the Ahmadi Muslims, 1 February 1990, PAK3917, available at: <http://www.unhcr.org/refworld/docid/3ae6ac4660.html> [accessed 11 April 2013].

²⁰ 20. Freedom to profess religion and to manage religious institutions.

Subject to law, public order and morality:- (a) every citizen shall have the right to profess, practise and propagate his religion; and

(b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.

21. Safeguard against taxation for purposes of any particular religion.

No person shall be compelled to pay any special tax the proceeds of which are to be spent on the propagation or maintenance of any religion other than his own.

This, however, does not prevent Pakistani law from determining that, to reach the presidency of the Secular Republic of Pakistan one must belong to the Muslim faith²¹. Other constitutional precepts allude to a protection of Islam that can lead us to identify a denominational model of quasi-identity²². From a legal point of view, a very relevant fact is the entry into force in 1986 of the Act,

22. Safeguard as to educational institutions in respect of religion, etc.

(1) No person attending any educational institution shall be required to receive religious instruction, or take part in any religious ceremony, or attend religious worship, if such instruction, ceremony or worship relates to a religion other than his own.

(2) In respect of any religious institution, there shall be no discrimination against any community in the granting of exemption or concession in relation to taxation.

(3) Subject to law: (a) no religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any educational institution maintained wholly by that community or denomination; and

(b) no citizen shall be denied admission to any educational institution receiving aid from public revenues on the ground only of race, religion, caste or place of birth.

(4) Nothing in this section shall prevent any public authority from making provision for the advancement of any socially or educationally backward class of citizens.

26. Non-discrimination in respect of access to public places.

(1) In respect of access to places of public entertainment or resort not intended for religious purposes only, there shall be no discrimination against any citizen on the ground only of race, religion, caste, sex, residence or place of birth.

(2) Nothing in clause (1) shall prevent the State from making any special provision for women and children.

27. Safeguard against discrimination in services.

(1) No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth.

(...)

²¹ 41. The President.

(...)

(2) A person shall not be qualified for election as President unless he is a Muslim of not less than forty-five years of age and is qualified to be elected as member of the National Assembly.

²² 31. Islamic way of life.

(1) Steps shall be taken to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam and to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah.

(2) The State shall endeavour, as respects the Muslims of Pakistan.

(a) to make the teaching of the Holy Quran and Islamiat compulsory, to encourage and facilitate the learning of Arabic language and to secure correct and exact printing and publishing of the Holy Quran;

(b) to promote unity and the observance of the Islamic moral standards; and

(c) to secure the proper organisation of Zakat, 1[ushr,] auqaf and mosques

known as the Blasphemy Act, which incorporated into the Pakistani Penal Code the crime of blasphemy, punishing insults to the prophet Mohammed or the Quran with life imprisonment or the death penalty.

The European Parliament Resolution of 20 May 2010, on religious freedom in Pakistan, expresses its concern about these criminal precepts and indicates that they are often used to justify censorship, criminalization, persecution and, in some cases, the murder of members of political, racial or religious minorities. It expresses particular concern about the discrimination and persecution of the Ahmadiyya community, to which Z and Y belong, showing that since 2010 the EU has been aware of the fear of persecution that the Ahmadi suffered in Pakistan.

3.3 *The facts*

In 2004 the Pakistani citizen referred to as Y in the process, together with the citizen referred to as Z in the process, entered Germany and sought asylum²³. Their reason for seeking asylum was on religious grounds. Both citizens belonged to the Muslim Ahmadiyya community²⁴, an Islamic reform movement, as a result of which they had been forced to abandon their country of origin: Pakistan²⁵. The reasons given for seeking asylum were: reports to the police, abuse, and incarceration, for their religious beliefs. In the resolutions dated 4 May and 8 July 2004, the Federal Bureau of Immigration and Refugees (Bundessamt) denied both requests for asylum. The Bundessamt found that there was insufficient evidence to establish that the applicants had abandoned their country of origin due to their good reason to fear persecution²⁶. In fact, Z

²³ As in many other countries, the right of asylum in Germany is ensured not only on the basis of the obligation under international law derived from the Geneva Convention on Refugees of 1951, but it also has a constitutional status as a fundamental right. It is the only fundamental right that is only accorded to foreign nationals.

²⁴ The Islamic Ahmadiyya Movement was founded in 1889 by Hadhrat Mirza Ghulam Ahmad (1835-1908) in Punjab (India). Hadhrat Mirza Ghulam Ahmad claimed to be the Reformer and the Awaited Messiah of the End Days, the Awaited One by all the religious communities of the world (the Mahdi and the Messiah). The movement that he started up is a compendium of Islam's conciliatory message: peace, universal brotherhood and submission to the Will of God, in its original purity. Hazrat Ahmad stated that Islam was the religion of man: "The religion of the people of the straight path" (98:6).

²⁵ Pakistan is third country in the world in presenting asylum requests to the States of the EU. Cf. http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-12-008/EN/KS-QA-12-008-EN.PDF, el 10.02.2015.

²⁶ The Bundesamt in its web page explains that not every violation of rights by a State guarantees the granting of asylum: "Persecution is considered to be political if it causes specific

and Y in their asylum request referred to the existence of penal provisions which, in themselves, pose a threat to every member of the Ahmadiyya community wishing to be considered or recognized as a Muslim. In effect, section 298 C of the Pakistan Penal Code²⁷ provides for the imposition of a penalty of up to three years' imprisonment or a fine to members of the Ahmadiyya community wishing to be considered Muslims, who qualify their faith as Islamic, who preach or dis-

violations of rights to the individual — in connection with his political convictions, his choice of religious belief or intangible characteristics that mark him out as being different — that, due to their intensity, exclude that person from the general peace framework of the state unit. Asylum law serves to protect human dignity in a more comprehensive sense. Not every negative measure carried out by the state represents persecution relevant to asylum — even if it is connected to one of the personal characteristics specified. It must involve a specific violation of a legally protected interest and be of such intensity that it excludes the affected person from society. Finally it must involve a measure that is so serious that it violates human dignity and goes beyond what the population of the state in question would otherwise consider to be generally acceptable". <http://www.bamf.de/EN/Migration/AsylFluechtlinge/Asylrecht/asylrecht-node.html>, el 15.10.2015.

²⁷ 298-C. Person of Qadiani group, etc., calling himself a Muslim or preaching or propagating his faith:

Any person of the Qadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name), who directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

In the same legal text: 298-B. Misuse of epithets, descriptions and titles, etc., reserved for certain holy personages or places:

(1) Any person of the Qadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name who by words, either spoken or written, or by visible representation- (a) refers to or addresses, any person, other than a Caliph or companion of the Holy Prophet Muhammad (peace be upon him), as "Ameer-ul-Mumineen", "Khalifatul- Mumineen", Khalifa-tul-Muslimeen", "Sahaabi" or "Razi Allah Anho";

(b) refers to, or addresses, any person, other than a wife of the Holy Prophet Muhammad (peace be upon him), as "Ummul-Mumineen";

(c) refers to, or addresses, any person, other than a member of the family "Ahle-bait" of the Holy Prophet Muhammad (peace be upon him), as "Ahle-bait"; or

(d) refers to, or names, or calls, his place of worship a "Masjid";

shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

(2) Any person of the Qadiani group or Lahori group (who call themselves "Ahmadis" or by any other name) who by words, either spoken or written, or by visible representation refers to the mode or form of call to prayers followed by his faith as "Azan", or recites Azan as used by the Muslims, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

295-B. Defiling, etc., of Holy Qur'an:

seminate their religion or urge other people to convert. Section 295 C of the Penal Code²⁸, also states that the death penalty or life imprisonment and a fine should be awarded to those who publicly insult the name of the prophet Mohammad²⁹.

Y filed an appeal with the Higher Administrative Court in Leipzig, which, in the judgement dated 18 May 2007, annulled the resolution from the Federal Bureau of Immigration and Refugees and stated that the appellant met the requirements established by law for granting asylum. Therefore, Y had the right to the protection that all asylum-seekers are looking for, in this case, to avoid being returned to Pakistan. The other Pakistani citizen however, known as Z, filed an appeal with the Higher Administrative Court in Dresden, which, contrary to the Leipzig Court, rejected the appeal, resulting in the resolution that Z should be returned to Pakistan. The Federal Commissioner on matters of asylum (Bundesbeauftragter) appealed the Leipzig Court ruling to the Higher Administrative Court in the State of Saxony. In the judgement dated 1 November 2008 the Higher Administrative Court of the State of Saxony dismissed the appeal filed by the Federal Commissioner on matters of asylum considering that asylum was rightly awarded. On the same day the Court modified the judgement in the first instance referring to Z, so that Z could not be returned to Pakistan.

The Federal Service for Migration and Refugees (Bundesamt) and the Federal Commissioner on asylum filed an appeal against the verdicts to the Federal Court of Administrative Justice (Bundesverwaltungsgericht), arguing that the court of appeal had interpreted sections 9 and 10 (1) (b) of Directive 2004/83/EC in too broad a manner. Referring to German jurisprudence prior to the implementation of the Directive³⁰, the appellants claimed that the existence of persecution should only be accepted, with regard to the right of asylum, if this leads to an impairment in the essential content of the right to religious freedom³¹. This is not the case in the simple restriction to practise a religion in

Whoever wilfully defiles, damages or desecrates a copy of the Holy Qur'an or of an extract therefrom or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life.

²⁸ 295-C. Use of derogatory remarks, etc., in respect of the Holy Prophet:

Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.

²⁹ Something that the Ahmadiyya community are understood to do.

³⁰ In 2007.

³¹ In this affirmation allusion is made, diffusely, to German jurisprudence.

public. The Bundesamt and Bundesbeauftragter stated that such was the exact situation which affected Z and Y, as *it is merely the* external practice of religion, which is banned in Pakistan. The limitations imposed on the Ahmadis in Pakistan, relating to the practice of their faith in public, would not detract from the essential content of religious freedom³².

To successfully resolve the conflict it is imperative to clarify and define which specific issues that interfere with the freedom of religion can lead to the recognition of refugee status, as described in section 2, letter d), of the Directive and in section 9 of the ECHR. Even though some of the interferences in the freedom of religion could be considered a “serious violation” of fundamental human rights, as per section 9, paragraph 1 (a), of the Directive, the Bundesverwaltungsgericht had doubts about whether other limitations to freedom of religion, which did not affect the essential elements of the religious identity of the person concerned, could give rise to the assumption that there was a persecution relevant for the purposes of the granting of refugee status.

As such, the Federal Administrative Court decided to raise the following questions to the Court of Justice:

1. Should section 9, paragraph 1 (a), of the Directive [...] be interpreted in the sense that not all interference in the religious freedom contrary to section 9 of the ECHR constitutes an act of persecution as per the first of these sections, but that there is only a serious violation of religious freedom as a fundamental human right when the essential content of this freedom is affected?

If this were the case:

2. Is the essential core of religious freedom restricted to the practice of religion in the domestic sphere or community, or should this be understood in a broader sense? As such there could be an act of persecution as per section 9, paragraph 1 (a), of the Directive [...] when the practice of religion in public in the country of origin means a risk to a person's life, physical integrity or physical freedom. As per section 2, paragraph c) of the Directive could it be considered that a well-founded fear of being persecuted exists [...], if the applicant can prove that upon return to his/her country he/she will perform certain religious practices (outside the essential content of religious freedom), despite the fact that this could entail a risk to his/her life, physical integrity or physical freedom?

³² It is curious how the debate focuses not on the persecution but on the severity of the restrictions.

3. If the essential content of religious freedom can also cover certain religious practices in public: Is it enough to consider that there is a serious violation of religious freedom, just because the applicant considers that he/she cannot renounce to practice his/her faith in order to preserve his/her religious identity? Or is it also necessary that the religious community to which the applicant belongs considers that such religious practice is a central component of its doctrine? Or could there be other limitations as a result of other circumstances, such as, for example, the general situation in the country of origin?

There are many issues under discussion here. To our understanding the essential issue is to determine what the restrictions on the practice of a religion are for these to be considered persecution and constitute sufficient grounds for granting refugee status. Within the realm of these regulations we have tried to sift through the Luxembourg Court's arguments which have helped us determine the content and thus discover what limits the CJEU acknowledges within religious freedom.

3.4 *Restriction to religious freedom and acts of persecution*³³

As we have seen, refugee status is awarded to those who comply with the requirements set forth in the Laws and International Covenants, as well as the regulations of each State. The Court reminds us that in international law refugee status is based on the 1951 Convention on the Status of Refugees, held in Geneva³⁴, and the New York Protocol of 31 January 1967. According to these legal texts, refugee status can be awarded to a person who "has a well-founded fear of persecution for reasons of race, religion, nationality, political views... and is outside the country of his/her nationality". Religious beliefs are becoming one of the key factors for which the various States provide protection to those who are persecuted for the exercise of their freedom of conscience outside our borders.³⁵

In reality, as has already been pointed out, the court basically requests whether section 9, paragraph 1 (a), of the Directive should be interpreted in the sense that any interference with the right to freedom of religion is an "act of persecution" or if it is necessary to distinguish between the essential content of

³³ Be noted that the judgment meets implementing legislation prior to June 2013.

³⁴ As established in Act 5/1984.

³⁵ VIDAL GALLARDO, M., "Las nuevas minorías surgidas de la inmigración desde una perspectiva de derecho comparado", *Revista de derecho migratorio y extranjería*, No.30, 2012, pp. 69-98

the freedom of religion and any “extra” content that would be envisaged as an outward manifestation of religious beliefs.

As previously mentioned, “a refugee” is, in essence, a citizen of a third country who is located outside the country of his/her nationality “owing to well-founded fear of being persecuted”³⁶. According to section 9, paragraph 1 (a), of the Directive, the relevant acts must be “sufficiently serious” in their nature or repetition as to constitute a “serious violation of fundamental human rights”³⁷.

There may be circumstances whereby the applicants, by the fact of merely belonging to a religion or creed, could be considered to have a sufficient reason for applying for refugee status, as in certain countries the authoritarian single-party regime and the country’s prevailing religion are sufficient indications that the refugee’s claim meets the requirements established by Law³⁸. In certain countries there are some social-political circumstances that imply the subversion of democratic and human values, which lead to persecution or harassment at least. The political regime of these countries makes it impossible to obtain evidence. It should also be borne in mind that the request for asylum is always brought about by a subjective cause, this being fear, something that is difficult to prove.

The Court stated that: *Religious freedom is one of the pillars of a democratic society and is a fundamental human right. Interference with the right to freedom of religion can be so severe as to equate it to the cases referred to in section 15, paragraph 2, of the ECHR, referred to in section 9, paragraph 1, of the Directive, offered for guidance, to determine the particular acts that should be considered a persecution ... but this in no way means that all types of interference with the right to freedom of religion, as guaranteed by section 10, paragraph 1, of the Charter, constitute an act of persecution forcing the competent authorities to grant refugee status, as per 2, paragraph d), of the Directive, to individuals who are in danger of suffering said interference.* The Luxembourg Court states that there must be a “serious violation” of that freedom and that that freedom must directly affect the person interested in applying for asylum.

To determine what acts in particular could be considered persecution, the Court considers that it is not relevant to differentiate between the acts that could affect the essential content of the fundamental right to freedom of religion, and those that could not affect the supposed essential content. The Court thus gives us their first reflections on the issue, proving quite enlightening. Luxembourg

³⁶ Item 50 of the judgement.

³⁷ An accumulation of various measures, including violations of human rights should be “sufficiently severe” as to affect an individual in a “similar” manner as mentioned in subparagraph (a) of this precept, are to be considered acts of persecution. (P. 54 of the ruling).

³⁸ As per the ruling of the Spanish Supreme Court (TS) in the ruling dated 5 March 1990 (1861).

case-law differentiates between the “forum internum” of the fundamental right of religious freedom and the “forum externum”. The former would be the essential content of the right to religious freedom and does not include religious activities in public. It then clarifies that *this distinction is not compatible with the broader definition of the concept of “religion” offered by the Directive in article 10, paragraph 1 (b), integrating all of its components, whether public or private, collective or individual. Acts that may constitute a “serious violation”, as per 9, paragraph 1 (a), of the Directive, are serious acts that undermine the freedom of the applicants not only to practice their belief in a private sphere, but also in public.* In short, it could be understood that there is an essential content of religious freedom but, in the framework of the EU, we must understand that the violation of religious freedom, beyond its essential content, enables the competent authorities to assess the actions referred to and determine if, in their nature or repetition, they are sufficiently serious to be considered as persecution. Here the Court opens the door to the possibility that the violation of religious freedom can, in certain circumstances, be considered sufficiently serious to grant asylum.

The next few lines of the judgement, however, are on a completely different note, refining their reasoning and focusing on the consequences of the exercise of religious freedom and not on its infringement by the authorities. It is the nature or repetition of the interference in religious practice — and not the interference itself — that will eventually become the reason for granting asylum. An individual’s religious freedom may be restricted, but if this restriction is used by a State as a dangerous response to the citizens, these may aspire to asylum for religious reasons. It is not the restriction itself, but the consequences of failing to comply with the regulations limiting the right³⁹. *Therefore, a violation of the right to freedom of religion is a persecution, as per section 9, paragraph 1 (a), of the Directive, when the asylum-seekers, by exercising that freedom in their country of origin, run a real risk, in particular, of being persecuted or subjected to inhuman or degrading treatment or punishment of this nature, by any of the actors referred to in section 6 of the Directive.*⁴⁰

The next question dealt with is whether it is necessary for the religious community to which the applicants belong to consider that this religious practice is a central component of its doctrine, or if for the court to believe that there is a serious violation of religious freedom it is sufficient that the applicants con-

³⁹ It follows that acts which, by their inherent seriousness and their consequences on the affected person, can be considered a persecution must be identified, not based upon the element of freedom of religion that is being violated, but depending on the nature of the repression against the interested party and its consequences, as stated by the Advocate General in item 52 of the conclusions. (Item 65 of the judgement).

⁴⁰ Item 67 of the judgement.

sider that they cannot renounce to practising that part of their faith in order to preserve their religious identity. In short, should this depend on the postulates of a religious denomination or on the religious sentiment of the individual?

The subjective circumstance that the observance of a religious practice in a public place — which is subject to restrictions under dispute — is of special importance to the person concerned for the purposes of conserving their religious identity and constitutes a relevant element in the assessment of the magnitude of the risk to which the applicant would be exposed in his/her country of origin due to his/her religion, even when the observance of such religious practice does not constitute a central element in the religious community affected. In fact, the wording of section 10, paragraph 1 (b), of the Directive indicates that protection offered due to persecution regarding religion encompasses both the personal and community forms of conduct that a person considers necessary for him/herself, namely, those “based on any religious belief”, such as those prescribed by the religious doctrine, namely, those “ordered by the doctrine”⁴¹.

These Court statements are extremely important. Luxembourg case-law views religion as a “personal matter”, relating to the individual. This refers to the actions that he/she considers necessary, and depends, therefore, on his/her own will to practise a religion, or not. It is obvious that religious practice and religious affiliation require that certain practices be carried out as a community, but one must not forget that the subject of protection, as per the legislation, is the individual. Religions are protected in this way due to the fact that a religious community is made up of individuals. In short, it would seem that the defence of an individual’s freedom of ideology and religion is linked to him/her belonging to a particular religion.

Regarding the third preliminary issue, the court asked that it be determined whether it is open to interpretation that the applicant’s fear of persecution be admissible when he/she can avoid persecution in his/her country of origin, by refraining from certain religious acts.

It should be reminded that we are referring to individuals who have not yet been persecuted, nor been the subject of direct threats of persecution due to their religion. In this sense, it is clear that, as per the Directive, the competent authorities, when evaluating⁴² whether an applicant has a reasonable fear of being persecuted, are seeking to determine whether the circumstances accredited constitute or not a threat to the extent that the person, due to his/her personal circumstances, fears being subjected to these acts of persecution. This

⁴¹ Items 70 and 71 of the judgement.

⁴² In accordance with section 2, subparagraph (c).

assessment should be carried out with special care and prudence.⁴³ It is an assessment based solely on the facts and circumstances in accordance with the regulations specifically included in section 4 of the Directive. *None of these regulations indicate that, in assessing the magnitude of the risk of actually being subjected to acts of persecution in a certain context, the possibility that the applicant has to avoid the risk of persecution by renouncing his/her religious practice should to be taken into account and, in consequence, renouncing to the protection that the directive grants the individual, by giving him/her refugee status*⁴⁴. Therefore, *having acknowledged that should the interested party return to his/her country of origin and continue practising his/her religion then he/she would be under a real risk of persecution, then refugee status should be granted in accordance with section 13 of the Directive. The fact that he/she could avoid the risk by giving up certain religious acts is, in principle, not relevant.*⁴⁵ It is not possible to claim as a basis for denial that the danger would disappear with the unfulfilment of religious precepts.

4. CONCLUSIONS: RELIGIOUS FREEDOM AND ASYLUM IN THE EU

- a) The fundamental right to religious freedom is a human right inherent to all human beings, whose exercise must be guaranteed without distinction of nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other condition. Pakistan applies severe restrictions to religious freedom, since the Pakistani Penal Code punishes membership and practice of a specific religious creed. Criminalizing religious practice cannot be considered to be a reasonable legal restriction or limitation of the exercise of this fundamental human right, nor is it the result of applying criminal law as a means to protect the core values of a system that respects and promotes human rights. In adopting the current Penal Code, the Pakistani legislator has made the highly controversial decision of punishing individuals who simply exercise their right to religious freedom, an exercise that may result in criminal prosecution. All in a legal context where capital punishment is one of the possible consequences of applying the law as it stands.
- b) From the EU perspective, the concept of religion as defined in Section 10, paragraph 1 (b) of the Directive clearly includes public participation

⁴³ In all cases (judgement Salahadin-Abdulla and others, paragraph 90).

⁴⁴ Item 78 of the judgement.

⁴⁵ Item 79 of the judgement.

in religious acts, either individually or collectively. For the purposes of asylum, a violation of the right to religious freedom becomes persecution when the holder of this right runs a real risk of being persecuted or subjected to inhuman or degrading treatment or punishment for the mere exercise of this fundamental right in his or her country of origin. An EU Member State would be acting in conformity with the rules of the Directive if it grants asylum to this type of asylum-seeker.

- c) Put succinctly, not every violation of the right to freedom of religion that is not in conformity with Section 10, paragraph 1 of the Charter amounts to an “act of persecution” pursuant to the provisions of the Directive. Religious persecution may take various forms, from a total ban on the practice of worship and religious instruction, to severe discriminatory measures against persons belonging to a particular religious group. Persecution does occur when the State, surpassing the measures necessary for the imposition of public order, prohibits or penalizes religious practice.
- d) Asylum should be granted to those individuals whose right to religious freedom is the object of severe restrictions. The required threshold of severity is reached when a State adopts measures that exceed the normal enforcement of law and order and violates the core content of religious freedom.
- e) The real issue is not whether religious freedom is proclaimed or acknowledged but, rather, that there should be no violations of this human right in the form of persecution or other severe instances of intolerance. Asylum is thus a measure of last resort, one conferring asylum seekers a special status of legal-social protection within the receiving State.

Título:

ASILO Y LIBERTAD RELIGIOSA. LA POSTURA DEL TJUE

Sumario:

1. La libertad religiosa en la UE. 2. El camino de la UE hacia la libertad religiosa. 3. La sentencia del TJUE (Gran Sala) de 05 de

septiembre 2012. 3.1. El asilo por razones religiosas. 3.2. La libertad religiosa en Paquistán. 3.3 Los hechos. 3.4 Restricción de la libertad religiosa y actos de persecución. 4. Conclusiones: Libertad religiosa y asilo en la UE.

Resumen:

El proceso de integración europea representa un hito histórico: los países de una misma zona geográfica, previamente enemigos, deciden unirse para crear un futuro en común. Con un origen económico, los Tratados constitutivos de las Comunidades Europeas no contenían disposiciones relativas a los derechos fundamentales. Esto significa que, desde el principio, de su reconocimiento y garantía se encargará el TJUE. La esfera religiosa, cuya regulación aún es incipiente, presenta problemas que necesitan una respuesta de la UE. El papel del Tribunal de Luxemburgo resulta cada vez más importante para el reconocimiento de los derechos humanos. La posición del TJUE en una cuestión de asilo nos acerca a su posición en materia de libertad religiosa para lo que estudiamos la sentencia del Tribunal de Justicia (Gran Sala) de 05 de septiembre 2012.

Abstract:

The process of European integration represented a historic milestone whereby countries in the same geographical area, previously enemies, chose to unite. Due to its economic origin, the founding treaties of the European Communities did not contain provisions relating to fundamental rights. This means that from the beginning its recognition and guarantee corresponded to the ECJ. The religious sphere, whose regulation is still nascent in terms of EU legislation, has come to adopt a clear interstate basis, presenting problems that need an EU response. The role of the Luxembourg Court will be increasingly important for the recognition of human rights. This can be seen in religious freedom recognition in the judgment of the ECJ (Grand Chamber) 5 September 2012.

Palabras clave:

Libertad religiosa, Derecho de asilo, Unión europea, TJUE.

Key words:

Religious freedom, Right to Asylum, European Union, ECJ.