



INSIGHT

THE *DOĞAN ET AL. V. TURKEY* CASE:
A MISSED OPPORTUNITY TO RECOGNISE
POSITIVE OBLIGATIONS
AS REGARDS THE FREEDOM OF RELIGION

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ABSTRACT: In the *Doğan et al. v. Turkey* case (judgment of 26 April 2016, no. 62649/10), the Grand Chamber of the European Court of Human Rights decided on an application made by several Turkish citizens belonging to the Alevi faith. They complained not to be able to enjoy the same guarantees granted to citizens of the Sunni branch of Islam because national authorities do not acknowledge the cultural features of their faith. The Court found a breach of Art. 9 of the European Convention of Human Rights, alone and in conjunction with Art. 14. However, the decision is not immune from criticism in the part concerning the violation of the freedom of religion. Although the applicants made specific reference to positive obligations stemming from freedom of religion, the Court did not deal with this aspect, and displayed a degree of caution when defining the content of substantive positive obligations stemming from the right to freedom of religion. After summarizing the Court's reasoning, this paper will analyse the case-law on positive obligations concerning the freedom of religion and will show its main problematic features.

KEYWORDS: European Court of Human Rights – freedom of religion – positive obligations – religious communities – principle of state neutrality – Alevi community.

I. INTRODUCTION

In the *Doğan et al. v. Turkey* case the Grand Chamber of the European Court of Human Rights decided on the freedom of religion guaranteed to the members of the Alevi community under the Turkish legal system.¹ The decision concerned the refusal of the claims, made by a great number of Turkish nationals belonging to the Alevi faith, to ob-

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¹ European Court of Human Rights, judgment of 26 April 2016, no. 62649/10, *Doğan et al. v. Turkey*[GC].

tain equal access to religious public service for their followers which, in their view, was provided only to those belonging to the Sunni branch of Islam.

At first glance this decision merely deals with the principle of the State's neutrality and the autonomy of religious communities. In reality, it involves some other fundamental aspects concerning the issue of the State's obligations flowing from Art. 9 ECHR. Indeed, while the applicants made specific reference to this question, the Court did not analyse the case from this point of view and focused its decision on the issue of legal recognition of the Alevi community.

Firstly, the paper will summarize the facts behind the decision and secondly, it will analyse the reasoning of the Grand Chamber underlining its caution when dealing with the issue of positive obligations. The paper will finally examine the case-law of the European Court of Human Rights on positive obligations concerning freedom of religion and highlight its main features.

II. FACT

The Grand Chamber's decision concerned the application lodged by 203 Turkish nationals belonging to the Alevi community. They complained about the refusal of their petition individually submitted to the Turkish Prime Minister in order to obtain, for the followers of the Alevi faith, the same guarantees assured to those of the Sunni branch of Islam. In particular, they requested national authorities to recognise religious Alevi services as public services, to qualify their place of worship (*cemevis*) as such, to recognise and recruit their religious leaders as civil servants and to assure some financial support for their worship.² The applicants specifically questioned the actual function of the Religious Affairs Department (RAD), the Turkish administrative body in charge of dealing with matters concerning the Muslim religion.

Under the Turkish legal system there is no specific procedure allowing religious minorities to be recognised or registered. Consequently, they are in a less favourable position than the Muslim community as regards places of worship, status of religious leaders and funding. A central issue of concern for Alevi followers pertains to their places of worship because a national regulation (Regulation 2/1958 of the Council of Ministers), defining the legal notion of place of worship, does not recognise the *cemevis* as such. Indeed, as stated by the RAD in many opinions and further upheld by the Turkish Government before the Court, the Alevi faith represents a mere Sufi interpretation of Islam and cannot be qualified as an autonomous religious movement or branch of Islam. In light of this, the *cemevis* is not assumed to be a place of worship in the strict meaning of the term. Not being recognised as places of worship, the *cemevis* cannot enjoy the

² Unlike Muslims, the members of the Alevi community practise their own rituals, namely the *cem cemerimonies*, in *cemevis*. According to the RAD, *cemevis* are a kind of monastery which strictly speaking are not a place of worship, but a place of assembly.

advantages linked to this status in terms of taxation exemption, granting of planning permission – which is left to the whim of central or local administration – and payment of electricity bills, otherwise met by the RAD for places of worship. In respect of religious leaders, the Turkish Civil Servant Act (Law no. 657) qualifies as civil servants those who have received religious training and carry out a religious function. On the contrary, Alevi leaders are denied this status. Consequently, they are paid directly by their followers and there are no dedicated establishments tasked with their training and teaching. Furthermore, the applicants claimed that children belonging to the Alevi faith are obliged to attend compulsory classes of religious education and ethics.³

Underlining that all demands made by the Alevi followers had always been rejected by the RAD, the applicants questioned its neutrality. While the RAD under its remit should provide service to all members of the Muslim religion, it seems to exclusively deal with cases concerning the Sunni theological school, disregarding the other branches of Islam.

As refusal of the claim by the Turkish Prime Minister was confirmed by the Ankara Administrative Court and, subsequently, by the Supreme Administrative Court, the applicants filed an application with the European Court of Human Rights claiming a violation of Art. 9 ECHR, alone and in conjunction with Art. 14. The case was examined by the Second section of the European Court, which relinquished jurisdiction in favour of the Grand Chamber (Art. 30 ECHR).

III. THE JUDGEMENT OF THE GRAND CHAMBER

As regards the violation of Art. 9 ECHR taken alone, the applicants affirmed that the administrative authorities did not grant their claims because they had not recognised their faith as a religious conviction distinct from the Sunni interpretation of Islam. This decision had supposed an assessment made by national authorities about the substance of the Alevi faith and this attitude breached the State's duty of neutrality and impartiality towards religions.

While the Turkish State is not obliged to provide a public religious service, the applicants underlined that if national authorities decide to grant such a service, they must respect the principle of equality. On the contrary, the RAD's practice shows that the religious needs of the Alevi citizens have been completely disregarded and in view of this, the applicants submitted that Turkish authorities had violated the State's negative and positive obligations under Art. 9 ECHR.

In line with the applicants' complaint, the Court started its evaluation exploring the necessity to examine the case from the standpoint of the State's negative and positive obligations. The principles of State neutrality and impartiality and the consequent ex-

³ In this regard, they recalled European Court of Human Rights, judgement of 16 September 2014, no. 21163/11, *Mansur Yalcin et al. v. Turkey*.

clusion of any state determination about the content of religious beliefs were stated in the historical decision on the *Hasan and Eylem Zengin v. Turkey* case (2007) and derive from the collective dimension characterising religious freedom.⁴ The Court had reaffirmed these principles in several decisions such as the *Metropolitan Church of Bessarabia et al. v. Moldova* (2001),⁵ *Moscow Branch of the Salvation Army v. Russia* (2006),⁶ *Religionsgemeinschaft der Zeugen Jehovas et al. v. Austria* (2008).⁷ In this case-law and in particular in the *Metropolitan Church* case, the judges had paid a great deal of attention to the applicants' being permitted to continue practising their religions in the cases where their Church did not have legal recognition. Making reference to these decisions, in the *Doğan* case the Court stressed that the assessment made by national authorities on the Alevi faith and the non-recognition of its religious nature, had compromised the Alevi community, its progression and funding of its activities and, consequently, had constituted an interference with the applicants' freedom of religion. Having reached this conclusion, the Court did not consider it necessary to examine whether Art. 9 ECHR implies some positive obligations. Instead, it simply recognised that, besides the States' negative obligation to abstain from interfering with human rights, "there 'may be positive obligations inherent' in such rights".⁸

Retaining that the refusal of the applicants' claims had represented an interference with their freedom of religion, the Court evaluated its legitimacy by verifying the existence of criteria as defined by Art. 9, para. 2, ECHR. In accordance with domestic judges, the Court affirmed that such interference was prescribed by law. As the aim pursued by decision was taken at a national level the Court, referring to the procedure before national Courts, concluded that the interference was aimed to protect public order.

With respect to the criterion of necessity, the Court recalled one by one all reasons adduced by the national authorities and the Turkish Government in order to ascertain whether the interference with the applicants' right to freedom of religion were proportionate to the legitimate aim pursued.

With respect to the necessity, affirmed by the Government recalling the *Fernandez Martinez* case (2014), to define the nature of the Alevi faith in the light of Islamic precepts, the Court underlined the differences existing between that case and the present

⁴ European Court of Human Rights, judgement of 9 October 2007, no. 1448/04, *Hasan and Eylem Zengin v. Turkey*.

⁵ European Court of Human Rights, judgement of 13 December 2001, no. 45701/99, *Metropolitan Church of Bessarabia et al. v. Moldova*.

⁶ European Court of Human Rights, judgement of 5 October 2006, no. 72881/01, *Moscow Branch of the Salvation Army v. Russia*.

⁷ European Court of Human Rights, judgement of 31 July 2008, no. 40825/98, *Religionsgemeinschaft der Zeugen Jehovas et al. v. Austria*.

⁸ *Doğan et al. v. Turkey*, cit., para 96.

one.⁹ In the *Fernandez Martinez* case, a teacher of Catholic religion and ethics in a State secondary school had alleged that the non-renewal of his contract was illegitimate because it was decided following the publicity he had given to his personal situation as a married priest. As underlined by the Court, the *Doğan* was different from the *Fernandez Martinez* case. In the latter, the applicant was a teacher of Catholic religion and ethics and, consequently, he has freely accepted a duty of loyalty towards the Catholic Church. On account of this duty of loyalty, in the *Fernandez Martinez* decision, the Court had made reference to the Catholic precepts about priests' marriage. This duty of loyalty cannot be imposed on the applicants in the *Doğan* case. On the contrary, on this occasion the State's duty of neutrality and impartiality imposed the definition of the Alevi faith on the spiritual authorities of the community, excluding any state determination. These considerations led the Court to rule that the State had interfered with the right of the Alevi community to an autonomous existence.

The Court devoted a great deal of attention to the damaging consequences affecting the Alevi community due to the authorities' refusal to recognise the religious nature of their faith.¹⁰ Taking into account the actual condition of the applicants, the judges came to reject the Government theses according to which, in spite of the restrictions imposed by law, freedoms left by national authorities to the Alevi followers enabled them to fully exercise the rights secured by Art. 9 ECHR.

Finally, the Court denied the possibility, invoked by the Government, to recognise to national authorities a certain margin of appreciation in defining the relationships between the State and religious communities. While this principle is widely recognised by the Court's case-law, on this occasion, the State's duty of neutrality and impartiality excluded any possibility to evaluate the nature of religious beliefs. This implies that the national authorities, when assessing the nature of the Alevi faith, had overstepped their margin of appreciation in the absence of relevant and sufficient reasons.¹¹

After analysing all reasons adduced by the Government, the Court came to the conclusion that the interference provoked by the national authorities cannot be qualified as necessary in a democratic society and represented a violation of Art. 9 ECHR.

In respect of the alleged violation of Art. 14 ECHR taken in conjunction with Art. 9 ECHR, the Court recognised that, while the different treatment granted to citizens of the Sunni branch of Islam was suitable to protect the principle of secularism, it was not proportionate for the achievement of this aim. Firstly, the existing differences have implied a glaring imbalance between the status of religious public service, conferred to the majority understanding of Islam, and the blanket exclusion of the Alevi community from

⁹ European Court of Human Rights, judgement of 12 June 2014, no. 56030/07, *Fernandez Martinez v. Spain*.

¹⁰ *Doğan et al. v. Turkey*, cit., paras 125 ss.

¹¹ *Ibid.*, para. 132.

this service. Secondly this difference was not accompanied by any compensatory measure. In light of this, the Court stated that the different treatment of the Alevi followers had no objective or reasonable justification and therefore represented a violation of Art. 14 ECHR in conjunction with Art. 9 ECHR.

IV. THE ISSUE OF POSITIVE OBLIGATIONS FLOWING FROM THE FREEDOM OF RELIGION

The reading of the Court's judgment on the *Doğan* case can provoke a little surprise. Indeed, as stressed by Judges Villiger, Keller and Kjølbros in their partly dissenting opinion, the Court's evaluation is based on a different question to the object of the applicants' complaint. While the Court focused its examination on the lack of recognition of the Alevi community, this issue was not covered by the applicants' complaint.¹² On the contrary, it included specific requests to obtain some factual and legal conditions necessary to practise their religion. The refusal of the Turkish authorities has raised the question of the States' positive obligations deriving from Art. 9 ECHR. Indeed, this aspect has been already recalled by the Turkish Administrative Court and the applicants made specific reference to it. Nevertheless, the Court did not consider it necessary to examine this issue.

According to the traditional view, civil and political rights merely imply a States' negative obligations. However, since 1969 and especially during the 1980s, the European Court of Human Rights had begun to recognise that, besides the negative obligation to abstain from interfering with human rights, States also have some positive obligations requiring them to take some specific measures to assure the implementation of same.¹³ This principle had been repeatedly affirmed as regards the right to respect for private and family

¹² As remarked by the partly dissenting judges, the case-law recalled by the Court on the principle of State's neutrality and impartiality concerns different issues from the applicants' requests; cf. Joint partly dissenting and partly concurring opinion of Judges Villiger, Keller and Kjølbros, *Doğan et al. v. Turkey* [GC], cit., para. 8.

¹³ Cf. *inter alia*, F. BESTAGNO, *Diritti umani e impunità. Obblighi positivi degli Stati in materia penale*, Milano: Vita e Pensiero, 2003; A. MOWBRAY, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford: Hart, 2004; J.-F. AKANDJI-KOMBE, *Les obligations positives en vertu de la Convention européenne des Droits de l'Homme: un guide pour la mise en oeuvre de la Convention européenne des Droits de l'Homme*, Strasbourg: Conseil de l'Europe, 2006; R. PISILLO MAZZESCHI, *Responsabilité de l'Etat pour violation des obligations positives relatives aux droits de l'homme*, in Académie de Droit International de la Haye. Recueil des Cours, Leiden - Boston: Martinus Nijhoff, 2008, pp. 175-506, cf. in particular, pp. 317 *et seq.*; L. LAVRYSEN, *Human Rights in a Positive State. Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, Cambridge - Antwerp - Portland: Intersentia, 2016. For the first references to positive obligations see European Court of Human Rights, judgement of 23 July 1968, no. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, *Case "relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium*, para. 31; see also judgement of 13 June 1979, no. 6833/74, *Marckx v. Belgium*, para. 31.

life and has been progressively extended to some other rights such as the right to life, the prohibition of torture and inhuman or degrading treatment, the prohibition of slavery and forced labour, the right to liberty and security, the right to a fair trial, the right to freedom of expression and the freedom of assembly and association.¹⁴ Contrary to other rights secured by the Convention, the idea of positive obligations deriving from the freedom of religion is rather underdeveloped in the European Court's case-law.

The most significant affirmations concern the procedural obligations by which States must assure effective investigations into human rights violations. In this regard one of the most important references can be found in a case concerning the violent attack inflicted by a group of Orthodox believers on a Congregation of Jehovah's Witnesses during a religious gathering. Referring to Art. 9 ECHR, the Court had recognised that national authorities have a duty to take necessary measures to protect members of religious congregations from attacks by others.¹⁵

In relation to the substantial obligations aiming to provide individuals with the juridical and practical conditions they need to effectively exercise their rights, it is possible to find some relevant affirmations regarding the legislative framework protecting the right to conscientious objection.¹⁶ In the *Savda v. Turkey* case, the Courts stated that national authorities have the positive obligation to provide "une procédure effective et accessible [...] et notamment la création d'un cadre réglementaire instaurant un mécanisme judiciaire et exécutoire destiné à protéger les droits des individus et la mise en œuvre, le cas échéant, de mesures spécifiques appropriées".¹⁷ This approach has been recently adopted in the *Osmanoğlu and Kocabaş v. Switzerland* decision concerning the refusal of Swiss authorities to exempt two Muslim children from compulsory mixed swimming

¹⁴ Cf. K. HAJIYEV, *The Evolution of positive obligations under the European Convention on Human Rights – by the European Court of Human Rights*, in D. SPIELMANN, M. TSIRLU, P. VOYATZIS (eds.), *The European Convention on Human Rights, a living instrument. Essays in Honour of Christos L. Rozakis*, Bruxelles: Bruylant, 2011, pp. 207 *et seq.*; the Author makes reference to a "generalisation" of the "positive obligations approach of the Court" (p. 214).

¹⁵ European Court of Human Rights, judgement of 3 May 2007, no. 71156/01, *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*, para. 134; the Court has stated the existence of a State's positive obligation to put in place the legal framework ensuring that a religious community will not be disturbed in the manifestation of its religion by activities of others in European Court of Human Rights, judgement of 7 October 2014, no. 28490/02, *Begheluri et al. v. Georgia*, para. 160; judgement of 24 February 2015, application no. 30587/13, *Karahmed v. Bulgaria*, para. 111.

¹⁶ The lack of procedure to exercise the right to conscientious objection represents a typical case displaying a strong connection between substance and procedural nature of obligations; cf. L. LAVRYSEN, *Human Rights in a Positive State*, cit., 2016, p. 48 ss.

¹⁷ European Court of Human Rights, judgement of 12 June 2012, no. 42730/05, *Savda v. Turkey*, para. 99; in particular, the Courts affirmed that national authorities have the positive obligation to provide an effective and accessible procedure to examine the question whether an individual can benefit from the right to conscientious objection. Similarly see also European Court of Human Rights, judgement of 15 September 2016, no. 66899/14, *Papavasiliakis v. Greece*, para. 52.

lessons.¹⁸ In its reasoning the Court recalled also the *Savda* decision and held that State have fulfilled their positive obligations providing the applicants with an effective and accessible procedure to submit their request of exemption.¹⁹

Furthermore, it is worth recalling some cases concerning the refusal of prison authorities to provide prisoners with a specific diet complying with their religious convictions.²⁰ On those occasions, the Court has found that national authorities had not fairly balanced the interests at stake and had violated the applicants' freedom of religion in the light of "the positive obligations flowing from the first paragraph of Art. 9".²¹

Finally, another significant reference can be found in the case *Magyar Keresztény Mennonita Egyház et al. v. Hungary* (2012)²² concerning the legal recognition of religious communities. The decision concerned several religious communities which, following the entry into force of the new Hungarian Church Act, had lost their status as registered churches and, consequently, the monetary and fiscal advantages linked to their qualification. Examining the case as regards Art. 11 ECHR (freedom of association), read in the light of Art. 9 ECHR, the Court had stated explicitly that "there is a positive obligation incumbent on the State to put in place a system of recognition which facilitates the acquisition of legal personality by religious communities".²³

Compared to other rights secured by the ECHR, the Court's approach concerning positive obligations – especially the substantive ones – arising from the freedom of religion is much more cautious. The shift of focus of the decision taken by the Court in the *Izzetin Doğan* case is a paradigmatic example. Indeed, the Court, while making reference to the existence of positive obligations, affirmed not to consider it "necessary to examine further whether Art. 9 ECHR also imposed positive obligations"²⁴ and showed a kind of reluctance to pursue its reasoning about the specific content of positive obligations. Certainly, the question was strictly linked with the discrimination on grounds of religion (Art. 14 ECHR); however, the issue was at the heart of the freedom of religion and it should have been examined from this point of view.²⁵

¹⁸ European Court of Human Rights, judgement of 10 January 2017, no. 29086/12, *Osmanoğlu and Kocabaş v. Switzerland*.

¹⁹ *Ibid.*, paras 86 and 104.

²⁰ See European Court of Human Rights, judgement of 7 December 2010, no. 18429/06, *Jakóbski v. Poland*; judgement of 17 March 2014, no. 14150/08, *Vartic v. Romania*.

²¹ *Jakóbski v. Poland*, cit., para. 15; similarly, *Vartic v. Romania*, cit., paras 44-45.

²² European Court of Human Rights, judgement of 27 September 2012, no. 70945/11, *Magyar Keresztény Mennonita Egyház et al. v. Hungary*.

²³ *Ibid.*, para. 90.

²⁴ *Doğan et al. v. Turkey*, cit., para. 97; the Court made reference to *Mouvement Raëlien Suisse v. Switzerland* and *Fernández Martínez* cases; actually, on that occasions the Court had examined the facts in the light of, respectively, Arts 10 and 8. Similarly see also European Court of Human Rights, judgment of 15 January 2013, no. 48420/10, 36516/10, 51671/10, 59842/10, *Eweida et al. v. The United Kingdom*, para. 84.

²⁵ That is why do not agree with Judges Villiger, Keller and Kjølbros when they denied the existence of positive obligations flowing from Art. 9 and recognised only a violation of Art. 14, in conjunction with Art. 9.

V. CONCLUSIONS

The issue of positive obligations deriving from Art. 9 ECHR is rather underdeveloped compared to the case-law elaborated by the European Court regarding other rights. This attitude roots in the fact that, in the Court's view, the adoption of some State positive measures in favour of one religion could compromise the principle of State neutrality and impartiality. Indeed, whether national authorities adopt positive measures necessary to create the legal and practical conditions which allow the followers of a specific religion to fully exercise their religious rights, they do not automatically breach the principle of State neutrality and impartiality. This principle is violated only when the measures adopted have a discriminating effect on the followers of other religions or convictions. In other words, this principle prohibits State authorities from adopting positive measures which could create a discrimination in the exercise of religious freedom.²⁶

As shown by the case-law concerning the right to conscientious objection and the recognition of religious communities, the European Court has sometimes recognised the necessity to adopt a number of positive measures assuring legal and practical conditions necessary for freedom of religion. While these decisions are still few, they include some relevant references to positive obligations and should pave the way for elaborating a more comprehensive framework on this topic. From this point of view the *Sveda* approach is greatly promising.

In the *Doğan* case the Court, instead of shifting the decision's focus to the issue concerning the legal recognition of the Alevi community, should have seized the opportunity to drive forward a debate about the issue of positive obligations. This debate is of paramount importance within European States where, following the increase of the number of religious groups which differ from those traditionally present, the implementation of freedom of religion poses new and problematic challenges.

²⁶ This principle emerges from the case *Magyar Keresztény Mennonita Egyház et al. v. Hungary*, cit., para. 107: "Where, in pursuit of its perceived positive obligations with regard to Articles 9 and 11, the State has voluntarily decided to afford entitlement to subsidies and other benefits to religious organizations – such entitlement thus falling within the wider ambit of those Convention Articles – it cannot take discriminatory measures in the granting of those benefits".

