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Does Religiously Motivated Shunning of (Former) Fellow Believers Constitute a Violation of Article 8 European Convention on Human Rights?

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ABSTRACT: The right to respect for private and family life guaranteed by Article 8 European Convention on Human Rights may function both as a counter-right and as a supportive right to freedom of religion enshrined in Article 9 (in conjunction with Article 11) European Convention on Human Rights in cases of religiously motivated social distancing or shunning. The article discusses the complex tripolar human rights situation, which involves the rights of the religious community, of the affected (former) believer, and of his/her family members. It examines how far the various rights play a role, interact, and either restrict or enhance each other when social distancing or shunning takes place. In this context, it particularly considers the situation of minors.

KEYWORDS: Excommunication, Disfellowshipping, Shunning, Social Distancing, Corporative Freedom of Religion, Right to Respect for Private and Family Life, Right to a Fair Trial, Right to Leave a Religion, Contact Rights of Children.

I. Introduction

It is a characteristic of religious communities first, to establish a religious doctrine, including a code of conduct that is determined by the commandments of faith and addressed to ministers and lay congregants; second, to define ecclesiastical authorities; and third, to set membership rules (see General Comment No. 22 to Article 18 ICCPR, para. 4). These aspects belong to the religious communities' autonomy, which is an expression of collective or corporative freedom of religion guaranteed by Article 9 in conjunction with Article 11 European Convention on Human Rights (ECHR; see ECtHR, GC, 26 October 2000, no. 30985/96, *Hasan and Chaush v. Bulgaria*, para. 78; 16 December 2004, no. 39023/97, *Supreme Holy Council of the Muslim*

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Community v. Bulgaria, paras. 81–6; 22 January 2009, no. 412/03, *Holy Synod of the Bulgarian Orthodox Church [Metropolitan Inokentiy] and Others v. Bulgaria*, para. 103; 15 September 2009, no. 798/05, *Miroļubovs and Others v. Latvia*, para. 77; Mückl 2013; Weber 2010).

The right of religious communities to determine membership includes the right to set out the conditions under which membership and associated participation rights are lost and the right to establish and implement procedures for deciding on the loss of membership. Accordingly, the European Court of Human Rights concluded in *Svyato-Mykhaylivska Parafiya v. Ukraine* that

> religious associations are free to determine at their own discretion the manner in which new members are admitted and existing members excluded. The internal structure of a religious organization and the regulations governing its membership must be seen as a means by which such organizations are able to express their beliefs and maintain their religious traditions. The Court points out that the right to freedom of religion excludes any discretion on the part of the State to determine whether the means used to express religious beliefs are legitimate (no. 77703/01, 14 June 2007, para. 150).

Conversely, the European Court of Human Rights emphasized that Article 9 ECHR does not give (former) members a right to remain in a religious community if that community decides that the individual engaged in serious religious misconduct and, therefore, that individual is deemed to have lost membership or is disfellowshipped (von Ungern-Sternberg 2015, para. 16).

The Court explained in *Miroļubovs and Others v. Latvia*:

> The principle of autonomy [...] prohibits the State from obliging a religious community to admit new members or exclude others [...]. Similarly, Article 9 of the Convention does not guarantee any right to dissent within a religious organization; in the event of a doctrinal or organizational disagreement between a religious community and its member, the latter's freedom of religion is exercised through the ability to freely leave the community in question (para. 80d, translation from French; see already European Commission on Human Rights, no. 12345/86, 8 September 1988, *Karlsson v. Sweden*; no. 20402/92, 12 October 1994, *Spetz and Others v. Sweden*; no. 27008/95, 17 May 1995, *Williamson v. United Kingdom*; Bielefeldt, Ghanea, and Wiener 2016, 72–3).

This indicates that individual freedom of religion does not play a role in doctrinal or organizational disputes within religious communities. It cannot be used by (former) members as a means to enforce religious beliefs against the religiously motivated self-determination of the relevant community or the commandments of

its religious authorities. Religion practiced within the framework of a religious community is addressed as a collective phenomenon vis-à-vis the individual members. The individual right to freedom of religion becomes relevant when the religious practice and observance of members conflict with state laws or the rights of third persons. This improved position of the collective aspects of freedom of religion within religious communities has historical reasons:

> Religious communities were (and to some extent still are) regarded by the state as a threat to a far greater extent than individuals with fundamental beliefs that deviate from what is generally accepted; this has to do with their group formation, which is not least associated with particular ways of life. They are therefore also particularly worthy of protection (Classen 2003, 27–8 [translation]).

Consequently, persons who invoke their freedom of religion toward a certain religious community must be outsiders. Dissenting members of a religious community who question essential parts of the religious doctrine and do not manage to convince their religious authorities by using possible paths provided by the religious community for the settlement of doctrinal disputes have usually either to accept the doctrinal rules of that religious community (at least in appearance) or to leave the religious community in the long run (see European Commission on Human Rights, no. 7374/76, 8 March 1976, *X. v. Denmark*). Against this background, the European Court of Human Rights stressed the individual right to freely leave a religious community. This right corresponds to the freedom of the individual to change his/her religion or belief, which is explicitly mentioned in Article 9 para. 1 half-sentence 2 ECHR.

Religious communities have the right to decide the consequences that exclusion from membership in, and voluntary leaving of, their organization have. This includes the loss of spiritual ministries and privileges as well as that of access to (certain) religious activities and services. For instance, a religious community may not allow excommunicated persons to enter their houses of worship or take part in religious ceremonies. They may refuse to administer sacraments to excommunicated persons, to give blessings on the occasion of weddings of former members, or to deliver religious speeches at funerals in case the deceased had left the community.

Moreover, religious communities may issue religious commandments or recommendations on how their members should behave toward excommunicated persons. Such a code of conduct may stipulate that members should not partake

in religious activities with the excommunicated former fellow believers or that they should even limit their contact with such persons to the bare minimum. The reasons for such measures must result from the respective religious doctrine. Therefore, it can be argued that religious communities benefit from a broad type of margin of appreciation on the basis of their religious self-determination. For example, religious communities may decide that congregants should abstain from practices considered "unclean" so as to keep the congregation of believers pure, that faithful believers should not be influenced by sinful thoughts and practices, and that the excommunicated individual should be made to reflect on his/her course, to repent, and to come back (see Pel 2023, sub 2). Furthermore, religious communities may claim that the change of status of the person who will be excommunicated protects members, since they are taught to support fellow believers financially, physically, and emotionally when they are in need, and this rule could only apply in the long run if all members fulfill their obligation in this charitable work and can trust that they also will be helped if they fall into need.

The limits of this margin of appreciation are in that regard determined by the theological concept of the community in service and by the relevant rules of the religious code of conduct, the extent of their binding effect, and the practice to deal with misconduct. Furthermore, it plays a role whether religious worship is defined as a matter that essentially only takes place in the church room or in other kinds of meeting rooms, or as one that permeates and influences the whole life. The more the concept of the community approaches that of a family, a brotherhood, or a religious order, and the more intensively the religious rules affect the life and lifestyle of the individual members, the easier it is for a religious community to make it plausible that, according to its faith, disfellowshipping measures must be accompanied by rules of social distancing and to insist that freedom of religion can be claimed for such commandment or behavior.

However, it has recently been argued in literature that religiously motivated social distancing from former members of a religious community, negatively connoted as "shunning," violates the rights of the affected persons and is therefore illegal (see Grendele, Flax, and Bapir-Tardy 2023; for a criticism, see Introvigne and Richardson 2023). Moreover, some state authorities took the view that disfellowshipping and subsequent social distancing violated the rights of the excommunicated persons. Such practice was contrary to the members' right to free withdrawal from a religious community, since they had to fear that they would

no longer be allowed to have contact with family and friends in the religious community. Particularly, it was argued without further explanation that shunning violated the rights of children. Therefore, a religious community in which social distancing was practiced must not only be excluded from public funding but also be deregistered (see on a case in Norway Introvigne 2024; and Pinto de Albuquerque 2023, sub III).

Against this background, it should be examined whether religiously motivated shunning really violates human rights guarantees. The verdict that a human rights violation is taking place can only be reached after a thorough investigation and consideration of the rights and legally protected interests involved. That is particularly true in situations where the opposing parties are non-state actors, namely religious communities without the status of state churches, former members of these religious communities and their family members, (former) friends and former fellow believers. Constellations of third-party effects of fundamental rights and human rights, which are primarily addressed toward the state, always require that conflicting positions are examined, weighed, and balanced, whereby state authorities and state courts must assume a neutral and impartial role (see ECtHR, GC, 10 November 2005, no. 44774/98, *Leyla Şahin v. Turkey*, paras. 107–8).

A core right in the context of religiously motivated social distancing is the right to respect for private and family life laid down in Article 8 ECHR. This right can be seen as the excommunicated person's counter-right to the religious community's freedom of religion. Furthermore, it plays a role with regard to the mutual relationship between that person and his/her family members and even beyond. Finally, it covers aspects of the upbringing, education, and training of children and of corresponding parental responsibilities (see ECtHR, GC, 8 April 2021, no. 47621/13, *Vavřička and Others v. Czech Republic*, paras. 287–88; GC, 10 December 2021, no. 15379/16, *Abdi Ibrahim v. Norway*, para. 145; 30 June 2022, no. 61657/16, *Paparrigopoulos v. Greece*, para. 40). Thus, it includes the rights of children, so that they can be treated in this context.

II. Article 8 ECHR and Its Multi-Relational Contents

1. Right to Respect for Private Life

Article 8 ECHR is construed as a relational human rights provision that refers to interaction between individuals. This is not only true with regard to the right to respect for family life but also with regard to the right to respect for private life. That notion includes, but is not limited to, an inner bubble in which individuals live their own personal lives as they choose, and exclude the outside world (ECtHR, GC, 25 September 2018, no. 76639/11, *Denisov v. Ukraine*, para. 96). Anyway, even if it were limited in such a way, to define personal identity within, and by means of a delimitation from, a certain subsystem of society or the social system in general. and to exclude the outside world from the inner bubble of self-experience and self-development, qualify as a determination of the relationship to other people (see ECtHR, 24 February 1998, no. 153/1996/772/973, *Botta v. Italy*, para. 32).

Besides, the aspect of the right to respect for private life encompasses the right of the individual to approach others in order to establish and develop relationships with them and with the outside world, which the European Court of Human Rights has described as the right to a "private social life" (GC, 5 September 2017, no. 61496/08, *Bărbulescu v. Romania*, para. 70). However, the Court stressed in that context that private life did not as a rule come into play in situations where somebody does not enjoy "family life" within the meaning of Article 8 ECHR in relation to a particular third person and where the latter does not share the wish for contact (28 May 2020, no. 17895/14, *Evers v. Germany*, para. 54). There is no human right to contact or even friendship with another person from outside the family, which could be invoked against the will of that person. If such an unfounded claim is made, there is not even a conflict of rights to be solved.

Finally, the concept of private life according to Article 8 ECHR covers the physical, psychological, and moral integrity of a person (ECtHR, GC, 24 January 2017, no. 25358, *Paradiso and Campanelli v. Italy*, para. 159; GC, 25 June 2019, no. 41720/13, *Nicolae Virgiliu Tănase v. Romania*, para. 126; 26 March 1985, no. 8978/80, *X. and Y. v. the Netherlands*, para. 22). Case-law in that regard concerned primarily (deficits in) the national legal frameworks affording

protection against acts of physical violence by private individuals (see GC, 12 November 2013, no. 5786/08, *Söderman v. Sweden*, para. 80; GC, 28 October 1998, no. 87/1997/871/1083, *Osman v. United Kingdom*, para. 128; 14 October 2010, no. 55164/08, *A. v. Croatia*, para. 60; 5 March 2009, no. 38478/05, *Sandra Janković v. Croatia*, para. 45; 12 June 2008, no. 71127/01, *Bevacqua and S. v. Bulgaria*, para. 65). Thus, a third person is causing physical harm to somebody (either the right bearer or someone else), which may have an adverse impact also on the psychological integrity and well-being of the right bearer (see ECtHR, 9 November 2021, no. 31549/18, *Špadijer v. Montenegro*, paras. 81–2).

In other cases, the European Court of Human Rights sometimes determined the applicability of the right to respect for private life by a severity test. This happened, for instance, in cases concerning a non-justified attack on a person's reputation, dismissal, demotion, non-admission to a profession, or other similarly unfavorable measures (see *Denisov v. Ukraine*, paras. 110–12). The Court examined, in line with its consequence-based approach to Article 8 ECHR, whether the circumstances of the relevant case attain a level of seriousness or severity resulting in significant impairment of the affected person's ability to enjoy his/her private life. It particularly referred to the intensity and duration of the nuisance or prejudice and its physical or mental effects on the individual's health or quality of life (see 9 June 2005, no. 55723/00, *Fadeyeva v. Russia*, para. 69; GC, 29 March 2016, no. 56925/08, *Bédat v. Switzerland*, para. 72; 14 January 2020, no. 41288/15, *Beizaras and Levickas v. Lithuania*, para. 109; 21 September 2010, no. 34147/06, *Polanco Torres and Movilla Polanco v. Spain*, para. 40).

2. Right to Respect for Family Life

According to the view of the European Court of Human Rights, the core ingredient of the right to respect for family life is the right to life together so that family relationships may develop normally (13 June 1979, no. 6833/74, *Marckx v. Belgium*, para. 31) and members of the family may enjoy each other's company (24 March 1988, no. 10465/83, *Olsson v. Sweden [No. 1]*, para. 59). Thus, the right to respect for family life, unlike the right to respect for private life, can form

a legal basis for a claim to regular contact with a particular third person, if that person belongs to the family.

The concept of family life is an autonomous concept under the European Convention on Human Rights. Whether or not "family life" exists is essentially a question of fact depending on the real existence in practice of close family ties (*Paradiso and Campanelli v. Italy*, para. 140). The Court emphasized in its case-law that even a biological kinship between a natural parent and a child alone, without further legal or factual elements indicating the existence of a close personal relationship, was insufficient to attract the protection of Article 8 ECHR. As a rule, "family life" requires cohabitation. Exceptionally, other facts can also serve to demonstrate that a relationship has sufficient constancy to create de facto family ties (21 July 2022, no. 2303/19, *Katsikeros v. Greece*, para. 43; 1 June 2004, no. 45582/99, *L. v. the Netherlands*, para. 36).

Moreover, the Court has considered that intended family life may, also exceptionally, fall within the ambit of Article 8 ECHR, namely in cases where the fact that a family life has not yet been fully established was not attributable to the right bearer. This is of particular importance with regard to the potential relationship that may develop between a child born out of wedlock and his/her natural father (see 8 July 2014, No. 29176/13, *D. and Others v. Belgium*, para. 49; 22 June 2004, no. 78028/01, *Pini and Others v. Romania*, para. 143). Relevant factors that determine the existence in practice of close personal ties in these cases include the nature of the relationship between the natural parents and a demonstrable interest in, and commitment from, the father to the child both before and after the birth (*Katsikeros v. Greece*, para. 44).

After all, the European Court of Human Rights does not exclusively focus on biological kinship for the notion of family, but stresses that in case of absence of any biological tie there must be a durable and stable de facto family or personal tie with strong emotional bonds (see *Paradiso and Campanelli v. Italy*, paras. 156-157; 18 May 2021, no. 71552/17, *Valdís Fjölnisdóttir and Others v. Iceland*, para. 59; 24 March 2022, nos. 29775/17 and 29693/19, *C. E. and Others v. France*, para. 49). On the other side, the Court generally does not take a broad approach to the biological family. For instance, it argued that a person's intention to develop a previously non-existent "family life" with her nephew by becoming his legal tutor lay outside the scope of "family life" as protected by Article 8 ECHR (17 April 2018, no. 6878/14, *Lazoriva v. Ukraine*, para. 65).

Consequently, religious communities, even very small ones, generally cannot constitute as such a "family" in the sense of the human rights provision. In the case of religious orders, it does not seem to be absolutely excluded that family-tie-like emotional bonds exist, but then at least a cohabitation in a monastery or similar establishment appears to be necessary.

As mentioned, the right to respect for family life particularly protects the rights and interests of children. Accordingly, the European Court of Human Rights has stressed the link between Article 8 ECHR and both the Convention on the Rights of the Child and the Hague Convention on the Civil Aspects of International Child Abduction (see GC, 6 July 2010, no. 41615/07, *Neulinger and Shuruk v. Switzerland*, para. 132; GC, 26 November 2013, no. 27853/09, *X. v. Latvia*, para. 93). It is well-established in the Court's case-law that

> in all decisions concerning children their best interests are of paramount importance. [...] It follows that there is an obligation on States to place the best interests of the child, and also those of children as a group, at the centre of all decisions affecting their health and development (*Vavřička and Others v. Czech Republic*, paras. 287–88; see also *Neulinger and Shuruk v. Switzerland*, para. 135; *X. v. Latvia*, para. 96).

The best interests of the child are not least protected by contact rights. A fundamental element of family life is the mutual enjoyment by parent and child of each other's company (see ECtHR, 26 March 2013, no. 21794/08, *Zorica Jovanović v. Serbia*, para. 68; 5 April 2005, no. 71099/01, *Monory v. Romania and Hungary*, para. 70; 26 February 2002, no. 446544/99, *Kutzner v. Germany*, para. 58; 19 September 2000, no. 40031/98, *Gnahoré v. France*, para. 50; *Olsson v. Sweden [No. 1]*, para. 59). Correspondingly, Article 9 para. 3 Convention on the Rights of the Child and Article 24 para. 3 Charter of Fundamental Rights of the European Union explicitly stipulate that every child shall have the right to maintain on a regular basis a personal relationship and direct contact with his/her parents, unless that is contrary to his/her interests.

The European Court of Human Rights explained that the child's interest in this context comprised two limbs:

> On the one hand, it dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and where appropriate, to "rebuild" the family [...]. On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 [ECHR] to have

> such measures taken as would harm the child's health and development (*Neulinger and Shuruk v. Switzerland*, para. 136; see also GC, 13 June 2000, no. 25735/94, *Elsholz v. Germany*, para. 50; 4 April 2006, no. 8153/04, *Maršálek v. Czech Republic*, para. 71).

Thus, contact rights within the family are not absolute. They must be balanced in each individual case with the (possibly conflicting) interests of the child. The child's best interests may, depending on their nature and seriousness, override those of the parents. However, the parents' interests, especially in having regular contact with their child, remain a factor when balancing the various interests at stake (*Neulinger and Shuruk v. Switzerland*, para. 134; *Abdi Ibrahim v. Norway*, para. 145; GC, 8 July 2003, no. 30943/96, *Sahin v. Germany*, para. 66). The European Court of Human Rights stressed that the assessment of the child's best interests and their balancing with conflicting rights and interests of the parents were a complex task. The child's best interest, from a personal development perspective, depended on a variety of individual circumstances, in particular his/her age and level of maturity, the presence or absence of his/her parents and his/her environment and experiences (*Neulinger and Shuruk v. Switzerland*, para. 138; see also United Nations High Commissioner for Refugees 2008, 23–4 and 68–9).

The Court stated that the protection by the right to respect for family life was not limited to the ties between parents and children but also included the ties between grandparents and grandchildren, since these relatives may play a considerable part in family life (*Marckx v. Belgium*, para. 45; *Evers v. Germany*, para. 54; 9 June 1998, no. 40/1997/824/1030, *Bronda v. Italy*, para. 51). However, the relationship between grandparents and grandchildren was different in nature and degree from the relationship between parents and children and thus by its very nature called for a lesser degree of protection. The right to respect for family life of grandparents in relation to their grandchildren primarily entailed the right to maintain a normal grandparent-grandchild relationship through contact between them (25 November 2014, no. 10140/13, *Vesna Kruškić and Others v. Croatia*, para. 111; 8 February 2022, no. 19938/20, *Q. and R. v. Slovenia*, para. 94; 16 April 2015, no. 53565/13, *Mitovi v. Former Yugoslav Republic of Macedonia*, para. 58). Furthermore, the Court considered that contact between grandparents and grandchildren normally takes place with the agreement of the person who has parental responsibility, which means that access of a grandparent

to his/her grandchild is normally at the discretion of the child's parents (*Vesna Kruškić and Others v. Croatia*, para. 112).

Finally, the European Court of Human Rights held that family life can also exist between siblings (18 February 1991, no. 12313/86, *Moustaquim v. Belgium*, para. 36; 6 April 2010, no. 4694/03, *Mustafa and Armağan Akın v. Turkey*, para. 19). It recognized the relationship between adults and their parents and siblings as constituting family life protected under Article 8 ECHR even in cases where the adult did not live with his/her parents or siblings (24 April 1996, no. 22070/93, *Boughanemi v. France*, para. 35) and the adult had formed a separate household and family (*Moustaquim v. Belgium*, paras. 35 and 45–6; 26 September 1997, no. 123/1996/742/941, *Boujaïdi v. France*, para. 33). However, the Court has stated that family ties between adults and their parents or siblings attract lesser or even no protection unless there is evidence of further elements of dependency, involving more than the normal emotional ties (see GC, 9 October 2003, no. 484321/99, *Slivenko v. Latvia*, para. 97; 20 December 2011, no. 622/10, *A. H. Khan v. United Kingdom*, para. 32; 17 February 2009, no. 27319/07, *Onur v. United Kingdom*, para. 45; 15 July 2003, no. 52206/96, *Mokrani v. France*, para. 33; 10 July 2003, no. 53441/99, *Benhebba v. France*, para. 36). Furthermore, the Court held that relationships with more distant relatives fall short of family life and can therefore only play a role in the context of private life (2 June 2005, no. 77785/01, *Znamenskaya v. Russia*, para. 27).

Anyway, in the case of contact rights claimed by an individual adult against another adult on the basis of family life can be countered by the latter at least with his/her right to respect for private life, if he/she does not want to maintain contact with the person making such a claim. Besides, counter-rights can result from other human rights guarantees, namely the right to freedom of religion according to Article 9 ECHR.

Lastly, it has to be mentioned that the right to respect for private and family life in Article 8 ECHR may itself include aspects also guaranteed by Article 9 ECHR, since religious beliefs and privacy as well as family life can be closely interrelated (see ECtHR, 20 July 2021, no. 12886/16, *Polat v. Austria*, para. 91). As such, both human rights guarantees together can strengthen a legally protected interest. For instance, the European Court of Human Right hold in *Abdi Ibrahim*

v. Norway that a child should be given the chance to develop and maintain ties to his/her cultural and religious origins. Therefore, the right to respect for family life under Article 8 ECHR should be interpreted and applied in the light of Article 9 ECHR (para. 142).

Furthermore, the right to respect for family life also covers the aspect of religious education. This aspect is explicitly guaranteed by Article 2 Protocol 1 to the European Convention of Human Rights, which gives parents the right to secure education and training according to their own religious convictions. General Comment No. 22 to Article 18 ICCPR even states that the liberty of parents and guardians to ensure religious and moral education cannot be restricted (para. 8). This authoritative interpretation given by the United Nations Human Rights Committee gives the right of parents to religious education of their children a particularly heavy weight and thus a very strong protection, at least as long as their children are not religiously mature.

In the following, these general findings on the multi-relational contents of Article 8 ECHR shall be applied to the shunning context. Special focus will be given to the relationship between the religious community and the excommunicated or disfellowshipped former member and to the relationship between family members and former fellow believers and the excommunicated or disfellowshipped person. The relevant human rights relations will be clarified and analyzed, and it will be examined the extent to which potential infringements affect core areas of protection. Thereafter, a thorough weighing and balancing of all human rights concerned will lead to a reliable conclusion.

III. Relationship Between the Religious Community and the Excommunicated Former Member

The relationship between the religious community and the (former) member is molded by the community's strong right to freedom of religion under Article 9 ECHR. The religious community has the right to decide that membership of the individual person terminates. As explained, the (former) member cannot invoke his/her own freedom of religion against the religious community with the aim to stay in the latter. His/her freedom of religion within the internal sphere of organized religion is limited to the right to freely leave the religious community.

1. Right to a Fair Trial

Whether an excommunicated or disfellowshipped person can assert rights other than freedom of religion to remain in a religious community has not yet been clarified at the ECHR level. The right to a fair trial under Article 6 ECHR and the previously discussed right to respect for private life under Article 8 ECHR may be considered. However, the right to a fair trial is provided for cases regarding the determination of civil rights and obligations and of criminal charges against a person. This means that the right to a fair trial is related to the claim of other rights recognized under domestic law (see ECtHR, GC, 3 April 2012, no. 37575/04, *Boulois v. Luxembourg*, para. 90; *Denisov v. Ukraine*, para. 44) or to the defense of such rights, in the criminal context particularly habeas corpus. Furthermore, Article 6 ECHR covers cases concerning the right to access to a national court or tribunal (see ECtHR, GC, 15 March 2022, no. 43572/18, *Grzęda v. Poland*, paras. 289–94) as well as cases that have been brought to, or have been examined by, a national court or tribunal (see ECtHR, 21 June 2007, nos. 2191/03, 3104/03, 16094/03 and 24486/03, *Pridatchenko and Others v. Russia*, para. 47).

Therefore, if there is no substantial right recognized in the national legal sphere that can be claimed by a member of a religious community to prevent him/her from being excluded by the community, then there is also no applicability of Article 6 ECHR regarding the procedure in which the exclusion is decided upon. The procedural right follows the substantial right. According to the determinations of Article 9 ECHR that must be recognized by the domestic law of the Contracting States, there is no individual religious freedom within a religious community except the right to freely leave the latter. This exclusion of an individual claim puts aside with procedural rights. Similarly, the European Court of Human Rights argued that membership of and exclusion from a political party or association are not covered by Article 6 ECHR (4 April 2017, no. 38458/15, *Lovrić v. Croatia*, para. 55).

Furthermore, Article 6 ECHR only refers to procedural requirements. It does not guarantee that a defined process has a particular substantial outcome. It also "does not guarantee any particular content for 'civil rights or obligations' in the substance law of the Contracting States" (*Grzęda v. Poland*, para. 258). Thus, even if there were procedural defects in a religious community's decision-making

process to exclude a member, this would not create a substantive right to remain in the community.

Finally, the right to a fair trial only finds application with regard to procedures that take place before a court or tribunal in the sense of Article 6 ECHR. Such a court or tribunal must fulfill a judicial function within the Contracting State and must be established by state law (see ECtHR, GC, 1 December 2020, no. 26374/18, *Guðmundur Andri Ástráðsson v. Iceland*, paras. 219–30). A decision-making body within a non-state religious community that decides on the basis of theological considerations is not a court or tribunal according to this definition.

Additionally, the exclusion or disfellowshipping of a member by his/her religious community does not qualify as a criminal charge according to Article 6 ECHR, since such charge starts with the official notification given to an individual by the competent state authority of an allegation that he/she has committed a criminal offence (see ECtHR, GC, 13 September 2016, no. 50541/18, 50571/08, 50573/08 and 40351/09, *Ibrahim and Others v. United Kingdom*, para. 249; GC, 12 May 2017, no. 21980/04, *Simeonovi v. Bulgaria*, para. 110; 27 February 1980, no. 6903/75, *Deweer v. Belgium,* para 46; 15 July 1982, no. 8130/78, *Eckle v. Germany*, para. 73). An exclusion or disfellowshipping procedure run by a state religious community in a secular state does not qualify as criminal procedure. Although it is possible that in such proceedings investigations are conducted into a matter that may also be the subject of a public prosecutor's investigation, these proceedings do not form a part of the latter.

Against this background, courts in Europe generally do not examine and decide about cases that concern proceedings within religious communities. For example, the German Federal Constitutional Court in a case in which a Protestant congregation had challenged the decision of the church leadership to divide the congregation and its confirmation by the church court held that internal church measures that do not have direct legal effects within the state's jurisdiction cannot be reviewed by state courts (BVerfGE 18, 385, 387–88). Similarly, the Administrative Court of Berlin argued in a case concerning the adoption of a decision by the Representative Assembly of the Jewish Community of Berlin that there was no legal protection by administrative courts for conflicts within a religious community. As an expression of the guaranteed autonomy of the religious communities, the secular state must not interfere in the internal affairs

of these communities and their local congregations (20 June 2013, file no. VG 27 L 141.13).

2. Right to Respect for Private Life

The right to respect for private life under Article 8 ECHR includes the right of the individual to develop his/her personality and to define his/her identity and self-understanding within collective settings outside the family. It is possible that such collective settings are embedded in an institutional framework, particularly in the form of a club, an association, or a religious community. Insofar, it can be argued that Article 8 ECHR also protects the integration into a particular society, when the individual derives central coordinates for his/her personal development and identity from this integration, not least because it means inclusion and delimitation from the outside world. Such a function can be fulfilled excellently by membership in a religious community.

However, it is not yet judicially clarified whether the right to respect for private life can exist parallel to the determinations of the guarantee of freedom of religion within a religious community. Generally, it appears to be possible that Article 8 ECHR has effects besides freedom of religion in a religious context. This can particularly be considered if a religious community spies on its members and collects dossiers on their private contacts or the times when they are away from home. Essential parts of private life should be free from intervention even in religious settings. This can be argued at least in the cases of ordinary members living a secular life. Maybe certain exceptions can be accepted in cases where members spend a consecrated life in a religious order or monastery.

a) Regarding the Formal Exclusion from Membership

When a member is excommunicated by a religious community, the person concerned is compulsorily cut off from his/her integration into the institutional settings. As a result, he/she loses his/her private social life or at least some aspects of such life within the context of the religious community, depending on the consequences of such a measure according to the respective ecclesiastical or religious rules. The consequences could be, for instance, that the (former) member can no longer visit the house of worship and take part in the religious

ceremonies therein. They can even amount to a loss of religion, as religion is traditionally understood as a collective phenomenon (see Classen 2003, 22–6).

In that sense, an exclusion from a religious community appears to be a measure with considerable potential to force the (former) member to redefine and restructure his/her private life. This potential is, of course, only realized in cases where the affected person has not already alienated himself/herself from the (faith of the) religious community in question in the time before the exclusion was decided upon. Such alienation and its manifestations, for example harsh criticism toward the religious leaders and their doctrine, or persistent misconduct that violates the moral code of the religious community, might just have led to the excommunication.

However, the question about the parallelism of the right to respect for private life and the determinations of freedom of religion within a religious community can only be answered in the positive if there is room for private activities within the institutional settings of the community that are not qualified as religious. Whether that is the case depends on the self-determination of the religious community. When religious activities within the institutional settings are the domain of the religious community and its freedom of religion, there can be no right of the (former) member to participate in such activities. The institutional rules for collective action prevail.

After all, there cannot be a right under Article 8 ECHR directed against a religious community to remain a member in the latter. Nevertheless, it appears to be possible that the right to respect for private life applies with regard to accompanying circumstances of the exclusion, such as its procedure or communication to the members of the religious community or its local congregation. Particularly, the communication should not reveal reasons that belong to the affected person's private life, for instance an extramarital or homosexual relationship.

b) Regarding the Effects of a Commandment or Recommendation on Social Distancing

The commandment or recommendation made by the religious community to its (remaining) members to socially distance from, or shun, the excommunicated person may be judged differently than the formal exclusion from membership. In

that situation, the religious community does not act directly vis-à-vis the excommunicated person. Instead, it issues rules or recommendations of behavior for its members so that they act in a certain way in relation to that person. Since it could be argued that the religious community by such rules steered its members' actions affecting the excommunicated person, the community could indirectly violate the right to respect for private life of that person.

The commandment or recommendation to socially distance from an excluded former fellow believer can form a consequence of the exclusion from membership according to ecclesiastical or religious law. Since the excluded or disfellowshipped person is no longer bound to the institutional settings of the religious community but is now an outsider in relation to that community, he/she is also not subjected any more to the community's dominant collective or corporative freedom of religion. Consequently, the right to respect for private life is not automatically put aside due to the fact that the rules concerning social distancing are issued by a religious community on the basis of its doctrine.

The question is whether such rules interfere with the private life of the excommunicated person and whether this interference causes physical harm to that person or reaches a certain degree of severity according to the severity test of the European Court of Human Rights. The commandment or recommendation to socially distance may cause the members of the religious community to avoid contact with the excommunicated person or to limit it to necessary encounters, to stop joint leisure activities or even to end friendships. In contrast, the excluded or disfellowshipped person may wish to continue his/her relationship and companionship with his/her former fellow believers as if the exclusion or disfellowshipping had not happened. That would amount to taking the benefits of a social life within the context of a religion without bearing the personal costs of such a life in form of adherence to the ecclesiastical or religious standards of behavior.

The right to respect for private life protects the establishment and development of relationships and friendships with persons from outside the family. But, as explained in the section about the contents of that right, this guarantee can only be invoked if the persons addressed by the right bearer are sharing his/her will for contact and for starting or maintaining a relationship or friendship. When a religious community orders or urges its members to avoid or reduce contact with the excommunicated former believer and they follow this

command or recommendation, they have given up or do not form any more the will to establish or maintain a relationship or friendship with that person. Thus, the wish of the excommunicated person does not find a counterpart in a respective acceptance by the addressed members of the religious community. Consequently, the excommunicated person cannot claim that his/her right to respect for private life was violated by the religious community because it has commanded or recommended its members to socially distance from him/her.

But even if there were a well-founded claim that a religious community should not order or recommend social distancing from, or shunning of, a former member, such measures would not violate the right enshrined in Article 8 ECHR when, first, the religious community could base their command or recommendation on their right to freedom of religion under Article 9 ECHR and, second, this right prevailed over the conflicting interest of the former member in the context of a balancing of interests. Thus, the command or recommendation must find its reason in the religious doctrine of the religious community, and it must be regarded as so essential that it trumps over the interest of the excommunicated former member to maintain contact and friendship with his/her former fellow believers. In this context the institutional practice of the religious community concerned would play a role.

3. Right to Respect for Family Life

The right to respect for family life includes the right to maintain close family ties with members of the inner family. Since religious communities generally do not qualify as family and religious worship within the institutional settings of such communities cannot be subsumed under the notion of family life in the sense of Article 8 ECHR, the exclusion from membership in a religious community as such does not infringe the right to respect for family life. Conversely, the commandment or recommendation of social distancing or shunning as consequence of an exclusion from membership in a religious community may, in particular circumstances, constitute an infringement of the right enshrined in Article 8 ECHR. It may cause members of the religious community to withdraw from an excommunicated family member, to end communication, and to avoid any other form of contact with that person.

The right to respect for family life only covers contact rights within certain family relations. For instance, it normally does not guarantee the contact between adults and their parents, siblings, grandparents, or more distant relatives in cases where one party does not wish to spend time or communicate with that person(s). However, the situation is more complex when minors are involved. This can be the case either if the mother, father, or other caretaker of a minor is excluded from membership in a religious community, while the minor and maybe also other family members remain in the community, and that person is, as a consequence, object of a social distancing or shunning commandment or recommendation or if the minor himself/herself is excommunicated or disfellowshipped, while his/her parent(s) or other caretaker remain(s) in the community.

Whether a social distancing or shunning commandment or recommendation issued by a religious community in such a case violates Article 8 ECHR depends on the content of the measure as perceived by reasonable objective third parties in the position of addressed members of the community and, furthermore, on the individual family situation of the affected persons. If the measure of the religious community must be understood in a way that the mother, father, or other caretaker who remains in the community should hinder any contact of the child with his/her excommunicated (other) parent, it appears to be generally problematic. It appears to be even more problematic if the child is the person excluded from membership and the social distancing measure of the religious community must be interpreted in a way that the mother, father, or other caretaker remaining in the community should withdraw any form of contact and care from the child.

Against this background, it must be clarified whether disfellowshipping, social distancing, or shunning in the religious community in question really means a cut of any contact. Since such a measure is a theological or religious concept, there might be various strategies for dealing with an excommunicated person. For example, it may mean that family members should not practice common religious ceremonies with the excluded person, should not have a common meal with that person, should not talk to that person, or should not cohabitate with that person. In any case, the religious community has the right to define and explain the content of its measure. The interpretation given by representatives of other churches or religious communities or by activist ex-members is not relevant.

Depending on the content of the measure, its consequences regarding contact rights of an affected minor differ. It may not constitute interference if a parent or both parents should no longer study the holy scriptures of the respective religion together with the child, or no longer pray together with the child, or if he/she has, or they have, to spend less time together with the child because some formerly common activities in the context of religion can only be continued by one party after the excommunication. Conversely, it may constitute interference if a parent or even both parents should stop talking to a child or caring for his/her physical needs, or if the child should no longer be allowed to talk to his/her mother, father, or another caretaker, be that person living in the same household or not.

Furthermore, the case-law of the European Court of Human Rights shows that contact rights between parent(s) and child do not exist in any case and, when existing, are not unlimited. In cases where there are no close family ties in practice between a parent and a child, the right to respect for family life under Article 8 ECHR normally does not guarantee protection. For instance, a parent may already have left the family home before exclusion from the religious community, not least due to facts relating to the circumstances which led to that measure, and he/she may have shown no interest in the child for a long period of time. On the other side, an excommunicated minor of religious age who nearly reached adulthood may already have left the parental home to move in with his friends outside the religious community and may not wish to meet with his/her parents so that they do not harm his/her conscience.

Contact rights between parent(s) and child are limited by the best interests of the child. A parental contact may be (potentially) harmful for the child. For example, this will probably be the case if the parent has physically or emotionally abused or severely neglected the child in the past. It may be also not be beneficial for the child's development and well-being if he/she (continues to) has/have contact with a parent who is addicted to alcohol or drugs. Such aspects might have been a cause for the excommunication or disfellowshipping. Thus, religious rules may run parallel to secular provisions regarding child custody.

In any case, the European Court of Human Rights rightly pointed out in *Neulinger and Shuruk v. Switzerland* (para. 138) and other judgments that decisions about contact rights between parents and children are a complex matter. Therefore, it cannot be said in general terms that an excommunication or disfellowshipping measure issued by a religious community violates the right to

respect for private life if a child is affected by such a measure. Such a generalizing judgement would not meet human rights requirements.

4. Freedom of Religion

Finally, excommunication from a religious community and its social distancing consequences could interfere with freedom of religion under Article 9 ECHR, namely the right to freely leave a religious community. The prospect that losing membership in the religious community could lead to a measure of social distancing or shunning could exert inadmissible pressure on members to remain in the community. This view emphasizes foreshadowing effects of the consequences of the loss of membership in a religious community on actual membership.

However, the exclusion from membership in a religious community due to religious misconduct may have different consequences than a voluntary leaving the community according to the respective ecclesiastical or religious law. When a voluntary leave does not lead to social distancing or shunning, such consequences of an excommunication by the religious community cannot restrict ex ante the right to freely leave the community. Thus, two different paths of losing membership must not be equalized if the religious community in question draws a theological distinction between them.

Furthermore, membership in an association, club, or other institutional framework usually goes hand in hand with obligations. These can include the obligation to pay the annual fee, to take on certain tasks of common interest, to observe a dress code, to comply with a confidentiality clause, or even to obey a more general code of conduct. Insofar, religious communities are not special, although their rules addressing members may often be quite extensive and refer to matters that are genuinely regarded as private and to moral choices. Members of any association can expect that violations of internal rules will not go unpunished, but will have consequences under association law or, in the case of a religious community, ecclesiastical or religious law.

The European Court of Human Rights stressed in the context of freedom of association guaranteed by Article 11 ECHR that this right cannot be interpreted as imposing an obligation on associations or organizations to admit whosoever

wishes to join and to tolerate whosoever wants to stay with them. Where associations were

> formed by people, who, espousing particular values or ideals, intended to pursue common goals, it would run counter to the very effectiveness of the freedom of association if they had no control over their membership (27 February 2007, no. 11002/05, *Associated Society of Locomotive Engineers and Firemen [ASLEF] v. United Kingdom*, para. 39).

For example, it was accepted in all Contracting States that religious bodies and political parties can generally regulate their membership to include only those who share their beliefs and ideals. The right to freedom of association did not comprise the right to become a member of a particular association (see already European Commission on Human Rights, 13 May 1985, no. 10550/83, *Ernest Dennis Cheall v. United Kingdom*). However, the expulsion from an association could constitute a violation of the freedom of association of the member concerned if it was in breach of the association's rules or arbitrary or entailed exceptional hardship for the individual (*Lovrić v. Croatia*, paras. 54 and 72).

These findings can also apply to religious communities. Regarding the latter aspect of exceptional hardship, it must be noted that, unlike "normal" associations, religious communities can claim their right to freedom of religion under Article 9 ECHR, besides freedom of association under Article 11 ECHR. Therefore, their human rights position is particularly strong in the process of balancing. Consequently, it can be argued that the requirement of an exceptional hardship must be interpreted very narrowly. Regular consequences of an exclusion from membership due to a certain religious misconduct that are well-known to actual members cannot be qualified as exceptional. This is at least true in cases where there are no extraordinary circumstances in the person excluded that require special treatment.

After all, the perspective that excommunication or disfellowshipping due to a certain religious misconduct can lead to social distancing or shunning generally does not interfere with the right to freely leave a religious community, which is enshrined in the right to freedom of religion under Article 9 ECHR. It does not exert inadmissible pressure on members to remain in the religious community.

IV. Relationship Between Family Members and Former Fellow Believers and the Excommunicated Former Member

The relationship between family members and former fellow believers on the one side and the excommunicated person on the other side can fall within the protection guaranteed by the right to respect for private life and family life under Article 8 ECHR. In that context, it must be taken into account that family members who remain in the religious community and former fellow believers of the excluded person additionally hold a relationship with that community. They can be the addressees of its social distancing or shunning commandment or recommendation. Thus, they may be able to invoke their freedom of religion under Article 9 ECHR to break off contact with the excommunicated or disfellowshipped former member.

Many of the aspects already mentioned in the explanations regarding the relationship between the religious community and the excommunicated former member are also relevant for the relationship between family members and former fellow believers and the excommunicated person. This has to do with the fact that social distancing or shunning is executed by the members of the religious community as natural persons.

Again, the excommunicated former member does not have a contact right against another person outside of his/her inner family if that person does not want to enter into, or maintain, such contact. The reasons for the refusal of contact may vary, and their level of comprehensibility and seriousness legally does not matter because they are not necessary as a counter-right. It is possible that a remaining member of the religious community either simply follows the commandment or recommendation without questioning it or that he/she believes that ignoring the message would qualify as sin.

Furthermore, the remaining member might think that he/she does not want to waste time with a person who has left, according to his/her conviction, the right religion, particularly when religion had been the only bond between the parties. This may be a very likely reason regarding religious communities that are not mainly linked with a certain territorial, cultural, or linguistic origin but primarily fill their lines by recruitment in the framework of missionary activities. It is also possible that the remaining member holds that following the religious community's code of conduct needs his/her whole attention and that he/she

therefore should not associate with people who could send out disruptive signals and tempt him/her to turn his/her back on religion as well.

Concerning contact rights between family members, the legal situation is more complex. The explanations that have been made with regard to the relationship between the religious community and excommunicated former members laid down the cornerstones for the human rights assessment. When excommunicated persons wish to maintain contact by reference to their right to respect for family life under Article 8 ECHR, the addressed family members who remain in the religious community may invoke their freedom of religion under Article 9 ECHR and also their right to respect for private life and family life under Article 8 ECHR as counter-rights. Thus, the conflicting rights (and interests) must be weighed and balanced to find an answer to the question whether a legal position of the excommunicated person is violated.

In this context, it should be mentioned that the European Court of Human Rights in its admissibility decision in the case *Šijakova and Others v. Former Yugoslav Republic of Macedonia* took a restrictive approach to legitimate state interference into family life:

> [T]he issue of maintaining contacts and communication between parents and children who are not minors, and the respect and affection they extend to each other, is a private matter, which concerns and depends on the individuals bound in a family relationship, the lack of which, and the reasons for and origins of such lack, do not call for a positive undertaking by the State and cannot be imputable to it (6 March 2003, no. 67914/01).

As mentioned, the notion of family usually implies close personal ties with strong emotional bonds. In situations where a family member is excluded from a religious community and other members remain in that community, there may often be a lack of such close personal ties. Family members may have alienated from each other already before the religious community has decided on the excommunication or disfellowshipping of the person concerned, because they were the first to realize or detect the religious misconduct. This may have happened when, for example, that person has committed physical or emotional violence toward family members, has taken drugs or excessively drunk alcohol on a regular basis, cheated, did not return home without prior announcement for days or even weeks, at a time, or violated his/her maintenance obligation or obligation to take care of the material needs of the family in the long term. It is also possible that alienation took place because that person has started to

blaspheme about religion, to ridicule the religious doctrine, the spiritual leaders or the (fellow) believers, or, on the other side, to use racist or misogynistic propaganda or to turn to other kind of hate speech or commitment to violence.

Adults are generally not required to contact or to maintain contact with excommunicated adult family members if they do not wish to do so. In that regard, social distancing or shunning cannot violate the excommunicated person's right to respect for family life under Article 8 ECHR. Regarding minors, there must be a thorough analysis what excommunication or disfellowshipping really means in the religious community concerned and what consequences are to follow by members if there is, according to the theological or religious doctrine, the possibility that a child or minor is excluded from membership or if a parent or parents are excommunicated while having a child remaining in the religious community.

As explained, the European Court of Human Rights rightly stresses the rights of children in its case-law. The Court assumes that it was principally in the child's interest to maintain his/her ties with his/her parent(s). But it also admits that there may be situations where further (regular) contact would harm the child's health and development. Therefore, the Court insists that in each individual case where a conflict arises there must be a comprehensive weighing and balancing of the child's rights or interests and those of the parent(s). That process should not least consider the child's age and level of maturity, the presence or absence of his/her parents and his/her environment and experiences (*Neulinger and Shuruk v. Switzerland*, para. 138). After all, it cannot be said that social distancing or shunning of (former) fellow believers that affects a child or children generally constitutes a human rights violation. If such behavior takes sufficient account of the interests of the child/ren in question, it is in accordance with the European Convention on Human Rights and other human rights instruments protecting the rights of the child.

V. Conclusion

All things considered, the right to respect for private and family life under Article 8 ECHR is a weak instrument for an excommunicated or disfellowshipped person to defend himself/herself against religiously motivated social distancing or shunning in the triangular relationship with the religious community that

ordered or recommended such a measure, (former) fellow believers and family members remaining in the community. The European human rights system guarantees religious communities a far-reaching freedom of religion to define their system of faith, their membership rules, and their code of conduct. Members cannot claim freedom of religion against their religious community but are limited to the right to freely leave the community.

The right to respect for private life does not guarantee contact rights against persons outside the inner family who do not share the wish for contact. Conversely, the addressed persons can invoke their own right to private life and, in case they have religious reasons not to establish or maintain a relationship, also their freedom of religion under Article 9 ECHR to fend off such a request. Therefore, a religious community that commands or recommends its members to socially distance themselves from, or shun, an excommunicated or disfellowshipped former member, directs its members only to a legally permitted activity or omission. This cannot qualify as a measure violating the human rights of the excommunicated or disfellowshipped person.

Similarly, the right to respect for family life regularly does not establish contact rights between adult family members. Fathers, mothers, adult children, and siblings need not enter into or remain in contact with an excommunicated or disfellowshipped person. However, the legal situation is more complex when minors are affected by social distancing or shunning. In that case, the content and extent of the measure issued by the religious community must be clarified, and a thorough weighing and balancing of the rights and interests of both the minor and of the family members concerned must take place. Only if such examination leads to the result that the rights and interests of the minor prevail over conflicting positions of family members who want to execute the social distancing or shunning measure, then the religious community in question could be blamed to violate human rights.

National authorities and courts that have to decide about legal consequences for religious communities where social distancing or shunning is practiced must therefore consider very carefully the various human rights positions within the triangle of religious community, excommunicated former member, and (former) fellow believers and family members remaining in the community. The latter two groups can claim their own right to respect for private and family life under

Article 8 ECHR and their freedom of religion under Article 9 ECHR when they end any contact with the excommunicated or disfellowshipped person.

Furthermore, the content and extent of the social distancing measures must be examined. The notion of shunning belongs to the language of the anti-cult movement (Pel 2023, sub 1 and 5). But it is primarily on the religious community itself to define and explain its doctrine and its code of conduct for members. That right is included in its church or religious autonomy and its right to self-determination under Article 9 ECHR. Representatives of other churches or religious communities, which are competitors on the market of religious offers to ascribe sense to the life of humans, and also activist ex-members, who gathered together to fight against the particular religious community or against any kind of religious community, do not qualify as expert witnesses about the religious faith or practice of that community.

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