

Panel Religious Establishments and Church-State Separation

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In European Law(s)

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While the US Supreme Court is using new tests to transform the most rigid versions of the principle of separation into a principle of impartiality linked to a guarantee of non-discriminatory public policies towards religions, Europe remains extremely diverse, with 46 states with very different regimes, ranging from state churches to secular separation regimes. The European Court of Human Rights affirms the need for a neutral state that guarantees pluralism. However, its oversight in this area remains fairly limited, recognising that states have a wide margin of appreciation 'in delicate matters relating to religion'. Thus, none of the national regimes is considered incompatible per se with the Convention. The communication presents some unique features of Belgian law on neutrality towards recognised religions and philosophies.

Diversity - In Europe, the constitutional principle of separation of church and state takes a variety of forms in the 27 states of the European Union and the 46 states of the Council of Europe. Many of these 46 states are themselves federations, or are made up of regions with varying degrees of autonomy in terms of their religious practices. The principle of separation between church and state is not constitutionally guaranteed in all the system.

Between Established Churches, Concordatarian Church in Italy or Spain ou Alsace Moselle and French laicite , different systems of establishment exists, even if the neutrality of the state is affirmed. The main issue is changing : no more about religious freedom, guareented to all, but the non discrimination between privileged = recognised religions.

Belgium has recognized 6 religions and 1 non confessional philosophy. By consequence, Belgium State is paying the salaries of the clergy of recognized church in all recognized parishes, and even pay the delegates of recognized humanist movement named "laïcité" in Belgium. Other benefits of a recognition is a special course of recognized religion in public schools, and special offices of chaplain in army or prisons or hospitals paid by the state.

The criteria for such recognition are at the disposal of the government, and Belgium has been condemned in 2022 by the ECHR due to the opacity of the criteria and the lack of procedural guarantees. Since 2006 Buddhism tried to be recognized as a non-confessional philosophy, and not a religion. Laïcité as the first recognized philosophy opposes to that recognition, saying that buddhism is a religion.

However, over the course of the twentieth century, sociological and historical developments have gradually demonstrated the importance of this principle of separation and church autonomy.

Pluralism Polarization = Secularist state posture - Several European crises have complicated the issue of church autonomy and the principle of church and state separation : how to change the system of recognition which was a “positive one” to a “negative one”. We talked yesterday of suspicion or hostility, not indifference : the crisis of "dangerous cult abuses" in the 1990s, the crisis of sexual abuse in the Catholic Church in the 2000s, the crisis of radicalization of certain religious actors, notably in Islam, the polarization of ethical questions around abortion or euthanasia, all of which lead to new fears and suspicions about religions. At a time when the moral value of religions is partly discredited, the rise and universalization of new fundamental rights such as gender equality and non-discrimination is also at stake. Even in France, where the principle of "separation" is asserted, new legislation in 2021 criminalizes "separatism", essentially against community self-separation in certain Muslim social realities.

State Neutrality – US case law and doctrine formalize some tests about non establishment, even if they are unstable and changing, like the disparition of the Lemon Test. But the main interest resides in the US analyse about balancing NE and FE, that is trying to discuss a common definition of religion in both parts. What about this in Europe ? Do we have 46 ways to compare NE and FE ? In a first approach, yes, we have potentially 46 ways to compare NE and FE. **But I think that at the end of the day no European country at all is trying to formalize a balance between the scope of religion in both aspects avec NE and FE.** By way of consequences we lack in Europe of a coordinated approach even in the case law of the ECHR. Neutrality means in European countries no coercion in religion, impartiality among religion, and sometimes or somewhere invisibility of religion. But through the mechanism of the national margin of appreciation very high about the “delicate religious questions in democracy”, every system generally escape to a condemnation by ECHR.

Submitting legal personality to excessive conditions, coercion in religion, discrimination between religions, and also a too rapid change about a national system are condemned by echr. It is not the role of the State in forcing religious groups to merge, even in the interests of peace.(Hasan and Chaouch c Bulgaria 2000) Within the Council of Europe, since 1990, the advisory mission of the Venice Commission has to be underlined and the Legal Guidelines produced about regulation and recognition systems.

Three examples from Belgium :

1. no laws have been adopted about a clear definition of neutrality : the constitutional court in a decision on 4 june 2020 decided that any public authorities may choose between exclusive neutrality or inclusive neutrality.
2. In public schools, till 1959 a neutral course of ethics was compulsory for pupils who not choose a religion course. In 2002, the first humanist movement named Laïcité was recognized and supported by the state. In 2015 the Constitutionnal court said that constitution has been implicitly revised in favor of non confessional philosophy, and by consequences the cours of ethics has to be dedicated to this new organization and by consequences was no more neutral, and thus by consequence any religion or ethics cours could remain compulsory : a new system of opt-out should be organized.

3. Among the conditions for recognition of local communities, Belgian law has required since 2004 that community leaders commit to respecting human rights and removing any hostile agents, and even leaders must commit to ensuring that no literature hostile to human rights is present in places of worship.

Secularization The rate of secularization is rising rapidly and is very high, particularly in Western Europe, and especially in North-Western Europe. Religious inculturation is on the rise, and some see this as the cause of new misunderstandings, and therefore of new violent conducts or emotions. Other researchers, however, see a certain post-modernity making its way into North-Western Europe among the younger generation, and slowly fostering a more pacifist, but relativistic, spirit of tolerance.

The deepening phenomenon of secularization then reopens the question from two angles not necessarily compatible:

Trivialization - the generalized trivialization of beliefs and convictions in Europe, lead to the "religious" being drowned in a generalized postmodern relativism. As a result, it no longer needs to be accorded any specificity. Nothing is in fact "serious" or "coherent", and certainly not religion any more than anything else. Religious faith is just another cultural choice. Whether you're a Catholic, a basketball player, a French fries connoisseur or a tattoo artist, it's all the same. When all is said and done, no specific regime is yet conceivable or acceptable for religious and lifestyle philosophies. This "trivialization" has a singular effect on non-discrimination law and church autonomy. The legal condemnation of indirect forms of discrimination leads to the reinforcement of tests by *results* (rather than justifications) which may bring to light implicit stereotypes and specifically religious biases, but whose corrective measures will then be extended to the benefit of all cultural singularities (for example, in Belgium, the UNIA principle of the highest common denominator).

Pejoration - treating the religious as folklore or personal fancy is not necessarily the end of the process. Deepening secularization can lead to "exculturating" the religious. The incomprehensibility of religions can lead to making it suspect. Seriousness and coherence then become the hallmarks of a fundamentalist or even radical group, whose compatibility with a secular society comes into question. A recent opinion from the European Court of Human Rights, implemented by Belgium's Council of State in 2024, discusses a policy of "weak signs" which leads to fire a security guard being accused of a vague closeness to the Muslim Brotherhood. The legal status of his intense prayer activity also seems to have become pejorative. What is partly at play behind this pejorative movement ultimately leads to the disqualification of all religious autonomy as a fundamental right, and reinforces in practice a progressive priority to be given to implicit loyalty control over explicit legal guarantees.

What are the emerging responses to these new challenges?

The first European point to emphasize is the fundamental diversity of national responses. The second point is the very slow and very partial unifying role of the European Court of Human Rights.

Slow convergence - The European Court of Human Rights recognizes a wide margin of appreciation for States, firstly on the basis of the factual and statistical findings of the political divergences just mentioned, but also, in a more theoretical and substantial way, by indicating that the Court will limit its control in "delicate religious matters", "which are reasonably controversial in a democracy".

The European trends that seem to be emerging

Apart from a system of recognition and state subsidies

With regard to the autonomy of churches and the non-intrusion of public authorities, particular mention should be made of two key judgments in European case law: eur.D.H. Court (Grand Chamber), judgment of July 9, 2013 (SINDICATUL "PĂSTORUL CEL BUN" vs. ROMANIA) , no. 2330/09, ; eur.D.H. Court (1st instance), judgment of December 1, 2015 (KÁROLY NAGY v. HUNGARY) , no. 56665/09, upheld by the Grand Chamber, eur.D.H. Court (Grand Chamber), judgment of September 14, 2017 (KÁROLY NAGY v. HUNGARY) , no. 56665/09). The Court's formula affirms the right to autonomy, both in relation to the question of unionization of the clergy and to the question of the rights of defense, but it does so with a new prudence, linked to the objectification of the real risks feared as an infringement of autonomy.

In France, two months ago, the Cour de cassation, in a ruling dated April 4, 2025, confirmed the principle of autonomy in relation to the rights of the defense (article 6 ECHR not invocable by the Catholic clergy, who are not in a civil law relationship).

Within a system of public recognition and state subsidies: about unconstitutional conditions

Three months ago, the Belgian Constitutional Court, in a ruling dated March 20, 2025, concerning the rights of a teacher of Islamic religion, who the Court found to be not only a minister of religion but also a public teacher, and therefore in a "hybrid function", which means that the religious leader is under a greater obligation to justify his decision (the Conseil d'Etat may verify that the decision 1) is duly motivated, 2) is not vitiated by arbitrariness and 3) has not been taken for a purpose unrelated to the exercise of the autonomy of the religious community concerned).

The same new proportionality test

ECHR GC Sindicatul, § 159 "(...) a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' trade-union rights compatible with the requirements of Article 11 of the Convention. It must also show, in the light of the circumstances of the individual case, that the risk alleged is real and substantial and that the impugned interference with freedom of association does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake..."

Conclusions

The ultimate question, then, concerns the procedural tension that runs through the background of these debates: between democratic recourse to the explicit requirements of the law, on the one hand, and, on the other, recourse to the implicit, even secret techniques of “raison d'Etat”, intelligence services and the control of supposed or expected loyalties. The regulation of religious groups autonomy will remain a major test of the balance to be struck between these two aspects of State governance.