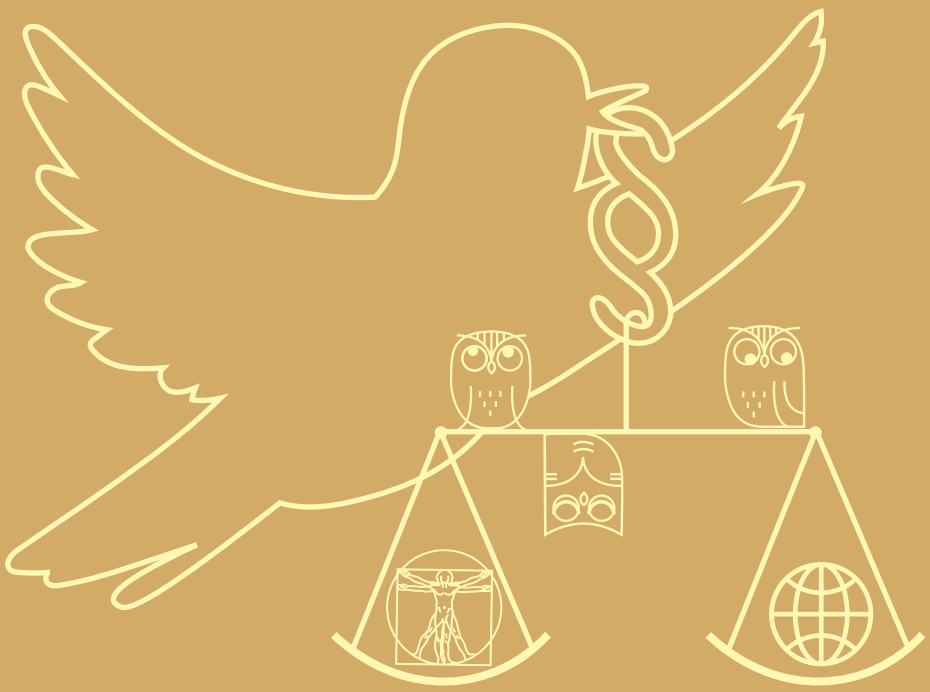
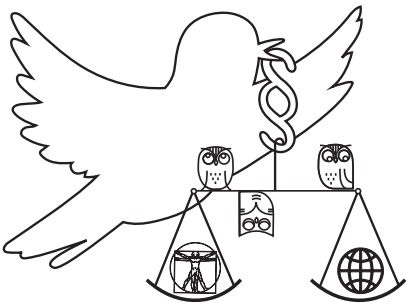
Jasminka
Hasanbegović (ed.)



ON EQUALITY & LIBERTY

AND THEIR CONTEMPORARY LEGAL MEANING: FROM SW 61 OF THE LUCERNE IVR WORLD CONGRESS

DOSIJE STUDIO



Jasminka Hasanbegović (ed.)

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Marko Božić*

EQUAL LIBERTY TEST: A PROLEGOMENON FOR AN AXIOLOGICAL DEFINITION OF A SECULAR STATE

The paper examines the way equality and liberty may contribute to the theoretical debate on the definition of a secular state. Its starting point is the idea that a modern state, with its liberal and democratic legitimacy, should guarantee religious liberty in an equal manner to everyone. However, most modern states either provide legal measures to restrain religious liberty as such, or do not treat all their citizens equally, but deliberately make some of them more equal than others. Therefore, a simple definition of a secular state, closely connected to the values of liberty and equality, is only an ideal and does not correspond to any empirical phenomenon. As such, it cannot offer the basis for a scientific theory, but it may be scientifically useful as a heuristic tool, and instrumental in evaluating different governmental practices and legislative policies.

Key words: *Secularism. – Liberalism. – Democracy. – Equality. – Liberty.*

1. INTRODUCTION

It is widely believed that secularism is one of the standard values of liberal-democratic constitutionalism. But, what does secularism actually mean? At the constitutional level, all European countries are secular,

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meaning that the state is officially religiously neutral. However, in reality legal frameworks stemming from these constitutional premises differ from state to state. They range from the laical approach, where religion belongs strictly and exclusively to the private sphere, as in the French political system, the so-called state churches, common for the Scandinavian and Greek political model, to advanced clericalization, typical for the Eastern-European transitional democracies. Hence, the question arises as to what kind of secular politics the modern democratic state is allowed to carry out, and consequently that of equality and liberty, as fundamental values affecting these dilemmas once they are interpolated into the constitutional discourse on secularism.

The following lines examine the way that equality and liberty may contribute to the theoretical debate on the definition of a secular state. Their starting point is that a simple definition of a secular state closely connected with the values of liberty and equality and understood as state non-interference policy, is only an ideal and does not correspond to any empirical phenomenon. As such, this definition cannot offer the basis for a scientific theory, but it may be scientifically useful as a heuristic tool and instrumental in evaluating different governmental practices and legislative policies.

2. SECULAR STATE – A CONCEPTUAL PROBLEM

In 2013, the Slovakian Government decided to celebrate the 1150th anniversary of the arrival of Christianity on Slovakian soil. The Slovakian National Bank took part in this event by minting a special commemorative euro coin featuring Byzantine monks Saint Cyril and Saint Methodius, with halos and crosses on their chests.

However, the European Commission (EC) found the design of the coins unacceptable since the EU diversity rules forbid any signs of inclination toward a single faith, whatever that faith may be, and as a consequence ordered the Slovakian Government to redesign the commemorative coins by removing the haloes and crosses (Higgins 2013).[1]

Yet, what makes this decision of the EC particularly controversial, providing an excellent topic for scholarly debate, is the absence of an actual and sound legal basis for it. Namely, even though it is widely believed that the European Union (EU) is a secular political entity (and that, therefore, this controversial decision was not unexpected), a closer look at the EU constitutional framework – a long series of founding treaties, from the treaties of Maastricht, Amsterdam and Nice, to the Treaty of Lisbon – indicates that there is no clear definition of what the EU secularism actually means, nor an intra-EU consensus on the exact meaning of the said "secularism" either. As it will be shown later, these documents practically do not pronounce on the issue of secularism at all, while, at the national constitutional level, all EU Member States are defined as secular.[2]

1 At the state level, however, some interesting charges in regard to the controversial issue of the Slovakian commemorative coins came from France (as a laical state with the most rigid separation) and Greece (where the Church and the State are closely intertwined). The French Government objected to the Christian symbols appearing on the Slovak coins because they would also appear as legal tender in France, while Greece protested because it considered the Greek-born monks Cyril and Methodius part of its own cultural heritage.

2 As indicated in the Introduction, there are various models and degrees of such separation: from the French laical model, with the religious belonging strictly and exclusively to the private sphere of life, to the so-called state-church model common in the Scandinavian and Greek political traditions, and the

While the above, surely, is not an exclusively EU issue, it confirms one of the underlying dilemmas of every theory of secularism: if there is a consensus that a secular state must be religiously neutral or, more precisely, that it must implement separation between private belief and public policy, it is also true that there are as many models of separation as there are states.

3. EQUAL LIBERTY – AN AXIOLOGICAL SOLUTION?

In order to find a plausible answer to abovementioned questions, i.e. to determine not only what the common denominator of EU secularisms may be, but also to define the place and role of secularism in a modern liberal democracy in general, one should take into account equality and liberty as fundamental values of liberal and democratic constitutionalism.

The starting point of secular logic is the idea of a liberal state understood as the guardian of human rights and liberties. One of the liberties that the liberal state is supposed to protect and promote is religious liberty, defined, *inter alia*, as the free manifestation of individual or collective beliefs through teaching, practice, worship, and observance. As such, religious liberty is closely linked to freedom of thought and consciousness, being (also) the very origin thereof. However, if the purpose of a liberal state is to guarantee religious

post-communist countries and transitional democracies that have experienced an overwhelming wave of new clericalization. Additionally, each of these models claims that it practices some kind of separation of church and state. There are several collections of papers that provide thorough comparative studies on distinctive European experiences in this field. See e.g. Champion 1993; Bauberot 1994; Robbers 1996; Haguenau-Moizard 2000; Giard 2002; Bauberot 2006.

liberty, the aim of a democratic state should be to ensure equal protection of this liberty to all its citizens without discrimination, i.e. regardless of their beliefs and religious choices. Therefore, it would be relatively easy to conclude that a modern state with liberal and democratic legitimacy should guarantee religious liberty and should do it in an equal way. In other words, the basic definition of the secular state is twofold: to be secular, a state must protect religious liberty, and it has to do this in an equal manner.

Nevertheless, this equal liberty model, as simple as it is, can be easily challenged by political reality: despite the fact that every modern liberal democracy, *per definitionem*, recognizes and protects religious liberty, it rarely does so without controversy. Most modern states, in practice, either adopt legal measures to restrain religious liberty, or they do not treat all their citizens equally regardless of their confessional identity, by deliberately making some of them "more equal" *vis-à-vis* others.

Furthermore, there are liberal democracies that have adopted a form of a so-called system of recognition, meaning that the state does not provide all religious organizations with the same legal status (set of legislative privileges, obligations, rights, and restrictions). In these systems there are usually one or more privileged churches that enjoy special legal treatment concerning state financial benefits – such as tax exemptions or direct subsidies – that other religious organizations cannot count on. The reasons for such special treatment are different, but they predominantly stem from the presupposed social importance or historical role of the privileged religious denominations.[3]

3 For example, Article 10 of Serbia's 2006 Law on Churches and Religious Communities (Zakon o crkvama i verskim zajed-

Also, there are states that purport to have a secular character, or even consider themselves champions of

nicama, *Official Gazette of the Republic of Serbia*, No. 36/06), introduced the categories of "traditional church" and "traditional religious community", as religious organizations with historical continuity, with many administrative and financial benefits. Besides the Serbian Orthodox Church, this status is also given to the Roman Catholic Church, the Islamic and the Jewish communities and the three Protestant denominations with the greatest congregations. Additionally, Article 11 of the Law recognizes the exceptional historical, statehood and civilizational role of the Serbian Orthodox Church in the formation, preservation and development of the Serbian national identity. This legal differentiation legalized some previous discriminatory governmental measures (e.g. the 2001 Uredba o organizovanju i ostvarivanju verske nastave i nastave alternativnog predmeta u osnovnoj i srednjoj školi [Governmental Regulation on Religious Instruction], *Official Gazette of the Republic of Serbia* No. 46/2001, which recognized the right to organization and implementation of religion classes in public schools only to these seven traditional churches and religious communities) and justified all further discriminatory legal solutions, as was the case with Article 55 of the Serbian Value Added Tax Law (Zakon o porezu na dodatu vrednost, *Official Gazette of the Republic of Serbia n° 84/2004, 84/2004, 86/2004 – correction, 61/2005, 61/2007, 93/2012, 108/2013, 6/2014 – harmonized dinar amounts, 68/2014 – other law, 142/2014, 5/2015 – harmonized dinar amounts, 83/2015, 5/2016 – harmonized dinar amounts, 108/2016, 7/2017 – harmonized dinar amounts 113/2017, 13/2018 – harmonized dinar amounts 30/2018, 4/2019 – harmonized dinar amounts, 72/2019 and 8/2020 – harmonized dinar amounts*) providing exemption from the VAT tax only to the traditional churches and religious communities. As such, the Serbian legal system discerns four types of religious communities with a distinctive legal status, i.e. a set of rights and benefits. Firstly, it makes a basic distinction between the recognized and non-recognized religious communities. Then, it classifies the recognized communities into two groups: the traditional and non-traditional. Finally, it recognizes the specific role of the Serbian Orthodox Church in order to justify its privileged political and social status in contemporary Serbian society.

secularism, even though in reality they have imposed numerous legal restrictions on religious liberty, understood as a free public manifestation of religious feelings and beliefs. Those are political cultures with political evolution marked by a previous severe conflict between religious and political authorities, with one dominant church continuously and persistently contesting the results of political modernization, and in which the state has traditionally had a hostile attitude toward religion as such. In those countries, such as France or Turkey, religion is strictly restricted to the private sphere of life and banned from the public space.[4]

Going back to the equal legality test, for example, it can be claimed that a secular state should be completely free to forbid school teachers, to use religious symbols at work, in order to protect schoolchildren from religious proselytism sponsored by the state – personified by school teachers as civil servants. However, at the same time, in some states such as France and Turkey the legal ban on the Islamic headscarf (and other religious symbols, such as the Christian cross or the Jewish kippah) applies not only to school teachers, but also to schoolchildren, who are then obviously limited in their constitutional right to free manifestation of their beliefs, on the pretext that religiously motivated practice could harm the religiously neutral character of the state and the school as a public service.[5]

4 For the French case, see Lalouette 2002; Ormieres 2002; Durand-Pringborne 2004; Bauberot, Wieviorka 2005; Haarscher 2005, and for the Turkish case see Akgonul 2008; or Anciaux 2003.

5 There are several French critical analyses of these legal politics that inspired our reflections (e.g. Robert, Duffar 1999; Robert 2004; Airiau 2005; and especially Bauberot 2006), as well as a series of American authors that contributed to the debate on the 2006 French legal ban of the Islamic headscarf (e.g. Lay-

This example is illustrative, but also indicative of the simple strategy that a liberal democratic state should adopt in order to ensure the secular character of its public policy: the principle of non-interference in religious matters. By adopting a public policy based on non-interference, a state would easily satisfy both requirements of the previously proposed equal liberty test. A liberal state would satisfy the first requirement by restricting or forbidding only those individual or collective manifestations of faith that are obviously harmful to other citizens or the public order. These acts should be treated as criminal not because of their religious nature (as is the case in the aforementioned French and Turkish legislation and which should be irrelevant as such), but simply because of their harmful social consequences. As for the second requirement, a strategy of non-interference would relieve a democratic state of endless political debates on how exactly the political authorities should settle the unequal legal treatment of unequal religious denominations (unequal by, for example, the size of the congregations or historical importance). In other words, such an approach would avoid the labyrinth of commutative justice.

4. EUROPEAN REALITY – AN EMPIRICAL CHALLENGE

Unfortunately for the philosophy of secularism and the definition proposed above, the policy of non-interference is rarely an option in modern liberal democracies. Contemporary experience best indicates how far from reality this axiological approach, based on a simple equal liberty test, actually is.

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cock 2005; Eisgruber 2005; Conkle 2005; Gedick 2005; Zoller 2005; Custos 2006; McGoldrick 2006).

As mentioned previously, even though it is widely believed that the European Union is a secular political entity, the EU constitutional framework – consisting of a long series of the EU founding treaties – does not precisely state what such EU secularism actually entails. For example, unlike the Treaty of Maastricht, the Treaty of Lisbon provides certain general remarks in the Preamble and in Article 17 of its Title II. The Preamble to the Treaty of Lisbon recognizes "drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law."[6] The fact that the Treaty of Lisbon finds its inspiration in religious inheritance is only a type of recognition of the European spiritual heritage, and declared in a quite neutral way. At the same time, in order to protect EU diversity, the Preamble of this Treaty avoids mentioning any specific religion, especially Christianity, albeit it is still the predominant religion in the majority of European Union member states.

On the other hand, Article 17 of the Treaty states that the "Union shall maintain an open, transparent and regular dialogue with these churches and religious organizations" about important social issues, whereas the same article also stipulates that the "Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States." The aim of this provision, which had already been included in the Treaty of Amsterdam,[7]

6 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union are available at *https://register.consilium.europa.eu/doc/srv?l=EN&f=ST%206655%202008%20INIT* (last visited 18 July 2021).

7 Specifically, Declaration 11 included in the Treaty of Amsterdam. Official version is available at *https://europa.eu/*

is not protection of religion, but the division of power between the European Union and its member states. This practically means that the state–church relationship is the residuary competence of the member states and that the European Union is not empowered to act in this matter. Hence, when it comes to choosing partners for the open dialogue with churches and religious organizations, the EC recognizes only those churches and religious organizations that the member states had previously decided to recognize as such.[8]

Thus, it is necessary to approach the explication of the role and place of religion in the European Union legal order in a different way. A solution might be to consider the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention or ECHR) and the jurisprudence of the European Court of Human Rights (the European Court or the ECtHR). Yet, right at the beginning, this approach is disputable for two reasons. The first is formal in nature and quite banal: the European Convention is not a formally binding document for institutions and bodies of the European Union because neither the European Union nor the European Communities are among the contracting parties. Hence, citizens of European Union member states have no possibility for bringing an application before the ECtHR regarding presumably illegal actions by the EU's executive bodies pertaining to religious liberties.

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european-union/sites/europaeu/files/docs/body/treaty_of_amsterdam_en.pdf (last visited 18 July 2021).

8 The European Political Strategy Centre (EPSC, formerly Bureau of European Policy Advisors – BEPA) is a body that conducts this dialogue through regular meetings with different representatives of major religious organizations. It reports directly to the President of the Commission.

However, there are at least two arguments why the European Convention actually might be considered a part of the EU legal order and, as such, relevant for this survey on EU secularism. One is the fact that all EU member states are bound by it, and another is that the Court of Justice of the European Union in Luxembourg considers the Convention a source of unwritten principles of fundamental rights within the Union.[9]

The second contention is substantive in nature. The ECHR does not specify the most appropriate state–church relationship model. In Article 9, which defines religious liberty as an individual right and establishes the state obligation to protect it, the Convention says nothing about how this protection should be organized on the state level nor does it impose any sort of compulsory secularism. The ECtHR has not used its case law to define any model of church and state relationship or secularism. Its focus is on the rights of private individuals and not the broader aspects of law and religion. Actually, the ECtHR's reasoning has been pretty much in line with the logic of the Treaty of Lisbon, and the European Court has tried not to prejudice the status under the national legislation on churches and religious communities. The European Court holds that the State's attitude toward religion is primarily a political issue and it is the result, to a large extent, of the historical tradition and the social circumstances of each country. "Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the

9 See Opinion 2/94 on Accession by the Community to the ECHR (1996) ECR I-1759. Official version is available at *https://www.cvce.eu/content/publication/2001/8/22/db253212–9e45–4545–8179-f6d51dd059c0/publishable_en.pdf* (last visited 18 July 2021).

role of the national decision-making body must be given special importance."[10]

However, the ECtHR case law does provide a set of protection standards that every European state is supposed to observe. In that way, indirectly or implicitly, Article 9 of the Convention, and the ECtHR case law, has already influenced arrangements between the governments and religious denominations in the European Union member states.

Namely, there are two compelling judgments that illustrate the importance of the ECtHR case law in this matter. The first is the 1993 judgment in the case of *Kokkinakis v. Greece*,[11] in which the Greek official prohibition of religious proselytism was considered a violation of Article 9 on religious freedom. It is important to note that the Court held that the so-called state–church system in Greece is compatible with the European Convention on Human Rights or, in other words, that the state did not have to collaborate with all religious groups on an equal basis. However, should the state choose to collaborate in a special way with only one church, as the Greek state had decided, this special collaboration may not, as a side effect, cause unjustified harm to the rights and freedoms that other religious groups and individuals enjoy. In other words, the fact that the state is allowed to privilege certain religious

10 *Leyla Şahin v. Turkey*, App. 44774/98 (ECtHR, 10 November 2005).

11 *Kokkinakis v. Greece*, App. 14307/88 (ECtHR, 25 May 1993). As a Jehova's Witnesses, Mr. Minos Kokinakis and his wife were invited into the home of Mrs. Kyriakaki, in Sitia, and engaged in a discussion with her. Mrs Kyriakaki's husband, who was the cantor at a local Orthodox church, reported the applicant, Mr. Kokkinakis, to the police and Mr. Kokkinakis was convicted for proselytism, under the Greek criminal law.

communities, does not mean that it can deprive others of their fundamental rights.[12]

The second example is the judgment in the case of *Rommelfanger v. Germany*.[13] This is an even more interesting case since it confirmed not only the legality of a controversial German law, but of European Union Council Directive 2000/78/EC, which provided an important exception to the non-discriminatory principle in an attempt to, ironically, establish a general framework for equal treatment in employment policy. Article 4 of this Directive established the employer's right to demand the loyalty of the employees regarding the respect of "ethos" – religion and moral views of the organization they work for. This practically means that churches and religious organizations, once they act as employers (especially those running hospitals, schools or welfare institutions), are free to take into account the religion or beliefs of candidates when making recruitment decisions, and that they can request current employees to act in good faith and loyally to the organization's ethos.

As these two landmark cases demonstrate, the European Court has given the states a large margin of

12 Similar to this is the judgment in *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, in which the Strasbourg Court confirmed that the state cannot compel citizens to believe nor restrain their belief in any given way. More precisely, the state is forbidden to organize its educational system in such a way so as to impose on pupils certain religious or moral views contrary to the religious or moral views of their parents. *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Apps 5095/71; 5920/72; 5926/72 (ECtHR, 7 December 1976).

13 *Rommelfanger v. Germany*, App. 12242/86 (ECtHR, 9 June 1989). Dr. Rommelfanger, an employee of a Catholic hospital in Germany, publicly criticized the Catholic Church conservative standpoint on abortion and was dismissed by his employer, which both the German Constitutional Court and the ECtHR declared lawful.

discretion when they rely on "public policy" concerning religious liberty and the legal framework of the state–church relationship. In general, the European Court emphasizes a strong principle of equal liberty, but it leaves it to the states to decide on how this equality will be understood and implemented by them.

5. CONCLUSION

The absence of a clear legal definition of EU secularism, but first and foremost the controversial ECtHR's case law, can easily explain why, back in 2013, the Slovak National Bank decided to pursue its initial idea and rejected the proposal to mint coins without religious symbols in honor of the two Christian saints. The European Commission went along with this, and the commemorate coins were minted with halos and crosses only a few months later than originally planned (Higgins 2013).

This was a result of the fluid meaning and flexible interpretation of the EU secularism, which is no more than an illustration of a global phenomenon. The definition of a secular state – closely linked to the values of liberty and equality – is only an ideal and does not correspond to any empirical phenomenon. There is no such state that can duly and completely pass the equal liberty test. Instead of a simple strategy that might easily ensure the secular character of its public policy (the principle of non-interference in religious matters), most contemporary states either provide legal measures to restrain religious liberty, or they do not treat all their citizens equally, but deliberately make some of them more equal than others. On the contrary, with a non-interference based public policy, a state could easily satisfy both of these requirements. A liberal state may satisfy the

first requirement and duly protect religious liberty by forbidding only those individual or collective manifestations of faith that are obviously harmful to other citizens or the public order. These acts should be treated as criminal not because of their religious motivation, but because of their harmful social consequences. Secondly, a strategy of non-interference would relieve the democratic state of endless political debate on how exactly political authorities should settle unequal legal treatment of unequal religious denominations. In reality, this logic is rarely a guideline for governmental strategies.

However, even though the proposed axiological definition of a secular state is deprived of an empirical foundation, and, as such, certainly cannot represent a scientific theory, it is still scientifically useful. The liberty and equality test might serve as an excellent heuristic tool, which can help in evaluation of different governmental practices in a world of extremely different politics and legislations, wherein due respect of religious liberty – equal for everyone – is still more of an ideal than a reality.

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