Experiences of Western Democracies in Dealing with the Legal Position of Churches and Religious Communities

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ABSTRACT: The author argues that Europe is characterised by a two-level model with regard to religious freedom: Level A guarantees religious freedom as such while Level B deals with the superstructure of the system. He then analyzes problems found in these two levels. The conclusion - especially regarding level B – is that two clear trends can be identified: the criteria leading to material advantages for and some religious groups tend to become more objective; and the general trend in state policy goes into the direction of extending advantages to an increasing number of churches and religious communities.

1. The European Two-level Model with regard to Religious freedom

Although most European Union countries have their specific tradition concerning Church and State relationships, a model common to most of them can be identified rather easily. This model is characterised by the existence of two clearly distinguished levels with regard to law and religion.

Level A covers religious freedom as such. Can people freely chose their religion? What about basic facilities about acquiring property, gathering freely, changing religion? Level A also deals with somewhat more problematic concerns including proselytism and new religious movements.

Level B deals with the superstructure of the system. It presupposes the realisation of level A. Once religious freedom for all is solidly implemented, more specific Church and

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State relationships can be elaborated. On this level the state grants certain advantages or privileges to a limited number or religious groups, or concludes agreements and concordats with a selected number of them.

Clearly, this two-level model is typical for Europe and seriously differs from the approach in the United States of America, where religious freedom is guaranteed but where cooperation with religious groups is not compatible with the constitution. Of course, the European model, that looks rather generous at first glance, entails considerable risks. Granting advantages, attributing privileges, seems nice but is only compatible with international religious freedom standards in cases when religious freedom on level A is adequately guaranteed. In other words, the full protection of religious freedom on level A is a *conditio sine qua non* for the implementation of the agreements and advantages as covered by level B. For this reason, I shall first describe some problems and challenges connected with level A. Only later I shall focus on some problems linked to the superstructure of level B.

2. Problems on Level A

Generally speaking the protection of religious freedom in Europe is not so much of a problem. Tolerance is the general rule. But then again, problems do emerge occasionally and can be brought together under some major issues as the following list illustrates.

New religious movements

New religious movements became a hot issue in the nineties of last century. Why? Several elements emerged simultaneously. Some dramatic events connected with so-called *cults* occurred in both Europe and the United States (*Temple Solaire*, David Koresh shooting from his bunker in Waco, Texas). At the same time the fast secularisation taking place in many European countries increased scepticism towards the religious phenomenon as such. In some countries, including France, Belgium and Bulgaria, parliamentary reports and/or case law tended to be rather radical vis-à-vis new religious movements in general and Jehovah witnesses or Scientology in particular. Today, a more moderate approach becomes dominant.

Security

Here the key question is: To what extent can the events of 11 September 2001 influence the scope of religious freedom? From the standpoint of experts in religious freedom, this question is rather challenging as religion finds itself from the beginning onwards in a defensive position. Secular leaders hardly show any interest in the deepest feelings experienced by religious groups. Their main concern is the protection of their citizens

against all forms of violence, including that which has been possibly religiously inspired. Religious freedom experts will need solid arguments in order to convince governments and politicians.

The best approach with regard to the establishment of a new equilibrium between security concerns on one hand and religious freedom on the other hand, is probably the approach of careful and detailed analysis. Indeed, religious freedom in not a fundamental right similar to others. It is a sum of quite a number of rights which together constitute the more general notion of religious freedom. The elements being part of this construction are: freedom of conscience, freedom of creed, freedom of worshipping, freedom of expression, freedom of association and freedom of internal organisation. The six components will be affected differently by the confrontation with security measures. For instance, freedom of conscience and freedom of creed will remain intact, whereas freedom of expression or freedom of association might be slightly limited in cases where the conditions as set forward by article 9,2 of the ECHR are fulfilled.

Proselytism

Proselytism, the active and sometimes slightly aggressive spreading of a religious message, is often felt as somewhat problematic in a certain number of European states, especially the Orthodox ones. And yet, from a legal perspective little can be done to curtail activities in this field. Religious freedom is protected even if it is exercised in a rather unsympathetic way, with little concern for the traditional religion of those who are proselytised. Even if evangelical missionaries coming from the United States try to convert poor people in Siberia by promising them attractive scholarships for an American university, nothing can be done. No crime can be proven, granting scholarships is different from illegal bribery.

The only way to adequately tackle the proselytism problem lies in the conclusion of agreements between religious groups themselves. In these agreements they can freely decide, out of respect for other religions, not to exercise all aspects of the religious freedom they legally enjoy.

Autonomy of religious groups

Two different and conflicting trends emerge simultaneously.

(a) The formal ties between the state and dominating religious groups tend to weaken. In the nineteenth and the earlier part of the twentieth century, formal relationships between the state and major religious groups could hardly be avoided. The heritage of the old *societas perfecta* ideas meant that religions enjoyed a rather official status, which sometimes led to unexpected cross-connections with secular legislation. A

typical example: the state quite often guaranteed a high degree of free internal organisation by religions, but in exchange the norm was introduced that religious marriages had to be preceded by the secular conclusion of marriage. Today the state is, from a political perspective, less interested in religious organisations and their action. As a result of the decreasing political importance of religious groups, the state leaves them alone more easily than before, which increases their internal autonomy.

(b) At the same time, the horizontalisation of fundamental rights entails a growing interest by the secular government with regard to internal relationships in religious groups. For some years now secular judges have exercised control in areas concerning whether churches and religious groups follow their self established internal procedures. Increasingly, secular courts apply the old Latin maxim *patere legem quam ipse fecisti*. Also in other fields the growing influence of secular legal principles becomes visible. Labour law and non-discrimination principles tend to be applied within the legal framework of churches and religious communities. For instance, a Dutch tribunal decided that church courts had to take into account secular norms with regard to the protection of privacy and to the professional secrecy of medical doctors.

The combination of (a) and (b) shows an evolution in two different directions. Whereas religions enjoy more autonomy today than they did in the past as a result of their weakening political importance, they find themselves at the same time more strictly scrutinised, as a consequence of the ongoing horizontal application of fundamental rights within the current secular legal framework.

'Exotic' religions and public order

In theory all norms promulgated in a secular context are applicable to all. Norms are supposed to be neutral. Consequently, they influence all religions and religious systems in exactly the same way. Yet, *neutrality* is not as neutral as it seems. Just one example. Generally speaking one can say that *public order* is a traditional limit to religious freedom. People can exercise their religion completely freely as long as they do not enter into a conflict with public order in a continental sense, which means the basic principles and main ideas of the legal system they are operating in. Whereas this objective notion of public order affects all religious groups in the same way, one cannot deny that in practice some groups are treated differently. Indeed, Christian religions fit well in the existing system. They feel at ease within a framework which is highly coloured by a combination of ideas coming from a mix of the Christian legacy and the ideas fostered by Enlightenment. The latter is not true of course for more exotic religions such as Islam or Asian faith communities. Islam for instance finds itself at odds with the non-discrimination principle, equality between men and women and animal protection. Polygamy can be hardly reconciled with true emancipation of women. Ritual slaughtering

finds itself structurally questioned by always stricter norms with regard to animal protection. In other words: the formal notion *public order* is equally applicable to all. But then again, the content of public order tends to be more burdensome for exotic, non-western denominations than it is for religious groups with a long standing Christian tradition.

Legal personality and acquisition of goods

A basic problem for all religious groups is linked up with their ability to participate in daily legal life. Here, we meet with some questions such as: Can religious groups freely acquire goods? Do they need legal personality in order to achieve that aim? Or do they enjoy other possibilities, including their operating within the structures of a non-profit organisation? It is clear that in this field the situation differs from country to country and that it is thoroughly connected with the functioning of the legal system as a whole. For instance, it does not make any sense to claim legal personality for religious groups as an absolute requirement. What matters is not formal organisation, but concrete results. Consequently, the key question is: can religious groups adequately participate in daily legal life? Can goods be acquired? Is the functioning of religious groups within secular society easily accessible to all?

3. Problems on Level B

As the previous description shows, guaranteeing religious freedom in a consistent way is not an easy task. Although the general principles seem to be adequately safeguarded, some questions remain unresolved, some loopholes hardly can be avoided.

Yet, in case the problems described above are settled in a satisfactory way, level B can be tackled with a quiet mood. Indeed, Europeans have fewer problems with advantages and privileges than Americans do have. As almost all countries of the European Union have a majority church, they are used to maintain an elaborated relationship with major religious groups.

This leads to the following question. Once the general principle of preferential treatment given to some religions is accepted, which are then the objective criteria adequately distinguishing between groups qualifying for official support and others not finding themselves in such a position?

Generally speaking five criteria leading to legitimate preferential treatment can be distinguished.

(a) The number of the faithful. Statistics may be debatable on a technical level. Yet, as a principle, within a democratic society, they are probably a better criterion than any other one, as no ideological components are involved.

(b) History might also be taken into account. As a matter of fact it was perceived as relevant in Austria when the *Protestantengesetz* was issued in 1961. It also played a part in Finland, where the Orthodox do only represent one percent of the population, but are nonetheless recognised as a state religion. This in entirely due to the fact that the roots of Finland are situated in the Orthodox territory of Karelia, currently a part of Russia.

(c) Absence of criminal activities tends to be important in the eyes of secular leaders, which is of course understandable. But then, which criminal activities should be taken into account? Official viewpoints of religious leaders representing their groups obviously do qualify. But what about criminal acts committed by individual members? Do they bind the community as a whole? Or are they just a result of criminal inclinations resting with the individuals involved? In any case, the establishment of the link between the individual act and the ideology or the creed of the group is far from being unproblematic.

(d) Duration of the presence of religious groups in the country… Can secular authorities require any continuity with regard to the presence of religious groups in the country? Some hesitation is possible. Whereas a minimal structural stability is an acceptable requirement for state support, conditions connected with historical presence are more questionable. Indeed, they could hide a preference for old, possibly not very dynamic, religious groups, leading to an implicit negative attitude towards new religious movements.

(e) Should 'privileged' religious groups accept democratic values? This is a very difficult question. Probably the state can ask for an overall acceptance of democracy as a system and of the rule of law as a guiding principle. Yet, requiring full compliance with all fundamental rights could endanger the autonomy of certain religious groups. Just one example: the limitless application of the equality and non-discrimination principles can entail severe difficulties for the Roman Catholic Church refusing for reasons of divine law the ordination of women to the priesthood.

All this leads us to one final intriguing question: what about the future of level B? Basically, two options are conceivable, namely *le nivellement vers le haut* and *le nivellement vers le bas*. In other words, will the existing privileges granted to the major religions be extended to smaller, minoritarian groups or, other option, will the ancient privileges slowly disappear and give way to a general acceptance of religious freedom for all in a legal context without privileges?

The main tendency goes into the direction of *le nivellement vers le haut*. That is what happens in countries such as Spain, Italy and Belgium where smaller religions gradually enjoy privileges which in the past were strictly reserved to the dominate religious groups.

Yet, the opposite move is also thinkable. In that configuration, old religions lose part of their privileged position. The disestablishment of the Church of Wales and of the

Church of Sweden deliver an illustration of that principle. And in the Netherlands, in the early eighties of last century, the government decided to discontinue any future material support to churches by offering them one final financial compensation.

To sum up, although both techniques described above are possible, *le nivellement vers le haut* turns out to be both the more sympathetic and the politically more feasible approach.

4. Conclusions

The conclusions can be brief.

Firstly, Europe is characterised by a two-level model with regard to religious freedom. Level A guarantees religious freedom as such. Where the latter is effectively guaranteed, room is given to level B where advantages and privileges granted to just a limited number of religious groups are at stake.

Secondly, with regard to this level B, two clear trends can be identified: the criteria leading to material advantages for just some religious groups tend to become more objective; and the general trend in state policy goes into the direction of extending advantages to an increasing number of churches and religious communities.