Ius Novum
4/2018

THE UNATTAINABLE NEUTRAL STATE

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DOI: 10.26399/iusnovum.v12.4.2018.33/c.garcimartin

1. A DEPICTION OF STATE NEUTRALITY

The definition of State neutrality is, at first glance, quite simple. A neutral State is one that deals impartially with its citizens and does not take sides on the issue of what sort of lives they should lead.[1] Applied to religion, neutrality prevents public powers from interfering in religious affairs, leaving citizens and communities free to act on that field, of course, within the legal framework.

Neutrality may be considered an independent principle of State action, or a characteristic of the State that conveys two other principles: equality and incompetence of the State on the issue at stake.[2] One way or another, the neutrality of the State entails, on the one hand, that under identical conditions, the State cannot grant a better or worse treatment to anybody because of his religious beliefs, or to religious communities because of their religious ethos. Then, religion cannot be considered a standard to decide in competitive situations. On the other hand, the State cannot get involved in internal issues of the religious communities.[3] It has no power to assess the pronouncements of these communities nor to appraise the religious doctrines, either individually or comparing them.

Neutrality, however, is not a goal in itself. It aims to protect religious freedom, which is a fundamental right. In Europe, this right is guaranteed both at the national and European level, in the latter case mainly through the European Convention on Human Rights (ECHR).[4] Neutrality does not enjoy such protection, as it is not

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1 Cf. P. Jones, *The Ideal of the Neutral State*, [in:] R. Goodin, A. Reeve (eds.), *Liberal Neutrality*, Routledge, London 1989, p. 9.

2 Cf. J. Martínez-Torrón, *Símbolos religiosos institucionales, neutralidad del Estado y protección de las minorías en Europa*, Ius Canonicum No. 54, 2014, p. 114 ff.

3 Cf. M. Barbier, *Esquisse d'une théorie de la laïcité*, Le Debat No. 77, November–December 1993, pp. 78–81.

4 Article 9: "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community

a human right but a means to better protect one of those rights.[5] It is not an essential characteristic of those states committed to fully protect human rights. The European Court of Human Rights (ECtHR) has repeatedly emphasized that no system of relations between State and religion can be excluded a priori if religious freedom is guaranteed. Those systems fall within the margin of appreciation: the states may decide which kind of relationship they will have with religions.[6]

Despite this statement, a neutral position of the State seems to be more appropriate to fully protect religious freedom.[7] Where individuals are free to choose, the State should not evaluate the options nor line up with any of them, because the result would be an imbalance among the choices. If citizens can choose, the State cannot.[8] In other words, religious freedom would be better safeguarded if the State does not opt in matters of religion.[9]

The European standards to label a State as neutral are far different than those from other parts of the world, namely the United States of America.[10] Some commitments of the European states aimed to support religion in general, or a specific religious denomination, would be regarded as a breach of the Establishment Clause of the First Amendment of the US Constitution ("Congress shall make no law respecting an establishment of religion").[11] That is the case of the special mention of the

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with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

[5] Cf. J. Martínez-Torrón, *Símbolos religiosos institucionales...*, p. 117.

[6] See *Lautsi and Others v. Italy*, [GC] Application no. 30814/06, ECtHR 2011, §60: "States have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups. That concerns both relations between believers and non-believers and relations between the adherents of various religions, faiths and beliefs". *Leyla Şahin v. Turkey*, [GC], Application no. 44774/98, ECtHR 2005-XI, §107: "The Court has frequently emphasized the State's role as the neutral and impartial organizer of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed". See, as well, *Manoussakis and Others v. Greece*, judgement of 26 September 1996, *Reports* 1996-IV, p. 1365, §47; *Hasan and Chaush v. Bulgaria* [GC], Application no. 30985/96, §78, ECtHR 2000-XI; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, §91, ECtHR 2003-II.

[7] Some authors go as far as considering neutrality "the defining feature of liberalism: a liberal state is a state which imposes no conception of the good upon its citizens but which allows individuals to pursue their own good in their own way" (P. Jones, *The Ideal of the Neutral State…*, p. 11). See also, J. Madeley, *European liberal democracy and the principle of state religious neutrality*, West European Politics Vol. 26, No. 1, 2003, p. 6.

[8] Cf. L. Zucca, *A Secular Manifesto for Europe*, 5 March 2015, available at http://ssrn.com/abstract=2574165, p. 12.

[9] See, among others, S. Ferrari, S. Pastorelli (eds.), *Religion in Public Spaces. A European Perspective*, Ashgate, Surrey 2012.

[10] J. Madeley, *European liberal democracy…*, p. 15.

[11] See a brief introduction to this clause at http://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion.

Catholic Church in the Spanish Constitution, the funding of religious denominations in Belgium, or the funding of religious schools in Ireland, all of them countries that are self-defined as systems with a certain level of neutrality. As Justice Scalia from the US Supreme Court put it, "while Americans tend to believe strongly that religious values undergird government, and should be acknowledged to do so, they simultaneously believe that the government should play no role in controlling religion, either at the individual or institutional level. Europeans tend to invert these two positions, believing that politicians should keep their religious beliefs to themselves while (paradoxically) turning a blind eye to state/church institutional entanglement – hence, the Church of England and the Concordat between the Vatican and Italy favouring the Catholic Church".[12]

The principle of neutrality has a double edge. Public powers can neither benefit nor burden religion as a whole or any particular religion.[13] According to the first approach, religion should be treated like any other element that contributes to the common good, without privileges, but without disregard, either. Certainly, different political projects give varying importance to the elements that shape the society; some of them foster the cultural heritage extensively, others pursue the advancement of a specific social issue, or grant special weight to sports or any other purpose.[14] These preferences will have an impact on the distribution of public funds; after all, governments aim to build up a particular model of society, and governing entails choices, as resources are scarce and must be allocated in one or another place. This is the essence of political diversity: proposing different ways to find a balance among the elements that contribute to the common good. This balance, however, has limits in neutral states: an element cannot be obliterated, as it would imply a negative appraisal of its contribution to the society.

Regarding the second perspective, neutrality requires that the State do not favour or harm a specific religious denomination or community. Lawmakers, as any other public power, cannot enact laws or regulations that target a religious group. Nonetheless, neutral laws or government actions are bound to have non-neutral consequences at times, causing a harm on a certain religious group, insofar as free competition for adherents will almost always lead to some ways of life prevailing over others.[15] In this case, reconciling neutrality with religious freedom – that, as all fundamental rights, should be construed as broadly as possible – would require that the State prove that the regulation has been needed in a democratic society and the restriction has been proportionated to the aim of the regulation.[16]

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[12] A. Scalia, *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived*, The Crown Publishing Group, 2018, pp. 31–32.

[13] Cf. L. Zucca, *A Secular Manifesto for Europe*…, p. 13; J. Madeley, *European liberal democracy*…, p. 8. The ECtHR declared that the State neutrality "concerns both relations between believers and non-believers and relations between the adherents of various religions, faiths and beliefs". See above, *Lautsi and Others v. Italy*, note 6.

[14] As an example, see A. Fornerod (ed.), *Funding Religious Heritage,* Ahsgate, Surrey 2015; it deals with the different approaches from European States to one of the elements of the common good, the heritage.

[15] J. Madeley, *European liberal democracy*…, p. 7.

[16] Cf. J. Martínez-Torrón, *Universalidad, diversidad y neutralidad en la protección de la libertad religiosa por la Jurisprudencia de Estrasburgo*, [in:] J. Martínez-Torrón, S. Meseguer Velasco,

2. SOME MISCONCEPTIONS ABOUT STATE NEUTRALITY

The implementation of the principle of neutrality depends on various factors, among others, the ideology of the political party in power. Certainly, there are some limits that cannot be trespassed, under risk of withdrawing this principle. But within those limits, there is a margin of discretion of the State to set up this principle.

Nevertheless, neutrality has been occasionally misunderstood, both in its scope or regarding its requirements and consequences. These mistakes bring about wrong approaches to this principle. I will deal with two of them.[17]

2.1. IDENTIFYING NEUTRAL STATE AND NEUTRAL SOCIETY

The first misconstruction that needs to be clarified is that a neutral State neither presupposes nor pursues a neutral society. At times, these two realities – the neutral State and neutral society – appear tightly linked, or even identified as the same political goal. However, this identification is not accurate and relies on an imprecise conception of the public space.

The public realm, as opposite to the private one, is the space open to everybody. We can still differentiate two spheres within the public realm: the public institutional and the public social ones. Both terms are conventional and admit diverse denominations (like political domain versus civil society, for example), but the distinction is essential because the neutrality has different consequences in each one.[18] The public institutional sphere comprises the State powers (the Parliament, Courts of Justice, City Councils, etc.) and the public administration at its different levels (national, regional, local). Religion should be out of that sphere in the neutral State. The interdiction of using religious reasoning and arguments in rulings and debates, the absence of religious symbols and the ban of expressions of faith in general manifest the non-commitment of the State to any religious beliefs. The public social sphere, on the contrary, is open to the participation of everybody. It is the sphere of the free development of ideas of any kind, including religious ones. It is also the specific field for the growth and spread of political parties, labour unions, associations, and so on. Nobody should be excluded from that sphere as far as they accept the constitutional limits of public order, and no one may impose their will

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R. Palomino Lozano, *Religión, Matrimonio y Derecho ante el siglo XXI*, Vol. 1, Iustel, Madrid 2013, p. 283.

17 This paper adopts mainly the perspective of the Southern European countries, that is those from a Catholic tradition. The Anglo-Saxon and Nordic perspectives are not considered here. There is a vast literature that copes with that viewpoint. Beside several books quoted in this paper, see the articles published within the *Religare* Project (https://cordis.europa.eu/project/rcn/94078_en.html).

18 Cf. V. Bader, *The 'Public-Private' Divide on Drift: What, if any, is its Importance for Analyzing Limits of Associational Religious Freedoms?*, [in:] S. Ferrari, S. Pastorelli (eds.), *Religion in Public Spaces. A European Perspective*, Ashgate, London 2012, p. 55 ff. This author recognises many internally diverse public arenas; see chart on page 56 of the aforementioned contribution. To our aim, this highly detailed distinction is not necessary.

by force to others. The public authorities must assure a fair play but should not interfere in that development. Using a visual comparison, in the public social field social agents are free to play like players in a football game. The State acts on that field like a referee: he must be sure that the rules of the game are respected; he himself must be neutral but players are not: each one, or each team, will seek their own interest, that do not coincide with that of the others'.[19]

Therefore, religion should not be pushed back to the private sphere in the neutral State. It must be out of the public institutional, but it can be present in the public social field. The neutral State must not suppress the different options on religion in the society. It must only guarantee that they are developed according to the rules of the game: within the legal framework of each country.[20]

The intent of expelling religion not only from the public institutional sphere, but also from the society, has been a target of political regimes of different sign. However, the impossibility of wiping out religion from the social sphere has been repeatedly demonstrated. Therefore, an attitude of tolerance, understood as coming to terms with a harm that cannot be kept away, is currently more frequent than a real will of erasing religion in European societies. Nonetheless, this approach is not neutral, either.

The consequence of the attitude of mere tolerance of religion is that atheistic convictions enjoy a more advantageous position than the religious beliefs.[21] The State would not be neutral in this case because that position implies a certain stance – a negative one – on religion, to the extent that religion is simply accepted as something unavoidable. This idea has been articulated rewording a famous expression: religion is not deemed the opium of the people anymore, and therefore it is not persecuted; instead, it is considered the *tobacco of the people*, and is treated as that: you have to avoid it as much as possible because it is harmful, use it without bothering anybody, and of course, out of any public space.[22] The religious factor, then, would lose all prominence in public life. From the juridical point of view, the regulation of the religious element, when necessary, would be redirected to other sectors of the law – the cultural sphere, social services, non-governmental organisations, etc. – without any recognition of its own specificity.

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[19] Cf. R. Palomino, *Neutralidad del Estado y espacio público,* Thomson Reuters–Aranzadi, Navarra 2014, p. 162.

[20] According to the European Court of Human Rights, the State neutrality "cannot be conceived as being likely to diminish the role of a faith or a Church with which the population of a specific country has historically and culturally been associated" (ECtHR/Council of Europe, Guide to Article 9, published in 2015, no. 170; available at http://www.echr.coe.int (Case-law – Case-law analysis – Case-law guide).

[21] Cf. J. Martínez-Torrón, *Símbolos religiosos institucionales...*, p. 120. See similarly, J. Madeley: "Arrangements based on Enlightenment liberal assumptions actually offend against the principle of governmental religious neutrality because they privilege secular beliefs over religious ones and consign religion to the margins of social life. This means that in areas such as the provision of education, health care and other social services, where churches have traditionally maintained a strong interest, they receive little or no encouragement from the state, which instead provides secular alternatives out of the public purse". J. Madeley, *European liberal democracy…*, p. 8.

[22] The idea comes from A. Ollero, *La engañosa neutralidad del laicismo*, [in:] J. Prades, M. Oriol (eds.), *Los retos del multiculturalismo*, Encuentro, Madrid 2009, p. 2.

In accordance with this attitude of tolerance of religion, the advancement towards a neutral society is usually accomplished not directly, but through indirect means. Social neutrality is not presented as a goal in itself, but as an outcome of other compelling actions. For example, the absence of religious elements in the public space is occasionally rendered as a necessary guarantee of the social peace. Religion is depicted as a potential element of conflict; the difficulties in solving issues that involve religion are emphasized. As a consequence, the message sent by the public powers is that only by eliminating that source of controversy, can a peaceful development of society be achieved.[23] The ECtHR has often underlined that public authorities cannot guarantee the social peace removing the religious element from the public square. "The role of the authorities in such circumstances – affirms the Court – is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other".[24] The State must promote respect and getting along among citizens; expelling religion from society to avoid social strain is an excessive and disproportionate measure.[25]

Another way to strive for a neutral society is searching for a consensus on moral issues depriving them of any religious connotation, at the same time that they are incorporated into the content of fundamental rights that everybody must respect. It happened in the United States with the substantive due process and the marital privacy or in Spain with the fundamental right to the free development of personality, protected by Article 10 of the Constitution.[26] This way, public powers impose a moral common to all citizens, stripped of any religious element, giving way to a kind of secular establishment in which only those secular beliefs would be acceptable. Furthermore, this attitude implies that the civil powers become arbiters of what is and what is not religious, thus undermining the bases of state neutrality.[27]

The imposition of this secular moral to everybody, however, is not acceptable in liberal democratic states. Public powers cannot attempt to achieve a consensus on values other than those stated in the Constitution. This consensus must not be pursued as it entails a denial of personal freedom to choose one's religious and moral set of values. Besides, that pretension would contravene the equality, because

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[23] Cf. B.L. Berger, R. Moon, *Introduction*, [in:] *Religion and the Exercise of Public Authority,* Hart Publishing, Oxford–Portland 2016, pp. 4–5.

[24] *Leyla Şahin v. Turkey*, §107. See also, *Serif v. Greece*, Application no. 38178/97, §53, ECHR 1999-IX.

[25] See J. Martínez-Torrón, *Universalidad, diversidad y neutralidad en la protección de la libertad religiosa...*, p. 299.

[26] In the United States, the right to *marital privacy* was recognised in *Griswold v. Connecticcut* (381 U.S. 479, 1965). Since then, the Supreme Court widened the scope of this right through the doctrine of the substantive due process, including a number of rights with moral content in its aim: adults' right to use contraceptives (*Eisenstadt v. Baird*, 405 U.S. 438,1972), and minors' right as well (*Carey v. Population Services Intl.*, 431 U.S. 678, 1977); women's right to abortion (*Roe v. Wade,* 410 U.S. 113, 1973), the right to homosexual relationships without punishment (*Lawrence v. Texas*, 539 U.S. 558, 2003). On this Supreme Court application of substantive due process, see H.M. Alvaré, *Putting Children's Interests First in U.S. Family Law and Policy,* Cambridge University Press 2018, p. 18 ff.

[27] Cf. B.L. Berger, R. Moon, *Introduction,* [in:] *Religion and the Exercise of Public Authority…*, p. 5.

while religious people must be tolerant of some behaviour they find hard to accept, secularists would refuse to display the same tolerance when it comes to religious behaviour which does not comply with that civic moral.[28]

Consensus in the religious or moral sphere cannot be claimed by the State, the same way that no consensus is sought in political or ideological matters. The opposite would be a manifestation of totalitarianism. The consensus should be pursued in those cases in which the individuals are not free to choose, for example, if it is a matter of sanctioning some behaviour or imposing a civic obligation. On the contrary, in areas where citizens are free to choose, the State must guarantee the conditions to achieve the maximum freedom to make the choice, not the greater uniformity in decisions. And it cannot shrink the scope of that area of freedom, either.

The game, as it is currently conceived, is diversity and coexistence in dissent, or, as is more commonly said, pluralism.[29] The rules of the game are established by the constitutional principles and the standards stipulated in the bills of rights, and these rules are broad enough and yet specific enough to include everybody without requiring any agreement on other background values.[30] In other words, the State neutrality is inclusive, not exclusive. It must not seek the exclusion of religion from public life, but the inclusion of all religious groups, without any preference, but also without reluctance or prejudice regarding religious or denominational values.[31]

2.2. RELIGIOUS INFLUENCE AND BALANCED SOCIETY

Another wrong way to understand neutrality is considering that the neutral State must avoid any kind of religious influence in law and politics. The neutrality does not accept the direct influence that comes from an entanglement between Church and State. However, there is also another influence that comes out as a consequence of the existence of a religious majority in a country. That majority may have an impact in the juridical or political field. The wrong approach to neutrality would consist in the conviction that if a religious denomination is prevalent in the society, the public powers should try to "neutralise" its potential influence. To this aim, they foster religious plurality, that is regarded as the only possible background of a true neutrality.

This kind of State intervention, however, is not neutral itself. Religious denominations and communities enjoy collective religious liberty that must be free

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[28] See P. Berger, G. Davie, E. Fokas, *Religious America, Secular Europe? A Theme and Variations*, Burlington, VT. 2008, pp. 103–104.

[29] On this issue, see S. Ferrari, *Introduction to European Church and State Discourses*, [in:] L. Christoffersen, K.Å. Modéer, S. Andersen (eds.), *Law & Religion in the 21st Century: Nordic Perspectives*, Djøf Publishing, Copenhagen 2010, p. 23 ff.

[30] See generally, L. Zucca, *The crisis of the secular state – A reply to Professor Sajó*, International Journal of Constitutional Law Vol. 7, 2009, Section Two, pp. 494, 498.

[31] I develop this reasoning related to the educational field in Spain in *Education in the secular state: Whose right is it?*, International Journal of the Jurisprudence of the Family Vol. 2, 2011, pp. 77–106.

from any State interference; their development, that is, their growth or decline, their success or failure, will be determined by the individuals' free choices. The more plural or more homogeneous configuration of a society will depend on multiple factors, but it must not be achieved through a political intervention. Public powers cannot neutralise or lessen a religious denomination (or several ones), promoting an artificial balance among them in order to counterweight their influence in the society and getting a zero-sum game.

Undoubtedly, a religious community with more members or a wider capacity for action will have a greater sway in the society. However, that cannot be understood as a negative result that must be repressed; it is an inescapable consequence of freedom. It would be a contradiction recognising the freedom of expression and religion, and at the same time considering the influence of religion in society illegitimate, as the Stasi Report did years ago.[32] "How is it possible, wonders a former president of the Italian Senate, to regard *free expression* of religious beliefs as legitimate, but their *influence* as illegitimate? Is it not precisely the goal of free expression to influence public debate and political decisions? By what (secular) miracle is it possible for religious expression to be free yet have no influence?". And the author himself answers the question: "Only one, the miracle by which secularism has been transmuted into a religion".[33]

Religious groups can spread their ideas and try to gain followers or to influence society as long as they do so while respecting the law. The legitimacy of this action, known with the reviled term of proselytism – which often evokes in an equivocal way a coercion or violation of religious or thought freedom – has been affirmed by the European Court of Human Rights.[34]

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[32] See, among others, M. Akan, *Laïcitè and multiculturalism: the Stasi Report in context*, The British Journal of Sociology Vol. 60, issue 2, 2009, p. 237. The author considers Will Kymlicka the strongest defender of multiculturalism as a liberal democratic project. His argument is that cultural context is one of the primary definers of the content of one's choice without which the idea of choice becomes meaningless. See p. 251.

[33] Cf. M. Pera, *Why we Should Call Ourselves Christians: The Religious Roots of Free Societies*, Encounter Books, New York 2008, p. 32.

[34] Cf. *Kokkinakis v. Greece*, Application no. 14307/88, A/260-A, 25 May, 1993, §31: "As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to 'manifest [one's] religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions. According to Article 9 (art. 9), freedom to manifest one's religion is not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private'; furthermore, it includes in principle the right to try to convince one's neighbour, for example through 'teaching', failing which, moreover, 'freedom to change [one's] religion or belief', enshrined in Article 9 (art. 9), would be likely to remain a dead letter". Obviously, the ECtHR does not protect any kind of improper proselytism, such as the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a Church; see *Larissis and Others v. Greece*, Applications nos. 140/1996/759/958–960, ECtHR, 24 February 1998, §45.

The possibility that religious beliefs may influence political decisions – like secular ideological ones may, too – does not diminish the neutrality of the State. It does not affect the separation of Church and State, either, although it may have an impact on a greater or lesser secularisation of society. For example, when a large number of citizens profess a faith that opposes the death penalty or the consumption of alcohol, they might get to influence the law or the political decisions in this direction, if they manage to change them through the majority principle that applies in democratic systems. Surely, their defenders will have to use secular reasonings to this aim, without relying on religious reasons, which must remain in the internal sphere of the individual. In the aforementioned examples, they could claim the defence of human dignity or public health reasons.[35] Actually, if the number of members of a religious group is big enough to achieve a change in the legal system, that religious group will have a real influence in society,[36] but the State would not be confessional, not even in a covert manner. It would be confessional if the reasons for the legal change were, expressly or tacitly, to adjust its laws and statutes to the tenets of a religious denomination, but not if it is the result of a process of citizen participation.[37] And we can assert it even when a religious element is at the origin of the citizens' decision. Nobody can demand or expect that citizens make their choices in a neutral way from the religious, ideological or any other point of view. Neutrality refers to the political or the juridical systems, not to the process of forming people's ideas.

In the search of the counterbalance among religious denominations, some states implement measures of positive discrimination. In the field of religion, the positive discrimination, or affirmative action, as it is better known in some juridical systems, entails a favourable treatment of one or several minority religious groups to

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[35] Cf. S. Ferrari, *Diritto e religione nello Stato laico: islam e laicità*, [in:] G.E. Rusconi (ed.), *Lo Stato secolarizzato nell'età post-secolare*, il Mulino, Bologna 2008, p. 318.

[36] This is a theoretical approach, in the sense that it would be very difficult to measure the actual influence of certain religious beliefs on a political decision based on fully secular arguments. On the one hand, because the different factors that determine the decision of a citizen cannot be divided, he will often adopt a certain position based not only on his religious convictions, but also on other ideological or political preferences. On the other hand, individuals who have forged their opinion on the basis of religious convictions come together in the processes of citizen participation with other people who have not taken into account any beliefs to make a decision and with whom they can agree supporting a specific legislative or political measure. It is almost impossible to determine, within the group of citizens who support a law or other political action, the percentage of those who have taken into account a religious doctrine to make a decision.

[37] J. Ratzinger refers to this issue from the perspective of politicians who profess religious beliefs. "The Catholic does not want, and cannot, passing through the legislation, impose hierarchies of values that only in faith can be recognised and realised. He can claim only what belongs to the bases of humanity accessible to the reason and that is essential for the construction of a good legal system". M. Pera, J. Ratzinger, *Sin Raíces. Europa, Relativismo, Cristianismo, Islam*, Península Ediciones, Barcelona 2006, p. 124. However, he recognises the difficulties that stem from trying to find a common background both for believers and non-believers on certain issues: "Here arises this question spontaneously: what is the moral minimum accessible to reason common to all men? Is it what all men understand? Would it then be possible to draw statistically these common rational bases of an authentic right? Here we are faced squarely with the dilemma of the human conscience. If rationality should be equated with the average conscience, in the end there would be little reason".

compensate for a historical situation of inequality. This special protection is acceptable if it is referred to the point of departure, that is, whenever it aims at procuring that all religious groups enjoy a legal status that allows their development in society. It does not apply, however, to the point of arrival, that is to say, to the situation resulting from that development. All religious groups must have identical opportunities, but the fact that minority groups effectively achieve a degree of acceptance or success equal or similar to that of other groups operating in the same territory cannot be a target of the public authorities; it depends exclusively on each group. The State must ensure that the necessary conditions are met – correcting past errors in the legal regulation, if necessary – so that all groups can perform their functions in the society, but it cannot impose a result; it must leave the religious groups to act in full freedom, whatever the consequences of such actions.[38] In other words, pluralism cannot prevent the success of any religious group.[39] Fostering the advance of the less developed religious denominations is a means to achieve a greater pluralism, but it would constitute an entanglement between State and religion incompliant with the required State neutrality. The European Court of Human Rights has frequently underlined the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, emphasizing that this role is conducive to public order, religious harmony and tolerance in a democratic society.[40]

Positive discrimination, therefore, is contrary to neutrality because the State does not act impartially with respect to religious groups. Besides, this attitude exceeds the competences attributed to the State: in order to adopt measures that involve positive discrimination, it is necessary to make a prior value judgement to determine which is the ideal achievable situation; that is, stating the degree of implementation each of the religious groups should have to consider that an adequate social composition has been accomplished.[41] When the State cooperates with religious denominations, it must protect and foster the development of the religious freedom, both individual and collective, not the particular development of certain religious denominations to fulfill a goal of a wider pluralism in society or a balance of faiths.[42] As some authors put it, the neutral State is not legitimated to intervene in the free market of ideas and beliefs.[43]

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[38] Cf. M. Barbier, *Esquisse d'une théorie de la laïcité*..., p. 81.

[39] Cf. I.C. Ibán, L. Prieto, A. Motilla, *Manual de Derecho Eclesiástico*, Trotta, Madrid 2004, p. 38.

[40] ECtHR/Council of Europe, Guide to Article 9, published in 2015, no. 169, available at http://www.echr.coe.int (Case-law – Case-law analysis – Case-law guide).

[41] J. Martínez-Torrón, *Separatismo y cooperación en los acuerdos del Estado con las confesiones religiosas*, Comares, Granada 1994, pp. 52–53.

[42] This misconception of neutrality is more likely to occur in societies, such as the Spanish one, that have a religious majority. I dealt with this issue in *The Ministerial Exception. European Balancing in the Spanish Context*, Oxford Journal of Law and Religion Vol. 4, issue 2, 2015, pp. 260–277.

[43] See R. Palomino, Á. López-Sidro, *¿Cabe la discriminación positiva en relación con el factor religioso?*, [in:] J. Martínez-Torrón, S. Meseguer Velasco, R. Palomino Lozano (eds.), *Religión, Matrimonio y Derecho ante el Siglo XXI, Estudios en homenaje al Profesor Rafael Navarro-Valls*, Vol. 1, Iustel, Madrid 2013, pp. 580–581.

3. CHALLENGES TO STATE NEUTRALITY

What has been said so far does not prevent recognising that the principle of State neutrality finds a main obstacle. From a theoretical point of view, the effort of defining neutrality, stating its demands and consequences, can offer accomplished results. Besides, this principle can generate adhesion from different political and ideological spectrums. Neutrality, understood as the position of the State which does not impose a specific conception of good or evil, but allows citizens to pursue their own good in the way they want, is undoubtedly broad enough to be endorsed by many different ideologies.[44] However, it poses a fundamental difficulty: want it or not, the State must make value judgements; it has to decide what is good and what is not to repress such behaviour and impose a penalty,[45] or to select the activities or social factors that will be promoted by the public authorities.[46] In other words, establishing the limits of neutrality is not a neutral issue.[47] Since there is such an assessment, there is no longer absolute neutrality. This statement is particularly true with regard to some fields that do not admit a neutral approach, for example, education. An education system deprived of any moral content is an option itself, a relativistic one; and therefore, non-neutral.

Where is the limit of freedom of choice? If the State decides that something is better – a certain healthy life style – and decides to promote it, it is not neutral with regard to that issue. Nonetheless, it does not appear to be better to remain neutral in an issue that may enhance the citizens' life. Should it extend the possibilities of choice, or should it be non-neutral on some issues? Which ones?

Hence, doubt remains about the principle of neutrality, as necessary as complex: are we facing a myth or a challenge? Can the State really fulfill its mission as an arbitrator in religious matters, or is it inescapable that in certain situations it also intervenes in the game? There may not be a single answer, but rather each state must take into account its circumstances and the legal instruments available to achieve a neutral action by all the State powers.[48]

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[44] See R. McCrea, *Religion and the Public Order of the European Union*, Oxford 2010, p. 36.

[45] "It is undeniable that the state is not ethically neutral from the moment that, for example, it establishes a criminal code"; R. Palomino, *Religion and neutrality: Myth, principle and meaning*, BYU Law Review Issue 3, 2011, p. 669.

[46] "A State which is truly neutral between different religious-ethical systems is a practical impossibility. The existence of political community is predicated upon the widespread acceptance of *political* values which determine where the line is to be drawn between matters of public concern and matters of private concern and how disagreements about matters of public concern are to be resolved"; D. Jensen, *Classifying church-state arrangements. Beyond religious versus secular*, [in:] N. Hosen, R. Mohr (eds.), *Law and Religion in Public Life. The Contemporary Debate*, Routledge, London–New York 2011, p. 19.

[47] See F. Requejo, *Religions and liberal democracies*, [in:] F. Requejo, C. Ungureanu (eds.), *Democracy, Law and Religious Pluralism in Europe: Secularism and Post-Secularism*, Routledge, London–New York 2014, p. 211.

[48] On this issue, see the chapter *Las dificultades prácticas de la neutralidad*, [in:] R. Palomino, *Neutralidad del Estado y espacio público...*, p. 172 ff.

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THE UNATTAINABLE NEUTRAL STATE

Summary

State neutrality in relation to religion is a principle of the juridical system and the political activity that aim to protect religious freedom. It conveys two main elements: equality and incompetence of the State in religious matters. Religious neutrality is entailed in a number of European Constitutions, although its scope varies from one country to another. At times, neutrality has been misunderstood. The article deals with two of the wrong approaches to this principle that are not uncommon in the contemporary society.

Keywords: law and religion, secularity, neutrality

NIEOSIĄGALNY MODEL NEUTRALNOŚCI ŚWIATOPOGLĄDOWEJ PAŃSTWA

Streszczenie

Neutralność państwa w stosunku do religii jest podstawą systemu prawnego i działań politycznych, mających na celu wolność religijną. Wyraża ona dwa główne elementy: równość i niekompetencję państwa w kwestiach religijnych. Neutralność religijna jest ustanowiona w wielu konstytucjach europejskich, chociaż jej zakres różni się w zależności od kraju. Niekiedy neutralność była źle rozumiana. Artykuł dotyczy dwóch niewłaściwych podejść do tej zasady, które nie są rzadkością we współczesnym społeczeństwie.

Słowa kluczowe: prawo i religia, laickość, neutralność

Cytuj jako:

Garcimartín C., *The unattainable neutral State [Nieosiągalny model neutralności światopoglądowej państwa]*, „Ius Novum" 2018 (12) nr 4, s. 33–46. DOI:10.26399/iusnovum.v12.4.2018.33/c.garcimartin

Cite as:

Garcimartín, C. (2018) 'The unattainable neutral State'. *Ius Novum* (Vol. 12) 4, 33–46. DOI:10.26399/iusnovum.v12.4.2018.33/c.garcimartin