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SECULARISM: FRAMEWORK OF THE RELATIONSHIP BETWEEN STATE AND CHURCH

INTRODUCTION

Religion with its natural condition is “in competition” with other religions, exclusive towards them, which is a part of implementation of its function – religious doctrine. Therefore, direct association of the state with one of the religion excludes the protection of freedom of religion and guarantees for the prohibition of discrimination between religions. The primary function of the state in contrast with the exclusive nature of religion is to create inclusive space for citizens¹. Apart from these, both, the state and the church impose obligations on their members/citizens, between which a conflict might arise.

Because of the natural interdependence, consensus is reached on the necessity of separation of the state from the religion. Such separation is characterized by the concept of secularism.

Secularism is an integral part of a democratic state and the rule of law as it represents an expression of collective conscientious objection of people against association of the state with any religion and therefore it is one of the means of exercising people’s sovereignty. Religion might also be viewed as a social construction and accordingly, secularism conditioned by it, though because of the stable grounds of the social construction in the society², this does not cause a sub-

¹ Ronald Dworkin, *Taking Rights Seriously*, Bloomsbury Revelations Series (London: Bloomsbury, 2013), 219-220.

² András Sajó, *Constitutionalism and Secularism: the Need for Public Reason*, pg.4.

stantive change and in practice, the principles of democratic, legal and secular state have equal and complementary nature.

Despite consensus on the necessity of secularism, boundaries between the state and the church differ according to countries. Models existing in democratic and legal states might be divided into three categories: strict separation, neutrality and accommodation models. According to the model of strict separation, state and church should maximally be distanced from each other. According to the model of neutrality, state should be neutral toward religious institutions and confer no advantage upon any of them. Accommodation model considers that religion has an important role in public life and partly encourages development of religious institutions, though within the framework of this model, coercion to participate/support or discrimination of religious organizations by the state are also excluded.³

Existence of different forms of secularism is caused by the different historical backgrounds⁴ of the concept's establishment in a specific place as well as its partly ambiguous content capable of being interpreted in different ways⁵. When the concepts can be interpreted arbitrarily, reference only to the concept and giving it a determinant importance, eliminates the possibility of considering opposite argument as well as a rational discussion⁶. Even hostile politics of the Soviet Union against the church might be justified by the formal argument of secularism, though obviously a number of aspects of this politics, such as confiscating religious buildings from the religious organizations was not an act characteristic to the inclusive state, as it was associated with one of the ideologies – atheism and determined by it.

Thus, in parallel with avoiding a close association when separating the state and church, there is a risk of transformation of their interrelation into the other radical form – repressive policy. Therefore, in order to develop an acceptable form of separation between the state and the church it is necessary that the state found the right balance between avoiding association and repressive politics. In case of such balanced secularism, we will not have the relationship which is based on the concept as a specific ideology, formal separation between the state and church, but which uses the concept, as a specific logical framework, as a ground⁷. In order to begin rethinking secularism

³ Chemerinsky, E. (2006). *Constitutional law* (3rd ed.). New York, NY: Aspen, 1707.

⁴ András Sajó, *Constitutionalism and Secularism: the Need for Public Reason*, pg.5.

⁵ Keny Greenawalt, *secularism, religion, and liberal democracy in the united states*, *Cardozo Law Review*, Vol. 30, 2009, 2383.

⁶ "Dignity" is similar, stating it as an argument loses the chance of presenting an opposing idea. See the case of the European Court of Human Rights – *Peta v. Germany*.

⁷ Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, Mass.: Harvard University Press, 2014), 5.

as a means of achieving a goal, the theory of “Public Reason” of John Rawls, according to which religious motives are fully acceptable, if they can be “translated” on the grounds acceptable for all, serves a good basis.

The present paper serves development of a logical definition of the concept of secularism acceptable for both stakeholders and than an illustration that the restriction of any right should serve not the secularism itself, but the right understanding of the goal to be achieved through it and serve that goal itself.

The logical framework of secularism is to guarantee the possibility for the state and the church to exercise their functions. As already mentioned, function of the religious organization is to exercise confessional goals determined by the doctrine while the state is an instrument to ensure coexistence of people with recognition and protection of human rights (including the security guarantees).

The present work paper argues that discussing secularism in view of the functions exercised by the state and the church displays the form of secularism acceptable for both stakeholders. Based on the analyses of separate decisions, the paper offers specific examples when it is necessary to invoke an argument of secularism to maintain autonomous space for existence of the state and the church.

The state violates a logical framework of secularism when it obstructs the church to implement its doctrine or/and evaluates, delegitimizes the doctrine/religion. Such self-restraint of the state is limited by the state’s obligation to be neutral towards any doctrine, ideology in terms of prohibition of discrimination and positive obligation to protect other rights. The margin of self-restraint also lies with the state’s authority to obstruct the church to come out from its natural condition and privatize public space.

For its part, decisions made by the religious organizations about exclusion of its members from its community because of the differences between their views, is left beyond prohibition of discrimination and the states’ obligation to protect human rights, as the motive of religious organizations to be associated with their doctrinal theses is a part of their function and is justified.

Precondition for a reasonable deliberation of these issues is an existence of preliminary agreement that while exercising the national sovereignty and exercising the secularism as well as ensuring freedom of religion and prohibition of discrimination, the state is free from any ideology,

does not support rejection of the religion by getting close to atheism, but is inherently in a different position and has the obligation to ensure “safe pluralism”. While performing this obligation the state’s attitude toward religions should be based not on the preliminary confidence but the formula of equal indifference, which will leave an autonomous space necessary for their functioning.⁸

According to the deliberation above, any restriction behind the protection of the concept of secularism should be based not on the autonomous definition of any legal system, but on the goal of the concept of “secularism”, protection of the balance between the functions of the state and the church. Thus, “secularism” should not be perceived as a goal, but an instrument/means to reach the goal. This resembles the principle of separation of powers between the state’s branches as similarly there are various attitudes toward it on the national level, and the European Court of Human Rights does not legitimize or reject any of the specific models while deliberating this issue, but speaks about the practicability of effective protection of human rights by means of such division of powers. Alike, this principle is not a goal, but a means of reaching the goal.⁹

The present paper deliberates secularism as a logical framework in sequential components. With this regard, case analysis does not aim at providing a comprehensive and sequential description of one of the legal systems, but at reviewing different aspects of relationship between state and church in the context of the cases and attempts to put an interrelation between the state and church, balance between their function in the one logical, sequential line.

The first chapter deliberates the place of freedom of religion among human rights and its relation to the principle of secularism. The second chapter explains that separate protection of the freedom of religion does not automatically give preference to the followers of a religion and does not result in differentiation between the insult of religious and other feelings.

The third chapter reviews definitions offered by different legal systems. The fourth and fifth chapters specify that secular state does not mean disappearance of the state from the public space, an aim to separate from church or ignoring religious motives when developing state policy by assuming that religious motives cannot be transformed into a public goal.

The next two chapters relate to the scope of autonomy of religious community and its individual members and borders set at the non-interference by the state in it, namely drawn at the protection from privatization of the public space, human rights and equality.

⁸ *ibid*, 11, 17–18.

⁹ David Kosa (2012). Policing Separation of Powers: A New Role for the European Court of Human Rights? *European Constitutional Law Review*, 8, pp 33–62.

Introduction of the present paper outlines the main theses for future deliberation and the conclusion sums up opinions developed based on the analyses of cases relating to different aspects of the relationship between the state and the church.

1. SPECIAL NATURE OF RELIGION OR ONE OF THE FORMS OF FREEDOM OF EXPRESSION

There is an opinion in theory that rejects recognition of freedom of religion with the argument that protection of the right to have an opinion and the forms of its expression subsume religious belief as well as its manifestation.¹⁰

However, it is important to note, that the case of religion is different and that it often determines obligations for its followers, which makes religiously motivated choices, provided that it reaches the minimum standard of seriousness,¹¹ different from libertarian ones and makes them legitimate even when it is contrary to law (e.g. in case of conscientious objection of Pacifists)¹². Religion is a special form of expression as it implies features of identity and the level of seriousness which might determine the most preferable existential interest for a human being¹³. All these together make some requirements legitimate despite its contradiction with law. The referred differences give us the possibility to embrace logically the separate protection of the freedoms of religion and expression under regional and international mechanism for the protection of human rights.

To some extent, this determines the role of secularism. Because of the special nature of the religion and belief, their protection cannot be ensured when the state directs its resources to one of the specific religions, gives preference to it or is associated with it. By doing so, it underlines the supremacy of one over others and infringes dignity of believers (or non-believers). Such state deprives human's supreme belief of its validity, rejects its importance and is no longer a tool for an inclusive coexistence.

That is why, despite the concept of freedom of expression, one cannot have a legitimate request to prohibit the state to finance cultural events not acceptable for them. Contrary to this, different

¹⁰ W. Cole Durham and Brett G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives*, Elective Series (New York: Aspen Publishers, 2010), 202, 203.

¹¹ Standard of "cogency, seriousness, cohesion and importance" in *Campbell and Cosans v. the United Kingdom*, ECtHR (1982): at 36

¹² Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 79-80.

¹³ Bernard Williams, *Moral Luck: Philosophical Papers 1973 - 1980*, Reprinted (Cambridge: Cambridge Univ. Press, 1999), 14. Raymond Plant, "Religion, Identity and Freedom of Expression," *Res Publica* (13564765) 17, no. 1 (February 2011): 16-17.

nature of freedom of religion and belief requires from the state to refrain from making support of a specific religion its public interest.

2. SEPARATE PROTECTION OF RELIGION AND GIVING PREFERENCE TO NON-BELIEVERS

Separate protection of religious freedom does not automatically give preference to -believers, e.g. in relation to atheist authors enjoying the right of freedom of expression, who might insult religious feelings of others by their occupation when the restriction of their activity might be offensive to them too.

Establishing hierarchy of human rights is prohibited as it was outlined in the preamble of the Universal Declaration of Human Rights as of 1948 by underlining the universal, inalienable and equal nature of the rights.¹⁴ Accordingly, protection of the freedom of expression is not a less important of an interest just because the freedom of manifestation of religion protects believers. Subject of the protection of human rights is not a belief or religion, but a human being. Legitimate and proportional restriction of expression which insults believers might only serve the protection of other human rights.¹⁵

According to the deliberation of the European Court of Human Rights, one who expresses its religion is obliged to tolerate and accept rejection of their religious belief from others, , even hostile propaganda against his/her belief¹⁶. The European Court considered restriction of freedom of expression, the criticism against religious leaders, because of it being insulting to the believers, as a violation of the convention in the cases of *Klein v. Slovakia* and *Giniewski v. France*. In the latter case, scope of protection by the Convention extended to the criticism pointing to the signs of Anti-Semitism in the Pope's statement and the Catholic Church's contribution to the extermination of the Jewish people.

In the case of *Choudhury v. the United Kingdom*, the Court found the request of the applicant inadmissible, who, based on the positive obligations of the state according to the guarantees for the freedom of religion, demanded from the Court to find that the state's inactivity toward insult caused by the book of Salman Rushdie was a violation of the Convention. According to the court, positive obligation to protect religious feelings from insult expressed in oral or written form does not exist and it is not part of freedom of religion.¹⁷

¹⁴ Ibid.

¹⁵ See cases of *Norwood v. United Kingdom* (ECtHR), *Ross v. Canada* (HRC).

¹⁶ *I.A v. Turkey* (ECtHR 2005): 28.

¹⁷ *Choudhury v. the United Kingdom* (ECommHR 1991), admissibility decision.

Besides secularism, state neutrality and equality, requirement for equal protection of citizens despite their beliefs, is also derived from the principle of popular sovereignty. When expressing its subjective attitude toward its believer or non-believer citizens, the state apart from violating these principles, is in contradiction with its own inclusive nature.

3. DEFINITIONS OF THE CONCEPT OF SECULARISM AT THE NATIONAL AND INTERNATIONAL LEVEL

Principle of separation between the state and the church is enshrined in the constitutional law of different countries.¹⁸ Because of a number of historical reasons the principle is directly stated in the text of constitution of the states such as France, Turkey, and India.¹⁹ Secularism is recognized by its alternative concepts such as neutrality and impartiality at the international level as well.

European Court points out that when regulating any issue related to different religions and belief systems, the state should remain neutral and impartial, which, first, is important for ensuring the pluralistic environment and operation of democracy in the state²⁰. Reflection of this principle might be seen in the second paragraph of the first protocol to the Convention, which establishes parents' right to the environment free from indoctrination in the public school.

The United Nations Commission on Human Rights pointed out in the case of *Arieh Hollis Waldman v. Canada*, that financing of catholic schools from the state resources was a discrimination while other schools could only operate by private funds. The Commission explained that financing religious schools is not an obligation of the state and therefore ensuring secular public education complies with prohibition of discrimination, though if the state decided to finance religious schools, this should necessarily be done without giving preference to any of the religious groups.²¹

The principle of secularism was considered as a natural part of the freedom of religion by the Supreme Court of Canada in the case of *Mouvement laïque québécois v. Saguenay (City)*. According to the Court, the state should remain neutral; in particular, it should neither give preference, nor obstruct followers of any faith. This serves the maintenance of free and democratic society. According to the judgment, if the state supports specific expression of religion by using a cultural and historical reality or legacy as an excuse, it violates obligation of state neutrality, under which administration of public authority to support a specific confession is prohibited.

¹⁸ Norman Doe, *Law and Religion in Europe*, Chapter: Property and Finances of Religion, p. 175.

¹⁹ András Sajó, *Constitutionalism and Secularism: the Need for Public Reason*, pg. 7.

²⁰ *Metropolitan Church of Bessarabia v. Moldova*, p. 116.

²¹ *Arieh Hollis Waldman v. Canada*, p. 10.6.

Constitutional Court of Germany in the case of *Mixed Marriage Church Case* recognized an act as unconstitutional, under which non-religious employed spouses of church members were subject to the church tax and pointed out that the state had an obligation of religious and ideological neutrality. Therefore, the state cannot transfer sovereign authority to the church over the people who are not its members. Constitutional Court of Germany explained that while considering this issues, the fact that the church had a privileged status at any different stage in the history does not matter, since state religion, in its classical form, does not exist anymore when there is separation between the state and the church.²²

The U.S Supreme Court in the case of *Larson v. Valente* underlined the principles of neutrality and prohibition of favoring one religion over another and pointed out that freedom of religion will be guaranteed only under conditions of free competition. According to the Court, freedom of religion is protected only when the legislator and voters are obliged to demonstrate the attitude towards new and unpopular religions similar to the one they have towards their religion or belief. The same court in the case of *Lemon v. Kurtzman* considered “**excessive government entanglement**” with religious affairs unacceptable based on the separation of the state and the church and the principle of secularism. The court found the financing system unconstitutional related to the financing of secular studies in any religious school as this system created an opportunity of arbitrariness from the state to interfere in the activities of religious schools in terms of examining targeted expenditure of the finances and besides this, teachers of secular subjects could use the funds for religious aims. The Supreme Court developed the test, according to which any law should be based on a secular goal, should not support one of the religions and at the same time should exclude “**excessive government entanglement**” with religious affairs.

The Constitutional Court of Georgia has also made its first references to the recognition of secularism by the Constitution.²³ The Constitutional Court of Georgia saw the principle of secularism under Article 9 and considered it as the part of the constitutional order. Besides, it explained that this principle implies functional separation of the state agencies from the operation of religious institutions. According to the Constitutional Court, confessional aims of religious organizations shall not be functionally connected to the public authorities and such connection would violate the principle of secularism.²⁴

²² *Mixed Marriage Church Case* (1965), German Constitutional Court.

²³ Georgian citizens – Giorgi Kekenadze, Nino Kvetenadze and Besiki Gvenetadze against Parliament of Georgia (judgment as of February 26, 2016).

²⁴ Judgment of the Constitutional Court of Georgia as of February 23, 2016 on the case Georgian citizens – Giorgi Kekenadze, Nino Kvetenadze and Besiki Gvenetadze against Parliament of Georgia.

Based on the analyses of the given cases, according to the common definition of secularism, the consensus is already reached on the issue that the state should not be associated with a specific religious group and should not direct its authority to support any of the religions. The state authority shall not be used to diminish or strengthen religions.

Such state policy is impermissible even when this is not a targeted choice of the state, but is used as a means of legitimizing itself, as the state legitimacy should be driven from the people, with disregard of indirect forms, being the essence of the popular sovereignty. Otherwise, there are risks of interference of a religion in the state policy and, in case of religious organizations' dependence on the state, there are theoretical risks in terms of unjustified interference of the state in their autonomy. As constitutionalist András Sajó explains, "A union of secular and ecclesiastical control would equal tyranny, irrespective of the fact which one of these entities has absolute power".²⁵

4. SECULAR OR RELIGION-FREE STATE (PRIVATIZATION OF RELIGION)

Proactive policy administered by the state aimed at underlining separation from the church might be a reflection of excessive role of the church in the state's operation in spite of the fact, that at a first glance, it is aimed at diminishing this role.

With this regard, it is relevant to mention the cases of "Sunday closing laws"²⁶ in which the courts evaluate the practice in old times conditioned by religious doctrine. The U.S Supreme Court in the case of *McGowan v. Maryland*²⁷ favored acting secular goal of the law (announcement of public holiday in the interest of health and unity of the family) and assessed its connection to the confessional goals in the past as an insignificant factor. Otherwise, the religious goals which are not currently implemented under effective law could have regained significance based on this decision and effective secular law could have been rejected because of the need to be separated from religion. .

An aggressive secular policy of the state in some cases crosses the borders of neutrality and impartiality itself. The state's fear of religious fundamentalism might become a reason for the stereotypical policy of the state.

²⁵ András Sajó, *Constitutionalism and Secularism: the Need for Public Reason*, pg. 7.

²⁶ See also the case of the Supreme Court of Canada *R v Big M Drug Mart Ltd* and the case of the Constitutional Court of Southern Africa *State v. Lawrence*.

²⁷ See also the case of the Supreme Court of Canada *R v Big M Drug Mart Ltd* and the case of the Constitutional Court of Southern Africa *State v. Lawrence*.

In this regard, “Islamic Headscarf” cases are especially interesting. The European Court of Human Rights considers the state’s restriction on wearing Islamic headscarves permissible. In these cases, the Court’s reasoning was based on the maintenance of a democratic state, principle of gender equality and presumed negative effect of wearing the headscarves on others. In these cases the Court’s attitude is displayed, namely it perceiving a specific religion as inconsistent with democracy.²⁸

The case of *Dogru v. France* is worth to be mentioned separately. It related to the expulsion of an 11-year-old girl from school for refusing to remove the headscarf. The Court emphasized that from the factual circumstances, because of the student’s said refusal, overall tension was evidenced at the school.²⁹ This was the case in spite of the fact that the Court in other cases discourages states to eradicate the tension caused by the co-existence of religions³⁰. In the same case, the Court considered that the manifestation of religion expressing attitudes contrary to the principle of secularism might not be protected under article 9 and belongs to the state margin of appreciation.³¹

Unlike other cases, *Leyla Sahin v. Turkey* related to the right to wear headscarves by the majority of the population at the universities as well as in other state or educational institutions. Accordingly, the Court considered dominant position of Islam as an additional argument, in particular, according to the Court, in the state where 94% of population are Muslims, wearing Muslim headscarves would put an existence of an environment free from coercion and intimidation under doubt.³²

The Constitutional Court of Germany displayed a different viewpoint in the case concerning the blanket prohibition of wearing the headscarf by a teacher. The Court pointed out in its judgment that “wearing a headscarf is a religious expression by individual and not the state”. Besides, according to the court, wearing the headscarf is not contrary to the educational goals of Germany or the State neutrality.³³

For comparison, the decision of the European Court of Human Rights in the case of *Lautsi v. Italy* is worth noting, in which an obligatory display of the crucifix was considered to be permissible by

²⁸ See below a deliberation of the case *Refar Partisi v. Turkey*.

²⁹ *Dogru v. France*, para 74.

³⁰ *Metropolitan Church of Bessarabia and others v. Moldova*, (ECtHR 2001): 116.

³¹ *Dogru v. France*, para 75.

³² *Leyla Sahin v. Turkey*, 111, 114 (ECtHR Grand Chamber 2005): 111. Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford ; New York: Oxford University Press, 2009), 434-435.

³³ https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html;jsessionid=CCFF242F94FFE23D1AA2EDD9BD04281A.2_cid370.

underling its passive role as a religious symbol³⁴. Bias is more evident in so called “crucifix cases” considered by the national Courts. They directly refer to the Christian roots of a democratic state and contradiction of Islam with such states, such comparison comes into play even when the claimants are atheists, not Muslims.³⁵

Focusing on the symbolic content of Islamic headscarves and its inconsistency with the democratic values, secularism, gender equality while disregarding and rejecting any special symbolic significance in “crucifix cases”, pointing out that the crucifix is not associated with an imposed study of Christianity, indicates that the national courts as well as an international court see creation of a secular environment free from religion as a goal in itself, it also points to the problems of impartiality under the pretext of achieving such a goal, and to an attempt to privatize the religion.³⁶

5. RECOGNITION OF RELIGIOUS MOTIVES

The state free from the influence of religion does not necessarily imply freedom from religion. According to the attitudes existing in theory, principle of secularism does not reject existence of religious motives in the state politics, though explains that reasons for the necessity of such motives should be acceptable for everybody and justification for such need should not only be based on the reference to the confession and its transcendental considerations³⁷. It should be possible to “translate” it into the grounds acceptable for everyone.³⁸ This attitude established in the constitutional law is based on John Rawls’s theory of “Public Reason” which recognizes religious motives, though with its transformed form in the relevant political reasoning.³⁹

The concept of secularism established with this assumption comes closer with an understanding of the popular sovereignty as it ensures agreement on the fact that each member of the society has an ability to think soundly and to participate in political decision-making.⁴⁰

³⁴ Lautsi v. Italy, p. 72.

³⁵ Constitutional Secularism in an age of Religious Revival, Susanna Mancini and Michael Rosenfeld, p. 123.

³⁶ Constitutional Secularism in an age of Religious Revival, Susanna Mancini and Michael Rosenfeld, p. 122.

³⁷ Andras Sajó, *Preliminaries to a concept of Constitutional Secularism* in Constitutional Secularism in an age of Religious Revival, Susanna Mancini and Michael Rosenfeld, p.55.

³⁸ András Sajó, *Constitutionalism and Secularism: the Need for Public Reason*, pg. 1.

³⁹ John Rawls, “The Idea of Public Reason Revisited,” *The University of Chicago Law Review*, 1997, 766, , 780, 783, 784, 799, 800.

Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 63.

⁴⁰ Ibid, page 2.

That is why under certain circumstances financing of religious organizations is allowed in the secular states. For example, in some countries, tax deduction system applies to those who decide voluntarily to support financially any church. In this case, one voluntarily makes a financial contribution and is partially exempt from the tax before the state⁴¹. In such systems, the state allocates funds from the taxed amount of the income though these funds are of a reasonable amount and based on the voluntary decision of the members of a church, without prior intention of the state to support the church, when its arbitrary role is decreased.

Financing religious organization might legitimately serve the performance of a public function, including the guarantees to enjoy the freedom of religion, a good example of which is a Chaplaincy⁴². Besides, financing a religious education at school is also acceptable within the framework of which teachers representing different denominations are financed for conducting religious lessons.⁴³ For example, in Hungary religious organizations with a legal status are financed alike and equally to state institutions for educational, social, healthcare activities.⁴⁴ It should be noted that while performing such public functions, religious organizations with a legal status are accountable before the state like any other types of organizations.⁴⁵

In the case of *Bruno v. Sweden*, the European Court of Human Rights differentiated performance of confessional and public (acceptable for everyone) functions by the religious organizations. The Court found admissible to tax the citizens for the expenses, which are connected to the performance of non-confessional functions of the church such as administration of funerals and distinguished it from the finances serving certain confessional goals.

However, despite acknowledgment of religious motives, under certain circumstances their transformation into public goals is unacceptable because of the natural condition of religions. For example, delegation of a relevant authority to the religious organization to ensure access to education is contrary to the understanding of the state's public function of being an instrument of the public sovereignty and of creating an inclusive educational environment for each sector of the society. Function of religions is to promote certain views and argue its supremacy, and it they antagonistic to other religions. Therefore, performance of the public function by a religious orga-

⁴¹ Norman Doe, *Law and Religion in Europe*, Chapter: Property and Finances of Religion, p. 178.

⁴² Law of France as of December 19, 1905, Article 2, Constitution of Romania, Article 29.5.

⁴³ Norman Doe, *Law and Religion in Europe*, Chapter: Property and Finances of Religion, p. 182.

⁴⁴ Hungary: LFCRC 1990, Art 19.1.

⁴⁵ Norman Doe, *Law and Religion in Europe*, Chapter: Property and Finances of Religion, p. 177.

nization for ensuring access to education would create an exclusive environment.⁴⁶ Apart from this, in spite of the fact that the state should not evaluate the content of religious doctrine, in case of its discriminatory nature, e.g. if it preaches obedience of women, the state should not delegate an authority, allocate resources to an organization when it enables it to strengthen such ideas. This would be contrary to the goal of creation of inclusive environment and administration of public sovereignty.⁴⁷

6. INDIVIDUAL AUTONOMY OF RELIGIOUS COMMUNITIES AND ITS MEMBERS

Individual autonomy of religious communities and its members is the second aspect of a secular state, the one free from religious influence. It implies setting the religion and its followers free from the state interference in their activities and enabling them to perform their doctrinal goals independently. The primary expression of this is a prohibition of evaluating the religion's legitimacy by the state.⁴⁸ The European Court of Human Rights negatively assesses the role of the state "to remove the cause of tension by eliminating pluralism".⁴⁹

In the case of *Izzettin Dogan and Others v. Turkey* examined by the European Court of Human Rights concerned the non-recognition of the religious nature of Alevi faith expressed in the lack of access to the certain privileges. The court explained that considering the autonomy of a religious group, only high religious leaders and not the states or courts could determine which belief a community belonged. In such circumstances, the lack of consensus inside a community on certain principles was irrelevant.

In the case of *Fernandez Martinez v. Spain* the court found the right of religious organization to restrict its members from advocating different positions on religious doctrine, namely views against celibacy as protected under autonomy of the church envisaged by the Convention and did not find a

⁴⁶ Peter Jones, "Religious Belief and Freedom of Expression: Is Offensiveness Really the Issue?," *Res Publica* 17, no. 1 (2011): 88.

Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, Mass.: Harvard University Press, 2014), 130.

Silvio Ferrari, Rinaldo Cristofori, and International Consortium for Law and Religion Studies, eds., *Law and Religion in the 21st Century: Relations between States and Religious Communities* (Farnham, Surrey ; Burlington, VT: Ashgate Pub, 2010), 216.

S. Parmar, "The Challenge of 'Defamation of Religions' to Freedom of Expression and the International Human Rights System," *EUROPEAN HUMAN RIGHTS LAW REVIEW*, no. 3 (2009): 6.

⁴⁷ András Sajó, *Constitutionalism and Secularism: the Need for Public Reason*, pg.19.

⁴⁸ *Metropolitan Church of Bessarabia and others v. Moldova* (ECtHR 2001): at 117.

⁴⁹ *Metropolitan Church of Bessarabia and others v. Moldova*, (ECtHR 2001): 116.

violation when a teacher was dismissed by the state based on the motion of the Catholic Church. The court pointed out that in case of doctrinal or organizational dispute inside a religious organization, a person's religious freedom was realized by his/her right to leave the religious organization.⁵⁰

In numerous cases, there is a close correlation between the guarantees of religious freedom of an individual and autonomy of religions itself. A good example of this is the decision delivered by the Supreme Court of Sweden in one of its cases. The Supreme Court found that the use of a homophobic language by a religious leader based on the biblical positions was protected provided that this did not include incitement to violence of the parish.⁵¹

Based on the analyses of these cases, the goal of protecting religious autonomy, namely creating space for independent operation of religious organizations is identified.

Guarantees for freedom of religion and belief also implies the freedom of an individual to stay loyal to their own views, in other words, the state shall not to force them to deny their faith by imposing certain obligations and the requirement to fulfill them.

An example for an autonomy of an individual related to their religion/faith is a right of pacifists to conscientious objection, in the form of refusing military service, universally recognized, including within the framework of the Constitution of Georgia.⁵²

When interpreting the right to conscientious objection, the US Supreme Court in the case of *Burwell v. Hobby Lobby Stores* took the unprecedented step, interpreted it broadly and made it applicable to the family type (closely-held) business as well. Individuals standing behind the business had a conscientious objection against the law, which obliged them to cover certain contraceptives by the insurance plans offered to their female employees, found by the court to be protected under the scope of freedom of religion.

The European Court of Human Rights in the case of *Darby v. Sweden* pointed out in respect to forced taxation that the state is obliged to respect views of individuals and not to force them to participate in financing religious goals.⁵³ This right of conscientious objection toward attributing

⁵⁰ see also the cases of *Obst v. Germany* (ECtHR 2010), *Sindicatul "P storul cel Bun" v. Romania* (ECtHR, GC, 2013).

⁵¹ *Ake Green case*, Supreme Court of Sweden, András Sajó, *Constitutionalism and Secularism: the Need for Public Reason*, pg. 23.

⁵² *Bayatan v. Armenia*, Decision of the Constitutional Court of Georgia as of December 22, 2011.

⁵³ Similarly, the Supreme Court of the United States pointed out in one of the cases (*Everson v. Board of Education of the Township of Ewing*) that no tax should be imposed on a person despite its amount if it is used to finance religious activities or institutions regardless of its form.

confessional goals of any of the religions to a state⁵⁴ belongs to many, is collective and nothing more than the manifestation of the principle of secularism itself.

Just as the state's secular politics has its margin namely that it should not imply a full release of the public space from religion, autonomy of religious organization as well as religious individuals, the right to lead their existence/life according to their will⁵⁵ is also limited. Thus, formal presentation of the arguments based on secularism or religion for the restriction of the activities of the state or a religious organization is unacceptable.

7. LIMITS TO FREEDOM OF RELIGION

7.1 Prohibition of discrimination, protection of the human rights, privatization of public space

It is obvious that the state's obligation toward prohibition of discrimination and protection of human rights cannot depend on the opinions of the religious organizations or persons. Otherwise, religion would stand above the law and the rule of law just would not exist. Refusal by the state to perform its function is permissible only when an individual, without the state's interference, can avoid discriminatory treatment or restriction of rights. Example of this is the case of *Fernandez Martinez v. Spain* discussed above, according to which in case of discrimination inside a religious organization, the state stands beyond autonomy of the church.

In contrast, in the case of *Eweida and others v. the United Kingdom*, the court did not consider the religious motives of the two applicants rejecting the services of, in the first case, performing civil marriage and, in the second, providing marriage counselling to the same-sex couples based on homophobic grounds. The applicants had been dismissed from their jobs because of the given discriminatory treatment, which, despite religious motivation of the treatment, was found to be admissible.

The logic of the case is shared by the Supreme Court of the United States in the case of *Bob Jones University v. United States*, in which the court considered the state's refusal of granting certain privileges (exemption from income tax) to those religious universities, which banned interracial dating justified.

⁵⁴ See the judgment of the Constitutional Court of Georgia as of February 26, 2016.

⁵⁵ John Rawls, *A Theory of Justice*, Rev. ed (Cambridge, Mass: Belknap Press of Harvard University Press, 1999), 10. John Rawls, "The Idea of Public Reason Revisited," *The University of Chicago Law Review*, 1997, 784.

The decision of the Labor Tribunal of the United Kingdom in the case of *Mbuyi v. Newpark Child-care, Ltd* is also interesting. In the case, the complaint of the citizen about ungrounded dismissal from work was upheld when the dismissal followed the sharing of her religious opinions against homosexuality with her lesbian colleague.

The logic of the latter case is shared by the Supreme Court of the United States in the case of *Snyder v. Phelps*, in which the court protected the freedom of speech of the members of the church when they organized a manifestation on the street against homosexuality in parallel to the funeral of the soldier who died in Iraq.

Based on the analyses of the given cases, we can see the logic, according to which, when fighting against discrimination inside the church, the state cannot go beyond the limits of the autonomy of the church, while fighting against discrimination outside the church is the state's responsibility. At the same time, provision of guarantees for the expression of discriminatory views remains the state's responsibility, also.

Apart from the cases of discrimination, religious motives are unacceptable in cases of privatization of the public space by the religion. When the church intends, and is able in a real position, to interfere in the public space in a way that it will not leave space for the performance of state functions, the principle of militant democracy is invoked justifiably in order to maintain the rule of the law in the state.

In the case of *Refah Partisi v. Turkey* the European Court of Human Rights justified dissolution of the largest political party by the state as it aimed to give a statutory force to Sharia laws. In the case, the court found Sharia laws incompatible with the Convention⁵⁶ because of its discriminatory nature towards other religions, opinions about equality and homosexuality,⁵⁷ despite the fact that it was pointed out that the state should not evaluate the legitimacy of the faith according to the obligations of neutrality and impartiality.⁵⁸ There is only one possibility of compatibility between these two positions, namely evaluation of legitimacy of the religion by the state is prohibited until the religion unambiguously interferes in the public space and tries to privatize it. In this case, the court indicates that in case of exchange of the roles between the state and the church the principles cannot remain the same.

⁵⁶ *Refah Partisi (The Welfare Party) and others v. Turkey* (ECtHR, Grand Chamber 2003): at 123, *Refah Partisi (The Welfare Party) and others v. Turkey* (ECtHR Chamber 2001): at 72.

⁵⁷ Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford ; New York: Oxford University Press, 2009), 439.

⁵⁸ *Refah Partisi (The Welfare Party) and others v. Turkey* (ECtHR, Grand Chamber 2003): at 91.

When the interests such as fighting against radical (symbolic) expressions of a religion, not recognized at the constitutional level and not under the scope of any of the human rights, are given an unjustifiably great importance in case of Islamic headscarves, in the given case, we face an attempt from religion to privatize the public space using the political party. The two are substantially different and the latter goes beyond the permissible forms of relationship between the state and the church.

Just as privatization of the public space by religious organization, in concrete cases by religious party, is inadmissible, it is also impermissible to give such a broad interpretation to freedom of religion, so that it results in imposing its views on others.

In the case of *Kalac v. Turkey*, nonrecognition of Turkey as a secular state became the reason for the dismissal of a person from the military service. The court pointed out that a person is not restricted from exercising his religion (prayer, Ramadan), though a soldier's behavior motivated by religion, non-recognition of secularism was contrary to the aims of the military service and violated the military discipline in this case.

In the case of *C. v. the United Kingdom*, the court did not find an individual's request permissible to force the state to implement the policy as acceptable for one person based on the autonomy arguments. A pacifist applicant requested exemption from the general taxation system, as the funds were spent for the aims unacceptable for him. The court stated that the state could collect taxes for the military purposes (envisaged for ensuring security) and pacifists did not have a right to be exempted from taxation. Freedom of belief of an individual is realized by the conscientious objection against military service and cannot apply to force the state to implement pacifist policy.

In contrast to the above mentioned case of *Darby v. Sweden*, in this present case if the request of the applicant was upheld, we would face excessive influence of religion and belief on the performance of the state's function namely ensuring security. When the state is functionally separated from the performance of religious goals, forcing citizens to participate in the performance of confessional goals is in any event inconsistent with the principle of public sovereignty.

Thus, the limit of the autonomy of religious community and an individual, the right to lead their existence/life according to their will runs across the protection of human rights, equality and public space from privatization.

CONCLUSION: SECULARISM, OBJECTIVE CONDITION FOR COEXISTENCE AND THE MEANS OF ITS IMPLEMENTATION

Generally, political and legal philosophy is not based on the presumption of confidence in state and vice versa, development of the science is founded on the contrary hypothesis.⁵⁹ The same deliberation should apply to the confidence in the religious organizations by the state.

The state should not have a pre-defined trust or loyalty, the latter necessary for the survival of the political party in power, toward religious community that has a significant resource to organize the parish for specific purposes.. The state can stay neutral while assessing the motives of a religious community even when remaining cautious in such a way as its caution is derived not from the content of religions but from the risks of its interference in the public space. However, it is important that such caution is balanced and the state does not become a victim of its stereotypes itself.

The secular state policy does not imply reduction of religion to the private sphere. Otherwise, secularism would itself appear as an exercise of atheism considering the natural closeness of secular values and atheism. Such approach would be inconsistent with the theory of "Public Reason" as according to it, the state can like any worldview, based on religion or atheism only equally.⁶⁰

Arbitrary interpretation of secularism, identifying it with the principle hostile toward religions is inadmissible. Otherwise, the state itself becomes fundamentalist and tries to impose a coercive or hostile policy on its citizens. Secularism of France, *Laïcité* might be perceived as an ideology and its normativity, close association with it by the state might be inconsistent with the freedom of religion and belief.

Caution of the state and admission of religion in the public space should be limited by the interest of the protection of human rights and equality.

State's neutrality, which demands from the state to refrain from the assessment of the legitimacy and expediency of religious motives, is a means of realization of the autonomy of religious organization and an individual having conscientious objection. Interference in the religious autonomy

⁵⁹ Raymond Plant, "Religion, Identity and Freedom of Expression," *Res Publica* (13564765) 17, no. 1 (February 2011): 20.

⁶⁰ Julian Baggini, "The Rise, Fall and Rise Again of Secularism," *Public Policy Research* 12, no. 4 (February 2006): 204, 206–207. Rex J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State*, Second edition (Oxford: Oxford University Press, 2013), 68.

is justified only when the state implements “purely public” functions, protection of human rights, free from ideology and. Such might be acting within the frames of militant democracy, when, for instance, religion on its own refuses its autonomy and appears as a political party, sharply interferes in the public space and aims at its privatization. It is obvious, that privatization of the public space by one religion and leaving the others outside this space will cause a restriction of numerous human rights and from the outset will deprive such religious motives of the opportunity to be transformed in the form acceptable for everyone.

In so far as, the state’s principal policy is necessary while protecting human rights and equality, the state’s attitude should also be consistent when protecting all forms of expression of religion, including expression of a discriminatory opinion except when such expression is realized in other forms of restrictive actions toward others.

In fact, holding balance by the state between the caution necessary for “safe pluralism” and recognition of religious motives represents the logical framework of secularism, an essence of the goal to be reached by it. In the reality of, at first glance, vague content of “secularism”, it is important to describe the goal for which it is a means of realization, rather than perceiving a secular state in the form of a state free from religion, as a goal in itself.

In other words, secularism is a precondition of an equal coexistence of the state and the church. The state and the church will coexist when the state compromises and interferes in the religion autonomy or/and in the private sphere of a religious person, only when it violates the rights of others, equality, or aims at full privatization of public space.

Presenting secularism in its logical framework in light of the cases discussed is just enhancing an opinion already existing in theory. According to that standpoint, recognition of religious motives is acceptable and even necessary, though for these reasons, it should be possible to translate them into the form understandable for everyone, which would be unacceptable in cases of disproportional restriction of human rights, violation of equality and privatization of public space.