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INDICE DELL'OPERA

ATHEISM AS A RELIGIOUS PHENOMENON: QUESTIONS FOR (AND NEW CHALLENGES TO) SECULARISM

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Abstract

The (re)emergence of religion in diverse modern societies challenges secularism. Atheism and other forms of religious nonbelief are on the rise as well. This paper analyzes atheism as a part of the religious trend. Even if freedom of religion connotates freedom from religion, it does not mean that atheism and religion are to be treated the same. Legal protections of theistic and atheistic groups must consider their peculiar features, as case studies from Europe and Italy demonstrate.

Introduction

The Canadian Federal Court of Appeal recently denied a self-styled "Church of atheism" of a charity tax status. The Court reasoned that atheism is not a religion, even though the appellant had a minister and commandments and worshiped the "sacred texts" of what it called "mainstream science"[1]. The Court also affirmed that:

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[1] Canada Federal Court of Appeal, *Church of Atheism of Central Canada* v. *Minister of National Revenue*, 2019 FCA 296, 2019, 29, 11.

"for something to be a "religion" … either the Courts must have recognized it as such in the past, or it must have the same fundamental characteristics as those recognized religions. These fundamental characteristics are not set out in a clear "test." A review of the jurisprudence shows that fundamental characteristics of religion include that the followers have a faith in a higher power such as God, entity, or Supreme Being; that followers worship this higher power; and that the religion consists of a particular and comprehensive system of faith and worship"[2].

In this case, Judges agreed with the appellant's argument that the requirement that a belief system have a faith in and revere a higher entity is not always required in defining religion[3]. Nonetheless, the appellant's case failed due to the third element ("a particular and comprehensive system of faith and worship"), as the appellant's system is founded on a particular and comprehensive system of doctrine and observances. The Court held that section 2(a) of the Canadian Charter of Rights and Freedoms and Rights protects an atheist's rights and prevents a Minister from interfering with practicing atheism[4]. Further, the minister's refusal to register the appellant as a charitable organization was not "more than trivial or insubstantial", as the appellant could "carry out its purpose and its activities without charitable registration"[5].

This decision covers all major issues on atheism. Is it a religion? What count as religion? Which branch is entitled to decide? Are atheists equally entitled to legal protection and political representation? What *is* a religion?

This article answers those questions in two parts. The first (sections 1-4) address general issues, such as the definition of religion, the contemporaneous occurrences of the return of religion in the public sphere and the rise of atheism, and the philosophical position of atheism. The second part (sections 5-6) examines atheism from European and Italian perspectives through some judicial decisions.

[2] *Syndicat Northcrest v. Amseleum*, 2004 SCC 47, [2004] 2 S.C.R. 551, at paragraph 39.

[3] The appellant rightfully pointed to Buddhism as being a recognized religion that does not believe in a Supreme Being or any entity at all (*South Place Ethical Society, Barralet and Others v. A.G.*, [1980] 1 W.L.R. 1565, at page 1573).

[4] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at paragraph 70.

[5] *Church of Atheism of Central Canada* v. *Minister of National Revenue*, cit., at paragraph 16.

1. *The definition of a religion?*

Almost a century ago, Max Weber claimed in a book that he would be able to define religion at the end of a book[6]. Seventy years later, Brian K. Smith stated the opposite: "to define is not to finish, but to start"[7]. When examining the debate surrounding the definition of religion, one cannot help but think of Courtney Miller's warning that the search for a unique and unanimously accepted definition of religion may be "an undertaking bound for failure"[8].

In America, the most diverse Western society[9], the debate on the definition of religion is very lively. W.C. Smith argued that a religion is not "in itself an intelligible entity, a valid object of inquiry or of concern either for the scholar or for the man of faith"[10]. In a more recent study, Brian Leiter argued that a prop-

[6] Weber, M., (1922) 1963. The Sociology of Religion, Boston: Beacon Press, 1.

[7] Smith, B.K., 1989. Reflections on Resemblance, Ritual, and Religion. New-York-Oxford: Oxford University Press, 4-5.

[8] Miller, C., 2016. "'Spiritual But Not Religious': Rethinking The Legal Definition of Religion". Virginia Law Review, 102, 833-894, 841. Tribe, L.H., 1978. American Constitutional Law. New York: The Foundation Press, 827-28, arguing for a dual definition of religion hinging on the particular Religion Clause in order to circumvent the definitional dilemma. Even Supreme Court Justices have weighed in on this side of the debate. See *Board of Education v. Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring) ("It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause (…) But the same constitutional principle may operate very differently in different contexts."). See also Crockett, C., 1998. "On the Disorientation of the Study of Religion". In What is Religion? Origins, Definitions, and Explanations, edited by T.A. Idinopulos - B.C. Wilson. Leiden-Boston-Köln: Brill, 1-13 : "Religion does not have a home or a place in any one of the commonly demarcated spheres of human activity, which is why the attempt to locate a determinative space of religion has become impossible"; Beyer, P., 2013. "Religion in the Context of Globalization. Essay on concept, form, and political implication", London-New York: Routledge; Cole Durham Jr., W. - Ferrari, S. - Cianitto, C. - Thayer, D., edited by, 2013. "Law, Religion, Constitution. Freedom of Religion, Equal Treatment, and the Law". London: Ashgate; Ferrari, S. (edited by) "Routledge Handbook of Law and Religion". London -New York: Routledge; Jeremy Gunn, T., 2010. "The Complexity of Religion and The Definition of 'Religion' in International Law". Harvard Human Rights Journal, 16, 189-215, 190: "the absence of a definition of a critical term does not differentiate religion from most other rights identified in human rights instruments and constitutions. However, because religion is much more complex than other guaranteed rights, the difficulty of understanding what is and is not protected is significantly greater".

[9] Schuck, P.H., 2017. One Nation Undecided. Clear Thinking about Five Hard Issues That Divide Us, Princeton: Princeton University Press, 316.

[10] Smith, W.C., (1962) 1991. The Meaning and End of Religion, Minneapolis: Fortress Press, 12.

er definition of religion must be based on "features that all and only religious beliefs have"[11]. Yet Leiter also notes that neither "categoricity" nor "insulation from evidence" – the two criteria that he says "matter" for the purpose of evaluating the claim for tolerating religion as such[12], are unique to religion[13]. As noted by Micheal McConnell, this is all rather confusing and inconsistent. In fact, "it is futile to draw up a list of features descriptive of religion and only of religion. What makes religion distinctive is its unique combination of features, as well as the place it holds in real human lives and human history"[14].

Some suggest that we "abandon the search"[15]. Finally, there are those who assert that "for constitutional purposes, any answer to [a] religious question[] is … *religion*"[16].

In Italy, defining "denomination" has been a crucial issue. Due to the lack of statutory definitions, scholars have proposed different theories. One theory called "self-assessment" posits that self-assessments of a group suffice to recognize a denomination. "Social recognition" theory uses quantitative, sociological, and historical criteria to determine whether denomination is present[17]. Other theories rely on a number of criteria – belief in a transcendental reality (not necessarily in God), existential interdependence between the faithful and this transcendental reality (manifested, amongst other things, with worship), capability to answer fundamental questions on men's origin and destiny, provision of a moral code, and organizational structure – to classify a group as a

[11] Leiter, B., 2012. Why Tolerate Religion? Princeton-Oxford: Princeton University Press, 27.

[12] In Leiter opinion, "those who genuinely conduct their lives in accord with the categoricity of the moral demands they recognize are overwhelmingly religious", and religious beliefs, "in virtue of being based on 'faith', are insulated from ordinary standards of evidence and rational justification, the ones we employ in both common sense and in science", Id., 34.

[13] Id., 38, 46.

[14] Mc Connell, M.W., 2013, "Why Protect Religious Freedom?", cit., 784.

[15] See Freeman, G.C.III.,1982-3. "The Misguided Search for the Constitutional Definition of 'Religion'". The Georgetown Law Journal, 71, 1519, 1549-59. See, recently, Jamal, A.A. - Neo, J.L., 2019. "Religious Pluralism and the Challenge for Secularism". Journal of Law, Religion and State, 7, 1-12, 11.

[16] Laycock, D., 1996. "Religious Liberty as Liberty". Journal of Contemporary Legal Issues, 7, 313-56, 329 (emphasis in original / added)

[17] See, *ex multis*, Mirabelli, C., 1975. "L'appartenenza confessionale. Contributo allo studio delle persone fisiche nel diritto ecclesiastico italiano". Padova: Cedam 140; Ferrari, S., 1995. "La nozione giuridica di confessione religiosa (come sopravvivere senza conoscerla)". In Principio pattizio e realtà religiose minoritarie, edited by V. Parlato - G.B. Varnier, Torino: Giappichelli, 19 ss.

denomination. This last approach derives support from decisions of the Constitutional Court, which has rejected the "self-qualification" and has affirmed that various criteria, including previous public acknowledgments, statutes that clearly express the characters, or common sense, can lead to a recognition of a denomination[18].

As the last example indicates, a lack of an accepted definition means that the task of giving meaning to the term "religion" sometimes falls to the courts[19]. For instance, the United States Supreme Court has affirmed that a religion, for purposes of the First Amendment, is distinct from a "way of life," even if that way of life is inspired by philosophical or other secular concerns[20]. In other words, a religion need not be based on a belief in the existence of a supreme being[21]. Further, "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion"[22]. This principle of neutrality has provided a good sense of direction: Because the Free Exercise Clause protects the individual's choice of religion, the government may not favor a religion over another or over irreligion[23].

This freedom of religion has led the Seventh Circuit Court of Appeals to hold twice that a prisoner's request to form an atheist study group must be given the same consideration as requests to form a religious study group[24]. Judge Diane P. Wood noted that the federal judiciary has "adopted a broad definition of 'religion' that includes non-theistic and atheistic beliefs, as well as theistic ones." Then she wrote that "when a person sincerely holds beliefs dealing with issues of 'ultimate concern' that for her occupy a 'place parallel to that filled by God in traditionally religious persons,' those beliefs represent her religion[25].

[18] Italian Constitutional Court, Judgments no. 467/1992; 195/1993; 346/2002.

[19] Ahdar, R., 2018. "Is Freedom of Conscience Superior to Freedom of Religion?". Oxford Journal of Law and Religion, 7(1), 124-142, doi.org/10.1093/ojlr/rwy006, 127: "The legal protection of religious freedom necessarily requires courts and tribunals to eventually determine what count as religion or religious belief"; Davis, D.H., 2005. "Is Atheism a Religion? Recent Judicial Perspectives on the Constitutional Meaning of 'Religion'". Journal of Church and State, 47(4), 703-723.

[20] See *Wisconsin v. Yoder*, 406 U.S. 205, 215-16, 92 S. Ct. 1526, 32 L.Ed.2d 15 (1972).

[21] See *Torcaso v. Watkins*, 367 U.S. 488, 495 & n. 11, 81 S. Ct. 1680, 6 L.Ed.2d 982 (1961).

[22] *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968); *Everson* v. *Board of Ed. of Ewing,* 330 U. S. 1, 15-16 (1947).

[23] *McCreary County v. American Civil Liberties Union of Ky*., 545 U.S. 844 (2005).

[24] *Kaufman c. Pugh*, 733 F.3d 692 (7th Cir. 2013).

[25] *Fleischfresser v. Dirs. of Sch. Dist.* 200, 15 F.3d 680, 688 n. 5 (7th Cir.1994).

Further, atheism may be deemed a religion[26]. That is because atheism presents views on "religion, the existence and importance of a supreme being, and a code of ethics"[27].

Is judiciary the most appropriate branch to deal with defining religion? Probably not. With regard to the task, the judicial tendency is to simply "select a particular set of criteria and make a decision … by … considering whether the religion, belief, or practice falls within these criteria". This necessarily involves "drawing an arbitrary line between protected and non-protected religions, beliefs, or practices"[28].

Definitions include and exclude[29]. As such, a legal definition of religion requires that the meaning be not too under or overinclusive. If underinclusive, a definition of religion could "expos[e] followers of 'foreign,' lesser known, or unpopular creeds to harm, or even persecution." If too overinclusive, the definition can encourage "misplac[ements] or abus[es of] benefits which may stem from constitutional protection"[30].

As Kent Greenwalt observed:

> "Since … religion … refers to a deep and important social phenomenon, it would be unfortunate if the law's idea of religion differed greatly from

[26] See *Reed v. Great Lakes Cos.,* 330 F.3d 931, 934 (7th Cir.2003) ("If we think of religion as taking a position on divinity, then atheism is indeed a form of religion.").

[27] *Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir. 2005).

[28] Neo, J. L., 2018. "Definitional imbroglios: A critique of the definition of religion and essential practice tests in religious freedom adjudication". International Constitutional Journal of Law, 16, 574-595, doi:10.1093/icon/moy055. The Author critiques the use of definitional tests in religious freedom adjudication, using case law from Malaysia and Singapore, 575. In particular, she argues adopting an overly narrow and formalistic approach to deny constitutional protection to religious beliefs and practices. She employes "case law from these jurisdictions to critique a jurisprudential innovation that originated from the Indian Supreme Court, which is the essential or integral practice test". The latter, in Neo's opinion, "is a variation of the definitional test as it seeks to allocate constitutional protection by drawing distinctions between what are essential practices (and thereby deserving of constitutional protection) and what are not (and not deserving of constitutional protection). Essential practice, depending on how it is defined, thus demarcates what religious practices are protected and what are not. It significantly restricts the scope of religious freedom guarantees since even practices that are accepted as "religious" may not be protected. This test, as such, potentially excludes a wide range of religious practices from constitutional protection", 576.

[29] Ahdar, R., 2018. "Is Freedom of Conscience", cit., 127.

[30] Sajó, A. - Uitz, R., 2012. "Freedom of Religion". In The Oxford Handbook of Comparative Constitutional Law, edited by M. Rosenfeld - A. Sajó. Oxford: Oxford University Press, 909, 915.

> ideas of religion outside the law. Although legal applications of a concept need not correspond precisely with how people use the concept in other contexts, it counts in favor of an approach … that it ties to more general understandings. An analogical approach fits our culture's ideas of what counts as religious better than [formalistic] approaches … and … remains open to changing understandings about which elements are of greater or lesser importance in deciding whether something is religion"[31].
>
> That said, the legal definition of a religion needs to consider local particularities that shape religious beliefs and practices. This applies even to global religions. Religious traditions are flexible and thus are subject to localizations[32].

2. *Religion in (post-)secular era*

Discussions on (the possibility of) defining a religion are entering a new stage. Religions are making surprising comebacks[33]. They are once again on the rise in Latin America, Africa, and Middle East. Even in China, many sectors of the population demonstrate inclination toward religiosity[34].

While religions are once again on the rise, they are finding themselves in new waters. Post-secularism, a concept that has been in prominence since the beginning of the 2000s[35], has designated a new role for the regaining insti-

[31] Greenawalt, K., 2006. "Religion and the Constitution". Vol. I "Free Exercise and Fairness". Princeton: Princeton University Press,143: "The analogical approach should not be unitary in the sense that whatever amounts to religion in one context automatically amounts to religion in another. But the approach is unitary in the more subtle sense that courts employ a uniform strategy to make determinations about religion. This strategy allows the sensitivity to context that has led scholars to propose different ideas of religion for free exercise and establishment cases, but without the awkwardness that a dual approach involves".

[32] Neo, J.L., 2018. "Definitional imbroglios", cit., 578.

[33] Khaitan, T. - Calderwood Norton, J., 2019. "The Right to Freedom of Religion and the Right Against Religious Discrimination: Theoretical Distinctions". International Journal of Constitutional Law, 17(4), 1125-1145, doi: 10.1093/icon/moz087, 1125.

[34] Robbers, G., 2013. "Church and State Relations in the Constitutions", in Cole Duhram, Jr., W. - Ferrari, S. - Cianitto, C. - Thayer, D., edited by, Law, Religion, Constitution, cit., 57.

[35] Beckford, J. A., 2012. "SSSR Presidential Address Public Religions and the Post-secular: Critical Reflections". Journal for the Scientific Study of Religions, 51(1), 1-19, doi.org/10.1111/j.1468-5906.2011.01625; McLennan, G., 2017. "Towards Postsecular Sociology". Sociology, 41(5), 857-870, 2017, doi: 10.1177/0038038507080441 41; Id., 2010. "The Post-secular Turn". Theory, Culture & Society, 27(4), 3-20, doi:

tutions. Philosopher Jurgen Habermas, in his article "Religion in the Public Sphere"[36], advanced critical reflections on secularism in modern democracy[37]. Habermas argued that, in a democratic sphere, religions are no longer private creeds but are public factors in the formations of political opinion and will[38]. This theory carries twofold implications. First, for the nonreligious, religion possesses a cognitive content that cannot be dismissed as irrational. Second, the religious must acknowledge both the legitimacy of scientific reason and the egalitarian principles of modern law and morality. The two groups must rephrase religion's semantic content in a rational language that is accessible to even nonbelievers. Ultimately, religion's explicit contribution to secular reasoning is the "awareness of what is missing"[39].

Following Habermas's initial formulation, scholars have defined and linked the idea of the post-secular society to that of the pluralistic society. As a result, post-secularism is now associated with cultural, ethical, and religious pluralism, where secular and religious phenomena coexist and continuously interacting with each other[40]. Post-secularism is pertinent to the pres-

10.1177/0263276410372239. See also Zucca, L., 2009. "The Crisis of Secular State - A Reply to Professor Sajó". International Journal of Constitutional Law, 7(3), 494-514, doi.org/10.1093/icon/mop010.

[36] Habermas, J., 2006. "Religion in the Public Sphere". European Journal of Philosophy, 14(1), 1-25.

[37] See, in particular, Rawls, J., 1997. "The Idea of Public Reason Revisited". The University of Chicago Law Review, 64(3), 765-808.

[38] On the clash between Habermas and Rawls theories, see Urbinati, N., 2014. "The Context of Secularism: A Critical Appraisal of the Post-Secular Argument". In Constitutional Secularism, cit. 14 ss.

[39] Habermas, J., 2010. "An Awareness of What is Missing". In An Awareness of What is Missing: Faith and Reason in a Post-Secular Age, edited by Id. et al. Cambridge: Polity, 15-24. Habermas argues that the relationship between reason and religion needs to be reconceived in view of the rise of religious fundamentalism, the postmodern intensification of the dialectic of Enlightenment, and the hegemony of capitalist principles of exchange in a globalized world. Habermas suggests that it is necessary to rethink the genealogy of post-metaphysical reason and to draw from religious resources in order to respond to these challenges. Habermas's proposal, therefore, involves a critical rejection of strands of modern secularism as well as a call for believers and theologians to engage in constructive dialogue with post-metaphysical thinking.

[40] See Jamal, A.A., 2017. "Considering freedom of religion in a post-secular context: hapless or hopeful?". Oxford Journal of Law and Religion, 6(3), 433-450, doi.org/10.1093/ojlr/rwx046.; de Vries, H. - Sullivan, E., 2006. "Political Theologies: Public Religions in a Post-secular World". New York: Fordham University Press, argued that the concept of post-secular means a transformation, first of all political, even before the sociological one,

ent discussion because, as predicted by the established model, the idea has clashed with the widespread resurgence of religion and has brought about many challenges and problems. Difficulties involving religious issues – such as crucifixes in classrooms, hijab practices, and constructions of religious buildings – arise throughout the world. Recent studies on Asia demonstrate that "context matters" – that is to say, what is controversial in one context may be banal in another, and what is odd in one place may be commonplace in another[41].

Now is the time of religion's "deprivatization" and "repoliticization"[42]. This energetic, turbulent concurrence has caused "a political and institutional struggle against secular constitutionalism" and has led to "a two-progged assault on the very legitimacy and viability of [secular constitutionalism] … On one hand, constitutional secularism has been attacked as inherently hostile rather than neutral toward religion … constitutional secularism has [also] been criticized as inevitably favoring one religion (or a set of religions) over others"[43]. In other words, secularism is now an increasingly disputed idea[44]. Religion, it seems, is "back with a vengeance"[45].

In addition to this new worldwide religious dynamism, New Religious Movements (NRMs) seek the same legal protections afforded to established religions in spite of the differences between the two. NRMs include a wide spectrum of sects, cults, and other nontraditional groups. There is "no single

of the context in which the political discourse unfolds in contemporary societies. It is a transformation of the secularist perception of political life. See Rosati, M., 2015. "The Making of a Post-secular Society. A Durkheimian Approach to Memory, Pluralism and Religion in Turkey". Farnham: Ashgate; Biano, I., 2017. "Laicità, libertà di coscienza e pluralismo religioso. Una prospettiva a quattro temi". Quaderni di diritto e politica ecclesiastica, 2, 445-458. Beaumont, J. - Baker, C., 2011. "Post-secular Cities. Space, Theory and Practice". London-New York: Continuum.

[41] Jamal, A.A. - Neo, J.L., 2019. "Religious Pluralism", cit., 6. See more in Neo, J.L. - Jamal, A.A. - Goh, D.P.S., edited by, 2019. "Regulating Religion in Asia: Norms, Modes, and Challenges". Cambridge: Cambrigde University Press. See, in general, Neo, J.L. - Son Ngoc, B., edited by, 2019. "Pluralist Constitutions in Asia". Oxford: Hart Publishing.

[42] Casanova, J., 1994. "Public Religions in the Modern World". Chicago: The University Chicago Press, 3-6.

[43] Mancini, S. - Rosenfeld, M., 2014. "Introduction". In Constitutional Secularism in a Age of Religious Revival, edited by Id. New York: Oxford University Press, xvi.

[44] See Calo, Z., 2019. "Law, Religion and Secular Order". Journal of Law, Religion and State, 7(1), 104-127.

[45] Hirschl, R. - Shachar, A., 2018. "Competing Orders? The Challenge of Religion to Modern Constitutionalism". The University of Chicago Law Review, 85(2), 425-456, 426.

characteristic … [these self-proclaimed] religions share[]. What they share[] [i]s [that] … they [a]re not part of the religious establishment"[46]. Given their diversity, NRMs resist classification[47]. Their doctrines, goals, practices, and lifestyles differ[48]. What makes NRMS even more difficult is that the list of groups that qualify as "new religions" would differ from country to country and would always be undergoing revision[49]. The features of NRMs also hold true for the Spiritual-but-not-Religious Groups (SBNRs)[50].

All in all, "religious diversity has increased … through the proliferation of different religious communities living in the same geographic space and the growing presence of unbelievers, [and] through the diffusion of 'unaffiliated believers' … and of believers who, although they remain faithful to their denominational religion, adopt forms of personal spirituality"[51].

3. *Atheism and agnosticism on the rise*

In spite of signs suggesting the contrary, atheism is thriving. For instance, in April 2016, National Geographic featured an article titled "The World's Newest Major Religion: No Religion". Australia has seen an increase pres-

[46] Melton, J.G., 2004. "Toward a Definition of 'New Religion'". Nova Religio: The Journal of Alternative and Emergent Religions, 8(1), 73-87. The Author argued, 76: "from the perspective of the various religious traditions operating in the West, we might begin to build a definition of "new religions" as those religious groups that have been found, from the perspective of the dominant religious community (…), to be not just different, but unacceptably different. See McLaughlin, L., 2012. "Soka Gakkai in Japan". In Handbook of Contemporary Japanese Religions, edited by I. Prohl - J.K. Nelson. Leiden: Brill, 269-307. New religions may challenge the "traditional parameters" of religion. "If we if we only look at the elements characterizing these groups that appear more religious, such as doctrines or similarities to other tradition, we risk overlooking the centrality of other practices that are vital elements of members' engagement and of the expansion dynamics of these organizations", see Baffelli, E., 2017. "Contested Positioning: "New Religions" and Secular Spheres". Japan Review, 30 (Special Issue), 135.

[47] See Saliba, J.A., 2003. "Understanding New Religions Movements". Walnut Creek: AltaMira Press.

[48] See Farrell, K., 2016. "New Religious Movements and the Need for Greater Clarity of Religion: Under Title VII". Rutgers Journal of Law & Religion, 18, 87-120, 116.

[49] Melton, J.G., 2004. "Toward a Definition", cit., 79.

[50] Miller, C., 2016. "Spiritual But Not Religious", cit., 840.

[51] Ferrari, S., 2016. "Religion Between Liberty and Equality. Journal of Law, Religion and State, 4(2), 179-193, 180.

ence of nonbelievers[52]. East Asian states now have the highest proportions of atheists[53].

Recent surveys targeting Americans show that atheism is on the rise in America. The number of atheists, agnostics, and "nones" (people who have no religious preferences) is rising[54]. Also, Americans who identify themselves as not practicing any religion has doubled in the past twenty-five years. Books by atheists seeking to debunk religion have become bestsellers[55]. An atheist iPhone application found its way to the top ten book-apps list on iTunes[56]. All in all, the atheist is no longer a stranger in America[57].

At the same time, atheists, agnostics, and nonbelievers still are a small "minority" and remain disliked, distrusted, and non-American in the eyes of many[58]. As a result, many atheists are hesitant to reveal their views. Those who

[52] From 22.3% in 2011 to 30.1% in 2016, according to Australian Bureau of Statistics 2017. 2016 Census Data Reveals

"No Religion" is Rising Fast. Available online: http://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/7E65A144540551D7CA258148000E2B85?OpenDocument (accessed on 2 September 2019).

[53] According to the World Values Surveys (WVS), see Yang, F., 2018. "Religion in the Global East: Challenges and Opportunities for the Social Scientific Study of Religion". Religions, 9, 305, 1-10, 4.

[54] Schuck, P. H., 2017. "One Nation Undecided", cit., 326-7: "These changes are strikingly generational. As Millennials enter adulthood, they become less religiously affiliated than older generations. Nearly a quarter of Generation Xers now claim to have no particular religion or describe themselves as atheists or agnostics, up four points in seven years. Baby boomers also are now more likely to identify as "nones".

[55] See Harris, S., 2004. "The End of Faith: Religion, Terror, and the Future of Reason". New York: W.W. Norton & Company.

[56] Press Release, Jay-Roc Invs., Inc., The Atheist Pocket Debater iPhone App Remains on Top Ten Best Selling Apps List in Book Category on iTunes (July 16, 2010), available at http://www.prweb.com/releases/iPhone_app/atheist_book_app/prweb3954134.htm

[57] Quillen, E.G., 2018. "Atheism Exceptionalism: Atheism, Religion and United States Supreme Court". New York: Routledge; Hickel, F. R., 2019, "Civil Religion and Religious Independents: Examining the Beliefs of Atheists, Agnostics, and the Unaffiliated". Journal of Church and State, 61(4), 610-636.

[58] For example, Gervais, W.M. - Shariff, A. F., - Norenzayan, A , 2011. "Do you believe in atheists? Distrust is central to anti-atheist prejudice". Journal of Personality and Social Psychology, 101(6), 1189-1206. doi.org/10.1037/a0025882 and Swan, L.K. - Heesacker, M., 2012. "Anti-Atheist Bias in the United States: Testing Two Critical Assumptions". Secularism and Nonreligion, 1, 32-42. doi.org/10.5334/snr.ac found that informal religious privilege is maintained in the US through anti-atheist prejudice, because people in the US distrust those who do not believe in god(s). Adding to the structural mechanisms behind such discrimination,

do risk discriminations and attacks. For example, some Americans believe that atheists are immoral and unpatriotic. Many Americans find atheists as some of the most problematic in both public and private spheres.

As these anti-atheist perceptions indicate, atheism has a long way to go in America. After all, the United States is a religious nation. American culture is steeped in religion. America's pledge of allegiance declares that it is one nation "under God"; its national motto proclaims "In God We Trust"; and its war memorials are in the form of Latin crosses[59]. Given this religious background, it is not surprising that atheists face social and legal consequences. Americans tend to distrust and reject atheists at sociopolitical levels[60]. Even now, a parent's lack of belief can count against him or her in a custody dispute[61].

In Europe, atheism is faring better. France has housed the world's largest populations of atheists[62]. In the United Kingdom, the number of people who identify as confident atheists has increased from ten percent in 1998 to eighteen percent in 2008 and then to twenty-six percent in 2018. Agnosticism, on the other hand, has shown little change (fifteen percent in 1998, nineteen percent in 2008, and then eighteen percent in 2018). Today, the majority (52%) of the British population do not see themselves as belonging to any religion, and two-thirds do not attend religious services[63]. Even in Italy, a recent survey demonstrates a rapid increase in "unbelief" among

Edgell, P. et al., 2016. "Atheists and Other Cultural Outsiders: Moral Boundaries and the Non-Religious in the United States". Social Forces, 95(2), 607-638 doi.org/10.1093/sf/sow063 show that prejudice stems from informal tendencies to see atheists as immoral due to US cultural values that connect religion and morality to citizenship and national identity.

[59] See Mala Corbin, C., 2012. "Nonbelievers and Government Speech". Iowa Law Review, 97, 347-415, 349. Recently, see Laurence Moore, R. - Kramnick, I., 2018. "Godless Citizenship in a Godly Republic. Atheists in American Public Life". New York: W.W. Norton Company.

[60] Franks, A.S. - Scherr, K.C. - Gibson, B., 2019. "Godless by association: Deficits in trust mediate anti-atheist stigma-by-association". Journal of Experimental Psychology: Applied, 25(2), 303-316. doi:10.1037/xap0000179.

[61] "Although the religious beliefs of parents are not dipositive in a child custody dispute, they are factor relevant to determining the best interest of a child", Staggs v. Staggs (Miss. Court of Appeal 2005, ruling in mother's favour and noting that "while father is an a agnostic and testified that religion is not important to him, mother testified that religion is very important to her".

[62] Alicino, F., 2018. "Atheism and the Principle of Laicité in France. A shifting Process of Mutual Adaptation". Stato, Chiese e pluralismo confessionale, 32, 7.

[63] Curtice, J. et al., edited by, 2019. "British Social Attitudes: The 36th Report". London: The National Centre for Social Research, 27.

youngsters. Twenty-eight percent of the interviewees have identified themselves as such[64].

These observations imply that a "secular state must address religious pluralism not only among different religions, but also between religions and no[n]-religion[s]. As the [religiously] unaffiliated increase in number, they may assert stronger claims against religion[s] as part of what they see to be the … [secular state's] promise"[65].

At the same time, the atheist and the nonreligious face discrimination for openly expressing their beliefs. For instance, there is worldwide evidence that supports the presence of prejudices against atheists that affect employment, elections, family life, and social inclusion[66].

Atheism is something complex. The debates over the best methods to examine its definitions, practices, and expressions are still ongoing. Recent developments in the scientific study of religious beliefs and behaviors point to the conclusion that religious disbelief is a product of multiple factors, including cognitive, motivational, and cultural learning mechanisms[67].

There are many variants: hard atheists, who affirmatively deny the existence of God and will assert as much. Soft atheists, who are less focus on attacking religion and more on examining a life without God[68]. Then, a "practical atheism" that represents one of the most interesting aspects, but is also more difficult to interpret. The category of nonbelievers might also include agnostics or atheists who describe themselves as humanist, secular, or of Ethical Culture. These nonbelievers may eschew the term atheist (or agnostic) as a description because, while its definition revolves around the concept of god, their focus

[64] See Garelli, F., 2016. "Piccoli atei crescono. Davvero una generazione senza Dio". Bologna: il Mulino.

[65] Jamal, A.A. - Neo, J.L., 2019. "Religious Pluralism and the Challenge", cit., 3.

[66] Gervais, W.M., et al., 2017. "Global evidence of extreme intuitive moral prejudice against atheists". Nature Human Behaviour, 1, doi.org/10.1038/s41562-017-0151. See also Giddings, L. - Dunn, T.J., 2015. "The Robustness of Anti-Atheist Prejudice as Measured by Way of Cognitive Error". The International Journal for the Psychology of Religion, 26,124-35, that found robust anti-atheist prejudice, suggesting that even where large non-religious populations exist, informal prejudice against atheists was present.

[67] Norenzayan, A. - Gervais, W.M., 2013. "The origins of religious disbelief". Trends Cognitive Science, 17(1), 20-25. doi:10.1016/j.tics.2012.11.006

[68] See Epstein, G., 2009. "Good Without God: What a Billion Nonreligious People Do Believe". New York: Harper Collins; Arons, R., 2008. "Living Without God: New Directions for Atheists, Agnostics, Secularists, and the Undecided". Berkeley: Counterpoint Press.

is not on the existence or nonexistence of God or gods. They may also avoid those terms because of the stigma associated with them.

There is an increasing debate on religion. In short, in words of Ronald Dworkin's last work: "Does religious freedom concern only God?"[69]. There are always more and more questions to be asked. Which also means that no matter how hard we try to construct complete or even workable definitions, we will always fall short.

4. *Religion and Conscience: an issue still under debate*

Atheism and agnosticism test the limit of freedom of religion to make believers *and* nonbelievers "feel at home." Indeed, some question whether law should abandon protections for the religious in favor of ones targeting some larger secular category that includes (and is not limited to) religions[70].

Of all candidates for this unifying category, *freedom of conscience* (where conscience is defined broadly as the ability to protect the deepest concerns shared by the citizens of a liberal democratic society) is the most promising for two reasons[71]. First, freedom of conscience is a foundational component of religious freedom. Freedom of conscience means the freedom to profess one's religious faith and to share one's membership in a specific religious group.

[69] Dworkin, R., 2013. "Religion Without God". Cambridge, Mass.: Harvard University Press.

[70] Lund, C. C., 2017. "Religion Is Special Enough". Virginia Law Review, 103(3), 481-523, 486.

[71] Nussbaum, M.C., 2008. "Liberty of Conscience: in Defense of American's Tradition of Religious Equality". New York: Basic-Books; Ahdar, R., 2018. "Is Freedom of Conscience", cit., 128: "the latitude for disagreement over its core meaning is narrow certainly much narrower than over the definition of religion". Rienzi, M.L., 2014. "The Case for Religious Exemptions - Whether Religion Is Special or Not". Harvard Law Review, 127, 1395-1418, with regard to Leiter, B., 2013. "Why Tolerate Religion?", cit. and Koppelman, D., 2013. "Defending American Religious Neutrality". Cambridge, Mass.: Harvard University Press, argued that "The most surprising and important lesson of these books is that the case for religious exemptions does not actually depend on treating religion as especially valuable at all. Rather, as both books demonstrate, there are strong reasons to protect acts of conscience – that is, acts based on a person's deeply held beliefs about his or her moral obligations – regardless of whether those beliefs are religious or secular, and regardless of whether religion is accorded special treatment. The books therefore support a strong argument that if any change is necessary to the current regime of religious exemptions, it should be to expand rather than eliminate their availability", 1408.

This concept does not rely on other dimensions of a religious experience, such as freedom of worship and freedom of proselytism. Second, freedom of conscience includes religious freedom. A *caveat*: this requires two conditions. The first condition is that the former is understood as a broad freedom to decide whether to have a religious belief, a certain set of ethical values, an ideology, a vision of life and the world personality. The second condition is that the latter be understood as the exercise of freedom of conscience in a certain religious sphere. For the believer, freedom of conscience would constitute an understanding that his nonreligious counterpart also has a conscience, to which the nonbeliever can conform his life. On the other hand, for the nonbeliever, freedom of conscience means that the faithful has a transcendent vision of life and the world, in accordance of which they have the right to act[72].

As the two conditions indicate, the relationship between freedoms of religion and of conscience is still under debate[73]. One important criticism is that the conversion of all plausible religious *and* nonreligious claims into ones under freedom of conscience allows courts to treat those claims as mere matters of conscience. This criticism holds that, for instance, a religious claim that might inform a court of the profound and difficult quandary a religious defendant had faced may not be as compelling if presented in terms of conscience[74]. This criticism also asks whether freedom of conscience per se is sufficient to fully represent the weight and range of claims involving religious liberty violations[75].

Freedom of conscience's shortcomings notwithstanding, the framework is useful because questions answered by atheism concern religion as well. Carlo Cardia in *Ateismo e libertà religiosa* argued that atheism is closely related to religion[76]. Both are religious phenomena because both answer questions on the meaning of existence and infinity. Thus, religious freedom must ontologically include freedom of atheism in everything the latter requires, because each religious bind is anti-atheistic, and vice versa[77]. Few years after Cardia's ob-

[72] Dalla Torre, G., 2008. "Libertà di coscienza e di religione". "Stato, chiese e pluralismo confessionale", 1-20.

[73] See Ahdar, R., 2017. "Exemptions for Religion or Conscience under the Canopy of the Rule of Law". Journal of Law, Religion and State, 5(3), 185-213; Schwartzman, M., 2012. "What If Religion is Not Special?". The University of Chicago Law Review, 79(4), 1451-1427.

[74] Horwitz, P., 2011. "The Agnostic Age: Law, Religion and Constitution" New York: Oxford University Press, 184.

[75] Ahdar, R., 2018, "Is Freedom of Conscience", cit., 124.

[76] Cardia, C., 1973. "Ateismo e libertà religiosa". Bari: De Donato.

[77] Cardia, C., 2011. "Conclusioni. Evoluzione sociale, ateismo, libertà religiosa". "Quaderni di diritto e politica ecclesiastica, 1, 213-225, p. 215. See also, Floris, P., 2011. "Ateismo e

servation the Italian Constitutional Court declared that the idea that "atheism begins where religious life ends" is outdated. This progression was possible thanks to article 19 of Constitution, whose freedom of religion includes the protection of freedom of nonbelievers' conscience and corresponding "negative" freedom[78].

If atheism and its non-traditional peers are left out of the religious realm, then they would fall into the nonreligious category and, as a consequence, governments would have no problem promoting and teaching them[79]. If the government cannot make positive assertions about religious truth, it would be nonsensical to allow it to make negative assertions[80].

5. *Freedom* of *religion as freedom from* religion

Traditionally, freedom of religion has been associated with two human domains: *forum internum*, the realm of inner belief where a person holds the right to believe, and *forum externum*, the external manifestation of religious beliefs through practices such as worships, rites, rituals, teachings, preaches, and publications[81]. International human rights law affirms that most liberal democracies consider freedom to believe also signifies freedom to not believe and thus protects atheism and agnosticism. In other words, freedom of religion includes

Costituzione". Quaderni di diritto e politica ecclesiastica, 1, 87-111; Fiorita, N. - Onida, F., 2011. "Anche gli atei credono". Ivi, 15-32.

[78] Italian Constitutional Court, Judgment n. 117/1979.

[79] Greenawalt, K., "Religion and the Constitution", cit., 148-50.

[80] As Greenawalt, K., "When Free Exercise and Non establishment Conflict". Boston: Harvard University Press, 192, noted: "It is important (…) to understand that the constitutional principle covers negative assertions as well as positive ones. School teachers can no more say 'there is no God' or 'Jesus was just an ordinary person' than they can say 'Jesus Christ was the son of God'. When the question is what schools must, or should, allow student groups to do, the general principle, as we have seen, is that they must ordinarily treat religious groups similarly to nonreligious ones". McConnell, M.W., 2013. "Why Protect Religious Freedom", cit., 809: A state that is neutral toward religion is different. Such a state may promote ideas consistent with democratic republicanism, but will not promote religion over irreligion or the other way around". The issue is relevant in Italy: see Italian Constitutional Court, Judgment n. 203/1989, further footnote no. 105.

[81] Neo, J. L., 2020. "Religious Freedom". In The Oxford Handbook of Constitutional Law in Asia, edited by H. Lau - A. Schwartz. Oxford: Oxford University Press (forthcoming). See also F. M. Gedicks, 2015. "Religious Freedom as Equality". In Routledge Handbook of Law and Religion, edited by S. Ferrari. London: Routledge, 133-144

freedom *from* religion. When freedom of religion concerns *forum externum*, any limit on that freedom can be allowed only if it is prescribed by law; is justified on a narrow range of public interests; and is "necessary, proportionate[,] and not excessive".

But some areas of the world disagree. For example, some jurisdictions actively oppose nonreligious rights[82]. Such states include Afghanistan, Indonesia, Malaysia[83], Egypt, and South Arabia[84]. Vietnam's Constitution is the only one that explicitly extend freedom of religion to freedom to not follow any religion[85].

But there is a third domain. Within *forum externum*, there is so-called *institutional forum*, where religious groups can play peculiar roles as organized institutions in the public sphere[86]. In European jurisdictions, certain problems appear when one examines the relationship between freedom *from* religion and governance through the institutional lens.

[82] Carpenter, D., 2017. "'So Made That I Cannot Believe': The ICCPR and the Protection of Non-Religious Expression in Predominately Religious Countries". Chicago Journal of International Law, 18, 216-44; Nixon, A.G., 2020. "'Non-Religion' as Part of", cit., 2.

[83] Nixon, A.G., 2020. "'Non-Religion", cit., 3: "Malaysian Atheists were targeted by government officials after a picture was posted on the Malaysian Atheist Republic Facebook page, outing many hidden members. Atheist Republic is the biggest atheist group on Facebook, supporting some of the most vulnerable atheists in the world. The Malaysian government requested that Facebook ban Atheist Republic pages but the request was denied by the company. The Malaysian branch was accused by the Malaysian government of attacking religions in an aggressive way. A deputy minister in the prime minister's department claimed that there was no place or rights for atheists in Malaysia or their constitution, a claim later disputed by lawyers. Another cabinet minister proclaimed that 'atheism is a very dangerous ideology' that was being 'spread by social media' and that the government would 'hunt them down'. The minister claimed that Malaysia has freedom of religion, but not freedom from religion".

[84] Neo, J. L. - Scharffs, B.G., 2020. "Law and Politics of Freedom of Religion in Comparative Perspective", University of Western Australia Law Review, 47, 1-14, 4 : "The Cairo Declaration on Human Rights in Islam, promulgated as a competing normative framework to universal human rights law, conceptualizes 'religious freedom' not in the formulation commonly found in other human rights documents, but in terms of non-compulsion. Article 10 of the Declaration provides that "Islam is the religion of unspoiled nature" and that it is "prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism". Such restrictions on the right to choose one's religion clearly violates the internal freedom or forum *internum* of persons, which is widely considered in international human rights law to be inviolable".

[85] Constitution of Socialist Republic of Vietnam, art. 24. See Neo, J.L., 2020. "Religious Freedom", cit.

[86] Dalla Torre, G., 2008. "Libertà di coscienza", cit., 9.

5.1. *The European perspective*

Freedom of thought is of paramount importance to all humans when it comes to (non-)religious experience[87]. One obstacle to a successful conceptualization and implementation of this freedom is that there is no unifying continental definition of religion. Neither the EU or its member states provide such a definition in their laws, preferring to leave the task to their courts[88]. It is interesting to note that the UK, which recently left the European Union, has adopted in 2010 the Equality Act expressly stating that "Religion means any religion and a reference to religion includes a reference to a lack of religion. Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief"[89].

The lack of specific definitions notwithstanding, European laws have recognized and upheld the idea of freedom of religion. The European Convention on Human Rights (ECHR) provides the right to freedom of religion and belief (article 9) and protects everyone from discrimination based on religion and belief (article 14).The European Court of Human Rights, in landmark case *Kokkikanis v. Greece* in 1993, ruled that "as enshrined in Article 9, freedom of thought, conscience[,] and religion is ... one of the most vital elements that ... [not only] make up the identity of believers and their conception of life, but ... also a precious asset for atheists, agnostics, sceptics[,] and the unconcerned. The pluralis[tic] ... democratic society … depends on it"[90].

The EU has also recognized religion's value in at least three instances.

First, the Treaty of Lisbon singled out in 2009 the defense of fundamental rights as a cornerstone of the European legal system. Respect for human dignity, freedom, democracy, equality, rule of law, and human rights are considered "common to the Member States in a society characterized by pluralism, discrimination, tolerance, justice, solidarity[,] and equality"[91].

Second, in December 2000 the EU affirmed its commitment to the principle of nondiscrimination with the Charter of Fundamental Rights. Article 10 of the Charter recognizes the right to freedom of thought, conscience[,] and

[87] Neo, J. L. - Scharffs, B.G., 2020. "Law and Politics of Freedom", cit., 12-13.

[88] Doe, N., 2011. "Law and Religion in Europe. A Comparative Introduction". New York: Oxford University Press, 21.

[89] See Colaianni, N., 2019. "L'Europa di chi non crede". In Non believers' Europe. Models of Secularism, Individual Statutes, Collective Rights, edited by A. Orioli. Milano: Hoepli.

[90] See also CEDU, 29 march 2007, Spampinato vs Italia.

[91] Art. 2, European Union Treaty.

religion. Article 21 prohibits, where EU's law applies, discrimination based on any ground such as sex, race, color, ethnic[,] or social origin; genetic features; language; religion or belief; political or any other opinion; membership in a national minority; property, birth, disability, age[,] or sexual orientation in all areas. The Charter has maintained its force and functions with the Lisbon Treaty.

Last but not least, the EU Council Directive 2000/78/EC of November 2000[92], in line with the EU Charter, did two things. First, the Directive established a general framework for equal treatment in employment and occupation and prohibits direct and indirect discrimination, harassment, instructions to discriminate, and victimization on grounds of religion or belief. Second, the Directive did not define *religion* and *belief*. In the *Samira Achbita* case, the Luxemburg Court pointed to recital 1 of the Directive, which refers to fundamental rights as protected in the ECHR and the Charter of Fundamental Rights of the EU. According to the Court,

> 'In so far as the [ECHR] and … the Charter use the term "religion" [to] include … the freedom of persons to manifest their religion[s], the EU legislature must be considered to have intended to take the same approach when adopting [the Directive], and therefore the concept of "religion" in Article 1 of that directive should be interpreted as covering both … *forum internum* … and … *forum externum*"[93].

5.1.1. Freedom of religion as individual right

The European Court of Justice recently interpreted the Directive in a case involving freedom of religion in Germany. After reading a job posting, Vera Egenberger, a German nonbeliever citizen, applied unsuccessfully for a eighteen-month position with the Evangelisches Werk für Diakonie und Entwicklung e.V. The religious organization, a branch of the Evangelische Kirche in Deutschland (the German Protestant church), pursued charities and was governed by its own laws. The job posting announced preparation of a report on Germany's compliance with the United Nations International Convention on the Elimination of All Forms of Racial Discrimination. Per the advertisement,

[92] WADDINGTON, L. - BELL, M., 2001. "More Equal than Others: Distinguishing European Equality Directives". Common Market Law Review, 38(3), 587-611.

[93] European Court of Justice, Judgment no. 203/2017, in Case C-157/15 (italics added).

applicants had to be a Protestant or a member of a church belonging to the Working Group of Christian Churches in Germany.

Egenberger alleged that the hiring organization discriminated against her in its decision process. The plaintiff had many years of experience in this field and authored a range of relevant publications. In spite of her qualifications, she was not called for an interview. The applicant claimed that the outcome had to do with her lack of confessional faith. As such, Egenberger sued Evangelisches Werk in the German courts on the basis of religious discrimination[94].

In its judgment, the European Court of Justice declared that a court of law must balance the rights to *and* from religion. That is, according the Directive, a judicial analysis must achieve a fair balance between a religious organization's right to autonomy and a prospective employee's right to not be discriminated on grounds of religion. Such an analysis requires an independent authority like a national court. Thus, where a religious or belief organization asserts in support of an act or decision that, due to the nature of its principles or activities, an effective judicial review must be able to examine such an assertion. The court hearing the case must satisfy the Directive's criteria for striking a balance between the individual and organizational rights. In this respect, the Court observed that, while national courts theoretically cannot rule on the ethos underlying a requirement imposed by a belief organization, those courts must nevertheless decide on a case-by-case basis whether the three criteria ("genuine, legitimate, and justified") are satisfied from the point of view of that ethos. Consequently, national courts must ascertain whether a belief organization's requirement is reasonably necessary from the group's perspective. Further, the requirement must comply with the principle of proportionality – that is, it must be appropriate and do not seek to achieve beyond what is necessary for the objective[95].

[94] Floris, P., 2019. "Organizzazioni di tendenza religiosa tra Direttiva europea, diritti nazionali e Corte di Giustizia". Stato, chiese e pluralismo confessionale, 12, 1-32.

[95] European Court of Justice, Judgment no. 257/2018, in Case C-414/16, Vera Egenberger v Evangelisches Werk fur Diakonie und Entwicklung e.V. It must be concluded that, where a church or other organization whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment by it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organization, it must be possible for such an assertion to be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of Directive 2000/78 are satisfied in the particular case.

5.1.2. Atheistic and nonbelievers' associations

Today's religious pluralism challenges secularism.

Traditionally, political and legal tools have played two roles. First, they can help neutrality in religion and separation of church and state ensure freedom and equality.

Also, those methods can contribute to a state's endeavor in managing its relationships with religious groups and minorities.

Today's rising religious nonbelief presents another possibility for those traditional political and legal tools. Unlike believers, most of whose practices involve a collective dimension, nonbelievers have tended to be individualists. However, nonbelievers have started to organize themselves in groups or associations. These organizations present a new challenge for secularism and the state.

In this area, article 17 of Treaty of the Functioning of the European Union (TFEU) can provide insights. The law states:

> 1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
> 2. The Union equally respects the status under national law of philosophical and non-confessional organizations.
> 3. Recognizing their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organizations".

Paragraphs 1 and 2 confirm the principle of non-interference of the EU law with national legislations on matters involving religious and philosophical organizations. But, for the present discussion's purposes, Paragraph 3 is more meaningful. Though its exact meaning is still under debate (more on this later), the provision equally acknowledges religious, philosophical, and non-confessional organizations.

Though the existence of these provisions might indicate otherwise, the EU to this date is testing their boundaries. The EU's goal is to maintain the status of churches, religious organizations, and philosophical and non-confessional groups. States possess authorities through their respective constitutions and legal systems reflecting their own traditions. The EU respects these diverse autonomies and thus seeks to uphold the principle of subsidiarity. Paragraph 3 of Article 17 tries to achieve a unitary consideration of religious and atheistic orga-

nizations with focus on participatory democracy at a continental level. Thus, European institutions, when interpreting and executing a "dialogue" as defined by the article, should avoid discriminating against certain (non)religious groups[96].

A 2013 case involving the European Commission helps clarify the meaning of Paragraph 3 of Article 17. The Commission, in an effort to successfully implement the Article, published dialogue implementation guidelines. These rules imposed two requirements. First, the topics covered must relate to the EU's agendas and be agreed on by concerned parties. Second, participating organizations must be recognized or registered by the state where they reside and must adhere to common European values. Participating groups are encouraged to register with the European Transparency Register, which includes about fifty of these organizations.

The dialogue implementation guidelines adhere to the European Ombudsman's decision on the European Humanist Federation's 2011 complaint against the Commission, which refused to hold a dialogue on human rights in light of exemptions for religious organizations in the Employment Equality Directive (2000/78). The Ombudsman admitted that the EU's institutions have discretion in fortifying the principle of "participatory democracy" through follow-up dialogues pursuant to Article 17[97]. In particular, the Ombudsman agreed that the Commission can define its priorities and identify the targets for those dialogues. But the Ombudsman rejected the Commission's arguments and held that a dialogue directly linked to a European legislation represents a constructive action and thus cannot question the status of religious and philosophical organizations at national levels[98]. Therefore, the case involved "maladminis-

[96] *Ex plurimis*, see Margiotta Broglio, F. - Orlandi, M., 2013. "Art. 17 TFUE". In Trattati istitutivi dell'Unione Europea, edited by A. Tizzano. Milano: Giuffrè, 454; Durisotto, D., 2016. "Unione europea, chiese e organizzazioni non confessionali (Art. 17 TFUE). Stato, chiese e pluralismo confessionale, 23, 1-39.

[97] Decision of European Ombudsman, par. 33: The Ombudsman further pointed out that the EU institutions necessarily have a margin of discretion when deciding upon the precise manner in which participatory democracy is made effective. However, they should always ensure that they can justify objectively how they have exercised that margin of discretion [17] .

[98] Decision of European Ombudsman, par. 48. It is the Ombudsman's considered opinion that, except in the most extreme cases, open dialogue is positive. It is furthermore his view that, unless the Commission were to demonstrate that a particular dialogue would be contrary to the Union's core values, as set out in Article 2 TEU [19] , the Commission is free to engage in an open and frank discussion. Conducting a dialogue on an issue dealt with in existing legislation cannot but constitute constructive action. In particular, it cannot, in itself, call into question "the status under national law of churches, religious associations or communities, and philosophical

tration," prompting the Commission to clarify through specific guidelines the criteria for application of Article 17.

As for Paragraphs 1 and 2 of Article 17, managing the relationships with religious groups is the state's prerogative. A small number of such laws expressly recognize atheistic groups. Take Germany, for example. The German constitution establishes the status of nondenominational organizations through the principle of equality between religious and atheistic groups. Article 137, Paragraph 7, of the Weimar Constitution (1922), which the *Grundgesetz* incorporated in its own Article 140, states that "associations pursuing a philosophical ideology will have the same status as religious communities". Under this provision, both religious and "philosophical" organizations (*Weltanschauungsgemeinschaft*, which also include humanistic and atheistic organizations) can obtain the status of public law corporations (Körperschaft des öffentlichen Rechts, or KdÖR). Since Germany is a federal state composed of Landers, each Lander is entitled to grant the KdÖR status to entities within its boundaries. A religious and atheistic community recognized as a KdÖR can enjoy certain benefits, including the rights to tax members, to assemble, and to appoint officials.

Thanks to this equal legal treatment of religious and philosophical organizations, Lower Saxony signed an agreement with Freireligiösen Landesgemeinschaft Niedersachsen, a local atheistic federation, whereby the Lander granted to the organization benefits that are particular to its needs. As this agreement indicates, the use of "agreed" legislation, normally reserved for relations between states and religious organization, represents a peculiarity in Europe and a sign of greater equality between religious and atheistic associations in Germany[99].

6. *Italian perspective: A constitutional framework*

With regard to freedom for atheists and agnosticists, two recent Italian cases highlight how approaches to the issue may differ. That is, such approaches

and non-confessional organizations"; par. 49. In this respect, the Ombudsman finds that the Commission was wrong to argue that, by engaging in the dialogue proposed by the complainant, it would go beyond the "spirit" of Article 17 (1) and (2) TFEU. By rejecting the complainant's proposal for a dialogue seminar, on the grounds that this would go beyond the spirit of Article 17 (1) and (2) TFEU, the Commission failed to implement Article 17(3) TFEU properly. This constitutes an instance of maladministration.

[99] Coglievina, S., 2011. "Il trattamento giuridico dell'ateismo nell'Unione europea". Quaderni di diritto e politica ecclesiastica, 1, 51-85, 82-3.

depend on the *internum* and *externum fora* from which they exercise institutional roles, as Italy's example demonstrates[100]. Italian law is unique because the Catholic Church plays a prominent role in its system. Rome houses the Holy See. As such, Catholicism is a cultural expression of the core national heritage. Thus, the historical bonds between the Italian peninsula and the Catholic Church are inseparable.

The Italian Constitution's provisions establish foundations for positive and negative religious rights. Articles 2 and 3 establish general rights from the perspectives of both the individual and the society through the general principle of equality. That equality principle covers freedom of religion. Article 19 declares that all Italians have religious freedom, so long as their "rites are not contrary to public morality". In addition to the decision discussed in Section 4 of this article, the Italian Constitutional Court affirmed that freedom of conscience is about religious experiences. This right, enshrined by Articles 2, 3, and 19, represents an inviolable aspect of human dignity.

By extension, atheistic freedom, in both *internum* and *externum fora*, also constitutes an exercise of freedom of religion. Consequently, the principle of equality requires the rights to the same treatment and from discrimination based on his atheistic stance.

In line with this implication, Article 20 protects religious associations from interventions based on religious discriminations with the aid of Articles 7 and 8, which outline relationships between the state and its religious groups. Within Article 7, Section 1, explicitly considering the Catholic Church, affirms that both the state and the Church are independent sovereigns with their own spheres. Section 2 regulates the two entities' relationship by the Lateran Pacts signed in 1929. The "bilateral principle" has been constitutionalized[101].

As for Article 8, Section 1 states that religious groups are "equally free" before the law. Section 2 allows such organizations to act in accordance with their own statues, provided that such laws do not contravene the Italian legal system. Last but not least, Section 3 regulates the relationships between the

[100] Recently, see Faraguna, P., 2019, "Regulating Religion in Italy". Journal of Law, Religion and State, 7(1), 31-56.

[101] *Ex multis*, see Jemolo, A.C., 1965. "Premesse ai rapporti tra Chiesa e Stato". Milano: Giuffrè; Lariccia, S., 1996. "I capisaldi del dibattito dottrinale sugli articoli 7 e 8 della Costituzione". Politica e diritto, 27(1), 29-47; Dalla Torre, G., 2003. "Il fattore religioso nella Costituzione. Analisi e interpretazioni". Torino: Giappichelli.

state and non-Catholic denominations through "law [based] on ... agreements with their respective representatives"[102].

Thus Articles 2, 3, 7, 8, and 19 establish the Italian principle of secularism, or *laicità*[103]. This rule, while not expressly mentioned in the Constitution, has been canonized as Italy's "overriding principle"[104]. *Laicità* does not signify "indifference toward … religion," but "guarantee that religious freedom will be safeguarded[] in a framework of denominational and cultural pluralism"[105]. In other words, *laicità* contains negative and positive components. The negative part favors pluralism, "guarantee[ing] the neutrality of the State … in relation to different religious beliefs." Meanwhile, the positive part helps "shape the legislation in relation to the peculiar characteristics of … individual religious communities"[106].

6.1. *The UAAR and propaganda of religious thoughts*

On April 17th, 2020, a regional court of appeals banned the "Unione Atei, Agnostici e Razionalisti" (UAAR), an atheistic and agnostic, from af-

[102] See Mirabelli, C., edited by, 1978. "Le intese tra Stato e confessioni religiose: problemi e prospettive". Milano: Giuffrè; Casuscelli, G., 1974. "Concordati, intese e pluralismo confessionale". Milano: Giuffrè.

[103] It is important to point that the equivalence of the expressions *secularism* and *laicità* is imperfect.

[104] Recently, see Colaianni, N., 2017. "La lotta per la laicità: Stato e chiese nell'età dei diritti", Bari: Cacucci; D'Amico, M., 2015. "Laicità costituzionale e fondamentalismi tra Italia ed Europa: considerazioni a partire da alcune decisioni giurisprudenziali". RivistaAic.it, 2.

[105] Constitutional Court, Judgment n. 203/1989. Deciding a case concerning the teaching of Catholic religion in public schools, that was mandatory until the 1984, when the modification of Concordat introduced an opt-out clause, the Court has clarified the outlines of the discipline regulating religious instruction and the principle of secularity by establishing: 1) the optional nature of the lessons on the Catholic religion, 2) the compatibility of the rules of the Rome Agreement with the principle of secularity, 3) the individual right to participate in religion classes or not, 4) the duty of the secular State to protect the self-determination of citizens and to respect the freedom of conscience and the educational responsibility of parents, guaranteed under Articles 19 and 39 of the Constitution, and 5) the evident discrimination against students who do not avail themselves of religion classes if attendance of lessons on another subject is compulsory for them. Instruction in Catholicism is optional, only becoming compulsory once a student has chosen to follow the lessons. Consequently, in the case of non-attenders, the alternative constitutes solely a situation of non-obligation.

[106] L. D'Andrea, 2003. "Eguale libertà ed interesse alle intese delle confessioni religiose: brevi note a margine della sent. cost. n. 346 del 2002". Quaderni di diritto e politica ecclesiastica, 3, 667-685, 671.

fixing a manifest. The manifest included the word *Dio* (God) with *D* crossed out, so that the only intact letters were *i* and *o* forming *io*, which signifies either "I," "ego," or "self.". The manifest also included the following message: "ten million Italians live well without *D*. Whereas they are discriminated, the UAAR is next to them". The lower court found that the manifest was an offensive message targeting all religions denominations with no atheistic message.

The Court of Cassation ruled otherwise. Articles 19 and 21 maximize the dissemination of thoughts, including religious ones. The law prohibits only expressions that offend another religion. But such an offense must be clear, direct, and serious. There, the UAAR's message was a lawful expression. Religious freedom applies to both believers and nonbelievers, meaning that atheists are entitled to the full profession of thought[107].

6.2. *The UAAR and the possibility of an agreement between an atheistics association and the state?*

The discussion in the previous section is interesting because the UAAR was involved in another dispute involving a similar constitutional question. Few years earlier, the UAAR requested the government to launch negotiations to conclude an agreement pursuant to Section 3 of Article 8. The government denied this request, based on the fact that its laws did not recognize the UAAR as a religious organization. The UAAR appealed that decision to the Administrative Court (TAR), which upheld the government's decision as a political act and thus not justiciable[108]. Then the Council of State, serving as a court of appeal, reversed the TAR's decision, subjecting the government's denial to judicial review. Then the Supreme Court of Cassation decided to hear the case.

The Supreme Court of Cassation, in its reversal, upheld the constitutional commitment to religious freedom and equality. The court declared that the preliminary assessment concerning the UAAR's classification as a religious group was an exercise of administrative discretion, subjecting the activity to judicial review. Examining the first and third sections of Article 8, the court then held that an agreement's conclusion pursues equality between faiths. As such, a belief system's eligibility for the authority to stipulate an agreement with the

[107] Court of Cassation, Sec. I^, ord. no. 7893/2020.

[108] TAR Lazio, Rome, Judgment no. 12539/2008.

state cannot be left to executive discretion, as ruling otherwise would violate the principle of equal freedoms for religious groups.

After the Court of Cassation's decision, the case returned to the TAR at merit stage. There, the TAR judge considered the government's refusal reasonable due to the "commonly accepted" interpretation of religion as a set of beliefs and acts of worship that bind an individual or a community[109].

What makes this dispute interesting is that the Court of Cassation's decision subsequently raised a constitutional controversy. The President of the Council of Ministers, acting on behalf of the Italian government on his own right, appealed to the Constitutional Court. The appeal claimed that the Government should be absolutely free in religious matters to decide whether to engage in negotiations on the basis of its own political assessments. This accordingly meant that, in the UAAR's case, the government's refusal to launch negotiations is a political act that is not subject to judicial review. In essence, the government asserted a political question[110].

The highest court took the case and thus addressed the government's request. The government's argument had asked the Court to rule that the judiciary lacked the power to review a decision by the Council of Ministers on matters involving Section 3 of Article 8. The Court approved the government's request by overturning the appellate decision, concluding that such decisions involved administrative discretion that could be held accountable before the Parliament and not before a court.

This constitutional decision is important because it gives an ultimate-

[109] See Tar Lazio, Roma, Judgment no. 7068/2014, p. 4.4 Law.

[110] On political question doctrine, see in American literature: Tyler, A., 2006. "Is Suspension a Political Question?". Stanford Law Review, 59(2), 333-413; Scharpf, F., 1966. "Judicial Review and the Political Question: A Functional Analysis". The Yale Law Journal, 75(4), 517-597, doi:10.2307/794865; Mulhern, J., 1988. "In Defense of the Political Question Doctrine". University of Pennsylvania Law Review, 137(1), 97-176, doi:10.2307/3312167; Choper, J., 2005. "The Political Question Doctrine: Suggested Criteria". Duke Law Journal, 54(6), 1457-1523; Henkin, L., 1976. "Is There a "Political Question" Doctrine?". The Yale Law Journal, 85(5), 597-625. doi:10.2307/795454; Huq, A., 2013. "Removal as a Political Question". Stanford Law Review, 65(1), 1-76; Epstein, R., 2014. "The Political Question Doctrine". In The Classical Liberal Constitution. Boston: Harvard University Press, 133-144. On the Italian literature, see at least, Sandulli, A.M., (1946) 1990. "Atto politico ed eccesso di potere". In Scritti giuridici, edited by A.M. Sandulli, III, Napoli: Jovene, 25 ss.; Barile, P., 1959. "Atto di governo (e atto politico)". Enciclopedia del Diritto, *ad vocem*. Milano: Giuffrè; Cheli, E., 1961. "Atto politico e funzione di indirizzo politico". Milano: Giuffrè.

ly unconvincing view on the specific role of agreements with religious groups. It is true that such agreements extend the principle of bilaterality to non-Catholic groups[111]. But this observation is only partial, because those agreements are an apparatus for meeting different religions' specific needs[112]. Those needs are products of conceptions that are different from ones on which a state, its legal system, and its atheistic or agnostic entities are founded. Secular subjects, like their religious counterparts, also express an existential conception of the world, of ethics, and of the individual's approach to fundamental questions. A religious group requires certain rites and symbols that warrant respect and protection that an atheistic or agnostic group does not require[113].

Conclusion

Atheism and religion have different characteristics. The latter involves interests and needs that belong to an order that is distinct from the civil order[114]. Believers and nonbelievers are in a sense parts of the same phenomenon but remain different.

John Dewey has distinguished between religion and religious. The adjective is a broader concept than the noun. Religion, although difficult to define, still refers to a set of beliefs and practices tied to an institutional organization, while religious identifies an attitude that addresses life, an orientation of life towards a sense of security and peace. This kind of orientation is a religious quality. Regardless of its cause, what is worth is the result into each human experience[115].

Theism and atheism are two sides of the same coin and must be protected.

[111] Constitutional Court, Judgment n. 52/2016, p. 5.1.

[112] As argued by Peyrot, G., 1978. "Significato e portata delle intese". In Le intese tra Stato, cit., 66-67, the agreement is a "tailored dress" and not a "pret-a-porter. As highlighted by Ruggeri, A., 2016. "Confessioni religiose e intese", cit., 8, if the agreement is not a condition of "equal freedom", it certainly raises its level of guarantee and effectiveness.

[113] Floris, P., 2011. "Ateismo e Costituzione", cit., 101-102.

[114] Floris, P., 2017. "La proposta di legge in materia di libertà religiosa nei lavori del gruppo di studio Astrid. Le scelte operate nel campo della libertà collettiva". Stato, chiese e pluralismo confessionale, 20, 5.

[115] Dewey, J., (1934) 1960. "Religion Versus the Religious". In A Common Faith, edited by John Dewey. New Haven: Yale University Press, 1-28, in part. 9-13.

But lawmakers must tailor legal measures designed to protect theistic and atheistic positions to their peculiar features.

Secularism is increasingly used to deal with pluralism. But secularism is a mere "method," for all faiths and doctrines to coexist and interact with each other, a foundation for democratic coexistence[116].

[116] Barbera, A., 2007. "Il cammino della laicità", In Laicità e diritto, edited by S. Canestrari, Bologna: Bonomia University Press, 33-91. See also Calo, Z., 2019. "Law, Religion and Secular Order", cit.