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Church and State in the Constitutional System of Norway

Francesco Duranti

1. Church and State: Comparative Constitutional Models

Historically, as it is well known, the spectrum of models of state-church relationships ranges from total control of the state by the church (theocracy) to total prohibition of religion (totalitarian atheism).

According to in-depth comparative constitutional analyses, however it is currently possible to identify eight prototypical models of constitutional relations between state and church, ranging from strict separation to weak establishment, and from model of jurisdictional enclaves to strong establishment.[1]

The first model is that of 'atheist state' (or strict separation between state and religion), inaugurated in 1917 with the Russian Revolution, as the most anti-religious end of contemporary continuum of models of state/religion relationships, aiming to eradicate any form of preference for religious ideas in the public life.[2]

The second one is that of assertive secularism, often identified in the form of 'laic state', with a formal separation between state and religion and *laïcité* as a fundamental principle (see, for example, the French V Republic or the Turkish Constitution).

The third model is the 'separation-as-neutrality' model, whose clearest example is the First Amendment to the U.S. Constitution (the 'Establish-

[1] R. Hirschl, *Comparative Constitutional Law and Religion*, in T. Ginsburg, R. Dixon (eds.), *Comparative Constitutional Law*, Edward Elgar, Cheltenham, 2011, p. 422. On the point, see also R. Uitz, *Religion in the Public Square. Perspectives on Secularism*, Eleven International Publishing, Utrecht, 2014.

[2] P. Cliteur, *State and religion against the backdrop of religious radicalism*, *International Journal of Constitutional Law - ICON*, Vol. 10, No. 1, 2012, p. 127.

ment Clause'): "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". Neutrality towards religion prohibits the state from adopting, preferring or endorsing a religion as well as from preferring religion over non-religion.[3]

The fourth model is defined 'weak religious establishment': here there is "a formal, mainly ceremonial, designation of a certain religion as 'state religion', but this designation has few or no implications for public life. Several European countries illustrate this model. A case in point is the designation of the Evangelical Lutheran Church as the 'State Church' in Norway, Denmark, Finland and Iceland. Norway's Head of State, for example, is also the leader of the church. Article 2 of the Norwegian Constitution guarantees freedom of religion, but also states that Evangelical Lutheranism is the official State religion. Article 12 requires more than half of the members of the Norwegian Council of State to be members of the state church".[4]

The fifth model guarantees formal constitutional separation between state and church, but with the pre-eminence of a single religion, due to long-standing cultural and religious traditions (e.g. the Catholic Church in many Latin American countries, Italy, Spain, Ireland or Poland).[5]

The sixth model is the 'multidenominational state': this model (prevalent in societies like the Canadian or South African ones) intends to treat all religions equally by evenly helping them, on the basis of a true commitment to multiculturalism and diversity (a sort of 'mosaic' approach to religious difference).[6]

Religious jurisdictional enclaves fall into the seventh model. This model is based upon the selective accommodation of religion in certain areas of law: general law is secular, yet a degree of jurisdictional autonomy is granted to religious communities, primarily in matters of personal status. To this

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[3] W. Sadurski, *Searching for Illicit Motives: Constitutional Theory of Freedom of Speech, Equal Protection, and Separation of State and Religion*, Sydney Law School - Legal Studies Research Paper no. 14/61, 2014.

[4] R. Hirschl, 2011, p. 428. On the constitutional order of Norway, see also A. Sajò, R. Uitz, *Freedom of Religion*, in M. Rosenfeld, A. Sajò (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, p. 924: "Norway has a State church. The special constitutional status of a church/national religion may remain symbolic and countered by practical measures of State neutrality and equality of religions and believers, but where a church or denomination is constitutionally recognized as the nation's faith this may have potential discriminatory consequences in holding public office or in civil equality".

[5] S. Mancini, M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford University Press, Oxford, 2014.

[6] A. Nieuwenhuis, *State and religion, a multidimensional relationship: Some comparative law remarks*, *International Journal of Constitutional Law - ICON*, Vol. 10, No. 1, 2012, p. 155.

regard, countries such as India, Kenya and Israel grant recognized religious or customary communities the jurisdictional autonomy to pursue their own traditions in several areas of law, most notably family law.

The last model is that of strong establishment, or 'constitutional theocracy'.[7] This model has four main elements: the presence of a single religion that is formally endorsed by the state; the constitutional enshrining of that religion, its texts, directives and interpretations as the main sources of law and the parameter for judicial interpretation; religious bodies or tribunals which operate in tandem with a civil court system; and, finally, adherence to some or all core elements of modern constitutionalism, including the formal distinction between political authority and religious authority (see, for example, the 1979 Constitution of the Islamic Republic of Iran).

It needs to be noted that there is considerable variance within these prototypical or ideal models: each of them comes in different shapes, forms and sizes, with local specific characteristics depending on the country's constitutional order.[8]

These differences notwithstanding, "a common motif in today's post-secularist age seems to be the increasing reliance worldwide on constitutional law and courts to contain, tame and limit the spread and impact of religion-induced policies. Consequently, constitutional courts operating under each and all of these models have become key mediators",[9] also because on state-church relationships the text of the constitution is not decisive, especially "when it comes to provisions concerning the (former) state religion or state churches".[10]

2. *State-Church System in Norway*

The Constitution of Norway – before the constitutional reform of 2012 – established the relationship between state, church and religion along the following clear lines: the Evangelical Lutheran religion is defined as the official religion of the state, combined with the right – formally recognized only in 1964 – of all inhabitants of the Realm to freely exercise their religion (Article 2); the King professes, upholds and protects the Evangelical Lutheran

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[7] R. Hirschl, *Constitutional Theocracy*, Harvard University Press, Harvard, 2010.

[8] W. Cole Durham, C. Evans, *Freedom of religion and religion-state relations*, in M. Tushnet, T. Fleiner, C. Saunders (eds.), *Routledge Handbook of Constitutional Law*, Routledge, Abingdon, 2013, p. 243.

[9] R. Hirschl, 2011, p. 438.

[10] A. Sajò, R. Uitz, 2012, p. 923.

religion (Article 4) and he is the head of the official church (Article 16); the King, therefore, appoints all senior ecclesiastical officials, bishops and deans (Article 21); half the members of the Council of State (i.e. the Government) shall profess the official religion of the state (Article 12), in order to form the so-called ecclesiastical Council of State, which deals with matter related to the Church of Norway.

This constitutional framework remained largely unchanged since the founding of the Constitution in 1814 up until 2008.[11]

According to the Norwegian Constitution it is, indeed, the King, as the head of the church, that has the right and responsibility to provide statutes for the church liturgy and see to that the teaching of the church is in accordance with the Evangelical Lutheran confession and doctrine.[12]

Church matters are to be discussed by the members of the Government that confess the state religion (Article 27), which in practice means those who are members of the Evangelical Lutheran Church; this is the main reason why the Constitution also decides that at least half of the members of the Executive should also be members of the church.

The constitutional provisions stating that the King/the Government is the head of the church in certain matters (Article 16) also limit the power of the Parliament to interfere with ecclesiastical affairs; most of the King's powers as head of the church after Article 16 have, however, been delegated to the Church Synod.[13]

The Supreme Court of Norway took, in some cases, the opportunity to state that the constitutional provision on the State's Evangelical Lutheran confession no longer carries limits on the freedom of the ordinary law-maker to decide according to the evolving religious or moral standards of each epoch.[14]

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[11] U. Schmidt, *State, Law and Religion in Norway*, *Nordic Journal of Religion and Society*, Vol. 24, No. 2, 2011, p. 139.

[12] R. Jensen, *The Formation and Identity of the Church as a Present Challenge in Norway*, in A.L. Erikson, G. Gunner, N. Blåder (eds.), *Exploring a Heritage: Evangelical Lutheran Churches in the North*, Church of Sweden Research series no. 5, Stockholm, 2012, p. 49.

[13] This has been seen as a crucial principle in the Norwegian state-church system, securing some degree of church autonomy, as the Parliament cannot be considered as 'church organ' in the same way as the King and his ministers when they make decisions on the ground of article 16: see I. Plesner, *State Church and Church Autonomy in Norway*, in G. Robbers (ed.), *Church Autonomy: A Comparative Survey*, Peter Lang, Frankfurt, 2001, p. 133.

[14] Supreme Court of Norway, *Norsk Rt.*, 1987, p. 473. Article 2 of the Constitution, indeed, does not put religious restrictions on the legislative sovereignty of Parliament, but it entails that the legislation pertaining to the Church of Norway must not infringe the constitutional provision on the Evangelical Lutheran religion of the state. See also Supreme Court of Norway, *Norsk Rt.*, 1983, p. 1004.

So, up until 2012, the coexistence of constitutional clauses providing for confessionalism and for freedom of religion has not given rise to substantial problems or main controversies in the country.[15]

Unambiguously, the Supreme Court clearly affirms that «*the Courts may in no way interfere with the sovereignty of faith of the religious community: consequently, lawsuits requiring the consideration of religious questions must be disallowed*».[16]

Norway's adherence to the European Convention on Human Rights (ECHR), anyway, automatically entailed also the need to ensure respect of Article 9 of the Convention, on the freedom of religion and beliefs, whose content has been clarified by the European Commission of Human Rights (ECsHR) and the European Court of Human Rights (ECtHR) through a number of decisions

One of these decisions is the *Darby case*, in which it is cleared i.a. that a state church system in itself does not necessarily conflict with freedom of religion or beliefs: «*A State Church system cannot in itself be considered to violate Article 9 of the Convention. In fact, such a system exists in several Contracting States and existed already when the Convention was drafted and when they became parties to it. However, a State Church system must, in order to satisfy the requirements of Article 9, include specific safeguards for the individual's freedom of religion. In particular, no one may be forced to enter, or be prohibited from leaving, a State Church*».[17]

The protection of freedom of thought, conscience and religion implies corresponding neutrality on the part of the state. Respect for different convictions or beliefs is a primary obligation of the state, which must accept that individuals may freely adopt convictions, and possibly subsequently change their minds, by taking care to avoid any interference in the exercise of the right guaranteed by Article 9. Furthermore, the right to freedom of religion excludes any assessment by the state of the legitimacy of religious beliefs or the means of their expression.

In a democratic society, anyway, in which several religions – or branches

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[15] E. Smith, *And They Live Happily Together? On the Relationship between Confessionalism, Establishment and Secularism under the Constitution of Norway*, in L. Christoffersen, K. Modéer, S. Andersen (eds.), *Law & Religion in the 21st Century – Nordic Perspectives*, DJØF Publishing, Copenhagen, 2010, p. 133.

[16] Supreme Court of Norway, *Norsk Rt.*, 2004, p. 1613: see H. Årsheim, *Legal Secularism? – Differing Notions of Religion in International and Norwegian Law*, in R. van den Brenner, J. Casanova, T. Wyller (eds.), *Secular and Sacred? The Scandinavian Case of Religion in Human Rights, Law and Public Space*, Vandenhoeck & Ruprecht, Göttingen, 2014, p. 146.

[17] Application no. 11581/85, *Darby v. Sweden*, Comm. Rep., 1989, par. 45.

of the same religion – coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.[18] However, in exercising its regulatory power in this sphere and in its relations with the various religions, denominations and beliefs, the state has a duty to remain neutral and impartial.

What is at stake here is the preservation of pluralism and the proper functioning of democracy.[19]

The European Court of Human Rights has held that Article 9 of the Convention can hardly be conceived as being likely to diminish the role of a faith or a church with which the population of a specific country has historically and culturally been associated.[20] Recently, also the European Commission for Democracy through Law of the Council of Europe (better known as *Venice Commission*) has reaffirmed that "the status of national church constitutionally guaranteed to the Evangelical Lutheran Church does not in itself raise problems, as long as this is not used as a justification for discrimination",[21] recalling its *Guidelines for Legislative Reviews of Laws Affecting Religion or Belief*, according to which "legislation that acknowledges historical differences in the role that different religions have played in a particular country's history are permissible so long as they are not used as a justification for ongoing discrimination".[22]

Consequently, in Europe, different constitutional systems can be compatible with religious freedom: a state church is not *per se* incompatible with Article 9 of the ECHR if there are specific safeguards for the individual's freedom of religion.[23]

It follows from what has been said that abolishing the constitutional clause on the confessional character of the state in Norway seems not to be required by human rights considerations on the part of the ECHR.[24]However,

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[18] R. Uitz, *Freedom of Religion: European, Constitutional and International Case Law*, Strasbourg - Council of Europe, 2007.

[19] *Metropolitan Church of Bessarabia and Others v. Moldova*, Application no. 45701/99, ECtHR, 2001-XII.

[20] *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, Application no. 71156/01, ECtHR, 3 May 2007.

[21] Venice Commission, *Opinion on the draft Constitution for Iceland*, CDL-AD 2013-010, March 2013.

[22] Venice Commission, *Guidelines for Legislative Reviews of Laws Affecting Religion or Belief*, CDL-AD 2004-028, June 2004.

[23] F. Tulkens, *The European Convention on Human Rights and Church-State Relations: Pluralism v. Pluralism*, *Cardozo Law Review*, Vol. 30, No. 6, 2009, p. 2584.

[24] This seems confirmed also by the dissenting judges in the very well-known case of *Folgerø and*

there are other arguments in favour of constitutional amendments: among the most powerful of them, there is probably the way the Constitution may serve as a symbolic factor in an increasingly multicultural Norwegian society.[25]

3. *The Constitutional Reform of 2012*

The process of constitutional reform started almost ten years before the final adoption of the constitutional amendments. The expectation of a forthcoming disestablishment was, in fact, created by the institution of a State-Church Committee, appointed by Royal Decree on 14 March 2003.[26]

The Committee consisted of a wide range of representatives from all the political parties in the Norwegian Parliament (*Storting*), church bodies, the Sami population, the Norwegian Council of Free Churches, the Norwegian Humanist Association, different other religions, and representatives with special expertise. Such a Committee was encharged to elaborate a Recommendation providing a basis for determining whether the state-church system should be continued, reformed or discontinued; its mandate was based on the premise that the Church of Norway shall continue to be "a confessional, missionary, serving and open popular church".

In January 2006, the Committee presented three different proposals, corresponding to the options of reforming, discontinuing, or continuing the existing state-church system.[27] A large majority, consisting of 18 of the 20

Others v. Norway, Application no. 15472/02, ECtHR, 29 June 2007. According to their opinion – unlike the majority, who did not take a stance on this – «*we find it necessary to address the question whether the second paragraph of Article 2 of the Norwegian Constitution is capable of raising an issue under Article 2 of Protocol No. 1 or Article 9 of the Convention. In our opinion, it is not. The notion of pluralism embodied in these provisions should not prevent a democratically elected political majority from giving official recognition to a particular religious denomination and subjecting it to public funding, regulation and control. Conferring a particular public status on one denomination does not in itself prejudge the State's respect for parents' religious and philosophical convictions in the education of their children, nor does it affect their exercise of freedom of thought, conscience and religion*».

[25] E. Smith, *And They Live Happily Together? On the Relationship between Confessionalism, Establishment and Secularism under the Constitution of Norway*, in L. Christoffersen, K. Modéer, S. Andersen (eds.), *Law & Religion in the 21st Century – Nordic Perspectives*, Copenhage: DJØF Publishing, 2010, p. 134.

[26] On the long process of constitutional reform, see, in particular, T. Lindholm, *The Tenacity of Identity Politics in Norway. From Unabashed Lutheran Monopoly to Pseudo-Lutheran Semi-Hegemony?*, in L. Christoffersen, K. Modéer, S. Andersen (eds.), 2010, p. 210.

[27] The Committee's Recommendation – with the three different options – of the State-Church Committee is available on the official website of the Norwegian Government. *www.regjeringen.no.*

Committee members, recommended the current state-church system to be discontinued and that a new system be established for the Church of Norway. Among them, a majority of these members (14) further recommended the Church of Norway to be organised as a statutory popular church; the remaining 4 members instead suggested the Church of Norway to be organised as an independent popular church.

The minority of two members would on the other hand recommend the existing state-church system to be left in place within the current provisions of the Norwegian Constitution.

The majority proposal for a statutory popular church consequently entailed a revocation of the existing articles in the Norwegian Constitution relating to the state-church system, and the consolidation of the Church of Norway as an independent legal entity, with its own governing bodies and independent responsibility for all matters relating to the church's faith and activities. According to such a proposal, the Church of Norway would continue to have a special relationship with the state pursuant to a Church Act adopted by the *Storting*.

The majority's recommendation stresses the importance that the Church Act be formulated as a brief framework statute, based on a new article in the Constitution. As a consequence of the proposal, Article 2, Paragraph 2, of the Constitution would be revoked: the majority of the Committee recommended that a new values article be incorporated into the Constitution, which would contain a special reference to Christian and humanist values.

The Ministry of Culture and Church Affairs in 2006/2007 held a public hearing on the Recommendation of the State-Church Committee.

The General Synod of the Church of Norway, in its resolution on the Recommendation, stated that "the constitutional provision on the official religion of the State shall be replaced by a 'values Article' referring to 'the Christian and humanist heritage' […] the General Synod wants to emphasize the significance of establishing a constitutional provision about the value foundations of the nation".

Following this, a State-Church Agreement was reached on 10 April 2008 among all of the seven political parties represented in the Parliament. After days and nights of intensive bargaining, they were finally able to come to a consensus upon a political settlement concerning the future legal regulation of the relationship between state and church in Norway.

The agreement addressed six fundamental points: 1) the appointment of bishops and deans and the democratic reform of the Church of Norway; 2) church cabinet and church order; 3) constitutional changes; 4) financial matters; 5) the administration of religious ceremonies; 6) Government-spon-

sored public ceremonies that are to be neutral with respect to religion or life stance.

Subsequently, according to Article 112 of the Constitution, on 13 June 2008 the *Storting* unanimously adopted, in the first reading, the proposed reforms of the pertinent provisions of the Constitution:

a) the revised Article 2 of the Constitution is the main symbolic (or 'ornamental') innovation, eliminating the official religion of the state, and establishing that "The value foundations shall remain our Christian and humanist heritage. This Constitution shall safeguard democracy, rule of law and human rights";

b) the revised Article 16 of the Constitution is the main substantive innovation: "All inhabitants of the Realm shall have the right to free exercise of their religion. The Norwegian Church, an Evangelical-Lutheran church, will remain the Norwegian Popular Church and will as such be supported by the State. Detailed provisions as to its system will be laid down by law. All religious and philosophical communities should be supported on equal terms";

c) the pre-existing Articles 12, 21, 22, 27 of the Constitution are modified with the aim of extinguishing the constitutional basis for the Church of Norway as a state church, whereas only Article 4 of the Constitution continues to provide that "The King shall at all times profess the Evangelical-Lutheran religion";

d) the bishops and deans of the Church of Norway are no longer to be appointed by the King and the Church Cabinet, but by the competent Church of Norway bodies. However, bishops, deans and all other clergy shall remain state employees and be salaried by the state. The Church of Norway shall remain woven with the state and municipal administrations. Furthermore, the Church of Norway shall not have independent legal standing.[28]

The second and definitive reading of the constitutional revision took place on 21 May 2012, when it was adopted with a large – almost unanimous – majority by the *Storting* (162 yeses and only 3 noes).

The clauses establishing an official state religion and an Evangelical Lutheran state church could be, thus, counted among those elements in the Constitution of Norway that could be abolished without incurring justified blame of unconstitutional conduct *ex* Article 112 of the Constitution.

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[28] So, the constitutional change does not as such provide the Norwegian Church with legal personality. Hence, a basic element of establishment remains, but "in the longer term, the current Government intends to provide the Church of Norway with legal personality of its own": see L. Christoffersen, *The Argument for a Narrow Conception of «Religious Autonomy»*, *Oxford Journal of Law and Religion*, Vol. 4, No. 2, 2015, p. 293.

It is noteworthy to consider that the amendments to the Constitution of Norway, on this point, adopted on May 2012, "have not stirred any notable discussion related to their conformity with the 'supra-constitutional' clause in Article 112".[29]

Originally lost in the meanders of the Constituent Assembly in 1814, an explicit clause on freedom of religion was finally included in Article 2 of the Constitution in 1964 (since May 2012, this clause appears in Article 16).

Even though it does – as seen – not stand in strict contradiction to a state church system, it is clearly not in optimal harmony with such a system. In the meantime, "religious pluralism in the Norwegian society has increased to such an extent that most people seem to accept this as an argument at least against maintaining the constitutional *status quo*".[30]

4. *Comparative conclusions*

From a comparative perspective, Nordic countries always used to represent the world of church establishment and were traditionally associated with the idea of the state church.

However, over the last two decades this world has undergone a significant transformation, not only in Norway, but also in Sweden, Finland and Iceland[31].

The State choice to have an official religion "presupposes a religiously homogeneous country: when people are divided among different faiths, the State adoption of one of them becomes a hindrance because it prevents a part of the citizens from fully identifying with the public institutions. The new religious, ethical and cultural plurality has outdated the systems of Church-State relations that are characterised by the legal identification of the State with one religion".[32]

The core of the Nordic countries' experiment is, currently, the attempt to redefine the special relationship of the church with state without giving up its special relationship with the nation.

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[29] E. Smith, *Old and Protected? On the 'Supra-Constitutional' Clause in the Constitution of Norway*, *Israel Law Review*, Vol. 44, 2011, p. 382.

[30] E. Smith, 2011, p. 383.

[31] P. Markkola, I.K. Naumann, *Lutheranism and the Nordic Welfare States in Comparison*, *Journal of Church and State*, vol. 56, 2014, p. 1.

[32] S. Ferrari, *Introduction to European Church and State Discourses*, in L. Christoffersen, K. Modéer, S. Andersen (eds.), 2010, p. 34.

Therein: "the restructuring of the Church-State relations is quite advanced and it will not result in a divorce between the Nordic States and the Lutheran Churches, but rather in a friendly separation, characterised by an increased autonomy of the Church from the State (although not always a full autonomy) and by a preservation of a special status in the State legal system".[33]

The preservation of this particular bond between the church and the nation emerges especially from the notion of "folk Church", that is explicitly affirmed in the reformed Constitution of Norway (Article 16) and in the Constitution of Denmark (Article 4).

This notion is also implicitly contained in the Swedish law stating that the Lutheran Church has to be "represented nation-wide".

Accordingly, in these countries, the Lutheran Churches– mostly due to both its historical role and the fact that the vast majority of the population belongs to it – maintains a special responsibility towards the nation as a whole.

In Norway, the bond between the state and Church of Norway has been significantly weakened since 2012, but is still firmly grounded in the Constitution as well as in the new legislation to be adopted by the Parliament and in the *de facto* administrative intertwinement of the Church of Norway with the state and its municipalities.[34]

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[33] S. Ferrari, 2010, p. 34.

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