

The Secular State in Law and Public Policy

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Секулярное государство в праве и общественно-государственной политике

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mapping the concept

The term was conceived by **George Holyoake** [the British social reformer] in the mid-19th century as a way of denoting an ethical framework independent of religion while avoiding the negative connotations that were associated with the term “atheism,” which had long been considered to pose a threat to the social order.

Steven Kettell: Secularism and Religion (2019)

<https://doi.org/10.1093/acrefore/9780190228637.013.898>

mapping the concept

Jean Baubérot, a sociologist of religion, sees secularism as an ideal made up of three parts:

- separation of religious institutions from the institutions of the state and no domination of the political sphere by religious institutions;
- freedom of thought, conscience, and religion for all; and
- no state discrimination against anyone on grounds of their religion or non-religious worldview.

as presented by Andrew Copson:
Secularism: A Very Short Introduction (2019)

mapping the concept

Craig Calhoun, a sociologist and social theorist presents it as an ideology / political program, often with anti-religious connotations

Craig Calhoun: Secularism, Citizenship and the Public Sphere,
in C. Calhoun, M. Juergensmeyer, & J. VanAntwerpen (eds.), *Rethinking Secularism* (2011)

Brett Scharffs, a law professor and expert on law and religion, argues that secularism is little more than "a misguided, even dangerous, ideology that may degenerate into its own dystopian fundamentalism"

Brett Scharffs, Four Views of the Citadel: The Consequential Distinction between
Secularity and Secularism.
6 *Religion and Human Rights* 109-126 (2011)

the secular state in constitutions

US Constitution, First Amendment (1791)

Congress shall make no law respecting an establishment of religion; ...

plus

US Constitution, Article VI

... no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States

the secular state in constitutions

Kenyan Constitution (2010)

s.8: There shall be no State religion.

also

s.24(4):

The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

secularism in constitutions

French Constitution (1958)

Article 1: France shall be an indivisible, secular, democratic and social Republic. ...

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Turkish Constitution

Article 2: The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble.

secularism in human rights instruments ?

protection of freedom of religion or belief as a human right is not linked to or conditioned upon secularism

rather:

- requirement of equal treatment / non-discrimination on the basis of religion
- requirement of state neutrality in matters of religion
- requirement of non-interference in internal affairs of religious communities (church autonomy)

secularism in human rights instruments ?

European Court of Human Rights:

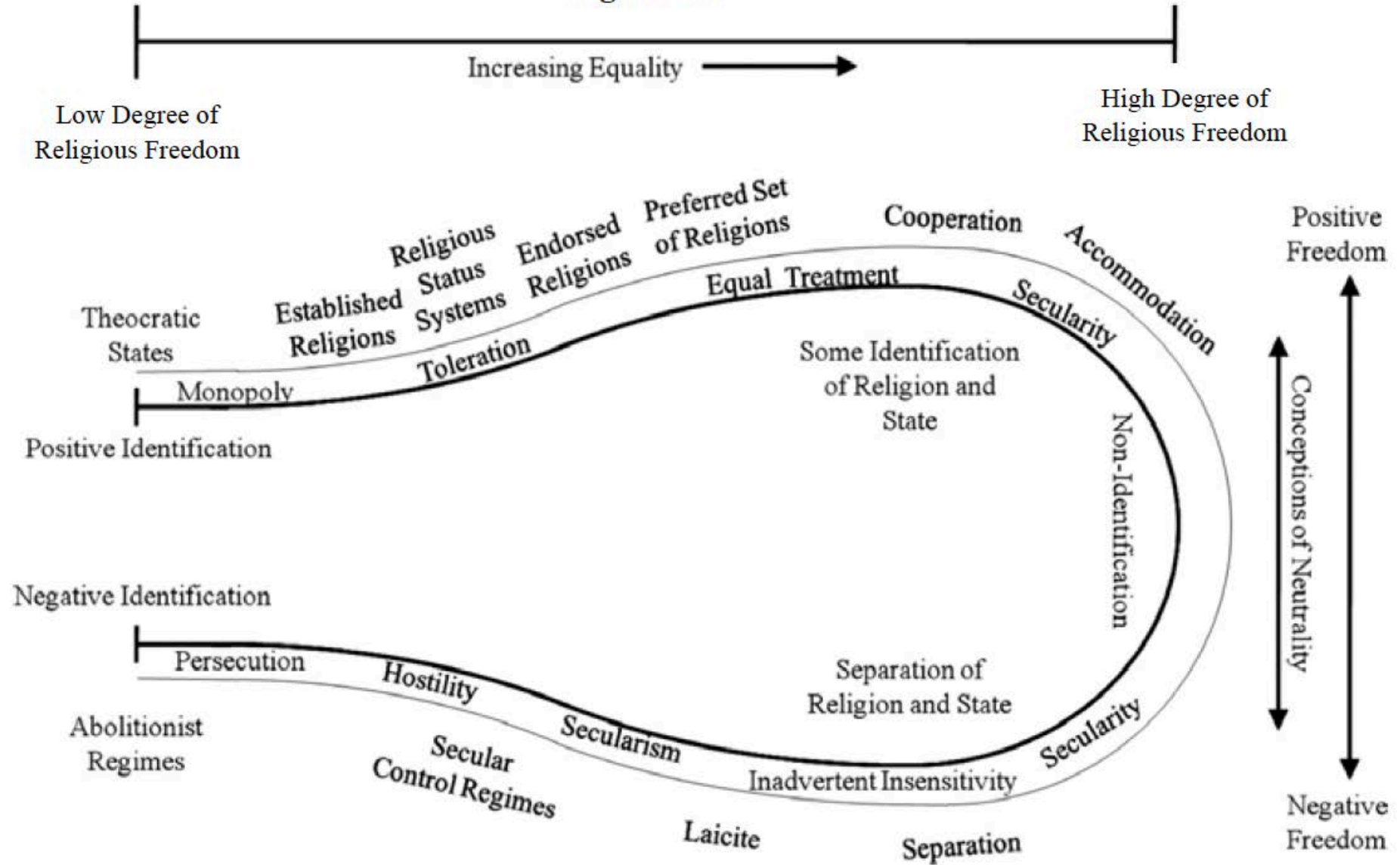
Föderation der Aleviten Gemeinden in Österreich v. Austria

(5 March 2024)

...

50. The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and has stated that this role is conducive to public order, religious harmony and tolerance in a democratic society (see *S.A.S. v. France*, cited above, § 127). What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principal characteristics of which is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome (see *The United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 57, Reports of Judgments and Decisions 1998-I).

Figure 4.3



variations of secularism?

transformations of secularism?

secularism in recent constitutional case law

classic takes

as the rejection of dominant church / French Revolution

as separation of church and state / US

as neutrality of public services / Germany

as the state's ideological neutrality / Austria

secularism in recent constitutional case law

German Constitutional Court
headscarf ban on judicial trainees
2 BvR 1333/17 (14 January 2020)

...

2. Constitutional interests that might conflict with freedom of faith and could justify an interference with freedom of religion in the present context are the principle of the state's ideological and religious neutrality, the principle of the proper functioning of the justice system and a potential conflict with the negative freedom of religion of others protected by fundamental rights. By contrast, neither the requirement of judicial impartiality nor the aim of ensuring an ideologically and religiously peaceful environment can justify restrictions on freedom of religion.

secularism in recent constitutional case law

Austrian Constitutional Court
headscarf ban in primary schools

Judgment G 4/2020-27 (11 December 2020)

...

2.6.3. The principle of equality, enshrined in Article 7 of the Constitution (B-VG) and Article 2 of the Basic State Law (StGG), in conjunction with Article 9 (1) of the ECHR and Article 14 (2) of the Basic State Law (StGG) provides the foundation for the State's duty of religious and ideological neutrality.

In organizing the system of education, the legislator is called upon to meet the requirement of religious and ideological neutrality by treating different religious and ideological convictions in consistence with the principle of equality.

secularism in recent constitutional case law

recent readings

religious marriage is an aspect of protecting private life and freedom of religion in a secular republic / Turkey

as a public square free of religious attire interfering with living together in a democratic society / France

as a republican principle against separatism / France

secularism in recent constitutional case law

Turkish Constitutional Court
recognition of religious marriages

2015/51 (27 May 2015)

...

... as marrying by arranging religious ceremony or conducting a religious marriage ceremony falls into the scope of the right to demand respect for private and family life and the freedom of religion and conscience, defining such acts as crime and introducing penal sanction on these acts constitute a disproportionate interference to the said rights and, thereby contradict the principle of proportionality.

secularism in recent constitutional case law

Turkish Constitutional Court
recognition of religious marriages
2015/51 (27 May 2015)

DISSENT: ...

The final paragraph of Article 24 of the Constitution states “No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets” and, **thereby, explains the principle of secularism in a way and emphasizes the classical definition of this principle which is the separation of religious and State affairs.**

secularism in recent constitutional case law

European Court of Human Rights
S.A.S. v. France
(1 July 2014)

...

122. The Court takes into account the respondent State's point that the face plays an important role in social interaction. It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier. That being said, in view of the flexibility of the notion of "living together" and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation.

secularism in recent constitutional case law

France:

Law of 24 August 2021 on consolidating respect for the principles of the Republic / *Loi du 24 août 2021 confortant le respect des principes de la République*

upheld: Decision no. 2021-823 DC of 13 August 2021

secularism in recent constitutional case law

Nancy Lefevre:

“the entry into force of the new legislation opens the field to a new type of relation between the French state and religions. What was known, since 1905, as a **laïcité of separation** has been transformed into a **laïcité of surveillance**, through the reinforcement of state control of religious activities.

...

French laïcité has conceptually turned from separation between state and religions to the **fear of separation between state and citizens by religion**. Religion now seems to be seen as a threat to French universalism.”

variations or transformations?

- concept of ample variation – shaped by political conflicts and intellectual debates
- no fixed constitutional meaning – easy to shape
- easy to sideline / replace by 'other' constitutional provisions
- easily mobilized against minority / not historic / unpopular religions

variations or transformations?

- aligned with public policies driven by strong Christian values
(e.g. prohibition of propaganda of homosexuality, prohibition of propaganda of childlessness)
- makes stigmatizing ('othering') policies sound legitimate and justifiable in constitutional terms