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Judicial search for a legal definition of religion

Sądowe poszukiwania prawniczej definicji religii

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Abstract: A prerequisite for the proper application of the law is a certain definition of the terms used in the law. A variable definition of a concept undermines the requirement of legal certainty, and an overly narrow or broad definition of a concept (compared with the general idea of its content) may lead to doubts about the fairness of legal regulation. Although the legal system uses the term "religion" relatively frequently, it does not generally define it explicitly. In most cases, this does not cause problems because there is no reasonable doubt as to whether we are dealing with a religious element. In hard cases, however, there is no choice but to decide where to draw the line between religion and other types of beliefs. The alternative is to stop distinguishing between them, thus depriving the religious element of its special legal status. The social sciences distinguish four basic approaches to the definition of a religious phenomenon. The substantive definition seeks to capture the content that a particular belief must satisfy in order to be labelled religious. The essentialist approach emphasises the experience of the believer. The functionalist definition notes the function that religion serves in the life of the believer. The analogical approach does not seek to capture the essence of religion but rather notes its manifestations and what different religions have in common. This article offers examples of the application of these theoretical approaches in jurisprudential practice. It also highlights the fact that courts work flexibly with the concept of religion and often give it a different content depending on the context under consideration.

Key words: religion; freedom of religion; US Supreme Court; European Court of Human Rights; conscientious objection; legal definition

Streszczenie: Przesłanką właściwej aplikacji prawa jest pewne zdefiniowanie używanych w nim pojęć. Zmienność takich definicji pozostaje w sprzeczności z wymogiem pewności prawa, a nazbyt wąskie lub nazbyt szerokie zdefiniowanie danego pojęcia (w zestawieniu z powszechnym postrzeganiem jego treści) może prowadzić do wątpliwości co do słuszności regulacji prawnej. Chociaż pojęcie religii używane jest w systemach prawnych relatywnie często, nie jest w nich ono zwykle definiowane *expressis verbis*. W większości przypadków nie powoduje to problemów, ponieważ nie ma racjonalnych wątpliwości co do tego, czy w danym przypadku mamy do czynienia z elementem religijnym. Jednak w trudniejszych sprawach istnieje konieczność podjęcia decyzji dotyczącej przeprowadzenia granicy pomiędzy religią i innymi typami przekonań. Alternatywą jest zaprzestanie dokonywania pomiędzy nimi rozróżnień, a więc pozbawienie specjalnego statusu tego, co religijne. W naukach społecznych wyróżnia się cztery zasadnicze

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podejścia do definiowania zjawiska religijnego. Definicje substancjalne starają się uchwycić, jakie treści mają być uwzględnione w danym zespole przekonań, aby mógł on zostać uznany za religijny. W podejściu esencjalistycznym podkreśla się znaczenie doświadczenia religijnego osób wierzących. Definicje funkcjonalne koncentrują się na funkcji, jaką religia pełni w życiu wyznawców. Natomiast podejście oparte na analogii nie dąży do uchwycenia istoty religii, lecz raczej skupia się na jej przejawach oraz na cechach wspólnych różnych religii. Niniejszy artykuł omawia przykłady aplikacji tych teoretycznych ujęć w praktyce orzeczniczej. Autor dochodzi do wniosku, że sądy podchodzą do pojęcia religii w sposób elastyczny i nierzadko przypisują mu różną treść, w zależności od kontekstu analizowanej sprawy.

Słowa kluczowe: religia; wolność religii; Sąd Najwyższy Stanów Zjednoczonych Ameryki; Europejski Trybunał Praw Człowieka; sprzeciw sumienia; definicja prawna

Introduction

What is religion – and what is it not? Where does the line between religion and other kinds of beliefs lead? At first glance, the law may leave this question to experts of the relevant disciplines: religious studies, sociology or philosophy.

However, this is only at first glance. National legal orders, as well as international law, use the concept of religion extensively. At the international level, there are several arrangements for the protection of freedom of religion, the prohibition of discrimination based on religion or the right to asylum on the grounds of a well-founded fear of persecution on religious grounds. At the national level, the issue of the specific status of legal persons established for the purpose of practising a religious belief (in many jurisdictions associated with a privileged status, manifested, for example, by the right to autonomy or access to public space),[1] the possibility of invoking conscientious objection on religious grounds or certain other religious exceptions (e.g. to carry out the ritual slaughter of an animal in a way that is otherwise generally prohibited) is regularly added.

In all of these cases, the legal order treats the concept of religion and therefore cannot resign itself to defining its content and scope. Fascinating

[1] An example, which is not exceptional in the context of continental Europe, is the legal order of the Czech Republic, which allows for the granting of legal personality in the form of a "registered church" only to such organised formations whose purpose of existence consists in "the practice of a particular religious faith" (Sec. 3(a) of Act No. 3/2002 Coll., on Freedom of Religion and the Status of Churches and Religious Societies). Thus, legal entities pursuing non-religious types of beliefs are excluded.

as the debates among religious scholars and philosophers about the true nature of religion may seem, the legal order cannot be thrown into uncertainty about such a fundamental concept.

1. Religion in the context of a social science debate

Approaches to the definition of religion can be divided into several categories. There are different variants of substantive definitions that seek to capture the elements that must be present for a belief to be considered religious, such as belief in a Supreme Being or belief in supernatural power in historically older kinds of definitions.[2] This kind of definition has been met with twofold opposition: it completely omits the aspect of religious experience and does not adequately explain what religion is.

Out of this critique grew the essentialist approach, which approaches religion not from the standpoint of doctrinal characteristics but from the experience of the believer. Examples include the position of M. Eliade, for whom religion is "a manifestation of the sacred"[3] (in apparent opposition to the profane). Other examples are Friedrich Schleiermacher, who understands religion as a self-affirming experience leading to a sense of absolute dependence, and Rudolph Otto, for whom religion is the experience of the holy, which is different from the mere rational acceptance of belief in a supernatural power.[4]

The third approach is the functionalist definition of religion, which is based on the function that religion serves in human life. This includes, for example, Tillich's well-known definition of religion as an "ultimate concern."[5] The weakness of functional definitions is their vagueness. Tillich's ultimate concern, for example, may apply equally well to sports, work or anything to which one gives one's life, but it may exclude some forms of Buddhism.[6]

2 Durham, Sewell 2006, 8.
3 Eliade 2008, 13.
4 Durham, Sewell 2006, 9.
5 "Toward a constitutional definition…" 1978, 1066.
6 Durham, Sewell 2006, 11.

In the late 20th century, we encountered a new kind of definition based on Wittgenstein's idea of "family resemblance;"[7] we also refer to this approach as analogous. This definition is polythetic in character – that is, it moves away from the need to find a core that is common to all religions but notes that certain mutually similar phenomena are present but not necessarily always.[8] In their account, there is no need for a definition based on the delineation of certain characteristics that a belief must satisfy to be a religion because there is nothing that all different religions have in common. They emphasise an analogical approach, which starts with phenomena that we know with certainty are religions. These instances of unquestioned religion become paradigmatic cases and offer clues for judgment, while not requiring that other religions fulfil all the features.[9] The criticism of the analogical approach is that it considers the concept of religion to be not actually defined in any way. It starts from a paradigmatic case that is not in dispute and asks whether other beliefs are its functional equivalent and not whether they are religious.

To complicate matters, Gunn points out that today, we approach the concept of religion through three different perspectives. First, religion can be thought of as a "belief" – a belief in relation to topics such as the supernatural, with an emphasis on the doctrinal aspect. Second, religion is identity in which we emphasise belonging to a religious group. In this sense, religion is something that people are born into, not a result of conversion due to a process of study, prayer and reflection. In the case of religion as identity, we emphasise shared history, cultures, ethnicity or traditions. Third, religion is a way of life – that is, certain requirements for life expressions, such as specific behaviours, rituals and customs traditions.[10] In this sense, an example is the Christian characteristic of the West of observing Sunday as a day of rest.[11]

7 Gunn 2003, 194.

8 Ibidem.

9 Durham, Sewell 2006, 24–25.

10 For details cf. Gunn 2003, 200–204. Gunn, as a lawyer, adds that while doctrinal understandings of religion are more understandable, identitarian understandings of religion are the most common cause of religious discrimination and persecution.

11 In this context, cf. the decision of the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.* (1985), 60 A.R. 161 (SCC), striking down a ban on Sunday sales on the grounds that it enforced the observance of the Christian Sabbath and thus interfered with freedom of conscience and religion.

However, a broad conception of religion that allows many primarily non-religious phenomena to be labelled as religious may be objected to. Cultural–national conflict can easily be labelled religious. Thus, the Catalonia dispute can easily be described as national (Catalans v. Spaniards), while in many ways, the analogous Northern Ireland conflict can be described as religious (Catholics v. Protestants).

2. Purpose of the legal definition of religion

The purpose of law is to regulate human conduct, not to describe the world around us. In this respect, the conclusions of the social sciences on the definition of religion can be an effective aid but are not necessarily binding on the legal order.

Legal definitions of terms have a specific goal: we do not expect them to be an exhaustive definition of defined parts of reality but rather a definition that is graspable in the process of identifying an act in terms of its normative qualification (whether it is prohibited, commanded or permitted). The law does not define concepts "in themselves" but as units of prescriptive sentences – that is, in relation to the need to regulate human conduct. To some extent, it does so independently of reality, autonomously for its own purposes.[12]

Therefore, the definition of religion is one element of the actual form of the relationship between the state and religious communities and of the protection of individual religious freedom. It is in this context and for these purposes that the legal order also seeks or establishes a definition of religion.

In other words, when we define religion, we are already touching on the boundaries of what will be considered "religious freedom," "religious autonomy" and "religious objection," thus influencing the scope of mutual rights and obligations that will be established by these institutions.

[12] Holländer's view that all legal concepts are human creations should also be understood in this sense (Holländer 2017, 12). Again, one of the many examples of the autonomous definition of concepts by the legal order can be found in the concept of "marriage," which is defined differently by the legal order and differently, for example, in the understanding of different religious groups (e.g. in terms of its permanence, the number of persons involved or their sex).

This is also why Durham and Sewell find that the problem of defining religion should be reconceptualised as a question of the extent to which state institutions should defer to the self-definition of believers and their religious communities.

> In a normative world, self-definition is an inherent part of what we mean by autonomy (the capacity and dignity of imposing self-chosen and self-accepted norm). The problem […] is about the extent to which religious self-definition, which is the core of authentic and autonomous religious belief, can be accorded full respect, including space for self-expression through conduct.[13]

It may seem that their position suffers from the problem of the circle: the very definition of religion already falls under the protection of religious freedom (and religious autonomy)[14] and thus should not be determined from the outside by the non-religious actor that the state is. However, it is the state that guarantees religious freedom and makes the concept of religion part of the rules it sets.

This contradiction can fade if we understand freedom of religion (and other fundamental rights and freedoms) as natural fundamental rights guaranteed to people by virtue of their humanity (human dignity, human nature) – that is, not created but only guaranteed by the state. Even in this case, however, the requirement of a sufficiently precise definition that will ultimately have to be made by the organs of the state called upon to enforce fundamental rights does not disappear. Moreover, it is questionable whether this protection would be effective and meaningful in a situation in which each opinion-oriented community determines quite autonomously whether its purpose is religious.

At the same time, Durham and Sewell's objection points to an important circumstance, namely, that many definitions of religion have implicit metaphysical assumptions about the nature of religion,[15] whereas

[13] Durham, Sewell 2006, 6.

[14] Similarly, Justice Brorby's dissent argued that the ability to define religion implies the power to deny freedom of religion. Dissenting opinion in *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996), at 1489.

[15] Gunn 2003, 193.

taking metaphysical positions should be avoided by a strictly neutral state.[16] If we want to define religion by the presence of certain doctrinal elements (e.g. relating to God) or by the questions it addresses (e.g. the meaning of existence in the perspective of mortality), does its identification no longer constitute a religious consideration but one that is forbidden to a religiously neutral state?

In mentioning the idea of a religiously neutral state or a state separated from religion, we touch on another dimension of our problem. If the state is to be neutral towards religion,[17] it should be clear about what religion is. Paradoxically, in this respect, it may also be valuable to recognise that the definition of religion is problematic and that non-religious comprehensive doctrines can play a similar role in human life.[18]

Probably the most common objection to any legal definition of religion is its potentially discriminatory nature and the fear that such a definition will exclude from its scope certain beliefs while not meeting the defining characteristics of religion, the adherents of which are sincerely convinced of their religious nature.[19] This is to say that the state's definition of religion is inadequate because it "forgets" certain religions. Such reasoning, of course, presupposes a prior rational grasp of the concept; thus, it indicates nothing more than that the legal definition of religion does not match our definition

16 Thus, even in the context of examining the content of the legal concept of religion, we are ultimately faced with the problem of the possibility of a state that is strictly neutral on religious and metaphysical issues. Personally, I am more inclined to the conclusion (for which there is insufficient space here) that any state is based on metaphysical assumptions and, therefore, must always ultimately identify with some vision of the good, and so it will always privilege some form of religion or philosophy.

17 Let us leave aside the question of how far any state neutrality is not only practically feasible but also unquestionably conceivable. Cf. Palomino 2014, 172–184.

18 For example, the Charter of Fundamental Rights and Freedoms of the Czech Republic prohibits the state from binding itself not only to a religion but also to an "exclusive ideology" (Article 2(1)). In relation to this requirement, the Czech Constitutional Court has developed a three-step test of religious and worldview neutrality, according to which the prohibition of binding to a religion or ideology consists of (i) prohibiting the state from self-identifying (positively or negatively) with a particular worldview or religious doctrine that would lead to the abandonment of the democratic legitimacy of public authority, (ii) the prohibition of the exercise of public power that interferes negatively or positively with religious or worldview issues, which would lead to an excessive association of the State with any religious or worldview trend; and (iii) the prohibition of the exercise of public power that would create unjustified inequality based solely on the criterion of religion or worldview. Cf. ÚS 10/13 of 29 May 2013 (N 96/69 SbNU 465; 177/2013 Coll.), para. 311.

19 Durham 2004, 352–353.

of religion, which we will use as the starting point for measurement. Thus, the impossibility of any legal definition of religion turns into a problem of the legal system's ability to identify an adequate definition and is also closely related to the problem of analogy.

Therefore, analogy may provide an effective solution to the concern about defining religion too narrowly. We can leave the debate about the actual content of the concept of religion to the social sciences. For the purposes of law, it is sufficient to identify the reasons why and for what the state guarantees freedom of religion. If some beliefs provide a similarly strong reason for action, they can provide the same protection and, if necessary to secure that protection, can reasonably label their beliefs as religious.

However, this does not escape the very heart of the problem of how the legal order should define religion.

3. Definition of religion in case law

When the U.S. Supreme Court decided in 1890 whether polygamy, as an element of the religion of certain (Old) Mormon groups, enjoyed the protection of the First Amendment to the U.S. Constitution, it provided the following definition of religion: "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[20] The U.S. Supreme Court also adhered to this definition of religion in a conscientious objection case in *United States v. Macinthos* in 1931. It reasoned that the essence of religion is belief in God, which establishes duties superior to those arising from any human relationships.[21] In both cases, the Court's decision was based on a substantive approach.[22]

[20] U.S. Supreme Court, *Davis v. Beason*, 133 U.S. 342 (1890). Thirteen years later, the U.S. Supreme Court concluded that while Congress could not prohibit belief in the correctness of polygamy, it could prohibit its practice, cf. *Reynolds v. United States*, 98 U.S. 145 (1878).

[21] U.S. Supreme Court, *United States v. Macintosh*, 283 U.S. 633 (1931).

[22] The U.S. Supreme Court also relied on a substantive definition in *United States v. Ballard*, 322 U.S. 78 (1944), in which it upheld a strong conception of individual religious liberty that "It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others.

In another conscientious objection case, a U.S. Court of Appeals in 1943 sought to draw a line between religious beliefs and philosophical or political beliefs. Indeed, only a religiously motivated, conscientious objection could be afforded legal protection under the law. The Court reasoned that:

> Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe a sense common to men in the most primitive and in the most highly civilised societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.[23]

Thus, the Court focused on its psychological function and did not place a requirement on the presence of certain doctrinal elements. In doing so, the Court opened the way for the protection of agnostics and atheists under the regime of religious exemptions:

> [Conscientious objection – J.K.] may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.[24]

The next step along this path was taken by the U.S. Supreme Court in *Torcaso v. Watkins*,[25] which struck down a provision of the Maryland Constitution that had been used to prevent a secular humanist from being appointed a notary public because he refused to declare his belief in God. The Court gave the term religion a broad scope by including Buddhism, Taoism, ethical culture and secular humanism. It reasoned that under the *Establishment Clause* of the First Amendment to the U.S. Constitution, the government cannot compel a person to declare belief or disbelief in any religion, to endorse all religions against non-religions or to endorse theistic religions against non-theistic religions.

Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law" (at 86–87).

23 U.S. Court of Appeals for the 2nd Circuit, *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943).

24 Ibidem, at 708.

25 U.S. Supreme Court, *Torcaso v. Watkins*, 367 U.S. 488 (1961).

The shift in American jurisprudence from substantive definitions to the use of a functional approach continued. Rather than placing certain requirements on a set of beliefs, functional definitions focus on the role those beliefs or practices play in an individual's life. Anything that fulfils this role in a person's life then becomes a religion. A typical example of this is Tillich's definition of religion as an "ultimate concern," which was used by the U.S. Supreme Court in *United States v. Seeger*[26] and later in *Welsh v. United States*.[27]

In *United States v. Seeger*, the Court considered the case of a man who had been convicted of refusing to join the armed forces. He argued that he fell within an exception under the Universal Military Training and Service Act, which provides that conscientious objectors need not serve in the armed forces if they have a specific religious training or belief that relates to a Supreme Being. Seeger was a true pacifist who made his objection in good faith but was denied an exemption because he did not believe in a Supreme Being, as he considered himself agnostic about the existence of God. At the same time, however, he argued that his objection was based on religious study and belief rather than on his personal morality, and he considered the conscientious objection clause unconstitutional because it requires proof of belief in a Supreme Being.

The Supreme Court dealt with the matter by holding that a person may invoke a conscientious objector status based on a belief that this person has a similar status in his or her life to belief in God. It unanimously concluded that the law was constitutional but that at the same time the term "Supreme Being" should be interpreted to include all types of beliefs. The Court reasoned that, as there are more than 250 religious groups in the United States, Congress cannot be expected to specifically address each of them in federal law. All sincerely held beliefs "which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent" should be included in the realm of religious belief.[28] According to the judgment, the presence of the element of religion is determined by whether a given belief, which is sincere and meaningful, occupies

[26] U.S. Supreme Court, *United States v. Seeger*, 380 U.S. 163 (1965).
[27] U.S. Supreme Court, *Welsh v. United States*, 398 U.S. 333 (1970).
[28] U.S. Supreme Court, *United States v. Seeger*, 380 U.S. 163 (1965), at 176.

a place in the life of its bearer, parallel to the place occupied by the orthodox belief in the God of the person who clearly qualifies for the exemption.[29]

This approach was deepened in *Welsh v. United States*, in which the Supreme Court further blurred the distinction between religion and morality by holding that purely ethical and moral considerations (i.e. without reference to an explicit religious grounding) must also be considered religious, at least where the beliefs by which the ethical stance manifests itself approach the intensity normally associated with more traditional religious beliefs.[30] Ethical convictions may play a role in people's lives, similar to that of God for traditional believers.[31]

This evolution of the concept of religion is best understood by placing it in its proper context: the consideration of the possibility of conscientious objection, which the American doctrine understands as a manifestation of the *Free Exercise Clause* of the First Amendment to the U.S. Constitution. A substantial body of legal scholarship defends the position that the concept of "religion" in the First Amendment should be interpreted differently in relation to Free Exercise cases and the *Establishment Clause*.[32]

The Harvard Law Review text cited to date (published without attribution) defends this position by stating that a broad functional definition of religion should be adopted in the context of free speech,[33] so that "[r]eligion exists when there is an ultimate concern, and the content of such a concern

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29 Ibidem, at 165.

30 U.S. Supreme Court, *Welsh v. United States*, at 342–43. It supplemented this reasoning by concluding that a sincere claimant invoking conscientious objection may be denied relief only if his beliefs "are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle, but instead rests solely upon considerations of policy, pragmatism, or expediency."

31 "If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content, but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by […] God' in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a 'religious' conscientious objector exemption […]." U.S. Supreme Court, *Welsh v. United States*, at 340.

32 Durham, Sewell 2006, 13.

33 And thus to define religion in a way that "does not discriminate among creeds on the basis of content, that does not circumscribe the very choices which the Constitution renders inviolate. What those choices are – and thus the meaning of religion for free exercise purposes – can therefore be limited only by a broader inquiry which looks at the role played by a system of belief in an individual's life and which seeks to identify those functions worthy of preferred status in the constitutional scheme." "Toward a constitutional definition…" 1978, 1075.

is not limitable by official action"[34] and any abuse of such a broad definition should be seen as an acceptable price for religious tolerance. By contrast, in relation to the *Establishment Clause*, it proposes a stricter definition that includes a component of organisational arrangement, theological authority and attitudinal conformity of believers.[35]

The jurisprudential development of the definition of religion was not ended by *Welsh v. United States*. The U.S. Supreme Court indirectly pulled the imaginary brake two years later in *Wisconsin v. Yoder*,[36] which dealt with the case of Amish, who objected to compulsory high school attendance on religious grounds. The Court held that the individual's First Amendment interests in the free exercise of religion outweighed the state's interests in enforcing school attendance beyond eighth grade. Although the question of the religious nature of the objection was not at issue, the Court discussed at length the reasons for finding it to be religious. It emphasised that the reason the Amish are different from the rest of society lies not in their subjective personal philosophical beliefs but in their incorporation into an ancient religious organisation whose rules regulate every aspect of their lives.[37] It seems that the Court needed to correct its earlier statements, suggesting that religion is a purely personal phenomenon.

However, even this correction was subsequently corrected. The cases of *Thomas v. Review Board*[38] and *Frazee v. Illinois Department of Employment Security*[39] provided protection under the religious exemption regime to members of traditional religious groups who themselves held a position not fully shared by those groups. Thus, although the link to the collective aspect of religion existed, it was weakened.[40]

34 Ibidem, 1082.
35 Ibidem, 1086–1089.
36 U.S. Supreme Court, *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
37 Movsesian 2022, 10.
38 U.S. Supreme Court, *Thomas v. Review Board*, 450 U.S. 707 (1981).
39 U.S. Supreme Court, *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989).
40 Movsesian assesses the development of the U.S. Supreme Court's jurisprudence in relation to the definition of religion as follows: "The Court's decisions on the definition of religion are muddled. According to the cases, religion entails a conventional belief in God-except when it does not. Religion entails a commitment to a traditional, organised faith community-except when it does not. Religion excludes purely individualistic spiritual convictions-except when it does not. And a court should not evaluate whether a particular belief is 'bizarre' or is shared by others in the claimant's religion-except when it should." Movsesian 2023.

At the lower level, an approach to religion based on an analogical definition has come to be accepted. For example, in *Africa v. Commonwealth of Pennsylvania*, the courts considered the issue of a specialised prison diet requirement. They used an analogical approach based on "useful indicia" to discern whether the requirement was based on religious grounds; this is an apparent adoption of the polythetic or analogical definition based on Wittgenstein's idea of family resemblance. Thus, the Court of Appeals for the 3rd District stated,

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief system as opposed to an isolated teaching. Third, a religion often can be recognised by the presence of certain formal and external signs.[41]

This approach was later applied in the consideration of cases of "religious communities" whose real substance lies outside religion (e.g. so-called marijuana churches or various recessive societies). In *United States v. Meyers*, the Court considered the case of a man prosecuted for distributing marijuana. His defence was that he was a minister of "the Church of Marijuana" and that his sincerely held religious beliefs (and his formal positions in the Church) entitled him to use, possess, cultivate and distribute marijuana for the benefit of the planet and humanity. The Court examined in detail whether the firm beliefs of Mr. Mayers qualified as religious beliefs and concluded that they did not.[42] It is indeed a belief but not a religious one. Rather, it was a philosophical belief or a certain lifestyle.

According to the Court, religion can be identified by the following criteria, which represent an elaboration of the approach taken in *Africa v. Commonwealth of Pennsylvania*: (1) Final justification. Religion speaks to the fundamental questions of life, its meaning and death. It addresses questions of an existential nature, man's role in the universe, the purpose of human life, etc. (2) Metaphysical belief. As a rule, religion is metaphysical – that is, it testifies to a reality inaccessible to the senses. (3) Religion as a rule brings out

41 Federal Court of Appeals for the 3rd Circuit, *Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981).

42 Federal Court of Appeals for the 10th Circuit, decision in *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996).

a certain system of norms of conduct, a way of life, and it expresses what is good and bad, moral and immoral, just and unjust. This ethical system often imposes obligations whose source is to be sought in a higher power, spirituality and the denial of pure self-interest. (4) Complexity. As a rule, religious belief is comprehensive; it does not confine itself to a particular partial doctrine and does not provide an answer to a partial question but offers a comprehensive view of the world. (5) As a rule, religion is accompanied by certain external features, such as the person of the founder (prophet, teacher and saints), sacred writings, places of worship that are sacred and not used for profane purposes (churches, synagogues, pyramids, etc.) and the presence of clerics who preserve and pass on the religious faith, religious rites, organisational structure, festivals, fasts, a certain manner of dress or other external arrangements and a missionary nature.[43]

The highest European courts – the European Court of Human Rights (ECtHR) and the Court of Justice of the EU – have not yet been confronted with a case for which it would be necessary to seek a definition of religion and a boundary between religious and non-religious elements.

In the case law of the ECtHR beliefs include different types of worldviews, "but they must always represent a coherent view of the fundamental questions of the existence of the individual and the functioning of society, a set of rules of conduct which determine the ordinary behaviour of their followers."[44]

In *Campbell and Cosans v. the United Kingdom*, the ECtHR held that Article 9 of the Convention protects convictions that reach "a certain level of cogency, seriousness, cohesion and importance."[45] The Court considered beliefs such as pacifism, atheism, communism and veganism, but not beliefs in euthanasia or the issue of scattering ashes after cremation.[46] The ECtHR's case law does not provide a definition for the concept of religion but imposes a general requirement of cogency, seriousness, cohesion and importance on it, just as it does on beliefs. In practice, the ECtHR subsumes

43 Federal Court of Appeals for the 10th Circuit, decision in *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996).

44 Bobek 2012, 972.

45 Judgment of the ECtHR of 25 February 1982, 7511/76, 7743/76, *Campbell and Cosans v. the United Kingdom*, at 36.

46 Bobek 2012, 972.

both traditional religions and less widespread religions, such as Jehovah's Witnesses, Scientology, Druidism, the Osho movement and others under the heading of religion,[47] but always in situations in which the parties to the dispute do not challenge the status of the belief as a religious belief, so the issue does not need to be explicitly considered by the Court.[48] Thus, the ECtHR's approach for the time being is based on the subjective characteristics of beliefs.

This was manifested in the case of *De Wilde v. The Netherlands*,[49] in which the ECtHR reviewed the procedure of the Dutch authorities who did not allow an alleged member of the Pastafarian movement[50] to be photographed with a colander on her head in her identity document. In considering the complaint, which was declared inadmissible, the Court had to deal with the question of whether Pastafarianism should be regarded as a religion or belief within the meaning of Article 9 of the Convention. In doing so, it acknowledged that non-traditional and minority forms of a religion cannot be deprived of legal protection and emphasised the need for a broad interpretation of the concept of religion or belief, which does not mean that all opinions or convictions should be regarded as such.[51] The ECtHR considered adequate the assessment of the Dutch courts that Pastafarianism did not meet the requirements of seriousness and cohesion, nor did the way in which the complainant implemented the requirements of Pastafarianism in her life (notwithstanding the fact that the complainant convincingly claimed that she would consistently wear a colander on her head outside).[52]

47 Ibidem, 973.

48 For example, in the case of Druidism, the European Commission on Human Rights explicitly states that it "does not consider it necessary to decide whether Druidism can be classified as a religion within the meaning of Article 9." Decision of the European Commission of Human Rights of 14 July 1987, 12587/86, *Chappel v. the United Kingdom*.

49 Judgment of the ECtHR of 2 December 2021, 9476/19, *De Wilde v. The Netherlands*.

50 Pastafarianism, also known as the Church of the Flying Spaghetti Monster, is a satirical religious movement that humorously criticises the teaching of intelligent design and advocates for the separation of church and state. Followers of this unconventional "faith" believe in a whimsical deity called the Flying Spaghetti Monster, a divine being made entirely of spaghetti and meatballs. They argue that their beliefs are just as valid as those of mainstream religions, using satire and absurdity to shed light on the privileging of religious beliefs in society.

51 Judgment of the ECtHR of 2 December 2021, 9476/19, *De Wilde v. the Netherlands*, paras 50 and 51.

52 Ibidem, at 53.

Thus, the practice of the ECtHR tends to adopt a functional approach to the definition of religion. In the case of a member of the Pastafarian religion, it did not only assess the nature and content of the doctrine itself but also its function in the life of its adherents. However, this must be seen against the background that the Court has not yet been confronted with the need to clearly distinguish "religion" from "belief."

When the Supreme Administrative Court of the Czech Republic considered the case of refusal to recognise a group called the "Cannabis Church" as a registered church, it synthesised both the subjective requirements (quality of belief) and the objective presence of religious belief. Adopting an analogous approach to definition, the Court stated that the fact that a particular system of thought is a religion could be inferred at least in part from the presence of the following indicia: metaphysical belief (relation to an empirically unverifiable reality), addressing the essential questions of human existence (life, death and the meaning of existence), the complexity of the worldview and the presence of moral or ethical requirements.[53] The Court explicitly emphasised that these are not exhaustive definitional features but rather indications and showed a willingness to recognise as a religion a system of thought that does not meet some of the indications. At the same time, the Court examined the teachings of the Cannabis Church for the presence of the indicia of cogency, seriousness, cohesion and importance and concluded that it did not meet them either.[54] Thus, the beliefs of the Hemp Church can reasonably be described as beliefs but not religious beliefs.[55]

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53 Supreme Administrative Court, Judgment of the Chamber of 10 March 2023, No. 5 As 21/2022–83, at 33–40.

54 That the teachings of the Cannabis Church are not coherent is evident, for example, from the fact that in the documents submitted for registration, it states that members can believe in any God, Allah, Buddha, Jesus or themselves. Supreme Administrative Court, Judgment of the Chamber of 10 March 2023, No. 5 As 21/2022–83, at 45.

55 However genuine the complainant's belief in the usefulness of cannabis may be, in the view of the Supreme Administrative Court, it can only be a secular belief, not a religious belief, which is an inherent premise of any religious society or church. Supreme Administrative Court, Judgment of the Chamber of 10 March 2023, No. 5 As 21/2022–83, at 48. In the case of religious disputes before Czech courts, it is also true that the religious character of beliefs is practically never questioned. In the context of the registration of churches and religious communities, mention may also be made of the Supreme Administrative Court's Judgment of 26 August 2021, No. 5 As 202/2020–43, in which it concluded that the registration process must examine "whether it is

Finally, the attitude of the States towards the recognition of the Church of Scientology must be noted. Historically, there have been multiple approaches to the question of whether to consider it a religion. As early as the 1970s, Australia recognised it as a religion.[56] The High Court there arrived at the approval of its religious status through a combination of analogy and respect for the fact that Scientology itself is considered a church.[57]

By contrast, in England in 1970, the Court of Appeal refused to grant Scientology religious status, concluding that its adherents believed in no God and did not practice worship in a manner comparable to any other known religion.[58] Forty years later, the UK Supreme Court has now considered the question differently. It based its approach on the need for a comparative and analogical approach based on the presence of certain clues that describe rather than define religion. It concluded that in the context at issue, religion is appropriately described as

> […] a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system.[59]

a longer-term structure and an organised system of beliefs of several persons, not a sudden, temporary or fluctuating movement of the mind of a few individuals."

56 High Court of Australia, *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1953) 154 CLR 120.

57 Judge Murphy explicitly stated that the category of religion is not closed. The following entities can be described as religious: any entity that claims to be religious and whose beliefs or practices are revivals of or resemble earlier cults; any entity that claims to be religious and believes in a supernatural being or beings, whether physical and visible, a physical invisible God or spirit, or an abstract God or entity; any entity that claims to be religious and offers a way to find meaning and purpose in life.

58 Court of Appeal, *R v. Registrar General, ex parte Segerdal*, 2 QB 697 (1970).

59 UK Supreme Court, Judgment of 11 December 2013, in *R (on the application of Hodkin and another) (Appellants) v. Registrar General of Births, Deaths and Marriages (respondent) Hodkin*, UKSC 77. The judgment has been criticised by the doctrine for not really offering any workable approach at all to distinguish between religion and non-religion. It defines religion as a "spiritual or non-secular belief system," thereby opening up a whole new set of questions, particularly about the relationship between "secular" and "spiritual" (and the meaning of both terms). Cf. Zucca 2014, 7.

4. An attempt at synthesis

Although the American debate about the dual definition of religion (different in the contexts of the *Free Exercise Clause* and the *Establishment Clause*) may seem alien to the European perspective, it contains an important message: it matters in what context and for what purpose we treat the religious element.[60] If a legal norm excludes an exclusive connection between the state and religion, for example, by ordering not to establish a state religion, it seems natural that the primary focus of attention is on organised forms of religion. The stricter the prohibition of contact between secular and religious authorities, the narrower the definition of religion must be for this purpose. Otherwise, there would be untenable situations in which many moral claims about the content of the legal order could be rejected on the grounds that they establish an impermissible connection with religion.

Conversely, in the context of the freedom of religious expression, it is the extent of that freedom that is at stake. Therefore, it is understandable that, for example, when considering conscientious objection cases, the focus is on the function that the believer's faith serves in his or her life. When viewed from the perspective of the "participant,"[61] the focal point is the personal response to the offer that religion presents. Confronted with the "divine," one responds with an act of faith that gives direction to one's entire existence, not just to certain particular aspects of living. If a similarly powerful direction for existence arises from a source of meaning and value not traditionally identified as religion, one can understand why courts would proceed to use a functional approach and declare that this other belief should also be afforded protection under the same regime as religious belief.

At the same time, the undoubted weakness of the functional approach to the definition of religion is its excessive openness, which in different contexts (e.g. registration of a religious society) opens the question of whether

[60] It is possible that this dual approach to the concept of religion will become more widely discussed in the European area following the judgment of the Court of Justice of the EU (Grand Chamber) of 13 October 2022, in Case C-344/20, *S.C.R.L.*, which indicated that religion is not entitled to a different treatment than other beliefs in the application of discriminatory law.

[61] Cf. Alexy 2009, 48.

religion should have any specific status at all,[62] if it is not even distinguishable from other kinds of beliefs.

The modern analogical approach, or its combination with the substantive approach, copes with this problem. For example, the modern substantive definition can be described as Choper's approach, which sees religion wherever (but also only where) one can speak of belief in the "extra-temporal consequences" of actions or in a transcendent reality.[63]

A specific synthesis of the different approaches to the need for a legal definition of religion is offered by Rafael Palomino, who proposes to define religion using three elements. The first element is the presence of a belief system and its collective dimension: A particular belief system is shared by a group of people, and the state should refrain from evaluating the intensity or sincerity of such belief. The second element is the presence of rituals and ceremonies (not necessarily a cult in the Judeo–Christian sense). Finally, the third element is the weighing or evaluation of individual and collective actions, manifested as the assignment of temporal or extra-temporal consequences to a particular action (the "dimension of transcendental retribution of deeds"), or as requiring a particular action to achieve perfection.[64]

Palomino's approach addresses concerns about the metaphysical involvement of the state with respect to the doctrine's obligatory content by assuming no mandatory elements; it requires only a collective sharing of belief (a consequence of understanding religion as fundamentally a common project) and external manifestations that imply that believers collectively relate to something. The fear of religion not being an even partial belief is eliminated by the requirement of transcendental consequences of action.

Conclusion

By analysing the case law, we can conclude that it may understand the concept of religion differently in the different contexts in which the law

62 Cf. the much-discussed book Leiter 2012, whose central motif is the question of what is so special about religion that it deserves special legal treatment. For an analysis of Leiter's position, cf. Baroš 2017, 707–720.

63 Cf. the detailed argument in Choper 1982.

64 Palomino 2011, 73.

uses it. In the situation of conscientious objection, a functionalist approach began to prevail in the second half of the 20th century, which made it possible to extend an institution reserved only for holders of religious convictions to holders of other similarly serious attitudes.

Conversely, in cases in which an overly benevolent approach to the notion of religion threatened to be abused, courts have applied various types of analogous or modern substantive approaches, with the apparent aim of being as inclusive as possible (and not excluding non-traditional, atypical or modern modes of spirituality outside the realm of religion), but at the same time exclusive enough to prevent the benefits associated with the religious character from being invoked by groups that exploit religious self-identification for their own benefit.

The ability to determine that certain beliefs are not religious is not inconsistent with the religious neutrality of the state: if it affords a religious element a certain degree of protection, it must be able to distinguish it from a non-religious element that is afforded a different kind of protection. At the same time, however, the way in which the state defines religion may affect the actual shape of the relationship between the state and religion and freedom of religion, particularly in the case of states that have a strong (positive or negative) attitude towards the religious element in the public sphere.

However, the urgency of the need to find an adequate definition increases as religious faith becomes increasingly individualised and transformed. Thus, new religious phenomena emerge, such as belief without affiliation with an organised religion (believing without belonging) or, conversely, religious affiliation without personal belief (belonging without believing),[65] leading to unique, completely personalised beliefs that have no field in any recognised religious tradition. In the lives of many people, the role of religion is then taken over by other systems of comprehensive doctrines,[66] which exclude their own religious character but represent similarly urgent conceptions of the good life for their bearers.

[65] Cf. Palomino 2014, 44.
[66] Voice 2014.

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