

The autonomy of religions from the state: the normative framework

Carp, Radu

Veröffentlichungsversion / Published Version

Zeitschriftenartikel / journal article

Empfohlene Zitierung / Suggested Citation:

Carp, R. (2010). The autonomy of religions from the state: the normative framework. *Studia Politica: Romanian Political Science Review*, 10(2), 349-357. <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-446680>

Nutzungsbedingungen:

Dieser Text wird unter einer CC BY-NC-ND Lizenz (Namensnennung-Nicht-kommerziell-Keine Bearbeitung) zur Verfügung gestellt. Nähere Auskünfte zu den CC-Lizenzen finden Sie hier:

<https://creativecommons.org/licenses/by-nc-nd/4.0/deed.de>

Terms of use:

This document is made available under a CC BY-NC-ND Licence (Attribution-Non Commercial-NoDerivatives). For more information see:

<https://creativecommons.org/licenses/by-nc-nd/4.0>

The Autonomy of Religions from the State

The Normative Framework

RADU CARP

The idea of the autonomy of religious denominations is derived from the separation between state and church, neither being allowed to interfere in the other's sphere of activity. In the case of religious denominations, the term "autonomy" refers to the capacity to legislate and rule according to their own norms, concerning everything which represents their own nature.

The principle of the autonomy of religious cults from the state is found in many of the constitutions of European states, and it has also been asserted by the European Court of Human Rights. Thus, it has been stated that the autonomous existence of religious communities is indispensable in a democratic society and it is a central point in the protection of religious freedom granted through Article 9 of the European Convention of Human Rights¹. One of the most important aspects of this autonomy, namely the right of religious cults to have their own jurisdictional bodies and to apply sanctions to their own personnel, which cannot be adjudicated in civil courts, was also asserted by the European Court of Human Rights. The Court initially had a more nuanced position, holding that ecclesiastical procedures which lead to the application of disciplinary sanctions cannot trigger penal charges, in line with Article 6, paragraph 1 of the Convention. Only in the case of sanctions leading to the loss of some civil rights, can the decisions of ecclesiastical judicial bodies be scrutinised by the courts of civil law. In this case, the Court had moved to analyse the essence of the situation and decided that the judicial bodies of the Anglican Church – the consistories – fulfil the conditions for independence and impartiality imposed by the Article 6 of the Convention². In another case however, the European Commission of Human Rights, which has the right of appraisal on the submission of cases to the Court for solution, has been more definite in affirming this side of cults' autonomy. The fact that a priest of the Evangelical Church of Sweden had not been allowed to run for a higher position within this denomination was determined to be a legitimate restriction of his rights³.

In the case of Romania, the principle of cults' autonomy was noted for the first time in an act with normative value by the 1869 Organic Statute of the Romanian Greek Orthodox Church of Hungary and Transylvania. According to Article I:

"The Oriental Greek Church of Hungary and Transylvania, as an autonomous Church, has its canonical right [...] to regulate, administer and lead independently its Church, and the educational and fundational affairs in all its parts and constituent factors, according to the representative form"⁴.

¹ Hasan and Ceauş v. Bulgaria, Case no. 30985/96.

² Tyler v. the United Kingdom, Case no. 10901/84.

³ Jan Ake Karlsson v. Sweden, Case no. 12356/86.

⁴ "Statutul Organic al Bisericii greco-orientale române din Ungaria și Transilvania", *INTER. Romanian Review for Theological and Religious Studies*, no. 1-2, 2007, pp. 273-301.

The significance granted to autonomy is very extensive in this case, references being made not only to the internal organisation of the Church, but also to confessional education.

In the case of other Churches during the 19th century, the language of internal norms frequently borrows from the political language. Thus, according to an explanation given by Richard Potz, Church autonomy is proclaimed in the name of long-sought national autonomy, often being considered as a first step in obtaining it¹. This is also an explanation for the fact that the term "autonomy" is found in the aforementioned Statute. This was applied until the unification of Transylvania with Romania at the end of World War I, and guaranteed in this way the Romanian Orthodox Church's autonomy from the Austro-Hungarian state, a tradition that did not continue after 1918 in relations with the Romanian state. The term "autonomy" was not found in either the 1923 Constitution, in the 1928 Law on the general regime of religions, or in the Statute of the Romanian Orthodox Church of 1925.

The reasons why the cults' autonomy from the state in this period was not requested remain unclear. When reviewing the existing explanations, we find only one testimony that the term autonomy "was not included either in the Constitution, or in a law, in order to grant a meaning not inconsistent with the national unity of the state"² and another of a government representative on the occasion of a discussion of the 1923 Constitution; a reaction following an address in parliament requesting the introduction of the principle of cults' autonomy from the state: "It is not necessary, the word is not there, but its content is".

The period of the communist regime marked the same absence of Church autonomy from the state in the texts with normative value, both those of the Church and of the state. Nevertheless, in this period we deal with one of the first attempts to define the autonomy of the Church from the state by the theologian Liviu Stan, who affirmed the right of the Church to establish its own doctrinal, clerical and judicial norms according to its nature and also the self government of the Church³.

Only with the 1991 Constitution did the autonomy of religious cults from the state become a constitutional principle. Thus, according to Article 29, paragraph 5:

"The religious denominations are autonomous from the state and enjoy its support, including through facilitating religious assistance in the armed forces, in hospitals, in prisons, in shelter homes and in orphanages".

The term has been interpreted in different ways. The constitutional law handbooks or the comments on the Constitution fail to give any definition, with one exception. In its comment on the Constitution, Ioan Stanomir expresses the view that:

"The relation between the state and the cults is conducted on the basis of Article 29 (5), by the principle that cults have an autonomous existence in relation to the state. The state is a neutral entity from the confessional point of view [...]"

¹ Paper presented by Richard Potz at the conference "Forms of autonomy in the Eastern Churches" of the Society for the Law of the Eastern Churches, Venice, 21-26 September 2009.

² I. MATEIU, *Politica bisericească a statului românesc*, Sibiu, 1931, p. 111.

³ Liviu STAN, "Statutul Bisericii Ortodoxe Române", *Studii Teologice*, IInd series, no. 7-8, 1949, p. 643.

The nature of state [...] separated from the Church (protected in the Romanian case since 1866) is not however a constitutional obstacle towards acquiring institutional support, in offering religious assistance in the army, hospitals, prisons, shelter homes and orphanages"¹.

Attempts to define this type of autonomy can also be found in other authors. Patriciu Vlaicu, for example, states that

"autonomy imposes a clear separation of competencies, as the State recognises the right of religions to organise according to their own norms, within the limits of law, while abstaining from participating in matters of the state",

this being, according to the author, "the double sense of autonomy" which is guaranteed by the Constitution².

In another opinion, a definition of the autonomy of religious cults from the state is not given, but the observation is only made that the precise configuration of the State-Church relationship is not entirely determined from a constitutional perspective³. We consider that it is not necessary for this term to be defined in the Constitution – it is the role of the doctrine, jurisprudence and laws to define clearly what autonomy of the cults from the state actually means.

The most complete interpretation of the concept of autonomy belongs to Ionuț Corduneanu. According to this author, autonomy

"is defined through the natural right of the Church to establish alone, independent of the state, the doctrinal, clerical and judicial norms specific to its nature and to self government though these, independently from the state".

Ionuț Corduneanu offers his own interpretation of this concept, starting from a model suggested in the interwar period by two authors⁴.

According to this model, (in the form agreed by Ionuț Corduneanu and revised by the author at the time his book was released, before the entry into force of Law 489/2006 concerning the freedom of religions and the general regime of cults⁵; we present this model with the appropriate adaptations due to the appearance of this law), autonomy is the result of assuming certain rights by the state, concurrent with the recognition of religious denominations as distinct bodies. These rights are grouped in three categories:

¹ Ioan STANOMIR, *Constituționalism și postcomunism. Un comentariu al Constituției României*, Editura Universității din București, 2nd edition, București, 2007, p. 52 (our transl.).

² Patriciu VLAICU, "Principiul autonomiei în relația Stat Culte", in Adrian LEMENI, Florin FRUNZĂ, Viorel DIMA (eds.), *Libertatea religioasă în context românesc și european*, Editura Bizantină, București, 2005, p. 135 (our transl.).

³ Bogdan IANCU, "State, Speech, and Religion in Romania: The Compounded Troubles of Overnight Transition", in András SAJÓ (ed.), *Censorial Sensitivities: Free Speech and Religion in A Fundamentalist World*, Eleven International Publishing, Utrecht, 2007, p. 209.

⁴ Lazăr IACOB, *Regimul general al cultelor în România întregită*, Ramuri, Craiova, 1931; N.Gr. POPESCU-PRAHOVA, *Raporturile dintre stat și Biserică*, Chișinău, 1936.

⁵ *Monitorul Oficial* (thereafter MO), no. 11 of January 8, 2007.

a) *jus reformandi*; represents the right of the state to recognise or not a religious denomination on its territory. Based on this right, the state may adopt a legal system which makes certain distinctions between different denominations, or one in which all the denominations benefit from the same legal status.

b) *jus inspiciendi et cavendi* – the right of supervision and control on the side of the state over all the cults. This right is exercised by the authorised public administration on a central level (currently the State Secretariate for Religions – SSR subordinated to the Prime Minister). This right has been acknowledged in Romania by the 1925 Law for Religious Denominations (Article 25: “The state has the right of supervision and control over all denominations, which is exercised through the Ministry of Religions”) and through the statutes of the different religious cults (the 1948 Romanian Orthodox Church Statute stipulates the right of control on the side of the Ministry; the current Romanian Orthodox Church Statute¹ strengthens its autonomy from the state in the sense that it affirms that Romanian Orthodox Church “is administered in autonomous way through own representative bodies”; the autonomy from the state is confirmed in that Romanian Orthodox Church “administers itself autonomously through its own representative bodies, constituted of clerics and believers” – Article 3, paragraph 2 – and “is autonomous from the state and from other institutions” – Article 4, paragraph 1. It also stipulates the “relations of dialogue and cooperation with the state” – Article 4, paragraph 2).

This right consists of the following:

– recognition by the state of the statutes and canonical codes. According to Article 49, paragraph 2 of Law no. 489/2006, all 18 religious cults recognised by the state must submit to SSR their statutes and canonical codes for recognition. This recognition cannot take place if these acts harm “the public security, order, health and public morality, or fundamental human rights and freedoms” (Article 17, paragraph 2), which is an acceptable limitation of the cults’ autonomy from the state. Any amendment of or supplement to the statutes or canonical codes is sent for recognition to SSR (Article 22, paragraph 1). The condition imposed by Article 49, paragraph 2 of Law no 489/2006 has been respected; hence currently there are 15 Government Decisions which recognise the statutes and the canonical codes of all the 18 cults². If

¹ Recognised through Government Decision no. 53/2008, *MO*, no. 50 of January 22, 2008.

² Government Decision 53/2008 concerning the recognition of the Statute for organising and functioning of the Romanian Orthodox Church (*MO*, no. 50 of January 22, 2008); Government Decision 1218/2008 concerning the recognition of the Canonic Law Code of the Romanian Catholic Church and of the Code of Canons of the Oriental Churches (*MO*, no. 798 of September 27, 2008); Government Decision 56/2008 regarding the recognition of the Organic and administrative statute of the Archdiocese of the Armenian Church of Romania (*MO*, no. 57 of January 24, 2008); Government Decision 398/2008 regarding the Statute of the Russian Orthodox Church of Ancient Rite of Romania (*MO*, no. 365 of May 13, 2008); Government Decision 186/2008 regarding the recognition of the Statute of the Reformed Church of Romania (*MO*, no. 171 of March 5, 2008); Government Decision 898/2008 regarding the recognition of the Statute of the Evangelical Church A.C. of Romania (*MO*, no. 67 of September 4, 2008); Government Decision 400/2008 regarding the recognition of the Statute of the Evangelical-Lutheran Church of Romania (*MO*, no. 296 of April 16, 2008); Government Decision 58/2008 regarding the recognition of the Statute of organisation and functioning of the Christian Baptist denomination – the Union of Christian Baptist Churches of Romania (*MO*, no. 59 of January 25, 2008); Government Decision 897/2008 regarding the recognition of the Statute of organisation and functioning of the Evangelical Christian Church of Romania – the Union of Evangelical

in respect to the recognition of the statutes and canonical codes it can be said without reservations that the autonomy of the cults is not breached, the situation becomes different in the case of religious associations which seek recognition as cults. To be recognised as such, these must submit a request to SSR. This request must be composed of the applicant's "own confession of faith, its organization and functioning statute [...] its central and local organisational structure; the mode of rule, administration and control; [...] the statute of its own personnel". The European Commission for Democracy through Law (Venice Commission) has stated its opinion on the draft law regarding religious freedom and the general regime of religions that these provisions "can be viewed as questionable state interferences, whose necessity in a democratic society is not established"¹. The Venice Commission does not speak about breaching the cult's autonomy in respect to the state in this situation, which gives birth to a legitimate question: does the principle of autonomy refer only to cults recognised by the state, or to any form of religious structure with legal personality? According to the Constitution of Romania, autonomy from the state is granted only to religious cults.

– the right of the state to control the funds received by religious cults from the state budget or the local budgets and to control the proper use of goods received, belonging or in use, by the local or central authorities. This right is guaranteed by Article 12 of the Law no. 489/2006;

– state cooperation in the establishment and the change of status of church dioceses. This does no longer exist, after the entry into force of Law no. 489/2006, which states that the component parts of religious denominations are also legal persons, as stated in their statutes or canonical codes (Article 8, paragraph 2). According to the Romanian Orthodox Church Statute, the Holy Synod "approves, with a two-thirds majority of the members present, the establishment, dissolution, territorial modification and the change of title of the dioceses and metropolitan provinces belonging to the Romanian Patriarchate" (Article 14, letter j));

– choosing higher clergy and the confirmation of bishops by the state; this component continued until the entry into force of Law no. 489/2006.

Christian Churches of Romania (MO, no. 638 of September 4, 2008); Government Decision 629/2008 regarding the recognition of the Statute of the Romanian Evangelical Church (MO, no. 462 of June 20, 2008); Government Decision 189/2008 regarding the recognition of the Statute of the Pentecostal Christian denomination - the Apostolic Church of God of Romania (MO, no. 214 of March 20, 2008); Government Decision 399/2008 regarding the recognition of the Statute of organisation and functioning of the Christian Seventh-day Adventist Church of Romania (MO, no. 324 of April 24, 2008); Government Decision 999/2008 regarding the recognition of the Statute of the Federation of the Jewish Communities of Romania – Mosaic denomination (MO, no. 670 of September 29, 2008); Government Decision 628/2008 regarding the recognition of the Statute of the Muslim denomination (MO, no. 469 of June 25, 2008); Government Decision 658/2008 regarding the recognition of the Statute of organisation and functioning of the religious organization "Jehovah's Witnesses" (MO, no. 470 of June 25, 2008). The texts of these statutes and canonical codes are part of a volume edited by the Ministry of Culture and Religious Affairs: *Legea privind libertatea religioasă și regimul general al cultelor*, București, 2008.

¹ European Commission for Democracy through Law (Venice Commission), *Opinion on the Draft Law regarding the Religious Freedom and the General Regime of Religions*, CDL-AD (2005) 037, 4 November 2005.

c) *jus advocatiae*. This was defined as the right to the protection of the state which consists of "acknowledging the character of public law"¹ of religious denominations. As we showed, according to Article 8, paragraph 1 of Law no. 489/2006, religious denominations are legal persons of public utility.

This right is composed of:

– support from the state for the remuneration of the clerical and non-clerical personnel of religious denominations. This support is not granted automatically, but only upon request, in the conditions provided for under Article 10, paragraph 4 of Law no. 489/2006, "the state supports, upon request, through contributions, proportional to the number of believing Romanian citizens and the real subsistence and activity needs, the remuneration of clerical and non-clerical personnel belonging to recognised religious denominations". The support of the state for the remuneration of clerical personnel is regulated by Law no. 142/1999² and Law no. 132/2008³, which modifies the former. According to the latter, clergy keep the status of employee of their respective religious denomination and benefit from a monthly allowance given by the state (in the case of managing personnel in religious denominations, assimilated to the public servants) or of monthly support additional to their salary for other categories of clergy, the sums received from the state also covering the contribution to the public social security, health insurance and unemployment. These specifications are important in order for clergy not to be assimilated under every circumstance to public servants. Nevertheless, this conclusion emerged even before the adoption of this normative framework, from the decision of the Constitutional Court no. 43/1993⁴: "granting a financial contribution from the state budget for the remuneration of the personnel of religious denominations does not signify that such personnel is included under the category of employees paid by the public budget, because the religious denominations do not thus become budgetary units, and their personnel do not receive the status of civil servant. The contributions simply represent an aid to which the religious denominations are entitled according to Article 29, paragraph 5 of the Constitution, stating that religious denominations are autonomous from the state and enjoy its support". For the remuneration of non-clergy personnel of religious denominations, according to Government Ordinance no. 82/2001⁵, approved with modifications by Law no. 125/2002⁶, the state also ensures support upon request through local budgets (17,500 contributions) and the state budget (330 contributions);

– the support of the state by facilitating religious assistance in the armed forces, hospitals, prisons, shelters and orphanages (Article 29, paragraph 5 of the Constitution);

– acknowledgement of the special nature of the sacred goods which can only be given away "under statutory conditions specific to each religious denomination" (Article 27, paragraph 2 of Law no. 489/2006); from here is derived also that the inheritance of hierarchs and hermits is governed by norms derogating from the civil law (according to the Romanian Orthodox Church Statute: "Dioceses have vocation

¹ Lazăr IACOB, *Regimul general al cultelor...cit.*, p. 11.

² MO, no. 361 of 29 June 1999.

³ MO, no. 522 of 10 July 2008.

⁴ MO, no. 175 of 23 July 1993.

⁵ MO, no. 543 of 1 September 2001.

⁶ MO, no. 198 of 25 March 2002.

over all the succesoral goods of their hierarchs" – Article 192; "property which monks and nuns brought with them or donated to the monastery when entering into monasticism, as well as what is acquired in any way during life in the monastery, remains entirely in the possession of the monastery where it belongs and cannot be subject to subsequet claims – Article 193);

– bringing to trial hierarchs by the state for problems which do not belong to the application of the canon law. According to Article 26, paragraph 3 of Law no. 489/2006, the existence of their own religious judicial bodies for problems of internal discipline "do not eliminate the application of the legislation concerning minor crimes and crimes in the jurisdictional system". Article 29, point 1, letter e) of the Criminal Procedural Code states that judging hierarchs for criminal acts is performed firstly by the High Court of Cassation and Justice.

The latter aspect of autonomy appears in the canon law of Romanian Orthodox Church – its Statute of organisation and functioning – in the form of the right of the Church to have its own jurisdictional system for matters concerning internal discipline through jurisdictional bodies whose decisions cannot be challenged in civil law courts (Article 156, paragraph 6). Apart from this sense of autonomy, we find in the canon law two other meanings: autonomy from the state (Article 3, paragraph 2; Article 4, paragraph 1), presented above, and internal autonomy within the Church - autonomy of each of the constitutive units of the Church – parish, monastery, deanery, diocese, metropolitan province – from all the others (Article 40, paragraphs 1 and 2).

According to the same Article 26 of Law 489/2006, "religious denominations can have their own jurisdictional bodies for problems concerning internal discipline, concurrent with their own statutes and regulations" (paragraph 1); "for problems of disciplinary substance exclusive statutory and canon provisions are aplicable" (paragraph 2). The connection between canonical jurisdiction and that of civil law results not only from the analysis of these specific provisions, but also from the way Law 489/2006 deals with the relationship between the two orders of law. Therefore, according to Article 8, paragraph 3 "denominations function with respect to the legal provisions according to their own statutes or canonical codes, the provisions of which are applicable to their believers". In other words, the autonomy of the cults is manifested through their own statutes, the provisions of which do not affect everyone, but only those belonging to the respective religious denomination, and not those belonging to other denominations or those who have no religious affiliation. Those who become members of a religious denomination accept implicitly the limitation of certain rights and submit to the jurisdiction of the respective denomination. All 18 denominations recognised by the state have in their statutes provisions regarding the existence of bodies competent to resolve cases regarding the violation of internal discipline, as well as regarding the way in which these cases are judged. All these statutes, with a single exception in the case of the Reformed Church, do not foresee a method of challenging in civil law courts any internally applied disciplinary sanction².

Guaranteeing the jurisdictional autonomy of religious denominations by the state was subject to numerous interpretations by courts and the Constitutional Court.

¹ Ionuț CORDUNEANU, *Biserica și statul – două studii*, Evloghia, București, 2006, pp. 52-82.

² See G.C. FRENȚIU, "Competența soluționării acțiunilor promovate împotriva sancțiunilor disciplinare aplicate personalului cultelor religioase", *Dreptul*, no. 10, 2008, pp. 56-77.

The first interpretation in this matter was made by the civil section of the Supreme Court of Justice (whose name was changed after 2003 to the High Court of Cassation and Justice). By Decision no. 3070/2000, the existence was accepted of

“a jurisdictional canonical system distinct from the jurisdictional system of the civil law [...] It is true that Article 21 of the Constitution of Romania ensures the right of free access to justice, but according to Article 49 of the same Constitution, exercising certain rights or freedoms can be restricted by law. Through the canonical norms to which it has been referred and which have the force of law in what concerns Church affairs, a partial limitation of free access to justice by members of the Church has been established. This partial limitation of free access to justice has been accepted by the plaintiff at the moment he decided to become a priest; this does not harm in any way his right to refer to the courts for solving matters of civil law”.

Subsequently the courts have refused to pronounce on the challenge of disciplinary sanctions, applied to personnel within a religious denomination.

The Constitutional Court had twice in 2008 the occasion to express an opinion on the autonomy of religious denominations in what concerns the application of canon law. Its first decision refers to an exception of unconstitutionality noted before the Court of Appeal of Constanța by an imam of the Muslim cult, under disciplinary sanction imposed by his superiors, who contested the penalty before a court of civil law. The exception referred to Article 26 from Law no. 489/2006, compared to Article 21 of the Constitution, regarding free access to justice, but also to Articles 4 and 16, regarding non-discrimination and the equality of citizens' rights. The Constitutional Court rejected this exception, reasoning that

“this particular case it is not about an administrative body, but about a religious denomination, autonomous from the state [...] The legislator [...] used the notion of the religious denomination's own jurisdictional bodies to specify the legal nature of bodies for religious jurisdiction which aim only at re-establishing the internal discipline of the denomination and not the modification of the legal order established by norms of general regulation”.

In another case, the Constitutional Court was informed by the Court of Appeal of Oradea which was called upon to resolve a dispute between a cleric and a denomination to which the cleric belonged - the Reformed Eparchy of Piatra Craiului. In this case the motivation was based on the same considerations as in the first case, the unconstitutionality of Article 26 from Law no. 489/2006 being invoked by referring to Article 21 of the Constitution. In this sense the Court of Appeal of Oradea considered that complaints formulated against the disciplinary measures applied to the clergy are beyond the material competence of civil law courts. Through Decision no. 797/2008 the Constitutional Court decided that:

“Civil law courts are not competent to exercise the function of carrying out justice within religious denominations for acts of violation of internal discipline, because the legal responsibility in that matter is not regulated by the norms of civil law, but by the proper legal norms of these denominations”.

Therefore, the principle of the jurisdictional autonomy of the denominations in the case of the clergy was once again affirmed.

The autonomy of religious denominations from the state contains not only the right to legislate through the promulgation of certain norms of canon law and the right of self-government through bodies established by these norms, but also the right to impose internal sanctions. The idea of autonomy, regardless of the religious confession to which it refers, is shaped in such a way as to mirror – or at least offer, in an ideal version – a reflection in the canon law of the way in which the separation and balance of the three powers – legislative, executive and judiciary – are conceived in constitutional law, and whose intervention is equally limited in what concerns the organisation of religious denominations.