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Pluralism, Secularism and New Constitutionalism: On Art. 3 of the Constitution of Greece

ABSTRACT

The descriptive and normative content of the term “prevailing religion” is interpreted in conjunction with the constitutional and international standards of the freedom of religion. Distinguishing between history and its political uses, the paper analyses some aspects of the co-evolution of the collective dimension of religious freedom and the shifting concepts and antonyms used for the construction of collective identities in Greek culture. Religious neutrality of the State is explored as an area of tension between the duty of non-identification with religion, the conflict of negative and positive liberty and the duty of enabling pluralism while recognizing a majoritarian religion in society. The Greek case is, on the one side, an example of how individual liberalism and moral markets deal with religious memory and collective identities. On the other side it shows how religious freedom can be a reform tool in modernizing the public sector in a clientelistic State. The major challenge for Greek society is not to reform Article 3 but to ensure completion of implementation of the liberal interpretation of the Greek Constitution currently in force.

KEYWORDS

Prevailing religion, millet, pluralism, neutrality

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On Article 3 of the Constitution of Greece*

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1. Introduction

“Neo-constitutionalism” is understood in this paper as an axiological attitude towards positive law based on a culture of individual and collective rights as expressed in a liberal democracy and robust civil society where public administration is neutral and interests evolve in a pluralist setting. All these elements are different in Greece: The public sector is a clientelistic State, the Orthodox Church has a fragmented organization and reflects Byzantine and Ottoman memories, and Greek civil society is «dominated by political parties which operate party-led factions in major associations, such as labour unions and student unions, as well as in the patronage-based funding of associations and NGOs by Greek ministries»¹. Pluralism, secularism, Church-State relations are not discussed under the keyword “neo-constitutionalism” in Greece. Rather, they are part of the debate about Europeanization and modernization of the country. This debate raises issues of constitutional reform and interpretation trying to cope with an endemic corruption problem and implementation deficit in the legal and moral orders and to investigate those drivers of institutional behaviour that lie outside the legal semantic and statutory realms. Both the moral and normative attitudes towards law and positive law itself are entangled with implementation deficits.

At first place the paper turns to an interpretation of Article 3 of the Constitution of Greece and displays the situation *de jure* at constitutional level. Then the situation in practice is described against the backdrop of the relevant historical context that shaped the evolution of the relation between Orthodox Church, political power, nation and State. The Articles of the Constitution of Greece that determine

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¹ SOTIROPOULOS 2013, 2.

Church-State relations are mainly Articles 3, 13 and 16 that are quoted below. Article 3 affirms recognition of Orthodoxy as the “prevailing” faith; Article 13 guarantees religious freedom; and Article 16 sets out development of religious conscience of youth as one of the aims of national education.

«Article 3

1. The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions. It is autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850 and the Synodal Act of September 4, 1928.
2. The ecclesiastical regime existing in certain districts of the State shall not be deemed contrary to the provisions of the preceding paragraph.
3. The text of the Holy Scripture shall be maintained unaltered. Official translation of the text into any other form of language, without prior sanction by the Autocephalous Church of Greece and the Great Church of Christ in Constantinople, is prohibited».

«Article 13

1. Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual's religious beliefs.
2. All known religions shall be free and their rites of worship shall be performed unhindered and under the protection of the law. The practice of rites of worship is not allowed to offend public order or the good usages. Proselytism is prohibited.
3. The ministers of all known religions shall be subject to the same supervision by the State and to the same obligations towards it as those of the prevailing religion.
4. No person shall be exempt from discharging his obligations to the State or may refuse to comply with the laws by reason of his religious convictions.
5. No oath shall be imposed or administered except as specified by law and in the form determined by law».

«Article 14

1. Every person may express and propagate his thoughts orally, in writing and through the press in compliance with the laws of the State.
2. The press is free. Censorship and all other preventive measures are prohibited.
3. The seizure of newspapers and other publications before or after circulation is prohibited. Seizure by order of the public prosecutor shall be allowed exceptionally after circulation and in case of: a) an offence against the Christian or any other known religion [...].».

«Article 16

[...]

2. Education constitutes a basic mission for the State and shall aim at the moral, intellectual, professional and physical training of Greeks, the development of national and religious consciousness and at their formation as free and responsible citizens. [...].».

«Article 28

1. The generally recognised rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of

domestic Greek law and shall prevail over any contrary provision of the law. Interpretative clause: Article 28 constitutes the foundation for the participation of the Country in the European integration process. [...]».

«Article 72

1. Parliament in full session debates and votes on its Standing Orders, on bills and law proposals pertaining ... to the subjects of Articles 3, 13 [...]».

2. *Church-State Relations at Constitutional Level*

2.1. *Prevailing Religion and Known Religions*

The wording of Article 3 of the Constitution indicates that Greek Orthodoxy is the “prevailing” faith. An old interpretative version understands “prevailing” to mean “State Religion” or “official” religion, which enjoys special, privileged treatment.

«The Church enjoys preferential (institutional, moral, and financial) treatment by the State, which does not extend to other cults and faiths. This, however, does not mean that the prevailing religion is dominant; this preferential treatment is not contradictory to constitutional principles of equality, despite the execution of the decisions of the Church authorities of the prevailing religion by state officials, the pure Orthodox character of the religious service of the armed forces, and the assumption on the part of the State of the founding and maintenance of Orthodox ecclesiastical schools. This preferential treatment concerns the Church, not its believers as individuals, since that would result in a dissimilar treatment of Orthodox and non-Orthodox citizens by the State, which would entail a violation of the principle of equality»².

Another interpretation of the term asserts that “prevailing” is simply the religion of the overwhelming majority of the Greek people. A third interpretation gives the Orthodox Church a honorary distinction of being *prima inter pares*³. The second and third interpretations reject the view that, at constitutional level, the status of “prevailing” religion is accompanied by a special privileged treatment. Article 13 of the Constitution establishes the unhindered practice of worship under the protection of the laws of any religion, as long as the religion is “known”, i.e., it has no secret doctrines and occult worship. The ministers of all known religions are subject to the same supervision by the State and to the same obligations towards it as those of the “prevailing” religion. Thus the clergy of the “prevailing” religion is treated in the same way as the clergy of the “known” religions. The question is, however, to what extent Article 3 is of normative nature. Does it impose protection of the “prevailing” religion, when a new statistical analysis refutes the homogeneity and majority thesis due, for example, to massive immigration? The answer is that Article 3 can only be applied in conjunction with Article 13 of the Constitution.

2.2. *Article 3 Has No Sufficient Content-Related Normative Determination*

Article 3 does not support any legislative project or initiative because of its insufficient certainty and definiteness in terms of its content. It does not determine any State aims or legislative assignments. The provision relating to the “prevailing religion” does not entail any information relating to optimum fulfillment of a public task through the adoption of legal provisions or regulations. The actual meaning of

² PAPANATHIS 2010, 344 s.

³ For a presentation of the various interpretative versions in English see KYRIAZOPOULOS 2001, 524 ss.

the Article is that the autocephalous Orthodox Church of Greece is an institution subject throughout to the control of the State and subordinated to constitutional legality⁴. It is for the national legislature to regulate the Church-State relations. This addresses issues such as, for example, the granting of the status of a corporation under public law, regulating the prerequisites to assuming Church offices and tasks or subsidizing diaconal institutions and charitable activities of the Church. These questions are not answered by Article 3. Nor does Article 3 accept a State Church or official religion. Any privileged position of any Church needs to be based on a law, but any such law must be compatible with freedom of religion, parity, and the principle of non-identification pursuant to Article 13 of the Constitution.

2.3. Inseparable Union in Doctrine and the Relations between the Ecumenical Patriarchate and the Church of Greece

Another question is whether Article 3 promotes and protects «the holy apostolic and synodal canons and sacred traditions». The debate on the constitutional power of the holy canons has given rise to many appeals against acts of the public administration and of the Church to the Council of State. The effects of any departure either of the Church or the State from these norms and traditional standards that are guaranteed by the Constitution would not be merely important along canonical lines, but they would also produce grave legal effects under constitutional law. Not observing “canons” and “traditions” would amount to infringing the Constitution. Additionally, Article 72 section 1 of the Constitution makes clear that the State legislates on religious matters. The plenary session of Parliament is the competent legislative body for debating and voting on bills and law proposals which refer, inter alia, to matters falling under Article 3 and Article 13 of the Constitution. The jurisprudence of the Council of State restricts the constitutional guarantee only to dogmatic canons. Administrative canons may be amended by the legislator, with the exception of those administrative canons which have established fundamental institutions of the Orthodox Church. These administrative matters of the Church are regulated by law while the Church «usually dictates to the state the content of such regulations»⁵. The Church defines its dogma and the State has the right to control whether the Church considers itself in confessional unity with Orthodoxy. That means that the Orthodox Church of Greece or a part of it can become a “known”, abandoning the status of the “prevailing”, religion, if the aforementioned “unity” no longer exists⁶. Anyway the state has no competence in theological issues and canon law is internal Church law that can be reinterpreted and modified only by the Church itself. The Council of State declines jurisdiction in Canon law. The highest administrative court subjects to its review all acts that pertain to administrative matters, irrespective of whether they regulate the internal or external affairs of the Church, using three relevant criteria. The act should originate from those agencies to which the state has entrusted the administration of the Church (for example, the Holy Synod, the metropolises, the parish councils). The contested act should be issued in compliance with state legislation. And the reviewable act should, thirdly, be both an exercise of administration (that is, it should not regulate doctrines, cult, or religious spirituality) and be executory. If an act is both spiritual and administrative in nature then it is reviewable only as to its administrative elements. As for the ecclesiastical courts the Council of State ruled that they have the character of disciplinary councils, which should safeguard the principles of the disciplinary law and due process⁷. Religious freedom includes the right of religious

⁴ DAGTOGLOU 2012, paras 547 ss.

⁵ STATHOPOULOS 2008, 145.

⁶ DIMOULIS 1999, 110.

⁷ See PAPANATHIS 2010, 353, and the following decisions of the Council of State: Nr. 491 and 583/1940; 3178/1976; 270 and 1269/1977; 545-546/1978; 2336 und 2635/1980; 3619/1982; 195/1987; 825/1988.

communities to self-government under Article 13 of the Constitution. Canon law is constitutionally protected in its form as autonomous internal law of the Church. This protection takes measure of the self understanding and self-image of the religious community as well as religious group's concept of itself. The selection and interpretation of "canons" and "traditions" are internal matters of the Church.

Article 3 is focussed on the regulation of the relations between the Greek Church and of the independent Greek State on the one side and the Ecumenical Patriarchate on the other. An independent Greek State demanded a break with the patriarchate of Constantinople that was under Turkish influence and, as Georg von Maurer (an important member of the Bavarian Regency in Greece) put it, protection against the threat of Russia was necessary. Maurer looked upon the Church as department of the State and subordinate to it. In 1833 in a series of decrees the Church was made subservient to secular control and granted the privilege only to conduct its internal affairs without supervision. A new ecclesiastical Constitution, issued on 23 July 1833, in the name of the king, brought into existence a transformed Church for Greece. Clerics should have no contact with foreign powers. The government noted that activities that have both secular and religious aspects must be subject to the inspection of the state and, if found detrimental to public interest, could be vetoed. The Greek Church had been set up in disregard of the Church canons and was made an «agency of an authoritarian state»⁸. Actually, one wanted to have it both ways: «to be united with Constantinople and thus be legitimate while at the same time keeping the Church of Greece autonomous so that, it would remain subservient to the civil power in Greece»⁹. The autonomous Church is in unity with all the other orthodox Churches. Unity is based on the same canons that the other Churches used as their foundation¹⁰. The state of tension existing between the Church of independent Greece and the patriarch of Constantinople ended with the canonical recognition of the independence of the Church of Greece (Synodal Tomos of June 29, 1850). Russian influence had dictated the Patriarchal Bull, and the question was how to merge the ideas of the Tomos and still keep the Church under the surveillance of the state. The Tomos contained a long list of suggestions concerning the internal order of the Church and removed the Church from its subservient position to the state. The laws implementing the Tome did not, however, measure up to the terms of the Tomos. Maurer's Constitution of the Church of 1833 was not overturned, it was simply modified. The state did not relinquish its control over the Church.

2.4. Christ as Head of the Church, Legal Personality under Public Law and the Text of the Holy Scripture

Jesus Christ is the head of the Church not of the state. This is not the expression and declaration of a religious confession and commitment of the framers and has not the meaning that the framers or the head of the state are or must be devout orthodox Christians. Religious affiliation of the head of the state was of significant geopolitical importance in the early days of the Greek State's existence. The Russians urged the Bavarian government to convince Otho he should convert to Orthodoxy¹¹. There was not such a norm in the constitution, though. The reference to Jesus Christ is a theological-liturgical expression referring to the sphere of transcendence without legal meaning.

In its decision, *Holy Monasteries vs. Greece* (1994) the European Court ruled that Church institutions, even if they have been endowed with legal personality under public law, do not belong to the hierarchical pyramid of the state. They cannot be endowed, however, with sovereign authority or prerogatives of public power. From the classification of the Orthodox Church and its institutions as public-law

⁸ FRAZEE 1969, 124.

⁹ FRAZEE 1969, 164.

¹⁰ FRAZEE 1969, 162.

¹¹ FRAZEE 1969, 94.

entities it may be inferred only that the legislature - on account of the special links between the Church and the State - wished to afford them the same legal protection vis-à-vis third parties as was accorded to other public-law entities. They are to be regarded as non-governmental organisations. The Greek Law of 27/31 May 1977 on the “Charter of the Greek Church” further provides for interdependence of Church and State in as much as it provides that the State is to contribute to the Church’s expenses (section 46(1)), that the Church’s resources are to be managed in a manner determined by decision of the Standing Holy Synod and that managerial acts are subject to the State’s financial supervision (section 46(4)). As to staffing, the provisions governing public servants are to apply by analogy to the staff of Church public-law entities. However, these privileges are not such as to enable the Orthodox Church «to be classed with governmental organisations established for public-administration purposes»¹². These privileges are decisions of the legislator in 1977 not of the Constitution, and they have a specific ratio legis. They are meant to be compensatory measures for the large part of the Greek Church’s property that was expropriated during the early years of the Greek State’s existence and especially during the period 1833 to 1977. They can be changed or abrogated at any time.

Article 3 section 3 of the Constitution was first introduced in the 1911 Constitution of Greece. Increased activity of Protestant missionaries in Greece had resulted in 1834 in the publication of a translation of the Old Testament (by *Neophytos Vamvas*) into the vernacular instead of employing the official Septuagint version, while the first Bible in Modern Greek had appeared in Constantinople in 1818 with the approval of the Patriarch. In 1901, the publication of a translation of the New Testament into the popular tongue in the Athenian newspaper *Acropolis* did not only alarm the Church or led to debates and pamphlets but set off riots and provoked bloodshed. The incident, known as “*Evangelikiaka*” (“Gospel riots”), resulted in the fall of the government. Because Queen Olga, who had asked for the translation, was of Russian origin, there were accusations of Russian influence. The propagators of Demoticism (non standardised vernacular) were considered as instigators of a panslavist influence in favour of the Slavs of Macedonia¹³. Article 3 section 3 was historically intended to improve social integration und pacification and to confirm national collective identity.

2.5. *Constitutional Harmonization of Articles 3 and 13 of the Constitution*

Article 13 section 1 of the Constitution, subject to no constitutional revision, enshrines religious freedom, subject only to constitutional restraints. Article 13 prescribes equality of treatment, irrespective of religious beliefs, in the enjoyment of all rights recognized by the legal order. The recognition of a “prevailing” religion in Article 3 may therefore not give rise to religious intolerance, religious discrimination and hence a privileged position. No matter what the normative content of the term “prevailing religion” may be, it must be interpreted in a way that can make the status of being “prevailing” compatible with contemporary human rights standards. The implementation of religious freedom is completely independent from any recognition of the status of the Orthodox Church. What is more, the latter must avail itself of the guarantee of religious freedom in Article 13 and not of its status as “prevailing” or “majoritarian” in order to ward off State interventionism.

The harmonization of the Orthodox Church’s status with religious freedom is also in accordance with the European and international obligations of Greece. The designation of a “prevailing religion” does not violate at constitutional level any particular international act that safeguards religious freedom as long as freedom of religion is safeguarded. Article 3 in conjunction with Article 13 section 1 of the Constitution may not be used as a way to foster or introduce privileges or discrimination. Any

¹² ECtHR, *Holy Monasteries v. Greece*, 9 December 1994, 13092/87, and 13984/88, par. 49.

¹³ KRITIKOS 2013, 139; KONSTANTINOY 2012; SKEDROS 2011, 290.

legislation affecting Church-State relations, will have to harmonize Church-State affairs with religious freedom, i.e., with Article 13 section 1, the European Convention on Human Rights and the International Law on the Protection of Human Rights. Article 3 must be read in the light of Article 28 of the Constitution in conjunction with Article 9 ECHR as well.

3. *Duty of Religious Neutrality and Impartiality of the State*

3.1. *Distinctions that Make a Difference: State/Nation, Church/Religion, State/Church*

Religious neutrality of the State is derived from Article 13 of the Constitution. Article 3 of the Constitution does not establish a State Church or State religion. It imposes in conjunction with Article 13 of the Constitution and the ECHR de jure a religiously neutral State within a society made of an overwhelming majority of orthodox people. On the one hand the Greek State takes into consideration the religious expectations of the majority. That means that it accepts and is traditionally used to the presence of the symbols of the “prevailing” creed in the public sphere. On the other hand it has to protect and enable the religious life of religious minorities, an obligation that, in turn, imposes limitations on the choice of institutional linkages between Church and State and on the use of the symbols of the “prevailing” faith by the Greek State itself. This religious neutrality is, therefore, not identical with secularism in the sense that religious practice has to be privatised¹⁴. The Greek State has to deal with the historical fusion between religion and national identity, as long as this link exists, while (re-)determining its relation to the Orthodox Church and while respecting its international law obligations. Religious neutrality implies then in actual fact that in some cases secularism, in the sense of an institutional separation or differentiation is necessary, as it happened in the identity-card issue.

It is here essential that we draw the distinction between society, Church, religion, public space, and the State. From the point of view of the society there is a prevailing religion in many regions. In Bavaria, in Italy, in France (a country that could be called “catholaique” in the sense that there is a secular State within a prevailing catholic society and a parallel system of catholic schools¹⁵), the “prevailing” religion is the Catholic Church. The issue of neutrality involves an answer to the question, whether the identification of the State with a majoritarian creed that forged the identity of a people, would be per se a violation of negative or positive religious freedom. Art. 9 ECHR does not mandate a particular institutional setting of relations between Church and State. Nor does the principle of ideological and religious neutrality of the State prohibit the identification of society with a majoritarian faith. It is identification of the State with a specific creed that is subjected to restrictions emanating from the combination of religious freedom with the principle of equality and non-discrimination. The State cannot remove those restrictions simply by renaming a “prevailing” religion “prevailing national culture”. Orthodoxy is part of Greek culture, but it remains a religion that has to accept that freedom of religion in conjunction with non discrimination imposes limits on the religious activity of the State.

3.2. *Enabling Religious Life and Refraining from Religious Action*

¹⁴ See the discussion in the shadow of the case law of the ECtHR and especially in the aftermath of the Lautsi decisions in FOKAS 2015, 54 ss.

¹⁵ «A la vérité, on ne peut rayer d'un trait de plume, fût-ce au moyen d'une loi voire d'une Constitution, une expérience historique de plusieurs siècles: la France est un pays laïque de tradition catholique. Elle est devenue, en quelque sorte, “catholaique”»: Assemblée Nationale, *Rapport fait au nom de la commission d'enquête sur les sectes 1995. Enregistré à la Présidence de l'Assemblée nationale le 22 décembre 1995*. Available at: <http://www.assemblee-nationale.fr/rap-enq/r2468.asp> (accessed 13.3.2016). See GROMITSARIS 1996, 363.

Religious freedom as negative liberty is freedom from interference by the State or by other people indirectly supported by the State. Religious freedom as positive liberty is concerned with the possession of the resources and the power to practice and manifest one's religion as well as with the State's obligation to create an environment that enables religious life and existence to flourish. Sometimes the State has the obligation to make practice of religion possible by accommodating religious holidays or permitting the registration of a place of religious worship or conducting religious classes in public schools. This positive role of State authorities is subjected to restriction in connection with the preservation of the ideological and religious neutrality of the State. Article 3 of the Constitution of Greece becomes much of a problem when it is relied upon by interested parties to define a restricted religious neutrality of the State in a context where, for historical reasons, religion, ethnicity and culture are inextricably connected. And this is so, because the next step after that is to use this sociological fact as a constitutionally legitimate reason to justify limitations on religious freedom. The Constitution of Greece does not foster the privileging of the prevailing religion in public life. However, a subconstitutional preferential use of the Orthodoxy-nation-link is supported by the State. This has a chance to harmonize with the Constitution and international law provided that everybody exposed to this fusion remains capable of enjoying her/his freedom of religion. The majoritarian principle, as expressed in the term "prevailing religion", is not a limitation to religious freedom necessary in a democratic society. The recognition of a "prevailing" religion does not give the State the right to take measures to pacify society by eliminating pluralism, but to «ensure that the competing groups tolerate each other»¹⁶. Nevertheless, neither the Constitution of Greece nor international law demands from the Greek State to express its collective identity without any reference to religion.

3.3. *Conflict of Negative and Positive Freedom of Religion*

From the perspective of the right holder, it is clear that positive religious liberty is subject to limitations. The subject of religious freedom may not demand from the State to impose a specific religious dress code or dietary laws to non believers or to other religious communities. Besides, positive freedom of religion is often in conflict with negative freedom of religion. The negative freedom of religion of an individual who does not want to be exposed to the religious symbols of the prevailing religion, can be classified higher or lower than the positive freedom of religion of other individuals who do not take offence at those symbols, and want them to be in the class- or courtroom. Negative freedom of religion does not go so far, that one is to be spared from different or "heretic" religious convictions and symbols. Conversely, the right to freedom of religion excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate¹⁷. At any case religious neutrality of the State leads to a differentiated solution of the conflict, consisting in providing for exemptions, exceptions, alternatives, flexibility. Flexibility is equally necessary as to the question whether negative freedom of religion entails a right not to be confronted with religious issues in the public sphere. As the relation between religion and national identity underlies most of the issues of collective identity in Greece, a general right, not to be confronted with religion in public sphere, amounts to a right, not to be confronted with Greek culture. However, the situation is completely different, when the public sphere in question is actually a State institution. In this case the conjunction of Article 3 and Article 13 of the Constitution, demands that a possibility of avoiding the confrontation with religious elements must be provided for. For instance, all members of the Greek Parliament are required, by Article 59 of the Constitu-

¹⁶ ECtHR, *Serif v. Greece*, 38178/97, 14 December 1999, par. 53.

¹⁷ ECtHR, *Serif v. Greece*, 38178/97, 14 December 1999, par. 52.

tion, to take an oath of office that includes a promise to keep faith under the Christian Trinity, but Article 59 enables members of other faiths to swear in accordance with their own creed. Additionally, no one may be obliged to disclose one's belief: The ECtHR¹⁸ found a violation of Article 9 of the Convention on account of the obligation imposed on the applicants, as witnesses in a number of sets of judicial proceedings, to disclose their religious convictions in order to avoid having to take an oath on the Bible. The State may not pursue an aim of indoctrination in State schools that might be regarded as not respecting parents' religious and philosophical convictions. Obligations on pupils are legitimate as long as they do not deprive parents of their right to enlighten and advise their children, or to guide them on a path in line with the parents' own religious conviction¹⁹.

4. *Uses of History, Collective Identity and Freedom of Religion in Practice*

In practice serious problems have arisen in the attempt to reconcile the constitutional Statement of Article 3 with freedom of religion enshrined in non-revisable Article 13 section 1 of the Constitution. The "prevailing" religion is treated as if it ought to prevail in the society. Metropolitans used to be given a role in the issuance of licenses for the building of places of worship for minority religions pursuant to a 1939 law, enacted under the Metaxas dictatorship (1936–1941)²⁰, a situation that came to an end in 2006. The lessons of religion in public schools reflect official Orthodox positions. State holidays are based on the religious calendar, so that the holidays of the Greek Orthodox Church are acknowledged as official national holidays. The 1975 Constitution extended the ban against proselytism to protect all faiths and not only Orthodoxy. Religious wedding is acknowledged as equal to the civil (Law 1250/1982, Decree 391/1982). Church-State relations are far from being harmonious. Since 1974 there have been conflicts over Church property, over changes to the civil code, over the reference to religious affiliation on the national identity cards, and more recently over cremation of the dead or a same-sex civil partnerships law. All these conflicts are issues of protection of the freedom of religion at a subconstitutional level. They are concerned with their reconcilability with the Constitution; they do not raise the issue of the amendment of the Constitution. It should be clear that in all practical questions it is not Article 3 of the Constitution which is the crux of the problem, but legislation and a preferential status of the Orthodox Church in practice. Some aspect of the historical roots of this situation will be succinctly traced below, in an effort to show that concepts of national and religious affiliation change through time and should not be interpreted anachronistically.

4.1. *Romanitas, Christianitas, Hellenitas and the Ottoman Legacy*

In late antiquity Greeks started calling themselves "Romans". In the Roman empire of the east Hellenic identity stood in a mutual relationship with christianitas and romanitas²¹. The people who lived in the "Byzantine Empire" neither knew nor used the word "Byzantine". They knew themselves to be "Romans"²². For Westerners to call "Byzantines" "Greeks" was meant to undermine the essence of Byzantine political identity as the legitimate successor of Rome. The word "Hellenes" meant "pagan". In the fifteenth century «there was still legislation that made an offence for a Christian to "Hellenize",

¹⁸ ECtHR, *Dimitras et al. v. Greece*, 42837/06, 3237/07, 3269/07, 35793/07 and 6099/08, 3 June 2010.

¹⁹ ECtHR, *Valsamis v. Greece*, 21787/93, 18 December 1996, par. 31.

²⁰ ECtHR, *Manoussakis et al. v. Greece*, 18748/91, 26 September 1996.

²¹ RAPP 2008, 144.

²² RAPP 2008, 141.

that is to perform pagan rituals»²³. After the Schism of 1054 and the Fourth Crusade in 1204 a “Frankish” or Latin Empire and the “Imperator Romaniae” was established: 1204-1261. 1261 The “Byzantines” restored the “Byzantine Empire” at Constantinople after the “Franks” were expelled. In the meantime they had begun to make the linguistic and cultural tradition of Classical Greece their inheritance against the Latin speaking invaders. In 1453, the Ottoman Turks stormed Constantinople. The “Byzantine” Christian “Commonwealth” did not cease to exist but changed shape and name under the Ottoman Empire.

In the Ottoman Empire non-Muslim communities were divided into religious groups and given “protected” status. In exchange for the payment of a special tax, these religious groups were allowed to live within the Muslim State without converting to Islam, but as second-class subjects. The Rum-Millet was placed under the leadership of the Patriarch of Constantinople.

All Orthodox Greeks, Bulgarians, Albanians, Vlachs and Serbs, as well as Georgians and Arabs were considered part of the same, linguistically and ecclesiastically Greek dominated millet in spite of their differences in ethnicity and language²⁴. They were called Greek Orthodox in Western Europe but they viewed themselves simply as Orthodox Christians. A division of labor was equally reflected in “national” appellations. «Merchants were invariably called “Greeks”», shepherds were thought to be “Vlachs”, and «peasants were “Bulgarians”»²⁵. The Ottomans also used “Rum” (Romans)²⁶ to refer to Greeks as an ethnic group.

During the Greek War of Independence the revolutionaries did not always share the same language and religious affiliation. There were: Greek speaking Orthodox, Greek speaking Muslims, Turkish speaking Orthodox, Albanian speaking Orthodox or Muslims, Non Greek speaking Orthodox, Bilingual or Multilingual Orthodox or Muslims. Greek speaking Catholics were under the protection of France in the Ottoman Empire, their bishops were ethnically Italians, and they were advised by their protectors not to take part in the war. The Declaration of Independence of 1822 stated:

«The prevailing religion in the Greek territory is that of the Eastern Orthodox Church of Christ; however, the Administration of Greece shall tolerate all other religions whose rites and sacred acts shall be carried out unhindered. The indigenous inhabitants of the Greek territory who believe in Christ are Greeks and enjoy all the political rights with no discrimination. All Greeks are equal before the law, with no exception on the basis of privilege, class or office. Any persons arriving from abroad to settle or reside in the Greek territory are equal to the indigenous population before the law».

A similar albeit not identical term had been already used in the Septinsular Republic that existed from 1800 to 1807 in the Ionian Islands and was granted self-government under Ottoman and Russian sovereignty. Italian and Greek were the two official languages. Article 4 of the Constitution (1803)²⁷ stated:

«Art. 4 – La Religione Greca Ortodossa è la Religione dominante dello Stato. La Religione Cattolica Romana è pure prediletta e protetta. Ogni altro culto è tollerato. La legge organica, che costituisce il Clero Greco e Romano stabilito nel territorio della Repubblica, è considerato come se formasse parte della costituzione. La legge determina i privilegi della Nazione Ebraica stabilita nello Stato».

²³ LIVANIOS 2008, 263.

²⁴ LIVANIOS 2008, 246 s., 254.

²⁵ LIVANIOS 2008, 248 s.

²⁶ Already the Seljuqs called their Sultanate of Iconium in Asia Minor after the Battle of Mantzikert in 1071 Rum: RAPP 2008, 127 s.

²⁷ Costituzione della Repubblica Settinsulare (1803). Available at: <http://www.dircost.unito.it/cs/docs/settinsula.htm> (accessed 12.3.2016).

The term used in this constitution was “dominant” which is different from “prevailing”. Anyway, the intention was to draw a distinction between Orthodox and Catholic Church. The latter was accepted and protected while other religions were tolerated. Interestingly enough, the “organic laws” of both the Orthodox and Catholic Church were safeguarded by and even part of the Constitution. The revolutionaries of 1821 had conceived of “coordination” (συναλληλία) of relations between the State and the Orthodox Church. The Establishment of an Autocephalous Church of independent Greece was a decision of a (Bavarian and Protestant) three-man regency council of the (Roman Catholic) King Otto²⁸. The Church was to be administered by a Holy Synod under the authority of the King, who was also the supreme bishop. More than four hundred monasteries were closed, their lands were expropriated²⁹.

4.2. Nationalization of Religion in the Balkans and the Compulsory Exchange of Populations

With the establishment of nation States «the relation between religion and nationalism was placed on a completely different footing»³⁰. Nationalization of religion was marked by unilateral declarations of independence of the Churches of Greece (1833), Romania (1865), and Serbia (1879) from the Ecumenical Patriarchate of Constantinople. The result was the institutional break-up of the Balkan religious community. National loyalty takes precedence over religious unity³¹.

Wars between the Orthodox themselves forged the Balkan States. By then the Greek “Great Idea”, a fusion of nationalism and religion had appeared. That was a romantic vision of redemption of Greeks still under Turkish rule outside the boundaries of the Greek State. It collapsed in 1922 with the defeat of the Greek army³². A compulsory exchange of populations between Greece and Turkey took place, foreseen by the Lausanne Treaty following the war in 1923. Greek society became religiously homogeneous. Exchanged were orthodox Christians of Asia Minor against Muslims in Greece. Obviously religion was treated as a substitute for nationality³³. Exempted were The Albanian Muslim Chams. The Muslim property in “Chamouria” was put to uses which resulted in discriminatory preferences favoring the Greek refugees from Asia Minor. A further population exchange was agreed with Bulgaria. This led to a drop in the numbers of the Bulgarian minority in Central and Eastern Macedonia and to their virtual disappearance in Western Thrace. However, there was still a significant Slav-speaking population in Western Macedonia. Unlike the Muslims in Western Thrace, they did not enjoy special minority rights and rallied behind their own elites³⁴.

A “Neo-Millet”³⁵ emerged in independent Greece: the “Muslims in Western Thrace”, as protected by the Lausanne Treaty. In the eyes of the Greek courts there is no ethnic minority in Thrace. On the contrary Turkey tries, as a kin-state, to nationalise the Muslim neo-millet in Greece, which is the State of citizenship. A millet-like system ensures, traditionally, systemic tolerance between groups, but it excludes individual dissent within the group. In the neo-millet system this is reflected in the jurisdiction of the Moufti. The mufti is a religious leader with both religious and administrative competences. This form of legal pluralism entails a paradox in which there is violation of fundamental principles in a democratic legal system in the name of respect for the minority’s religious specificity³⁶. Additional

²⁸ FRAZEE 1969, 92 s.

²⁹ FRAZEE 1969, 113, 127 s., 148 ss.

³⁰ LIVANIOS 2008, 264.

³¹ LIVANIOS 2008, 264 ss.

³² FRAZEE 1969, 144, 166.

³³ TSITSELIKIS 2012, 67, 69.

³⁴ TSITSELIKIS 2012, 72 ss.

³⁵ TSITSELIKIS 2012, 8 s., 411, 536, 543 discussing the neo-millet conception.

³⁶ TSITSELIKIS 2012, 6, 390, 399, 414, 540.

problems that single out the particularities of the neo-millet regard the compatibility of the procedure before the Moufti with Article 6 of the ECHR. Moufti's appointment by the Greek State is not compatible with State neutrality. Besides, there is no remedy for the control of the merits of the Moufti's decision. But there is a right to recourse to a juridical instance according to art. 20 of the Constitution³⁷. Finally, human rights protection within the neo-millet (Muslim Minority) remains a black box. Regulations governing conflicts between civil code and Islamic law should be developed and it is not clear, to what extent Moufti's decisions are recognizable in other legal orders³⁸. Against this backdrop it is obvious, that the religion and national identity link is broader than the Church-State link. The former is also part of a classical minorities' problem. Modern Human Rights Conceptions based on an individualist approach have a destructive effect when applied to premodern collective entities, as the example of the Muslim-neo-millet shows. Anyway, being forced to apply to different legal orders according to religious affiliation, does not comply with individualist human rights standards and culture.

4.3. *Historical Contingencies of the Ban on Proselytism, Dictatorships, and a Clientelistic State*

There is historical experience behind the ban on proselytism. Proselytizing among the sultan's Muslim subjects was prohibited by law. Catholic missionaries concentrated therefore their efforts among the local Christians. After local Catholics aided a Venetian attempt to seize an island in the Aegean (Chios) in 1695, the sultans sided with the Orthodox patriarch and issued orders and limited the missionary activity³⁹. The Catholic Church inserted itself dramatically into the life of the Christian East on some occasions: the Crusades, in the sixteenth and seventeenth century and by means of Uniatism (parallel Church structures in lands of already existing Christianity)⁴⁰. Proselytism was pictured by the Orthodox Church as inherently⁴¹ dangerous, not only for the Orthodox Church but also for the State, first the Ottoman, and then the independent Greek State. The Jehovah's Witnesses proselytism was for ex. pictured as anti-patriotic. Linking religious heresy with treason against the State was a means of protecting the political role of the Church. After the Greek civil war, a fusion of nationalism, Orthodoxy and anticommunism became a political ideological blend. From the perspective of the Greek legal system proselytism is defined in a 1939 law as the attempt to intrude on the religious beliefs of a person of a different religious faith by taking advantage of his "inexperience, trust, need, low intellect, or naïveté". Ironically enough, what this law seems to seek to do, and it is a law enacted under a dictatorial regime, is to distinguish between freedom of religion and freedom of speech. There is proselytizing that is an expression of private autonomy and freedom of speech and there is proselytizing which involves a morally dubious or unacceptable behaviour. Interestingly, Article 179 of the Greek Civil Code declares legal transactions to be null as contrary to morality whereby the freedom of a person is "hampered excessively" or whereby through an "exploitation of the need, the levity of character or the lack of experience" of the other party are stipulated or received for one's own benefit or for the benefit of a third party and in consideration of something furnished pecuniary advantages which in the circumstances are obviously out of proportion to the consideration furnished⁴². The right to adhere to a religion is accompanied by the right to change beliefs and to engage in religious persuasion, so long as

³⁷ TSITSELIKIS 2012, 405.

³⁸ TSITSELIKIS 2012, 406.

³⁹ MASTERS 2009, 139.

⁴⁰ TAFT 2013, 25.

⁴¹ ANASTASSIADIS 2010, 49.

⁴² On Article 178 of the Greek Civil Code, see ZIMMERMANN, WHITTAKER 2000, 211.

this is done in non-coercive and non-manipulative ways. However, behind the anti-proselytism law is the aim to protect the prevailing religion and ensure national cohesion.

Many of the deficits of protection of religious freedom in Greece are due to the 1938 and 1939 laws under the dictatorship of Metaxas and the arbitrariness of their application. The 1967-1974 dictatorship promoted its own special brand of “Greek-Christian” civilization⁴³ and saw the Church cooperating with a clientelistic Greek State. The Church and State-link concerns the lack of institutional differentiation between the religious and the political spheres. In various political circumstances that usually characterize a clientelistic State, the government interfered in Church affairs by way of Synods that it composed itself. In such Synods, it appointed hierarchs “according to merit”, regardless if they were still serving or not. The Constitution now in force included the term “serving” in Article 3 to qualify the hierarchs of the Holy Synod in order to restrict clientelistic practice⁴⁴. From this perspective, Church-State relations are part and parcel of Greece’s neo-patrimonial public sector. Religious freedom becomes then an important constitutional reform tool in administrative law. Under modern constitutional theory, the Constitution of Greece is not an obstacle but an ally in this exercise.

5. *Pluralism, Secularism, Neo-Constitutionalism*

The historical contingencies mentioned above show the particularities of the approach to pluralism, secularism and neo-constitutionalism in Greece. The millet-system and its remnants are the religious organizing principle of a segmentary, not a functionally differentiated society, where “segments” have an unequal access to resources and power with some of them being subordinate to others. Fundamental rights culture started having an influence on the Greek legal order after the Second World War. This trend was met with resistance stemming from the collectivist point of view of the Church that carried with it the religious memory of the preponderance of the community over the individual and its rights. Thanks to the remarkable efforts of constitutional law jurists, fundamental rights culture became the pervading interpretation paradigm within the context of the European and international integration of the country. Jurists used the ECHR as a vehicle and alibi to introduce individual-oriented pluralism into the various interpretative versions of the Church-State relations. The ECtHR became in practice the actual constitutional court in a country that follows the system of diffuse and incidental control of constitutionality. The legal task of harmonizing a “prevailing religion” with a fundamental rights culture resulted in making out of “prevailing” a descriptive concept at constitutional level. That did not matter much, though, because in practice, it is still treated as a normative concept favouring the majoritarian religion.

It is the concept of State neutrality that builds the bridge between legal dogmatics and descriptive/prescriptive legal theory. Secularism is only a part issue of this theoretical approach while “State” and “Church” are both treated as parameters that have to be defined anew. For this theoretical stance, the Greek State is a “neo-patrimonial” and clientelistic State that depends, for its reproduction and legitimacy, on a symbiotic relationship with the rule of law. The Orthodox Church, in turn, presents itself as a fragmentation of organizational structures⁴⁵, and participates in the politics-administration nexus, clientelistic networks, and usual scandals. As the Greek court system is an extremely time consuming means for enforcing (property, contractual, religious) individual rights without always guaranteeing unbiased and effective recourse, social pluralism has to rely on client-patron relations, alterna-

⁴³ KOKOSALAKIS 1998, 61.

⁴⁴ PAPASTATHIS 2010, 350.

⁴⁵ Instructive on this issue the study of MITRALEXIS 2015.

tive dispute resolution, international arbitration or European courts to enforce fundamental rights. Therefore, at the level of legal and political theory the big issues are modernization, Europeanization and reform of the public sector in its intertwinement with a (clientelistic) state-dependent uncompetitive economy. Politically, modernizers and their opponents make a diametrically opposite and selective use of the historical contingencies and semantics mentioned above⁴⁶. In this context the question is what kind of remedies should be applied so that the creation of a politically neutral State does not get mired in implementation. It is obvious that morality won't help, as it faces the same implementation deficit. Greece is a democracy without (a functioning) State, where clients lay their trust in efficient clientelistic networks rather than in inefficient public institutions. The country is in need of a neutral, efficient public sector trusted by citizens. It is in need of implementation of the Constitution currently in force and of Church organisations that are no longer subservient to a clientelistic State.

6. Conclusion

Article 3 of the Constitution of Greece does not demand from the Greek State to be a religious and confessional one. Even if the majority of Greek people are used to seeing the opening of the parliament of all Greeks starting with Orthodox Church blessings, or Church and State leaders jointly presiding over State functions and national holiday celebrations, and even if politicians exert an important influence on functions and institutions of the Orthodox Church, all this is not the normative content of Article 3 as interpreted in conjunction with Article 13 and the international obligations of Greece. If the followers of the "prevailing religion" that comprise the majority of the population want "their" State to espouse "their" confession, they will have to get used to the idea that the Constitution of "their" State combines Article 3 with Article 13 and the ECHR. They will have to take their Constitution seriously. On the one hand the fact that the Orthodox Church is accorded preponderant visibility in society and government institutions does not mean *de jure* that it is a State Church or official religion. State identification with Greece's majority Church in practice is reconcilable with the Constitution only insofar as this does not result in any impairment of the enjoyment of religious freedom or in any discrimination against adherents to other religions or non-believers. On the other hand, Article 3 does not prohibit a religiously neutral State within a society that is overwhelmingly orthodox. In fact, it is Article 13 that really protects the majority religion as a religion. In Greece, the collective dimension of the freedom of religion poses the problem of defining the scope of the non identification and impartiality rule. Traditional Greek legal constitutional theory has tried to harmonize the recognition of a "prevailing religion" with freedom of religion by partly tolerating the preferential identification of the State with the collective dimension of the Orthodox Church of Greece while acknowledging, in turn, the necessity to fully protect the individual followers of other religions and the non believers without exception or discrimination. This stance is, however, untenable because State neutrality undeniably pertains to the collective sphere of religious freedom. Recognizing a "prevailing" religion is only permissible as long as it goes hand in hand with recognition of diversity and as long as it does not result in a violation of the equality principle *vis à vis* other collective right holders. Moreover, the State protects the enjoyment of religion in community with others but it also provides protection of the adherents to a religious community against their own community. As the neo-millet example shows, religious communities can be more or less pre-modern and trapped in a historical antagonism between the citizen State and the kin State of the followers. Meta rules are then necessary in accordance with international treaties in order to ensure social cohesion, plurality and tolerance. The Greek experience

⁴⁶ ROUDOMETOF 2011, *passim*.

shows further that collective identities are characterized by shifting contents and (obvious or, quite often, tacit) antonyms that have been developed through the ages.

Discrepancy and tension between reality and constitutionality of the Church-State relations can be solved if we take into consideration the fact that normative collective identities cannot simply be superseded by «a formless sand heap of individuals»⁴⁷ (in Max Weber's words) acting as participants in moral and religious markets within a globalized world. In Greece such normative communities are not voluntary associations based on religious commitment. Orthodoxy in Greece is often, albeit not only, experienced as a shared set of rituals that (re-) produces a linguistic and cultural "We" and defines a contextually shifting "Otherness". Only to a lesser extent it is experienced as a commitment to a religious conduct of life⁴⁸. The State may not be uniquely identified with the Orthodox Church, but the followers of the majoritarian religion cannot and should not be legally prevented from identifying with the State. This cannot be decreed from above and is beyond the competence of the State. By contrast, what can and must be done is enforcing non-discrimination and engaging a battle against patronage and corruption in the Church-State relations. Given that the politics-administration nexus in Greece de facto includes parts of the Church⁴⁹, trustworthiness is not based on Church-membership but, rather, on inclusion⁵⁰ in clientelistic networks that are proved to have developed a good everyday problem-solving capacity. Another lesson to be learnt is that uses of history and religious memories should not serve to justify religious freedom violations. Conversely, modern human rights theory should not be anachronistically projected in a past when proselytism endangered the very existence of collective entities. The Greek Orthodox Church preserved Hellenic culture during the period of Turkish suzerainty but lived as an extension of the venal Ottoman bureaucracy. The autocephalous nature of the Church in independent Greece gave the Church administrative independence from the Patriarchate but made it subservient to Greek State power. The result was a mutually parasitical relation where the State regulates by acts of Parliament most administrative matters of the Church, while the Church gives itself the status of "State Church". Nevertheless, from a constitutional point of view, the Church is not a governmental agency and has to rely, as every "known" religion, upon Article 13 to ward off violations of its religious freedom by the government. The Constitution of Greece currently in force has all the normative elements necessary to enforce religious freedom and neutrality (albeit not secularism) of the State. One of the key challenges for Greek society is how to overcome the legal implementation deficit. Constitutional law and European law along with the European cultural elements in the collective identity of Greece should be not just law in the books; it must also be law in action in a country where the struggle for political independence started with a Declaration of Independence saying that the revolutionaries wanted to create «a State similar to the one of their Christian, friendly, civilised European nations»⁵¹. That was the mandate of the revolution. Nowadays this mandate includes religious freedom and pluralism, fundamental rights culture, a neutral efficient public sector, the possibility of identifying oneself with a collective identity, and an Orthodox Church that can thrive without being subservient to a clientelistic State. Simple implementation of the European legal order and the Greek Constitution currently in force is appropriate to ensure that these norms and values are respected. The problem lies with the completion of institutional reform. Otherwise, any new Constitution will remain a dead letter.

⁴⁷ For comments on this phrase and the problem of trustworthiness see ALDRIDGE 2005, 91.

⁴⁸ See for analysis on the occasion of the identity cards crisis CHRYSOLORAS 2004.

⁴⁹ NIKOLAOU 1993, 60.

⁵⁰ On social integration as a matter of inclusion see BELVISI 2006, 23.

⁵¹ FLOGAITIS 2013, 3.

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