

The New Calefragia Case

I. Introduction

1. I shall start this contribution with the central question as formulated at the end of the narrative: “The constitutionality of both provincial and federal provisions is being categorically challenged as an impermissible establishment of religion both by a group of physicians and by a religious sect insisting on strict separation of Church and State. In addition, both the Ayurvedic Society and the Sisters of Mercy are challenging conditions imposed to eligibility for participation in the federal subsidies.”

I analyze the various positions from a Belgian perspective. Orally, I shall make a comparison with France. I will also do so in a longer and more elaborated version of this short paper.

II. Separation of Church and State

2. Probably basing themselves upon different arguments, two groups challenged the provincial and federal provisions as an impermissible establishment of religion.

In Belgium, the constitution does not include a non-establishment clause. Four articles of the Constitution – promulgated in 1831 and hardly ever changed since with regard to religious matters – deal with religious freedom and church/state issues¹. Articles 19, 20 and 21 of the Constitution concern religious freedom as such, and they do so in a fairly classical way. Article 19 concerns active freedom of religion. Article 20 highlights its passive counterpart, namely the right not to participate in any

¹ R. TORFS, *State and Church in Belgium*, in G. ROBBERS (ed.), *State and Church in the European Union* (second edition), Nomos, Baden-Baden, 2005, p. 9-33, p. 11: ‘Freedom of worship and its free and public practice are guaranteed under Article 19 of the Constitution, with an exception allowing the punishment of criminal offences committed in the exercise of these freedoms. Article 20 is the negative counterpart of Article 19: no person may be forced to participate in any way in the acts of worship or rites of any religion or to respect its days of rest. Article 21 stresses that the State has no right to interfere with the appointment or induction of the ministers of any religion, to forbid them to correspond with their Church authorities or to publish the latter’s Acts, subject to the ordinary rules of liability concerning the use of the press and publications. This Article is generally interpreted as an affirmation of the freedom of internal ecclesiastical organisation. It contains at the same time an exception to this principle by providing that civil marriage must always precede a religious marriage ceremony except in specific cases established by law. Finally, Article 181 says that the salaries and pensions of the ministers of a religion should be borne by the State budget.’

religiously oriented event. Finally, article 21 focuses on freedom of internal organization as enjoyed by religious groups. So far go the articles concerning religious freedom. The reason why non-establishment is not a characteristic of the Belgian constitution can be found in the current article 181 of the Constitution. It stipulates that the salaries and pensions of religious ministers are paid by the state. This is only true for ministers of the so called recognized religions², and even then only in a limited way. Moreover, no religion in Belgium is an established one in the strict sense of the word. There is no single state religion at all. Nor are there two official religions like the Lutheran and the Orthodox church in Finland. Yet, the mere existence of *recognized religions* receiving *financial support* makes any legal claim against “establishment” not very likely to succeed.

How then can the Belgian system with regard to religion and state relationships be characterized? It probably can be qualified as a system of *mutual independence*, which means that, while religion and state can go their own way, there are various *cross-connections* between both players, yet without churches enjoying any *official position*.

However, this *mutual independence*-qualification, which technically speaking is probably the most correct one that can be found, is not commonly used in practice. Indeed, in Belgium, politicians, administrators as well as the general public, tend to qualify our system as a system of *separation of Church and State*. Clearly, technically speaking it is not. Strict separation exists nowhere in Europe, even not in France. Yet, even if the notion *separation* (and not: *non establishment*) may be used in Belgium,

² R. TORFS, *State and Church in Belgium*, in G. ROBBERS (ed.), *State and Church in the European Union* (second edition), Nomos, Baden-Baden, 2005, p. 9-33, p. 13-14: ‘Although Belgian law recognizes a theoretical equality between all religions, one cannot deny that some receive different treatment from others. Several religions have obtained official recognition by, or by virtue of, a law. The main basis for such a recognition is the social value of the religion as a service to the population. Currently, six denominations enjoy this status: Catholicism, Protestantism, Judaism, Anglicanism (Law of 4 March 1870 on the organization of the temporal needs of religion), Islam (Law of 19 July 1974 amending the law of 1870) and the (Greek and Russian) Orthodox Church (Law of 17 April 1985 amending of the same law of 1870). A change to the Constitution on 5 June 1993 added groups of non-believing humanists to the financial responsibilities of the State.’ In fact, the law of 4 March 1870 was a confirmation of a number of former laws. The recognition of Catholicism is a direct result of the Concordat of 1801, confirmed by the law of the 18th Germinal X (8 April 1802). Protestantism also obtained recognition as a result of the law of 18th Germinal X, whereas Judaism found its recognition through the decrees of 17 March 1808. Finally, Anglicanism obtained recognition through the decrees of 18 and 24 April 1835. All this was confirmed by the law of 4 March 1870 (Moniteur belge, 9 March 1870).

the consequences following from the implementation of that notion are different from what may be the case in the United States.

3. Here, an important point should be made. The *separation or mutual independence* in Belgium tends to focus on Church activities in the strict sense of the word. That is, by the way, not an all European approach: Germany follows a completely different road. Yet, from a Belgian perspective, schools and even more so hospitals are not always seen as an element of the global 'religious package' closely connected to churches and religious institutions. Legally, the disconnection between, for instance, the Roman Catholic Church as an institution, and a catholic hospital will always be clear. Why? Both a *legal-technical* and a *sociological* explanation can be given. Moreover, the connection obviously existing between both elements of explanation should not be underestimated. Let us examine them more closely:

- *Legally*, the Catholic Church, or any other Church, will never be the owner, nor will they operate as the controlling instance with regard to the hospital. Churches do not enjoy legal personality. They have to act through *non-profit associations* (ASBL/VZW), governed by a revised law originally issued in 1921³. Thus, in any case, a catholic hospital will be administered by a board constituted along the lines of the law of 1921. And there is more: most of the time, the initiative does not come from church authorities as such, but from a religious male or female congregation. By the way, the same legal requirements are valid for parishes or dioceses: their only way to participate in legal life goes through the legal technique of a non-profit association. This construction leads to a large degree of autonomy enjoyed by hospitals⁴. Even if, *canonically*, i.e. according to internal religious norms and mechanisms, church authorities can exercise a lot of power within

³ Law of 27 July 1921 'betreffende de verenigingen zonder winstoogmerk, de internationale verenigingen zonder winstoogmerk en de stichtingen' (*Belgisch Staatsblad*, 1 July 1921), with a revision on 11 December 2002 that gained force of law on 1 July 2003 (art. 4 K.B. 2 april 2003, *Belgisch Staatsblad*, 6 June 2003).

⁴ R. TORFS, *Congregationele gezondheidsinstellingen. Toekomstige structuren naar profaan en kerkelijk recht*, Leuven, Peeters, 1992.

catholic hospitals, *civilly* they can not. Church authorities could *punish* canonically unwilling hospital administrators, yet they are not in a position to revoke them, nor can they stop or hamper their *legal transactions and decisions*.

- *Sociologically*, many hospitals and most schools are only theoretically “confessional”. Their roots are within catholic faith or tradition, yet there it stops. And they are very strong, statistically speaking. Paradoxically, this gives the church less, instead of more control over these institutions. Why? As many, if not most, hospitals are *Catholic*, the other side of the coin is that they are *not very catholic*. Indeed, they follow mainstream trends and tendencies in society. The *patients* are coming from everywhere without any distinction, they are not just Catholics. And the employees are not scrutinized (any longer) with regard to their adherence to Christian principles or their living according to Christian ethics. In other words, the immediate connection to the church as an institution which always has been *legally weak*, is today also sociologically becoming a *very elusive one*. In the eyes of the public, yet also increasingly in the eyes of judges and lawyers, Catholic hospitals are seen as clearly disconnected from the institutional Church. That phenomenon is also visible in legal and administrative practice: subsidies granted to private and to public hospitals are most often exactly the same, as long as the institutions involved comply with all the requirements set forward by the applicable hospital legislation.

4. *The clear disconnection* between churches and hospitals is also linked up with another issue. In Belgium, health care is entirely taken care of by social security. All costs are covered by the federal state, as health care remains a federal (and not a regional) matter. There are only a few exceptions to the (financially) free character of health care, and they concern luxury, going from the use an individual room in hospitals to plastic surgery for mere esthetical reasons. As an inevitable result of the global social security framework, all hospitals are directly and immediately involved in public funding and financing.

5. Although the connection between all hospitals and the state is strong, as a result of the health care funding system, some delicate questions remain open. Some of them can be found back in the New Calefragia narrative. What happens in case ethical concerns of the religiously inspired hospital come into conflict with state norms regarding health care in general?

In that perspective, the duty to *include sterilization and abortive services* would also be a relevant issue of discussion in Belgium. Sterilization, by the way, would be much less of a problem than abortion, as churches in Belgium are not focusing on sterilization. Yet, euthanasia remains a delicate issue, as Belgium is among the few countries in which euthanasia, be it under strict conditions, is legal.

Here, we see a cautious trend, showing protection moving from *collective or institutional religious freedom* to *individual religious freedom*. Yet, many questions remain unsolved on both of these levels.

a. On the *institutional level*, the religious character and inspiration of a hospital can never lead to the *de facto* denial of the right to abortion or euthanasia, again under strict legal conditions⁵. Here, the Belgian system may come close to the one of New Calefragia: patients must be referred to other hospitals or institutions. Yet, the concrete implications of this obligation are not always obvious. No clarity exists with regard to the *nature* of the effort as it is required. Indeed, what really does matter? What is the aim of the effort? Is it the mere fact of referring to another hospital? Or does it include the necessity of a practical outcome, namely the identification and cooperation of a hospital where the services can be delivered? Obviously, in a region with a vast majority of Catholic hospitals, the first objective (*the mere referral*) is more easy to achieve than the second one (*the concrete result*). Yet, at this point another element enters into the debate: many catholic hospitals *do offer* abortion and euthanasia, sometimes openly, sometimes (and perhaps more often) secretly.

b. On a *personal level*, medical doctors or nurses have the right *not* to proceed to abortion or to any other action that goes *against their conscience*. Here, obviously, the discussion focuses more on *conscientious objection* (concerning legislation), than on the exercise of *religious freedom*. This means a shift from a more *active* attitude

⁵ E.g. the legal conditions expressed in the law concerning euthanasia, 28 May 2002 (*Belgisch Staatsblad*, 22 June 2002).

based upon religious freedom, to a more *passive* one centered round conscientious objection.

Of course, on a micro level, conscientious objection as it is exercised by medical doctors shows some similarities with what hospital policies entail on a macro level: rights legally enjoyed by patients should be guaranteed, and can not be eclipsed as a result of the religious or ideological options taken by hospitals or medical doctors.

A last, and new element, should be taken into consideration, as it has an obvious influence on the *religious options* that can be taken by hospitals. According to some experts in medical law, the responsibility with regard to all forms of medical treatment in the broad sense of the word lies with medical doctors *individually*, and not with hospital policy *collectively*. This would imply that decisions with regard to abortion will always be taken by *medical doctors*, and never by the board of the hospital. Two consequences of this (not yet accepted) model should not be overlooked. Firstly, the power of the hospital decreases, and the “inconveniences” of its confessional status become more theoretical. Secondly, the predictability of the availability of all legally guaranteed health care options, considerably decreases.

6. What precedes shows clearly that a Belgian judge would be highly surprised to see the New Calefragia case being tackled through non-establishment principle. There is a *cascade* of elements not encouraging this viewpoint. Firstly, religious hospitals are strictly disconnected from their religion of origin. Secondly, religious hospitals are, as a result of public health care-funding, always financially linked up with the state. Thirdly, the focus today tends to shift from the hospital policy in general to decisions made by individual medical practitioners.

7. Something should be added with regard to the legal status of the two parties complaining.

Firstly, there is a group of physicians. Here, a first question would be: what is their legal interest? Can they demonstrate that they are harmed by provincial or federal provisions? I am not sure that their claim would be taken into consideration. The mere fact of the existence of contractual relationships with certain religious groups is

in any case not a sufficient argument to go to court. Governance by contract, in a welfare state (the latter also is an element in the debate) hardly can be avoided.

Secondly, there is the religious sect insisting on the separation between church and state. The use of the notion of “sect” is interesting. Does it mean that the group involved is part of the unofficial list of so-called sectarian organizations, which was an appendix to the parliamentary sect report of 1997⁶? If so, the group involved risks to be in an overall bad position, not ready to start a procedure against others. Further, the “sect” will have no standing in court unless it is organized as a non-profit organization. Of course, individual members of the group involved may always go to court as private citizens. Even if it comes to a formal trial, the so called sect will lose the case for three main reasons: (a) The hospital will be clearly seen as an identity disconnected from its religious leadership or inspiration source; (b) The support it receives fits within the whole framework of health care and social security, and there is certainly no question of granting subsidies without offering some form of service in exchange; (c) In case the activity were to be qualified as *religious* (quod non), some forms of financing and support are not constitutionally excluded. Moreover, in case so called recognized religious groups are concerned, this support is even guaranteed by article 181 of the Constitution.

III. Conditions imposed to eligibility for participation in the federal subsidies

8. Let me start with the more empirical part of the question. Given the disconnection between the religious authorities and the hospital, the possible discriminations, especially with regard to gender, would not play an important part *legally*. As a matter of fact, discrimination will not be allowed. Also *practically*, one will, in Belgium, probably not see any difference on the discrimination level between public and private (religiously inspired) hospitals.

⁶ Belgische Kamer van Volksvertegenwoordigers, *Gewone zitting 1996-1997. 28 april 1997. Parlementair onderzoek met het oog op de beleidsvorming ter bestrijding van de onwettige praktijken van de sekten en van de gevaren ervan voor de samenleving en voor het individu, inzonderheid voor de minderjarigen. Verslag namens de onderzoekscommissie uitgebracht door de heren Duquesne en Willems. 2 dln, 364 + 306 blz + lijst van 189 sekten of ‘Synoptische tabel’.*

9. More important is the theoretical question with regard to the possibility of requiring conditions. Are they allowed? The answer is yes, even when it comes to privileges constitutionally guaranteed to recognized religions. For instance, the salaries of (some) ministers has to be paid by the State. Yet, this does not mean that the State is obliged to pay all ministers proposed by the competent religious authorities. The State can impose certain qualifications with regard to education, training, and degrees obtained by candidates as a condition for financial support. Imposing conditions is today generally accepted, yet it was challenged (on a theoretical level, there were no court cases) until two decades ago.

The true question, however, is what happens if the conditions required or imposed are at odds with some essential elements or characteristics of the religious group involved, including its doctrine. Indeed, qualifying a minimal degree of education as contradictory to the creed or the structure of a religious group looks to be a hazardous enterprise. Yet, other conditions could be perceived differently. That may be the case for religiously motivated or underpinned sex discrimination.

I imagine that sex discrimination in a hospital will not be accepted by health care law. Probably a court would decide that hospitals are to remote from religious institutions as such to claim dogmatic principles held by the latter in order to discriminate within the context of the hospital. But then again, it is more than unlikely that a religiously inspired hospital were to organize that type of discrimination.

More delicate are the ethical questions. Some politicians, including some belonging to majority parties, would like *to impose* on hospitals the *obligation* to bring into practice abortion or euthanasia. Let us be clear: consciousness objection by individual doctors would remain possible, yet the hospital should *guarantee the result*, by invoking the assistance of any doctor whatsoever. In the rather unlikely (but not impossible) hypothesis that a law containing this principle were issued, one can, perhaps successfully, invoke the violation of freedom of religion. Yet, the debate could also be enlarged. Are *Tendenzbetriebe* still possible if highly ideologically colored acts such as abortion or euthanasia are made indirectly compulsory? And what about potentially interesting notions such as *collective conscientious objection*? Here, the debate may become heated. And it shows another thing: perhaps one day

religious freedom issues and hospitals will be brought into connection again, not because of dogma, not because of religions feeling uneasy with non-discrimination legislation, but because of the State, starting from its own idea of neutrality, and thus imposing norms that are far from being neutral, and that affect people's conscience, more than they affect their creed or their dogmatic insights.