# The Legal Status of Old and New Religious Minorities in the European Union

# Le statut juridique des minorités religieuses anciennes et nouvelles dans l'Union européenne

**Marco Ventura**
*(Ed.)*

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*Maquetación: Miriam L. Puerta*


Polígono Juncaril
C/ Baza, parcela 208
18220 Albolote (Granada)
Tlf.: 958 465 382
www.comares.com • E–mail: libreriacomares@comares.com
facebook.com/Comares • twitter.com/comareseditor • instagram.com/editorialcomares

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*Dedicated to Richard Potz,*
*a scholar deeply committed to the advancement*
*of Church and State research in Europe,*
*a highly esteemed member of the Consortium since 1998,*
*and an emeritus member since 2016*

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# THE TWO-WAY LEGAL MAKING OF RELIGIOUS MINORITIES. INTRODUCTORY REMARKS

Marco Ventura*

For the second time in its lifetime, the European Consortium for Church and State Research deals with religious minorities in an explicit and systematic manner. In fact, the meeting in Siena of November 15-17, 2018 on 'The legal status of old and new religious minorities in the European Union', from which this book emanates, took place 25 years after the meeting in Thessaloniki on November 19-20, 1993 on 'The legal status of religious minorities in the countries of the European Union'[1].

The need to return to the same topic a quarter of a century later stems from the historical threefold change that has occurred in Europe in the social reality of minorities, in the actors' perceptions, discourse and strategies, and in the framing of the very category of religious minorities, in society and the law. Such fundamental change can be looked at from the long period perspective of developments since the XIX$^{th}$ century colonial treaties, or from the recent perspective of social transformations in contemporary Europe. In both perspectives, the category of 'old and new minorities' is crucial.

For the purpose of this book, the expression 'old and new religious minorities' is meant to acknowledge the concern of scholars and actors for those 'new' minorities which, because they originate from recent migration, risk not enjoying the same protection as 'old' minorities. Responding to the concern, and encouraging ambitions, progress in law and policy has made it possible to consider today the equal protection of 'old' and 'new' minorities as an acquis of international human rights law[2].

* Università degli studi di Siena; Fondazione Bruno Kessler, Trento; DRES – CNRS, Strasbourg; 2019 Annual President of the European Consortium for Church and State Research.

[1] See the proceedings of the meeting: European Consortium for Church and State Research, *The legal status of religious minorities in the countries of the European Union* (Thessaloniki, Sakkoulas and Milano, Giuffrè, 1994). Available online on the website of the Consortium at http://www.churchstate.eu (last visited 15 January 2021).

[2] Fabienne Bretscher provides a clear example in her overview of the protection of new religious minorities in the framework of the European Convention on Human Rights and the UN system, arguing

Such a conventional understanding whereby 'new minorities' are identified with minorities originated by recent migration, and positing their entitlement to equal rights with 'old minorities', and with majorities, is the starting point for the presentations collected here.

Contributors to this book are equally aware that such conventional understanding of 'old and new religious minorities' could warrant inaccurate interpretations, especially when the migration factor is isolated and amplified, when the fluidity of religion is not fully acknowledged, and when recent change within historical minorities and majorities is ignored[3].

Indeed, 'new minorities' cannot be reduced only to those minorities which result from recent migration and migration itself needs to be relativized and seen in its interaction with other factors. Inspiring this book is the realization that 'new minorities' are far more complex and multiple than their conventional understanding, if not challenged and updated, might suggest[4]. Also inspiring is the observation that majorities are much less 'majority' (in perceptions if not in numbers), and 'old minorities' are much 'newer' than certain actors and experts could think.

In addition to minorities stemming from recent migration, it is possible to identify at least three further 'new minorities', variously associated with both migration and religion[5]. First, 'new minorities' can emerge from communities sharing other common denominators than culture, ethnicity and geography, and can have a very different origin than recent migration, as eloquently witnessed, for example, by the LGBT community and the humanist community, which can now see themselves as

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that so far the United Nations Human Rights Committee has proved a better protective institution for new minorities than the European Court of Human Rights. See F. Bretscher, *Protecting the religious freedom of new minorities in international law* (Abingdon, Routledge, 2019).

[3] Roberta Medda Windischer underlines the need for an updated understanding of old and new minorities, stressing the importance of equal protection, and inviting to go 'beyond the old/new minority dichotomy'; see R. Medda-Windischer, 'The Nexus between Old and New Minorities', in *Junge Wissenshaft im Öffentlichen Recht*, 6 October 2017, online at https://www.juwiss.de/108-2017/ (accessed 15 January 2021). See for further background R. Medda-Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion. A Human Rights Model for Minority Integration*, (Baden-Baden, Nomos, 2009); and for an updated approach R. Medda-Windischer, C. Boulter, T. H. Malloy (eds.), *Extending Protection to Migrant Populations in Europe. Old and New Minorities* (Abingdon, Routledge, 2019).

[4] In particular, the conventional definition of 'new religious minorities' as stemming from recent migration is very problematic because of the inherently vague, and possibly misleading nature of the two defining factors. With regard to the time frame, how 'recent' should 'recent' migration be, considering that the United Nations referred to recent migration as a factor in the definition of minorities already in the 1980s? Also, how should we understand migration in the time of globalisation?

[5] I have presented the three cases at the European Academy of Religion, in my (unpublished) paper on 'New majorities and minorities. The impact of/on religion or belief', in the panel on 'Freedom to Believe or not to Believe. New Directions of Belief. The Religious Pluralism in Europe', Bologna, 21 June 2017.

'new minorities' in the context of emerging gender-based and/or non-religion-based agendas and rights. Second, 'new minorities' can coincide with 'old majorities'. Because secularisation has hit hard in the ranks of Christian majorities, or because legal reforms in sensitive areas such has same-sex marriage have disenfranchised portions of them, or simply because a multi-cultural, impoverished and vulnerable European society is experienced by many as a dramatic departure from the past, members of the 'old majority' can now feel they themselves form a 'new minority', possibly one committed to re-Christianising Europe and/or defending its Christian identity and culture. Third, 'old minorities' can be considered as 'new minorities'. Because they are faced with renewed hostility, as for the Jewish community, or with strong competition from 'new minorities', as for historical minority Christian communities challenged by more lively African, Asian or Latino groups of their own faith, 'old minorities' might feel they are becoming a 'new minority' as well, or at least a 'new' 'old minority'.

The conventional 'new minorities' originated from recent migration, as well as the unconventional 'new minorities' – and amongst them the three kinds illustrated above (agenda/rights based, former majorities, 'new' old minorities) – all point at a large range of reasons why actors come to see and present themselves as a minority (possibly combining, as indicated in the emerging category of multiple minorities). Paramount is the intermingling of objective and subjective reasons, and the varying degree to which the subjective sphere is understood as dependent or independent from the free will of the individual[6]. When combining in the trajectory of the individuals and the groups, objective and subjective reasons grounding the identification with a minority religion nourish expectations and strategies. Hence self-identification can be used to express different feelings – from anxiety to pride – as well as to articulate an agenda and pursue a goal. Since this is not possible without actively resorting, or being passively exposed to the law, the social complexity of living minorities is intimately interconnected with the no less complex experience of the law.

The interaction of the social and the legal dimension of minorities is bidirectional. On the one hand, minorities frame the law through their claims and the correlated arguments and actions. Therefore the very legal definition of minorities, and the resulting status, is the product of who and what minorities are, and intend to be in society. On the other hand, the law frames minorities by granting its symbolic and

[6] The contrast between religious belonging by revocable individual choice or by irrevocable transmission from the family, group and society is presented as key for contemporary, global law and religion in S. Ferrari, 'Law and religion in a secular world: a European perspective, in (2012) 14 3 *Ecclesiastical Law Journal*, pp. 355-370. With regard to contemporary developments in the Protestant church, the same paradigm is studied in M. Ventura, 'Faith vs. Identity. The Protestant Factor in Contemporary European Freedom of religion or Belief', in H. Schilling and S. Seidel Menchi (eds.), *The Protestant Reformation in a Context of Global History. Religious Reforms and World Civilizations* (Bologna, il Mulino and Berlin, Duncker & Humblot, 2017) pp. 193-209.

practical benefits under the inescapable condition that actors adjust to its conceptual and procedural constraints. As a result, the more minorities expect from the law, and the more they consequently engage with the legal infrastructure, the more they are forced to be moulded accordingly.

In the two-way legal making of religious minorities, these resort to the law because of their power to shape it, and because of the power of the law to shape them, hopefully to their advantage. Logically distinct, the two movements are simultaneous, and inextricable. While needing the law to advance their agenda, pursue their goals and protect and promote their rights, minorities need to engage in a process through which they make the law while being made by the law. Considered in its multifaceted reality, such bidirectional, two-way process is open to a variety of outcomes. In the face of the ambition to get as much as possible through the category of minorities in terms of equality-based and diversity-based status, equality and diversity are not as easy to achieve, and reconcile on the ground as they are in documents[7]. A win win outcome is thus far from granted, especially as individuals and communities might have conflicting visions and interests, based on which the very assessment of what is 'a win' could be extremely variable.

Religious actors know this only too well. Faced with the growing commitment of the human rights community to minority rights, rooted in the faith that the rationale, mechanisms and implementation of minorities protection do no harm to the agenda of equality and enhance the agenda of diversity, authoritative religious leaders have voiced their worries. In the Abu Dhabi document of 4 February 2019 on 'Human fraternity for world peace and living together'[8], Pope Francis and the Grand Imam of Al-Azhar Ahmad Al-Tayyeb declared: 'The concept of *citizenship* is based on the equality of rights and duties, under which all enjoy justice. It is therefore crucial to establish in our societies the concept of *full citizenship* and reject the discriminatory use of the term *minorities* which engenders feelings of isolation and inferiority. Its misuse paves the way for hostility and discord; it undoes any successes and takes away the religious and civil rights of some citizens who are thus discriminated against' (italics in the original online).

While not consisting in a wholesale rejection of the social and legal category of minorities, the caveat is a powerful reminder that the equality communities seek while advancing their diversity might be better served, depending on the circumstances,

[7] For a development of this argument see M. Ventura, 'Religious pluralism and human rights in Europe. Equality in the regulation of religion', in M. L. P. Loenen and J. E. Goldschmidt (eds.), *Religious pluralism and human rights in Europe: where to draw the line?* (Antwerpen-Oxford, Intersentia, 2007) pp. 119-128.

[8] See the document on the website of the Holy See at www.vatican.va (last visited 15 January 2021). Also see my interview to the Grand Imam in M. Ventura, 'Famiglia, gay. L'Occidente sbaglia', in *Corriere della Sera / La Lettura*, 1 March 2020, p. 9.

by other categories and mechanisms than those of 'minority', 'minority rights' and 'minority protection'. If the contrast between the 'equality of rights and duties' of 'full citizenship' and the status coming with the minority label is so problematic, it is not necessarily because the category of minority as such is irredeemably flawed. However, if the category elicits such a concern in Pope Francis and the Grand Imam Al-Tayyeb, there is something about it to be reconsidered, a challenge which cannot be avoided by simply putting all the blame for the shortcomings of the category on its discriminatory misuse[9].

Legal experts are particularly well-placed to discern implications and opportunities of the two levels at stake with legal definitions. They are aware of the role of formulations, and the forging of reality through the language, categories and concepts of the law[10]. They are no less aware of the complexities the legal machinery consists of, the distance between the theory and the practice, and the intricacies of the law in action. Both abstract law and real law, the law in the book and the law in the actors' hands are crucial when it comes to labelling individuals and groups as minorities, be this of their own making, or to the initiative of third agents. This is particularly true in the laboratory of the European Union[11], where supranational law is experimented to an unprecedented degree, and a multi-level system is being created through the integration of international human rights law, domestic law, local law, court cases including rulings from the courts of Strasbourg and Luxembourg, soft law measures, policy documents and projects, and even religious laws[12].

Key to the impact of the system on religious minorities, is the articulation of their category, and legal definition, with the category and legal definition of 'churches and religious associations or communities' and 'philosophical and non-confessional

[9] This comment is rooted in my analysis of equality, diversity, minorities and citizenship in M. Ventura, 'La dimensione religiosa della cittadinanza nello spazio mediterraneo', in F. Alicino (a cura di), *Cittadinanza e religione nel Mediterraneo. Stato e confessioni nell'età dei diritti e delle diversità* (Napoli, Editoriale scientifica, 2017) pp. 57-101.

[10] For this point, see the analysis of the formula 'freedom of religion or belief', in M. Ventura, 'The Formula «Freedom of Religion or Belief» in the Laboratory of the European Union', in (2020) 23 *Studia z Prawa Wyznaniowego*, pp. 7-53.

[11] For the expression 'laboratory' as an appropriate descriptor of the interaction of law and religion in EU law, see M. Ventura 'Diritto e religione in Europa: il laboratorio comunitario', in (1999) 30 4 *Politica del diritto*, pp. 577-628. Two years later, the concept of the EU laboratory was central in M. Ventura, *La laicità dell'Unione europea* (Torino, Giappichelli, 2001). Bérengère Massignon later resorted to the same expression in her overview on religion in the European construction. See B. Massignon, *Des dieux et des fonctionnaires. Religions et laïcités face au défi de la construction européenne* (Rennes, Presses Universitaires de Rennes, 2007) p. 10 and pp. 17-21.

[12] For an overview, see M. Ventura, 'Non discrimination and protection of diversity and minorities' in G. Amato, E. Moavero-Milanesi, G. Pasquino and L. Reichlin (eds.), *The History of the European Union. Constructing Utopia* (Oxford, Hart, 2019) pp. 239-255.

organisations' in EU law, and with the equivalent categories in EU members states.[13] Church and state and law and religion scholars have a distinct capacity and responsibility to describe such articulation and to prescribe how it should evolve. If this implies creative reinterpretation of principles such as establishment, neutrality and separation, legal pluralism, cooperation and accommodation, it also presents the church and state and law and religion community, in partnership with legal scholars and social scientists, with the unique opportunity to develop the heritage and instruments of European research and policy in the domain.

In this regard, as a venture with an Italian heart, this project could not but capitalise on the legacy of Italian legal scholarship. Building on the post WWII commitment of the Italian people to the European integration process and the peaceful development of the international community, in many ways Italian scholars have been crucial in the forging of European and international human rights law in general and in the protection of freedom of religion or belief, and religious minorities, in particular. To mention just a few brilliant examples marking European law in the XX$^{th}$ century, in 1901 Francesco Ruffini authored the first modern history of religious freedom, in 1917 Santi Romano was the early proponent of legal pluralism and the virtue of coordination between the law of the land and religious legal systems, in 1967 Francesco Margiotta Broglio was the first European scholar to highlight the revolutionary potential of the European Convention on Human Rights and its Court in the area of religious freedom, and in 1979 Francesco Capotorti contributed a capital Report on minority rights for the United Nations[14]. This book is built on such legacy, and the more recent effort of the Italian experts who figured amongst the founding fathers of the Consortium.

* * *

The structure of this research, and book, is shaped after the terms of reference produced in March 2018, with the fundamental inputs of Daniele Ferrari[15] the wisdom of Silvio Ferrari, the supervision of the Executive Committee of the Consortium, and

[13] This formulation is borrowed from article 17 of the Treaty on the functioning of the Union. See M. Ventura, 'L'articolo 17 TFUE come fondamento del diritto e della politica ecclesiastica dell'Unione europea', in (2014) 22/2 *Quaderni di diritto e politica ecclesiastica*, pp. 293-304.

[14] See F. Ruffini, *Religious liberty* (New York, NY, Putnam, 1912), ed. or. *La libertà religiosa: storia dell'idea* (Torino, Bocca, 1901); S. Romano, *The legal order* (Abingdon, Routledge, 2017), ed. or. *L'ordinamento giuridico. Studi sul concetto, le fonti e i caratteri del diritto* (Pisa, Mariotti, 1917); F. Margiotta Broglio, *La protezione internazionale della libertà religiosa nella Convenzione europea dei diritti dell'uomo* (Milano, Giuffrè, 1967); F. Capotorti, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* (Geneva, UN, 1979).

[15] For the wider research of Daniele Ferrari on the topic, see D. Ferrari, *Il concetto di minoranza religiosa dal diritto internazionale al diritto europeo. Genesi, sviluppo e circolazione* (Bologna, il Mulino, 2019).

published below. While articulating an approach conscious of both the bidirectional interaction of society and the law and the two-way legal making of religious minorities, the terms have offered the authors a common frame, meant to facilitate exchange and comparison, and encourage variations. Respecting the bilingual custom of the Consortium, terms of reference are also available in French as a grille thématique.

The book is opened by a cross-country section devoted to international and European perspectives. Also reflecting the 19 national reports drafted on the basis of the terms of reference, and now transformed into chapters for the purpose of this volume, the five chapters of this section are focused on the law and religion perspective, social and legal change, the legal definition, the EU law and policy, and the mapping of international and European instruments.

In the following sections, each of the 19 chapters presents a country case and develops a report initially presented and discussed at the Siena meeting in November 2018. These chapters are regrouped in three geography-based sections: Southern and Western Europe; Central and Eastern Europe; Northern Europe. Geography is not neutral and the identification of countries with one area or another is not always obvious. Nonetheless, it was helpful to have countries ranged in some order, and geography seemed the least arbitrary. Within the three geography-based sections, chapters are in alphabetical order, according to the name of the relevant country.

The authors of this book are solely responsible for the published content of their chapters. The views expressed in the chapters do not necessarily correspond to the views of the editor.

* * *

Amongst the many who have contributed to this project and book, I wish to express my gratitude to Daniele Ferrari for his constant support, to Silvio Ferrari for the guidance and the dialogue with his 'Atlas of religious minorities rights' project, to Miguel Rodriguez Blanco for his relentless assistance, and to Isotta Rossoni for the help with linguistic revision and editing. Special thanks to the contributors for their commitment and patience, and to the fellow members of the Consortium for their companionship and trust. Special thanks to Università degli studi di Siena, in particular to the Dipartimento di Giurisprudenza and Roberta Lelli, Violante Pirotta and Antonia Del Vecchio, to Fondazione Bruno Kessler di Trento, in particular the Centre for religious studies, and to the Italian religious organizations which have contributed financially and beyond.

As this book is the result of the European Union Jean Monnet project *Boosting European Security Law and Policy: Focus on flows of migrants, data security and movement of capitals* (BESEC), and the Italian Ministry for University and Research PRIN project *Representing religious diversity in Europe: past and present & features* (REREDIEU), I also wish to thank the colleagues partnering in those projects, at Università degli studi di Siena and elsewhere, for their stimulating contribution.

# TERMS OF REFERENCE / GRILLE THÉMATIQUE

Daniele Ferrari*
Marco Ventura**

The following terms of reference / grille thématique have been prepared in the first months of 2018 under the supervision of the Executive Committee of the European Consortium for Church and State Research.

Prior to the 2018 Siena meeting of the Consortium from which this book emanates, the terms of reference / grille thématique have guided the preparation of national reports. National reports have been successively updated, completed and edited for publication in this book as country-specific chapters.

While guiding the preparation of national reports, and assuring some consistency across the chapters, the terms of reference / grille thématique were by no means intended to frustrate the freedom, initiative and creativity of the contributors.

In fact, as clearly illustrated in the chapters that follow, authors have succeeded in interpreting the terms of reference / grille thématique with great flexibility, according to their individual preferences, and to the specifics of the relevant country.

## Terms of reference

### I. Definition and status

### 1. Social science definition

If social scientists in the relevant country use the category of religious minority, how do they define the category and how do they identify religious minorities? Do they differentiate between old and new religious minorities, and/or between sects and religious minorities? Do they understand the traditional majority(ies) as a new

* Daniele Ferrari: Università degli studi di Siena; GSRL, EPHE – CNRS Paris; DRES – CNRS, Strasbourg.

** Marco Ventura: Università degli studi di Siena; Fondazione Bruno Kessler, Trento; DRES – CNRS, Strasbourg; 2019 Annual President of the European Consortium for Church and State Research.

minority because of decline in believing, belonging or practice? Are the unaffiliated considered as a new minority, or indeed majority? Report about the state of social sciences research in the area (abundance or scarcity of quantitative and/or qualitative research; interdisciplinary collaboration between legal scholars and social scientists).

## 2. Legal definition

A. Is "minority" in domestic official legal sources a general category applicable to religious minorities? Is "religious minority" a category used in domestic official legal sources such as the constitution, legislation / statutes, administrative measures or case law? If so, how is the category substantially defined? Are other kinds of minorities (eg national or linguistic minorities) in domestic official legal sources a category with significant impact on religion? Was the legal definition of religious minority directly or indirectly discussed in Parliament or in court? Is it used in policy documents? If so, how was/is the category substantially defined? Based on official sources, how does the category of religious minority relate to other legal categories such as recognized or unrecognized communities/groups of faith or belief?

B. Based on official sources how are minorities identified to the effect of their legal operation and relationship with the government? Is this based on the procedure for the granting of legal personality to communities of faith or belief? In this case, does the relevant country comply with the 2015 OSCE Guidelines on the legal personality of religion or belief communities? In case an official census is administered in the country, does it have any impact on the legal identification of religious minorities?

C. Do legal scholars employ the category of religious minority? If so, how is the category substantially defined? How do legal scholars determine who is included and who is excluded (eg Church of Scientology, Baha'ism, Rastafarians and Pastafarians, Humanists and atheists)? Do they draw a line between old and new religious minorities (eg by using the expression "new religious movements") and/or between sects and religious minorities? Do they explicitly or implicitly borrow from social science?

D. Is article 27 of the 1966 UN International Covenant on Civil and Political Rights on religious minorities (and the relevant CCPR General Comment n. 23 of 1994) of significance? If so, how?

E. Is the Framework Convention for the Protection of National Minorities adopted in 1994 by Council of Europe's Committee of Ministers of significance? If so, how?

### 3. Legal status

Describe present differences in legal status: a) between the religious majority/ies and minorities, and b) between religious minorities in terms of more (eg access to fiscal advantage or civil recognition of religious laws) or less (eg anti-sect or anti-headscarf measures) advantageous treatment. Consider areas of particular significance in the relevant country (eg. teaching of religion in public schools and religious schools; access to media; marriage and family law; fiscal exemptions; conscientious objection). Describe how structural features of the relevant legal system impact on the above differences (eg bilateral agreements in Italy and Spain or federal system in Germany).

## II. Social and legal change

### 1. Social change

Describe quantitative and qualitative social change of old and new minorities in your country and identify crucial factors (eg migration and secularization), actors and strategies behind such change. Provide data on the present landscape (number of members and other relevant indicators of growth/stability/decline such as service attendance, religious marriages, ministers, chaplains or schools) as well as on change over time (in particular in the last 25 years). Describe features of minorities and in particular their local/international character and social and political influence. In particular, is it of significance that a particular religion with a minority presence in European countries is the majoritarian faith, often with significant political and social influence, elsewhere in the world?

### 2. Legal change

Describe historic-legal dynamics behind what has been reported under I.3. How has the legal status of religious minorities changed, especially in the last 25 years? In which areas and for which minorities was change more substantial, visible and problematic? In which sense? Was there a correlation between the upgrading of the legal status of minorities and legal change for the majority? Describe if and how domestic, European and international legal developments resulted in change in the status of religious minorities in the relevant country, and identify the most significant developments.

## III. Social and legal developments

### 1. Social developments

Identify and describe social issues and current or possible/probable developments related to old and new religious minorities. Special attention should be paid to: a)

claims and strategies of minority religious actors, political movements and NGOs; b) claims and strategies of religious majorities (eg former majority groups understanding themselves as a new minority under threat by secularists, or as creative minorities), c) developments within faith communities; d) experiences of interfaith and ecumenical dialogue as well as dialogue between minorities and local/national governments; e) practices of social innovation and the impact of social media and information technology; f) multi-level public policies; g) driving arguments and factors such as security, national interest and identity, equality and diversity.

### 2. Legal developments

Identify and describe legal issues and current or possible/probable developments related to old and new religious minorities. Special attention should be paid to: a) litigation and case law; b) legislative reform in religious laws (within faith communities) and religion law (States or other public legislative bodies); c) legal developments within religious majorities with an impact on minorities; d) domestic impact of European and international legal developments; e) intersection with developments in anti-discrimination law, especially on grounds of gender or sexual orientation, or in the case of migrants and refugees.

## Grille thématique

### I. Définition et statut

### 1. Définition des sciences sociales

Si les spécialistes des sciences sociales du pays concerné utilisent la catégorie de la minorité religieuse, comment définissent-ils la catégorie et comment identifient-ils les minorités religieuses ? Font-ils la différence entre les minorités religieuses anciennes et nouvelles, et/ou entre les sectes et les minorités religieuses ? Comprennent-ils la (les) majorité(s) traditionnelle(s) comme une nouvelle minorité en raison du déclin de la croyance, de l'appartenance ou de la pratique ? Les non affiliés sont-ils considérés comme une nouvelle minorité, voire une majorité ? Rapport sur l'état de la recherche en sciences sociales dans la région (abondance ou rareté de la recherche quantitative et/ou qualitative, collaboration interdisciplinaire entre juristes et spécialistes des sciences sociales).

### 2. Définition légale

A. La « minorité » dans les sources juridiques officielles nationales est-elle une catégorie générale applicable aux minorités religieuses ? La « minorité religieuse » est-elle une catégorie utilisée dans les sources juridiques officielles nationales telles que la constitution, la législation/les lois, les mesures admi-

nistratives ou la jurisprudence ? Si oui, comment la catégorie est-elle définie ? Les autres types de minorités (par exemple les minorités nationales ou linguistiques) dans les sources juridiques officielles nationales sont-elles une catégorie ayant un impact significatif sur la religion ? La définition juridique de la minorité religieuse a-t-elle été discutée directement ou indirectement au Parlement ou au tribunal ? Est-elle utilisée dans les documents de politique ? Si oui, comment la catégorie a-t-elle été définie ? Sur la base de sources officielles, comment la catégorie de minorité religieuse se rapporte-t-elle à d'autres catégories juridiques telles que les communautés/groupes de foi ou de croyance reconnus ou non reconnus ?

B. Sur la base de sources officielles, comment les minorités sont-elles identifiées à l'effet de leur fonctionnement légal et de leur relation avec le gouvernement ? Est-ce basé sur la procédure d'octroi de la personnalité juridique aux communautés de foi ou de conviction ? Dans ce cas, le pays concerné se conforme-t-il aux lignes directrices 2015 de l'OSCE sur la personnalité juridique des communautés de religion ou de conviction ? Dans le cas où un recensement officiel est administré dans le pays, a-t-il un impact sur l'identification légale des minorités religieuses ?

C. Les juristes emploient-ils la catégorie de la minorité religieuse ? Si oui, comment la catégorie est-elle définie ? Comment les juristes déterminent-ils qui est inclus et qui est exclu (par exemple l'Église de Scientologie, le Bahaïsme, les Rastafariens et les Pastafariens, les Humanistes et les Athées) ? Tracent-ils une ligne de démarcation entre les minorités religieuses anciennes et nouvelles (par exemple en utilisant l'expression « nouveaux mouvements religieux ») et/ou entre les sectes et les minorités religieuses ? Empruntent-ils explicitement ou implicitement aux sciences sociales ?

D. L'article 27 du Pacte international relatif aux droits civils et politiques de l'ONU de 1966 sur les minorités religieuses (et l'Observation générale pertinente du CCPR n ° 23 de 1994) est-il important ? Si oui, dans quelle mesure ?

E. La Convention-cadre pour la protection des minorités nationales adoptée en 1994 par le Comité des Ministres du Conseil de l'Europe est-elle importante ? Si oui, dans quelle mesure ?

### 3. **Statut juridique**

Décrire les différences présentes dans le statut juridique : a) entre la/les majorité(s) religieuse(s) et les minorités, et b) entre les minorités religieuses en termes de traitement plus (par exemple l'accès à l'avantage fiscal ou la reconnaissance civile des lois religieuses) ou moins (par exemple les mesures antisectes ou antifoulard) avantageux. Envisager des domaines d'importance particulière dans le pays concerné (par exemple, l'enseignement de la religion dans les écoles publiques

et les écoles religieuses, l'accès aux médias, le mariage et le droit de la famille, les exemptions fiscales, l'objection de conscience). Décrire comment les caractéristiques structurelles du système juridique concerné ont une incidence sur les différences susmentionnées (par exemple, accords bilatéraux en Italie et en Espagne ou système fédéral en Allemagne).

## II. Changement social et juridique

### 1. Changement social

Décrire les changements sociaux quantitatifs et qualitatifs des minorités anciennes et nouvelles dans votre pays et identifier les facteurs cruciaux (par exemple, la migration et la laïcisation), les acteurs et les stratégies à l'origine de ces changements. Fournir des données sur le paysage actuel (nombre de membres et autres indicateurs pertinents de croissance / stabilité / déclin tels que fréquentation de service, mariages religieux, ministres, aumôniers ou écoles) ainsi que sur l'évolution dans le temps (en particulier au cours des 25 dernières années). Décrire les caractéristiques des minorités et en particulier leur caractère local / international et leur influence sociale et politique. En particulier, est-il important qu'une religion particulière avec une présence minoritaire dans les pays européens soit la foi majoritaire, souvent avec une influence politique et sociale importante, ailleurs dans le monde ?

### 2. Changement juridique

Décrire la dynamique historique-légale derrière ce qui a été rapporté sous I.3. Comment le statut juridique des minorités religieuses a-t-il changé, en particulier au cours des 25 dernières années ? Dans quels domaines et pour quelles minorités le changement était-il plus important, visible et problématique ? Dans quel sens ? Existe-t-il une corrélation entre l'amélioration du statut juridique des minorités et le changement juridique pour la majorité ? Décrire si et comment les développements juridiques nationaux, européens et internationaux ont entraîné un changement dans le statut des minorités religieuses dans le pays concerné, et identifier les développements les plus significatifs.

## III. Développements sociaux et juridiques

### 1. Développements sociaux

Identifier et décrire les problèmes sociaux et les développements actuels ou possibles / probables liés aux minorités religieuses anciennes et nouvelles. Une attention particulière devrait être accordée : a) aux revendications et stratégies des acteurs religieux minoritaires, des mouvements politiques et des ONG ; b) aux revendications et stratégies de majorités religieuses (par exemple, les anciens groupes majoritaires

s'identifiant comme une nouvelle minorité menacée par les laïcs ou comme des minorités créatives), c) aux développements au sein des communautés de foi ; d) aux expériences de dialogue interconfessionnel et œcuménique ainsi qu'au dialogue entre les minorités et les gouvernements locaux / nationaux ; e) aux pratiques d'innovation sociale et à l'impact des médias sociaux et des technologies de l'information ; f) aux politiques publiques à plusieurs niveaux ; g) à la conduite des arguments et des facteurs tels que la sécurité, l'intérêt national et l'identité, l'égalité et la diversité.

## 2. **Développements juridiques**

Identifier et décrire les problèmes juridiques et les développements actuels ou possibles / probables liés aux minorités religieuses anciennes et nouvelles. Une attention particulière devrait être accordée : a) au contentieux et à la jurisprudence; b) à la réforme législative dans les lois religieuses (au sein des communautés religieuses) et au droit religieux (États ou autres organes législatifs publics); c) aux développements juridiques au sein des majorités religieuses ayant un impact sur les minorités; d) à l'impact interne des développements juridiques européens et internationaux; e) à l'intersection avec l'évolution de la législation antidiscriminatoire, notamment en raison du sexe ou de l'orientation sexuelle, ou dans le cas des migrants et des réfugiés.

# INTERNATIONAL AND EUROPEAN PERSPECTIVES

# THE PROTECTION AND PROMOTION OF RELIGIOUS MINORITIES IN EU COUNTRIES. A LAW AND RELIGION PERSPECTIVE

Silvio Ferrari*

## I. Introduction

In 2015, the Pew Research Center published a report titled "Religious Hostilities and Religious Minorities in Europe". According to this report, European countries score 2.3 on the index of social hostilities against religions, much higher than the average global score of 1.6. The report underlines that "many acts of hostility in the region were directed at religious minorities", Jews and Muslims in particular. They have respectively been the target of acts of hostilities in 76% and 71% of the European countries, compared to the 25% and 34% of the non-European countries[1]. This data begs the question: does Europe have a problem with religious minorities? Are they in a worse situation in Europe than in other parts of the world?

## II. Why religious minorities need to be protected

Before addressing the European context, a short summary of the debate on the need to give minorities a specific legal protection may be helpful. This need is grounded in an apparently very simple principle: a minority is a vulnerable group that has the right to be legally protected[2]. Even in a democratic state, the vulnerability of minorities does not disappear, since the mechanisms of democracy entail that political decisions are taken by the majority and thus leave open the possibility

* Silvio Ferrari was professor of Law and Religion at the University of Milan until 2019 and now teaches Comparative Law of Religions at the Faculty of Theology in Lugano, Switzerland.

[1] See www.pewforum.org/2015/02/26/sidebar-religious-hostilities-and-religious-minorities-in-europe/.

[2] It is possible that a minority is in power in a country and therefore does not present the characteristic of being vulnerable. This is the reason why many minority definitions exclude the numerically minority groups that are in a position of power with respect to one or more numerically larger groups. See for example Francesco Capotorti's definition of minority (*Study of the Right of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN doc. 1/ E/CN.4/Sub.2/384/Rev.1, para. 568).

that the majority use its power to oppress minorities[3]. Therefore, the guarantees that the human rights attributed to all individuals and groups must be supplemented by further guarantees for minority groups or, at least, for the individuals who are part of them[4]. Not all minorities have the right to this additional protection, that is usually reserved to national, ethnic, linguistic and religious minorities. Moreover, according to the prevailing legal doctrine, even these protected minorities do not enjoy this particular protection if they are in a dominant position or, in the case of national minorities, if they are not comprised of citizens (it should be noted that the latter is controversial)[5]. In any case, the whole system that international and constitutional law have developed to protect minorities is based on the principle that the mere fact of constituting a minority places a group of people at a disadvantage. This disadvantaged position does not depend only on the fact that the majority has the power to approve measures that may penalize minorities. Even when the majority refrains from doing so, decisions and rules that are apparently neutral may be the product of a culture and legal policy that depends on the majority's convictions (including unconscious and implicit)[6]. Even in today's secularized Europe, a significant part of family law or, to a more limited extent, labor and criminal law is imbued with elements deriving from Europe's Christian tradition and, indirectly and even unintentionally, plays in favor of the Christian majority in comparison to non-Christian religious minorities. The very idea of state secularism, which has been long and bitterly fought by many Christian churches, is an implicitly Christian idea[7] that, according to Talal Asad and others, is

[3] One of the most controversial decision concerning the freedom of religion of a religious minority –the ban on the building of minarets in Switzerland- has been taken by a popular referendum, that is through a decision-making process that is democratic by definition. On this issue see V. Pacillo, 'Stopp Minarett'? The controversy over the building of minarets in Switzerland: religious freedom versus collective identity', in S. Ferrari and S. Pastorelli (eds.), *Religion in Public Spaces A European Perspective*, (Farnham, Ashgate, 2012); L. Langer, 'Panacea or Pathetic Fallacy? The Swiss Ban on Minarets', (2010), 43, *Vanderbilt Journal of Transnational Law*, pp. 863-951.

[4] The rights recognized to minorities can be attributed to the group or, as more frequently happens, to the individuals who compose it. On this topic see R. Hofmann, 'Minority Rights: Individual or Group Rights: A Comparative View on European Legal Systems', (1997), 40 *German Yearbook of International Law*, p. 356 ff.

[5] See R. Medda-Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion. A Human Rights Model for Minority Integration*, (Baden-Baden, Nomos, 2009), pp. 56-57.

[6] This is one of the two arguments put forward by Kymlicka to support the need to attribute specific rights to minorities; the other argument hinges on the need of minorities to obtain recognition of their cultural identity. See W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*, Oxford, Oxford Univ. Press, 2001. On the "majoritarian bias" see H. Årsheim - P. Slotte, *The Juridification of Religion?*, (Leiden, Brill, 2017), pp. 60-61.

[7] See S. Ferrari, 'The Christian roots of the Secular State', in R. Provost (ed.), *Mapping the Legal Boundaries of Belonging. Religion and Multiculturalism from Israel to Canada*, (Oxford, Oxford Univ. Press, 2014), pp. 25-40.

based on a separation between religion, politics and the law that is functional to the Christian doctrine but not, for example, to the Muslim one[8]. Should the majority wish to get rid of their cultural and historical background to attain a chimerical position of neutrality, they would not be able to. Therefore, the advocates of minority rights conclude that the only realistic way to prevent minorities from living at a permanent disadvantage is to provide rules that protect them from the interference of the majority[9]. However, the provisions contained in the treaties and laws devoted to minorities go beyond the obligation of protection; they also impose on the state the duty to promote their identity[10]. This obligation translates into normative language the belief that the existence of minorities, by contributing to the common good in terms of their own values and interests[11], enhances the social pluralism that is a fundamental condition of a democratic state[12]. In conclusion, protection of minorities and promotion of their identity are, together with the prohibition of discrimination, the pillars of the current minority rights system.

One could debate at length about the soundness of these conclusions. Some object that the special legal measures that are invoked to protect minorities would be in and of themselves the product of a majority culture that would inevitably reproduce the same "bias" that should be eliminated. Others argue that "we do not need to postulate special group rights intended to protect and support the identities of religious minorities": to protect them it is not necessary "to depart from a traditional liberal conception according to which all citizens have the same set of individual citizen's rights" - it is enough to implement it correctly[13]. Even the state's obligation to promote the identity of religious minorities through positive action is controversial, on the grounds that it could lead to excessive social fragmentation. However, this discussion goes well beyond the purpose of this paper. In this context, it is sufficient to mention that the instruments for the protection of minorities provided by international and domestic law are of two types: instruments that prevent discrimination against minorities; and instruments that protect and promote their identity granting

[8] See T. Asad, *Genealogies of Religion. Discipline and Reasons of Power in Christianity and Islam*, (Baltimore: Johns Hopkins University Press, 1993), p. 28.

[9] The right to develop one's identity is one of the two pillars of the system of minority protection (the other is non-discrimination). See K. Henrard, 'Minority Specific Rights: A Protection of Religious Minorities Going Beyond Freedom of Religion?', (2009) 5, *European Yearbook on Minority Issues*.

[10] See for example art. 5 of the *Framework Convention for the Protection of National Minorities* (FCNM).

[11] See J. A. van der Ven, 'Religious Rights for Minorities in a Policy of Recognition' (2008) 3, in *Religion and Human Rights*, p. 160.

[12] See European Court of Human Rights, Kokkinakis v. Greece, § 31.

[13] L. Binderup, 'Liberal Equality – from Minority Rights to the Limits of Tolerance', in L. Binderup – T. Jensen (eds.), *The Rights and Plights of Religious Minorities*, special issue of *Res Cogitans*, v. 4. n. 2, 2007, p. 95.

them particular legal status through the enactment of "special measures safeguarding minorities as groups"[14]. Although there are ongoing discussions about the notion of discrimination, the former instruments have gained a firm position in the legal culture of European countries. Instead, the provision of a special legal status for minorities – in the form of exemptions from general rules, affirmative action on the part of the state, recognition of specific rights to minorities as such and other - is a much more controversial issue.

In the context of an article devoted to religious minorities in EU countries, the first step consists in identifying the main features of the European system for the protection of religious minorities and assessing its soundness. I shall then proceed to consider whether the protection of religious minorities guaranteed by international and national standards in Europe is still effective in the new cultural and religious landscape of the Old Continent. Does the appearance of "new religious minorities" signal a break with the past and call for a renewed approach to relations between religious majorities and minorities? In the following pages, I will try to answer these questions.

## III. Protecting religious minorities "the European way"

The survey of the EU countries legal systems and of the national reports collected as chapters in this book shows that:

a. There is "no common minority policy in the EU"[15];
b. Constitutions mention national, ethnic and sometimes linguistic minorities but, apart from Sweden[16], never refer to religious minorities;
c. a few EU States have enacted laws on national, ethnic or linguistic minorities[17] but none has passed a law on religious minorities;

[14] F. Ermacora, *The Protection of Minorities before the United Nations*, (Martinus Nijhoff, 1987), p. 345.

[15] This point is made by Matti Kotiranta in his chapter on Finland in this book, sect. 2.a. The point is reiterated by Michał Rynkowski in his chapter on EU law and policies, sect. VII, in this book: "Generally, the law and the policies of the EU do not focus directly on the protection of the religious minorities. These questions constitute a part of the general framework of non-discrimination and equal treatment".

[16] See art. 2 of the Swedish Constitution. According to the chapter on Cyprus in this book (sect. 1.2), the Republic of Cyprus "official[ly] refers to the three religious groups as religious minorities" (the groups in questions are the Armenian, the Maronite and the Roman Catholic). However, the expression "religious minority" does not appear in the text of the Constitution.

[17] See for example Croatia, *Constitutional law on the rights of national minorities*, 13 Dec. 2001; Hungary, *Act CLXXIX of 2011 on the Rights of Nationalities*; Czech Republic, *Act on the rights of members of national minorities*, 10 July 2001; Poland, *Act of 6 January 2005 on National and Ethnic Minorities and Regional Languages*.

d. in their sub-constitutional laws, these countries rarely make use of the expression "religious minorities"[18] and, when they use it, do not provide a definition[19];
e. no international instrument concerning the protection of religious minorities is in force in EU countries, while almost all have signed and ratified a convention for the protection of national minorities[20] and many a charter for the protection of minority languages[21];
f. international provisions concerning the protection of minorities (in particular art. 27 ICCPR and the European Framework Convention for the Protection of National Minorities) do not play an important role in domestic debates on the relation between state and religions[22].

This assessment raises a first question: why did the EU States feel the need to protect national, ethnic and linguistic minorities but avoided protecting religious minorities[23]? There are different and equally convincing answers to this question. Some focus on history. Minorities (including religious minorities) have always existed but

[18] See in this book the chapters on Hungary ("Hungarian law does not employ a term of "religious minorities", p. 222), France (« Les sources juridiques sont aveugles à la notion de minorité », p. 110; «On ne trouve donc pas de référence aux « minorités religieuses » dans les sources constitutionnelles ou législatives, pas plus que dans les mesures administratives ou la jurisprudence», p. 111) and Poland («Polish law does not use the term 'religious minority'», p. 251).

[19] See in this book the chapters on Austria ("le droit ne définit pas la notion de "minorité", même s'il l'emploie": Première partie), the UK ("There is no statutory definition of 'minority' as used in the context of religion", p. 336), Greece ("There is no legal definition of religious minorities in the constitutional texts nor in other laws", p. 121), The Netherlands ("Definitions of 'religious minorities' are scarce", p. 325), and Poland ("the executive and judicial authorities do not face the problem of defining a 'religious minority'. In judgments given by Polish courts and in documents signed by authorities at various levels, this term is used very infrequently and only incidentally", p. 251). See also the chapters on Germany, pp. 294-296 and Romania, pp. 265-266.

[20] All EU countries have signed and ratified the FCNM with the exception of Belgium, Greece, Luxembourg (which signed but did not ratify it) and France (which did not sign it).

[21] The *European Charter for Regional or Minority Languages* has been signed by 20 and ratified by 17 EU countries.

[22] See in this book the chapters on The Netherlands ("Article 27 ICCPR plays no specific role in the debate on freedom of religion for religious minorities", p. 327) and Hungary ("international or European law does not play a specific role with regard to religious minorities", p. 231). France did not sign the Framework Convention and, when ratified the ICCPR, declared that "l'article 27 n'a pas lieu de s'appliquer" (see the chapter on French, pp. 112-113).

[23] See K. Henrard, *Minority Specific Rights*, p. 6 ("not that much attention is actually paid to the religious dimension of the minority rights to identity"). See also K. Henrard, *The ambiguous relationship between religious minorities and fundamental (minority) rights*, (The Hague, Eleven International Publishing, 2011), pp. 46-47. In his chapter in this book Ronan McCrea underlines that "Often we can see that where a religious minority is linked to a long established ethnic or national minority, many of the benefits accruing to the religious minority are in fact, piggybacking on protection of a national or ethnic group rather than being specifically religious rights".

the concept of 'minority' found its way in legal texts only after the First World War, when new states were built from the ashes of the last European empires. At that time, nationality, not religion, was the issue and this explains why religious minorities were left on the margins[24]. Others offer a political explanation, emphasizing the link between minorities and national states. According to these scholars, a national state is inevitably pushed to marginalizes groups that do not share the national narrative and ethos[25]. Granting rights to national minorities was the legal device adopted to keep the latter's aspirations towards independence under control, avoiding the potential destabilizing effects of their presence within national majority's territory.[26]. Again, the spotlight is on national, rather than religious, minorities. A third explanation is based on the new role played by religion in the public sphere. Since the end of the previous century, any matter related to religion has had a renewed impact on public life. Religions have become capable of supplying categories and language to express social, political, economic claims and in this way have extended their area of influence. The new political importance of religion, together with the increase of migration flows towards Europe, has placed religious minorities at the center of attention. However, this phenomenon is still recent and law-makers and judges have not yet had the time to devise strategies and develop tools to address the new challenges it poses[27].

Without questioning the soundness of these analyses, the issue of religious minorities should nonetheless be placed in a longer-term perspective that takes into account the processes of secularization and uniformization of the law that, at a different pace and with different intensity, have interested many European countries, particularly in the Western part of the continent. Since the second half of the 19th century and up to the end of the 20th, European societies and institutions have been reshaped via a process of marginalization of religion in the public sphere. Family law, education, welfare are just a few areas of human life where church power was replaced by that of the secular state. This model of state was based on the principle that all citizens must enjoy the same civil and political rights regardless of their religious affiliation, a principle that was not favorable to the provision of special rights for religious minorities, as they would have reproduced the legal disparity that the secular state intended

[24] See S. Agkönul, 'La naissance du concept de minorité en Europe', in J.-P. Bastian – F. Messner, *Minorités religieuses dans l'éspace européen. Approches sociologiques et juridiques*, (Strasbourg, PUF, 2007), pp. 37-59.

[25] National minorities "are by definition anomalies in the nation state system": J. Jackson Preece, *National Minorities and the European Nation-states System*, (Oxford, Clarendon Press, 1998), p. 10.

[26] See J. Jackson Preece, *National Minorities*, p. 11.

[27] This explanation is supported by the remark of Jeroen Temperman that "Whereas on the whole, major demographical changes are charted, relatively few legal changes are to be noted […] on the point of religious minorities and legal ramifications of that notion specifically" (chapter on Social and Legal Change, part I, in this book). See also the conclusion of Ronan McCrea's contribution in this book.

to eliminate. In this perspective, the road to fight discrimination and ensure equality to all citizens in religious matters (including those who professed minority religions) went in a different direction, that of the irrelevance of religion in defining the rights and obligations of individuals and groups[28]. This explains why religious-based systems of personal law, which had flourished in Europe for centuries, were abandoned in almost all the countries of Central-Western Europe during the nineteenth century[29]. The history of Jews and their assimilation is emblematic of this trend. It ran along a double track, clearly indicated in the famous phrase pronounced by Count Clermont-Tonnerre at the French National Assembly in 1789: "We must reject everything to Jews as a nation and give everything to Jews as individuals"[30]. The recognition of individual rights to citizens of Jewish religion went hand in hand with the denial of particular rights to the Jewish religious minority.

On the basis of these philosophical and political premises, the main legal instrument to protect religious minorities has not been identified in the assignment to them of particular rights but in the assignment to all individuals and groups of the right to religious freedom. Even with frequent deviations and long periods of regression, in the course of the 19th and 20th centuries many countries of Central and Western Europe were able to take significant steps forward in the recognition of individual and collective freedom of religion. This process has not eliminated all disparities between majority and minority religions, but has triggered a progressive improvement of the latter's legal position enabling religious minorities to enjoy rights that they had previously been denied[31]. The fact that this improvement does not concern all religious minorities, but privileges "old" compared to "new" ones and that the levelling of differences between religious majorities and minorities was never completed constitute

[28] See L. Binderup, *Liberal Equality*.

[29] This does not mean that the recourse to specific rights for the members of a particular religious minority is excluded. In some European countries, Jews have the right to abstain from work on Saturdays and in others, Sikhs can wear a turban instead of a helmet when riding a motorcycle. However, these measures concern a limited number of cases and a small number of people. For a discussion of these issues see S. Ferrari, *Religious Rules and Legal Pluralism: An Introduction*, in S. Ferrari-R. Cristofori-R. Bottoni (eds.), *Religious Rules, State Law, and Normative Pluralism. A comparative overview*, (Bern, Springer, 2016), pp. 535-548.

[30] S. M. A. de Clermont–Tonnerre, *Speech on Religious Minorities and Questionable Professions* (23 December 1789), available in English at http://chnm.gmu.edu/revolution/d/284/.

[31] For a few examples of this process (and also of its limits) see what happened in Spain (Cl. Proeschel, 'Religious minorities in democratic Spain: rekindling the past and considering the future', in G. D. Chryssides, *Minority Religions in Europe and the Middle East*, (London, Routledge, 2018) and in Greece (as explained by Lina Papadopoulou in her chapter on Greece, p. 129 ss.). They provide two different models of the same process. The former is an example of an autonomous legal development while in the latter a significant role was played by the decisions of the European Court of Human Rights. The same trend towards the improvement of the religious minorities' legal status is discernible in Italy, Germany and other countries.

elements of weakness of the whole process[32]. Regardless, the legal distance between religious majorities and many religious minorities today is significantly smaller than fifty or a hundred years ago.

In conclusion, the lack of a strong system of protection of religious minorities has been compensated in EU countries with the emphasis placed on the right to religious freedom. This leads us to conclude that where respect for religious freedom is stronger (and it is worth noting that on an international scale, EU countries rank fairly well) the urge to resort to a system of protection of religious minorities is weaker. Collective rights of religious freedom are considered sufficient to grant religious communities the autonomy and self-government ensured by the rules that protect religious minorities[33]. This also explains why, in the system of protection of minorities which is in force in Europe, the focus is on national, ethnic or linguistic minorities, rather than on religious ones: the protection of the latter was ensured by the legal provisions and court decisions granting religious freedom. As noted by Nazila Ghanea, while the issue of minorities has gained importance in the last decades of the 20th century, minority rights have never become the main tool to protect religious minorities, whose problems have been and are still addressed and solved through general provisions on freedom of religion[34].

The remarks contained in the previous paragraph do not wish to suggest that placing the spotlight on religious minority rights or on the right to religious freedom leads to the same results. As already noted, minority rights include both protection and promotion rights; the latter may result underdeveloped in an approach based exclusively on the right of freedom of religion. Therefore, it is likely that the combination of the two approaches will lead to a better outcome, than the choice of adopting one to the exclusion of the other. However, the significance of the secular state in the Western European history of the last two centuries helps understand why the protection of religious minorities in EU countries has been granted through legal strategies and tools different from those adopted to protect national, ethnic and linguistic minorities.

[32] The limits of an approach to the issue of religious minorities exclusively based on the right to freedom of religion are discussed by J. A. van der Ven, *Religious Rights*, pp. 162-73.

[33] The European Court of Human Rights played a significant role in this area. As noted by K. Henrard (*Minority Specific Rights*, p. 24), "A general feature of the Court's jurisprudence on freedom of religion which is particularly positive for minorities and the accommodation of their special needs is the explicit protection of the group aspect of the freedom to manifest one's religion. As minority identity is inherently a group identity, the Court's protection of the community aspect of manifestation as an essential dimension of that right is surely to be welcomed". See also K. Henrard, *The Ambiguous Relationship*, pp. 52-53.

[34] N. Ghanea, 'Are Religious Minorities Really Minorities?' (2012), *Oxford Journal of Law and Religion*, pp. 1-23.

It also explains why religious minorities have remained on the fringes of the system of minority protection in force in EU countries.

A second element that deserves to be considered is the development of system of uniform law in many European States. This is a byproduct of the consolidation of nation states that took place between the Congress of Vienna and the Paris Peace Conference. Within a hundred years, the last empires still existing in Europe were dissolved and the process of formation of nation states was completed. In the legal field, the main manifestation of this process was the strengthening of a uniform legal model based on the principle that the same law must be applied to all within the state through a unified system of national courts. The plurality of legal systems and jurisdictions within the same political entity that had characterized empires, disappeared and left room for systems of uniform law, in line with the principle of coincidence between state and nation. This transformation had a negative impact on the rights of minorities, which the treaties for the protection of minorities that the new states were compelled to sign after the First World War, failed to eliminate. The self-government systems of minorities, which in various forms were in force in a significant part of Europe, disappeared and were replaced by uniform legislation. This shift from the internal plurality of legal systems to their uniformity is functional to the secularization of the law and institutions of the state. This process could not be completed without affirming the principle that civil and political rights are to be enjoyed by all citizens on an equal footing irrespective of their religious convictions. In this way, secularization and uniformization of the law are interlinked and place the question of religious minorities within the horizon of secular and uniform state law. In Western Europe, after the Second World War, this is the context for developing the right to religious freedom as a right granted by the state's secular law to all citizens on an equal and uniform footing. No space was left for special forms of protection of religious minorities that would have been scarcely compatible both with the secular and the uniform characteristics of state law[35].

However, (and this is the third feature of the European pattern) this drive towards the unification of law at a national level did not result in identical legal regulation of all religious communities. The idea that church and state are two distinct entities, which nation states inherited from the European Christian tradition, requires them to respect the internal organization and self-administration of religious groups. Therefore, once all citizens were granted the same political and civil rights, the state's legal systems refrained from applying the same uniform law model within the religious organizations. This meant, on the one hand, that states abstained from applying their own rules within religious groups and, on the other, that they adjusted their regulatory

[35] On this process see S. Ferrari, *Religious Rules*.

mechanisms to take into account the different organizational structures of religious communities. This is particularly evident in the countries that have adopted a system of agreements between state and religions, such as Italy, Spain, Germany and others, but also where other systems have been implemented states have refrained from imposing a uniform pattern of legal organization on religious communities. Many countries have different mechanisms of registration or recognition of religious communities according to the number of their followers, the time they have been active in a country, their degree of social integration. Similar remarks apply to the public funding of religious communities or their access to public mass media. Sometimes the respect for the diversity of the religious community masks the intent to maintain unjustified disparities but, on the whole and in spite of the processes of secularization and uniformization of the law, the legal systems of many European States have been able to accommodate religious diversity. This explains why the need to protect the autonomy of religious groups has been addressed, without making use of the legal tools adopted for protecting national, linguistic or ethnic minorities.

Obviously, the impact of these three elements -the secular character and the uniformity of the state law on the one hand and the accommodation of religious diversity on the other- differs from country to country and over time. The schematic explanation that has been provided here should be analytically verified, in light of the fact that in each country the path of secularization, uniformization and accommodation has been tortuous and marked both by progress and setbacks. In conclusion, from the vantage point of a scholar of law and religion, the lack of a system of protection of religious minorities comparable to that of national, linguistic or ethnic minorities can be explained by the convergence of the three elements for an alternative system of protection grounded in the right to religious freedom and non-discrimination. The pros and cons of this system will be considered in the next section of this article.

## IV. Management of religious diversity vs. protection of religious minorities

Taking into account this background, one can easily understand why scholarly discussions on the relations between state and religions (including minority religions) have never given the legal category "religious minorities" a central place. Law and religion scholars have traditionally preferred to frame the issue in terms of management of religious diversity, rather than in terms of protection of religious minorities. In this perspective, ensuring equal rights and freedoms to all religious groups is the main objective and, in the opinion of most law and religion scholars, this goal can be attained without envisaging special rights for religious minorities. This approach emerges clearly from the chapter devoted to Spain in this book with two remarks that echo in many national cases illustrated in the other chapters: "There is not a specific catalogue or list of fundamental rights for minorities in the Spanish Constitutional system. Nevertheless, all religious minorities are protected by the generic principles

of equality and non discrimination, and the general recognition of the fundamental right of religious freedom"[36]. It does not come as a surprise, then, that many national rapporteurs state that the structure of their national laws "relating to religion is such that no definition of a 'religious minority' is useful"[37]. As a consequence, they conclude that "special provisions safeguarding the rights and legal status of religious minorities do not seem necessary"[38] as "*une situatione sociale minoritaire n'implique pas, come telle, des traitements juridiques différents*"[39].

Few minority rights scholars would accept these conclusions and this disagreement signals a significant difference between them and law and religion scholars. The former focus on vulnerable groups and are primarily interested in seeking out legal strategies and tools that can minimize their handicaps. They see the links between different minorities and include religious minorities in a family of groups that face similar problems because of their minority status[40]. The latter place religious minorities within another family, made up of different religious groups. They focus on the links between religious majorities and minorities and are primarily interested in developing a system of state-religions relationships that is fair to both. The interest in religious minorities is the point of contact of the two groups of scholars, but each of them looks at the issue from a different point of view.

Is the specific approach of law and religion scholars to the issue of religious minorities comprehensive enough? Are they right to show some restraint in making use of the legal category of religious minority or, in doing so, are they missing out on opportunities to grant freedom of religion and equal treatment to disadvantaged religious groups? In conclusion, is there something that law and religion scholars could learn from minority scholars?

## V. The protection and promotion of religious identity

To answer this last question it is helpful to consider the cultural context in which the current debate on "new" religious minorities is taking place and to compare it with the one that involved, a few decades ago, "old" religious minorities. In the 1960s and the 1970s, when the gap between religious minorities and majorities started being filled, the debate was grounded in the principle of equal treatment. In an increasingly

[36] P. 165. See also the chapter on Latvia in this book ("All Latvian regulatory enactments do not talk about "religious minorities" but rather underscore equality and freedom of religion": p. 245).

[37] Chapter on The Netherlands, p. 325.

[38] Chapter on Germany, p. 308.

[39] Chapter on Austria, p. 189.

[40] See R. Medda-Windischer-K.Wonisch, *Old and New Minorities in the Middle East: Squaring the Circle through Common Solutions*, in *Maghreb-Machrek*, 2018/2, p. 216 : minority rights scholars are convinced that minority groups "have some basic common claims […], that they can be subsumed under a common definition and that the rationale for protecting them is fundamentally the same".

secularized society, the justification for the legal disparity between religious majority and minorities had become less and less evident and a movement for their (at least partial) levelling could develop and succeed. Nowadays the context within which the majority-minorities debate takes place is completely different and the issue of identity has taken center stage in the debate. On the one hand, the majority is afraid to lose its identity (including its religious identity) because of the growing number of non-European and non-Christian immigrants[41]; on the other, religious minorities want to wear their turbans, eat their halal food, and build their minarets because they are seeking recognition of their distinct identity. Like all discussions centered on identity, this debate is muddled and frequently exploited for political aims. However, this new focus is a fact and this is enough to raise the question whether the law and religion approach to the issue of religious minorities, focusing on freedom of religion, is still capable of managing a discussion based on the juxtaposition of different identities. This doubt is grounded in the fact that, in an increasing number of cases, the appeal to religious freedom has been successfully neutralized through a strategy of "culturalization of religion". It is hard to uphold the prohibition to build minarets on the grounds of religious freedom; it is much easier to defend it by claiming that minarets are alien to the culture and tradition of a country like Switzerland. It is equally hard to defend the public display of the crucifix in schools as a manifestation of religious freedom; it is much easier to support it as an expression of the national culture of Italy. It would be easy to adduce other examples, but the trend is quite clear: the effectiveness of the right to religious freedom is limited by the affirmation that a specific religion is part (or not) of the identity of a people, a nation or a country. Can minority rights scholarship provide us with tools to counteract this trend?

Minority rights scholars are more familiar with the legal implications of the issue of identity than their colleagues working on law and religion[42]. The principle of the protection and promotion of religious identity is formulated in art. 5 of the Framework Convention for the Protection of National Minorities which declares that states have the obligation "to preserve the essential elements of their [national minority] identity, namely their religion, language, traditions and cultural heritage" and has been extensively interpreted by the Framework Convention Advisory Committee[43]. It is true that in the FCNM, religion is regarded only as a component of national identity; hence, the lack of consensus concerning the Convention's applicability to religious

[41] "Immigration, more than anything else, has brought to the fore the question of national identity" (L. Orgad, *The Cultural Defense of Nations. A Liberal Theory of Majority Rights*, (Oxford, Oxford Univ. Press, 2015), p. 45 of the e-book).

[42] See however J. Martinez Torron, 'The (Un)protection of Individual Religious Identity in the Strasbourg Case Law '(2012) *Oxford Journal of Law and Religion*, pp. 363-385.

[43] See K. Henrard, *Minority Specific Rights*, p. 25 ff.

minorities that are not national minorities at the same time[44]. However art. 1.1 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities is more explicit. It specifically takes into consideration the religious identity of minorities when it affirms that "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity"[45]. This "identitarian" language is uncharacteristic of international and domestic legal documents on freedom of religion and this explains why the protection of religious identity is an understudied topic by law and religion scholars.

The exact scope and content of the protection of religious identity remains a little unclear, however it includes positive action by the state, something that the European Court of Human Rights tends to confine to a limited number of cases[46]. The Advisory Committee on the FCNM has argued that the promotion of religious identity includes "a duty to revitalize the religious heritage of particular minorities" and to "provide the necessary financial support" for the construction of their cemeteries[47]. Some scholars have correctly underlined that, "in their current interpretation", minority-specific rights (including the protection and promotion of religious identity) "do not add much to existing interpretations of the non-minority-specific right to religious freedom"[48]. However, teleological and evolutive interpretation methods can be used to broaden the application of this underdeveloped legal principle and assess whether it has the potentiality to address the claims of religious minorities in a way that can integrate the protection granted by the right of freedom of religion.

The prohibition to build minarets in Switzerland is a good test to evaluate how much this is feasible[49]. One of the reasons invoked to defend the prohibition of building minarets is that it does not limit the freedom of religion of Muslims, who can assemble and pray in the mosque. In the context of a minimalistic interpretation of freedom of religion, this argument is not without foundation and it may be easier to respond focusing on religious identity rather than freedom of religion. For centuries, the minaret has been part of the Muslim religious and architectural tradition. Outlaw-

[44] See F. Benoît-Rohmer, 'Droit des minorités et minorités religieuses', in J.-P. Bastian – F. Messner, *Minorités religieuses*, pp. 22-24.

[45] Similar provisions are contained in the OSCE Copenhagen Document on the Human Dimension (para. 32 and 33).

[46] See K. Henrard, *The Ambiguous Relationship*, pp. 55-56.

[47] K. Henrard, *Minority Specific Rights*, p. 27. For the Advisory Committee opinions on the places of worship and the religiously prescribed clothing see S. E. Berry, 'A Tale Of Two Instruments: Religious Minorities And The Council Of Europe's Rights Regime' (2012) 10, *Netherlands Quarterly of Human Rights*, p. 12.

[48] K. Henrard, *Minority Specific Rights*, p. 44.

[49] See footnote 3.

ing it entails placing a constraint on the Muslim religious heritage that states should not only protect, but also revitalize as part of their obligation to promote the identity of this specific religious minority. The same applies to confessional cemeteries. Where the law does not allow to build these facilities for any religion, it is difficult to argue in terms of violation of freedom of religion. It may be simpler and more effective to address the issue from the viewpoint of the protection and promotion of the religious identity of a minority group. These are just but a few examples, all pointing in the same direction: religious minority rights may be enhanced if the right to religious freedom is supplemented by that of protection and promotion of religious identity[50].

This is a sensitive matter that should be dealt with very carefully. In some cases, the protection of the religious identity of a group can conflict with the protection of the individual rights of its members (or the members of other groups); in others it can increase the state's burden to yield to the religious minorities demands and raise delicate problems of (un)equal treatment. However, the presence of communities recently migrated to Europe –the new religious minorities- is an opportunity to reflect on the need to integrate more human rights provisions aimed at protecting religious freedom with minority law provisions aimed at protecting religious identity.

## VI. Conclusion

Some minority rights scholars believe that fundamental rights, including that of religious freedom, "in their current formulation and interpretation do not provide adequate protection for religious minorities. Notwithstanding their trigger function, religious minorities are currently neglected by the fundamental rights paradigm in that their special vulnerability in terms of identity and substantive equality is not matched by appropriate – that is not absolute but reasonable protection"[51]. On the other hand, many law and religion scholars are concerned about the weakening of respect of the right to religious freedom, subject to increasing violations in every part of the

[50] This point is underlined by Berry, *A Tale of Two Instruments*, p. 12, who writes that "the standards established in the FCNM and by the AC to protect freedom of religion now confer a higher level of protection on religious minorities than Article 9 ECHR".

[51] K. Henrard, *The ambiguous relationship*, p. 85. 6. This opinion is shared by some law and religion scholars who underline the "relatively limited positive obligations that have been developed under the freedom of religion" and wonder "why the development of positive obligations in this context has been less elaborated than in some other areas of human rights law" (L. Lavrysen-E. Brems, 'The Right to Religious Freedom in International Human Rights Law: A Brief Overview and Exploration of its Positive Dimension', in R. Bottoni-S. Ferrari-M. Hill-A. Jamal (eds.), *Routledge Handbook of Freedom of Religion or Belief*, Abingdon, Routledge, 2020). These scholars conclude that, while the respect for the religious freedom of individuals and communities has been effectively guaranteed by the identification of precise State negative obligations, the fulfillment of this same freedom has been somewhat limited by the absence of equally precise provisions on the State positive obligations.

world[52]. We live in a historical period in which both the right of religious freedom and the rights of religious minorities are threatened by the resurgence of nationalistic drifts, often defended through invocation of the role played by a specific religion in developing the identity and the culture of a people. In this context, it is important that minority rights and law and religion scholars join forces to reflect on the synergies between freedom of religion and religious identity. Protecting and developing the religious identity of minorities is a way to strengthen freedom of religion for all, as this latter right is indivisible. A society where only religious majorities are free is not a society that respects freedom of religion. Better defining, within the framework of universal and indivisible human rights, the specific state obligations towards religious minorities and the special measures that states should adopt "to ensure appropriate conditions for the preservation and development of group identity which go beyond what follows from universal human rights"[53], goes well beyond the interests of religious minorities and concerns every human being.

[52] See, among many others, H. Bielefeldt, 'Freedom of Religion or Belief—A Human Right under Pressure' (2012), *Oxford Journal of Law and Religion,* pp. 15-35.

[53] R. Medda-Windischer-K. Wonisch, *Old and New Minorities in the Middle East* p. 211.

# THE STATUS OF RELIGIOUS MINORITIES IN THE EUROPEAN UNION: REFLECTIONS ON SOCIAL AND LEGAL CHANGES

Jeroen Temperman*

## I. Key Trends

The most striking commonality in the chapters of this book on country cases is the following: whereas on the whole, major *demographical* changes are charted, relatively few *legal* changes are to be noted (that is, on the point of *religious minorities* and legal ramifications of that notion specifically – not excluding the possibility of profound developments in the area of law and religion *sensu lato* or religious freedom *sensu lato*).

My reflections are structured in the following fashion:[1] I commence with pointing out a number of parallelisms and differences in the area of social change.[2] Subsequently, I engage with a few examples of the most profound legal changes in relation to religious minorities as reported in the country chapters of this book. Finally I present, by way of conclusion, a hypothesis with seeks to explain the inverse or rather absent correlation between social and legal change in the present area.

## II. Social Change (Demographics)

Most country chapters in this book discern profound changes in religious demographics over the last 25 years, mostly due to immigration and secularization. There are exceptions to this trend: majority Christian Orthodox states typically remain precisely that and with overwhelming numbers, at least nominally speaking. Also, the demographics of small island states are relatively less influenced by migration patterns as compared to the mainland.

* Professor of International Law and Religion, Erasmus University Rotterdam.

1 Largely following the structure of Part II of the Terms of Reference.

2 In the Terms of Reference largely defined as religious demographics.

Most rapidly rising minorities mentioned in a fair number of country chapters in this book are "those who do not belong to any religion" and Muslims. Both *secularization* and *migration*, especially from predominantly Muslim states, have effectuated the relative decline in adherence to the formerly dominant Christian denominations. To a (far) lesser extent the proliferation of new religious movements (NRM) is a cause here, as far as the data presented in the chapters are concerned.

### 1. On Muslim Demographics Specifically

What is interesting about the nearly universal rise in numbers of Muslims in European states is that many states struggle to quantify their presence and nearly all are working with educated guesses rather than official statistics. This of course has to do with the difference in organizational structures and dissimilar modes of membership of religions. Specifically, Muslims typically are not neatly being listed in congregation-style structures. And where national Islamic organizations exist, they typically capture only a fraction of the different schools or branches of Muslims present in a country. States also struggle with such questions as: When is a person who migrated from a Muslim country to be counted as Muslim? Is a child of a Muslim to be counted as Muslim? As the chapter on France describes this struggle for accuracy most strikingly, depending on what criteria a census uses the figure in France has varied from 2 to 6 million (!),[3] a massive discrepancy obviously.

### 2. On New Religious Movements Specifically

Country chapters in this book are generally rather scant on the notion and typically on the *rise* of new religious movements, let alone legal changes related to these movements. Chapters differ widely in approach and definition. For instance, the very concept of "new" may vary profoundly: mostly this is used in absolute terms denoting the recent origins of the religion in question as compared to Christianity or other world religions, but occasionally "new" is relative to the country under consideration, in which case such ancient religions – predating Christianity – as Buddhism are depicted as NRMs.[4]

## III. Legal Changes

The following concise overview should not be mistaken to mean large-scale, drastic legal changes and developments. The following legal changes have been reported in some states, almost always surrounded by major caveats as to the relative

[3] See the chapter on France.

[4] This particularity is very nicely described in the chapter on Poland.

modesty of such changes. In that light, then, it can be said that recent or ongoing legal changes in the area of religious minorities (treatment) include most typically the following:

## 1. Registration

Changes in registration procedures or outcomes are noted in a number of country chapters in this book. To mention some examples, in Poland dozens of religions and beliefs have received recognized status in the last 25 years, while in Finland the 2003 Freedom of Religion Act settled questions of registration. Furthermore, as far as ongoing change is concerned, in Germany the public corporation notion is under discussion.

## 2. Bilateralism

In some instances legal changes come about through bilateral negotiations between the beneficiary religious minority itself and the governing authorities of the country concerned.[5] Here I am of course referring to such countries as Italy (18 such agreements between 1984 and now); the cooperation agreements of Spain with the Evangelicals, Jews and Muslims; and to a lesser extent Portugal (worth mentioning is especially the 2015 Imamat Agreement). Occasionally, a similar model is *de jure* in place (like in Poland, following the 1993 Concordat and the 1997 Constitutional promise of extending agreements to other religions) yet *de facto* no agreement with minority religions is made by the Government, the rationale therefore being a mixture of a lack of political will and a lack of unity among religious representatives. This, it is contended, shows the risks and weaknesses of the bilateral model. The chapter on Spain also notes a lack of political will to extend cooperation to further minorities, including Christian Orthodox ones, despite interest on the latter's part. In Latvia the infamous "one denomination – one church" rule that impacts both registration per se and the governmental agreements with religious denominations shows another pitfall. In practise, these disparities in legal protection and privileges may be more or less remedied through a patchwork of more thematic acts and laws (e.g. Poland has extended equal rights or privileges in such thematic areas as education), rather begging the question whether thematic rather than inherently fraught bilateral approaches are not the best way forward.

## 3. Taxation

Especially in state church systems tax rules, and here notably the tithing schemes (church tax levied through income and/or corporation taxes) have recently been

[5] See e.g. the chapters on Poland, Spain, and Portugal.

reformed (e.g. in Finland). These legal developments tend to be something of an exception to the rule that the only legal change effected in this area is brought to the country top-down, i.e. through (international) judicial activism, rather than through competitive politics. In any event, it rather seems that changes in taxation systems, as far as their links to organized religion are concerned, stem from domestic political dialogue and social change.

## 4. (Other) Financial Ramifications

In those countries that traditionally subsidize religious groups, like Sweden, there is an interesting upshot of the increasing number of Muslims (and some other religious denominations): There is increasingly less funding available for the smaller religious minorities, as the bigger minorities take a profound dig in the coffers earmarked for this purpose.[6]

## 5. Education & Religion

Some legal changes concern the educational system and then in particular the manner in which religion is taught. Examples include Finland, Poland at level of kindergarten and in the area of optional ethics classes instead of religion classes as a result of European Court of Human Rights judgement.

## 6. Religion-State Relations (with an impact on religious minorities)

One instance of recent *separationism* was reported in the period under consideration, i.e. the last 25 years. In Sweden, church was separated from the state. This led to renewed and typically and interestingly *intensified* relations between state and religion, especially also including the minority religious groups. An example of an agreement that led to a far-reaching *state accommodation of one local religious minority* was reported in Greece, where in terms of family and personal status law the government has facilitated the application of Sharia law in Western Thrace. As the author of the chapter on Greece indicates,[7] all well and good from a minority rights perspective – less ideal from a "super-diversity" perspective, in this case notably a gender rights perspective.

## 7. Legal issues related to NRMs

As mentioned, country chapters in this book are generally scant on NRMs in general, hence including any legal developments in that regard. Adverse/repressive/

[6] See chapter on Sweden.
[7] See chapter on Greece.

hostile legal responses (from a minority rights perspective), are occasionally reported, such as the "anti-cult movement" in Poland which led to a special public body monitoring and warning against the activities of NRMs. Interestingly, occasionally such anti-cult activities are carried out in tandem with the dominant church. Again Poland is an example, where the Catholic Church enacted similar anti-cult centres and maintains them up until to date.

With the chapters on France and The Netherlands as notable exceptions, it is noted that few country chapters describe how the minority rights frame and the largely critical, legal-political discourse surrounding it in many European states has been preoccupied with Muslim minorities and questions of their integration or assimilation in particular and the concomitant question how that state of affairs – or mindset – may or may not adversely rub off on minorities and religious freedom in general. As the French rapporteur notes,[8] "religion" both socially and legally is increasingly framed as a "minority-thing", as a phenomenon that for reasons that were adopted in some remote past must be tolerated, but that is both politically but also socially increasingly re-casted as the seeds for sectarianism, segregation, radicalization, unrest, and age-old practises that no longer appear acceptable, be it from human rights, equality, animal welfare, or other contemporary ethical perspectives. A comparative perspective on this trend may be valuable and interesting.

## IV. Concluding Reflections

In sum, major social, *demographical* changes; relatively few *legal* changes. Explanations, in the form of the following hypotheses, are to be found in the area of *(f)actors for change* – a "sociology of legal change", if you will. First and foremost, while direct influence of former state churches in political matters is sharply on the decline, overall the legal status quo on matters pertaining to religious minorities and their legal treatment is maintained through a political constellation and political discourse that remains premised on the "old" normative status quo, i.e. typically a liberal and/or social but in any event *Christian* framework. What corroborates that thesis is this: What relatively little changes are reported typically stem from judicial strategies (under both international and domestic law) rather than legislative endeavours. Main actors in effecting changes for the good – from a minority (rights) perspective – appear to be international human rights monitoring bodies, notably the European Court of Human Rights, domestic constitutional courts, and in first instance of course religious organizations or religious individuals themselves. What is more, whenever the legislator *does* instigate legal changes in relation to minorities and their status in recent times such initiatives tend to have been ill-advised (Hungary being a worrying

[8] See chapter on France.

example), that is accompanied by major human rights concerns and criticism on the part of civil society and legal doctrine.

Thus actors in effecting changes appear to be international human rights monitoring bodies and domestic (UK should be listed here in particular, since the chapter on UK lists recent jurisprudence in relation to minority rights in the country)[9] courts and religious actors themselves. Moreover, legal changes tend to be ad hoc and in response of outright condemnation at the international level, typically by the European Court of Human Rights. Hence, legal change is brought about in fairly *top-down* manner as the case of Greece indicates best: most of the recent (i.e. last 25 years) legal changes have been made in response to "Strasbourg Court" convictions, over matters ranging from proselytism, to founding of houses of worship. In Austria the well-known registration cases before the European Court of Human Rights and the changes Parliament made to the multi-tier registration system in 2011 follow the same pattern.[10]

The influence of the International Covenant on Civil and Political Rights (ICCPR) and its UN Human Rights Committee are, by comparison, negligible. So is the OSCE and its non-binding instruments on legal personality among other issues.[11] Other Council of Europe instruments, besides the European Convention on Human Rights, are considered significant in some countries. In Cyprus,[12] it is for instance reported that the only legal changes seem to be steered on by the Framework Convention for the Protection of National Minorities (FCNM), having led to the acceptance of new categories of national minorities (but not to changes to the for the present purposes more important category of "religious groups"). In Sweden too, the FCNM has been a catalyst for legal change, more in particular the acceptance of additional groups, including religious ones as minorities. The European Union appears to be an important actor for change, notably through its Charter of Fundamental Rights and its non-discrimination law and non-discrimination norms in the workplace in particular.[13]

Very occasionally, change is engendered more bottom-up, more popularly, or democratically if you will. Think of the overruling of age-old church dictates entrenched in the law through *popular vote*, notably in Ireland through a series of recent constitutional referenda. This development is particularly interesting in light of its demographics. True, also in Ireland there is a sharp decline of adherence to the majority religion of Roman Catholicism, in the most recent years only from 84

[9] See chapter on the UK.

[10] See chapter on Austria.

[11] As far as data in chapters on country cases is concerned.

[12] See chapter on Cyprus.

[13] See also the other relevant secondary EU sources as analyzed in the chapter on EU law and policy.

to 78%, but that still is an overwhelming majority that nominally adheres to this religion.[14] What is more, Ireland according to one census is only second to Poland in terms of active religious observance (church attendance, praying and so forth).[15] So what these figures and recent legal changes indicate is that popular or "lived religion" and "ecclesiastical religion" may go their separate ways and if they do this may have legal ramifications. That is to say, while lifting bans on abortion, same-sex marriage, blasphemy and so on may be problematic from an ecclesiastical perspective, in contemporary "lived religion" religious individuals may have no trouble whatsoever reconciling their religion with the demands or challenges of modernity or with competing interests or values.

[14] See chapter on Ireland.
[15] *Ibid*.

# MINORITIES, MAJORITIES AND THE DIFFICULT TASK OF DEFINITION IN A CHANGING EUROPE

Ronan McCrea*

I have spent a lot of time thinking about the relationship between law and the state in Europe but have done so from a different perspective from that of those who focus on ecclesiastical law. In my work, I have normally focused on what limits the liberal democratic state places, or ought to place, on religious influence over law and politics rather than looking at the question of the organization of religious life and relationships with religious bodies. Certainly, there is some overlap between these two enquiries but a person's point of view does affect one's understanding and the conclusions drawn when presented with a mass of information. What strikes me when reviewing national reports of Consortium members, and now the chapters of this book, is in part the product of my perspective, but I hope that it is informative for you.

As someone who has focused mainly on European law, in the back of my mind when reading these chapters, I am always conscious of the Strasbourg and, to a lesser extent, the Luxembourg case law. The Strasbourg case law can be divided into two categories. In the first, which covers the regulation of religion's overall role in society, the Court of Human Rights is very deferential to symbolic links between faiths and the state, or restrictions on religious expression in state contexts. . The Strasbourg judges have been clear that they do not feel able to identify an ideal model for the regulation of religion's role in society and the state and as such, tolerate a wide range of arrangements - from symbolic endorsement of a faith by state (as in *Lautsi v Italy*[1] or recognizing the legitimacy of state churches) to French style laïcité (with the attendant restrictions on religious expression in state contexts).[2] Only when arrangements are noticeably oppressive (such as a mandatory religious oath in *Buscarini v San Marino*[3]) will the Court intervene.

* Professor of Constitutional and European Law, University College London.

1 *Lautsi v Italy,* Application No. 30814/06( 18 March 2011,Grand Chamber).

2 *Ebrahimian v France* (2015) ECHR 1041.

3 *Buscarini v San Marino* (1999) ECHR 7.

In the second category, the Court has been much less deferential. In relation to this category of case, namely, cases where the state has attempted to organize religious life by imposing registration requirements or by excluding some faiths from benefits intended to facilitate religious life and activity, the court has been quite interventionist. It has found fault with onerous registration requirements, such as in Hungary, and it has regularly found fault with states for refusing recognition of a faith as part of a wider pattern of discrimination in favour of a preferred faith, or against a disfavoured one (as in *Metropolitan Church of Bessarabia and Others v Moldova,*[4] *Metodiev v Bulgaria*[5]*, Izzetin Dogan v Turkey)*.[6]

Looking at the chapters, several things appear noteworthy. The first is the diversity of state arrangements. Some states have elaborate registration systems, while others are content to allow religious bodies to be a kind of voluntary association. This diversity is further reflected in the question of definitions. Both social science and the law have struggled to provide definitions of 'religion' or indeed of 'minority'. In both cases, we have a strong sense of being able to recognize it when we see it but have a hard time setting out a watertight definition. Restrictive approaches have been subject to pressure to liberalise, for example from the Latvian Constitutional Court or the European Court of Human Rights.

In relation to religion, the hard cases are provided by bodies such as the Pastafarian church of the flying spaghetti monster whose case for registration failed in Poland and the Netherlands. In Poland the court looked for evidence of concern with the sacred in a case about the Raelian movement and was happy to find that the Pastafarian church was merely a parody, an approach like that adopted by the Czech authorities. On the other hand, in relation to Scientology, the German courts were much more reluctant to recognize it as a faith, while the UK courts, applying a looser test than in Poland, looked for evidence of concern with spiritual matters and the infinite.

Just as lawyers and academics have struggled with defining religion, they have also struggled with the idea of a 'minority'. Reading the chapters, one gets the clear impression that the term 'minority' is standing in for something else and actually centers not on numerical weakness but on subordination or vulnerability.

However, even when the idea of minority as relating to a relative lack of power has been clarified, it does not fully clear things up. Reading the chapters, it is very striking that the issue of who is dominant or in control, and who is the vulnerable minority, is very unclear in Europe. This is one of the reasons why we have so much

[4] *Metropolitan Church of Bessarabia and Others v Moldova,* Application No 45701/99(13 December 2001).

[5] *Metodiev and Others v. Bulgaria*, Application No. 58088/08.

[6] *İzzettin Doğan and Others v. Turkey,* Application No. 58088/08.

heated litigation around religion in which both sides use the language of liberalism and minority rights.

In almost all European states there is a long history of dominance by Christianity and, indeed by a particular Christian denomination. Catholicism in, for example, France, Ireland, Spain, Poland, Austria and Portugal. Protestantism, in varying forms, in the UK, Netherlands, Sweden and Denmark.

But there are various complications. Sometimes minorities have been historically dominant. In Ireland for example, for most of the pre-independence period, the Protestant minority was politically and economically dominant and remained wealthier, on average, than the majority population. And in Latvia, the Russian (mainly Orthodox) minority, though less numerous, was powerful and privileged under Tsarist Russia and the USSR.

More fundamentally, while today in Europe most countries retain nominal Christian majorities, it is far from clear whether Christianity retains political or cultural dominance. In most countries, levels of nominal Christianity are far above levels of practice and, in some cases, even of belief in God. As the French chapter notes, as early as 1960, fewer than a quarter of the French population consisted of practicing Catholics. In Scandinavia, high levels of membership in the state churches (or former state churches) is combined with rock bottom levels of practice and very low levels of belief in core Christian teachings.

On issues like abortion and same sex marriage, in Western Europe, the orthodox Christian position is decisively in the minority. This has given rise to cases such as *Ladele*[7] in which Christians have sought to use rights to religious freedom to assert their right to publicly live out their now-minority beliefs in relation to marriage.

This emphasises just how great the degree of change Europe is going through. After centuries of Christianity being at the center of national culture and the day to day lives of Europeans, within a few decades it has moved to being a minority pursuit. This is a change of such magnitude that it is impossible to know how it will turn out. The chapters bring out quite noticeably that such changes mean we cannot tell clearly who is in control, leaving each side in emotive conflicts with ample opportunity to portray themselves as underdogs and victims.

Though we are in a state of unprecedented change, the chapters show how we are also institutionally and legally linked to the past. In one notable example, the representative of the Holy See has retained his status as doyen of the diplomatic community attached to the EU.

It is noticeable how the strongest protections for minority faiths tend to relate to older, long-established and smaller minorities. Catholics, Jews and Protestants have

[7] Decided as part of *Eweida and Others v United Kingdom* (2013) ECHR 37.

the strongest institutional status in Germany. In Cyprus, Maronites, Armenians and Latins have institutional recognition that newer faiths lack. In Ireland, the Protestant minority has special protection for its' schools. Often, we can see that where a religious minority is linked to a long-established ethnic or national minority, many of the benefits accruing to the religious minority are in fact piggybacking on protection of the national or ethnic group, rather than being specifically religious rights. As the chapter on the EU notes, in the case of the Union too, when the issue of the protection of religious minorities has come up in relation to the process of accession to the Union, it has often been because the religious minority in question is part of a national minority, such as the Greeks in Albania.

One issue it would be interesting to reflect upon is why there is such nervousness about addressing religious minorities directly and why the matter of religious minorities is so often indirect (as in relation to employment discrimination legislation in the EU, or the accession process). Dealing with religion qua religion, rather than as something that represents something else, like a personal or ethnic identity, seems to be something that the authorities in many states are reluctant to do.

This linking of religious minorities to another form of minority status, such as ethnicity, is important for two reasons. The first is because it leaves new religious movements, which tend not to be linked with a separate national or ethnic identity, with a lesser status. Secondly, it leaves the largest and most newsworthy religious minority in Europe, Islam, in an odd position. In some ways Islam, as a long-established, large faith which is within the Abrahamic tradition and therefore recognizable to Christians, is treated as an insider faith. Ritual slaughter, for example, is widely permitted.

On the other hand, in most countries, Islam does not generally benefit from the protections given to ethnic or national minorities that are religiously distinct (even though Muslims in Europe generally are relatively ethnically distinct). This is because (with some exceptions such as Cyprus, Greece, Bosnia and Kosovo) Islam arrived in Europe through migration. Muslim minorities were not present at the "constitutional moment" of independence, or establishment of a new constitutional order, and their status was not baked into the constitutional settlement as in Cyprus, Ireland, Austria and many other states who, at the moment of the establishment of their constitutional order, or independence, specifically addressed the question of rights of the religious minorities then present (which apart from Cyprus, did not at the time, include Islam).

As the chapter on the Netherlands notes, having arrived via migration over time, and sometimes thinking that, as guest workers their presence would be temporary, Muslims were slow to set up schools and institutions that other faiths set up with state assistance.

It is an interesting and controversial question whether minorities that arrive via migration ought to be treated in the same way as long-established religious minorities (and in Finland there is an interesting case of Islam moving from being seen as an old,

tiny, established minority whose presence came from links to the Russian Empire to a new minority constituted by recent immigrants from places such as Somalia) but I do not intend to get into that debate.

Finally, it is also notable how the rise of Islam is making worries that used to be confined to a small number of states, more mainstream. For historical reasons, Germany has long been suspicious of religions that it sees as in tension with its constitutional order. Scientology and Jehovah's Witnesses have faced difficulties due to German concerns about whether they promote undemocratic teachings. What is noticeable around Europe is the degree to which such concerns in relation to Islam are pushing states into closer regulation of religious activity. Security services in countries with larger Muslim populations, such as the Netherlands, the UK and France have taken an interest in what is going on in mosques. I was very struck by the part in the chapter on the Netherlands that noted how Amsterdam municipality gave a favourable lease for the construction of the Westermoskee but only on the condition that liberal Islam would be preached there.

In the UK, schools have been required for the first time to teach what are called "Fundamental British Values" of democracy, tolerance, religious freedom and the rule of law. This is a big departure from the previous tradition of suspicion of ideological approaches in Britain. These moves were driven by concerns about the teaching of extremist values in some Muslim schools, but they have also affected Orthodox Jewish schools in particular. In France, as is well known, there have been additional restrictions on the wearing of religious symbols in schools and a number of countries have been introducing integration tests that require those seeking naturalisation to show acceptance or awareness of values such as gender equality, religious freedom and tolerance of homosexuality. These may all be worthy values, but it is noticeable how concerns about the rise of Europe's fastest growing religious minority is pushing a firming up of enforcement of liberal and secular values.

To conclude, these chapters to me, speak above all to a Europe in flux. Institutionally, there is still a predominant Christian denomination in most places. States whose culture and identity were founded on Christianity for centuries can seek to be fair to religious minorities and to treat them equally as truth claims and as religious practices, but absolute religious neutrality is unattainable. Centuries of dominance have left institutional and symbolic traces that cannot be erased without a rupture with the necessary imagined shared past that national communities need. In addition, as Professor Rynkowski's chapter notes, there would be a degree of unfairness in treating all denominations entirely equally, for example by allowing the many millions of Catholics the same number of representatives in meetings with the Commission as the much smaller number of Mormons or Buddhists. Sometimes, as he points out, additional meetings are held with COMECE or other organisations, and that seems reasonable.

However, although a particular denomination is still primus inter pares, usually in Europe, these historically dominant denominations do not feel like dominant powers. On the contrary, nominal predominance exists alongside rising, and in Western Europe, dominant, secular and liberal values and, again in Western Europe, alongside an increasing Muslim minority which is occupying the minds of liberals and secularists more than the residual, historically dominant denomination.

The institutional and legal reality is much more stable than the sociological and political situation where, after centuries of Christian dominance, all the chips have been thrown in the air. How things will turn out is entirely unpredictable.

# THE PROTECTION OF RELIGIOUS MINORITIES IN EU LAW AND POLICY

Michał Rynkowski*

Protection of religious minorities under EU law and policy falls under the non-discrimination and equal opportunities policy of the EU[1]. The international framework and European context are presented in the chapter by D. Ferrari in this book. The protection of religious minorities in Europe falls primarily within the purview of the Council of Europe, which has created specialised fora, like ECRI (European Commission against the Racism and Intolerance)[2] to deal with these issues. The legal situation of religious minorities in the jurisprudence of the ECtHR is examined by many authors, including most recently E. Fokas in 2018[3]. The aim of this chapter is not to repeat the points already raised and discussed by other authors, but rather to scrutinize the issue of religious minorities at EU level from different angles, including:

1. (Indirect) protection of the religious minorities in the EU law.
2. Protection of religious minorities in EU candidate countries (Copenhagen criteria).
3. Religious minorities in the documents of the European Parliament: the "transparency register" as an example of non-discrimination.
4. Religious minorities in the jurisprudence of the Court of Justice of the EU.
5. Dialogue with churches and religious communities at EU-level: religious minorities.
6. Institutions, coordinators.

* Dr.iur. habil, LL.M.Eur. Former Assistant Professor at the Chair of International and European Law at the Faculty of Law, Administration and Economics, University of Wrocław, Poland. Since 2006 official of the European Commission. All the views presented in this paper are his personal opinion.

[1] Non-discrimination laws and policy were subject of the Consortium meeting in 2011, in Oxford and resulted in a book edited by Prof. Mark Hill QC.

[2] Although its name includes "European Commission", this body was created by the Council of Europe and should not be confused with the European Commission.

[3] Effie Fokas, 'The legal status of religious minorities: Exploring the impact of the European Court of Human Rights' (2018) 65(1), *Social Compass*, pp. 25-42.

Two preliminary remarks should be made:

a. the majority of these points could not have been discussed at the Consortium for Church and State Research's meeting in Thessaloniki 25 years ago.
b. EU efforts as regards the protection of the religious minorities apply primarily to the countries outside of the EU.

## I. (Indirect) protection of the religious minorities in the EU law

So far, there is no general EU definition of religion, or religious minority, which – given the general European context and the different positions of EU Member States – should not be surprising.

### 1. Primary EU law

Provisions concerning (religious) minorities are scattered, with the most important being Article 2 of the Treaty on the functioning of the EU, based on the Lisbon Treaty and Article I-2 of the draft Constitution of Europe[4]. At the time of the Consortium for Church and State Research's Thessaloniki meeting, this provision did not exist: its predecessor, Article 6, known at the time as Article F of the Treaty on the European Union (TEU) was and (still is) much more general. The text of such Article makes clear that the rights of the persons belonging to minorities – however defined - are important; yet lacks a specific focus on religious minorities[5]. Generally it is agreed that there are a few categories of minorities: ethnic, linguistic, religious and other, with some people belonging to various minority groups at the same time.

Article 3 (3) of the TEU, provides that the EU respects its rich cultural and linguistic diversity of Europe; however this provision does not allude to the religious diversity. Article 6 of the TEU stresses that the EU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights (FRC) of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

In the Charter there are also a few provisions, which are relevant to the protection of the religious minorities, however none of these provisions states this *expressis verbis*: Article 10 guarantees freedom of religion or belief; Article 14(3) rights of parents as regards the education, which may be of importance for minorities; Article 20 is on

[4] Rudolf Geiger, Daniel-Erasmus Khan, Markus Kotzur (ed.), *EUV/AEUV Kommentar*, München 2015, p. 15.

[5] Article 2 TEU (new Article): The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to **minorities**. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

equality; Article 21 on non-discrimination; and Article 22 of the FRC on diversity. While mentioning religion, Article 22 does not include a provision on minorities. The notion of religion is not legally defined and as suggested by the commentators, should be the subject of broad interpretation[6].

## 2. Secondary EU law

Secondary EU law deals with non-discrimination and equal opportunities, rather than with the protection of religious minorities. In the field of religion, the most common reference is Article 4 (2) of Directive 2000/78[7], which relates to organisations based on ethos, being a very broad definition of churches and religious communities. This Directive lists a range of situations where "a difference of treatment based on a person's religion or belief shall not constitute discrimination". However, this provision does not specifically aim at protecting religious minorities, and does so only indirectly. The main addressees of this paragraph are big churches, employing thousands of people in their countries.

The Racial Equality Directive (Directive 2000/43)[8] prohibits any discrimination based on racial or ethnic origin (Article 2). While the religious dimension is not mentioned, it is useful to refer to the chapter by D. Ferrari in this book, pointing out that membership to a religious minority is often linked with membership to an ethnic group, hence this directive indirectly applies to religious minorities. The national reports explain in detail the ways in which this directive was implemented in the legislation of the Member States.

## 3. Soft law

The EU Guidelines on the Promotion and Protection of Freedom of Religion and Belief[9] were adopted by the Foreign Affairs Council in June 2013 and refer exclusively to the EU's external relations. Importantly, point 7 of the Guidelines reiterates the EU's *leitmotiv* in the area of church-state relations: "The EU is impartial and is not aligned with any specific religion or belief".

[6] Carmen Thiele, Article 22 of the FRC, in: Matthias Pechstein, Carsten Nowak, Ulrich Häde (eds.): *Frankfurter Kommentar zu EUV, GRC und AEUV*, (Tübingen, Mohr Siebek, 2017), p. 1310.

[7] Council Directive 2000/78/EC of 27 Nov 2000 establishing a general framework for equal treatment in employment and occupation, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303, 2.12.2000, pp. 16-22.

[8] Council Directive 2000/43/EC of 29 Jun 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ L* 180, 19.7.2000, pp. 22-26.

[9] https://eeas.europa.eu/sites/eeas/files/137585.pdf, accessed on 15 Jan 2021.

## II. Religious minorities in accession negotiations

"Respect for and protection of minorities" is one of the EU's accession criteria, as defined by the European Council in Copenhagen in 1993. Religious minorities are not listed separately, but are understood as one type of minority. Assessments are conducted via the annual reports prepared by the European Commission. A recent example of an adaptation process during accession negotiations is Montenegro, that adopted a special law on the protection of the minorities, as pointed out by the Commission in the 2018 Montenegro report[10]. Similarly, as regards the ongoing negotiations with Albania, in its progress report[11] the Commission refers to the protection of minorities, although the primary focus is on ethnic minorities. Also, the newly adopted Albanian law on minorities refers to national minorities, which may coincide with religious minorities, but may also differ: in fact, one of the largest minorities in Albania is the Egyptian minority.

The Greek MEP M. Kefalogiannis (PPE) in a question[12] to the Commission explicitly asked about the situation of a minority he called the Greek minority: however, it is quite clear that in the Albanian context the Greek minority is to be understood as the Orthodox minority. In his answer on behalf of the Commission, Commissioner J. Hahn confirmed that he is aware of the situation and of the ongoing claims of the Albanian Autocephalous Orthodox Church concerning the return of the property seized by the Albanian communist regime.

The report on minority rights in the EU points out that once a country joins the EU, the matter of the minorities falls outside of the European Commission's remit[13], as it cannot rely on any instrument to control the situation within a Member State.

[10] Commission Staff Working Document, Montenegro 2018 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2018 Communication on EU Enlargement Policy {COM(2018) 450 final} Strasbourg, 17.4.2018 SWD(2018) 150 final; https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-montenegro-report.pdf, accessed on 15 Jan 2021, p. 28.

[11] Commission Staff Working Document, Albania 2018 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2018 Communication on EU Enlargement Policy, Strasbourg, 17.4.2018 SWD(2018) 151 final, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-albania-report.pdf, accessed on 15 Jan 2021, various pages.

[12] Question for written answer E-008662/2016.

[13] Towards a Comprehensive EU Protection System for Minorities, study commissioned by the EP, study 596.802, 2017, p. 53.

## III. Religious minorities in the documents of the European Parliament: the Transparency Register as an example of non-discrimination

The European Parliament adopted a number of resolutions, which address the situation of religious minorities in various countries of the world[14]. Members of the European Parliament attempted many times to defend religion, and (Christian) religious minorities in particular. The overwhelming majority of questions asked by the MEPs to the Commission and since its creation, to the European External Action Service, have referred to the situation of Christian minorities in the Middle East and worldwide. The European Parliament Intergroup on Freedom of Religion or Belief and on Religious Tolerance publishes on its website questions and events linked to this topic.[15] So far, there have only been a handful of EP questions concerning religious minorities in the EU, e.g. the situation concerning the Orthodox legacy in the Northern part of Cyprus.

Another interesting aspect was brought forth by the Lautsi case before the Grand Chamber of the European Court of Human Rights. This case, despite being an ECtHR case, is exceptionally invoked here, as 33 members of the European Parliament acted collectively as a third-party. However, it should be noted that the MEPs did not act in support of the applicant, who was representing a minority[16]. On the other hand, 33 members of the EP themselves constitute a minority of MEPs (at the time 751).

The European Parliament publishes on its website the transparency register, which lists all the organisations registered for lobbying purposes, and the staff that, equipped with a special EP-badge, is allowed to meet MEPs and their assistants. Particularly relevant is section V of this register[17] listing organisations representing

[14] E.g. 21 Jan 2010 attacks on Christian communities in Egypt and in Malaysia (P7_TA(2010)0005), 6 May 2010 Nigeria (P7_TA(2010)0157), 20 May 2010 Pakistan, 25 Nov 2010 Christian communities in Iraq, 20 Jan 2011 on the situation of Christians (P7_TA(2011)0021), 27 Oct 2011 again on the Christian communities in Egypt and Syria, 9 Oct 2013 persecution of Christians on Syria, Pakistan and Iran, commented in: Cornelis (Dennis) de Jong, 'The Contribution of the European Parliament to the Protection of Freedom of Religion or Belief through the External Relations of the European Union' in: Malcolm Evans, Peter Petkoff and Julian Rivers: *The Changing Nature of Religious Rights Under International Law* (Oxford, Oxford University Press, 2015).

[15] http://www.religiousfreedom.eu/work/parliamentary-questions/, accessed on 15 Jan 2021.

[16] "…that a State which, for reasons deriving from its history or its tradition, showed a preference for a particular religion did not exceed that margin. Accordingly, in their opinion, the display of crucifixes in public buildings did not conflict with the Convention, and the presence of religious symbols in the public space should not be seen as a form of indoctrination but the expression of a cultural unity and identity. They added that in this specific context religious symbols had a secular dimension and should therefore not be removed.", Appl. 30814/06, judgment of 18 Mar 2011.

[17] http://ec.europa.eu/transparencyregister/public/consultation/reportControllerPager.do?d-1924860-page=3&d-1924860-sort=&d-1924860-order=&action=search&categories=44, accessed on 15 Jan 2021.

churches and religious communities. These are 52 out of a total of 11892 registered organizations (as on 14 January 2019). It is worth highlighting that these are not churches, rather church offices, representing various Christian, Muslim, Jewish and Bahai denominations[18]. All these organisations are registered in the same category/list: there are no subdivisions or differentiations between organisations, hence minorities are in the same position as bigger churches/organisations. Two remarks may be added: firstly, what may discourage some organisations from registering, is the need to make public their annual budget and declare their sources of funding. Secondly, due to their own choice, some religious entities are represented on various levels: as an example, the Austrian Catholic diocese of Graz-Seckau is registered an institution (the "Welthaus" of the diocese), as the Austrian Bishop's Conference and as the European Bishops' Conference (COMECE). Similarly, the Church of England is represented both by the bishop of diocese for Europe and by the (Anglican) Procathedral of Holy Trinity in Brussels.

As regards the budget, the office of the Church of Scientology did not share any information on its budget and the European Muslims League presented a rather far-fetched budget (annual budget of 40.000 EUR for 40 staff members). The transparency register is a genuinely interesting source of information: the entry on COMECE lists all its seminars, major meetings and contacts with EU staff. What could be viewed as a sign of unequal treatment is the presence of Jean-Claude Juncker, President of the European Commission, at the farewell event of the Cardinal R. Marx, President of the COMECE in early 2018. Presumably Jean-Claude Juncker would not attend the farewell parties of the presidents of all of the 51 other registered religious organisations.

## IV. Religious minorities in the jurisprudence of the Court of Justice of the EU

This section can be divided in two subsection: cases relating to the protection of the minorities (mainly intra-EU cases), and cases relating to acts of persecution of religious minorities (mainly the extra-EU cases). ECJ jurisprudence on religious issues is very limited. In all the following cases but one (Catholic priest and missionary van Roosmalen[19]) reference is made to religious minorities living in the EU:

— Dutch national and member of the Scientology Church Ms van Duyn, was refused entry to the UK where she would take the position of secretary in the Church of the Scientology, due to public security concerns[20].

[18] Bahai was chronologically the first organisation to be registered.

[19] Judgment of the Court (Second Chamber) of 23 Oct 1986. A. J. M. van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen, Case 300/84, ECLI:EU:C:1986:402.

[20] Judgment of the Court of 4 Dec 1974, Yvonne van Duyn v Home Office. Case 41/74, ECLI:EU:C:1974:133.

— Jewish Ms Prais refused to sit an exam on a major Jewish holiday, to which the Council (of at the time European Community) responded by refusing to postpone the date of the exam for all aplicants. This was an obvious case, where rights of a person belonging to a minority were ignored[21].
— German national Mr Steymann who was working for the Bhagwan community[22] and the ECJ spoke in his favour, considering him a member of a religious community rendering services to the community and qualified this case under the "freedom to provide services".

The ECJ in the Bhagwan case ruled in favour of Mr Steymann and against the applicants in the Prais and van Duyn cases. The negative outcome was caused by their religious membership - directly in the van Duyn case and indirectly in the Prais cases. These cases are over 40 years old and perhaps, nowadays the ECJ would be more sensitive to issue, in particular in the van Duyn case. Looking at the Prais case, it would still be hard to expect the ECJ to consent to the Council organising exams on another day due to one applicant's need to celebrate a religious festivity.

The issue of religious minorities in the context of their persecution arose in two other judgments of the ECJ. As briefly mentioned above, in both cases the acts of persecution took place outside of the EU, and the cases were brought to the attention of the ECJ due to members of these minorities fleeing their countries of the origin. Interestingly, while the two Advocates General[23] *expressis verbis* used the term "religious minorities" in their opinions, the Court avoided using this term in its judgments.

In the case of an Ahmadiya member originating from Pakistan and applying for a visa[24], the ECJ ruling (Grand Chamber) in case C-71/11 gave hints as regards understanding acts of the persecution of religious minorities, which may be useful and helpful in other cases (bold by MR).

> On those grounds, the Court (Grand Chamber) hereby rules:
>
> 1. Articles 9(1)(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted must be interpreted as meaning that:
> — **not all interference with the right to freedom of religion** which infringes Article 10(1) of the Charter of Fundamental Rights of the European Union **is**

[21] Judgment of the Court (First Chamber) of 27 Oct 1976, Vivien Prais v Council of the European Communities, Case 130/75, ECLI:EU:C:1976:142.

[22] Judgment of the Court (Sixth Chamber) of 5 Oct 1988. Udo Steymann v Staatssecretaris van Justitie, Case 196/87, ECLI:EU:C:1988:475.

[23] In case C-638/16 PPU, opinion ECLI:EU:C:2017:93, X and X, 07 Feb 2017: Advocate General Mengozzi; in case C-71/11, Opinion ECLI:EU:C:2012:224, Y, 19 Apr 2012, Advocate General Bot.

[24] Case C-71/11, see above.

**capable of constituting an 'act of persecution'** within the meaning of that provision of the Directive;

— there may be an act of persecution as a result of interference with the external manifestation of that freedom, and

— for the purpose of determining **whether interference** with the right to freedom of religion which infringes Article 10(1) of the Charter of Fundamental Rights of the European Union **may constitute an 'act of persecution'**, the competent authorities must ascertain, in the light of the personal circumstances of the person concerned, whether that person, as a result of exercising that freedom in his country of origin, **runs a genuine risk of, inter alia, being prosecuted or subject to inhuman or degrading treatment or punishment by one of the actors referred to in Article 6 of Directive 2004/83".**

In another case, C-638/16 PPU, X, X v État belge, the preliminary ruling concerned the situation of the Orthodox Christians from Aleppo in Syria, in particular in the context of the Community Visa Code from 2009 and its references to the Articles 4 and 18 of the Charter of the Fundamental Rights (prohibition of torture and right to the asylum)[25] and as such is of limited importance for this paper.

## V. Dialogue with churches and religious communities at EU level – religious minorities

At the time of the Thessaloniki meeting, EU relations with the representatives of the religious organisations were formally inexistent. An exception in this regard was the Papal Nuncio of the Holy See, who had been enjoying the position of Doyen of the diplomatic corps accredited to the EC, irrespective of the date of his arrival and the seniority in this function. The rule of Papal Nuncio as Doyen is stipulated in Art. V of the Protocol, which was adopted when the Community consisted of 6, mainly traditionally Catholic, states. The subsequent accession of the UK, Scandinavian Lutheran and Southern (Orthodox) countries did not change this rule.

EU dialogue with churches and religious communities, as initiated in the 90's by President Jacques Delors, continues[26]. Within the Commission there is a coordinator in charge of such relations, Mr Vincent Depaigne, who in October 2017 replaced the previous coordinator, Ms Katharina von Schnurbein. The first employees tasked with sustaining EU dialogue (Mr Thomas Janssen, Mr Michael Weninger), were part of a

[25] Interpretation of Article 25(1)(a) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 Jul 2009 establishing a Community Code on Visas (Visa Code) (OJ 2009 L 243 p. 1) and of Articles 4 and 18 of the Charter of Fundamental Rights of the European Union ('the Charter'), submitted by Conseil du contentieux des étrangers (Council for asylum and immigration proceedings), Belgium.

[26] More about its history: S. Silvestri, 'Islam and Religion in the EU Political System' (2009) 32 (6), *West European Politics*, pp.1212-1239.

special body (Cellule de prospective, later renamed GOPA-Group of Policy Advisors and subsequently, BEPA- Bureau of the European Policy Advisers) reporting directly to the President of the Commission. At present, the coordinator is an official of the Unit "Fundamental Rights" in the Directorate-General for Justice and Consumer Affairs (DG JUST, C3).

The tradition of annual meetings between institutions, churches and religious communities continues unaltered[27]. As reported below, the dialogue seems to be inclusive and does not pose particular problems for minorities. The Commission through its representative – currently the First Vice-President, Mr. F. Timmermans - meets religious and non-religious leaders separately (the former are met in November, the latter in June).

As an example, a meeting in the format of the Article 17 (1) of the TFEU (Treaty on the Functioning of the European Union) took place on the topic of the Future of Europe, to discuss a value-based and effective Union, in Brussels, on 7 November 2017. The European Commission's First Vice-President Frans Timmermans, in the presence of European Parliament Vice-President Mairead McGuinness, hosted a high-level meeting with religious leaders from across Europe. The composition was balanced: from the list of the participants - which in the spirit of transparency is available on the website of the Commission - one can identify the presence of two representatives of the Catholic Church (COMECE), two representatives of the Lutheran/ Protestant Church (CEC-KEK), two members of the Orthodox Church, two imams, rabbis, one Buddhist and a Mormon. A similar meeting with non-religious leaders took place on 19 June 2017: during this meeting, 13 representatives of the humanist and freemasonry associations were present.

Another opportunity to discuss the future of Europe with churches and religious communities was a seminar under the same title, which took place in Brussels on 7 July 2017. The list of participants (31) seems to be well balanced, with the presence of the Catholic, Protestant, Orthodox and Mormon Churches, Jewish, Muslim, Quaker, Bahai and Hindu communities, as well a number of humanist associations and freemasons. The biggest absentee were Jehovah Witnesses.

On top of the meetings with the representatives of various religious communities, Mr Timmermans also holds individual meetings with religious representatives, as was the case on 28 March 2018, when he met with Muslim religious leaders.

The meetings with churches and religious organisations were the subject of a complaint, brought forward by the European Humanist Federation to the European

[27] All duly reported on the website of the Commission: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=50189, accessed on 15 Jan 2021.

Ombudsman[28]. The EHF proposed a seminar within the framework of the Article 17(3) of the TEU, yet the proposal was rejected by the Commission. Following a complaint by the EHF, the Ombudsman, Mr Diamandouros concluded that "By rejecting the complainant's proposal for a dialogue seminar, on the grounds that this would go beyond the spirit of Article 17 (1) and (2) TFEU, the Commission failed to properly implement Article 17(3) TFEU, according to which the EU is obliged to ***"maintain an open, transparent and regular dialogue"*** with churches, religious associations or communities, philosophical and non-confessional organisations. This constitutes an instance of maladministration."

The fact that the Commission holds additional meetings with the Catholic Church (COMECE - Commission of the Bishops' Conferences of the European Union), and Protestant Churches (CEC-KEK Conference of European Churches) could be perceived as unfair advantage. However, this could be justified by arguing that it would be discriminatory for the "big" churches to be treated like small religious communities. Big churches such as the Catholic and Protestant one are key players and employers in the countries in which they operate; hence, they are important partners not only in relation to the spiritual dimension of life, but also as regards more practical issues, such as working conditions, education requirements, etc.

So far, neither a concordat, nor "*Staatskirchenvertrag*", as it is known in Germany, nor an "*intesa*", as it is known in Italy, was signed between the EU and any church/religious community. First of all, the matters which could be the subject of any such treaty/convention, are relatively scarce, due to limited competencies of the EU in the area. Secondly, since the treaty would require approval by the Council of the EU, its procedural chances remain low.

## VI. Institutions, coordinators

The European institutional framework has been redesigned to address issues of non-discrimination. Interestingly, two religious minorities rely on designated interlocutors within the European Commission: Coordinator against Islamophobia Mr Davide Friggieri and Coordinator against Anti-Semitism, Ms Katharina von Schnurbein. They conduct a range of activities including roundtables with NGOs working on anti-Muslim hatred and discrimination. The 4th Roundtable, took place on 8 December 2017 in Brussels and was chaired by D. Friggieri.

[28] Decision of the European Ombudsman in its inquiry into complaint 2097/2011/RA Against The European Commission, Decision – Case 2097/2011/RA - opened on 15 Nov 2011, decision on 25 Jan 2013.

Following the European Parliament's Resolution on the Systematic Mass Murder of Religious Minorities by the So-Called 'ISIS/Daesh' (2016/2529(RSP) [29], Mr Ján Figel', previously a member of the European Commission, was appointed by the President of the Commission, Jean-Claude Juncker as the Special Envoy for the promotion of freedom of religion or belief outside the EU[30]. His third mandate runs until May 2019. His title and role highlight that the focus of Mr Figel's activities is on the countries outside of the EU.

The issue of discrimination of minorities remains within the scope of FRA's (Fundamental Rights Agency) agenda in Vienna. FRA publishes regularly reports on human rights issues. For the purpose of this discussion, two reports appear to be of particular importance, as they offer an updated and pan-European overview of the situation. One is the general report on the situation of the minorities[31], and the other– part of the same research project – focuses on Muslims[32]. Interestingly, the respondents –10.500 persons out of 25.000 thousands participating in the general study – are categorized by religious affiliation, even if ethnically they belong to various groups. The report demonstrates that religious discrimination is *ex aequo* in second place, alongside discrimination based on skin colour (12%), both of them preceded by discrimination based on ethnic origin (25%, report p. 23).

## VII. Conclusions

Generally, the law and the policies of the EU do not focus directly on the protection of the religious minorities. These questions constitute only a part of the general framework of non-discrimination and equal treatment.

[29] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0051+0+DOC+XML+V0//EN&language=EN, accessed on 15 Jan 2021.

[30] http://europa.eu/rapid/press-release_IP-16-1670_en.htm, accessed on 15 Jan 2021.

[31] Second European Union Minorities and Discrimination Survey. Main results. FRA, Vienna 2017, available under: http://fra.europa.eu/en/publication/2017/eumidis-ii-main-results, accessed on 15 Jan 2021.

[32] Second European Union Minorities and Discrimination Survey Muslims – Selected findings, Vienna 2017, available under: http://fra.europa.eu/en/publication/2017/second-european-union-minorities-and-discrimination-survey-eu-midis-ii-muslims, accessed on 15 Jan 2021.

# MAPPING THE LEGAL DEFINITION OF RELIGIOUS MINORITIES IN INTERNATIONAL AND EUROPEAN LAW

Daniele Ferrari*

## I. Introduction

The legal status of religious minorities has been the subject of an international Conference of the European Consortium for Church and State research held in Thessaloniki in November 1993[1]. In this Conference, the theme was investigated based on the following thematic breakdown: 1) legal definitions of religious minorities; 2) legal position and internal organisation; 3) legal rights or religious minorities: protection; 4) employment law: rights of religious observance in work; 5) law and religious education; 6) critique: religious neutrality; 2) myth?; 7) limitations on the exercise of religious rights. Since the 1993 Thessaloniki Conference, a range of legal and social processes have sparked the need for a new reflection on the theme of religious minorities. In particular, the concept of "religious minority" seems to have changed as a result of: 1) the transformation of law at the national, European and international level; 2) social transformations.

From a legal perspective, attention needs to be paid to the following factors: a) the recognition of new human rights (in particular LGBT rights); b) the recognition of new minorities; c) the debate on the protection of migrants and refugees; d) new interpretations of freedom of conscience and religion (in particular implying equality of believers and non-believers); e) new judicial interpretations of the concept of religious minority; f) innovative legal-sociological literature.

* Università degli studi di Siena; GSRL, EPHE – CNRS, Paris; DRES – CNRS, Strasbourg. A preliminary version of this chapter has been published in D. Ferrari, *Mapping the Legal Status of Religious Minorities in Europe. A contribution to the 2018 ECCSR Siena meeting*, in Il Diritto Ecclesiastico, 3-4: 2018, pp. 663-702. For an extensive overview on the topic, see D. Ferrari, *Il concetto di minoranza religiosa dal diritto internazionale al diritto europeo. Genesi, sviluppo e circolazione* (Bologna, il Mulino, 2019).

[1] AA VV, *The Legal Status of Religious Minorities in the Countries of the European Union. Proceedings of the Meeting (Thessaloniki, 19-20 November 1993)* (Milano, Giuffrè, 1994).

On the social level, the most important phenomena affecting religious minorities seem to be: a) migrations; b) change in relations between majorities and minorities; c) the emergence of new minorities and new majorities; d) the transformation of national societies in a pluralistic, multi-cultural and multi-religious direction; e) technological developments.

As a consequence of these phenomena, the complexity of religious minorities may depend on the following factors: a) the origin of the minority group; b) the nature of the link between individuals and the group; c) the single-minority or multi-minority nature of the group; d) the relations between minorities and majorities. As to the factor b, in particular, the link that binds the individual to the group can be determined by the free choice of the individual, or, on the contrary, by the choice of parents, the family, the group for the individual. In different terms, under factor c, religious minorities can be mono-minorities, when religion is the only qualifying factor, or multi-minorities, when religion combines with other factors such as language, ethnicity, gender, or sexual orientation as in the case of religious and linguistic minorities (eg Jewish communities), religious and ethnic minorities (eg Druze communities), religious, linguistic and ethnic minorities (eg Armenians), religious and gender minorities (eg Muslim feminists), and religious minorities also sharing the same views on sexual orientation (eg The Inclusive Mosque Initiative).

Having acknowledged the importance of a bi-dimensional, social and legal understanding of religious minorities, this chapter will be limited to mapping the definition of religious minority in its legal dimension, from which derives the legal status of minorities[2].

## II. The legal definition

In the following pages, the legal definition and the resulting status of religious minorities will be mapped based on three indicators: a) the linguistic use of the notion of religious minority in legal sources; b) legal rules referring to religious minorities; c) models of legal recognition of religious minorities.

With regard to the first indicator, legal sources may refer implicitly or explicitly to the notion of religious minority. With regard to the second indicator, religious minorities can be recognised: a) in international or national law; b) in unilateral (state) or bilateral sources (state and minority agreements); c) in case law; d) in literature. In relation to the third indicator, the legal model can: a) be binding or non-binding for the state; b) affect the degree of protection; c) recognize individual and/or collective

[2] In particular, the legal status coincides with the characteristics used by international and European law to qualify a group as a religious minority, whose members are holders of specific rights. For the notion of legal status, see P. Barile, *Le libertà nella Costituzione. Lezioni* (Padova, Cedam, 1966), p. 25.

rights; d) impose duties; e) derogate or not derogate from general law; f) identify criteria for determining who belongs to a given minority, regardless or in respect of the autonomy of the individual.

The three indicators may overlap according to variable combinations, as, for example, in: a) implicit or explicit definitions contained in international or national law that recognize rights and/or duties to religious minorities; b) extensive or restrictive interpretations of implicit or explicit norms given in judgments of international or national courts; c) comprehensive or restrictive scholarly interpretations of the rights recognized to minority members in international or national law.

Depending on how the three indicators are interpreted in international and national law, religious minorities are: a) implicitly defined or b) explicitly defined.

In the first case, the implicit definition emerges from a) the provision of specific rights (such as freedom of conscience, religious freedom, freedom of education, cultural freedom, right to asylum); b) the protection of specific communities (such as peoples, religious or social groups, national minorities, generic minorities); c) the non-discrimination principle.

In the second case, the explicit definition results from the application of three interpretative criteria: a) objective (quantitative, territorial); b) subjective (the will of the group not to be assimilated to the majority); c) historical (traditional religious minorities).

Even if this chapter is totally devoted to mapping definitions of religious minority with a protective intent, it is necessary at this stage to make clear that legal definitions of religious minority can also be given with the intent, or at least the effect, of limiting their freedom and rights. Such a typology of restriction-oriented definitions may result from the application of five normative criteria aimed at drawing the line between majorities and minorities: a) scientific criteria (such as race); b) cultural criteria (such as civilization, ancestry); c) general grounds for restrictions of freedom (such as security, public order and morality); d) protection of human rights; e) general principles (such as the principle of non-discrimination based on gender or sexual orientation).

The scientific criteria have been largely adopted in the past. On the one hand, in colonial times various international acts concerning sovereignty over the colonies resorted at the cultural criterion of civilization in order to separate the civilised to "uncivilized". On the other hand, the persecution of Jewish individuals and communities, in particular in the first half of the twentieth century, exemplifies the application of allegedly scientific criteria (in this case biology-determined race) in order to single out a group, possibly a religious minority, with the aim of restricting its freedom[3].

[3] *Les status des juifs en France en Allemagne et en Italie: texte et analyse des dispositions en vigueur*, Lyon, Express-Documents, 1941.

As for general grounds for restrictions of freedom, in today EU law and policy implicit definitions can derive from restrictions to the activity of religious minorities, which are justified in the name of limitations such as, in the case law of the Court of Strasbourg, public order[4], public health[5], public morality[6], public security[7], and the rights and freedoms of others[8].

As to protection of human rights, asylum cases provide further examples of restriction-oriented definitions of religious minority. Terrorist activities carried by the applicant constitute a cause of exclusion of the individual from asylum under the Geneva Convention[9] and the Qualification Directive[10]. As a consequence, members of religious minorities who are carriers of subversive doctrines against human rights will not be entitled to the recognition of refugee status. The exclusion clause, however, must be applied prudently by state authorities, so as to avoid that it become an instrument to sanction specific religious affiliations[11] perceived as alien in the country where the asylum application is lodged.

Concerning the last normative criteria (under e) in the list above), significant restrictions of religious minorities, and correlated implicit definitions of those, can also derive from the development of international and European law in the field of gender equality and protection from discrimination or persecution based on sexual orientation and gender. In EU law sexual orientation is approached both a reason for persecution and a factor based on which one belongs to a particular social group[12]. In this regard, according to the EU standard, discriminatory or persecutory behaviour is forbidden even if motivated by the beliefs of an individual or a group[13].

[4] *Serif v Grecia* (1999) 31 EHRR 561, [55].

[5] *X v Germany* (1981), 24 DR 151.

[6] *Wingrove v U.K.* (1996), 24 EHRR 1.

[7] *Refah Partisi (the Welfare Party) and Others v Turkey*, Appl no. 41340/98, 41342/98, 41343/98 and 41344/98 (ECHR, GC, 13 February 2003). Security as such is not a permissible ground for restrictions under Article 9 n. 2 of the European Convention.

[8] *S.A.S. v France*, Appl no. 43835/11 (ECHR, GC, 01 July 2014); *Eweida and others v The United Kingdom* (2013), ECHR 37.

[9] Convention Relating to the Status of Refugees 1951, Article 1, l. f).

[10] Directive 2011/83/UE, Article 12, Paragraph 2, l. c).

[11] The Strasbourg Court ruled on the link between terrorism and asylum; see *Nasr et Ghali c. Italie*, Appl no 44883/09 (ECHR, 23 February 2016).

[12] Council Directive 2004/83/EC of 29 April 2004 - Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011.

[13] W. C. Durham and D. Thayer, *Religion and Equality. Law in conflict* (London-New York, Routledge, 2016); J. Corvino and R. T. Anderson-S. Girgis, *Debating Religious Liberty and Discrimination* (Oxford, Oxford University Press, 2017); T. F. Farr and J. Friedman and T. S. Shah (ed.), *Religious Freedom and Gay Rights. Emerging Conflicts in North America and Europe* (Oxford, Oxford University Press, 2016).

Further witnessing the importance of the normative criterion under e), in its Guidelines on Questions of Protection for Sexual Orientation[14], the UN Refugee Agency has highlighted the possible interference between sexual orientation and religion, whereas religion can legitimize the homosexuality of the persecuted as an abomination or, on the contrary, teach acceptance of LGBT people. Furthermore, the UNHCR has clarified that in the context of religious persecution[15], homophobic positions expressed within the LGBT asylum seeker's religion can motivate the choice of a conversion to a new religion in the host country. In this perspective, the protection of sexual orientation has the effect of excluding intolerant and homophobic doctrines professed by majority or minority religious groups from the protection of freedom of belief.

After the preliminary clarification of the complexities of the legal definition of religious minority, the next two parts will be devoted to mapping the implicit and the explicit definitions.

## III. The Implicit Legal Definition

### 1. The provision of specific rights

With regard to specific rights, the definition and the correlated legal status of religious minorities emerge from the protection of: a.1.) freedom of conscience and religion, a.2.) freedom of education, a.3.) cultural freedom, a.3.) right to asylum, a.4.) LGBT rights.

#### A. *Freedom of conscience and religion*

The notion of religious freedom can be traced back to historical sources of international (Peace of Westphalia, 1648, Articles 5-44; Treaty of Berlin, 13 July 1878) and national law (Edict of Nantes, 1598), and then, after WWII, in sources from the United Nations (Article 18, Universal Declaration of Human Rights), the Council of Europe (Article 9, European Convention on Human Rights, 1950), the Conference, then Organization for Security and Cooperation in Europe (Charter of Paris for a new Europe, 1990) and the European Union (Article 10, Charter of Fundamental Rights of the European Union, 2000). At the same time, religious freedom was also enshrined in domestic constitutions. Extending protection to both the individual and the collective levels, the recognition of freedom of conscience and religion implicitly protects religious minorities with regard to the individual sphere (freedom of the individual to join or not join denominational or philosophical groups[16]; freedom of the individual to

[14] UN Doc HCR/GIP/12/09/2012.

[15] UN Doc HCR/GIP/04/06/2004, p. 13.

[16] *Mirolubovs et Others v. Latvia* (2009), App no 798/05 (ECHR, 15 September 2009), [80].

manifest or conceal their religious affiliation[17]; freedom of propaganda[18]) as well as to the collective sphere (definition of religious community or organization[19]; autonomy of religious or philosophical groups to include or exclude their affiliates[20]; autonomy of groups opposed to the state[21]).

Starting from the Universal Declaration of 1948 (Article 18), the reference in international sources to freedom of thought, conscience and religion, as well as to freedom of religion or belief, is deemed by international institutions and supranational courts to have broadened the scope of protection.

The United Nations High Commissioner for Refugees (UNHCR) [22] and EU[23] institutions have broadly interpreted the notion of religion in relation to refugee status so as to include atheists, agnostics, indifferentists, pagans and superstitious. Since the case of Kokkinakis v. Greece, the Court of Strasbourg has interpreted the right to freedom of thought, conscience and religion as "a precious asset" not only for believers, but also "for atheists, agnostics, sceptics and the unconcerned"[24].

The broadened scope of protection extends to the concept of religion or belief organization. In this sense, Article 17 of the Treaty on the Functioning of the European Union, includes both religious organizations and philosophical and non-confessional organizations, as interlocutors in the institutional dialogue with the European Commission. Religious minorities can, therefore, coincide with both groups committed to transcendent doctrines and groups of atheists, agnostics and humanists.

### B. *Freedom of education*

The provision of the freedom of parents to educate their children in accordance with their beliefs or convictions, is a significant guarantee of religious minorities (Article 13, para. 3, the International Covenant on Economic, Social and Cultural Rights, 1966; Article 18, International Convention on the Rights of the Child, 1990, Article 2, Additional Protocol to the ECHR, 1952, Article 14, paragraph 3, Charter of Fundamental Rights of the European Union). Members of minority groups are protected, in fact, from the risk of being pressured into educational choices by the majority, for example through educational policies of forced assimilation to the precepts of the dominant religion. In these terms, the right to education is realized in accordance to

[17] *Buscarini and Others v. S. Marino* (1999), App no 24645/94 (ECHR, 18 February 1999).

[18] *Jehovah's Witnesses of Moscow v. Russia* (2010), App no 302/02 (ECHR, 10 June 2010), [139].

[19] *Izzettin Doğan e altri v Turchia*, App no 62649/1026 (ECHR, GC, 26 Avril 2016), [68].

[20] *Sviato-Mykhaïlivska Parafiya v Ukraine* (2007), App no 77703/03 (ECHR, 14 June 2007), [146].

[21] *Sindicatul Pastorul Cel Bun v Roumanie*, App no 2330/09 (ECHR, GC, 9 July 2013), [137].

[22] UN Doc., HCR/GIP/04/06, p. 3.

[23] Article 10, Paragraph 1, l. b), Directive 2011/95/UE of the European Parliament and of the Council of 13 December 2011.

[24] *Kokkinakis v. Greece*, App no. 14307/88 (ECHR, 25 May 1993), [31].

the freedom of the minority group by establishing schools inspired by the professed doctrine or in a system of neutral public education that respects the moral identity of pupils and students. In this sense, the Court of Strasbourg has stated, pursuant to Article 2, Additional Protocol to the ECHR, that, first, the European Convention includes the obligation to allow the establishment of separate schools[25], in order to respect the religious and philosophical convictions of families, and, second, that the obligation to attend religious education does not respect the objectivity and pluralism of teaching programs[26].

### C. *Cultural freedom*

The right of a group to have its own culture and to preserve it, is included in various international sources (Declaration of the principles of international cultural cooperation, UNESCO, 1966, Article 2, paragraph 3; Convention on the protection and promotion of cultural diversity, UNESCO, 2005, Article 3; International Covenant on Economic, Social and Cultural Rights, 1966, Article 1; Charter of Fundamental Rights of the European Union, 2000, Article 22). The link between religion and culture has emerged in international sources in the process of defining both the notion of culture and groups entitled to cultural rights. Regarding the definition of culture, in the preamble of the UNESCO Universal Declaration on Cultural Diversity of 2001, culture has been defined as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group; so defined, culture encompasses not only art and literature, but also lifestyles, ways of living together, value systems, traditions and beliefs.

With regard to the entitlement to cultural rights, UNESCO in both the Declaration on Cultural Diversity and the Convention on the Protection and Promotion of Cultural Diversity of 2005 identified indigenous minorities and peoples as the main holders of the right to cultural diversity. Consequently, the cultural identity of religious minorities needs to be protected through the promotion (libraries, museums, exhibitions) and dissemination (books, shows, documentaries), of the relevant traditions. The right to culture also becomes particularly significant if the group possesses, in addition to religion, ethnic and/or linguistic characteristics, that are officially recognized as differentiating the group from the rest of the population.

[25] The value of pluralism in education, pursuant to Article 2 of the Prot. n. 1, strengthens the right of parents to the respect of their beliefs in educating their children, which includes, even if implicitly, the right to set up and run private schools: *Joredbo Foundation of Christian School and Jordebo v Sweden*, App no 11533/85 (ECHR, 6 March 1987), [128]; *Verein Gemeinsames Lernen v Austria* (1995), 20 EHRR CD 78; ECHR, *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, [54].

[26] *Folgero and others v Norway*, App no. 15472/02 (ECHR, GC, 20 March 2007).

### D. *The right to asylum*

The international recognition of the status of religious refugee constitutes a protection for members of persecuted religious minorities (Article 1, l. a), Paragraph 1, Geneva Convention on the Status of Refugees, 1951; Article 10, Paragraph 1, l. b), Directive 2011/95/EU, laying down the rules governing the attribution of a uniform status for refugees or for persons entitled to subsidiary protection and the content of the recognized protection, 2011). As a result, the individual belonging to a religious minority is protected through the status of religious refugee, whenever a well-founded fear of being persecuted in the country of origin is established by the competent authority.

### E. *LGBT rights*

The recent, progressive recognition of LGBT rights has had an impact on the definition and the legal status of religious minorities through the protection of the right of freedom of conscience and religion of homosexual persons[27]. The new international standard based on the principle of non-discrimination on grounds of sexual orientation has been applied to freedom of thought, conscience and religion within the Yogyakarta Principles of 2007. Principle 21 clarifies that States shall: a) Take all necessary legislative, administrative and other measures to ensure the right of persons, regardless of sexual orientation or gender identity, to hold and practise religious and non-religious beliefs, alone or in association with others, to be free from interference with their beliefs and to be free from coercion or the imposition of beliefs. In this sense, the religious freedom of LGBT people can be protected from discrimination, also in relation to their affiliation or non-affiliation with religious minorities. In the report "Minority Rights: International Standards and Guidance for Implementation", the High Commissioner for Human Rights has observed that "the question often arises as to whether, for example, persons with disabilities, persons belonging to certain political groups or persons with a particular sexual orientation or identity (lesbian, gay, bisexual, transgender or intersexual persons) constitute minorities. While the United Nations Minorities Declaration is devoted to national, ethnic, religious and linguistic minorities, the report says, it is also important to combat multiple discrimination and address situations where a person belonging to a national or ethnic, religious and linguistic minority is also discriminated against on other grounds such as gender, disability or sexual orientation"[28].

[27] N. Bamforth, *Sexual Orientation and Rights* (Abingdon, Routledge, 2015); D. Ferrari, *Status giuridico ed orientamento sessuale. La condizione giuridica dell'omosessualità dalla sanzione, alla liberazione, alla dignità* (Pavia, Primiceri Editore, 2015).

[28] UN Doc., HR/PUB/10/3/2010, p. 3.

## 2. The protection of specific communities

In terms of protection of specific social groups, religious minorities can be included in the concept of: a) people, b) religious or social group, c) national minority, d) minority.

### A. *The notion of people and indigenous people*

Religious minorities can be included in the concept of people (Article I, International Covenant on Civil and Political Rights, Article I, International Covenant on Economic, Social and Cultural Rights) or of indigenous population (ILO, Indigenous and Tribal Peoples Convention, 1989; UN Declaration on the Rights of Indigenous Peoples, 2007)[29]. As far as their implications for the notion of religious minority are concerned, the notions of people and indigenous people can be examined from two different perspectives: the role of religion in the definition of these categories[30] and the right to self-determination[31].

With regard to the first perspective, in the absence of a definition of people in international sources, UNESCO has defined it as a group of human beings that have many characteristics in common, which might include religious or ideological affinities[32]. With regard to the relation between the notion of minority and the notion of people, the Working Group on Minorities of the Commission on Human Rights has argued that the rights of minorities are individual rights, while the right of self-determination of peoples is a collective right. However, the two can coincide, when a minority claims the right to self-determination[33]. This happens, for example, if the minority group defends its right not to be excluded from political decision-making processes or if, through the request of specific statutes of autonomy or through secession processes, the minority aims at to making itself relatively or absolutely independent from the state the minority belongs to,

Under the second perspective, the link between indigenous people and religion has emerged in definitions adopted both in international law sources and in documents by UN institutions. With regard to the sources, in the preamble to the Indigenous

[29] A. Gudmundur, "Minorities, Indigenous and Tribal Peoples: Definitions of Terms as a Matter of International Law" in N Ghanea-Hercock and A. Xanthaki (eds.), *Minorities, Peoples and Self-Determination: Essays in honour of Patrick Thornberry* (Nijhoff, Brill, 2005), pp. 163-172.

[30] T. D. Musgrave, *Self-Determination and National Minorities* (Oxford, Oxford University Press, 1997).

[31] A. Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (Oxford, Oxford University Press, 2001).

[32] UNESCO Doc. SHS- 89/CONF. 602/7/1990.

[33] ONU Doc., E/CN.4/Sub.2/AC.5/2005/2/2005, p. 5.

and Tribal People Convention[34], the connection between the autochthonous group and religion emerges when the aspiration of the indigenous people to maintain and develop their own religion is recognized. Similarly, the Declaration on the Rights of Indigenous People[35] makes several references to the relation between religion and indigenous peoples. Among these references, particularly important is Article 12, Paragraph 1, where it is expected that: "Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies".

At the UN level, indigenous peoples have been defined by the UN Permanent Forum on Indigenous Peoples as a group that has a specific link with a given territory, with its own social, political and economic systems, a language, a culture and specific beliefs[36]. Jose R. Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities underlined the importance of the religious element by stating that "religion as an element of indigenous culture (that) is always implied"[37].

Additionally, in relation to the rights of indigenous people, the UN Committee on Human Rights has recognized, since 1994, the right of representatives of indigenous peoples to claim the collective rights of the group to which they belong, pursuant to Article 27 of the International Covenant on Civil and Political Rights, which recognizes and protects the rights of religious, ethnic and linguistic minorities. The Committee clarifies that the:

> "enjoyment of the rights to which Article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that Article - for example, to enjoy a specific culture - may consist in a way of life which is closely associated with territory and use of its resources. This may be particularly true regarding members of indigenous communities constituting a minority"[38].

The connection between the categories of indigenous peoples and minorities was further stressed by the Office of the United Nations High Commissioner for Human Rights:

> "in practical terms, a number of connections and commonalities exist between indigenous peoples and national, ethnic, linguistic and religious minorities. Both groups are usually in a non-dominant position in the society in which they live and

[34] Indigenous and Tribal Peoples Convention, 1989.

[35] Declaration on the Rights of Indigenous People, 2007.

[36] Office of the United Nations High Commissioner for Human Rights, *Indigenous Peoples and the United Nations Human Rights System* (Fact Sheet No. 9/Rev.2), 2013, p. 3.

[37] UN Doc. E/CN.4/Sub.2/1982/2/Add.6/1982, p. 21.

[38] UN Doc. HRI\GEN\1\Rev.1/1994, p. 39.

> their cultures, languages or religious beliefs may be different from the majority or the dominant groups"[39].

On the same vein, the Office also underlined that "minorities and indigenous peoples have some similar rights under international law"[40].

Communities qualifying both as religious minorities and as indigenous peoples often express their religious identity in the relationship between religion, cultural traditions and territory[41]. With reference to the relationship between religion and the indigenous culture, as highlighted by the United Nations, the concept of indigenous spirituality deemed "inherently connected to culture"[42]. Therefore, "adopting policies that promote certain religions or prohibit indigenous spiritual practices, or the failure of laws or other governmental institutions, such as the police and courts, to respect indigenous spiritual practices, can undermine the right to culture" [43].

The connection between rights linked to land ownership and religious freedom emerges from Article 12, Paragraph 1, of the Declaration on the Rights of Indigenous People, which protects "the right to maintain, protect, and have access in privacy to their religious and cultural sites", as well as from Article 14, Paragraph 1, of the Indigenous and Tribal peoples Convention, which guarantees the right of the natives to ownership and possession of the lands which they traditionally occupy. Because of the special connection between the identity of the indigenous religious minorities and their local traditions, the guarantee of the land-based continuity of these traditions is a key tool of protection in order to avoid that minority groups are victims of assimilation policies.

### B. *The notion of religious or social group*

The category of protected religious or social group has a significant impact on the definition of religious minorities whenever it is resorted at with the aim of protecting the existence of the group or prohibiting the segregation thereof.

With regard to the first aspect, the right to the existence of religious minorities is protected within international sources that punish crimes against humanity, war crimes, the crime of genocide, as well as in sources protecting religious refugees.

[39] Office of the United Nations High Commissioner for Human Rights, *Minority Rights: International Standards and Guidance for Implementation*, (HR/PUB/10/3), 2011, 3.

[40] Office of the United Nations High Commissioner for Human Rights, *Indigenous Peoples and the United Nations Human Rights System* (…), cit., 3.

[41] International Law Association, *Final Report of the Sofia Conference. Rights of indigenous peoples*, 2012 file:///C:/Users/danie/Downloads/Conference%20Report%20Sofia%202012%20(1).pdf (accessed 28 June 2018).

[42] UN Document HR/PUB/13/2/2013, p. 14.

[43] *Ibidem*.

In relation to crimes against humanity, the link with religious minorities emerges in the definition of acts that can integrate such crimes contained in the Statute of the International Criminal Court[44]. In fact, beyond the genocide case envisaged in Article 6 and which will be analysed in more detail below, crimes against humanity can coincide with:

> "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court"[45].

With regard to war crimes, "attacks against buildings dedicated to religion" are defined as war crimes by the Statute of the Court (Article 8, Paragraph 2, l. b), n. 9). The punishment of these acts will protect the religious freedom of minorities victims of the destruction of their places of worship.

Regarding the crime of genocide, the Convention for the Prevention and Repression of the Crime of Genocide of 1948 at Article II defines religious groups as made of vulnerable individuals and implicitly protects the right of religious minorities to physical existence. The crime of genocide, in particular, is defined as:

> "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group"[46].

The Convention has been developed in several documents by the UN Office on Genocide Prevention and the Responsibility to Protect[47]. An example of its impact on religious minorities can be found in a resolution of 4 February 2016, where the European Parliament refers to the Convention as an instrument offering protection to religious minorities victims of systemic violence in Syria:

> "«ISIS/Daesh» is committing genocide against Christians and Yazidis, and other religious and ethnic minorities, who do not agree with the so-called 'ISIS/Daesh' interpretation of Islam, and that this therefore entails action under the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide;

[44] Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, UN Doc. A/CONF.183/9/1998.

[45] *Ivi*, Article 7, Paragraph 1, l. h).

[46] *Ivi*, Article 6.

[47] http://www.un.org/en/genocideprevention/crimes-against-humanity.html (accessed 10 July 2018).

> underlines the fact that those who intentionally, for ethnic or religious reasons, conspire in, plan, incite, commit or attempt to commit, are complicit in or support atrocities should be brought to justice and prosecuted for violations of international law, notably war crimes, crimes against humanity and genocide"[48].

The fight on segregation is another major vehicle for the impact of the category of protected religious or social group on religious minorities. An example can be found in the punishment of the crime of apartheid. The 1976 International Convention on the Suppression and Punishment of the Crime of Apartheid protects racial groups and groups in general from the risk of being segregated from dominant groups through violent attacks or acts of discrimination or persecution. Such protection applies both to racial groups and groups sharing other identifying features and thus it can also be invoked by religious minorities in case of apartheid on an ethnic-religious basis, or of apartheid on a religious basis only. In the first case, the group is a victim of segregation for ethnic and religious reasons at the same time. In the second case, the religious minority is the victim of exclusion policies due to the professed faith. The importance of the Convention on the Crime of Apartheid with respect to the guarantee of minority rights was highlighted by the UN Working Group on Minorities, when experts stressed the importance of protecting the right of minorities to access all forms of participation in national society[49].

In both the protection of the very existence of the group and the fight on segregation, the religious refugee status and the notion of persecuted religious group has come to play a key role.

Based on the refugee status as defined by the Geneva Convention (Article 1, para. 2), EU law (Article 10, Directive 2011/95/EU) provides guidelines on the attribution of the status of beneficiary of international protection to third country nationals or stateless persons, and to members of particular social groups persecuted because they share fundamental beliefs of conscience or a common identity.

The UNHCR has defined a particular social group as

> "a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights"[50].

Religious persecution is defined by the UNHCR, both in the Handbook on Procedures and Criteria for Determining Refugee Status, and in the Guidelines for Asylum Seekers for Religious Reasons, by reference to undue restriction of freedoms

[48] European Parliament, *Resolution of 4 February 2016 on the systematic mass murder of religious minorities by the so-called 'ISIS/Daesh'* (2016/2529(RSP).

[49] UN Doc. E/CN.4/Sub.2/AC.5/2001/2, p. 7.

[50] UN Doc. HCR/GIP/02/2002, p. 3.

of religion or belief beyond the scope of permissible limitations of Article 18, co. 3, of the ICCPR.

Religious minorities and persecuted religious groups may, or may not coincide, since refugee status can be recognized to subjects belonging "to a religious minority or majority"[51]. In particular, a persecuted group coincides with a religious minority when the individual is persecuted a) because of his or her association with a cohesive or non-cohesive minority; b) because the persecutors believe that the person adheres to a minority doctrine different from the one actually professed; c) because of a conversion occurred sur place; d) through attempts of forced conversion.

As for the first case, as explained by the UNHCR, "there is no requirement that the group should be «cohesive»(...) it is not necessary that the followers of a religion or those who express a certain political opinion attend or belong to a «cohesive» group"[52]. It is therefore possible to recognize the status of religious persecuted person both to members of cohesive religious minorities and to members of non-cohesive religious minorities.

As for the second case, the High Commissioner has clarified that: "it may not be necessary, for instance, for an individual (or a group) to declare that he or she belongs to a religion, is of a particular religious faith, or adheres to religious practices, where the persecutor imputes or attributes this religion, faith or practice to the individual or group"[53]. As a result, the risk of persecution needs to be assessed regardless of the real or perceived nature of the affiliation.

As for the third case, the risk of persecution may arise from the choice of the asylum seeker to convert to a new religion in the country of arrival. The conversion of the applicant to a new religion can, in particular, alternatively determine, in the country of origin and in the host country, the transition from a religious majority to a religious minority, from a religious minority to a religious majority, or from a religious minority to a new religious minority. With regard to the country of origin, in many cases, conversion exposes the individual to the risk of persecution, when the dominant group identifies with the former religion. In these cases, for example, conversion to a new faith can be punished under the crime of apostasy. In this regard, the European Court of Human Rights recommended that Member States carefully evaluate the consequences of conversion in their country of origin, in order not to expose applicants to the risk of suffering inhuman and degrading treatment through expulsion measures[54].

[51] UN Doc. HCR/GIP/04/06/2004, p. 5.

[52] UN Doc. HCR/GIP/02/02, p. 4.

[53] *Ivi*, 4.

[54] The Grand Chamber eventually upheld the appeal, rejected at first instance by the Court of Strasbourg, which held that there were no elements to suppose that the Iranian authorities were aware

As for the fourth case, the assimilation of a religious minority to the majority doctrine through actions aimed at the forced conversion represents "a serious violation of the fundamental human right to freedom of thought, conscience and religion and would often satisfy the objective component of persecution"[55].

### C. *The notion of national minority*

The concept of national minority comes into account first with regard to the definition and recognition of the rights of national minorities (UN, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 2, 2001; Conference on Security and Cooperation in Europe (CSCE), Helsinki Final Act, Paragraph VII, 1975; Council of Europe, Framework Convention for the Protection of National Minorities, 1995), and second with regard to the prohibition of discrimination based on nationality.

UN institutions, the Council of Europe[56] and the OSCE[57] have defined national minorities as coinciding or not with ethnic, religious or linguistic minorities. In its commentary on the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the UN Working Group on Minorities has expressed the view that national minorities are necessarily also ethnic, linguistic or religious minorities. This definition does not exclude the existence of specific cases in which the rights granted to the national minority are different from those recognized to other types of minorities. As highlighted in the Capotorti Report of 1979[58], origin is the criterion of distinction between national and religious minorities: only historical religious minorities can qualify as national minorities, while the new religious minorities that derive, for example, from migratory processes, whose members are not holders of the nationality or citizenship of the state, cannot be considered as national minorities. The fact that these religious groups belong to one or the other category has an effect on the rights recognized at international and national level. In accordance with these principles, the UN Working Group on Minorities clarifies that the rights deriving from the national identity of a group can be invoked only by historical religious groups, as minorities "long established in the territory may have stronger rights

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of the applicant's conversion to Christianity See *F.G. vs Sweden*, App no 43611/11 (ECHR, GC, 23 March 2016).

[55] UN Doc. HCR/GIP/04/06/2004, p. 7.

[56] Conseil de l'Europe, *Rapport du Comité d'experts sur les droits de l'homme au Comité des Ministres*, DH/Exo (73) 47, 9 November 1973.

[57] OSCE, High Commissioner on National Minorities, *Information about the mandate and the activities of the OSCE High Commissioner on National Minorities*, 2017 <http://www.osce.org/hcnm/33317?download=true> (accessed 21 Avril 2018).

[58] UN Document ST/HR(05)/H852/no.5/1979, p. 12.

than those that have recently arrived"[59]. In this perspective, the UN Working Group on Minorities stresses that "persons belonging to groups defined solely as religious minorities might be held to have only those special minority rights which relate to the profession and practice of their religion", unlike the national religious minorities that will be recipients of "stronger rights relating not only to their culture but to the preservation and development of their national identity"[60].

The Council of Europe's Committee of Ministers adopted a Framework Convention for the Protection of National Minorities in 1994. The definition of national minority was the subject of the work of the Committee of Ministers (CAHMIN), the advisory body of the Committee of Ministers, composed of experts in the field of national minorities. The Committee identified a specific link between religion and nationality, observing that "in a variety of state parties, the understanding of the term «national minority» is linked to specific characteristics that are often considered as emblematic for identity and for differentiating the minority from the majority, including language, religion, culture, ethnic background, specific traditions or visible features". In this sense, according to the Committee, "the right to manifest one's religion, for instance, as also stipulated in Article 9 of the European Convention on Human Rights, must be extended to all persons belonging to national minorities"[61].

In the OSCE context, in 2012 the High Commissioner on National Minorities clarified in The Ljubljana Guidelines on Integration of Diverse Societies that "The term, as used in the Guidelines, refers to a wide range of minority groups, including ethnic, religious, linguistic and cultural communities"[62]. The legal status of religious groups can thus benefit from rights of minorities in areas such as: recognition of diversity and multiple identities; primacy of voluntary self-identification; non-isolationist approach to minority issues; shared public institutions, a sense of belonging and mutual accommodation; inclusion and effective participation; rights and duties; inter-community relations; policies targeting both majorities and minorities.

The prohibition of discrimination is laid down in international sources, with general formulas (Council of Europe, European Convention on Human Rights, Article 14, 1950; EU, Charter of Fundamental Rights of the Union, Article 21, 2000), within individual discriminatory clauses (UN, International Convention on the Elimination of All Forms of Racial Discrimination, Article 1, Paragraph 1, 4 January 1969), or in specific sectors such as teaching (UNESCO, Convention on the fight against discrimination in the field of education).

[59] UN Doc. E/CN.4/Sub.2/AC.5/2001/2, p. 3.

[60] *Ibidem*.

[61] UN Doc. ACFC/56DOC(2016)001, pp. 15-17.

[62] High Commissioner on National Minorities, *The Ljubljana Guidelines on Integration of Diverse Societies*, 2012, p. 4.

## D. *The notion of minority*

EU law applies the general category of minorities in both the procedure for the accession of new states and the protection of minority rights.

In the first case, the protection of minorities emerged within the Copenhagen criteria of 1993, which establish the rules for the enlargement of the Union to new states. The conclusions of the Danish Summit stated that "membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities"[63]. The assessment of the condition of minority groups in candidate states is entrusted to the European Commission which expresses, through regular reports, opinions on developments in the relevant candidate state (Article 49 of the Treaty on the European Union, henceforth TEU)[64]. As an example, the 2016 Turkey 'report highlighted that the candidate country

> "is the only member of the Council of Europe that does not recognise the right to conscientious objection for conscripts. Outstanding issues concerning the Alevi community need to be tackled, including the implementation of several ECtHR judgments. The Ecumenical Patriarchate received no indication from the authorities that it may use the «ecumenical» title freely. Venice Commission recommendations on this issue are yet to be implemented. No steps were taken to open the Halki (Heybeliada) Greek Orthodox Seminary. There were reactions triggered by the controversial use of the Hagia Sophia, which is a museum situated within a listed UNESCO world heritage site, for marking religious celebrations. The Armenian Patriarchate's proposal to open a university department for Armenian language and clergy has been pending for several years. Similar demands have been made by different Christian communities who sought to train clergy. Similar problems exist over the construction of places of worship. Hate speech and hate crimes against Christians and Jews continued to be repeatedly reported"[65].

In the second case of the protection of minority rights, Article 2 of the TEU, in enunciating the values on which the European Union is founded and which the Member States must respect (human dignity, freedom, democracy, equality, law), refers to the pluralism that must characterize the social system, and to the correlated obligation of Member States to recognize the rights of minorities[66]. In this perspective, the

[63] European Council, *Copenhagen criteria*, Paragraph 7 «*Relations with the Countries of Central and Eastern Europe* », l. a) « *The Associated Countries*», 1993.

[64] Consolidated version of the Treaty on European Union (C 362/13) 2012, Article 49.

[65] European Commission, Commission Staff Working Document, *Turkey 2016 Report. Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* (COM(2016) 715 final), pp. 71-72.

[66] Consolidated version of the Treaty on European Union 2012, Article 2.

Fundamental Right Agency of Vienna has issued several reports on the conditions of minorities in the Member States. In particular, in the "European Union Minorities and Discrimination Survey - Main Results Report" of 2009, FRA noted that:

> "having a non-majority religion was generally considered to be a barrier in the workplace by fewer respondents in each country (compared to ethnic background); though still about six out of 10 respondents in the Netherlands, Denmark and Sweden (Figure 3.1.3) thought it to be a drawback. The rate of those who considered that a non-majority religious background was a disadvantage was lowest in Ireland, Malta (one in three respondents in both countries) and especially in Portugal (14%); but again, the rate of indecisive respondents was also the highest in these three countries (19-23%), which would seem to indicate a lack of knowledge/experience among respondents on which to base their opinion"[67].

## 3. **The non-discrimination principle**

The non-discrimination principle affects religious minorities implicitly, when generally referred to religion or other risk factors, or explicitly, in case of specific protection of those belonging a religious minority. For the purpose of this chapter, in this section we will analyse the first case only, the second belonging to the category of explicit protection to be dealt with later in the chapter.

The principle of non-discrimination on a religious basis protects from direct and indirect discrimination the right to exercise, in an individual or associated form, freedom of conscience and religion in a general sense (UN, Pact Convention on Civil and Political Rights, Articles 4-20-24-25; Council of Europe, European Convention of Human Rights, Article 14; European Union, Charter of Fundamental Rights of the European Union, Article 21) and in specific areas (European Union, Directive 2000/78/EC on labour). This principle is crucial, since religious minorities are often in a subordinate and vulnerable position compared to a dominant group and, therefore, run a greater risk of being discriminated against.

When dealing with the general protection from religious discrimination, the European Court of Human Rights has ruled on several appeal cases by members of religious minorities who complained of a violation of Articles 9 and 14 of the Convention in relation to various areas, such as the exercise of worship[68], conscientious objection[69], and the right to privacy[70]. In relation to specific areas of protection, EU Direc-

[67] FRA, *EU-MIDIS. European Union Minorities and Discrimination Survey. Main Results Report*, 2010, 85.

[68] *Austrianu v Romania* (2013), ECHR 134.

[69] *Thlimmenos v Greece* App no. 34369/97 (ECHR, GC, 6 April 2000).

[70] *Sinan Işık v Turkey*, App no. 21924/05 (ECHR, 02 May 2010).

tive 2000/78/EC[71] protects the working rights of individual affiliates to a religious minority (Article 3) and the autonomy of minority groups (Article 4, Paragraph 2).

Prohibition of discrimination on religious grounds in employment implicitly protects those belonging to religious minorities. The Court of Justice has clarified, in two preliminary rulings relating to two Islamic workers, that: a) not in all cases the prohibition of wearing religious symbols in the workplace is direct discrimination[72]; b) the willingness of an employer to take into account the desire of a client or customer, not to receive services from an employee wearing an Islamic headscarf, cannot be considered as an essential and determining requisite in relation to Article 2, Paragraph 2, l. b) of Directive 2000/78/EC[73].

According to the first ruling, the treatment can be objectively justified by a legitimate purpose, such as the pursuit, by the employer, of political, philosophical and religious neutrality when relating to clients or customers, providing that the instruments used by the employer are appropriate and necessary[74].

In the second ruling, the Court distinguished between two possible models of anti-discriminatory judgment: b.1.) in the presence of a prohibition to wear religious symbols, provided by internal rules of the company, it is necessary to check whether the prescription places the Muslim worker in a condition of particular disadvantage and if the aim pursued is legitimate[75]; b.2.) in the absence of any internal provision, on the other hand, only objective requirements inherent to the nature of a work activity or in the context in which it is carried out may justify an unequal treatment, pursuant to Article 2, Paragraph 2, l. b) of Directive 2000/78/EC, but not subjective elements, as in case (b), where an employer applies such rule to satisfy the wishes of the customers of a company[76].

In connection with these cases, the 2017 report "Religious clothing and symbols in employment" of the European network of legal experts in gender equality and non-discrimination stressed the importance of to the status of religious minorities, in particular of Islamic communities, in EU Member States:

> "the overview of national case law demonstrated that bans on the wearing of religious clothing and symbols have been challenged in the courts in a number of Member States. The case law almost exclusively concerns clothing or symbols of

[71] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[72] *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijdin v G4S Secure Solutions NV*, C-157/15 (CJ, GC, 14 March 2017).

[73] *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole SA, già Micropole Univers SA*, C-188/15 (CJ, GC, 14 March 2017).

[74] *Samira Achbita (...)*, cit., [34] and [38].

[75] *Asma Bougnaoui*, cit., [32] and [33].

[76] *Ivi*, [40].

> the Islamic religion, although the bans that are in place are all formulated in neutral language and ban all religious clothing or symbols. The fact that the case law overwhelmingly concerns Islamic headscarves and face-covering veils, suggests that the Muslim religion and its clothing and symbols are particularly problematic in many EU Member States"[77].

Also impacting on religious minorities is the right of EU states to provide exceptions to the right to prohibition of discrimination, for those organizations or associations, public or private, whose ethics is based on a religion or belief. In this regard, the Advocate General at the EU Court of Justice has recently pointed out that the protection of the right to self-determination of the organization must be evaluated in the workplace on the basis of the link between the tasks of the worker and the values pursued by the organization[78].

The category and protection of religious minorities can also depend on discrimination based on other risk factors.

Firstly, this occurs whenever the relevant group is a minority not only on a religious basis, but also on an ethnic one. The Declaration on Race and Racial Prejudice of 1978 identifies one of the possible causes of religious intolerance in racism (Article 3). Discrimination based on religion can therefore be punished under the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. In this case, the prohibition of racial discrimination is defined as a condition for the effective enjoyment of rights, in particular to freedom of thought, conscience and religion (Article 5, Paragraph 1, l, d), n. VII). EU law takes inspiration from the UN model in Directive 2000/43/EC on ethnic or racial discrimination in access to goods and services[79].

Non-religious risk factors can be variously associated with the religious element. It is the case, for example, of gender, race or sexual orientation (Article 21, Paragraph 1, EU Charter of Fundamental Rights). In this case of multiple discrimination[80], the group is a minority with reference not only to religion, but also to other characteristics. In multi-minority groups the individual belongs to two or more minorities and has multi-minority identities.

[77] E. Howard, European network of legal experts in gender equality and non-discrimination, *Religious clothing and symbols in Employment. A legal analysis of the situation in the EU Member States*, 2017, p. 106.

[78] Opinion of Advocate Tanchev delivered on 9 November 2017, Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung E.V.*

[79] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[80] European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, *Tackling Multiple Discrimination: Practices, policies and laws* <file:///C:/Users/danie/Downloads/multdis_en.pdf> 2007 (accessed 12 May 2018).

## IV. The Explicit Legal Definition

With regard to the explicit legal definition, the notion and status of religious minority emerge chronologically in the sources of the League of Nations, then in UN sources[81] and, finally, in the Council of Europe and the European Union law and policy[82]. This definitional process identifies two different meanings of the religious element as pertaining a) to national belonging, and b) to the universal and European protection of human rights.

### 1. Religious minorities and nationality

At the end of the First World War, the identification of religious, ethnic and linguistic minorities with respect to the majority is based on the principle of nationality: the majority shares the same racial, religious and linguistic affiliation[83]. In the international treaties of the first post-war period, religion is qualified as a factor of national identity: religion, together with language and ethnicity, becomes a criterion of distinction between majorities and minorities in a given nation[84]. In this context, the League of Nations drew up a model for the protection of religious minorities within specific treaties[85], special chapters included in peace treaties or treaties[86], Statements before the Council of the League of Nations[87]. Minorities are recognized as eligible for individual protection: equality before the law and prohibition of discrimination based on race, language or religion, free use of minority languages, recognition of

[81] S. Wheatley, *Democracy, Minorities and International Law* (Cambridge, Cambridge University Press, 2005).

[82] J. P. Bastian and F. Messner (eds.), *Minorités religieuses dans l'espace européen : approches sociologiques et juridiques* (Paris, PUF, 2007).

[83] Cf., *ex multiis*, P. Azcàrate, *League of Nations and National Minorities: An experiment* (Washington, Carnegie Endowment for International Peace, 1945); J. L. Brun, *Le problème des minorités devant le droit international* (Paris, Spes, 1923); R. Brunet, *De la protection des minorités par la Société des Nationes* (Paris, E. Desta, 1925); E. Colban, 'La Società delle Nazioni e il problema delle minoranze' (1925) 242 *Nuova antologia di lettere, scienze ed arti* , p. 171-181. 1925; A. De Balogh, *La protection internationale des minorités* (Paris, Les editions internationales, 1930); J. Fouques Duparc, *La protection des minorités de race, de langue et de religion : Étude de droit des gens* (Paris, Dalloz, *1922);* A. Mandelstam, *La protection des minorités (Cours de l'Académie du droit international de la Haye)* (Brill, Nijhoff-Leiden-Boston, 1923); B. Pirro, *La protezione delle minoranze per opera della Società delle Nazioni* (Roma, Garroni, 1924); A. C. Rudesco, *Étude sur la question des minorités : de race, de langue et de religion* (Lausanne, Payot e C, 1929) ; A. P. Sereni, *Il diritto internazionale delle minoranze* (Roma, Athenaeum, 1930).

[84] P. Stanislao Mancini, *Della nazionalità come fondamento del diritto delle genti* (Torino, Giappichelli, 2000).

[85] For example, Treaty of Versailles, 28 June 1919.

[86] Section V, Protection of Minorities, Treaty of Saint-Germain-en-Laye, 10 September 1918.

[87] Finland, 27 june 1921; Albania, 2 ottobre 1921; Lithuania, 12 May 1921.

freedom of religion and worship, freedom of education. In this model, religious minorities have been defined in international law on the basis of an objective element, a subjective element and a relational element: minorities are numerically inferior to majorities, as they profess a different religion (objective element); the members of the group are united by the faith professed and want to preserve their identity and their traditions (subjective element); religious minorities must be loyal to the majority and not represent a dominant group (relational element).

The subjective and objective element constitute the first definition of minority contained in an advisory opinion on the Greece-Bulgaria treaty elaborated by the International Court of Justice in 1930. In particular, the Court defined the concept of minority as:

> "a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other"[88].

The relational element emerges in the various acts that the internal institutions of the League of Nations adopted with regard to the elaboration of the procedures for guaranteeing the rights of minorities in the event of violation of the treaties. In particular, the Assembly in 1922, affirming the right of minorities not to be oppressed, emphasized the duty of minority groups to behave as loyal citizens towards the nation they belong to[89].

## 2. **Universal and European protection of human rights of religious minorities**

The international protection of human rights after World War II has a bearing on the status of religious minorities on the level of international law at universal and European level[90]. In this perspective, the explicit notion emerges in both the universal legal status, and the European legal status.

[88] Permanent Court of International Justice, *Greco-Bulgarian Communities*, Advisory Opinion, 1930 P.C.I.J. (ser. B) No. 17 (July 31), pp. 19-33. Cf. N. Feinberg, 'La juridiction et la jurisprudence de la Cour permanente de justice internationale en matière de mandats et de minorités' (1937) 1. *Le Recueil des Cours de l'Académie de Droit international de La Haye*, pp. 591-708.

[89] League of Nations, Assembly, Resolution, 21 September 1922.

[90] F. Rousso Lenoir, *Minorités et droits de l'homme : l'Europe et son double* (Bruxelles and Paris, Bruylant/LGDJ, 1994); N. Lerner, The evolution of Minority Rights in Catherine Brolman et al. (eds.), in *Peoples and Minorities in International Law*, (Cambridge, Brill, 1993), p. 44.

## A. *The universal legal status*

With the Universal Declaration of 1948, the international community was faced with a twofold challenge to the pre-existing system of protection of religious minorities. Substantially, the system needed to adjust to the human rights centered new model as well as to the subsequent relativized weight of internal political problems of individual states. Formally, once the League of Nations' treaties on minorities were annulled[91], and with the United Nations Charter and the Universal Declaration of Human Rights containing no reference to minorities, their rights needed a renewed engagement and framing. Responding to the concern, the UN General Assembly adopted on 10 December 1948 a resolution on the "Fate of minorities"[92], paving the way for a new, and stronger system of protection.

The UN response was developed through: a) the establishment of ad hoc bodies; b) the elaboration of documents defining the notion of religious minority; c) the adoption of binding and non-binding instruments bearing recognition of religious minorities.

### a). *Ad hoc bodies*

The Sub-Committee for the Protection of Minorities and Against Discrimination[93] is competent for presenting to the Commission on Human Rights recommendations to fight discrimination and protect racial, national, religious and linguistic minorities. This body dealt specifically with the question of minorities from 1947 to 1954 and then again from 1971.

The Human Rights Commission (Article 68, Charter of the United Nations) is competent for the protection of minorities[94]. Since 2006, the Human Rights Commission has been replaced by the Human Rights Council[95], which includes the Forum on Minority Issues[96],

[91] Cfr. UN Doc E/CN.4/367/1950, chap. XIV.

[92] Cfr. UN Doc A/RES/3/217C/1948.

[93] UN Doc E/CN.4/SR.131/1949, Paragraph 13.

[94] Economic and Social Council, Resolution 5 (I)/1946 and Resolution 9 (II)/1946 (UN Doc E/56/Rev. 1/1946 and E/84/1946).

[95] The Council was created by the United Nations General Assembly on 15 March 2006 by resolution 60/25; UN Doc A/RES/60/251/2006.

[96] Established by the HRC in 2007 by resolution 6/15 (UN Doc A/HRC/RES/6/15), serves as a platform for dialogue and cooperation on issues relating to persons belonging to national or ethnic, religious and linguistic minorities. It provides thematic input and expertise to the work of the Independent Expert on Minority Issues, which forwards the recommendations for consideration to the Council. The Forum holds an annual two-day session under the guidance of an expert on minority issues, appointed by the President of the Council, on the basis of geographical rotation and in consultation with regional groups.

and the Special Rapporteur on Minority Issues[97]. The Special Rapporteur on Minority Issues contributes to the development of the protection of the rights of national or ethnic, religious and linguistic minorities from various perspectives:

> "the implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, including through consultations with Governments, taking into account existing international standards and national legislation concerning minorities; ways and means of overcoming existing obstacles to the full and effective realization of the rights of persons belonging to minorities; views of and cooperate closely with nongovernmental organizations on matters pertaining to his/her mandate; guide the work of the Forum on Minority Issues, prepare its annual meetings, to report on its thematic recommendations and to make recommendations for future thematic subjects, as decided by the Human Rights Council in its resolution 19/23; submit an annual report on his/her activities to the Human Rights Council and to the General Assembly, including recommendations for effective strategies for the better implementation of the rights of persons belonging to national or ethnic, religious and linguistic minorities"[98].

b). *The elaboration of documents defining the notion of religious minority*

Four UN institutions have elaborated documents expressly defining religious minority: the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities; the Secretary General; the Human Rights Committee; the High Commissioner for Human Rights. In this paragraph, the relevant documents will be presented institution by institution and not in chronological order.

In its report of 6 December 1947 the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities defines minorities in general, and for the first-time religious minorities as:

> "groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population (…) The characteristics meriting such projection are race, religion

[97] The mandate of the Special Rapporteur on minority issues was established in resolution 2005/79 by the Commission on Human Rights on 21 April 2005 (Cf UN Doc E/CN.4/RES/2005/79). The mandate was subsequently renewed by the Human Rights Council in its resolutions 7/6 of 27 March 2008 (cf. UN Doc A/HRC/7/L.22/Rev.1/2007), 16/6 of 24 March 2011 (Cf UN Doc A/HRC/16/L.24/2011), 25/5 of 28 March 2014 (Cf UN Doc A/HRC/RES/25/5/2014) and 34/6 of 23 March 2017 (Cf UN Doc A/HRC/34/L.6/2017). Resolution 34/6 renews the mandate under the same terms as provided by resolution 25/5.

[98] Human Rights Council, Twenty-fifth session Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Resolution adopted by the Human Rights Council 25/5. Mandate of the Independent Expert on minority issues, 11 April 2014.

> and language. In order to qualify for protection a minority must owe undivided allegiance to the Government of the State in which it lives. Its members must also be nationals of that State"[99].

Thirty-two years later, for the second time in the history of the Sub-commission, a definition of religious minority was formulated by Francesco Capotorti, Special Rapporteur of the Sub-commission, in his 1979 "Study on the rights of persons belonging to ethnic, religious and linguistic minorities". Capotorti dedicates the first chapter of his study to the notion of minority, moving from the observation that "a generally accepted definition of the term «minority» does not exist". In particular, according to the author, the tension between universality and contingency in determining a general definition of minority emerges with regard to: a) the numerical data (is the quantitative inferiority of the group an essential element? Is there a minimum threshold?); b) the subjective data (is the will of the group to preserve its identity a necessary or accessory element in the legal notion of minority?); c) the causes of the phenomenon (is the origin of minorities significant for the purposes of the legal definition?); d) the model of belonging of the individual to the group (should the link between the individual and the minority be understood as a choice of the subject or as a fact?). Underlying this discussion, according to Capotorti, is the understanding of minorities as a

> "group numerically inferior to the rest of population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious, or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity directed towards preserving their culture, traditions, religion or language".

In 1985 Jules Deschênes presented a third definition to the Sub-commission, describing minorities, and religious minorities, as

> "a group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law"[100].

While the three definitions converge in identifying religious minorities on the basis of the objective parameter of the inferior number, only the first definition requires the minority's loyalty to the national government, and the second and third emphasize the solidarity that should exist between the members of the group in order for it to qualify as a minority. In this regard, Capotorti understands solidarity in relation to

[99] UN Doc E/CN.4/52/1947, p.13.
[100] UN Doc E/CN.4/Sub.2/1985/31.

the will of the minority to preserve its religion, while Deschênes rather but as the aspiration to achieve, in the eyes of the law, equality with the majority.

The progressive work on the definition of minorities at the UN level also builds on the 1949 Report by the UN Secretary General on the "Definition and classification of minorities"[101], which provides three different definitions of minority, each based on a different parameter.

According to the first definition, based on the preservation of the existence and characteristics of the group, "the term «minority» should normally apply to groups whose members have a common ethnic origin, language, culture or religion and seek to preserve either their existence as a national community or the particular characteristics that distinguish them"[102].

For the second definition, based on non-discrimination beyond national borders, "in the case of minorities who wish to obtain equality only from the point of view of non-discrimination, the question of the quality of citizenship should not be considered". In this case, therefore, "the meaning of the word «minority» was not (...) limited to the groups that constitute the national collectivities"[103].

According to the third definition, based on qualifying characteristics, the notion of minority includes, regardless of the presence of the character of nationality, "groups united by the same religion, or the same language or the same ethnic origin, or by two of these characteristics, or by all three together"[104].

In 2013, the Secretary General updated the definition of ethnic, religious or linguistic minority. In the absence of a shared normative definition, the Secretary General stated that it is preferable to embrace:

> "an inclusive approach to the concept of minorities, guided by the principle of self-identification and bearing in mind that there is no internationally agreed definition of the term. Using UN minority rights standards and mechanisms is not conditioned upon the use of the term minority in the domestic context, and the UN Human Rights Committee has stressed that the existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria"[105].

In 1994, the UN Human Rights Committee defined the notion of religious minority in relation to the interpretation of Article 27 of the International Covenant on Civil and Political Rights of 1966. This provision recognises the rights of minority

[101] UN Doc E_CN.4_Sub.2_85/1949.

[102] *Ivi*, p. 14.

[103] *Ivi*, p. 46.

[104] *Ivi*, p. 11.

[105] Secretary-General of the United Nations, *Guidance Note of the Secretary-General on Racial Discrimination and Protection of Minorities*, 2013, Paragraph 8.

groups. In particular, the definition of minority is formulated with reference to Article 27, which indicates that the persons designed to be protected are those who belong to a group and who share a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party[106]. In this perspective, religious minorities may coincide with both historical groups composed of citizens and new groups coming from migrations[107].

As for the Office of the United Nations High Commissioner for Human Rights, its 2014 document on the inclusion of minorities in consultation and decision making stated the following:

> "the term «religious minorities» encompasses a broad range of religious communities, traditional and non-traditional, recognized by the State or not, large and small, which seek protection of their rights under minority rights standards. The diversity that exists within minority religious groups must be recognized. Religious minorities may also be national, ethnic or linguistic minorities"[108].

The various definitions offered by the four UN institutions express different ways of understanding and defining the notion of religious minority. Particularly relevant are the following criteria: a) the origin of the minority (old minorities, new minorities); b) the legal recognition (recognized minorities, unrecognized minorities); c) the quantitative criterion (small minorities, large minorities); d) single-minority (religious minority) or multi-minority (religious and national minority, religious and linguistic minorities, religious and ethnic minorities, religious minorities, linguistic and ethnic minorities, religious minorities, national and linguistic minorities).

### c). *The adoption of binding and non-binding instruments on religious minorities' religion*

UN international sources have defined the status of religious minorities in the International Covenant on Civil and Political Rights of 1966, and in the Declaration on the Rights of Persons Belonging to the National or Ethnic, Religious and Linguistic Minorities of 1992.

The International Covenant on Civil and Political Rights was adopted by the United Nations General Assembly in 1966. For the States that have ratified it, the treaty represents a binding legal instrument, also affecting the protection of minority

[106] UN Doc CCPR/C/21/Rev.1/Add.5/1994, Paragraph 5.1.

[107] R. Wolfrum, 'The Emergence of "New Minorities" as a Result of "Migration"' in C. Brŏlmann – R. Lefeber and M. Zieck (eds.), *Peoples and Minorities in International Law* (Amsterdam, Nijhoff, 1993), p. 153-166 ; R. Cholewinsky, 'Migrants as Minorities: Integration and Inclusion in the Enlarged European Union' (2005) 43, *JCMS*, pp. 695-716.

[108] United Nations High Commissioner for Human Rights, *The inclusion of religious minorities in consultative and decision-making bodies*, 2014, 1.

rights. In this regard, Article 27 provides that "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".

In relation to the interpretation of Article 27, the UN Human Rights Committee drew up a specific commentary laying out the recipients of the recognised rights, the requisites necessary for the recognition of the status of subject belonging to a religious minority, and the contents of protection of religious freedom.

When considering the recipients of recognised rights, the Committee holds that these rights should be interpreted as rights held by individual members of the minority group[109].

In terms of the necessary requirements, the protection of the rights of members of religious minorities does not depend on the requirement of nationality or citizenship, but on the simple condition of the existence of the group on the territory of the state, since Article 27 confers rights on persons belonging to minorities which "exist" in a state party. In this regard, given the nature and scope of the rights protected under Article 27, it is not necessary to determine the degree of permanence that the term "exist" denotes, this meaning that the existence can be temporary[110]. This approach reiterates the interpretation held by Francesco Capotorti in 1979, when he wrote that "because of the general nature of the rules for the protection of human rights adopted in the framework of the United Nations, it cannot be admitted either that a distinction can be made between «old» and «new» minorities"[111].

In relation to the content of the rights, the protection of the freedoms of members of religious minorities coincides implicitly with cultural rights, and explicitly with the freedom to profess and practice one's own religion. The described freedoms, as highlighted by the Committee, impose on states not only a duty of abstention, but also of specific interventions creating the favourable conditions in which the members of minorities can effectively exercise their recognized rights. In particular, according to the Committee,

> "the protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant. State parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end"[112].

[109] UN Doc CCPR/C/21/Rev.1/Add.5/1994, Paragraph 6.2.
[110] *Ivi*, Paragraph 5.2.
[111] UN Doc ST/HR(05)/H852/no.5/1979, p. 37.
[112] UN Doc CCPR/C/21/Rev.1/Add.5/1994, Paragraph 9.

With reference to the instruments for the protection of minority rights, the Optional Protocol to the International Covenant on Civil and Political Rights provides for a verification procedure by the Human Rights Committee in case of violations of the rights guaranteed in the Covenant on Civil and Political Rights[113]. Over time, the Committee has developed its own jurisprudence on the protection of religious minorities with reference, in particular, to 1) acts of worship, when their fulfilment requires exemptions from criminal law[114]; 2) equality of religious minorities before the law, in relation to the autonomy of the group to form a society[115]; 3) the right to asylum of persecuted members of religious minorities[116].

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992, not a binding legal act, represented the first formulation of protected rights for national or ethnic, religious or linguistic minorities. In particular, the Declaration identifies the rights of religious minorities, the duties of states towards them, and the beneficiaries of protection.

The rights of religious minorities include: 1) the freedom to demonstrate and profess one's own doctrine, in private or in public, without interference and discrimination (Article 2, Paragraph 1); 2) the right to participate in social, cultural,

[113] The protocol provides that Member States, who will sign, will recognize the Committee the power to receive and consider communications from individuals who declare themselves victims of violations of rights enshrined in the Covenant.

[114] *Gareth Anver Prince v. South Africa* (2007), Comm No 1474/2006. On the author's claim that the failure to provide an exemption for Rastafarians violates his rights under Article 27, the Committee noted that it is undisputed that the author is a member of a religious minority and that the use of cannabis is an essential part of the practice of his religion. The state party's legislation therefore constitutes interference with the author's right, as a member of a religious minority, to practice his own religion, in community with the other members of his group. However, the Committee recalls that not every interference can be regarded as a denial of rights within the meaning of Article 27. Certain limitations on the right to practice one's religion through the use of drugs are compatible with the exercise of the right under Article 27 of the Covenant. The Committee cannot conclude that a general prohibition of possession and use of cannabis constitutes an unreasonable justification for the interference with the author's rights under this Article and concludes that the facts do not disclose a violation of Article 27 (Paragraph 7.4).

[115] *Sister Immaculate Joseph and 80 Teaching Sisters v. Sri-Lanka* (2005), Comm No 1249/2004. In this case a religious order claimed that the national prohibition to found a religious company was in breach of Article 2, Paragraph 1; Article 18, Paragraph 1; Article 19, Paragraph 2; Articles 26 and 27 of the Covenant. The Committee has concluded that this prohibition constitutes a violation of Article 18, because the national law has not determined if the limitation was justified by the Paragraph 3 of the Article 18.

[116] *J. D. v. Denmark* (2016), Comm No 2204/2012. In this case the author, who had performed religious activities covered by Articles 18 and 27 of the Covenant, was detained and tortured by the Chinese authorities on a number of occasions because of her affiliation with Falun Gong and eventually prevented from exercising her religious freedom when she was forced to sign the declaration that Falun Gong was a harmful movement.

religious, economic and public life (Article 2, Paragraph 2); 3) the right to participate in decision-making procedures concerning their legal status (Article 2, Paragraph 2.3); 4) freedom of association (Article 2, Paragraph 2.4); 5) freedom in relations between members of the same minority or other minorities at national and supranational level.

The duties of states towards religious minorities include: 1) the protection of the existence and identity of denominational minorities, including through the adoption of appropriate legislative measures (Article 1, Paragraphs 1-2); 2) the adoption of effective measures to allow these groups to exercise their rights, express their specificities, and develop their traditions (Article 4, Paragraphs 1-2); 3) the provision of tools for understanding the traditions and culture of minorities in the field of public education (Article 4, Paragraph 4); 4) measures able to guarantee the participation of minorities in the progress and economic development of the country (Article 4, Paragraph 5); 5) the development of national or supranational policies and programs that take into account the legitimate interests of minorities (Article 5); 6) forms of collaboration between states in the area of minorities (Article 6); 7) forms of cooperation between states to promote respect for the rights provided for in the Declaration (Article 7).

In relation to the beneficiaries of protection, the envisaged rights are to be considered both individually and collectively (Article 3) and can therefore be exercised by the members of a minority individually or together with the other members of the group.

### B. ***European legal status***

The legal status of religious minorities at the regional European level has been defined through a) the establishment of ad hoc bodies, and b) the adoption of documents on the notion of religious minority.

#### a). *The establishment of ad hoc bodies*

The Council of Europe, the European Union and the OSCE have established specific bodies which, in the general framework of the protection of human rights, have dealt with the rights of minorities. This is the case, in particular, of the European Commission of Democracy for the Council of Europe, the EU Network of Independent Experts on Fundamental Rights for the European Union, the Office for Democratic Institutions and Human Rights of OSCE.

#### b). *The adoption of documents on the notion of religious minority*

Established in 1990, the European Commission for Democracy, an advisory body of the Council of Europe, has produced articulated reflections on the rights of minorities[117].

[117] Venice Commission, *Compilation of Venice Commission opinions and reports concerning the protection of national minorities* (2011), CDL(2011)018-e.

In particular, in the 1994 report on "The protection of minorities"[118], the Commission published a Draft Convention on Minority Rights. This proposal contains the following definition of religious minority:

> "the term «minority» shall mean a group which is smaller in number than the rest of the population of a State, whose members, who are nationals of that State, have ethnical, religious or linguistic features different from the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language"[119].

The definition was partly criticized by the experts of the European Commission for Democracy through Law, who described the definitional issue as "a delicate problem" and warned that "one solution might be not to include a specific definition in the text but to rely on the usual meaning of the word"[120]. Also criticised as too narrow and specific was a notion of religious minority linked solely to the criterion of nationality, as this would protect only historical minorities to the exclusion of new minorities.

The EU Network of Independent Experts on Fundamental Rights drafted in 2005 a "Thematic Comment" on the protection of minorities in the European Union[121]. Based on what is presented as the prevailing understanding of ethnic, cultural, religious or linguistic minorities in Europe, the document defines a minority as

> "a group of persons who reside on the territory of a State and are citizens thereof, display distinctive ethnic, cultural, religious or linguistic characteristics, are smaller in number than the rest of the population of that state or of a region of that state, and are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language"[122].

Within the EU Member States the document draws a distinction between states that do not recognize any specific status to religious minorities, as in the case of France under the 1905 separation law and the constitutional principle of secularism, and states that recognize minority status only to specific groups, as in Greece for the Muslim minority of Thrace. Despite the differences, according to the document, a consensus between Member States can be found, if they share the international and European legal standard. In this sense,

> "the Member States with respect to the definition of minorities call for a clarification of the meaning recognized to that notion in Union law, these approaches do

[118] European Commission for Democracy through law, *The Protection of Minorities*, 1994.

[119] Proposal for a European Convention for the protection of minorities, Article 2, 1994.

[120] European Commission for Democracy through law, *The Protection of Minorities*, cit., p. 29.

[121] E.U. Network of Independent Experts on Fundamental Rights, *Thematic Comment n. 3: The Protection of Minorities in the European Union*, CFR-CDF.ThemComm2005.en.

[122] *Ivi*, p. 10.

> not exclude the identification of such a meaning on which a consensus between the Member States may be found, insofar as it is based on the acquis of international and European human rights law"[123].

Within the OSCE, the Office for Democratic Institutions and Human Rights, in the 2014 "Guidelines on the Legal Personality of Religious or Belief Communities", reiterating the principles enshrined in the Document of the Copenhagen Meeting of the Conference on the Human Dimension of 1990[124], emphasised that

> "differential treatment relating to the procedure to be granted legal personality is only compatible with the principle of non-discrimination if there is an objective and reasonable justification for it, if the difference in treatment does not have a disproportionate impact on the exercise of freedom of religion or belief by (minority) communities and their members and if obtaining legal personality for these communities is not excessively burdensome"[125]. If this applies to religion or belief organizations in general, by implication this also applies to them when representing religious minorities".

For further information on specifically EU documents and actions, see the chapter on EU law and policy in this book.

## V. Conclusion

In this chapter I have presented: a) a timeline of the definition of religious minority in legal sources and documents from WWI to today; b) a vocabulary test for the linguistic approach to religious minority rights in international and European framework; c) an analysis about the intersection between religious minorities and several phenomena (eg indigenous people, migrants, LGBT people, national minorities) at the social and legal level; d) the ambivalence of the legal definition with regard to the protection or the restriction of the freedom of minorities; e) the twofold, implicit and explicit, protection-oriented legal definition.

The importance of the definition for the protection of the legal status of religious minority has emerged recently. In 2019, in his annual report to the UN General Assembly, the United Nations Special Rapporteur on Minority Issues, Fernand de Varennes, has stressed contradictions of the concept of religious minority in Article 27 of the International Covenant on Civil and Political Rights.[126] In light of this, the expert has argued that the problematic protection of religious minority rights at na-

[123] *Ivi*, pp. 10-11.

[124] CSCE, *Document of the Copenhagen meeting of the conference on the human dimension of the CSCE*, 1990, Paragraph 32.

[125] Office for Democratic Institutions and Human Rights, *Guidelines on the Legal Personality of Religious or Belief Communities*, 2014.

[126] Un Doc A/74/160/2019, p. 8.

tional level is considerably dependent on the lack of an official definition. Based on this statement, Varennes has proposed the following definition of religious minority in his 2020 report: "The category of «religious minority» includes non-religious or non-theistic and other beliefs. This category should be understood broadly to include unrecognized and non-traditional religions or beliefs, including animists, atheists, agnostics, humanists, «new religions», etc."[127]. Following the binary character of the formula "religious or belief minorities"[128], the definition seems to point at a new challenge for the protection of religious minority rights, coinciding with the inclusion in the target group of article 27 "non-hierarchical or non-formalized religions or beliefs, including shamanism (..) the Falun Gong in China (…) brujería followers in the United States of America and Latin American countries, or Rastafarians in Ethiopia, or (…) böö mörgöl shamanism in Mongolia".[129]

[127] Un Doc A/75/211/2020, p. 16.

[128] For an extensive analysis about the binary development of the formula "FoRB", see M. Ventura, *The Formula 'Freedom of Religion or Belief' in the Laboratory of the European Union*, in "Studia z Prawa Wyznaniowego", 23, 2021.

[129] Un Doc A/75/211/2020, p. 16.

# SOUTHERN AND WESTERN EUROPE

# RECOGNIZED, BUT NOT FULLY APPRECIATED: THE LEGAL STATUS OF RELIGIOUS MINORITIES IN CYPRUS

Achilles C. Emilianides*

## I. Definition and Status

### 1. Social Science Definition

In general, there is a scarcity of social science research, both quantitative and qualitative, about religious minorities (or minorities in general) in Cyprus. Social scientists tend to engage in a discussion of the main religious minorities of the island by focusing on their historical development, their culture, educational and linguistic issues, as well as their integration.[1] Their relationship with the majority is mainly viewed through the lens of the Cyprus Question and the demands of minority groups themselves. However, the distinction between 'minority groups' and 'religious minority groups' is rarely drawn in the literature, with most scholars pointing out that the Maronites and the Armenians should be considered as national and ethnic minorities and not merely as religious minorities.[2] As a result, their categorization as a religious minority is mostly viewed by social scientists as offering a somewhat weaker protection compared to the notion of national or ethnic minority.

The abnormal political situation prevailing on the island due to the Cyprus Question affects the definition of who should be included in the notion of a minority. Numerically the largest minority is the Islamic religion. However, due to the position of the Turkish Community as one of the two constitutionally recognized communities on the island, the bi-communal character of the Constitution, as well as the

* Professor, Dean, School of Law, University of Nicosia, Secretary-General, Cyprus Academy of Sciences, Letters, and Arts.

[1] The edited volume by A. Varnava, N. Coureas and M. Elia (eds.), *The Minorities of Cyprus. Development Patterns and the Identity of the Internal –Exclusion* (Newcastle upon Tyne, Cambridge Scholars Publishing, 2009) is a solid example of this trend.

[2] See: C. Constantinou, 'Epilogue' in A. Varnaca et al: 361ff.

turbulent political history of the island,[3] social scientists are extremely reluctant to include Turkish Cypriots –and the Islamic religion - as a minority. Some have even suggested that the Greek Orthodox majority is also a *de facto* minority in the areas of the island occupied by the Turks, i.e. the areas which are out of the effective control of the authorities of the Republic of Cyprus.[4]

An extensive study considering the social definition of religious minorities has noted that the social concept of a 'minority religious group' implies a numerically smaller group in a certain society that differentiates itself by doctrine, rituals, and practices. However, a numeric definition of such a group does not suffice to properly appreciate its social status. The number of its members is amenable to the historical contingency of its emergence and development and subject to change. Other variables, such as the pattern of interaction with other groups, the privileged social/political positions of some of their leading members and the group's smooth functioning are much more relevant to social status than the number of its members. The size of a religious community does not have a direct bearing with their social status. It has therefore been suggested that in the conceptualization of the social status of minority religious groups the emphasis should neither be on their size nor on their type, but on their differentiated situational logic.[5]

## 2. **Legal Definition**

A '*religious group*', according to Article 2 §3 of the Constitution, is a group of persons ordinarily resident in Cyprus, professing the same religion and either belonging to the same rite or being subject to the same jurisdiction thereof. The number of members of such a group on the date of the coming into operation of the Constitution must have exceeded one thousand persons, out of whom at least five hundred became on that date citizens of the Republic. Such distinction between the number of people ordinarily residing in Cyprus and the number of people who became citizens of the Republic is due to the fact that a great number of Roman Catholics and Armenians retained their British citizenship, even following 16 August 1960, when the Constitution came into force.

[3] See: A. Emilianides, *Constitutional Law in Cyprus* (The Hague, Kluwer, 2nd Ed, 2019).

[4] See Constantinou: 361ff.

[5] G. Kentas and A. Emilianides, 'The Emergence and Regulation of Minority Religious Groups in Europe' in M. Bessone, G. Galder and F. Zuolo (eds.), *How Groups Matter: Challenges of Toleration in Pluralist Societies* (London, Routledge, 2013).

The constitutionally recognized religious groups are the Armenians,[6] Maronites[7] and Roman Catholics (Latins).[8] There is no possibility to constitutionally recognize a new religious group in the future, even if such group fulfils the numerical criteria set by Article 2 §3 of the Constitution; nor is it possible to revoke any of the three aforementioned religious groups of their constitutional status, even if the number of their members who reside in Cyprus, or who are citizens of the Republic, is diminished, and the numerical criteria set by Article 2 §3 of the Constitution are no longer fulfilled. According to Article 2 §3 of the Constitution, religious groups should decide collectively whether they belong to the Greek or the Turkish Community, within three months of the Constitution coming into effect. All three religious groups opted to belong to the Greek Community.

The documents presented to the British Parliament in July 1960 contained a statement by the British Government, concerning the rights of the three smaller religious groups in Cyprus.[9] It was stated that the aim of the relevant constitutional provisions with respect to religious groups had been to secure for them the continued enjoyment of the liberties and status which those groups had under British rule, as well as to maintain the enjoyment of no less extensive rights in respect of religious matters than they had enjoyed by law, before the Constitution came into force. It was further stated that the member of a religious group would enjoy the same benefits as the other members of the community to which they had opted to belong.

The Republic officially refers to the three religious groups as religious minorities. However, the term is not really distinguishable from the definition of national minorities in the internal legal order. The Republic of Cyprus ratified the Framework Convention for the Protection of National Minorities of the Council of Europe (FCNM) with Law 28(III)/1995, which entered into force on 1 February 1998. It is important to note the statement of the Government of the Republic of Cyprus that it considers that the FCNM should apply to all three 'religious groups' of the Republic, namely, the Armenians, Maronites and Roman Catholics, as well as, and without prejudice to their constitutional position, to the Turkish Cypriots living in the non-occupied

[6] See A. Emilianides, *The Status of the Armenian Church of Cyprus* (Nicosia, Cyprus Institute of Church and State Relations, 2006, in Greek); C. Tornaritis (ed.), 'The Legal Position of the Armenian Religious Group', in *Constitutional and Legal Problems of the Republic of Cyprus*, 2nd edn (Nicosia, 1972): 85-90; A.M., Hadjilyra, *The Armenians of Cyprus* (Larnaca, Kalaydjian Foundation, 2009).

[7] A. Emilianides, 'Legal Opinion on the Legal Personality of the Karpasha Church Committee of the Maronite Church of Cyprus' *Cyprus and European Law Review* 11 (2010): 164-169.

[8] See A. Emilianides, 'The Legal Status of the Latin Community of Cyprus', in *Minorities of Cyprus*, ed. A. Varnava, N. Coureas & M. Elia (Cambridge, Cambridge Scholars Publishing, 2009): 229-240.

[9] *Cyprus: Presented to Parliament by the Secretary of State for the Colonies, the Secretary of State for Foreign Affairs and the Minister of Defence*, Cmnd. 1093, July 1960, App. E.

areas[10]. This regardless of the fact that the Roman Catholics are a religious and not a national minority, and that the Armenians and Maronites could probably be considered as ethnic minorities, rather than national minorities. In view of the above, in Cyprus the FCNM is currently applied predominantly as an instrument for the protection of the major religious minorities of the island and thus, is of particular importance for the protection of religious human rights in Cyprus.

The definition of 'religious minority' thus operates on two different levels: the three religious groups of the Republic (as well as the Islamic religion of the Turkish Cypriots) essentially enjoy the status of a national minority, although they are defined as religious minorities; and other religious minorities, such as Jews, Protestants, Buddhists, Jehovah's Witnesses or members of new religious movements, enjoy full protection as religious minorities by virtue of Article 18 of the Constitution which safeguards religious freedom. Article 18 §2 of the Constitution provides that all religions whose doctrines or rites are not secret are free. For a religion to be constitutionally protected it need not register with the authorities; the only requirement is that its doctrines or rites are not secret. There has been so far no court's decision, or other attempt to define religion in Cypriot Law. In principle, however, not only mainstream religions, such as Christian denominations of various kinds, but also less known religions, or new religious movements, have been deemed to constitute a religion in the sense enshrined in Article 18 §2 of the Constitution, so long as their doctrines or rites were free. A sect, or a specific religious creed, may well be considered as religion in the constitutional sense. The assessment of whether a particular creed is a religion, excludes an assessment by the state of the legitimacy of religious beliefs or the ways in which such beliefs are expressed.[11] Thus, the right to manifest one's religion refers to churches and other religious communities as collective entities, in addition to the individual right of their members.

Furthermore, Article 18 § 3 provides that all religions are equal before the law and no legislative, executive or administrative act of the Republic shall discriminate against any religious institution or religion. There should, in principle, be no discrimination between newly established religions, or religions which represent religious minorities. The leading case with respect to discrimination between religions is the case of *The Jehovah's Witnesses Congregation (Cyprus) Ltd*.[12] The Minister of Interior had decided to omit marriage officers of the Jehovah's Witnesses Congregation from the annual list of officers authorized to officiate marriages, on the grounds that

[10] Report Submitted by Cyprus pursuant to Art. 25, para. 1 of the Framework Convention for the Protection of National Minorities, 1 Mar. 1999, Part II, Art. 3.

[11] *Metropolitan Church of Bessarabia v. Moldova* (2002) 35 EHRR 306.

[12] *The Minister of Interior v. The Jehovah's Witnesses Congregation (Cyprus) Ltd* [1995] 3 CLR 78 (in Greek).

such officers had ceased to be considered as such following the enactment of Civil Marriage Law 21/90. The Supreme Court held that according to Article 18 of the Constitution, freedom of religion should not be violated, either directly, or indirectly, and that all religions whose rites are known, are equal before the law. It further held that Law 21/90 should not have been interpreted in the manner in which the Minister of Interior had. Thus, it was held that the marriage officers of the Jehovah's Witnesses Congregation should not have been omitted from the relevant list of officers authorized to conclude marriages.[13] Accordingly, the right to manifest one's religion refers not only to individuals, but also to churches and other religious communities; any restriction of such right should be in accordance with the law, should meet one of the specified legitimate aims and should be necessary in a democratic society; any interference will be unconstitutional if it is not proportionate to the pressing social need that it addresses.[14]

## 3. **Legal Status**

In accordance with the system of co-ordination prevailing in Cyprus, the five constitutionally recognized major religions of the island are legally treated in the same manner. Accordingly, the three religious groups and the Islamic religion, while described as religious minorities, enjoy the same level of legal protection as the majority religion, i.e. the Greek Orthodox Church. There are some differences in the treatment of the five main religions and other religious minorities in certain areas, mainly in financing and education.

Article 110 of the Constitution provides for the right of the five major religions to exclusively regulate their own property. The same status is essentially, however, recognized by law with regards to other religions. Consequently, each creed administers its own property without state intervention. Article 23 §9 and §10 of the Constitution stipulate that no deprivation, restriction or limitation on the right to acquire, own, possess, enjoy or dispose of any movable or immovable property belonging to any ecclesiastical corporation, or Islamic religious institution may take place, except with the written consent of the appropriate religious authority being in control of such property. While the abovementioned constitutional provisions apply not only to the five major religions, but potentially to other traditional religious minorities, it is doubtful that they would apply to new religious movements or to religious minorities which are neither Christian, nor Muslim.

[13] A. Emilianides, *The Cypriot Law of Marriage and Divorce between Church and State* (Athens-Thessaloniki, Sakkoulas, 2006) in Greek.

[14] *Ktimatiki Eteria Neas Taxeos v. The Chairman and Members of the Municipal Committee of Limassol* [1989] 3 CLR 461.

The Republic of Cyprus provides significant religious assistance to religious communities with regard to the construction, or repair, of their churches, monasteries and cemeteries, and for other religious purposes, in the form of state aid. Such state aid is offered by the Government and is in practice provided only to the five major religious communities and not to other religious organizations. However, exemption from the income tax is available based on the income of religious organizations and charitable associations, and thus, is not restricted to the five major religions.

As a result of an agreement between the Republic of Cyprus and the Orthodox Church, the Church has transferred some of its immovable property to the Republic, which in return contributes to the payment of the salaries of the parish clergy in rural areas. The government decided that this agreement should also extend to the clergy of the three religious groups of the Republic, and as of 1 January 1999 the state has also begun to pay the salaries of a number of priests of the three religious groups, despite the fact that only the Orthodox Church had granted any immovable property to the Republic. This was due to the fact that the three religious groups and the Orthodox Church should be treated on an equal basis in view of the system of coordination, which is in force in the Republic of Cyprus. The same treatment was granted to the parochial priests of the Orthodox Christians who follow the Old Calendar, but not to other religious minorities.

In addition, the Government provides an annual grant towards the churches of the three religious groups of the Republic, in order to assist them in fulfilling their religious duties, as well as additional financial assistance to the three religious groups of the Republic with regard to their education, worship places, and their cultural heritage. Land, as well as public grants, have been given to the three religious groups of the Republic for construction of their churches, monasteries and cemeteries. Grants are also given for repairs of existing churches and monasteries. In addition, the Ministry of Education finances cultural activities of the Greek Orthodox Church and the three religious groups of the Republic, including publications, performances, construction of libraries, seminaries, museums, archives, or historic buildings. Financial assistance is also granted to social and athletic clubs, which relate to the Orthodox Church, or to the three religious groups, but could potentially be given to other traditional religious minority as well. Financial assistance is also given with regards to maintenance and repair of mosques in the non-occupied areas.

The five constitutionally recognized religions are all considered as legal persons under private law, as are other religious minorities. Religions other than the five constitutionally recognized religions are not required to register with the authorities. However, if these religious organizations desire to engage in financial transactions, such as maintaining a bank account, they must register as non-profit companies. In order to register, a religious organization must submit an application stating the purpose of the non-profit organization and providing the names of the organization's directors. So far, applications by religious organizations have been promptly accepted by the

authorities of the Republic of Cyprus, without any particular problem. There are no special legal provisions relating to the clergy or monks of the major religions, or their employees. Furthermore, with regards to family law, differences between religions no longer seem to be of significance following the 1989 constitutional amendment.

Religious education in public schools is of a doctrinal character and follows the doctrine of the Orthodox Church. There is no possibility of religious education for members of other religions in public schools, with the exception of Maronites and Turkish Cypriots. This is why the Government has opted to assist children belonging to religious groups in attending private schools of their choice, if they so desire. Moreover, pupils who are not Christian Orthodox may request to be exempted from religious education, including collective worship.[15] However, financial assistance to attend private schools is only given to pupils adhering to the major religions of the island and not to other religious minorities. The Cyprus Broadcasting Corporation (CyBC) Law makes an attempt to accommodate religious minority interests, by providing access to the media and ensuring that all religious creeds may enjoy a certain amount of broadcast time. Nevertheless, in practice major minorities and other traditional religious minorities enjoy more broadcasting time when compared to new religious movements.

The Religious Groups (Representation) Law 38/1976, further provides that the members of the three religious groups of the Republic, in addition to the right of electing and being elected in parliamentary elections, elect, in their capacity as members of their respective religious groups, a representative of each religious group in the House of Representatives. These representatives have the right to address the House of Representatives with regard to all matters which concern their religious group, but do not have the right to vote; their status, concerning remuneration and other benefits, is equivalent to that of a regular member of the House of Representatives.

## II. Social and Legal Change and Developments

### 1. Social Change

According to the 2011 official census the population of Cyprus (Turkish Cypriots residing in the occupied areas excluded) was of 840,407 people, out of whom 667,398 (79.41%) were Cypriots, 106.270 (12.64%) were European citizens and 64.113 (7.62%) were third country nationals (the majority being Asian or Russian nationals).[16] Out of the members of the Greek Community, 2,700 (0.4%) were Armenians, 4,800 (0.6%) were Maronites, while 900 (0.1%) were Roman Catholics. With

[15] This, however, potentially violates the ECHR due to the obligatory disclosure of religious affiliation. See *Papageorgiou* v. *Greece*, 31.10.2019.

[16] The remaining 0.33% were unidentified. Source: Statistical Service of the Republic of Cyprus.

the exception of a few agnostics, atheists, or naturalized foreign citizens, people of Greek origin normally adhere to the Greek Orthodox religion. In view of the fact that many non-Cypriots, such as mainland Greeks, Russians, Romanians and Bulgarians also adhere to the Orthodox Christian religion, it is estimated that approximately 82% of the total current population of Cyprus are Orthodox Christians. It is further estimated that the number of Roman Catholics residing in Cyprus, including foreigners, is approximately 2%. While the Statistical Service of the Republic of Cyprus estimates that the number of Turkish Cypriots currently residing in the occupied areas reaches approximately 88,900, it is suggested that the actual number might be closer to 120,000 as estimated by Turkish Cypriot sources. Therefore, it is estimated that approximately 12% of the current total population of the Republic, excluding the Turkish settlers, are Turkish Cypriots.

In view of the above, and considering the small size of the population, the traditional religious minorities, i.e. the three religious groups, as well as traditional religious minorities, such as Anglicans, Jews, Jehovah's Witnesses, Protestants, Old-Calendarists and Buddhists, seem to remain the main religious minorities of the island. New religious movements seem rather inconspicuous for the time being. A more interesting development is, however, the following: Turkish Cypriots, like most Turkish nationals, are followers of Sunni Islam. However, some of the Sunni Muslims (who count the great majority of Turkish Cypriots in their ranks) seem to consider the mostly immigrant Shia Muslims as intruders in traditional Turkish Cypriot Mosques situated in the Republic of Cyprus; this has led in some cases to violence between the two groups.[17]

## 2. **Legal Change**

There has been no actual legal change during the past 25 years, other than the recognition of the three religious groups as national minorities under the FCNM, which represented a significant development. The application of FCNM and the recommendations of the Advisory Committee during the four cycles of country visits that have taken place so far have led the Republic of Cyprus to engage more systematically with the notion of minorities than in the past. Since, however, the Constitution does not allow for the recognition of additional 'religious groups' in the constitutional sense, the differentiation between the five major religions of the island and all other religions has remain unchanged. Furthermore, the number and impact of new religious movements has not been such so as to require any legislative change.

[17] A. Emilianides, C. Adamides, E. Eftychiou, E. 'Allocation of Religious Space in Cyprus' (2011) 23 *The Cyprus Review*: 97-121.

## III. Social and Legal Developments

### 1. Social Developments

The Cyprus Question remains a factor limiting the development of specific strategies by religious minorities in Cyprus. Hence, strategies have mostly been employed by the three main religious groups. The Armenians and Maronites have considered that their characterization as *religious groups* does not represent their position as ethnic or even national minorities. However, it is posited that the recognition of the Armenians and the Maronites as religious groups does not necessarily entail a non-recognition of their ethnic characteristics. Indeed, the Republic of Cyprus has considered that both Maronites and the Armenians constitute *National Minorities* within the context of the FCNM. In view of the above, Maronites and Armenians enjoy the constitutional protection of a religious minority, as well as the international protection of a national minority.

The Representative of the Latins in the House of Representatives has expressed the view that the term *Latins* does not properly reflect the essential element of their identity, namely the Roman Catholic rites that they share. The Advisory Committee on the FCNM observed, in its Opinion on Cyprus adopted on 6 April 2001, that the Republic could address this matter without undue difficulties and modify the name of the Roman Catholic religious group to *Roman Catholics-Latins*, since such modification does not require an amendment of the Constitution.[18] On 2 September 2004 the Attorney-General of the Republic also advised the Ministry of Interior that the intended change in the name of the Latin religious group, would not amount to an amendment of the Constitution of Cyprus and that such change could be implemented with an amendment of laws, where reference is made to the constitutionally recognized religious groups. Thus, in December 2004 a proposal to that effect was submitted to the Council of Ministers for approval.

However, the Council of Ministers, at its meeting of 20 January 2005, decided to postpone its decision, stating that the above matter *had been associated by the Representative of the Latins with other issues that presented constitutional difficulties*.[19] Such issues included primarily the question of who should be considered as member of the Roman Catholic religious group according to the Constitution of Cyprus. It is submitted that changing the name Latin into Roman Catholic should not engender constitutional controversy. Thus, the Government of the Republic of Cyprus

[18] Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on Cyprus*, 6 Apr. 2001, para. 20.

[19] Second Report submitted by Cyprus pursuant to Art. 25, para. 1 of the Framework Convention for the Protection of National Minorities, 27 Oct. 2006, Part III, Art. 3.

should promptly proceed to enact the proposed change, since it does not present any constitutional difficulties.[20]

## 2. **Legal Developments**

Cypriot courts have so far been willing to acknowledge the rights of both traditional and new religious minorities. There has been a scarcity of particular legal developments, however. The cycle visits of the Advisory Committee of the FCNM have been contributing towards discussion. The Advisory Committee has correctly observed that the provisions of Article 2 of the Constitution, according to which members of the religious groups belong either to the Greek or to the Turkish Community, should be amended, since they violate Article 3 of the FCNM, according to which each member of a minority group has the right to be considered, or not be considered as such[21]. However, the Advisory Committee acknowledged that an amendment to the Constitution in that respect would currently be an extremely difficult task, in view of the abnormal situation prevailing in Cyprus. It was also recommended to further improve the effective participation of representatives of the religious groups by providing them with the right to vote, or initiate legislation in matters within their competence.[22]

[20] See A. Emilianides, 'Who May Be Considered to Be Members of Religious Groups According to the Constitution of Cyprus' (2006), *Lysias*: 26-31 (in Greek); Advisory Committee on the Framework Convention for the Protection of National Minorities, *Third Opinion on Cyprus*, 19 Mar. 2010, para. 31 ff.

[21] Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on Cyprus*, 6 Apr. 2001, para. 18.

[22] See also Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on Cyprus*, 7 Jun. 2007, para. 143.

# DE L'(IN)EXISTENCE DES MINORITÉS RELIGIEUSES EN FRANCE

Louis Hourmant*
Pierre-Henri Prélot**

## I. Définition et statut

### 1. Définition des sciences sociales

Dans leur approche conceptuelle des groupes religieux minoritaires, les sciences sociales des religions mettent en avant leur hétérogénéité et répugnent généralement à les assimiler toutes à des minorités religieuses *stricto sensu.* Elles en distinguent au moins quatre types : 1) les confessions chrétiennes hors l'Église historiquement dominante, comme le protestantisme en France (ou le catholicisme en Angleterre) ; 2) les grandes religions d'importation ancienne (judaïsme) ou plus récente (islam, bouddhisme, hindouisme) ; 3) les croyances marginales issues de la nébuleuse mystique-ésotérique : New Age ou syncrétismes avec les religions orientales ; 4) les mouvements socialement controversés ou « sectaires ». Habituellement, seuls les types 1 et 2 sont considérés comme relevant de la catégorie « minorité religieuse », les autres mouvements illustrant simplement la pluralité interne à l'univers religieux et convictionnel[1].

Cette distinction renvoie à deux approches conceptuelles différentes de la pluralité religieuse :

* Louis Hourmant, École Pratique des Hautes Etudes.
** Pierre-Henri Prélot, Université de Cergy-Pontoise.

1 Voir L. Obadia et A.L. Zwilling (dir.), *Minorité et communauté en religion*, Strasbourg, Presses Universitaires de Strasbourg, 2016 ; A.-L. Zwilling (dir.), *Minorités religieuses, religions minoritaires dans l'espace public. Visibilité et reconnaissance*, Strasbourg, Presses universitaires de Strasbourg, coll. « Société, droit et religion », 2014 ; I. Rivoal, « Minorité religieuse », in R. Azria et D. Hervieu-Léger (dir.). *Dictionnaire des faits religieux*, Paris, Presses Universitaires de France, pp.718-725, 2010 ; S. Laithier et V. Vilmain (dir.), *L'histoire des minorités est-elle une histoire marginale ?,* Paris, Presses Universitaires de Paris-Sorbonne, 2008.

— une première approche concerne le fait minoritaire au sens strict avec au moins trois critères pour qualifier un groupe en tant que minorité : démographique (une minorité doit avoir un certain poids statistique, ce qui exclut les groupuscules) ; politique (la minorité est en position dominée, ce qui exclut les minorités statistiques politiquement dominantes, comme les musulmans dans l'Inde des Moghols) ; anthropologique (la minorité est dotée de particularismes socio-anthropologiques : mœurs et coutumes, langues, croyances). De plus, une minorité est généralement dotée d'un statut : elle ne se résume pas à un fait statistique mais renvoie à des constructions juridico-politiques qui définissent la place de certains groupes par rapport au groupe dominant. La minorité religieuse est vue dans l'historiographique comme un cas particulier de construit minoritaire, lequel peut être spécifié en fonction d'autres critères (national, ethnique, linguistique…) qui peuvent se superposer ou non à un critère confessionnel ou religieux: lorsqu'il y a superposition (par exemple, le cas des Kurdes de Turquie qui sont de confession alévie), le fait minoritaire ethnico-national se trouve renforcé par le fait minoritaire de type confessionnel ; en cas de dissociation, au contraire, il peut s'affaiblir (on appartient à une minorité, selon une dimension, tout en appartenant à la majorité, selon l'autre dimension).
— La seconde approche, qui n'a pas recours au concept de minorité, est plus englobante par son objet mais plus spécifique du point de vue méthodologique puisqu'elle se fonde sur les concepts et les paradigmes des sciences sociales des religions : elle étudie les différentes formes prises par les processus de pluralisation interne des religions (typologie des modes de sociation religieuse, des formes de l'attitude religieuse, de l'orientation par rapport au « monde », aux institutions profanes et aux autres groupes religieux, de l'autorité dans un groupe, etc.).

Dans le cas français marqué à la fois par des siècles de monolithisme confessionnel catholique et par deux siècles d'affirmation conflictuelle de l'idée laïque face à la conception politique d'une France catholique, les minorités religieuses anciennes (protestants de type luthéro-réformé et juifs) ont activement participé à l'émergence de la laïcité juridique et/ou idéologique, ce qui a fortement contribué à leur intégration politique dans le courant majoritaire, en particulier pour les protestants (le cas des juifs est plus complexe, puisque le courant assimilationniste du « francojudaïsme » a été concurrencé par des réaffirmations identitaires dans les dernières décennies, plus présentes chez les juifs sépharades installés en France dans les années 1960, suite à la décolonisation de l'Afrique du Nord).

Le fait migratoire a bouleversé le paysage des minorités religieuses ainsi que la problématisation politique de ce qu'est une minorité religieuse en contexte de laïcité, l'islam devenant, à partir des années 1980, la principale minorité, tant d'un point de vue purement statistique que d'un point de vue politique et idéologique.

La question des « nouveaux mouvements religieux » (NMR) ou des « sectes » a pris de l'ampleur de la fin des années 1970 à la fin des années 1990. Elle a connu son acmé au milieu des années 1990 avec la multiplication d'affaires de sectes : suicides ou massacres au sein de ou à l'instigation de groupes sectaires. L'analyse du phénomène a été obscurcie par l'amalgame fréquemment réalisé dans le débat social entre des sectes anciennes de terrain chrétien (*sects* en anglais) – comme les témoins de Jéhovah – et des « nouvelles sectes » (*cults* en anglais) – comme les groupes orientaux néo-hindous ou néo-bouddhistes apparus en Occident à partir des années 1970, ou comme les mouvements de développement personnel à visage religieux dont le prototype est l'Église de Scientologie. Rarement ces mouvements socialement controversés ont fait l'objet d'une analyse en termes de minorité religieuse. C'est plutôt sous l'angle de la micro-sociologie ou de la psychosociologie (analyse du mode d'autorité, des processus de conversion et de « déconversion », etc.) qu'ils ont été pris en compte dans la littérature scientifique. Après l'irruption brutale du jihadisme sur la scène occidentale le 11 septembre 2001, l'intérêt social aussi bien que scientifique pour la question des sectes a fortement décru.

Dans la période récente, l'approfondissement de la sécularisation en France amène à reconsidérer ou à nuancer la notion de majorité religieuse : si les catholiques pratiquants étaient déjà minoritaires statistiquement en France au début des années 1960 – un quart des Français allant à la messe chaque dimanche avec de fortes variations régionales –, l'affiliation par les sacrements (nombre de baptêmes et de mariages religieux) aussi bien que la revendication d'appartenance faisaient sans conteste du catholicisme la religion majoritaire. Au début du XXI$^{e}$ siècle, il est en passe de devenir minoritaire, non pas vis-à-vis d'une autre religion, mais face à la population peu étudiée des « sans-religions » (les *nones* en anglais) qui n'est pas pour autant considérée comme une « majorité » autre que statistique car elle n'a pas de grande cohérence interne : elle ne constitue pas un bloc ayant ses propres options, mais n'est qu'un agrégat statistique.

Tous les indicateurs classiques de la religiosité (pratique, croyance, affiliation) sont en chute concernant le catholicisme : le taux de pratique religieuse régulière (assistance à la messe dominicale) est tombé à 2% environ[2] ; une moitié de Français seulement déclare croire en Dieu (contre trois-quarts d'Européens), mais un Dieu qui ne correspond pas toujours au Dieu personnel et sauveur tel qu'enseigné par les Églises ; enfin, dans une enquête de 2008, 42% des Français se déclarent encore catholiques[3], le pourcentage étant nettement plus réduit dans les tranches d'âge plus jeunes.

[2] 1,8% selon l'enquête Ipsos dirigée par Yann Raison du Cleuziou pour *La Croix*, 12 janvier 2017.

[3] Enquête européenne sur les valeurs de 2008, analysée dans P. Bréchon, O. Galland, *L'individualisation des valeurs*, Paris, Armand Colin, 2010.

Sur un plan de sociographie religieuse, et en s'en tenant à ces données de type quantitatif, il est possible d'affirmer aujourd'hui le caractère minoritaire du catholicisme, caractère minoritaire parfois intégré voire revendiqué par certains militants catholiques eux-mêmes.

Sur le plan de l'analyse plus profonde, la réponse est moins claire : du fait du lien multiséculaire du christianisme et de l'identité nationale, un sentiment d'identification à la « christianitude » (le terme est d'Emile Poulat), face, par exemple, à des revendications relevant de l'islam politique pour une plus grande visibilité de l'islam dans l'espace public, peut se manifester y compris chez des personnes qui se déclarent indifférentes ou sans-religion dans les enquêtes par sondage. Le fait majoritaire se déplacerait ainsi hors du champ strictement confessionnel et convictionnel mais continuerait à produire des effets politiques et sociaux.

## 2. **Définition légale**

### A. ***Absence de pertinence de la notion de minorité religieuse***

Les sources juridiques sont aveugles à la notion de minorité. Le droit français est en effet rétif à la notion de minorité, qu'elle soit ethnique, linguistique, culturelle ou religieuse. Une minorité, c'est un groupe humain spécifié par des caractéristiques communes qui le distinguent du reste de la population, et qui aspire de ce fait à la reconnaissance de droits spécifiques ainsi le cas échéant qu'à une représentation politique différenciée. Or de telles revendications sont antinomiques avec l'égalité des citoyens devant la loi commune[4], ainsi qu'avec le principe d'unité indifférenciée de la communauté nationale. C'est pour cette raison que la France n'a jamais voulu ratifier la Charte européenne des langues régionales ou minoritaires. Selon un énoncé du Conseil constitutionnel, l'article 1er de la Constitution, ainsi que le principe d'unicité du peuple français, *« s'opposent à ce que soient reconnus des droits collectifs à quelque groupe que ce soit, défini par une communauté d'origine, de culture, de langue ou de croyance »*[5].

Compte tenu de cet interdit, l'usage de la notion de minorité religieuse est cantonné au champ de la sociologie religieuse. Encore le droit ne facilite-t-il pas le travail des sociologues, dans la mesure où la législation relative aux données numériques interdit tout recensement des populations selon leur appartenance religieuse. L'identité religieuse constitue une *« donnée sensible »* à propos de laquelle il est interdit d'interroger toute personne identifiée. Il n'existe donc pas de recensement

[4] Déclaration des droits de l'homme et du Citoyen, 1789 : *« La loi doit être la même pour tous, soit qu'elle protège, soit qu'elle punisse ».*

[5] Conseil constitutionnel, n°99-412 du 15 juin 1999, Charte européenne des langues européennes et minoritaires.

officiel des communautés religieuses en France. Impossible dans ces conditions de d'identifier précisément ce qui est numériquement minoritaire.

On ne trouve donc pas de référence aux *« minorités religieuses »* dans les sources constitutionnelles ou législatives, pas plus que dans les mesures administratives ou la jurisprudence. Cette réalité proprement française n'est pas propre aux minorités religieuses, elle concerne également les identités linguistiques, culturelles ou nationales.

### B. *Absence d'identification administrative des minorités religieuses*

Le système français séparatiste est caractérisé par l'absence de reconnaissance des religions, toutes soumises à un même régime de droit commun. Les minorités religieuses ont accès comme les autres groupements religieux au statut d'associations cultuelles. Pendant près d'un siècle, ce statut d'association cultuelle, qui procure un certain nombre d'avantages, a été réservé par les pouvoirs publics aux représentants des anciens cultes reconnus. Mais cette politique de protection des convictions dominantes a fini par être remise en cause par le Conseil d'Etat[6].

En ce qui concerne les règles ou les recommandations du droit international relatives aux minorités religieuses, l'accès à un statut associatif est aujourd'hui ouvert librement. En ce sens, il y a tout lieu de considérer que la France se conforme aux lignes directrices de l'OSCE en matière de liberté religieuse, ainsi qu'aux exigences de la Cour de Strasbourg.

### C. *Une typologie de fait des groupements religieux*

Mais parce qu'elles correspondent à une réalité de fait, les différences que le droit entend ignorer finissent toujours par ressurgir au niveau concret. Après la séparation intervenue en 1905, une distinction est très vite réapparue entre les religions, reposant sur plusieurs critères qui agissaient de façon tantôt isolée, et tantôt combinée. Le premier critère trouve son origine dans la loi de 1905 elle-même, et il a permis de prolonger artificiellement le régime de la reconnaissance. L'article 4 de la loi prescrivait en effet d'attribuer les biens des anciens cultes reconnus aux associations *« se conformant aux règles d'organisation générale du culte dont elles se proposent d'assurer l'exercice »*. Du fait de cette exigence de conformité interprétée de façon étendue comme devant s'imposer à l'ensemble des cultuelles, certaines communautés dissidentes ont été rejetées hors de la vie légale. C'est ainsi que les préfets ont systématiquement refusé, jusqu'au tournant des années 2000, de donner leur agrément aux libéralités consenties par des particuliers au profit d'associations cultuelles

[6] On peut situer le point de départ de cette évolution dans l'avis du Conseil d'Etat du 24 octobre 1997 Association locale pour le culte des témoins de Jéhovah de Riom.

(Saint Pie X) condamnées par la hiérarchie catholique[7], avant que l'administration ne décide finalement de changer ses pratiques. Dans le même sens[8], le Conseil d'Etat a validé en 1994 le monopole accordé par les pouvoirs publics à la seule association Consistoriale israélite de Paris[9] pour l'abattage rituel des animaux, au détriment d'une association dissidente à laquelle les juges n'ont voulu reconnaître aucun droit propre. La solution a été confirmée par la Cour de Strasbourg[10].

Le second critère de la distinction est celui de l'ordre public. L'ordre public opère le partage entre les religions reconnues comme telles par les pouvoirs publics et celles considérées par eux comme des sectes. Le statut d'association cultuelle, et les avantages liés à ce statut, a longtemps été refusé à des groupes religieux controversés sur ce fondement. C'est le cas en particulier des témoins de Jéhovah, auxquels il était reproché de mettre en danger la vie de leurs adeptes (refus des transfusions sanguines). Sous la pression de la Cour de Strasbourg, la jurisprudence administrative a fini par évoluer. En ce qui concerne les témoins de Jéhovah, le Conseil d'Etat a fini par considérer que le risque d'atteinte à l'ordre public devait résulter des *« activités de l'association »* et non des seules convictions imputées à ses membres[11]. Cette évolution jurisprudentielle s'inscrit dans un contexte général marqué par un changement d'approche du phénomène sectaire, la lutte contre les sectes étant désormais remplacée par la lutte contre les dérives sectaires. C'est ainsi que la loi du 12 juin 2001 tendant à renforcer la prévention et la répression des mouvements sectaires vise indistinctement les petites communautés et les grandes religions, autant que les mouvements non religieux. Par ailleurs la MILS, Mission interministérielle de lutte contre les sectes, est devenue en 2002 la MIVILUDES, Mission de vigilance et de lutte contre les dérives sectaires. Aujourd'hui la radicalisation islamiste est régulièrement assimilée à une dérive sectaire.

On ajoutera, en conclusion de ces développements, que la distinction établie par l'autorité publique entre les religions relève également de considérations formelles dans le cas de l'Eglise catholique, dans la mesure où le régime juridique applicable à l'Eglise catholique est pour une partie défini par voie de conventions passées avec le Saint Siège (modus vivendi des années 1921-1924, convention de 2008 sur les diplômes).

### D. *Indifférence aux sources internationales de protection*

La France a ratifié le Pacte international sur les droits civils et politiques en 1980. Mais au titre des déclarations et réserves, le gouvernement a déclaré, *« que l'article*

[7] Il s'agissait des Associations Saint Pie X.

[8] CE 25 novembre 1994, Cha'are Shalom ve Tsedek, n°110002.

[9] Rattachée au Consistoire central, l'association consistoriale israélite regroupe la majorité des juifs de France.

[10] CEDH 27 juin 2000, Association cultuelle israélite Cha'are Shalom Ve Tsedek c/France.

[11] CE ass. 24 oct. 1997, avis, Association locale pour le culte des Témoins de Jéhovah de Riom.

*27 n'a pas lieu de s'appliquer ».* Par ailleurs la France n'a pas signé la Convention-cadre pour la protection des minorités nationales.

## 3. Statut juridique

### A. *Différences statutaires entre majorités religieuses et minorités*

Il n'existe aucune différence statutaire entre religions minoritaires et majoritaires.

### B. *Différences de traitement entre groupes religieux*

L'accès des minorités religieuses à une représentation ès qualités ou à certaines prestations que la loi autorise est dans l'ensemble limité.

**Ecole** : La religion n'est pas enseignée à l'école primaire publique, elle l'est parfois dans les collèges et lycées au sein de l'aumônerie. Les seules aumôneries existantes sont catholiques et (plus rarement) protestantes. L'enseignement privé est massivement catholique. Il existe également des écoles privées protestantes et juives, ainsi que musulmanes.

**Aumôneries des services publics :** l'aumônerie des services publics (armées, prisons, hôpitaux) a été maintenue après la séparation au profit des anciens cultes reconnus. Longtemps, les autres religions n'y ont pas eu accès, mais ce n'est plus le cas. Une aumônerie militaire musulmane a été créée en 2005. Il existe également des aumôniers dans les prisons et les hôpitaux. Le Conseil d'Etat dans un arrêt de 2013 a censuré le refus d'agrément d'aumôniers des témoins de Jéhovah par l'administration pénitentiaire, le faible nombre des pratiquants n'étant pas un motif justifié de refus.

**Accès aux medias :** La loi de 1986 modifiée relative à la liberté de communication prescrit que la chaine publique *« France Télévisions programme le dimanche matin des émissions à caractère religieux consacrées aux principaux cultes pratiqués en France… ».* L'émission Les Chemins de la foi diffusée le dimanche matin laisse place aux religions les plus présentes (catholicisme, islam, protestantisme, judaïsme, orthodoxie, chrétientés orientales). Les autres courants religieux ne bénéficient d'aucune diffusion.

**Mariage et droit de la famille :** il s'agit d'un droit entièrement laïcisé qui ne laisse aucune place aux communautés religieuses. Le code pénal (L433-21) prescrit que le mariage religieux doit impérativement être célébré après le mariage civil.

**Avantages fiscaux :** les avantages fiscaux sont liés soit à la nature d'une activité (caractère d'intérêt général) soit à une forme juridique (association cultuelle). Longtemps les avantages ont été réservés de fait aux anciens cultes reconnus, mais c'est de moins en moins le cas.

**Objection de conscience :** Les régimes d'objection de conscience n'opèrent aucune distinction entre les religions. L'objection de conscience à l'usage des armes est sans objet compte tenu de la suspension du service militaire. Quant aux médecins,

ils peuvent refuser de pratiquer des interruptions de grossesse sans avoir à justifier des motifs qui peuvent être religieux mais également de pure convenance.

**Répressions spécifiques :** Il n'existe pas de législation ou de réglementation visant à réprimer les pratiques de groupes religieux désignés en tant que tels. La loi de 2004 interdit le port de signes religieux ostensibles à l'école, et vise sans distinction tous les signes religieux dits *« ostensibles »*. Mais en réalité ce sont les foulards musulmans qui ont motivé son adoption. De même, la loi de 2010 qui interdit la dissimulation du visage dans l'espace public vise en réalité le voile intégral des musulmanes.

La répression fiscale est également un instrument de la lutte contre certains mouvements religieux. L'administration fiscale en a souvent fait usage à l'encontre de certains mouvements religieux. On retiendra qu'en 2012, la France a été condamnée sur par la Cour de Strasbourg, à raison d'un redressement fiscal imposé aux Témoins de Jéhovah.

## II. Changement social et juridique

### 1. Changement social

Le changement principal concerne la prééminence croissante des minorités issues de la migration récente (islam) par rapport aux minorités issues de la scissiparité chrétienne.

Sur un plan strictement statistique, le nombre de « Français musulmans » renvoie à des sources non homogènes avec des écarts considérables entre les 2,1 de « musulmans déclarés » des rares enquêtes statistiques[12], les 3,5-4 millions de personnes de confession musulmane des sondages d'opinion[13] ou les 6 millions de personnes originaires de pays musulmans ou descendants d'immigrés, selon les statistiques démographiques de culture musulmane. Quels que soient les chiffres retenus, le nombre de musulmans dépasse largement celui des protestants (autour de 1,5 million de protestants de conviction quel que soit leur degré de pratique ou de 2 millions de protestants « de conviction » et « de culture », les protestants culturels pouvant éventuellement être athées mais attachés à leur identité protestante)[14]. L'émergence de l'islam comme question politique française a suscité une remobilisation du camp laïque autour de nouveaux combats (le voile féminin sous ses diverses formes, la nourriture dite *halal*, etc.) ainsi qu'une reconfiguration des acteurs. Elle a engendré

[12] Enquête « Trajectoire et origines », INED, 2010, sur https://teo.site.ined.fr/.

[13] Cf. C. Dargent, « Les musulmans déclarés en France », *Cahiers du CEVIPOF*, février 2003, n°34, sur http://www.cevipof.com/fichier/p_publication/436/publication_pdf_cahierducevipof34.pdf .

[14] Selon l'évaluation de S. Fath et J.-P. Willaime (dir.) : *La nouvelle France protestante. Essor et recomposition au XXIe siècle*, Genève, Labor et Fides, 2011.

également une multiplication de travaux de sciences sociales (principalement de type sociologique ou de science politique).

Par comparaison, les autres minorités religieuses issues de l'immigration (170.000 hindous, principalement des réfugiés Tamouls sri-lankais, ou 10.000 sikhs, migrants en provenance du Penjab indien) ne suscitent quasiment pas d'intérêt politique et donnent lieu à peu d'études sociologiques ou anthropologiques.

Les données chiffrées concernant les minorités sont fragmentaires, celles provenant de sondages peu nombreuses car le pourcentage réduit des minorités dans la population rend les enquêtes peu fiables ou peu exploitables. D'autre part, des obstacles légaux (loi de 1978) rendent rares et difficiles les enquêtes de type démographique sur l'appartenance religieuse.

Dans ces conditions, les études sur les minorités sont essentiellement de type qualitatif. Elles tendent à montrer que même si la sécularisation générale affecte également les membres des minorités, la volonté de préserver une identité religieuse ou confessionnelle et de lutter contre le risque de dissolution dans une majorité informe, en limite les effets. Contrairement aux catholiques dont le clergé a subi un vieillissement considérable et une raréfaction drastique des effectifs (environ 60 nouveaux prêtres incardinés seulement ordonnés chaque année pour 100 diocèses), protestants et juifs ne connaissent pas de problème de recrutement de leurs pasteurs et rabbins. Dans le cas de l'islam, la question du nombre des imams et de l'insuffisance de leur formation constitue un problème politique récurrent en France.

## 2. **Changement juridique**

Du point de vue du droit, le statut juridique des minorités n'a pas changé durant les 25 dernières années. En revanche, le regard porté par la société sur les religions s'est profondément transformé. La déculturation massive de la population fait apparaître aux yeux de beaucoup les pratiques religieuses comme des survivances du passé de moins en moins compatibles avec l'évolution contemporaine des mœurs et des droits fondamentaux qui en sont le support (bioéthique, sexualité, égalité des sexes). Des pratiques telles que la circoncision des enfants ou l'abattage rituel sont de plus en plus souvent contestées, même si elles ne paraissent pas devoir être mises en cause juridiquement. Par elle-même la religion est devenue un phénomène minoritaire et donc une pratique de minorités. C'est cette marginalisation des pratiques religieuses qui explique le déclin de l'intérêt pour les phénomènes sectaires. La religion étant devenue vecteur de sectarisme aux yeux de beaucoup, la distinction des bonnes et des mauvaises religions qu'opérait la notion de secte a perdu tout intérêt.

L'irruption de l'islam dans le débat public a également contribué à la transformation du regard social porté sur les religions. La demande nouvelle de laïcité formulée à l'encontre des pratiques islamiques a transformé ce principe d'organisation des

pouvoirs publics en un droit subjectif[15] opposable aux particuliers dans l'ensemble de l'espace social. Elle a par ricochet entrainé un certain nombre de bouleversements pour les religions traditionnelles. Les demandes de création d'aumônerie dans l'enseignement secondaire sont aujourd'hui systématiquement refusées, pour éviter la création d'aumôneries musulmanes. Il en va de même pour les attributions de locaux aux associations confessionnelles étudiantes dans les universités. L'exigence d'un diplôme de formation civile et civique pour les aumôniers des services publics, imposée depuis 2017 comme condition de leur rémunération publique, s'étend également aux aumôniers des anciens cultes dans une logique de traitement indifférencié, alors que jusqu'ici elle n'avait jamais été jugée nécessaire. Enfin, on peut noter que les pouvoirs publics ont fait preuve d'une grande désinvolture dans la prise en compte des pratiques religieuses lors de l'épidémie de Covid en 2020, en sorte qu'ils ont été rappelées à l'ordre à deux reprises par le Conseil d'Etat[16].

Cette marginalisation sociale coïncide avec un mouvement inverse de reconnaissance publique des religions en tant qu'institutions porteuses de sens. En raison des valeurs qu'elles défendent, et de l'autorité qu'elles exercent sur leurs adhérents, elles contribuent à la cohésion sociale et c'est pourquoi les pouvoirs publics sont de plus en plus enclins à dialoguer avec elles et à soutenir leurs activités. C'est le cas en particulier de l'islam, qui fait l'objet d'une attention particulière du pouvoir politique depuis une trentaine d'années. Cette politique de bienveillance, dont les réalisations restent modestes, n'est évidemment pas motivée par la seule préoccupation de faciliter la pratique religieuse. Elle comprend une dimension fondamentale d'ordre public, qu'exprime la volonté de promouvoir une pratique de l'islam respectueuse des valeurs de la société nationale, et de faire échec à la diffusion des théories radicales qui font le lit du terrorisme. On peut penser qu'une telle politique de bienveillance profite également aux minorités religieuses, à l'égard desquels les pouvoirs publics sont devenus moins méfiants.

## III. Développements sociaux et juridiques

### 1. Développements sociaux

Concernant les revendications des acteurs religieux minoritaires et leurs formes d'organisation, notamment dans les relations aux pouvoirs publics, on peut relever dans le cas français :

[15] Dans sa décision du 21 février 2013, Association pour la promotion et l'expansion de la laïcité, le Conseil constitutionnel a fait de la laïcité un *« droit et liberté que la constitution garantit »*.

[16] CE 18 mai 2020, Rassemblements dans les lieux de culte (ordonnances n°440361.- 440511.- 440366s.- n°440519). CE ordonnance du 7 novembre 2020, Civitas.

— la tendance des groupes religieux à créer des fédérations leur permettant *ad extra* de bénéficier d'une forme de reconnaissance politique et sociale et *ad intra* de gérer les questions de représentativité interne et de conflit avec des groupes déviants : Fédération protestante de France (FPF), créée en 1905, Conseil national des évangéliques de France (CNEF), créé en 2003 (certains de ses membres étant également membres de la FPF), Union bouddhiste de France (UBF), créée en 1986 sur le modèle de la FPF. Ces instances fédératives permettent à leurs membres de se distinguer de franges controversées qui pourraient être labellisées en tant que « sectes ». Elles fonctionnent ainsi comme « boucliers » face à des accusations pouvant affecter tel ou tel mouvement.
— des formes d'hétéro-organisation instables dans le cas de l'islam : volonté sur le long terme des pouvoirs publics français de faire advenir un « islam de France » distinct de « l'islam en France » : CORIF (1991), CFCM (2003), Fondation de l'Islam de France (2016), projet nouveau annoncé pour 2018.

Parallèlement, certains groupes militants catholiques invitent les catholiques de France à tirer parti de leur nouvel état minoritaire et à se vivre comme une minorité agissante plutôt que comme une majorité amorphe. Les politiques publiques concernant le religieux ont visé les « sectes » et « dérives sectaires » dans les années 1980-90 (plusieurs rapports parlementaires, créations d'instances para-gouvernementales : MILS, puis MIVILUDES, loi AboutPicard en 2001, etc.). La problématique de la lutte contre la « radicalisation » est devenue largement prééminente. Elle a recyclé certains thèmes de la lutte antisectes tout en veillant à séparer soigneusement le champ « radicalisation » du champ « dérives sectaires ».

La dimension internationale est cruciale dans l'évolution des minorités et dans la perception de cette évolution par les acteurs sociaux et politiques : islam français vu comme chroniquement incapable de dépasser les clivages nationaux des pays d'origine ; condition diasporique juive bouleversée par la création de l'État d'Israël qui, d'une part, suscite une attraction croissante (*aliyah*, « montée en Israël), d'autre part atténue l'auto-perception des juifs de France comme minorité : les séjours fréquents en Israël font qu'ils vivent, même temporairement, l'expérience de la « condition majoritaire » des juifs israéliens[17].

## 2. **Développements juridiques**

Le refus de reconnaître les minorités, de même que le principe selon lequel la République ne reconnaît aucun culte, font partie de l'identité constitutionnelle de la France, et n'ont pas vocation à évoluer. Quant aux évolutions jurisprudentielles

[17] Voir L. Obadia et A.L. Zwilling (dir.), *Minorité et communauté en religion*, Strasbourg, Presses Universitaires de Strasbourg, 2016.

susceptibles d'intervenir dans ce cadre contraint, elles ne résultent jamais que des pratiques sociales que le juge consent à valider. Concrètement l'assouplissement jurisprudentiel du régime de financement public des cultes à l'œuvre depuis 2011 devrait se confirmer dans l'avenir. A ce jour ce sont surtout l'Eglise catholique et l'islam qui ont bénéficié des financements municipaux, mais le soutien ponctuel de municipalités à des groupes minoritaires localement implantés n'est pas à exclure. Dans le même sens, l'assouplissement de la jurisprudence administrative à l'égard des groupes religieux minoritaires et en particulier les Témoins de Jéhovah, n'a pas vocation à être remis en cause.

Si des évolutions jurisprudentielles ne sont pas à exclure, en revanche il ne faut pas s'attendre à des changements législatifs, *a fortiori* en ce qui concerne le statut des minorités religieuses. De la même façon, le monisme de l'ordre juridique national, qui exclut toute validité des normes religieuses en-dehors de l'ordre religieux lui-même, n'a pas vocation à être remis en cause. Il est vraisemblable au contraire que l'autocompréhension des communautés religieuses sera de plus en plus restreinte par l'imposition des droits fondamentaux dans l'ordre religieux.

# CONSTITUTIONAL PROTECTION OF RELIGIOUS MINORITIES IN GREECE

Lina Papadopoulou*

## I. Definition and status

### 1. Social science definition

The term 'religious minority' as a subdivision of the generic term 'minority' denotes a group of people whose members, whether they be citizens of the same state or not, have religious characteristics that differ from the majority of the population of the state in which they reside. They are numerically inferior to the latter and are in a non-dominant position. They might also share a common desire to preserve their own religious beliefs and rites.[1]

Besides this sociological definition, in Greece, defining religious minorities has been mostly an historical issue. Specifically, religious identity, in this case the faith of the Christian Orthodox Church, has been a cornerstone for nation-building in Greece. According to the first revolutionary Constitutions,[2] the Christian Orthodox population

* Associate Professor of Constitutional Law, Jean Monnet Chair for European Constitutional Law and Culture, Law School, Academic Co-ordinator of the Jean Monnet Center of Excellence 'European Constitutionalism and Religion(s)', Aristotle University of Thessaloniki, Greece.

[1] H. Mihailidou, 'The religious minorities in Greece, especially according to the Report of the Special Rapporteur of the Human Rights Committee of the UN', in K. Beis (ed.), *The religious freedom – theory and praxis in the Greek Society and legal order* (Athens, Eunomia Verlag, 1997), pp. 159-161.

[2] The first Greek constitutional text adopted during the Greek War of Independence from the Ottoman Empire, which officially started in 1821, was that of 1822 and was adopted by the First National Assembly at Epidaurus on January 1, 1822. It was formally called 'The Provisional Regime of Greece' (*Προσωρινό Πολίτευμα της Ελλάδος*). The second revolutionary constitutional text, named 'The Law of Epidaurus' (*Νόμος της Επιδαύρου*)was adopted in the spring of 1823 by the Second National Assembly, just before the beginning of the first civil war during the Revolution. The third Greek Constitution was signed and ratified in June 1827 by the Third National Assembly at Troezen, which had already unanimously elected Ioannis Kapodistrias as Governor of Greece for a seven-year term. Both this election and the proclamation of the Constitution were movements towards state centralisation. This Constitution declared for the first time the principle of popular sovereignty. According to Article 6 of this Constitution the Greeks were classified as:

of the newly liberated Greek territory, or those naturalised in accordance with the laws of the time, constituted the Greek nation. Given the fact that the Ottomans were Muslims, the only characteristic that could possibly differentiate and exclude them from the newly established Greek nation was religion – not language, the revolutionaries thought. Indeed, at that time, people were more willing to die for their religion than they were for their language.[3] Consequently, the Greek Orthodox Church has always been a national Church, just as all churches in the Balkans are national Churches. It was the Greek state that established it as a national, autocephalous Church, so that it did not depend on the Patriarchate of Constantinople anymore, which remained under Ottoman domination. As a result, it has always held a dominant position in the state, one that is enshrined in Art. 3 of the Greek Constitution (henceforth GrConst), which provides that the prevailing religion in Greece is that of the Eastern Orthodox Church of Christ (see below under 2).

Accordingly, the Christian Orthodox majority is well established in all regions of the country and is not considered to be a new minority. It is socially and legally well established, as will be shown below. No other religion or denomination, nor atheism or religious skepticism, can threaten the dominance of Orthodox Christianity. The latter's practices are dominant in social life and its symbols are to be found everywhere in public spaces, such as schools, courtrooms, public buildings etc. Consequently, all religious minorities in Greece have always struggled to achieve equal status in the Greek state.

This prevalence of Orthodox Christianity has been the subject of a series of social science studies, mainly of a qualitative nature. The most common topics have been the legal framework in which the Greek Orthodox Church operates (which will be analysed below) and the politics of this Church (including its relations with political forces and parties etc.). The need to differentiate between old and new religious mi-

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— The Christians living in Greece;
— Those Christians living in the Ottoman Empire who would come to the Greek territory to fight for it or to live in it;
— Those living abroad who had been born to a Greek father;
— Those individuals, either native Greeks or not, as well as their children, who were citizens of another state at the time this constitution was published, who would come to Greece and take the Greek Oath;
— Aliens who were prepared to come and be naturalised as citizens.

The criteria and procedure for naturalisation were provided for in Articles 30–35. As a formal sign of naturalisation, the Constitution included the so-called Greek Oath: "I swear in the name of the All-Highest and of the fatherland to always come to the assistance of the freedom and well-being of my nation, sacrificing for it even my life, if the need should arise. Further I swear to submit to the laws of my fatherland, to respect the rights of my fellow citizens, and to fulfil without fail the obligations of a citizen".

[3] B. Anderson, *Imagined communities: Reflections on the Origin and Spread of nationalism* (London, Verso (rev. ed.), 1991), p. 144.

norities, especially between old and new forms of Islam, is based on both sociological and legal reasons, as will be shown below.

## 2. Legal definition

### A. *A legal framework providing equality for minorities*

As we have seen, the social prevalence of the Greek Orthodox Church derives from its constitutional status as the prevailing religion in Greece (Article 3 GrConst).[4] This means that the Church enjoys a certain set of privileges, some of which have been gradually shared with other Churches, mainly Catholic and Protestant, as well as the Jewish community. This prevalence of the Greek Orthodox Church means that the most prominent Christian Orthodox festivals (Christmas, Easter etc.) are also public holidays, and that Greek Orthodox priests are present at festive public occasions. Although some theorists insist that this is an empirical declaration only, meaning that this is the religion 'to which the vast majority of the Greek people belong',[5] there have been rulings by the Council of State (the Supreme Administrative Court, henceforth CoS) which base their reasoning on Article 3 of the Constitution. It is difficult to insist that a constitutional provision is only descriptive and not normative and regulatory, even if its content needs to be reconciled with the principles of freedom of religion and religious equality.

There is no legal definition of religious minorities in the constitutional text nor in other laws. Religious minorities are protected under the general constitutional provision of Article 13 GrConst, which guarantees the right to freedom of religion, in combination with Article 4 §1 GrConst (equality principle) and Art. 5 §2 GrConst.[6] Freedom of religion is something more positive in nature than mere religious tolerance: it establishes the claim upon the State that 'it should not intervene –neither by acting nor by failing to act- in the process of forming religious convictions … or in manifesting them…'.[7] Moreover, proselytism is prohibited altogether (Art. 13 §2

[4] Section II, Article 3, para. 1 sec. a, 'The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ'.

[5] S. Troianos, *Ecclesiastical Law* (in Greek) (2nd edn, Athens, Komotini, Sakkoula, 1984), p. 95; S. Troianos, 'La situation juridique de la 'religion dominante' en Grèce' (2003) 45 *L'Année Canonique,* pp. 127ff; C. Papageorgiou, *An introduction to Hellenic Ecclesiastical Law* (Trikala-Thessaloniki, Degiorgio Editions, 2012), p. 48.

[6] Article 5 para 2 GrConst,'All persons living within the Greek territory shall enjoy full protection of their life, honour and liberty irrespective of nationality, race or language and of religious or political beliefs. Exceptions shall be permitted only in cases provided by international law'.

[7] *J. M. Konidaris*,'*Legal status of minority* churches and religious communities in Greece' in European for Church and State Research, *The Legal Status of Religious Minorities in the Countries of the European Union* (Milan, 1994) 171ff (171), with reference to the Greek constitutional lawyer A. Manesis, *Constitutional Rights*, *I, Individual Freedoms* (4th edn, Thessaloniki, Sakkoula, 1982) pp. 249ff.

GrConst), either by a minority or by the prevailing religion. However, as the state is inhibited in this respect (religious education courses in Greek state schools are of an Orthodox Christian catechetical character; Christian icons are to be found in public spaces such as schools and courts, etc.), in the past it was the religious minorities (particularly the Jehovah's Witnesses) who faced charges of proselytism (see the well-known ECtHR case *Kokkinakis*). Within a framework of religious equality, problematic though it may be, the confiscation of newspapers and other publications is permitted upon their distribution when they are considered to have offended any 'known religion' (Art. 14 §3 GrConst). A 'known religion' is one which has overt worship practices and is accessible to everyone without any need for initiation. In short, all minorities –and not only religious ones- function within the general legal framework of the constitutional protection of human rights, which is composed of both the Greek Constitution and the international and European human rights texts.[8]
I. 2. b. but state practices that set minorities apart from the prevailing religion.

A brief look at the Greek Constitution will allow an observer to identify the many points where the prevalence of the Greek Orthodox Church can be clearly seen, starting with the Preamble, which declares that the Constitution is enacted 'in the name of the Holy and Consubstantial and Indivisible Trinity'. It is also worth mentioning that although freedom of religion, as provided for by Art. 3 GrConst, applies to all religions, freedom of worship covers only 'all known religions'. A 'known religion' is one which any individual is free to adopt and whose worship is carried out in public without the need for any form of initiation.[9] However, only the most prominent religions and denominations are considered to be such. In the past there was a problem with the Jehovah's Witnesses but there is no longer any ambiguity, as it has now become a 'known religion'.

In addition, a newly elected President of the Republic has to take a religious oath 'in the name of the Holy, Consubstantial and Indivisible Trinity' (Art. 33 §2 GrConst); no alternative oath is provided for and this creates the misconception that only a

[8] These sources include, at the European level, Article 14 of the ECHR, and, at the international level, Article 27 of the International Covenant on Civil and Political Rights, the International Convention against all Forms of Racial Discrimination, the International Convention on the Elimination of all Forms of Discrimination against Women, the Convention for the Rights of Children, and the UNESCO Convention Against Discrimination in Education. Of course, in connection with the protection of minorities, we also have the prohibition of genocide, which forbids the extermination of religious minorities (amongst all other groups). Soft law instruments such as the UN Declaration on the Rights of Persons Belonging to Minorities, a series of Concluding Documents of the CSCE (Vienna 1989, Copenhagen 1990, the Geneva meeting of experts 1991), and reports adopted by the European Commission against Racism and Intolerance (ECRI, Council of Europe), as well as reports by UN bodies add to the international protection of minorities.

[9] I. M. Konidaris, *Legal Theory and Practice regarding Jehovah 's Witnesses,* (in Greek) (3rd edd, Athens 1991), p. 42 and pp. *55* ff.

member of the prevailing Church can be elected to the supreme state office. The same applies to newly elected Members of Parliament who are atheists or agnostics, given that Art. 59 §1 GrConst enables adherents of other religions or dogmas to swear their own version of the oath, but not those who adhere to no religion.[10]

Art. 16 §2 GrConst provides that one of the aims of education should involve the development of a religious conscience. Although it is worded openly, allowing religious education courses in schools to have a non-catechetical content, in accordance with Art. 5 §1 GrConst (free development of one's personality), the state insists on organising courses of a catechetical character, allowing for students belonging to minority religions (including atheists) to be granted an exception.

However, there are two terms in administrative use pertaining to religious minorities: *eterothriski* ('ετερόθρησκοι, which means 'heteroreligious' or 'of different religion') and *eterodoxi*, ('ετερόδοξοι', i.e. 'heterodox', which means of different denomination, that is non-Orthodox Christian). Odd as this might sound for an EU country in the 21st century, there is still a distinct department in the Ministry of Education and Religious Affairs dealing with those who are *eterothriski* and *eterodoxi*.[11] So, although the legislator does not acknowledge religious differences, the administration does.

The word used to define religious minorities is also semantically loaded: they are not called 'religious minorities' but either *eterothriskoi*, i.e. 'of another religion', that is 'non-Christians', or *eterodoxi*, i.e. 'of another denomination', that is 'non-Orthodox Christians'. So, these people are defined through their difference to the 'normality' of Orthodox Christians. According to this logic, anyone who is not an Orthodox Christian belongs to a religious minority.

### B. *The exceptional status of the Muslim minority in Western Thrace*

In contrast to the actual social reality, legally speaking there is only one religious minority that is legally recognised as such (and not as a national or ethnic one) with distinct rights and duties: the Muslim minority in Western Thrace. Its members enjoy special protection, both under national and international law, based on the Lausanne Treaty (1923), an international treaty concluded with Turkey.[12] This is due to the

[10] Obviously, this provision has to be read in conjunction with Art. 13 §1 GrConst (freedom of religion) and does not prevent an elected non-religious Greek from becoming a Member of Parliament.

[11] There is a General Secretariat for Religions, with two Directorates, one for Religious Administration and one for Religious Education and Inter-religious Relations. Under the first Directorate there are three Departments: the Dept. of Ecclesiastical Administration, the Dept. for Other Religions and Denominations, and the Dept. of Muslim Affairs. Under the second Directorate there are also three departments: the Dept. of Ecclesiastical and Religious Education, the Dept. of Religious Freedoms and Interreligious Relations, and the Dept. of Muslim Religious Schools.

[12] There were also other treaties before the Treaty of Lausanne.

fact that the majority of the Muslim minority in Thrace consists of Greek citizens of Turkish origin, so Turkey is their kin-state.

The designation of this minority as a religious minority was obviously an attempt to avoid calling it a national or even a linguistic minority, despite the fact that there are specific provisions regulating the separate schools for this minority in Western Thrace (and despite the fact that not all are Turkish-speaking).[13] After all, by downplaying the differences within this Muslim minority, the law shapes its identity, often on the basis of erroneous and political assumptions.[14]

However, the impossibility of distinguishing between the religious (and other) features of a distinct group of people who regard themselves as being separate from the main ethnic group in their country of residence, is not a new phenomenon. Already back in the Treaty of Westphalia (1648) when the rights of religious minorities were awarded legal protection under international law, it was not possible to distinguish, at least in legal terms, between a religious minority and an ethnic or linguistic one.[15]

## II. Legal status

### 1. Accommodating differences in legal terms

Religious communities have the right, as an expression of their religious freedom in combination with the right to associate for religious purposes, to acquire a legal personality,[16] and the right to self-administration. The ordinary legislator is thus not allowed to radically alter their fundamental administrative institutions (CoS 1270/1977).

The Greek Orthodox Church is a legal entity of public law (Article 1§4 of Law 590/1977, which constitutes the Charter of the Church). The same applies to the Catholic Church.[17] The former also enjoys, according to the Third London Protocol of 1830, special protection of its property and the preservation of its previous

[13] This has the absurd corollary that Pomaks and Rom people are obliged by the Greek state to study in Turkish only because they are Muslim, despite the fact that they are not of Turkish origin.

[14] K. Tsitselikis, *Old and New Islam in Greece, From Historical Minorities to Immigrant Newcomers* (Leiden/Boston, Martinus Nijhoff, 2012), p. 1.

[15] G. Gilbert, 'Religious minorities and their rights: A problem of approach' (1997) 5/2 *International Journal of Minority and Group Rights*, pp. 97-134; A. Patten and W. Kymlicka 'Introduction. Language Rights and Political Theory: Context, Issues and Approaches' in W. Kymlicka and A. Patten (eds.), *Language Rights and Political Theory* (Oxford, Oxford University Press, 2003), pp. 1-51.

[16] C. Anthopoulos, 'Freedom of conscience and freedom of religion in the Greek Constitution' in A. Weber (ed.), *Fundamental Rights in Europe and North America*, *Part B1: The Individual Rights* (Kluwer Law International, 2003) p. 89, and pp. 98 ff.

[17] C. Papastathis, 'State and Church in Greece' in G. Robbers (ed.), *State and Church in the European Union* (Baden-Baden, Nomos,2006) p. 115.

privileges.[18] Its organisational subdivisions have a 'sui generis legal personality', even if they have not acquired such under Greek law (ECtHR, *Canea Catholic Church*, 1997). Those institutions of the Catholic Church which had been established, or had operated in Greece before 23 February 1946, when the Civil Code, and its Introductory Law regulating the right to stand before a court, was enacted, also enjoy the latter right (Article 33 of L 2731/1999).[19] In contrast, there is no legal text regulating Protestantism and the legal status of the Evangelical Church, so it retains the status of a legal entity of private law, as does the Armenian Church.

The status of Jewish communities in Greece is regulated by a series of legal provisions (e.g. Law 2456/1920, Mandatory Law 367/1945, Law 1657/1951, etc.). A Jewish community may acquire the status of a legal entity of public law provided that it consists of at least twenty families and a synagogue. Legally constituted Jewish communities have the right to operate religious schools.

## 2. The special status of the Muslim minority in Western Thrace

The legal status of the only officially recognised minority in Greece, the Muslim minority of Western Thrace, is regulated by the Treaty of Lausanne (1923), which covers the issues of state-funded bilingual education and religious ministers, as well as the operation of mosques and auqafs. Moreover, the Greek government, within its discretionary competence, has chosen to permit the application of sacred Islamic law (Sharia) in family law matters.

Sacred Islamic law (the Shari'a) is applied to Greek Muslims and regulates their personal status and family relations, especially with regards to inheritance, marriage and divorce and, in the latter case, issues of custody and the award of parental responsibility. In this field, the application of Sharia does not impinge upon private international law, as is the case in many European countries; it is rather applied by the Mufti as internal Greek law on Greek citizens. This means that the Mufti, a religious leader, in accordance with Law 1920/1991, also has judicial functions. The application of Islamic law in the national legal order represents a kind of 'official legal pluralism';[20] religious norms co-exist with, and can take the place of, state laws, if the individual concerned so wishes. In contrast, non-Greek Muslims bring their

[18] Papastathis,'State and Church in Greece', p. 135.

[19] E. Psychogiopoulou, 'The European Court of Human Rights in Greece: Litigation, Rights Protection and Vulnerable Groups' in D. Anagnostou and E. Psychogiopoulou (eds.), *The European Court of Human Rights and the rights of marginalised individuals and minorities in national context* (Leiden-Boston, Martinus Nijhoff, 2010), p. 115 and pp. 130 ff.

[20] Papadopoulou, 'Trapped in history: Greek Muslim Women under the Sacred Islamic Law', p. 412; I. Tsavousoglou, 'The Legal Treatment of Muslim Minority Women under the Rule of Islamic Law in Greek Thrace' (2005) 03 *Oslo Law Review,* volume 2.

cases before civil courts, which have the discretion to decide according to Islamic law based on international private law provisions.[21]

Within this context, Greece continues to officially recognise the jurisdiction of three Muslim Muftis in Thrace (one in Komotini, one in Xanthi, and one in Didymoteicho) who are able to adjudicate on family matters amongst Muslims in accordance with Sharia and local Muslim customs. Muftis are appointed and paid by the Greek government. Sharia law is not codified, so there is no social control of its application. Neither are there any procedural laws, or rules of evidence applicable before the Muftis. Their decisions are translated and then directed to the competent Greek court (*Monomeles Protodikeio* or Court of First Instance) for ratification. This Court issues the enforceability decree of the Mufti's decision after affirming that the latter is not *ultra vires*, that is to say, it does not exceed the Mufti's jurisdiction (which covers marriage, divorce, maintenance, custody, guardianship, wills, and inheritance disputes), and does not violate the Constitution.

No legal provision is made for remedies and appeals against the Muftis' decisions.[22] Besides this lack of 'rule of law' which guarantees the right to a fair trial, theorists contend that this normative setting essentially undermines fundamental rights, especially those of women, including gender equality, and children.[23]In 2013, a judgement (1497/2013) was made by Areios Pagos,[24] the supreme civil and penal Court in Greece, affirming, once more,[25] the obligatory character of Sharia law.[26] The Court annulled the will of a deceased Muslim man in Thrace, who had bequeathed all his assets to his wife (since they did not have any children) by preparing a will in accordance with Greek civil law. The plaintiffs, the testator's sisters, challenged the will, claiming they were entitled to their fair share of his estate, based on Sharia, the Islamic sacred law regulating succession (as well as other family issues) which

[21] L. Papadopoulou, 'Trapped in history: Greek Muslim Women under the Sacred Islamic Law' (2010) AIDH Vol. V *Religions et droits de l' homme, Annuaire International des Droits de l'homme*, p. 397.

[22] Sezgin, 'Reforming Muslim Family Laws in Non-Muslim Democracies', p. 162; Papadopoulou, 'Trapped in history: Greek Muslim Women under the Sacred Islamic Law', p. 410.

[23] See, in greater detail, Papadopoulou,'Trapped in history: Greek Muslim Women under the Sacred Islamic Law', p. 400; Cf also A. Tsaoussi and E. Zervogianni,'Multiculturalism and Family Law: The Case of Greek Muslims' in K. Boele-Woelki and T. Sverdrup (eds.), *European Challenges in Contemporary Family Law* (Intersentia, 2008) p. 209.

[24] *See* K. Nikolas, '*Greek Supreme Court Puts Sharia Law Before Civil Law', Digital Journal*, 11 Nov. 11 2013; G.. Beyer, 'Greek Supreme Court Issues Shocking Decision', *WILLS, TRTS. & ESTS. PROF BLOG*, 16 Nov, 2013 http://lawprofessors.typepad.com/trusts_estates_prof/2013/11/greek-supreme-court-issues-shocking-decision.html [https://perma.cc/4WG7-VWKZ].

[25] See also AP rulings 2113/2009, 1588/2011, 1370 / 2014.

[26] On this AP ruling *cf* A. York, 'What would Zeus think?: Choosing Between the Freedom to Create a Will and Freedom of Religion' (2016) 8:93 *The* CODICIL— *Online Companion.*

does not recognise a Muslim's right to draw up a will based on secular law. The Areios Pagos (the Court of Cassation) quashed the judgements of both the Court of First Instance and the Thrace Court of Appeal, who had found, in September 2011, that the decision by the deceased to request a notary to draw up a public will was an expression of his statutory right to have his estate disposed of, after his death, under the same conditions as other Greek citizens. The testator's wife has applied to the European Court of Human Rights (see Molla Sali v. Greece, Appl. No. 20452/14, judgement of 19 December 2018). Given the fact that for decades, hereditary relations had been formed on the basis of the knowledge that the application of Sharia law was optional, and the fact that, since 1946, Greek Muslims had drawn up their wills in accordance with Greek civil law,[27] the judgement by the Areios Pagoa could take away this right of choice and have far-reaching repercussions on the local community. The long-awaited ECtHR judgement confirmed this right. As anticipated, the Grand Chamber of the European Court of Human Rights (ECtHR) held unanimously that there had been a violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights (ECHR), read in conjunction with Article 1 of Protocol No. 1 (protection of property) to the Convention.[28] The different treatment between a beneficiary of a will drawn-up under the Civil Code by a Greek testator of Muslim faith, as compared with a beneficiary of a similar will by a non-Muslim Greek testator, had not been objectively and reasonably justified, the Court ruled. It also noted that Greece was at the time the only contracting State applying Sharia to a section of its own citizens against their own preferences. According to the Court, however, when a State decides to establish a particular status for a religious minority, it has to guarantee both a non-discriminating treatment and the right of the members of this minority to opt for, and benefit from, ordinary law.

## III. Social and legal change

### 1. Social change

Based on the tradition explained above, even today the vast majority of Greeks are Christian Orthodox. This is mainly due to the fact that Greeks who belong to this denomination baptise their children when they are still infants, so the percentage of Orthodox Christians –at least on paper– is huge, almost 97%. However, this is an informal estimate, since in the census there is no question concerning religion.

[27] A. Alloush, '*Shocking Decision from Greek Supreme Court', Greek Reporter*, 10 Nov 2013.

[28] See more analytically, F. Cranmer,'*Sharia* and inheritance in Western Thrace: the Grand Chamber judgment in *Molla Sali'*, *Law & Religion UK*, 19. Dec2018 <https://www.lawandreligionuk.com/2018/12/19/sharia-and-inheritance-in-western-thrace-the-grand-chamber-judgment-in-molla-sali/).

According to an informal poll (Metron Analysis, December 2011), 1.5% declared that they belonged to a different religion to Orthodox Christianity and 2.8% identified themselves as atheist or non-religious. Some Orthodox Christians continue to follow the Julian calendar (since the adoption in Greece of the Gregorian Calendar in 1924) and have their own clergy and parishes. In another poll (conducted in 2011 by Kapa Research) on the question of whether respondents believed in God, 56.3% replied 'yes', 20% 'probably yes', while 7.7% and 13% said 'probably not' and 'no', respectively.[29]

Consequently, socially speaking, all the other religious or non-religious faiths, besides Orthodox Christianity, are religious minorities. The most prominent religious minorities consist of other Christian denominations, especially Jehovah's Witnesses, Catholics and Protestants, as well as Muslims and Atheists.

The traditional Muslim minority is the one living in Western (Greek) Thrace. Most of its members are of Turkish origin and have been established in the region for centuries. Amongst the Muslims of this region, there are also Pomaks, who are native inhabitants of Thrace, and Rom. Many of the newly arrived immigrants are also Muslim. As will be shown below, the Thracian Muslims enjoy different rights to those of the newcomers. There is also a large group of Albanian immigrants in the country. Most of them are non-theists and a small percentage are Muslims, though of a mild persuasion.

According to one estimate, the Muslims in Greece account for 5% of the population, a fifth of which lives in Western Thrace.[30] As has already been mentioned, the Muslim population in Western Thrace (consisting of individuals of Turkish ethnic origin, Pomaks and Roms, all with Greek citizenship) has been the traditional religious minority par excellence in Greece. In the last three decades or so, the country has experienced a series of migratory waves, the first of which consisted of Albanians, who, although coming from a Muslim country, have been mostly atheists (due to the former communist Albanian regime). Since then, there has been a constant flow of immigrants, which escalated recently in 2015-2016 with newcomers from Syria, ,Pakistan, and other mainly Muslim countries. Concerning the Muslim minority in Thrace, Sezgin (2017, 164) reports that there is an increasing tendency amongst its members to use civil courts for inheritance issues.[31]

[29] L. Papadopoulou, 'Law and Religion in Greece' in G. Robbers and W.C. Durham (eds.) *Encyclopedia of Law and Religion*, *Vol 4: Europe* (Leiden/Boston, Brill, 2016) p. 156.

[30] See: PEW Research Center, *The Future of the Global Muslim Population* (Washington DC, Pew Research Center, 2011).

[31] According to Sezgin, 2017, 164 (based on a personal interview in March 2015), the secretary general of the Muftiate of Komotini reports that while the mufti issued about 185 inheritance (faraiz) fatwas per annum between 1964 and 1985, and 20 between 1985 and 2005, the yearly average has now fallen to 3–5.

A development worth mentioning is also the establishment of a large mosque in Athens.[32]

## 2. Legal change

### A. *The ECtHR as guarantor of religious equality in Greece*

Over the last twenty-five years (since the previous meeting in Thessaloniki, where religious minorities were discussed),rights for religious minorities have gradually improved. The main reason for this has been the European Court of Human Rights and its jurisprudence.[33] Of its cases on religious freedom, Greece has had a big share. This can be explained by the fact that the Greek Orthodox Church used to be unfairly privileged and a series of cases found the Greek state to be discriminating against religious minorities.

The *Kokkinakis* case (No 14307/88, 1993)[34] is a landmark decision which signified an end to the endless persecution of the Jehovah's Witnesses based on the old legislation on proselytism. Although the law, which was enacted by the Metaxas dictatorship, remains intact, administrative (police) and judicial practice has radically changed. The law on proselytism is no longer supposed to protect only the prevailing religion and the criteria set by the ECtHR are respected.

Concerning the religious oath which used to be the norm in the courts, the Council of State (judgement 2601/1998) concluded that those who are atheist, or whose religion forbids the taking of an oath in the name of their God, have the right to certify the sincerity of their testimony.[35] Nowadays, the witness is asked whether they prefer to give a religious or political oath, in accordance with Art. 218 of the Code for Penal Procedure (CPP), as amended by Art. 39 §3 of Law 4055/2012. Art. 220 of the CPP, which provided for the oath of *allothriskoi* (people of other religions), was abolished by Article 109 §1b of Law 4055/2012.

## IV. Establishment of places of worship

Concerning the establishment of religious places of worship, members of religious minorities used to have to satisfy the following condition: for a place of worship

[32] This has become possible after Council of State ruling 2399/2014.

[33] A series of cases concerning religious discrimination in Greece has brought about changes: see *Kokkinakis* (1993), *Tsirlis-Kouloumpas* (1997), *Georgiadis* (1997), *Ibrahim Serif* (1999) etc.

[34] In that case, Mr Kokkinakis, a Jehovah's Witness, was sentenced to imprisonment and a fine for proselytism under section 4 of Mandatory Law 1363/1938. See also the *Larissis* case, No 23372/94, 1998.

[35] There has also been a series of ECtHR decisions on the same issue: see e.g. Alexandridis, No 19516/2006, 2008; Dimitras, Nos. 42837/06, 3237/07, 3269/07, 35793/07 and 6099/08 (2010); 2011, Nos 34207/08 and 6365/09, ECtHR Nos 44077/09, 15369/10 and 41345/10 (2013).

to be established, 50 families had to be living close to each other, the applications had to be signed by the head of each family and the signatures had to be ratified by the police.[36] They also needed to prove that there was no other place of worship nearby and were obliged to obtain the consent of the local Metropolitan of the Greek Orthodox Church as well as a licence from the relevant Minister. The conditions were relatively easier to meet if the place of worship was smaller. These outdated laws (enacted by the Metaxas dictatorship)[37] were applied for decades. Until the mid-1990s, the administration very rarely awarded licences for the establishment of places of worship for religious minorities. A usual victim of this hesitance were the Jehovah's Witnesses. This practice changed after the *Manoussakis* case at the ECtHR, and licences are now issued more easily than before. This change may also be attributed to the Greek Council of State's jurisprudence: it initially declared the Metropolitan's consent to be merely an advisory opinion for the Minister. It then concluded that the Minister's licence is a 'circumscribed competence' as long as the other preconditions apply and there are no specific public order reasons for opposing the issue of the licence. The condition of the Metropolitan's consent was abolished by Art. 27 of Law 3467/2006.

## V. A new law for religious communities

Law 4301/2014 was enacted in order to regulate the functioning of religious communities. It has introduced a new form of legal entity under private law: 'religious legal entities'. The law grants these entities the right to establish, in accordance with the provisions in force, houses of worship and retreats. However, the requirement of at least 300 persons for the establishment of a religious legal entity (Article 2) has already been criticised by legal theorists because it introduces an excessive restriction on the practice of religious worship.

According to Art. 17 of Law 4301/2014, any religion for which a ministerial licence has already been awarded for a place of worship to be established, is considered to be 'known' and thus its members enjoy freedom of worship, as provided for in Art. 16 §2 GrConst.

## VI. The optional character of Sharia law

The only legal change refers to the application of Sharia law in Western Thrace. For a long time its application had been considered to be optional.[38] As has already

[36] This has been changed by the Council of State ruling 4202/2012 declaring that the ratification of signatures can be performed in any legal way. See also CoS 1920/2014 and 625/2016.

[37] Art. 1 of Mandatory Law 1363/1938, as amended by Art. 1 of Mandatory Law 1672/1939 and Art. 41 of Mandatory Law 1369/1938.

[38] *Contra* Sezgin,'Reforming Muslim Family Laws in Non-Muslim Democracies', p. 162.

been mentioned, the Court of Cassation (Areios Pagos) has established the obligatory character of its application for Greek Muslims residing in Western Thrace. Law 4511/2018 now explicitly provides for what had previously been the case (before the 2013 ruling by the Areios Pagos) on the obligatory character of Sharia law. That is to say, its application is conditional upon the mutual consent of all parties involved that want to come under the Mufti's jurisdiction. Moreover, it provides for the inheritance relations between the members of the Muslim minority of Thrace to be governed by the provisions of the Civil Code, except in cases where the plaintiff draws a public will expressly stating their desire to subordinate their inheritance succession to the Sacred Muslim Law. This statement may be freely revoked, either by a subsequent declaration to the contrary to a notary, or a subsequent will, under the terms of the Civil Code. The simultaneous application of both the Civil Code and the Sacred Muslim Law to the hereditary property, or to a percentage, or even to discrete elements, is prohibited. This solves the problem that would have been caused in the Muslim community, especially concerning inheritance cases. It does not tackle human rights concerns, however, since gender inequality persists in practice.

## VII. Social and legal developments

A major social issue in Greece has always been the special ties between the Greek state and the Greek Orthodox Church, and the latter's special status and privileges, which create an environment of curtailed religious freedom for members of religious minorities, including atheists and agnostics. Within this framework, the issue of school religious education courses has once again attracted the attention of the public. Non-Orthodox pupils can now be exempted from these studies, but this already constitutes an exposure of their personal data which may stigmatise the young students at school. The public debate revolves around the question of whether these courses should be catechetical in nature (the conservative viewpoint) or more sociological in character (the liberal viewpoint). A recent Council of State ruling (660/2018) has once again many conservative connotations in favour of courses of a catechetical nature.

The second diachronic issue has to do with the application of Sharia law in Western Thrace. Greece has never tried to reform or directly interfere with the religious laws of the Muslim minority of Western Thrace by executive or legislative means - 'due mostly to fear of antagonizing nationalist elements'[39] within the minority community and its ties to its kin-state, Turkey. Here again, a section of public opinion and various opinion leaders (including human rights organisations), as well as a number of

[39] Y. Sezgin, 'Reforming Muslim Family Laws in Non-Muslim Democracies' in J. Cesari and J. Casanova (eds.), *Islam, Gender, and Democracy in Comparative Perspective* (Oxford, Oxford University Press, 2017) p. 160.

legal theorists, insists that Sharia is a systemic violation of human rights and should be abolished altogether. There is always the fear, however, that this would provoke a negative reaction on the part of Turkey, due to the bonds this state has with the Thracian Muslim minority.

During the current (September 2018) SYRIZA-ANEL administration of the Ministry for Education and Religious Affairs, there have been some thoughts by various officials to extend the application of Sharia law, which according to one opinion[40] is the result of a series of treaties, the latest being the Lausanne Treaty. They believe that Sharia law should be extended from the Muslim minority in Western Thrace to all Muslims in Greece. This would supposedly disconnect the Muslim minority from the kin-state, Turkey. On the other hand, it would, regrettably, extend a Paleolithic and anti-human-rights regime to more people, instead of abolishing it. This change has fortunately not taken place (yet).

Thirdly, there is a more general uneasiness with the newly-arrived Muslim immigrants, as there is in the whole of Europe. The immigration issue is here inseparably connected with the religious issue. The questions being raised by this phenomenon are more or less the same throughout Europe and have to do with each country's ability to integrate the immigrants, and in some cases, their desire to assimilate them.

The issue of integration brings a fourth issue to the forefront. Since there are still some fundamental rights preserved only for citizens, in Greece it is crucial for immigrants to obtain citizenship status. Consequently, there is a distinction between those belonging to religious minorities who have Greek citizenship, and the new immigrants who lack this tie with the state. Whilst, for example, both the Catholic minority on some Greek islands (e.g. Syros) and the newly-arrived Muslims are minorities, their situation is not comparable, because it is inseparably connected with their (lack of) citizenship. There was an attempt through Law 3838/2010 to make naturalisation easier, but it has been overturned by the Supreme Administrative Court, the (so-called) Council of State.[41]

[40] See, for example, Greek Supreme Court (Areios Pagos) Judgment nos 322/1960, 1723/1980, 1041/2001. From the legal theory, see *İ. Tsavousoglou, 'The Legal Treatment of Muslim Minority Women under the Rule of Islamic Law in Greek Thrace', op. cit. Contra* Y. Ktistakis, *Sacred Muslim Law and the Muslim Greek Citizens* (Sakkoulas,2006) [in Greek], pp. 89-114; G. Koumantos, *Family Law*, vol I (Sakkoulas, 1988), p. 244 [in Greek]; particularly on the Treaty of Lausanne see A.Kotzampasi, 'The Scope of Application of the Sacred Muslim Law in the Family Legal Relations of the Greek Muslims' (2003) 44 *Elliniki Dikaiosyni,* p. 57 and pp. 63 ff [in Greek].

[41] See in greater detail L. Papadopoulou, 'Schooling as a basis for naturalisation: Exploring the educational and philosophical underpinnings of a legal debate in Greece' in A. Viviani (ed.), *Global Citizenship Education, Multiculturalism and Social Inclusion in Europe – The Findings of the 'I Have Rights' project* (Coimbra, Simoes e Linhares Ltd., 2018) pp. 201-223.

In conclusion, if one looks back on the quarter of a century that has passed since the last Consortium meeting in Thessaloniki, one may observe that huge progress has been made in respect of the legal status of religious minorities in Greece, a progress which is to be attributed mainly to the European Court of Human Rights. On the other hand, this does not mean that little remains to be accomplished. The road to achieving fully-fledged religious equality in Greece is still a long one and it passes necessarily through challenging the virtual omnipotence, in social and institutional terms, of the Greek Orthodox Church.

# RELIGIOUS MINORITIES IN ITALY. ISSUES AND DEVELOPMENTS

Roberto Mazzola*

## I. Definition and status

### 1. Social science definition

For long time, members of the Waldensian Church, one of the oldest and most combative religious minorities in Italy, have played a crucial role in denouncing the risk that formulas such as "admitted cults" (from Act n. 1159 of 1929) and "religious denominations" (from art. 8 paragraph 1 of the Constitution of 1948) are interpreted so as to suggest that non-Catholic groups have no distinctive identity and they form an undifferentiated lot. Church and State expert and member of the Waldensian Church Giorgio Peyrot referred to this when he exposed the danger of exploiting statutory and constitutional categories in order to frame non-Catholic communities as "an anonymous, indistinct heap" [1]. Far from endorsing interpretations designed to weaken the identity of individual religious minorities, Peyrot argued that the principle of equal liberty of all religious denominations provided for by art. 8 paragraph 1 of the Constitution should be interpreted as granting all denominations the right to express their true nature and traditions, this implying that state agents and bodies act in their regard with the "precise knowledge of their connotations"[2].

### 2. Legal definition

The second paragraph of Italian Constitution, Art. 8 allows for religious autonomy only insofar as internal religious regulations are not in contrast with the legal order of the State. This principle should not be interpreted as mandating for internal

* Università del Piemonte orientale.

[1] See. G. Peyrot, *Condizione giuridica delle confessioni religiose prive di intesa, in Nuovi accordi fra Stato e confessioni religiose*, (Torino, Giappichelli Editore, 1995), p. 622.

[2] *Ibid*., p. 624.

religious rules to be under the supreme and primary state regulation. In accordance with the fundamental principles of the Constitution, Art. 8 par. 2 should rather be understood as commanding respect of the distinction between the religious and the civil legal orders. Piero Bellini captures the Italian legal doctrine in the matter in the following terms: "[religious denominations are] real entities in their own right, which do not rely on civil law, nor on any other sanction by any public body: they are rather the product of the autonomous aggregate energies, which characterise such religious groups. When they enter into relations with the State, they already have their own rules and order. Each one has its own structures and code of conduct"[3].

Italian scholars have debated whether the legal system should focus on the socio-institutional profile of religious minorities rather than on the spiritual one. If the socio-institutional dimension is prioritized, the risk is to overlook "the spiritual vocation of an authentically religious movement"[4]. Authors underline the importance of the particular sense of commitment "that aggregates and unites the *communitas fidei*", the community of faith. Therefore religious denominations are to be understood as "communities of faith": thanks to their own internal spiritual calling, religious systems formally assemble and are able to function in society[5].

In the past, the Catholic Church has adopted a guarded, if not hostile, approach to new minorities. Actions by the Church "to obtain limitations on religious freedom granted to religious minorities, especially in the Italian society of the 1950s, are evident if only we examine the various methods used to influence public opinion and the actions of state bodies of that period"[6]. This approach was consistent with the governments' commitment to preserve the original *status quo* (perpetuated through the Lateran Pacts of 1929 and the Act on admitted cults, also of 1929) based on the state's preferential defense of Catholicism and the lack of sensitivity towards old or new minority religions. Arturo Carlo Jemolo[7] was particularly insightful in exposing how the early post World War II Christian-democratic governments upheld the Catholic preference. Symptomatic of this approach was the resilience of the *Buffarini Guidi* ministerial circular of 1935 aimed at repressing the activities of evangelical

[3] See. P. Bellini, *Realtà sociale religiosa e ordine proprio dello Stato*, in *Normativa ed organizzazione delle minoranze confessionali in Italia*, (Torino, Giappichelli Editore, 1992) p. 293. See further L. Barbieri, *Sul principio di ragionevolezza, eguaglianza e libertà delle confessioni religiose*, in *Principio pattizio e realtà religiose minoritarie*, (Torino, Giappichelli, 1995), pp. 74-95.

[4] *Ibid*., p. 291.

[5] See. *Ibid*.

[6] S. Lariccia, *Pubblici poteri e nuovi movimenti religiosi*, in *Normativa ed organizzazione delle minoranze confessionali in Italia*, (Torino, Giappichelli, 1992), p. 54. See further S. Berlingò, *Considerazioni introduttive*, in *Principio pattizio e realtà religiose minoritarie*, (Torino, Giappichelli, 1995), pp. 1-14.

[7] See A. C. Jemolo, *Chiesa e Stato in Italia. Dalla unificazione ai giorni nostri*, (Torino, Einaudi, 1977), p. 314.

communities, which remained in force until 1955[8]. Since 1956, things have changed thanks to the simultaneous and interconnected evolution of the Constitutional Court on the one hand and international law on the other. The Constitution has come to be interpreted in accordance to Artt. 18 and 27 of the *International Covenant on Civil and Political Rights* of 1966[9]. The Covenant was transposed into Italian law with Legislative Decree 881 of 1977. The same considerations can be made for the *Convention for the Protection of National Minorities* of 1994.

In sentence n. 334 from 1996, the Constitutional Court clearly underscored that the distinction between the civil and the religious order is an essential character of the supreme principle of secularism (*laicità*). Thus, even if the Constitution only refers expressly to the Catholic Church, state independence from religion is applicable to all religious denominations. If this were not the case, "equal freedom" for the enjoyment of independence and institutional autonomy of all religions would be compromised, with consequent violation of Italian Constitution, Art. 7, para 1 and Art. 8 para 1. All of this has had a decisive impact on the civil efficacy of acts that are carried out by religions, as they cannot be effective in the state sphere unless formally provided for by state law. An example can be found in the agreement-based Law 1988, Art. 10 on "Rules for the regulation of relations between the State and Assemblies of God in Italy". The Law provides that the Republic recognizes the value of "diplomas of theological training and biblical culture issued by the Italian Biblical Institute as per current regulations, at the end of the three year courses, to students in possession of secondary school qualifications". Art. 12, paragraph 8 states that "marriage has civil effect from the moment of its celebration, even if the state official who receives the act fails to carry out the registration within the transcribed period".

In general, the civil effectiveness of actions carried out by religious authorities is dependent on the general principle of non-contrast with the public order and, more generally, with the supreme principles of the Italian legal system, as declared in the United Sections of the Court of Cassation in sentence n. 16379 of 2014.

The recognition of the legal personality of minority religions can be granted via a specific agreement. Alternatively, the provisions contained in Italian Law 1929, Art. 2 and in Royal Decree 1930, n. 289, Arts 10 and 11 apply. In the first case, legal personality is granted after a preliminary investigation, a hearing and, if requested, an opinion by the State Council (the State Council's opinion was made optional after 1997). Recognition is no longer granted through decree by the President of the Repub-

[8] See. P. Naso. *Protestanti, evangelici, Testimoni e Santi,* in E. Pace (ed.), *Le religioni nell'Italia che cambia. Mappe e bussole* (Milano, Carocci, 2013), p. 114.

[9] B. Ceffa, 'Sensibilità costituzionale e salvaguardia dei valori giuridici interni nella giurisprudenza italiana in tema di diversità religiosa nel contesto della società multiculturale' (2017) 4, *Rivista Associazione italiana dei Costituzionalisti*, pp. 7-10.

lic - as was common practice prior to the Bassanini Reform of 1997 - but through a decree by the Minister of the Interior. For religions that do not have an agreement, the aggravated procedure provided for by the 1929/30 legislation applies. This provides for the establishment of the religious body as a "moral entity" through a decree of the President of the Republic, following proposal by the Interior Minister and a hearing with the Council of Ministers (instead of the State Council). With these procedures and processes, the legislation in force appears (at least formally) to comply with the requirements of the OSCE *Guidelines on the Legal Personality of Religious or Belief Communities* 2015, Point 5, Part One[10]. However the Interior Minister and the Council of Ministers enjoy ample discretion in the recognition of religion or belief denominations or associations. Such discretion seems to conflict with the guidelines which are based on the requirement of non-arbitrariness by the state authority.

## 3. **Legal status**

The legislation governing minorities is based on Art. 8 of the Italian Constitution.

On the one hand, paragraph 1 enshrines the principle of "equal freedom" of all religious denominations, Catholic Church included. The formulation is functional to legitimizing the treatment of some religious denominations differently from others, provided that the differential treatment is based on a solid rationale and is not discriminatory.

On the other hand, paragraph 3 prescribes that ad hoc State regulations for one specific denomination can only be enacted based on a formal agreement between the Italian government and the denomination's representatives, to be approved by the Parliament.

[10] "a) the limitation is prescribed by law; b) the limitation has the purpose of protecting public safety, (public) order, health or morals, or the fundamental rights and freedoms of others; c) the limitation is necessary for the achievement of one of these purposes and proportionate to the intended aim; d) the limitation is not imposed for discriminatory purposes or applied in a discriminatory manner". If anything, some perplexing factors emerge with regards to the legal framework provided for by the law on admitted cults and the subsequent implementing r.d. in relation to the guidelines indicated at n.7. Part One of the guidelines: "For a limitation to be "prescribed by law", the legal provision outlining the limitation should be both adequately accessible and foreseeable. This requires that it should be formulated with sufficient precision to enable individuals or communities– if need be with appropriate advice – to regulate their conduct. For domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interference by public authorities with human rights and fundamental freedoms. In matters affecting fundamental rights, it would be contrary to the rule of law for a legal discretion granted to the executive to be expressed in terms" of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise. It also requires that limitations may not be retroactively or arbitrarily imposed on specific individuals or groups; neither may they be imposed by rules that purport to be laws, but which are so vague that they do not give fair notice of what the law requires or which allow for arbitrary enforcement".

Implementation of agreements under article 8 para 3 of the Constitution started in 1984[11]. In the first phase (1984- 1993), three agreements were signed and enacted. In the seven years between 1993 and 2000 no further agreement was ratified. Between 2000 and 2007 other agreements were signed, but were not enacted as the respective bills were not presented to Parliament. A procedural innovation in July 2012 allowed for a direct final decision by the Constitutional Affairs Commission of the Senate, which definitively approved the draft laws related to the agreements signed in 2007.

With the 2011 decision by the State Council, the supreme administrative judge ruled that it was illegitimate for the government to deny the start of negotiations with a religious denomination in view of an agreement. In other words, according to the administrative judge, all religious groups should be able to negotiate an agreement with the government, regardless of whether they have obtained recognition. This decision renders the concept of "religious denomination" the sine qua non requirement for access to agreements. Indeed, the administrative judge relies on the notion that only "religious denominations" can exercise the right to collective religious freedom; all other entities are barred from doing so. However, these were not excluded by the constitutional judge in sentence n. 59 from 1958.

[11] Updated agreement situation as of January 2021:

| | | |
|---|---|---|
| | 21 February 1984 | Law 449/1984 |
| Waldensian (Tavola Valdese) | 25 January 1993 (modified) | Law 409/1993 |
| | 4 April 2007 | Law 68/2009 |
| Assemblies of God in Italy (ADI) | 29 December 1986 | Law 517/1988 |
| | 29 December 1986 | Law 516/1988 |
| Union of the Seventh day Adventist Churches | 6 November 1996 (modified) | Law 637/1996 |
| | 4 April 2007 | Law 67/2009 |
| | 27 February 1987 | Law 101/1989 |
| Union of Italian Jewish Communities in Italy (UCEI) | 6 November 1996 (modified) | Law 638/1996 |
| Christian Evangelical Baptist Union of Italy (UCEBI) | 29 March 1993<br>16 July 2010 (modified) | Law 116/1995<br>Law n.34/12 |
| Evangelical Lutheran Church in Italy (CELI) | 20 April 1993 | Law 520/1995 |
| Greek Orthodox Archdiocese of Italy and Malta and Exarchate of Southern Europe | 4 April 2007 | Law n. 126/12 |
| Church of Jesus Christ of the Latter-Day Saints | 4 April 2007 | Law n. 127/12 |
| Apostolic Church in Italy | 4 April 2007 | Law n. 128/12 |
| Italian Buddhist Union (UBI), | 4 April 2007 | Law n. 245/12 |
| Italian Hindu Union | 4 April 2007 | Law n. 246/12 |
| Soka Gakkai Italian Buddhist Institute (IBISG) | 27 June 2015 | law n. 130/16 |

The jurisprudence of the State Council, confirmed through sentence n.16305 of the United Civil Sections of the Cassation, 28 June 2013, prompted the government to file a jurisdictional conflict between the powers of the state before the Constitutional Court.

With sentence n. 52 of 2016 the Constitutional Court reversed the position of the Council of State and the Cassation Court and stated that since the agreement with a religious denomination is a political act, the government has absolute discretion in deciding whether to open, carry and conclude negotiations in view of an agreement. The decision risks to have a negative effect on the Italian four level pyramidal system: the Catholic Church is at the top; on the second level are religious denominations with approved agreements; on the third level are those who have stipulated agreements that are yet to be approved; on the fourth level are religious organizations that have been recognized as entities but do not have any agreement underway and on the last level are the religious organizations and groups that are organized in various ways but operate only under general law. Each of these levels corresponds to a different source of regulations: first level "very special law" (law contained in the Concordat and the Agreements that places conditions on access to general law); second level: "special law" (law contained in agreements and the Concordat that does not influence access to general law); third level: "general law" that has been stripped of the protection offered by religious freedom and the very special and special laws. As a consequence of the system, a high level of administrative and political arbitrariness affects the transition from one level to another in the "pyramid of faiths". Moving up a level is dependent on state discretion, which is largely erratic and unpredictable.

No less important is the discretion employed in the recognition of the legal personality of ecclesiastical bodies for the purpose of religion and worship. Indeed, Italian legislation requires a decree from the President of the Republic and political enforcement by the Council of Ministers, which is of a political nature. Any discussion on the issue hinges on the magnanimity of the undersecretary to the President of the Council of Ministers, who is in charge of agenda drafting and has the possibility to push the issue forward. Moreover, although it is no longer obligatory, the opinions of the State Council are an essential factor in the process, as they tend to be understood by the government as a precautionary measure. Indeed, the Presidency of the Council of Ministers can deem it appropriate to request the opinion of the administrative judge for the adoption of the decrees of the President of the Republic relative to the recognition of legal personality of the bodies in question (as provided for by Italian Law 1988, Art. 2 par 3, let. 1, n. 400). Therefore the opinion of Consiglio di Stato is still considered fundamental for access to the process of agreements.

This discretion is also present at the bottom of the pyramid: if a religious group wishes to move from a mere association to a more articulated structure and benefit from the simplified procedure for the recognition of legal personality provided for in Decree of Republic President, 2000, n. 361, this "would clash with a legal orientation

under which the recognition of legal personality is dependent on the principle that special legislation relative to admitted cults is applied whenever there is a religious element in the organization, whatever importance this can take on in its juridical existence"[12].

Additionally, the "pyramid of faiths" weakens Art. 20 of the Italian Constitution, as it favors discrimination between religious groups and renders free organizational autonomy difficult by forcing minority religious groups to fit into the rigid institutional and legal boundaries of religious denominations regulated by Art. 8 of the Italian Constitution.

## II. Social and legal change

### 1. Social change

There are many factors that have contributed to increasing Italian pluralism in the last decades. The migration phenomenon has clearly played a part. Since the end of the 1970s, men and women who arrived in Italy looking for a new life brought with them cultural and religious differences. These differences are relevant not only in the public sphere, but also on an individual and private level and can be found in urban areas, as well as in smaller towns, industrial districts or lower-income temporary communities that have emerged near intensive farming areas.

Globalization has greatly assisted in the proliferation of different religious models and faiths, advanced through mass communication and information technology, while the web has enhanced the circulation of information.

Over the last twenty years, the socio-religious profile of Italy has gradually changed: once a Catholic majority, Italy is becoming a society characterized by a completely unprecedented, highly articulate religious diversity. In this regard, it is important to draw a picture of the main religious groups in Italy[13].

#### A. *Orthodox Christians*

There are roughly 1,500,000 Orthodox Christians in Italy. Most of them are Romanian, Ukrainian, Moldovan, Russian, Greek, Montenegrin, Serbian, Bulgarian, Albanian, and Georgian. A minority is made up of Belarusians, Ethiopians, Eritreans, Poles, Macedonians, Egyptians and Cypriots. There is also a more ancient Orthodox presence in Italy that is not related to migratory flows. 72% of Orthodox communi-

[12] A. Ferrari, *La libertà religiosa in Italia. Un percorso incompiuto*, Carocci, Roma, 2012, p. 102. The author refers to the decision of the Council of State n. 2331 of 17 April 2009.

[13] See XXVII *Report Immigration Caritas-Migrantes*, 28 September 2018, in http://www.caritasitaliana.it/pls/caritasitaliana/v3_s2ew_consultazione.mostra_pagina?id_pagina=7824 (accessed 15 Jan 2021).

ties were established after 2000; 13% in the nineties; 4% in the eighties; 8% of the historical communities in the seventies. 73% of worship places are provided by the Catholic Church on a renewable free loan for use, while only 27% are owned by the Orthodox Church itself or are located in properties leased by the Municipalities or other sources (usually rooms or garages).

### B. *Muslims*

There are around 1,600,000 Muslims in Italy. The majority live in Lombardy (379,189), followed by Emilia Romagna (219,794), Veneto (186,677), Piedmont (125,484) and Tuscany (81,824). Aside from second generation Muslims with Italian citizenship and Italians who have converted to Islam, the Muslim community in Italy is mainly composed of non-Europeans from Morocco (506,369); Albania (491,495); Tunisia (122,595); Egypt (117,145); Bangladesh (106,671); Pakistan (90,185); Senegal (87,311); and Algeria (28,081).

On the basis of the data supplied by CENSIS in 2007 there were 774 registered Muslim centers of worship. From 2000 to 2007, the number of centers jumped from 351 to 774. The regions with the highest number of centers were: Veneto (96); Lombardy (89); Emilia Romagna (83); Piedmont (66); Sicily (41); Tuscany (35); and Lazio (31)[14].

### C. *Sikhs*

The number of Sikhs in Italy varies according to statistical data, ranging from a minimum of 40,000, up to 100,000 individuals. Within the Italian-Indian community, Sikhs make up 2%, contra 18% Kerala Christians and 80% Hindu. Examining the national distribution, the regions with the highest number of Sikhs are Lombardy (38.3%); Emilia Romagna (13.3%); Veneto (12.2%) and Lazio (12.1%). Regarding the distribution of Sikh places of worship (*gurdwara*), 8 are in Lazio; 7 in Lombardy and Veneto; 3 in Emilia Romagna; 2 in Friuli Venezia Giulia, Piedmont, Marche, Umbria, Puglia; and 1 in Tuscany.

### D. *Buddhists*[15]

There are around 80,000 Buddhists in Italy, 20,000 of which are immigrants. The largest Buddhist associations in Italy joined forces in 2000 to form the Unione Bud-

[14] See M. Bombardieri, *Moschee d'Italia. Il diritto al culto. Il dibattito sociale e politico,* (Bologna, EMI, 2011); See too S. Allievi, *Un patto per (e con) l'islam italiano* in http://www.stefanoallievi.it/2017/02/un-patto-per-e-con-lislam-italiano/ (accessed 15 Jan 2021).

[15] See XXVII *Report Immigration Caritas-Migrantes, 28th* on Friday 2018; R. Lorenzini, *Le minoranze religiose senza intesa e il disegno di legge sulla libertà religiosa e abrogazione della*

dhista Italiana (Italian Buddhist Union-UBI), which includes schools of three different traditions: Theravada, Mahayana, Vajrayana. The UBI was founded in Milan in 1985 and was recognized as a religious body thanks to a decree from the President of the Republic in 1991. UBI is a member of the European Buddhist Union. If one adds on the 60,000 members of the Soka Gakkai, or Japanese Buddhism, that are not part of the UBI, the total Buddhist population is estimated to be around 140,000.

### E. *Jews*

As of 2005, the number of Jews voluntarily registered to a Jewish community was 24,927. However, taking into account those that are not members of a community, members of the Jewish faith in Italy are approximately 35,000 people[16]. The data supplied by the UCEI indicates a downward trend starting in 1975. In the four biggest communities (Rome, Milan, Turin, Florence) the rate of decrease is significant: -44.24% in Turin; -35,11% in Milan, -24,34 in Florence and -44,47% in Venice. This trend is confirmed by the decline in attendance to Jewish schools between 1996 and 2001. For example, in the biggest and oldest Jewish community in Italy, Rome, the numbers of school registrations have reduced from 1,072 in 1996 to 894 in 2001, a decrease of 5.19%. In Florence, the decrease is 61.29%: from 86 students in 1966 to 12 in 2001.

The 21 communities through which the Italian Jewish population is structured are represented by the *Unione delle Comunità ebraiche* (Union of Jewish Communities - UCEI) which has been granted legal personality and has signed an agreement with the State in 1989. The recent history of Italian Judaism has also seen the growth of the presence of missionaries from the Hasidic and Messianic *Chabad Lubavitch* movements. The presence of the latter in Italy dates back to 1959 in Milan, with first contact made in 1949.

### F. *Protestants and Evangelicals*

Italian Protestants can be divided into five large groups: 1) Waldensian Church – Methodists of Calvinist tradition; 2) Lutheran Evangelical Church; 3) Churches of the Great Awakening such as the Evangelical Baptist Church (UCEBI); 4) Adventist

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*legislazione sui 'culti ammessi'*, in *Principio pattizio e realtà religiose minoritarie*, (Torino, Giappichelli, 1995), pp. 169-177. For a different perspective see S. Angeletti, *La nuova intesa con l'Unione Buddhista Italiana: una doppia conforme per il Sangha italiano*, in *Rivista telematica* (www.statoechiese.it) 2008, pp. 1-9; S. Angeletti, *L'intesa tra lo Stato italiano e l'Unione Buddhista Italiana,* (Torino, Giappichelli, 2004).

[16] The organization of the Jews Italian Communities since 1991 is the UCEI (Union of Jewish Communities), in www.ucei.it (accessed 15 Jan 2021); S. Dazzetti, *L'autonomia delle comunità ebraiche italiane nel Novecento* (Torino, Giappichelli, 2008), p. 328.

Church; and 5) Pentecostal Churches[17].The total number of members of the first three groups, which form the basis of historical Protestantism in Italy, does not exceed 50,000 people. Including members of the Adventist Church, who hold positions consistent with the first three groups on some public and social issues, the total number of participants reaches 60,000. The organizational body of historical Protestantism is the *Federazione delle Chiese evangeliche italiane* (Federation of Evangelical Churches in Italy - FCEI), which is made up of Waldensians, Methodists, Baptists, Lutherans, Salvation Army and some Free Churches. The latter include Adventists, the IUCCA, the *Federazione delle Chiese pentecostali* (Federation of Pentecostal Churches - FCP), the *Assemblee di Dio in Italia* (Assemblies of God in Italy - ADI), the Apostolic Church in Italy and numerous other smaller denominations that also collaborate with the Federation, as indicated hereto.

a). *Waldensian – Methodist Churches*

According to the official data of the synod, there are around 20,000 so-called "electoral members": those who have declared their faith, attend a community and contribute financially to the activities. 50% of these individuals are concentrated in the Waldensian Valleys in Piedmont. The Waldensian area is divided into four large districts. The first (the Valdese Valleys) is home to 18 churches with 19 Pastors and 9275 electoral members; the second district (North Italy, excluding the Waldensian Valleys) has 56 churches, 41 pastors and 5221 electoral members; the third district (Central Italy) has 28 churches, 20 pastors and 2235 electoral members and finally, the fourth district (South Italy) has 33 churches, 17 pastors and 1663 electoral members.

b). *The Italian Lutheran Community*

The Italian Lutheran Community is recognized as the CELI (Chiesa Evangelica Luterana in Italia - Evangelical Lutheran Church in Italy). There are around 7000 members organized in 17 communities.

c). *The Baptist Community*

The majority of Baptists are part of the *Unione cristiana evangelica battista* (Christian Evangelical Baptist Union of Italy - UCEBI), which counts around 5000 active members in around 100 local churches distributed across the national territory, with concentrations in Southern and Northern Italy (especially in Piedmont). The

[17] P. Naso. *Protestanti, evangelici, Testimoni e Santi,* in E. Pace (ed.), *Le religioni nell'Italia che cambia. Mappe e bussole* (eds.), (Milano, Carocci, 2013), p. 97 ss.

communities are overseen by around 40 pastors that are trained at the Waldensian Theological Faculty in Rome.

d). *Adventists*

According to the data provided by the denomination, members of the faith are around 10,000, but reach 25,000 if young members and sympathizers are included. For some time now, Adventists have chosen to collaborate with existing Protestant Churches. This is not a given choice and is not the case in other European and international contexts. For example, Adventists do not participate in organizations such as the World Council of Churches (WCW) or the Conference of European Churches (CEC), while they are observers within the FCEI.

e). *Pentecostals*

This is a dynamic and vital part of the protestant family, with fragmented origins. Unlike the dominant, centralized ecclesiological model - usually involving a dogmatic monopoly of communities transmitting indications and directives to local offshoots - Pentecostalism by its very nature conveys a spiritual experience founded in the fragmentation of local communities. This fragmentation is not accidental, but rather it is linked "to the sociological or collective psychology of those that adhere to this spiritual current, and is, so to speak, inscribed in its theology"[18]. In the immediate post-war years (more precisely in Naples, on 16-18 August 1947), the Pentecostal world underwent a change in its ecclesiological organization, creating a central representative body, the *Assemblee di Dio in Italia* (The Assemblies of God in Italy, known as ADI), which is organized with a statute and internationally accredited. The Italian Pentecostals obtained legal recognition in 1960 after the 1955 abrogation of the above mentioned Buffarini Guidi ministerial circular. They stipulated an agreement on 29 December 1986, which was enacted two years later with law 517/1988.

G. *Jehovah's Witnesses*

With over 3000 local congregations[19], 1500 Kingdom halls, 250,000 members and almost as many sympathizers, Jehovah's Witnesses make up one of the most solid communities of faith in the national setting. In the years of Fascism, the congregation was under the scrutiny of the OVRA (Organizzazione per la Vigilianza e la Repressione dell'Antifascismo), the Secret Fascist Police, who found suspicious the strictly millenarist teaching of the faith, its political and military neutrality and its links with the Ameri-

[18] *Ibid*., p. 110.
[19] *Ibid*., p. 120.

can *Watch Tower Society*. The activities of Jehovah's Witnesses only resumed after World War II and an active proselytism has produced important growth: the community counted 150 evangelizers in 1946, 20,000 in 1976, 86,000 in 1980, 187,000 in 1990 and today has about 250,000 members. Legal personality was recognized by the State Council in *parere* n. 1390 of 30 July 1986; a first agreement was signed in 2000 under the D'Alema Government and another was signed in 2007 under the Prodi Government. However, these agreements have not yet been filed for enactment by Parliament.

### H. *The Church of Jesus Christ of the Latter-Day Saints*

According to data provided by the Church, otherwise known as the Mormon Church, there are currently around 25,000 Mormons in Italy. They are mostly Italian, and are divided into around 90 local communities, split into *districts* and *branches*. The universal centralized structure of the Mormon Church has strong ties to the USA. The main factor that favored the 2012 enactment by Parliament of the 2007 Agreement was the image of social reassurance conveyed by the Church.

Local government services are generally not the only options that minority religions resort to for articulating their action. Due to their international networks, some religious organizations have many different theological or political profiles. This is significantly witnessed in large sectors of the Muslim community. Italian Muslims are extremely diverse, including, when immigrants, in their national background. By consequence, the role of Islamic states is very dynamic[20], especially in connection with the second generation activism in the development of Italian Islam. The attitude of the Moroccan Government is significant in this regard as it is "inclined to re-establish cultural ties with its migrant population while recognizing the importance of full inclusion in the host country"[21]. In this sense, the experience of the *Italian Islamic Confederation* (CII) between 2009 and 2012 is emblematic, given its ties to the Moroccan Government and several Moroccan religious and cultural institutions: "The collaboration with the country of origin is a positive experience, also thanks to the constitutional evolution of the country and the democratic growth of the Italian Moroccan community, as well as its participation in Italian society"[22].

In the context of emerging ethno-national Islam, and of the inertia of the Italian State in addressing Islamic issues, links to the countries of origin become stronger and new federations and associations combine national identity and the Islamic identity.

[20] G. Macrì, 'La libertà religiosa, i diritti delle comunità islamiche. Alcune considerazioni critiche su due progetti di legge in materia di moschee e imam' (2018) 5, *Rivista telematica* (www.statoechiese.it), pp.1-57; K. Rhazzali, *I musulmani e i loro luoghi di cult*o, in E. Pace (ed.), *Le religioni nell'Italia che cambia. Mappe e bussole* (eds.) (Milano, Carocci), p. 54.

[21] K. Rhazzali, I musulmani e i loro luoghi di culto, cit., p. 54.

[22] *Ibid*., p. 64.

Historic Protestant Churches are also actively involved in international networks, as are other Evangelical Churches such as *Neo-Pentecostal* and *African Charismatic*, who have joined in a common project with a transnational mission. Historical Protestantism has had a strong transnational inclination from its origins as it is spread across different countries and linguistic families and has connections to two of the most significant evangelical bodies in Europe: The *Ecumenical Council* and the *Conference of European Churches*. The same can be said for Pentecostal Italians and their increasingly strong links with the Assemblies of God in the United States, even if in this case this is actually a predominantly theological-pastoral involvement.

### 2. Legal change

State law draws a line that delimits the legal status of minorities in law n. 1159/1929. The line is somewhat thin and for a minority, the difference depends on the side of the line it finds itself on. On one side, separatism and constitutional principles based on the supreme principle of secularism are weak, freedom is limited and the shadow of state interference (*giurisdizionalismo*) looms ahead. Here there are only "admitted cults". On the other side, religions are "equally free before the law" and subject to special legislation stipulated with the state. Thanks to this, the distance from the top of the pyramid, which is occupied by the Catholic Church, is reduced. It is not accidental that since 1984 the Italian Catholic episcopate has witnessed, without great enthusiasm, the improvement of the status of religions that have entered into an agreement approved by law. The reasons for passing from the 1929 legislation to the agreed special legislation can only be understood through a political lens. There was no legal reason for the Italian government to justify denying the Buddhists access to an agreement until 18 years ago, if not for fear of moving away from a Judaic–Christian conception of religion.

## III. Social and legal developments

### 1. Social developments

The growth of religious pluralism brings with it specific idiosyncrasies and a particular dynamism which manifests itself in four main ways.

i). Firstly, what model of religious pluralism has developed over the past twenty years? Italian sociologist Enzo Pace highlights how Italian religious pluralism is similar to the British multiculturalist model.[23] The resulting situation is still confusing and in constant development. There are religious communities that present a higher degree of homogeneity, while others are characterized by a strong internal differentiation.

[23] E. Pace, *Introduzione*, in *Le religioni nell'Italia che cambia. Mappe e bussole*, cit., p. 2 ss.

ii). Secondly, does a pluralism of this nature favor interreligious dialogue? The data supplied by the *Vademecum* edited by the *Department for Civil Freedoms and Immigration – Department of Central Affairs of Faith* of the Ministry of the Interior[24] demonstrate that at a national level, initiatives for dialogue have been consolidated. On occasion, these initiatives are conducted on an international level: "*The freedom week"* organized by the *Federation of Evangelical Churches in Italy*; *The world week of harmony between religions* introduced in 2010 by the UN: *A day for Islamic-Christian dialogue,* not to mention the Sessions of the *Secretariat of Ecumenical Activities (SAE)* which has always placed particular attention on interreligious dialogue with a focus on Christian-Jewish relations.

iii). The widespread presence on the territory, together with extensive application of the subsidiarity principle on an administrative level, has resulted in the growth of relationships between minority religions, as well as stronger connections with local municipalities. The local government is the first point of reference for religious communities and provides a forum where they can deal with practical issues related to the exercise of their religious freedom: from problems linked to opening places of worship, to concerns with food regulations in schools, from public order at large religious events, to participation in intercultural and interreligious programs.

iv). With the growth of new religious realities, there are new security and public order issues to consider, that challenge the interpretations of the legitimate ground for limitation of rights such as morality (art. 19 of the Constitution) and compliance with the "Italian legal system" (art. 8 of the Constitution). In its decision n. 24084/2017, the Court of Cassation focused on the security debate and stated (at para 2.3) that in a multiethnic society "it is essential that the immigrant adapts his values to those of the western world, in which he freely chose to enter and assesses in advance the compatibility of his behavior with the principles that regulate society and therefore their lawfulness in relation to the governing legal system". Whether it is addressing the question of the Muslim veil - an topic which is no longer relevant to Italian political-legislative debate following the rejection of various proposals for the reform of art. 5 of law n. 152 from 22 May 1975 - whether it is a reflection on regional legislation regarding worship places (l.r. n. 2 Lombardy, 3 February 2015), (l.r n. 12 Veneto, 12 April 2016), (l.r n. 23 Liguria, 4 October 2016)[25], whether it

[24] *Religioni, dialogo, integrazione. Vademecum,* in Department for Civil Freedoms and Immigration – Department of Central Affairs of Faith of the Ministry of the Interior (eds.), Rome, 2011.

[25] See N. Marchei, *Le nuove leggi regionali 'antimoschee'*, in *Rivista telematica* (www.statoechiese.it), 25, 2017, pp. 1-16.

is an issue of religious radicalization within the prison system, or of training of ministers of religious minorities, in the end the recurring theme is the same: the difficulty in identifying a common core of civil juridical principles that balance security needs with pluralism. The sentence of the First Section of the Cassation took the debate on religious pluralism from a purely "legal system-principle issue" to a matter of ethnical-moral values. The Court recognized the wall placed between western values and every other identity, and that every effort of minorities to self-identity goes against the values of the majority.

## 2. **Legal developments**

Two judgements have brought a paradigmatic change in the interpretation of the principle of religious pluralism: judgement n. 439 given by the Court of Cassation on 1 March 2000 and the abovementioned judgment n. 24084 given by the same Court on 15 May 2017. Eighteen years apart in the legal history of the Italian Republic, the decisions demonstrate two different ways of construing ethnic/religious pluralism.

Contrary to a consolidated understanding of the principle of *laicità* as not requiring a shared value framework, the First Criminal Section of the Court of Cassation in 2017 stated that: "cohabitation between those who are ethnically, culturally and religiously diverse requires necessarily the identification of a common core recognized by both migrants and the host society". The Cassation judges maintain that if this is true, integration does not require one to abandon their culture, in accordance with Art. 2 of the Constitution which values social pluralism, but in any case, "the non-derogable limit is constituted by respect for human rights and legal civilisation of the host society. It is essential that the immigrant adapts his values to those of the western world, in which he freely chose to enter and to verify in advance the compatibility of his behavior with the principles that regulate society and therefore the lawfulness of them in relation to the governing legal system".

A common issue among religious minorities in Italy is the effort to adapt their institutions to the ecclesiological model of the Catholic Church, in the hope to look more intelligible and trustworthy in the eyes of the government, thus increasing the chance to be granted legal personality or initiate negotiations in view of future agreements. An example can be found in Italian Islam, where a spontaneous process has been underway for some time within federations of various ethnic-cultural origins (see. 2.1 above). In this regard, reference can be made to the *Coordinamento associazioni islamiche di Milano* (Coordination of Muslim Associations of Milan - CAIM), to the *Consiglio islamico di Vicenza*, (Muslim Council of Vicenza), to the *Comunità dei musulmani della Liguria* (Muslim Communities of Liguria - COMUL), and to the *Confederazione Islamica italiana* (Italian Muslim Confederation CII)[26]. By the way these organizations all have links to the government of Morocco, as well as connections to a range of cultural and religious institutions in Morocco. A similar process was initiated by denominations such as the *Sacra arcidiocesi ortodossa*

*d'Italia ed esarcato per l'Europa meridionale* (Greek Orthodox Archdiocese of Italy and Malta and Exarchate of Southern Europe), and *Assemblea di Dio in Italia* (The Evangelical Assemblies of God in Italy). Mormons have also succeeded in providing an ecclesiological model that is attuned to the Italian system, having organized the religion according to a strongly centralised model.

The Catholic Church's resistance to agreements between the state and some minority religions has been very influential. The case of Jehovah's Witnesses is paradigmatic. In the article "*Il fenomeno delle sette o nuovi movimenti religiosi. Sfida pastorale (The phenomenon of sects or new religious movements: Pastoral challenge)"*, published in the Vatican daily newspaper *Osservatore Romano*, on 7 May 1986 the state was invited to implement radical measures to prevent the growth of sects. It is not by chance that the strong anti-sect movement of the mid-eighties had its roots in Catholic circles. Requests were repeatedly made to the state to intervene against religious groups labeled as sects, with the principle of *laicità* being invoked to justify such requests.

A certain continuity exists between Italian developments and the evolving European and international standard. On the one hand Italian law is protected from undue impact by Art. 17 of the Treaty on the Functioning of the European Union on the respect and protection of the status provided by national legislations for churches and religious associations/communities of EU member States. On the other hand Italian law is coherent with the principle of non-interference as consolidated in the jurisprudence of the Court of Strasburg and strictly linked to the principle of neutrality. Whether or not the religion is a minority, it still has the right to require the state not to interfere with *interna corporis.* Indeed, today "despite some grey areas that are yet to be explored with regards to the legitimacy of state interference, the call for non-interference has ended up belonging to the theory of formulas and principles that the Court continuously invokes, in an attempt to reiterate its irreversibility"[27].

As far as intersections with developments in anti-discrimination law, especially on grounds of gender or sexual orientation, are concerned, it is useful to examine the positions taken by minority religions with regards to same-sex marriage.

Concerning the traditional reformed world, an example can be found in the Waldensian-Methodist Church. The Church has been very sensitive to the Evangelical Church of Rhineland's document of 1996 entitled "Sexuality and forms of life.

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[26] See C. Morucci, 'I rapporti con l'Islam italiano: dalle proposte d'intesa al Patto nazionale', (2018) 38, *Rivista telematica* (www.statoechiese.it), pp. 1-32. See further A. De Oto, 'Le proposte di legge Santanchè-Palmizio sul registro delle moschee e l'albo degli imam: un tentativo di refurbishment della legge n.1159/1929?', (2018), 4, *Rivista telematica* (www.statoechiese.it), pp. 1-16.

[27] M. Toscano, *Il fattore religioso nella Convenzione Europea dei Diritti dell'Uomo. Itinerari giurisprudenziali*, (Pisa, Edizioni ETS, 2018), p. 136.

Marriage and blessing". The document concluded that from a legal perspective, if a church decides to include blessings for same sex couples, it is then called upon to support the request for public recognition of same-sex couples by the state.

Regarding the Muslim world, it is worth noting the adhesion of many parts of the Muslim Italian community to the 2010 *Cairo Declaration* on the subject ("*The objectives of Islamic Sharia and the causes of our age*"), which reads at point 25: "(…) The conference recalls the need to build the Islamic family on Islamic foundations, such as the fact that a family must be composed of a man, a woman and children, through a regular marriage contract. The conference refuses homosexual marriages and all relationships outside of marriage between a man and a woman". Finally, in completing the study of various Abrahamic religious, the position of Judaism, as observed by Haim Fabrizio Cipriani, a reform-oriented rabbi, is blurred and difficult to outline. This is because observance of religious principles is not always consistent among different groups. There is definitely a greater desire in progressive circles to respect the intimacy of individuals, which is why a celebration of ceremonies between LGBT couples seems to be acceptable.

With regard to developments in anti-discrimination law in the case of migrants and refugees, minority religions have three main functions: *respect*, as they facilitate a foreign immigrant's integration process in the eyes of the majority population, and in most cases they also provide a self-esteem boost; *refuge,* as they reproduce a community context and provide a sense of stability as the individual appears as a member of a religious community; and finally, *resource*, as they provide a basic level of economic and social assistance.

# RELIGIOUS MINORITIES IN PORTUGAL. BETWEEN THE SECULAR AND THE POST-SECULAR

Jónatas E. M. Machado*

## I. Historical and social context

### 1. Traditional dominance

Established during the Crusades, in 1143, Portugal was conceived as a Catholic state. This situation continued during the time of maritime discoveries, when Pope Alexander VI, in 1484, re-affirmed the missionary mandate of Portugal. Portuguese navigators displayed the symbol of the cross on their vessels and transported it across the world. The Reformation which challenged the Catholic rule of Europe and the domain of the seas was led by the Protestant Dutch and British, who Portugal confronted politically, economically and militarily. It was only in the nineteenth century, with protection of free exercise of religious practice that some religious pluralism began to be felt in Portugal, mainly through English and German bourgeoisie communities in Porto and Lisbon linked to the Port wine trade and industry[1].

Secularisation has been described as the state's autonomisation relative to the Church, accompanied by the emergence of new world views which question the role of the Church in society, in particular, its excessive influence.[2] This process is char-

* Professor of the Legal Research Institute of the Faculty of Law of the University of Coimbra and of Universidade Auntónoma de Lisboa.

[1] H. Vilaça, 'Territorialidades Religiosas em Portugal, Dossiê – Perspetivas Contemporâneas sobre o Mundo Lusófono', 2016, p. 197 ss., p. 199 ss. (DOI: 10.5433/2176-6665.2016v21n2p197).

[2] P. Coelho, 'O processo de secularização em Portugal: da Primeira República ao Estado Novo', 2011, 9 ff. A. Teixeira (coord.), 'Identidades religiosas em Portugal: Representações, valores e práticas'. Relatório apresentado na Assembleia Plenária da Conferência Episcopal Portuguesa, Fátima 16 a 19 de abril de 2012, Lisboa: Universidade Católica Portuguesa (Centro de Estudos e Sondagens de Opinião – Centro de Estudos de Religiões e Culturas), 2012 [policopiado]; Anexo I - Questionário: «Identidades religiosas em Portugal - representações, valores e práticas». Didaskalia. Lisboa, 2013, ISSN 0253-1674. 43:1-2 (2013) pp. 383-392.

acterised as social differentiation, modernisation and affirmation and establishment of a naturalistic and *disenchanted* (Max Weber) philosophical world view. In Portugal, this process began with liberal and democratic movements in the nineteenth century which challenged the power of the Throne and the Altar. It continued in the twentieth century with the Law of Separation between Church and State (1910), the Republican Constitution (1911), the Constitution of the New State (1933) and the Concordat with the Holy See (1940). The subsequent regime was marked by a clear separation between Church and State, with some tension. The Carnations Revolution (1974) and the 1976 Constitution marked a clear paradigm shift relative to the 'concordatarian' regime.[3] The new Constitution enshrined equal individual and collective religious freedom, and separation of religious denominations from the State as a substantive limit of constitutional revision.

Properly understood, secularization does not aim to move religion away from the public sphere. It does not purport to lead to a radical *secularism* or *laicisme*[4]. This would not be possible without a serious and widespread violation of fundamental rights. In the constitutional democratic state, political and legal secularization offers a level playing field in which religious communities can participate in a relative position of equal dignity and freedom in the formation of public opinion and political will, competing in the market of ideas without totalitarian temptations[5]. At the same time, the fundamental rights of the individuals are protected from both State and Church.

## 2. **Diversification**

A 2011 study, 'Religious Identities in Portugal: Representations, Values and Practices'[6] was sponsored by the Portuguese Episcopal Conference. It was based on a survey of the Portuguese Catholic University, conducted by the Center for Studies and Opinion Surveys and the Center for Studies on Religion and Cultures of the Catholic University of Portugal. It surveyed around four thousand people who were at least fifteen years old. This study is interesting because it reveals the diversification of the religious fabric in Portugal, with a tendency toward the ruralisation of Catholicism and the urbanisation of non-Catholic religious practice. At the same time, it also reveals a diversity of trends within the group of those who claim to have

[3] H. Machado Jorge, Religions and Secularism in Portugal: mainly a lingering monotheism, Observatoire des Religions et de la Laicité, http://www.o-re-la.org/index.php?option=com_k2&view=item&id=1305:religions-and-secularism-in-portugal-mainly-a-lingering-monotheism&Itemid=85&lang=fr (accessed 21 January 2021).

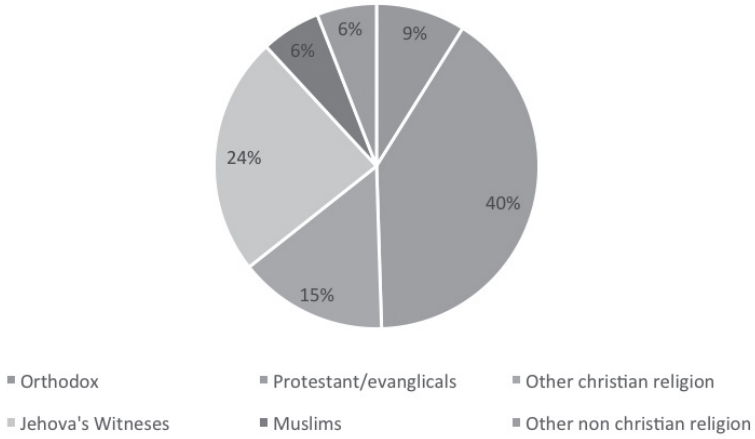
[4] F. Catroga, ' 'Secularização e Laicidade: Uma perspectiva histórica e conceptual' (2004). 25 *Revista de História das Ideias,*Faculdade de Letras, Coimbra, pp. 51-127.

[5] L. Abreu, *Ensaios Anticlericais* (Lisboa: Roma Editora, 2005), p.19.

[6] R. Santos, O Estudo «Identidades religiosas em Portugal». Mediação Jornalística, Didaskalia. XLII, Lisboa, 2013, 1.2., p. 235 ff.

no religion. One aspect emphasised by the study is that taking a stand on religious issues, whatever the context, is increasingly a manifestation of individual autonomy.

The study concluded that the number of Catholics has declined in Portugal in contrast with other religious denominations, particularly Protestants and Jehovah's Witness. It revealed that from 1999 - 2011, Catholics decreased by 7.4%, from 86.9% of the population to 79.5%. In contrast, the percentage of people with a different religion doubled (2.7% in 1999 to 5.7% in 2011), as did the number of people without any religion (from 8.2% to 13.2%), a significant increase in all categories. The indifferent rose from 1.7% to 3.2%, agnostics from 1.7% to 2.2% and atheists from 2.7% to 4.1%. The survey showed an increase in Protestants / Evangelicals, which went from 0.3% to 2.8% and Jehovah's Witnesses, who in 1999 represented 1% and now 1.5%. Muslims are around 0.3% of the population. Immigration has also contributed to religious diversification[7]. The study that points to the fall in numbers of Catholics was released in2012, though its author, the sociologist Alfredo Teixeira, says that his results are still current. As pointed out by Helena Vilaça[8], the data presents the following numbers on non-Catholic minorities:




The large majority of religious minorities in Portugal come from a Christian background. If we include Jehovah's Witnesses in the Christian movement *lato sensu*, in spite of their unitarian view, we come to the conclusion that non-Christian minorities are still a very small part (12%) of the non-Catholic religious population. Ca-

[7] H. Vilaça, Imigração, Etnicidade e Religião, O Papel das Comunidades Religiosas na Intergração dos Imigrantes dos Países de Leste, Observatório da Imigração, Acidi, Dezembro de 2008, p. 13 ff., p. 35 ff.

[8] H. Vilaça, 'Novas paisagens religiosas em Portugal: do centro às margens' (2013) 1.2. *Didaskalia*, xiii pp. 81-114.

tholicism is much more open and dependent on the efforts of its individual members. This creates some affinities between the Catholic Church and other Christian groups, especially when it comes to opposing secularist tendencies. There are no ethnic, cultural or linguistic barriers between Catholics and most other Christians. Significant differences in substance and form of worship remain, however. For example, there are different Evangelical neopentecostal movements which place a strong emphasis on emotion and devotion; contemporary music and worship; spiritual and material prosperity, and all accompanied by intensive use of social media and communications technologies. Most Evangelicals come from a Catholic background, having changed their religious affiliation. Mostly because they were looking for a genuine, non-cultural or traditional, religious experience and a deeper understanding of the person and the message of Jesus Christ[9].

Non-believers – the study showed – based their position on autonomy, conviction and disinterest. Autonomy vis-à-vis religions is the most salient feature, bringing together those who underline how 'I disagree with the doctrine of no church or religion' (32.7% of cases), 'I do not agree with the moral rules of churches and religions' (2%), and 'prefers to be independent of the norms and practices of a religion' (21.1%). The researchers also found that non-believers and believers are mostly younger compared to Catholics, which although distributed across all age groups, are (though increasingly ageing. The same study revealed that the majority of Jehovah's Witness, Protestants and non-believers lived in the Lisbon area and Tagus Valley. More than half (55.2%) of Portuguese non-believers live in Lisbon and the Tagus Valley, an area occupied by 62.2% of Protestants (including Evangelicals). 43.6% of Catholics are concentrated in the north of the country.. The study also points out that 80% of Catholics live in rural areas and 66% in urban areas, whilst other religions are concentrated in urban areas.

## II. Social science research

According to H. Machado Jorge, 'signs are that only now an effective multiplication of creeds is underway, whose future impact cannot yet be soundly discerned'. Based on the above 2011 study, and on other statistical data on Portuguese marriage patterns, this author observes that 'many self-proclaimed Catholics do make a distinction between Catholic doctrine and the institutional Catholic Church'. He goes even further to point out that 'when «intellectual» critics of Christian religions try to «denounce» what they there condemn from a humanist standpoint, they mostly focus on despicable acts by the top hierarchy, clergy malpractice, errors and so on. Con-

[9] H. Vilaça, 'Novas paisagens religiosas em Portugal: do centro às margens' (2013) 1.2. *Didaskalia,* xiii pp. 81-114.

sequently, that sort of criticism ends up having little effect on the believer masses at large. This seems to be a consequence of the separation between doctrine and 'clergy' practice that believers have along the way incorporated into their personal belief systems. In this perspective, the multiplication of «legalized» creeds (full freedom of religion in Portugal was only instituted by the second Republic) surely has been, and will remain, a mind-opening factor"[10]. Helena Vilaça emphasises the fact that, in Portugal, it is not yet certain that one can speak of the existence of a religious market with religious transit between different religious denominations, as for example in the United States. Portugal, like in Europe, has a history of a religious monopoly of Catholic origin[11], and its religious minorities, whilst experiencing some growth, are still micro-minorities, with little ability to challenge the prevailing cultural landscape. However, a more open and diverse religious environment has had an impact on the majority religion: institutional doctrinal proclamations are mediated and relativised by the individual religious freedom of Catholics themselves.

## III. Legal status

### 1. Charter of Fundamental Rights of the European Union

There is an important European dimension to the legal protection of religious minorities in Portugal. On one hand, we must underline the importance of the European Convention of Human Rights and the Strasburg court's case law concerning article 9º. The simple fact that such a case law is there, sends an important message to all European countries. However, although Portugal has serious difficulties in complying with other provisions, it is significant that there are no Portuguese cases involving article 9º violations. As will become clear, this is largely due to the fact that Portugal has an adequate and reasonable normative framework concerning religious freedom. What is more, European citizenship is a legal status of the European Union which is becoming more and more important for regulating religious freedom within each Member State. Since many European Citizens from other member States live in Portugal, their legal status is defined by European Treaties, including the Charter of Fundamental Rights of the European Union. The principle of non-discrimination, including religious discrimination, is paramount. [12]

[10] H. Machado Jorge, 'Religions and Secularism in Portugal: mainly a lingering monotheism', *Observatoire des Religions et de la Laicité*, http://www.o-re-la.org/index.php?option=com_k2&view=item&id=1305:religions-and-secularism-in-portugal-mainly-a-lingering-monotheism&Itemid=85&lang=fr (accessed 21 January 2021).

[11] H. Vilaça, 'Novas paisagens religiosas em Portugal: do centro às margens' (2013) 1.2. *Didaskalia xiii* pp. 81-114.

[12] S. Morano-Fouadi, 'EU Citizenship and Religious Liberty in an Enlarged Europe' 2010, 16 *European Law Journal*, p. 4, p. 375 ff.

## 2. Portuguese Constitution

The Portuguese Constitution of 1976 enshrines the right to freedom of conscience, religion and worship in its Article 41. Here, important individual rights of freedom, equality and religious privacy are protected, together with institutional rights of organisation and action of religious communities, as well as teaching and public diffusion of the religious message. The principle of separation of religious confessions from the State is established in Article 28 / c) of the Constitution as a material limit of constitutional revision. The Constitution establishes that the national identity of Portuguese is a legal status compatible with the membership of any religious confession. At the same time, it states that religious freedom is a right of equal freedom that cannot be restricted by the state or any religious or non-religious entity. These dispositions are simultaneously an effect and cause of the gradual secularisation of Portuguese society, understood as a loss of influence of religion in the various domains of social life[13]. They allow for the development of multiple modernities and secularisms, leaving it to legislation to pick the model that will be more suited to constitutional and social conditions.

## 3. Religious Freedom Act

The Religious Freedom Act (RFA)[14] enshrines a normative framework of individual and collective religious freedom based on the principles of equal dignity and freedom, separation, non-confessionality, cooperation and tolerance. It guarantees a set of individual rights to religious freedom, such as freedom of conscience, religion and worship; freedom to educate minor children; religious assistance in special situations; or exemption from work or classes for religious reasons. It also enshrines the rights of worship ministers, including dispensation from intervention as a juror in court. Equally relevant are collective rights to religious freedom, including freedom to carry out religious purposes; self-organisation; the exercise of religious worship; the diffusion of religious doctrines; religious teaching in public schools; and public radio and television broadcasting. Also relevant are norms that guarantee the right of audience in the elaboration of zoning plans, the use of buildings for worship and the protection of religious property. Taken together, these and other norms ensure a legal status of broad religious freedom for religious minorities, protecting them from

[13] Jorge Botelho Moniz, 'Sobre o Secularismo Contemporâneo: Um Estudo de Caso Português No Período Democrático (Pós-1974)' (2016) *Dossiê - Perspectivas contemporâneas sobre o mundo Lusófono*, DOI: 10.5433/2176-6665.2016v21n2p169.

[14] Lei nº16/2001, de 22 de junho (in its consilidated version given by Lei n.º 66-B/2012, of 31/12).

pressures and discrimination that may be directed towards them from the dominant religious confession or from secularist groups[15].

The RFA created the Religious Liberty Commission (RLC), a consultative body independent of Parliament and Government. Its functions include study, information, opinion and proposal in all matters related to the application of the RFA, and the development of the law of religion in Portugal. It also researches topics concerning churches, communities and religious movements in Portugal. It is composed of the President, two members appointed by the Portuguese Catholic Bishops' Conference and three members appointed by a member of Government competent in the area of justice, from amongst those indicated by non-Catholic churches or religious communities located in the country, and by the federations in which they are integrated, taking into account the representativeness of each and the principle of tolerance. It also includes five persons of recognised scientific competence in areas relating to the functions of the RLC, designated by the member Government competent in the area of justice, in order to ensure diversity and neutrality of the State in religious matters. The RLC has created a space for representatives of different religious communities, allowing for the discussion of legal problems of common interest, facilitating mutual understanding and enabling the identification of social issues in which religious communities can find common ground. Over the years, this legal statute has generated a sense of inclusion and equal dignity, contributing even to friendly relationships and collaboration between Catholic and non-religious sectors of the country.

## 4. **Concordat of 2004**

The Concordat of 2004, signed by the Portuguese State and the Holy See, updated the 1940 Concordat in accordance with the constitutional principles of equal freedom and with the international human rights law[16]. It recognises the historical links between the Holy See and Portugal as well as the deep roots of Catholicism in the history, culture and identity of the Portuguese people[17]. It confers a legal status of institutional freedom on the Catholic Church. The 2004 Concordat is not intended to be a charter of privileges, or to side step Constitutional provisions. It should be read and interpreted in accordance with fundamental human rights and principles. On the one hand, it upended the ideological connection between Church and State. On the other hand, it proved that religious freedom is not just about the rights of minorities, but also about the rights of the majority. This Concordat meets the specificities of the

[15] C. Priscila Alves Pratas*, Direito da Religião: A Proteção das Minorias Religiosas* (Universidade Nova de Lisboa, Lisboa, 2013).

[16] Preamble of the Concordat of 2004.

[17] M. Saturnino da Costa Gomes and J. João Gonçalves Proenla, *O Direito Concordatário, Natureza e Finalidades* (Universidade Lusíada Editora, 2008).

Catholic Church in the historical, social, cultural and patrimonial reality of Portugal, acknowledged even by non-Catholic religious denominations. This international treaty is not a political and legal problem for the equal dignity and freedom of non-Catholic religious minorities.

### 5. Imamat Agreements

In 2009, Portugal and the Ismaili Imamat signed an Agreement whereby the legal personality of the Ismaili Imamat was recognised. In 2015, a new agreement was signed with a view to establishing world headquarters of the Ismaili Imamat in the country[18]. This agreement of international law concluded with a minority religious confession of small size, although with considerable economic power. It shows the readiness of the Portuguese State to attend to the institutional and social specificities of the different religious denominations and to do so beyond the religious-cultural boundary of the Judeo-Christian tradition.

## IV. A Post-secular moment?

The Catholic Church continues to be a considerable sociological majority. It is too early to consider Catholicism as just another minority in Portuguese society. The aforementioned statistical data shows that the Catholic Church retains a significant cultural influence in Portugal. However, it tends to be lost because many young people affirm mere cultural religiosity, lacking solid theological foundation. What's more, Catholicism is more concentrated in rural areas and has less influence in urban centers and around Lisbon. This may jeopardise its ability to influence, much less control, the political process, the educational system and the sphere of public discourse. This may have considerable consequences in the medium and long term. We are already feeling a weakening of the power and influence of the Catholic Church in debates on controversial topics such as same-sex marriage, surrogate motherhood and euthanasia.

At the same time, the legal status of equal freedom has contributed to the development of an open relationship between different religious denominations and has allowed them to identify some points of convergence, namely the promotion of religious freedom and resistance to a materialist and secularist worldview. The fact that evangelicals are increasing in numbers in urban centers can contribute to the development of critical mass. All the more so since they have the support of American and Brazilian evangelicals who come from countries where they have already

[18] Resolução da Assembleia da República n.º 135/2015; H. Machado Jorge, 'Religions and Secularism in Portugal: mainly a lingering monotheism', *Observatoire des Religions et de la Laicité*, http://www.o-re-la.org/index.php?option=com_k2&view=item&id=1305:religions-and-secularism-in-portugal-mainly-a-lingering-monotheism&Itemid=85&lang=fr (accessed 21 January 2021).

reached this critical mass. Brazil and America are examples of what can be achieved when evangelicals unite with other religious denominations and political forces and become actively involved in the political-democratic process.

Liberal democratic society has eventually led to a protestantisation of the generality of religious denominations. All institutional pronouncements are filtered by individual consciousness and freedom. Even in the Catholic Church, Pope Francis is criticised by some Catholic sectors for being too frugal and almost socialist, from a social and economic point of view, and too liberal from a theological and ethical point of view. Believers will not necessarily be side by side with their own religious communities in debates and polls involving controversial ethical issues.

For this to be possible, a greater commitment by these communities to politics, higher education and the media is needed. This is because philosophical naturalism is the worldview that still dominates these sectors. It should be noted, however, that evangelicals are far from being a homogeneous bloc. Indeed, historically, evangelicals have revolted against political-religious homogeneity and defended freedom of conscience, thought and expression. Greater diversification of the public sphere, with a diversity of religious and non-religious views, could have a positive effect, since a cross-examination of different perspectives can lead to mutual correction and relativisation.

The recent debate on euthanasia, which took place in May 2018, shows that things may be more complex that what one might expect. Some leftist parties, with the notable exception of the Communist Party, presented bills for the legalisation of euthanasia in Portugal. The parliamentary vote, which took place on 29 May 2018, was very divided and the project was eventually rejected, even if only for the next few years. Among other reasons, it was argued that most political parties had not included the issue in their programs for the current legislature. One fact deserves mention, however. A large group of religious denominations, including the Catholic Church, Orthodox Church, the Evangelicals, 7th Day Adventists, Muslims, Hindus, Buddhists and Jewish communities, have signed a joint public statement against euthanasia[19]. This expressed a common desire, that most of the main religious communities wish to actively participate in public debates on matters of ethical and social relevance.

Underlying this position is the idea that non-religious perspectives also rely on philosophical and ideological views of the world, based, inevitably, on presuppositions of faith. It is on the basis of these ideological presuppositions, and not in any special position of moral superiority, or even moral neutrality, that social movements and leftist political parties construct their ethical systems and seek to promote and impose them on the whole of society. They do so by instrumentalising the political-

[19] "Caring Until the End With Compassion", http://www.conferenciaepiscopal.pt/v1/declaracao-comum-das-confissoes-religiosas-sobre-a-eutanasia/ (accessed 21 January 2021).

legislative process, as if the whole state should serve these secular ethical systems. In this case, nothing is left to religious communities, except to firstly adopt a defensive position, and then to counter-attack. The loss of space of religion in the public sphere is a product of the Enlightenment, strongly influenced by rationalist and scientific thinking. It was believed that religion corresponded to a primitive, pre-rational and pre-scientific way of looking at reality, whereas science could eventually provide a definitive explanation for reality.

In recent years it has become clear that reason and science have a problem of *promise v. performance*. It has now become clear that behind them both, the philosophy of naturalistic materialism, that is, a specific view of the world, is often hidden. On the other hand, it is also evident that this philosophical conception has its own axioms and fideistic elements, devoid of empirical proof[20]. Equally clear is that even scientific methods, based on hypotheses, empirical observation, inference and the construction of models and theories, cannot explain fundamental aspects of the real world, and at the same time, contribute to many of its major problems (e.g. pollution, weapons of mass destruction). Much less can it substantiate the dignity of the human person, free will and moral values that should guide the lives of individuals in society. If this is so, there is no reason to give the secularised worldviews any epistemological, ontological, rational, and moral privilege[21]. Then, there is no ontological or epistemological reason to distance religious confessions from the public sphere and to prevent them from participating in debates on the political, legal, and ethical issues affecting the life (and death) of all members of society.

This reality may mark a *post-secular turn* in Portugal. As explained by Jürgen Habermas, in a post-secular society, 'religion maintains a public influence and relevance, while the secularistic certainty that religion will disappear worldwide in the course of modernisation is losing ground'[22]. Religious communities organise and join with each other in order to reclaim their expressive rights of political and public participation, trying in this way to fight and repel the recent dominion of the *secular imaginary*[23]. Post-secularism acknowledges the truth claims of the different religious communities and the presence of religion in the public sphere[24], not ascribing the

[20] T. Nagel, *Mind and Cosmos: Why the Materialist Neo-Darwinian Conception of Nature is Almost Certainly False* (Oxford, 2011).

[21] T. L. O'Brien, S. Noyb, 'Traditional, Modern, and Post-Secular Perspectives on Science and Religion' (2015) 80 (1) *United States American Sociological Review* pp. 92-115.

[22] J. Habermas, 'A "Post-Secular" Society: What Does that Mean?', *ResetDoc,* 16 September 2008.

[23] B. Schepelern Johansen,'Post-secular sociology Modes, possibilities and challenges' (2013) 3 (1) *Approaching Religion*, p. 4 ff.

[24] I. Leigh, R. Ahadar, 'Post-Secularism and the European Court of Human Rights: Or How God Never Really Went Away' (2012)75 *The Modern Law Review*, p. 6.

views of the non-religious world any exclusive right over the processes of formation of public opinion and political will[25].

## V. Conclusion

Religious minorities in Portugal may be considered micro-minorities in a country where the Catholic tradition is confronted with secularised worldviews. However, a generous and inclusive legal regime and the possibility of dialogue between the various religious minorities, and between them and the Catholic Church, have contributed to a climate of greater mutual understanding and cooperation. This climate is especially sensitive in an environment of transition from secularism to a post-secular understanding of the position of religious communities in the public sphere. In any case, the emphasis on freedom of conscience and individual religion makes the doctrines proclaimed by religious communities to a large extent filtered by their individual members.

[25] C. Fordahl, 'The Post-Secular: Paradigm Shift or Provocation?' (2017) 20(4) *European Journal of Social Theory,* pp.550-568.

# LEGAL STATUS OF RELIGIOUS MINORITIES IN SPAIN. THE SAME FUNDAMENTAL RIGHT WITH DIFFERENT REGULATORY SCENARIOS

Alejandro Torres Gutiérrez*

## I. Definition and Status

### 1. Social Science Definition

What is a religious minority? Social scientists[1] agree that from a subjective point of view, the common characteristic of a minority is the numerical inferiority of a group of people. An additional qualitative attribute of a minority is that this collective shares some particular signs of identity, in this case, of religious nature. The concept of religious minority is dynamic, or contextual, because it may experience variations, (for instance because of the influence of immigration flows), but always with a non-hegemonic position. There is no catalogue or list of fundamental rights recognised for minorities in the Spanish Constitutional system. Nevertheless, all religious minorities are protected by the generic principles of equality and non discrimination[2] and a general recognition of the fundamental right of religious freedom[3].

There are four doctrinal orientations for defining a "religious group"[4]:

1. Sociological: A religious group will be defined by public opinion according to its *notorious* social presence. This concept excludes small religious groups.
2. Theological: The main requirement should be to believe in some divinity. That excludes "*not deist* groups" such as Buddhism and Confucianism.

* Professor of Constitutional Law, Public University of Navarre, Spain.

1 G. Ruiz Rico Ruiz, 'Los derechos de las minorías religiosas, lingüísticas y étnicas en el ordenamiento constitucional español', (1996) 91 *Revista de Estudios Políticos,* pp. 99-102.

2 Article 14 of the Spanish Constitution.

3 Article 16 of the Spanish Constitution.

4 A. Motilla de la Calle, *El concepto de confesión religiosa en el Derecho español. Práctica administrativa y doctrina jurisprudencial,* (Madrid, Centro de Estudios Políticos y Constitucionales, 1999), pp. 23-32. I. Aldanondo Salavarría, "Nuevos movimientos religiosos y Registro de entidades religiosas", (2013) 17 *AFDUAM*, pp. 358-359.

3. Institutional: The group must be stable and permanent. This may introduce some (risky and non-desirable) quantitative requirements.
4. Self-referencing: It is not enough to self-declare as a religious group. This is because the public powers would lose any capacity for control.

## 2. **Legal Definition**

There is no specific legal definition for what constitutes a religious group. This makes it more difficult to define what a religious minority is.

Nevertheless, according to article 5.1 of the Organic Law 7/1980, of 5 July 1980, of Religious Freedom:

> 'Churches, Faiths and Religious Communities and their Federations shall acquire legal personality once registered in the corresponding public Registry created for this purpose and kept in the Ministry of Justice.' This registration shall be granted 'by virtue of an application together with an authentic document containing notice of the foundation or establishment of the organisation in Spain, declaration of religious purpose, denomination and other particulars of identity, rules of procedure and representative bodies, including such body´s powers and requisites for valid designation thereof[5]'.

The Sentence 46/2001, of 15 February 2001, of the Spanish Constitutional Court, established that, during the process of registration, the public administration is not allowed to control the *legitimacy* of the particular beliefs of the religious groups[6]. The administration must only *check*[7], (that means *confirm* or *verify*, and not *qualify*[8]), that the religious group which wants to be inscribed, is not included in any of the cases foreseen in art. 3.2 of the Organic Law 7/1980 of 5 July 1980 on religious freedom[9].

[5] Article 5.1 of the Organic Law 7/1980, of 5 July 1980, of Religious Freedom. https://www.religlaw.org/content/religlaw/documents/religliblawsp1980.htm.

[6] See § 8 of the Legal Basis of the Sentence of the Spanish Constitutional Court 46/2001.

[7] *Comprobar*, *constatar*, [sic].

[8] *Calificar*, [sic].

[9] This article establishes the circumstances that do not qualify for the protection provided in this Act: 'activities, purposes and Entities relating to, or engaging in, the study of and experimentation with psychic or parapsychological phenomena or the dissemination of humanistic or spiritualistic values or other similar non-religious aims'. F. Amérigo Cuervo-Arango, 'Crónica jurisprudencial. Sentencia TC de 15 de febrero de 2001', (2001) 1 *Laicidad y Libertades. Escritos jurídicos*, pp. 433-442. M.C. Caparrós Soler, 'El estatuto de las confesiones religiosas en la LOLR: Hacia una mayor garantía del derecho a la libertad religiosa' (2017) 43 *RGDCDEE*, pp. 1-34. A. Fernández-Coronado, 'Reflexiones en torno a la función del Registro de Entidades Religiosas (a propósito de la Sentencia de la Audiencia Nacional de 11 de octubre de 2007 sobre inscripción de la Iglesia de la Scientology)' (2007) 7 *Laicidad y Libertades. Escritos jurídicos*, pp. 389-402. A. Fernández Coronado, 'La Ley Orgánica de Libertad Religiosa en la nueva realidad social española: Funciones de la Comisión Asesora de Libertad Religiosa", in Ministerio de Justicia, (Ed.), *Comisión Asesora de Libertad Religiosa: Realidad y Futuro*, (Madrid, Ministerio de

The administrative procedure is *regulated* by the Law, and it must not be *discretionary*, neither *arbitrary*. The Public Administration may not judge the *religious component* of the group that wants to be inscribed in the Register of Religious Groups[10].

The Constitutional Court´s doctrine has influenced[11] the subsequent jurisprudence of the Supreme Court, and the National Audience, allowing the registration of the Church of the true soldiers of Jesus[12], the Beneficent Spiritist Center União do Vegetal[13]

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Justicia, 2009), pp. 54-68. A. López-Sidro López, 'La naturaleza confesional de la entidad solicitante como criterio para denegar la inscripción en el Registro de entidades religiosas. Comentario a la sentencia de la Sala 3.ª del Tribunal Supremo, de 21 de mayo de 2004', (2004) 6 *RGDCDEE*, pp. 1-11. A. López-Sidro López and D. Tirapu Martínez, 'La Cienciología en España: El camino hasta la personalidad jurídica", (2008) 16 *RGDCDEE*, pp. 1-16. A. Motilla de la Calle, *El concepto de confesión religiosa en el Derecho español. Práctica administrativa y doctrina jurisprudencial,* Centro de Estudios Políticos y Constitucionales, Madrid, 1999. S. Meseguer Velasco, 'Avances y retrocesos en la protección jurídica de la libertad e igualdad religiosa en España', (2015) 39, *Revista General de Derecho Canónico y Eclesiástico del Estado,* p. 18. A. Motilla de la Calle, "Sobre la inscripción de la Iglesia de la Cienciología en el Registro de Entidades Religiosas (A propósito de la Sentencia de la Audiencia Nacional de 11 de octubre de 2007)", (2008) 16 *RGDCDEE*, pp. 1-18. M. Murillo Muñoz, 'La eficacia constitutiva de la inscripción en el registro de entidades religiosas', (2000) 0 *Laicidad y Libertades. Escritos Jurídicos*, pp. 201-227. M. Murillo Muñoz, '¿Miedo a la religión en el reconocimiento jurídico de los grupos religiosos? Una reflexión en torno a la inscripción de entidades religiosas en la jurisprudencia española". (http://www.ull.es/congresos/conmirel/murillo1.html). M. E. Olmos Ortega, 'Personalidad Jurídica de las entidades religiosas y Registro de entidades religiosas', (2009) 19 *RGDCDEE*, pp. 1-43. J. Otaduy, 'Crónica de Jurisprudencia 2007, - Derecho Eclesiástico del Estado Español', (2008) XLVIII-95 *Ius Canonicum*, pp. 298-299. D. Pelayo Olmedo, *Las comunidades ideológicas y religiosas, la personalidad jurídica y la actividad registral*, (Madrid, Ministerio de Justicia, 2007), p. 294. J. del Picó Rubio, 'El sistema de reconocimiento de la personalidad jurídica de las entidades religiosas en las leyes de Chile y España ante la pretensión de inscripción en los respectivos registros públicos por parte de la Iglesia de la Unificación (Moon)', (2012) 30 *RGDCDEE*, pp. 1-21. G. Suárez Pertierra, 'Laicidad y cooperación como bases del modelo español: Un intento de interpretación integral (y una nueva plataforma de consenso)', (2011) 92 *Revista Española de Derecho Constitucional*, p. 52.

[10] See § 10 of the Legal Basis of the Sentence of the Spanish Constitutional Court 46/2001.

[11] M. Alenda Salinas, *El Registro de entidades religiosas. La praxis administrativa tras la STC 46/2001,* (Madrid: Iustel, 2008). A. Motilla de la Calle, 'Sobre la inscripción de la Iglesia de la Cienciología en el Registro de Entidades Religiosas (A propósito de la Sentencia de la Audiencia Nacional de 11 de octubre de 2007)', (2008) 16 *RGDCDEE*, pp. 1-18. M. E. Olmos Ortega, 'Personalidad Jurídica de las entidades religiosas y Registro de entidades religiosas' (2009) 19 *RGDCDEE*, pp. 25-26.

[12] Sentence of the Spanish Supreme Court of 21 May 2004, allowing the inscription of the *Iglesia de los verdaderos soldados de Jesús*, that reproduces that doctrine. The Supreme Court established that the administrative activity is fully regulated by the law, and is not discretionary.

[13] Sentence of the Spanish National Audience of 4 October 2007 allowing the inscription of the *Centro Espirita Beneficente União Do Vegetal – Núcleo Inmaculada Concepción.* The National Audience said that in that case the religious purposes were clearly pointed at the statutes of this religious group. These religious purposes were predominant and essential. The activity of the religious group was not in conflict with public order and the right of other citizens.

and the Church of Scientology[14]. According to the Spanish Courts, the Public Administration cannot control the legitimacy of religious beliefs[15].

Nevertheless, the Sentence of the National Audience of 19 October 2020,[16] denied the registration of the *Pastafari Church*, (sic), because the Tribunal understood that this collective has not a religious scope, and that it was created with a purpose other than religious, respectable, but different, that of making a parody criticism of some decisions in the educational system of the State of Kansas.

This constitutional jurisprudence is directly connected with the 2015 OSCE Guidelines on the legal personality of religious communities[17], that consider the right to legal personality status as vital to the full realisation of the right to freedom of religion or belief[18].

The Royal Decree 593/2015 of 3 July 2015[19], rationalised the procedure of recognition of religious communities with 'notorious presence', and tried to reduce the traditionally wide margin of discretion of the Spanish Administration. The Royal Decree 594/2015 of 3 July 2015[20] did the same with the inscription of Religious Groups in the Register[21].

## 3. **Legal Status**

In spite of the recognition of the principle of equality and neutrality in the Spanish Constitution, five inconsistencies (contradictions) can be found[22]:

[14] See § 7 of the Legal Basis, of the Sentence of the National Audience, of 11 October 2007, allowing the inscription of the Church of Scientology. The National Audience said again that the public administration must only *check* that the religious group that wants to be inscribed is not included in any of the cases foreseen in art. 3.2 of the Organic Law 7/1980, of 5 July 1980, of religious freedom. The administrative procedure is *regulated* by the Law, and it must not be *discretionary*, neither *arbitrary*.

[15] See § 7 of the Legal Basis of the Sentence of the National Audience of 11 October 2007.

[16] Roj: SAN 2490/2020 - ECLI: ES:AN:2020:2490.

[17] https://www.osce.org/odihr/139046.

Because according with 2015 OSCE Guidelines, 'a refusal to recognise it as a legal entity has also been found to constitute an interference with the right to freedom of religion under Article 9 of the ECHR, as exercised by both, the community itself and its individual members', OSCE, *Guidelines on the Legal Personality of Religious or Belief Communities,* 2015, §18, p. 21.

[18] OSCE, *Guidelines on the Legal Personality of Religious or Belief Communities,* 2015, §20, p. 22.

[19] Official Bulletin of the State of 1 August 2015.

[20] Official Bulletin of the State of 1 August 2015.

[21] M. Rodríguez Blanco, 'El Registro de Entidades Religiosas en la doctrina española' (2008), XXIV *Anuario de Derecho Eclesiástico del Estado*, p. 839-864. E. Herrera Ceballos, 'Hacia la construcción de un Registro fiel reflejo de la realidad. La reforma del Registro de entidades religiosas' (2015) 39 *Revista General de Derecho Canónico y Eclesiástico del Estado,* pp. 1-35.

[22] A. Castro Jover, 'Laicidad y actividad positiva de los poderes públicos' (2003) 3 *RGDCDEE*, pp. 1-32.

1. The Catholic Church, which signed the Agreements of Cooperation of 1979, has a wide catalogue of rights, including direct public financial support through a tax assignment of 0.7% of Income Tax;
2. Evangelicals, Jews and Muslims, who signed Agreements in 1992, are more limited in nature and rights[23];
    a. The Agreements of 1979 are equivalent to International Treaties whilst the Agreements of 1992 are only *ordinary* Laws.
    b. The Agreements with the Catholic Church were signed by the Head of State, (with the previous Parliament´s authorisation), and the Agreements of 1992 by the Minister of Justice, with the commitment that the governmental majority in Parliament would support their content during the parliamentary approval procedure[24].
    c. Considering their execution and interpretation, the Agreements of 1979 consecrate the principle of bilaterality, (they must be interpreted by common accord by the State and the Catholic Church, because of their equivalency to International Treaties).
    The Agreements of 1992 are subjected to the principle of unilaterality, (the Government may interpret them autonomously because they are mere ordinary laws).
    d. The Agreements with the Catholic Church are equivalent to International Treaties and they must be abrogated, modified or suspended according to International Law procedures.

The State may not legislate against their content without previous formal denunciation, because *pact sunt servanda*. The Agreements of 1992 are ordinary laws and they may be freely modified by Parliament at any moment, (*lex posterior derogat lex anterior*)[25].

[23] D. Llamazares Fernández, *Derecho de la Libertad de Conciencia I. Libertad de conciencia y laicidad* (Madrid, Civitas, 2007), pp. 394-396. A. Motilla de la Calle, *Contribución al estudio de las Entidades religiosas en el Derecho español. Fuentes de relación con el Estado* (Granada: Comares, 2013). G. Suárez Pertierra, 'Laicidad y cooperación como bases del modelo español: Un intento de interpretación integral (y una nueva plataforma de consenso)' (2011) 92 *Revista Española de Derecho Constitucional*, pp. 41-64.

[24] The Agreements of 1992 were processed in Parliament by the procedure of 'single lecture', without the introduction of amendments.

[25] There may be a deluge of legal problems as the Catholic Church will never want to lose the privileges as set out by the Agreements of 1979. Let´s remember the VAT case. When Spain joined the European Community in 1986, the tax benefits on indirect taxation recognized in articles III and IV of the Agreement on Financial Matters of 1979, were in opposition to European Union legislation about indirect tax harmonization. The first interpellation came from the European authorities in 1989 and the

3. Religious groups with an administrative declaration of "notorious presence":
   a. Church of Jesus Christ of Latter-Day Saints (23 April 2003);
   b. Jehovah´s Witness (29 June 2006);
   c. Buddhism (18 October 2007);
   d. Orthodoxy, (15 April 2010).

This declaration has very limited consequences. There are some expectations of signing an Agreement of Cooperation with the State, but only if there is some political will. The Royal Decree 932/2013 of 29 November 2013[26] allows them to have a representative in the Advisory Commission on Religious Freedom and their marriages will be recognised by the State. This is a new possibility opened by the Law 15/2015 of 2 July 2015 on voluntary jurisdiction[27].

4. Religious groups that are merely inscribed in the Register of Religious Groups. This subject has been recently regulated by the Royal Decree 594/2015 of 3 July 2015[28].

This inscription has very limited effects but at least allows full legal recognition of a collective of people as a "religious group".

We must consider that[29]:

a. The inscription may not be refused because of a reduced number of believers because there is no a minimum fixed by Law. The Administration should have tremendous discretionary power, the membership may change and it may be against article 16.2[30] of the Spanish Constitution[31].

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problem was not resolved until 1 January 2007 with a solution that consisted in raising the percentage of the Income Tax from 0.5239% to 0.7%.

[26] Official Bulletin of the State of 16 December 2013.

[27] Official Bulletin of the State of 3 July 2015.

[28] Official Bulletin of the State of 1 August 2015.

[29] J. Camarasa Carrillo, *La personalidad jurídica de las entidades religiosas en España,* (Madrid: Marcial Pons, 1995). S. Catalá Rubio, *El derecho a la personalidad jurídica de las entidades religiosas,* (Cuenca: Ediciones de la Universidad de Castilla-La Mancha, 2004). C. Garcimartín Montero, *La personalidad jurídica civil de los entes eclesiásticos en el derecho español,* (Barcelona: Cedecs, 2000). A. Motilla de la Calle, 'Sobre la inscripción de la Iglesia de la Cienciología en el Registro de Entidades Religiosas (A propósito de la Sentencia de la Audiencia Nacional de 11 de octubre de 2007)', (2008) 16 *RGDCDEE*, pp. 6-18.

[30] Article 16.2 of the Spanish Constitution: *No one may be compelled to make statements regarding his religion, beliefs or ideologies.*

[31] Sentences of the National Audience of 5 December 1997, 3 March 1999 and 22 December 1999. Sentence of the Supreme Court of 21 May 2004. Sentence of the Constitutional Court of 15 February 2001.

b. The Administration cannot control the *legitimacy* of the particular beliefs held by the religious groups[32].

5. Religious groups that have not been given access to the Register. These collectives are not recognised as religious groups by the State.

There is a "Mediterranean" interpretation of the principles of equality and neutrality:

a. In spite of the declaration of the principle of public neutrality, the King appoints the Catholic Army´s Archbishop[33].
b. Only the Catholic Church is directly financed by the public budget. This commitment was already recognised by the Spanish Constitution of 1837 after the first ecclesiastical confiscation of Mendizabal (1836).

In 1850-51, the Church's share represented more than 12% of the Spanish public budget. All previous attempts to end this privilege have been unsuccessful[34].

Article 2.5 of the Agreement on Financial Matters of 1979 established the Catholic Church´s commitment to self-financing which has never been put into practice.

Since 2007, the Catholic Church has received around 250 million euros from the Public Budget by means of the 0.7% of Income Tax contributions from taxpayers. The following table sets out the percentage of Income Tax contributions assigned to the Catholic Church yearly, from 2007 – 2016.

[32] See § 8 of the Legal Basis of the Sentence of the Spanish Constitutional Court 46/2001.

The administration must only *check* that the religious group that wants to be inscribed is not included in any of the cases foreseen in art. 3.2 of the Organic Law 7/1980, of 5 July 1980, of religious freedom. As we told: 'activities, purposes and Entities relating to, or engaging in, the study of and experimentation with psychic or parapsychological phenomena or the dissemination of humanistic or spiritualistic values or other similar non-religious aims'.

[33] King Juan Carlos I renounced to the appointment of the Catholic Archbishops and Bishops through the Agreement of 28 July 1976, Official Bulletin of the State of 24 September 1976, but one exception was included, because the Military Archbishop is appointed by the King between a list of 3 names, witnessed by the Nunciature in Spain and the Spanish Foreign Office.

[34] Mainly two: During the period in which Eugenio Montero Ríos was Minister of Justice, in 1871, and after the proclamation of the Spanish Constitution of 1931, during the Second Spanish Republic, whose article 26 foresaw the end of this amount of money in a period of 2 years.

**INCOME TAX ASSIGNEMENT – CATHOLIC CHURCH**[35]

| Year | Income Tax Declarations | % of declarations for the Church | Amount of Euro |
|---|---|---|---|
| 2007 | 6,958,012 | 34.38 | 242,101,605 |
| 2008 | 7,195,155 | 34.31 | 253,423,689 |
| 2009 | 7,260,138 | 34.75 | 249,983,345 |
| 2010 | 7,454,823 | 35.71 | 248,600,716 |
| 2011 | 7,357,037 | 34.83 | 247,935,801 |
| 2012 | 7,339,102 | 34.87 | 248,521,593 |
| 2013 | 7,268,597 | 34.88 | 246,911,425 |
| 2014 | 7,291,771 | 34.76 | 252,287,369 |
| 2015 | 7,347,612 | 34.93 | 249,162,060 |
| 2016 | 7,112,844 | 33.54 | 256,208,146 |

From 2005 onwards, religious minorities which have an Agreement of Cooperation with the State have received a certain amount of money from the Public Budget, through the Public Foundation "Pluralism and Convivence"[36]. There are three main differences from the Catholic Church´s status: The amount of money is quantitatively smaller, they only may invest this money in social projects, and it is not possible for them to pay the salaries of their ministers of worship.

**REVENUES OF THE PUBLIC FOUNDATION "PLURALISM AND CONVIVENCE"**[37]

| Year | Public Revenues | Total Revenues | % Public Revenues – Total Revenues |
|---|---|---|---|
| 2005 | 3,000,000 | 3,004,040.64 | 99.86% |
| 2006 | 4,000,000 | 4,037,486.44 | 99.07% |
| 2007 | 4,500,000 | 4,595,982.68 | 97.91% |
| 2008 | 5,000,000 | 5,189,413.03 | 96.35% |
| 2009 | 5,000,000 | 5,003,375.98 | 99.93% |
| 2010 | 5,000,000 | 5,003,085.81 | 99.93% |
| 2011 | 4,400,000 | 4,402,545.00 | 99.94% |

[35] F. Giménez Barriocanal, 'Una exposición de la financiación del 0,7% desde la perspectiva de la Iglesia', in Carmen Garcimartín, *La financiación de la libertad religiosa. Actas del VIII Simposio Internacional de Derecho Concordatario* (Granada: Comares, 2017), p. 40.

[36] In Spanish: "Pluralismo y Convivencia", [sic].

[37] P. Díaz Rubio, 'La financiación de las confesiones minoritarias: La Fundación Pluralismo y Convivencia', (2013), XXIX, *ADEE*, p. 121. M.J. Ciáurriz Labiano, 'La fundación pluralismo y convivencia', Andrés Corsino Álvarez Cortina and Miguel Rodríguez Blanco, (Dir.) *Aspectos del régimen económico y patrimonial de las confesiones religiosas*, (Granada: Comares, 2008), pp. 105-122.

| Year | Public Revenues | Total Revenues | % Public Revenues – Total Revenues |
|---|---|---|---|
| 2012 | 1,830,000[38] | - | - |
| 2013 | 1,500,000 | 1,501,000.00 | 99.93% |
| 2014 | 1,380,000 | - | - |
| 2015 | 1,380,000 | - | - |
| 2016 | 1,380,000[39] | - | - |
| 2017 | 1,380,000 | - | - |
| 2018 | 1,750,000[40] | - | - |

The remaining religious groups, which don't have an Agreement of Cooperation in place with the State, do not receive any direct public financial support.

3. Only the Catholic Church has full exemption[41] from the tax on constructions, installations and building works, (ICIO[42]). This tax benefit includes buildings where financial work takes place and as such may affect commercial competition and contravene European Legislation on State aid, as analysed in the case *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*[43].
4. Only religious groups with an Agreement of Cooperation in place have the advantage of these tax benefits:
    a. Full exemption from property tax for places of worship and the housing of ministers.
    b. A wide catalogue of tax benefits from contributions made from income tax and corporation tax, extended by Law 27/2014, of 27 November 2014[44] and the the Final Disposition n. 2 of the Royal Decree-Law 17/2020[45], of 5 May 2020.

[38] http://www.pluralismoyconvivencia.es/upload/92/56/CUENTAS_ANUALES_INFORME_AUDITORIA.pdf.

[39] http://www.pluralismoyconvivencia.es/upload/14/49/Memoria_de_actividad_2016.pdf.

[40] This is the final amount of money established by the new Law of National Public Budget of 2018. At the beginning of 2018, it was prorogated in the Public Budget of 2017. See section: "13 MINISTERIO DE JUSTICIA (13.01.111N.441)".

[41] Article IV.1.B) of the Agreement on Financial Matters of 1979.

[42] ICIO means in Spanish: *Impuesto sobre Construcciones, Instalaciones y Obras*, [sic].

[43] Aid not exceeding a ceiling of EUR 200.000 over any period of three years is deemed not to affect trade between Member States and not to distort or threaten to distort competition. *Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe*, (Court of Justice of the European Union, CJEU, 27 June 2017), [82]. See: http://curia.europa.eu/juris/document/document.jsf?text=&docid=192.143&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5582995.

[44] Official Bulletin of the State of 28 November 2014.

[45] Official Bulletin of the State of 6 May 2020.

**TAX DEDUCTIONS – INCOME TAX**[46]

| Donation[47] | % of deduction from year 2020 |
|---|---|
| First 150 euro<br>Rest | 80%<br>35% |
| Donations during at least 3 years. | 40% |

**TAX DEDUCTIONS – CORPORATION TAX**[48]

| Donation[49] | % of deduction from year 2016 |
|---|---|
| General donations | 35% |
| Donations during at least 3 years. | 40% |

c. Law 49/2002 also establishes a wide catalogue of corporation tax exemptions in favour of religious groups with Agreements of Cooperation in place. This includes dividends, interest rent and income from a great list of activities. Non-exempt incomes are subject to a 10% in the corporation tax. These benefits may violate European legislation on competence and state aid.

Religious minorities with an Agreement of Cooperation in place[50]:

1. Have formal guarantees in place which allow their religion to be taught in public schools. But *de facto*, only teachers of Evangelism and Islam are paid a salary similar to that of temporary teachers, through public funds, and only if at least ten students attend their lectures. They can be members of School Boards[51]. Nowadays there are 240 Christian Evangelical teachers and 60 Muslims, (many Autonomous Communities[52] have no teachers of Islam, and sometimes it is difficult to find teachers of Islam with the required civil degrees). Judaism teachers are paid by local religious communities. *Curricula* are approved by religious authorities and published by Public Administration in the case of Evangelicals and Muslims[53].

[46] Donations in favour of religious groups with Agreements of Cooperation in place.

[47] Limit: The donation must be smaller than 10% of the taxable income.

[48] Donations in favour of religious groups with Agreements of Cooperation in place.

[49] Limit: The donation must be smaller than 10% of the taxable income.

[50] J. Ferreiro Galguera, 'Desarrollo de los Acuerdos de Cooperación de 1992: Luces y sombras' (2017) 44 *RGDCDEE*, pp. 1-99.

[51] Order of 21 September 1993, Official Bulletin of the State of 2 October 1993.

[52] Or *Spanish Regions*. Spain is politically divided into 17 Autonomous Regions and the 2 Autonomous Cities of Ceuta and Melilla, in North Africa.

[53] J. Mantecón Sancho, 'La enseñanza religiosa de las confesiones minoritarias en los Acuerdos de Cooperación', (2017) 44 *RGDCDEE*, pp. 1-18.

2. Have been formally recognised the right to celebrate religious festivities, which can be agreed with employers. Public administrators must consider dates of religious festivities when planning exams, particularly if notified in advance by the applicant[54].
3. Are guaranteed availability of Halal and Kosher menus, correctly prepared, at public services.
4. Are guaranteed the right to religious assistance in publicly-run organisations, such as hospitals, army and prisons.
5. Have inviolable places of worship, and religious authorities must be consulted in case of expropriation[55].

## II. Social and Legal Change

### 1. Social Change

The Spanish National Institute of Statistics, (INE)[56], does not run surveys to measure religious attitudes in Spain. This is done by the Spanish Center of Sociological Research, (CIS[57]) which has published statistical series about the sociological evolution of religious beliefs in Spain since 1974. These statistics are not entirely comparable because the question asked has been changed three times between 1974 -2018. A general glance at these statistics however shows a progressive process of secularisation of Spanish society and an increasing presence of religious minorities, especially after the last influx of immigrants which started at the end of the twentieth century.

The poll run by CIS showed that at the end of Franco´s Dictatorship (1975), society was mostly Catholic, (at least 90% of the population defined themselves as 'practicing Catholics' or 'not practicing Catholics'). From 1989, the number of people defining themselves as 'not practicing Catholics' started to be higher than those who considered themselves 'Practicing Catholics', and in 1994, the percentage of Catholics had dropped to 85%. Religious minorities remained stable, at between 0.5%-1% of the population, during the period 1974 - 1993.

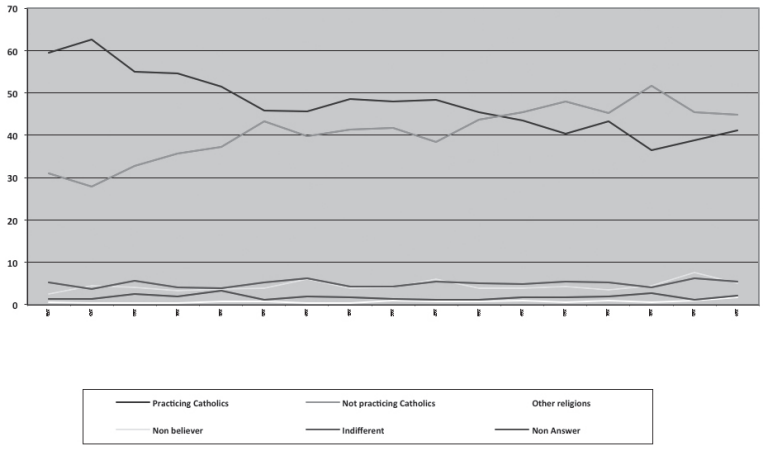
[54] The Sentence of the Supreme Court of 6 July 2015 ordered to repeat an exam in favour of an Adventist candidate training to become a teacher in Galicia. She had announced her objection of conscience to sit exams on a Saturday, two months before.

[55] Except in cases where there is a deemed threat to national security or public order.

[56] In Spanish: INE, *Instituto Nacional de Estadística*.

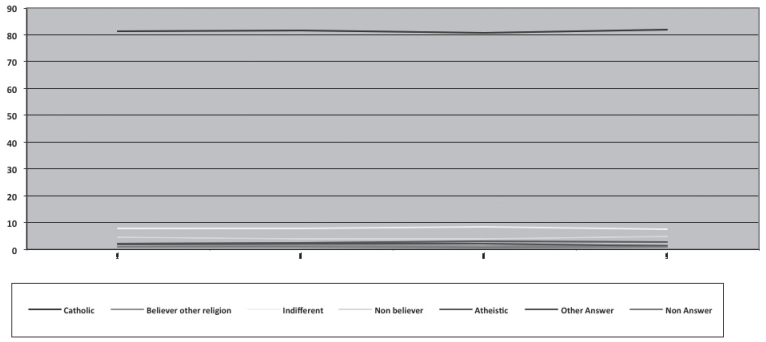
[57] In Spanish: CIS, *Centro de Investigaciones Sociológicas*.

**RELIGIOUS BELIEFS – SPAIN – 1974-1994**[58]




Between 1994 - 1997, CIS did not distinguish between "practicing" and "not practicing" Catholics, and the total number of Catholics was around 81% of the total population. Religious minorities were at slightly more than 1%[59].

**RELIGIOUS BELIEFS – SPAIN – 1994-1997**[60]




[58] Data: *Spanish Center of Sociological Researches*: http://www.analisis.cis.es/cisdb.jsp Series - 'Religiosidad de la persona entrevistada' –'Serie F.1.04.01.001 RELIGIOSIDAD DE LA PERSONA ENTREVISTADA (I)'.

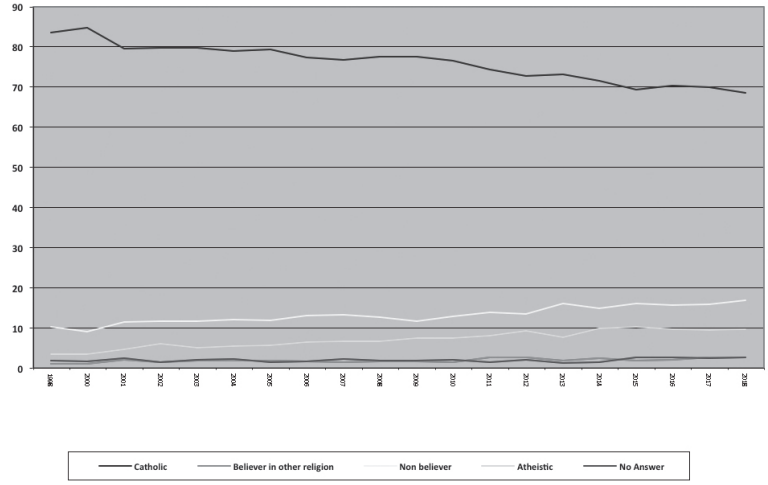
[59] This 1% was exceeded in 1989 for the first time, (1.1%, that year).

[60] Data: *Spanish Center of Sociological Researches*: http://www.analisis.cis.es/cisdb.jsp Series - 'Religiosidad de la persona entrevistada' –'Serie F.1.04.01.002 RELIGIOSIDAD DE LA PERSONA ENTREVISTADA (II)'.

From 1998, we can see the increasing secularisation of Spanish society, with a clear drop in the number of "Catholics" to less than 70%[61], and a clear rise in people who considered themselves to be non-believers (16.8% in 2018) or atheists (9.6% in 2018). Jointly, this represents more than a quarter of the Spanish population. Another important conclusion is that religious minority numbers grew to more than 2% of the Spanish population, (2.6% in 2018).

It is particularly difficult to measure the exact number of non-Catholic believers. Other evaluations calculate that there are 1,800,000 Muslims, 1,200,000 Evangelicals and 30,000 Jews living in Spain[62]. These numbers are not compatible with the data from CIS and INE[63], especially if we consider that the last Census of 2017 calculated the total population of Spain to be 46,549,045 inhabitants[64].

**RELIGIOUS BELIEFS – SPAIN – 1998-2018**[65]




61 68.5% in 2018.

62 J. Mantecón Sancho,' La enseñanza religiosa de las confesiones minoritarias en los Acuerdos de Cooperación' (2017) 44 *RGDCDEE*, p. 3.

63 Data: *National Institute of Statistics*, (*Instituto Nacional de Estadística*, INE).

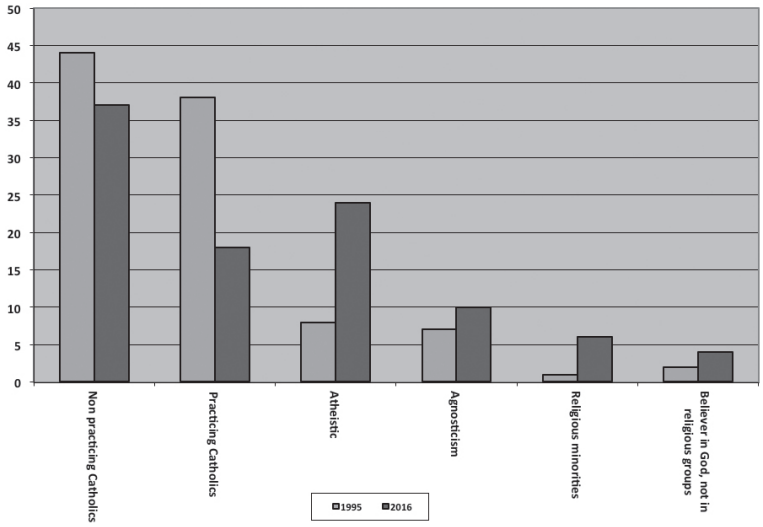
64 2.6% of 46,549,045 inhabitants is only 1,120,275.

http://www.ine.es/dyngs/INEbase/es/operacion.htm?c=Estadistica_C&cid=1254736176951&menu=ultiDatos&idp=1254735572981.

65 Data: *Spanish Center of Sociological Researches*: http://www.analisis.cis.es/cisdb.jsp Series -'Religiosidad de la persona entrevistada' –'Serie F.1.04.01.007 - RELIGIOSIDAD DE LA PERSONA ENTREVISTADA (VII)'.

Some Autonomous Communities, like the Basque Country, have their own public statistics. In these data sets it is also possible to see the process of social secularisation and the increase in religious minorities over the last two decades.

**BASQUE COUNTRY, STATISTICS, (1995-2016)**[66]




## 2. **Legal Change**

The Spanish Constitution of 1978 shows the change from a Catholic denominational State to a more neutral one. The Agreements of 1976 and 1979 with the Catholic Church, and in1992 with the Evangelicals, Jews and Muslims were inspired by the principle of cooperation. Nevertheless, some scholars have criticised the extension of some privileges (especially for Catholics).

The last 25 years have been characterised by a lack of political will to sign new agreements with religious minorities, in spite of some groups (like Christian Orthodox Churches) expressing interest in doing so.

Motilla de la Calle[67] foresaw the problems caused by arbitrary decisions of the religious federations with an agreement in place. These decisions of the religious

[66] Eusko Jaurlaritza – Gobierno Vasco, 60. Euskal Soziometroa - Euskal iritzi publikoa 20 urtetan - Sociómetro Vasco 60 - 20 años de opinión pública vasca, 2016, p. 57.

[67] A. Motilla de la Calle, 'Jurisprudencia del Tribunal Supremo' (2014) XXX *ADEE*, p. 964-965. and M.J. Ciáurriz Labiano, 'La situación jurídica de las comunidades islámicas en España', in Agustín Motilla de la Calle, *Los musulmanes en España: Libertad religiosa e identidad cultural*, (Madrid, Trotta, 2004), pp. 23-64.

federations were denying applications of another religious communities in order to be integrated in such federations. The Preamble of the Royal Decree 1348/2011 of 14 October 2011[68], recognised that at that time, 30% of Spanish Muslim communities were not integrated into the Islamic Commission of Spain[69]. This Royal Decree imposed a period of ten days in which the Islamic Commission must respond to the applications of integration of new communities. In case of arbitrary silence, the Community would be automatically registered with the Federation. In case of motivated opposition, the Register would deny inscription. It would however be possible to make an administrative appeal before the Ministry of Justice.

The Royal Decree 932/2013 of 29 November 2013[70], modified the structure and functions of the Advisory Commission of Religious Freedom and made it possible for new members, representing new religious minorities which had until recently been declared as having 'notorious presence' to be integrated.

There was a wide spectrum in understanding of the term 'notorious presence', which led to some arbitrary decision-making. This is why, we believe, successive applications made by the community of Jehovah´s Witness´s were rejected[71].

The Royal Decree 593/2015 of 3 July 2015[72] rationalised the procedure of recognition of such 'notorious presence' and tried to reduce the traditionally wide margin of discretion of the Spanish Administration by establishing five requirements:

a. To be registered in the National Register of Religious Groups for a period of at least 30 years. If registered in Spain for only 15 years, then they must have been recognised in a foreign country for at least 60 years;
b. To be present in at least ten Autonomous Communities and/or the Autonomous Cities of Ceuta and Melilla[73];
c. To have at least 100 inscriptions, (places of worship, or entities susceptible for inscription), in the Spanish Registry of Religious Groups;
d. To have an appropriate structure and representation;
e. To be able to prove active presence and participation in Spanish Society.

The Portuguese Law 16/2001 of 22 June 2001 for religious freedom, which establishes similar periods of 30/60 years of social, organised presence influenced the

[68] Official Bulletin of the State of 22 October 2011.

[69] This is the name of the Federation of Islamic Communities that signed the Agreement with the State.

[70] Official Bulletin of the State of 16 December 2013.

[71] They must wait until 2006 for full recognition of 'notorious presence', after several unsuccessful attempts.

[72] Official Bulletin of the State of 1 August 2015.

[73] Spain is politically divided into 17 Autonomous Regions and the two Autonomous Cities of Ceuta and Melilla in the North of Africa.

Royal Decree. The requirements set out in b) and c) are an attempt to try to avoid recognition of notoriety for very small groups or communities, (a problem that happens in Portugal where we can find religious groups with *radicação*[74] in only one city or town), and the consequent fragmentation of possible interlocutors with the State.

The requirements set out in d) and e) are a little bit indeterminate, and must be applied with flexibility and equity, in order to avoid possible administrative arbitrariness.

Another important legal change was introduced by Law 15/2015 of July 2015, for voluntary jurisdiction[75], that recognised religious marriage of all religious groups with administrative declaration of 'notorious presence'[76].

In future it consideration should be made:

1. If some legal privileges granted to some religious groups (especially for those with an Agreement of Cooperation) should be maintained.

Let´s think for instance:

a. On 1 January 2007, The Catholic Church renounced its tax benefits from VAT as they were incompatible with European Legislation of Indirect Tax harmonisation. Some tax benefits from Corporation Tax and the Tax on constructions, installations and building works may be incompatible with European legislation on State Aid. This has already been established by the recent case *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*[77], previously cited.
b. Is the State´s protocol compatible with the idea of public neutrality on religious beliefs? Let´s think about the public ceremonies of State celebrated in Madrid at the Catholic Cathedral of *La Almudena*, after the terrorist attack on 11 March 2004. Were they appropriate?
c. The ECHR, in the case *SA del Ucieza v. Spain,* (ECHR, GC, 4 November 2014), [99], expressed its *surprise* by the fact that a certificate issued by a Catholic Bishop should be enough to register an immovable property in the Register of Real Property, have the same value as a certificate issued by State officials exercising public authority, and that the domestic norm governing this procedure referred only to diocesan bishops of the Roman Catholic Church, to

[74] Declaration of 'notorious presence'.

[75] Official Bulletin of the State of 3 July 2015.

[76] Before this, only marriages of religious groups with an Agreement of Cooperation in place were recognised.

[77] *Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe*, (Court of Justice of the European Union, CJEU, 27 June 2017), [82].

http://curia.europa.eu/juris/document/document.jsf?text=&docid=192143&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5582995.

the exclusion of representatives of other denominations[78]. The Law 13/2015, of 24 June 2015, that Reforms the Mortgage Law, derogated this privilege of the Catholic Church.[79]

2. To fix a common legislation for all religious groups. Some privileges and prerogatives that nowadays are exclusive to religious groups with an Agreement of Cooperation should be extended to the remaining religious minorities.

Some local administrations create many difficulties when religious minorities wish to open new places of worship[80]. Sometimes local regulations regarding noise are restrictive, or the location of places of worship in industrial estates isn´t appropriate. In addition, there is no public land reserved for use by religious minorities to instate places of worship[81].

The inappropriate location of religious places of worship in cities may be a contributing factor to segregation and social exclusion[82]. A standard national regulation put in place by National Parliament would help tackle this problem, but some Autonomous Communities, such as Catalonia, have already legislated on this topic, meaning that national harmonization may not be possible[83].

## III. Social and Legal Developments

### 1. Social Developments

It is always risky to attempt to predict the future. Nevertheless, we can foresee the following social developments:

1. Immigration flows may continue, leading to further sociological changes that will intensify the more pluralistic character of Spanish society.

[78] It is also noteworthy that there was no time limit on such registration. This meant it could be imposed at any time, without any prior publicity requirement, and in breach of the principle of legal certainty.

[79] M. Moreno Antón, 'Luces y sombras en el acceso de los bienes eclesiásticos al Registro de la Propiedad' (2015) 38 *RGDCDEE*.

[80] Two of the best studies on this topic are: M. Rodríguez Blanco, *Libertad religiosa y confesiones. El régimen jurídico de los lugares de culto.* (Madrid: Centro de Estudios Políticos y Constitucionales, 2000). J.A. Rodríguez García, *Urbanismo y confesiones religiosas,* (Madrid: Montecorvo, 2003).

[81] M. García Ruiz, 'Acuerdos de Cooperación entre el Estado español y las confesiones religiosas minoritarias. 20 años después' (2013) XXIX *ADEE*, p. 406.

[82] A. Fernández-Coronado and G. Suárez Pertierra, *Identidad social, pluralismo religioso y laicidad del Estado*. Working Paper 180/2013, (Madrid: Fundación Alternativas, 2013), p. 60. M. Vidal Gallardo, 'Pluralismo y ordenación urbanística de los lugares de culto' (2014) 32 *Anales de Derecho,* p. 29.

[83] A. Castro Jover, 'Los lugares de culto en el derecho urbanístico: un análisis desde la igualdad material' (2007). 7 *Revista Laicidad y Libertades. Escritos Jurídicos*, p. 47.

We will need to accommodate these newcomers to ensure harmonious integration. It will be necessary to reduce the impact of possible conflicts between their cultural and religious traditions and our principles of public order. This will require the implementation of educational tools, as well as legal changes.

We must be ready to confront the challenges of new forms of violence (especially religious violence); an issue is already affecting Spanish society.

2. Society will be probably become more secular. Young people do not share the same values and beliefs as the older generation. This may influence future development of our legislation, and consequently, the shape of our society.

Social media and information technology will play a featuring role in many of our future challenges and we must be prepared. A new world of risk and opportunities is already being opened.

## 2. **Legal Developments**

We must reflect on our legislation regarding freedom of conscience, particularly in the following two ways:

1. We should analyse of whether the legislation that develops our constitutional principles are really neutral.

In this sense, we propose *de lege ferenda,* the adoption of a model of 'common legislation' for all religious groups.

The best solution is not to allow for a wide spectrum of understanding as the ECHR did in the cases *Alujer Fernández and Caballero García v Spain* (ECHR, 14 June 2001), and *Spampinato v Italy,* (ECHR, 29 March 2007).

We think that the strong distinction between groups with an Agreement of Cooperation with the State, and those without, is not fair. The lack of political intention in signing agreements with new religious groups, (like for instance Orthodox), has intensified a distinction which is not justified.

This common model should be in line with the constitutional principles of freedom of conscience and public neutrality.

2. Our society will become more diverse and we must ready ourselves for the new challenges that this diversity will lead to.

Violence may be one of these challenges and it will require implementation of new educational and security policies.

The Anglo Saxon jurisprudence on accommodation may be a useful tool. Values such as freedom of conscience, pluralism, tolerance, non-discrimination, and full respect for the Rule of Law, must also be considered.

# CENTRAL AND EASTERN EUROPE

# COMME À TRAVERS UN KALÉIDOSCOPE : LE STATUT DES MINORITÉS RELIGIEUSES EN AUTRICHE

Wolfgang Wieshaider*

## I. Définition et statut

En Autriche, la communauté religieuse majoritaire est l'Église catholique. En ce qui concerne les autres religions, il convient de distinguer d'une part selon les effectifs et d'autre part selon le statut juridique car ce sont toutes les sociétés religieuses reconnues par la loi qui ont un statut traditionnel de droit public.[1] Tel était l'unique statut pour les corporations religieuses du passé [2] et on trouve parmi elles soit des grandes, soit petites. Depuis l'introduction du statut des communautés confessionnelles enregistrées en 1998 qui allait de pair avec la nécessité d'un nombre élevé de membres pour la reconnaissance au niveau du droit public, les nouvelles communautés aux petits effectifs sont enregistrées sur la base de la loi relative aux communautés religieuses confessionnelles[3]. Mis à part les autres conditions légales pour la reconnaissance des sociétés religieuses dans les divisions 11/1/a–c *leg. cit.,*[4] les lois ne distinguent pas, sur le fond, entre des communautés anciennes et nouvelles. Selon les enquêtes citées ci-dessous[5], les sciences sociales font de même. Le troisième type de personnalité juridique que des organisations religieuses peuvent acquérir, est

* Wolfgang Wieshaider est professeur à la Faculté de droit de l'Université de Vienne et professeur invité permanent à la Faculté de droit de l'Université Charles à Prague.

1 Cf. Herbert Kalb, Richard Potz et Brigitte Schinkele, *Religionsrecht* (Wien : WUV, 2003), pp. 93 sq.; Wolfgang Wieshaider, ‹ Zu Rechtspersönlichkeit und Wesen gesetzlich anerkannter Religionsgesellschaften ›, (2013) 60 *österreichisches Archiv für recht & religion,* pp. 336-346.

2 Voir ci-dessous, la II^e partie.

3 *Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften,* Bundesgesetzblatt I № 19/1998 dans sa version modifée par Bundesgesetzblatt I № 75/2013.

4 Voir Kalb, Potz et Schinkele, *Religionsrecht,* pp. 95-104 ; Stefan Schima, ‹ Die wichtigsten religionsrechtlichen Regelungen des Bundesrechts und des Landesrechts, Jahrgang 2011 ›, (2015) 62 *österreichisches Archiv für recht & religion,* pp. 70-125 (pp. 82-89) ; Richard Potz et Brigitte Schinkele, *Religion and Law in Austria* (Alphen aan den Rijn : Kluwer Law International, 2016), al. 220-225.

5 Voir ci-dessous, la II^e partie.

celle d'une association à but non lucratif pour laquelle l'alinéa 1(2) de la loi sur les associations de 2002[6] n'exige que deux membres au minimum.[7] Chacun de ces trois statuts permet le libre exercice de la religion.

Compte tenu du fait que certains paramètres de l'ordre juridique sont historiquement influencés par les besoins et par la tradition de l'Église catholique, il faut revenir à la distinction entre la majorité et les minorités pour comprendre les ramifications de l'obligation positive qui incombe à l'État de protéger le libre exercice de la religion de ces dernières. Cela concerne, entre autres, les domaines du droit du travail, de la réglementation des jours fériés, de l'économie et de la distribution de produits alimentaires, du droit fiscal, des réglementations relatives aux tenues vestimentaires, et bien d'autres sujets encore.[8]

Un autre secteur du droit des minorités est celui des minorités ethniques et linguistiques. Là, le droit se focalise uniquement sur des minorités autochtones. À l'heure actuelle, il y a six minorités soi-disant ‹ reconnues ›.[9] Ce sont les groupes ethniques slovène, croate, hongrois, tchèque, slovaque et romani :[10] pour ceux-ci, le gouvernement fédéral a établi un conseil consultatif par règlement[11] pris sur la base du paragraphe 2 de la loi sur les groupe ethniques[12]. L'alinéa 1(2) *leg. cit.* définit ces groupes comme rassemblant des citoyens autrichiens ayant une autre langue maternelle que de l'allemand. Les communautés religieuses ont le droit de proposer des membres à ce conseil aux termes de la division 4(2)3 *leg. cit.* L'un des mécanismes du soutien, est la subvention étatique versée en vertu du paragraphe 8 *leg. cit.* Cette aide financière peut être accordée à des organisations d'un groupe ethnique afin d'assurer leur sauvegarde conformément à l'alinéa 9(2) *leg. cit* ; l'alinéa 9(3) *leg. cit.* assimile les communautés religieuses et leurs structures aux organisations des groupes ethniques.

[6] *Vereinsgesetz 2002,* Bundesgesetzblatt I № 66 dans sa version modifée par Bundesgesetzblatt I № 32/2018.

[7] Cf. le paragraphe 27 des *Guidelines on the Legal Personality of Religious or Belief Communities* de l'OSCE, <https://www.osce.org/odihr/139046> (15 janvier 2021).

[8] Voir par ex. la compilation des questions dans Paul Simon Pesendorfer, *Staatliche Akzeptanz von religiösen Riten und Symbolen,* (Wien : Verlag Österreich 2009), pp. 29-147.

[9] Voir Stefan Hammer, ‹ Das Recht der autochtonen Minderheiten in Österreich ›, in Christoph Pan et Beate Sibylle Pfeil (dir.), *Zur Entstehung des modernen Minderheitenschutzes in Europa. Handbuch der europäischen Volksgruppen, tome № 3* (Wien, New York : Springer, 2006), pp. 300-329 (p. 310).

[10] Pour la comptabilité avec la Charte européenne des langues régionales ou minoritaires (STE № 148 ; Bundesgesetzblatt III № 216/2001 dans sa version modifiée par Bundesgesetzblatt III № 11/2016) ; voir Ursula Doleschal, ‹ Österreich ›, in Franz Lebsanft et Monika Wingender (dir.), *Europäische Charta der Regional- oder Minderheitensprachen. Ein Handbuch zur Sprachpolitik des Europarats* (Berlin, Boston : de Gruyter, 2012), pp. 191-209.

[11] *Verordnung der Bundesregierung über die Volksgruppenbeiräte,* Bundesgesetzblatt № 38/1977 dans sa version modifiée par Bundesgesetzblatt № 895/1993.

[12] *Volksgruppengesetz,* Bundesgesetzblatt № 396/1976 dans sa version modifiée par Bundesgesetzblatt I № 84/2013.

En pratique, les subventions ne sont accordées qu'aux groupes ethniques qui disposent d'un conseil consultatif, même si la loi n'impose pas cette restriction ; les structures ecclésiastiques qui sont liées aux groupes ethniques et qui reçoivent des subventions sont surtout des structures catholiques, ainsi que quelques institutions protestantes.[13]

Les différentes sciences sociales se réfèrent souvent à ces groupes ethniques quand elles parlent des ‹ minorités › en général et sans précision,[14] parfois elles entendent ce terme dans un sens plus large, en impliquant des minorités religieuses et d'autres minorités.[15] Cependant, elles insistent sur des critères plutôt qualitatifs que quantitatifs.[16] D'autres minorités linguistiques qui se distinguent à la fois par la langue et par la religion, comme les Églises orthodoxes, ont la possibilité d'acquérir un statut de communauté religieuse confessionnelle ou de société religieuse.[17]

[13] Voir *Bericht über die Volksgruppenförderung des Bundeskanzleramtes 2015,* Wien 2016 ; cf. Hammer, *Das Recht der autochtonen Minderheiten,* pp. 310 sq.

[14] Cf. par ex. Rainer Bauböck, ‹ Ethnizität, Minderheiten und Staat ›, in Rainer Bauböck, Gerhard Baumgartner, Bernhard Perchling et Karin Pintér (dir.), *... und raus bist du ! Ethnische Minderheiten in der Politik. Österreichische Texte zur Gesellschaftskritik, tome № 37* (Wien : Verlag für Gesellschaftskritik, 1988), pp. 3-22 (pp.14-18) ; Gerhard Baumgartner, ‹ Minderheiten als politische Kraft ›, *ibid.,* pp. 309-326 ; Albert F. Reiterer, *Gesellschaft in Österreich. Struktur und sozialer Wandel im globalen Vergleich* (3e éd., Wien : WUV, 2003), pp.137-142 ; Gero Fischer, ‹ Autochthone Minderheiten und Migrantenminderheiten in Österreich. Kärntner Slowenen – Steirische Slowenen – Wiener Tschechen – Wiener Slowaken – Polen – Ex-Jugoslawen – Türken ›, in Rosita Rindler Schjerve (dir.), *Der Beitrag Österreichs zu einer europäischen Kultur der Differenz. Sprachliche Minderheiten und Migration unter die Lupe genommen* (St. Augustin : Asgard, 2003), pp. 130-208 (p. 174) ; Rosita Rindler Schjerve et Peter J. Weber, ‹ Schlussfolgerungen ›, *ibid.,* pp. 268-270 ; Andreas Schimmelpfennig, ‹ 1989 und die österreichische Identität der nationalen Minderheiten ›, in Andrea Brait et Michael Gehler (dir.), *Grenzöffnung 1989. Innen- und Außenperspektiven und die Folgen für Österreich* (Wien, Köln, Weimar : Böhlau, 2014), pp. 445-468 (pp. 446-449).

[15] Anton Pelinka, ‹ Minderheitenpolitik im politischen System Österreichs ›, in Bauböck, Baumgartner, Perchling et Pintér, *Ethnische Minderheiten*, pp. 23-28 ; Initiative Minderheitenjahr (dir.), *Wege zu Minderheiten in Österreich. Ein Handbuch* (Wien : Der Apfel, 1993) ; Andre Gingrich, ‹ Ethnologische Praxis und Minderheiten in Zeiten der Globalisierung ›, in Helmut Kletzander et Karl R. Wernhart (dir.), *Minderheiten in Österreich. Kulturelle Identitäten und die politische Verantwortung der Ethnologie* (Wien : WUV, 2001), pp. 4-49 ; Herbert Langthaler, ‹ Welchen Schutz für welche Minderheiten ? ›, *ibid.,* pp. 91-102.

[16] Cf. Bernhard Perchinig, ‹ Ethnizität, Minderheit, Assimilation : Einige kritische Anmerkungen ›, in Bauböck, Baumgartner, Perchling et Pintér, *Ethnische Minderheiten,* pp. 129-141 (pp. 136 sq.) ; Ursula Hemetek, *Musik der Klänge. Musik der ethnischen und religiösen Minderheiten in Österreich. Schriften zur Volksmusik, tome № 20* (Wien, Köln, Weimar : Böhlau, 2001), pp. 83-85 ; Reiterer, *Gesellschaft,* pp. 135-137 ; Rindler Schjerve, *Beitrag Österreichs.*

[17] Cf. Wolfgang Wieshaider, ‹ Religionsgemeinschaften und Minderheiten ›, (2001) 41 *Der Donauraum* № 3 : pp. 109-117 ; Kristina Stöckl, ‹ Orthodoxe Kirchen als Migrations- und Minderheitenkirchen: Herausforderungen und Chancen ›, in Jürgen Nautz, Kristina Stöckl et Roman Siebenrock (dir.), *Öffentliche Religionen in Österreich. Politikverständnis und zivilgesellschaftliches Engagement. Edition Weltordnung – Religion – Gewalt, tome № 12* (Innsbruck : innsbruck university press, 2013), pp. 187-201.

Le droit ne définit pas la notion de ‹ minorité ›, même s'il emploie le terme, cette notion étant empruntée à la notion homologue du droit international public.[18] En adoptant l'allemand comme langue officielle de la République, l'alinéa 8(1) de la Constitution fédérale[19] sauvegarde les droits accordés aux minorités linguistiques.[20] L'alinéa 8(2) *leg. cit.* les assimile aux groupes ethniques autochtones mentionnés ci-dessus. L'absence de la nécessité d'une définition générale semble être due au fait que, soit dans le domaine religieux, soit dans le domaine ethnique et linguistique, les réalités sociales quantitatives des uns et des autres sont toujours très claires.[21]

Pour les minorités religieuses, les dispositions du droit international public importantes sont surtout celles qui ont valeur constitutionnelle : tout d'abord les articles 62 à 69 du Traité d'État de Saint-Germain-en-Laye,[22] garantissant le libre exercice de la religion pour tous et un traitement égalitaire et l'article 26 du Traité d'État de Vienne,[23] réglant le dédommagement des sociétés religieuses pour les expropriations entre 1938 et 1945. L'élévation de la Convention européenne des droits de l'homme

[18] Voir Dieter Kolonovits, *Sprachenrecht in Österreich. Das individuelle Recht auf Gebrauch der Volksgruppensprachen im Verkehr mit Verwaltungsbehörden und Gerichten* (Wien : Manz, 1999), pp. 52-66 ; Cf. par ex. les lois scolaires pour les minorités au Burgenland *(Minderheiten-Schulgesetz für das Burgenland,* Bundesgesetzblatt № 641/1994, dans sa version modifiée par Bundesgesetzblatt I № 101/2018) et en Carinthie *(Minderheiten-Schulgesetz für Kärnten,* Bundesgesetzblatt № 101/1959, dans sa version modifiée par Bundesgesetzblatt I № 138/2017) ; le paragraphe 16 de la loi sur l'enseignement scolaire *(Schulunterrichtsgesetz,* Bundesgesetzblatt № 472/1986) et le paragraphe 10 de la loi sur l'organisation scolaire *(Schulorganisationsgesetz,* Bundesgesetzblatt № 242/1962, les deux dans leurs versions modifiées par Bundesgesetzblatt I № 19/2021) ; les paragraphes 8, 12 et 15 de la loi sur le collège des médiateurs *(Volksanwaltschaftsgesetz* 1982, Bundesgesetzblatt № 433 dans sa version modifiée par Bundesgesetzblatt I № 56/2021) ; les paragraphes 87 et 94 de la loi concernant le régime pénitentiaire *(Strafvollzugsgesetz,* Bundesgesetzblatt № 144/1969 dans sa version modifiée par Bundesgesetzblatt I № 100/2018).

[19] *Bundes-Verfassungsgesetz,* Bundesgesetzblatt № 1/1930 dans sa version modifiée par Bundesgesetzblatt I № 2/2021.

[20] Cf. l'article 6 de la Constitution du Burgenland *(Landes-Verfassungsgesetz,* Landesgesetzblatt № 42/1981 dans sa version modifiée par Landesgesetzblatt № 43/2020) ; l'article 5 de la Constitution carinthienne *(Kärntner Landesverfassung,* Landesgesetzblatt № 85/1996 dans sa version modifiée par Landesgesetzblatt № 117/2020) ; l'article 5 de la Constitution styrienne (*Landes-Verfassungsgesetz 2010,* Landesgesetzblatt № 77 dans sa version modifiée par Landesgesetzblatt № 115/2017).

[21] Cf. Reiterer, *Gesellschaft,* pp. 113 et 123-126 ; Regina Polak et Christoph Schachinger, ‹ Stabil in Veränderung : Konfessionsnahe Religiosität in Europa ›, in Regina Polak (dir.), *Zukunft. Werte. Europa. Die Europäische Wertestudie 1990–2010 : Österreich im Vergleich* (Wien : Böhlau, 2011), pp. 191-219 (p. 198).

[22] *Staatsvertrag von Saint-Germain-en-Laye,* Staatsgesetzblatt № 303/1920 dans sa version modifiée par Bundesgesetzblatt III № 179/2002.

[23] Traité d'État portant rétablissement d'une Autriche indépendante et démocratique *(Staatsvertrag von Wien – Staatsvertrag betreffend die Wiederherstellung eines unabhängigen und demokratischen Österreich,* Bundesgesetzblatt № 152/1955 dans sa version modifiée par Bundesgesetzblatt I № 2/2008).

(CEDH) et de son premier protocole au niveau constitutionnel en 1964[24] , et de même plus tard en ce qui concerne ses protocoles № 4,[25] № 6,[26] № 7[27] et № 13[28] ont facilité une jurisprudence cohérente de la Cour constitutionnelle autrichienne et de la Cour européenne des droits de l'homme (Cour EDH) appliquant directement les mêmes articles de la même convention. D'autres conventions internationales, comme le Pacte international relatif aux droits civils et politiques,[29] n'ont que valeur de loi ordinaire.

En général, une situation minoritaire sociale n'implique pas, comme telle, de traitements juridiques particuliers.[30] Toutefois, il faut signaler les trois cas suivants :

— des traitements distincts peuvent provenir du statut juridique de la communauté,
— ils peuvent découler de la religion elle-même,
— il peut n'y avoir aucun traitement spécifique.

Ces rapprochements légaux vont être illustrés par des exemples dans ce qui suit. Premier cas : le statut marque la différence. Si on considère les trois statuts corporatifs possibles – ceux de la société religieuse reconnue, ceux de la communauté religieuse confessionnelle enregistrée et ceux de l'association à but non lucratif – la loi fait découler certaines conséquences juridiques de tel ou tel statut. Dans ce sens, l'alinéa 17(4) de la loi fondamentale de 1867[31] confie aux églises et sociétés religieuses la responsabilité de l'enseignement religieux dans les écoles. En conséquence, l'alinéa 1(1) de la loi sur l'enseignement religieux[32] dispose que l'enseignement religieux dans la plupart des écoles publiques est obligatoire pour des enfants qui appartiennent à une société religieuse reconnue, sous réserve du droit de désinscription prévu par l'alinéa 1(2) *leg. cit.* La rémunération des enseignants est prise en charge par l'État selon le paragraphe 7 *leg. cit.*[33] En revanche, l'alinéa 3(2) du règlement sur

[24] Bundesgesetzblatt № 59/1964.
[25] Bundesgesetzblatt № 434/1969.
[26] Bundesgesetzblatt № 138/1985.
[27] Bundesgesetzblatt № 628/1988.
[28] Bundesgesetzblatt III № 22/2005 dans sa version modifiée par Bundesgesetzblatt III № 53 et 127/2005.
[29] Bundesgesetzblatt № 591/1978 dans sa version modifiée par Bundesgesetzblatt III № 56/2021.
[30] Cf. Wolfgang Wieshaider, ‹ Das andere Muster oder: Ein Versuch über das österreichische Religionsrecht des 21. Jahrhunderts anhand der Struktur des Protestantengesetzes ›, in Kerstin von der Decken et Angelika Günzel (dir.), *Staat – Religion – Recht. Festschrift für Gerhard Robbers zum 70. Geburtstag* (Baden-Baden : Nomos, 2020), pp. 411-427.
[31] *Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder,* Reichsgesetzblatt № 142/1867 dans sa version modifiée par Bundesgesetzblatt № 684/1988.
[32] *Religionsunterrichtsgesetz,* Bundesgesetzblatt № 190/1949 dans sa version modifiée par Bundesgesetzblatt I № 138/2017.
[33] Kalb, Potz et Schinkele, *Religionsrecht,* pp. 351-360 et 368 sq.

les formulaires des bulletins scolaires[34] permet la notation de la confession pour tous les élèves qui appartiennent à une société religieuse reconnue ou à une communauté religieuse confessionnelle enregistrée. Le droit de protection du patrimoine culturel va dans le même sens. Tandis que l'alinéa 5(4) de la loi sur la protection du patrimoine culturel[35] prévoit une procédure spéciale pour la modification des monuments dédiés à l'office religieux uniquement pour les sociétés religieuses reconnues,[36] l'alinéa 5(6) de la loi sur la restitution de biens culturels[37] englobe explicitement dans la même aire d'application aussi bien les sociétés religieuses reconnues que les communautés religieuses confessionnelles enregistrées.[38] Dernier exemple : la division 18(1)5 de la loi de l'impôt sur le revenu[39] permet la déduction des contributions obligatoires à des sociétés religieuses reconnues, mais les communautés religieuses confessionnelles ne sont pas mentionnées.

Deuxième cas : la religion marque la distinction.[40] La loi vise à concilier les besoins des religions majoritaires et des minoritaires, en offrant une action positive aux seules religions minoritaires. Évidemment, ces dispositions n'englobent ni toutes les minorités en général, ni toutes les minorités qui disposent du même statut juridique. C'est pourquoi l'élément constitutif qui importe, c'est la religion spécifique elle-même. Dans ce sens, l'alinéa 22(2) de la loi sur l'Église protestante,[41] aux termes duquel le service des affaires de l'Église protestante – ce sont selon le paragraphe 1er *leg. cit.* les Églises luthérienne et réformée – doit être pourvu par un de ses membres, n'a pas d'équivalent ni pour d'autres minorités religieuses, ni pour la majorité religieuse. Bien évidemment, il est statistiquement très probable que les autres postes seront occupés par des membres de la religion majoritaire.

[34] *Zeugnisformularverordnung,* Bundesgesetzblatt № 415/1989 dans sa version modifiée par Bundesgesetzblatt II № 465/2020 ; cf. Stefan Schima, ‹ Die wichtigsten religionsrechtlichen Regelungen des Bundesrechts und des Landesrechts – Jahrgang 1999, zweites Halbjahr ›, (2000) 47 *österreichisches Archiv für recht & religion,* pp. 82-102 (pp. 91 sq.).

[35] *Denkmalschutzgesetz,* Bundesgesetzblatt № 533/1923 dans sa version modifiée par Bundesgesetzblatt I № 92/2013.

[36] Cf. Wolfgang Wieshaider, ‹ Die Weitergabe von Kultusbauten vor dem Hintergrund des Denkmalschutzrechtes ›, in Brigitte Schinkele, René Kuppe, Stefan Schima, Eva M. Synek, Jürgen Wallner et Wolfgang Wieshaider (dir.), *Recht – Religion – Kultur. Festschrift für Richard Potz zum 70. Geburtstag* (Wien : facultas, 2014), pp. 923-934.

[37] *Kulturgüterrückgabegesetz,* Bundesgesetzblatt I № 19/2016.

[38] Cf. Wolfgang Wieshaider, ‹ Der Begriff religiöser Einrichtungen im Kulturgüterrückgaberecht ›, (2017) 64 *österreichisches Archiv für recht & religion,* pp. 662-675.

[39] *Einkommensteuergesetz 1988,* Bundesgesetzblatt № 400/1988 dans sa version modifiée par Bundesgesetzblatt I № 71/2021.

[40] Cf. le paragraphe 41 des *Guidelines on the Legal Personality of Religious or Belief Communities* de l'OSCE.

[41] *Bundesgesetz über äußere Rechtsverhältnisse der Evangelischen Kirche,* Bundesgesetzblatt № 182/1961 dans sa version modifiée par Bundesgesetzblatt I № 166/2020.

L'alinéa 28(1) de la loi sur la Radiodiffusion autrichienne[42] prévoit la création d'un conseil public pour préserver les intérêts des auditeurs et des téléspectateurs. Selon l'alinéa 28(3) *leg. cit.* l'Église catholique a le droit d'y nommer un membre et l'Église protestante un autre. Cependant, la loi ne fait pas mention d'autres sociétés religieuses ici ; en revanche, il fait partie de la mission essentielle de la radiodiffusion publique telle qu'elle est prévue par la division 4(1)12 *leg. cit.,* de tenir compte de l'importance de toutes les églises et sociétés religieuses reconnues, de façon appropriée.[43]

Le droit fédéral n'est pas seul à prendre en considération ; il faut également compter avec le droit régional. En vertu de l'alinéa 7(1) de la loi basse-autrichienne sur l'aménagement du territoire[44] un conseil consultatif est établi pour conseiller le gouvernement régional dans les affaires d'aménagement du territoire.[45] L'alinéa 7(9) *leg. cit.* mentionne l'Église catholique et l'Église protestante parmi des corporations représentant des intérêts professionnels, économiques ou politiques comme habilitées à nommer une personne dans ce conseil. Même situation selon la division 15(2)e de la loi styrienne sur les cinémas,[46] pour le conseil créé conformément à l'alinéa 15(1) *leg. cit.* ou encore pour la plate-forme de santé, l'un des deux organismes du Fonds viennois de santé selon l'alinéa 4(1) de la loi viennoise sur le Fonds de santé[47] ; la Conférence autrichienne des évêques catholiques et le conseil régional suprême de l'Église protestante ont le droit d'envoyer un membre sur lequel ils s'accordent en vertu de la division 5(1)6 *leg. cit.* Pas plus que les précédentes, ces lois ne font mention d'autres sociétés religieuses. Une représentation amplifiée peut aussi résulter de la division 47(1)d de la loi styrienne relative à la gestion des écoles obligatoires[48], selon laquelle l'Église catholique, l'Église protestante, l'Église vieille-catholique et la Société religieuse israélite envoient chacune un représentant dans le conseil scolaire de la ville de Graz.

D'autres différences selon les religions sautent aux yeux en ce qui concerne l'aumônerie militaire dont les détails sont surtout réglés au niveau du ministère de

[42] *ORF-Gesetz,* Bundesgesetzblatt № 379/1984 (rebpublication) dans sa version modifiée par Bundesgesetzblatt I № 10/2021.

[43] Cf. Kalb, Potz et Schinkele, *Religionsrecht,* pp. 183 sq.; Potz et Schinkele, *Religion and Law in Austria,* al. 431.

[44] *Niederösterreichisches Raumordnungsgesetz 2014,* Landesgesetzblatt № 3/2015 dans sa version modifiée par Landesgesetzblatt № 97/2020.

[45] Cf. Wolfgang Wieshaider, ‹ Profane Regeln für sakrale Bauten. Religionsrechtliche Aspekte des Raumordnungs- und Baurechts ›, (2003) 6 *Baurechtliche Blätter* pp. 138-148 (p. 143).

[46] *Steiermärkisches Lichtspielgesetz 1983,* Landesgesetzblatt № 60 dans sa version modifiée par Landesgesetzblatt № 87/2013.

[47] *Wiener Gesundheitsfonds-Gesetz 2017,* Landesgesetzblatt № 10/2018.

[48] *Steiermärkisches Pflichtschulerhaltungsgesetz 2004,* Landesgesetzblatt № 74 (republication) dans sa version modifiée par Landesgesetzblatt № 40/2021.

la défense.[49] Actuellement, l'armée autrichienne a créé les aumôneries catholique, protestante, orthodoxe, musulmane, (islamique-) alévie[50] et juive.[51] Les aumôneries catholique et protestante avaient été institutionnalisées dès le rétablissement de l'armée autrichienne en 1955 ; ces aumôniers sont incorporés dans la hiérarchie militaire en tenant compte de la hiérarchie ecclésiastique et rétribués par l'État.[52] Par contre, les aumôniers orthodoxes, musulmans, (islamiques-)alévis et juifs – institutionnalisés depuis 2011 – n'appartiennent pas à l'armée. Leurs sociétés religieuses ne sont indemnisées que par un forfait, modeste par rapport à la situation de l'Église protestante.[53] Cette différence de traitement résulte du règlement du ministre de la défense sur l'échelon hiérarchique qui ne comprend des grades que pour des aumôniers catholiques et protestants.[54]

En plus des facultés de théologie catholique et protestante dans des universités publiques, l'État fédéral s'est engagé, par l'alinéa 24(1) de la loi sur l'islam de 2015, à financier six postes d'enseignants de théologie islamique à l'Université de Vienne, ceci en tenant compte des doctrines propres des sociétés religieuses reconnues dans le cadre de ce régime, c'est-à-dire à ce jour : la Communauté religieuse islamique en Autriche et la Communauté religieuse (islamique-)alévie en Autriche.[55]

[49] Wolfgang Wessely, ‹ Die Militärdiözese – eine Grenzgängerin ›, (2012) *Spektrum der Rechtswissenschaft* VuV A, pp. 79-111 (p. 86).

[50] Pour la désignation voir ci-dessous auprès de la note de bas de page № 83.

[51] Cf. <https://betreuung.bundesheer.at/pages/viewpage.action?pageId=7930160> (15 janvier 2021).

[52] Cf. Kalb, Potz et Schinkele, *Religionsrecht,* pp. 498 sq. et 561 ; Wessely, *Militärdiözese,* pp. 79-111; Potz et Schinkele, *Religion and Law in Austria,* al. 710.

[53] Karl-Reinhart Trauner, ‹ Wandel von Staat und Kirche am Fallbeispiel Militärseelsorge ›, (2012) 59 *österreichisches Archiv für recht & religion,* pp. 174-198 (pp. 191 sq.) ; Eva Maria Synek, ‹ Die „österreichische" Orthodoxie : rechtliche Entwicklungen seit der Errichtung der Bischofskonferenz ›, (2014) 61 *österreichisches Archiv für recht & religion,* pp. 310-338 (p. 326) ; Potz et Schinkele, *Religion and Law in Austria,* al. 712 sq.; Wolfgang Wieshaider, ‹ Les aumôneries dans les établissements publics autrichiens ›, in Ringolds Balodis et Miguel Rodríguez Blanco (dir.), *Religious assistance in public institutions · Assistance spirituelle dans les services publics. Proceedings of the XXVIII^th^ Annual Conference, Jurmala, 13–16 October 2016 · Actes du XXVIII^ème^ colloque annuel, Jurmala, 13–16 octobre 2016* (Granada : Comares, 2018), pp. 41-51 (pp. 48 sq.).

[54] *Dienstgradeverordnung 2018,* Bundesgesetzblatt. II № 135 dans sa version modifiée par Bundesgesetzblatt II № 226/2020.

[55] Voir Wolfgang Wieshaider, ‹ Les enjeux de l'ancrage de la théologie musulmane dans une université publique en Autriche ›, in Francis Messner et Moussa Abou-Ramadan (dir.), *La théologie musulmane à l'Université* (Paris : Les Éditions du Cerf, 2018) ; mais voir les remarques de la Communauté religieuse (islamique-)alévie dans son avis public au projet modificatif de la loi sur l'islam de 2015, 18/SN-85/ME, 27^e^ législature, pp. 3-5.

Enfin, l'alinéa 7(3) de la loi sur le repos[56] ajoutait le Vendredi saint comme jour férié légal supplémentaire pour les membres de l'Église luthérienne, de l'Église réformée, de l'Église vieille-catholique et de l'Église méthodiste par rapport aux jours fériés légaux généraux qui s'appliquent à tous, selon l'alinéa 7(2) *leg. cit.*[57] En applicant les articles 1er, 2 et 7 de la directive 2000/78/CE[58], la CJUE a conclu :

> « qu'une législation nationale en vertu de laquelle, d'une part, le Vendredi saint n'est un jour férié que pour les travailleurs qui sont membres de certaines églises chrétiennes et, dans laquelle d'autre part, seuls ces travailleurs ont droit, s'ils sont amenés à travailler durant ce jour férié, à une indemnité complémentaire à la rémunération perçue pour les prestations accomplies durant cette journée, constitue une discrimination directe en raison de la religion.
>
> Les mesures prévues par cette législation nationale ne peuvent être considérées ni comme des mesures nécessaires à la préservation des droits et des libertés d'autrui, au sens de l'article 2, paragraphe 5, de ladite directive, ni comme des mesures spécifiques destinées à compenser des désavantages liés à la religion, au sens de l'article 7, paragraphe 1, de la même directive. »[59]

Fin février 2019, le législateur a choisi de supprimer le jour férié supplémentaire et d'interdire aux partenaires sociaux d'inscrire le Vendredi saint comme jour chômé dans une convention collective de travail. Tandis que cette dernière disposition ne s'applique pas au Jour du Grand Pardon et d'autres fêtes religieuses comparables, il faut bien noter la différence entre un propre jour férié spécial critiqué à cause de ses conséquences juridiques par la CJUE, et un jour chômé conditionnel tel que prévu par des conventions collectives de travail. La modification législative implique en plus le droit pour un employé de fixer unilatéralement un jour de congé, en respectant un préavis de trois mois. Ce droit n'est pas lié à une affiliation religieuse, mais peut naturellement être utilisé pour une fête religieuse qui n'est pas prise en compte par le calendrier des jours fériés publics. À mon avis, la nouveauté n'est que la disposition explicite d'un droit (qui du reste peut être déduit des dispositions générales) et d'un

[56] *Arbeitsruhegesetz,* Bundesgesetzblatt № 144/1983 dans sa version modifiée par Bundesgesetzblatt I № 127/2017.

[57] Cf. les conclusions de l'avocat général Michal Bobek présentées le 25 juillet 2018 dans l'affaire C-193/17 *(Cresco Investigation GmbH / Markus Achatzi) ;* voir aussi Wolfgang Wieshaider, ‹ Das staatliche Feiertagsrecht als vergessene Umsetzungsmaterie der Richtlinie 2000/78/EG ›, (2008) 55 *österreichisches Archiv für recht & religion,* pp. 279-289 ; Wolfgang Wieshaider, ‹ Der verfahrene Feiertag ›, (2009) 17 *Journal für Rechtspolitik,* pp. 67-71 ; Andrea Potz, ‹ Dienstverhinderung aus religiösen Gründen ›, in Schinkele, Kuppe, Schima, Synek, Wallner et Wieshaider, *Festschrift für Richard Potz,* pp. 639-661.

[58] Directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail, JO № L 303/2000, pp. 16-22.

[59] CJUE 22 janvier 2019, C-193/17 *(Cresco Investigation GmbH c/ Markus Achatzi),* points 69, 90.

délai fixe sans tenir compte des conditions concrètes du travail.[60] Quand même, la modification de la loi votée[61] n'arrive pas à éliminer les inégalités entre des personnes dont les fêtes religieuses prinicpales se réflètent dans la loi étatique, et celles qui sont renvoyées à négocier des jours de congé ou qui n'ont même pas cette possibilité comme les enseignants des écoles.[62]

Troisième cas : il n'y a pas de différence et de régime juridique particulier. En ce qui concerne la protection de la religion, des sentiments religieux, des croyances, des objets et des rites religieux, les paragraphes 117, 126, 128, 188 et 189 du Code pénal[63] n'opèrent aucune distinction.[64] Ils mentionnent des églises et sociétés religieuses qui tout simplement existent sur le territoire de l'État. De plus, dans les prisons, c'est la décision du détenu qui importe, lorsque ce dernier demande à recevoir le réconfort d'un aumônier conformément au paragraphe 85 de la loi concernant le régime pénitentiaire[65]. La loi se réfère à la confession du détenu ; la Cour constitutionnelle a précisé qu'une adhésion formelle n'est même pas requise.[66]

Une appréciation qualitative conduit à constater que l'Église protestante ne se retrouve pas en position minoritaire.

## II. Changements

Depuis 2011, on a compilé le recensement des registres de naissances, mariages et décès en application de la loi fédérale sur le recensement fait à partir de ces registres.[67] Ceux-ci ne mentionnent pas l'affiliation religieuse. Si nécessaire, le ministre compétent peut ordonner une enquête statistique non personnelle sur l'affiliation re-

[60] Proposition de loi № 606/A, 26e législature; № 500 des *Beilagen zu den stenographischen Protokollen des Nationalrats,* 26e législature.

[61] Bundesgesetzblatt I № 22/2019.

[62] Voir Martin Gruber-Risak, ‹ Der Karfreitag (auch) als koalitionsrechtliches Problem. Grundrechtliche Überlegungen zur Aufhebung von „Karfreitagsregelungen" in Kollektivverträgen durch § 33a Abs 28 ARG ›, (2019) 66 *österreichisches Archiv für recht & religion,* pp. 322-338 ; en détail Wolfgang Wieshaider, ‹ Aller heilige Zeiten und das staatliche Recht ›, *ibid.,* pp. 339-378, proposant une solution plus ouverte.

[63] *Strafgesetzbuch,* Bundesgesetzblatt № 60/1974 dans sa version modifiée par Bundesgesetzblatt I № 154/2020. Voir ci-dessus, note .

[64] Cf. Christian Bertel in Frank Höpfel et Eckart Ratz (dir.), *Wiener Kommentar zum Strafgesetzbuch* (2e éd., Wien : Manz, 1999 ss.), § 126 StGB, № 3 ; Helene Bachner-Foregger, *ibid.,* § 188 StGB, № 6 sq.

[65] *Strafvollzugsgesetz,* Bundesgesetzblatt nº 144/1969, modifiée en dernier lieu par Bundesgesetzblatt I nº 100/2018.

[66] Verfassungsgerichtshof 6 octobre. 1999, B 15/99, (2000) 47 *österreichisches Archiv für recht & religion,* pp. 260-266, commenté par Stefan Schima. *Ibidem,* pp. 266-268 ; Kalb, Potz et Schinkele, *Religionsrecht,* pp. 266 sq.; Potz et Schinkele, *Religion and Law in Austria,* al. 706 sq.

[67] *Registerzählungsgesetz,* Bundesgesetzblatt I № 33/2006 dans sa version modifiée par Bundesgesetzblatt I № 100/2018.

ligieuse conformément à l'alinéa 1 (3) *leg. cit.* À ce jour, cela ne s'est pas fait. Selon une enquête officieuse publiée en 2013 par un portail de service pour les journalistes, les catholiques représenteraient environ 63 % de la population autrichienne, les musulmans entre 6 et 7 %, les chrétiens orthodoxes et orientaux 6 %, les protestants 3,8 %, les alévis 0,7 %, les bouddhistes 0,25 %, les Témoins de Jéhovah 0,25 % et les Juifs 0,15 %.[68] Selon une autre enquête, il y aurait environ 64 % de catholiques, 5 % de protestants, 5 % de chrétiens orthodoxes, 8 % de musulmans, 2 % d'autres et 17 % sans confession en 2016,[69] ; cette enquête ne mentionne pas les autres confessions mêmes reconnues, ce qui ne permet pas de savoir où elle a située les alévis.

En raison de la différence entre les données officielles et officieuses, il importe de comparer ces statistiques avec celles du dernier recensement de 2001. Il faut préciser que, selon la deuxième annexe du règlement en la matière,[70] les formulaires ne connaissaient que les rubriques suivantes comme indication de la religion : catholique, luthérien, réformé, vieux-catholique, musulman, israélite, sans confession et autre (à remplir).[71] Cette dernière rubrique a eu pour conséquence d'introduire certaines incertitudes dans les statistiques, dont les plus significatives sont reproduites ici ; elles permettent d'illustrer les changements : en 2001 on comptait 73,7 % de catholiques, 2,2 % de chrétiens orthodoxes, 0,1 % de chrétiens orientaux, 4,7 % de luthériens et réformés, 0,2 % de vieux-catholiques, 0,3 % de Témoins de Jéhovah, 0,1 % d'israélites, 4,2 % de musulmans, 0,1 % de bouddhistes ; 12,0 % se disent sans confession et 2 % ne sont pas déclarés.[72]

Les fondements du droit des religions datent du troisième tiers du XIX^e^ siècle. À cette époque, la plus grande différence qui existait entre des communautés établies et non établies, était que la liberté de culte des communautés non reconnues était limitée à l'espace privé.[73] De fait, le libre exercice public de culte était réservé aux sociétés

[68] Medien-Servicestelle Neue ÖsterreicherInnen, *Weltreligionen in Österreich – Daten und Zahlen* (Wien, 2013), <http://medienservicestelle.at/migration_bewegt/2013/01/18/weltreligionen-in-osterreich-daten-und-zahlen/> (13 juillet 2018).

[69] Anne Goujon, Sandra Jurasszovich et Michaela Potančoková, *Demographie und Religion in Österreich. Szenarien 2016 bis 2046. Deutsche Zusammenfassung und englischer Gesamtbericht* (Wien : Österreichischer Integrationsfonds, 2017), <https://www.integrationsfonds.at/mediathek/mediathek-publikationen/publikation/forschungsberichte/forschungsbericht-demographie-und-religion-in-oesterreich-132/> (15 janvier 2021).

[70] Bundesgesetzblatt № 385/2000.

[71] Voir Kalb, Potz et Schinkele, *Religionsrecht,* pp. 178 sq.

[72] Statistik Austria, *Bevölkerung 2001 nach Religionsbekenntnis und Staatsangehörigkeit* (Wien, 2007), <http://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/bevoelkerung/volkszaehlungen_registerzaehlungen_abgestimmte_erwerbsstatistik/bevoelkerung_nach_demographischen_merkmalen/022894.html> (15 janvier 2021).

[73] Cf. Inge Gampl, *Österreichischisches Staatskirchenrecht* (Wien, New York : Springer, 1971), pp. 62 sq.

religieuses reconnues par la loi, en vertu des articles 15 et 16 de la loi fondamentale de 1867. Pour les sociétés religieuses reconnues, l'article 15 prévoyait un traitement égalitaire.

L'alinéa 63(2) du Traité d'État de Saint-Germain-en-Laye abrogea cette inégalité capitale entre religions selon qu'elles étaient – ou non – reconnues.[74] Néanmoins, le droit de la religion du XXe siècle restait lié à cette différentiation, pour ce qui concernait la plupart des dispositions administratives. Même l'élévation de la CEDH au niveau constitutionnel en 1964[75] ne changea rien. Le statut des sociétés religieuses reconnues restait le seul à produire des effets juridiques. Ce fut seulement à partir de 1981 que les communautés qui ne pouvaient pas, ou qui ne voulaient pas, acquérir le statut de société religieuse reconnue, purent s'organiser sous forme d'association à but non lucratif.[76] Il faut quand même souligner que les conditions de la reconnaissance étaient très ouvertes. Conformément au paragraphe 1er de la loi sur la reconnaissance des sociétés religieuses[77], il suffisait d'établir que la doctrine de l'organisation requérante, son culte, sa constitution et sa dénomination ne contenaient rien d'illégal ou de contraire à la morale et qu'au moins une communauté de ce culte était véritablement établie localement.[78] La reconnaissance s'effectue par voie réglementaire, ce qui a longtemps permis à l'autorité publique compétente de se borner à garder le silence et à ne pas agir, si elle ne voulait pas reconnaître l'organisation requérante.[79] En 1995, la Cour constitutionnelle finit par considérer une telle pratique contraire à la Constitution et obligea l'autorité publique à prendre une décision administrative négative expresse, contre laquelle la requérante pouvait faire appel ;[80] la Cour administrative suprême suivit en 1997.[81] Le parlement réagit presque immédiatement et vota la loi sur les communautés religieuses confessionnelles, toujours au cours de la même année.[82] Cette loi a bouleversé le droit de la religion en Autriche.[83] Elle a introduit un second statut, inférieur à celui des sociétés religieuses et imposé pour la première fois un nombre minimum de membres. Cette obligation ressort d'une part de l'alinéa

[74] *Ibid.,* p. 73.

[75] Bundesgesetzblatt № 59/1964.

[76] Voir Comm. eur. DH 15 octobre 1981, 8652/79 *(X. c/ Autriche).*

[77] *Gesetz betreffend die gesetzliche Anerkennung von Religionsgesellschaften,* Reichsgesetzblatt № 68/1874.

[78] Voir Gampl, *Staatskirchenrecht,* pp. 132-144.

[79] Voir déjà *ibid.,* p. 149.

[80] Verfassungsgerichtshof 4 octobre 1995, K I-9/94 ; Verfassungsgerichtshof 4 décembre 1995, K I-11/94, VfSlg. 14 383.

[81] Verwaltungsgerichtshof 28 avril 1997, 96/10/0049 ; Herbert Kalb, Richard Potz, Brigitte Schinkele, *Religionsgemeinschaftenrecht. Anerkennung und Eintragung* (Wien : Verlag Österreich, 1998), pp. 70-75.

[82] *Ibid.,* p. 76.

[83] Cf. *ibid.,* pp. 23-28.

3(3) de la loi sur les communautés religieuses confessionnelles pour l'enregistrement des communautés religieuses confessionnelles qui doivent compter au minimum 300 adeptes ; elle ressort d'autre part de la division 11/1 *leg. cit.,* aux termes de laquelle la reconnaissance des sociétés religieuses requiert l'adhésion d'au moins 2 ‰ de la population entière. Le deuxième critère pour passer du statut inférieur au statut supérieur, est la durée pendant laquelle une organisation doit fonctionner comme communauté religieuse confessionnelle ; celle-ci fut modifiée en 2011, en conséquence de la jurisprudence de la Cour EDH.[84] Le dernier grand changement fut le remplacement de la vieille loi sur l'islam datant de 1912[85] par une nouvelle loi. Cette loi sur l'islam de 2015[86] concerne toute communauté religieuse qui se dit elle-même musulmane ; en particulier, elle règle les relations extérieures de la Communauté religieuse islamique en Autriche et de la Communauté religieuse (islamique-)alévie en Autriche.[87] Cette dernière, reconnue comme communauté islamique, a changé sa désignation en supprimant le mot ‹ islamique ›, ce qui fut confirmé encore en novembre 2015 par l'autorité compétente.[88] La Fédération des communautés alévies, représentant un alévisme non islamique, a été déboutée de son recours par la cour administrative de première instance.[89] L'enregistrement comme communauté confessionnelle leur a été refusé pour la seconde fois déjà,[90] au motif qu'il n'existe pas de distinction doctrinale entre les deux. L'autorité compétente semble persister dans l'application du principe de la représentation exclusive des religions[91]. La requête contre le refus présentée à

[84] Cour EDH 31 juillet 2008, 40825/98 *(Religionsgemeinschaft der Zeugen Jehovas et autres c/ Autriche).*

[85] *Islamgesetz,* Reichsgesetzblatt № 159/1912.

[86] *Islamgesetz,* Bundesgesetzblatt I № 39/2015.

[87] Cf. Richard Potz et Brigitte Schinkele, ‹ Die Genese des österreichischen Islamgesetzes 2015 ›, (2015) 62 *österreichisches Archiv für recht & religion,* pp. 303-385 ; Susanne Raab, ‹ The New Austrian Islam Law: Aims, Potentials and Limits to the Legal Governance of Islam. Practical Insights into the Development of the Legal Framework in Austria ›, in Stephan Hinghofer-Szalkay et Herbert Kalb (dir.), *Islam, Recht und Diversität* (Wien : Verlag Österreich, 2018), pp. 355-367 ; Stefan Schima, ‹ Das im Islamgesetz 2015 verankerte Verbot der Auslandsfinanzierung. Anmerkungen vor dem Hintergrund der verfassungsgesetzlich gewährleisteten Religionsfreiheit ›, *ibid.,* pp. 369-398.

[88] Stefan Hammer, ‹ Die Aleviten im österreichischen Religionsrecht – ein Kampf um Anerkennung. Der schwere Abschied vom Ausschließlichkeitsgrundsatz ›, (2018) 65 *österreichisches Archiv für recht & religion,* pp. 1-17 (p. 10).

[89] Verwaltungsgericht Wien 8 août 2016, VGW-101/069/4623/2016 ; Hammer, *Die Aleviten im österreichischen Religionsrecht,* pp. 10-16.

[90] Cf. Richard Potz et Brigitte Schinkele, ‹ Eintragung bzw gesetzliche Anerkennung alevitischer Gruppen in Österreich ›, (2011) 58 *österreichisches Archiv für recht & religion,* pp. 137-155.

[91] Gampl, *Staatskirchenrecht,* pp. 163 sq.; Richard Potz, ‹ Das Ausschließlichkeitsrecht. Zur aktuellen Bedeutung einer traditionellen dogmatischen Figur des österreichischen Religionsrechts ›, in Clemens Jabloner, Gabriele Kucsko-Stadlmayer, Gerhard Muzak, Bettina Perthold-Stoitzner et Karl Stöger (dir.), *Vom praktischen Wert der Methode. Festschrift für Heinz Mayer zum 65. Geburtstag* (Wien : Manz, 2011, pp. 555-573 ; Potz et Schinkele, *Religion and Law in Austria,* al. 244-247; Ver-

la cour administrative de première instance de Vienne[92] et plus tard la révision déposée à la Cour administrative[93] furent rejetées en 2019. Résulte de la révision publiée un motif supplémentaire du rejet : le statut communautaire comptait tous les alévis résidant à titre principal en Autriche à ses membres ce qui n'est pas licite. En 2020 une nouvelle demande d'enregistrement a été présenté à l'autorité compétenté : celle de la Communauté religieuse européenne alévie en Autriche.[94]

## III. Perspectives

Le dialogue interreligieux est largement développé. En plus des initiatives bilatérales déjà anciennes, comme des dialogues chrétien-juif[95] et chrétien-musulman[96], les sociétés religieuses reconnues ont créé une plate-forme commune en 2012 :[97] la *‹ Plattform der Kirchen und Religionsgesellschaften ›* qui habituellement est convoquée tous les six mois. Le ministre compétent du gouvernement fédéral entretient des échanges réguliers avec cette plate-forme.[98]

Une organisation de droit international public, qui a son siège à Vienne, se situe au-dessus les relations internes à l'Autriche en ce domaine ; il s'agit du *Centre international Roi Abdullah bin Abdulaziz pour le dialogue interreligieux et interculturel*.[99] Il fut constitué dans la même année 2012 par accord international entre l'Arabie Saoudite, l'Espagne et l'Autriche. Selon l'alinéa II(1) de l'accord constitutif[100], ses objectifs sont la promotion du respect et de la coopération entre les hommes, de la justice et de la paix, la lutte contre un unage abusif de la religion pour justifier l'oppression, la violence et les conflits, la promotion du respect des lieux et des symboles sacrés

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fassungsgerichtshof 1 décembre. 2010, B 1214/09, VfSlg. 19 240 = 58 (2011) *österreichisches Archiv für recht & religion,* pp. 192-209.

92 Verwaltungsgericht Wien 29 janvier 2019, VGW-101/073/17170/2017.

93 Verwaltungsgerichtshof 28 mai 2019, Ra 2019/10/0049.

94 <https://www.bundeskanzleramt.gv.at/agenda/kultusamt/bekanntmachungen-kultusamt.html> (29 avril 2021).

95 Cf. ‹ Koordinierungsausschusses für christlich-jüdische Zusammenarbeit ›, <http://www.christenundjuden.org/> (15 janvier 2021).

96 Cf. ‹ Plattform Christen und Muslime ›, <http://www.christenundmuslime.at> (15 janvier 2021).

97 Katholische Presseagentur Österreich 25 mai 2012, <https://www.kathpress.at/goto/meldung/431009/> ; voir le site de la plate-forme <http://www.proreligion.at/> (15 janvier 2021).

98 Katholische Presseagentur Österreich 27 avril 2018, <https://www.kathpress.at/goto/meldung/1626976/> (15 janvier 2021).

99 Voir le site web du centre, <https://www.kaiciid.org/> (15 janvier 2021) ; cf. Stefan Schima, ‹ Das „King Abdullah bin Abdulaziz International Centre for Interreligious and Intercultural Dialogue" (KAICIID) in Wien und seine Rechtsstellung ›, (2017) 64 *österreichisches Archiv für recht & religion,* pp. 474-496.

100 *Übereinkommen zur Errichtung des Internationalen König Abdullah bin Abdulaziz Zentrums für interreligiösen und interkulturellen Dialog,* Bundesgesetzblatt III № 134/2012.

ainsi que l'attention à la société, la dignité humaine, l'environnement, l'éducation éthique et religieuse et le soulagement de la pauvreté. En mars 2021, le centre annonça quitter Vienne.[101]

Dans le domaine du droit, on constate des évolutions dues à des préoccupations de sécurité qui ont conduit à une interdiction légale[102] de dissimulation du visage, et du port du voile intégral.[103] En 2018, un débat sur une interdiction du voile islamique porté par des jeunes filles dans les écoles primaires et dans les écoles maternelles fut lancé par le gouvernement fédéral.[104] La compétence pour légiférer dans ce dernier domaine appartient aux états fédérés ; un standard républicain fut établi aux termes de l'article 15a de la Constitution fédérale entre l'État fédéral et les états fédérés :[105] Son alinéa 3(1) interdit aux enfants de porter des vêtements marqués par une idéologie ou une religion qui implique de se couvrir la tête. Les états fédérés se sont engagés à infliger une répression aux parents ou tuteurs. En ce qui concerne les écoles primaires, on ne peut renvoyer qu'à un projet de loi sur la base duquel s'insérera un paragraphe 43a dans la loi sur l'enseignement scolaire et qui aurait un contenu analogue.[106] Ce projet de loi fut ajourné en janvier 2019.[107] Fin 2020 la Cour constitutionnelle a annulé ledit paragraphe 43a de la loi sur l'enseignement scolaire pour violation du principe de l'égalité de traitement et de la liberté religieuse.[108]

Un autre débat de l'année 2018, qui n'a des implications que pour des religions minoritaires, est celui concernant l'abattage des animaux pour la consommation de viande.[109] Les arguments semblent plus politiques que liés à des nécessités

[101] <https://kaiciid.org/news-events/news/statement-faisal-bin-muaammar-secretary-general-kaiciid-centresrelocation-vienna> (26 avril 2021) ; voir entre autres les propositions de résolution parlementaire № 100/UEA et № 908/A(E), 26e législature.

[102] *Anti-Gesichtsverhüllungsgesetz,* Bundesgesetzblatt I № 68/2017.

[103] Cf. Cour EDH 1 juillet 2014, 43 835/11 *(S.A.S. / France),* paragraphes 121 sq., 141 sq., 153, 157 ; № 1586 des *Beilagen zu den stenographischen Protokollen des Nationalrats,* 25e législature, p. 11 ; cf. Wolfgang Wieshaider, ‹ Public Security and Religion : An Austrian Approach ›, in Merilin Kiviorg (dir.), *Securitization of Religious Freedom : Religion and Limits of State Control. Proceedings of the XXVIIIth Annual Conference, Tallinn, 16–19 November 2017 · Sécurisation de la liberté religieuse : La religion et les limites du contrôle de l'Etat. Actes du XXIXème colloque annuel, Tallinn, 16–18 novembre 2017* (Granada : Comares, 202020), pp. 151-163 (p. 159).

[104] Cf. par ex. Kurier 4 avril 2018, p. 2 ; Die Presse 6 avril 2018, p. 7 ; Tiroler Tageszeitung 15 juillet 2018, p. 26 ; Der Standard 18 juillet 2018, p. 7 ; Tiroler Tageszeitung 27 juillet 2018, p. 1 ; Der Standard 7 août 2018, p. 6.

[105] Bundesgesetzblatt I № 103/2018.

[106] Proposition de loi № 495/A, 26e législature.

[107] Correspondance parlementaire № 33/2019.

[108] Verfassungsgerichtshof 11 décembre 2020, G 4/2020.

[109] Cf. par ex. Der Standard 18 juillet 2018, p. 7, 19 juillet 2018, p. 30 et 20 juillet 2018, p. 6 ; Tiroler Tageszeitung 21 juillet 2018, p. 13 ; Wiener Zeitung 21 juillet 2018, p. 31 ; Der Standard 25 juillet

objectives.[110] Pour le futur, on peut néanmoins espérer que la situation se détendra sur la base d'un consensus relatif aux garanties des droits fondamentaux, comme ce fut le cas à propos des minarets.[111]

2018, pp. 8 et 27 ; Falter № 30/2018, pp. 14 sq.; Kurier 26 juillet 2018, p. 34 ; Der Standard 26 juillet 2018, p. 7 ; Die Presse 28 juillet 2018, p. 8.

[110] Mais même la CJUE a manqué de trouver un équilibrage des intérêts : CJUE (grande chambre) 17 décembre 2020, C-336/19 *(Centraal Israëlitisch Consistorie van België e.a., Unie Moskeeën Antwerpen VZW & al. c/ Vlaamse Regering)* cf. par contre les conclusions de l'avocat général Gerard Hogan du 10 septembre 2020 ; voir Wolfgang Wieshaider, ‹ Equal Treatment, not just Religious Freedom: On the Methods of Slaughtering Animals for Human Consumption ›, in Armin Lange, Kerstin Mayerhofer, Dina Porat & Lawrence H. Schiffman (eds), 516. *Comprehending and Confronting Antisemitism. A Multi-Faceted Approach,* vol. I (Berlin, Boston : De Gruyter, 2019), pp. 503–516.

[111] Cf. Ernst Fürlinger, *Moscheebaukonflikte in Österreich. Nationale Politik des religiösen Raums im globalen Zeitalter. Wiener Forum für Theologie und Religionswissenschaft, tome № 7* (Göttingen : V& R unipress, 2013) ; Wolfgang Wieshaider, ‹ Ums Minarett ›, in Hinghofer-Szalkay, Kalb, *Islam, Recht und Diversität,* pp. 423-433.

# ALL RELIGIONS IN THE CZECH REPUBLIC ARE MINORITIES BE THEY OLD OR NEW

Jiří Rajmund Tretera*
Záboj Horák*

In order to understand the position of all religions in the Czech Republic without distinction in size and time of arrival in the country or their founding in the territory of the Czech Republic, it should be emphasized that the forty-one year totalitarian regime led by the Communist Party of Czechoslovakia (1948–1989) significantly hindered the free competition between religion and secularism in the country. At that time all churches were attacked by the state suppressing power of the totalitarian regime aiming at their entire liquidation. But the Marxism-Leninism might be also considered as a religion. Its "church" was the Communist party and submitted organizations such as the Union of the Youth, Unified Trade Unions, Union of Czechoslovak-Soviet Friendship and most of the cultural and sport organizations. The exterior forms of Marxist-Leninist cult were the May Day Parades, all sport ceremonies (especially "Spartakiads"), celebrations of the Communist feasts (e.g. International Women's Day, Anniversaries of Soviet and Czechoslovak coups d'états) and public activities of schools, factories, agricultural cooperatives and the army. However, atheist or other similar organizations were suppressed.

The overall decrease in the membership to the Roman Catholic Church and to the middle-sized churches, such as the Evangelical Church of the Czech Brethren, the Czechoslovak Church (since 1971 Czechoslovak Hussite Church) and Silesian Lutheran Church, in the above-mentioned period did not result from the spread of secularism that we are witnessing in Western Europe, rather from the purposeful propagation of communist atheism. The latter affected not only the families of members of the Communist Party, but also the population as a whole. A great role in spreading atheism was played by schools, the army, the media, resulting in discrimination in

* Both authors work at the Faculty of Law, Charles University, Prague as lecturers of church canon law and secular religion law.

access to schooling and education, and blocked career advancement. The activities of all religious communities were confined to the liturgical space, and the number of clergy was artificially restricted by granting and withdrawing state consent to spiritual activity, as well as by limiting the number of theology students.

However, paradoxically this way of governing helped the religious communities to a certain extent. They became a symbol of resistance and, for most of the period of totalitarianism, religious belief was the only tolerated alternative to the ruling ideology of Marxism-Leninism. Therefore, it acted as a form of consolation for the persecuted and a beacon of hope for all of those who stood in the opposition due to their personal belief. The rise of radical religious communities that had been active in the country prior to the Second World War was particularly noteworthy; especially the Seventh-day Adventists - whose Church was officially banned in the years 1952–1956 and only marginally tolerated afterwards - and Jehovah's Witnesses, who were proscribed by the Communist regime. The heroism of hundreds of priests, who were in prison for many years, was of great importance for the prestige of the Roman Catholic Church; the same effect was caused by the liquidation of all male monasteries and deportation of religious sisters to camps in remote border regions. In 1950–1968 the Greek Catholic Church was expunged and almost one hundred priests with their families were transferred from Slovakia especially to industrial parts of northern Bohemia and Moravia and forced to work in factories. The 1980s witnessed the influx of new believers in the Catholic Church and some Protestant Churches, particularly in the wake of the expansion of the new Evangelization or Pentecostal renewal movements.

After 1989, the process of renewal of religious communities began. Participation in worship and the number of places of worship of all existing religious communities rapidly increased. The Catholic male religious orders and some religious communities from pre-war times (e.g. the Mormons), even those that were destroyed after 1948 (e.g. the Salvation Army), were restored. However, the 1991 population census shows that no confession had a majority position. Adherence to the Roman Catholic Church was expressed only by 39 % of the population, contra the approximately 74 % of 1948, at the beginning of the Communist regime.

The increase in the number of believers came to a halt around 1995, and gradually declined for the four largest churches. The main cause of this phenomenon was the influence of teachers, who under the previous regime were professionally formed as atheists. The second cause was the loss of popularity of religion as a symbol of resistance to totalitarianism and struggle for democracy. The issue of restitution of church property gave rise to a struggle between political parties in Parliament. Partial compensation was approved in 2012, thanks to the intervention of the Constitutional Court that accused the Parliament of inaction.

Soon it became obvious that the secularization of the ever-richer Czech society, for reasons similar to those of Western countries, played a role in the decrease of affiliations to larger religious communities. The core of Czech religiosity continues to

be reflected in its ancient tradition of "shy piety", which does not like the spectacular religious gestures and religious symbols.

On the other hand, there has been a steep increase in the number of some of the smaller religious communities. The Congregational Church of Brethren (founded in 1880) and the Moravian Church (repatriated in 1870) doubled or almost tripled the number of their members and parishes after 1990. Each of them has more than 10,000 members and more than 50 parishes nowadays. Similarly, several Pentecostal Churches of Czech origin increased their core membership (the Apostolic Church and the Christian Fellowship Church). Some new Christian religious communities were "imported" from the Western countries and six non-Christian religious communities of South Asian origin were established, such as the Czech Hindu Religious Society, Hare Krishna Movement and Diamond Way Buddhism Karma Kagjü. Almost all their members are Czech, with only a small portion of immigrants. The general spiritual aridity of modern society has begun to affect some members of contemporary Czech society.

A degree of influence of immigration on the religious composition of the Czech population is also visible, albeit only to a lesser degree. The influx of approximately 100,000 Ukrainians has strengthened both the Greek Catholic Church - especially as regards Ukrainians originating from Subcarpathian Ruthenia or Western Ukraine - and the Orthodox Church. 40,000 Czech exiles from the Ukrainian Volyn arrived in 1945–1948, hundreds came after 1992 and around 2015. Amongst them are Orthodox, Roman Catholics, members of the Evangelical Church of the Czech Brethren and Baptists.

The Vietnamese have constituted the second largest immigrant group ever since the final years of the Communist regime. Their community is growing year after year. The number of Vietnamese in the Czech Republic exceedes 30,000 people, spread over the whole territory of the Czech Republic. A large portion of them do not adhere to any religion; however, a small minority are Roman Catholic. Since the restoration of democracy in the Czech Lands, they have been slowly finding the courage to participate in worship. Spiritual administration for the Vietnamese has been established in all eight Roman Catholic dioceses.

Upon the request of Czech bishops after 1993 the significant aid for catholic spiritual administration came from Poland. Polish priests have come for a limited period of time of five years to help as parish priests. Many of them have asked after this period for its prolongation because they are usually satisfied with their work and pastoral environment. Their missionary accommodation is easy because of similarity of Polish and Czech languages, historical political experience of both nations during last centuries and relatively traditional orientation of Czech Catholics. Nowadays, the Polish clergy accounts for 10 % of the Catholic clergy in the Czech Republic, Approximately 15 Polish missionary priests administer Polish personal parishes consisting of Polish guest workers, which were founded in all Czech dioceses.

The only national minority in the Czech Republic, which is concentrated in one region, are the Poles located in eastern Silesia, in the small region of Těšín (Polish: Cieszyn). In this region there live about 50,000 Poles alongside Czechs, both members of the Roman Catholic or Lutheran Church. This region is the main fulcrum of Polish Lutheranism. Polish Lutherans live also on the Polish side of the border in the Republic of Poland.

The largest ethnic minority in the Czech Republic is composed of Slovaks, who have settled in cities and towns all around the country before or after dissolution of Czechoslovakia (1993). Their religious affiliation is similar to that of the Czech ethnic group, Catholic, Protestant or without religion. Among Catholics from eastern Slovakia is a large group of faithful of Byzantine rite.

The Slovak language is very similar to Czech. Also style of living of Slovak nation is similar to the Czech one. Many Slovaks settled in the Czech Republic do not feel like a minority and participate in worship in Czech parishes. There is no statistics about number of Slovak priests working in the Czech Republic, but we can assume it could be the same as the Polish one. But Slovak priests are usually Czech citizens, ordained in Czech dioceses (not in Slovakia).

Significant minority of Slovaks is Lutheran. The Slovak Lutheran congregations on the territory of the Czech Republic were part of Lutheran Church in Slovakia till 1993. After the dissolution of Czechoslovakia they founded new Lutheran Church in the Czech Republic and spread their activities in favour of foreigners. Some new parishes of this Church are German or English speaking. This Church differs from two mixed Czech-Polish Lutheran Churches in Těšín region.

The second largest minority besides the Slovaks spread throughout the territory of the Czech Republic are the Gypsy/Roma ethnic group. It amounts about a quarter of a million people. Their ancestors immigrated to the Czech Lands from Slovakia, Hungary and Romania in 1945–1947.[1] They speak Czech or Slovak and most of them declare as Czechs or Slovaks in statistical surveys. Only small group of them speaks in their community also their original Roma language, which is part of the family of Indo-Aryan languages (similar to Sanskrit). They are usually Catholic, some of them are Orthodox.[2]

The presence of Islam in the Czech Republic can be considered as a peculiarity. It is probably the only religion, whose members consist mainly of non-Czech im-

[1] J. R. Tretera and Z. Horák, 'Čeští a moravští migranti a jejich náboženský osud' ('Bohemian and Moravian Migrants and Their Religious Fate') in M. Skřejpek, P. Bělovský and K. Stloukalová (eds.), *Cizinci, hranice a integrace v dějinách (Foreigners, Boundaries and Integration in History)* (Praha, Auditorium, 2016), p. 169.

[2] J. R. Tretera and Z. Horák, *Religion and Law in the Czech Republic* (2nd edn, Alphen aan den Rijn, Wolters Kluwer, 2017), pp. 15-17.

migrants, (unlike Hinduists and Buddhists in the Czech Republic, who are mostly Czech). The first generation of Czech Muslims was lead by Czech converts to Islam in the time of Czechoslovakia (1918–1992). The second group are men who studied in Communist Czechoslovakia as citizens from befriended Islamic countries, such as Libya, Syria, Iraq, and Afghanistan, and married Czech women. The number of Muslims in the Czech Republic has traditionally been low, but over the last ten years it has increased from 5,000 to almost 10,000 by new immigrants who usually come from above mentioned countries.

Till the beginning of the 21st century almost no Islamophobia has spread amongst the Czech population. But in recent years we can observe it. It has started in the time of terrorist attacks in New York and Washington DC on 11th September 2001. Deepening of Islamophobia in the Czech Republic came due to news on so called Islamic State in the Middle East and particularly due to the war in Afghanistan, where many Czech soldiers part of the NATO contingent lost their lives. In spite of above mentioned slight Islamophobia, the Centre of Islamic Communities was registered by the Czech Republic in 2004 and Muslims have built several mosques.

The above introduction helps contextualise the questions addressed during the Conference of the European Consortium for Church and State Research held on 15–17 November 2018 in Certosa di Pontignano (Siena). These questions focus on the environment of the European West, but do not always apply to the situation of the Czech Republic.

No religion in the Czech Republic constitutes a majority. The Catholic religion, which constituted the majority religion of all of the inhabitants of the Czech Lands a hundred years ago, holds no such status today. From a sociological point of view, it could be defined as the largest minority religion. According to the Czech Bishops' Conference, about 34% of the inhabitants of the Czech Republic receive baptism in the Catholic Church. The number of people who actively confess Catholic faith is considerably smaller. The way of professing faith of Catholics is similar to members of smaller churches. So not only worship and creating cordial relationships in parochial community but also participation in spiritual care in hospitals, prisons, the army, and assistance to victims of crime and natural disasters.

The Czech Bishops' Conference, representing the Roman Catholic Church and the Greek Catholic Church, work closely with the Ecumenical Council of Churches in the Czech Republic, which brings together twelve member churches. Among four observers are the Federation of Jewish Communities and Seventh Day Adventists. Roman Catholic Church is affiliated church. The spiritual service is carried out in the external institutions together. The Czech Bishops' Conference and the Ecumenical Council of Churches cooperate to send chaplains to these institutions, who do attend to both believers and nonbelievers. Ecumenism among Christians and solidarity with other religions is widespread in the Czech Republic.[3]

Some other religious communities (e.g. Jehovah's Witnesses or Darbyites Christian Congregations), not involved in the ecumenical movement, provide their own spiritual care in public institutions by entering individual contracts with these institutions.

Since the Holocaust, there has been a rapprochement between Christians and the small Jewish minority who survived the Holocaust in the Czech Lands (under 10%). The memory of joint suffering in Nazi concentration camps and communist prisons acts as a glue holding together different religious groups, including Christians of all denominations and Jews in the ideological realm. Moreover, at present, all religious communities share similar financial concerns.

A small part of the religious communities in the Czech Republic does not enter into cooperation with others, at a local or national level, maintaining exclusivity. Among registered religious communities are primarily more than 20,000 Jehovah's Witnesses and about 6,000 members of the Darbyites Christian Congregations, both of which are religious communities founded in the Czech Lands after the First World War. Similarly, there are six new churches originating from the Movement of Faith (under the motto "health and wealth"), which were established and registered in the Czech Lands only in the last decade. However, these religious communities are not hostile to other religious communities in public institutions, nor are other religious communities hostile to them.

The Charter of Fundamental Rights and Freedoms of 1991, which forms the second part of the Constitution of the Czech Republic, guarantees religious freedom to all religious communities.[4] Legal personality and safeguard of their name are obtained by religious communities through registration at the Ministry of Culture. However, some religious communities do not apply for registration, despite having fulfilled the pre-requisite of 300 adult members with permanent residence in the territory of the Czech Republic, as they do not feel the need for registration. Until the liberalization of the registration process in 2002, twenty-one religious communities were registered in the Czech Republic. Between 2002–2020, another twenty religious communities were registered. The registration process is not difficult, but requires the applicant to articulate the principles of its faith and organization in a basic document. The registration process can be slowed down if the religious community wishes to use a name that is identical or similar to the name of another religious community, or when it is clear from the principles of faith that it does not constitute a religion.

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[3] Z. Horák 'Spiritual Care in Public Institutions in the Czech Republic' in J. R. Tretera and Z. Horák (eds.), *Spiritual Care in Public Institutions in Europe* (Berlin, Berliner Wissenschafts-Verlag, 2019), pp. 119-140.

[4] J. R. Tretera and Z. Horák, 'Czech Republic' in G. Robbers and C. W. Durham (eds.), *Encyclopedia of Law and Religion*, Volume 4, Europe (Leiden/Boston, Brill/Nijhoff, 2016), pp. 86-87.

Religion, however, is not defined in a legal sense; therefore, the Ministry of Culture always faces the difficult task of recognizing, with the help of experts, whether or not a community is indeed a religion.

Groups whose beliefs are deemed far-fetched are not registered as religious communities. Entities of atheists or followers of similar non-religious thought systems are not registered as religious communities either, although some are registered as associations. These are usually small groups with low membership. The largest atheist organization is the Communist Party of Bohemia and Moravia, which fiercely opposes all religions in Parliament. At the latest elections to the Chamber of Deputies of the Parliament of the Czech Republic, the number of votes in favour of this party fell to 7,76%. Nevertheless, it exercises influence through alliances with other political parties. At the recent elections to the Senate of the Parliament of the Czech Republic, this party did not earn a single senator's seat.

The right to freedom of religion, including worship, is provided to all religious communities, even those that are not registered. The law does not distinguish between them. The activities of a religious community can be banned only on the basis of international law and through act of Parliament. So far, this has never happened.

Legislation does not distinguish between new religious communities and old ones. More than ten religious communities were active in the territory of the Czech Lands in the 19th century. Several religious communities were founded in the time of First Republic (1918–1938)[5] and again several religious communities after 1945. Even the Communist regime recognized several new religions in meantime 1948–1956. Between 1989–2020 we witnessed an acceleration of this development.

The expressions "majority and minority religious communities", "new" and "old religious communities", "sects", are not used in official documents in the Czech Republic. Certain tentative and inconsistent use is found in scientific literature only.

Religion-related questions are addressed in a scientific manner by institutes of religion at universities. The first of them were transformed from Marxist institutes of so called scientific atheism, which were largely founded during the totalitarian regime before 1989. Gradually, they have been reformed, and most have adopted a more or less neutral stance. There are also four Faculties of Law, which since 1990 offer modules in religious law. The five theological faculties (three Catholic, one Protestant and one Hussite) also deal with religious law and religious studies.

The Society for the Study of Sects and New Religious Movements has become a recognized specialist in religious studies. It publishes the religious studies magazine Dingir. Specialists from its ranks are often invited to the Ministry of Culture as

[5] E.g. Evangelical Church of Czech Brethren founded by unified Czech Reformed and Czech Lutherans in Bohemia and Moravia (1918), Czechoslovak Church founded by Catholic modernists in 1920 (now Czechoslovak Hussite Church), Unity of Czechoslovak Unitarians (1930).

experts. The Church Law Society headquartered in Prague, led by the authors of this chapter, also focus on the issue of the legal and social status of both small and large denominations. Its members have spearheaded a variety of treatises in the field, and often publish in the Church Law Review, a scientific magazine included in the Web of Science citation database published in Czech, Slovak and English (print run of 1,000 copies) four times a year by the Church Law Society.[6]

The Czech courts, including the Constitutional Court, come into contact with religious communities, acting both as plaintiffs or defendants. In many judgments, some religious communities are mentioned by name – e.g. the Czechoslovak Hussite Church, the Unity of Brethren (Moravian Church), Jehovah's Witnesses - or by reference to a particular institution – e.g. the Catholic diocese, the monastery, or the charity. Nevertheless, in court decisions, concepts such as old and new religious communities are never cited.

Law scholars who deal with the issue of minorities and law in the Czech Republic, organize conferences on the topic and publish scientific publications. However, mostly ethnic groups or socio-ethnical groups count as "minorities". These experts rarely deal with their connection to religion. Under the umbrella of religious issues fall Jewish affairs, despite the fact that only a minority of Jews professes the Jewish religion and belongs to one of the ten Jewish communities in the Czech Republic. To some extent, they also deal with Muslims, with respect for their considerable ethnic diversity.

In some publications, it is sometimes acknowledged that minority research should be devoted not only to ethnic or socio-ethnic minorities but also to religious minorities. This term has already been utilized in the above-mentioned minority literature several times. However, such issues have not yet yielded the official adoption of the term and lawyers specializing in religious law, as well as specialists of religious studies dealing with religious minorities, do not refer to them as such. Just as it is difficult to find a time limit, in terms of distinguishing new and old religious communities, it is difficult to determine which social or religious group is a majority and which is minority. In our opinion, there are no new and old religious minorities in our country and they have no special status.

[6] See http://spcp.prf.cuni.cz/en/basic-information-2/.

# THE SOCIAL AND LEGAL STATUS OF RELIGIOUS MINORITIES IN ESTONIA

Merilin Kiviorg*

## I. Introduction

According to the census conducted in 2011, only 29% of the Estonian population (those aged 15 and above) considers themselves to adhere to any creed[1]. Thus, one could argue that any religious community is a minority community in Estonia. At the same time, according to some recent surveys, 58% (of people questioned) say they have individual beliefs independent of any religious community (e.g. new age)[2] and the percentage of atheists is relatively low (approximately 6-10%). There is a high level of individual beliefs and religion is often seen as a private matter. Most Estonians do not formally belong to any religious organisation. It has been often argued that this is due to Soviet occupation (1940-1941; 1945-1991) and atheistic education. However, this is only partially true. There are other factors that have influenced religiosity in Estonia, including a secularisation of society which had already begun before the occupation.[3]

Religion and national identity are not tightly connected for Estonians. In comparison, according to some surveys, this connection is more important for minority ethnic communities the largest community being Russian. Due to extensive immigration administered by the Government of the Soviet Union after World War II, Estonia has been left with a considerably large Russian-speaking minority (approximately 26% of the total population). It has been confirmed by various surveys that, compared to

* Associate Professor in Public International Law, University of Tartu, School of Law. This paper is written with support from the Estonian Research Council Grant No. 'PRG969 'Russia and the Consolidation of Regional International Law in Eurasia'.

[1] Population and Housing Census 2011 < https://www.stat.ee/en/statistics-estonia/population-census-2021/2011-population-and-housing-census > (accessed 15 Jan 2021).

[2] 'Uuring: eestlastel on oma usk' [Estonians have Their own Belief], *Äripäev,* 22 April 2014.

[3] For a more detailed account on the matter see M. Kiviorg, *Law and Religion in Estonia* (Alphen aan den Rijn, Kluwer Law International, 2016).

Russians, Estonians are less religious.[4] This has been explained by the fact that for Russians, and other non-Estonians, religion is a uniting factor that strengthens their identity. 'The bond between religion and national identity becomes especially important for people who live outside their historical homeland'.[5] Some researchers have pointed out that for Estonians, the primary unifying factor is language.[6]

This large minority has had, and continues to have, an effect on demographics and politics in Estonia, but also on changes to its religious composition. The Lutheran Church has historically been the largest religious institution in Estonia since the sixteenth century. During the first independence period 1918–1940 (before the Soviet occupation), Estonia was more or less religiously homogenous. Most of the population (ca 78%) belonged to the Estonian Evangelical Lutheran Church (EELC).[7] The second-largest Church was the Estonian Apostolic Orthodox Church (EAOC). According to the 1934 census, approximately 19% belonged to the latter church.[8]

As noted above, according to the last census of 2011, only 29% of the population considers themselves to adhere to any creed. This percentage has not changed since the previous census of 2000. Of this figure, about 10% (13.6% in 2000) declared themselves to be Lutheran, the majority of whom are ethnic Estonians. Currently, the largest religious tradition in Estonia is the Orthodox Church, with 16% of the population considering themselves as Orthodox (12.8% in 2000).[1] Since the census in 2000, the Orthodox community has grown in numbers and has become bigger than the historically dominant Lutheran Church. However, this change in numbers, where historical majority has become minority, does not seem to yet have had any significant impact on church and state (religion and state) relationships. The Lutheran Church also still has its dominant position in dealings with the State.

All other Christian and non-Christian religious communities have adherents of approximately 3% of the adult population (aged 15 and above).[9] The largest religious

[4] See, e.g., R. Liiman, *Usklikkus muutuvas Eesti Ühiskonnas* [Religiosity in Changing Estonian Society] (Tartu, Tartu Ülikooli Kirjastus, 2001).

[5] Statistical Office of Estonia, '2000 Population and Housing Census: Education. Religion' (Tallinn, Statistical Office, 2002), p. 31.

[6] A. Kilp, 'Secularisation of Society after Communism: Ten Catholic-Protestant Societies', in A. Saumets and A. Kilp (eds.), *Religion and Politics in Multicultural Europe* (Tartu, Tartu University Press, 2009), p. 226.

[7] According to the national census 1934, there were 874,026 Evangelical Lutherans in Estonia of a total population of 1,126,413. Estonian Institute, <www.einst.ee> (accessed 15 Jan 2021); See also Statistical Office of Estonia, '2000 Population and Housing Census: Education. Religion' (Tallinn, Statistical Office, 2002), p. 17.

[8] Riigi Statistika Keskbüroo, 'Rahvastiku koostis ja korteriolud: 1 III 1934 rahvaloenduse andmed' (Tallinn, Riigi trükikoda, 1935), Vihik II.

[9] Population and Housing Census 2011, <https://www.stat.ee/en/statistics-estonia/population-census-2021/2011-population-and-housing-census> (accessed 15 Jan 2021).

communities amongst those are Roman Catholics, Old Believers,[10] the Baptists, Pentecostals and Jehovah's Witnesses. Jehovah's Witnesses is one of the fastest growing organisations. The social and legal responses to growing new religious movements (new minority communities) that have emerged in Estonia after the collapse of the Soviet Union will be addressed later on.

Muslims have lived on Estonian territory since approximately the eighteenth century. The majority of Muslims are ethnic Tatars who arrived in Estonia during the late nineteenth and early twentieth century. During the first independence period (1918–1940) there were two registered Muslim communities in Estonia. The Tatar community established two mosques and also graveyards and followed their particular Islamic cultural and religious life.[11] In 1940, the Soviet regime prohibited the activities of these communities. During the occupation, the Muslim community carried on its activities unofficially. Currently there are two registered Muslim religious associations.

Estonia has not experienced extensive new immigration. The few that have arrived have come from all over the world, and do not form any significant ethnic religious communities.

The Jewish religion has been represented in Estonia for centuries. However, a more permanent congregation emerged in the nineteenth century. Today there are several Jewish organisations in Estonia and a new synagogue was opened in 2007. There is also a Jewish secondary school (gymnasium) in Tallinn.

The relationship between religious communities, state and society have been mostly amicable. As noted, religion is primarily a private matter and religion does not play a major role in public debates or in politics. There have also been hardly any court cases regarding individual or collective religious freedoms. These few cases have, for example, involved autonomy of religious communities[12], rights of prisoners to religious freedom[13], property and legal personality/registration disputes[14], conscientious objection to alternative military service[15] and protection of sacred places[16]. Property disputes have dominated the court practice regarding religion,

[10] The Old Believers are Russians who fled to Estonia because of religious persecution.

[11] R. Ringvee, 'Islam in Estonia', in *Islam v. Európe* (Bratislava, Centrom pre európsku politiku, 2005), pp. 242-243.

[12] Supreme Court of Estonia, Case No 3-4-1-1-96, 20 Dec 1996.

[13] E.g., Tartu District Court, Case No 3-16-176, 15 Dec 2016; Tartu District Court, Case No 3-14-52503, 21 Jun 2016; Tartu District Court, Case No 3-11-2943, 15 Nov 2013.

[14] Supreme Court of Estonia, Case No 3-7-1-2-1023-13, 10 February 2014. The majority of cases concerning religious communities in lower courts have been related to land reform and restoration of illegally expropriated property as a result of the land reform initiated at the beginning of the 1990s.

[15] Supreme Court of Estonia, Case No 3-1-1-82-96, 27 Aug 1996.

[16] Supreme Court of Estonia, Case No 3-3-1-39-07, 17 Oct 2007.

or more precisely, religious communities. For example, the most visible case was the dispute between two minority churches, both Orthodox (the Estonian Apostolic Orthodox Church and the Estonian Orthodox Church of Moscow Patriarchate) in the 1990s and early 2000s.

One of the most recent cases in the Supreme Court of Estonia concerned denial of international protection/refugee status for a person who claimed he was being religiously persecuted in Uzbekistan due to alleged membership in the Hizb ut-Tahrir.[17] The refusal was considered justified on national security grounds. Estoniahas not yet faced any of the challenges related to growing Muslim communities which have been experienced in other European countries. However, this does not mean that there is currently no national debate relating to the possible effects of it. Besides legitimate concerns over the capability of the state and society to cope with increasing religious diversity and possible challenges to security, the theme has also been engaged with by populists and far right groups for their political purposes. Some of the effects of these new political developments on minority religions will be discussed later on.

## II. Definition and Status

### 1. Social science definition

At the beginning of the 1990s there was an influx and increase in activity of so-called New Religious Movements (NRMs). It is probably right to say that there was a phobia against these movements in society, and correspondingly in politics, as well as, to some extent, in research which reflected on this new phenomenon. Traditional communities reacted in the same way. For example, the Estonian Council of Churches announced in 1995 that destructive new communities should be banned in Estonia. Although no serious anti-cult movements appeared in Estonia, there were negative responses to activities of NRMs similar to reactions in some other Western and Eastern-European states.

The expression ‘new’ in ‘NRM’ in this paper does not necessarily mean absolute or world novelty, but rather novelty in Estonia or Europe. In this sense it includes, for example, nineteenth century communities such as Jehovah’s Witnesses and the Bahá’í. NRM is not used as a pejorative term. The choice of the term seeks to emphasise neutrality and is preferred to terms such as ‘sects’ or ‘cults’ which seem to have clearly negative connotations in Europe.

These movements were popularly considered to be dangerous, particularly in the 1990s. According to a survey conducted in 1998, both Estonians and Russians

[17] Supreme Court of Estonia, Case No 3-17-1026, 1 Oct 2018.

in Estonia had negative views about Jehovah's Witnesses.[18] To be frank, on the one hand, this was related to ignorance about different religious beliefs generally, and on the other, it showed that Estonian society was not used to active proselytising. The activities of the NRMs were simply different from the activities of traditional religious communities known to Estonians. One also needs to note that some of these communities, and specifically Jehovah's Witnesses, were banned during Soviet times and their members heavily prosecuted. Thus, intolerance towards these groups may have been inherited from Soviet times.

The aforementioned attitudes in the 1990s were reflected in some research that probed into the essence of new religious communities. Some categorisation/ definition of sects or, as described, destructive new religious communities was attempted.[19] No reliable scholarship emerged which could explain or define destructiveness of these new communities, beyond what would be prohibited by criminal law.

It would be probably right to say that most of the current research focuses on the phenomena or development of new religious/belief minorities rather than on their precise definition. It is also probably right to say that there is relatively little research on the matter. The majority of the scholarship has emerged from scholars in the field of theology and political science. The latter's focus has mostly been on the presence of the Estonian Orthodox Church of Moscow Patriarchate in Estonia and to its possible influence on the local Russian ethnic minority. Its relationship with the Russian Federation has been looked at with concern in public political debate. This church has sometimes been seen as a 'fifth column' with the potential to undermine Estonian territorial integrity. These discussions intensified after the Russian annexation of Crimea (*Krimm*) and have been linked to the question of the loyalty of local Russian minority to the Estonian state.

## 2. **Legal definition**

There is no definition of religious minority in Estonian legal acts, including the constitution. As noted above, all religious communities can be considered minorities in this society. However, the word ('minority') itself is used and abused in everyday politics, especially in the context of migration, and now in the context of upcoming elections in March 2019. As noted above, the recent migration crisis has had hardly any real consequences in Estonia. There have been some new arrivals, however most have eventually left, or tried to leave, Estonia. The newcomers have found it difficult to integrate, but also to cope with not having their usual support networks and etc.

[18] R. Liiman, *Usklikkus muutuvas Eesti ühiskonnas* [Religiosity in Changing Estonian Society] (Tartu, Tartu Ülikooli Kirjastus, 2001), p. 84. They were negative towards Muslims and Hindus as well. Estonians were also slightly more negative towards Muslims than Russians.

[19] E.g. J. Leppik, 'Uususundid Eestis' (1992) 6 *Vikerkaar*.

This is specifically true regarding migration from non-European states. Contrary to popular beliefs, most immigrants are Finnish and Latvian citizens from the European Union countries and Ukrainian and Russian citizens from the third countries.[20]

### A. *The category*

'Religious minority' is not a category used in domestic official legal sources such as the constitution, legislation/statutes, administrative measures or case law yet. There are other kinds of minorities (national/linguistic minorities) in domestic official legal sources which have some impact on religion. The Estonian constitution recognises collective religious freedom (e.g., Articles 40, 9, 19 and 48) and provides protection for cultural/religious minorities and for their autonomy (Article 50). National minorities will be discussed below. The constitution also prohibits discrimination on grounds of religion (Article 12).[21]

Registered religious communities do not give a full picture of religious life in Estonia because some of the groups have not deemed it necessary to register in order to obtain a legal personality (registration of religious communities is not required by law), and some of the religious communities have chosen to register as ordinary non-profit organisations rather than religious associations.[22] The associations that have chosen to register as ordinary non-profit associations are, for example, the Friends of the Western Buddhist Order in Estonia, the Family Federation for World Peace and Unification and the Collegiate Association for the Research of the Principle.[23] No legal disputes have emerged due to these minorities choosing a different status provided for them by law.

### B. *Registration*

The registration procedure in Estonia is probably one of the most liberal in the OSCE countries. For this reason, it is mentioned as one of the examples of good practice in the 2015 OSCE Guidelines.[24] In the current law there is no difference in registration for emerging religious entities and historically majority churches. So

[20] L. Haugas, H. Hennoste (eds.), *An Overview of Social and Economic Developments in Estonia. 2/18 Quarterly Bulletin of Statistics Estonia* (Tallinn, Statistics Estonia, 2018), p. 13.

[21] Estonian Constitution, RT 1992, 26, 349.

[22] M. Kiviorg, 'Religious Entities as Legal Persons' in L. Friedner (ed.), *Churches and Other Religious Organisations as Legal Persons* (Leuven, Peeters, 2007), pp. 79-100.

[23] R. Ringvee, 'State, Religion and the Legal Framework in Estonia'(2008) 2 *Religion, State and Society,* pp. 192-193.

[24] *Guidelines of Legal Personality of Religious and Belief Communities* (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2015), p. 20, 24, 28 and 31. The guidelines are available at < https://www.osce.org/odihr/139046> (accessed 15 Jan 2021).

far, there have been no major problems in practice either. With one exception, there are no cases inhibiting registration or activities of so-called non-traditional or new religious movements (NRMs) and there is only one case where a traditional religious community initially encountered some problems with registration (the case of the Estonian Orthodox Church of Moscow Patriarchate). The one exception involved Satanists in Estonia. Satanists were refused registration on grounds of public order and rights and freedoms of others.[25] The Orthodox Church of Moscow Patriarchate was eventually registered.

### C. *Legal scholarship*

As noted above, currently very little legal scholarship touches upon religious minority issues. The primary focus is on the large Russian speaking (linguistic, ethnic) minority. In this regard, most of the discussion is focused on the problem of dual citizenship, the shamefully large number of people who are still without any citizenship (so called holders of grey passports) and on Russian and Estonian language education. It is probably safe to say that no significant definition of religious minority has emerged in legal scholarship. The main criterion seems to be numerical. No debate is taking place about the need to differentiate between new or old religious minorities in legal scholarship. No debate is active on the matter of including or excluding minorities. Saying that, issues such as public financing of some communities and equal treatment of religious communities have caused some public debate and religious minorities themselves have sometimes expressed their dissatisfaction with the situation. There is a visible preferential treatment of communities belonging to the Estonian Council of Churches and most notably of the Estonian Evangelical Lutheran Church. No court case has yet emerged from this fact. The preferential treatment of this church is not expressed in legal terms but rather in tradition, and the historical relevance of this church.

As mentioned, some new communities may not be awarded status of a legal person if their by-laws or activities are considered against the law, as in the aforementioned case of refusal of registration of Satanists. These registration cases have not involved a definition of minority, but rather assessment of their by-laws and activities. Issues of protecting individual religious freedom have also emerged in the practices of detention facilities, especially related to prison chaplaincy service. These issues are briefly mentioned later on in this paper.

[25] Tartu District Court [ *Tartu Ringkonnakohus, Kohtumäärus*], 25 Nov 2013, Case No 2-13-24298, Supreme Court of Estonia [ *Riigikohus, Tsiviilkolleegium, Kohtumäärus*], 10 Feb 2014, Case No 3-7-1-2-1023-13.

### D. *The ICCPR*

Estonia is party to the 1966 International Covenant on Civil and Political Rights (ICCPR) and other major international and regional conventions relevant for religious freedom, most notably the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). These international treaties have legal significance in domestic practice. It needs to be mentioned that Estonia follows a monistic approach to international law. For example, international treaties (ratified by Parliament) are incorporated into the Estonian legal system by Article 123(2) of the Constitution. Article 123 states that if Estonian legal acts or other legal instruments contradict foreign treaties ratified by the *Riigikogu* (Parliament), the provisions of the foreign treaty shall be applied.

### E. *The Framework Convention for the Protection of National Minorities*

Estonia is party to the Framework Convention for the Protection of National Minorities adopted in 1994 by the Council of Europe's Committee of Ministers. Thus, this document has legal significance. When Estonia ratified the Council of Europe's Framework Convention on the Protection of National Minorities, it declared that members of national minorities must be citizens of Estonia. In Estonia, minorities who are registered in the national register of national minorities may submit an application for national cultural autonomy (self-government).[26] The autonomy granted would include, in particular, the right to organise education in their mother tongue, form minority cultural institutions, and also preserve their distinctive religion. The monitoring bodies of the convention have suggested that the National Minorities Cultural Autonomy Act (*Vähemusrahvuse kultuuriautonoomia seadus*) contains elements that are not suited to the present situation of minorities in Estonia and needs to be revised or replaced in order for it to be effective.[27] This pertains in particular to the application of the act only to citizens. The law defines national minorities, among other requirements, through citizenship.

Religious minorities can, however, also associate under the 2002 Churches and Congregations Act[28] or the Non-profit Organizations Act[29] in order to enjoy their collective freedom of religion or belief. Limiting the right to form cultural autonomies only to citizens is controversial, especially in the context of Estonia where a significant number of non-citizens have been residing for a long time. One of the

[26] National Minorities Cultural Autonomy Act (*Vähemusrahvuse kultuuriautonoomia seadus*), RT I 1993, 71, 1001.

[27] Advisory Committee on the Framework Convention for the Protection of National Minorities: Opinion on Estonia, Adopted on 14 Sep. 2001, Council of Europe, ACFC/INF/OP/I(2002)005.

[28] RT I 2002, 24, 135.

[29] RT I 1996, 42, 811.

reasons for limiting cultural self-government only to citizens is probably a result of concerns about the loyalty of the Russian-speaking population and from concerns of preserving the Estonian language. This limitation has caused frustration, particularly amongst the Russian-speaking population, and has definitely not contributed to the promotion of tolerance in Estonian society. It should be noted, however, that non-citizens can participate in the activities of national cultural autonomies. According to the law, they cannot found cultural self-governments or actively participate in the election of governing bodies of the organisation. More than 3000 people are needed for the formation of a cultural autonomy.

Interestingly, the first National Minorities Cultural Autonomy Act was adopted in Estonia as early as 1925 and was quite unique in Europe at that time. According to that law, all the largest minorities were entitled to form cultural autonomies (self-governing organisations). At that time the largest national minorities were German, Russian, Swedish and Jewish. The right to cultural self-government was granted to Germans in 1925 and Jews in 1926. Swedish and Russian communities did not manage to create their cultural self-governments before 1940.[30] However, as these communities were geographically located in certain areas, it was easy for them to manage problems related to their minority status through respective local governments (for the Russian community this holds true even today). All cultural self-governments were liquidated in 1940 by the Soviet authorities.

## 3. **Legal status**

In addition to constitutional law and international human rights law, Estonia regulates freedom of religion and belief and church-state relations by a number of statutes and regulations. The principal statutes regulating church-state relations are the Non-Profit Organisations Act (*Mittetulundusühingute seadus*)[31] and the 2002 Churches and Congregations Act (*Kirikute ja koguduste seadus*, CCA)[32]. There are many other acts which directly or indirectly regulate freedom of religion of individuals and communities. For example, the acts concerned with tax exemptions, education and criminal liability.[33] In Estonia church-state relations are governed not only by general laws but also by formal agreements that are negotiated directly between the Government and religious institutions.

[30] Kultuuriministeerium, <www.kul.ee/index.php?path=0x2x1424x1431> (accessed 15 Jan 2021).

[31] RT I 1996, 42, 811.

[32] RT I 2002, 24, 135.

[33] Translation of the texts of selected Estonian legal acts can be found at < https://www.riigiteataja.ee/en/> (accessed 15 Jan 2021). This is an official webpage of the State Gazette (*Riigi Teataja*) where all the laws and other legislative acts of Estonia are electronically published.

There is no profound difference in how the law treats different legal communities – majorities or minorities. There is no basis for unequal or differential treatment in the Constitution. Quite the opposite. As noted, the Constitution prohibits discrimination on grounds of religion, and prescribes (albeit not *expressis verbis*) the principle of neutrality ('there is no State Church) towards different religions or beliefs.[34]

Moreover, the 2002 Churches and Congregations Act does not differentiate between minorities and majorities. The definitions it provides concern different categories of communities - church, congregation, association of congregation, cloister, religious society. All these definitions are provided in the 2002 CCA. The first four fall under regulation provided by the Churches and Congregations Act. Religious societies are treated under the Non-profit Organisations Act (NPOA). It may be argued that the latter have less autonomy regarding their internal affairs. For example, the NPOA proscribes democratic governance of the community. However, in principle it is up to the community to choose their legal form. However, they need to provide some evidence of complying with the definitions.

## III. Social and Legal Change

### 1. Social Change

As noted in the introduction, there has been a change in numbers of people declaring to belong to the two largest churches: Lutheran and Orthodox. People belonging to the Orthodox tradition now numerically exceed (official statistics of 2011 census) the historically majority church – the Estonian Evangelical Lutheran Church. This has not diminished the political influence of the Estonian Evangelical Lutheran Church and its cooperation with the Government. However, the main partner for the government has been the Estonian Council of Churches, of which the Estonian Evangelical Lutheran Church is a member. The Estonian Council of Churches is an unusual ecumenical body comprised of communities that do not always work together.

### 2. Legal Change

The majority of legal changes took place in Estonia just before, and right after, the collapse of the Soviet Union in 1991. No significant legal change has occurred since those changes from authoritarian rule to liberal democracy. However, it does not mean that there have been no attempts to change laws. These attempts have been related to, for example, concerns about migration and possible influx of Muslims into Estonia and by aforementioned phobia towards activities of NRMs.

[34] M. Kiviorg, P. Roosma, § 40, Ü. Madise *et al* (toim.), *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne* [Commentaries to Estonian Constitution] (Tallinn, Juura, 4th trükk, 2017).

## IV. Social and Legal Developments

### 1. Legal developments

In 2015, the Ministry of Justice initiated a proposal to amend both the Penal Law (*Karistusseadustik*)[35] and Law Enforcement Act (*Korrakaitseseadus*)[36]. The main aim, according to the proposal, was to set rules and send a clear message to foreigners about Estonian values. The proposed changes also related to wearing religious garbs.[37] One of the aims of this amendment was to introduce a blanket ban on face coverings. The law was primarily targeted towards Muslim women wearing burkas or niqabs. The amendment did not get the approval from all the relevant ministries, including the Ministry of Internal Affairs. One of the reasons was that the law amendment was felt to be too hasty, trying to solve an issue before any issue had arisen. As yet, there have been no burka or niqab wearing women in Estonia. In response to the proposed reasons of the blanket ban, the Ministry of Internal affairs pointed out that it is not right to argue that covering a face is alien to Estonia, in Estonian public space. Quite rightly, the ministry pointed to the fact of people using face coverings in cold Estonian winters and for skiing. The Ministry of Internal Affairs pointed out that in certain circumstances, for security and identification reasons, uncovering the face is necessary (banks, airports etc.), but a general ban does not feel to be justified on broad security arguments. Unfortunately, this law initiative has not been completely taken off the agenda.

In 2017, a proposal for an amendment to the Equal Treatment Act was prepared by the Ministry of Social Affairs. The alleged reason being that Estonia had not done enough to implement EU anti-discrimination directives[38]. Whilst issues relating to rights of disabled people were covered in the proposed amendment with sufficient expertise, the sections on freedom of religion or belief and its collective dimension (including autonomy of religious organisations) were not. There was a response to this initiative from the Council of Estonian Churches. The main concern expressed by the Council was that extending the scope of the current Equal Treatment Act would put autonomy of religious organisations under question in all situations, even in those where the current law follows the wording of EU directives allowing for certain

[35] RT I 2001, 61, 364.

[36] RT I, 22.03.2011, 4.

[37] Justiitsministeerium, 'Karistusseadustiku ja korrakaitseseaduse muutmise seaduse eelnõu väljatöötamise kavatsus', 24 Nov 2015.

[38] Council Directive (EC) 2000/78 on Employment Equality [2000] OJ L 195/16; Council Directive (EC) 2000/43/ on Racial Equality [2000] OJ L 180/22.

exemptions. They also pointed out concerns about extending the law to provision of services by religious organisations, including providing education.[39]

This last amendment was not targeted towards any specific minority religions. As noted at the beginning of this chapter, all religions are in the minority in Estonia. It also needs to be seen in the larger context of heated debates over discrimination based on gender and sexual orientation. These debates have a religious dimension but also reflect the fact of intolerant attitudes amongst part of the Estonian population.

In the Spring of 2018, an internal audit of the prison chaplaincy service was conducted by the Ministry of Justice. This audit revealed some misgivings regarding protection of rights of believers/prisoners belonging, or wanting to belong, to minority religions. Some chaplains, for example, were of the opinion that they should not facilitate changes of religion in prison.[40] The chaplaincy service is not adequately regulated and needs further development.

[39] Eesti Kirikute Nõukogu, 'Arvamus võrdse kohtlemise seaduse eelnõu kohta', 30.08.2017, nr 8-6/536.

[40] Justiitsministeerium, 'Korralise teenistusvalve vahearuanne. Vangla töö kinnipeetavate usuvabaduse tagamisel' (Justiitsministeerium: Jõhvi, 2018).

# RELIGIOUS MINORITIES IN HUNGARY. SOME LEGAL AND SOCIAL ASPECTS

Balázs Schanda*

In a sense, all religions are minorities in Hungary: although the country is predominantly Christian with a Catholic majority, the majority of the population does not take part actively in the life of any religious community. Besides Catholics, all other denominations are minorities; within the Catholic Church, Greek Catholics qualify as a minority in all social respects too. Calvinists are outnumbered by Catholics, but play a crucial role in shaping the culture and public life of the country – they can thus be considered both as a mainstream religion and a minority. Calvinists outnumber all other minorities. Although Lutherans are quantitatively less numerous than Calvinists, the historical role and social status of the Lutheran Church qualifies it as a mainstream community as well. Traditional mainstream communities and newly emerging ones differ greatly. Some minorities are closely connected to certain ethnic groups (like various Orthodox churches), some are concentrated in specific geographical areas, others in urban areas, and others still in rural ones. The landscape of religious minorities is colorful and constantly changing.

## I. Definition and status

### 1. Social science definition

Sociology of religion is an emerging field of social science in Hungary. Evidently, social science differentiates between old and new religious minorities, and research is focused on new religious movements[1], as well as more complex religious phenomena,

* Pázmány Péter Catholic University, Budapest.

[1] P. Török, *És (a)mikor destruktívak? Új vallási mozgalmak szociológiája és hazai helyzete* (Budapest, Semmelweis Egyetem Mentálhigéné Intézet – Párbeszéd (Dialógus) Alapítvány, 2007).

M. Tomka, *Religiöser Wandel in Ungarn. Religion, Kirchen und Sekten* (Mainz ‚Matthias-Grünewald, 2010). A. Máté-Tóth A, G. D.Nagy, *Vallásosságváltozatok. Vallási sokféleség Magyaror-*

e.g. Judaism in Hungary.[2] Some traditional minorities are affected by secularization and also by assimilation (also due to mixed marriages, where generally, kids either become indifferent or follow the faith of a parent belonging to a major community, rather than that of the parent belonging to a minority). New religious movements are on the rise.

Non-affiliation to religious communities exists on different levels. The majority is formally a church member (due to baptism) but only roughly half of the population would identify with their church. This means that more people define themselves as Catholics or Calvinists than as members of the Catholic or the Calvinist Church.[3] As for religious practice, the majority is religious "in their own way" and both non-religious citizens and observant adherents of religious communities qualify as minorities.

## 2. Legal definition

### A. *"Minority" in domestic official legal sources*

Hungarian law does not employ the term "religious minorities". Certainly, discrimination on the basis of religion is prohibited by the Constitution. On the other hand, the social status of a religious community cannot be the basis of positive discrimination (affirmative action): the neutrality of the state implies that there is no obligation to promote small religious communities to compensate lack of members.

The preamble of the Basic Law ("national avowal" of the Constitution) contains an acknowledgement of the role of Christianity in upholding the nation. This is on the one hand the acknowledgement of a historical fact and on the other hand, it is not the religious content of Christianity that is endorsed, but its role in forming the nation. The preamble also shows respect to the various religious traditions of the country. ("We recognize the role of Christianity in preserving nationhood. We value the various religious traditions of our country.")

The Constitution recognizes the collective rights of traditional ethnic minorities. Traditional ethnic minorities are legally defined (one of the conditions is their presence in the country for over a century) and their list is fixed by law.[4] Agreements with some minority churches relate to their impact in preserving the ethnic community,

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*szágon* (Szeged, JATE Press Szeged 2008). Zs. Bögre, 'Mit jelent a „maga módján vallásos és a „nem vallásos" kategória a magyar fiatalok értékválasztása szempontjából?' (2018) 74, *Kapocs*, pp. 15-20. J. Szigeti and Z. Rajki, *Szabadegyházak története Magyarországon 1989-ig* (Budapest, Gondolat Kiadói Kör, 2012).

[2] A. Kovács, *Zsidók és zsidóság Magyarországon 2017-ben* (Budapest, Szombat, 2018); https://jewishstudies.ceu.edu/andras-kovacs.

[3] Census data is methodologically problematic but still a valuable source: http://www.ksh.hu/nepszamlalas/tables_regional_00.

[4] Act CLXXIX/2011.

for example the agreement between the Serb Orthodox diocese of Buda and the Government.[5] Similar agreements have been concluded by other Orthodox Churches too. The Act on National Minorities acknowledges the right of minorities to exercise their religion in their native language; this right is dependent on their faith communities to a large extent. It is therefore a right that shall be respected, but cannot be enforced by the state.

### B. *Minorities operating and their relationship with the government*

All minor religious communities can easily obtain the official status of religious associations. The two-tier system of religious communities (adopted in 2011), however, expects recognized churches to cooperate with the state with regard to public services (education, health care etc.). Religious associations can also set up institutions providing public services, but cannot expect public funding for them.

Among officially recognized churches the only newly emerging communities are the "Faith Church" – an evangelical congregation and the Hungarian branch of ISKCON. A number of "older" communities that in the past were regarded as destructive sects have been recognized later. These include Jehovah Witnesses, the Salvation Army, Nazarenes, Adventists, Methodists, Mormons and others. A number of traditional minorities, including various Jewish, Muslim and Buddhist communities, have also been recognized. All these minority communities are included in the "upper tier" of the two-tier system.

The Framework Convention for the Protection of National Minorities adopted in 1994 by Council of Europe's Committee of Ministers has been ratified by Hungary.

### C. *Legal status*

Accommodation of religious claims is generally granted at individual level, rather based on membership to a particular community. Headscarves or halal food have not raised public concerns so far, partly due to the limited number of Muslims in Hungary. The right to ritual slaughter has been conceded.

With regard to rights, often no difference is drawn between religious associations and recognized churches. Both enjoy legal personality, autonomy and tax exemption. Cooperation with the government, however, is generally reserved to recognized churches. Only recognized churches have the right to offer religious education in public schools and have airtime in mainstream media. Major recognized churches have set up chaplaincies within the army and at penitentiary institutions. They enjoy a generous system of public funding including a tax assignment system to support

[5] Agreement of December 2012, promulaged by Govenment Resolution 1696/2012. (XII. 29.) Korm. hat.

their religious activities and public support of their public benefit activities (schools, hospitals etc.). Moreover, a number of church projects have received public funding in recent years for the reconstruction of architectural heritage. Some legally recognized churches have opted out of public support (e.g. the LDS), whereas others cannot effectively enjoy many rights – e.g. small communities cannot invest in religious. The policies of religious communities differ to a large extent, as do the legal regimes (e.g. the status, rights and obligations of recognized churches are different from those of religious associations).

Besides several agreements concluded with the Holy See, the Government has also signed cooperation agreements with a number of legally recognized churches. These are rather of formal in character and do not provide for special rights to specific communities.

The Venice Commission (European Commission for Democracy through Law) stated in its opinion on the new law on religious communities (2011) that eliminating "the abuse of religious organizations, which have operated for illicit and harmful purposes or for personal gain" was a legitimate concern. It further added that the "limitation of number of recognized churches" was legitimate according to the Venice Commission (17).[6] Freedom of religion has to be enjoyed by all communities without any distinction in terms of the community's legal status. Religious communities do not need to rely on a specific legal form, yet they can do so: a non-recognized group or a religious association shall enjoy the same freedom as a recognized church.[7] Despite identifying important issues of concern, the Venice Commission regards the new Act to "constitute a liberal and generous framework for the freedom of religion"(107), "a generous framework that permits the recognition of a relatively high number of churches in comparison to other European countries" (21).

Whereas the 1990 legislation only required a formal registration from faith communities and all registered communities formally enjoyed equal rights, the 2011 law established a two-tier system and requires legal recognition to obtain the status of a church. Criteria allow for religious associations to seek recognition if they have been operating in Hungary for at least twenty years in a systematic manner or if they represent a religion that has been practiced internationally for at least a century (the previous version of the law did not take the international level into account).[8] The request can be filed by the representative of the religious association with at least

[6] Opinion 664/2012 on Act CCVI of 2011 on the Right to freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities of Hungary, Adopted by the Venice Commission at its 90th Plenary Session.

[7] Decision 8/1993. (II. 27.) AB.

[8] Whereas the requirement related to number of applicants is not regarded as excessive by the Venice Commission, the duration requirement is deemed excessive (64).

1,000 supporters (not necessarily members, since anyone can support the recognition of a new church). The request is transferred by the Human Rights Committee to Parliament. Parliament decides based on the Committee's bill. Out of 82 communities applying for recognition, in February 2012 Parliament recognized 17 religious communities, raising the total number to 31.[9]

The two-tier system also received constitutional protection as the Basic Law refers to the different categories of religious communities. From a religious freedom perspective it is not the two-tier system as such that raises concern, but rather the political nature of the recognition procedure as there is no remedy against the decision of the Parliament denying status to a community that fulfills legal requirements. The parliamentary decision on recognition is more of a political vote than a formal procedure with procedural guarantees and effective remedies – one cannot appeal Parliament's decisions.

If a recognized church were to adopt an unconstitutional practice, Parliament could withdraw recognition after an opinion delivered by the Constitutional Court.[10] Associations could be dissolved by a court decision if evidence of unlawful activities emerges.[11] It has to be noted that religious associations – unlike other associations – are not subject to control by the Public Prosecution with regard to the lawfulness of their activities.

The new system can be described as a two-tier system with an easily accessible association-status and a small group of communities that have special recognition. A "recognized church" under the new law is more protected and autonomous than a "church" under the 1990 law. On the other hand, communities that have lost their church status and have become religious associations are in a less favorable position than before.

The new law on religion and associations ensures a base level entity status for all religious communities. The most important difference between religious associations and other NGOs is that unlike other associations, religious associations enjoy full autonomy. Like recognized churches they are not subject to state control and function separately from the state. Moreover, the right of their clergy not to be questioned with regard to vocational secrets is recognized (§ 36 (2). This recognition inherently means that there is a legal recognition of the fact that religious associations can also

[9] Act VII/2012. Recognized communities include the Methodist Church, the Adventist Church, Pentecostals, the Anglican Church, the Church of Jesus Christ the Latter-day Saints, Nazarenes, the Salvation Army, Jehovah's Witnesses, ISKCON, the Copt Orthodox Church, two Islamic communities and five Buddhist communities.

[10] The procedure is analogous to the dissolution of local self-governments (city councils) by Parliament.

[11] Act CLXXV/2011. § 11.

have a clergy. On the other hand, the clergy of a religious association does not enjoy criminal protection and would be judged as any other private individual.

Due to the amendment of the 2011 Church Act from April 2019 instead of the two categories (religious association – recognized church) there are be four categories provided for religious communities. The base level entity remains the religious association, a legal person enjoying full autonomy. A novelty of the amendment is that also religious associations have the right to receive tax assignments from income tax payers. This way they will enjoy a kind of public subsidy beyond tax exemption. The law also provides for a possibility to enter into agreements between the state and a religious association for further subsidies and the support of public benefit activities (like education, health care etc.). A religious association can be upgraded into a registered church after three years if in the three preceding years at least 1,000 taxpayers in average have assigned the 1% of their income tax to them and they have been functioning for at least five years as a religious association in Hungary or a hundred years abroad. Smaller religious associations can become registered churches if they declare to have no intention to receive extra public funding beyond the tax assignment system. For further subsidies the state can also establish a contractual relation with registered churches. A slightly higher status would be that of the incorporated churches – a kind of second level registration. A religious association can become an incorporated church if in the previous five years in average at least 4,000 taxpayers have assigned the 1% of their income tax to them and they have been functioning as a religious association for at least 20 years in Hungary or 100 years abroad or it has been a registered church for at least 15 years. Religious associations with at least 10,000 registered members can also become incorporated churches after 20 years if they declare not to run for further public subsidies. Beyond the possibility of agreements between an incorporated church and the state on public benefit activities incorporated churches also take part in the tax assignment system and they also receive an additional subsidy that supplements the tax assignments distributing the relevant share of the tax not covered by assignments (1% of the income tax is distributed between churches – the relevant share of those who do not make use of their right to assign 1% of their tax is distributed according the proportion established by those who assigned the 1% of their tax). Religious associations, registered and incorporated churches are registered at the Budapest Metropolitan Court. The highest status provide for religious entities remains that of recognized churches. When the state enters a comprehensive cooperation agreement with an incorporated church this grants recognition to it. Such agreements are promulgated by special acts of Parliament. Recognized churches enjoy a wide range of special rights and public support including the public funding of their public benefit institutions (like schools, hospitals etc.).

## II. Social and legal change

### 1. Social change

The collapse of the communist regime has led to the revival of religious minorities - e.g. Jewry of Hungary – and to the mushrooming of new religious movements and foreign missions. Nevertheless, traditional minorities are generally aging communities and novel fast-growing religious movements may also reach a peak in their growth in a few decades.

Hungary is less affected by international migration than most European countries. Communities impacted by immigrants or resident aliens go from the Anglican Church, to the Coptic Church and Islam. Some minorities have been weakened, and others strengthened by migration: after World War I many Serbs left Hungary for Yugoslavia, and since World War I many ethnic Hungarian Unitarians from Transylvania settled in Hungary. Some minorities suffered tensions between newcomers and traditional members: for example the majority of the Armenian community in Hungary living in the country since the 17th century, is (Uniate) Armenian Catholic and while preserving some Armenian traditions and roots, is highly integrated; whereas Armenians who have settled during or after the Soviet era are mostly affiliated to the Armenian Apostolic Church and speak Armenian as their native language. Based on census data and data provided by the Muslim community, it is estimated that the size of the Muslim community in Hungary ranges from 6,000 to 30-50,000. According to census data approximately 50% of Muslims in Hungary have part Turkish, part Arabic roots and 50% also stated that they are Hungarian. The age composition of the Muslim community clearly suggests a dynamic growth.

Minorities within minorities may have special dynamism. For example the Lubavitch Movement (Unified Hungarian Jewish Congregation) has become a highly visible player on the religious scene attracting many young people searching for their Jewish roots. Detailed data on the religious practice of communities is not available.

### 2. Legal change

The liberal legislation of 1990 on religious freedom (passed in one of the last sessions of the last communist parliament) proved to be a safeguard for religious freedom for two decades. Since its adoption some of its elements – first of all the easy registration of religious communities granting a wide autonomy and financial benefits without any scrutiny and hardly any control – were repeatedly criticized, but none of the attempts to change the law earned the required majority. The 1990 law provided that:

> "Those following the same religious beliefs may, for the purpose of exercising their religion, set up a religious community, religious denomination or Church (hereinafter together referred to as "Church") with self-government. (...) Churches

> may be founded for the pursuance of all religious activities which are not contrary to the Constitution and do not violate the law."[12]

The registration of churches was done by county courts in the same way as associations, political parties or foundations. Requirements were highly formal: communities wishing to be registered needed to submit the names of 100 private individuals as founding members, and a charter containing at least the name of the religion, the address of its headquarters, and its internal organizational structure, specifying the internal units of the church that should enjoy legal personality. The founders had to submit a declaration that the organization they have set up had religious character and that its activities complied with the Constitution and the law (sections 8-9). The number of registered churches has grown to over 300.[13] All churches that were registered had the same rights and obligations. Equality, however, has become a matter of legal status and not of social significance. As the Constitutional Court stated: 'Also, treating the Churches equally does not exclude taking the actual social roles of the individual Churches into account.'[14]

Consequently, external and social differences between religious communities may be taken into account by the legislator if these are of relevance to a given issue. In many situations, historic and social differences were taken into account by legislation and the government (e.g. restitution of confiscated property, army chaplaincy). Following approval of the new Constitution, Parliament passed the new law on churches that was enforced on January 1, 2012 replacing Act IV/1990.

## 3. How has the legal status of religious minorities changed, especially in the last 25 years?

The 1990 legislation, passed by the last one-party parliament (elected in 1985) has been considered as extremely liberal . Channeling an (overly) liberal system is certainly much more problematic than liberalizing a (very) rigid one. Abandoning the formally equal status of religious communities for a two-tier system has not resulted from a single legislative move. In the last 25 years, social reality has shown that equality can only be formal, since the reality and needs of different communities are so different. Consequently, step by step the differences were taken into consideration by the legislation and the government, for example property restitution has only affected denominations that have lost property due to communist expropriations, army

[12] Act IV/1990. § 8.

[13] Including communities like the Church of Scientology, the Association of Witches, the Community for the dignity of birth (running a maternity center), the Noah for Life Community (running a shelter for abandoned pets), a community of UFO-believers, a number of esoteric and pagan cults, often with a far-right agenda.

[14] Decision 4/1993 (II. 12.) AB.

chaplaincies were only set up for denominations that had personnel in the military in sufficient numbers, and different communities have engaged into education, health care etc. at very different levels. Patterns developed for traditional minority communities do not necessarily fit new religious movements.

The new structure of legal personality for religious or faith communities is also in conformity with the 2015 OSCE Guidelines on the Legal Personality of Religious or Belief Communities. Whereas the situation of some minority groups has not changed significantly (not even by the law) others felt offended for losing their formally equal status to mainstream churches. Some emerging communities, however, were seemingly able to use the two decades of liberal legislation to develop a reality that could not be overlooked. For example the Faith Church, ISKCON or the Buddhists have set up college-level institutions of higher education issuing state-recognized BAs and MAs in Theology, run a number of public institutions etc. The 1990 law has clearly contributed to the rapid institutionalization of these movements and has resulted in their parliamentary acknowledgment as "recognized churches" in 2011-2012. So far there are no experiences on religious communities having an interim status between religious associations and recognized churches.

## III. Social and legal developments

### 1. Social developments

Predicting social changes calls for special caution. Census data has shown that the religious landscape is stabilizing. Whereas religious affiliation is stronger among the elderly than in younger generations, the religiosity of people in their 20s and in their 40s is not significantly different. The landscape, however, is not determined by minorities, but by traditional mainstream churches. Trends may be determined by demographics (the decline of Lutherans is primarily a result of the high percentage of mixed marriages that is a consequence of the minority status).

Some religious associations vehemently claim the status of recognized churches and oppose the two-tier system. Especially the "Evangelical Brotherhood" (a breakaway Methodist group with a politically highly engaged pastor, former liberal MP keeps this issue 'current' both at court and in the media (prophesizing for instance. that the Prime Minister will end up in hell)[15]. It has to be underscored that the Catholic Church as a majority community has never suggested that the rights of "concurrent" faith communities should be curtailed.

As the political use of the protection of Christian culture (not that of Christian faith) has made it to the top the agenda as an issue of national interest in the migration crisis, discussion on its meaning has ensued. The present situation is somewhat

[15] http://hvg.hu/itthon/20161128_ivanyi_gabor_interju_orban_viktor_elkarhozas.

different from that of the 15th to 17th centuries when Hungary understood its historical role as the defender of Christian Europe against the Muslim (Ottoman) invasion. Generally, the population has not been very welcoming and this attitude has spread over the recent years primarily with regard to Muslim immigrants.

Whereas some minority groups are "peaceful" and focus on internal matter, others have engaged in activism, attracting the sympathy of many non-members. Baptist Aid and ISKCON's charitable actions are significantly shaping public opinion on the religious groups.

The relation between traditional mainstream and minority religious groups is generally amicable both with regard to the ecumenical movement and the Jewish-Christian dialogue. A relation between newcomers and traditional communities is almost non-existent. Whereas in the 90s voices of concern could be heard with regard to the appearance of new religious movements, by now it seems to be clear that their growth is not unlimited and does not endanger the social position of mainstream churches.

## 2. **Legal developments**

The 2011 law on religion and associations ensures a base level entity status and full autonomy for all religious communities. In a case filed by communities that were not recognized by Parliament and were registered as religious associations, rhe European Court of Human Rights identified a violation with regard to the freedom of association, read in light of freedom of religion[16] . After the judgment Parliament discussed a bill to make the registration/recognition system more detailed and granting more rights to communities not recognized by Parliament. However, the bill lacked the necessary qualified majority in Parliament. As the 2018 parliamentary election brought a constitutional majority for the governing parties the amendment could be discussed again.

Generally the legal framework of religious communities can be expected to be more supportive of traditional communities than to newly emerging groups. Major and minor traditional minorities may be beneficiaries of this kind of support (from the Calvinist Church to the Greek Orthodox Exarchate). Some religious associations continue to fight to be recognized as churches.[17] Some engaged into litigation to obtain public funds to run their social institutions.[18]

[16] Magyar Keresztény Mennonita Egyház and Others v. Hungary (Judgment 8.4.2014).

[17] For example the new age community inspired by ancient Egyptian religion Ankh.

[18] The case of the Evangelical Brotherhood ended in Strabourg awarding 3,000,000 euros pacuniary damage the the community running number of social institutions. Magyarországi Evangéliumi Testvérközösség v. Hungary (Judment 24.4.2017).

An example of internal regulations of religious communities affecting majority/minority relations is marriage law. Whereas the Catholic Church has insisted for centuries on Catholic baptism and upbringing of children from mixed marriages, state provisions dating back to the 1700s indicated that kids should follow the denomination of the parent of their same sex ( sons in particular, should follow the denomination of their father). As such state provisions no longer exist, the internal policies of churches matter. Canonical norms within the Catholic Church are favorable to minor oriental rites (e.g. Greek Catholics), whereas denominational limitations to marriages of Lutheran and Calvinist pastors are currently discussed.

The regulation of the status of religious communities is affected by the case law of the European Court of Human Rights, but international or European law does not play a specific role with regard to religious minorities. International awareness of data protection (GDPR Art 91) has generated a major clash in relation to data protection in the "Church of Scientology"[19]. A development in anti-discrimination law does not specially affect religious minorities.

[19] https://www.naih.hu/files/Scientology-Decision-final-2018-01-29-.pdf.

# EQUALITY OF CHURCHES AND ETHNIC AND RELIGIOUS MINORITIES IN PREDOMINANTLY NON-RELIGIOUS LATVIA

Ringolds Balodis*

## I. Introduction

"Christian values" are included in the 5th paragraph of the Preamble to the Latvian Constitution (*Satversme*) as one of the core elements of Latvian identity. [1] Indeed, Latvia is a pronouncedly Christian state, since the prevalent denominations are Roman Catholics, Evangelic Lutherans and the Orthodox Christians. Information drawn from sociological surveys shows that the main religious groups among the Latvian population are: Lutherans at 25 %, Roman Catholics at 21 % and Orthodox at 25 %. In 2018 Latvia counted a population of around 2 million people. Of these nearly 60 % are Latvian, and Russians (approximately 30%) are the second largest nationality. All other religious organisations may be considered as religious minorities. [2] The number of Roman Catholics has increased since the territory of Latvia was

* Faculty of Law, University of Latvia, Riga.

[1] "Since ancient times, the identity of Latvia in the European cultural space has been shaped by Latvian and Liv traditions, Latvian folk wisdom, the Latvian language, universal human and Christian values. Loyalty to Latvia, the Latvian language as the only official language, freedom, equality, solidarity, justice, honesty, work ethic and family are the foundations of a cohesive society. Each individual takes care of oneself, one's relatives and the common good of society by acting responsibly toward other people, future generations, the environment and nature" (Section 5 of the Preamble Constitution of the Republic of Latvia).

[2] Other religions are considerably less practiced in Latvia, in particular: Old Believer Orthodox 2.7 %, Adventists 0.4 %, Jews 0.1 %. Minimum about 20 % of Latvian population do not belong to any religion – part from them consider themselves to be believers without identifying themselves with any particular denomination, while others declare themselves to be atheists. Thus, information provided by religious organisations proves that among two million inhabitants there are: Evangelic Lutherans – 700 000, Roman Catholics – 423 176, Orthodox – 370 000, Old Believers – 2550, Charismatic Christians – 8 000, Baptists – 396, Seventh-Day Adventists – 3 862, Mormons – 948, Latvian pagans (*dievturi*) – 695, Jehovah Witnesses – 2250, Methodists – 534, Jews – 417, Krishna followers – 158, Muslims –295, Buddhists – 157, Hindu – 21, etc. This breakdown in percentages is approximate, because the State does

Christianised/ occupied by the German crusaders in the 12th century. The number of Lutherans rose after the Reformation spread among the Germans living in the Baltic region in the 17th century, whereas the cause of the spread of the Orthodox belief is the fact that the territory of Latvia was part of the Orthodox Russian Empire from the 18th century up to the very beginning of the 20th century, when in 1918 the Republic of Latvia was established. Although both the Catholics and Lutherans in Latvia enjoyed a special status, which differed from the treatment of these religions in the rest of Russia, "the Czar's religion" or the Orthodoxy enjoyed a special protection by the institutions of power and was part of the imperial policy of "Russification". Later, during the period of Soviet occupation (1940 – 1941, 1944 – 1990), hundreds of thousand migrants flew into Latvia from the Soviet Union, and the Orthodoxy experienced a considerable numerical increase.[3]

## II. Definition and Status

### 1. Understanding of the concept "religious minority" in Latvia

The concept of "religious minority" is not widespread in Latvia,[4] whereas the concept of "new religious movements (organisations)", comprises also the concept of a religious minority.[5] For instance, it could be argued that in the public space the concept of a religious minority is perceived as a designation of a new, numerically small newcomer. In this respect, Latvia is not unique because also elsewhere in Eastern European countries (for example, in Poland), these words are perceived similarly. The designation "new religious organisations" became more widespread from the mid-1990s onwards and gradually replaced another designation – "sects", being more politically correct and comprehensive, and, most importantly, more legal.

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not have at its disposal statistics that would be based upon credible sources of information. Based on data from the Central Statistical Bureau of Latvia, the number of religious organisations registered in Latvia is 1163 (2016). It should be noted that for the last fifteen years this number of registered religious organisations has remained roughly unchanged in 2000 1058, in 2005 1120, in 2010 1140, in 2013 1179.

[3] It must be noted that similarly to the flow into Latvia of migrants of Russian, Belorussian and Ukrainian ethnicity, which increased the number of Orthodox believers in Latvia, the Azerbaijanis, Chechens, Tatars, Uzbeks, who flew into Latvia from the Southern Soviet Republics, constituted the Muslim community. The migration of Soviet citizens in Latvia formed also new Christian minorities, for example, the Armenian Apostolic Church, which currently takes a stable place among the religious organisations of Latvia.

[4] Of course, the term "religious minority" is found in scientific literature. For instance, professor Leo Dribins examines the fight for influence between the majority and the minority of the Christian faith. See, Dribins L. Etniskās un nacionālās minoritātes Eiropā. Vēsture un mūsdienas. Eiropas padomes Informācijas birojs, Latvijas Universitātes Filozofijas un socioloģijas institūts. Rīga 2004, pp. 18-19.

[5] Krūmiņa – Koņkova S., Tēraudkalns V. Reliģiskā dažādība Latvijā (Religious Diversity in Latvia). – Rīga: Īpašu Uzdevumu ministrija sabiedrības Integrācijas lietās sekretariāts, Izdevniecība Klints, 2007. -17.lp.

This designation was based on the norms of the Religious Organisation Law of 1995 [6] (Section 7(2), Section 8 (4)), which established the obligation for new religious organisations, which commenced their activities in Latvia for the first time to re-register annually. After a period of 10 years of annual re-registration, a religious organisation automatically obtains the status of a permanent organisation. The legislator applied this measure of administrative surveillance to new religious organisations to be able to control anti-social activities and due to the need to verify the loyalty. The aforementioned legal norms, which gave legal content to the concept of "new religious organisation", were revoked by the ruling of the Latvian Constitutional Court of 26 April 2018, by virtue of which the concept was repealed from section 8 (4)[7] .This means that the concept of a new religious organisation no longer exists from a legal point of view and all churches, by their status, are equal.

## 2. The connection of the concept "national minority" to religion

In Latvian, the word "minority" is linked to ethnicity, which sometimes can also be linked to religion. For example, Section 6 of the Religious Organisation law [*Religious Organisations and Education*] provides that:

> *(4) Schools for national minorities under the management of the State and local governments, observing the wishes of students or the parents or guardians thereof may also provide religious teachings in accordance to the relevant national minority in accordance with the procedures specified by the Ministry for Education and Science*.

The same is found in the law "On the Framework Convention for the Protection of National Minorities", Section 2, which pertains to national minorities bound by their own religion, culture, and language.

Following accession to the European Union (2004), Latvia ratified the Framework Convention for the Protection of National Minorities, by adopting the law "On the Framework Convention for the Protection of National Minorities", setting out in Section 2 of this law that:

> *the Republic of Latvia declares that the term "national minorities", which has not been defined in the Convention, under the Convention refers to those citizens*

[6] Reliģisko organizāciju likums (Law on Religious Organisations), *Official gazette*, Latvijas Vēstnesis 26.09.1995, Nr.146.

[7] "(4) Congregations which begin functioning in the Republic of Latvia for the first time and which do not belong to the religious associations (Churches) already registered in the country shall re-register with the Register Office (hereinafter – re-registration) each year during the first ten years. Conducting re-registration of a religious organization, the Register Office shall take into account the opinion of the Ministry of Justice on the compliance of the activities of a religious organization with the laws and other normative acts in the previous period".

*of Latvia who differ from Latvians in terms of culture, religion or language, who have been traditionally living in Latvia for generations, who consider themselves as belonging to the state of Latvia and the Latvian community, and who would like to preserve and develop their culture, religion and language.*

It must be noted that the issue of both national minorities and religious minorities is linked to the Ministry of Justice since the law quoted above that contains two declarations[8] regarding the entering into force of Article 10 and Article 11 of the Framework Convention for the Protection of National Minorities. The Ministry of Justice, jointly with the Ministry of Foreign Affairs, is responsible for the implementation of the Convention. Pursuant to Section 5 (5) of the Religious Organisation law, the Ministry of Justice is responsible for policy in the field of religion. A rather extensive explanation of the concept of a minority can be found in scholarship. For instance, minority is explained as "a totality of persons, who according to certain features, for example, the national, ethnic or linguistic affiliation of the inhabitants, are in minority among the inhabitants of a certain territory"[9]. Nevertheless, there is no univocal explanation[10], nor an authoritative definition of a minority, on which legal experts, scientists and politicians had been able to agree upon.[11]

Finally, it must be noted that Article 114 of the Latvian Constitution defines the right of ethnic minorities (national minorities) to the protection of their language, ethnicity and culture. The rights guaranteed to minorities include also the preservation of elements that are essential for identity, including religion. This means also supporting minority schools and providing all other possible support. Minority religions, practised by national minorities (for instance, for Tatars and Uzbeks this religion is Islam, while for Russians it is the Old Believers faith) must obtain additional support from the state compared to other religious minorities. This consideration would apply for example, to Buddhism, which is practised by people of different ethnicities. Admittedly, some scientists believe that the link between national

[8] See Section 3 and Section 4 of the Law.

[9] The database of academic terms: Akadēmiskā terminu datubāze *AkadTerm* http://termini.lza.lv/term.php?term=minorit%C4%81te&list=minorit%C4%81te&lang=LV.

[10] "Ethnic minority" is a nationality, which in its ethnic territory in a state is a minority, for example, the Livonians (Livs) in Latvia. Gypsies, who have no state of their own anywhere in the world, are also considered to be an ethnic minority of Latvia. In determining an ethnic minority, not only the quantitative aspect is important but also the compactness of the place of residence and the economic power. See: Terminu un svešvārdu skaidrojošā vārdnīca https://www.letonika.lv/groups/default.aspx?cid=47863&r=1107&lid=47863&g=1&q=Ethernet&h=0.

[11] Zankovska – Odiņa, S. Nacionālās minoritātes definīcija. In: Brands-Kehris, I., Kučs, A., Zankovska-Odiņa, S. Nacionālo minoritāšu konvencija – Eiropas pieredze Latvijā. Rīga: Latvijas Cilvēktiesību centrs, Latvijas Universitātes Juridiskās fakultātes Cilvēktiesību institūts, Eiropas Padomes Informācijas birojs, 2006, 27.-54.lpp. (Quoted from Treļs Ē. Nacionālās minoritātes jēdziens http://www.trels.lv/publikacijas_2.html).

minority and religions is limited, because in practice is it said to manifest itself as "*selective preservation and foregrounding of some aspects of the Russian culture*".[12] In view of the fact that in Latvia, notwithstanding the various integration policies, a two-community state composed of Latvians and Russians has emerged, the matter of Orthodox and Old Believers must be examined from the perspective of national minorities. This regardless of the fact that in terms of the number of believers, the Orthodox faith is among the three dominant denominations in the country. Latvia is a multi-denominational state, where these three religions dominate. Therefore, other religious organisations should be counted as belonging to religious minorities. Old Believers, the Seventh Day Adventists, Methodists, Jews should be considered as "old religious minorities", which have been able to corroborate their status legally, whereas Muslims, the Church of Jesus Christ Latter-days Saints (Mormons) Jehovah's Witnesses, Buddhists and Pentecostal congregations should be counted as "new religious minorities". The so-called "national religion" - *dievturi [God's keepers]* (the Latvian pagans) - should be examined separately. It has been active for a long time: however, because of its weak organisational structure it cannot fit in the family of "the old religious minorities".

## 3. The conceptual closeness of the Latvian designation of "untraditional religious organisation" and " religious minority"

The prevailing designation of "a religious minority" in Latvia is, undoubtedly, "a traditional religious organisation" and the opposite that follows from it is "an untraditional religious organisation". Traditional religious organisations comprise a definite and clear list of religions, whereas untraditional religious organisations include all other religions, such as Jehovah's Witnesses, Muslims, Buddhists, Bahá'ís, Shintoists and Pentecostals. Of course, this approach is not scientifically consistent and does not reveal the nature of religious minorities. It does nonetheless, reveal the policy of the Latvian State in religious matters. The State's attitude is secular, with a tendency to support traditional religions. Although the number of believers is of certain significance in any state, in the Republic of Latvia this fact is not of decisive importance because traditional organisations are supported due to the duration of their activities and loyalty, rather than number of followers. This is proven, first of all, by the fact that during the national census information about the respondents' religious affiliation is not collected in Latvia.

[12] Krūmiņa – Koņkova S., Tēraudkalns V. Reliģiskā dažādība Latvijā (Religious Diversity in Latvia). – Rīga: Īpašu Uzdevumu ministrija sabiedrības Integrācijas lietās sekretariāts, Izdevniecība Klints, 2007. - 85.lp.

## III. Legal Status

### 1. The agreement between the Republic of Latvia and the Holy See

In Latvia, the Roman Catholic Church stands out among all other religious organisations both as to the type of recognition by the state and as to the level of recognition. Since 12 September 2002, the status of the Roman Catholic Church in Latvia is regulated by the agreement between the Republic of Latvia and the Holy See, which was created upon the initiative of the Holy See. Pursuant to the provisions of the agreement, the Catholic Church is the only Latvian church that has been recognised as the subject of public law, and it acquires this status irrespectively of reporting to the institution tasked with registration; moreover, the Church, differently from all other religious organisations, instead of registering congregations, merely informs the Registrar about the existence thereof. The President of Latvia announces the bishops appointed by the Catholic Church. Despite active efforts by other churches (for example, the Evangelic Lutheran), only the Roman Catholic Church, with the support of the Holy See, has been able to achieve this status. This allows to conclude that the Roman Catholic Church in Latvia is guaranteed a higher degree of autonomy compared to any other religious organisation. This is manifest in the right to freely determine its internal governance, engage in worshipping activities, perform pastoral activities within the social, educational and cultural fields. With regard to a number of essential issues (for example, registration, the chaplain service etc.) the activities of the Roman Catholic Church are regulated both by the Law on Religious Organisations and the agreement between the Republic of Latvia and the Holy See.

### 2. Legal status of "traditionalism" and the positive neutrality

For decades, the principles of the relationship between the State of the Latvia and churches have not changed and are based on the principle of religious freedom, the separation between state and church, and the concept of "traditionalism". The principles enshrined in the Constitution (religious freedom, equality, separation of the church from the state) have been supplemented by the agreement with the Holy See and the special church laws, in which the traditionalism of a number of religious organisations has been recognised. Over the last fifteen years, this has obviously brought Latvia closer to the Italian, Spanish model.[13] The positive neutrality policy has been implemented in Latvia because the State has recognised, supports and finances a certain circle of churches. This special treatment (recognition by the state)

[13] Balodis R., 'Las relaciones entre el estado de Letonia y las organizaciones religiosas: de la realidad soviética al modelo de España y Italia' (2009) 21, *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* https://www.iustel.com/v2/revistas/detalle_revista.asp?id_noticia=408366&d=1.

is implemented with respect to eight Christian religious organisations and the Jewish denomination. The aforementioned Christian organisations are **the Roman Catholics**, four unions of Protestants (**the Evangelic Lutherans** – the Latvian Evangelic Lutheran Church, the Union of the Seventh-day Adventist Congregations, **the Baptists –** the Latvian Baptist Congregation Union, **the Methodists** – the Latvian United Methodist Church), as well as the **Orthodox –** the Latvian Orthodox Church, **the Old Believers –** the Latvian Old Believers Pomorie Church and **the Jewish denomination.**[14] "**Recognition"** by the state must be differentiated from "**registration"**, which religious organisations obtain through the registration process. Seven registered religious organisations have acquired it by special laws adopted by the Parliament (*Saeima*) of the Republic of Latvia,[15] but one – by an international agreement.[16]

The largest among them are the Roman Catholics, the Evangelic Lutherans, and the Orthodox. In terms of numbers, the smallest ones are the Adventists and the Methodists. All these organisations have been active in the territory of Latvia for a long time and have been recognised as loyal to the Republic of Latvia and its values. The long-term activities have been recognised by the State on the regulatory level. All the aforementioned organisations obtained their initial recognition already in 1936 when, upon adoption of the Civil Law, religions which had the right to register marriage on behalf of the state, were officially recognised.[17] When after the Soviet occupation, the Civil Law of 1937 was reinstated, it established, in lieu of the socialist relationship of the right to property, the free market, no discussion regarding the transfer of the right to marry to other religions ensued. Muslims and the representatives of other religious denominations are not included among State-recognised religions because in Latvia these are small. The state has delegated to the recognised religions not only

[14] The Jewish Religious Congregation of Riga and the Council of Latvian Jewish Communities and Congregations.

[15] Latvian Evangelical Lutheran Church Law: *Latvijas Vēstnesis* (Official Gazette), No 188(3972), 3 December, 2008; Seventh-day Adventist Latvian Congregation Union Law: *Latvijas Vēstnesis* (Official Gazette), No 93(3669), 12 June, 2007; Latvian Baptist Congregation Union Law: *Latvijas Vēstnesis* (Official Gazette), No 86(3662), 30 May, 2007; Latvian United Methodist Church Law: *Latvijas Vēstnesis* (Official Gazette), No 91(3667), 7 June, 2007; Latvian Orthodox Church Law: *Latvijas Vēstnesis* (Official Gazette), No 188(3972), 3 December, 2008; Latvian Old Believers Pomorie Church Law: *Latvijas Vēstnesis* (Official Gazette), No 98(3674), 20 June, 2007; Latvian Orthodox Church Law: *Latvijas Vēstnesis* (Official Gazette), No 188(3972), 3 December, 2008; Riga Jewish congregation Law: *Latvijas Vēstnesis* (Official Gazette), No 98(3674), 20 June, 2007.

[16] Agreement of the Republic of Latvia and the Holy See: *Latvijas Vēstnesis* (Official Gazette), No 137(2712), 25 September, 2002.

[17] Section 51 of the Latvia Civil Law "If the persons to be married belong to the Evangelical Lutheran, Roman Catholic, Orthodox, Old Believers, Methodist, Baptist, Seventh-day Adventist or believers in Moses (Judaism) denominations and wish to be married by a minister of their denomination who has the relevant permission from the leaders of the denomination, then they shall be married in accordance with the procedures of the denomination concerned".

marriage registration, but it has also allowed them to teach religion in schools. Until 2018, the policy of positive neutrality could be characterised as a "monopoly" of some denominational centres. With the judgement by the Constitutional Court of 26 April 2018, the state has changed this situation in the country by reinforcing the right to freedom of religion and to found new denominational centres. Hence, the separation between state and church has been reinforced even further. However, in view of the delegation of the Latvian State's functions and state support of churches in Latvia, in practice strict separation does not exist, but rather a partial separation from the state, the limits of which are not strictly demarcated.[18]

## 3. Legal Status of minor religious communities in Latvia

All minor religious communities can now easily obtain official status as religious organisations. To obtain legal personality, the authorized representative of the religious organization must submit an application for the registration of the religious organization with the Registrar of Enterprises of the Republic of Latvia (hereafter – Registrar). Paragraph 8 of Article $18^{14}$ of the Law on the Registrar of Enterprises of the Republic of Latvia states that competence of the Registrar does not extend to inquiries into decisions by religious organizations or its institutions. This means that the legislature has not delegated to the Registrar the right to check, under what conditions submitted documents are prepared. The Registrar's State notary checks whether registration documents were prepared in accordance with laws and regulations, rather than examining the adequacy of these documents vis-à-vis the factual truth. Both the Constitutional Court[19] and the Senate of the Supreme Court has repeatedly recognized [20] that the Registrar checks for the formal compliance of documents with the requirements set by law, but does not evaluate facts relevant to actual decision-making. In addition, the Religious Organisation Law Article $7^{1}$, paragraph 1 states, that legally registered religious organizations within statutory objectives in religious activities can form institutions that do not have profit-making purpose and nature. According to the second subparagraph of article $18^{14}$(3) of the Law on the Registrar of Enterprises of the Republic of Latvia, the State notary of the Registrar must take the decision to refuse registration of religious organization or its institu-

[18] Balodis R., 'Church and State in Latvia', in *State and Church in the European Union* (Baden – Baden, European Consortium for State and Church research, Nomos Verlagsgesellschaft, second ed., 2005), pp. 259-230.

[19] About compliance of article $59^{5}$ of Credit Institutions Law with the article 1 and 105 of Constitution of Republic of Latvia: Decision of the Constitutional Court of case No 2010-71-01, Latvijas Vestnesis (Official Gazette), No 167(4565), 21 October, 2011.

[20] Decision of the Senate of the Supreme Court 28 January, 2004 in case No SKC-31; decision 15 February, 2005 in case No SKA-27; decision 19 February 2007 in case No SKA-5/2007; decision 14 February, 2008 in case SKA 30/2008; decision 18 March, 2010 in case SKA-69/2010.

tion, if the Ministry of Justice concludes that there are reasonable grounds to believe that the activities and teachings of religious organizations are contrary to laws and regulations or endanger human rights, democratic country, public safety, welfare and morale. The State notary of the Registrar, deciding about the registration of religious organizations or their institutions, as well as employees of the Ministry of Justice who participate in the preparation of the opinion, should comply with those principles. If an individual feels that their rights have been unduly wronged, they have the right to challenge the decision of suspension or the refusal to register a religious organization to a higher authority, while the higher authority's decision can then be appealed in court. In both cases, - the appeal and the challenge - in administrative proceedings an assessment is made as to whether these principles have been met, thus providing an impartial decision, through a neutral and independent decision-making process. According to the Religious Organisation Law, twenty persons over 18 registered in the Latvian Citizens Registrar and sharing one confessional affiliation, may establish a religious organisation. Ten or more congregations of the same denomination with permanent registration status may form a religious association. As provided by the Religious Organisation Law, religious organisations (church congregations, religious communities and dioceses), seminaries, monasteries and diaconal institutions are to be registered. Only churches with religious association status may establish theological schools or monasteries. There are no differences between "younger" and "older" religious organisations, "religious minorities" or so called "traditional religious organisation" in Latvia.

## IV. Social and Legal Change

### 1. Post 1990 change

As regards changes that have taken place in the field of religious minorities, the period since the restoration of the Republic of Latvia needs to be examined. During the second period of Latvia's independence (from 1990 till now), the attitude towards religious minorities can be properly understood based on five stages.

#### A. *The first "Law on Religious Organisations" (1990 – 1995)*

In one single year the Latvian Transition Parliament - Supreme Council adopted 140 laws and 349 ordinances to bridge the legislative gaps[21]. In 1991 Latvia became party to 51 international human rights documents[22]. Although sometimes serious

[21] Birkavs, V. Ievads, Vītiņš V. Vispārējs tiesību pārskats (General overview of law). Riga: Verdikts, 1993, p. 8.

[22] Par Latvijas Republikas pievienošanos starptautisko tiesību dokumentiem cilvēktiesību jautājumos: LPSR AP deklarācija (On joining of the Republic of Latvia to international human rights

problems were caused by revoking the old USSR provisions, mostly related to the inability to replace them with new and efficient legislation,[23] in general the process proceeded with admirable success. The Transition Parliament subordinated its work to the new legislative reality.[24] The separation of the church from the state in Latvia from the beginning was established by law[25] and within four months of proclaiming the Declaration of Independence[26], the Parliament adopted the law "On Religious Organisations". [27] The law revokes the regulatory enactments of the Latvian SSR on religious organisations and, on the basis of international law, recognises every person's, both natural and legal persons', rights to freedom of religion and equality.[28] The law of 1990 is general, rather naïve, however, extremely liberal (ten persons may establish a congregation and three congregations may create a religious association, namely a church) and provides the basis for the adoption of other laws, which allowed for the gradual denationalisation of the churches' property.[29] These laws were poorly drafted, however, they fulfil their main mission – first of all, they ensure the registration of religious organisations; secondly, they ensure legal clarity regarding the status of churches, so that they can regain property previously nationalised, as a result of the Soviet occupation; thirdly they lay the foundations for the future model for the relationship between the state and churches. It must be noted that the 1990 Law "On Religious Organizations" (Section 2 (4)) provided that the Advisory Council on Religious Matters should be established at the Latvian Parliament. Every registered

documents: Declaration of the Supreme Council of the LSSR). *Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs*, No. 21, 1990.

[23] Lēbers, A., Bišers, I. Komentārs Latvijas Republikas Satversmes IV nodaļai "Ministru kabinets" (Commentary on Chapter IV "Cabinet of Ministers" of the Constitution of the Republic of Latvia). Riga: Privatizējamā valsts SIA "Tiesiskās informācijas centrs", 1998, p. 24.

[24] Balodis, R., Kārkliņa, A. Valsts tiesību attīstība Latvijā: otrais neatkarības laiks (Development of state law in Latvia: the second period of independence). *Latvijas Universitātes žurnāls,* No. 1. Legal Science. University of Latvia, 2010.

[25] Konstitucionālais likums "Cilvēka un pilsoņa tiesības un pienākumi" (Constitutional law "Rights and Duties of People and Citizens". Law of the Supreme Council of the Republic of Latvia, not effective. *LR Saeimas un MK Ziņotājs*, No. 4, 1992.

[26] Par Latvijas Republikas neatkarības atjaunošanu (On the Restoration of independence of the Republic of Latvia). Declaration of the Supreme Council of LSSR. *LR Saeimas un MK Ziņotājs*. No. 20, 1990.

[27] Likums par reliģiskajām organizācijām (law "On Religious Organizations"). Law of the Supreme Council of the Republic of Latvia, not effective. *Latvijas Republikas Augstākās Padomes un Valdības ziņotājs*, No. 40, 1990. https://m.likumi.lv/doc.php?id=72588.

[28] The law "On Religious Organizations" (Section 9) allows the ecclesiastical and also administrative employees to establish trade unions, sets the rules of social insurance, granting and disbursing of pensions (Section 10), the rights of the religious organisations to import religious literature (Section 7).

[29] Par īpašumu atdošanu reliģiskajām organizācijām (On the return of property to religious organisations): Law of the Supreme Council of the Republic of Latvia. *LR Saeimas un MK Ziņotājs*, No. 22/23. 1992.

religious organisation has the right to delegate its representatives to the Council. Thus, religious minorities, in practice, gain as large representation as the others. It must be noted that this Council was granted the right to legislative initiative.

### B. *The second "Law on Religious Organisations" (1995)*

This law marks a new period in the relationship between the state and the church[30]. However, the new law is pronouncedly stricter with respect to religious minorities. For example, 10 congregations, instead of 3, are required in order to be able to register as a church. A 10-year moratorium on re-registration was established, as well as a prohibition to establish a church during this period. Additionally, Section 7 (3) of the Law provides for **"one denomination – one Church"**. The Latvian Parliament adopted the regulation without major discussions, the motivation being as follows: "*Latvia is inundated by the invasion of foreign, previously unseen religious or pseudo-religious trends. The majority of the new trends are not only totally foreign to the Latvian mentality but often are also engaged in unlawful or even anti-governmental activities*". The Parliament deliberately reinforced the status of the historical Latvian churches, at the same time creating impediments to the creation of new religious movements and for the launch of their activities in full. In 1998, such restrictions did not hinder the legislator from adding to the Constitution, the Chapter on Fundamental Rights, Article 99 which defines the separation of the church from the state and freedom of religion.

### C. *Reinforcing traditional churches (2000 – 2009)*

In 2000 – 2002, Latvia concluded and ratified an Agreement with the Holy See. Following the agreement with the Holy See, in 2004, the Government concluded agreements with six Christian Churches and in 2006 – with the Jewish Congregation, on the basis of which in the period from 2007 to 2008, seven laws were adopted (hereafter – the Special Church Laws) with the Evangelical **Lutheran** Church, the Latvian Association of Seventh-day **Adventist** Congregations, the Union of **Baptist** Churches, the Riga **Jewish** Religious Community, the Latvian United **Methodist** Church, the Latvian **Old-Believers** Pomor Church, and the Latvian **Orthodox** Church. The special laws recognise the traditionalism of particular religious organisations, protect their name against unlawful use, safeguard their right to interpret the Holy Scriptures, their right to conclude state-recognised marriages, their right to conduct religious ceremonies in cemeteries owned by local governments, their right to provide a chaplain service, their right to establish and terminate employment relationships that are

[30] Reliģisko organizāciju likums (Law on Religious Organisations), *Official gazette* Latvijas Vēstnesis 26.09.1995, Nr.146.

based on a person's religious affiliation and loyalty towards their teaching (doctrine), or other views and principles, their right to protection as confessions or a pastoral conversion, and more. The seven special laws define the status of a traditional religious organisation for each of the aforementioned religious organisations, although the state did not grant any of them legal personality.

In 2000 a new governmental authority was created. From 2000 till 2008, the Board of Religious Affairs (*Reliģisko lietu pārvalde*) was responsible for making proposals on arrangements for the elimination of infringements of human rights. The main responsibility of the Board was the record religious organizations in the public register, and to check the compliance of documents connected with the establishment and activity of religious organisations and other institutions. The Board of Religious Affairs on a constant basis and in co-operation with other state institutions was tasked to prepare and submit to the Minister of Justice information on infringements of clause 99 of the of Constitution, infringements of other normative acts regulating human rights and analyses of circumstances preceding the violations of law. It is important to note that in Latvia, as in Poland or Hungary, the legal framework of religious communities generally can be expected to be more supportive to traditional communities than to newly emerging groups. To sum up the deeds of this period, it can be noted that Latvia, by reinforcing traditional religious organisations, also appeased them. The bases for religious pluralism had been set up in Latvia, which also meant a significant weakening of the state's supervision.

### D. *Formalisation of the registration procedure for religious organisations 2009 – 2018*

The Amendments to The Law on Religious Organisations adopted by the Latvian Parliament on 18 December 2008, abolished the Religious Affairs Board. From 1st January, 2009 religious organizations and their institutions are registered by the Registrar of Religious Organizations and their Institutions. The Registrar of Enterprises of the Republic of Latvia maintains this Registrar. The Ministry of Justice is in charge of handling relations between the state and religious organizations, within the competence set by laws and other normative acts it ensures elaboration, co-ordination and implementation of state's policy on religious affairs, it deals with issues connected to mutual relations between the state and religious organizations. In Latvia, registration procedures are now formalised, and religious organisations are not supervised. The Ministry of Justice's supervision of registration procedures could rather be regarded as a form of mediation between the security police and the Registrar of Enterprises. The Ministry of Justice communicates with religious minorities and, if necessary, becomes involved in conflict resolution and the provision of advice.

### E. *Revocation of the restrictions for new religious minorities in 2018*

By its ruling on 26 April 2018, the Latvian Constitutional Court significantly transformed the relationship between the state and the church. The Court revoked legal restrictions set by the Religious Organisation Law (Section 7 (2), Section 8 (4), placed on new religious organisations. Presently any religious organisation, which becomes registered in Latvia, acquires an equal status to any previously-registered religious organisations. The Constitutional Court revoked the respective norms, on the basis of an application by the Latvian Supreme Court, which, in turn, based its application on the complaint submitted by an unregistered minority of the Orthodox Church – the Latvian Autonomous Orthodox Church – regarding the refusal to register it. The Supreme Court obtained that the Latvian Constitutional Court examined the compliance of the Religious Organisation Law with Article 99 of the Latvian Constitution (freedom of religion and the separation of the church from the state), Article 102 (the right to association) and Article 91 (the principle of equality and prohibition of discrimination). In this case, the Latvian Constitutional Court heard the opinions of the so-called "traditional religious denominations", the Parliament and the Ministry of Justice, which held that the norms of the Religious Organisation Law were compatible with the Constitution, and concluded the contrary, ruling that the norms, were in fact in contradiction with the Constitution.

## 2. **Legal change**

All Latvian regulatory enactments do not mention "religious minorities" but rather underscore equality and freedom of religion. Firstly, this can be seen in the 4th paragraph of the Preamble to the Latvian Constitution[31], which provides that Latvia is a democratic, socially responsible national state based on the rule of law and on respect for human dignity and freedom; it recognises and protects fundamental human rights and respects ethnic minorities.

Since the restoration of independence, major achievements have been made. Firstly, in 1998 a new Chapter was added to the Constitution, which includes reference to fundamental human rights (Articles 89 – 116), and in 2013 a new Preamble was added to the Constitution. It should be noted that the Latvian Constitution was adopted in 1922, but was suspended in 1934, and reinstated in full in 1993; therefore, clearly, changes occur gradually.

[31] "Latvia as democratic, socially responsible and national state is based on the rule of law and on respect for human dignity and freedom; it recognises and protects fundamental human rights and respects ethnic minorities. The people of Latvia protect their sovereignty, national independence, territory, territorial integrity and democratic system of government of the State of Latvia". (Section 4 of the Preamble Constitution of the Republic of Latvia).

Article 91 of the Constitution applies to religion; it establishes equal treatment in Latvia and prohibits any kind of discrimination, whereas Article 99, which is also applicable, consists of two sentences: "*Everyone has the right to freedom of thought, conscience and religion. The church shall be separate from the State"*. Each of these sentences defines the content of the relationship between state and religion. In the first sentence, which is the principal clause of the Article, the legislator has included "the clause of freedom of religion", whereas the second, the auxiliary clause, is "the clause on the separation of the church from the state." As the Constitutional Court of the Republic of Latvia has recognised[32], freedom of thought, conscience and religious belief is one of the most significant values in a democratic society. This freedom encompasses various religious, non-religious and atheistic views, as well as the right to convert to any religion or be non-affiliated. Freedom of religion, which is established by Article 99 of the Constitution, in the opinion of the Court, should be interpreted broadly.

The Court has found that in Latvia not only the existence of religious belief, but also expression thereof is protected.[33] The Constitutional Court found[34] that freedom of religious belief, defined in Article 99 of the Constitution, applies not only to various religious but also to non-religious and even atheistic views. The right of every person to convert to a religion or to be non-affiliated with any religions must also be protected. The Constitutional Court has recognised that the dimension of freedoms included in Article 99 of the Latvian Constitution is an important element shaping the identity and views of life of a religious person. In examining this Article in connection with Article 116 of the Constitution, the Constitutional Court concluded that the internal aspect of religious belief (in Latin – *forum internum*) is separate from the right to devote oneself to religion, the expression of religious beliefs and the right to public manifestation of freedom of religion (in Latin – *forum externum*). Although freedom of religion is primarily a matter of a person's internal consciousness, it also pertains to the right to devote oneself to one's religion or to express one's religious beliefs. The expression of religious beliefs comprises, *inter alia*, worshipping, the performance of religious and ritualistic ceremonies and preaching. The internal expressions of religion may not be restricted.[35]

[32] Judgement of 18 March 2011 by the Constitutional Court of the Republic of Latvia in Case No.2010-5—03, Para 7.1. of the Findings.

[33] *Ibid*.

[34] Judgement of 26 April 2018 by the Constitutional Court of the Republic of Latvia in Case No. 2017-18-01, Para 8 of the Findings.

[35] *Ibid*.

## V. Social and legal developments

Information about the number of believers is made available to the state by registered religious organisations. This information is not verified in any way. The census does not inquire about religious beliefs. The relativeness of the data provided to the state is vividly revealed by information about the number of Muslims in Latvia. Registered Muslim congregations report to the Ministry of Justice 300 members, whereas in publicly accessible sources of information the number of Muslims ranges between 1.000 and even 10.000 believers. The case of Muslims is interesting also because normally religious organisations tend to exaggerate the number of their adherents. The total number of believers in the country of approximately 1.5 million drawn from information collected by religious organisations, is also misleading. This means that atheists and those without religious belonging make up only ¼ of the total population. This, of course, is unlikely, because Latvian society is predominantly non-religious. For instance, religion lessons in school are taken by an extremely low number of pupils. The same applies to church marriages, the number of which is diminishing. In view of the above, it is rather difficult to assess the true nature of changes that have occurred in terms of people's religious beliefs.

# THE CHALLENGE OF EQUALITY OF RIGHTS: THE LEGAL STATUS OF RELIGIOUS MINORITIES IN POLAND

Piotr Stanisz*

## I. Introduction

One of the characteristics of Polish society is its relatively high degree of religious uniformity; a situation not typically seen in contemporary Europe. This state of affairs has not come about naturally, but is a consequence of World War II (the Holocaust), as well as of decisions made post-war to move Poland's borders to the West which resulted in mass relocations of people. Prior to 1939, Poland demonstrated substantially greater religious diversity,[1] and the Constitution of 17 March 1921 granted the Catholic Church 'the chief position among religions enjoying equal rights' (art. 114).[2]

No major changes in the religious structure of society were brought about by over 40 years of Communism post-war, despite the regime's materialistic ideology, marginalisation of socially significant religious communities and application of the *divide et impera* principle in the field of state-church relations and policies on religion. As a result, it was only after 1989 that issues pertaining to proper regulation of the status of religious minorities in the context of the sociological dominance of the Catholic Church became the focus of deeper reflection and the object of legal regulations made in accordance with the principles of the democratic state of law. Creating favourable conditions for the realisation of religious freedom (as well as other rights and freedoms) naturally led to new problems, both practical and theoretical in nature, which had to be faced.

* John Paul II Catholic University of Lublin.

[1] According to data from 1921, Roman Catholics comprised about 60 percent of the population. Other numerous religious groups were Greek Catholics (11.1%), Orthodox (10.5%), Jews (10.5%) and Evangelicals (3.7%). H. Misztal, 'Druga Rzeczpospolita (1918-1939)', in H. Misztal and P. Stanisz (eds.), *Prawo wyznaniowe* (Lublin – Sandomierz: Wydawnictwo Diecezjalne w Sandomierzu, 2003), p. 97.

[2] *Dziennik Ustaw* (Polish Official Journal) 1921, No. 44, item 267 (as amended).

## II. Definition and status

### 1. Social science definition

The denominational structure of Polish society makes it natural to speak of a Catholic majority and treat all remaining religious organisations as minorities. It is in this sense that the concept of 'religious minorities' is also used in sociology and religious studies, and no special definition is ascribed to it.[3]

'Religious minorities' are typically argued to include 'new religious movements'. However, understanding of this term is not uniform and remains rather intuitive. Some assess the 'newness' of religious movements exclusively from the perspective of Poland (which leads to categorizing Buddhism and the Krishna Consciousness Movement as new religious movements),[4] while others tend to adopt a more universal approach.[5]

When characterizing the so-called 'new religious movements', scholars commonly point to their considerable diversity. According to one of the more convincing theories, this category embraces the following: 'movements originating in, or referring to, Oriental spirituality', 'movements which […] draw upon the Christian tradition' (such as, for example, the Unification Church), 'Polish neopagan movements' (which 'appear to be a trend within the so-called invented traditions', such as, for example, the Native Polish Church or the Polish Slavic Church), scientist movements (the Raëlians, the Church of Scientology, etc.), as well as movements situated within esoteric and occult traditions, neo-gnostic movements and different varieties of Polish Satanism (which all share common properties, such as 'anti-Christian attitude, alternative morality, frequently clandestine mode of operation […], anthropology assuming inequality of humans').[6]

Issues connected with the activity of religious minorities, including new religious movements, are investigated by sociologists of religion, scholars in religious studies, and even Catholic theologians, while the legal status of these communities is primarily the domain of specialists in law on religion. However, no broader interdisciplinary research has been conducted thus far.

[3] See, e.g. Z. Pasek, 'Religious minorities in contemporary Poland' in S. Ramet and I. Borowik (eds.), *Religion, Politics, and Values in Poland: Continuity and Change since 1989* (New York: Palgrave Macmillan, 2017), pp. 161-182; K. Urban, *Mniejszości religijne w Polsce 1945–1991 /zarys statystyczny/* (Kraków: NOMOS, 1994).

[4] See T. Doktór, *Nowe ruchy religijne i parareligijne w Polsce. Mały słownik* (Warszawa: Verbinum, 1999).

[5] Pasek, 'Religious minorities', p. 177.

[6] *Ibid.*, pp. 176-179.

## 2. Legal definition

Polish law does not use the term 'religious minority' but commonly refers to 'national and ethnic minorities', implicitly recognising their potential religious distinctiveness. In art. 35 para. 2 of the Constitution of the Republic of Poland,[7] national and ethnic minorities are guaranteed, amongst other things, the right to establish institutions designed to protect their religious identity. A similar approach can be found in good-neighbourliness, friendship and co-operation agreements made between Poland and numerous states. For example, in the Treaty of 23 June 1992 between the Republic of Poland and Belarus on good-neighbourliness and friendly co-operation,[8] the contracting parties confirmed the right of the Polish minority in Belarus, and the Belarusian minority in Poland, to freely maintain, develop and express their identity – not only ethnic, cultural and linguistic, but also religious identity (art. 14).

In Polish law, a national or ethnic minority is a group of Polish citizens that is numerically smaller than the rest of the population, has a distinct language, culture or tradition which it strives to maintain, is aware of being a historical community of its own and aims to express and protect this awareness. This group's ancestors must have lived on contemporary Polish territory for at least 100 years. The difference between a national and ethnic minority is that the former – apart from the aforementioned properties – identifies with a nation organised as a state of its own, while the latter does not identify with such a nation (see the Act of 6 January 2005 on National and Ethnic Minorities and on Regional Language, art. 2).[9]

Given the legal situation described above, executive and judicial authorities do not face the problem of defining a 'religious minority'. In judgements given by Polish courts and in documents signed by authorities at various levels, this term is used very infrequently and only incidentally. It can be found almost exclusively in: (1) factual descriptions in judicial cases pertaining to granting refugee status,[10] (2) in some court decisions when parties' arguments are presented,[11] and (3) in official interpretations of some tax regulations (which refer to activities conducted for the benefit of ethnic and religious minorities).[12]

[7] *Dziennik Ustaw* 1997 No. 78, item 483 (as amended).

[8] *Dziennik Ustaw* 1993 No. 118, item 527.

[9] *Dziennik Ustaw* 2017, item 823.

[10] See, e.g., the judgements of the Supreme Administrative Court of 12 Sep 2007, II OSK 1785/06 (Lex no. 384271) and 31 Aug 2000, V SA 1758/99 (Lex no. 2224685).

[11] See, e.g., the judgement of the Supreme Administrative Court of 4 Jul 2014, I OSK 2826/13 (Lex no. 2006626) or the judgement of the Regional (*Voivodeship*) Administrative Court in Rzeszów of 26 Jun 2013, II SAB/Rz 53/13 (Lex no. 1362068).

[12] See, e.g., the letter (individual interpretation) of the Tax Office in Poznań of 27 Apr 2012, ILPP1/443-84/12-4/NS (Lex no. 156693) and the letter (individual interpretation) of the Tax Office in Warsaw of 16 Jan 2013, IPPB3/423-950/08-5/13/S/AG (Lex no. 193813).

Polish law uses other terms that point to some diversity among religious organisations (which are understood to be religious communities 'set up in order to profess and spread religious faith and having its own organisation, doctrine and rituals'; see the Act of 17 May 1989 on the Guarantees of Freedom of Conscience and Belief, art. 2 para. 1).[13] For example, the Constitution of the Republic of Poland refers to 'churches and other religious organisations' (e.g., art. 25 para. 1), or it distinguishes between the Catholic Church on the one hand and 'other churches and religious organisations' on the other (see art. 25 para. 4–5).

In Poland, there is no obligation to legalise or formalise the functioning of communities established for religious purposes. They can operate as informal groups without legal personality. In order to obtain legal recognition, they can for example acquire the status of associations or foundations. However, there is a special organisational form applicable to religious communities, namely that of a religious organisation (*związek wyznaniowy*). Once acquired, such a status is linked to specific rights and obligations. Polish law establishes two methods for regulating the legal situation of non-Catholic religious organisations. The simpler of the two is being listed in the register of churches and other religious organisations. The second method involves the enactment of a separate act that regulates the relationship between the state and a given religious organisation.[14]

The registration procedure is initiated by submitting an application, along with a declaration of establishing a religious organization, to the registration authority (who is the minister competent for religious affairs; currently the Minister of the Interior and Administration). Organisations that are not deemed to have a religious character are not added to the register of churches and other religious organisations (such as with the case of the Polish Raëlian Movement and the Church of the Flying Spaghetti Monster). The Supreme Administrative Court, investigating the complaint filed by representatives of the Polish Raëlian Movement, agreed with the minister and stated that the doctrine of the Movement did not correspond to the familiar patterns of religion, and rather bore the hallmarks of a programme of a political party or – possibly – an association. The doctrine of the organisation did not include any references to the sacred, which are required in the case of religious doctrines.[15] As for the Church of the Flying Spaghetti Monster, the first Minister's decision (refusing to add it to the register) was based upon the opinion of specialists who stated that the church at issue should be counted among joke religions, and that its set of beliefs 'definitely

[13] *Dziennik Ustaw* 2017, item 1153.

[14] See P. Stanisz, *Religion and Law in Poland* (Alphen aan den Rijn: Wolters Kluwer, 2020), pp. 65-70.

[15] Judgement of the Supreme Administrative Court of 22 Jan 1999, I SA 775/98 (unpublished).

shows the signs of a parody of already-existing doctrines'.[16] In subsequent judgements passed on this case, it has been indicated that if an application for registration concerns an entity that does not have the attributes of a religious organisation, the registration authority – instead of issuing a registry refusal – should (pursuant to art. 61a and art. 105 § 1 of the Code of Administrative Procedure[17]) refuse to initiate the registration process, or dismiss the procedure that has already been initiated.[18]

It has been suggested in the literature that the registering authority has no right to assess the religious character of a community. If this is so, registering an entity that has made an application would have to be obligatory if there were no circumstances specified in art. 33 para. 2–3 of the Act on the Guarantees of Freedom of Conscience and Belief (which does not refer to lack of religious character).[19] It appears, however, that the decision ultimately taken by the registering authority (who dismissed the procedure in accordance with the opinion of the Supreme Administrative Court) was correct in this case. Ministerial verification of the declaration concerning religious character by a group should be considered not only permissible, but also obligatory (when taking the decision whether particular proceedings should – according to the provisions of the Code of Administrative Procedure – be initiated in the first place).

An application for registration requires endorsement of at least 100 Polish citizens who must have full legal capacity. It should provide specifically defined information about the group applying for entry onto the register. In addition, an internal statute is a mandatory element of the application. The Guarantees of Freedom of Conscience and Belief Act of 17 May 1989 expressly indicates the circumstances under which the minister is obliged to refuse entry onto the register. Such a decision must primarily rest on the conclusion that the content of the application is inconsistent with the provisions of the laws on the protection of security and public order, health, public morality, parental authority or the fundamental rights and freedoms of others. The registration authority ought to take the same decision if the application is incomplete, and has still not been completed following an official request. It is assumed that if no circumstances that might serve as the basis for a negative decision

[16] Decision of the Minister of Administration and Digitization of 10 Oct 2014, DWRMNiE-WROA.6120.10.2014 (unpublished).

[17] *Dziennik Ustaw* 2018, item 2096 (as amended).

[18] Judgement of the Regional (*Voivodship*) Administrative Court in Warsaw of 8 Apr 2014, I SA/Wa 1517/13 (Lex no. 1464959); judgement of the Regional (*Voivodship*) Administrative Court in Warsaw of 19 May 2016, I SA/Wa 1804/15 (Lex no. 2459112); judgement of the Supreme Administrative Court of 27 Jul 2018, II OSK 2217/16 (Lex 2592090).

[19] J. Cupriak, 'W obronie Kościoła Latającego Potwora Spaghetti'(2013) 2 *Miesięcznik Ewangelicki (Pismo er)*, <http://ewangelicki.pl/erpublica/w-obronie-kosciola-latajacego-potwora-spaghetti-jakub-cupriak/> (accessed 15 January 2021).

occur, the minister is obliged to register the organisation. As of 4 January 2019, the register lists 166 churches and other religious organisations.[20]

Polish legal doctrine has not yet posed the question if the registration procedure complies with the 2015 OSCE Guidelines on the Legal Personality of Religious or Belief Communities.[21] A preliminary analysis leads to the conclusion that the requirement to support an application for entry into the register by (as many as) 100 applicants, as well as the requirement for the applicants to be Polish citizens, may raise some questions.

Legal scholars primarily make use of categories and concepts used in legal provisions. Consequently, they refer to the term 'religious minority' rather infrequently, using it only in its ordinary sense. A similar meaning is associated with such expressions as 'minority religious organisations' (*mniejszościowe związki wyznaniowe*)[22] or 'non-Roman Catholic religious organisations' (*nierzymskokatolickie związki wyznaniowe*).[23] Both expressions are more legal in nature and refer to all religious organisations except for the Catholic Church, thus undoubtedly emphasising differences between them. It is clear, however, that the scope of these terms encompasses only entities that can be considered 'religious organisations' in the legal sense of the term. It does not include communities that make use of other legal forms, such as associations or foundations.

So far, the doctrine has proposed no comprehensive and convincing explanation of the status of religious communities acting as informal groups. Only very few scholars have paid attention to the issue, stating that such communities take advantage of regulations concerning religious freedom in the individual and collective sense. They suggest that these communities are entitled to various rights pertaining to religious organisations, as Polish law reserves particular rights to religious organisations with regulated legal status only in some cases.[24] Some scholars (referring to the art. 17 of

[20] See <https://www.gov.pl/web/mswia/rejestr-kosciolow-i-innych-zwiazkow-wyznaniowych> (accessed 15 January 2021).

[21] See <https://www.osce.org/odihr/139046> (accessed 15 January 2021).

[22] E.g., T. J. Zieliński (ed.), *Władze Polski Ludowej a mniejszościowe związki wyznaniowe* (Warszawa: Credo, 2000); W. Wysoczański, 'Wpływ Konkordatu z 1993 r. na sytuację prawną kościołów i innych związków wyznaniowych mniejszościowych' in J. Wroceński and H. Pietrzak (eds.), *Konkordat polski w 10 lat po ratyfikacji* (Warsawa: Wydawnictwo UKSW, 2008), pp. 69-85.

[23] E.g., P. Leszczyński, *Regulacja stosunków między państwem a nierzymskokatolickimi Kościołami i innymi związkami wyznaniowymi określona w art. 25 ust. 5 Konstytucji RP* (Gorzów Wielkopolski: Wydawnictwo Naukowe Państwowej Wyższej Szkoły Zawodowej, 2012); J. Matwiejuk, 'Konkordat z 1993 roku a pozycja prawna Kościołów i związków wyznaniowych nierzymskokatolickich' in A. Mezglewski (ed.), *Prawo wyznaniowe w systemie prawa polskiego* (Lublin: Wydawnictwo KUL, 2004), pp. 227-253.

[24] See, e.g., T. J. Zieliński, 'Pojęcie religii, wyznania, związku wyznaniowego i kościoła w Konstytucji Rzeczypospolitej Polskiej' (2007) 1 *Prawo i Religia*, p. 47.

the Treaty on the Functioning of the European Union[25]) have called for legal equality between non-confessional and religious organisations.[26] However, such postulates in Poland have not yet met with any broader recognition[27].

Polish legal scholars are reluctant to use such terms as 'new religious movements' or 'sects'. They are aware that these terms are not used in the provisions of Polish law and therefore do not concern entities that have a clearly defined legal status. The two terms can also be misunderstood, such as being taken to mean the same thing.[28] Some authors rightly note that the connotations of the term 'sect' in Polish are decidedly pejorative, while the concept of 'new religious movements' is more neutral.[29] In light of this, some researchers suggest adopting a clear distinction between sects (understood as socially harmful organisations) and new religious movements.[30]

Both the International Covenant on Civil and Political Rights 1966[31] and the Framework Convention for the Protection of National Minorities 1995[32] are ratified international agreements and therefore constitute sources of universally binding law of the Republic of Poland (art. 87 of the Polish Constitution). They 'shall constitute part of the domestic legal order and shall be applied directly, unless [their] application depends on the enactment of a statute'. Moreover, as international agreements ratified upon prior consent granted by parliament, they 'shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statute' (art. 91 para. 1–2 of the Constitution).

Polish commentators of the Covenant do not notice any deficiencies concerning the protection of religious minorities in Polish law. However, they note that the Human Rights Committee in the General Comment no. 23 stated that 'the individuals designed to be protected need not be citizens of the State party' (5.1). Art. 35 of the Polish Constitution, for its part, contains guarantees of rights for Polish citizens who

[25] Consolidated version: *Official Journal of the European Union* C 326, 26.10.2012, pp. 47-390.

[26] M. Pietrzak, *Prawo wyznaniowe* (Warszawa: LexisNexis, 2010), p. 309.

[27] In 2014, a group of MPs submitted a draft bill to Parliament to extend the regulations on the cooperation of the state with religious organisations to secular organisations. However, it received negative reviews from both the government and the parliamentary Commission of Administration and Digitization and as a result had no chance of becoming law. See *Druk nr 2482. Poselski projekt ustawy o zmianie ustawy o gwarancjach wolności sumienia i wyznania*, <http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=2482> (accessed 15 January 2021).

[28] See A. Czohara, 'Prawne aspekty stosunku państwa do tzw. sekt' (2009) 1 *Przegląd Prawa Wyznaniowego*, p. 75.

[29] E. Guzik, 'Prawne aspekty działalności sekt religijnych w Polsce' (2000) 3 *Państwo i Prawo*, pp. 45-47.

[30] M. Szostak, *Sekty destrukcyjne. Studium matodologiczno-kryminalistyczne* (Kraków: Zakamycze, 2001), pp. 60-61.

[31] *Dziennik Ustaw* 1977 No. 38, item 167.

[32] *Dziennik Ustaw* 2002 No. 22, item 209.

belong to minority groups.[33] The rights of 'groups of Polish citizens' are also ensured in the Act of 6 January 2005 on National and Ethnic Minorities and on Regional Language (see art. 2). It should be noted that when ratifying the Framework Convention 1995, the Republic of Poland stated in the Declaration of interpretation that in view of the lack of a definition of 'national minorities' in this Convention, 'it understands this term as national minorities residing within the territory of the Republic of Poland […] whose members are Polish citizens'.[34]

## 3. **Legal status**

According to art. 25 para. 1 of the Polish Constitution, 'churches and other religious organisations shall have equal rights'. The principle of equal rights of all religious organisations, no matter how their legal situation is regulated, is also included in the Act of 17 May 1989 on the Guarantees of Freedom of Conscience and Belief (art. 9). Both provisions refer to religious organisations and do not pertain to communities which have chosen to act as associations, foundations or business entities.

According to the Polish Constitutional Tribunal, equal treatment should be given to such religious organisations that are characterised by a common distinctive feature. Thus, not every instance of diversification of the legal situation of religious organisations can constitute an infringement of the principle at issue. In the case of religious organisations 'which do not have a common feature relevant from the point of view of a certain regulation', different treatment is justified (judgement 2 April 2003, K 13/02).[35] The Tribunal also observed that what makes the differentiation of religious organisations admissible is, amongst other issues, the fact that the relations between them and the State are to be regulated by acts based on previously adopted agreements (judgement of 14 December 2009, K 55/07).[36]

At the level of ordinary acts, it is easy to find regulations which do not treat every religious organisation in exactly the same way. In view of this, some authors voice numerous objections regarding the respect of the principle expressed in art. 25 para. 1 of the Polish Constitution.[37] Such opinions seem too radical. Examples of regulations that do not comply with the constitutional provision in question can however be

[33] See R. Wieruszewski (ed.), A. Gliszczyńska-Grabias, K. Sękowska-Kozłowska, W. Sobczak, L. Wiśniewski, *Międzynarodowy Pakt Praw Obywatelskich (Osobistych) i Politycznych. Komentarz* (Warszawa: Wolters Kluwer, 2012).

[34] *Dziennik Ustaw* 2002 No. 22, item 209.

[35] *Orzecznictwo Trybunału Konstytucyjnego* 2003, series A, no. 4, item 28.

[36] *Orzecznictwo Trybunału Konstytucyjnego* 2009, series A, no. 11, item 167. See A. M. Abramowicz, 'Zasada równouprawnienia związków wyznaniowych w orzecznictwie Trybunału Konstytucyjnego' (2015) 18 *Studia z Prawa Wyznaniowego*, pp. 231-261.

[37] See, e.g., P. Borecki, 'Zasada równouprawnienia wyznań w prawie polskim' (2007) 10 *Studia z Prawa Wyznaniowego*, pp. 138-159.

found. For instance, the right to conclude civil marriages in religious form is unjustly limited only to religious organisations whose legal situation is regulated by a separate act (and as a matter of fact, this right – for various reasons – was not granted to all fifteen organisations from this group, but only to eleven of them). The possibility of acquiring this right is completely excluded for religious organisations that are listed in the register (see the Family and Guardianship Code, art. 1 § 3).[38] In some other cases, differentiation of treatment should nevertheless be considered as complying with the principle of equal rights of all religious organisations interpreted in the light of the jurisprudence of the Constitutional Tribunal. This can be said about regulations concerning religious instruction at schools. According to the Constitution, religion of any religious organisation which has regulated legal status can be taught at school. However, classes in a specific religion at a particular school are only organised when parents of at least seven students (or students themselves, depending on their age) declare that they are willing to participate in such classes. When the group of interested students is smaller, it is possible to organise religious instruction outside school, in inter-school groups or religious education centres (but still within the system of education), irrespective of the number of pupils involved (see the Regulation of the Minister of National Education of 14 April 1992 on Conditions and Manner of Organizing Religious Instruction in Public Kindergartens and Schools).[39]

## III. Social and legal change

### 1. Social change

Democratic changes at the turn of the 1980s and 1990s created favourable conditions for the development of various forms of religiousness. 23 religious organisations were registered in 1990 alone, and 10 religious organisations were on average registered every year between 1990 and 1998 (113 of them were entered onto the register of churches and other religious organisations in the years 1990-1998; some of them ceased operating after a short period of time, however). This phenomenon gave rise the so called "anti-cult movement".[40] The government set up the Interdepartmental Team for New Religious Movements in 1996, which published a report warning against the activity of some religious groups in 2000. Similar initiatives were also taken up by the Catholic Church (e.g., the Dominican information centres on new

[38] See P. Stanisz, 'The status of religious organizations in Poland: equal rights and differentiation' in W. C. Durham, Jr. and D. D. Thayer (eds.), *Religion, Pluralism, and Reconciling Difference* (Abingdon – New York: Routledge, 2019), pp. 147-158.

[39] *Dziennik Ustaw* 1992 No. 36, item 155 (as amended). See A. M. Abramowicz, 'Teaching of religion in the system of public education and equality of religious organisations' (2015) 3 *Roczniki Nauk Prawnych*, pp. 7-32.

[40] Pasek, 'Religious minorities', p. 179.

religious movements and sects, which are still maintained to this day).[41] Since 1998, the number of registered religious organisations has been rising much more slowly than before. For the past ten years, the number of registered religious organisations has increased annually by no more than 3.[42]

Currently, slightly over 33 million people living in Poland belong to the Catholic Church of the Latin rite, which constitutes about 90% of the entire population (38.5 million).[43] In addition to the Latin (Roman Catholic) rite, there are three other Catholic rites present in Poland: Byzantine-Ukrainian (Greek Catholics; 33,000–55,000), Armenian and Byzantine-Slavonic (the size of the latter two does not exceed 1,000 people).

Amongst other Christian churches, the Polish Autocephalous Orthodox Church is the most numerous. The data on its faithful, however, varies quite significantly. According to statistics released by representatives of this group, the number of people professing Orthodoxy amounts to 500,000. However, data from the 2011 National Census shows this number to be overstated, and it is assumed that there are 160,000–200,000 Orthodox believers in Poland (living primarily in the eastern parts of the country).

Protestantism encompasses approximately thirty (relatively small) religious organisations. All Protestant Churches and Churches of the Protestant tradition encompass no more than 150,000 people altogether. The most numerous is the Evangelical Church of the Augsburg Confession, which brings together more than 60,000 faithful, living mostly in the Śląsk Cieszyński region. A number of religious communities belonging to the Protestant tradition are exclusively local in character.

Jehovah's Witnesses are a relatively large religious minority in Poland. Their organisation has about 120,000 proclaimers, though their numbers have decreased over the past few years. The number of organisational units belonging to the Religious Organisation of Jehovah's Witnesses has also decreased in recent years (from 1,804 in 2005 to 1,299 in 2016).

[41] See <https://sekty.dominikanie.pl> (accessed 15 Jan 2021).

[42] *Wyznania religijne w Polsce 2012-2014* (Warszawa: Główny Urząd Statystyczny, 2016), p. 11.

[43] The data concerning the sizes of religious organisations in Poland are systematically published by the Main Statistical Office. The information comes primarily from religious organisations themselves, and then it is verified. Moreover, when the National Census was conducted in 2011, one of the (non-compulsory) questions it included concerned one's religion. For the present study, the following materials were used: *Rocznik Statystyczny Rzeczypospolitej Polskiej 2017. Statistical Yearbook of the Republic of Poland 2017* (Warszawa: Główny Urząd Statystyczny, 2017); *Wyznania religijne w Polsce 2012-2014* (Warszawa: Główny Urząd Statystyczny, 2016); *Kościół katolicki w Polsce 1991-2011. Rocznik statystyczny* (Warszawa: Instytut Statystyki Kościoła Katolickiego SAC, Główny Urząd Statystyczny, 2014); *Ludność. Stan i struktura demograficzno-społeczna. Narodowy Spis Powszechny Ludności i Mieszkań 2011* (Warszawa: Główny Urząd Statystyczny, 2013).

According to official data, the number of Muslims in Poland amounts to approximately 7,000. It should not come as a surprise, however, that according to unofficial estimates, the number of people professing Islam is significantly higher (the Muslim League alone, which is not included in the official statistics, may have tens of thousands of followers). It should be noted that – besides a relatively recent group of immigrants – there is also a well-assimilated Tatar community which has been present in Poland for several centuries now. Their Muslim Religious Organisation comprises about 800 people.

The Jewish community in Poland is also small. It can be assumed that the country has a population of 8,000–12,000 Jews. They primarily belong to communities organised in the Union of Jewish Religious Communities. However, there are also Reform Judaic communities in Poland which are associated in Beit Polska – the Union of Progressive Judaism.

Religious organisations referring to the Far East tradition also have little membership in Poland. According to official information, the largest of them (Karma Kagyu Buddhist Association) has less than 10,000 people, while the International Society for Krishna Consciousness and the Buddhist Association Karma Bancien Kamstang have only approximately 2,000 faithful each.

As is clear from the information given above, the vast majority of Poland's population clearly identify with some religious community. In the 2011 National Census, only approximately 2.5% of the respondents declared they had no religious affiliation. However, it can be assumed that the percentage of such people is in fact slightly higher.

## 2. **Legal change**

The explicit inclusion of the principle of equal rights of churches and other religious organisations in Polish law was a response to the expectations of minority religious groups. They were afraid (and still are) of the dominant position of the Catholic Church. The conclusion of the Concordat in 1993 increased this anxiety. In view of this, eleven acts defining the legal situation of individual non-Catholic religious organisations were adopted in the 1990s. In the Constitution of 1997, in search of an instrument similar to the Concordat applicable to non-Catholic religious organisations, it was stated that the relations between these organisations and the State 'shall be determined by statutes adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers' (art. 25 para. 5). Unfortunately, since the Constitution entered into force, no act has been adopted which would holistically regulate the legal status of any religious organisation. The reasons for this should be sought not only in the lack of political will, but also in theoretical difficulties. Nevertheless, a number of minority religious organisations keep petition-

ing for the realisation of art. 25 para. 5 of the Constitution. Ten years ago work on agreements with several religious organisations seemed to be nearing completion.[44]

The conclusion of the Concordat influenced the legal situation of other religious organisations also in another way. Even before the ratification of the Concordat (in 1998), a number of acts pertaining to religious organisations were modified following its conclusion. Due to these changes, the right to conclude civil marriages in a religious form, or the right to provide religious instruction in kindergartens, was extended to non-Catholic religious organisations.[45]

Similar acts, which aimed to extend rights already granted to the Catholic Church to the remaining religious organisations with a regulated legal status, have also been undertaken by Polish legislator on other occasions. The legislation pertaining to the restitution of church property which was nationalised in the period of the Polish People's Republic, was established first in reference to the Catholic Church (in 1989). In subsequent years, it was used as a model for solutions concerning other religious organisations.[46] The Act of 13 May 2011 on Funding the Orthodox Seminary in Warsaw from the State Budget[47] can also be considered as a response to funding several Catholic universities by the state.[48]

It should be noted that the last change carried out in favour of religious minorities in regulations pertaining to religious instruction at schools was a reaction to the judgement of the European Court of Human Rights in the case of *Grzelak v. Poland* (7710/02, ECHR, 15 June 2010). The change consisted in abolishing the previous limit (3 pupils) which determined whether instruction in religion or ethics in interschool groups or religious education centres could be organised (see the Regulation of the Minister of National Education of 25 March 2014 Amending the Regulation on

[44] See P. Stanisz, 'Relations between the State and Religious Organisations in Contemporary Poland from Legal Perspective' in W. Rees, M. Roca and B. Schanda (eds.), *Neuere Entwicklungen im Religionsrecht europäischer Staaten* (Berlin: Duncker & Humblot, 2013), pp. 695-697.

[45] See J. Matwiejuk, 'Konkordat z 1993 roku a pozycja prawna kościołów i związków wyznaniowych nierzymskokatolickich' in A. Mezglewski (ed.), *Prawo wyznaniowe w systemie prawa polskiego. Materiały I Ogólnopolaskiego Sympozjum Prawa Wyznaniowego /Kazimierz Dolny, 14-16 stycznia 2003/* (Lublin: Wydawnictwo KUL, 2004), pp. 231-253; W. Wysoczański, 'Wpływ konkordatu z 1993 r. na sytuację prawną kościołów i innych związków wyznaniowych mniejszościowych' in J. Wroceński and H. Pietrzak (eds.), *Konkordat polski w 10 lat po ratyfikacji. Materiały z konferencji* (Warszawa: Wydawnictwo UKSW, 2008), pp. 83-85.

[46] See Stanisz, 'Relations', pp. 699-700.

[47] *Dziennik Ustaw* 2011 No. 144, item 849.

[48] Such funding is currently awarded to: the John Paul II Catholic University of Lublin, the Pontifical University of John Paul II in Cracow, the Pontifical Theological Faculty in Warsaw, the Pontifical Theological Faculty in Wrocław and the Jesuit University of Philosophy and Education "Ignatianum" in Cracow. See M. Duda, 'Zasady finansowania uczelni kościelnych z budżetu państwa' (2012) 15 *Studia z Prawa Wyznaniowego*, pp. 36-41.

Conditions and Manner of Organizing Religious Instruction in Public Kindergartens and Schools).[49]

What can be perceived as a difficulty in the activity of religious minorities is the required number of applicants for registering religious organisations. Towards the end of the 1990s, the number was raised from 15 to 100 (see the Act of 26 June 1997 on Amending the Act on the Guarantees of Freedom of Conscience and Belief and Some Other Acts).[50]

## IV. Social and legal developments

### 1. Social developments

There is no indication that the social position of the Catholic Church will be weakened in favour of minority religious organisations in the near future. It is true that the number of Poles identifying themselves with the Catholic Church has decreased to some extent. However, 'the majority of people who are weakening their connection with Catholicism take a secular, indifferent attitude to religion or become engaged in widely understood New Age / new spirituality practices, which are not associated with religion'.[51]

Clearly, one can observe some progression in secularisation. Research on the differences in the levels of religiousness between older and younger generations has shown that, the age gap in religious commitments is particularly big in Poland.[52] It may herald some major changes in the religiousness of Poles in the upcoming decades, especially as the social trust in the institutions of the Catholic Church and some other religious organisations has been undermined by cases of sexual abuse of minors by the clergy which were not properly handled by religious authorities. On the other hand, traditional forms of religiousness seem to be relatively stable in Poland.[53] As far as fulfilling (Catholic) religious practices is concerned, the rate remains high (in 2012, only 10 per cent of Catholics declared to be entirely non-practising). The rate of *dominicantes* is approximately 40 per cent. It is undoubtedly the effect – despite various crises and difficulties in finding an adequate answer to

[49] *Dziennik Ustaw* 2014, item 478.

[50] *Dziennik Ustaw* 1998 No. 59, item 375.

[51] Pasek, 'Religious minorities', p. 181.

[52] Pew Research Center, 13 Jun 2018, 'The Age Gap in Religion around the World', <http://www.pewforum.org/2018/06/13/the-age-gap-in-religion-around-the-world/> (accessed 15 January 2021).

[53] I. Borowik, 'Religia jako element tożsamości w warunkach transformacji w Europie Środkowo-Wschodniej. Perspektywa socjologiczna' in M. Mróz and T. Dębowski (eds.), *Państwo – społeczeństwo – religia we współczesnej Europie* (Toruń: Wydawnictwo Adam Marszałek, 2009), pp. 17-35.

the contemporary challenges – of 'the strong and multidimensional evangelizing influence of the Catholic Church'.[54]

A proven forum for solving problems concerning institutional relations between the State and more representative religious organisations are joint commissions composed of representatives of interested parties, such as the following: the Concordat Commissions, the Joint Commission of the Government of the Republic of Poland and the Polish Episcopal Conference, the Joint Commission of Representatives of the Government and the Polish Ecumenical Council (since 1991), the Joint Commission of Representatives of the Government and the Holy Council of (Orthodox) Bishops (since 2007), the Joint Commission of Representatives of the Government and the Polish Evangelical Alliance (since 2009), the Team for the Catholic Church in the Republic of Poland of the Byzantine-Ukrainian Rite (Greek Catholic Rite; since 2011) and the Joint Commission of Representatives of the Government and the Evangelical Church of the Augsburg Confession (since 2011).[55]

### 2. **Legal developments**

It can be expected that the principle of equal rights of religious organisations will continue to exert a positive influence on the legal situation of non-Catholic religious organisations. However, there is no indication that the impasse regarding the realisation of art. 25 para. 5 of the Constitution will be resolved in the near future.

The legal regime pertaining to issues under discussion could be significantly changed only by modifying constitutional provisions. On 20 July 2018, the President of the Republic of Poland proposed that a consultative referendum on the constitution should be organised in November 2018. According to the proposal, citizens would be asked, amongst other things, whether the significance of Christian sources of the Polish state, as well as of the culture and identity of the Polish Nation, should be emphasised in the Constitution. On 25 July 2018, the Senate (whose agreement is required in such cases according to art. 125 para. 2 of the Polish Constitution) did not consent to holding this referendum.

## V. **Conclusions**

The status of religious minorities in Poland – in spite of a number of specific reservations and uncertainties – seems to reflect rather well on the condition of Pol-

[54] J. Mariański, 'Praktyki religijne w Polsce w procesie przemian' in L. Adamczuk, E. Firlit and W. Zdaniewicz (eds.), *Postawy społeczno-religijne Polaków 1991-2012* (Warszawa: Instytut Statystyki Kościoła Katolickiego, 2013), pp. 59-101 (quotation: p. 100).

[55] See P. Stanisz, 'La Commissione congiunta dei rappresentanti del Governo della Repubblica di Polonia e della Conferenza Episcopale Polacca come un modello del «dialogo strutturato»' (2017) 1 *Ephemerides Iuris Canonici*, pp. 161-185.

ish law on religion. This is especially due to the principle of equal rights of churches and other religious organisations, whose inclusion in the 1997 Constitution not only determines the current law, but also shapes the thinking of yet another generation of lawyers. At the same time, it remains clear that, for one thing, the principle in question has not realised its full potential yet, and for another, the proper shape of the actual relations between various religious groups is not only a matter of legal regulations.

# MINORITIES IN TRANSITION VS. MAJORITY IN TRADITION. THE CASE OF ROMANIA

Emanuel Tăvală*

## I. Definition and status

### 1. Social science definition

Romania has a long history of multiethnic and multicultural cohabitation. On its territory live since many centuries many ethnic minorities who are identified also by their religious orientation. Even if the minorities' protection was a criteria for Romania to become member of the EU and our country was considered to be a good example for the protection of its minorities, no law specifically providing for the protection of minorities has been adopted so far.

A minority *"is a sub-group which consists of less than 50% of the population and which is numerically overrated by another sub-group, not necessarily the majority"*.[1] The definition is used to characterize a population with another language, nationality, religion, culture or any other characteristic of these populations accepted as parts of the reference group.

### 2. Legal definition

There is no legal definition of the religious minority in Romanian legislation as far as no difference is made in the text of Law 489/2006 between religious cults, religious associations and religious groups. The difference is not made clear because the situation does not ask for this, taking into account the fact that there is an Orthodox majority (over 86,45%)[2].

* Law Faculty, Department of Public Law, Lucian Blaga University of Sibiu.

1 https://dexonline.ro/definitie/minoritate.

2 https://insse.ro/cms/files/publicatii/pliante%20statistice/08-Recensamintele%20despre%20religie_n.pdf.

### 3. Legal status

In Romania, all persons have the right to belong or to adopt a religion, to manifest this individually or collectively, in public or in private. All persons have the right to be part of a religious community that is a legal entity or one that is not (religious group[3]). Religious entities that are legal entities are (1) religions recognized by Government Ordinance; (2) religious associations, recognized by Court decision with the approval of the State Secretariat for Religious Affairs and (3) associations and foundations with religious objectives registered in accordance with Government Ordinance nr. 26/2000.

As showed before in Romania most of the minority religions are recognized as private or public legal entities. They are equal before the law and public authorities, organize themselves and function autonomously, according to their own statutes, canonical code and regulations, abiding by the constitution and the laws of the country. The Romanian state affirms its neutrality in terms of religions/faiths in the sense that it does not favour one over another, but has a relationship of cooperation and social partnership with the recognized religions/faiths. Religious associations do not automatically receive the public utility status, but may enjoy certain facilities or tax exemptions.

## II. Social and legal change

### 1. Social change

A country of twenty million Latin-language speaking inhabitants, Romania is situated on the crossroad of different politic, religious and cultural influences. In the Moldavian and the Walachia principalities, the role of the Byzantine, the Ottoman, and the Russian Empires was essential. As for Transylvania, it was influenced by Vienna, Budapest and Rome. Unavoidably, the Romanian religious landscape is closely related to this historic heritage. It is important to stress that the social facts of South Eastern European countries are hard to grasp for westerners. People think and feel differently there. They have a different identity than the West and that identity influences society. If the societal debate in Romania is to remain authentic, it is essential to take this into consideration and avoid imposing alien, "Western", mainly Anglo-American, forms of identity on the population. Religion and religious denominations,

[3] The law recognises the religious cults as public utility legal persons, whereas the other collective religious entities (which may be *religious associations* or *religious groups*) are either private law legal persons or associations without legal personality. The religious groups do not fulfill the conditions of being recognized as religious associations (number of members, time of activity in Romania etc). For more information see E. Tăvală, *State and Church in Romania,* in Gerhard Robbers (ed.), *State and Church in the European Union,* Nomos, 2019.

history and a sense of home *(Heimat)*[4] shape the people more strongly in Romania than in the West. For over 800 years, Germans in Transylvania proudly cultivated and preserved their German identity, which was closely connected to the Protestant Church. People's identity in South Eastern Europe is defined primarily by ethnicity and religion, and less by the economic success of individuals. The founding of nations themselves is closely connected to religious denomination and the founding of churches. This is not a unique result or a late consequence of the Orthodox church. The *Byzantine symphony* between throne and altar also applied to the Protestant Transylvanian Saxons, as they became a nation through their religious denomination as well. Especially during the Ottoman oppression, churches forged the identity holding the respective ethnic groups together and were a refuge in times of oppression. This feeling persevered during communist times.

In former Moldavian and Walachia principalities, the dominant Church (87 %)[5] is the Orthodox. In Transylvania, denominations other than the Orthodox are Roman Catholicism (5 %), Greek-Catholicism (Uniatism) (1 %) and the Protestantism, or more precisely Calvinism (3 %), Unitarianism (anti-Trinitarians) (0.3 %) and Lutheranism (0.5 %). Roman Catholicism, Calvinism, Unitarianism, and Lutheranism followers are mainly among the Hungarian community. Lutheranism is also the denomination of the German minority, the Transylvanian Saxons. The Jewish community (0.03 %) experienced a real diminution since the World War II. As for Islam (0.25 %), it represents an important religious component in Dobrogea, in the South-East Romania, between the lower Danube River and the Black Sea. The collaboration of the ecclesiastic hierarchy with the communist authorities, primarily of the Orthodox Church, incited multiple controversies after 1989. Today the renaissance of religion is understood mainly on political and cultural grounds, and is essentially dominated by the national question.

Fourteen different denominations were recognized by the communist state, namely Roman Catholicism, Calvinism, Lutheranism, Unitarianism, Islam, Judaism, as well as different neo-Protestant denominations. Nowadays, the Law 489/2006 on the freedom of religion and the general status of denominations, published in 2007, recognizes 18 denominations, i.e. (1) Romanian Orthodox Church, (2) Serbian Orthodox Bishopric of Timişoara, (3) Roman-Catholic Church, (4) Romanian Church United with Rome, Greek-Catholic, (5) Archbishopric of the Armenian Church, (6) Russian Old-Rite Christian Church of Romania, (7) Reformed Church of Romania, (8) Evangelical Church of Romania, (9) Evangelical Lutheran Church of Romania,

[4] J. Henkel, *Kirche – Staat – Gesellschaft in Rumänien nach 1989 – Aufbruch und Widersprüche auf dem Weg in die EU*, in H. Dix, J. Henkel (Hrsg.), *Die Europadebatte in den Kirchen Rumäniens*, Schiller Verlag, Hermannstadt-Bonn, 2011, p. 106.

[5] https://insse.ro/cms/files/publicatii/pliante%20statistice/08-Recensamintele%20despre%20religie_n.pdf.

(10) Unitarian Church of Transylvania, (11) Union of Christian Baptist Churches of Romania, (12) Christian Church of the Gospel in Romania – Union of Christian Churches of the Gospel in Romania, (13) Romanian Evangelical Church, (14) Pentecostal Union – The Apostolic Church of God of Romania, (15) Adventist Seventh-Day Christian Church of Romania, (16) Federation of Jewish Communities of Romania, (17) Muslim Denomination and (18) Religious Organization Jehovah's Witnesses.

The communist decree 358 that imposed the return of the Greek-Catholics to the Orthodoxy in Transylvania in 1948 was abrogated in the aftermath of the 1989 Revolution. Two Catholic denominations have been coexisting in Transylvania ever since: the Roman Catholic Church that reunites mainly the believers of Hungarian minority and the Romanian Church United with Rome (Greek-Catholic Church) or *Uniat Church* that consists of Romanian believers. The latter was born from the union of the members of the Orthodox Church with Rome in 1700 as a result of the Habsburg recovery of Transylvania. Since then, it is the subject of an important dispute with the Orthodox Church. During the establishment of the communism, this Church was forced to reintegrate the Mother Church i.e. the Romanian Orthodox Church. Since that moment, the dissidents founded the clandestine *Church of Silence*.

After 1989, the Uniats claimed the recovery of the ecclesiastic goods allocated to the Orthodox Church. The legal recognition of the Uniats incited serious conflicts with the Orthodox Church, not only for the retrocession of the ecclesiastic goods, but also for historical, ecclesiological and political reasons. The Greek-Catholic Church is indeed considered by the Orthodox Church as a product of the Western Roman and Austro-Hungarian *imperialism* on Orthodox land, as an instrument of division within Christianity and as an obstacle to the dialogue with Catholics. Although Pope John Paul II visited Bucharest in 1999 and the late Patriarch Teoctist returned the visit to Rome in 2002, the Uniat question has remained a stumbling block in the development of ecumenical relations and the relations between Rome and Bucharest.

In the last two decades the neo-protestant Churches (Adventist, Baptist, Pentecostal, etc.), achieved a great success. They are supposed to offer to their followers a *livelier* faith, a faith better adapted to the modern world compared to the one of the traditional denominations considered as orientated too much towards the past. These Churches and religious movements, often regarded as *sects*, provoke a certain irritation with the *traditional* Churches that see in them the marks of proselytism coming from abroad compared to the Romanian faith and the so called *historical* churches. In general, the sectarian movements elicited hostile reactions as they did in all the ex-communist countries where these organizations have achieved a real success.

Romania's Jews formed one of the most important Jewish communities of Central and Eastern Europe until World War II. During the interwar period, they constituted more than 4% of the population. Due to anti-Semitic politics in the 1930's, the extermination of Jews during WWII and their significant emigration to Israel under the communist regime, their number decreased considerably. Nowadays the Jewish

community counts only a few thousand members. After the fall of communism, anti-Semitism had a significant raise, especially within the ultranationalist political parties as the Greater Romanian Party (PRM). On the other hand, the recent Romanian authorities have been actively engaged in calling for the recognition of the genocide of Romanian Jews, and opposing anti-Semitism. In this sense, significant developments have recently occurred with regard to both the "memory work" and the reconciliation between the different denominational communities.

### 2. **Legal change**

According to the 1991 Constitution, reviewed in 2003, all religious denominations are considered *autonomous* entities, independent from the State, and benefiting from its support (art. 29). For that matter, a part of the priests' wages is funded by the State. Article 7 of the Law 489/2006 stipulates that the State of Romania recognizes the important role of the Romanian Orthodox Church and the other Churches and denominations acknowledged in the Romanian national history and society. However, the role of the Orthodox Church role as a *national* Church remains essential for understanding the status of the Orthodoxy in the country. According to the views of the Church, and those of the State to a certain extent, the Romanian Orthodox Church is the *Church of the Romanian people*, even if the *dominant national* qualification of the Orthodox Church stipulated in the Constitution from 1923 had been removed from the constitutions since the end of WWII. Also, the 1991 Constitution no longer refers to the specific role of the Orthodoxy within the State. But generally, the perception and reality of the status of the Orthodox Church remains closely related to the national question, to the origins of the Romanian people, to the unity, to the sovereignty and to the integrity of the State.

## III. Social and legal developments

Religious developments in Romania are inseparable from the national question, the regional issues, and the debate concerning the eastern borders of Europe. Romanian tensions are directly related to the stability of Eastern and South-Eastern Europe due to the bonds between Church, State, and nation within the Orthodoxy which make religion extremely influential in regional geopolitics.

### 1. **Social developments**

Ever since, the Orthodox Church has been experiencing difficulties in placing itself in a system that separates the Church and the State. Likewise its sister Churches in the *Byzantine Commonwealth*, the Romanian Orthodox Church appeals to the *Byzantine traditions* (*Byzantine symphony*) comprising a centennial absence of separation of Church and State. The Orthodox Church has been the *national* Church

of the Romanian people since the 19th century. The Romanian ethnicity is one of its founding principles. Although the ecclesiological conception of *ethnophyletism* that had developed in the Balkan during the Ottoman Empire was condemned by the Constantinople Patriarchate in 1872, it became a standard in the entire contemporary Orthodox world. As the philosopher Nae Ionescu said between the two world wars, converting to Catholicism means losing one's Romanian quality.[6] Consequently, in order to understand the religious and spiritual post-communist renaissance of the country, the national and identity nature of Orthodoxy should be emphasized, in Romania, like in the other Eastern European and Balkan countries where Orthodoxy is the dominant religion.

It is therefore not difficult to understand why the theses of the fascist-like Legionary Movement from the 1930s have become popular after the fall of communism. As this movement used Orthodoxy as one of the fundamental elements of its nationalist ideology, it proved successful amongst the young post-revolutionary generation and within the Orthodox Church. During many years, the controversial construction of a People's Salvation Cathedral in Bucharest has illustrated the willingness of the Romanian Church authorities to impose their church as a national and *ethnic* Romanian Church. Consecrated in 2018, the cathedral was eventually built next to the Romanian Parliament, the former People's House erected by Nicolae Ceauşescu. In the communist era, the patriarchal church used to be situated next to the Great National Assembly, which was the legislative power under the dictatorship. During the communism, the Orthodox Church considered the church as the symbol of the historical link between the Orthodoxy and the Romanian people. Now the symbolism of the proximity between the State and the Church is again highlighted by the edification of this cathedral in front of the Parliament.

The struggles concerning the reunification of Romania with the ancient ex-Soviet Moldavia (Bessarabia) that resurged after 1989 are also related to the unity of the Romanian Orthodox Church. During the reorganization of the Orthodox Church after WWI, the Bessarabia eparchies were reunited with the Romanian Church. This reunification was withdrawn in the aftermath of WWII as a result of the annexation of Bessarabia to the Soviet Union. The Church of Bucharest decided in 1992 on the Metropolis of Bessarabia final return to the Romanian Orthodoxy. The Bucharest Patriarchate created an Autonomous Metropolis of Bessarabia under the canonical authority of the Bucharest Patriarchate. The pro-Russian Moldavians who were opposed to this ecclesiastical unification with Bucharest decided to stay canonically dependant from the Moscow Patriarchate in the frames of a Moldovan Orthodox Church. The symbolical burden of this unification with the Romanian Orthodoxy in 1992 is clear.

[6] D. Staniloae, *Between Orthodoxy and Catholicism,* in *Ortodoxia*, 1982, Nr. 3, p. 336.

It was interpreted by a part of the Moldavians as a preliminary stage of a reunification of Moldavia with Romania. For Bucharest, it was a way to oppose the *moldavism* of the Moldavian authorities, which represented a national concept aiming at creating a Moldavian ethnic identity different from the Romanian one.

In 2004 the Romanian Orthodox Church has founded a Romanian Orthodox Diocese known as Bishopric of Dacia Felix in Vojvodina, Serbia, where a Romanian minority lives. This ecclesiastical circumscription was recognized by the Serbian State in 2009 and it has been coexisting with the eparchies of the Serbian Patriarchate. Ever since, the Bucharest Church has had under its jurisdiction the eparchies beyond the Romanian State borders, in Moldavia and Serbia.

The Orthodox Church in Northern Bucovina is a matter of contention between Romania, Ukraine and Russia. Bucovina was annexed to Romania in the aftermath of WWI. The Bucovina dioceses were attached to the Bucharest Patriarchate. After WWII, following the annexation of North Bucovina to the Soviet Union and its inclusion in the Soviet Republic of Ukraine, these dioceses were integrated into the Church of Russia. Currently the Church of Bucovina still depends on the Moscow Patriarchate. The wish of the Patriarchate in Bucharest to reattach them to the Romanian Church creates tensions with Bucovina Churches.

## 2. **Legal developments**

With 18 recognized religious denominations in Romania, any attempt to provide a definition of religious minority requires a high degree of latitude and negotiation. Minority groups represent different historical circumstances and this is reflected in their respective interests and preferences. Generally speaking, minority groups desire at the very least: recognition; support; funding; co-operation; inclusion; and permanent institutionalized dialogue. The key is to provide a definition of religious minority that allows for the successful pursuit of religious minorities' interests and aspirations and that is, on the one hand, receptive to the needs of smaller, less organized minorities and, on the other, not too inclusive. It is necessary to strike a balance which leaves the door open for smaller and less organized minorities. Safeguards should be put in place which allow for minorities to join the "club" at a future date providing they fulfill certain criteria laid down in the law.

# NORTHERN EUROPE

# THE SPECIFIC ROLE AND EQUAL RIGHTS OF RELIGIOUS MINORITIES IN FINLAND

Matti Kotiranta*

## I. Definition and status

### 1. Social science definition of religious minorities

Numerous criteria are used for describing minorities in the social sciences. In Finnish social sciences, the term 'minority' is often used in its classical formulation, defined as:

> a group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members [are] nationals of the state and possess ethnic, *religious*, or linguistic characteristics that differ from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion, or language.[1]

Another available definition used by legal anthropologist Reetta Toivanen is that a minority is a group characterised using the following criteria:

1. A fundamental difference between a minority and a majority: minority members have an unequal access to economic, social, cultural and political resources;
2. Participation in these resources will only be successful with the help of the majority;
3. The minority group does not participate in the definition of power; and
4. No one voluntarily belongs to a minority.[2]

* Matti Kotiranta is a Professor of Church History at the University of Eastern Finland.

[1] Definition originally proposed by Italian legal scholar Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*. (United Nations Publication, New York, 1979), p. 96 (monograph 4). Patrick Thornberry rightly argues that Capotorti's definition is derived from Article 27 of the International Covenant on Civil and Political Rights (ICCPR). See Thornberry *International Law and Rights of Minorities*, (Oxford, Clarendon 1992), p. 8.

[2] R. Toivanen, Vähemmistöt ja vähemmistöksi tekeminen Euroopassa: Tapaus Suomi (Minorities and making minorities in Europe: Case Finland), (Helsinki 2008), p. 5.

Minorities in Finland are classified, amongst other attributes, in terms of linguistic, religious, sexual, ethnic and cultural minorities. Minorities have a specifically mentioned role in Finnish law. They also have equal rights with all other Finns. Discrimination against minorities is prohibited, and in some cases, even punishable. According to Finnish sociologist Pasi Saukkonen, minority policy states that 'cultural and other rights are organised between the State and between different groups and communities so that the existence of society is not endangered and its function is maintained'.[3]

In general, a religious minority is defined as a smaller group characterised by religious characteristics that contradict or oppose the dominant religious majority. It seems that Finnish social scientists do not especially treat religious minorities as such, but they understand religious minorities as a part of a larger minority policy. They do not differentiate between old and new religious minorities or sects and religious minorities either. These definitions are mostly used by church lawyers and theologians; that is, church historians, church sociologists and comparative religion scholars. The main distinction used by sociologists is ethnic versus national minorities. The first of these, an 'ethnic minority', is a generic term that covers cultural, religious and linguistic differences. The latter, a 'national minority', which has also become popular in European jurisprudence, refers to several generations of a national minority (Swedes, Sámi, Roma and Tatars) living in the country with a nationality.

Historically, there has been no lively interdisciplinary collaboration between legal scholars and social scientists on minority questions. Two milestones can be mentioned here. Firstly, the book *Minorities and their discrimination in Finland*[4] (*Vähemmistöt ja niiden syrjintä Suomessa*), published in 1996, represented the first detailed work written in Finnish on this topic. The authors were a group of prominent human rights lawyers, sociologists and social psychologists. Secondly, a totally new opening in this field is the Centre of Excellence (2018–2025) in Law, Identity and European Narratives. Subproject 3, migration and the narratives of Europe as an 'Area of freedom, security and justice', traces narratives of Europe, traversing both historical and current experiences of exile. It focuses on the influence exile has had on shaping the role of expulsion and refugee experience when constructing European legal and theological thought, especially the European identity grounded in the idea of rule of law and human rights.[5]

[3] P. Saukkonen, *Erilaisuuksien Suomi* (*Finland – Land of Differences)*(Helsinki, Gaudeamus, 2013), p. 9.

[4] T. Dahlgren, J. Kortteinen, K.J. Lång, M. Pentikäinen and M. Scheinin (eds.), *Vähemmistöt ja niiden syrjintä Suomessa* (*Minorities and their discrimination in Finland*), Yliopistopaino – Helsinki University Press.

[5] See 'Law, Identity, and the European Narratives', *City of Helsinki*, 9 October 2018 <https://www.helsinki.fi/en/researchgroups/law-identity-and-the-european-narratives>; Eurostorie, @Eurosto-

## 2. The Legal Dimension

### A. *Legal definition and background*

Finland is largely a consensus society, where the national ideology emphasises the unity of the people, social equality and culture under one law (Finnish Constitution [731/1999]), as well as legally guaranteed minority rights.[6] The term 'minority' is not explicitly defined in the Finnish Constitution, but it is required by law.[7] Section 6 of the Constitution, which encompasses the provision of equality and considers non-discrimination, reads that the people are equal before the law:

> No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, *religion*, conviction, opinion, health, disability or other reason that concerns his or her person.

These two concepts, 'equality' and 'non-discrimination', are also the sole ground for criminal law,[8] as well as for the protection of other minorities. The provision applies to all people, regardless of their nationality. The equality regulations also

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rie <https://twitter.com/eurostorie>; Centre of Excellence in Law, Identity and the European Narratives <https://www.facebook.com/eurostorie/>.

[6] European societies are usually built according to the model of a nation-state. Finland has been a nation-state in the strongest sense of the word, but it has also granted cultural rights to some groups. In the history of independent Finland, there were two 50-year periods of minority politics. The first period was quite passive and during that that time, agreements relating to independence (1917) were maintained. Over the ensuing half-century, from the late 1960s to the present day, the position of the Swedish language as a national language was developed. During the same time, the status of the Sami and Romanies and other minorities improved, and linguistic as well as cultural rights were established . In the integration of immigrants, a multicultural line was chosen to preserve language and culture. Saukkonen, *Erilaisuuksien Suomi* (*Finland – Land of Differences),* p. 237.

[7] The Finnish Constitution does not contain any specific mention to the protection of minorities or religious minorities. Here, Finland differs from a few Central European countries (most of them Balkan countries that were directly or indirectly involved in the wars that followed the disintegration of Jugoslavia), that emphasize minority rights in their constitution. *The Finnish legal system (in the New Constitution of 2000's) is strongly focused on individual rights at the constitutional level*. For this reason, there is for example no mention in the Constitution of the protection of family rights. This does not mean that other legislation would not guarantee the rights of family members.

The legislator in the Finnish context would deliberately avoid talking about minorities or minority rights at a constitutional level, but rather talk about the rights of *vulnerable people* or *vulnerable groups*. For example, Swedish people are a minority group in Finland, but a legislator would deliberately avoid stalking about the Swedish-speaking minority in legislation. This is because Swedish people have played a substantial role in the history Finland. Swedish- speaking people to this day have specialised status in our Constitution (See Language Laws § 17).

[8] The provisions of criminal law applicable to the protection of minorities are explicitly linked to the violations of the rights of minorities, including the provisions of Chapter 11 of the Penal Code on violation of human rights (§ 4), genocide and its preparation (§ 6), and provisions on aggression against the population (§ 8) and discrimination (§ 9).

include the provisions of the Constitution governing the status of Finnish and Swedish languages (§17).[9] The prevention of discrimination entails protection of weaker groups and equal opportunities.

Fundamental rights may be restricted only if the Constitution allows a provision of a statutory exception. Section 6, paragraph 2 of the Constitution requires an 'acceptable ground'. The requirements for such justification are extremely high for the criteria listed in the provision.

The Republic of Finland has signed numerous international treaties protecting freedom of religion or belief; these implicitly relate to minority rights. Finland joined the Council of Europe in 1989 and ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) on 10 May 1990. Nevertheless, Finland had established relatively close relations with the Council of Europe before joining it formally. The country signed the European General Agreement on Culture in 1970, which was the first Council of Europe general agreement that it ratified, and it subsequently signed numerous other such agreements prior to becoming a full Council member. Some of these agreements have had a substantial influence on the development of the country's internal legislation. For example, the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR)[10], the Convention on the Rights of Children and the Convention for Elimination on Discrimination against Women, have been incorporated into Finnish Law through acts of Parliament.

The ECHR is considered to be the most important human rights treaty that binds Finland and its supervisory system, representing the most effective transnational oversight mechanism. The Agreement and its Additional Protocols provide for, *inter alia*, the right to life, personal freedom and security, freedom of speech, religion

[9] One could even argue – when talking about minority rights – that the status of national language rights compared to other minority rights is emphasised. It is worth mentioning here that the Finnish Constitution has been created jointly by two national language groups. This is also reflected in Section 17 of the Constitution:

> The national languages of Finland are Finnish and Swedish.
>
> The right of everyone to use his or her own language, either Finnish or Swedish, before courts of law and other authorities, and to receive official documents in that language, shall be guaranteed by an Act. The public authorities shall provide for the cultural and societal needs of the Finnish-speaking and Swedish-speaking populations of the country on an equal basis.
>
> The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sami to use the Sami language before the authorities are laid down by an Act. The rights of persons using sign language and of persons in need of interpretation or translation aid owing to disability shall be guaranteed by an Act.

Moreover, separate language legislation (Language Law 423/2003, §8, §9 and §37) applies in addition to the Finnish and Swedish national languages, minority languages, Sámi, Roma and sign language.

[10] The Finnish State ratified this treaty in 1986. In 2014, Finland also ratified the Additional Protocol to the Agreement.

and conscience, protection of private and family life, the right to a fair trial and the right to an education. In addition, Article 6 in the agreement of the European Union (Maastricht II 1992) refers to ECHR's Article 14, which states:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Although the EU Member States have signed the ECHR, there is no common minority policy in the EU. Article 13 of the Amsterdam treaty required the establishment of Non-discrimination Directives (2000/43/EC & 2000/78/EC) in 2000. Its claims were implemented in the Finnish Non-discrimination Act of 2004. In addition, the European Charter for Regional or Minority Languages (1992) entered into force in Finland on 1 March 1998, and the Framework Convention on the Protection of National Minorities (1995) entered into force on 1 February 1998.

The widest understanding of the term 'minority' in international law comes from Articles 18 and 27 of the ICCPR. The two articles claim a binding universal norm for minority protection, guaranteeing ethnic, religious and linguistic groups the right to enjoy and participate in their religion, culture and language. Article 27 reads:

> In those States in which ethnic, *religious* or linguistic *minorities exist*, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, *to profess and practice their own religion*, or to use their own language.

## B. *Legal status*

A formal recognition of a certain (minority) group as a religious community is not provided by the Finnish Constitution, but rather, it is covered by the Freedom of Religion Act (453/2003), which contains provisions concerning membership in religious associations, the procedure when joining or leaving a religious association the oath and affirmation, and application of the law of assembly to the public practice of religion[11]. More precisely, the Freedom of Religion Act exhaustively enacts the detailed legal status and foundation, rights and obligations of churches and registered religious associations, including both old (Roman Catholic Church, Jewish congregations, Adventist, Baptist and Methodist congregations, Salvation Army, Mormons) and new religious minorities (followers of Islam, registered Buddhist and Hindu communities, Bahá'í and other registered New Religious Movements).

[11] The Act also includes some changes to regulations concerning religious and moral education in basic education and in high schools.

In the Finnish context, three different types of legal person[12] – including old and new religious minorities – can be distinguished in religious associations:

1. The status of the Evangelical Lutheran Church under public law is ensured in the constitution.
2. In the new constitution, there is no direct provision for the Finnish Orthodox Church to regulate its position in society. In this respect, the legislative status of the Orthodox Church differs from that of the Lutheran Church. The Orthodox Church is the subject of a new law concerning the Orthodox Church, 2007 (985/2006). (**At the same time a national Church and an old religious minority in Finland**).
3. In Finland, a registered religious association is, however, a special type of community. Its foundation and legal status are enacted in subsection 2 of the Freedom of Religion Act. Such a religious body gains the status of a legal person; that is, it can acquire property, enter into commitments and be a litigant in court and with other authorities once it is entered in the register of religious associations. In this respect, the regulation observes the principle otherwise observed in Finnish community law, whereby the community achieves legal capacity once it is entered into the register of associations kept by the authorities, in this case, the National Patent and Register Board. (**Registered religious associations include both abovementioned old and new religious minorities**).

It is interesting to note that the Finnish model of three different types of legal person (2003) anticipates the 2015 OSCE Guidelines on the legal personality of religion or belief communities.

## II. Social and legal change

### 1. Social change

At the beginning of the 21st century, Finland was still a religiously homogenous country, relatively speaking, although the change brought about by multiculturalism has also been slightly reflected in the development of membership of denominations and (minority) religious communities. Finland has followed the same trend as in the other Nordic Countries, albeit at a slower pace.

It is a characteristic of the Finnish religious landscape that, despite the dominance of two major churches – the Lutheran and Orthodox churches – most of the world religions (in Finland, new religious minorities) that have found their way to Continental Europe, also have followers in Finland, though only in extremely small numbers. In recent years, the rising numbers of refugees and asylum seekers has re-

[12] There are no regional differences in the legal status of religious bodies as far as registration is concerned, because in Finland there is no federal system.

sulted in increased religious diversity[13]. Finnish membership of registered religious denominations in 1990, 2000 and 2015 is listed in the following table below:[14]

| | 1990 | % | 2000 | % | 2015 | % |
|---|---|---|---|---|---|---|
| **Total population** | 4, 998,478 | 100 | 5,181,115 | 100 | 5,487,308 | 100 |
| Evangelical Lutheran Church of Finland | 4,389,230 | 87.8 | 4,409,576 | 85.1 | 4,004,369 | 73.0 |
| Other Lutheran churches | 2,588 | 0.1 | 2,228 | 0.1 | 1,317 | 0.0 |
| Greek Orthodox Church of Finland | 52,627 | 1.1 | 56,807 | 1.1 | 60,877 | 1.1 |
| Other Orthodox churches | 800 | 0.0 | 1,088 | 0.0 | 813 | 0.0 |
| Jehovah's Witnesses | 12,157 | 0.2 | 18,492 | 0.4 | 18,286 | 0.4 |
| Free Church in Finland | 12,189 | 0.2 | 13,474 | 0.3 | 15,409 | 0.3 |
| Roman Catholic Church | 4,247 | 0.1 | 7,227 | 0.1 | 13,069 | 0.2 |
| Islamic congregations | 810 | 0.0 | 1,199 | 0.0 | 10,088 | 0.2 |
| Adventist churches | 4,805 | 0.1 | 4,316 | 0.1 | 3,553 | 0.1 |
| Pentecostal Church in Finland | - | - | - | - | 6,876 | 0.1 |
| Church of Jesus Christ of Latter Day Saints | 2,883 | 0.1 | 3,307 | 0.1 | 3,208 | 0.1 |
| Baptist congregations | 2,565 | 0.1 | 2,395 | 0.0 | 2,320 | 0.0 |
| Methodist churches | 1,251 | 0.0 | 1,260 | 0.0 | 1,415 | 0.0 |
| Jewish congregations | 1,006 | 0.0 | 1,157 | 0.0 | 1,133 | 0.0 |
| Other registered communities | 712 | 0.0 | 720 | 0.0 | 3,278 | 0.0 |
| **No religious affiliation** | 510, 608 | 10.2 | 659,979 | 12.7 | 1,336,106 | 24.3 |

In 2015, most of the Finnish population (5,505,257) still belonged to the Evangelical–Lutheran Church of Finland (73.0% in 2015). The second biggest religious denomination in Finland was the Finnish Orthodox Church (just over 1%, with 60,877 members). The Orthodox Church of Finland has repeatedly highlighted that it is a religious minority, although the legal status of the Orthodox Church (Orthodox Church Law 985/2006) is fully comparable to the special status of the Lutheran Church in the Constitution (§76). The Church Acts of both churches include provisions with a clear denominational character as regulated through Acts of Parliament. Between 2000 and 2015, the membership of the Lutheran Church decreased considerably; specific societal events over the years have been reflected more clearly than before in departures from the church and new members joining it.

[13] See M. Kotiranta, "Securitization of Religious Freedom: Religion and the Limits of State Control in Finland", in M. Kiviorg (ed.), *Securitization of Religious Freedom: Religion and the Limits of State Control in Europe* (Editorial Comares 2020), pp. 199-218.

[14] Cf. Statistical Yearbook of Finland 2012. Statistics Finland 23.9.2016. See ://www.stat.fi/til/vaerak/2015/01/vaerak_2015_01_2016-09-23_tau_006_fi.html.

The proportion of those belonging to old minority religious communities has increased to some degree during the 21st century to date, but within this group, there are some diverse trends. Jehovah's Witnesses and the Free Church of Finland are among those where membership has grown and are the largest of the registered communities. A similar trend has been observed in the Catholic Church in Finland, where membership has more than tripled (1990: 4,247 and 2015: 13,069), but it is still a relatively small community. In contrast, the membership of the Seventh Day Adventists has been falling. The membership of the Mormons (Church of Jesus Christ of Latter Day Saints) remains much as before.

The membership of the Pentecostal congregations is at approximately the same level as the Orthodox Church; it is currently estimated at around 50,000 baptised members, and if children are included, a total of approximately 60,000 members. However, not all Pentecostals are registered as a religious community; instead, for example, they can be registered as ideological associations. At present, the Pentecostal movement has increasingly been organised as a religious body. From the beginning of 2002, the movement's organisational structure was supplemented with the establishment of a registered religious community, the Finnish Pentecostal Church (*Suomen Helluntaikirkko*), to enhance inter-parish co-operation and promote the Pentecostal movement in Finnish society and internationally. There were 6,876 registered Pentecostals in 2015.

Inside the Finnish Evangelical–Lutheran Church, there are still *old minor revival movements, which are religious movements in the 'official' Church*. Therefore, they are not classified as old minorities. These popular spontaneous revivals began to spring up among the rural population in the mid-18th century as a reaction to the Finnish Enlightenment and its reserved attitude towards the idea of progress and other cultural trends amongst the intelligentsia. These revival movements – *Supplicationism* (*rukoilevaisuus*), *the Awakened* (*herännäisyys*) and the Evangelical revival (*evankelisuus*) – originated in the western parts of Finland and then spread elsewhere. With the northern Lappish revival, *Laestadianism* (*lestadiolaisuus*), they were a protest against secularisation and different values and ways of life in towns compared to the countryside. In addition to domestic revival movements, Anglo-American revivalism arrived in Finland at the turn of the 20th century. As *Religion in Finland* puts it,

> To simplify slightly, one might say that the Anglo-American movements had to a large extent similar emphases as the Finnish revival movements, but whereas the latter represented domestic revival within the Lutheran Church, the former represented foreign movements which eventually became separate denominations. These were the Seventh Day Adventist, the Pentecostal movements, the Methodist Church, the Salvation Army, the Baptist Union and the Free Church[15].

[15] 'Religion and early modernization' in K. Kääriäinen, K. Niemelä and K. Ketola, *Religion in Finland. – Decline, Change and Transformation of Finnish Religiosity* (Publications of the Church Research Institute 54, Jyväskylä, 2005) pp. 53-53.

Followers of Islam are the largest non-Christian movement in Finland. *Islam is both an old and new minority in Finland.* The roots of Islam in the country go back at least two centuries, to the 19th century. The first Muslims were soldiers serving in the Imperial Russian Army in Finland as part of an autonomous Grand Duchy of Russia. A more settled Muslim community started to appear as early as the 1870s, when the Tatars began to move from Nizhny Novgorod to Finland. The Muslims living in the country received Finnish citizenship shortly after independence, and in 1923, they were granted the right to register as a religious community. The first registered Islamic community, the *Finnish Islamic congregation*, was established two years later, in 1925; this was initially called the *Mohammedan parish of Finland*. Tatars are often seen as a positive example of Islamic integration into Finnish society. Traditionally, the Tatars have also been relatively well-educated and wealthy. They have also actively participated in inter-religious dialogue and have established good relations with Judaism. However, when it comes to other types of Muslims, the Tatars hold a certain distance and do not accept them as members of their community. In the early 1990s, only about a thousand Muslims, who were mainly Tatars lived, in Finland[16].

In recent decades, the situation has changed rapidly, and the number of Muslims in Finland has increased considerably. The reason for this, above all, is that since the early 1990s, immigration from the Muslim world has increased. *Then, Islam was regarded more as a new religious minority.* The first major group of arrivals were the Somali people who started to arrive in Finland as refugees in the early 1990s. The number of Muslims increased tenfold in Finland between 1990–2011 and current numbers are estimated to be around 65,000–70,000. Finding a precise number is difficult, however, because few of them have organised themselves into registered religious groups. Notwithstanding, registrations have clearly increased in the early 21st century (1990, 810; 2000, 1,199; and 2015, 10,088).

Since the large-scale entry of Muslims into Finland happened later than it did in many other European countries, as mentioned above, this group's development has been slower in Finland. However, there are signs of a difference between generations in religious practice. In recent years, for example, a number of young Finnish Muslims have come up with their own associations and communities, with the aim of responding specifically to the religious needs of young people.

The Islamic Council of Finland (SINE) was established in November 2006 and co-ordinated by the Office of the Ombudsman for Minorities. The aim of the authori-

[16] T. Pauha, S. Onniselka & A. Bahmanpour,'Kaksi vuosistaa suomalaista Islamia' (Two hundred years of Finnish Islam) in R. Illman, K. Ketola, R. Latvio & J. Sohlberg (eds.), *Monien uskomusten ja katsomusten Suomi (Finland – a country of many religions and beliefs)*. (Kirkon tutkimuskeskuksen, verkkojulkaisuja 48, 2017), pp. 104-115. At http:www.sakasti.evl.fi/...nsf/.../Kirkkohallitus_MUKS%20julkaisu_verkkojulkaisu_17_04_24_B.pdf.

ties was to establish an umbrella organisation for Islamic communities and associations which acts as a liaison body with the authorities. This goal was also shared by the Muslim community, although the communities and organisations outside SINE founded another Islamic umbrella organisation that used the old name of the Islamic Federation of Finland.

Regarding other new religious minorities, in 2015, there were six registered Buddhist communities, with 956 members. In addition, there were two registered Hindu communities with 324 members.

It is interesting to note that the Scientology movement does not have the status of a registered religious community in Finland. The Ministry of Education denied it access to the register of religious communities at the end of 1998. The Ministry justified the rejection of the application 'because in the activities of the scientologists the fundraising was seen to be more important than the practice of religion'[17].

According to a recent study there are also 1,336,106 (in 2015) inhabitants of Finland who do not belong to any religious community. This total number has almost tripled since 1990 when it was 510,608.

## 2. Legal change

Currently, no major legal changes can be foreseen in Finland regarding the status of old and new religious minorities. However, three issues are worth mentioning, as described below.

### A. *Registration*

Regarding the registration of religious communities, both old and new religious minorities are confirmed in the new Freedom of Religion Act (453/2003). The act exhaustively enacts the detailed legal status and foundation, rights and obligations of churches and registered religious associations.

### B. *Taxation*

Regarding taxation, there are some changes to observe. The most important source of income for major churches - the Evangelical Lutheran and Orthodox and their parishes - has been the church tax, which is levied from parishioners based on their taxable income in the municipal tax.

The parishes' share of the proceeds of corporation tax has been altered several times during the time that the Income Tax Act has been in force. *The latest reform of corporation taxation came into force at the beginning of 2016*. The financing of

[17] Decision 85/901/94 2.10.1998.

the Church's social services was reformed so that, by 2016, the parishes no longer received corporate taxes. In the law (430/2015)[18], the state statutory funding for the Church's social services amounted to 114 million euros per year[19]. The aim was to raise the amount of funding annually, in line with the change in the consumer price index. As part of the balancing of central government finances, this index increase was frozen for the current parliamentary term. For the Orthodox Church, the loss of corporation tax was replaced by an equivalent increase in the amount of State Aid.

Since the beginning of 2008, registered religious associations – which are either old or new religious minorities – have received financial aid from the government to support their activities. Earlier, the associations principally funded their activities through donations, membership fees and fundraising activities. According to the State Aid Act, state aid is received by registered religious associations on a numerical basis according to the number of members. State aid is not to be granted to associations with fewer than 100 members or associations that engage in few or no activities. The goal is to provide clear criteria concerning aid so that as little assessment-based discretion as possible is required.

In the same reformation of 2016, the state aid amount for registered religious associations increased. Originally, the appropriation was intended to increase by 1 million euros, but because of savings made by the State, the increase was smaller. The appropriation for 2016 was 532,000 euros, and for 2017 and 2018, it was 524,000 euros respectively.

### C. *Education*

The communal system of comprehensive schools carries the main responsibility for providing compulsory education in Finland. Currently, religious education is a compulsory school subject, both in Finnish comprehensive schools (7–16 years) and senior/upper secondary schools (16–18/19 years).

In Finland, a model for teaching minority religions as part of compulsory education is especially important for the support of minorities. As required by the new law (2003), the term 'education according to individual religious affiliation' in the law on comprehensive and upper secondary education was replaced with 'teaching the pupil's own religion'[20]. However, religious education is delivered for the majority religion. Because most Finns are members of the Evangelical Lutheran Church of Finland, in practice, the instruction in religious education is given mostly according to the Lutheran majority.

[18] https://www.finlex.fi/fi/laki/smur/2015/20150430.

[19] https://www.eduskunta.fi/FI/Vaski/sivut/trip.aspx?triptype=ValtiopaivaAsiat&docid=he+250/2014.

[20] See http://www.finlex.fi/Perustuslaki 13 § (6.6.2003/454) and Lukiolaki 9§ (6.6.2003/455).

Religious education of other religious denominations will be organised if three conditions hold. Firstly, the denomination must be a registered religious community in Finland. Secondly, the denomination must have a curriculum (so-called National Framework Curricula) approved by the National Board of Education. The approval is not automatic and some Christian minority groups participate in the Lutheran religious education lessons. Thirdly, instruction is implemented if there is a minimum of three pupils in one municipality who belong to the community and will take part in the teaching. If religious education for one's religion or denomination is available, the pupil has no right to opt out of it.

The status of Orthodox instruction differs from that of other religious minorities. If there is a minimum of three Orthodox children in municipal schools, instruction is automatically provided and the parents' request is not needed.

## III. Social and legal developments

### 1. Social developments

#### A. *The need for (religious) minority policy as a part of State policy integration*

As mentioned above (section I.2.A), Finland is largely a consensus society where the national ideology emphasises the unity of the people, social equality and cultural unity under a single law (Finnish Constitution [731/1999]), as well as legally guaranteed minority rights. However, with its ethnic and cultural structures, Finland is not to be considered a multicultural society. The Finnish Constitution does not directly mention multicultural society or the state's commitment to multiculturalism. At the same time, Finland is one of the most multicultural countries in Europe[21], where multiculturalism means that society recognizes[22] its ethnic and cultural diversity and provides support for multiculturalism by various means. At a legislative level and in political rhetoric, this is the case, but there are numerous restrictions and reservations regarding the implementation of the policy and the resources available to it. It seems

[21] Canadian researchers Keith Banting and Will Kymlicka have tried to create a methodology to determine how much different countries apply multiculturalist policies. Their *Multiculturalism Policy Index* is divided into three sub-areas: *indigenous policies, national minority policies, and immigrant groups policies*. According to the study's MCP-index, in 2010 Finland was among those countries, including Canada, Australia and Sweden, – where multiculturalist policies of immigrant groups were strongest. In addition, Finland belonged to countries where the rights of indigenous peoples were realised. In this area, Finland's score was higher than in Sweden but lower than Norway. See closer https://www.migrationpolicy.org./.../TCM-Multiculturalism-Web.pdf.

[22] There are specialised bodies – the Ombudsman for Minorities, the Chancellor of Justice, the Sámi Parliament, the Advisory Board on Roma Affairs, the Ethnic Relations Advisory Board (ETNO) – implementing multiculturalist policies in practice.

there are minority issues that are legitimate to deny in legislation, whilst also being required by human and civil rights.

A good example is Islam whose legal status in Finland is fairly complex. In the EU, most Muslims are migrants. This is also the case in Finland. This brings a challenge for equal treatment because, in Finland, Muslim migrants do not traditionally have national minority status, and thus, do not have the rights of minorities. None of the EU countries has ratified the rights of UN migrants. Thus, legal issues are also being approached in Finland through equality and non-discrimination legislation. The right to their own language and culture is certainly acknowledged, but Finnish Muslims are linguistically and culturally diverse. This legal basis complicates the dialogue in the Finnish Muslim community. It is worth mentioning that, in Finland, there are three groups in the Islamic community. The first group comprises migrants, while the second includes Tatars, who have the status of a national minority. The third group can be considered converts and children born or raised by immigrants in Finland. The example of the Tatars has been positive for new Muslims, but it does not facilitate the broader legal status of the Muslim community[23].

The debate around Muslims has focussed on integration; it has also been the basis of dialogue between religious communities, authorities and non-governmental organisations (NGOs). As immigration increases, the need for dialogue has risen from the side of authorities[24]. Muslims are a visible group in terms of schooling and health care. The new laws on education (2003) and the new curriculum that underlines 'education according to individual religious affiliation' regulate the activities of elementary and secondary schools, and have proven the status of Muslim communities from the point of law. In medical care, the situation has also improved significantly in a practical way because nursing employs many Muslims.

The experience of the Finnish Muslim community is that authorities seek to listen to minorities in terms of various immigration and discrimination issues[25]. However, it is hoped that the voice of minorities would also be heard on other issues and not only be confined to questions of equality and discrimination.

[23] About three different groups within the Islamic community see *Teemu Pauha, Suaad Onniselkä & Abbas Bahmanpour* 2017, p. 110.

[24] See the strategy of the minority (religious) actor, the Islamic Council of Finland, SINE.

[25] Deviating from France and some other EU countries, the authorities' attitudes, for example, to Muslim head scarfs have been acceptable, and the authorities have not endorsed a scarf ban in public offices or schools. So far, there has been no case at the local or upper courts concerning the wearing of scarves or *burqas* (black garments that entirely cover the body and head) in basic education or in the upper secondary schools. The question of religious garments has not been discussed by the Finnish National Board of Education. The Board has not given official instructions for schools. The labour law obliges employers and employees to follow safety instructions. Therefore, it is possible, that a person would not be allowed to wear a scarf if that person were working with machinery and could be injured because of the scarf.

To summarise the latest developments in Finland, globalised events are linked to international developments and Islam is no exception. The threat of radicalisation is linked to challenges of integration; all available studies suggest that exclusion leads young people to terrorist organisations. This has created a challenge for Finnish society. Currently, society's reactions are highly polarised. While prejudice and racism have been emphasised, there have also been many positive reactions and there is a desire to help asylum seekers integrate into society[26]. It is quite certain that the acceptance of Muslim minorities into Finnish society will be one of the major future societal challenges in Finland.

### B. *Interfaith and ecumenical dialogue and dialogue between minorities and local/national governments*

Interest in religious dialogues arose at state level after the terrorist attacks of the early 2000s[27]. In autumn 2001, the former president of the Republic of Finland, Mrs. Tarja Halonen, started an initiative where representatives of three monotheistic religions should meet each year to discuss, for example, how they can act together to prevent and influence hate behaviour in the country. The president encouraged religious leaders to keep in touch with each other. The regular meetings and the Hanasaari (island) seminar were held in preparation for more organised co-operation, which led to the establishment of the 'Cooperation of Religions in Finland' Forum (USKOT Forum) in January 2011[28].

The member communities of the USKOT Forum have drawn up views on the social debate and the world's day-to-day events. The forum organises seminars and panel discussions. The calendar of three Abrahamic religions has been one of the most important projects of the USKOT Forum. The Forum joined the World Religions for Peace (RfP) network in autumn 2013. This network also includes the European Council of Religious Leaders, where Finland has gained international visibility[29].

[26] See M. Kotiranta, "Securitization of Religious Freedom: Religion and the Limits of State Control in Finland", in *M. Kiviorg (ed.),* Securitization of Religious Freedom: Religion and the Limits of State Control in Europe, (Editorial Comares 2020), pp. 199-218.

[27] The Finnish State was already active at the time of the Cold War, when the Russian Orthodox Church and Evangelical–Lutheran Church of Finland started their ecumenical dialogue, which continued from 1970 up to 2013. See H. Hurskainen, *Ecumenical Social Ethics as the World Changed*. Diss. Helsinki, 2013. Schriften der Luther-Agricola-Gesellschaft 67.

[28] The USKOT Forum is a joint forum of three Abrahamic religions whose members represent Judaism, Christianity and Islam. Its founding members were the Finnish Council of Church Governors of the Jews, Evangelical Lutheran Church of Finland, Finnish Ecumenical Council (SEN), Finnish Islamic Church (Finnish Tatar community) and SINE.

[29] See H. Rautionmaa, R. Illman & R. Latvio (2017), "Uskonto ja katsomusdialogi Suomessa" (Religion and Belief Dialogue in Finland), in R. Illman, K. Ketola, R. Latvio & J. Sohlberg (eds.),

Another organisation worth mentioning is the Christian-based cultural organisation FOKUS, which also seeks to promote inter-religious and intercultural dialogue in its work, notably by strengthening the interaction between science, art and religion. FOKUS is involved in organising many large-scale dialogue projects in Finland, including co-ordinating the World Interfaith Harmony Week of the UN every year in February.[30].

### C. *Citizens who have no religious affiliation – a 'new' minority?*

At the beginning of the 21st century, the number of people who have no religious affiliation increased much faster than it did before. In 1990, the share of total population was 10.2%; it increased to 12.7% in 2000, and in 2015, it was 24.3%. From the minority policy perspective, *citizens without any religious affiliation* has become a prominent minority (1,336,106 in 2015). Traditionally, it has been typical for the Finnish debate to belittle the religious rights of unbelievers by invoking their small number. Respect for the human rights of this group has not always been perceived as a matter of public authority.

After the governmental elections of 1990s, The Union of Freethinkers (*Vapaa-ajattelijoiden liitto*) and the Finnish Humanists (*Suomen Humanistiliitto*) have repeatedly proposed their goals for the elected new governments. The main issues listed have been the special status of the Evangelical–Lutheran Church and the need for clarification of church and state relations, as well as respect for the principle of neutrality of the State. The mentioned organisations also have goals relating to freedom of expression, equal treatment of children's rights and sexual and gender minorities.

## 2. Legal developments

### A. *Legislative reforms in religious laws (within faith communities) and religion law (public legislative bodies)*

As indicated above (sections I.2.B and II.2), currently, no major legal changes can be foreseen in Finland regarding the status of old and new religious minorities. The Freedom of Religion Act – which also has an important influence on the future development of relations between state and church – enacts in exhaustive detail the legal status and foundation, rights and obligations of all registered religious associations, including both major Churches (Evangelical–Lutheran Church and Orthodox Church) and old (Roman Catholic Church, Jewish congregations, Adventist, Baptist

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*Monien uskomusten ja katsomusten Suomi (Finland – a country of many religions and beliefs),* pp. 250-251. Kirkon tutkimuskeskuksen verkkojulkaisuja 48. At http:www.sakasti.evl.fi/...nsf/.../Kirkkohallitus_MUKS%20julkaisu_verkkojulkaisu_17_04_24_B.pdf.

[30] *Ibid*., p. 252.

and Methodist congregations, Salvation Army, Mormons) and new religious minorities (followers of Islam, registered Buddhist and Hindu communities, Bahá'í and other registered New Religious Movements).

By taking over the form of a registered religious association, that is, the form of a legal person, associations can participate in the public and legal life of the state, receiving all privileges that can support religious life. This type of association can acquire property, enter into commitments and be a litigant in court, and with authorities. As concerns registered religious associations, the procedure is that they accept their order of association, and then must be approved by the authorities, that is, the National Patent and Register Board, provided it is not illegal. They may also interpret their confessions and develop 'own constitutions' (i.e. Church Acts or Church Codes) in a manner appropriate to the civil society of a modern democratic state.

If the religious association (or any other body) is not registered, it cannot receive competent legal person status or gain rights and obligations. Persons acting on behalf of such an unregistered body are personally responsible for all their commitments.

The current formulation of the State's church policy regarding the Lutheran majority Church, as presented in the new Finnish Constitution of 2000, maintains the *status quo*, and thus, supports the relevant section 76 concerning the Lutheran Church. However, this does not suggest that the state has adopted a more favourable attitude toward the Lutheran Church specifically. It seems inevitable that a gradual process towards fewer constitutional, or other official links, between the State and the two national churches (Lutheran and Orthodox) will continue. The most interesting question, although this will not occur in the near future, is whether the special status of the Lutheran Church (§76) will disappear in the next revision of the Constitution.

### B. *Anti-discrimination and sexual orientation*

Regarding gender or sexual orientation, co-habitation of two same sex individuals was identified in 2001 by the Finnish Parliament to have the same legal status as marriage (having reached the age of 18). In accordance with this law, starting on 1 March 2002, people of the same sex were able to formalise their partnerships by contracting a civil marriage.

By the amendment to the Marriage Act, same-sex individuals have been able to enter into marriage since 1 March 2017. At the same time, registration of partnerships was abolished. Along with the amendment, people in a registered partnership can change their partnership into a marriage by making a joint notification at a local registry office[31]. The Evangelical–Lutheran Church, which has the right under secu-

[31] Concepts of family, cohabitation of couple, and marriage, see chttp:www.stat.fi => Quality description, families 2017.

lar law to solemnise marriages has not yet given permission to its priests to conduct same-sex marriages, by the decision of the General Synod (2018). However, some priests have in fact conducted same-sex marriages[32]. Old minority churches – Orthodox and Catholic churches and Finnish Free Churches (Adventist, Baptist and Methodist congregations) – have been conservative and emphasised that marriage is exclusively between a man and woman and may not be compared with any other form of co-existence. From the point of view of Finland's constitution, respect for private life is ensured in accordance with section 6, which states that '[e]veryone is equal before the law', in that it is forbidden to discriminate between persons on the grounds of their sex, state of health or possible handicap or other personal grounds without good reason. Questions of the human rights of sexual minorities can be regarded as falling within the scope of anti-discrimination legislation.

[32] In Finland, the Diocese of Helsinki was the first diocese that decided a priest should be punished for conducting marriages of same-sex couples. On 13 September 2017, the Chapter of Helsinki diocese gave a serious warning to pastor Kai Sadinmaa because he had conducted several same-sex marriages. Mr. Sadinmaa has complained about his warning to the Helsinki Administrative Court. In other dioceses, the chapters have punished priests who have conducted the same sex marriages. Three other priests have complained to the Administrative Court about the warnings they have received according to the Church Act.

# RELIGIOUS MINORITIES IN GERMANY. PRACTICAL LEGAL CHALLENGES ACCORDING TO THE TRIED AN TESTED PRINCIPLES OF GERMAN BASIC LAW

Matthias Pulte*

## I. Social science definition

In Europe around 100 million people belong to minority groups. In social science, the criteria used to describe minorities are numerous. The main distinction is between so-called 'new' minorities, people who come as immigrants into a country, and 'autochthonous' minorities, who have resided in a territory for centuries. However, social scientists criticise this distinction because in many cases the categories between 'new' and 'autochthonous' are not precise enough.[1]

An autochthonous minority is a group characterised by the following five criteria:

I. a closed group/community, or settled in a territory of a state;
II. numerically smaller than the rest of the population of the state;
III. members are citizens of that state;
IV. members have been resident for generations, and have permanently been in the area concerned;
V. distinguished from other citizens by their ethnic, linguistic, religious or cultural characteristics and willing to preserve these characteristics.[2]

This characterisation harks back to the definition of minorities proposed by Francesco Capotorti in 1979. But the above-mentioned characteristics are only objective criteria. On the subjective side, in addition to a feeling of solidarity or identity, the desire to maintain a group identity must also be added.[3] In general, a religious

* The author is University Professor for Canon Law, Canon Law History and Law and Religion at Johannes Gutenberg-University Mainz (Germany).

[1] Cf. Jan Diederichsen, 'Was ist eigentlich eine Minderheit – wer gehört dazu?' https://www.shz.de/10443916 ©2018 (accessed 15 January 2021).

[2] Cf. Diederichsen, *ibid*.

[3] United Nations (ed.), 'Minorities under international law', https://www.ohchr.org/EN/Issues/Minorities/Pages/internationallaw.aspx (accessed 15 January 2021).

minority is a smaller group characterised by religious characteristics that are in opposition to the dominant religious majority. Following this general definition, it becomes more and more difficult to describe religious minorities in societies with growing religious pluralism.

## II. Legal definition and background

The term 'minority' is not defined by international and German national laws but it is assumed. This lack of legal definition reflects the restrained attitude of the state towards minorities, though it does not necessarily mean that it discriminates against them.

A broad understanding of the term 'minority' in international law comes from the International Covenant on Civil and Political Rights of 1966[4] (short: ICCPR), Art 27 which covers cultural, ethnic, religious and linguistic minorities. Article 27 states:

> *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

The two German states ratified this treaty in 1973, alongside a number of other countries. From this time on, the definition of minority used in Art 27 binds the legislator when using and interpreting the term. On one hand, the legal content of Art 27 ensures that all members of religious minorities, have the right to engage in their own unique cultural and religious activities. On the other hand, Art 27 does not provide any political rights. Minorities, as such, have not been endowed with any rights of political autonomy.[5]

In the constitutional history of Germany, we only find definite minority protection provision in Art 113 WC/1919. Placed in the section on fundamental rights, this article recognises the existence of ethnic and national minorities in Germany and establishes constitutional protection for them. Art 113 WC states that foreign-language speaking groups of the population in the German empire, are not allowed to be restricted by legislation and administration in their free popular development. They should not be held back from using their mother tongue at school, nor from administering their

[4] International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966. No. 14668, United Nations Treaty Series vol. 999, New York 1983, pp. 171-186, 179: online: https://treaties.un.org/doc/Publication/UNTS/Volume%20999/v999.pdf.

[5] Cf. C. Tomuschat, International Covenant on Civil and Political Rights, in: United Nations Audiovisual Library of International Law, 2008, pp. 1-4, online: http://legal.un.org/avl/pdf/ha/iccpr/iccpr_e.pdf (accessed 15 January 2021).

internal affairs, including administration of justice.[6] Ultimately, this article must be understood as a specialisation of the general principle of equality which was born out of necessity from Germany's first unification in the 19th century.[7] But again, even Art 113 WC does not define 'minority'.

German Basic Law (GBL) does not contain a specific law for the protection of national, ethnic or religious minorities. In German legislation, the protection of the rights of religious minorities is exclusively covered by Art 2 - 4 GBL on personal freedom, legal equality and religious freedom for every individual, as well as every religious community. When the constitution was birthed, the intention was not to legislate separately for minorities, but to accentuate and strengthen the idea of equality. This was particularly necessary at the time to help re-integrate the surviving Jewish community after the Shoah. The current catch-all legislation, where legally, religious freedom is considered to be a human right, has to date seemed sufficient. It seems clear that the rights as set out in Art 1-19 GBL protect minorities of every type.[8] The protection of minorities, according to Art 20 GBL, is an integral part of the principle of democracy. This includes the possibility that minorities can also prevent majority voting if they are impeded in their rights.[9]

Formal recognition of specific groups as religious communities is not provided for in German law, but there are some legal provisions which grant special rights to 'religious communities'. The resulting question of how to define a religious community is not answered in the law. According to prevailing opinion in literature and jurisprudence, a religious or ideological community is understood to be an association of people with a common religious or ideological consensus, who testify their consensus of a religion or belief in a comprehensive manner.[10]

More differentiation is carried out by the religious articles of the Weimar Constitution which are incorporated into the GBL by Art 140. Art 137 sec 3 WC in particular guarantees every religious community the right to organise and administer their own affairs independently, within the framework of 'the law applicable to all'. This phrase means that the law applies equally to religious bodies as it does to all other entities.[11] The state will not intervene in the internal affairs of religions, and in addition, Art 137

[6] Art. 113 WC : '*Die fremdsprachigen Volksteile des Reichs dürfen durch die Gesetzgebung und Verwaltung nicht in ihrer freien, volkstümlichen Entwicklung, besonders nicht im Gebrauch ihrer Muttersprache beim Unterricht, sowie bei der inneren Verwaltung und der Rechtspflege beeinträchtigt werden'.*

[7] Cf. S. Hähnchen, *Rechtsgeschichte. Von der Römischen Antike bis zur Neuzeit* (Heidelberg, 2016), p. 353.

[8] Cf. F. Hufen, *Staatsrecht II* (München, 2009), p. 11.

[9] Cf. K. Windthorst, 'Art. 20' in C. Gröpl, K. Windthorst, C. von Coelln (eds.), *Grundgesetz – Studienkommentar* (München, 2015), p. 330.

[10] R. Scholz, 'Neue Jugendreligionen und Grundrechtsschutz' (1992) *NVwZ,* pp. 1152-1160.

[11] Cf. C. von Coelln, ‚Art. 140' in *Grundgesetz – Studienkommentar*, p. 836.

sec 4 WC guarantees all religions the right to be appointed a legal status in accordance to general law. As Art 137 sec 3 and 4 WC clearly point out, these guarantees apply to all religious communities (Religionsgesellschaften). Secondary literature recognises Art 137 WC as a provision which includes the protection of the rights of religious minorities.[12] This German term is handed down from the state ideology of its superiority over religion, although these days, this idea is becoming old-fashioned. The term does have further legal significance though. 'Religious community' refers to religions which endeavour to have a legal personality governed by state law. They do not need to be a public body but they must be organised to such a degree that the state can identify the association of individuals as a union, at least under private law, according to sec 54 of the German Civil Code (BGB).[13] The OSCE guidelines refer to the general equality of a public or private corporative status for religions. Both establish the possibility for the religion to participate with legal personality in the legal system of the state. We can take this to mean that, if a religion is not granted the status of a public corporation, its right to collective religious freedom will not have been violated, as guaranteed in Art. 4 sec. 2 GBL.

Commentaries on the GBL do not treat the question of religious minorities. During the last 70 years of jurisdiction, in the Federal Constitutional Court (Bundesverfassungsgericht, short: BVerfG), there have been several judgements where religious minorities have been denied constitutional laws.

## III. Legal status

### 1. Freedom of religion and legal privileges for religions

The most significant German laws concerning religion are the human rights guarantee of religious freedom, as already stated, in Art 136 sec 1 WC and Art 4 GBL, which determines freedom of faith, conscience and confession.[14] The norms on religion in the GBL strike a balance between separation and cooperation between the state and all religions resident in its territory. Separation means non-identification of the state with any religion. Cooperation means the state is willing to collaborate

[12] Cf. C. Gusy, *Die Weimarer Reichsverfassung* (Tübingen, 1997), p. 286 sq.

[13] 2015 OSCE Guidelines on the legal personality of religion or belief communities: '*In Germany, religious communities that are not registered as an association or as any other specific form of a legal entity have the status of nonregistered associations (non-registered associations are regulated under Section 54 of the German Civil Code), as are other legal entities. This kind of association enjoys the same rights as a non-trading partnership (Gesellschaft bürgerlichen Rechts) and has partial legal capacity; in practice, the courts widely make use of analogies to the provisions for registered associations.*' Online: https://www.osce.org/odihr/139046?download=true (accessed 15 January 2021).

[14] Cf. M. Pulte, *Grundfragen des Staatskirchen- und Religionsrechts* (Würzburg, 2016), p. 79.

with religions in fields of common interest.[15] Based on the general equality of all religions and beliefs, according to Art 4 GBL, we also have to admit there is no absolute separation between church and state in this country. It has to be realised also that Art 137 sec 1 WC forbids there to be any form of a state religion: "*There is no state church*". This means that any institutional or organisational connection between church and state is absolutely illegal.[16] The fundamental principle of this constitution is to give the state the opportunity to collaborate with religions in certain fields of political interest, mainly the field of social welfare, which is one of the state objectives mentioned in the GBL the permanent jurisdiction of the BVerfG, points out.[17] From this perspective, Art 140 GBL and Art 137 sec 2-7 WC open a wide range of self-organisation and legal recognition for religions.

***Article 137 WC:***

*(1) There is no state church.*

*(2) Freedom of assembly in religious association is guaranteed. No restriction shall be placed upon the union of religious associations within the territory of the Reich.*

*(3) Every religious association shall direct and administer its affairs without interference, within the limitations of the law applicable to all. It shall fill its own offices without assistance from the state or local authorities.*

*(4) Religious associations have the right to incorporate according to the general provisions of the civil code.*

*(5) Religious associations shall, to the extent that they were formerly, remain public corporations. The same rights may be accorded to other religious associations at their request if, by their constitution and the number of their members, they give assurance of permanence. If several of these public corporate religious associations combine in a union, this union shall also be a public corporation.*

*(6) Religious associations which are public corporations are entitled to levy taxes on the basis of the civil tax lists in accordance with provisions of the laws of the states.*

*(7) Societies which aim at mutual cultivation of a worldview shall be in a status similar to that of religious associations.*

*(8) So far as the execution of these provisions requires further regulation, it shall be provided by legislation of the states.*

[15] Cf. A. Frh. v. Campenhausen / H. deWall, *Staatskirchenrecht* (München, 2006), pp. 196-225.

[16] Cf. H. D. Jarass and B. Pieroth (eds.), *Grundgesetz, Kommentar* (München, 2002), p. 1236.

[17] Cf. BVerfGE 24, p. 236 sq.; 32, p. 98 sq.; 83, p. 341 sq.; 102, p. 73 sq.

Church and state history in this country shows that traditionally the Roman Catholic Church and the Protestant Churches (Lutheran and Reformed) were recognised as public corporations (KöR)[18] by customary law, at least since the Peace of Westphalia (1644). Art 137 sec 5 WC recognises this legal reality. Continuing in this tradition, the Jewish Religious Associations of Germany received the same legal status in the Weimar Republic.[19] After the persecutions of the Nazi era, this legal status was renewed for the Jewish community in the FRG since the erection of the 'Zentralrat der Juden' in 1950, which represents 108 Synagogue communities with about 100.000 members. The 108 Jewish communities have this privileged status too.[20]

What was, and what is, the idea behind the legal status of a public corporation (KöR)? The WC does not wish to preserve legal history alone, and as such, the constitution is open to development. The second sentence in the clause found in Art 137 sec 5 sets out criteria which new religious organisations or associations need to meet in order to register for legal status. The first, mentioned in Art 137 sec 5 is the free will of the religion to obtain this status. It is up to the religion to decide whether the other criteria, mentioned in sec 5 match the organisation and structure of the religious community. The religion must have: a sufficient number of members and the assurance of permanence, a criterion not directly mentioned here, but distinctively outlined by the jurisdiction of the BVerfG.[21] These criteria do not demand total accordance of the laws and doctrine of any religion with the GBL, but only for general acceptance of the principles of the autonomous, religiously neutral, democratic state according to the GBL.[22] The jurisdiction, and a majority of academics, agree that this requirement is justified for religions which in return receive a number of state privileges.[23] Under these conditions, every religion has the right to acquire the privileged status of a public corporation by law.[24] However, those religions that are not able to create

[18] The special status of public corporations / associations in German law is distinctively discussed in the monography of A. Jansen, Aspekte des Status von Religionsgemeinschaften als Körperschaften des öffentlichen Rechts. Ausgewählte Fragestellungen des Körperschaftsstatus in der Rechtspraxis, SöR 1352, Berlin ²2017, especially pp. 55-69.

[19] Cf. R. Pennsel, *Jüdische Religionsgemeinschaften als Körperschaften des öffentlichen Rechts* (Köln, Weimar, Wien, 2014) p. 19.

[20] Gesetz zu dem Vertrag vom 27. Januar 2003 zwischen der Bundesrepublik Deutschland und dem Zentralrat der Juden in Deutschland - Körperschaft des öffentlichen Rechts, BGBl. I 2003 S. 1597.

[21] Cf. BVerfGE 139, p. 321 sq. 359, 2 BvR 1282/11, decision 30 June2015, Jehovah's Witnesses - Bremen.

[22] Cf. M. Pulte, *Grundfragen*, *ibid*., pp. 144-146; S. Muckel, 'Die Verleihung der Körperschaftsrechte an Religionsgemeinschaften in Deutschland unter besonderer Berücksichtigung des Erfordernisses der Gewähr der Dauer durch »die Zahl ihrer Mitglieder«' in: W. Rees, M. Roca, B. Schanda (eds.), *Neuere Entwicklungen im Religionsrecht europäischer Staaten* (KST 61, Berlin 2013) pp. 435-448.

[23] Cf. A. Jansen, (fn. 14) ibd., pp. 622-624.

[24] Cf. BVerfGE 102, 370 [385 sq.].

in structures like a church are free to organise themselves according to the prescriptions of common law. German constitutional law and the jurisdiction refrain from distinguishing between religious majority and minority. In this legal system this distinction is not relevant because of Art 3 and 4 GBL. The legal question is whether a certain group can be identified as a religion or not. The jurisdiction has focussed on the criteria for this identification over decades. Some of the fundamental decisions made by the German high court are illustrated in the following pages.

## 2. **Bahá'í decisions**

### A. ***Federal Constitutional Court 5 February 1991***

For small religions in Germany in particular, the decision of the Federal Constitutional Court of 1991 regarding the status of the Bahá'í community is of relevance. The judgement dealt with the question of which framework state authorities should use to examine the terms 'religion' and 'religious community' as part of the German constitution. As an initial principle, the court laid out that - a community understanding itself as a religion is not sufficient. For a group to be identified as a religion, the content of its spiritual teachings must be looked at, its community should act in accordance with the teachings, and should outwardly appear to be a religion. In case of dispute, the legal authorities, and ultimately the courts, must decide. If an agreement cannot be reached as to whether a community is a religion or simply another organisation, the state must intervene and make a decision. The second principle of this decision made it clear that religious freedom in the framework of Art 4 sec 1 and 2 GBL not only covers individual religious freedom but also religious freedom of association, as outlined in Art 140 GBL and the incorporated articles of the Weimar Constitution. The court explained that the constitution assures the freedom to join together and organise in common faith as a religious society. This does not mean the right to being a specific legal entity, such as a public corporation (KöR); it only guarantees the possibility of legal existence, including participation in general legal relations.[25]

The Bahá'í decision is one of the most important decisions of the BVerfG regarding the question of religion and joint religious practice. Now, the objective criteria 'in fact, according to spiritual content' and 'external appearance' have been added. This may be because the court wanted to close a gap which existed in the earlier jurisdiction, where religions more or less had the autonomous right to define their own status.

[25] Cf. BVerfGE 83, 341-362 – 2 BvR 63/86, 'Bahá'í decision'; von Coelln, Art. 140, in Grundgesetz, ibd., p. 837.

### B. *Federal Administrative Court 28 November2012*

A jurisprudential reception of this fundamental decision can be found in a judgement made by the Federal administrative court (BVerwG) in 2012. In this case, the court had to decide whether the denial of the status of public corporation (KöR) for the Bahá'í community of Germany was legal or not. The BVerwG explained that the jurisdiction of the BVerfG sets out various criteria which can be used to decide whether a religious association may receive the status of a public corporation (KöR) or not. The administration and the courts of lower instance denied the Bahá'í this status because of its low numbers of members (less than the critical mass of one per thousand of the population in the country (Hesse)). The BVerwG pointed out that this criterion must be noted alongside others, especially permanent residency and the internal legal structure of the association. If these two criteria are fulfilled, the number of members alone would not have been decisive in this case.[26]

The two Bahá'í decisions show that the German constitution ensures the rights of religious minorities even if the constitution does not contain a special legal status for religious minorities. The jurisdiction of the German high courts on Art. 137 sec. 4 WC points out that this norm only guarantees the right for religions to organise as private juridical bodies in order to ensure they can participate in legal matters without any barriers.[27] Because the Bahá'í religion is more than 100-years-old in the Near East, this religion has to be counted as an Old Religious Minorities.

## 3. **Scientology decisions**

The Scientology movement has not existed for long. In the US, this organisation is accepted as a New Religious Movement. Scientology considers itself a church. In public, both the character of this movement and its methods of organisation are highly controversial. This is especially true for Germany. Here, Scientology has been monitored since 1997 in several states, due to a decision of the Conference of Interior Ministers by the Office for the Protection of the Constitution.[28] As per a report in 2016: '*The SO (Scientology Organization) aims for a society without general and equal elections and rejects the democratic legal system.*'[29] Since the very beginning of Scientology in Germany, there has been much scepticism and reservations, which are mainly due to the lack of transparency of the organisation. Until now, the organisation was not able to dispel mistrust, as the newest intelligence service reports show.

[26] Cf. BVerwG, decision 28.11.2012 - 6 C 8.12 [ECLI:DE:BVerwG:2012:281112U6C8.12.0].

[27] Cf. with more references to the judgements: von Coelln, Art. 140, in: Grundgesetz, ibd., p. 837.

[28] Cf. J.T. Richardson, 'Scientology in Court: A Look at Some Major Cases from Various Nations' in James R. Lewis (ed.) *Scientology* (Oxford University Press, Oxford 2009), pp. 284-292.

[29] 'Bundesamt für Verfassungsschutz, Verfassungsschutzbericht 2016', p. 37: *Scientology Organisation (SO), 4 July 2017* www.verfassungsschutz.de (accessed 15 January 2021).

Because Scientology continues to seek for recognition as religion in Germany, there have been several cases regarding this organisation.

### A. *Judgement of the Federal administrative Court 1992*

As we have already seen, the Bahá'í decision of the BVerfG was one of the most remarkable judgements of German High Courts regarding the status of religious groups. The Federal Constitutional Court pointed out that it is not enough for an organisation to refer to itself as a 'church' or 'religious community'[30]. The court clearly stated that the mere assertion and self-image of a community that claims to be a religion cannot justify the protection of Art 4 GBL. Rather, it must actually be a religion and a religious community '*according to spiritual content and outward appearance*'. To examine and decide this in the case of a dispute is in the competence of the state, and ultimately it is in the competence of the courts. In doing so - as the Federal Constitutional Court expressly pointed out - the courts exercise no free power of determination but have to use the concept of religion, meant or presupposed by the constitution. Decisive here is the current reality of life, the cultural tradition and the general as well as religious scientific understanding.[31] The Federal Constitutional Court has explicitly stated in a decision of 1992 that these principles should also be applied when assessing the Scientology organisation.[32]

The BVerwG passed judgement on whether Scientology is a religion or not. According to its self-understanding and description, Scientology is a church which follows its prophet Ron L. Hubbard and his teachings. The question discussed was not if the self-understanding of Scientology as a religion is correct or not, but whether the denial of the country's administration was correct, regarding its refusal to recognise Scientology as a charitable organisation.[33] In the decision from 1997, the court had to decide whether the legal form of a registered association is, according to the provisions of the German Civil Code, only open to associations whose purpose is not directed towards economic business (so called ideal associations). Economically active associations must use the commercial legal forms of a company (such as GmbH, AG) or can obtain legal capacity granted by the state under strict conditions if the religious aspect is significantly overtaken by the economic activities. In these cases, the self-understanding of the association as a religion is not relevant because the association is still able to participate in legal life by assuming an appropriate legal

[30] Cf. BVerfGE 24, 236: „Lumber room" decision – 1 BvR 241/66.

[31] Cf. BVerfGE 83, pp. 341-362.

[32] Cf. BVerfG, decision 28.08.1992 – 1 BvR 32/92, NVwZ 1993, p. 357 (358), Scientology decision.

[33] Cf. BVerwG, 06.11.1997 - 1 C 18.95, NJW 1998, p. 1166 (1168).

status. The legal status of 'registered non-profit association' is reserved for those associations whose primary purpose is charitable.

## B. *Federal Labour Court 1995*

In light of German labour law and its allowance for registered religions to be public corporations (KöR), the BAG had to pass judgement on the legal status of certain members of Scientology working for the organisation. Scientology claims to be a religion and therefore would like to benefit from special exemptions from labour law which the German legal system offers. The court referenced the aforementioned settled jurisprudence of the High courts on the qualification of religions. The court pointed out that an organisation can be a religion even if its purpose is predominantly to generate profit. However, religion could be used to mask economic activity. The court considered this to be the case with Scientology. It argued that the business activities do not only make up a significant portion of the organisation's entire activities. Its business activities are inseparable from its other activities. Scientology is an institution for the marketing of certain products. The religious or ideological teachings serve as a pretext for the pursuit of economic goals.[34]

## C. *Result or no result?*

It should be noted that whether the Scientology organisation is a religious community or not is judged differently by the courts. While the Federal Labour Court, in its decision of 1995, sees in the religious or ideological teaching only a pretext for the achievement of economic goals, the OVG Hamburg judged one year earlier in 1994[35], that according to preliminary assessment, Scientology should not be denied the status of a world view community. Whether the Scientology organisation qualifies as a community of beliefs has been considered irrelevant to that particular process. The Federal Constitutional Court[36], the Federal Administrative Court[37], the Federal Finance Court[38] and also the Federal Labour Court[39] in 2002, left the question of whether Scientology is a religion or not, open.

[34] Cf. BAG, 22.03.1995, Az.: 5 AZB 21/94, BAGE 79, pp. 319-360.
[35] Cf. OVG Hamburg, Urteil vom 17.06.2004 – 1 Bf 198/00.
[36] Cf. BVerfG, Beschluss vom 28.08.1992 – 1 BvR 32/92, NVwZ 1993, pp. 357-358.
[37] Cf. BVerwG, Urteil vom 15.12.2005 – 7 C 20/04, NJW 2006, pp. 1303-1304.
[38] Cf. BFH, Urteil vom 21.08.1997 – VR 65/94.
[39] Cf. BAG, Beschluss vom 26.09.2002 – 5 AZB 19/1, NJW 2003, pp. 161-163.

## 4. **Jehovah's – Witness decisions of 2000 and 2015**

The Jehovah's Witness are a Christian, chiliastic and non-trinitarian religious community that organises itself as a church. They call their inner constitution 'theocratic organization'. This religion has been active in Germany for more than 100 years. In 1927, they were registered as a private association under the name 'Internationale Bibelforscher-Vereinigung' (International Bible-Research Association) in the association register of Magdeburg. During the Nazi-dictatorship, the Jehovah's Witness were oppressed. Many members were murdered in concentration camps. Therefore, Germany is very sensitive in the treatment of this religious minority. At no time in German history has the question arisen as to whether this organisation is a religion or not. Other critical points regarding the criteria for public religious organisations have been brought to courts. Amongst those, the most critical question was if, and in how far, the Jehovah's Witness fulfil the non-written criterion of lawfulness. The main goal of the BVerfG in 2000 was to describe this criterion in a legal sense. The court made it clear that: A religious community that wishes to become a corporation under public law must guarantee that its future conduct does not jeopardise the fundamental constitutional principles outlined in Art. 79 sec. 3 GBL. These are the fundamental rights of third parties which are entrusted to state protection and the basic principles of the liberal religious law and state church law of the GBL. These basic laws also include the principles of the rule of law and democracy. Corporate religious communities are not directly bound to individual fundamental rights except when they exercise sovereign state powers[40]. Normally, religious public corporations do not act in this field in Germany. They are identified as special or unique public corporations without any sovereign powers.[41]

In a second decision made in 2015, the BVerfG confirmed its previous decision. The case concerned Jehovah's Witness, who after their initial registration as a public corporation in Berlin, wanted to be registered in the same way in the other sixteen federal states of Germany. The city-state of Bremen denied this because of a section in Art. 61 of the Bremen-Constitution of 1947, which states that churches, religious and philosophical communities remain corporations under public law, as far as they have been previously. Other religious or philosophical communities can be given the same legal status by law if they guarantee the duration by their constitution and the number of their members. The crucial question here was if the state of Bremen had the right to deny this status for its own territory or if it had to follow the city of Berlin which first conferred this status onto the Jehovah's Witness. The BVerfG finally judged that Bremen had to follow the decision of Berlin, not because Bremen would

[40] Cf. BVerfGE 102, p. 370-400. 1 BvR 1500/97, 'Jehovah's Witness'.
[41] Cf. M. Pulte, *Grundfragen* (*ibid.*), p. 144.

not have the competence to examine the requirements, but because the section of the Bremen Constitution is against Art. 20 GBL.

These decisions regarding Jehovah's Witness have shown the religious neutrality of German Constitutional Law and its jurisprudence, even if the decisions in detail can be criticized. These further details however, do not fall within the scope of this report.

## IV. Social change

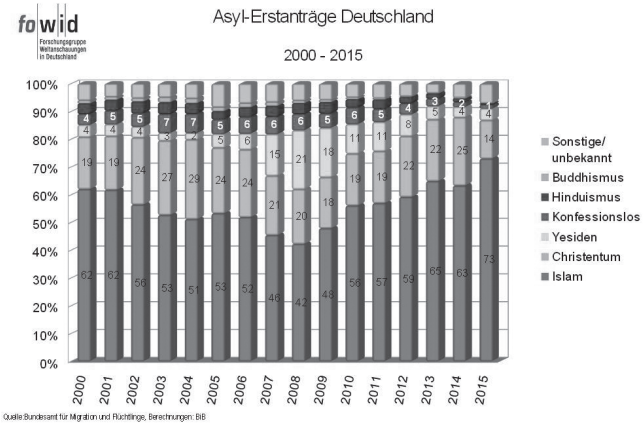
In Germany, there has been a remarkable decrease of Catholic and Protestant members over the recent decades. Other religions, including Christian confessions, have remained in a strong minority however. Historically, in Germany, there have been Protestant ecclesiastical minorities since the reformation. During the period of the legal principle *cuius regio eius religio* even in Protestant parts of Germany, Protestant minorities such as Baptists or Mennonites were only tolerated because of the principle that there was only one powerful state religion. During the 16th and 17th centuries, they were barely even allowed to emigrate. These Christian minorities did not participate in the system of privileged treatment. Since the Weimar Constitution, this problem of unequal treatment has been overcome.[42] As already pointed out, freedom of faith, conscience and religion are guaranteed by German Basic Law (Art. 3 sec. 3, Art. 4, Art. 140 GG and Art. 137 sec. 1 WC).

Since the mid of 20th century, the number of Muslim believers had been growing continuously. The first wave of Muslims came during the late 1960s when foreign workers, particularly from rural areas of Turkey, settled in Germany with their families. Now this mainly Turkish Muslim community lives in Germany as second and third generation immigrants. Another reason for the growth of the Muslim community here is the worldwide migration movement, especially since 2015, when many Muslims from Syria and Iraq asked Germany for asylum. Most of them belong to a Muslim denomination. Others, such as Yesides and Oriental Christians are amongst them, but they also are a minority within the group of refugees.[43]

[42] Cf. P. v. Tiling, 'Minderheiten, kirchliche', in A. Frh. v. Campenhausen, et al. (eds.), *Lexikon für Kirchen- und Staatskirchenrecht,* Bd. 2 (Paderborn 2002), p. 807.

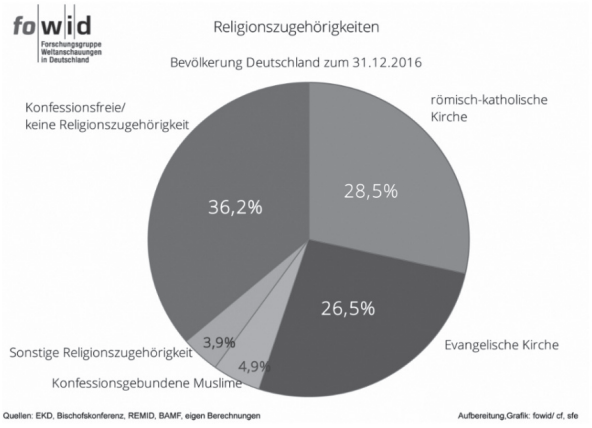
[43] Cf. 'Bundesamt für Migration und Flüchtlinge, Wie viele Muslime leben in Deutschland' (2016) 71' in *Auftrag der Deutschen Islam Konferenz*, pp. 28-31.

**Table 1: Religious orientation of refugees registered in Germany 2000-2015**[44]




Nowadays (2015), the two ancestral Christian denominations in Germany only represent 55 percent of the population, though they remain as the dominant religions in the political field. Of those that do not belong to any registered religious community, it is not clear whether they do not have any beliefs or merely do not wish to be a member of an organised religion.

**Table 2: Religious Affiliation in Germany 2016**[45]




[44] 'Forschungsgruppe Weltanschauungen in Deutschland, Religionszugehörigkeiten der erfassten Asylsuchenden' https://fowid.de/meldung/religionszugehoerigkeiten-erfassten-asylsuchenden (accessed 15 January 2021).

[45] Forschungsgruppe Weltanschauungen in Deutschland, statistics: https://fowid.de/meldung/religionszugehoerigkeiten-deutschland-2016 (accessed 15 January 2021).

Looking at the statistics, we can see that 4.9 percent of the German population identifies with one of the Muslim denominations and 3.9 percent belong to other religious minorities. The group marked in the statistics as 3.9 percent, contains Christian denominations such as the Orthodox Churches, the Evangelical Free Churches, Old-Lutherans, Old-Catholics, New-Apostolic Churches and Jehovah's Witness, Mormons, Jews, Buddhists and others.

We must conclude that the majority of the German population still identifies as belonging to a certain religion (74.8 percent).

## V. Legal change

At the moment, no legal change can be foreseen in Germany, though there are ongoing discussions regarding the registration of religions as public corporations. It is an open question whether the German system of registration put religions coming from other cultural backgrounds as a disadvantage. Since the mid of 1990s, proposals were made to open a way for better integration in the religious law system of Germany, especially for Muslim communities. It remains an open question whether Muslim communities are able to receive the status of a public corporation (KöR).[46] At the 2010 Lawyers conference in Berlin, this issue was discussed. Christian Waldhoff made the proposal *de lege ferenda* to establish a new class of public corporation that could come close to the communitarian ideas of the Muslim communities. He invented a so called 'public corporation – light'. The idea was not to demand the exact fulfilment of the aforementioned criteria if the character of the religion does not allow this.[47] This idea was not withdrawn by other lawyers or the state authorities, but rather from Muslim theologians themselves. They pointed out that even this light version of a public corporation forces Muslim communities to undertake a church-like institution process that would not fit the origin, teaching and tradition of Islam. A legally recognised, institutional authority, in the sense of state church law in Germany is alien to Islam.[48] This view may be shared by the majority of Islamic communities. Lawyers also have concerns whether Muslim communities fulfil the requirements for public corporations in general, because of the same facts pointed out by Muslim representatives: the lack of a definite religious authority or authorities,

[46] Cf. S. Muckel,'Muslimische Gemeinschaften als Körperschaften des öffentlichen Rechts' (1995) *DÖV,* pp. 311-317.

[47] Cf. C. Waldhoff, 'Neue Religionskonflikte und staatliche Neutralität – Erfordern weltanschauliche und religiöse Entwicklungen Antworten des Staates?' (2010) 3 *NJW Beilage*, pp. 90-93.

[48] Cf. H.Mohagheghi,'Neue Religionskonflikte und staatliche Neutralität. Erfordern weltanschauliche und religiöse Entwicklungen Antworten des Staates? Eine muslimische Perspektive' (2011) 2 *Ethik und Gesellschaft,* pp. 1-9.

no priesthood, or synod. Islam is a religion without being a church.[49] Traditionally, this does not fit into a legal system which is based on a Western tradition based on Christianity in a broader sense. However, there are also Muslim communities that seek corporate status. In 2013, the Ahmadiyya Muslim Jamat in the FRG (AMJ) was the first Muslim community that received the status of a public corporation (KöR) in Germany.[50] This community does not typically stand for the majority of Muslim communities. AMJ is organised in the structure of a caliphate. It pointed out that the idea of caliphate here only stands for religious leadership and not for interference in state affairs. Indeed, until 2018, this seemed to be the only Muslim community asking for such a legal status, in accordance with Art. 137 sec. 5 WC.

## VI. Social development

As a part of its integration policy, the Federal administration started a dialogue with several Muslim communities in 2006, called the German Islam Conference.[51] According to its own statements, the Federal Ministry of the Interior is pursuing the goal of placing the relationship between the German state and the Muslims living in Germany on a sound basis, to promote better integration in terms of religion and socio-political policy. It is not about the relationship between Islam and Christianity, but about the relationship between state and religion.[52] A consequence of the conference was the founding of the Muslim Coordinating Council (MCC). It is a collaboration network of the four biggest Muslim communities in Germany. Members are the Central Council of Muslims in Germany, the Turkish-Islamic Union of the Institute for Religion (DITIB), the Islamic Council for the Federal Republic of Germany and the Association of Islamic Cultural Centres. The MCC only represents members from Sunni (74%) and Shiite (7%) Islam. The group of Alevite Muslims (13%), who numerically come in second place behind the Sunni do not participate in the MCC.[53] These are the main representatives of Islam in Germany. Other Muslim communities have no equivalent to these structures. One the one hand, even if the

[49] Cf. *v. Campenhausen / deWall*, ibd. p. 89.

[50] Certificate from 25.4.2013, Staatsanzeiger Hessen, p. 634; Verordnung der Senatskanzlei Hamburg 9.4.2014, HmbGVBl. p. 137.

[51] Bundesministerium des Inneren, https://www.bmi.bund.de/DE/themen/heimat-integration/staat-und-religion/islam-in-deutschland/islam-in-deutschland-node.html (accessed 15 January 2021).

[52] DIK - Deutsche Islam-Konferenz 27. September 2006, https//www.deutsche-islam-konferenz.de. Bundesamt für Migration und Flüchtlinge, 19. September 2006 (press release of the Federal Ministry of the Interior).

[53] Cf. Bundesamt für Migration und Flüchtlinge: Muslimisches Leben in Deutschland im Auftrag der Deutschen Islam Konferenz, Nürnberg 2009, http://www.deutsche-islam-konferenz.de/SharedDocs/Anlagen/DIK/DE/Downloads/WissenschaftPublikationen/MLD-Vollversion.pdf?__blob=publicationFile (accessed 15 January 2021), p. 98.

federal administration took the initiative to bring the Muslim communities somehow together, from a legal point of view, it is the task of the communities themselves to organise and to coordinate their interests. On the other hand, it is not the first time in European history that state authorities took over responsibility for bringing rival religious groups together. It was the Roman emperors of the first Christian centuries who initiated and directed the first ecumenical council, with its important theological and political decisions. It is not a violation of the religious neutrality of the state to take such similar initiatives again. The state only creates the platform for a free exchange within the religious family.

## VII. Legal development

One of the ideas was to establish a permanent dialogue between the Muslim communities and the state and to prepare the ground for the recognition of these communities in public law. But until now, and because of the aforementioned arguments, the Muslim communities have retained their legal status of registered organisation according to private law (e.V.). A change in this development is not foreseeable for Muslim communities in Germany.

Other religions already have arranged themselves within the legal system for religions in Germany. One reason may be that Christian minorities, such as the Jewish community, have a more ecclesiastical structure than Muslim communities. This structure makes it easier to adopt German law on religions for their own.

## VIII. Conclusion

Germany provides a legal system with quite a lot of different forms of juridical organisation for religious communities. This legal system is based on four principles in the field of law and religion: freedom of religion and belief for individuals and communities, neutrality, parity and tolerance regarding every religion and belief. Under these circumstances, from a legal point of view, special provisions safeguarding the rights and legal status of religious minorities do not seem to be necessary. Even the privileged status of public corporations (KöR) is not only reserved for the traditionally settled religions in Germany. The granting of this legal status to religious minorities such as the Jewish, the Ahmadiyya Muslim Jamat in the FRG, the Jehovah's Witness and a Hindu temple (in Bavaria) show the dynamism of this legal institution. If other religions in their belief or form of organisation do not meet prerequisites for this privileged legal status, they are not excluded from the legal system. By taking the form of a registered organisation (e.V.), they are able to participate in the public and legal life of the state, receiving some, but not all, privileges which are foreseen to support religious life in this country. It is a valuable decision of the state to promote religions because the state has a substantial interest in the values and responsibilities of its population.

# OLD AND NEW RELIGIOUS MINORITIES IN IRELAND: EXAMINING THE IMPACT OF IMMIGRATION ON A NATION OF EMIGRANTS

Stephen Farrell*

## I. Definition and status

### 1. Social science definition

In the early years following Irish independence the phrase 'religious minority' was almost synonymous with the term 'protestant', an umbrella term covering a diverse range of small religious denominations who may look almost indistinguishable from without, but from within feel that they share very little in common. Sociology in Ireland has produced a wealth of studies on the changing position of the Catholic Church[1] and on religious conflict and the peace process in Northern Ireland[2]. However, relatively little has been written on the changing face of religious affiliation in the Republic and in particular, the experience and growth of religious minorities[3]. It is likely that the pace of growth in the number of people claiming to adhere to no religion will attract more social scientific attention than the relatively small changes in real terms in the 'religious minority' category. When looking at religious minorities it is common to distinguish between religious minorities that are indigenous to Ireland and those who are new minorities brought by recent trends of inward migration[4].

* Rector, Zion Parish, Diocese of Dublin.

1 L Fuller, 'Religion, politics and socio-cultural changes in twentieth century Ireland, *The European Legacy,* 2005 10(1): 41-54; J Hirschle, 'From religious to consumption-related routine activities? Analyzing Ireland's economic boom and the decline in church attendance', *Journal for the Scientific Study of Religion,* 2010 49(4): 673-687; T Inglis *Moral Monopoly: The Rise and Fall of the Catholic Church in Modern Ireland* (1998 2nd edn. Dublin: UCD Press).

2 Brewer et al 2011, Coakley 2011, Compton 1985, Doherty 1993, O'Malley and Walsh 2013, Todd 2010.

3 See A Roder, 'Old and new religious minorities: Examining the changing religious profile of the Republic of Ireland', *Irish Journal of Sociology*, 2017 Vol 25(3) 324.

4 D Gillmor, 'Changing religions in the Republic of Ireland 1991-2002', *Irish Geography*, 2006 39(2): 111-128.

These indigenous or old minorities are Protestants, the Church of Ireland being the largest group, followed by Presbyterians and Methodists. The new minorities include Orthodox Christian and Muslims. The categories are not absolute, and recent studies have noted that the 'old' minorities have recently been boosted by immigration, whilst almost half of migrants belong to the dominant religious group. Attempts to understand the increase in those adhering to no religion do not treat this group as a religious minority, partly because that is unlikely to be their self-understanding.

The relative lack of studies on religious minorities can be understood when the history and development of sociology in Ireland is considered. After Irish independence two of its three main currents of nineteenth century thought (nationalism and Catholicism) found themselves no longer in opposition to the state, and what had been Ireland's third nineteenth century intellectual current, Liberalism, was crowded out.[5] What followed was the dominance of Catholic sociology, which combined with the legacy of colonialism, real and perceived, gave sociology in Ireland a 'national' or even 'nationalist' tradition,[6] with a focus on emigration, rural decline, the family and Catholic social teaching.[7] Whilst this focus has gone, sociology in Ireland has arguably only relatively recently come of age in terms of interdisciplinary approaches and comprehensive comparative analysis that seek to locate Ireland culturally and historically[8].

## 2. **Legal Definition**

Religious Minority is not expressly defined in Irish law, but Minority Religion is defined in Irish law in relation to education. It was most recently defined with the publication of the Education (Admission to Schools) Bill 2016 (now the Education (Admission to Schools) Act 2018). Subsection two of section 7, which seeks to define a 'Recognised primary School' for the purpose of state regulation of school admission policies, allows a school which has 'the religious ethos of a minority religion[9]' to prioritise applications from a child who is a member of a minority religion[10]. This applies only where the school provides a religious education which is of the same

[5] B Fanning, A Hess, '*Sociology in Ireland: Legacies and Challenges*', Irish Journal of Sociology (2015, Vol. 23 issue 1) 5.

[6] *Ibid.* See also B Fanning, A Hess, 'Sociology in Ireland: A Short History' (2015 London: Palgrave Macmillan).

[7] See P McKevitt, 'The Plan of Society' (1944 Dublin: The Catholic Truth Society); J Kavanagh, 'The Manual of Social Ethics' (1954 Dublin, Gill and Sons). For a consideration of sociology during this period see B Fanning, 'The Quest for Modern Ireland: The Battle of ideas 1912-86' (2008 Dublin: Irish Academic Press).

[8] Fanning and Hess 17.

[9] s7(2)(a) Education (Admission to Schools) Act 2018.

[10] s7(2)(b) Education (Admission to Schools) Act 2018.

religious ethos as, or. similar religious ethos to, the religious ethos of the minority religion of the student concerned.[11] In this context Minority Religion is defined as 'a religion whose membership comprises in excess of ten per cent of the total population of the State'.[12] The 2016 Census of Ireland showed that 78.3% of the population identify as Roman Catholic, 9.84% have no religion, 2.65% are Church of Ireland, 1.33% are Muslim and 1.31% are Orthodox.[13] It would appear that the State has sought to define minority religion as any religion other than the Roman Catholic Church. The parliamentary debate on the Bill shows that there was not an attempt to reach a legal definition that balanced old and new minorities or that considered the rise in those adhering to no religion. Rather, the Minister sought a definition that allowed for a change in the law for Catholic schools, but no change in the law for 'Church of Ireland, Presbyterian, Methodist, Jewish or Muslim schools'.[14] The definition is based on an attempt to protect those who adhere to a religion, though it would seem to exclude protection based on belief.

In Ireland religious or belief groups take the form of voluntary unincorporated associations. The right to form such associations is a right protected generally by the Irish Constitution[15], which also protects freedom of expression[16] and assembly[17]. Though the Church of Ireland was once established by law, s20 of The Irish Church Act 1869, makes clear that the rules of the Church operate as though members had 'mutually contracted and agreed to abide by and observe the same'[18]. In *State (Colquhoun) v d'Arcy*,[19] Sullivan P. described the status of any Church not established by law as having

> 'the status of a voluntary association the members of which subscribe or assent to certain rules and regulations and bind themselves to each other to conform to certain laws and principles, the obligations to such conformity and observance resting wholly in the mutual contract of the members enforceable only as a matter of contract by the ordinary tribunal of the land'.[20]

[11] s7(2)(a) Education (Admission to Schools) Act 2018.

[12] s7(6) Education (Admission to Schools) Act 2018.

[13] Census 2016, Profile 8: Irish Travellers, Ethnicity and Religion, Central Statistics Office 2017.

[14] Speech of Minister for Education and Skills. Dáil Éireann Debates. Tuesday 29th May, 2018. Education (Admission to Schools) Bill 2016: Report Stage (Resumed) – Debate on Amendment No. 2.

[15] *Bunreacht na hÉireann,* Article 40.6.1.iii.

[16] *Bunreacht na hÉireann,* Aricle 40.6.1.i.

[17] *Bunreacht na hÉireann,* Article 40.6.1.ii.

[18] See also N Doe, *Canon Law in the Anglican Communion* (1998 Oxford: Oxford University Press) 17 and 19.

[19] *The State (Colquhoun) v. d'Arcy* [1936] I.R. 641.

[20] *The State (Colquhoun) v. d'Arcy* [1936] I.R. 641 at 650.

That there are no barriers to the formation of voluntary associations or to the creation of trusts for the management of real or other assets, shows general compliance with the 2015 OSCE Guidelines on the legal personality of religion or belief communities.

Legal Scholars have largely failed to engage with the definition of religious minority in Ireland. The presence of a clear majority religion, combined with the presence of relatively few minority groups and relatively small numbers of migrants who do not belong to one of the existing religious groups in the country have made this an area of limited legislative or scholarly intervention. Scholars will consider the definition of religion or belief[21] itself or the scope of the protection offered by blasphemy legislation[22], though the area of interest is arguably the interface of identifiable religions with those of no religion or codified belief system[23].

## 3. **Legal Status**

Prior to 1972[24] various religious minorities were given Constitutional recognition, with the Roman Catholic Church being ascribed a special position, though this was deemed to confer no juridical privilege[25], and the universal nature of the constitutional guarantees has since been reiterated[26]. Today certain religions are recognised by being the subject of specific statutes[27], whilst others have chosen to become limited companies[28] and others remain unregistered voluntary associations. That there is no mechanism for churches to become corporate bodies does not pose a practical problem given the variety of other solutions for questions of property. Article 44.2.2 of the Constitution guarantees that the State will not endow any religion. It has been established that the non-endowment clause allows the State to confer economic benefits on religious bodies, provided it does so in a non-discriminatory manner. In *Campaign*

[21] C Hogan, 'Accommodation of Faith in the workplace: European and Irish Perspectives' *Irish Employment Law Journal* 2017, 14(2), 37-50.

[22] Charleton J., 'Blasphemy: Religion Challenges Freedom of Speech' *Irish Judicial Studies Journal* 2017 Vol 1, 15.

[23] See for instance, J McLoughlin, 'In the Presence of Almighty God – the human rights violations at the heart of the Irish Constitution', *Irish Law Times* 2017, 35(17) 230-235; E Fitzsimons, 'A Recipe for Disaster? When Religious Rights and Equality Collide through the Prism of the Ashers Bakery Case' *Hibernian Law Journal* 2016, 15 (1), 65-85.

[24] Fifth Amendment to the Constitution Act 1972.

[25] see *Quinn's Supermarket v Attorney General* [1972] I.R. 1; *Campaign to Separate Church and State Ltd v Minister for Education* [1998] 3 IR 321.

[26] *Corway v Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484.

[27] The Irish Church Act 1869, The Irish Presbyterian Church Act 1871 and the Methodist Church Act 1915.

[28] The Society of Friends holds property as 'Friends Trusts (Eire) Ltd 'and the Baptist Church as 'Southern Baptist Corporation Ltd'.

*to Separate Church and State Ltd v the Minister for Education*[29] the Plaintiff argued that the State funding of Chaplaincies – both Catholic and Anglican – was against the non-endowment clause. The court rejected this argument and held that the support for salaried chaplains was available to all community schools of all denominations on an equal basis, in accordance with their needs[30]. The Constitutional Review Group has examined this area and concluded that there is

> 'something of a discordance between the constitutional prohibition on the endowment of religion and no discrimination on religious grounds by the State on the one hand and the maintenance of a religious ethos in a publicly funded institution on the other'.[31]

The Constitutional Review Group has questioned the non-discrimination justification as being unfair on religious minorities in particular as they may not be of sufficient size to avail of pro-rate assistance and any assistance could unavoidably risk their religious autonomy.[32]

Almost all publicly funded schools in Ireland are under religious Patronage. The *Education (Admission to Schools) Act 2018* gives favourable treatment to schools with a religious minority ethos in allowing them to prioritise the admission of children of that same or similar ethos. This has yet to be tested before the courts and could be argued to be endowment in the sense that it confers a benefit and does so in a way that overtly seeks to discriminate between religious groups. The Act also confers a disproportionate benefit on more settled religious minorities such as Protestants as they have a larger school system than new minorities. The majority of newly opened schools in Ireland are non-denominational, making it unlikely that a new religious minority could open a system of publicly funded schools in order to ameliorate the inherent old versus new religious minority imbalance in the legislation.

## II. Social and Legal change

### 1. Social change

Ireland is a predominantly Roman Catholic Country, with 78.3% of the population identifying as such in the 2016 census.[33] However, this marks a sharp decline from the 2011 census, in which 84.2% of the population identified as Roman Catholic. This is part of a wider trend of fewer Irish citizens identifying

[29] *Campaign to Separate Church and State Ltd v the Minister for Education* [1998] 3 IR 321.

[30] For a closer consideration of the non-endowment clause see J Casey., 'Church and State in Ireland' in *European Journal of Church and State* 6 (1999), 60.

[31] The Report of the Constitutional Review Group 1996, 382.

[32] *Ibid.* 383.

[33] Census 2016, Profile 8: Irish Travellers, Ethnicity and Religion, Central Statistics Office 2017.

as Christian in general. In the same period, the Anglican population fell by 2%, the Presbyterian population by 1.6%, Pentecostals by 4.9% and those identifying simply as Christian by 9.1%.[34] There has been a corresponding increase in those describing themselves as having no religion from 269,800 in 2011 to 468,400 in 2016, an increase of 73.6%. Those with no religion now account for just under 10% of the Irish population. The only religious groups to increase in this period were the Muslim community, up 28.9%, or 14,200; the Hindu community, up by 34.1%, or 3,600; and the Orthodox community, up by 37.5%, or 17,000.[35] Though these percentage increases are significant, they still represent relatively small numerical increases, even in a population of just over 4 million. It is possible to link some of these changes to migration, but others are due to societal change. In this period, there was an increase of only about 6,000 in the number of non-Irish people declaring themselves to be of no religion, while the figures for Irish people of no religion increased by around 190,000. In this period, the number of non-Irish people living in Ireland fell from 544,357 to 535,475.[36] Sociologists point to the rate of decline in those identifying as Roman Catholic in Ireland as being the beginning of a steep and sharp decline, if Ireland is to follow the pattern of other western nations from several decades before.[37] Data on the reality of religious life outside of the Census is limited. The European Social Survey 2002-14 records lower level of religious affiliation in Ireland than the Census, largely before respondents must answer whether or not they are members of a religion before declaring which religion in a separate question, whereas the census asks what the respondents religion is. In the European Social Survey Ireland ranks second only to Poland for weekly religious attendance,[38] prayer frequency outside religious services[39] and religious attendance of those aged 15-34.[40] Data for religious minorities shows that they are less likely than Roman Catholics to attend worship daily or more than once a week, but are more likely to pray outside of religious services. This may speak only to the forms of devotion prevalent amongst different groups rather than to the strength or cohesion of those groups.

[34] *Ibid.*

[35] *Ibid.*

[36] Census 2016, Profile 7: Migration and Diversity, Central Statistics Office 2017.

[37] S Bullivant, 'Religion in Ireland: Recent Trends and Possible Futures', Iona Institute lecture given in Dublin, 24 August 2017, slides available online at: http://www.ionainstitute.ie/religion-in-ireland-current-trends/ (last accessed on 15 January 2021).

[38] Ireland 34%, Poland 51%. See Bullivant n37.

[39] Weekly prayer outside religious services: Ireland 57% Poland 67%. See Bullivant n37.

[40] Ireland 17%, Poland 34%. Bullivant n37.

## 2. Legal change

Little has changed in the legal framework governing religious minorities. The Irish Constitution appears to offer a clear separation between Church and State[41] and outside of the field of education or charities legislation the state intervenes little in the organisational life of religious minorities. Greater changes have been seen in how the State has grown increasingly reluctant to tie its social policy to the teaching of the majority Church. In 1951 the government was brought down when the bishops of the Catholic Church rejected the Mother and Child Public Healthcare Scheme as being against Catholic social teaching. In the parliamentary debate that led up to the passing of the bill the government had stressed to the House their acceptance of the bishops authority in social matters. The Taoiseach, John A Costelloe, said, 'I, as a Catholic, obey my Church authorities', and offered on his own behalf and of the entire government, his and their 'complete obedience and allegiance'.[42] Sixty years later the Taoiseach of the day, in response to a growing rift with the Vatican over Clerical sexual abuse of minors pledged himself to a 'Republic of Laws' where 'the law of the land should not be stopped by collar or a crozier' and in which the Church would have no privileged institutional or legal status[43].

Between these two positions were decades where the Catholic Church exerted notable influence on the social legislation. Things began to change in 1974 with the *McGee*[44] case, which overturned the ban on the sale of contraceptives. In 1995 the fifteenth amendment to the Constitution overturned the constitutional ban on divorce, passed by the narrowest of margins, 50.28% to 49.72%. 2015 saw Ireland become the first country in the world to legalise same sex marriage by popular vote. The last instance of the Catholic Church showing the extent of its social influence came in 1983 with the eighth amendment to the Constitution, which gave equal value to the right to life of the unborn and the mother, effectively banning abortion. The 2018 vote to repeal the 8th amendment passed by a two thirds majority despite the vigorous campaigning of the Catholic Church, a sign that a new political landscape now exists in Ireland and that the Church has a marginal voice on social and political matters. What is notable is that through the pendulum swing in the position and influence of the Church in shaping legislation, even from 1951 to today, little has changed in the regulatory framework governing the church state relationship, with the exception of the repealing of Article 44.1.1. The changing position has not been inspired by or

[41] That the constitutional separation may not reflect the reality see D Clarke, *Church and State* (1984 Cork: University Press).

[42] Dáil Éireann Debates, Vol 125, Col 784, 12 April 1951.

[43] P Cullen '*Vatican Relationship at New Low*'. The Irish Times, 21 July 2011. See E Daly, '*Religion, Law and the Irish State',* (2012 Dublin: Clarus Press) at 7ff.

[44] *McGhee v The Attorney General.* [1974] IR 284.

reflected in the legal framework, and shows the flexibility of the Constitutional model of Church state relations found in Ireland.[45]

## III. Social and legal developments

### 1. Social developments

Having traditionally been associated with emigration, from the 1990s onwards Ireland experienced increased levels of inward migration[46]. Celtic Tiger years saw the return of many Irish migrants as well as more and more European migrants, work permit holders from outside of Europe as well as asylum seekers. Immigrants have established new congregations and have revitalised religious communities[47]. This influence will likely continue as parents tend to pass on religious affiliation to children[48]. Debates around cultural diversity are only now beginning to happen and have thus far taken place mainly in the education literature[49]. That half of migrants are Catholic and part of the majority faith perhaps ignores their religious separateness. Polish Catholics have their own parish in Dublin and other Polish masses are offered around the country. Within the Anglican minority an effort to reach out to Anglican immigrants, mainly Africans, bore little fruit and is no longer funded. Those who arrived to Ireland with Anglican identity have largely not found a worshipping home in the Church of Ireland but have chosen to worship in house churches with others according to their nationality, though they may still identify as Anglican[50]. Whilst Protestants as a whole saw an increase in their numbers in the 2011 census, sociologists warn that this ought not to be seen as a long term reversal in the trend towards their numbers declining. The older age profile of Protestants on average suggests that numbers may have received a one-off boost from (return) migration in 2011 and that this will not be sustainable over the longer term.[51] It remains to be seen if the

[45] See E Daly, '*Religion, Law and the Irish State',* (2012 Dublin: Clarus Press) at 7ff.

[46] See A Roder, 'Old and new religious minorities: Examining the changing religious profile of the Republic of Ireland', *Irish Journal of Sociology*, 2017 Vol 25(3) 324.

[47] A Horner, 'Reinventing the city: The changing fortunes of places of worship in inner-city Dublin' in HB Clarke, J Prunty and M Hennessy (eds.) *Surveying Ireland's Past: Multidisciplinary Essays in honour of Anngret* Simms (2004 Dublin: Geography Publications).

[48] SM Myers, 'An interactive model of religiosity inheritance: The importance of family context', *American Sociological Review* (1996 61(5)) 858-866.

[49] E Smyth, M Darmody, F McGinnity, *Adapting to Diversity: Irish Schools and Newcomer Students*, (2009 Dublin: Economic and Social Research Institute); M Parker-Jenkins and M Masterson, 'No longer Catholic, White and Gelic: Schools in Ireland coming to terms with cultural diversity' *Irish Educational Studies* ( 2013 32(4)) 477-492.

[50] Evidence of this is only anecdotal and comes from speaking with clerical colleagues in the United Dioceses of Dublin and Glendalough. Research is much needed.

[51] n41, 330.

projected increase in those born Catholic ceasing to identify as Catholic will offer a boost to religious minorities in terms of people moving from majority to minority denomination, but to date they have tended to simply identify as having no religion, and there is no evidence to suggest this trend will change.

## 2. **Legal developments**

Future legal developments affecting religious minorities are likely to come in the field of education. The *Education (Admission to Schools) Act 2018* has yet to be enacted, but will stop minority religions prioritising school admissions based on religious practise, as evidenced by membership of a local congregation. Rather, those of that same or similar minority ethos will be put on an equal footing[52]. For minority Christian denomination schools it is difficult to see what the similar ethos provision will mean. For Church of Ireland schools this may mean having to give equal priority to local Presbyterians and Methodists, or it could include all non-Catholic Christians, including house churches and Orthodox Christians. This could have the effect of more closely aligning old and new religious minorities in the educational sector whilst removing the historic link between parishes and their schools, potentially exacerbating the decline in the number of those expressing Protestant identity.

Within religious communities as the civil legal landscape changes from socially conservative to increasingly liberal there is a likelihood that churches will follow suit. This trend is most often seen in minorities that lack the strength or numbers to take views that are at variance with the state. I suggest that it is more likely to be found in old religious minorities that see belonging in the State as a well established part of their identity. This has been identified in the United Kingdom by Professor Russell Sandberg and termed the Secularisation of Religious Bodies[53]. His premise is that in an increasingly secular world religious groups and religious individuals cannot hope to remain immune to the charms or language of the new order. Sandberg points to the fact that developments in religious law often incorporate the language, culture and standards that are found in civil law, becoming more rationalised and bureaucratic. Examples include the proliferation of guidance and codification of principles as found in Anglican Canon Law. Internal secularization follows through the process whereby religious groups adapt to the secular world. Sandberg identifies five overlapping phases on the route to internal secularization, namely: polarization, pluralism, bureaucratisation, moderation and adaption. Polarisation is the process whereby religion becomes associated only with particular aspects of social life, such as health and family, as opposed to permeating all aspects of society. Pluralism is the loss of

[52] s7(2)(a) *Education (Admission to Schools) Act* 2018.

[53] S Sandberg, *Religion, Law and Society* (2014 Cambridge: Cambridge University Press).

the monopoly on moral voice as societies diversify and views abound. Bureaucratisation is the term used to describe something internal and external to religious groups, namely the professionalization of religious groups and the increased similarity and ecumenicity of more bureaucratically structured organisations. increased ecumenicity is linked to moderation. This stage sees the churches limiting their claims to uniqueness, and coming to realise that they are one among many. This leads to the final stage, adaption. This entails accepting the intellectual assumptions of contemporary society by adjusting particular beliefs whereby new "permissive" attitudes are taken. This is shown in Churches accepting change in society, and the right of society to embrace changes in public morals. Any attempt to chart the future social and legal developments impacting on religious minorities ought to be cognisant of this analysis.

# NOT A BIG ISSUE. THE QUESTION OF RELIGIOUS MINORITIES IN SWEDEN

Lars Friedner*

## I. Definition and Status of Minorities

As an effect of Sweden's adherence to the European Council's Framework Convention regarding Protection of National Minorities, Sweden has since 2010 five legally protected national minorities – the Jewish, Roma, Sami, and Finnish peoples as well as the people from the Torneå Valley[1]. The minority members normally have various religious affiliations. Only the Jewish people have presumably a common religion - the Mosaic. It must be noted, however, that the legal protection of the Jewish people as a national minority is as a cultural minority, not a religious minority. This means that the protection of the Jewish people also covers those of Jewish origin who are not Mosaic believers.

Swedish law does not contain any definition of a religious minority. This must be considered, however, against the background of Swedish religious history as well as its current religious landscape.

Until the year 2000, Sweden had a state church system, with the Lutheran Church of Sweden as the dominating religious community. The Church of Sweden still counts a majority of the Swedish population as members. Seen from this perspective , every other religious community, i.e. the Roman-Catholic Church, is in fact a minority.

The Organization for Security and Co-operation in Europe (OSCE) guidelines for legal recognition of religious communities, have not been much discussed in Sweden. It is clear, however, that Swedish legislation complies with these guidelines. One exception may exist. The guidelines include atheistic communities amongst the religious, which implies that an atheistic organization should be treated by the State in the

* Former judge of appeal and former general secretary of the Church of Sweden.

[1] 2 § Act on National Minorities and Minority Languages (Sw. *lagen (2009:724) om nationella minoriteter och minoritetsspråk)*; at the time of writing a Government Bill was presented in Parliament, which is somewhat widening the rights of the national minorities (prop. 2018/19:199).

same way as any religious community. In Sweden, though, an atheistic organisation would not be accepted as a registered denomination, a form of legal entity which is reserved for religious communities. On the other hand, there are other, quite similar, forms of legal recognition available for atheistic organisations.

As a difference from the preparatory works of the current Act on National Minorities and Minority Languages[2], compared to amendments of the Act, now proposed by Government[3], the new Bill contains a reference to the United Nations International Convention on Civil and Political Rights from 1966[4]. The actual Government Bill does not, however, propose any changes in what is mentioned above regarding Swedish religious minorities.

There are no examples of Swedish legal scholars – nor sociologists – handling the question of religious minorities.

Every religious community has the right to register and receive legal personality as a registered denomination[5]. There is, however, no obligation to register. A religious community may choose to act under another legal form. The Church of Sweden has legal personality as a registered denomination through a Parliamentary decision[6].

Several religious communities have the right to use the taxation system for collecting their membership levies. The Church of Sweden has this right by means of a Parliamentary decision, whilst other religious communities have had to apply for it[7]. Most religious communities of any size are granted economic contributions from the State for their activities[8]. The Church of Sweden does not receive any such funding though it is granted economic State support for the maintenance of old church buildings[9]. Religious minorities may receive such support as well, but as part of the State support for old buildings in general[10]. Most religious communities have the right to officiate marriages[11]. The Church of Sweden is responsible for burial activities and burial grounds in most parts of Sweden[12]. A religious minority community may, however, own a private burial-ground[13].

[2] Prop. 2008/09:158.

[3] Prop. 2018/19:199.

[4] Ib. p. 13f.

[5] 7 § Act on Denominations (Sw. *lagen (1998:1593) om trossamfund).*

[6] 5 § ib.

[7] 16 § ib.

[8] Act on State Contributions to Religious Communities (Sw. *lagen (1999:932) om stöd till trossamfund).*

[9] 4:16 Act on Cultural Environment (Sw. *kulturmiljölagen [1988:950]).*

[10] 3:10-11 ib.

[11] Act on Right to Officiate Marriages in Religious Communities (Sw. *lagen (1993:305) om rätt att förrätta vigsel inom trossamfund.*

[12] 2:1 Funeral Act (Sw. *begravningslagen [1990:1144]).*

[13] 2:6 ib.

Sweden does not indicate the religious affiliations in the national registers of its inhabitants. Such registration would probably be regarded as against the constitution, which states that no person may be obliged to give the authorities information about their religious beliefs[14]. As a matter of fact, this information is collected anyway, but through the backdoor. Some religious communities, including the Church of Sweden, have, as mentioned, the right to use the taxation system for collecting their membership levies. In order to receive this assistance from the tax authorities, the religious communities – of course – have to give the names of their members to the authorities. But in this case, the acknowledgement of religious affiliation is meant to be given voluntarily.

## II. Social and Legal Change

### 1. Social Change

The main social change in Swedish society regarding religion over the past 25 years is the decrease of members of the Church of Sweden, as well as other traditional Swedish religious communities, and the influx of new inhabitants, mainly from Asia, Africa, and the Middle East. These two changes, which have occurred for very different reasons, have both led to the same outcome: the number of Swedish inhabitants belonging to the Church of Sweden, or any of the other traditional Swedish religious communities, has decreased.

In 1995, 86 percent of the Swedish population were members of the Church of Sweden (7.6 Million). In 2015, this had dropped to 63 percent (6.2 Million)[15]. During the same period, other traditional Swedish religious communities (including e.g. the Methodist Church and the Pentecostal Movement) also experienced a drop in members, from circa 450,000 to around 300,000. The same applies to the Jewish community, which fell from 10,000 (1995) to 8,000 (2015) and the Roman-Catholic Church - 160,000 (1995) to 110,000 (2015)[16].

On the other hand, the Orthodox and Eastern Churches have increased their member numbers from 95,000 (1995) to 140,000 (2015), as well as the different Muslim communities, from about 70,000 (1995) to 140,000 (2015)[17]. There is, however, and has always been, a difficulty in counting Muslims in Sweden, as Muslim communities do not have members in the same way as i.e. Christian communities. The numbers of Muslims, quoted here, is an approximation made by the State authority, the Swedish

[14] 2:2 Form of government (Sw. *regeringsformen).*
[15] www.svenskakyrkan.se
[16] www.sst.a.se.
[17] Ib.

Agency for Support to Faith Communities[18], based on the number of people served by Muslim communities. There are other sources of information, which differ widely. Some argue that the number of Muslims in Sweden stands at about 1 Million, others 400,000. It is to be noted that some people may have political reasons for giving a higher number of Muslims than in reality. How you count Muslims also depends on whether you regard all people that come from a Muslim background as Muslim, without taking into account whether they are active as Muslims or not. The numbers may also vary depending on whether you count only those that have residence permits for Sweden or asylum-seekers as well.

Within the Church of Sweden, through the church's public statistics, you could easily track i.e. the numbers of churchgoers and religious marriages[19]. You would then see that those numbers are declining. Such statistics are not available for other religious communities, neither are there any statistics regarding the number of ministers and other religious leaders. It is obvious that religious communities that are in decline have fewer ministers and those that are rising have more. This does not seem to apply to the Church of Sweden, whose number of ministers has remained static despite the falling number of members.

When it comes to schools run by religious communities, a different pattern is observed. This is probably due to the fact that the real possibility for religious communities to run schools is quite new, as religious community schools are now eligible for state and municipality contributions. In this regard, whether the community is increasing in size, or declining, does not seem to have an effect on the number of schools actually set-up and run by the relevant religious communities[20].

It is obvious that many of the religious minorities in Sweden are majorities in other countries – amongst the Christian minorities one can count Roman-Catholic, Orthodox, Anglican, Reformed and Methodist, which are majority churches in other countries. The same applies to Muslim, Buddhist, and Hindu communities.

## 2. **Legal Change**

As already mentioned, the relationship between State and religious communities changed in the year 2000. The former state-church system was abolished and the Church of Sweden became a registered denomination, legally equal to other religious communities in the country. A consequence of the reform was, however, that other religious communities became more closely linked to the State, through registration.

[18] Sw. *Myndigheten för stöd till trossamfund.*

[19] www.svenskakyrkan.se.

[20] The future right for religious communities to run schools is today under debate in Sweden; the current (and historical) biggest political party, Labour, has made a principal decision that it is against schools, run by religious communities.

This applied to the traditional Swedish religious communities as well as i.e. Orthodox and Muslim communities.

It cannot be stated that the change of relationship between State and church in Sweden was a result of international influence or adherence to international conventions. Rather, it was a result of a domestic, historical process, which could be said to have started back in the 18th century, when some groups of immigrants were allowed to hold religious services which were not controlled by the Lutheran State church.

Ever since the 1970s, religious communities in Sweden (other than the Church of Sweden) have received state contributions[21]. The total sum of contributions can vary but has actually remained the same for years. As a result, the increasing number of Swedish inhabitants belonging to e.g. the Orthodox or Eastern churches, or to different Muslim communities has led to decreasing state contributions to the traditional Swedish minority churches and other religious communities.

## III. Social and Legal Development

### 1. Social Development

The secularisation of Swedish society is ongoing, and this trend does not seem to weaken. It is probable that the curve of secularisation will level out in the long run, but no one can say when, or to what degree, this will happen. The other main trend that affects social development with regards to religious affiliation is immigration, which for the time being has stalled. This is due to political decisions. Sweden has introduced controls at its borders with Denmark and Germany, which has led to a decrease in immigration compared to before, i.e. 2016. This means that fewer people who practice minority religions are arriving in Sweden and receiving residency permits. Whether this stemming of immigration will continue in the long run is to be seen. For the time being, the main political parties point at the need for a common European Union immigration policy before making any changes in Sweden.

In the meantime, Swedish society and its authorities are dealing with the current religious situation. A number of initiatives have been taken to integrate the new inhabitants into Swedish society. The question of religious affiliation has, however, been left aside. So far, the Swedish position seems to be that immigrants' religious preferences should not be influenced by the State or other authorities.

On the other hand, many ecumenical and inter-religious contacts have been established and will probably be deepened onwards.

[21] Nowadays according to the mentioned Act on State Contributions to Religious Communities.

## 2. Legal development

There are no legal changes foreseen as regards the basic structure of state and church in Sweden.

As already hinted at, one question now under debate, is the matter of religious schools. Some argue that religious schools – even if they have to follow the State-set curriculum – work against Swedish common values as e.g. equality between women and men. It is obvious, however, that this critique is aimed at Muslim schools, of which there are some. Whether this opinion will lead to a ban on religious schools is unclear. On one hand, you could argue that the State and municipalities would be entitled to choose whether a school should be supported by public funds or not. On the other hand, it could be regarded as discrimination if all schools other than religious schools receive public contributions. Two questions which repeatedly come up in private bills in Parliament are the matter of burial-grounds (which are today mainly held by the Church of Sweden) and the matter of male circumcision (which is today allowed under certain circumstances). It does not seem, however, that a political majority will be gathered on any of these matters so as to produce legal changes.

# RELIGIOUS MINORITIES AND RELIGIONS AS MINORITY. THE DUTCH EXPERIENCE

Sophie van Bijsterveld*

## I. Religious minorities: definition and status

### 1. Social science definition

Definitions of 'religious minorities' are scarce. Taking the establishment of the Kingdom of the Netherlands in 1813 as a starting point, one could posit that at the time all faith-based traditions except the Dutch Reformed Church - which was the dominant church - were minorities. The Roman Catholic Church, of which the diocesan hierarchy was restored in 1853, could also be regarded as a minority. The same holds true for the branches that separated from the Dutch Reformed Church, beginning in the 1830s. Other Christian faith traditions, such as Lutheranism, were minorities as well. Although back then, tensions manifested themselves between different religious traditions, over time the Dutch Reformed Church and the Roman Catholic Church came to constitute the pillars of mainstream Christianity. The former merged in 2014 with the Reformed Churches in the Netherlands and the Evangelical Lutheran Church in the Netherlands. Depending on the definition, all other varieties of Dutch Christianity can be regarded as religious minorities or as part of a broader Christian majority.

No uniform definition of a 'new religious movement' or 'sect' exists in the social sciences. The issue is subject to debate. A brief overview of various approaches and definitions can be found in the most recent investigation commissioned in 2012 by the Minister of Justice on the instigation of the Lower House of Parliament concerning abuses in new religious movements and the adequacy of the instruments for tackling these abuses. For the purposes of its investigation, the report relies on the following four criteria to define a new religious movement: "1. a group of people 2. that follows or has followed a leader 3. has its own, recognisable religious/spiritual ideology 4. is recent, namely has been in existence roughly since World War II."[1]

* Professor of Religion, Law and Society, Radboud University, the Netherlands.

[1] A. van Wijk, B. Bremmers et. Al., *Het warme bad en de koude douche. Een onderzoek naar misstanden in nieuwe religieuze bewegingen en de toereikendheid van het instrumentarium voor recht*

## 2. Legal definition

The structure of Dutch law on religion is such that no definition of 'religious minority' is useful. Neither is there a general definition of 'religion' in law. In the process of the enactment of Article 6 of the Dutch Constitution which guarantees freedom of religion or belief, the meaning of the words 'religion' and 'belief' were discussed, but no definitions were given. When 'religion' or words like 'religious', 'church', 'spiritual office' and similar terms are used, no operational definition is provided.[2] Courts may need to assess whether the conditions of the legislature are met. In those instances, no overall definitions are given either. The European Court of Human Rights requires a set of convictions to "attain a certain level of cogency, seriousness, cohesion and importance" in order to be able to qualify as "religion or belief" in the sense of Article 9 of the European Convention on Human Rights. These criteria were adopted in Dutch jurisprudence.[3]

Legal scholars usually do not define the category of religious minority. The notion of 'new religious movements' or, the less common term, 'sects' are occasionally used, yet these are not legal categories. There is no tradition of employing the category of 'new' religious minorities versus 'traditional' religious minorities, although these concepts or varieties thereof may occur.[4] Scholarly contributions on specific legal issues relate to new movements.[5]

The word 'minority' featured in the Minorities (Consultation) Act.[6] Article 1, sub b, that defined a 'minority group' as: 'a target group of integration policy as designated by the Minister'. It is occasionally included in subordinate regulations at the national level, such as that of gradual termination of subsidies for 'consultation on minority policies' on the basis of the previous Act or the transfer of departmental

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*en zorg* (onderzoek in opdracht van het WODC, ministerie van Veiligheid en Justitie), (Arnhem: Bureau Beke, 2013), p.31. Translation in English by the author of this chapter.

2 See A. Vleugel, *Het juridische begrip godsdienst*, diss. in print.

3 See Afd.Bestr. RvS, 18 augustus 2018, ECLI:NL:RVS:2018:2715 (Pastafari).

4 See, for instance, Sophie van Bijsterveld, 'Experiences in Dealing with New Religious Plurality in Some Western European Countries and the EU', paper presented at the International Conference 'Freedom of Beliefs and Religions in Vietnam – From Policy, Law to Practice', Hanoi, 8-9 October 2015.

5 See, for instance, on Pastafarism, L.M.H.A.A. Hennekens, 'Art. 2:2 BW, het Vliegend Spaghettimonster en de vrijheid van godsdienst en levensovertuiging', *WPNR* 2016/7105, pp. 331-338; A. Vleugel, 'Geloof-'waardige' godsdienst en het spaghettimonster-geloof: wat telt (wel) als godsdienst(ig)?', *RM Themis* 2017, pp. 228-238; Monique Verheij, Anti Pas(foto)tafarisme. Een artikel over geloof, hoop en satire, in NJB 5 januari 2018, nr. 1, pp.6-12; Mr. R.H.C. Jongeneel, 'Pastafariërs kun je niet serieus nemen', in NJB 2018/547, afl. 11; and on Scientology, Richard Steenvoorde, 'Winstgevende commerciële activiteiten door kerkelijke en levensbeschouwelijke organisaties bedreiging voor ANBI-status?', in *Tijdschrift voor Religie, Recht en Beleid,* 2017 (8) 1, pp. 86-91.

6 Wet van 19 juni 1997, houdende regeling van het overleg over de integratie van minderheden (Wet overleg minderheden), *Stb. 1997, 335*, which was in force from 23 june 2010 until 22 July 2013.

unit for minority integration to another department.[7] In policy documents 'minority policy' is commonly used to indicate policy focusing on ethnic minorities, which, in fact, are often religious minorities as well, notably Muslims. Currently, 'integration policy' is the more commonly used word.[8] Article 137c of the Criminal Code penalises purposeful insult of a group of people on the grounds of, inter alia, their religion; it does not mention the word 'minority'.

The Netherlands has ratified the Framework Convention for the Protection of National Minorities adopted in 1994 by the Council of Europe's Committee of Ministers. Under this Convention, the State Party itself has the authority to decide if a particular group and, which group or groups, are a national minority. The Netherlands has defined one group, the Frisians, as national minority.[9] This historic minority has no religious dimension attached to it. Article 27 ICCPR plays no specific role in the debate on freedom of religion for religious minorities.

## 3. **Legal Status**

The Dutch system of church and state law is egalitarian. It is an open system in which no religion enjoys a special status under the law. No differences exist in legal status between traditional churches, 'old' religious minorities, and 'new' religious minorities. 'Churches' are legal persons in their own right. The legal category 'church' is open to all these three groups and fits both hierarchically-organised religions and religions organised in a decentralised manner. However, Muslim groups are usually organised as foundations tasked with the management of a mosque or the employment of an imam. At some stage, an equivalent arrangement was created for non-religious societies, in particular the Humanist League, but the category was abolished again, as it served no practical use.

[7] See, for instance, Besluit van 22 juli 2002, houdende de herindeling van de ministeriële taak met betrekking tot de coördinatie integratiebeleid minderheden, or Regeling van de Minister van Sociale Zaken en Werkgelegenheid van 12 julie 2013, houdende regels inzake de afbouw van de subsiëring van samenwerkingsverbanden en gezamenlijke rechtspersoon minderheden (Regeling afbouw subsidiëring overleg minderhedenbeleid).

[8] For an analysis of the religious dimension in integration policy, see B. Koolen, 'Integratie en religie. Godsdienst en levensovertuiging in het integratiebeleid etnische minderheden', (2010), (1)1, *Tijdschrift voor Religie, Recht en Beleid*, pp. 5-26.

[9] At the time of the enactment of the Parliamentary Approval Act in 2001, the coalition government proposed also to recognize people with a Moluccan, Turkish, Antillean, Surinam, and Moroccan background as national minorities, as well as Roma and Sinti, and asylum seekers and refugees as Kurds, Ghanaians, Afghans, and Somalians. This proposal threatened to be defeated and in 2004 the government agreed to limit the designation to Frisians only. The Bill was then passed. See, < https://www.eerstekamer.nl/nieuws/20041201/friezen_enige_nationale_minderheid > (last accessed on 15 January 2021).

In practically all areas of the law, religious minorities enjoy the same rights as majorities.[10] However, Dutch law relating to religion has been shaped over time in relation to mainstream Christian churches. As a result, for instance, various days that are important in the Christian calendar are official public holidays. This means that it can make a difference for an employee to have a day off on a weekly day of rest or on a religious holy day, whether it concerns a mainstream Christian day or not. On the other hand, specific allowances have been made in the law for Jewish and Islamic ritual slaughter and for Islamic burial rites. Organisational obstacles, internal division, and unfamiliarity with Dutch law and society, combined with the fact that the first waves of Muslim immigrants came as 'guest workers' who would eventually return home, resulted in the fact that it took some time to make use of possibilities that were common in other faith traditions, such as the right to found faith-based schools, financed by the state, providing certain criteria were met.

In law as well as in practice, a process of differentiation is taking place in church and state relationships. An example can be found with regard to tax emptions for donations or bequests to general interest organisations, including churches and their non-Christian equivalents. In order to obtain the legal status to qualify for such exemptions, an assessment takes place by the tax authorities, which request detailed information. Churches, united in a co-operative structure called *Interchurch Contact in Government Affairs* [Interkerkelijk Contact in Overheidszaken – CIO] - in which the mainstream Christian churches, 'old' Christian and Jewish minorities, and a number of Christian churches of foreign origin are gathered - have negotiated a deal with the tax authorities to obtain a 'group' exemption, which relieves administrative burdens for both parties. In fact, this is a form of self-regulation.

Another example is the involvement of the city of Amsterdam in the complex process which led to the construction of the *Westermoskee.* The Municipality provided a favorable leasehold arrangement for the use of the land. In the 2005 leasehold arrangement, it was agreed that only a 'liberal teaching' could be propagated in the mosque. The Municipality's involvement provided a framework for the accommodation of and dialogue with the leadership of the religious community involved.

By contracting out activities in the social domain - such as neighbourhood youth work - rather than using the more traditional method of providing subsidies on the basis of subsidy regulations that allow for more (religious and non-religious) organizations to be involved, differentiation between religions is also evident. Such differentiation stands out from the other examples in that it is a side-effect of employing a different steering mechanism, rather than a policy aimed at religions themselves.

[10] See, for a discussion on the importance and relativity of equal treatment on the grounds of religion, S. van Bijsterveld, *State and Religion. Re-assessing a Mutual Relationship*, (Den Haag: Eleven Publishing 2018), notably Chapter 6. 'Equal Treatment: To Each His Own'.

Dialogue and co-operation have become new features of church and state relationships in practice, notably at the municipal level. The nature of the co-operation and the intensity and focus of dialogue also differ according to the particular local situation and the position and ambitions of the various religions involved.

Differences in policies towards religions may find expression through the enactment of neutral, generally applicable law, that nevertheless affects a particular religion. This legislation may be especially enacted, such as the so-called 'burka ban' for specifically designated public spaces (which also applies to other facial coverings such as motor helmets). Anti-radicalisation and anti-terrorist law and policies also have effects on a particular religion, most notably, Islam. Specific strands within Islam have become the target of investigation by the Security Services.[11] State involvement in efforts to preserve cultural religious heritage, such as church buildings, and promote strategic decision-making with respect to re-designation or demolishment of churches tends to favour particular religions, that is, mainstream religions and 'old minorities'. These, and other examples, are part of policies towards religions, or rather, history, values and behaviour that are connected to religions.

For a long time, religion was regarded as a merely private affair. In the past two decades, it has become quite clear that religion is a social phenomenon which impacts society. As a social phenomenon, religions and their members occupy different positions in society. As the above examples show, this may lead to differential treatment, as equal treatment applies only in equal circumstances. The circumstances under which the state encounters the various religions differ.

## II. Social and Legal Change

### 1. Social Change[12]

The socio-political and religious make-up in the Netherlands has long remained fairly stable. For decades, about a third of the population adhered to various mainstream Protestant denominations, a third of the population was Roman Catholic, and a third of the population either adhered to other, smaller denominations or did not have a religious affiliation. In the latter category the relatively small percentage of Muslims was included. The social and political context was one of a solid welfare

[11] For the process of securitisation of religion, see B. de Graaf, 'Religie als probleem van orde en veiligheid. Salafisme onder vuur', in Sophie van Bijsterveld, Richard Steenvoorde, *200 jaar Koninkrijk: Religie, staat en samenleving*, (Oisterwijk: Wolf 2013), pp. 353-375. See also, S. van Bijsterveld, 'Securitization of Religious Freedom: Religion and Limits of State Control. The Netherlands', Paper prepared for the Conference European Consortium for Church and State Research, 6 – 19 November 2017, Tallinn, Estonia, pp. 407-420.

[12] For this section see S. van Bijsterveld, 'Securitization of Religious Freedom: Religion and Limits of State Control. The Netherlands', quoted above.

state: a secular climate was combined with a high degree of tolerance and electoral shifts remained within familiar parameters.

Much has changed in a short time span. Recent surveys show a steep decrease in church membership in the Christian sphere. By the end of 2015, membership to the mainstream Protestant Church was 10%; of the Roman Catholic Church 23%.[13] No solid information is available about the percentage of Muslims in the Netherlands. Estimates range between 5 % and 6%, the former being the percentage that was estimated in 2007.[14]

Immigration over the last few years has increased significantly. The number of immigrants per year over the last number of years shows a steady peak. The number of immigrants in 2015 was 203,000; the expectation for 2016 at that time being 240,000.[15] There are no signs of the number decreasing. However, precise data is not available. The total number of the country's population as of July 2017 was over 17,1 million.[16]

## 2. **Legal Change**

To explain the dynamics behind legal changes, a number of factors are important. First, the decrease in church membership in the Christian domain impacts formerly self-evident legal arrangements with respect to religion. Second, the increase in Muslim presence, unease with respect to issues of immigration, religious radicalisation, and even terrorism in the name of religion, directly and indirectly have an effect on the law governing religion. Third, religious pluralism in general and the individualisation of religious belief, exert influence on law relating to religion.

Developments not directly related to religion have a bearing on law relating to religion. First, stronger attention to values such as privacy, physical integrity, gender issues, equal treatment and non-discrimination, and animal welfare, question formerly self-evident legal arrangements with regard to religion. Second, the development of a more individualistic, anonymous society in itself plays a role, leading to tighter regulation and administrative control instead of high trust arrangements. Third, the

[13] See < http://www.ru.nl/kaski/onderzoek/cijfers-rooms/virtuele_map/katholieken/ > and < https://www.ru.nl/kaski/onderzoek/cijfers-overige/> (both last accessed on January 15, 2021); see also, Ton Bernts Joantine Berghuijs et.al, *God in Nederland. 1966-2015*, Utrecht: Ten Have 2016.

[14] See < http://nos.nl/artikel/2163084-het-aantal-moslims-stijgt-maar-met-hoeveel.html > and < https://www.cbs.nl/nl-nl/nieuws/2007/43/ruim-850-duizend-islamieten-in-nederland > respectively (both last accessed on January 15, 2021).

[15] See < https://www.cbs.nl/nl-nl/nieuws/2015/51/bijna-kwart-miljoen-immigranten-verwacht-in-2016 > (last accessed on January 15, 2021). This number includes asylum seekers, immigration through family unification, and immigration from other EU-countries. Emigration is not included.

[16] See < https://www.cbs.nl/nl-nl/visualisaties/bevolkingsteller > (last accessed on January 15, 2021).

process of re-configuration of the welfare state, and the re-positioning of the state towards society that goes along with it, brings the state into a different position vis-à-vis social institutions, including churches and religious organizations. This has an impact on the methods through which the state operates.[17] This brings churches and religious organizations into renewed contact with public authorities, notably at the local level, leading in fact to differentiation in the way that the state deals with religions.

Changes occur also in relation to issues arising from the relationship between church and religion. When we look back on 200 years of church-state relationships, we can see a threefold shift in focus. In the first half of the 19th century, the predominant focus was on institutional issues. Although separation of church and state had been proclaimed in principle, the consequences in theory, law, and practice had to be worked out. This meant a focus on institutional issues. The young, newly established state, furthermore, was confronted with a strong, formerly established church, a process of restauration of the diocesan Catholic hierarchy, and new separations from the formerly established church. From the second half of the 19th century onwards, the lead-up to what would become the social welfare state started. The state was increasingly engaging in activities in areas in which already, amongst others, faith-based organisations were active. The focus shifted to the accommodation of state and religious and non-religious civil society organisations. Since the turn of the century, under the influence of a complex interplay of factors, the stress has shifted to value debates. In each of these stages mentioned, other issues also played a role, and former issues of interest continue to play a role today - nevertheless the main focus of has shifted.

In practice, interlocking factors are at stake in promoting or carrying through legal change. For instance, in problematizing religiously motivated male circumcision, children's rights and physical integrity play a role, as does a decrease in the awareness of the meaning of the religious practice for the parents involved. The decriminalisation of blasphemy was argued by some on the grounds of the need to get rid of 'privileges' for religions; disapproval of Muslims' sensitivity towards insults addressed at the prophet Muhammed and their religion, as displayed violently nationally and internationally, cannot be ignored. Another example is the enactment of a specific law that states that there is no room for conscientious objection for civil registrars to perform same sex marriages. Equal treatment regardless of sexual orientation, less empathy for Christian orthodoxy, and fear for Islam play a role here, explicitly or implicitly.

In the context of deradicalisation and anti-terrorist policies, so-called 'hate imams' are rejected entry into the country, or are forbidden to participate in conferences, hold prayer meetings in bookshops, and often given a restraining order. Most

[17] As alternatives to state regulation, (quasi-)contractual arrangements come to the fore, practical co-operation, or dialogue.

of these administrative decisions, based on already existing zoning laws, public order laws, or newly enacted legislation have so far been upheld by the courts. These measures can be applied when hate speech provisions of the Criminal Code are not considered to have been violated. The legislative burka ban and court rulings upholding decisions not to hire or fire Muslim employees who for religious reasons refuse to shake hands with persons of the opposite sex, should be viewed in the context of stricter integration policies.

A project such as the previously mentioned one concerning the preservation of Christian religious heritage must be understood in the context of a renewed awareness of the positive (cultural, historical, architectural) values it represents.

## III. Social and legal developments

### 1. Social developments

Three Christian political parties are represented in both Houses of Parliament and have a long-standing tradition. The largest of these, the Christian Democratic Party (CDA), is a merger of two Protestant Parties (CHU and ARP; loosely drawing their support from the two main Reformed Churches) and the former Catholic Party (KVP). Only with a few recent interruptions, this party or its predecessors have been in government. The Christian Union (CU) is a merger of two other Reformed Parties (GPV and RPF) and is traditionally much smaller in size and draws its membership to a substantial extent from Evangelical Christians. The oldest party was represented in Parliament for the last hundred years (SGP) and draws its support mainly from the orthodox wing of Reformed Christianity. Despite population growth and the relative decrease of its traditional constituents, the party has been able to maintain its position as a small but significant party. More recent developments are the anti-Islam party PVV that became the second largest party following the 2017 general elections and, for the first time, a political party with a Muslim/minority focus (DENK), that entered the Lower House of Parliament. In the 2017 general elections issues of national identity, preservation of Dutch cultural values, immigration and integration, and public safety and security were major themes.

Quarterly surveys conducted by the Netherlands Institute for Social Research (SCP) show ongoing issues related to, amongst other things, immigration, integration, values and norms rank high in citizens' concerns.[18] Recently, the Netherlands Scientific Council for Government Policy published an exploratory study on increased diversity and the complexity it brings.[19]

[18] See : < https://www.scp.nl > for the various publications (last accessed on January 15, 2021).

[19] R. Jennissen, G. Engbersen et.al., *De nieuwe verscheidenheid. Toenemende diversiteit naar herkomst in Nederland*, (Den Haag: WRR, 2018). For an English summary, see < https://english.wrr.

Within 'old' Christian minorities various developments are taking place. The small, liberal *Remonstrantse Kerk*, has followed the example of the Humanist League with inviting radio ads. Evangelical churches flourish and are connected with a broadcasting company with a relatively strong evangelical identity (EO), which has airtime on public television and actively engages its youth. The mainstream Protestant Church in the Netherlands (the merger) has been engaged in a process to rethink its position in society and its position as a de facto minority. This has led, amongst other things, to abandoning its complete territorial coverage in the Netherlands.[20] Within the Roman Catholic Church both developments of 'retreating' to a minority position as well as 'reaching out' to nominal Catholics and society at large can be seen. Authoritatively speaking out in public as leadership of the church on issues of societal importance has largely made way for other, often more dialogical, modes of communication. At the same time, there are signals that mainstream churches are becoming slightly more orthodox as they tend to be more disciplined and active when it comes to church involvement than more liberally oriented believers.[21]

Dialogue between state and representatives of faith communities takes place. There is no 'single' dialogue: these dialogues take place both at the national and at municipal levels in a wide variety of constellations and for many different purposes. They may be ad hoc or have a more structural nature; they may be focused on one or more particular topics or be more general in nature. The rediscovery of the social dimension of religious traditions, both positively (social work) and in its problematic form (radicalisation) give new impetus to these dialogues.

With the shift from a socio-economic perspective to a cultural perspective in integration debates and policies, the issue of Dutch identity has emerged. In the public debate as well as the political one, Dutch identity is often labelled as Christian or 'Jewish-Christian'; sometimes the 'Enlightenment' is also invoked. Christian Churches and Jewish societies do not rely on these notions.

## 2. **Legal developments**

As we have seen in Sections I.3 and II.2, the combined developments discussed in this chapter have given rise to changes in legislation and policy with regard to religion. In broader terms, new balances are being sought in society, politics, governance, and the law, particularly between the (former) mainstream Christian majorities and

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nl/publications/publications/2018/07/11/summary-the-new-diversity-v38 > (last accessed on January 15, 2021).

[20] Incidentally, more innovative ways of drawing attention can be witnessed, such as billboards on train stations.

[21] For Muslims, see W. Huijnk, *De religieuze beleving van moslims in Nederland. Diversiteit en verandering in beeld,* (Den Haag: SCP, 2018).

'old' minorities versus new minorities, notably Islam, on the one hand; and between the secular and the religious on the other hand. At the same time, especially within mainstream Christian churches, there are different levels of membership; and the boundaries between 'faith' and 'non faith' blur, also among Church members.

As far as traditional Church and State law is concerned, the analysis made by Gedicks that in Western states a shift from the guarantee of liberty towards equality can be observed, is fitting for the Netherlands.[22] As far as institutional liberty is concerned, it is not a fully-fledged case, but in the Netherlands, the tendency seems to be comparable.[23] The result is that specific rights guaranteed to 'old' minorities may be under pressure of secularism and fear for Islam. In this way, it has been said that orthodox Christianity pays the price of these developments.[24] The following example makes this clear.

A few years ago, the Supreme Court in Civil Affairs ruled that the state had violated the UN Convention of the Elimination of All Forms of Discrimination of Women by allowing the SGP, a traditional, orthodox reformed political party – the oldest party uninterruptedly represented in the Dutch Parliament – to prohibit women to be elected in representative public bodies for their party, on the basis of their Biblical views on the relationship between men and women.[25] The case was not filed by SGP-women, but by feminist and human rights groups. In an obiter dictum, the court of first instance referred to the possibility that other parties might stand up in the future with a similar view on the relationship between men and women. Although the highest administrative court had ruled otherwise in the same issue, the EHCtR declared the application manifestly ill-founded and thus not admissible.

[22] F.M. Gedicks, *'Religious Freedom as Equality',* in S. Ferrari (ed.), *Routledge Handbook of Law and Religion* 2015, pp. 133-144.

[23] See, S. Ferrari, 'Religion between Liberty and Equality', 2016 (4), *Journal of Law, Religion and State,* pp. 179-193.

[24] See A.A. Kluveld, *Gewetensvrijheid in het geding. Het relationele geweten ondervraagd*, (De Banier: Apeldoorn, 2016).

[25] See HR 9 april 2010, ECLI:PHR:BK4549, < https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2010:BK4549 > (last accessed on January 15, 2021); see also ECtHR (third section), 10 July 2012, SGP vs. The Netherlands, appl. No.58369/10. This example is taken from S. van Bijsterveld, 'Securitization of Religious Freedom: Religion and Limits of State Control. The Netherlands', quoted above.

# RELIGIOUS MINORITIES, SECULAR SOCIETY, AND BRITISH BIFOCALISM

Norman Doe*
Rebecca Riedel*

Recent years have witnessed in the United Kingdom major developments in the field of law and religion. On the one hand, in the practical field, there has been the enactment by Parliament of a series of statutes which affect religion – not least the Human Rights Act 1998, and its protection of religious freedom under the European Convention on Human Rights incorporated by that statute into domestic national law, as well as under the Equality Act 2010 and its complex body of rules on religious discrimination and associated forms of discrimination. As a result, the courts have been very active in decision-making with regard to a host of religion-specific issues. On the other hand, the field of religion law has seen a burgeoning of scholarly literature. What follows deals with the legal status of old and new religious minorities in these two contexts.[1]

## I. Definition and status

### 1. Social science definition

There are various sociological approaches to the meaning of the word 'minority'. The word 'minority' is most commonly used by social scientists to correlate with population – a minority denotes a numerically smaller group than other numerically larger groups in society. However, 'minority' may also be defined, more subtly, as 'a culturally, ethnically or racially distinct group that coexists with but is subordinate to a more dominant group. As the term is used in the social sciences, this subordinancy is the chief defining characteristic of a minority group. As such, minority status does not necessarily correlate to population. In some cases one or more so-called minority

* Centre for Law and Religion, Cardiff Law School, Wales.

[1] At the Centre for Law and Religion, Cardiff, we are grateful to Frank Cranmer for invaluable comments on drafts.

groups may have a population many times the size of the dominating group...'[2] This definition makes no mention of 'religion' but may equally characterise, for example, Islam in the United Kingdom whose members outnumber those of the established Church of England which sociologists may regard as a historically 'dominant' though numerically smaller religious group.[3]

## 2. **Legal definition**

There is no statutory definition of 'minority' as used in the context of religion.[4] However, the explanatory notes to some statutes use the word but without defining it;[5] and the word is also used in the context of parliamentary debate, internal standards and organisation.[6] The Equality and Human Rights Commission also uses the word; for example: 'There are two essential characteristics which an ethnic group must have: a long shared history and a cultural tradition of its own. In addition, an ethnic group may have one or more of the following characteristics: a common language; a common literature; a common religion or common geographical origin; or being a minority or an oppressed group'.[7] Likewise, the category 'minority' is recognised by the Charity Commission.[8] Courts too associate minorities with the characteristic of vulnerability, when judges speak of 'the need to guard against tyranny which majority opinion may impose on those who, for whatever reason, comprise a weak or voiceless minority'.[9] However, for legal commentators the most common definition of 'minority' is, simply, 'the smaller number';[10] and so in turn a 'religious minority' is a numerically smaller religious group in terms of population. But for other legal scholars, religious minorities may also be understood as those, for example, with 'distinct cultural or religious norms' which possess 'some "systemic" features that allow us to say that there is a distinct institutional system for the identification, interpretation or enforcement of these norms'; whether or not a community has such features may be

[2] *Encyclopeadia Britannica* (2015), 'Minority': <https://www.britannica.com/topic/minority>.

[3] P. Balls Organista, G. Marín, and K.M. Chun, *Multicultural Psychology* (Rowman and Littlefield, 2018).

[4] The word is used though e.g. in relation to 'minority shareholders' in the Companies Act 2006, s. 979; 'minority' is also used to denote the state of being under age.

[5] E.g. Equality Act 2010, s. 521: 'ethnic minority background'.

[6] See e.g. T. Saalfeld and D. Bischof, 'Minority-Ethnic MPs and the Substantive Representation of Minority Interests in the House of Commons, 2005–2011', *Parliamentary Affairs*, Volume 66:2, 1 April 2013, 305-328.

[7] Equality Act 2010, Code of Practice: Services, Public Functions and Associations, Statutory Code of Practice.

[8] Registered charities include e.g. Minority Integration Network and Ethnic Minorities Development Association.

[9] *Singh v Entry Clearance Officer, New Delhi* [2004] EWCA Civ 1075.

[10] *Jowitt's Dictionary of English Law* (London: Sweet and Maxwell, 3rd edition, 2010) 1471.

'a matter of degree'.[11] On the basis that international law is judicially enforceable in United Kingdom only when it is incorporated in domestic law, international norms on religious minorities have merely persuasive not binding authority in the United Kingdom, but are commonly invoked by courts.[12]

A minority group and/or its activities will be classified legally as 'religious' if the group satisfies whichever test is appropriate depending on the issue at hand, such as under charity, human rights or discrimination legislation.[13] For example, it has been held recently in the Supreme Court that a building within the Church of Scientology could be a 'place of meeting for religious worship' under the Places of Worship Registration Act 1855. Registration of a place of 'public religious worship' is exempt from local council tax. For Lord Toulson, although there is no 'universal legal definition of religion in English law', nevertheless, 'the understanding of religion in today's society is broad'. Moreover: 'Unless there is some compelling contextual reason for holding otherwise, religion should not be confined to religions which recognize a supreme deity' – since this would be 'a form of religious discrimination unacceptable in today's society'. For the purpose of the 1855 Act, religion can be described 'as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how to live their lives in conformity with the spiritual understanding associated with the belief system'. The term 'religious worship' is 'wide enough to include religious service'. This understanding is intended to be broader than the 'unduly narrow' definition previously found at common law where 'a place of religious worship' was defined as 'a place of which the principal use is as a place where people come together as a congregation or assembly to do reverence to God'; worship involved 'reverence or veneration of God or a Supreme Being'; 'worship has been defined as having 'some, at least, of the following characteristics: submission to the object worshipped, veneration of that object, praise, thanksgiving, prayer or intercession'.[14] The decision has been welcomed for its inclusiveness.[15]

[11] M. Malik, *Minority Legal Orders in the United Kingdom: Minorities, Pluralism and the Law* (British Academy, 2012), Executive Summary, 4.

[12] See e.g. J. Alder and K. Syrett, *Constitutional and Administrative Law* (Palgrave, 11th edition, 2017) 199-205.

[13] For statutory definitions of religion, see R. Sandberg, *Law and Religion* (Cambridge, 2011) 39-57.

[14] *R (On the Application of Hodkin) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77; the decision overturned the narrower approach in *R v Registrar General ex parte Segerdal* [1970] 2 QB 679. See also *Lee (Respondent) v Ashers Baking Co Ltd and Others (Appellants) (Northern Ireland)* [2018] UKSC 49.

[15] E.g. C. Kenny, 'Law, religion and the curve of reason', in F. Cranmer, M. Hill, C. Kenny, and R. Sandberg (eds.), *The Confluence of Law and Religion: Interdisciplinary Reflections on the Work of Norman Doe* (Cambridge, 2016) 19.

### 3. Legal status

The civil legal position of religious minorities varies minimally as between faiths.[16] The most common arrangement is that a religious community is treated in law as a voluntary association – a group of persons associated together for the purpose of practising or advancing religion. They are classified as contractual societies whose members are bound together as a matter of private agreement. Legally, they are not corporations. They have no separate legal identity and, unlike corporations, they are not treated in law as a person. They cannot, as a body, sue at law, nor can they be sued. They are incapable of holding property as a body – though institutions within them may be legal owners of property, and these institutions may themselves enjoy the legal status of corporations.[17] Religious minorities may negotiate with government enactment of tailor-made parliamentary statute to protect e.g. their institutional structures, doctrinal position, or property.[18]

## II. Social and legal change

### 1. Social change

According to the Census of 2011, for example, of the population of England and Wales, 59.3% regarded themselves as Christian, 4.8% as Muslim, and 0.50% as Jewish, 0.28% Buddhist, 1.06% Hindu, 0.643, Sikh, 0.29 other, and 14.81% none, with 7.71% of respondents giving no answer. Pagans, Wiccans and 'Witchcraft' together had over 70, 000 devotees.[19] As of May 2017, net long-term international migration was estimated to be +248,000 in 2016, which is statistically significant as this is down 84,000 since 2015. This was driven by a considerable increase in emigration, which was up 40,000 from 2015, and this was mainly EU citizens (117,000 – up 31,000 from 2015). Immigration was estimated to be 588,000 with a decrease of 43,000, and this was not considered to be statistically significant.[20] These figures are reflected in for example the numbers of minority faith schools and charities: in 2011, about one third of the 20,000 state funded schools in England were faith schools (68% Church

[16] However, Jews and Sikhs have been classified judicially as *racial*, rather than religious, groups: see e.g. *Mandla v Dowell Lee* [1983] 2 AC 548; and *R (E) v Governing Body of Jewish Free School* [2009] UKSC 15.

[17] See M. Hill, R. Sandberg, and N. Doe, *Religion and Law in the United Kingdom* (Kluwer, 2014) III.1.2.

[18] See e.g. the United Synagogues Act 1870, the Methodist Church Act 1976, and the Dawat-e-Hadiyah Act 1993.

[19] Office for National Statistics, 'Religion in England and Wales 2011', 2012; See also: Home Office, R. O'Brien, A. Potter-Collins, '2011 Census analysis: Ethnicity and religion of the non-UK born population in England and Wales: 2011' (18 June 2015).

[20] Migration Statistics Quarterly Report, May 2017.

of England), including 42 Jewish, 12 Muslim, 3 Sikh and 1 Hindu;[21] and the register of the Charity Commission shows over 22,000 religious charities in England and Wales - many are minority religious charities.[22]

There is also the social phenomenon of 'religious minorities within religious minorities'. For example within Judaism,[23] many Jewish communities and organisations are long-standing and others more recent: the Board of Deputies of British Jews, 'the representative body of British Jewry' was founded in 1760;[24] the United Synagogue in 1870, and under the religious authority of the Chief Rabbi, with 50 member synagogues;[25] the Federation of Synagogues in 1887 for Orthodox communities which 'retain their individuality and distinct identity';[26] the Union of Orthodox Hebrew Congregations in 1926, an umbrella organisation of Haredi communities in London and Manchester (so-called 'Strictly-' or 'Ultra-Orthodox') with over 6,000 members;[27] Movement for Reform Judaism founded 2005 (with 41 autonomous synagogues);[28] and Union of Liberal and Progressive Synagogues founded 1902, with 30 or so congregations in Britain.[29] The same diversity within a religious minority is also found among e.g. Muslims and Christians.[30]

[21] Department for Education, *Faith Schools: Maintained faith schools* (2011).

[22] M. Hill, R. Sandberg and N. Doe, *Religion and Law in the United Kingdom* (2014) par. 13 and par. 178.

[23] It is believed the first Jews came from Normandy with William the Conqueror in 1066. However, the Edict of Expulsion issued by King Edward I, 18 July 1290 (on the Jewish Fast of Tisha B'Av) banished the entire Jewish population. Yet, in 1656, Rabbi Menashe Ben Israel successfully petitioned Oliver Cromwell to allow their readmission. Within 50 years, the offices of the Chief Rabbi and the London Beth Din were set up to provide a religious authority for Jewish communities in London and elsewhere: see Jewish Policy Research Report (for the Board of Deputies of British Jews): Synagogue Membership in the United Kingdom in 2016 (2017), compiled by D.C. Mashiah and J. Boyd (2017).

[24] The Board was founded in 1760 when seven deputies were appointed by elders of the Spanish and Portuguese Congregations (Sephardic) to form a committee to pay homage to George III on his accession; the Ashkenazi Community also appointed a committee then and it was agreed in that both committees should hold joint meetings.

[25] See: https://www.theus.org.uk/. Members are chiefly in the south east, but also in e.g. Sheffield.

[26] See: http://www.federation.org.uk/.

[27] Its synagogues constitute some 37.4% of all British synagogues. Its spiritual leadership is in the hands of its rabbinate led by the Av Beis Din.

[28] See: https://www.reformjudaism.org.uk/. The Associated British Synagogues was founded in 1942, later renamed the Associated Synagogues of Great Britain, and in 1958 adopted the name Reform Synagogues of Great Britain, which in 2005 became the Movement for Reform Judaism.

[29] See: *Affirmations of Liberal Judaism* ((London: Revised Edition 2006) Preamble. The head office is in London. It is linked to the World Union for Progressive Judaism.

[30] See N. Doe, *Comparative Religious Law: Judaism, Christianity, Islam* (Cambridge University Press, 2018) 8-13.

## 2. Legal change

It is commonly understood that, historically, there are 'four broad overlapping but conceptually distinct phases' in the development of State law on religion, including religious minorities.[31] The first – the medieval period – is characterised by a temporal-spiritual partnership between the realm of England (and its common law) and the Church of Rome (and its canon law); the Jewish minority in England suffered grave persecution.[32] The second period was that of discrimination and intolerance following the Reformation of the sixteenth century. This period was marked by the ousting of papal jurisdiction, the establishment of the Church of England by the civil power, protected from 'foreign' jurisdiction, and religious intolerance towards all other religious groups' including minority 'dissenters' such as Presbyterians and Baptists. After the civil war, during the Protectorate (from 1649), the dissenting religious minority disestablished the Church of England and introduced a non-episcopal religious order operative until the Restoration of the monarchy and the re-establishment of the Church of England in 1660. The third period was that of religious toleration: it saw abolition of statutes making religious conformity a precursor of taking public office and the Act of Toleration 1689 was enacted which allowed Trinitarian Protestants to have their own places of worship. The eighteenth century saw the rise of the category of 'religious freedom' at common law and was followed in the nineteenth century by a series of statutes removing legal disabilities hitherto placed on dissenters, e.g. Roman Catholic Relief Act 1829.[33]

The twentieth century saw, for example, the disestablishment of the Church of England in Wales in 1920, on the basis, *inter alia*, of the inequality in legal treatment of the minority which that church represented – it was conceived of as an 'alien church' in light of the religious majority of Welsh dissenting groups.[34] Religious minorities also sought relief from general laws by way of special statutory exemptions (such as that for Sikhs from the wearing of crash helmets on motor-cycles). The final period sees the introduction of positive religious freedom for all, including religious minorities, with the incorporation of Article 9 of the European Convention on Human Rights (ECHR),[35] in the Human Rights Act 1998.[36] In turn, the Equality Act 2010

[31] R. Sandberg, *Law and Religion* (Cambridge University Press 2011) 17.

[32] See above n. 23.

[33] R. Sandberg, *Law and Religion* (Cambridge University Press, 2011) 17.

[34] See the Welsh Church Act 1914.

[35] Previously, as the ECHR was not part of UK law, the courts could not directly enforce it - it therefore had little effect upon religion law – see e.g. *Ahmad v. Inner London Education Authority* [1978] QB 36, where the appellant was refused leave from work as a teacher to attend prayers at the Mosque.

[36] S. Knights, *Freedom of Religion, Minorities, and the Law* (Oxford University Press, 2007). See also: St. J. A. Robilliard, *Religion and the Law: Religious Liberty in Modern English Law* (Manchester University Press, 1984) ix.

also forbids religious discrimination - the benefits of this statute are shared alike by all religious minorities.[37]

Importantly, the courts have in recent years accepted a role to protect the rights of minorities; for example, in *Ghaidan v Godin Mendoza* (2001), Keene LJ stated: 'Where discrimination against a minority is concerned, amounting on the face of it to a breach of article 14 rights [ECHR], the courts are entitled to require to be satisfied that a proper and rational justification for the difference in treatment has been made out. It is…a matter involving rights of high constitutional importance where the courts are equipped to arrive at a judgment. It is indeed a classic role of the courts to be concerned with the protection of such minority rights. That being so this court is entitled to ask whether there is any rational and proportionate basis for the distinction. For my part, I am not satisfied that any such basis has been established'.[38] Again, in *R (Countryside Alliance) v Attorney General*,[39] Sir Anthony Clarke MR approved the Divisional Court judgment that a measure is not necessary in a democratic society only because the democratically elected majority of the legislature enacts it; and in *Re S: Newcastle City Council v Z,* Munby LJ referred to the need for courts' decisions to reflect the pluralism of society: 'to live, or strive to live, in a tolerant society increasingly alive to the need to guard against tyranny which majority opinion may impose on those who, for whatever reason, comprise a weak or voiceless minority. Equality under the law, human rights and the protection of minorities, have to be more than what Brennan J [High Court of Australia] once memorably described as "the incantations of legal rhetoric"'.[40]

## III. Social and legal developments

### 1. Social developments

There would seem to be two largely polarised appraisals about the (un)conditional protection of minorities today. On the one hand, we find such current opinions as: 'Minority views are likely to need greater protection than majority views under a constitutional democracy in that they may not be able to gain the necessary protection through the normal channels'; and: 'Minorities are especially vulnerable to biased perceptions and negative stereotyping and may not easily be able to secure their rights through the normal democratic process'. Therefore, there may be a 'need to support

[37] Previously, at common law, see *Matadeen v Pointu* [1991] AC 98, 109, citing *Police v Rose* [1976] MR 79: Lord Hoffman recognised that '[e]quality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently'. But the Privy Council also noted that 'it by no means follows, however, that the rights which are constitutionally protected and subject to judicial review include a general justiciable principle of equality'.

[38] [2001] EWCA Civ 1533 – decision upheld by the HL: [2004] UKHL 30.

[39] [2006] EWCA Civ 1677, para 45.

[40] [2007] EWHC 1490 (Fam).

a vulnerable or politically weak group in society against more powerful interests'. However: 'certain minority views may be considered by the majority as conflicting directly with democratic values, such that it is argued that no recognition should be given to those views'.[41]

On the other hand: 'There have always been religious groups (or individuals) on the fringes of society, considered radical or even extreme, with teachings that are newly invented, re-invented, or renewal movements within old traditions... Such oppositional attitudes often come with social structures…that can be conducive to the engendering of certain attitudes and behaviours. [They] tend to be small in size, demographically atypical compared to the rest of the population'.[42] Indeed, the Ethnic Minority British Election Study (EMBES), which was conducted in 2010, found a great diversity in ethnic minorities' religious involvement. There were general concerns that if groups felt themselves disenfranchised, they may either withdraw politically or turn to alternative unconventional forms of protest: the study aimed to understand 'whether minority political concerns were being adequately incorporated into the mainstream political agenda'.[43]

There is also evidence of religious minorities engaging in interfaith and ecumenical dialogue, and with the State; for instance: the Muslim Council of Britain often expresses its opinion, or else urges government to act, on human rights issues;[44] and the Board of Deputies of British Jews advocates human rights,[45] has an interest in promoting of religious freedom and non-discrimination,[46] has called on both Jews and Muslims to stand together on issues such as *halal* and *shechitah*,[47] and it engages in interfaith dialogue.[48] Government too has dialogue structures: the Ministry of Housing, Com-

[41] S. Knights, *Freedoms of Religion, Minorities, and the Law* (Oxford University Press, 2007). See also R. Jones and W. Gnanapala, *Ethnic Minorities in English Law* (Threntham Books, 2000).

[42] A. Van Eck Dumaer Van Twist, 'What can we learn about radicalisation from the life histories of cult members?', 6 July 2015, https://www.radicalisationresearch.org/debate/van-eck-cult-members/#_ftnref1. See also: E. Barker, "Plus ça change..." Twenty Years On: Changes in New Religious Movements, Special edition of Social Compass 42/2 (1995).

[43] A. Heath, O Khan, Ethnic Minority British Election Study – Key Findings (RUNNYMEDE TRUST, Feb 2012).

[44] MCB: 20 May 2011: http://www.mcb.org.uk/our-government-must-not-look-the-other-way-as-bahrain-commits-gross-violations-of-human-rights/.

[45] See: https://www.bod.org.uk/jonathan-arkush-irans-human-rights-record-is-dire-and-deteriorating/.

[46] See: https://www.bod.org.uk/political-party-manifestos-where-they-stand-on-issues-of-jewish-interest/.

[47] See: https://www.bod.org.uk/board-of-deputies-president-calls-for-muslims-and-jews-to-work-together-to-marginalise-extremists/.

[48] The Board promotes relations between different faith communities in the UK as to e.g. education, equality and extremism, and works with the Inter Faith Network, Council of Christians and Jews, and Three Faiths Forum: https://www.bod.org.uk/issues/interfaith-social-action/.

munities and Local Government has a Minister for Faith (who currently is Lord Bourne of Aberystwyth) and an Integration and Communities Directorate;[49] the Equality and Human Rights Commission promotes equality in protected grounds like religion.[50]

## 2. **Legal developments**

As we have seen, UK law seeks to protect religious minorities. Indeed, for some legal scholars: 'The liberal nature of the state, as well as constitutional and human rights commitments to protect minorities, mean that it is not viable to openly adopt policies that lead to persecution, exclusion or discrimination against a minority group. Moreover, it is now considered to be reasonable for minorities to make requests for the accommodation of some of their cultural or religious practices, including some… they consider…part of their community based "law"'.[51] The idea that the courts do not understand religious minorities is considered a further issue.[52]

At the same time, concerns persist. Three examples may be offered. First, that Islam and some Jewish traditions govern the whole of the life of the faithful may be problematic. For instance, in 2012, in a case (about the schooling of children in Haredi Judaism), Sir James Munby stated:

> Even for the devout Christian attempting to live their life in accordance with Christ's teaching there is likely to be some degree of distinction between the secular and the divine….But there are other communities, and we are here concerned with such a community, for whom the distinction is, at root, meaningless, for whom every aspect of their lives…of their being, of who and what they are, is governed by a body of what the outsider might characterise as purely religious law. That is so of the devout Muslim, every aspect of whose being and existence is governed by the Quran and the Sharia. It is so also of the ultra-orthodox Jew, every aspect of whose being…is governed by the Torah and the Talmud. I therefore agree entirely with… Hughes LJ…The issue is: "not simply a matter of choice of school but a much more fundamental one of way of life. 'Lifestyle' scarcely does [it] justice. It is a matter of the rules for living".[53]

[49] See https://app.beapplied.com/apply/bwfxktindr. See also the Integrated Communities Strategy Green Paper: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/696993/Integrated_Communities_Strategy.pdf.

[50] It was set up under the Equality Act 2006.

[51] M. Malik, *Minority Legal Orders in the United Kingdom: Minorities, Pluralism and the Law* (British Academy, 2012), Executive Summary, p. 3.

[52] See also e.g. F Cranmer, 'OSCE guidelines on legal personality of faith-groups', Law and Religion UK blog, 7 February 2015: these look 'remarkably like an expansion of Article 9 ECHR'. Point 10 is 'particularly telling, given the recent experience of minority religious groups such as the Alevis, Jehovah's Witnesses and the Scientologists'.

[53] *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233.

Secondly, there are concerns about the accommodation by civil law of religious law - from the view that religious laws are not recognised by the civil law, through the opinion that they could be recognised by it, to the view that it is not possible to have legal pluralism in society.[54] For instance, in 2008, the then Archbishop of Canterbury, Dr Rowan Williams, proposed that some form of 'transformative accommodation' should be found between State law and Islamic *sharia*; but in Parliament in 2008, Bridget Prentice MP, Parliamentary Under Secretary, Ministry of Justice, stated: 'Shari'a law has no jurisdiction in England and Wales and there is no intention to change this position'.[55] Moreover, the current Archbishop of Canterbury, Most Reverend Justin Welby, said in 2017 that *sharia* should not be part of English law: 'I don't think that we should have elements of sharia law in the English jurisprudence system'; rather: 'We have a philosophy of law in this country, and you can only really cope with one philosophy of law within a jurisprudential system. English courts always have to prevail, under all circumstances, always'.[56]

Thirdly, there are concerns that theocratic ideas are incompatible with democracy. In a case in 2010, for example, Sir John Laws stated that to give legal protection to a moral position because it was based on Christianity or any other religion would be 'deeply unprincipled'; he said: 'in the eye of everyone save the believer religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may of course be *true*; but the ascertainment of such a truth lies beyond' the law 'in the heart of the believer'. To do otherwise, he said, would be 'divisive, capricious and arbitrary', especially 'in a society where all the people [do not] share uniform religious beliefs'. Also, he states: 'our constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law; but the State, if its people are to be free, has the burdensome duty of thinking for itself'.[57] To these may be added many other concerns, e.g. religious marriages, and safeguarding children.[58]

[54] Also, one may contract into religious law and the terms of that agreement will be enforced by the secular courts: see, e.g., *Kohn v Wagschal & Ors* [2007] EWCA Civ 1022 in which the Court refused to set aside an arbitration award of the London Beth Din.

[55] For the lecture, 'Civil and religious law in England' (7 February 2008), and the Written Parliamentary Answer by Bridget Prentice MP (23 October 2008), and other reactions to the lecture and the issues raised in it, see R. Griffith-Jones, ed., *Islam and English Law: Rights, Responsibilities and the Place of Shari'a* (Cambridge: Cambridge University Press, 2013) 20-33 and 35 and the other studies therein.

[56] *Church Times* (9 February 2018) 6.

[57] *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 771.

[58] See generally N. Doe, *Comparative Religious Law: Judaism, Christianity, Islam* (Cambridge, 2014) Chs. 8-10.