Contemporary Challenges to the Regulation of Religions in Europe

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Foreword

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I am delighted to contribute a Foreword to this important book, which derives from a conference held in Porto, Portugal, in September 2021. The theme of this meeting was the regulation of religion in Europe seen from a multiplicity of perspectives: legal, social, historical, political and cultural. An interdisciplinary group of scholars came together to consider the theoretical and practical considerations of regulating religion, raising questions of immediate importance for the good governance – one could almost say the wellbeing – of European societies.

In the early decades of the twenty-first century, this part of the world has been exposed to contrary pressures with respect to religion. On the one hand, Europe – and in particular Western Europe – is noticeably secular in global terms. Much has been written about the secularization process in its European forms and whilst there is considerable and continuing discussion about the detail, there is little doubt about the overall picture: not only is Europe unusually secular, it is becoming more so. At the same time, however, Europe is becoming markedly more diverse, a process brought about by immigration. Clearly the movement of people lies at the core of these changes, but it is important to note an associated shift in academic thinking. In the early post-war decades (beginning in the 1950s), new arrivals in Europe were very largely categorized in terms of their race or ethnicity, generating significant – but *secular* – discussions about racial, ethnic and national issues. Towards the end of the century, however, the debate turned increasingly to questions of religion – a shift that discomfited many of Europe's secularists and the professions of which they were part. New questions arose: how were European societies to accommodate religious rather than ethnic differences and how were legal scholars, secular social scientists, politicians and policy-makers to address both the theoretical and practical questions that followed?

In short, an unexpected reversal was taking place. Scholars accustomed to talking in terms of the privatization of religion – seeing this, correctly, as the consequence of secularization – were increasingly obliged to note the rising profile of religion in *public* debate, despite the falling indicators of religious activity. Put differently, two rather different things were happening at once: continuing and undisputed secularization alongside insistent, and at times heated, exchanges about the place of religion in late modern societies. Even more difficult was the

growing awareness that the former (secularization) was eroding the knowledge, vocabulary and sensitivities demanded by the latter (the increasingly visible presence of religion in the public sphere). What was to be done?

This, very briefly, is the overall picture. The significance of the following chapters lies in addressing the detail as scholars from many disciplines attempt both to understand and to resolve the demanding questions that arise in relation to the regulation of religion across European societies, taking into account the distinctive histories, confessional backgrounds and particular aspirations of each case. One point, however, becomes clear very quickly: easy generalizations are best avoided if progress is to be made in understanding both the theoretical implications of the regulation of religion and its practical consequences. The Introduction to this volume sets out the steps in the argument presented in this book which moves from a theoretical overview to a series of fascinating case studies. I recommend these very warmly: every one of them merits close and careful attention.

To conclude this Foreword, I will – if I may – sidestep a little, taking a concept from my own work to demonstrate how its meaning and application have evolved as the European context developes. The concept in question is what I have termed 'vicarious religion' – an idea that derived from the marked difference between the hard and soft indicators of religious life in much of modern Europe. My argument found its focus in the relationship between a continuing but relatively restricted community of Christian believers who expressed their faith in more or less regular church-going, and a much larger penumbra who retained some sort of belief, and who wished from time to time to make contact with the institutions with which they identified.

The notion of 'vicarious religion' pivots on the idea that the smaller group is doing something on behalf of the larger one, who are aware (if only implicitly) of this relationship. For example, churches and church leaders perform ritual on behalf of others; church leaders and churchgoers believe on behalf of others; church leaders and churchgoers embody moral codes on behalf of others; and churches can at times offer space for the 'vicarious' debate of unresolved issues in modern societies. It is worth noting that all of these functions have in common the typically European perception of the church as a public utility: that is, an institution (or more accurately a cluster of institutions) that exists to make provision for a population living in a designated place, local or national, and that are found wanting if they fail to deliver.

Some 20 years later, I was taken aback to find a rather different use of my ideas. Getting to know the rapidly expanding literature on populism across Europe and the place of religion in this, I found more than occasional references to 'vicarious religion' deployed in ways that I did not intend and do not like. As

I used this term in 2000, it captured an investment in the historic churches of Europe, understanding these as institutions that operated on behalf of a wider constituency who were appreciative of what the churches were doing, but were themselves largely, if not totally, inactive. Both the concept itself and the constituency that I had in mind were entirely benign and would, I thought, be unlikely to outlast the generation born in the aftermath of World War II. I was wrong, in so far as the debate has taken an unexpected turn: no longer do the Christian churches necessarily represent a cherished and somewhat wistful connection to the past; they have become instead a potent means to resist outsiders, notably Muslims.

Interestingly, for many authors the link is found precisely in the disconnect between belief and belonging: without a firm base in theology – or, as Max Weber put it, a religious ethic – Christianity, together with the heritage that it represents, is vulnerable to misuse, as will be made clear in the chapters that follow. Its re-modelling as 'culturalized religion', or 'Christianism' works well in some cases (see, for example, the chapter on Denmark), but all too often it introduces a more negative feature: the deployment of a Christian heritage to exclude rather than include, at times aggressively. It is, finally, powerful evidence of the *point du départ* of this Foreword: to understand the regulation of religion in Europe in the early decades of the twenty-first century, it is necessary to pay attention to *both* the continuing – some would say remorseless – process of secularization *and* to growing religious diversity. The chapters that follow should be read with this in mind.

Introduction

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The globalisation of society produces paradoxical effects. Despite structurally favouring the privatization of religion and secularization at the micro, meso, and macro societal levels, it also contributes to its deprivatization and a re-updated influence (Beyer, 1990; Casanova, 2009; Berger, 2014) in the public space. In a very particular way, this paradox has been central to Grace Davie's theoretical and empirical reflection in recent decades (Davie, 2022), given that Western societies have become arguably more secularized, but also progressively more culturally, religiously and ethnically diverse.

In the current context of pluralism and societies governed by democratic principles, the problem of religious regulation has been addressed particularly from the point of view of the competencies of the central State, distributed by different agents and institutions. According to varying strategies, States thus regulate both historical majority religion and religious minorities in the public space (Sandal & Fox, 2013; Fox, 2019; Turner, 2013; Pollack *et al*., 2012). This regulation is carried out through forms of support, restriction, and control, regardless of the type of government and the dominant religion (Fox, 2019).

This volume seeks to give visibility to elements that make it possible to delineate the configuration of the contemporary religious field, avoiding its reduction to models centred on the majority/minority dichotomy, which starts from the unverified assumption that this border explains the diversity of processes. Problems must be interpreted through the dynamism of their multiple records, whether memories, historical, material or symbolic. Only through this path will it be possible to apprehend new facets of the contours of pluralism and the direction of trends within the western religious landscape.

If we take in account Michel de Certeau's concepts of 'the practice of everyday life' and 'discourse' (de Certeau, 1984), an individual's everyday life is lived within social institutions. However, individuals are not passive recipients but creative users of institutional discourses, through which they express and

realise their own subjective interests. According to de Certeau (1988), 'subject' is the medium through which individuals simultaneously internalise and express institutional knowledge and practices. In other words, an individual's knowledge and practices are simultaneously institutional and subjective while institutions thus set the conditions for individuals' everyday life, an individual's subjective expressions of institutional knowledge and practices represent slight but identifiable deflections from the main road of institutional discourse. Members of religious groups thus express the discourses of public institutions through subjects that are simultaneously identified with other institutions, *e.g.*, family and cultural or religious organisations. The policy-concept 'cultural democracy' must be rather understood in the sense that all cultural groups must have equal opportunities to represent and negotiate their interests and needs in relation to public institutions.

The forms of conflict, negotiation, and cooperation that characterize the current remodelling of the social space, in the national, regional, and local dimensions, are not immune to changes in the structures of plausibility, thus provoking transformations in the universe of religious beliefs and practices (Berger, 2014; Repstad, 2019), due to the interactions to different people.

In the case of conflict, as supports Lamine (2013), is also a context of knowledge and recognition, promoting redesigning in the domain of transactions between the political and the religious. However, to a large extent, the problems inherent to religious experience, in its sociability, or even as an exercise of individual freedom, have a strong impact on the level of local and regional policies, insofar as they are the ones that organize the State in its dimension of "proximity", as stated by Teixeira (2020), quoting Frégosi and Willaime (2001).

In this sense, it is overriding to analyse how political and legal institutions work in building the memory of territories (Davie, 2015) both in terms of conflict resolution and the promotion of cohesion and development policies.

The recomposition of religious identities in a context of pluralism, which accompanies the processes of political democratization, does not happen in a single sense, nor in a deterministic way. This environment can be favourable both to the politicization of religious issues and to the religious translation of political problems. Conflict as a social dynamic, within the framework of recognition strategies (Teixeira, 2020, p. 2), becomes a place of fundamental observation, demanding new models of understanding.

Following once again Teixeira (2020, p. 3), this is the domain in which it may be important to test the notion of indivisible social conflicts, proposed by Hirschman (1994): "indivisible social conflicts" – of a religious, ethnic, linguistic, or moral nature – have a more pronounced non-negotiable character, since they concern "non-divisible" objects and, therefore, reduce the possibility of compromise. There are many situations in which individuals, sharing the same vision of the world, make

contrasting decisions, and act in markedly different ways (Lamine, 2013). On the other hand, sometimes, a particular statement of interest is taken as referring to a community of religious affiliation, when, in fact, it concerns a set of actors within that group. The analysis of these conflict situations, rooted in religious identities and contexts of democratic regulation of the public scene, requires knowledge of internal pluralism (Teixeira, Villas Boas, & Zeferino, 2022).

Conflicts can be analysed also from the observation of the boundaries between groups of religious identification (Zwilling, 2015). There are social borders that are objectified in the unequal forms of access to different goods, material and immaterial. But there are also symbolic boundaries, constituted from the representations used to qualify and differentiate objects, people, times, and spaces (Vilaça & Oliveira, 2019). The use of religious memory to construct national boundaries varies widely (Lamine, 2013). For example, studies carried out in the 1990s, in Europe, on immigrant communities coming from Islamized spaces, showed that several Christian Churches played an important role in the integration of these populations (Teixeira, 2020, p. 4). Muslim immigrants were often integrated into social care networks, where Christian Churches have a particular presence – especially in situations where it was not yet possible to reconstitute Islamic civilities and solidarities (Galembert, 2003). In another context, when in a popular initiative vote, held in 2009, the Swiss population was consulted about the construction of new minarets, the scenarios presented new contours (Fath, 2013; Teixeira, 2020) as voters belonging to Protestant Churches expressed positions that did not follow this trend.

For all these matters, the way political and legal institutions govern the contemporary religious field show multiple dynamics at play. Trying to reveal and analyse these dynamics has been the aim of the conference *Regulating religions? Legal and social status in contemporary Europe*[1]. Based on a multi-faceted approach, the debate on State-religions relationship in late modern societies was under question by a group of specialists of religion of different disciplines (sociology, political sciences, law, History, civilisation...) during the conference. It focused on the issue of regulating conventional religious groups from multiple perspectives, considering the formal as well as informal aspects of this regulation. The conference was promoted by the EUREL project *Sociological and legal data on religions in Europe and beyond*[2]. The EUREL project relies on a

[1] The conference took place at the University of Porto in September 2021 and was promoted by the EUREL network, which organizes every two-years an international conference. Previous conferences took place in Manchester (2012), Lublin (2014), Luxembourg (2016), and Oslo (2018). The 2020 edition in Porto was postponed to 2021 due to the Covid-19 pandemic restrictions.

[2] The EUREL project is available online (www.eurel.info) via a free access website intended for the international scientific community, public authorities, and political forces. It gathers comparative information concerning an enlarged Europe (EU member states, candidate countries, and other non-European countries) as well as Canada.

network of national correspondents (researchers and scholars in law and social sciences) who regularly provide and validate information based on scientific research on the social and legal status of religion in Europe (and beyond) from an interdisciplinary viewpoint. The network regularly supports and organises international conferences. In 2022, the EUREL conference was hosted by the Institute of Sociology of the University of Porto, the co-organizer of the conference. It gathered over 80 participants and 24 papers were presented, from 12 different countries.

This volume stems from the work presented at the conference. However, it goes far beyond a proceedings book. The aim was to develop a cohesive and high-quality volume on a topic of relevance in contemporary societies. As a result, this book brings together the contributions of national and international researchers' specialists in law, sociology, and other social sciences, who debate in a transversal way the State-religion relationship in late modern society, namely how religion is regulated, considering the formal and informal aspects of this regulation.

Before delving into the question, however, it was necessary to define the question and its terms; therefore, the book opens with these **Theoretical approaches**. Firstly, with a legal perspective, Jónatas E. M. Machado, in a chapter entitled *Regulation of religion in Europe: Theoretical perspective* tackles the theory of regulation, which is increasingly used in diverse legal disciplines. He uses the concepts of responsive regulation and smart regulation to describe some of the ways in which individual, collective, and institutional religious practices can be steered or influenced. This allows him to highlight and explain some aspects of the regulation of religion that an exclusively legal and normative perspective tends to disregard.

From a sociological perspective, in *Do we really need regulation of religion?*, Per Pettersson recalls firstly that it has always been difficult to define religion, but that this is even more difficult in an increasingly diverse Europe. Therefore, although regulation of religion is at work everywhere, he questions the necessity of such a regulation, especially in the light of the presence of people without religion or belief. He claims that all matters about religion should be dealt with by common regulations, since any other approach might lead to discrimination.

However, in the following chapter, *Religious accommodation in a post-secular Europe? Redefining the secular context,* Paula Arana Barbier and Ángela Suárez-Collado hold a different opinion. They affirm, on the contrary, the relevance of religious regulation in a post secular context in which diversity is society's foundation. They show how the notion of post secularism can contribute to the question of the relationship between states and religions. They also describe at length accommodation as a mode of regulation, one of the strategies available to deal with the increased contemporary religious plurality.

The second part of the book offers a **Practical approach** with several chapters on concrete cases that shed light on how the regulation of religions is played out.

Two chapters adopt a ***European legal perspective on governance of religion***. Firstly, Felipe Carvalho, Cintia Silvério Santos, and Lucas Vianna, in *Regulating religious proselytism: The views from Strasbourg and Luxembourg*, analyse how the European Court of Human Rights and the Court of Justice of the European Union have ruled on domestic laws and practices that prohibit or restrict religious proselytism, and the consequences of such decisions to religious minorities. The authors argue that both courts have too readily accepted state justifications for measures that impact negatively on the ability of religious minorities to share their beliefs. By using a case-by-case balancing approach, they have missed the chance to provide predictable principles about the extent to which restrictions on proselytism are in accordance with the international human rights regime.

Romain Mertens, in *Separate opinions at the European Court of Human Rights: Ideological divisions about the regulation of religion?*, also deals with the legal approach of the regulation of religion at the European level, with an interesting approach: that of the dissidents. His literary analysis of the separate opinions, especially dissenting ones, reveals that ideological standpoints exist on matters pertaining to the regulation of religion. It also allows concluding that religious cases will rarely lead to a straightforward solution.

A series of chapters then illustrate the different issues raised by the question of the regulation of religions, show the diversity of national situations, and examine the influence they can have on each other.

Several contributions explore ***the impact of the regulation of religion on religious groups*** by the state. The first example can be found in the chapter in which Kirstine Helboe Johansen, Elisabeth Tveito Johnsen, Lene Kuhle examine *Culturalized religion in Denmark: Legal and social regulation of Christmas in public schools.* Their analysis of the social and legal regulation of a religion widely turned into a culture, on the occasion of the Christmas celebrations, also illustrates the phenomena of resistance to regulation which can be an opportunity of empowerment for religion. In an ethnographic study entitled *Portuguese citizenship for descendants of Sephardic Jews: Ethnographic notes on the law and agents in Portugal*, Marina Pignatelli explores the consequences for the identity of those who used the 2015 amendment to Portugal's Law on Nationality which allowed descendants of Portuguese Sephardic Jews expelled during the Inquisition to become Portuguese citizens. Finally, in *The legal regulation of religious minorities in Italy*, Rossella Bottoni describes the complex legal system of recognition of religions by the State. Various statutes are available, and she displays the system of inequality that this has contributed to create.

But this impact goes both ways, as can be seen in the following chapter. Miroslav Tížik uses the interesting situation of the split of Czechoslovakia into the Czech Republic and Slovakia to exhibit ***the reciprocal impact of regulation and religion***. He describes both the impact of the legal system of regulation of religion and the role played by religion in the emergence of a model of relation to the State in *Two ways of regulating religions: The case of Czechia and Slovakia after the division of the federative state in 1992*. Clara Saraiva (*Religious freedom, civic rights and magical heritage: the case of Sintra, Portugal*) also exhibits an interesting case of intertwined dynamics. She describes the progressive installation of a very diverse religiosity, leading to the current situation where Catholics and many new spiritual groups all claim heritage as the ground for their right to establish and maintain devotional activities in Sintra. The chapter analyses the influence of the regulation of religion by the state on the Sintra past and present situation.

The last chapters evoke even more clearly the reverse influence: ***the impact of religious groups on the regulation of religion by the state***. In England, Muslims and Jews challenge the regulation of religions in a situation rendered even more acute by the refugee crisis, as it is shown by Ekaterina Braginskaia *in Muslim and Jewish responses to safeguarding refugees and asylum seekers in England before and during the Covid-19 pandemic*. Her sociological approach provides an insight into how religious minorities are involved in rule-making matters. It is obvious that the presence of religious minorities is an opportunity to question established situations. It is the case for Islam in Italy, as demonstrated by Francesco Alicino in *Dealing with neo religious pluralism: Regulating Islam in Italy*. He establishes that Islam receives a very different treatment from that of the other religious groups, thus challenging the current situation. The same inequality exists for Protestants in Turkey as shown by Nesrin Ünlü in *Regulating religion and the Protestants in Turkey*. She depicts the complex legal situation of this minority and the entanglement of legal and political issues. The inequality of treatment, nevertheless, is a ferment of future difficulties.

All these cases describe intertwined dynamics, and display a reciprocal influence. There is of course an impact ON religious groups OF the regulation of religion by the state. But there also is an impact OF religious groups ON the regulation of religion by the state. In our complex modern world, it is certainly interesting to reflex on these complex powers at play in society.

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PART I

Theoretical approaches

CHAPTER 1

Regulation of religion in Europe: Theoretical perspective

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1. Introduction

In the last decades we have witnessed a significant development of regulatory activity followed by the incursion of regulation theory in many traditional domains of law. Many traditional legal disciplines, such as constitutional law, administrative law, competition law, securities law, media and entertainment law, tax law, sports law, criminal law and civil law (v.g. family law, property and torts) have been importing new conceptual tools from the regulatory theory toolkit. The studies of regulation are now all-encompassing. Regulation in general and responsive regulation in particular are often described as "a general theory of how to steer the flow of events". Modern theory of regulation goes far beyond the legal norms themselves, making use of rules and mechanisms little or not at all formalized (Drahos & Krygier, 2017, p. 1 ff). Especially important is the recognition of the importance of both rationality and emotions in the regulatory processes (Drahos & Krygier, 2017, p. 9ff). Its main purpose is to promote individual and collective well-being (Braithwaite, 2017, p. 25ff). This broad understanding of regulation may obviously be applied to the domain of religion. Drawing from some perspectives and basic concepts developed by the theory of regulation, this article will briefly describe some of the ways in which the regulation of individual, collective and institutional religious practices can be steered or influenced through the use of the concepts of responsive regulation and smart regulation, including its conceptual tools such as regulatory pyramids, combinations of policy instruments and the consideration of a broad range of regulatory actors. It is about carrying out a theoretical experiment, applying analytical structures to the domain of religion that have already been applied

and tested in other areas of regulation. The main objective of this article is to make more visible and clear some aspects of the regulation of religion that an exclusively legal and normative perspective tends to disregard.

2. Regulation of religion

2.1. Historical notes

The regulation of religion has always been a fundamental problem for all structures of political power, even when they were ostensibly religious. And it has never proved to be an easy task and free from political and legal tensions and problems. Although there is no time and space to elaborate on this subject, it is important to recall, topically, some critical historical moments in the regulation of religion, such the binding of the gods to the affairs of the Greek polis; the Roman doctrine of the open pantheon; the roman condemnation and execution of Jesus Christ; the establishment of Emperor worship in the Roman Empire; the Edict of Milan of freedom or religion (313); the convening of Council of Nicea by the Emperor (325); the Edict of Tessaloniki proclaiming Christianity as the oficial religion of the Roman Empire (380); the establishment of the Inquisition (1063); the proclamation of the Crusades by Pope Urban II (1095); the persecution of heretics, apostates and schismatics; the massacre of the Templars by Philip the Fair and Pope Clement V (1307); the attempts of the Emperor and european monarchs to control the Pope; Luther's appeal to the German princes to become emergency bishops; the Peace of Augsburg (1555); the toleration Edict of Nantes (1598); the proclamation of religious tolerance in the Peace of Westphalia (1848); the Act of Toleration (1689) the struggle of catholic absolute monarchs against the catholic religious orders; the Edict of Fontainebleau (1685); the Bill of Rights of Virginia (1776), the Napoleon Concordat (1803); the Reichskonkordat (1933). These are just a few of the many examples that go to show that the regulation of religion has always been most probably the biggest legal-political challenge in European history. The regulation of religion throughout history is inseparable from the dominant conception about the nature, purpose and limits of political power.

Things are not entirely different today. In spite of the enormous influence, in the the eighteenth and nineteenth centuries, of several anti-religion lines of thought, such as the Enlightenment, Modernism, Naturalism, Rationalism and Scientism, religion has made an impressive comeback in the twentieth and twenty-first centuries (Berger, 1999, p. 1ff). In the European Union, the United States, Russia, Turkey, Iran, Saudi Arabia, India, China or Brazil, the regulation of religion and the relationship between faith and politics have

acquired a fundamental acuteness (Casanova, 1994, p. 11ff; 75ff). Globalization and global movements of people and ideas have increased the importance of the problem. People with different and colliding worldviews are called to live peacefully together side by side. At the same time, consumerist, scientifically and technologically sophisticated modernity, seems far from providing a satisfactory answer to some perennial human questions about the origin, meaning and purpose of existence. Global risks such as pollution, nuclear, chemical or bacteriological catastrophe, pandemics, the drastic reduction of biodiversity, climate change and its effects, have helped placing the world in a pre-apocalyptic cultural mood and in a state of doomsday anxiety (Parfray, 1990, p. 17ff). More than ever before, people are turning to religion and spirituality in search of a sense of *existential security* they can't find elsewhere (Norris & Inglehart, 2014 [2011], p. 243ff).

Religion continues to make its impact on politics, law, economics, science, culture, art or sport on a global scale (Ventura, 2021, p. 1ff). Contemporary secular societies, supposedly neutral from the religious point of view, are faced with the need to make difficult choices in religious matters, regulating institutions, people and conduct. Because modern universities have largely neglected religion, politicians, legislators, administrators, and judges are often unprepared to understand the real dimension and all the ramifications of what they are called to regulate. Religious literacy is in short supply. Our reference to history also serves to alert to the fact that the regulation of religion always operates in a given civilizational, historical and cultural context, and not in a vacuum. This makes it politically impossible and socially undesirable to guarantee absolute regulatory neutrality in relation to different religions[1].

2.2. Concept of regulation

In general terms, there are four distinct strategies of control that can be followed in order to achieve social goals: market discipline, private litigation, public enforcement through regulation, and state ownership (Schleifer, 2005, p. 442). Although they all can be described as forms of regulation in a broad sense, regulation is often described as the intentional activity of attempting to control, order or influence the behaviour of others. In the last decades we have observed the development of a specific concept of regulation. It often starts with the idea that regulation is to control or direct others by rules or standards in order to achieve some pre-determined valuable goals thus strenghthening the social fabric. Understood from this perspective, regulation theory is generally

[1] Lautsi and Others v. Italy [GC], Application no. 30814/06 § 68 ECHR 2011-II.

associated with the quest for efficiency and rational design of institutions and policies. This concept of regulation is different from the general idea of the law, because it concentrates on specific areas of social life, where it identifies a set of given goals and tries to come up with various means (v.g. criminal law, civil liability, disciplinary measures, licensing, fines, agreements, letters, consent decrees) in order to achieve those goals. On the other hand, it underlines the regulatory role of informal and non-legal standards, values, habits, customs, practices, incentives or expectations. Far from being dismissed as a negative bureaucratic overload, regulation serves the positive and important role of assuring valuable community oversight. The concept of regulation emerged as a result of the need to deal with the political, legal, social, financial, economic and technological complexity of modern advanced societies, in many cases at a global level (Schleifer, 2005, p. 439ff).

The concept of regulation is mostly applied when dealing with specific sectors, such as food and drugs, communications, banking, securities, competition or civil aviation, where the specific rationality of ends and means is especially important. It often implies the existence of independent regulatory agencies (v.g. FTC, FDA, SEC, FCC, FAA) with the task of drafting legal rules, licensing companies, activities or products, supervising the activities of these companies, ensuring the enforcement of rules and preventing their violation, exercising supervisory and inspection functions and, where necessary, applying the appropriate sanctions. Regulation soon became a global task, involving States, International organizations and corporations in the areas of trade, finance, governance, telecommunications, maritime issues or international aviation (v.g. WTO, IMF, OECD, ITU, IMO, IACA).

Some of the main characteristics of regulation, in a specific sense, are: a) the recognition that there are market failures which require the government to structure a policy and regulatory framework and search for creative regulatory solutions, in order to promote the public good in the face of many challenges; b) the concerted action of various legal and non legal disciplines and of legal and non legal norms from different branches and traditional areas of law (criminal and civil, public and private, national and international) and society (v.g. education) along with technical standards to achieve certain regulatory objectives, c) the relativization of structural and substantive differences between these branches and areas of the law and, d) the creation of multilevel dynamic local, national, supranational, international and global regulatory partnerships and networks involving public and private sector entities, e) the use of soft-law and soft-regulation forms and strategies (eg letters, agreements, self-regulation, nudges, naming and shaming) for this very purpose. Regulation is also f) concerned with compliance and periodical monitoring and review of the actual results of the application of existing regulatory strategies in order to verify to what extent they

are achieving their intended objectives. Regulation is understood as a process of exploration and rebuilding, oriented towards the advancement of knowledge about regulatory processes in order to solve existing and emerging problems. Although regulation has a specific meaning, it has been used to explain and reconceptualize classical areas of the law, such as administrative law or criminal law. Even war itself has been described as a form of regulation (Knowles, 2017, p. 1953ff). For some authors, regulation is the essence of all law. In a broad sense, encompassing legal and non-legal dimensions, regulation, in a broad sense, can be seen as a complex set of means of "influencing the flow of events" (Parker & Braithwaite, 2003, p. 119ff).

2.3. The concept of religion

The definition of religion is not entirely straightforward, being preferable to understand the concept of religion as an ideal type. This means that religion is understood as having some characteristics and elements, but that doesn't mean that these will be present in all religious phenomena. Religion can be described as a worldview with metaphysical and supernatural overtones, being different in that regard from secular philosophies and ideologies (Iannaccone, 1998, p. 1466). This connotation of the concept of religion has allowed it to denote movements, such as Judaism, Christianity, Islam, Confucianism, Taoism, Buddhism and Hinduism, each with many different branches, both large and small. But there are also new religious phenomena arising today. However, all worldviews have a "a sense of taste for the infinite in the finite" (Schleiermacher, 1893 [1799], p. 33) that is, they purport to deal, in one way or another, with ultimate concerns and questions respecting the origin, meaning and destiny of the Universe, life and man, as well as the existence, source, nature and content of moral norms of universal validity (Tillich, 1957; Hoffman & Ellis, 2018, p. 1ff). This means that religious and non-religious worldviews can encounter each other in the same sphere of discourse. A neo-atheist and and a Preacher have God as their ultimate concern, and are this religious in a broad sense. That's why atheism and secular humanism have been described as forms of religion [2].

Far from being confined to a social autopoetic subsystem separated from politics and law, as some authors implied (Teubner, 1993, p. 1ff; 13ff), religion is related to all spheres of life. It refutes the notion that modern society is made of social systems that are code-specific, autopoietic and normatively closed

[2] Torcaso v. Watkins, 367 U.S. 488 (1961), footnote 11: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."

to one another (Luhmann, 1997, p. 16ff; 230ff). Furthermore, it offers basic axioms and presuppositions that structure an interpretative framework that individuals and communities may use to understand reality. It also creates spiritual and transnational epistemic communities that provide a sense of identity, belonging, meaning, comfort and hope. It has even been stated that the possibility of theoretical thought itself is grounded on axioms, motives and pressupositions about the nature and meaning of reality as a whole that are essentially and inescapably religious (Dooyeweerd, 1969, p. 1ff). The act of thinking theoretically rests on assumptions about the rationality of the human being, the intelligibility of the cosmos, the existence of objective truth and the universal validity of the laws of logic and mathematics. According to this view, religious neutrality is really impossible in the fields of politics, law or science (Queiroz, 2020, p. 26ff). Regulating religion is, in a way, a means of regulating many other domains. The opposite is also true. In fact, religious people move fluidly among social spheres and networked organisations. They are politicians, lawyers, journalists, economists, scientists and athletes, taking with them, as they go about their activities, their religious beliefs and practices, knowledge and contacts, thus allowing religion to influence different normative domains.

This is precisely what John Braithwaite (2006) has in mind when he said:

> In this regard my conception of responsiveness differs from Teubner's reflexiveness and Niklas Luhmann's autopoiesis. I do not see law and business systems as normatively closed and cognitively open. In a society with a complex division of labor the most fundamental reason as to why social systems are not normatively closed is that people occupy multiple roles in multiple systems. A company director is also a mother, a local alderman, and a God-fearing woman. When she leaves the board meeting before a crucial vote to pick up her infant, her business behavior enacts normative commitments from the social system of the family; when she votes on the board in a way calculated to prevent defeat at the next Council election, she enacts in the business normative commitments to the political system; when she votes against a takeover of a casino because of her religious convictions, she enacts the normative commitments of her church … So much of the small and large stuff of organizational life makes a sociological nonsense of the notion that systems are normatively closed. Nor is it normatively desirable that

> they be normatively closed ... there is virtue in the justice of the people and of their business organizations bubbling up into the justice of the law, and the justice of the law percolating down into the justice of the people and their commerce. (p. 885)

2.4. Regulating religion

Religion concerns all spheres of life. It influences how people understand and experience politics, economics, science, culture, art, entertainment or sports. Beliefs translate into habits, rituals and actions. Even critics of religion, such as atheist Sam Harris, recognize this, when they say that religion poisons everything. Religion is also influenced by politics, law, economics, science and culture. It has ontological, epistemological, deontological and normative dimensions. Modern theories of regulation can easily be applied to religion, since they generally assume that law exists alongside a variety of normative orderings. Since religion concerns every aspect of life, the regulation of religion must be assessed from an interdisciplinary perspective, involving law, theology, economics, sociology, political science and International relations, in a way that takes into account the existing complex network of connections and interactions between multiple individual and institutional actors, events and mechanisms. Regulating religion has an impact on the political, legal, economic, scientific, cultural and sports and entertainment systems.

The regulation of religion has to take into account its subjective and objective dimensions. That means it has to consider the significance and content of a) personal conscience, beliefs, convictions, experiences and practices; b) texts, traditions, symbols, rituals, clothing, food; c) institutions, collective enterprises, corporate structures and properties. Because of this, religion is to be seen as both a public or private concern, manifesting the tension between State and individual, sovereignty and freedom. Unlimited freedom of religion would most probably be significantly detrimental to human rights the public good. The main task of the regulation of religion is to consider potential policy pathways to address these concerns.

Some values that are used in regulating religion may not be entirely neutral from the religious point of view. They may be the result of a set of theological developments. For instance, Roger Williams, the founder of the Colony of Rhode Island, first defended religious freedom for all religious communities, both christian and non-christian, on the basis of his own theological beliefs. He thought that the center of gravity of religion should be uncoerced personal

conviction (Williams R., 1644). In fact, it has often been pointed out that the modern constitutional values of religious freedom and equality implicitly privilege the protestant theistic liberal perspective (Walter, 2006, p. 38 ff).

3. Theories of regulation

3.1. Public interest regulation

An important theory of regulation attempts to base it on the values of citizenship and common good, as opposed to consumer preferences. In modern constitutional democracies, this kind of regulation stresses the values of participation and public interest. However, in the last centuries, since the days of colbertism, mercantilism, metalism and protectionism, public interest regulation describes mainly a state-centered command and control approach to economic regulation that gave precedence to the public interest as defined by the absolute monarch or the chief of the executive. As far as the regulation of religion is concerned, the same approach was followed. During the centuries, religion was regulated as a means of attaining very clearly defined political and social goals. In England, the Anglican Church was created in order to free the monarch from the foreign influence of the Pope. In France, the galican theologico-political regime stressed the ideal of "Un roi, une loi, une foi", in which the catholic faith would be used to legitimate the absolute power of the monarchs. The provision of spiritual public goods concerning the salvation of the people was largely seen as a State responsibility (*salus publica*), giving rise to something like a spiritual welfare State. In order to do that, States would engage in the active reform of the Church (*jus reformandi*) (Vinding, 2019, p. 88ff). The statist and absolutist attempt to control religion, even at the cost of permanent conflicts with the Pope, was also present in catholic states such as Austria, Spain and Portugal in the 17th and 18th centuries. Many European absolute monarchs affirmed their sovereign rights over religious matters (*iura maiestatica circa sacra)*. Throughout Europe the religion of the king was the religion of the kingdom (*cuius regio, eius religio*). A similar approach was followed by the Napoleon Concordat and other Concordats with authoritarian regimes (Holmes & Bickers, 2021 [1983], p. 139ff; 199ff). A structured relationship with the dominant religious communities was seen as essential to secure public order and peace. In many countries there was the expectation that being a good citizen implied being a good Christian *(idem cives et christianus*). More recently, some lines of civic republicanism and communitarianism emphasised the role of religion in fostering the necessary civil virtues.

3.2. Market-oriented regulation

This theory of regulation stresses the regulatory importance and function of market structures. The market is understood as a framework of freedom, autonomy and decentralization of authority. Adam Smith was maybe the leading proponent of this notion. He saw the free market as an antidote to public protectionist and mercantilist economic structures as well as against private monopolies. Competition amongst small corporations was seen as the best way to maximize individual social and economic freedom and collective wealth creation. However, markets are regulatory constructs in need of regulation. Competition law is a form of regulation aiming at correcting market failures. These same principles were applied by Adam Smith (2007 [1776], p. 608ff) and his followers to religious communities, especially in the anglo-saxon world where the Protestant Reformation had given way to the creation of multiple Protestant factions. Religious freedom was understood as a kind of competition law for religious communities, protecting against abuses of dominant position.

The principle of separation of churches and State assured that the *magistrate* would be a neutral and impartial regulator, initially within a protestant playing field, leaving it to individual consciences to decide on matters of religious faith. According to John Locke, Catholics and Atheists should be kept at bay for political and moral reasons. The former were seen as an external threat, because of their connections with the French King and with the Pope in Rome (Stanton, 2006, p. 84ff; 91ff). The latter were seen as a moral threat to the political and legal system because of their disbelief in a superior moral authority (Numao, 2013, p. 252ff). This particular view showed that even the more liberal minds had a problem with absolute religious deregulation, accepting the intervention of the State to correct negative political, legal and social externalities of religious market failures. Even today, even the most generous defenders of religious freedom would have problems with accepting religious practices like burkas, the caste system, polygamy, genital mutilation, widow burning, etc. Complete deregulation of religion would be unthinkable. This regulatory state structure combines state oversight with "marketisation" of religious services provision and, in the responsive model, religious communities are expected to cooperate with state oversight.

3.3. Responsive regulation

In the last decades the concept of responsive regulation was developed, meaning that regulators should understand the context and motivations of those whose conduct they were regulating and then choose a response based on that

contextual understanding (Braithwaite J., 2017, p. 117ff). Responsive regulation requires a deep knowledge of the specific characteristics of the domain that is to be regulated. It understands that consistency and "one size fits all" approaches can only make things worse in the future (Braithwaite J., 2017, p. 118). It draws the regulator's attention to the particular actor and specific situation. Drahos and Krygyer explain that "[a] responsive regulator is not denied the option of penalties, but is denied their first and automatic application" (Drahos & Krygier, 2017, p. 5). This concept is relevant in all regulatory domains (v.g. crime, corruption, media, competition, securities, internet).

Responsive regulation is particularly important when it comes to regulating religion. First of all, it is important to have in mind the theological and theonomical aspects of a significant part of religious thought. It is perceived as based on revelation, and thus not entirely flexible. Although it can change over the course of the centuries, through internal and external discusión and pluralism, it has some very rigid parts, concerning doctrines and conduct that are seen as absolute, unconditional and unchanging divine imperatives that won't simply go away. Another important aspect of religion, it is its resilience in the face of changing political, social, cultural and economic circumstances. Christianity started in the periphery of the Roman Empire and its theologians always found a way to accommodate and adapt to different structures and strictures of political, ecclesiastical and economic power. Theology may also be highly responsive to context.

Another aspect, concerns its ability to empower the apparently humble and vulnerable. Through its religion, the small and weak Jewish people were able to resist and outlast the strongest Empires, such as Egypt, Assyrian, Babylonian, Persian, Greek, Roman, deal with the Respublica Christiana, the rise of the nation State, France, Prussia, Germany, Austria, and be here today, as we speak, having influenced the political decisions of successive American Administrations, and challenged the United Nations and International law. Religion empowered the african-american community in its fight against slavery, segregation and discrimination, providing an absolute claim to equal dignity. In East-Timor, it was largely catholicism that gave the necessary resilience against Indonesian occupation. It is also worth noting that theological differences and conflicts, within and between religious communities, are able to generate large amounts of spiritual and intellectual energy, that inevitably impact all other spheres of life.

Religious communities coexist in an atmosphere of spiritual competition and confrontation, as we see between and within Catholic, Orthodox, Protestant and Evangelical Christianity or between and within Shiite and Sunni muslims. In some circles, theological arguments may be used in a way that demonizes individuals, groups and peoples. For instance, the Protestant Reformation, which started as a theological dispute within the then recently created and largely unknown

University of Wittenberg, soon became a spiritual revolution with profound and lasting political, geopolítical, economic, social and cultural implications and effects. The different religious communities are always in a state of spiritual confrontation and competition, of actual or potential theological war of all against all, in which man can become the demon of man.

Responsive regulation must be context sensitive, going with the flow of events while trying to influence it and steer it towards socially desired outcomes. In doing that, it doesn't rely on state power alone, enlisting the civil society in a way that makes regulation a tripartite enterprise. Tripartism starts from the assumption that society cannot rely exclusively on law and its agencies of implementation, relying instead on informed and motivated public interest groups. There are different private and public layers of regulatory action, and multiple informal and formal pathways. A responsive regulator of religion is not denied the option of penalties, but is denied their first and automatic application.

4. Regulation of religion in Europe

A significant number of individuals and religious communities view the regulation of religion as a potential threat to freedom and well-being. For some of them, the simple formulation of restrictions on the use of temples for health reasons is understood as a state attempt to impose by force a secularist and materialist ideology. However, on the opposite end of the spectrum many are convinced that the regulation of religion is inevitable and desirable. This is why clarity about the agents, objectives, principles, strategies and techniques of the regulation of religion is so important. When dealing with individual believers and religious communities, in different settings, regulators should foster commitment, communication and cooperation and not suspicion, distrust and alienation.

4.1. The presence of history

The history of Europe is largely the history of the interaction between politics and religion. As far as the regulation of religion is concerned, each country has its own *historical background* (Torfs & Vrielink, 2019, p. 13; Tretera & Horák, 2019, p. 71ff). It must be taken into account the fact that different individuals and religious communities will attribute different meanings to the various regulatory strategies and actions according to their particular world views and historical experiences. Some religious communities have been around for centuries and keep memories of past interaction with public and private power. The regulation

of religion is characterized by the *presence of history*. The memories of the Crusades, the Inquisition, the Wars of Religion or the Holocaust still pervade this field. That's why the regulator or religion must be especially sensitive to historical and cultural context and the weight of tradition ["*le poids de la tradition*"] (Mazzola, 2016, p. 55). Christian and non-christian religious communities, being in a majoritarian or minoritarian position in different parts of Europe, will perceive the regulation of religion very differently, according to their collective or institutional memories. Although sharing many common features, European States have different specific historical experiences concerning the regulation of religion. However, this fact should not be used to justify significant restrictions to the right of religious freedom or discriminations in its exercise[3]. Some regulatory measures may have an impact likely to resurrect some "childhood traumas" recorded and repressed in the collective psyche of religious communities. For example, Jews would hardly fail to understand a ban on circumcision – however well-intentioned – in the context of the centuries-old history of anti-Semitic persecution. For this reason, the regulation of religion cannot be done without the history of religion.

4.2. Regulatory objectives

The pursuit of the right regulatory objectives may foster compliance, once individuals and religious communities feel that the regulatory framework is legitimate, fair and just. In Europe, the regulation of religion must pursue a reasonable and healthy balance of different human rights and constitutional objectives, as enshrined in European human rights documents, such as the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union and in the constitutional texts and traditions of the Europan States. At the core of these constitutional objectives are equal dignity and freedom, social cohesion and the common good. Here the concept of smart regulation is particularly helpful, since it draws attention to the fact that an intelligent and pragmatic combination of regulatory techniques must be sought (Gunningham & Sinclair, 2017, p. 133ff).

4.2.1. Individual conscience

In a free and democratic constitutional order, respect for the individual conscience should be a paramount goal of the regulation of religion. Conscience, therefore, is a key means to protect the moral autonomy of humans from the coercive power of the legal system. This can result in numerous possibilities of

[3] Lautsi and Others v. Italy [GC], Application no. 30814/06 § 68 ECHR 2011-II.

conflict of conscience requiring careful consideration. Individuals should remain free to hold any religious or non-religious views. No person should be forced to conduct an act which might reasonably be seen as pledging allegiance to a given religion or secular ideology. State authorities cannot directly or indirectly interfere with individuals' freedom of conscience. They cannot ask them about their beliefs, force them to express any beliefes or exert psychological pressure in order to "correct" their beliefs. Regulation of religion should try to avoid moral dilemmas as much as possible (v.g. allowing the refusal of blood transfusions on religious grounds) (Mancini & Rosenfeld, 2018, p. 1ff). Among other things, this means that those actors engaged in the regulation of religion should not adopt a naturalistic and materialistic worldview, for purely philosophical or ideological reasons, that *a priori* dismisses the possibility of individual conscience as an immaterial entity and assumes the neurological origin of all beliefs, including those particular regulatory assumptions. The regulation of religion should not be carried out as *if God did not exist* (*etsi Deos non esset*), but as if God could really exist (Corvino, 2019, p. 13ff). Respect for individual conscience calls for a regulatory strategy that aims at maximising opportunities for win–win outcomes.

4.2.2. Freedom of religion

The regulation of religion must be premised on an ideal of freedom as non-domination. Individuals and communities should have an equal freedom to investigate and develop their own views on and freely debate the ultimate questions of existence and their normative implications. The right to deeply hold any belief, religious or not, and to change one's mind is absolute and unconditional. This means that no one should be subjected to any political, legal, economic or psychological pressure in order to adhere to or to abandon religious or secular beliefs. Individual religious convictions, when developed freely in a context of freedom of conscience, opinion, expression and discussion, may themselves be powerful regulatory instruments, because they are able to significantly shape and influence the doctrine and behavior of religious communities. If religious individuals are not entirely satisfied with the nature and content of religious doctrines on this or that subject (v.g. gender and sexuality issues, climate change, social justice), they can always go to a different religious community, create a new one or abandon religion altogether. In a free, open and democratic society, religious and non-religious people are thus in a position to wield more regulatory power over the behavior of religious communities than are government officials. Under no circumstances can the State force individuals to adhere to the tenets of one particular religion or to follow the precepts of their own particular religion[4].

[4] Hassan and Tchaouch v. Bulgaria [GC], no. 30985/96, § 78 ECHR, 2000-II.

4.2.3. Equal dignity and freedom

Regulation of religion must promote the values of equality and non-discrimination. Although there is some room for reasonable disagreement as to what these values require, there are some red lines, such as the equal dignity of men and women that should not be crossed[5]. Equal dignity and freedom are fundamental principles of the regulation of religion, requiring that it will be pursued in an atmosphere of respect, participation in institutional processes of procedural fairness. The State should remain in a position of relative neutrality and impartiality, thus promoting order and tolerance. It should abstain from deciding on the legitimacy or truthfulness of the tenets of religious communities and from favoring some religious communities compared to others and from trying to resolve internal religious disputes[6]. On the other hand, it should take positive measures to promote the effective equal freedom of religion[7]. The balance of different and competing rights and interests should follow principles of consistency and proportionality. To the maximum extent possible, the State should adopt the principle of the most favoured religious community, meaning that, as a matter of principle, it should extend the treatment of the most favored to all religious denominations. This does not, of course, exclude the possibility of differentiated treatment, if and to the exact extent that there is a justification of a historical, sociological or cultural nature for this differentiation. There is some room for proportional and reasonable legal differentiation. It is important that the freedom of religion of individuals and religious communities is not burdened and limited in an unreasonable, unfair and disproportionate way. This is incompatible, for instance, with government keeping records of individual religious membership.

4.2.4. Protection of the sphere of public discourse

A free and democratic society requires an open sphere of public discourse, where all relevant topics of public interest are subjected to a permanent process of dialogical and critical examination. The regulation of religion must ensure that religious communities may actively participate in the sphere of public discourse. At the same time, religion and religious communities are also topics of conversation, since their worldviews, doctrines and practices impact all the different domains of social life. The regulators should assure the existence of

5 Staatkundig Gereformeerde Partij v. the Netherlands (dec.) no. 58369/10, ECHR 2012-III, Metropolitan Church of Bessarabia and Others v. Moldova, §§ 115-116, no. 45701/99, ECHR 2001-XII.

6 Miroļubovs and Others v. Latvia, no. 798/05, §§ 89-90 ECHR, I2009-III; İzzettin Doğan and Others v. Turkey [GC], no. 62649/10, § 121, ECHR, 2016-II; Serif v. Greece, no. 38178/97, § 51, ECHR, 2000-II.

7 Dubowska and Skup v. Poland, nos. 33490/96 and 34055/96, Commission decision of 18 April 1997, DR 89.

a broad freedom of religious speech and of speech about religion. This means that religious communities must be allowed to participate in the discussion of matters of public interest, while also being ready to withstand sharp public criticism and face the dissemination of doctrines hostile to the tenets of their faith[8]. Likewise, in respect for fundamental principles of ethics and discursive justice, religious communities can freely fight their spiritual battles, vehemently attacking ideologies they consider undesirable from their point of view.

4.2.5. Democracy and open society

Constitutional democracy is very much linked to the concept of open society, as advanced by Karl Popper (2002 [1945], p. 11 ff). This concept points to a polycentric view of governance and regulation, devoid of any teleological or theological historicism or sociological determinism. Law is just one system of ordering that exists. Religious norms can be another. In an open society, based on the rights of freedom of conscience, thought, expression, assembly and association, the formation and consolidation of nodes and networks of individuals and collective entities, including religious communities, or religiously inspired political parties, is a natural and expected manifestation of a decentred conception of governance with multiple sources and many forms. Religious individuals are free to interpret and even influence reality on the basis of their narratives and worldviews, but should not be allowed to capture the constitutional, institutional, normative and coercive structure of the State in order to advance it. Religious freedom is limited by the protection of an open democratic society, in which individuals are free to develop, express, revise and abandon their religious or ideological convictions[9]. Subjected to this understanding, non-state entities do not necessarily pose a threat of division, disorder, corruption or subversion of the free, open and democratic constitutional order. On the contrary, they should be seen as indispensable components of an open and democratic society, in which public, private, religious and non-government secular stakeholders collaborate towards mutually negotiated and commonly agreed goals. The State may intervene when there is a clear and present danger that a religious group is trying to impose its worldview or all-encompassing narrative on the political community, thus becoming a threat to democracy[10]. The regulators of religion should deliver

[8] Dubowska and Skup v. Poland (dec.)). nos. 33490/96 and 34055/96, Commission decision of 18 April 1997, DR 89, p. 156.

[9] Refah Partisi (the Welfare Party) and Others v. Turkey [GC] nos. 41340/98 and 3 others, ECHR 2003-II); Staatkundig Gereformeerde Partij v. the Netherlands (dec.), no. 58369/10, § 71, ECHR 2012-III.

[10] Refah Partisi (the Welfare Party) and Others v. Turkey [GC] nos. 41340/98 and 3 others, § 128, ECHR 2003-II; Hizb Ut-Tahrir and Others v. Germany (dec.) no. 31098/08, ECHR 2012-V.

procedural justice by treating those being regulated with respect, have clear and transparent procedures and provide reasonable and fair hearings for dissidents and engage constructively with alternative voices.

4.2.6. Rule of Law and checks and balances

The rule of law principle requires that laws must be publicly promulgated, equally enforced and independently adjudicated. This is the essence of procedural fairness (Braithwaite V., 2017, p. 30 ff). The concept of rule of law has, on the one hand, a substantive dimension, inseparable from human rights, democracy, separation of powers and effective judicial protection. The principle of the rule of law is an indispensable element in the regulation of religion. On the other hand, it has a procedural dimension, implying administrative compliance with formal law, equality and non-discrimination, proportionality of rights limitations, respect for legitimate expectations and the preservation of the essential core of fundamental rights. The rule of law principle also requires respect for the due process rights of individuals and religious communities as well as the right to judicial review of legislation and pecuniary compensation for serious human rights violations. It also requires public authorities to take all reasonable measures to ensure that all individuals and religious communities, especially minorities, benefit from the protection of existing general laws[11]. What's more, those who exercise legislative, administrative and judicial functions should not be permitted to do so in a way that violates the right of equal religious freedom[12].

Rule of law norms are generally inscribed in legal instruments such as conventions and treaties, legislative and administrative acts, best practices and standards, legislative guides and model laws, International, European and national court rulings and the rules of global regulatory bodies. As far as the regulation of religion is concerned, doctrines, canons, determinations of religious institutions and private association norms may also be relevant. The regulation of religion goes beyond the strictures of formal law. The regulation of religious involves the concerted efforts and actions of legislative, administrative and judicial branches, according to a classical perspective of the principle of separation of powers.

However, a new conception of separation of powers might envisage state, market and community actors, including religious communities, holding each other in check through the permanent dialectical confrontation of their different institutional objectives, doctrinal perspectives and interests of social action. The principle of separation of Church and State, even if not understood in a strict, full and absolute sense (Torfs & Vrielink, 2019, p. 18 ff), can be seen as

11 Karaahmed v. Bulgaria, no. 30587/13, §§ 91-96, ECHR 2015-IV.

12 Pitkevich v. Russia (dec.). no. 47936/99, ECHR 2001-II.

a manifestation of the objective of dispersing political and social power. In this way, the free and democratic constitutional order guarantees the existence of ideological checks and balances, preventing the capture of the political, legal and educational apparatus by a single worldview.

4.3. Responding to religion

Responsive regulation, as developed by regulatory theory, can and should be applied to religion. Among other things, it stresses that in deciding whether a more or less intrusive form of regulation is needed, regulatory authorities should be responsive to the regulatory environment and to the behaviour of the regulated. In the regulation of religion that means that historical, cultural, etnographic and demographic realities must be taken into account. Regulation of religion must account for variations in intensity, time and place of the religious phenomenon. Regulating religion in a historical context of religious strife, as in Northern Ireland, requires a different approach than in a country with a history of quasi-religious homogeneity.

Another important insight of responsive regulation is that regulating religion requires a deep understanding of religion as a social phenomenon. Religion distinguishes human beings from other living beings. Purporting to give the ultimate answers to questions concerning the origin, destiny and meaning of the Universe and life, from which the axioms that will guide human interaction and the relation with the world, religion puts forward a core of immovable doctrines and a set of categorical assertions about good and evil, right and wrong, the discussion of which often generates a kind of *odium theologicum* and rhetoric of demonization, both within and between religious communities.

Religion requires a kind of regulation that takes seriously the intimate connection that religious doctrines establish between revelation, tradition, reason, emotion and experience. It should take into account the psychology of rationality, along with its heuristics and biases, as well as the complex set of positive (v.g. love, joy) and negative (v.g. anger, pride) emotions generated by religion. Religion presents itself as a very thick and loaded phenomenon, giving rise to deeply engrained feelings, in which emotions are caused by religious beliefs and beliefs are caused by religious emotions, reason dominates passions and passions dominate reason. This domain of regulation points to the insufficiency of regulatory models based on human rationality. The existence of emotionally resilient but false beliefs can create regulatory problems on a national or transnational scale.

4.4. Regulatory institutions and actors

When analysing the regulation of religion in Europe, we immediately should consider the role of public power, at a national, supranational and International levels, that is, States, the European Union and the Council of Europe. But we need to go beyond that and research the impact of global and nodal regulation of religion, including the webs of legal, confessional and social structures along with the natural systems of social regulation. At the same time, we must be open to use multiple rather than single policy instruments, and draw from a broader range of regulatory actors, who, by working together, will be able to produce better regulation.

We should also start from the realization that several centuries of secularization and globalisation reconfigured the European religious landscape. This means that the regulation of religion in Europe, be it at the national, supranational and International levels, inevitably takes place within a plural regulatory community comprising different subcultural groups with their own particular values, norms, beliefs and processes. This means that it is particularly important to try to find common objectives and shared values and instruments between states, European institutions, religious communities and civil society, taking into account that through their leaders, religious communities may try to undermine regulatory authority or extend its reach or engage in forum shifting, that is, moving a regulatory agenda from one organisation to another, leaving an organisation and pursuing agendas simultaneously in more than one organisation.

4.4.1. States

Because of its internal and external sovereignty, recognised by constitutional, supranational and International law, States remain at the centre of the regulatory space. Due to the principles of equal sovereignty, non-interference in internal affairs and subsidiarity, the primary regulatory decisions are made and enforced by the State. It is up to its elected officials to set the rules that religious individuals and entities should comply with. The unitary, regional or federal structure of the State may have a direct or indirect impact on the regulation of religion (Torfs & Vrielink, 2019, p. 17ff).

Because of equal freedom and institutional adequacy concerns, when regulating religion, States cannot claim jurisdiction and theological competence to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed. The legitimacy of the exercise of regulatory power is subjected to an aggregate of substantive and procedural constraints concerning the democracy, accountability, authority and legitimacy of its institutions. European

States have a long tradition of regulating religion and interacting with it. Within a constitutional framework of equal dignity and freedom, their regulatory actions should seek to generate a response of support and commitment from the existing religious communities, not of resistance or capitulation. The secular State may recognise God without violating proper religious neutrality, namely through undue favouritism or prejudice against religion in general or a particular religion. It is not supposed to be an agnostic, anti-religious or atheist State. It is neither necessary nor constitutionally required for secular legal systems to reject God.

According to the axioms of smart and responsive regulation, the purpose of these bodies shouldn't be to foster religious unity, to create a national civil religion from various religious communities or to generate a State induced ecumenical dialogue, but simply to encourage mutual understanding and dialogue between different religious communities in the search of regulatory solutions to the political, legal and social problems affecting them. This would mean, for instance, that States, may recognise a transcendent source of law that lies beyond its own positive laws; but should not dictate, define or favour any particular religion, and that even if not formally recognising the existence of religious law, should abstain, to a significant degree, from interfering in the faithful submitting to religious norms. Smart and responsive regulation will help preventing an attitude of disengagement or game-playing, on the part of the regulated religious communities – that could end up undermining State capacity and legitimacy – and harnessing the regulatory capacity of non-state actors.

4.4.2. Council of Europe

Religion has the ability to shape International systems, discourses and relations. Since the Universal Declaration of Human Rights, in 1948, the regulation of religion became intimately connected with International human rights, at universal and regional levels. Created in 1949, in the aftermath of World War II, the Council of Europe aims to promote human rights, democracy and the rule of law. Nowadays it has 47 member States. One of its main achievements has been the enactment of the European Convention of Human Rigths, in 1950, and the institution of the European Court of Human Rights, headquartered in Strasbourg. Article 9.1, of the ECHR protects the right to freedom of thought, conscience and religion, including freedom to change one's religion or belief and freedom, either alone or in community with others and in public or private, to manifest one's religion or belief, in worship, teaching, practice and observance. Article 9.2. admits that interests of public safety, public order, health, morals or the rights and freedoms of others are grounds for regulating religion and limiting the free exercise thereof, provided that these limitations are prescribed

by law and necessary in a democratic society. Article 9 is often relied upon in conjunction with Article 14 of the Convention, which prohibits discrimination based on, among other things, religion and opinions (De Gaetano, 2020, p. 11ff). Collective religious autonomy may also benefit from other provisions, such as article 11, relating to the freedom of freedom of assembly and association, and article 6, concerning the right to a fair trial (De Gaetano, 2020, p. 12ff).

In 1998, through Protocol 11, individuals and religious communities have been granted direct access to the Court, once they have exhausted all national legal means of judicial protection. Its judicial decisions have a binding effect on States, providing for a system of coerced rule compliance. The Court has been instrumental in determining the content and the boundaries of the concept of religion and in balancing competing rights and interests. In doing so, it recognises a reasonable margin of appreciation to the States, allowing them to take into account local historical, political, sociological and cultural realities, as long as essential dimensions of equal liberty and freedom are safeguarded. Europe knows different constitutional models for relations between the State and the religious communities[13]. That means that one cannot find throughout Europe a coherent conception of the meaning or impact of the public expression of a religious belief in society. Rules in this sphere will inevitably vary in time, place and manner from one country to another, taking into account the specific elements of different national history, culture, tradition and constitutional law as well as the requirements imposed by the need to protect the rights and freedoms of others and the public order[14].

Today, the Strasbourg court embodies the transnational dimension of the regulation of religion, influencing the behaviour of national legislators, judges, religious organisations and individuals. Its rich case law constitutes an important framework of the regulation of religion in Europe. In fact, the regulation of religion in Europe is to a large extent determined by the interpretation of the ECHR made by the Strasbourg Court. However, the controversy that surrounded some decisions (v.g. islamic veil, crucifix in schools) seems to show that, from the point of view of the theory of responsive regulation, giving priority to judicial mechanisms as a response to human rights violations overlooks the limited capacity of international courts to create local cultures of mutual tolerance and respect for human rights. The risk of regulatory backlash should always concern the Court. Its judges must be careful not to try to create and enforce a unified set of rules for the regulation of religion in all 47 Council of Europe States, insensitive to the historical and cultural context of each and every one of them. Regulatory interventions at a broad European level need to consider and reflect the context,

13 Sindicatul "Păstorul cel Bun" v. Romania [GC], no. 2330/09, § 138, ECHR 2013.

14 Leyla Şahin v. Turkey [GC], no. 44774/98, § 109, ECHR 2005-XI

values and cultures of the different regulatory communities. The doctrine of *margin of appreciation* plays a very important role in this area, allowing States a reasonable amount of regulatory autonomy, leaving European supervision for clearer, more serious and consensual violations (Witte Jr & Pin, 2021, p. 590ff).

4.4.3. European Union

The European Union (EU) emerged in 1992 as a result of of process of European political, legal and economic integration that started with the Paris Treaty of 1951 and the Rome Treaty of 1957. It is based on the pooling of Member State sovereign powers in order to collectively and democratically address a growing number of crossborder problems and promote European interests. The transfer of powers and areas of jurisdiction from the Member States to the EU is based on the principles of subsidiarity, proportionality and respect for national identities. The nationals of the Member States are endowed with the political and legal status of European Citizenship. The European Union is based on human rights, democracy, separation of powers and the rule of law. It has a rule of law compliance standard: a warning procedure for assessing where there has been 'a systematic breakdown in rule of law' within a Member State of the kind that would trigger the suspension of EU voting rights under Article 7 of the Lisbon Treaty. In the UE, the competence to regulate religion lies largely with the Member States, operating as a regulatory community.

The EU institutions and bodies, along with the Member States when implementing EU law, are subjected to the Charter of Fundamental Rights of the EU, that protects freedom of religion in its article 10º da protects freedom of thought, conscience and religion. According to article 17º of the Treaty on the Functioning of the European Union (TFEU), the EU respects and does not prejudice the status under the national law of churches and religious associations or communities and of philosophical and non-confessional organisations in the Member States. It recognizes their identity and their specific contribution. Based on article 17º, EU institutions hold high-level meetings, or working dialogue seminars, on an annual basis with churches and non-confessional and philosophical organisations. The regulation of religion at an EU level takes place when religious issues interfere with some core areas of EU competence. That has been the case, for instance, when freedom of religion or equality and non-discrimination collide with important aspects of the internal market, such as the protection of freedom of economic freedoms such as the right of establishment and of provision of services or the guarantee of fair competition within a level playing field undistorted by state aid. Religious communities may also be affected by European standards of general scope, as in the case of the General Data Protection Regulation or the rules of regulations and directives on the prevention and repression of money laundering.

The Court of Justice of the European Union, in the context of preliminary references by national courts or in competition lawsuits for non-compliance with European Union law, has developed an increasing case law on conflicts between religious freedom and other rights and interests relevant to the European Union, on topics such as ritual slaughter[15], the display of the Islamic veil[16] or other religious symbols in the workplace[17] or the subsidies and tax benefits to religious institutions[18]. In some cases, these decisions leave national courts to assess certain facts relevant to the decision of the case. In others, they may give national law some leeway. But the Court's pronouncements tend to create valid and binding law across the European Union (Witte Jr & Pin, 2021, p. 591ff).

4.4.4. The Catholic Church

The regulation of religion in Europe should consider the role of the Catholic Church, as a mega-religious actor, having earned, throughout the centuries, and in spite of various periods of severe turbulence, a significant degree of moral, discursive and cultural authority. Although it is a religious community, and thus subjected to religious regulation, it also plays an important part in the regulation of religion. On the one hand, many key regulatory concepts that we now take for granted, such as dignity, equality, solidarity, good, truth, proportionality, infraction, retribution, sanction or justice, have been shaped by centuries of theological discourse and legal and technical experience related to the development of canon law and its application to many concrete situations. On the other hand the Catholic Church proves the regulatory insight according to which informal mechanisms of social control often prove more important than formal ones.

Since the modern theory of regulation asks us to consider transnational nonstate regulatory regimes, the Catholic Church presents itself as an obvious example of a non-state actor settiing and enforcing rules and standards transnationally. Even when it had sovereignty over the Pontifical States, its moral authority was largely extraterritorial, profoundly influencing the religious thought and behavior of individuals and communities in many parts of the world. Considering that "Catholic" literally means "universal", the Church was largely precursory in the development of theories of globalisation – most obviously regulatory globalisation. During centuries it engaged in the making, implementing and enforcing of religious rules and standards across national

15 C-336/19, Centraal Israëlitisch Consistorie van België and Others, 17-12-2020.

16 C157/15, G4S Secure Solutions, 14-03-2017; C188/15, Bougnaoui, 14-03-2021.

17 C804/18 e C341/19, WABE e.V. & MH Müller (Opinion AG A. Rantos), 25-01-2021.

18 C-622/16 P, C-623/16 P, C-624/16 P, Commission v Scuola Elementare Maria Montessori, 06-11.2018; C-74/16, Congregación de Escuelas Pías, 24.06.2017.

borders, that local communities had to comply with in order to be considered part of the Christian Church.

Through its councils and ecclesiastical tribunals, it developed, *de facto*, a kind of private theological certification program, deciding who was in and who should be left out of the Church. A recent example of the regulation of religion by the Catholic Church has been the abolition of the secrecy policy concerning child abuse by catholic priests. Church officials can now share information with secular law enforcement authorities. The regulation of religion also involved, often times, in lobbying for policies that benefit the rights and interests of the institution, the clergy and its members and the conclusion of agreements with various states. In the context of the reaction to COVID-19, the recommendations of liturgical self-control directed by the Pope to the whole Church allowed, in many cases, an anticipation of restrictive measures approved by the State and had an impact even on the behavior of other religious communities.

In order to understand the possibilities and limits of the regulatory role of the Catholic Church, one has to take into account the regulatory concept of motivational postures. These are described in the literature as "composite of values and beliefs about authority that are held by individuals and used by them to enter into a positioning game with regulatory authorities" (Braithwaite V., 2017, p. 33). This concept is important, both internally and externally. First, the history of the Catholic Church is full of regulatory failures, because catholic officials under the authority of the Pope often reacted and rebelled against its regulatory interventions. In fact, we see exactly this happening today. Even within the Catholic Church regulatory compliance is not always assured. Second, those in positions of State regulatory authority might better learn to look for and interpret the signals of defiance towards authority coming from Catholic institutions reacting to regulatory interventions, especially when dealing with controversial issues such as abortion, gay marriage, euthanasia, climate change, universal healthcare or migration.

4.4.5. Non-state regulatory networks

In a free and democratic society, the legitimacy of the regulatory framework depends on its own openness, transparency, intrinsic fairness as well as on the procedural justice on which it is based. Responsive regulation theory has stressed the limits of a State-centered approach to regulation and pointed to the existence of many centres and sources of regulation in the modern world. National, supranational and International public power and law are not always at the centre of regulatory activity. It is important to take into account the existence of broader networked flows of power and regulatory influences and interactions. That's why regulatory theory has been drawing our attention to new, networked,

nodal, polycentric, decentred, plural and collaborative governance or regulation. Network enrolment is crucial to the understanding of the processes and outcomes of regulatory globalisation (Braithwaite J., 2017, p. 122ff).

In the field of the regulation of religion in Europe, it is possible to talk of a 'religion-anchored pluralism', in which the Council of Europe, the European Union and the States have to share regulatory power with the Catholic Church, Orthodox Churches, Protestant Churches, Evangelical Free Churches and other religious communities such as, for example, Muslim, Jews, Hindus or Buddhists. Very often the regulation of religion assumes the substance and form of self-regulation and co-regulation, blurring the distinction between regulators and regulated. In some cases, the State itself organizes public entities in which different religious communities participate in the regulatory processes. In Portugal, for instance, the Religious Freedom Community, within the Ministry of Justice, enrolls representatives of the State and of different religious communities, in order to supervise the regulation of religion.

We also observe the transnational character of the regulation of religion in the existence of many pan-European religious bodies, that form crossborder religious interest group and coalitions of churches. We may think of a few examples, such as the Conference of European Churches, European Evangelical Alliance, European Council for Theological Education, European Jewish Organization or the Federation for Islamic Organizations in Europe. They form 'transnational advocacy networks' and o lobby for policies that benefit the interests of their members. In order to do so, they maintain strong connections and dialogue with the States, the European Union and the Council of Europe, giving rise to a decentred or polycentric governance. By setting doctrinal, performance and corporate governance requirements of membership these transnational religious federations can perform an important regulatory role.

These organizations build networks within the various regulatory communities, at European and State levels, to foster civic virtues, promote work through dialogue, and ensure clear communication, information gathering and exchange of ideas. They enhance religious community-wide coordination. Each of these and other similar organizations may have some ability to control its membership and to sanction members who violate its behavioural standards. They are able to influence the lives of millions of people by engaging in collaborative capacity-building, education and training, thereby regulating, albeit softly and indirectly, the behaviour of its member institutions. These religious networks also exercise a regulatory function over national, European and International politics.

By working together, religious communities engage in private and voluntary, non-legal forms of norm-making and in the creation of networks that form European webs of dialogue, influence and empowerment. They are able to

promote reflection and knowledge about relevant topics such as human rights, religious freedom, religious persecution, hate speech, populism, nationalism and radicalization. As private actors, religious entities may be formally recognised by public authorities of some States and enlisted to assist in the regulatory process and to develop private quality assurance, accreditation and certification programs (v.g. theological education). Influencing the course of global regulation of religion requires multiple capacities and resources at personal, technical, legal and political levels, that no single local religious community possesses. By looking at this reality regulatory theory can focus on both the structure of regulation and the strategic behaviour of different religious communities within regulatory domains and understand the role of public religious interest groups in increasing the regulatory capacity of a society.

4.4.6. Civil society

Regulatory theory emphasises the importance of informal mechanisms of social control, in which third parties operate as surrogate regulators. It takes the role of non-state religious actors as regulators seriously The State centered perspective, while the basis of a positivistic rendering of law, was long recognised as being too limited. In the field of the regulation of religion, civil society plays a key role through a myriad of religious and secular associations and human rights networks, potentially increasing the repertoire of regulatory solutions way beyond formal compliance. Free and democratic societies should create the necessary preconditions for third parties to assume a greater share of the regulatory burden, rather than having public authorities always engaging in direct intervention. Civil society can play an important role in requiring that religious communities are sufficiently open, transparent and accountable, defending the community's right-to-know, freedom of information and proactive public disclosure. Even secular organizations (v.g. human rights activists, humanists, atheists) can be part of a civil society environment that shapes the tendencies of religious communities towards compliance. It is important to acknowledge the decisive role played by religious communities in contributing to regulatory success, while at the same time according to the national, supranational and International public law institutions a decisive function in setting norms, monitoring and enforcement.

4.5. Regulatory mechanisms

The regulation of religion, like any other type of regulation, will try to find an optimal combination of particular regulatory instruments to achieve desired policy goals. These goals revolve around respecting the freedom of religion of

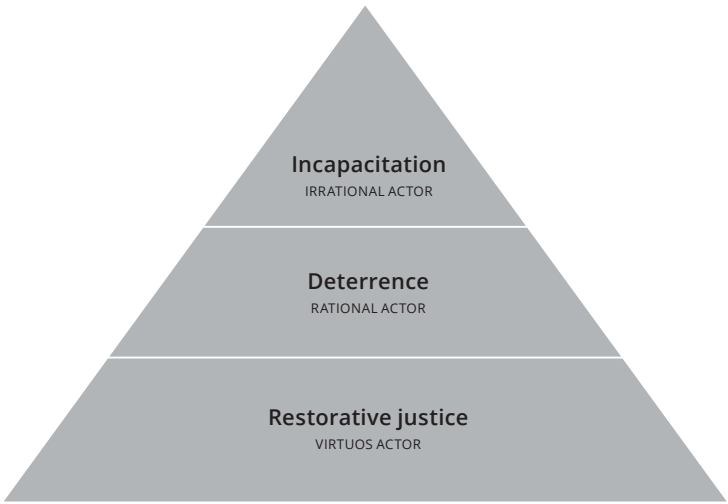
individuals and religious communities as much as possible, without jeopardizing the rights of others and important dimensions of public interest. Regulatory mechanisms or instruments are tools or devices intentionally used by different public and private regulators to bring about their desired ends. Smart regulation tends to prefer complementary instrument mixes and combinations over single instrument approaches. It also assumes a less interventionist mindset (Gunningham & Sinclair, 2017, p. 134). The choice of regulatory instruments is a function not only of the goals pursued, but also of basic constitutional principles, adopted at a national and European level, of equal dignity and freedom, state religious and ideological neutrality, legality and proportionality, along with different kinds of norms, both formal and informal, all with regulatory effect, such as legal, social, moral and customary, that serve as performance and prescriptive standards in the regulatory process.

4.5.1. Informal regulation

Regulation theory points to the importance of informal regulation in all fields of regulation. Informal mechanisms or regulation often prove more important and effective than formal ones (Gunningham & Sinclair, 2017, p. 134). Public criticism, codes of conduct, informal non-binding agreements and peer pressure can also be a significant pressure to change the course of events. Regulation very often takes advantage of third parties as surrogate regulators and of multiple successive combinations of public and private enforcement. As far as the regulation of religion is concerned, it is important not to overlook the role of political, social, economic and psychological pressures over individuals and religious communities. The shared capacity of legal and social regulation can be utilised in developing effective ordering. Informal regulation of religion relies to a large degree on advice, persuasion education to secure compliance with regulatory standards, reserving formal and more severe sanctions to more serious and persistent breaches. Governments should recognise the scope for delegating regulatory tasks to religious communities and their associations and federations, at a national, European and International level. Only when informal options have been considered and rejected should more intrusive regulatory techniques be proposed, involving, for example, civil penalties, criminal sanctions or licensing. Early warnings of instrument failure must be given (Gunningham & Sinclair, 2017, p. 135). However, in some cases, when serious infractions are at stake, publicising abuses that take place within religious communities (v.g. paedophilia; corruption) is as important as legally prosecuting them.

4.5.2. Formal regulation

Responsive and smart regulation theories stress the government's role as a catalyst or facilitator of regulation. The idea here is for public regulators to resort to complementary instrument mixes and combinations of regulatory instruments and techniques. Regulatory pluralism accounts for various regulatory instruments, embracing flexible and innovative forms of social control (Grabosky, 2017, p. 151ff). Currently, the image of a regulatory pyramid is used, with means of different coercive intensity. Regulation begins by resorting to the mildest means, only going up the regulatory pyramid if and as necessary, escalating and de-escalating according to circumstances. According to this view, smart and responsive regulation operates as a dynamic model in which persuasion and/or capacity building are tried before escalation up to increasing levels of enforcement. The regulatory pyramid comprises sequenced interventions that begin with the soft processes of dialogue and persuasion and escalate to harder processes of command and control. The theoretical representation of the regulatory pyramid can be illuminating when dealing with the regulation of religion. When may think, for instance, of a soft approach when dealing with historic peace churches, such as the Mennonites or the Quakers, or with islamist extremism, such as the Taliban or the Islamic State.



Source: Braithwaite J., 2017, p. 120.

As far as regulatory instruments and techniques are concerned, the smart regulation and enforcement pyramid can be also represented as follows:

Source: Gunningham & Sinclair, 2017, p. 136.

Although the application of this regulatory pyramid to the domain of religion may require some adaptations, we easily conclude that its intrinsic logic can be effectively used in this context. Regulators have a range of sanctions available to them, in terms of graduated response and progression of increasing levels of intervention. In the words of Drahe and Krygier, "[a]s one travels up the pyramid, options carrying a greater degree of coerciveness become available to the regulator" (Drahos & Krygier, 2017, p. 5). Responsive regulation will seek to climb and descend the pyramid in a reasonable and prudent way, knowing that in many cases de-escalating may be more effective (Braithwaite J., 2017, p. 118ff).

4.5.2.1. Monitoring

The relationship between regulator and regulated may require resorting to different forms of surveillance, tracking, monitoring, supervising, inspecting, questioning. That is the case when regulating tobacco, aviation, pharmaceutical, financial, media and social media corporations. The regulator must continually monitor the regulated, in order to be able to target potentially suspicious behaviour and select appropriate and effective diagnostic, surveillance and evaluative tools. In Portugal, one of the tasks of the Religious Freedom Commission is to gather information, express opinions and make proposals in all matters related to the application and improvement of the Religious Freedom Act, and to engage in scientific research on the activities of religious communities and movements

in Portugal. Responsive regulation theory stresses that the existence of highly technocratic regimes of oversight and control notwithstanding, regulation and the rule of law continue to be a highly relational field. In the regulation of religion, this may require the blacklisting of extremist religious groups and their monitoring by the national secret services, and, as far as the European Union is concerned, by Frontex, Europol and Eurojust. In doing this, it is important not to engage in the wrongful identification and mass policing of legitimate religious activities and law-abiding religious communities.

4.5.2.2. Soft regulation

Regulation theory stresses the importance of soft law and soft regulation in all domains of regulatory activity. This approach should be tried before escalating to harder regulatory techniques. This same approach makes sense when regulating religion. On the one hand, it is based on the appeal to moral and social responsibility and resorts to persuasion, education and capacity building as the first steps to achieving compliance. On the other hand, it is based on utilitarian considerations of effectiveness and efficiency, assuming that it is always better to give cheaper, more respectful and dialogic-based options a chance to work first. Legal considerations are also relevant, since the soft regulation approach is a requirement of the principles of proportionality, legitimacy and procedural fairness. The basic premise of soft regulation is to avoid escalating to hard (command and control) options without considering all available softer and horizontal regulatory interventions. Regulatory theory points out that a regulator with the capacity to escalate to more severe sanctions will be better able to 'speak softly', because, as Theodore Roosevelt used to say, they 'carry a big stick´. It is always important to have in mind the proverbial regulatory pyramid in which a range of possible responses is arranged in sequential order, with dialogue and persuasion appearing at the base of the pyramid.

4.5.2.2.1. Persuasion

Within a constitutional system premised on freedom, such as those that exist in the Council of Europe and in the European Union, self-regulation, education, influence, advice, recommendation and persuasion should always take precedence over hetero-regulation, sanction and punishment. Dialogue and consultation over standards between public officials and religious communities should play a central role, as a means of promoting and assisting with voluntary compliance and non-domination. In this tone, regulatory authorities should signal but not threaten the possibility of escalation to more formal techniques of regulation if necessary. Informal regulation reduces the risk of public domination of religion (v.g. Constantinism; Erastianism) and promotes religious freedom. It also reduces the risk of ideological polarization and radicalization and political and social confrontation.

4.5.2.2.2. Negotiation and agreement

An important form of *soft regulation*, albeit at a different level, is the possibility of negotiation and agreement between religious communities and the State. This can be a means of securing important regulatory goals at the administrative level. It assumes the desirability of a posive-sum interaction between the States and religious communities and requires discussions, negotiations and agreements between them (Braithwaite J., 2017, p. 124ff). Voluntary commitments are not excluded either. However, negotiation and agreements can evolve to concordat-type relations and be forms of hard-regulation and co-regulation. There is a long history of agreements between the Catholic Church and European States, bearing in mind that the Church preceded most of them. The history of concordats allows us to discern a strong political dimension in the agreements between the religious confessions and the State, with exchange and reinforcement of political and religious legitimacy and the creation of expectations of a future relationship and theological-political harmony. This is a factor that should not be overlooked.

Today, negotiation makes sense when it comes to complex regulatory regimes that require a close, dynamic and flexible interaction between the State and non-state actors. These rule-making agreements may be signed at a national or International level, and may be mostly legislative or administrative. They presuppose the existence of different phases, such as diagnostic, formula, details, 'post-agreement' or 'compliance bargaining'. They are an accepted technique of the regulation of religion, although in some countries (v.g. Italy, Spain) there are serious complaints, levelled by minority religious communities, that essential dimensions of religious freedom and equality are left dependent on the will of the State and the bargaining power of the religious entity, with a clear disadvantage of smaller, more recent, lesser known and less conventional religious communities. Negotiation between the State and religious denominations must be limited to the regulation of specific aspects of common interest, and must not violate the principle of substantive equality.

In order to assess the substantive equality of these agreements it is important to take into account not just the rights that are granted to different religious communities but also the internal connection between rights and obligations[19]. The fundamental dimensions of collective religious freedom should not be dependent on the negotiation and bargaining power of different religious communities, but should result directly from human rights law, the Constitution and general law. Recently it has become clear that EU law also

[19] Iglesia Bautista "El Salvador" and Ortega Moratilla v. Spain, no. 17522/90, Commission decision of 11 January 1992, DR 72.

contrains the celebration of agreements, namely when they create benefits for activities which do not have a strictly religious purpose in violation of State aid rules[20].

4.5.2.2.3. Co-regulation

In some cases, State officials and religious authorities can establish schemes of co-regulation. These can be bilateral, involving the State and a specific religious community, or multilateral, involving several religious communities. This regulatory strategy enhances substantive legitimacy, democratic participation and procedural fairness, while reducing complexity. For instance, prison authorities may need to consult the Chief Rabbi to get approval for the kosher diet that is to be served to Jewish prisoners. Another example is the granting to Jewish Consistorial Association of Paris of exclusive rights to approve and control ritual slaughter, butcher's shops and "glatt" food. In Portugal, the Religious Freedom Commission allows for the inclusion of all main religious communities in the discussion of regulatory issues.

4.5.2.2.4. Peaceful resolution of disputes

The application of conventional, legislative or administrative rules to religious communities will inevitably create practical problems and disputes. It must be also bear in mind that religious communities will want to have a say in many political, economic and social problems, concerning political corruption, poverty, abortion, family and sexuality. On the other hand, the State may have quarrels with church property taxes, feminine genital mutilation, child-marriage, child-abuse, religious corruption or religious extremism. In these disputes, dialogue is a low-cost, respectful and time-efficient strategy for obtaining compliance. The State can and should resort to rational and persuasion, sensitive to emotions. The existence of non-judicial mechanisms to prevent and solve disputes between religious communities and the State can be a valid regulatory tool. On the other hand, sometimes religious communities face internal theological and institutional disputes or they enter into conflicts with other religious communities or civil society groups. In these cases, the State may try to promote the resolution of the conflict, offering its good offices or intervening as a mediator, from a position of neutrality and impartiality. This in itself does not violate individual and collective religious freedom[21]. A peaceful, fair, reasonable and balanced system of resolution of conflicts, based on rigorous fact-finding and due process principles, can indeed function without compromising fundamental

20 C-74/16, Congregación de Escuelas Pías, 24.06.2017.

21 Supreme Holy Council of the Muslim Community v. Bulgaria, § 80. no. 39023/97, 2004, ECHR-I.

rights and interests of pluralism, equal dignity, freedom and integrity that the general law aims at protecting. There may be a room for allowing some internal disputes to be settled by internal forms of negotiation, mediation, conciliation and arbitration.

4.5.2.2.5. Naming, blaming and shaming

Considering that in today's world good reputation and fear of scandal are very important, it is understandable that naming, blaming and shaming play such an important role in current regulatory theory (Harris, 2017, p. 59ff). This strategy draws on the importance of moral emotions and social approval or disapproval. Shaming is sometimes used in the regulation of religion. In the middle ages, calling someone "heretic", "apostate", "schismatic", "infidel", "hussite" or "protestant" was clearly a calculated strategy to promote a sense of guilt and a fear of alienation and social disapproval, rejection and ostracism, in this way trying to enforce religious uniformity. Today, we find the same strategy in secular or religious circles when religion is accused of "sexism", "misogyny", "islamophobia", "homophobia" or "transphobia".

As far as regulating religion is concerned, this strategy can be very effective, generating a sense of universal condemnation on the part of religious authorities and individuals. It is especially used and effective when it comes to confronting the institutions, leaders and members of religious denominations with the inconsistency between their doctrinal and ethical identity and their actions, thus generating a sense of institutional, collective and individual moral failure (Harris, 2017, p. 65ff). This aspect was clearly visible in the repression of sexual abuse of children in the Catholic Church in several European countries.

However, there is always the possibility of moral and emotional pushback (Harris, 2017, p. 60), since religious communities can attempt to stress the sinful nature of mankind and the demonic causes of religious dissent. What's more, a situation of persecution, victimization and martyrdom (real or perceived) can create favorable conditions for the sedimentation of a religious subculture or even a reinforced return of religion. There may be indeed a place for naming, blaming and shaming of religion, in some very limited instances (v.g. child abuse, genital mutilation; widow burning; forced marriage of young girls) although it is important to avoid stigmatizing, humiliating and alienating. The social distancing of religious communities from institutions and the larger populace can have long-term detrimental effects on religious individuals and entities possibly leading to entrenched resentment and systemic problems, including anomie, deviance and radicalization. It is important that the dignity of religious individuals and communities be preserved.

4.5.2.3. Hard regulation

Formal regulation is an indispensable technique in the regulation of religion. It is known as command and control and is based on deterrence and coercion. It may impose sanctions and penalties, of a civil, administrative and criminal legal nature. Even if when a regulatory system is able to run essentially on goodwill, the recalcitrant few will most probably demand a formal and coercive regulatory effort. The responsive regulation of religion should be based on the constitutional principles of equal dignity and freedom, democratic legitimacy, transparency, proportionality and due process. It can reasonably be assumed that when regulatory design follows these fundamental principles, trust, cooperation and voluntary compliance are likely to be higher and fewer parties will need coercive measures to comply.

4.5.2.3.1. General law

General laws are enacted by legislative and administrative authorities in order to pursue some democratically defined social goals. They aim at protecting and balancing multiple and competing fundamental rights and public interests, such as environment, public property, cultural heritage, zoning, order, safety or health. They may contain principles and rules. Principles are open-ended as to the range of actions they prescribe, allowing for weighing and balancing when confronted with competing principles (vg. public interest). Principles are compatible with different solutions, in different times and places, according to the demands of context. Rules prescribe specific actions, having an all-or-nothing structure. Both general principles and rules may protect the individual and collective freedom of religion and belief, by allowing and making possible the public manifestation thereof in various contexts, or by preventing and repressing the actions of third parties that may prevent or disturb the free exercise of religion. Because of their general content they are considered neutral when it comes to religion.

As a matter of principle, freedom of religion and belief does not confer a right to refuse, on the basis of religious convictions, to abide by legislation the operation of which is provided for by the Convention and which applies neutrally and generally. For instance, one cannot object to income taxes just because part of the collected money may be used to fund the military sector or abortion. The same is true about objections to the assignment of taxpayer numbers on the grounds that they are the sign of the antichrist. However, general laws may require the carving of opting out and exceptional solutions when their general enforcement has a disproportionate and discriminatory impact on freedom of conscience and belief. Restrictions on freedom of religion and belief should be made by formal legislative acts and should balance the right of religious freedom

with other rights and interests, according to the constitutional principles of freedom, equality, proportionality, legal certainty and due process of law.

4.5.2.3.2. Criminal and civil law

The regulation of religion can escalate to the "big stick', that is, to formal hard regulation involving civil and criminal law (Torfs & Vrielink, 2019, p. 16ff). Both areas of law can cause serious material and reputational harm to a religious community. One of the main challenges here remains to address legitimate complaints by victims of rights violations by the religious communities, while at the same time protecting the theological autonomy of religious communities and preventing abusive judicial harassment for purely ideological reasons.

Civil law will be used, most of all, when dealing with torts, involving civil liability for damages. It has played a significant role when dealing, for instance, with child abuse by the priests. Civil lawsuits have been filed by victims against catholic churches at a national level (v.g. Ireland, Poland). Civil liability has also been used when addressing cases of alleged manipulation by churches in the collecting of offerings. Criminal law is also an important formal regulatory technique. It has been used, mainly, in criminal prosecutions against members of the clergy. At least for now, a criminal prosecution against the Catholic Church itself has not been leveled in any European State. Especially important, as a regulatory technique, was the filing of a lawsuit for crimes against humanity in the International Criminal Court. So far, the court has declined to investigate.

4.5.2.3.3. Registration suspension and revocation

Another civil-administrative sanction, to be used as a kind of *ultima ratio* measure, would be the denial or the revocation of registration of a religious community, ammounting to its dissolution[22]. It should be used only when there are very serious reasons, such as preventing activities harmful to the population or endangering public security. In practice, however, it would require a smart application, since the same people could reorganize, change the name of the community and come up with another registration request. The revocation of registration should be the result of a reasonable and proportional weighing of competing rights and interests. For instance, the prohibition of blood transfusions in the teaching of the Jehovah's Witnesses cannot serve as justification for dissolving the organisation and prohibiting its activities, since it can be limited to mentally competent and informed adults. The dissolution of a religious community affects not just its collective freedom but also the individual freedom of its members[23].

[22] Biblical Centre of the Chuvash Republic v. Russia, § 54, no. 33203/08, 12, 2014, ECHR.

[23] Metodiev and Others v. Bulgaria, § 24. no. 58088/08, ECHR, 2017-V.

4.5.2.3.4. Expropriation of assets

The nationalization of assets is an extreme measure of the regulation of religion. It was widely used in Europe, sometimes dramatically, successively by defenders of monarchical, liberal and republican causes as a reaction to the political, economic and social problems caused by the excessive concentration, over the centuries, of uncultivated ecclesiastical property. Expropriation for public interest reasons is always admissible, but it requires due compensation. In some countries, it requires the hearing of the affected religious community and the existence of an urgent public interest[24].

4.5.2.4. Taxation and subsidies

Taxation has always been a critical part of the regulation of religion. It was a key aspect of the Magna Carta of 1215, of the XIII century conflicts between Philip the Fair and Pope Boniface VIII or of the French Revolution. In the modern constitutional State, taxation is required in order to pay for the provision of public goods and it is based on the principles of vertical and horizontal equity and ability to pay. The principle of equality and non-discrimination plays a critical role here, although it may allow for reasonable and justified differentiations. Tax systems also have important economic and social functions, related to the creation and redistribution of wealth. They can also be used to encourage and discourage some activities.

In Europe, religious communities cannot claim a tax exemption on religious grounds[25]. The taxation or non-taxation of religious communities depends on a large extent of concrete political, social and historical factors[26]. In some cases, the system of taxation and financing of religious communities can only be correctly understood in light of past events of expropriation and nationalization of their assets (Torfs & Vrielink, 2019, p. 36). However, non-profit entities and activities relating to the religious worship, teaching and communication are generally not subjected to corporate, property or value added tax nor based on the ability to pay. If that is the case, that regime should be extended to all religious communities without discrimination. Taxation should not become a disproportionate restriction on religious freedom[27].

24 Art. 30º, Religious Freedom Act.

25 Iglesia Bautista "El Salvador" and Ortega Moratilla v. Spain, Commission decisión, no. 17522/90, Commission decision of 11 January 1992, DR 72

26 Alujer Fernández and Caballero Garcia v. Spain (dec.), no. 53072/99, ECHR 2001-VI.

27 The Church of Jesus Christ of LatterDay Saints v. the United Kingdom, no. 7552/09, § 30, ECHR, 2014-IV.

Individuals can often deduct their offerings to religious communities in their income tax, in which cases this tax regime should not discriminate individually and collectively[28]. It must be noted that exemptions (income, property and VAT) are generally limited to non-profit activies direcly connected with the the exercise of religion. The ECJ has stated several times that if a religious school is operating in the private education market, is must pay the same taxes as all its competitors in the same relevant market. In some European countries the tax administration helps in the collection of a religious tax[29]. In others, it taxes religious people and gives some money to the religious communities. Still in others it gives the possibility of tax payers to earmark a small percentage ot their income tax to a religious community or to some other scientific, cultural or social entity that ask to be listed. These tax regimes are to be assessed in light of the príncipleS of freedom, equality and privacy[30]. In general, no one can be forced to pay to a religious community to which one doesn´t belong, unless it provides some non-religious public goods from which non members benefit[31]. Besides, none of these techniques should be applied in a way that discloses the tax payer religious affiliation or lack thereof[32].

4.5.3. Compliance

Compliance is currently a very important component of regulatory theory (Haines, 2017, p. 190). Regulators must rely on cooperation. As a regulatory technique, it tries to ensure that the responses that individuals and firms make to regulation are positive and adequate. As a sociological discipline, compliance studies and explains compliant and noncompliant individual and collective intentions attitudes and behaviours. It researches the social-psychological determinants of compliance: values, norms, trust, identity, pride, shame or guilt. It should take into account existing interpretations, social habits, institutional cultures, meanings and practices. It should be acknowleged that compliance is a relational process, built upon good faith, trust and interactions and communications between different actors (*i.e*., regulator, regulated, third parties) in the implementation process (Braithwaite V., 2017, p. 28ff). As a scientific descriptive concept, it describes behaviour that is deemed to be obedient to a regulatory obligation.

28 Association Les Témoins de Jéhovah v. France (Association Cultuelle du Temple Pyramide v. France, no. 8916/05, ECHR, 2011-V.

29 Wasmuth v. Germany, § 55, no. 12884/03, ECHR, 2011-V; Klein and Others v. Germany, § 89, nos. 10138/11 and 3 others, ECHR, 2017.

30 Wasmuth v. Germany, § 55. no. 12884/03, ECHR, 2011-V.

31 Klein and Others v. Germany, § 81 nos. 10138/11 and 3 others, ECHR, 2017; Bruno v. Sweden (dec.) (dec.), no. 32196/96, ECHR, 2001-I.

32 Spampinato v. Italy, (dec.), no. 23123/04, ECHR, 2007-III.

Compliance is important when dealing with individual believers and religious communities. These tend to believe in and promote respect for the law in general. Many fundamental constitutional law and international law principles (v.g. human dignity, equality, freedom of conscience, justice) have had a religious origin or a theological justification. Religious communities tend to comply with the general law and promote compliance by their members even when they don't agree with this or that legal obligation. The regulation of religion requires compliance from individuals and communities. Spontaneous compliance will generally occur if regulatory norms are reasonable and procedurally fair and will most certainly promote the religious communities doctrinal and social objectives, allowing them and their individual members to earn the approval and respect of State officials and the general public.

Cooperation and willingness to comply will most likely occur if the religious communities being regulated see social benefits, believe the regulation is substantively and procedurally fair and feel a sense of obligation to defer to the regulating authority. Religious communities and their representatives are not exempt from having to comply with non-religious legal regimes that target the generality of entities and that may impact their activity (v.g. data protection, anti-money laundering, beneficial owner)[33]. Non-compliance may sometimes result from excessive complexity of the regulatory obligations or the idea that the regulation is illegitimate and violates absolute religious imperatives deemed as such by religious individuals and communities. It is important that the political and religious authorities know each other, have a deep understanding of each other's needs and points of view and respect each other's judgment. Some norms may be disproportionate and too expensive to comply with by small minority religious communities.

4.6. Regulatory domains

The regulation of religion covers different domains. In all of them regulators face the challenge of influencing people and gaining their trust and cooperation, being important to consider objective and subjective concerns. The former relates to topics such as regulatory enforcement and whether or not actors comply. The latter, include, for instance, the meanings attributed to regulation as influenced by participants' religious beliefs or worldviews. In the distinct arenas

[33] Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law: Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

of regulatory activity, it is possible to detect the many ways in which development and expansion of regulation both respond to and reflect globalized changes. In all these areas, the principles of legality, freedom, equality and weighting of competing rights and interests are particularly important, together with the requirements of the adequacy, necessity and proportionality of restrictions.

4.6.1. Recognition and registration

The legal recognition and registration of religious communities is a critical issue in the regulation of religion. The possibility of organizing and conducting religious meetings and ceremonies shouldn't require prior registration of a legal entity[34]. What's more, civil law norms on private law associations can be used to establish religious associations. However, the registration as a religious entity allows for a higher level of institutionalization, autonomy and legal and judicial protection[35]. It brings forth the possibility of acquiring legal personality, which is very important for the practical pursuit of the goals of the religious community, and of performing civil and religious acts that can be recognized by the State[36]. Rules that deal with this matter, including those about re-registration of an already recognised religious community or of associations and federations of existing religious communities, should be bound by the principles of freedom, equality, non-discrimination, prohibition of administrative discretion, social inclusion and integration and by their corollary goal of 'reducing regulatory burdens', especially to new and minority communities. They must not give the State the possibility to decide on the merits of the professed doctrines or to question their legitimacy (De Gaetano, 2020, p. 15ff).

The existence of these rules is justified to the extent that they are necessary to safeguard public interests of transparency and accountability, providing information to the public and preventing confrontation amongst different religious communities[37]. That is especially important when dealing with "schismatic groups" in conflict with an existing religious community[38]. These rules must be sufficiently clear and specific[39]. The careful identification and differentiation of the name and doctrinal tenets of different religious communities is a factor that generates transparency, clarity and trust, thus

34 Krupko and Others v. Russia, no. 26587/07, ECHR, 2014-I.

35 SvyatoMykhaylivska Parafiya v. Ukraine, § 152, no. 77703/01, ECHR, 2007-V; Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria, § 63, no. 27540/05, ECHR, 2012-I.

36 Metodiev and Others v. Bulgaria, § 24, no. 58088/08, ECHR, 2017-V.

37 Metodiev and Others v. Bulgaria, §§ 40 et 45, no. 58088/08, ECHR, 2017-V.

38 *Metropolitan Church of Bessarabia and Othersv. Moldova,* no 45701/99, ECHR 2001-XII.

39 Metodiev and Others v. Bulgaria, no. 58088/08, ECHR, 2017-V.

avoiding confusion and conflict[40]. Registration rules should be designed in ways that respect the identity and autonomy of religious communities and reduce registration bureaucracy and costs (v.g. requirements, certificates, fees)[41]. Their application should not be too complicated, expensive and slow[42].

Denial of registration is liable to cause a series of practical problems and difficulties to a given religious community. Along with the suspension and revocation of registration, it should be reserved for extreme situations, in which Incapacitation is an adequate, necessary and proportional means to secure a public interest goal. The legal regime of registration should not be captured by a theologico-political coalition of dominant forces with the purpose of preventing the rise of new and emerging religious communities. The existence and application of different legal provisions or regimes to different religious entities on the basis of their legal status as "private associations", "registered religious organizations", "recognized religious associations" or "rooted religious communities", must have a sufficient and reasonable normative justification and be proportional to its purported goals[43].

4.6.2. Clerical, doctrinal and institutional autonomy

Collective religious freedom protects the right of religious communities to choose, train, move and remove their own ministers of worship, according to rules and standards based on their doctrinal tenets[44]. In some cases, this means that States must welcome foreign religious leaders according to the principles of freedom and equality[45]. Any restrictions on this right must have a legal basis, be based on the pursuit of a legitimate purpose and be adequate, necessary and proportional to that purpose[46]. It also protects the doctrinal self-image, self-understanding and self-definition of each religious community (Walter, 2016, p. 192ff), and the right to defend its credibility by requiring a reasonable, variable and proportional degree of loyalty from their ministers, workers and representatives, to the extent as that doesn't threaten essential dimensions of

40 Bektashi Community and Others v. the former Yugoslav Republic of Macedonia, nos. 48044/10, 75722/12 and 25176/13, § 71, ECHR, 2018-I; Genov v. Bulgaria, § 43, no. 40524/08, ECHR, 2017-V.

41 Fusu Arcadie and Others v. the Republic of Moldova, no. 22218/06, ECHR, 2012-III.

42 Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria, no. 27540/05, § 79, ECHR, 2012-I.

43 Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria, no. 27540/05, ECHR, 2012-I.

44 Kohn v. Germany (dec.), no. 47021/99, ECHR, 2000; Sotirov v. Bulgaria (dec.), no. 13999/05, ECHR, 2011.

45 Perry v. Latvia no 30273/03, ECHR 2007-III; Cyprus v. Turkey [GC], no. 25781/94, §§ 243-246, ECHR 2014.

46 Nolan and K. v. Russia, no. 2512/04, ECHR, 2009-I.

their rights nor the exercise of the rights of non-members of the community[47]. This requires the right of institutional self-organization, self-government and self-determination, which is a cornerstone of pluralism in a democratic society (De Gaetano, 2020, p. 12 ff; Torfs & Vrielink, 2019, p. 24ff)[48]. Religious communities should remain free to decide about their internal structure and membership, without State interference (Robbers, 2019, p. 114ff)[49]. They must be able to apply their canonical and doctrinal rules to deal with indiscipline and dissent (De Gaetano, 2020, p. 23ff).

Religious communities should be allowed to hold, articulate and defend their own views on subject matters such as religious authority, religious worship and rites, internal organization, abortion, euthanasia, poverty, corruption, gender, sexuality, marriage, family of the burying of the dead[50]. In some cases, this is naturally due to their interpretation of ancient texts that they consider to be sacred and from which they derive principles of natural law, and it is not for the State to subject them to judicial review. States, political parties and civil associations cannot interfere in the internal issues and teachings of any religious communities (Tretera & Horák, 2019, p. 79). For instance, each religious community has the right to decide, according to their understanding of divine imperatives, whether and to what extent they will permit same-sex unions[51]. Doctrinal autonomy may be restricted when it contends with fundamental community interests, namely the protection of public health or the prevention and repression of drug use[52]. On the other hand, treating a religious minister as an ordinary worker – without taking into account the spiritual and vocational dimensions of the ministry – or allowing for the clergy to create a labor union, although not necessarily so, may in some instances pose a threat to the institutional autonomy of a given religious community (Mazzola, 2016, p. 49ff)[53]. Regulation of religion should encourage transparency and public accountability and make some room for non-state dispute solving mechanisms within religious communities, as long as public interests are not significantly affected and the essential nucleus of individual autonomy is not sacrificed.

47 (DE GAETANO, 2020, p. 24ff); Sindicatul "Păstorul cel Bun" v. Romania [GC], no. 2330/09, § 138, ECHR 2013; Jehovah's Witnesses of Moscow and Others v. Russia, no. 302/02, § 118, ECHR 2010-I; Fernández Martínez v. Spain [GC], no. 56030/07, § 131, ECHR 2014; Schüth v. Germany, no. 1620/03, § 69, ECHR 2010-V.

48 Hassan and Tchaouch v. Bulgaria [GC], no. 30985/96, §§ 62 and 91 ECHR 2000; Fernández Martínez v. Spain [GC], no. 56030/07, § 127, ECHR 2014.

49 Svyato-Mykhaylivska Parafiya v. Ukraine, § 150, no. 77703/01, ECHR, 2007-V.

50 *Johannische Kirche and Peters v. Germany* (dec.), no. 41754/98, ECHR 2001-VIII.

51 *Parry v. the United Kingdom* (dec.), no. 42971/05, ECHR 2006-XV.

52 *Fränklin-Beentjes and CEFLU-Luz da Floresta v. the Netherlands* (dec.), no. 28167/07, ECHR 2014-III.

53 *Sindicatul "Păstorul cel Bun" v. Romania* [GC], no. 2330/09, § 138, § 159, ECHR 2013.

4.6.3. Property of religious communities

An important domain of the regulation of religion concerns the holding of property by religious communities. These need places or buildings devoted to religious worship, training, education and social activities. The regulation of religious property should be based on principles of liberty and equality. The right to hold or rent a building or use a meeting room for worship is part of the essential domain of the freedom of religion and belief, since it enables freedom, privacy, communion, stability, security and continuity[54]. That doesn't mean that religious communities have the right to receive public funding to buy or rent a place of worship. The operation of religious buildings has often a significant impact on the collective exercise of religion[55]. The same applies, *mutatis mutandis*, to *cemetery layout*, also an essential aspect of religious practice[56]. Town-planning and zoning laws should reasonably accommodate the property need of religious communities[57]. If the State decides to grant a special status to religious buildings it must do it without discriminating against any religious community[58]. The regulation of religious property must be sensitive to the particular historical context. This is especially important when dealing with property that is part of the cultural heritage of the State and thus conserved by public funding. In some cases, the historical context may justify the regulation of alternate use by different religious communities[59]. Another aspect concerns taxation, being very common, and reasonable, to allow for exemption of taxes for real estate of religious entities, if and to the extent that they are destined to worship and other religious activities, without any economic significance.

4.6.4. Political participation

In a free and democratic society, participation should necessarily be driven from below. Religious communities may not be of this world but they are in this world. There are many topics that are relevant to the world community as a whole (v.g. war, peace, development), to the Europen continent (v.g. cultural pluralism, migration), to the national political community (v.g. corruption,

54 *Association de solidarité avec les témoins de Jéhovah and Others v. Turkey*, § 90, nos. 36915/10 et 8606/13,§ 105, ECHR, 2016-II.

55 *The Church of Jesus Christ of Latter-Day Saints v. the United Kingdom*, no. 7552/09, § 30, ECHR, 2014-IV.

56 *Johannische Kirche and Peters v. Germany* (dec.), no. 41754/98, ECHR 2001-VIII.

57 *Association de solidarité avec les témoins de Jéhovah and Others v. Turkey,* nos. 36915/10 et 8606/13,§ 105, ECHR, 2016-II.

58 Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey, no. 32093/10, §§ 48-49, ECHR 2015.

59 *Gromada Ukrayinskoyi Greko-Katolitskoyi Tserkvy Sela Korshiv v. Ukraine* (dec.), §§ 33-38), no. 9557/04, ECHR 2016.

poverty, abortion, marriage) or for a given religious community and its members (v.g. freedom, equality) about which religious communities may want to speak. As members of civil society, they should be allowed to actively participate in the sphere of public discourse and engage in collective activism and to have some interaction with the political party system (Tretera & Horák, 2019, p. 78ff). Most of them will show their commitment to shared moral norms and social institutions, since their values may have influenced to a significant extent those of the political and legal systems. Political participation is a right of all individuals, and it should not expected that individuals leave behind their religious convictions when they engage in it. Religious beliefs may influence political speech, electoral campaigns, voting and exercise of public office. Sometimes religion will be able to influence other areas of social life through religious professional networks (v.g. politicians, lawyers, doctors, artists, scientists or teachers). This may also lead to a clash of cultures in the public sphere, including lively interactive discussion on social media.

4.6.5. Manifestation of religion

There is a strong link between belief and conduct. People with religious beliefs have the right to manifest one's religion through worship in private and also in the community of believers. They have the right to persuade other of the tenets of their religion, respecting the dignity and liberty of others[60]. They will want to act in different domains of life in a way that is consistent for them. That may include observance of dietary laws (v.g. meat free food, kosher), wear an outfit that is characteristic of a religious identity (v.g. veil, turban, tunic, cross) in public. Regulation of religion should provide the possibility of doing so, in a reasonable way. Restrictions to this right must be necessary and proportionate[61]. The right to manifest religious beliefs, both individually or collectively, is not absolute, since it may impact other rights and interests, such as the possibility of face-to-face social interaction and open interpersonal relationships[62]. That means that not all manifestations of a religious belief should considered legitimate. On the other hand, not all acts that are in any way influenced, motivated or inspired by a religious belief constitute a manifestation of it. In order to be so, they must be intimately, that is (theo)-logically, linked to the given belief. That is the case, for example, of an act of worship or devotion which forms part of the practice of a religion or belief and is generally recognised as such. But the existence of a sufficiently close and direct nexus between the act and the underlying religious

60 *Larissis and Others v. Greece*, no. 23372/94, ECHR 1998.

61 Ahmet Arslan and Others v. Turkey, no. 41135/98, ECHR, 2010-II.

62 *S.A.S. v. France [GC]* no. 43835/11, ECHR 2014; *Dakir v. Belgium*, no. 4619/12, ECHR 2017-II; *Belcacemi et Oussar v. Belgium*, no 37798/13, ECHR, 2017-II.

belief may lead to the consideration of some acts (v.g. wearing a necklace cross; skullcap) as manifestations of religion even if they are not really required by the doctrines and decrees of the religion in question[63]. In these situations, it may be important to consider the public or private nature of the functions and context of the persons concerned, as well as the age and maturity of the people affected by their conduct. Equally important is to take into account the purpose (*e.g.*, public security; public order; public health) that justifies the restrictions. The right to manifest and exercise one's religion may require some accommodation measures when dealing with public structures, such as the army, prisons, schools or hospitals[64].

4.6.6. Religious expression

Religious communities and their members are part of the sphere of public discourse in a free and democratic society. They must, therefore, have access rights to broadcasting and social media. This may vary from country to country (Torfs & Vrielink, 2019, p. 34ff). It can include guaranteeing space in the public radio and television service, under general conditions to be defined by law, and access to private radio and television outlets, namely cable services. Religious communities should enjoy broad access to the public sphere, thus guaranteeing its pluralism and vitality (Vilaça & Oliveira, 2019, p. 21ff). They must be able to freely express their theological, moral and ethical convictions, even in controversial subjects such as abortion, euthanasia, sexuality, family, corruption or inequality, and must do so, content, within the general principles of respect for equal dignity that must be recognized by all individuals as full members of the political community. It is important to emphasize that the free expression of doctrinal, moral and ethical convictions, within the general framework of freedom of critical discussion and disagreement, cannot, in itself, be understood as hate speech, even if it does not please all people or social groups. In exercising this right, religious communities and their members cannot in any way incite to violence or exert wrongful pressure on non-members.

4.6.7. Religious education

Education assumes that human life is plastic and modifiable through human intelligence and reason (Ellwood, 1913, p. 290). That's why religions and secular ideologies generally want to have a saying and leave a mark on education. In Europe it is considered that States are not compelled to allow for and organize religious teaching in public schools, although they must adhere to the principles

63 *Hamidović v. Bosnia and Herzegovina,* no. 57792/15, § 30, ECHR, 2017-IV.

64 *Kovaļkovs v. Latvia,* no. 35021/05, ECHR, 2012-III; J.L. v. Finland, no. 32526/96, ECHR 2000.

of equality and non-discrimination if they decide doing so[65]. Still, in some of them religious denominations still play a very important role in the education system (Torfs & Vrielink, 2019, p. 30ff).

There is no worldview neutral education. Eliminating religion from education is in itself a way of teaching about religion, sending a public message that religion has no real importance in the real world and of excluding it *a priori*, in the name of a secular, naturalistic and materialistic philosophy. What's more, religion is an important part of the history of ideas, of majoritarian and minority cultures, and of contemporary social life. It is impossible to understand politics, law, economics, literature, music, poetry, architecture, sculpture or painting, without a reasonable understanding of the role that religion has played in all these areas. That's why it is important that religion be part of school and university curricula.

This can be accomplished in several ways, such the historical and sociological teaching about various religions, optional confessional teaching in public schools and the existence of private religious schools, from different religious communities. Once the classes are run by religious communities themselves, the teachers are expected to show a significant degree of loyalty towards the religious, moral and ethical doctrines of the religious community they represent[66]. Also very important is the existence of theological studies and science of religion in various university courses at public and private universities, secular or denominational. Religious denominations must be free to form, expose and promote their own view of the world. The public authorities' only concern is to guarantee the fundamental principles of equal individual and collective religious freedom.

4.6.8. Social intervention and welfare

Many religious communities have been engaged in social welfare activities ever since a long time. In Europe, Christian religious orders have developed orphanages, nursing homes or hospitals, to care for the poor and needy. Judeo-Christian religious thought has always emphasized care for orphans, widows, sick and foreigners. For Christianity, social commitment to others is inseparable from religious belief. "Faith by itself, if it does not have works, is dead".[67] The same social concern will be present later in Islam. It is no wonder, therefore, that in Europe, religious convictions have to be understood as inseparable from the social intervention of religious communities and individuals with religious motivations. Religious communities actively intervene in education, health

[65] *Savez crkava "Riječ života" and Others v. Croatia,* no. 7798/08, § 57, ECHR 2010-I.

[66] Fernández Martínez v. Spain no. 56030/07, [GC], §§ 137-138, ECHR, 2014.

[67] James 2:17.

and social security systems. For its part, the State adopts new forms of public management that allow for greater cooperation and partnership with the private sector (Vinding, 2019, p. 94ff). It is important that these public-private partnerships strike a reasonable balance between the values of universal access to public services and respect for the doctrinal and institutional identity of religious communities.

4.7. Socio-cultural and political risks

Human beings need some form of social order for their survival and flourishing. However, social coexistence and interdependence do not prevent significant ideological, worldview and value conflicts within a society. Religious strife can seriously undermine the social fabric, including conflict between religious communities and between religious people and those who hold secular materialistic worldviews. An important part of religious regulation requires dealing with threats to the human collective, the social fabric (Haines, 2017, p. 183). Dealing with socio-cultural risk means precluding religion from harming collective well-being, comprising the social interactions within the political community from which individuals derive their sense of security, identity and belonging. In this sense, "political risks" are risks to human rights, democracy, the rule of law and the open society. States should try to enhance their legitimacy by reasonably integrating the social practices of religious communities and their individual members, being particularly careful with the way they deal with them. The use of pejorative expressions and comments in official documents against a given religious community, may lead to negative consequences for the individual and collective exercise of religion and increase the risk of social discrimination and regulatory backlash. Considerable legislative and regulatory reforms have taken place in some jurisdictions following the terrorist attacks in the United States on 9/11 2001. These changes, including those designed to reduce the impact and likelihood of an attack in a public place, rest on an uncertain and highly politicised risk-assessment process. Priority must be given to rigorous scientific and technical gathering and assessment of evidence (Haines, 2017, p. 181ff). For instance, populist nationalism induced a significant regulatory response to the risk of Islamist terrorism, while letting the actuarial risk of white supremacist terrorism vanquish for lack of attention. In this area, it is important to stick to "evidence-based policy", instead of "policy-based evidence" (Haines, 2017, p. 186ff).

4.8. Regulatory effects

Regulation is aimed at producing some palpable, specific, behavioural and measurable effects. The natural and desired goal of regulation is compliance. However, in a plural and multicultural society, the interpretation and meaning given to regulation by those being regulated may not be the same as that of regulators. What the regulators understand as being a reasonable attempt to balance competing rights and interests may be experienced, by the regulated, as a hostile and evil attempt to impose a particular religious or secular worldview on all society. This can generate a regulatory blowback or backlash, with unintended consequences, leading individuals and groups to adopt an attitude of defiance and even radicalization, forming alliances to confront the regulators. This can give rise to a climate of confusion, conflict and loss of trust in the system and to a search for an alternative regulatory authority. For young disenfranchised Muslims, the Islamic State might seem a good option. Defiance can be understood as a premeditated response when a regulatory authority threatens religious or cultural identity. It may also be the case that the protection of the religious rights of religious minorities is perceived or described by members of the majority religion or secular community, as a left-wing strategy to attack conventional judeo-christian values by promoting pluralism, tolerance, multiculturalism, globalism or islamization of Europe. If this happens, some individuals and religious communities may be tempted to act out their grievances (v.g. populism, nationalism, discrimination and persecution of religious minorities, religious extremist violence). The success of the regulatory system must be measured by its ability to create a sense of equal dignity and freedom, reinforce social inclusion and cohesion, and promote a spirit of mutual understanding and collaboration among all citizens.

4.9. Regulated as regulators

Regulatory theory has been pointing out that regulation is often a two-way street. Civil society actors also play an important regulatory role, regulating the regulators. In the domain of politics and religion this has often been the case and still is to a significant extent. History tells us that religion has always been a very important regulator of political and social authorities. The excommunication of Emperor Theodosius I by Ambrosius of Milan because of the Massacre of Thessalonica (390 AD), or the famous Humiliation of Canossa (1077), in which Pope Gregorius VII forced Holy Roman Emperor Henry IV to humiliate himself on his knees waiting for three days and three nights before the entrance gate of

the castle, while a blizzard raged, are just two impressive and dramatic examples amongst countless possible. The influence of canon law on medieval law, the role of the Church in the regulation of family, sexuality, property, taxation, banking, usury, trade, income redistribution, armed conflict and the rise of the antislavery movement in late eighteenth-century Britain all provide examples of religion as a regulatory force.

Religion is not just one more regulatory domain among others. It also provides a source for those values upon which regulation is based and remains above and beyond the control of any regulatory authority. In other words, religion can serve as the source and a standard for interpreting and regulating the application of political, economic social power (Iannaccone, 1998, p. 1466). During the centuries and today, highly networked religious actors have the capacity to shape state and social behaviour (Jakobsen & Pellegrini, 2004, p. 1ff). Its role is ambivalent, as religion can either foster, shape or hinder human rights, democracy and the rule of law (Arikan & Ben-Nun Bloom, 2019). We have already made some remarks about the role of religious movements at an European level, as they engage in continuous processes of network formation and alliance creation. We can observe the same trend with the Orthodox Church in Russia or with the Evangelicals in the US and Brazil. At the global level we observe as the G20 Interfaith Movement has been trying to promote global regulatory webs of influence integrating a multiplicity of religious groups with religious motivations in order to influence the policymaking priorities of G20. We are speaking about religious communities regulating political and legal authorities through direct contact, participation in the democratic process by religious individuals, indirect moral persuasion and the slow and persistent building of an epistemic community. This phenomenon of decentered regulation confirms that consideration of non-state religious actors is required in any explanatory account of regulatory globalisation. Religion can also work as a regulator of private power, namely by promoting boycotts or engaging in naming, blaming and shaming.

5. Regulating religion in a constitutional democracy

Since there is no doubt that religion is linked to all aspects of social life, its full immunity to state regulation could hardly be sustained. The central problem that must be addressed, therefore, is not whether or not there can be regulation of religion, but rather what are the principles, purposes, and means to which such regulation should be subordinated in the framework of a free and democratic

constitutional order. In Europe, national constitutions, the values and principles of the Council of Europe and the Treaties of the European Union all point in the same direction, towards a rights-based governance and regulation, based in the principles of democracy, separation of powers and the rule of law.

5.1. Freedom as non-domination

An important regulatory meta-principle, which is based on the axiomatic dignity of the human person and individual autonomy, is freedom understood as the absence of domination (Braithwaite V., 2017, p. 29 ff). Regulation should be understood as an instrument to promote socially responsible freedom, minimizing, as far as possible, coercive imposition. Hence the preference for informal regulatory mechanisms and the progression in the regulatory pyramid towards higher and more intense levels of coactivity if and to the extent that this is considered necessary. This means, for example, that the State can communicate with its citizens to inform them of individual and social risks of some religious doctrines and practices, especially in the case of the most impressionable young people[68], but it cannot use physical and psychological coercive means to try to deprogram and reprogram individuals' religious beliefs[69].

5.2. Competing religious communities and world views

The regulation of religion concerns the spiritual and intellectual competition of different worldviews within the political community, something which will inevitably have an impact on the way politics, law, economics, culture, science or sports, are perceived and socially constructed and collectively experienced. This explains the high level of intensity religious discussions may reach, and their tendency to spillover to all areas of social life. Edward O. Wilson (1998) coined the term 'consilience' to describe the generation of new, robust understandings of the human condition that goes on when different experiences and epistemologies come in contact with and learn from one another (Williams, 1998). As a matter of fact, different religions and secular ideologies will seek to offer their own attempts to unify both what we know and what we don't know. This positive assessment of worldview confrontation should not distract us from the fact that this learning process is often sent to the background by an atmosphere of distrust, hostility, antagonism and confrontation.

68 *Leela Förderkreis e.V. and Others v. German,* no. 58911/00, ECHR 2008-V.

69 *Mockutė v. Lithuania,* no. 66490/09, §§ 107-131, ECHR 2018-IV.

5.3. Balancing competing rights and interests

When there is a collision of different rights and interests, there should be a balancing and harmonization procedure, according to the principle of proportionality in a broad sense. Restrictions to religious freedom and belief must be adequate, necessary and proportional, in a strict sense, to the pursuit of a legitimate and compelling interest. This means that regulatory actors must advance serious and compelling reasons for an interference with individual and collective religious freedom. Individuals' interest in not having to act contrary to their conscience, although not absolute, should be respected and protected. If there is the possibility of safeguarding the equal freedom rights of others and public order, safety, security and health interests without infringing on freedom of conscience, that should be the preferred option. For instance, religious freedom may be restricted if that is necessary to prevent polygamous or underage marriage, a flagrant breach of gender equality or the refusal of medical treatment to a minor. Another example, individuals and communities that profess belief in Apocalyptic doctrines that advocate collective suicide or violence, posing a risk to public order and security, may have their rights curtailed.

COVID-19 posed many problems in regulating religion, forcing the imposition of several restrictions on collective freedom of worship. The least individualistic religious communities were naturally the most penalized. Few would question the legitimacy, in the abstract, of restrictions on religious freedom to safeguard public health. The main concrete problems that arose, all over the world, were related to the respect for the constitutional principles of legality, proportionality and equality and non-discrimination of the restrictions made. In some cases, attention has been drawn to the fact that religious experience must be considered essential, so restrictions, being in principle admissible, obey an especially sensitive and rigorous scrutiny[70]. Despite the difficulties inherent in the pandemic, the best regulatory outcomes were obtained with a responsive and smart regulation, based on dialogue, persuasion and negotiation, sensitive to the contextual specificities of the exercise of religion. When regulations are based on the principles of freedom, procedural fairness, participation and dialogue, cooperation and voluntary compliance are likely to be higher and fewer parties are likely to need coercive measures to comply (Braithwaite V., 2017, p. 29).

[70] *Roman Catholic Diocese of Brooklyn, New York v. Cuomo,* 592 U. S. (2020).

5.4. Religious market failure

The analogy of the market should not be taken too far, considering that religion tries to respond to the ultimate existential questions. Religion is not to be commodified. However, the analogy can be useful up to a certain extent in order to represent the regulation of religion, since it assumes that the dissemination and exchange of immaterial goods among individuals can bring about processes of spontaneous ordering (Iannaccone, 1998, p. 1465ff). It posits a reality in which different religious communities coexist in an atmosphere of permanent spiritual confrontation and decentralization of authority, avoiding the dangers of religious monopolies. This confrontation results in a permanent revision of the content and formulation of religious doctrines, in order to make them more understandable and acceptable to individuals and societies. The principle of equal dignity and freedom, which has a religious origin, is, at once, the foundation and the limit of the right to profess, spread and put into practice religious beliefs and to seek to influence the whole society based on them. As religious communities spread their word, individuals are free to accept or reject it. The role of the State's regulatory authorities is to ensure that the exercise of this equal freedom does not represent an effective danger to the rights of others and to other constitutionally protected interests, thus being responsible for correcting the failures of the so-called religious market.

5.5. Meta-regulation

Many factors can prevent regulation from achieving its goals and lead it to produce unintended consequences. The same may happen in the field of the regulation of religion. Good regulatory practice requires open debate and contestation over the purposes, principles and techniques of regulating religion and how to do it best in the context of democratic governance. Meta-regulation refers to the monitoring and regulation of the regulatory process (Grabosky, 2017, p. 149ff). The Council of Europe, the European Union, the States, a variety of institutions in the private sector and public interest groups (v.g. political parties; universities; research centres; human rights organizations) should take part in the meta-regulation debate, thus acknowledging the diversity of regulatory space and its set of characters. These and other organisations should play a constructive role in monitoring the behaviour not only of religious communities, but also of governmental authorities. Although public power still often remains at the centre, we can observe a growing list of intervening actors. Meta-regulation seeks to ensure the adaptability of regulatory regimes. However,

the increasing number of public and private actors in the fields of regulation and meta-regulation, while very interesting from a democratic and regulatory point of view, raises meta-regulation transparency and accountability issues which shouldn't be easily dismissed. In the field of the regulation of religion self-anoited secular prophets and self-appointed moral entrepreneurs may be driven by personal interest, ideology, misconceptions about religion or malice rather than for respect for human dignity, freedom of conscience and religion and the public good.

6. Conclusion

In this article, we tried to apply some conceptual instruments elaborated by the theory of regulation to the domain of relations between religious communities and the State. A brief reference to history highlighted the centrality of the regulation of religion in the development of political ideas and institutions and its impact on constitutional law and human rights. After presenting the concepts of regulation and religion, we tried to analyze the problems raised by the regulation of religion, considering the theory of public interest, the free market of religious ideas and the theory of responsive regulation. This points to the need to build and adapt regulatory instruments based on a deep knowledge of the specific characteristics of the religious phenomenon. Responsive regulation must be context sensitive, going with the flow of events while trying to influence it and steer it towards a socially desired outcome. Our focus was on the European reality, where history and its memories have a decisive impact. We draw attention to the fact that European law sets as regulatory objectives the guarantee of freedom of conscience, religious freedom, equal dignity and freedom, democracy and the rule of law. Fidelity to these values and attention to the intellectual, spiritual, psychological, social, normative and institutional specificities of the religious phenomenon are at the basis of the regulatory response to religion. With regard to the institutions of other regulatory actors, we underlined the reality and need for action and articulation of the role of States, the Council of Europe, the European Union, the religious communities themselves and the regulatory networks of civil society. This aspect is important, among other things, because it draws attention to the complementarity of legal and non-legal factors in the regulation of religion that an exclusively legal approach tends to ignore.

With regard to regulatory tools, we sought to highlight the complementarity between informal and formal regulation techniques and, within the latter, softer and harder techniques, which should be used in a responsive, adequate and proportional way. In this context, we made use of the well-known regulatory

pyramids of the theory of regulation, which seem to us entirely appropriate to the regulation of religion. Responsive regulation will seek to climb and descend the pyramid in a reasonable and prudent way, knowing that in many cases de-escalating may be more effective. We then tried, but very briefly, to apply these conceptual instruments to some of the main domains of regulation. In the final part of our article, we tried to apply to our theme other aspects of the theory of regulation, considering the socio-cultural and political risks of the regulation of religion and the evaluation of the effects of religion. We conclude by drawing attention to the constitutional dimensions of the regulation of religion and underlining the importance of regulating the process of regulating religion itself. In our view, regulation theory can help politicians, jurists, administrators and religious actors to better understand the regulatory challenges posed by religion in a free, open and democratic society, and help the work of academics from various disciplines who focus on this important thematic area.

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CHAPTER 2

Do we really need special regulation of religion?

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Introduction

Europe has historically developed from state-related monopoly churches controlling and regulating religion, to secular religiously neutral states with individual freedom of religion. In parallel Europe has continuously become more religiously and culturally diverse by globalisation, migration, travel etc. As part of increasing religious pluralism new questions on religion and possible needs for special regulation of religion are brought up in political and juridical contexts.

Simultaneous with the increasing use of the concept of religion in the secular legal context, it is questioned as a useful concept by researchers in religion. The concept of religion is too multifaceted and there is no common universal definition of religion. It is also criticised as being a western European social construction, which makes it especially problematic to use in general policies and common law in a religiously diverse society with many different understandings of "religion".

This chapter discussess the needs and limitations of regulation of religion, and questions if secular states really need special regulation of religion. Is it not enough with the same common law for people of all kinds of belongings, beliefs, values and practices regardless if they are religious, non-religious, political etc.? The European empirical context is in focus, although the theoretical discussion is largely general.

Historic regulation of religion by churches

Europe has a relatively homogeneous religious history of dominant Christian churches with close relationships to the nation-state. The Christian heritage is a formative factor in the construction of Europe, in terms of institutional structures

as well as cultural norms (Davie, 2000; Hervieu-Legér, 2000). The historic religious monopolies combined with dominating agricultural economies formed unitary societies. Religion, state, politics, values and culture were closely linked, and the Christian majority churches were in the centre of society having political and legal power, including regulation of religion. Collectivism, standardisation, and subordination of the individual were promoted and tendencies to individualise religion were subdued and even punished by the churches and the state.

However, from being relatively uniform in the long history of agricultural dominance, society has rapidly become increasingly diversified and pluralistic in the age of the industrial revolution and the subsequent development of a service-dominated society. The continuous functional differentiation process of the previous unitary society has implied changes of relationships in the European religious landscape at societal, organisational, and individual levels (Luhmann, 1982; Dobbelaere, 2002). Relationships have changed at the macro level between religion and society as a whole by the loss of churches' dominating position. Secondly, relationships have changed at the meso level, between the historic churches and other societal functions, which have developed as separate organisations in parallel with the churches and free from religious control. Thirdly, relationships have changed between religious organisations and individuals as a consequence of the changes at the two other levels. From historically been authorities of religious regulation, religious organisations are in present society appearing as possible resources and service providers, to be voluntarily used by free individuals (Chaves, 1994; Gauthier & Martikainen, 2013).

This development paved the way for Europe to become increasingly religiously diverse in two different forms. Firstly by continuously growing cultural and religious pluralism among Europeans themselves. The loss of traditional and hierarchical forms of social control over cultural resources means that individuals are free to pick and choose from a global market of cultural and religious resources (Giddens, 1991). Globalisation, internet, media, travel etc. have made endless religious and cultural alternatives accessible. Secondly, religious diversity is driven by migration, especially having an impact in Europe by the last decades of growing numbers of immigrants arriving from many different parts of the world (Vilaça *et al.*, 2014).

As a result, Europe's common historical traditions become increasingly mixed with new forms of religious pluralism, caused on the one hand by immigration, and on the other by internal religious differentiation and the growth of more individualized forms of spirituality (Heelas & Woodhead, 2005; Jakelić, 2010). From a historical perspective, the change from Christian European unitary societies to present multicultural religious pluralism has taken place during a very short period.

In the past, the majority of churches took on the task to regulate religion; what kind of religion and religious practice that should be accepted and how individuals' religion should be regulated. Today however, we may ask if there is any need to regulate religion in liberal religiously neutral societies, since religion is regarded as an individual matter.

Revival of religion in legal regulation

European states are religiously neutral, churches are no longer controlling religion and individuals are free to believe and practice religion in liberal democracies. Seeming like a paradox, religion has during the last decades appeared more frequently as a hot topic in the European discourse on legal regulation (*e.g.*, Doe, 2011; Lind *et al*., 2016). This new focus on religion in a legal context has mainly been related to new issues raised by the increased immigration of people from Muslim dominated countries, and an increasing notion of people's religious identity (Shiffauer, 2017). In the previous waves of migration from Greece, Spain, former Yugoslavia, Vietnam etc., different groups of immigrants were labelled by their nationality. However, with the increasing immigration of people from Islam-dominated countries there has been a "religionising" of their identity and they are reduced to "Muslims" instead of specifying that they are Turkish, Syrian, Iranian, Somali etc. (Mattes, 2018). Often all people from these countries are counted as Muslims even if many of them belong to another religion, *e.g.*, Christians.

This "religionising" or "Muslimisation" of Muslims has had the function of stressing the "otherness", the difference between "me/us" and the "other/s" and contributed to focus at religion as an identity marker. It is driven from two opposite political discourses; a) right-wing opponents to immigration who stress the difference between European Christian culture and Muslim culture, b) left-wing defenders of immigrant minorities' rights who stress certain rights related to the Freedom of Religion principle of Human Rights. Both of these groups have an interest in stressing the different religions as the identity of immigrants from these countries.

The highlighting of religion as being a more significant identity marker than nationality is underpinned by religious extremism and terror attacks from Islamist as well as right-wing Christian Nazi-inspired groups and individuals. Both of these groups have an interest in polarising Muslims and Christians as part of their respective image of a dualistic reality in conflict. The focus on religion as an identity marker has indirectly implied a "religionising" of a number of issues previously regarded as cultural, ethnical or political issues.

This development has repeatedly brought up religion on the political and legal agenda in all European countries, sometimes regarded as part of a return of religion to the public sphere or the so-called post-secular turn (Ziebertz & Riegel, 2008). The revival of religion in European public discourse raises new questions about how to understand and handle religion in religiously neutral states with common law for all, separation between organised religion and the state, and a view of religion as being a private matter. New questions are also raised on how to understand and define the concept religion.

The unclear concept of "religion"

There is no common universal definition of the concept of religion. It is used in various ways in different social, cultural, political and legal contexts, mostly without a specified definition. There is however a long academic tradition of discussing and problematizing the concept of religion from different perspectives (*e.g.*, Marx, 1970[1844]; Durkheim, 1995[1912]; Freud 1913; Weber, 1920), and different theoretical or empirical definitions of religion have been suggested (*e.g.*, Stark & Glock, 1968; Vaillancourt, 2008; Greely, 2017; Woodhead, 2017).

Over the last decades, there has been an increasing new kind of fundamental critique and deconstruction of the analytical category "religion" (*e.g.*, Beckford, 2003; Fitzgerald, 2015; Horii, 2015, 2021). Several authors stress that the concept of religion is a social construct created in a Western European context that does not exist in that same way in traditional cultures, unless imported from or imposed by Western Europe (Spickard, 2017). It has been highlighted that there is no equivalent concept or word for religion in *e.g.*, Chinese, Japanese, Egyptian, Sanskrit, Pali or native American languages, and it is not used in the Hebrew Bible or the Greek New Testament (Smith, 1962; Schilbrack, 2012).

According to David Martin (1978) the monopolistic Catholic church had a key role in creating the Western European concepts of religion and secular, by polarizing a division between a "religious Christian" part of society and a "secular" part in opposition to the church. When the word religion first appeared in the English language, it was in the process of developing a mainly secular national state. "Religion" was a label for the "The Christian Truth" referring to the Anglican Church and thereby a way of distancing the Church from the state. Subsequently the concept "religion" was developed as a tool of state to classify churches and similar organized societal formations into one single category (Fitzgerald, 2007, 2015; Cavanaugh, 2009; Horii, 2015). The historical background of the category "religion" as a Western European social construction, and the lack of a common definition mean that we need to question if we really should use the concept of religion in a legal context in the present religiously diverse society.

In theoretical discourse, the unclear conceptual understanding of religion is relatively unproblematic. It becomes however a problem when used as a normative concept without definition in public debate, political discourse, policies or legal regulation. In these contexts, the interpretation of the concept of religion often becomes decisive and affects people's practical lives in serious ways. This is especially significant when it comes to demands for special rights or treatment with reference to the concept of religion, for example by referring to the Universal Declaration of Human Rights principle of "Freedom of religion". The lack of a common definition and understanding of the concept of religion makes it difficult to use the concept of religion without specifying what aspects or dimensions of religion we mean in each case.

Religion as belonging, identity, belief and practice

When religion is empirically studied, it is implicitly defined by the way it is conceptualized in terms of *belonging, identity, belief or practice,* and in different combinations of these four dimensions. Questions or items on these dimensions are measured quantitatively in surveys or studied qualitatively in-depth by *e.g*., interviews (Pettersson, 2019).

Studying *belonging* can mean focusing on formal membership in a religious organisation or an individual's perceived and self-reported belonging. Since the indicators of belonging often build on models from established religion, they tend to miss multiple religious belonging or individual constructions of religion. For example, someone's religious *identity* can deviate from formal or cultural belonging, or someone can belong to both Islam and Christianity, or be both organised atheist and have a Hindu identity. A woman can explain that she is both a Muslim and a Buddhist since her mother was a Muslim and her father was a Buddhist. These examples show the complexity of mapping and comparing statistical figures on religious belonging and identity in empirical studies.

Individual *belief* (including values, attitudes etc.) is a third dimension of religion focused in empirical research. Common indicators are *e.g*, belief in God, belief in life after death or the authority of holy books. Results from qualitative as well as quantitative studies show that people's beliefs, values and attitudes are often inconsistent, ambiguous and even internally contradicting. There is an ongoing development of research methods to grasp the grey zone between yes-no options in questionnaires and to catch answers like "I sometimes believe in God" (*e.g.*, Shilderman 2015). Studies on people's beliefs demonstrate the multifaceted character of the concept of religion and the difficulties to judge what should be regarded as religious beliefs.

The fourth main dimension addressed in empirical research on people's religion is *practice,* such as participation in different activities organised by religious organisations or individual practices that are regarded as religious. Studies often include the use of religious services *e.g.*, worship, baptism, confirmation, weddings and funerals, and individual practices such as individual prayer, observation of religious holidays or fasting periods, *e.g.*, Ramadan, observation of restrictions related to food, rules of clothing etc.

These four dimensions of religion have different meanings in different contexts and for different groups of people, which illustrate the problem of defining religion, and using religious belonging in *e.g.*, legal contexts.

Differentiation of belonging, identity, belief, practice and culture

As part of increasing pluralisation and individualisation, differences of religious practice within groups of the same religious belonging increase continuously. Results from empirical research show that individual's religious belonging, identity, belief and practice are very often inconsistent and ambiguous in relation to the official or traditional (theoretical) model of a certain organised/institutional religion. Differentiation within religious traditions also means a differentiation between religion and culture. Practices that have previously been regarded as very important religious practices thereby become increasingly viewed as historical cultural practices, rather than directly linked to the belonging or beliefs of a certain religious tradition or group (Pettersson, 2019).

This development highlights a number of questions when it comes to the issue of the possibility to regulate religion: How should we define the concept of religion? What should be regarded as an individual's religion when religious belonging, identity, belief and practice appear functionally differentiated, and one and the same individual can be secularised in one of these dimensions, a Buddhist in the second and a Christian in the third dimension? Should religion primarily be regarded as an issue of belonging and perceived identity? Or is religion in its core an issue of belief and confession? And what practices should be regarded as practice of religion? It is often difficult to judge what practices should be regarded as religion and what should be regarded as "culture", and it is common that people themselves talk about their religious practices as "tradition" without distinguishing between religion and culture.

Since the concept of religion is so multifaceted it has a variety of meanings in different contexts and for different people. Thereby the word religion has no common meaning, it is difficult to use and tends to become only a value-loaded word without specific content.

Needs and limitations to specially regulate religion

When it comes to the issue of special regulation of religion, the frame of reference is usually the articles on freedom of religion in the Universal Declaration of Human Rights, and the question is about its implementation in national, European and international law. The Declaration mentions religion in three articles: 2, 16:1 and 18. Only article 18 states special rights that would need special regulation related to religion.

Article 2: *"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"*. The article states that everyone has the same rights and freedoms, so no special regulation of religion is needed.

Article 16:1: *"Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family"*. The article states individual freedom (including religious freedom) in relation to the group in which the individual is born or living. None of articles 2 and 16:1 demand any specified definition of the concept of religion or any specific regulation of religion, since they just stress equal treatment and individual rights of all human beings regardless of religion.

Article 18 declares freedom of religion in three aspects: 1) *"Everyone has the right to freedom of thought, conscience and religion"*. The formulation is wide and does not need a definition of religion or any special regulation of religion. 2) The following text of Article 18 focuses only at religion and belief: *"...this right includes, freedom to change his religion or belief "*. Individual freedom of belonging, identity and belief is stressed and no specific definition of "religion" is needed and no special regulation. 3) The third part of Article 18 is about practice of religion and reads: *"...and freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance".* It is only this last part of Article 18 that demands a definition of the concept of religion, since it expresses not only freedom, but also states special rights for people with religion or belief – *"in public or private, to manifest his religion or belief"*. Since there is no common definition of religion, the question is what should be regarded as religion when it comes to manifestations in teaching, practice, worship and observance. What is the difference between religion, culture, tradition etc.?

When the needs to regulate religion are raised in public debate, politics or legal context it is in most cases the implementation of Article 18 that is in focus. As long as "freedom of religion" is interpreted as a principle of non-

discrimination based on religion and equal treatment regardless of religion, no special regulation of religion is needed apart from common law for all people. However, when freedom of religion is an argument for special rights to practices that are not granted to everyone, the principle of "freedom of religion" becomes an obstacle to the general idea of equality and will indirectly discriminate people of non-religious beliefs and worldviews (Sullivan 2005). Additionally, if we would accept the right to special treatment when referring to religion, we still have a problematic issue of how to define what should be regarded as an individual's or group's religion, separate from "secular" customs, common culture etc., and be granted this right.

We have to ask why the practices of people with religious belonging or belief should be exclusively protected and treated in a different way than the practices of people who do not refer to religion (c.f. Leigh, 2012). When the demand for special regulation of religion is discussed, a control question should be: Can this regulation be part of common law for all people without discriminating people without religion or belief?

Do we need special regulation of religion?

As described Europe has passed through an historical development from unitary collectivistic societies to functionally differentiated liberal democracies promoting freedom of the individual. From religious control by monopoly state-related churches to religious freedom in religiously neutral states. Today individuals find their own way of forming their religious beliefs, practices and identities in various ways apart from the standard models of the religious authorities. From theoretical as well as empirical perspectives, the concept of religion becomes increasingly difficult to define and the category of religion is fundamentally questioned by researchers.

Against this background, the title of this chapter raises the question if we really need special regulation of religion. This question can be further specified: Do we really need special regulation of religion apart from the common law for all people regardless of religion? A lot of misunderstandings, confusion, conflict and inequality between people with and without religion, would be avoided if there was no special regulation of religion and the concept of religion was not used as an argument for special treatment or rights. If special regulation of religion would be argued, the problem to define the concept of religion persists and opens up for conflicts when the special regulation is to be applied. When it comes to the four above-mentioned dimensions of religion – *belonging, identity, belief and practice* – common law for all people should grant religious freedom, tentatively as the following:

Belief/Identity

Common law should grant all people; freedom of thought, conscience or belief – including religious, philosophical, ethical, scientific, political, etc., views; freedom to change thought, conscience or belief; not to be discriminated because of any kind of belief or identity, regardless if it is religious, philosophical, ethical, scientific, political etc. No special regulation of religion is needed.

Belonging

The same common law concerning belonging to, and form organisations/associations should be applied to all kinds of organisations/associations: religious, philosophical, ethical, scientific, political etc. Freedom of religious belonging needs no special regulation apart from common general regulation on belonging/membership in organisations. General restrictions concerning membership to certain types of organisations/associations (*e.g.*, destructive, antidemocratic or fascist organisations) should be applied also concerning religious organisations/associations. No special regulation of religion would be needed.

Practice

When demands for special regulation of religion are raised in the public debate, politics etc. they concern in most cases religious practice that are manifested in public. Sometimes issues on special regulation of religion are raised to restrict the religious practices. Sometimes exemptions from common law are requested by individuals or groups referring to religious freedom. However, any special regulation with reference to religion would require a clear definition of religion and what kind of practices that should be regarded as religious practices. As discussed, this would not be possible. Consequently, common law on freedom and restrictions in private and public life should be applied also to the multifaceted field of religion.

Conclusion

Someone's religious belonging, identity, belief or practice is mostly regarded as a private matter as long as it is kept in the private sphere. Questions on special regulation of religion arise in most cases regarding religious practice, when it is expressed in public and when such practices require exemptions from common law/regulations. Such demand by religious individuals or groups to be specially treated and have special rights or exemptions would require a clear definition of religion. However, since we cannot define "religion", law should not grant people certain rights that others do not have – motivated by their religious beliefs,

belonging or identity. Arguing for certain religious rights leads to discrimination against people whose religion is disfavoured and people who don´t self-identify as being religious (Sullivan, 2005). The different social constructions of the concept of "religion" and the lack of a common definition of "religion" imply that we should not refer to religion as an argument in politics, law and other public social contexts.

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CHAPTER 3

Religious accommodation in a post-secular Europe? Redefining the secular context

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Introduction: The survival of religion in the modern world

The theory of secularisation, built on the idea that modernisation tends to undermine religious belief and activity, has been at the centre of the academic debate in social sciences for decades (Fox, 2019a). For a long time, it was considered the central explanatory theory of the transformations Western societies were undergoing concerning the religious phenomenon. In this sense, economic progress, urbanisation, industrialisation, and social mobility were assumed to lead to a decrease in religious beliefs and its eventual privatisation (Berger, 1967; Martin, 1979). This idea of the inevitable replacement of religious myths by more rational thoughts largely influenced the discussion of religion's role in politics in the European context (Weber, 2001). Because of the short life expectancy of public religion, governments attempted to create a secular sphere for politics, one that would be neutral for religious terms and issues and facilitate its transition into the private sphere (Fox, 2018).

In the 1980s, the theory of secularisation began to be contested as it failed to explain what was occurring in different parts of the world, including Europe, with the so-called "return of religion", reflected in the increasing importance of religion in international politics, the emergence of "new religious movements" and the strengthening of new and old fundamentalisms (Esteban, 2011; Blancarte, 2012; Willems, 2018). Since then, even though there is a consensus

that there has been a significant decline in religiosity worldwide, with Europe being the epicentre (Bruce, 2009), it has also become evident that religion can remain an active actor in public in other parts of the world (Norris & Inglehart, 2011; Modood & Kastoryano, 2006). Furthermore, such resilience combined with globalisation's developments has given religion the resources it needed to return to the public sphere in places that had already been given as "dead" (McLennan, 2009). Thus, the present context depicts a scenario in which the forces of secularisation and religion interact and collide, generating opposing dynamics. In this regard, Europe represents a paradigmatic case insofar a de-privatisation of religion alongside the continuing process of secularisation because religion has entered the public sphere and has become a central element in globalisation and its processes.

With religious plurality burgeoning, the secular sphere has begun to interact with religion more every day; official or dominant religions have started to feel challenged by incoming faiths, and the number of agents involved in its strengthening in the public sphere has multiplied. Additionally, the new media and globalising processes have provided religion with new means to cross the territorial boundaries of the nation-state and to strengthen its transnational dimensions while generating favourable conditions for the development and revitalisation of intercultural conflicts, many of which emerge or are sustained by religious differences (Parker, 2008; Esteban, 2011; Del Olmo-Vicén, 2015). As a result, the secularisation paradigm has been contested, and it has also become evident its limited explicative and policy power of contemporary religious landscapes (Triandafyllidou *et al*., 2006). The emergence of new approaches to better cope with the religious plurality of today's societies is its biggest threat and a necessity for current social sciences.

In this search for a new analytical and conceptual framework and new tools that allow reflecting on the governance of present religious pluralism, the objective of this chapter is to examine the idea of post-secularism and its foundational concepts to redefine the application and conceptualisation of secularism. In general, post-secularism proposes a compromise between the secular and the sacred by bringing them into dialogue and introducing the idea of a world where religious people are seen as equal to those with secular beliefs (Habermas, 2001; Habermas, 2008a). In such a world, pluralism becomes society's foundation, and instead of swiping religion under the rug, it acknowledges its existence and ideas. Being legally recognised by governments, religious groups can ensure their cultural rights are respected, while the governments create mechanisms for that to be translated into reality. It is worth mentioning this process may create tension between religious sentiments and secular policies. Therefore, it is essential to find a context in which both can coexist without undermining the other, and without governments being influenced by religion.

It is well known that post-secularism has received as many or even more criticisms than secularism itself (Ungueranu & Thomassen, 2015; Modood, 2019; McLennan, 2009; Beckford, 2012). Notwithstanding, this chapter argues the diversity-based social and governmental contexts post-secularism proposes, could be the new perspective secularism needs to remain relevant in the debate for finding appropriate strategies to deal with the increased diversity and religious plurality (Vertovec, 2007). Against this backdrop, accommodation, an umbrella mechanism that uses several means to allow religious people to practice rituals that otherwise would not be permitted (Nussbaum, 2008; Fraser & Honneth, 2003), emerges as a tool to understand and deal with religious pluralism. Religious accommodation acknowledges that societies are diverse, and what applies to some does not necessarily apply to everyone.

Religious accommodation proposes the inclusion of those religious practices that were not considered in the multiculturalism wave (Bader, 2007) and are essential for some people's cultural and ethnic identity (Bou-Habib, 2006; Bader, 2007). The literature provides explanations and justifications for how and in which context it can be used. Therefore, the question is whether religious accommodation could be the tool that would allow the pluralism that post-secularism proposes to flourish within a secular context.

Along these lines, the proposal is to reintroduce the discussion of religious accommodation as a mechanism for managing religious pluralism in the challenges secularism faces in Europe. It does so by putting into dialogue the theoretical discussion produced by diverse disciplines to understand the issue from a multidisciplinary perspective to translate it into a more practical sphere. This approach's main reason is that addressing such a complex issue from only a single perspective would mean disregarding its full ramifications and the risk of superficiality (Bader, 2007). For that reason, this chapter divides into four parts that analyse post-secularism, church-state relations, the reconceptualization of secularism, and religious accommodation to sketch a possible normative situation where factors such as the rationale behind it, government relations with religion, and religious pluralism could interact without the so-called "clash of civilisations" (Huntington, 1996; Gamwell, 1995).

Post-secularism: an academic debate

The theory of secularisation has been prevalent in social sciences, predicting religion's loss of relevance as people would prefer more rational and scientific thought processes (Weber, 2001), and it has produced a diverse theoretical body. There is certain agreement on its core ideas, which focus on the

significant decline of religion's public role, its eventual disappearance, and its replacement by reason-based ideas (Habermas, 2001; Gill, 2008; Fox, 2015). The disappearance idea can be considered a misinterpretation of the original process which highlighted a privatisation of religion (Bader, 2007). The general trend assumes it is an ongoing process in Western countries that spreads to the rest of the world (Weber, 2001).

This theory was the norm until the 1980s when its weaknesses became more apparent (Pollack, 2018). Criticisms start when the empirical data from which the secularisation thesis was dependent started to hint at a religious change rather than a decline; and did not take into consideration the privatisation of religion (Bader, 2014; Gorski, 2000; Davie, 2006). According to critics, secularisation theorists did not consider religion as a dynamic social force, which can evolve and mould itself into new contexts (Fox, 2018; Berger, 1999). Moreover, the thesis was considered ethnocentric because a central part is its European foundation and eventual outward spread (Fokas, 2009; Robbins & Lucas, 2007). This centralisation on the European case, created a weak explanation for the resilient role religion had in other regions of the world or Europe itself (Requena & Stanek, 2014).

Herein this academic turmoil, post-secularism emerges as a possible contextual evolution or even correction of the secularisation thesis (Gräb, 2010). When using post-secularity to understand the current European context, two realities are referred to: on the one hand, the survival of religious communities in secularising environments; and on the other hand, the existence of a change of consciousness regarding the relationship between reason and faith (Habermas, 2009). In this regard, post-secularity refers to a context that intends to understand and explain the interactions and intersections between religion and modern societies in the public sphere (Ziebertz & Riegel, 2008). Within this context, secular citizens are now obliged to express the previously denied respect for religious citizens (Habermas, 2006). As a result of religion's now vivid presence in the public sphere and recognition of religious groups, religion can be recognised as a public good (Zieberts & Riegel, 2008; Habermas, 2008b).

Post-secularism has been criticised for its normative nature, which introduces how citizens should respond to the challenges brought by the increase in general pluralism (Roldan, 2017). It has also been confronted by considering it a Eurocentric approach, as it has been argued that it can only be applied to affluent societies in Europe (Leezenberg, 2010). This idea construes societies, especially European ones, that have never been secular, conventionally religious, or post-secular; instead, the further along with modernisation, the easier it is to showcase their always existent pluralism (Ungureanu & Thomassen, 2015).

Regardless of its shortages, post-secularism brings to the table a vital notion: the normalisation of a public sphere with religion in it. As a secular configuration, it would allow the coexistence of the secular and the sacred, which together with religious accommodation could serve as a basis for the survival of the newly religiously diverse Europe. In a sense, the focus is on the rapid pluralisation of European societies and the arrangements those secular systems need to adapt.

Behind the current contexts: Church-State Relations in Europe

This section can begin with the statement that no country in Europe is post-secular. There are two reasons, firstly, there is no measurement of post-secularism in Europe, and the second is that based on other studies trying to pinpoint empirically, no country fulfils the criteria (Fokas, 2009; Roldan, 2017). Therefore, the question is not whether Europe is post-secular but rather what the Church-State models are and how the notion of post-secularism can help pinpoint current challenges.

Church-State relations influence how a government may relate to religious groups (Monsma & Soper, 2009). Four models have been related to European countries: the first one refers to countries with a state or national church such as Malta or Denmark; the second is a strict separation model, like France; the third is a preference for one or more specific religions like in Spain or Portugal (Monsma & Soper, 2009; Fox, 2015); and the final one is known as the cooperation model, where most European countries can be located.

The first model is the established church, where the state and the chosen church are seen as the two main pillars in a society (Monsma & Soper, 2009). The definition already explains that countries that follow this model do not practice secularism in their public sphere. This scenario tends to go hand in hand with a religious monopoly, either by one or a maximum of two churches. Most of the population belongs to the preferred church, which makes the entrance of new religious groups extraordinarily challenging, as they face several difficulties (Stark & Iannacone, 1994). Because of the lack of religious diversity, together with the absence of a strong public voice, governments lack an agenda for religious accommodation of other religious groups different from the established Church (Ahdar & Leigh, 2013).

The second model, separation, is characterised by a defined separation between the church and state which applies to all religious groups (Monsma & Soper, 2009; McConnell, 2000). The idea is to maintain religion as a private matter (Ahdar & Leigh, 2013), and it could be described as the empirical translation of

secularism. In its softer form, it allows religious public participation in certain areas, whereas, in its rigid form, it excludes it entirely from the public. Religious groups do not face challenges for entrance; these countries can be highly pluralistic. However, the downside is that religion tends to be pushed to the private sphere and governments reject any special treatment towards a religious group.

The third model, preferred religion, is an in-between as countries do not have an official religion but show preference towards one or two religious' groups (Fox, 2015). In this case, one religion receives the most benefits compared to the other groups present, as the state actively singles them out (Fox, 2015; Ahdar & Leigh, 2013). In this context, despite countries attempting to portray a secular front, they do not follow the neutrality principle towards religion core to the secular theory.

The fourth model, cooperation, is the one that recognises the existence and presence of several religious groups (Monsma & Soper, 2009). Because of the diverse demography, governments tend to work with accommodation as a tool for managing religious pluralism. However, they do so mainly as exceptions rather than the other forms of accommodation. This scenario is friendlier towards religious groups, and the entrance for new ones is more accessible than in other contexts. However, the model focuses on the normative part, as the empirical shows failures to accommodate and discrimination (Fox, 2019b).

The models provide the unaware eye with a starting point to understand the challenges countries face because of the presence of religion in the public sphere. They facilitate understanding the origin of those challenges, their explanatory weight on current regulations, and their historical importance and evolution over time. However, the models on their own do not offer sufficient explanations for specific cases or paradoxes within the national context (Astor, 2014). It is against this background that the question of whether secularism as a strategy can be rescued from the predicted failure (Habermas, 2008b).

Rethinking Secularism

As previously explained, EU countries are not post-secular in theory or practice, and some have not even reached secularity. Thus, the question is whether the ideas and principles brought forward by post-secularism are compatible with secularism; the proposal is to redefine the idea of secularism. It is clear that the secular notion has been heavily criticised and considered to be in crisis, while post-secularism rose as the solution (Modood, 2019). However, they might not be as different as one could think.

To properly understand the concept of secularisation, differentiation is crucial due to the multifaceted nature of its meanings and dimensions (Dobbelaere, 1981; Bader, 2014). In this vein, the idea of secularisation can be defined in three primary connotations, according to Casanova (2013):

- Differentiation of the secular sphere from religion.
- The decline of religious beliefs and practices in modern societies.
- The privatisation of religion.

The differentiation of a secular sphere refers to the separation of the state, the economy and science from ecclesiastical institutions and religious norms (Casanova, 2013). In other words, public spheres without any religious influence over their existence. The decline of religious beliefs and practices is the most used connotation of secularism, where through the process of modernisation, people change religious beliefs for science (Casanova, 2013). While the privatization of religion refers to the transition into a more private practice (Casanova, 2013). Secularisation, thus, refers to the processes that translate the idea of secularism into reality either because of religious decline, separation of spheres or privatisation of religion.

The main problem with secularism is what can be referred to as the Secularist Paradox or the Secular Imbalance (Casanova, 2006; Habermas, 2006). Religious citizens accuse the secular system of demonizing their beliefs and, in some cases, relegating them as "second-class citizens" (Rosenblum, 2000). This peculiarity refers to the fact that in the name of freedom, individual autonomy and tolerance, religious people must keep their religious beliefs, practices, and identities private which can cause severe burdens to religious people (Casanova, 2006).

Several alternative models were brought to light in response to the incompatibility of the predominantly used definition of secularism. One of those alternatives is *Open Secularism*, as Bouchard and Taylor (2008) proposed. The idea is to develop secularism that ensures equality between religious and non-religious people through state neutrality towards religion. This basis of state neutrality is similar to the model of *Religious Pluralism* proposed by McConnell (2000), with the extra step of applying that neutrality to groups and not just individuals (Walker, 2000). Another alternative is *Moderate Secularism*, which includes state recognition of religious groups and even provides support through social policy, but it maintains a firm principle of separation between religious and political authorities (Modood, 2019). These proposals encompass the ideas brought forward by post-secularism of acknowledging religious presence in the public sphere without attempting to privatise it or make it disappear.

Secularism, as seen by the diverse definitions, is multidimensional, and the focus needs to land on the proposal of state impartiality rather than on the disappearance of religion. Neutrality towards religion is crucial to solving the injustices and incompatibilities presented by the secular paradox and from general critics that focused on the lack of applicability of the theory and described a crises of secularism (Sherer, 2010; Bhargava, 2010). That means a state that holds no opinion over any religion but ensures the freedom of individuals to practice or not their religion (Modood & Kastoryano, 2006). With this change in the focal point, secularism can return to be a critical context for today's religiously pluralistic Europe.

The puzzle of religious accommodation

Although the accommodation question has been discussed for years, an official definition of the matter does not exist. In any case, there seems to be a consensual general idea of religious accommodation. Some define *religious accommodation* as an individual and fundamental right of those with strong convictions who have a burden to practice their moral conducts (Bou-Habib, 2006). Others pin accommodation as a process through which someone takes the burden away from religious people to conduct certain religious practices (Schlanger, 2014; Nussbaum, 2008). These definitions, however, are insufficient, as they fail to consider the multidimensionality of religious accommodation.

This chapter chooses to define governmental religious accommodation as a political right provided by governments through the process of public policy. Through this definition, one can consider the state as a provider of accommodation, and citizens as the ones who request it. Furthermore, by considering public policies, other factors that influence the process are also considered, such as the general search for public good without creating difficulties to others. It is also crucial to center the focus on the governmental area, as religious accommodation can also pertain to societal attitudes towards other religious groups. Finally, this definition allows governmental religious accommodation to be measurable and identified in societal contexts, thus, it extracts the concept from its supposed normative nature into a more empirical one.

There are different aspects of religious accommodation, as an interdisciplinary issue, religious accommodation comprises legal, political, sociological and even philosophical aspects (Bader, 2007). Therefore, the matrix needs to reflect this, but at the same time, carefully merge them. The aspects identified throughout the literature are four.

The first criterion to be provided is the reasoning behind whether accommodation should or should not happen (Bou-Habib, 2006; Bou-Habib, 2018; Laborde, 2017; Nussbaum, 2008; Wintemute, 2014). The second one, forms it can be provided, sees accommodation as a toolbox with different tools, so it essentially describes the tools accommodation offers (Seglow & Shorten, 2019; Jones, 2017; Kymlicka & Norman, 2000; Walker, 2007; Kymlicka, 1992; Schlanger, 2014). The third explains some contextual factors that can influence whether accommodation is used or not (Somasundram *et al*., 2017; Fox, 2015; Gill, 2008; Grim & Finke, 2006; Finke, 2013; Cumper, 2007). The fourth is the different ways groups can ask for an accommodation, based on the data provided by sociologists and political scientists (Tatari, 2009; McLennan, 2009; Knott, 2016; Vasquez & Dewind, 2014).

Criteria for accommodation

When it comes to the criterion, there are two trends of justification, the one that focuses on accommodation as a fundamental right and the one that bases it on personal integrity. It is justified as a fundamental right when there is a clash between fundamental rights or freedoms or rules, regulations, or institutions (Bader, Alidadi, & Vermeulen, 2013; Nussbaum, 2008; Eisgruber & Sager, 2007; Wintemute, 2014). This perspective is generally defended in the legal sciences, but the social sciences also touch it under the right of religious freedom (Ketscher, 2007; Gill, 2008). On the other side, integrity-based accommodation explains that a person's integrity is influenced by the capacity to fulfill their perceived duties; in that sense, not practising actual religious conduct would directly violate their integrity (Bou-Habib, 2006; Laborde, 2017). Said justification is used in the legal sciences because, in some cases, the law will clash with a person's integrity, which is maintained when a person acts by their perceived duties (Bou-Habib, 2006). It is applicable for instances in which the right to religious freedom does not protect all the diverse duties a person may have in their religion.

Forms to provide accommodation

Once it is determined whether an accommodation can be provided, the next aspect is implementing it. Despite being able to take several forms like changes in legislation, suchlike adding other faith's religious personnel to the already existing chaplaincy services (Schlanger, 2014), or the creation of new ones, like the regulation of religious slaughter in some European countries, the focus

usually lands on exemptions (Seglow & Shorten, 2019; Jones, 2017; Levy, 1997). Exemptions are seen as instruments used by the judicial system to correct existing disadvantages of one or several groups compared to the majority (Jones, 2017). The general concept of exemptions has been discussed in the legal sciences and the areas of political philosophy, principally because they can apply to non-religious cultural practices (Kymlicka & Norman, 2000). They have been a tool to equalise the field of cultural and religious practices for as long as the multicultural state existed (Kymlicka, 1992).

Contextual factors for accommodation

Based on the need for state recognition, one can pinpoint it as a crucial provider and actor that can choose one or some religions over others (Somasundram *et al*., 2017; Fox, 2015; Gill, 2008; Cumper, 2007; Lipset, 1981). This idea complies with the belief that states can have different approaches, and one approach favours one specific religious group over others (Grim & Finke, 2006). There is the idea that actors within the state behave rationally and aim to increase the state's revenue and reassure their position within the state apparatus (Gill, 2008). Therefore, they tend to make decisions that are not costly for any of their goals, nor economically or politically; these usually involve being in accord with society's majoritarian view on an issue (Gill, 2008). A second factor that can have a role in how a government regulates religion is its will and commitment towards religious freedom (Finke, 2013). However, if the state consistently complied with public opinion, accommodation would be an impossible matter. One can recognise that the state has limited resources, so that some accommodations may be denied due to their costs (Cumper, 2007).

Religious accommodation as a political right

The focus goes to the Institutionally based religious accommodation which is founded on one's religious right and the anti-discrimination principle. Even though both are categories of accommodation, they focus on the justification while the institutional one goes one step further, relating it to religious governance by states. Therefore, because institutional-based religious accommodation is provided and regulated by states (Lillevik, 2020), it can be considered a political right that forms part of the general umbrella of religious governance. It is justified through one's personal right because it builds upon religious freedom, if it does not endanger society. It is also based on anti-discriminatory principles because

the general purpose is to level the field between religious and non-religious people by eliminating burdens.

As a political right, it can be provided as changes in existing legislation, the regulation of new practices and the most common exemptions (Seglow & Shorten, 2019; Jones, 2017; Levy, 1997). Even though exemptions are the most common, countries are starting to increase regulation of religious groups, specifically minorities. Within those regulations, religious accommodation can identify three areas in practice: materials, practices, and rights. Daily or special occasion rituals need specific materials that can range from books, cups, or specific utensils; access to them is essential for proceeding with those rituals. The second area, general practices, refers to essential routines for a religious person's daily activities. These endeavours or celebrations involve a wide range of activities such as rites of passage, burial, clothing and religious symbols and dietary laws. Finally, talking about rights refers to the legitimate observance of services or practices protected under the religious freedom right, such as the access of clergy to jails, military bases, hospitals, and other public entities.

A different formula: secular religious accommodation

The type of religious accommodation described here can be categorised, as a political right based on personal religious rights and the anti-discrimination principle. It is political in that a formal state institution must provide it and adapt its organisation to relieve the burdens. It is also a personal religious right because the main reasoning is the fundamental human right of practising whichever religion one chooses if it does not endanger others or oneself. Moreover, it is anti-discriminatory because its fundamental principle is to equalise the field between religious and non-religious people, aiming at equal opportunities to live their beliefs.

With this idea of equality, religious accommodation's crucial relation with secularism can be established. As previously proposed, secularism refers to separating the political sphere from the religious one, highlighting the idea of neutrality towards religious groups and, in a sense, acknowledging their presence and respecting their rights without providing them with political power (Bouchard & Taylor, 2008; Modood, 2019). Secularism as state neutrality can come to life through religious accommodation as its primary tool to govern religious groups. Religious accommodation as a tool can be provided through changes in existing legislation, the regulation of new practices and exemptions (Seglow & Shorten, 2019; Jones, 2017; Levy, 1997).

At this moment, the redefined secularism and its principle of neutrality come into action as governments recognise the presence of religion in the public sphere, not only as a private matter. The regulation of religious practices is then, ideally, conducted through a secular decision-making process that attempts to provide equal treatment to all religious groups. Therefore, it is proposed that religious accommodation is the tool that would allow secularism to remain relevant.

Based on this context, three accommodation areas can be pinpointed: materials, practices, and rights. They cover the different needs religious people tend to ask for to conduct their practices (Knott, 2016). One of the most basic requirements for the private and public observance of religion is the accessibility to materials used for rites, ceremonies, and personal means. The second area concerns conducting the practices themselves either publicly or privately. Practices involve various activities such as rites of passage, burial, clothing, religious symbols, and dietary laws. The third area involves a legal perspective, as it involves rights. Most of them fall under the protection of the right to religious freedom, such as the access of clergy to jails, military bases, hospitals, and other public entities.

Together, those three provide a multidimensional option to identify religious accommodation empirically within secular societies' public and private spheres. Therefore, the discussion of accommodation and secularism is not separate but a conjoint one. Refocused secularism needs religious accommodation to transition into a measurable and more realistic context, and accommodation needs secularism to fit into a framework of its own.

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PART II

Practical approaches: Regulation of religions in diverse national situations

a.

The European legal perspective on governance of religion in question

CHAPTER 4

Regulating religious proselytism: The views from Strasbourg and Luxembourg

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Abstract

The right to proselytize is encompassed within the scope of Freedom of Religion or Belief (FoRB) in international law. The European Convention specifically refers to "teaching" as a form of "manifestation" of religion. It is also supported by the reference to "change religion or belief". As part of the *forum externum*, it is not an absolute right, and may be limited by the State. Domestic law might seek to protect individuals considered in some sense vulnerable against inappropriate pressure to change a religious belief. As a result, domestic and international courts are called on to decide whether an alleged interference was or was not justified in the particular circumstances. This article analyses how the European Court of Human Rights and the Court of Justice of the European Union have ruled on domestic laws and practices that prohibit or restrict religious proselytism, and the consequences of such decisions to religious minorities. We argue that both Courts have too readily accepted state justifications for measures that impact negatively on the ability of religious minorities to share their beliefs. By using a case-by-case balancing approach, they have missed the chance to provide predictable principles about the extent to which restrictions on proselytism are in accordance with the international human rights regime.

1. Definition of Proselytism

"Proselytism" is a term that often remains undefined while typically carrying negative connotations in its common use. We adopt a working definition of proselytism: expressive conduct undertaken with the purpose of trying to change the religious beliefs, affiliation, or identity of another (Stahnke, 1999, p. 255).

The definition stresses that proselytism is intentional, undertaken with a particular goal in view, and does not necessarily entail a religion to the agent/source. Although unusual, proselytism includes attempts to persuade individuals to abandon their current religious beliefs or affiliation without necessarily replacing them with those of the agent. Heiner Bielefeldt adds a "non-coerciviness" element to the definition, meaning the attempt to convert others by means of non-coercive persuasion (Bielefeldt, 2013, p. 48). In this sense, the right to proselytism is related to the right of changing one's religion, which will be addressed further in this text.

It is worth mentioning that in proselytizing religions, sharing the faith is a religious duty, rather than a matter of choice (Rivero & Moutouh, 2006, p. 523-524). As posed by Arcot Krishnaswami (1960), "while some faiths do not attempt to win new converts, many of them make it mandatory for their followers to spread their message to all, and to attempt to convert others. For the latter, dissemination is an important aspect of the right to manifest their religion or belief" (p. 32).

Therefore, for many creeds, proselytism is not something accessory, but essential to the believer's adherence to its faith. Given the centrality of proselytism in many religious traditions, conflicts are likely to arise when that component of the religious practice is excluded.

2. Proselytism in International Law

With the exception of the American Convention, which states in article 12(1) that the right to freedom of religion includes the freedom to "disseminate one's religion or beliefs," neither proselytism nor the freedom to disseminate a religion is explicitly mentioned in international instruments.

Nonetheless, the right to proselytize is encompassed within the scope of Freedom of Religion or Belief (FoRB as a shorthand) in international law. The ICCPR specifically refers to "teaching" as a form of "manifestation" of religion. If that were not the case, the "freedom to change [one's] religion or belief", which is part of the Article 18 of the Universal Declaration of Human Rights, would be likely to remain a dead letter. It is intertwined with other human rights, like freedom of association, freedom of conscience, and the principles of tolerance and pluralism.

Proselytism can also represent a clash between aspects within the scope of the same right, as freedom of religion encompasses both the freedom to legitimately disseminate religious views and the right to be protected against religious coercion. It is also a precious asset for atheists or agnostics, and for the unconcerned.

Regarding the importance of FoRB and the discretionary margin given to the States, the United Nations Human Rights Committee has stated, in its general comment n. 22, that "paragraph 3 of article 18 [limitations on FoRB] is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security" (U.N., 1993).

Specifically on the European Level, the most important religious freedom guarantee enforced by the ECtHR is Article 9 of the European Convention:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

In 2000, the European Union adopted the Charter of Fundamental Rights of the European Union, and Article 10 of the Charter echoes Article 9 of the Convention, while adding an express conscientious objection clause.

3. Proselytism in the European Court of Human Rights' Jurisprudence

Historically, cases regarding violations of FoRB were exclusively dealt by the European Commission, with an emphasis in the distinction between two dimensions of this right: "whereas its internal dimension, namely the right to have or change religion or belief, cannot be subject to any limitation whatsoever, its external aspect, *i.e.*, 'the freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance' may be restricted in some circumstances, under the conditions set forth in the second paragraph of Article 9" (Ringelheim, 2012, p. 285).

Since 1993, many cases regarding FoRB have been object of judgment by the European Court of Human Rights, which followed, generally, the same principles applied by the Commission. Some advancements have been made, as when the Court *in Hasan and Chaush v. Bulgaria* (2000) recognised that the internal dimension of FoRB does not refer uniquely to the individual, but also includes the right to take part in a religious community. For the community itself, it expresses the right to freely decide on matters concerning its doctrine, choose its leaders, and criteria for membership. Nonetheless, albeit the Court expanded the internal dimension from individuals to religious communities, it still maintains the distinction between both spheres and deems that FoRB entails a weaker protection when the religion is expressed outside the context of a community of faith (Ringelheim, 2012, p. 285).

The international courts are often called on to decide whether an alleged interference on the exercise of religion was or was not justified in the particular circumstances. This is determined according to a three part test by which the Court assesses whether the action was (1) prescribed by law, (2) had a legitimate aim, and (3) was necessary in a democratic society. Considering this threefold framework, we move on to the relevant case law.

Kokkinakis vs Greece

A Leading case on religious proselytism was *Kokkinakis* and dealt with the criminalization of proselytism in Greece.

Mr Kokkinakis, a Jehova's Witness, was convicted and arrested over an act of "proselytism", something criminalised under Greek constitutional and criminal law. He and his wife called at Mrs. Kyriakaki's home and engaged in a religious discussion with her. Her husband, a cantor at an Orthodox Church, informed the police and the Kokkinakis were arrested.

They were found guilty for attempting "[...] to proselytize (...) by taking advantage of their inexperience, their low intellect and their naivety. In particular, they went to the home of Mrs. Kyriakaki (...) and told her they brought good news; by insisting in a pressing manner they gained admittance to the house and began to read a book from the Scriptures (...) encouraging her by means of their judicious, skillful explanations (...) to change her Orthodox Christian beliefs" (ECtHR, 1993, para. 9).

It is important to note that Kokkinakis "served a total of 31 months in prison for convictions relating to acts of proselytism, conscientious objection, and holding a religious meeting in a private house" (Ringelheim, 2012).

The ECtHR found a violation of Mr. Kokkinakis' rights, but the reasoning and conclusion by the Court did not touch on the alleged abusive and illegitimate provisions of the Greek legislation. Rather, "[t]he Court reasoned that Greece's ban on proselytism had a foundation in the law, that it may have served the legitimate aim of protection of the rights and freedoms of others, but, under the circumstances of the case, the ban could not be deemed necessary in a democratic society" (Editorial, 2017, p. 79).

Therefore, the majority's decision was based on factual particularities and legitimated the law itself as providing the certainty and foreseeability required to guide potential infringers. Although in Mr. Kokkinakis favor, the decision was not celebrated as a major victory for freedom of religion or belief; most scholars perceived it as a failure of the Court to take FoRB seriously.

Larissis v. Greece

Five years later, the ECtHR found no violation of the Article 9 rights when military officers were convicted for proselytizing their subordinates. In this case, the officers were Pentecostal Christians; their subordinates were Greek Orthodox.

The Court argued that "the hierarchical structures which are a feature of life in the armed forces may color every aspect of the relations between military personnel, making it difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him. Thus, what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power" (1998, para. 51).

The court's reasoning differentiates proselytism between civilians and between military subordinates, in the sense that the principle of free exercise or free manifestation of religion can be limited when the question of relative power and vulnerability arises. Therefore, the ECtHR found that proselytism to persons who are "obliged to listen" can be qualified as improper proselytism.

There is no doubt that vulnerability is multi-faceted, and coercion or undue pressure to change one's religion or belief should not be considered as a legitimate exercise of FoRB. However, this decision suggests that every discussion about religion or other sensitive matters between individuals of unequal rank will fall within the category of coercion.

In assessing cases like this, it is crucial to notice that (1) most activities related to teaching, preaching or evangelizing – and the responses to them – are voluntary and optional – in other words, do not seek to impose any religious

influence or conversion, and (2) part of promoting pluralism, tolerance and harmonious coexistence in a society involves encouraging the individual's agency in the realm of philosophical, political and religious ideas.

Court of Justice of the European Union

In 2018, a group of Jehovah's Witnesses challenged a Finnish privacy law that prohibited them from keeping unregistered personal data gathered during their door-to-door visits. The national Finnish court eventually asked the CJEU to determine whether the data collected in door-to-door evangelism fell under the umbrella of the privacy directive and whether the Jehovah's Witness could be considered a data controller and therefore subject to the EU Directive.

The Court stated that European Union Data Protection Directive must be interpreted as meaning that the collection of personal data by members of a religious community in the course of door-to- door preaching and the subsequent processing of those data does not fall under the exemptions to the scope provided by the first or second item of that article, which excluded data from public security, defence, state security, criminal law, or "purely personal or household" activities.

In sum, the Court decided that the practice of keeping notes about the families and private parties they visited during the proselytism endeavours did not amount to "personal data," such as diaries; therefore, the data protection rules applied to the Jehovah's Witnesses' proselytizing activities.

For instance, the Witnesses kept a list of contacted people who did not want to be contacted again. Following the decision, the religious community was not exempt from compliance with the EU directive just because the data were collected as part of their missionary work. According to Pin and Witte Jr (2021), this case "demonstrates the spillover effects of privacy regulations on religious organizations" and "reaches more deeply into a core component of the Jehovah' Witnesses' activities, namely keeping track of visits in order to facilitate later religious activities within a certain area where there is no tangible harm to a victim" (p. 259).

4. Critical analysis

In this last chapter, we focus on two commonly (even though implicitly) evoked reasons for restriction of religious expression, with the objective of developing a critical analysis of those.

Secularization Thesis

It seems that the secularization thesis has great influence over the Courts' case-law. As argued by Ringelheim (2012), "Underlying the Court's case law is the idea that religion is primarily an inward feeling; a 'matter of individual conscience'. It can be exteriorised through rites and acts of cults, but these are in principle accomplished within the family and 'the circle of those whose faith one shares'. The case law strongly suggests that manifestations of religion outside this domain are considered as of secondary importance. Faith is normally expressed in a specific, discrete, domain, which is distinct from the rest of social life" (p. 291).

Proponents of the secularization thesis have been increasingly arguing not only in favour of acknowledging the necessity for the State to be conducted by public reason, but also that religion would be banished to the private sphere of individual conscience, becoming irrelevant to the society as a whole (Casanova, 1994). Nonetheless, empirical researches developed on modern societies widely defy this assumption of the inevitable privatization of faith (Berger, 1999).

Moreover, this thesis is intensely rooted in John Rawls' idea that all discussion occurring in the public sphere should be dictated by norms of public reason, and not of morality or religion. However, it is relevant to observe that Rawls himself, in a later moment of his life, adjusted his claim and conceded that, in some situations, religious reasons could be presented in the public sphere, in informal public spheres (Rawls, 1997). In a similar line, Habermas proposes the idea of a "post-secular society", claiming that, in non-official settings, if religious citizens are not able to find secular translations for their ideals, it must be allowed for them to communicate those through a religious language (Habermas, 2006).

Thus, "privatization of religion is not necessary to modernity: provided certain conditions are met, religious groups may enter the public sphere and assume the role of civil society actors without endangering individuals' freedom and modern differentiated structures" (Ringelheim, 2012). Bielefeldt (2013) highlights the need for a distinction between political secularism and doctrinal secularism.

This idea also assumes a clear and distinct line between the private and public spheres, intimately related with the aforementioned distinction between the external and internal dimensions of FoRB. However, both these assumptions have been often questioned by modern scholars in the field of sociology of religion. In the view of several religious groups, the external manifestation of the faith – through proselytism, preaching and conducts dictated by certain moral values –, is intrinsically inseparable from its internal dimension.

For a considerable amount of creeds, religious practices, like clothing or dietary requirements, affect the whole believer's life, wherever they might be (Asad, 2003). The more restricting notion that FoRB only entails one's right to

believe, and not to practice, is very questionable, since the sphere of the mind is, by its own nature, inescrutable to the State. As posed by Martin Scheinin (1992), the difficulty found by states is not their citizens' freedom of thought, but to allow them to act in accordance with those thoughts.

Lastly, one must not ignore that blanket laws that prohibit proselytism tend to maintain the status quo, preserving "a certain pattern of religious affiliation by limiting the opportunities for conversion", and, therefore, "such a provision will naturally favor the majority religious group (Stahnke, 1999, p. 268).

Protection of the target

The protection of the rights of the target of proselytism is also usually evoked as a basis for restriction on FoRB. In this context, it is frequently claimed that people should have the right to be "left alone", in the sense of not being exposed to religious proselytism.

The point is: many still confuse freedom *of* religion as freedom *from* religion (Guiora, 2009). Freedom of religion certainly has a negative component, as do other freedoms such as association, assembly or speech. "The reason is that one is not free to do something unless he is also free not to do it" (Bielefeldt, 2013, p. 50). Nonetheless, when its negative dimension is maximized isolatedly from its broader meaning, it tends to authoritarian postures incompatible with pluralist societies. It is not a human right to be protected from the exposure to any other religion.

It is common, for example, to limit proselytism when the target is part of a minority group, such as indigenes, based on the notion that these groups' religions are part of their own cultural identity and, therefore, proselytism would violate their right to identity preservation. This is something important to ponder, and the particularities of minority groups must be acknowledged, since universalistic laws may, indeed, suppress minority religions (Rosenblum, 2000). Similarly, some researchers argue for the State intervention to protect minorities especially against universalistic religions' proselytism (Mutua, 2004).

One must also take into consideration, though, that "limiting the source may also restrict the target as the target is entitled to the freedom to change religion and the freedom to receive information", which can "move a state in contradictory directions" (Stahnke, 1999, p. 281). Similarly, the European Court has already stated that the right of a person to adopt some views implies the right to "take cognisance" of those views (ECtHR, 1994. *Otto-Preminger-Institut v. Austria*, para. 55).

Once more, it seems that religious ideologies tend to be considered, contradictorily, as less relevant and more dangerous than other cultural values. "If people are continually confronted with information designed to influence their political opinions, their moral values, and even their consumer choices, it might be inconsistent to otherwise overly restrict information designed to influence their religious choices (Stahnke, 1999, p. 287).

It is also worth questioning whether the criminalization of proselytism, be it general or specific, is the most humanitarian and reasonable way of protecting minority groups from cultural violation. When faced with a collision of human rights, the decision must attempt to preserve both rights as much as possible.

Moreover, considering the centrality of the duty to share the faith to the believer's identity, it is often observed that religious groups will not refrain from the activity regardless of criminal consequences, as noted in Kokkinasis' case. Therefore, criminal sanctions tend to not restrain believers nor protect the minority communities.

Conclusion

We argue that both Courts have too readily accepted state justifications for measures that impact negatively on the ability of religious minorities to share their beliefs. So far, the Strasbourg Court has issued much more substantial case law on FoRB, than the Luxembourg one.

Since the first case, in 1993, Kokkinakis case, the Strasbourg Court has missed the chance to provide a coherent response about the extent to which restrictions on proselytism are in accordance with the Convention. Moreover, the Court has drawn a distinction between "proper" and "improper" proselytism, but has not defined what acts of proselytism constitute an illegitimate exercise of FoRB.

Since 2017, however, the Luxembourg Court has issued landmark rulings on FoRB, and has exchanged the controversial "margin of appreciation" for decisions that touch on longstanding church-state relations in the European Union.

It is worth bearing in mind the structure and jurisdiction of both Courts. The ECtHR, sitting in Strasbourg, has jurisdiction over the forty-seven European countries of the Council of Europe. The Court of Justice of the European Union, sitting in Luxembourg, has jurisdiction over the twenty-seven Member States in the European Union (EU).

Unlike the European Court of Human Rights, the Court of Justice's has a distinctive feature; its decisions immediately bind all EU Member States and preempt conflicting local laws. Moreover, as happened with the Finland's case mentioned before, local state courts may and regularly seek advisory opinions from the latter on prevailing EU law before resolving local cases before them.

The CJEU has often started with relevant ECtHR case law, picking up where the ECtHR left off and then casting its rulings in the "hard law" terms with which it operates. If this pattern continues, the CJEU will play an increasingly vital role in shaping religious freedom protections and informing religion-state relations in Europe.

We agree with John Witt Jr and Andrea Pin (2021) that "balancing countries with very different sensitivities on the topic has led to a case-by-case balancing approach, rather than a set of broader and predictable principles on proselytism" (p. 624).

The lack of a legal comprehensive framework on proselytism is likely to be filled by the Luxembourg Court in the coming cases. For instance, whether the very principle of applying a criminal statute to proselytism is compatible with Article 9 of the Convention is a question still unanswered in the realm of international human rights law.

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CHAPTER 5

Separate opinions at the European Court of Human Rights: Ideological divisions about the regulation of religion?

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Introduction

Since the *Kokkinakis v Greece* case, the European Court of Human Rights (hereafter ECtHR) has developed an abundant case law about freedom of religion. Most religious cases are analysed doctrinally and debated in civil society. This is understandable since "religion is one of the most debated topics of this era in Western societies" (Brems & Ouald-Chaïb, 2019, p. 369). According to the Court itself, religious beliefs are indeed "one of the most vital elements that go to make up the identity of believers and their conception of life."[1] With its case law, the Court plays a significant role in the legal regulation of religion in Europe.

Thus, it is not a surprise that judges of the ECtHR often choose to write separate opinions when they want to express their disagreement with the solution reached by the majority or when they wish to reinforce the majority's decision (Rivière, 2004). In a dissenting opinion, judges explain why they disagree with the majority's solution[2]. On the contrary, a concurring opinion 'is written by one of the judges forming part of the majority and serves to provide for different, or additional, legal reasons to support the conclusion' (Raffaeli, 2012, p. 8).

[1] ECtHR, *Kokkinakis v Greece*, 25 May 1993, § 31.

[2] There are also partially dissenting opinions and partially concurring opinions, as well as opinions that are a mix of both. Judges can also write a statement.

This paper focuses on separate opinions that judges of the ECtHR have written in religious cases. The hypothesis is that an in-depth reading of separate opinions, especially dissenting ones, can reveal ideological divisions that pervade religious case law at the ECtHR and the regulation of religion. The analysis distinguishes between conservative and liberal ideologies. Religious cases involve more cases than those falling in the ambit of article 9 of the European Convention of Human Rights. There are also cases in which the claimant invokes a fundamental right in a religious context[3].

The following section begins with a contextualisation of separate opinions in courts and digs into the scientific literature concerning ideology and separate opinions (I). Then, the method of analysis is introduced (II). The third section uses the conservative-liberal frame to unfold ideological divisions about religion and its regulation by the Court (III).

The rationale for separate opinions at the European Court of Human Rights

Article 45 of the European Convention on Human Rights provides that "if a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.' This mechanism is 'a variant of the common law tradition" (White & Boussiakou, 2009, p. 39).

In short, the right to write separate opinions leads to a "better argumentative quality" (Mastor, 2012, p. 88) of the decision. According to Canadian Judge Claire L'Heureux-Dubé (2000), dissenting opinions "may enhance the judiciary's legitimacy by preserving and strengthening judicial independence, by fostering collegiality among judges and by enhancing the coherence of courts' decisions" (p. 512-513). Former Judge Ruth Bader Ginsburg (2010) considers that dissenting opinions carry first and foremost an "in-house impact" (p. 3). Dissenting opinions can help to reach a consensus or, on the contrary, accentuate dividing lines among judges (Paulus, 2019, p. 3-4).

When fundamental rights are at stake, such as freedom of religion, the right to adopt separate opinions is even more critical. Dissenting opinions are indeed valued for the defence of a variety of ideologies. According to Justice Jesse Carter (1953), dissenting opinions "give expression to social, economic and political philosophies that (differ) from those subscribed to by the majority" (p. 123).

[3] See: ECtHR, *Obst v Germany*, 23 September 2010; ECtHR, *Fernandez Martinez v Spain*, 12 June 2014.

In this regard, some authors confirm that the decision to write a dissenting has an ideological dimension. Previous research in the US has shown that ideological distance is likely to increase the probability of judicial dissent in certain circumstances (Epstein *et al*., 2010). In other words, the ideological position of the judge in the Court influences the decision to dissent (Mak & Sidman, 2020). Furthermore, empirical research in the US has shown that judges can be categorized into left-wing and right-wing ones (Pritchett, 1943) or that the ideological composition of a court is likely to influence the outcome of death penalty cases (Beim & Kastellec, 2014).

Concerning constitutional courts, Benjamin Bricker (2017) shows that "the further away judges are from the ideological median judge in the panel, the more likely they are to dissent from the opinion" (p. 184). Just like constitutional issues, cases brought in front of the ECtHR require the interpretation of open-handed provisions and have policy connotations. The ECtHR bears thus similarities with constitutional courts (Greer & Wildhaber, 2013).

From the literature reviewed here, it results first that separate opinions do have an ideological component. Of course, this does not mean that ideology is the only element involved in separate opinions, but it can provide an additional level of understanding. For instance, a legal analysis of religious cases concluded that what is at stake in dissenting opinions is 2the interpretation of freedom of religion' and 'the nature of the review itself" (Van Bijsterveld, 2007, p. 226).

Methodology of analysis

According to statistics, 14.5% of Grand Chamber judgements were unanimous between 1999 and 2007, while dissenting opinions were present in 72% of the cases (White & Boussiakou, 2009, p. 50-51). By comparison, when taking the sample of cases involving religion, 34% of them include a dissenting opinion[4]. The percentage rises to 69.5% if Grand chamber judgements are isolated[5]. Concurring opinions are much less frequent than dissenting opinions. There are indeed 17% of religious cases that have a concurring opinion but 43% if Grand chamber judgements are considered alone[6].

[4] According to HUDOC database, there are 190 judgements involving freedom of religion. 65 of them have a dissenting opinion. Numbers on the 25 May 2021. The proxy used is the keyword '(Art. 9) Freedom of thought, conscience and religion'.

[5] 23 Grand chamber judgements involve freedom of religion. 16 of them have a dissenting opinion.

[6] 34 judgements involving freedom of religion have a concurring opinion. 12 Grand chamber judgements involving freedom of religion have a concurring opinion.

There are several ways to measure ideology in courts (Bailey, 2016). In order to examine whether separate opinions reflect the ideological positions of judges, I need to determine what ideology is. Ideologies 'are primarily some kind of "ideas", that is, belief systems' (Van Dijk, 2006, p. 116). According to Jon Gerring (1997), the definition of ideology could be "a set of idea-elements that are bound together" (p. 980). Language is particularly relevant for the analysis of how ideology is conveyed (Weiss & Wodak, 2003, p. 14).

The methodology is to identify direct expressions of ideology in concurring and dissenting opinions. Indeed, "it is there, in their separate opinions, that judges present their specific individual takes on the case and in so doing, intentionally or not, also reveal their ideological perspective on the questions raised" (Avbelj & Šušteršič, 2019, p. 134). However, ideology does not necessarily mean a departure from the law (Fischman & Law, 2009, p. 141).

Several textual markers can be highlighters to reveal ideologies, such as the use of agency in writing, passive voice for negative perceptions, the lexicon, or disclaimers (Van Dijk, 1995, p. 24-27).

In this research, I will mainly rely on the distinction between a conservative and a liberal position to carry out the analysis. The conservative-liberal distinction can be explained as follow:

> *The conservative element is concerned with the preservation of existing institutions and attaches great importance to history, tradition and established social values. (...) Tough conservatives believe that most people are capable of looking after themselves and should be encouraged to do so. (...) Whereas the ideal world of the conservative is one in which everyone's behaviour conforms to the standard pattern for people of his group or class, the liberal welcomes diversity. Unusual behaviour is seen not as a threat, but as a contribution to a rich tapestry of action and self-realisation which the liberal wishes to see encouraged (Merrils, 1993, p. 238-241).*

When considering a subject such as religion, social ideologies are first and foremost at stake. In short, "*social ideologies* emphasize traditional moral and cultural issues (with conservatives and liberals favoring greater vs. lesser restriction, respectively, on personal freedom in moral and cultural domains)" (Crawford *et al.*, 2017).

Analysis of separate opinions

This section proceeds to a textual analysis that looks for excerpts directly revealing ideological opinions. I begin with the conservative ideology (A) and then look at the liberal ideology (B). The analysis mainly focuses on Grand Chamber judgments. Indeed, they are the ones that involve the fiercest ideological debates about religion and its regulation.

Conservative ideologies at the ECtHR

The defence of traditional religions is present in several separate opinions. For instance, in *Folgero v Norway*, dissenting judges consider that Christianity *must* be present in the school curriculum. They contend that:

> *one cannot overlook the many centuries of Norwegian history. Christianity has a very long tradition in Norway, both as a religion and a school subject (…). This aspect must be reflected in the curriculum, which must at the same time be inclusive and broad*[7].

The ideology is conservatism because it defends the place of the country's traditional religion. Some expressions reinforce the argument, such as "many centuries", "Norwegian history" or "very long tradition". Besides, the dissenting judges do not simply consider that Christianity *can* be present in the curriculum but that it *must* be. In the case of *Johnston and others v Ireland*, an ideological defence of established traditions is also present in Judge Pinheiro Farinha declaration. According to him:

> the following sentence should have been added to sub-paragraph (b) of paragraph 55 of the judgement: 'The Court recognises that support and encouragement of the traditional family is in itself legitimate or even praiseworthy[8].

[7] ECtHR, *Folgero c. Norway*, 29 June 2007, dissenting opinion of Judges Wildhaber, Lorenzen, Birsan, Kovler, Steiner, Borrego Borrego, Hajiyev and Jebens, 50. Emphasis added.

[8] ECtHR, *Johnston and others v Ireland*, 18 December 1986, declaration of Judge Pinheiro Farinha, 29.

This sentence clearly supports the traditional socio-religious family model and is thus conservative. Indeed, the Judge does not simply affirm that states can defend the traditional family but that doing so is something to encourage. Then, the conservatism-liberalism distinction can be helpful for the study of judgments involving the issue of religious diversity. For instance, in *Izzettin Dogan v Turkey*, Judge Vehabovic takes a clear position concerning religious diversity:

> In today's world there are many deviant forms of religious practice and belief which should never obtain legitimacy and, by means of such recognition, the possibility to spread these deviant ideas and ideologies[9].

By attacking "deviant" religions, he takes a position related to conservatism and implicitly defends established religions that are recognised against new religious movements. Indeed, Europe faces a redesign of the religious landscape with the rise of several new minority movements while established religions decline (Ringelheim, 2010, p. 518).

Sometimes, a conservative opinion might overlap with a defence of judicial restraint, as in *Hamidovic v Bosnia and Herzegovina*. Judge Ranzoni writes that:

> the Strasbourg Court has to show a certain restraint when examining whether decisions taken by national courts are compatible with the State's obligations under the Convention, *in particular* when reviewing decisions in the area of religion. The domestic situation is likely to reflect *historical*, *cultural*, political and *religious sensitivities*, and an international court is not well placed to resolve such disputes[10].

Here, the opinion defends judicial restraint, which implies less regulation from the ECtHR, but justifies this position with a reference to the particular history and culture of the state. The emphasis on religion is also quite significant. Dissenting opinions are also quite valuable when there is a conflict of rights, as in *Eweida and others v The United Kingdom.* Ideological arguments are present in the dissenting opinion of judges Vucinic and Gaetano. The two judges manifest an unmistakable position in favour of religious objection and show that they prefer religious rights over non-discrimination based on sexual orientation:

[9] This quotation can also be found in ECtHR, *Religious community of Jehovah Witnesses of Kryvyi Rih's Ternivsky district v Ukrain*e, 3 September 2019, dissenting opinion of Judge Vehabovic, 21.

[10] ECtHR, *Hamidovic v Bosnia and Herzegovina*, 5 December 2017, dissenting opinion of Judge Ranzoni, § 6. Emphasis added.

> In the third applicant's case, however, a combination of back-stabbing by her colleagues and the blinkered political correctness of the Borough of Islington (which clearly favoured "gay rights" over fundamental human rights) eventually led to her dismissal[11].

Again, the opinion defends an established social order. The opposition between "fundamental rights" and "gay rights" shows an implicit hierarchy between certain competing values. The language displays a certain hostility towards non-discrimination based on sexual orientation (McRea, 2013).

Finally, ideological positions can sometimes be revealed or highlighted by the tone of the dissenting judge in a quite explicit manner. The most topical illustration is perhaps the concurring opinion of Judge Bonello in *Lausti v Italy* about the presence of crucifixes in classrooms. The expression of Judge Bonello is self-speaking:

> before joining any crusade to demonise the crucifix, we should start by placing the presence of that emblem in Italian schools in its rightful historical perspective. (...) The Court has been asked to be an accomplice in a major act of cultural vandalism[12].

Again, the defence of history and culture is central to the argument, which is a feature of conservatism. The argument is reinforced by words such as "demonise" or "crusade". The conservative position of Judge Bonello is highlighted by the lexicon surrounding the word 'cultural' and by its frequency. The word appears ten times in the opinion and always in a positive form[13]. His position consists, thus, in a defence of national traditions against the intervention of the Court (Zucca, 2011).

To conclude this section, when the Court judged the *Kokkinakis v Greece* case, judges wrote no less than five separate opinions, two concurring and three dissenting. The depiction of the facts of the case reflects an ideological approach of freedom of religion and, more specifically, of proselytism from minority religious movements. A comparison of the separate opinions of Judges Martens and Valticos is insightful:

11 ECtHR, *Eweida and others v United Kingdom*, 15 January 2013, dissenting opinion of Judges Vucinic and Gaetano, 50.

12 ECtHR, *Lautsi and others v Italy*, 18 March 2011, concurring opinion of Judge Bonello, 38.

13 For instance: 'part of European cultural heritage', 'symbol of European cultural continuity' or 'rob the Italians of part of their cultural personality'.

> We have a militant Jehovah's Witness, a hardbitten adept of proselytism, a specialist in conversion, a martyr of the criminal courts whose earlier convictions have served only to harden him in his militancy, and, on the other hand, the ideal victim, a naïve woman, the wife of a cantor in the Orthodox Church (if he manages to convert her, what a triumph!). He swoops on her (...) and, as an experienced commercial traveller and cunning purveyor of a faith he wants to spread, expounds to her his intellectual wares cunningly wrapped up in a mantle of universal peace and radiant happiness[14].
>
> What occasioned this debate was a normal and perfectly inoffensive call by two elderly Jehovah's Witnesses (the applicant was 77 at the time) trying to sell some of the sect's booklets to a lady who, instead of closing the door, allowed the old couple entry (...)[15].

What is quite interesting in these extracts is that the opposition between the judges does not pertain to the solution to adopt but to the understanding of the facts. A comparison of the use of the word 'proselytism' confirms the analysis. In Judge Valticos' opinion, several strong and pejorative words are in its proximity, such as 'militant', 'hardbitten', 'martyr', 'abuses' or 'corruption'. None of these words is present in Judge Martens' opinion.

According to Bruinsma and de Blois (1997), the opinion of Judge Valticos is a striking illustration of conservatism and national bias (p. 184). The mention that the "victim" was "the wife of a cantor in the Orthodox Church" stresses the conservative dimension of the opinion since the Orthodox Church is the main religion in Greece. This argument bears "traces of a predominant Greek public opinion on jws" (Fokas, 2017, p. 251). On the contrary, the opinion of Judge Martens shows a more positive attitude towards Jehovah's Witnesses and proselytism, which is thus more liberal. The following section examines other separate opinions that display a liberal ideology.

Liberal ideologies at the ECtHR

First, a case that greatly the Court is *Fernandez Martinez v Spain.* The issue was the firing of a religion teacher because he was a partisan of the "optional celibacy"

[14] ECtHR, *Kokkinakis v Greece*, 25 May 1993, separate opinion of Judge Valticos, 28.

[15] ECtHR, *Kokkinakis v Greece*, 25 May 1993, separate opinion of Judge Martens, 30.

for priests. While nine judges concluded that there was no violation of article 8 of the Convention, eight judges took the opposite position. This division led to the adoption of several dissenting opinions. In one of them, Judge Dedov defended a clear ideological position about the celibacy of priests:

> If the Convention system is intended to combat totalitarianism, then there is no reason to tolerate the sort of totalitarianism that can be seen in the present case. Indeed, for centuries celibacy has been a well-known and serious problem for thousands of priests who have suffered for their whole lives while concealing the truth about their family life from the Catholic Church and fearing punishment (...). I believe that optional celibacy is the best way out of this problem and that it could also – I hope – serve as a preventive measure against the sexual abuse of children by members of the clergy in the future[16].

This extract is a vibrant positioning against the celibacy of priests, which raised criticisms from observers (Cranmer, 2014; Kiska, 2014). Such a position is liberal and against the established social order. Judge Dedov uses the word "celibacy" five times, four of which directly critique this principle[17]. He shows that he considers the celibacy of priests as an element of the past. The rest of the argument relies on terms that bear a negative implication, such as "totalitarianism", "suffered" or "fearing".

To find a liberal separate opinion about religious diversity, the best case to look at is *Leyla Sahin v Turkey*. While the majority ruled that the prohibition of the headscarf at university respected the Convention, Judge Tulkens defended the opposite. She takes a clear position in favour of the right of women to wear the headscarf:

> What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to. (...) Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. "Paternalism" of this sort runs counter to the case-law of the Court[18].

16 ECtHR, *Fernandez Martinez v Spain*, 12 June 2014, separate opinion of Judge Dedov, 64-65.

17 See: 'for centuries, celibacy has been a well-known and serious problem' or 'the outdated rule of celibacy'.

18 ECtHR, *Leyla Sahin v Turkey*, 10 November 2005, dissenting opinion of Judge Tulkens, 48.

The criticism of "paternalism" and the defence of non-discrimination of women favours a more liberal regulation than conservative. In the conflict between State prohibition and non-discrimination, it is the second that takes precedence in her reasoning, showing again that she welcomes religious diversity. Another example of liberal argument is the defence of minority religions against "the dictatorship of the majority" by Judge Spano:

> courts, whether national or international, like this Court, have the duty to review and detect, if possible, whether the imposition of measures, although widely accepted in the legislative forum, are triggered by animus or intolerance towards a particular idea, view or religious faith[19].

By doing so, Judge Spano defends minority religions against legislative measures, which is a way to protect diversity. Hence, this argument is more liberal.

Conclusions

From the review carried out in this paper, separate opinions revealing ideological opinions are not numerous in religious matters. But they exist. The *first conclusion* is that *some* judges *sometimes* take clear ideological standpoints when religion and its regulation are at stake. The reading of separate opinions has shown that ideology is primarily visible in certain emblematic cases that have led to many debates. Several of these cases involve a conflict of rights (Zucca, 2008).

The *second conclusion* is that the number of occurrences of a word and its environment in a separate opinion are thus relevant elements to identify or confirm an ideological argument. However, these textual markers are mainly discernible in separate opinions that already contain explicit ideological arguments. In addition, these textual markers also depend on the writing style of judges. Thus, they are relevant as a confirmation tool but probably insufficient if used alone.

In the sample of cases studied here, the *third conclusion* is that we tend to have more conservative opinions than liberal ones, at least when religion is at stake. An explanation for this difference is perhaps that judges write more dissenting opinions than concurring ones. Since the case law of the Court tends to be progressive, it can be expected that many dissents adopt a conservative position to counter this tendency. Furthermore, the *fourth conclusion* is that there are more conservative opinions when the status of traditional religions is questioned, but that liberal opinions are more present to protect minority religions.

[19] ECtHR, *Dakir v Belgium*, 11 July 2017, concurring opinion of Judge Spano joined by Judge Karakas, 19.

The review carried here highlights the fact that there is an ongoing debate at the ECtHR and that religious cases rarely lead to a straightforward solution. This is particularly illustrated by the fact that cases with the most separate opinions are often the ones in which judges display ideological arguments. These separate opinions have thus critical importance and call for more study. Indeed, "it is the separate opinions where the Court's voice really comes to life. Separate opinions have been conversational, sophisticated, punchy, innovative, literary and polemical, on issues of great political importance" (Letsas, 2011, p. 309).

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b.

The impact of the regulation of religion on religious groups

CHAPTER 6

Culturalized religion in Denmark: Legal and social regulation of Christmas in public schools

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Introduction

Recently, *culturalized religion* has emerged as an important category of religious identification whose character is primarily cultural and thus largely divorced from belief in religious dogma or participation in religious rituals (Astor & Mayrl, 2020, pp. 223-224). Canadian sociologist Lori Beaman has argued that the 'culturalization of religion' (or the transformation from religion to culture) could be seen as a way of regulating religion, which offers majority religion a place in the public sphere. She also argues that constructing religion as culture is a manoeuvre with costs, particularly for those for "whom Christian symbols and practices are more than relics" (Beaman, 2020, p. 131). Similarly, German political sociologist Christian Joppke finds that while the culturalization of religion craves out a privileged role for Christian symbols in Western Europe, it is not a process in the interest of religions. The churches do not like it, he claims, because "the notion of Christian identity without a Christian faith 'makes no sense'" (Joppke, 2018, p. 240). Hence, Joppke states that "culturalized religion marks the ultimate victory of secularization as the religionist's true enemy, the Christian not less than the Muslim" (*ibid.*). Thus, culturalized religion can provide religious traditions, history, symbols and practices new life and legitimacy within secularly defined public domains, however, it may also promote the diminishment of religion by

ignoring it as a lived, contested, historically produced phenomenon (Beaman, 2020, p. 131). However, analysing how religion, and particularly practices related to Christmas, is regulated legally and socially in public schools in Denmark, we will add to research showing how culturalized religion differs and is shaped by specific socio-historical contexts. In particular, by analysing how different modalities of culturalized religion are regulated legally and socially in public schools in Denmark, we will argue that the Danish case exemplifies that culturalized religion represents 'proper' lived religion making sense in the public sphere and for religions.

Analysing culturalized religion implies examination of how a majority religion is positioned legally and socially within the context as issue. Denmark is one of the few national states where a majority church can be categorized as a state church. The Evangelical Lutheran Church in Denmark (ELCD) is often referred to as 'the folk-church' and constitutionally, legislatively and executively entangled with the state (Kühle, Schmidt, Jacobsen, & Pettersson, 2018). As in other European countries, Denmark has become more religiously pluralistic and secular, but contrary to the trajectories in most of Europe, culturalized religion is almost uncontested in Denmark. Even when compared to other Nordic countries, culturalized religion in Denmark is largely taken-for granted by the state, and the majority church is more approving than critical to its manifestations. Hence, Christmas in schools is a well-suited case because it enables observation of how the phenomena of culturalized religion plays out legally and socially in everyday life in Denmark.

Analytical framework

Sociologists Avi Astor and Damon Mayrl propose to study culturalized religion through its modalities. C*onstituted culture* is collectively produced and relatively stable but schematic semiotic structures, cognitive schemata, and value systems, not necessarily consciously acknowledged as religious by individuals or institutions (Astor & Mayrl, 2020, p. 212). As such, it is "inscribed in the political and legal architecture of modern society in ways that we typically do not recognize" (Astor & Mayrl, 2020, p. 214). However, constituted culturalized religion also has the capacity to emerge through creativity. Referring to Bourdieu and Sewell, they point out that culture once externalized is transposable, "allowing cultural shemas or practices to spread beyond the context in which they were initially developed" (p. 215).

Pragmatic culture primarily captures how religion is defined as culture by actors promoting concrete political projects. Thus, a conscious discursive framing where religion is understood as culture for instrumental purposes. As example

Astor and Mayrl point to how Danish mainstream politicians have positioned Christianity as central to Danish culture, as opposed to Islam (Astor & Mayrl, 2020, p. 216). According to Astor and Mayrl, the pragmatic modality redefines religion as culture in a way that "offers a means of providing majoritarian religions with the rulings and policies they prefer, while upholding the letter of laws mandating neutrality among majority and minority religions" (p. 217).

*Religion as identit*y captures aspects of culturalized religion that are primarily communal, often termed as "belonging without believing", where makers of belonging remain significant as emblematic markers of collective identity, but most often without a deeper religious participation (p. 217). Astor and Mayrl argue that notions such as "cultural history," "nostalgia," "vicarious religion" can be applied beyond studies of majorities. Conditions that reinforce cultural, religious identities, such as ethnoreligious conflicts and extended periods of oppression and exclusion, are also relevant to understand how minorities might construct their religious identities as culture (p. 218).

We employ this threefold analytical framework in a meta-analysis of quantitative and qualitative research on Christmas in Danish schools, as well as some media cases, emphasizing how the different modalities may reinforce, work as resources or destabilize one another (Astor & Mayrl, 2020). Our main analytical target is how Christmas worship services, offered to local schools by the majority church, the ELCD, are legally and socially regulated. Opting for a dynamic analysis of the complexity of culturalized religion, our analysis is unique by addressing how religion is regulated legally and socially in schools in Denmark from a wide range of perspectives and actors: state authorities, school leaders and teachers, non-Christian minority pupils, pastors in the ELCD. Finally, we examine the dynamic between the different actors in one specific media case caused by a school cancelling the annual Christmas worship service.

Legal regulation of Christmas in Danish Public schools

Public schools are obliged to introduce pupils to Danish culture and history (Law on Public Schools Ch. 1 §1), in which the Evangelical-Lutheran majority religion unquestionably plays a tremendous role. In line with this, Religious education (RE) is taught with a "main knowledge domain when teaching Christianity" being "the Evangelical-Lutheran Christianity of the Danish Folk-church" (Law on Public Schools § 6). This expression as well as the name 'Kristendomskundskab' ['Knowledge about Christianity'] stresses how the topic is knowledge-based (Undervisningsministeriet, 2019).

Teaching is however not devoid of a religious dimension as a "life philosophy-existentialist" approach in which pupils is to learn "about but also from religion(s)" adds a certain "pro-religious and Christian-theological" dimension to the teaching (Kjeldsen, 2016, p. 149). Exemption from this otherwise mandatory subject is possible, yet alternatives for pupils with other religious backgrounds or no religious affiliation are not provided.

The emphasis on knowledge clearly resonates with Astor and Mayrl's modality of constituted culture, but the explicit confessional boundaries of the school as such and RE in particular as well as the possibility of exemption suggest that more is at play. The school also aims to nurture a specific culturalized religious identity. The ambivalent interplay between culturalized religion and the Lutheran church as a faith community clearly plays out in the rules governing the school participation in Christmas services. In a Q&A section on the website of the Ministry of Education, it is explained that at Christmas the individual school may decide to carry out activities with a religious content as part of the school's teaching, including joint events, to the extent that the activities are organized in a way that is non-preaching (Undervisningsministeriet, 2017).

It is added that the distinction between preaching and non-preaching concerns the presence of an intent to influence the pupils in a specific religious direction and that the assessment will depend on the specific circumstances and ultimately rests upon the school leader. In addition, it is emphasized that it is always possible to receive total exemption from participating in a Christmas event in a church regardless of whether it constitutes a service *i.e.*, it is not enough to ask the pupils to participate passively or to not engage in prayer or song (ibid). The potential tensions between constituted culture and culture as identity is thus solved through an emphasis on the duty of the school to prevent the enforcement of culture as identity upon pupils and the freedom of pupils to reject any such influence if they find it to be present even at an event that the school leader has assessed as religious, but non-preaching.

Thus, Christianity is inscribed as constituted culturalized religion in the legal architecture of Denmark, enabling Christmas activities as part of school life in Denmark.

School leaders and teachers' social regulation of Christmas

Even though the state by regulation offers the majority religion a place in schools, schools in Denmark are relatively independent agents with a strong secular identity. The relative autonomy of local schools means that it is the responsibility

of local school leaders and teachers to regulate the presence of religion in such a way that school harmony and cohesion is not challenged by religious dissonance. Parents have a right to exempt their children from attending the RE subject, but since 2014, a new procedure decided by the Minister of Education obliges parents who want exemption to attend a meeting with the school leader. At this meeting, parents receive information about the RE subject as a non-confessional subject. According to school leaders interviewed by Jensen, a meeting leads to fewer exemption requests, also at schools with a significant number of pupils with a Muslim background (2019, p. 137).

The Minister of Education, as well as the school leaders, thus perceive exemption not as a principal question about basic human rights, but as a question of providing information about RE as non-confessional subject. However, the parents' "misconception" is highly understandable. In most places in the world, a school subject explicitly linked to a specific religious institution would be considered confessional. However, in the Danish context, teaching Christianity as the Evangelical-Lutheran Christianity of the Danish Folk-church (cf. the law), is interpreted as culturalized religion providing all Danes with a collective identity, not requiring confession or individual faith.

The link between the formal aim of the RE as subject and school activities during Christmas, and the low number of exemption requests from minority pupils, is visible in a study by Johnsen and Johansen (2021) on how Danish school leaders understand Christmas, one school leader explains:

> That service is part of tradition. And if anybody asks, it is part of school. It is just like Christianity classes [a mandatory subject until 7th grade]. Nobody is exempted from Christianity classes either. Well of course, we have migrant children and children from Muslim backgrounds, but they participate just like everybody else (school principal, AarhusSuburban).

As shown, the expression of this school leader is in accordance with how religion is legally regulated in schools in Denmark, and it is also representative of most Danish school leaders. According to an 2011-interview study of school leaders (response rate 27%) 70% of schools arrange Christmas services (Jensen, 2019, p. 138), while 86% indicate that they cooperate with the local church (139). Comparatively, 21% has visited a mosque**.** A 2015 study (response rate 24%) found that 84 % of schools arrange or participate in Christmas services (Jacobsen, 2019, p. 230).

Table 1. Interviews with school leaders (Jensen 2016, 2019).

School leaders on (pct.)	Disagree	Either /or	Agree	Don't know
Christianity should be a major part of the values of the school	34	31	34	1
Compared to other religions, Christianity should have more influence at school	30	27	42	1
Christianity is a personal religion which does not have anything to do with school	34	27	39	0
The significance of Christianity for the school regards culture and tradition	3	6	91	0
Christianity should not impact the circumstances of the school	37	24	38	1

Table 1 underlines how many Danish school leaders, regardless of their own evaluation of Christianity, view the proper role of Christianity at schools as culture and tradition. Jacobsen similarly finds that among school leaders 95% argue that schools celebrate Christmas because it is a tradition, 87 % argue it is to celebrate community. Puzzling, only four out of ten considers Christianity to constitute the 'the aim' of Christmas (Jacobsen, 2019, p. 233). An established differentiation between Christianity as culture and as religion enables this social regulation of Christmas services in the ELCD as part of Danish culture, and therefore as part of what it is expected of the school to teach their pupils. However, as mentioned, school leaders are relatively autonomous agents.

In the study by Johnsen and Johansen, a school leader at a school with most pupils with a minority background explains that school services are not part of what they do during Christmas at school. Instead, the school leader initiated that the school invites all neighbours and parents, many of them unaccustomed to Christmas celebrations, to gather around an enormous Christmas tree in the school's front yard in the afternoon of the last Friday in November. At this gathering, the tree is lit for the first time. They sing traditional Christmas songs but no hymns, and the school principal gives a short speech. The school leader underlines that arrangements related to Christmas is not religiously motivated, but a way to help children, often from other religions, understand 'why Danes go crazy almost from October and onwards'.

The school leader aims to make minority pupils and their parents aware of and knowledgeable about Christmas; and thereby, to enable them to construct a sense of culturalized belonging to Christmas as a collective identity. This aim denotes an understanding of 'religion as identity' (Astor & Mayrl, 2020, p. 217), namely that the main purpose is matter of inclusion in the larger community.

Minority pupils' experiences of Christmas in Public schools

Even if Christianity has a prominent position legally and socially in schools in Denmark, not all pupils come from a Christian background or consider themselves Christians. In 2009, about 10% of all pupils in the Danish primary school system (the state-run as well as the free schools) had a non-Danish origin. Of these, 7% had a Muslim background (Sedgwick, 2014). A pertinent question is thus how minority pupils, including pupils with a Muslim background and pupils identifying as non-religious, experience Christmas activities, such as worship services.

A study of Muslim pupils in primary schools supports the finding that Muslim pupils do not necessarily understand the participation in Christmas services as problematic. Sally Anderson's interviews with young Muslim refugees from Iraq, Iran and Afghanistan, attending small-town schools in the Danish countryside generally accept the Christmas service as providing them with knowledge about Christianity as well as providing them with a comparable perspective vis-à-vis their own religion, Islam (Anderson, 2014, 78). Nargis (16 years old and from Basra) enjoyed the Christmas service:

> Yes, I have been to the church, but I thought 'this is their faith'. It is ok but not for me... I like to know about what other people believe – not to say 'this is wrong' or 'this is right' because they might be in regard to some issue. Maybe it is different to think in this way, but I think this is the way to think. Some Muslims would say that we should not go into church but I don't believe it. I would like to see how they practice their religion and why they go to church. I like to be there and watch their... eh belief and such (p. 79).

Contrary to the school leaders presented above, these Muslim pupils regard Christmas services as a confessional religious practice. To be present in the church is expressed as an issue of consideration, but to be present may also help understand "their faith", an expression probably covering fellow pupils, and Danes more generally. This "misunderstanding" of Christmas services during

school hour as a religious practice can be explained due to their newly arrival as refugees. The concept of culturalized Danish Christianity is quite subtle, and is probably something they will realize more gradually when they become more acquainted with the public position of the ELCD.

While the presence of Christianity in Anderson's study of small town schools with very few non-Christian pupils is associated with little conflict, other Danish scholars report of a more conflictual patterns. Marianne Holm Pedersen has encountered Muslim parents that attempt to limit their children's exposure to the production of Christmas decoration, but also Muslim parents, that encourage their children to participate in all activities including those associated with Christmas (Pedersen, 2015, pp. 30-31). Laura Gilliam found that in one of the classes where she did fieldwork, Muslim identities, which had a clear oppositional character, were prompted by the celebration of Christmas in school (Gilliam, 2015, pp. 175-177). In another school, the presence of oppositional identities, which were less directed towards the school activities and authorities displayed a "relaxed [Muslim] religiosity" which included a level of cross-cultural tolerance (Gilliam, 2015, pp. 179-182).

These case studies indicate that the harmony between culturalized religion as *constituted culture* and *as identity* is present in some schools, and that some parents and pupils with Muslim background accept the dominating interpretation of Christianity as culture. But also, that a higher proportion of Muslims may upset the concord. In that case, the presence of Muslim pupils becomes 'a problem' which may entail changes to the Christmas service by for instance replacing hymns with American Christmas pop songs, an accommodation, which those Muslims, who are "without a fuss" is believed to find acceptable (Gilliam, 2021, p. 1105).

In this case, the schools adjust their Christmas activities in line with popular culture. The protests from Muslim pupils have probably made the school leaders more aware of the religious or 'churched' character of some elements previously not acknowledged as religious neither by them as individuals or by the schools as institutions. A recent representative survey (table 2) of both the majority population ('Danish descent') and different groups of ethnic minorities shows that most of the adult Danish population are content with the tradition of schools celebrating Christmas in a church. About half of the population agree or agree very much that all pupils should participate in this tradition regardless of their religious background. Support is highest (52%) among the 'Danish descent' and lowest among the 'other, non-western' youth (35%). Disagreement is also highest among this group (38%), with 'Danish descent' having the second largest group of people who disagree (29%). The least likely to disagree is the group of 30+ from MENAP countries or Turkey (24%).

Table 2. Many schools have the tradition of attending a church service at Christmas. Do you agree that all pupils regardless of religion should attend? N=4693 (Integrationsbarometer, 2021).

Percentages	Fully agree/ agree	Either/ or	Fully disagree/ disagree	Don't know	Do not wish to answer
Danish	52	16	29	3	2
MENAP and Turkey 18-29	41	23	20	6	4
MENAP and Turkey 30+	48	17	24	8	4
Other non-western 18-29	35	21	38	5	1
Other non-western 30+	50	15	25	7	3

In summary, while the support for the tradition remains high, it is worth noticing that it is lowest among the youth across ethnic backgrounds. This finding might indicate that the acceptance of Christianity, and the ELCD, as part of Danish culture is about to lose legitimacy and become more contested (Gilliam, 2021, p. 1105).

Pastors understanding of Christmas Services offered to schools

In her examination of the 2013 discussion paper from the commission for a more cohesive and modern governance structure for the ELCD, Danish sociologist of religion, Marie Vejrup Nielsen emphasizes that the ELCD manifests a self-understanding as an inclusive community (Nielsen, 2015, p. 22). Stemming from this self-understanding, the commission explicitly positions the ELCD as also responsible for cultural cohesion. The ELCD is thereby also, according to the discussion paper, "a carrier of culture, which contributes to creating cultural [folkelig] cohesion and interpretation of meaning in the life of the individual human being and in Danish society" (Nielsen, 2015, p. 22). An important point being that the church as defined and delimited by its evangelical-Lutheran confession and the church as

carrier of culture in Danish society is understood as complementary, not as contradictory. Thus, the close bond between ELCD and Danish culture is part of a theological understanding of what the church is which furthers a responsive and inclusive relationship to the broader culture.

Reflecting on the covid-19 cancellations of the traditional Christmas service with schools, a pastor maintains the importance of churches engaging with schools at Christmas: "We could have chosen just to cancel it all saying that we resume our traditions next year instead. But I believe that all agree that the children should feel that the church is present at Christmas time" (Kristeligt Dagblad, 3.12.2020).

Thus, resembling religion as identity, the basic tenet is that Christianity is part of culture and the Christmas service with schools is needed for this purpose. Thus, the Christmas service is not understood as an expression of individual faith, but as an emblematic marker conveying the church and its pastors as part of a Danish culturally religious history and identity. Contrary to Joppke's claim that churches do not like culturalized religion (Joppke, 2018, p. 240), the ELCD perceives "belonging without believing" not as an enemy but as something valuable and part of its own self-understanding.

However, pastors acknowledge that demographic changes increase cultural and religious plurality, which demands further reflections on what Christmas service is all about. A 2019 report by the ELCD interfaith organization "the Evangelical Lutheran Church in Denmark Committee for Church and Encounter with other Religions" finds that church services for schools at Christmas are socially regulated as self-evident by both pastors and schools. The church is part of the local town and its life and as such its interactions with the school at Christmas in not questioned (Religionsmøde, 2019, pp. 8-9). In continuation with the engagement with cultural formation found above, one pastor explicitly envisions an open and inclusive church (Religionsmøde, 2019):

> As pastor for the cultural Christians it is my finest job to open the door at make it a meaningful room. If I was pastor for the insiders, I could just sit and be a connoisseur; but I am not; and I believe that it is our mission to open that door (p. 6).

By inviting the schools into church, the church not only contributes to the cultural formation already taking place in school, but it also adds another layer of solemnity. A quality deemed important at Christmas, as described by a male pastor: "Christmas service is solemn, not entertaining. Christmas cookies stay at school" (10). Accordingly, the pastors regard Christmas services similarly to surveyed school leaders, signalling that both parties are part of a shared

and relatively stable semiotic structure where the Christmas service, and the church as such, is perceived as part of constituted culture. Still, and somewhat contrary to Astor and Marl's claim about constituted culturally religion as part of an unconscious cognitive schemata (Astor & Mayrl, 2020, p. 212), the pastors reflect upon the challenges in inviting a religiously diverse school into church. These reflections surface in a discussion about the right name for the event. Some maintain that it is a "Christmas service", others prefer to call it a "Christmas celebration". However, it is not just a matter of a name. A "Christmas celebration" in church will typically be without prayers and blessing, just as the pastor holds a speech rather than a sermon (Religionsmøde, 2019, p. 7). One pastor explicitly connects her practice of having a Christmas celebration with the school rather than a Christmas service to the ELCD organization "The church's school service", which is a church funded initiative creating school projects and teaching material for schools to enhance and assist them in their knowledge-based teaching in Christianity and Christianity related topics (Religionsmøde, 2019):

> This is what I lean on, it is the school-church-cooperation, they do not attend a church service. The school visits the church and it is the pastor that communicates. I do not compromise with one fiber in my body, I know that there are colleagues who think that I do (...). What I do at the celebration is not different from the other things that I do in a school-church-cooperation (p. 13).

As discussed, schools in Denmark are legally obliged to link the RE subject to a specific religious tradition. Offering different knowledge-based educational activities, is thus one way the church assists schools realizing their legal obligation of teaching "the Evangelical-Lutheran Christianity of the Danish Folk-church". Christmas services, or modifications, like Christmas celebrations, are understood as part of a school-church cooperation where pupils, regardless of their own religious faith and background, become knowledgeable about the Christianity of the majority church. However, other pastors maintain that preaching is part of what they do in Christmas services. "When we have activities by the [church] school service, then I weigh my words carefully, but at the Christmas service with the school, I communicate more freely. There is more preaching." (Brandt & Böwadt, 2018, p. 123). Thus, though there seems to be a general agreement on culturalization as part of the backbone of the ELCD; there seems just as well to be a disagreement about the degree to which more distinct religious practices such as prayer and blessing can be upheld as part of cultural formation in cooperation with a culturally and religiously diverse school.

The way that the ELCD actively engages in and treasures it's responsibility for Evangelical-Lutheran Christianity as part of cultural identity, challenges Joppke's and Beaman's argumentation that culturalization is not in the interest of churches and also adds into Astor and Mayrl's reasoning about how the different modalities of culturalized religion may stabilize each other. The pastors are active agents in culturalized religion and contribute to the stability of a culturalized social regulation of religion beyond what the state or schools are able to do on their own. Even if individual pastors want to include preaching, these major societal institutions reinforce one another by their shared understanding of culturalized religion as part of schools. Hence, our Danish case shows so far that the church reinforces the relation between constituted religion and religion as identity in public schools. However, culturalized religion can also be a matter of intense contestation in Denmark.

Destabilizing cultural religion

December 2017, a school (Gribskolen) in the Northern part of Zealand hit the news across Denmark because school leadership decided to cancel the former tradition with a Christmas service in the local church. The school leadership argued that not all children belong to the ELCD:

> We are very fond of cooperating with the churches and we will definitely continue this cooperation. However, the Christmas service is also preaching, and it should be up the individual families whether they wish to participate in the Christmas service as part of their private celebration (Ritzaus Bureau, 10.12.2017).

The association of School leaders instantly confirmed that schools are free to decide whether or not to celebrate Christmas in church (Stiften.dk, 11.12.2017). Nevertheless, the school faced severe criticism from dissatisfied parents (DR.dk, 11.12.2017) as well as from the city council (Dagbladet Roskilde, 19.12.2017). A mother argued that "it is good to get to know traditions and see how other people do things, and then it is also a nice time that gathers people", while a conservative member of the city council was more explicit: "A Christmas service is something very Danish, a beautiful and proud tradition". Even the prime minister, who used to attend this school, publicly challenged the decision, and received support by other ministers (DR.dk, 11.12.2017). According to Minister of Education, it was an "ill-conceived concern on behalf of some pupils", whereas the Minister of Ecclesiastical affairs deemed it "an expression of fright of religion and tradition that I simply do not understand" (DR.dk, 11.12.2017).

This case proves that social regulation of religion in schools can be politically explosive, and that controversies lie behind the surface of shared understandings. Still, this school in northern Zeeland spurred a roar that they did not seem to have foreseen. For the school leadership, the Christmas service in church did not fit their ideals and profile as a diverse and inclusive school – and they rightly presumed for it to be their own decision. However, as shown above, the critique did not resolve around the issue of inclusion of minorities. Thus, it is not a typical example of pragmatic religion, as Astor and Mayrl describe it, where culturalized religion is made into a political project promoting Christianity as opposed to Islam (Astor & Mayrl, 2020, p. 216). Cancelling the Christmas service provoked a massive number of responses because it destabilized, and threaten to undermine, constituted culturalized religion, as well as religion as cultural identity. The local parents, as well as national politicians, engaged with full force because an interpretation of Christmas services in schools as religion undermined the legitimacy of a collective culturalized Christian identity as 'belonging without believing'. Thus, this debate was not only about a local school in the outskirts cancelling a Christmas service. It was reacted upon as a national threat against fundamentals in how religion is regulated as culture legally and socially in Denmark.

Interpreting it as a protest against transforming culture to religion, is strengthened by other media reports from schools with an even more diverse population, which continue to attend church at Christmas (information.dk, 12.12.2017), and by interviews with Muslim parents supporting the tradition. A Muslim father explains:

> We live in Denmark and therefore, my children get to know Christianity. For many years it has been a tradition at school to attend church at Christmas, and I like that. If others do not want their children to attend, they can just keep them at home or let them stay at school (Kristeligt Dagblad, 15.12.2017).

At an extraordinary meeting, the school board supported the decision of the school leadership but it caused two members to leave the school board in dissatisfaction (SN.dk, 15.12.2017). Accordingly, the line of reasoning seems to be that the school leaders in Northern Zealand provoked a deeply held cultural value that most others in the country, even more diverse schools, as well as Muslim parents, approve or a least do not problematize. Paradoxically, to publicly accept Christmas services as part of school can constitute a way in which Muslim parents and pupils is not 'the other", but a part of the Danish community.

Events in church are acceptable in schools, also the highly diverse ones, if they are socially regulated not as religion, but as culture.

Though the debate was intense, the school did not change its decision. In 2018, they however agreed with the local church to host a Christmas service, but left the decision as to whether the classes should participate or not to the teachers – of course still with the possibility of individual exemption. Such a solution indicates that schools, and their leaders, are granted a high level of autonomy, but that opposition against the legal and social regulation of culturalized religion in Denmark comes with costs.

Conclusion

Utilizing the material on Christmas services in school thematically through the different modalities of culturalized religion, as proposed by Astor and Mayrl, we find that the legal and social regulation of culturalized religion in Denmark is quite distinct, and nuances the modalities of culturalized religion in important ways.

First, the legal regulation of religion in schools explicitly state that the main knowledge domain when teaching the RE subject "is the Evangelical-Lutheran Christianity of the Danish Folk-church" and this legal regulation influences how religion is regulated socially within schools, in relations between school and church, and by the church. Christmas services for the schools in local churches are not regarded as predominantly religious, but as part of Danish culture. This understanding is highly approved by school leaders, teachers, pastors, as well as by pupils and parents with a minority background. Claims about the Christmas service in schools as expressions of faith are present in the material, but such statements are less socially accepted, and have been sanctioned politically in local and national media.

Second, we find it particularly telling that Muslim pupils and parents articulate that they perceive and participate in Christmas services in schools as part of culture, and not as religion. More research is needed, but understanding Christmas services, and the RE subject as such, as knowledge about Danish culture, can be attractive to immigrants because you can attend and be part of a Danish collective identity, instead of, or in addition to, a representation as "Other".

Third, in the Danish case the church is an active proponent of culturalization. The majority church has a theological self-understanding supporting religion as a valuable part of Dane's cultural and collective identity marker. Thus, the church represents itself as a community for those who believe, and for all those who belong without an individual faith.

In conclusion, Astor and Mayrl argue that culturalized religion needs to be theorized as a particular phenomena, and not as some kind of diminished subtype lesser "real" than "proper" religion (Astor & Mayrl, 2020, p. 211). Our analysis has shown that a legal and social resistance against transforming culture to religion exists in Denmark. By exploring this less discussed aspect of culturalized religion, we have offered support for the study of culturalized religion as both "real" and "proper" religion.

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CHAPTER 7

Portuguese citizenship for descendants of Sephardic Jews: Ethnographic notes on the law and agents in Portugal

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Abstract

In 2015, an amendment to Portugal's Law on Nationality allowed descendants of Jews who were expelled in the Inquisition to become Portuguese citizens if they "belong to a Sephardic community of Portuguese origin with ties to Portugal." This text aims to describe and analyse such Law No. A/2015, namely the agents involved in helping the applicants who claim to be of Sephardic descent, to obtain a new Portuguese passport. The notions of "agency" and "bricoleur" are used in the analysis to understand the ways in which new citizenships are constructed, under this recent Portuguese decree-law. The study is a brief ethnographic research, based on qualitative data, using documentary sources and semi-structured interviews carried out with some of the agents in Portugal who are more closely involved in the process.

Introduction

Jewish identity is plural and, in Portugal, it is also linked to times of persecution, namely during the Inquisition (1536-1821), which practically annihilated the presence of Jews in the country, forcing them to conversion to Christianity or compulsive exile.

Today, many of the diasporic Jews descend from these Sephardic[1] families who resisted assimilation and perpetuated an affective and effective connection to Sepharad (Portugal and Spain). Sharing their own language, rites, history and a common cultural identity, they transmitted such ties between generations, creating communities with transnational, global links, extending what is perceived as "Portugality". Many still resist the anti-Semitism to which they are subjected, in the name of such identity.

Portugal's efforts to try to repair the effects of the Edict of Expulsion of Jews (1496), date back to the decree of the liberal courts of 1821, which granted not only to Jews from expelled families, but to all Jews, the right to return to Portugal (Silva, 2014, p. 278).

The new Nationality Law (NL) nr. 30-A/2015, 27 February, is the 5th amendment to Law nr. 37/1981 and allows those who prove they belong to a Sephardic community of Portuguese origin, to require Portuguese citizenship, based on proven objective requirements of connection to Portugal, namely: surnames, family´s language and direct or collateral descent. However, to restrict access to such a naturalization, a new Law was issued in March 2022[2] to further control over candidates and to streamline procedures and backlogged processes.

This research aims to characterize the main agents in Portugal, involved in the process of acquiring Portuguese nationality, under the 2015 Portuguese NL. Among these are genealogists, lawyers or solicitors, the Jewish communities of Lisbon and Porto´s staff dealing with the certification, public registrar staff and applicants for a new Portuguese passport, who claim descent from Portuguese Jews who fled during the Inquisition period. Due to space limitations, the latter will not be analysed here.

As an ethnographic approach to the ways in which human action deals with new contingencies of the social structure – in this case, the search for a new citizenship due to a new amendment to the Portuguese NL -, it is important to frame the outlined research aims within the theories of social action, namely those referring to agenciality. In the social sciences, human action or agency is generically described as the ability of individuals to act according to their will, or *habitus* (Bourdieu, 1980). This ability, however, always occurs within a certain context or structure, being subject to rules, objectives, negotiations, skills, resources and creativity that are available at any given time. Such structures not only constrain agents but also lead them to seek new action strategies to deal with new challenges. Thus, according to Holy and Stuchlik (1981):

[1] *Sepharad* appears only once in the Bible, in Obadia 1:20 and has an uncertain origin, but it was the Roman name given to its Iberian colony.

[2] See: https://dre.pt/dre/analise-juridica/decreto-lei/26-2022-180657814.

> The essence of the process of social life is that it is continuous. People did not create their society once and for all, for everybody else born afterwards to be born into a predetermined world. By learning the world into which they were born, and by continually thinking and acting in it, people continually create and change it. (p. 16)

Levi-Strauss' (1969) classical formulation of "bricolage", is also useful in the analysis of these agents. It refers to the ability to select fragments of existing cultural configurations and re-deploy them in novel ways. Looking with an interpretive eye at the things immediately available, local and on the ground, the "bricoleurs" work as improvisers, to cobble together something to serve a new purpose, reinterpreting it for a new use and new meaning. Such agents-bricoleurs bring innovation through acute observation, broad knowledge, and cunning recognition of opportunity and are active entities, especially useful in times of crisis or new changes, in order to make sense of the world.

The study is based on a qualitative ethnographic approach, anchored in documental research and semi-structured interviews, carried out with some of the participants in the new Portuguese citizenship acquisition process. Among the interviewees are two genealogists (G1 on 24/3/2022 and G2 on 4/4/2022), two lawyers (L1 on 17/5/2022; and L2 on 19/5/2022), a registrar civil service (R1 on 30/3/2022) and one of the agents of the Israeli Community of Lisbon (CIL1 on 24/2/2022) who manages certification requests[3].

The Jewish Communities of Lisbon (CIL) and Porto (CIP)

Among the main facilitators involved in these nationality processes for the Portuguese Sephardic descendants are the CIL and CIP staff, genealogists, lawyers and civil registrar.

The CIL was officially established in 1912 and was consulted by the government for the elaboration of the new 2015 NL, and also entrusted to certify applicants for Portuguese nationality. In order to deal with the thousands of applicants who began to flow in, this congregation was forced to hire a "Procedural Management" team (to answer all questions and receive and carry out a prior analysis of the documentation); a "Historical Analysis" team (specialists in Sephardic genealogies and migratory routes of the Iberian

[3] Access to the agents in the CIP was not possible.

Jewish diaspora, and analyze and evaluate the evidence presented); and a "Certification Commission", to issue and send the certificates to the candidates or their legal representatives. These teams grew, from a single person in the secretariat in the early years, to the more than two dozen they currently have, including historians. Genealogical evidence is of special relevance to the CIL. CIL has made available on its website all the information on contacts, steps, procedures, forms and official documents required[4].

One week after delivery of the documents, the applicant must pay the "donation" of €500 to CIL and wait for the certificate, which takes approximately 6 to 8 months. With the expiring of the similar Law in Spain, the end of CIP´s certification services and the recent changes on the Portuguese NL, CIL is now overwhelmed with all applicants knocking on its door.

Like CIL, also CIP was delegated the power to certify applicants. This community, established in 1923, is headed by Rabbi Daniel Litvak, and was also consulted in 2013, for the elaboration of the Law and to certify applicants. Since the State did not create an international committee for certification, at that time, as suggested by the CIP´s board, CIP created its own "Internal Committee" for the purpose, headed by Rabbi and Vice-President Francisco Garrett. On suspicion of crimes in certification concessions, in April 2022, Rabi and Garrett were involved in a judiciary inquiry, which is still ongoing. The stir led CIP to stop issuing certificates for nationality, block the blog, keeping only an informative text from 2018 on its website[5].

Until then, however, the applicant had to obtain information, formalize the application, pay the 250€ "donation" and communicate with the Porto Certification Committee by email or through the CIP´s website or blog.

At CIP, any elements that would guarantee that the applicant has an effective traditional connection to a Portuguese Sephardic community or synagogue was considered as evidence. Included here were: surnames; cemetery registers; ketubot or family objects; religious or food rites; family episodes narrated in history books; connection to the Jewish world in terms of halacha; synagogues attended today; knowledge of Ladino (surnames and Ladino are objective criteria, but CIP did not assume them as determinants in the process) and genealogy. DNA tests were also accepted (CIP, 2018, p. 10-11), as were family records, archives of Jewish congregations with birth, marriage and death records, circumcision, state migration records (ship lists with entry and exit from the country) and documents showing a migratory route pattern, expert opinions on the Jewish diaspora and evidence of reputable witnesses. Among these proofs, records of known history by rabbis or credible scholars

[4] See: https://cilisboa.org/concessão-da-nacionalidade-portuguesa/.

[5] See: http://www.comunidade-israelita-porto.org/x#0.

about the applicants' families were accepted, and a letter from a rabbi of some Orthodox Sephardic community in the diaspora was generally required, attesting to the applicant's Jewish origin and current Jewish practice. Questions on interpretation of this latter precondition arose, since "the law only refers to the requirement regarding the tradition of belonging to a Sephardic Jewish community, with proof of Jewish practice of the applicant's ancestor as sufficient, and not of his own in the present,", (Interview L1). In fact,

> These are evidences enough for civil registries, but they are also very circumstantial, as they are better preserved only among families with ancestors with privileged positions. When these ancestors are linked to a synagogue and if they had some prominent role, this memory is preserved. The possession of written documentation, among these families in general is very scarce, due to the secrecy that was kept – even in countries of greater religious tolerance. Even today, Christians in Europe do not assume their religious identity when they introduce themselves, out of fear! (Interview CIL1)

Once submitted, the documents were evaluated as a whole and the applicants were advised by the CIP to have a lawyer (CIP, 2018: 11).

Michael Rothwell, delegate of the CIP Certification Commission, told Expresso (16 February, 2022), that 90% of all certificates issued in Portugal came from CIP. This is probably due to the fact that at CIP, the process was half the price and more facilitated for applicants, comparing to the CIL.

On March 13, 2022, however, the CIP posted a statement on its website informing that it is no longer interested in collaborating with the Portuguese State in the issuance of certificates, adding a range of justifications and considering outrageous the suspicions that have arisen, which increase the potential of antisemitism in Portugal.

As confirmed by a registrar, "the €250 fee is the same amount that any applicant pays for registrations for a Portuguese passport at the registry offices, and nobody accuses them of receiving millions of profits" (Interview, R1). Compared to countries with large ultra-Orthodox communities, Portugal welcomed 7000 new residents, some investing heavily in the country and promoting Jewish ethnic institutions in a very significant way, such as museums, schools, synagogues, cemeteries, *ashdut* youth centers, etc. Rothwell also told Expresso (February 16, 2022).

The CIP sees the extensive genealogical evidence required by the CIL as too complex to decipher (requiring transcription) and attest; they consider that Spain has too difficult criteria (demanding Spanish language and culture tests, after 500 years); but requires that the applicant must be Jewish. For the CIP, there are no non-Jewish Sephardim[6]. However:

> Each community interprets the law in its own way. Converts are included in the CIL, but not in the CIP, where they only consider Orthodox "Jews" and with some proof of religious Judaism, through a *Ketubah* for example. Take the case of children of mixed marriages... In Porto it is easier because a Jew can prove more easily that he/she has a Sephardic ancestry – which is not the same as proving that he/she has a forcibly converted ancestry – the proof documents are different. To accept children of converted ancestors, the CIL asks for a letter, in which people expose their oral memory. These are evidence reports that do not weigh much in the process, nor in the set of documents to be presented, due to the danger of lack of reliability. If there are family passports with birth dates and names of several family members and children, this should force Porto to accept them all. If all this is about historical reparation, it makes no sense to marginalize some and not others. But in reality, some brothers or sons were accepted and others were not. The trauma is common to all because the process is not religious but political, humanitarian, diplomatic. (Interview CIL1)

By selecting fragments of the existing legal regulation, the CIL and CIP have become creative bricoleurs in this process.

Genealogists

Not being mandatory, but advisable, many applicants look for a genealogist to help with Sephardic ancestry research for certification, especially at CIL. Upon being contacted, one of these agents (Interview G1) says that some people already know what he does, while others ask for explanations about the procedures. He then asks the applicant to send him copies of all the genealogical data of

[6] See: https://www.mjporto.comhttps://dre.pt/dre/analise-juridica/decreto-lei/26-2022-180657814.

his closest relatives (especially dates and places of birth and marriage, as death records have little information) and suggests them to get also a lawyer. Based on the data received, the genealogist does a first free analysis and research, to check if the case is viable. He then sends a first service proposal with a price and, if accepted, he makes the complete genealogical report. In this process, there are three possibilities: a) the genealogist sees that his efforts are not worth it, since there are many cases in which there might even be a distant Sephardic ancestor, but this ancestry has not been documented and no evidence is found, so the contact ends there. Then, either the genealogist asks for more data, or tells his client that it is unreasonable to continue this research, as it would take years (with no guarantees) to find a "viable line" of that family, making the work too costly; b) or he may consider that the result is viable and a fixed cost is presented; c) or he considers that the work can be done and is justified, but further research is needed without commitment to find the "viable line". This allows the disappointed client, to choose to look for another specialist, who might discover a "viable line", due to differences of genealogical sources knowledge.

> Each of us have our own domain of the written sources and there may be a colleague who has access to documentation of family lines that I don't have. It would be legitimate to charge for this work/analysis, but I prefer to have a clear conscience, so that no one will ever accuse me of being a profiteer. (Interview, G1)

If the person accepts the budget, the next step is, for the genealogist, to start making a small outline of the "relevant line" and to present a text with the complete data of that line, with all the proof that the client has a New-Christian ancestor.

Some of these agents added an opinion from a recognized academic in the field of Portuguese genealogy, who analysed the reports and all the evidence attached, signing their agreement and this served as a peer-review safeguard in cases that may be considered dubious.

Initially the genealogists sent the all the documentation directly to the applicants, but later, they started to send them to the lawyers who began to deal with the applications in the CIL/CIP, where the analysis for certification, takes 6 to 8 months. Some processes are approved right away, while others may have details that raise doubts to the communities´ analyst, who sends it back to the lawyer, who in turn sends it back to the genealogist to review/clarify. For professional genealogists, there are questions posed that show the total ignorance of historians in the communities regarding genealogy. If necessary, additional supporting documents will be provided in response to such requests for clarification. There is of course a concern to certify all documentation, but it is often frustrating for genealogists,

> The lack of communication with the CIL, especially since it changed its managing board and since the lawyers started to act as intermediaries. It was much easier and faster than before, when we were dealing directly with the CIL. We clarified all doubts immediately. The thing is that there are very few genealogists in Portugal, and these young historians know nothing about the subject. There are one or two out of the 20 historians that CIL has, who showed that they knew what they were asking, but most did not. It makes no sense for the CIL to have cut off communication. (G1 interview)

This idea is shared by other genealogists, such as interviewee G2, who adds that:

> We could even train them; I wouldn't mind at all. They don't accept one brother but accept the another; there are parents who were approved and their children are not. You cannot do this without understanding why. There is no communication with them, it is a pity. The CIL defends its historians and there is no opened mindedness. In the beginning it was very different. All this [the 2022 NL´s amendment] was a relief for me, because I'm tired. There are approved Brazilians who are now Portuguese, with very tenuous signs [of a true Sephardic ancestry]. We mainly use primary sources and some secondary sources – we complete with what is found on baptisms, marriages. There has to be rigor. At CIL, they don't like this and they sometimes accept less detailed sources, because historians can't even read paleography and accept less rigorous genealogy. Even Cau Barata, a prominent and renowned genealogist in Brazil, copies us... he copies our processes, because for decades we have been studying, exchanging and we know well our sources. (Interview G2)

For these genealogists who worked mainly with the CIL, what the CIP did is unconstitutional, as it only accepts those who are Jewish (arguing that, by law, no one can be discriminated due to their religion). They perceived that there were many dubious processes that could raise doubts, especially in Porto. But they think that although the CIP and CIL had different requirements, they did their best to assess the right criteria for certification, according to the 2015 law and consider that the current regulation regarding the latest amendments to the NL is purely ideological. The Portuguese NL

> Is one of the most open in the world. You see, the children of illegal immigrants become Portuguese… it's opening the doors wide for illegals. I've done several pro-bono processes, eg. a Brazilian boy – paid €500 to CIL and €250 to the registry office and became Portuguese. But the politicians have this idea, that the applicants are all rich Jews! The new law opens our citizenship to everyone, and closes it off to the 'rich Jews'. Very few of these foreigners came, but people here thought it was too much for them to come and invest in Portugal. Now the illegals enter, but for the descendants of Sephardim it´s finished, after September. It is an ideological problem. (G2 interview)

Lawyers

Also not being mandatory, there are many applicants for citizenship who seek the services of lawyers or solicitors and their agencies, to expedite, with an added cost depending on the fees charged, the acquisition of Portuguese nationality.

Lawyers are seen as facilitating agents, providing information and mediation in citizenship processes, and dealing with the preparation of all necessary documentation, especially legal argumentation, within the requirements of the law, until the certificate and/or citizenship is granted.

There are around 33,000 registered lawyers with the Portuguese Bar Association (Pordata, 2020), many of whom have dedicated themselves to this cause of nationality. Some work in isolation in this specialty of administrative law, while larger offices create specialized departments, hiring historians and consultants with experience in processes related to the analysis of the genealogical strategy of the applicants' ancestors. This analysis is done through the study of the documentation presented, compiling the life and migration histories of the applicant's ancestors, gathering relevant places and dates to discover where they passed and thus find possible similarities with the migratory pattern of the Sephardic diaspora, recognized by historiography. All this, in order to assess the profile of these applicants so that they are certified by the CIL/CIP.

Some lawyers are specialized in foreign law and Portuguese citizenship, and assist in the search for documents in the registry offices and in the documents´ transcription and apostille. With the intensification of agenciality in this area, many lawyers have been increasing their skills and tools, creating their own libraries on Portuguese Judaism to gain familiarity with the subject and better develop each case´s "puzzle", as creative thinkers and bricoleurs.

"My office is now full of books on Jews, and I've gained a lot of taste for this cause. It's a shame they treated this law as if it were a business or a political issue. Many applicants do not even know how to explain this very special connection they feel to Portugal, from a distance. I deal with many North Americans and they have no interest in entering Europe, because for them it is really a symbolic issue. Others even come here to live... to the Alentejo. In the Odemira area, for example, there are already many Jews, New-Portuguese communities settled there" (Interview A1).

These agents also serve as mediators between the genealogists and the CIL or CIP, having to send back and forward, documentation, requests for clarification on any data sent to the communities and to be asked to verify evidence. In addition to legal advice, within the scope of the instruction of processes for certification in Jewish communities, these agents will also be able (with a new power of attorney for the purpose) to assist in the preparation of the application addressed to one of the civil registry offices, and accompany the administrative process until the final phase, which is the issuance of the passport. This application must contain the argumentation for the application and the essential identification of the applicant and the lawyer or solicitor. Many of these professionals advertise their services on their websites and social networks on the internet, and many offer "a free and online initial consultation so that each case is analysed and the necessary guidance is given. But now, this [2022 amendment] is the final nail in this coffin" (Interview A2).

Registrars

Once all the documentation has been compiled, it is forwarded to the Portuguese Civil Registry Conservatories, to complete the second phase of the process: the request of citizenship. There, each process costs €250 and lasts for at least 6 more months, but it generally takes 14 to 24 months, given the lack of specialized technical personnel. This is because all the documentation of each process has to be scanned, digitized and classified by the civil registers staff, before it is delivered to one of the registrars who will then analyse it and make an opinion that is not binding, as it has to finally get favourable order from the minister of justice, who has the last word, because she has a discretionary power, which registrars do not have.

Since 2017, the minister delegated this task to a secretary of state. An agent of the conservatories confirmed that, "usually the judges do not understand anything about notary and delegate to a secretary of state who understands the matter" (Interview C1). Until 2018, all processes were headed to the Lisbon

Central Civil Registers Conservatory services. Since then, however, especially in Porto, with the huge increase in citizenship seekers, pressures began so that the Porto Central Archive could also handle the processes. Since they had too much work in the central services in Lisbon, they began to distribute the processes to other smaller conservatories. Here, agenciality is also very compromised, because the job is done

> By untrained people, with too much work in hands and, on the part of the registrars, there is no motivation to work faster, given the low wages and because we received the fees according to the profits of each conservatory. Since the central services naturally have more work, all the registrars wanted to go and work there, in order to achieve the objectives and obtain a better performance evaluation. There was envy among colleagues and so, to alert our bosses, among the registrars, it was agreed that everyone would do only 380 processes per month. Anyone who worked 500 or more and exceeded these goals was not well regarded. And that is why there is a general lack of zeal. (Interview C1).

Given these imbalances, the minister has decided that, since November 2021, the old and new registrars must earn the same. Also, the Ombudsman has already warned the ministry that there are registrars who earn less than certain civil registers staff. "There is no incentive to dispatch processes. And some registrars like me, are proud to help applicants. Now, it is all over. The new 2022 law´s regulation mentions in point 26 that the minister can delegate to the registrars the issuance of the final opinion" (Interview C1), but this does not happen in practice. This interviewee adds that, if it is true that the number of people with Portuguese nationality has been increasing over the last years, this fact does not translate into an increase in the population residing in Portugal.

As for the investigation and processing of cases, mechanisms were created to simplify the procedures, namely the exemption from presenting certificates and acts of the national civil registry of the Portuguese criminal record, or documents proving legal residence in Portugal, since the Public Administration has direct access to that information, and, in exceptional situations, the possibility of waiving the need to present documents that must support the process, provided that there is no doubt as to the facts in question. Notwithstanding the simplification carried out in the processing of cases, given the growing volume of requests for nationality, the competent services have not been able to respond to them within the period considered reasonable.

Conclusions

The NL in Portugal has adjusted to the times and its successive changes show a gradual opening, namely, for reparations of historical injustices. "The Portuguese NL is, therefore, strongly committed to the integration of foreigners who have chosen our country as a place of residence, being considered one of the most liberal in Europe (Carneiro, 2021, p. 63). Having been unanimously approved, the new Law 30/A/2015 that allows descendants of Sephardic Jews to acquire Portuguese citizenship, seemed a sign of this openness. Being the correction of a historical error or a just act referring to circumstances fifteen generations ago, each case must surely be carefully examined. Although the number of candidates and what they would do after naturalization was uncertain, regardless of whether they reside in Portugal or speak Portuguese or not, it is also certain that this law has extraordinary symbolic effects for many people and an undoubted international impact on the country's image.

But soon came the suspicions about this 2015 NL, and anonymous reports were built in the media, linking it to big business or Freemasonry, which subsist and reproduce old anti-Semitic preconceptions. It was a law open to all but it came to be seen as a "law of convenience" that was not supposed to rehabilitate the Jewish presence or culture in Portugal. The agents involved in these processes, in addition to the applicants themselves (genealogists, certifying Jewish communities in Lisbon and Porto, lawyers and registrars), described here, did not have consensual understandings regarding the regulations of the law and criteria for citizenship´s acquisition. They worked as responsive and often spontaneous improvisers/bricoleurs to deal with this NL and the thousands of citizenship applicants and share a unanimous regret, however, that the new 2022´s regulation has put an end to these processes.

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CHAPTER 8

The legal regulation of religious minorities in Italy

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1. The definition of religious minority

It is well known that the use of the expression "religious minority" is a very sensitive issue. In a number of countries, members of religious minorities feel uncomfortable about being so labelled. In the past legal definitions of minority groups (including religious ones) were used to draw a line between "civilised" and "uncivilised" groups. Today they can be used to justify restrictions on minorities' rights and freedoms (see *inter alia* Ferrari, 2021, p. 63).

For the purposes of this chapter, a religious minority is «a group of people gathered in common membership who represent less than half of the population of a State and who are bound together by the intent to preserve and advance their religion or belief»[1]. Thus, "minority" should be understood as a word carrying no diminutive value or dignity. However, as we shall see below, even an objective, number-based criterion can be used to justify questionable restriction-oriented norms or policies.

2. Historical background

In the past, in the Italian political entities existing before the creation of the Kingdom of Italy – like everywhere else in Europe – only people professing the official religion were regarded as full members of the political community. Those who belonged to another religion were discriminated, persecuted or – in the worst cases – expelled. In the Kingdom of Sardinia – which led the process of

[1] This definition, which is consistent with the European and international standards of human rights protection, can be found in the website of the Atlas of Religious or Belief Minorities, a research project that aims to map and measure the rights of religious or belief minorities in the EU countries (see https://atlas.webecom.site/index.php).

Italian unification – the principle of equality of all subjects regardless of their religion was progressively recognised in 1848 and definitely confirmed by the law of 19 June, known as the "Sineo law", after its proponent (Bottoni & Cianitto 2022, p. 25, 29-30).

The proclamation of the Kingdom of Italy on 17 March 1861 was not accompanied by the adoption of a new constitution, but by the confirmation of the one of the Kingdom of Sardinia, the so-called Albertine Statute that had been granted on 5 March 1848. This charter – which served as the country's constitution until the establishment of the Republic one century later – did not contain any provisions on religious freedom. Under Art. 1, "The Catholic, Apostolic and Roman religion is the only religion of the State. Other cults now existing are tolerated conformably to the law" (English translation in Lindsay & Rowe, 1894, p. 25). Religious minorities' public manifestations, including the opening of new places of worship and proselytism (Spano, 2008, p. 2), remained prohibited, although later administrative practice progressively lifted some of such restrictions.

A major change took place in 1929, when the Fascist regime promoted a new regulation of the state's relationships with both the Catholic Church and the religious minorities, which was inherited by the Italian Republic and which still grounds a large part of today's inequalities. The signing on 11 February of the Lateran Agreements – composed of a concordat regulating the relationship between the state and the Catholic Church in Italy, and a treaty solving the Roman Question – was followed by the approval of Law no. 1159 of 24 June 1929 on admitted cults, and of Royal Decree no. 289 of 28 February 1930 on the application of Law no. 1159/1929 and its coordination with the other state laws. This regulation was originally welcomed by religious minorities as the *Magna Charta* of their freedoms: for the first time in Italian history, they had obtained public recognition. The Union of Jewish Communities even coined a gold medal for Mussolini (Jemolo, 1948, p. 500). However, the parliamentary reports accompanying the draft regulation already pointed to the restrictive position that would characterise its application. In the report of 30 April 1929, Minister of Justice Rocco stated that the expression "admitted cults" was more respectful than that used by the Albertine Statute ("tolerated cults"), but – from the legal point of view – it had no substantially different meaning (quoted by Madonna, 2012, p. 31). The application of the new rules, and especially of the decree, was much harder than religious minorities expected, and it was especially harsh on non-traditional communities, such as the Jehovah's Witnesses and the Pentecostals (Ferrari, 2013, p. 38). At this regard, it should be noted that the religious minorities already present in Italy in 1929 were far fewer than they are today: they included the Jews, the Waldensians, the Orthodox and a number

of communities from German- and English-speaking countries, such as the Baptists, the Methodists, the Wesleyans, the Anglicans, Scottish Presbyterians, the Salvation Army, the Adventists and the Pentecostals. There was no "Islam Question". Muslims subject to Italian authority were those in the colonies and they were subjected to different rules, *i.e.*, colonial ecclesiastical law (Botti, 2011).

Last but definitely not least, an abhorrent derogation to Sineo law was introduced by the racial laws of 1938-1945 (see *inter alia* Brusco, 2019).

3. The constitutional framework between religious pluralism and selective cooperation

Religious pluralism is one of the basic principles enshrined in the Constitution of the Italian Republic, entered into force in 1948. Its programmatic base is Art. 2, whose application goes well beyond the regulation of religion:

> The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social formations where his/her personality is developed, and it requires the fulfilment of the non-derogable duties of political, economic and social solidarity[2].

The recognition of the role of social formations (an expression encompassing religious denominations) aims to overcome both liberal and Fascist ages, when the only legally relevant relationships were those between the individual and the state. This norm grounds the constitutional regulation of religious pluralism, whose pillars are Arts. 7 and 8 (Cardia, 1996, pp. 182-185):

> Art. 7(1). The State and the Catholic Church are, each one in its own sphere, independent and sovereign.
> (2). Their relationships are regulated by the Lateran Agreements. The amendments of the Agreements, agreed upon by both parties, do not require the procedure of constitutional revision.
> Art. 8(1). All religious denominations are equally free before the law.
> (2). Religious denominations other than the Catholic Church have the right to organise themselves according to their own charters, provided that they do not breach the Italian legal system.

[2] The translation of this and the subsequent constitutional provisions is mine.

(3). Their relationships with the State are regulated by law on the basis of agreements with the respective representatives.

The reading of these norms leads to two remarks. The first one concerns the definition of religious minorities, which the constitution refers to as "religious denominations other than the Catholic one". This expression has been much criticised, as liable to "suggest that non-Catholic groups have no distinctive identity and they form an undifferentiated lot" (Mazzola, 2021, p. 135). As to the second remark, the systematisation of Arts. 7 and 8 may look like erratic to a reader unfamiliar with Italian constitutional history: Art. 7 concerns only the Catholic Church, Art. 8(1) refers to all religious denominations and Art. 8(2-3) only applies to religious minorities. In fact, this order reflects the hierarchy of priorities manifested by the majority of the members of the Constituent Assembly (25 June 1946 – 31 January 1948). Their primary interest was the protection of the legal position of the Catholic Church and the Lateran Agreements, including Art. 1 of the Treaty, which reiterated the norm included in the Albertine Statute, according to which the Catholic Apostolic Roman religion was the sole religion of the state. The legal position of the Lateran Agreements became one of the most hotly debated issues in the entire constitution making-related debate (Musselli, 2010, pp. 82-161). Only in the end, as a form of compensation for both past injustice and present inequality, the norms on religious minorities were elaborated. They were originally added to what was to become Art. 7 and then moved to a separate article: the Catholic Church and the other religious denominations may not be placed on the same level and, thus, had to be regulated by different constitutional articles. At this point, the inclusion of a unifying norm, referring to *all* religious denominations, was debated. The discussion revolved around whether the constitution should recognise their equality or their equal freedom (Long, 1990, pp. 348-353). Given the prevailing trend, the logical conclusion was the latter: the recognition of religious pluralism may not entail the equity of the Catholic and other religions.

The difference made between the Catholic Church and the other religious denominations fits the pattern described by Silvio Ferrari as selective cooperation. Cooperation with social groups is a typical feature of democratic states. As noted, social groups include religious denominations, and cooperation with religious denominations takes place just like with other social groups (*e.g.*, political parties and trade unions). However, it is not the same with all religious denominations: the more one is regarded as having values shared by the (majority of) society, the higher its chances of cooperating with the state (Ferrari, 2015, pp. 71-72).

Under Art. 8(1) of the constitution, all religious denominations are equal before the law only insofar as the sphere of freedom is concerned, that is, they are all entitled to the same rights to freedom, but the specific manifestations thereof may be different. As argued by Waldensian scholar Giorgio Peyrot, this means in principle that all religious denominations have the right to manifest their traditions and true nature (quoted by Mazzola, 2021, p. 135). Religious minorities should be all given the same opportunities, and not to be subject to a homogenising legal regulation. This is a crucial development in a context, like the contemporary one, where the call is no longer for equality but for the right to be different (Dalla Torre, 2007, p. 7). Nevertheless, the management of differences may also lead to the continuation of a policy of inequality.

A typical example is the provision of spiritual assistance services. All religious denominations have an equal right to provide spiritual assistance in prisons, healthcare facilities and the armed and police forces, because members of any religion have the right to receive it[3]. However, the related services are organised in different ways: chaplaincy for the Catholic Church, and the right to visit for religious minorities. This difference has been justified on objective reasons, that is, the differences in the number of their members. In fact, the organisation of the same spiritual assistance services for all religious denominations would be unfair and impracticable. In the context of an ever-increasing degree of religious pluralism, with many, but little numerous religious minorities, the establishment of chaplaincies for all religious denominations would mean the creation of permanent offices where most chaplains would have little, if not nothing to do. By contrast, the institution of external services, where ministers of all religions have the right to visit, would require the Catholic spiritual assistant to enter and exit continuously (Cardia, 1996, p. 209). Nevertheless, this legal arrangement is not free of shortcomings. On the one hand, it does not take into account the religious demography-related changes occurred in Italy. The described system of spiritual assistance services had its *raison-d'être* when the greatest majority of people in prisons, healthcare facilities and the armed and police forces were Catholics. With the passing of time, the immigration phenomenon has led to the increase of the number of members of some religious minorities, which today should justify the creation of chaplaincies for the minorities concerned in the institutions involved, or other adjustments. The imbalance affects in particular prisons and healthcare facilities, and far less the armed and police forces, whose members must necessarily be citizens of the Italian Republic (Mazzola, 2018,

[3] This is part of the broader right to religious freedom, recognised by Art. 19 of the constitution: "Everybody has the right to profess freely their religious faith in any form, individually or in association, to propagandise it and to worship in private or public, provided that the rites are not contrary to public decency".

p. 198). On the other hand, public funding covers completely only the costs of the Catholic chaplains. After the 2001 reform of the constitution, which has redistributed state and regional competences in a number of matters related to the legal regulation of the religious factor (see *inter alia* Floris, 2012), a few Regions have stipulated bilateral agreements with some local religious communities *inter alia* on the organisation of spiritual assistance services in healthcare facilities. These have ultimately introduced a new level of inequality between different local communities belonging to the same religious community. For example, the 2003 Protocol between the Region of Lazio and the Jewish Community of Rome attributed the related costs to the National Health Service, whereas under the 2009 Agreement between the Region of Lombardy and the Jewish Community of Milan, it is the latter who has to pay for the spiritual assistance services in regional healthcare facilities (Bolgiani, 2009, p. 474).

At the constitutional level, another difference between the Catholic Church and religious minorities is made by Art. 7(1) and Art. 8(2). Both recognise the principle of organisational autonomy, but the former states that the Catholic Church is sovereign and independent in its own sphere (that is, something more than mere autonomy), whereas under the latter religious denominations other than the Catholic one (only) have the right to self-organisation according to their own charters, provided that these do not breach the Italian legal system. This limitation is quite reasonable (and consistent with the European and international standards of protection of the right to religious freedom), but it formally does not apply to the Catholic Church.

4. A four-tier system of inequality

The distinction between the majority and minority religions, which characterised Italy's past history, has evolved with the passing of time into a more complex system of different legal regulations of religious minorities, which nevertheless has increased, rather than reducing, their unequal treatment. This may be described as a four-tier system of inequality (see Bouchard, 2004, pp. 70-71).

The first tier represents the most privileged religion, which remains the Catholic Church, whose legal position is first and foremost protected by the concordat. Only in 1984 was the Lateran concordat reshaped and, on that occasion, the contracting parties added a protocol to the revised concordat, stating that they considered the principle of the Catholic religion as the sole religion of the state no longer in force. In the first decades of Republican history, a sociological reinterpretation of this principle – where Catholicism enjoyed a special protection as the religion of the majority of the population, and not of

the state – continued to justify an unequal treatment. One of the most notable examples is the protection to religion afforded by the Criminal Code (one of the many pieces of legislation inherited by the Fascist regime and still in force, despite substantive revision). This made the prosecution of defamation of religion and blasphemy compulsory only when they concerned the dogmatic heritage of the Catholic religion, and reduced penalties in cases of crimes against religious feelings of a religious minority (Cianitto, 2018, p. 343). This matter was dealt with by over 180 judgements delivered by lower and higher courts since 1956 (Ivaldi, 2012, p. 44, fn. 84). Only with the judgment no. 440/1995 did the Constitutional Court start the equity process of the Catholic and other religions (see *inter alia* Ivaldi, 2004), by invoking the principle of secularism (*laicità*)[4]. Law no. 85/2006 finally amended the Criminal Code consistently with the constitutional case law (Cianitto, 2016, pp. 177-204; Gianfreda, 2012, pp. 19-31).

The second tier consists of the thirteen religious minorities regulating their relationships with the state by virtue of law based on a bilateral agreement with the respective representative entity. They are:

- nine Christian denominations, many of which are unions, federations or associations representing respectively (in chronological order): 1) the Waldensian and Methodist Churches, 2) the Pentecostal Churches, 3) the Seventh-day Adventist Churches, 4) the Baptist Churches, 5) the Evangelical-Lutheran Church, 6) the Orthodox Churches under the jurisdiction of the Ecumenical Patriarch of Constantinople; 7) the Church of Jesus Christ of Latter-day Saints (Mormons); 8) the Apostolic Church, 9) the Church of England; the Union of Jewish communities;
- two unions representing respectively Hindu and Buddhist associations, schools and centres and, last but not least, a separate Buddhist entity – Soka Gakkai Buddhist Institute[5].

The extension of the possibility to regulate bilaterally one's relationships with the state, first available only to the Catholic Church, to other religious denominations is a novelty introduced by Art. 8(3) of the constitution. Nevertheless, for a long time this possibility remained only on paper. In 1950 the Federal Council of Evangelical Churches requested to start negotiations for a bilateral agreement, but the request was rejected by the Department for religious affairs of the Ministry of Interior Affairs because "a parallelism between the concordat with the Holy See and the agreements with the representatives of religious denominations other than the Catholic one [was] not legally admissible"

[4] On the meanings attached by the Constitutional Court to the principle of secularism in its case law, see Ferrari (2012, p. 124).

[5] See: https://presidenza.governo.it/USRI/confessioni/intese_indice.html#2.

(quoted by Cardia, 1996, p. 203). The first bilateral agreement was signed only on 21 February 1984, three days after the signing of the revised concordat, to stress once more the hierarchy of the state's priorities in the regulation of its relationships with religious denominations.

With the passing of time, as mentioned, twelve more bilateral agreements have been signed and approved by law but – in a context of socially increasing religious pluralism – the religious minorities concerned remain a small group among all those existing in Italy (see Mazzola, 2021, pp. 141-147). Nevertheless, the main criticism of such a system of bilateral agreements is not so much its selectivity, but the fact that it has enlarged, instead of restricting, privileges. Bilateral agreements have not regulated the specific aspects of the religious life of the minorities concerned, which general legislation is not suited to address. This would have in principle justified the stipulation of a small number of agreements. But far from regulating the special needs of the interested minorities, bilateral agreements have merely been the instruments to extend the prerogatives first reserved only to the Catholic Church to thirteen religious minorities[6]. In fact, they have been developed as "photocopy-agreements" and have invariably reproduced almost the same text. As a result, the broader system of bilateral agreements (including the concordat) has come to include general rights, which should be instead recognised to all religious denominations by virtue of a law on religious freedom (see *inter alia* Alicino, 2013).

However, the Italian legal system lacks such a law. This is what Alessandro Ferrari calls the "mother" of all lacks (2012, p. 96). No attempt has so far succeeded in abrogating the law and decree on admitted cults, and in substituting it with a new regulation suited to face the new challenges posed by the evolution of time and society (Tozzi *et al*., 2010; De Gregorio, 2013). The 1929 law is severely outdated. On the one side, some stipulations are obsolete: Art. 4, which reproduces the text of the Sineo law, has been overridden by Art. 3 of the constitution (recognition of all citizens' formal and substantive equality and equal dignity); Art. 5 guarantees freedom of discussion in religious matters but this, too, has been superseded by Art. 19 of the constitution. On the other side, it does not take into account many of the contemporary problems of religious freedom, for the obvious reason that they had not arisen yet at the time of its approval (suffice it to mention the issue of religious symbols).

The last two tiers of the Italian system of inequality concern the religious minorities unable (or uninterested) to secure a bilateral agreement. They

[6] Including the access to the public financing system known as otto per mille. The Catholic Church and the religious denominations having a bilateral agreement and wishing to receive funds are the only subjects (along with the state) entitled to be allocated a share of the 0,08% of the tax on income on natural persons. See inter alia Durisotto (2009).

constitute the largest part of those existing in Italy and include two of the most numerous ones: Muslims[7] and Jehovah's Witnesses[8]. All of them are still subject to the regulation on admitted cults, but there is a difference in their legal position. Some of them are recognised religious minorities, having obtained legal personality (*ente morale*) under Art. 2 of the 1929 law and Art. 10 of the related decree. As such, they constitute the third tier. The fourth one comprises non-recognised religious minorities, which have not been able[9] or have been uninterested[10] to be recognised as *ente morale*, while remaining subject to the regulation on admitted cults in any other matter.

The religious minorities of the last two tiers are the non-privileged ones: they enjoy far fewer freedoms and are subjected to a greater number of checks and controls than those having a bilateral agreement. In fact, not only is the 1929 regulation out of date, but – being rooted in the Fascist regime – it includes norms that do not seem fully consistent with the constitution. Under Art. 1 of the law, cults other than the Catholic religion are admitted in Italy, provided that they do not profess principles and do not perform rites breaching public order or public decency. However, Art. 19 of the constitution mentions only one limitation (public decency), which applies exclusively to rites; any inquire into a religious denomination's doctrine would be illegitimate.

Art. 3 of the law stipulates that the appointment of ministers of religions other than the Catholic one shall be notified to the Ministry of Interior affairs, in order to be approved. Without the government's approval, any religious marriage celebrated under Arts. 7-12 of the law itself may not obtain civil effects. By contrast, there is no requirement to approve the appointment of the ministers of the religious denominations with a bilateral agreement. This difference seems inconsistent with the principle of equal freedom before the law enshrined by Art. 8(1) of the Constitution. What is more, the administrative practice has been characterised by the application of controversial requirements. For example, in the opinion no. 561/2012, the Council of State has suggested that a positive reply should be given to those requests from ministers of religions having at least 500 members at the local level (corresponding to the smallest Catholic parishes with a resident parish priest), or 5,000 members in the entire national territory. This number-based requirement is nevertheless illegitimate in the light of the most recent constitutional case law, according to

[7] See Alicino's chapter in this book.

[8] The bilateral agreement they signed in 2000 has never been approved. See Ferrari (2012, pp. 80-83).

[9] This has been the case of the associations representing Sikhism in Italy. See Perego (2020, pp. 480-482).

[10] Some groups manifest a soft religiosity, expressed in facts rather than in legal forms (Ferrari, 2012, p. 100).

which no difference of treatment may be based on sociological or quantitative criteria (see *inter alia* Parisi, 2014).

Concluding remarks

The passage from the liberal and Fascist era to the Republican, democratic one has been characterised by the recognition of religious pluralism but, at the same time, by the continuation in new forms of the old pattern of selective cooperation. Whereas in the past there was a distinct difference between the Catholic Church and other religious denominations, since the mid-1980s there has been a trend to extend the privileges first reserved to the majority religion to some minorities. This has improved the position especially of some traditional religious denominations, like the Waldensians and the Jews, but the problem of the unequal treatment of religious minorities remains unsolved.

The issue at stake – as stressed – is not so much the existence of different regulations for different religious groups, as the consequences that this system entails. The differences in the legal regulation have not been merely justified by the will to accommodate some specific needs of some minorities, but they have mostly resulted in the extension of the area of privileges. The failure to approve a law on religious freedom – which could address most of the issues currently regulated by the bilateral agreements – ultimately forces the Italian state to continue on an endless path, by admitting from time to time some new religious groups to the club of the privileged ones. In doing so, it reinforces the system of inequality no longer of all religious minorities *vis-à-vis* the majority religion, as it happened in a traditional confessionist regime, but at different tiers among different groups of religious minorities (on this point see Ferrari and Ibán, 1997, p. 71).

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C.

The reciprocal impact of regulation and religion

CHAPTER 9

Two ways of regulating religions: The case of Czechia and Slovakia after the division of the federative state in 1992

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Abstract

The Czechoslovak Republic, established in 1918 was a project of creation of one common legal and constitutional system from dual Austrian- Hungarian Empire. After more than seventy years of the existence of Czechoslovakia, in 1993 there were started two ways of searching for state-church relations in two new independent states – Slovakia and Czechia. One common legal basis established mostly in post WWII period and mostly democratised in the short period of democratic Czechoslovakia 1990 – 1992 has changed after a quarter of a century into two completely different forms of state-church relations. In Czechia, a system of mutual independence of state and religions (a way of marginalisation in the political life) was created but at the same time in Slovakia a system of strong state´s support of religions has fixed their position in public life and pushing them to the centre of political life.

Introduction

The legal regulation of religious life in the Czech Republic and Slovakia is a unique comparative example in Europe. A comparison of the development of the relationships between the state and churches in the Czech Republic

and Slovakia invites a unique analysis of the formation of the "religious field" (Bourdieu, 1971) within the transformation of the social and political system from state socialism to a market society. Both countries were part of the Habsburg monarchy until 1918, which, despite its various specificities, has been trying for the last century or more to unify the legal situation in the Austrian (included Czech lands) and Hungarian (included Slovakia) parts of the state (Nešpor, 2020). Later, as part of Czechoslovakia, the two parts sought a common model of this regulation that would overcome some of the historical differences of the monarchy, but at the same time would be open to the realities of a republican and democratically formed state. Within the framework of the common state, a unified, completely new model of church policy was introduced in 1949 by the ruling Communist Party of Czechoslovakia. This was based on the principle of nationalisation of the public and property functions of churches and religious societies, which came under direct control and dependence on the state (Law No. 217/1949), which was supplemented by direct financing of the salaries of the clergy and head offices of the recognised churches and religious societies (Law No. 218/1949). In the period 1949-1989, this model created an egalitarian system of recognized churches that were under the control of the state authorities (Tížik, 2011) However, this system excluded from the not autonomous religious field all religious groups not recognized by the state, which for this reason did not even exist for the state as groups of people of a common religious or ideological belief. Such cases of unrecognized churches were, for example, the Jehovah's Witnesses or the Unification Church (Beláňová, 2016; Beláňová, 2020) For this reason, too, the existence of full religious freedom as a possibility of a free but collectively cultivated religious life cannot be said to have existed between 1949 and November 1989, even despite the constitutionally and legally guaranteed protection of individual religious rights (Constitution of the Czechoslovak Republic, No. 150/1948, Constitution of the Czechoslovak Socialist Republic, No. 160/1960). The third period of the common Czechoslovakia in the formation of common religious field but at the same time the creation of basis of two independent fields was the short period of transition from state socialism to pluralistic and liberal democracy, beginning with the Velvet Revolution in November 1989 and ending with the split of the federative state at the end of 1992.

The aim of this study is therefore to analyse the gradual break-up of the two models of state-church relations, with an indication of the importance of common ground in the model existing in the years 1949-1989. The study, built on the analysis and comparison of the successively adopted legal norms, will also show that neither model can be taken for granted as natural and self-evident. At the same time, the analysis aims to show to what extent the original legal

framework can shape the newly emerging systems (religious field), *i.e.*, what role continuity plays even in a world of revolutions and fundamental political and social changes. What may appear from the existence of legal norms as an objective fact is revealed in such a comparison as the result of the resolution of various dilemmas as to how particular issues can be resolved in the new socio-political conditions.

Democratisation as building the autonomy of religious fields

Issues of religious freedom and the entry of religion (and churches) into the public space were an important part of the demands of the Velvet Revolution in November 1989 in Czechoslovakia. Already in the first days of Revolution, which broke out after the violent suppression of the student march on 17 November 1989, priests or believers of the main churches in both parts of the country began to engage in the public space in a different way. In the Czech part of the common state, representatives of the churches were active agents of the revolutionary changes, despite the still persistent official control of the state over the churches. The strongest voice in both parts of the state was that of the Catholic Church. On 25 November 1989, for example, the programme of protest activities included participation in events connected with the canonisation of Agnes of Bohemia (canonised in Rome on 11 November 1989), which included a live television broadcast of the solemn mass from Prague. Cardinal František Tomášek made a public speech in which he bowed to the protesting public and called for non-violence. At a subsequent gathering of some 500,000 citizens on Letná Plain in Prague, participants prayed the Our Father with Catholic priest Václav Malý.

Although in Slovakia the protests did not include similar religious rituals and ceremonies, nor did they involve priests, but rather only lay people from the so-called underground church, among the main twelve demands of the civil public in the document Programme Declaration of the Public against Violence and the Coordination Committee of Slovak University Students of 25 November 1989 was also a demand for "consistent separation of the church from the state" (Krapfl, 2013; Tížik, 2011)

At the federal level, *i.e.*, with implications in both parts of the State, already on 29 November 1989, at the 16th Special Session of the Federal Assembly, Article 4 on the leading role of the Communist Party in the state and society was abolished. At the same time, Constitutional Article 6 on the National Front, which, according to the Constitution, brought together permitted political

parties and social organizations, was amended, as was Article 16, according to which cultural policy, education and training were to be conducted in the spirit of scientific communism and Marxism-Leninism. Already in the first month of social change, the issue of the abolition of state control over the churches became a topic, with the abolition of the so-called religious crimes (obstruction of church control) as early as 13 December 1989.

In less than a month, the old ideological framework of the state, which had also legitimised the previous model of state-religion relations, had clearly collapsed. The initially disfavoured religion, in its various forms and through the activities of different actors, began to change the whole structure of relations between the various religious actors and also the state *vis-à-vis* them.

The period of state socialism also had fundamentally different consequences for their abilities of self-reproduction, which was particularly evident when comparing the development of the confessional structure of Czech and Slovak society. Two different processes took place in the same legal system. Until the adoption of the so-called church laws in 1949-1950, both societies were dominantly declaratively associated with a religious group (more than 90% of the population) (Tížik, 2011). But already in the 1991 census, less than half of the population in the Czech Republic subscribed to a religion, in contrast to Slovakia, where almost three quarters of the population subscribed to a church or religious group. In both societies, the denominational structure before 1950 was almost identical – about three quarters of the total population belonged to the Catholic Church. Although the Catholic Church remained the largest in the Czech Republic after 1990, the proportion of the population subscribing to it declined from almost 40% in 1991 to about 7% in 2021. In Slovakia, the proportion of adherents to the largest church, the Catholic Church, remained slightly above 60% for the whole period, until it dropped to about 56% of the population in 2021 (Tížik, 2022). It is in this changing context of radical "de-churching" of Czech society and basically reproduction or only slight weakening of the religious structure in Slovakia that the changes in legal norms took place.

Since the beginning of 1990, a new system of relations between the state and religion can be said to have begun in Czechoslovakia. Already in January 1990, a law was passed abolishing the provisions on state approval for the nomination and practice of clergy and on the supervision of the administration and disposal of the property of churches (Law No. 16/1990), and the two-year process of building a new system of a legal framework coordinated in both parts of the federative state began. The starting point in the creation of the new formal religious field (in the sense of defining the authorized actors and their possibilities of action in the spiritual and worldview sphere) in terms of legislation was continuity in the financing of state-recognized religious entities according to the 1949 law, but

without control over the personnel policy of the churches and the disposition of their income and property. Even after the radical political change in the state, the new religious field began to take shape on the basis of a significant continuity in legal relations with the period of state socialism.

The adoption of the Constitutional Law of the Federal Assembly of the Czechoslovak Federal Republic No. 23/1991, which introduced the Charter of Fundamental Rights and Freedoms as the constitutional law of the Czechoslovak Federal Republic, became important in the first period of the formation of the religious field in Czechoslovakia. It includes a declaration guaranteeing "freedom of thought, conscience and religion" as well as the right to change religion or belief or to remain without religion. Hradecký draws attention to the seemingly minor, but in its consequences fundamental, significance of the use of the word faith in the text of the document as opposed to the original word belief, used in the Convention for the Protection of Human Rights and Fundamental Freedoms of 3 September 1953. The use of the more narrowly understood term in post-revolutionary Czechoslovakia was also reflected in other guarantees, which specifically address only the protection of religious faiths and give rights (including in the field of education) only to religious groups (Hradecký, 2020, p. 119). These real and symbolic acts and legal norms have created a specific understanding of religion that is no longer associated with a broadly defined protection and promotion of a plurality of beliefs and worldviews, but there has been a restriction of the understanding of religion on a theistic basis, expressed in the form of an organised association in the form of a church.

The relationship between federal and national legislation began to show divergent approaches in the two parts of the common state as early as the early 1990s. In the Czech part of the country, different topics were addressed on the beginning of transformation. As the question of recognition of specific religious groups was delegated from federative to the national authorities even before 1989, in the Czech Republic, at the beginning of the year (March) 1990, the Church of Jesus Christ of Latter-day Saints (the so-called Mormons), was recognised by a decision of the Czech government. This example also shows that there were still no universal laws regulating the conditions for the recognition of new churches, but it was within the competence of the authorities.

The federal legislature, even before the official process of property restitution has begun, has proceeded to two phases of restitution of church properties through so-called calculation laws. First, the restitution of properties to religious orders and congregations (it means catholic) in Bohemia, Moravia and Slovakia was carried out on the basis of Law No. 298/1990. A further part of the total of about 900 buildings was returned in July 1991 under Law No 338/1991.

In 1990, another federal law concerning the association of citizens was adopted – the Law on the Association of Citizens (Law No. 83/1990) – but it negatively defined itself against religiously oriented entities. In fact, the law does not explicitly refer to "the association of citizens in churches and religious associations" and states that if the Ministry of the Interior finds that an association is carrying out an activity "which is reserved for political parties (...) or for the exercise of religion or belief in churches and religious associations", it will dissolve it. Unlike churches and religious associations falling under the competence of the Ministry of Culture, citizens' associations under this law are registered with the Ministry of the Interior of the respective republic.

It was only in 1991 that legislation began to define the conditions of recognition and the space for recognized churches within the legal system in both parts of the state and the federation as a whole. At that time, the Federal Assembly adopted the Law on Freedom of Religious Belief (Law No. 308/1991), which also sets out the conditions for the registration of churches and religious societies, defines the definition of a church and the definition of a believer (*i.e.*, a member of a church). The wording of the law suggests that the model for the definition of a church or religious society was on the territory of Czechoslovakia the traditional, large and formally organised churches in the form of a bureaucratic institution. This definition, according to Nemec, means that the state considers churches to be public associations (corporations) of a special nature, which is embodied in the condition of having a religious, spiritual basis. A corporation that does not have a faith basis (moreover, a unified one) and a spiritual mission cannot be registered as a church. (Nemec, 1996) Churches that were operating under other applicable legal norms prior to the entry into force of the law (*i.e.*, by law or by state approval) were considered registered as recipated. During the existence of the Federation, no new church was recognised by the State after the adoption of this law. In the Czech Republic, 19 churches and religious societies (including the group Church of Jesus Christ of Latter-day Saints registered before adoption of the law) were thus transferred to the new legal framework by reception, *i.e.*, on the basis of "traditionalism"; in Slovakia, there were 14.

This general law was specified in 1992 by national laws which created frameworks for the possible registration of new churches or religious societies and which indicate a divergence in the approach to potential new actors in the religious field in both parts of the federation. The Czech National Council adopted the Act on Registration of Churches and Religious Societies (Law No. 161/1992), which established rather restrictive conditions for registration, but with the possibility of an exception for churches that are part of the World Council of Churches, *i.e.*, the large Christian churches. For registration under this law, it was necessary to declare 10,000 registered adults residing in the Czech Republic or 500 registered by such a church that is a member of the World Council of Churches.

In Slovakia, a much more restrictive law was adopted by the Slovak National Council at the same time and without any exceptions. (Law No. 192/1992) According to this law, 20,000 adults permanently residing in the territory of the Slovak Republic were required to declare their membership in order to register (which is four times the proportion of the population in comparison to the Czech Republic).

The Federal Law on Religious Freedom and the national registration laws created the boundaries of what can be described as a state-recognized religious field, *i.e.*, a precisely defined number of actors who become bearers of the legal designation of religion and who enter into relationships with each other and with the state in a number of legally defined areas. Recognised churches were also affected by laws allowing religious groups to enter the public media, education and family law systems even in the first period of the formation of the religious field. In the case of education, both by allowing religious instruction in public schools and by allowing religious schools to be established alongside public and private schools (Law No. 171/1990). Proof of the State's friendliness towards recognised churches (but only towards them) was also the adoption of Law No. 234/1992, which replaced the previously existing and established form of compulsory civil marriage with an optional form based on the choice of either civil or religious marriage, both of which became legally equivalent. (Čeplíková, 2001, p. 115)

As has been shown, already at the time of federation the approaches of the individual republics to the regulation of religious life began to differ, but the basic frameworks and principles remained uniform. However, the establishment of two separate republics meant a fundamental divergence in dealing with this issue.

A fundamental divergence in the systems of regulation of the religious field

Despite similar constitutional premises emphasizing the equality of religious actors, both countries after their independence from the federative state in 1993 have approached the problem of registration of churches and religious societies differently. In the Czech Republic they proceeded in a regulated pluralisation, which has been completed for the time being with the adoption of the so-called Church Law of 2002, when a completely new system was adopted. In Slovakia, after the establishment of the independent state, there was a legislative hegemonization of the official religious field by the traditional actors.

In the Czech Republic, between 1993 and 2002, only two religious groups were included among the registered churches under the 1992 law. Of these, one was by virtue of separation (Nešpor & Vojtíšek, 2015, pp. 403-409) from an already registered church (in 1995 the Lutheran Evangelical Church was recognized, separated from the Silesian Evangelical Church). The second one (Jehovah's Witnesses, registered in 1993) was the only one that fulfilled one of the most essential criteria of the current law – the numerical census of 10,000 registered inhabitants of the Czech Republic.

The situation in Slovakia was different. Two pieces of legislation were more fundamental to limiting the possibility of registration. In 2007 (Law No. 201/2007) it was reformulated when the original non-binding registration was redefined to membership and the content and form of information about members was more precisely defined. Prior to the entry into force of this form of the law, two religious groups managed to register in 2007 – the Church of Jesus Christ of Latter-day Saints (Mormons) and the Baha'i Fellowship. The New Apostolic Church, registered by the Ministry of Culture in 2001, was registered retroactively, still under the pre-1992 legal status. The representatives of the New Apostolic Church argued that they had obtained permission to operate in Slovakia (Bratislava) in the summer of 1989 and that this had been recognised by the Slovak Republic. Despite the unprecedentedly strict conditions for registration in the Slovak Republic in European context, these were further tightened in 2017 (Law No. 39/2017) by increasing the required number of members of the registering church up to 50,000 members – citizens of the Slovak Republic.

When new legislation was adopted in the Czech Republic in 2002 (Law No. 3/2002), it was a radical change in the understanding of the public role of churches and the rules of the official religious field. However, the new law has substantially liberalized the possibilities of registration, replacing the former high census with a requirement of 300 adult residents of the Czech Republic claiming membership in a religious group. However, with regard to the possibility of obtaining specific rights, where the original census of 10,000 members remained. However, the law has enabled a large number of different religious groups to register and thus obtain legal status as a religious group. Indeed, it is the new approach, introducing specific ("special") rights, that is the most significant change in the law. These rights are not granted by registration to all churches, but may (but need not) be granted only after 10 years of uninterrupted operation since registration, and this is granted on application and after a number of conditions have been met by the registering authority.

This Czech new model is commonly referred to as two-stage registration, but this can lead to the mistaken assumption that specific rights become fully claimable at the second stage. Some of the churches that were registered or

reciprocated prior to the 1991 and 1992 Laws do not have all the specific rights after the new 2002 Law. And none registered after 2002 possesses any such specific right, despite their more than a decade of existence. The list of specific (special) rights is not very extensive, largely but not entirely overlapping with the previously legally enumerated rights for registered churches: 1. to teach religion in state schools, 2. to carry out spiritual activities in the armed forces, etc., 3. the right to perform church marriages, 4. to establish church schools, 5. the obligation of confidentiality (confessional secrecy) for clergy, not laity, and, according to Přibyl, 6. a kind of "cross-cutting" specific right was their funding from public budgets (Přibyl, 2004, p. 8), which was, however, abolished in the Law on Restitution of Church Property in 2012.

Prior to 2012, specific rights in Czech Republic included the right to have financial subsidies for clergy salaries and the operation of church headquarters under the 1949 Law. The abolition of this right by law in 2012 effectively removed even the theoretical possibility of any of the churches registered after 2002 to enter the state funding system. The consequence of the passage of this law is that mere registration after 2002 no longer implies the same status for a registered church as before.

A more fundamental change in the legal situation and in the ways of dealing with the relations between the state and the churches was related to the preparation of specific treaties of an international type between the state and the Catholic Church, represented by the Holy See as a subject of international law. In both countries, after their separation from the common federation, the processes of preparation of such treaties began at approximately the same time. In Slovakia, this was partly complicated by the international status of Slovakia during the government of authoritarian Vladimír Mečiar, but after the new, anti-Mečiar government coalition came into power in 1998, they got underway and in a very short time (in 2000) the Basic Treaty between the Slovak Republic and the Holy See was prepared and signed. Similarly, in the Czech Republic, a draft of a similar treaty was prepared relatively quickly (25 July 2002). Its preparation had been going on since about 1997, when Pope John Paul II, during his visit to the Czech Republic, offered the government to form a joint commission to solve the necessary problems in the relationship between the Czech Republic and the Catholic Church at the international level (Němec, 2003). However, the treaty was not approved and signed, thus it did not affect the form of legal relations between the state and the Catholic Church.

In Slovakia, only shortly before the actual adoption of the Basic Treaty between the Slovak Republic and the Holy See, a small amendment (No. 394/2000) to Law No. 308/1991 on freedom of religion was adopted, which introduced the possibility of concluding individual contracts between churches

and the state. This changed the previous construction of the law as universally applicable to all churches and allowed for specific relations between the state and individual churches.

Although the Basic Treaty mainly fixed the already existing rights of the Catholic Church, its character of being an international treaty gave the Catholic Church in Slovakia specific protection and its binding force is higher than the validity of the laws issued by the National Council of the Slovak Republic. Its consequences for the Church's position were more significant. First of all, it suppressed the principles of a religiously neutral state in several areas. For example: 1. the state gave contractual preference to one of the many registered churches, 2. in contrast to the treaties adopted with other churches, it gave this one a specific and essentially unchangeable content by its international character, 3. the National Assembly of the Slovak Republic gave it a specific and essentially unchangeable content by shifted the statehood, which had been built on Christian references, to a Catholic one, especially by incorporating ten Catholic holidays into the system of free days in the Slovak Republic, the commitment of the Church to form the citizens of the Slovak Republic in accordance with the principles of Catholic doctrine, 4. took upon itself the obligation to finance Catholic education in Slovakia.

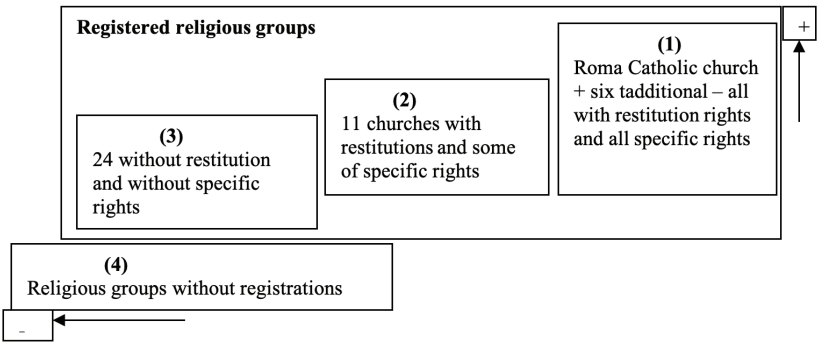
This basic covenant also included a commitment to adopt four other sub-covenants with a specific focus on several areas of the Catholic Church's activity: 1. in the armed forces, 2. in education, 3. on conscientious objection, and 4. on the financing of the Catholic Church. The first was signed the Treaty between the Slovak Republic and the Holy See on the Spiritual Service of the Catholic Believers in the Armed Forces and Armed Corps (No. 648/2002). The other treaty was the Treaty between the Slovak Republic and the Holy See on Catholic Education and Training (No. 394/2004). Treaties on conscientious objection and funding have not yet been adopted.

At the same time, however, the form and, to a large extent, the content of the Basic Treaty became a model for a similar treaty with a part (not all of them) of the non-Catholic registered churches, which, however, as churches that are not subject to international law, could only sign presidential-type treaties. The possibility to enter into a special contract with the state created by the 2000 law was used by 11 other churches in Slovakia two years after the Catholic Church (No. 250/2002). This agreement was followed by the agreements on religious education (No. 395/2004) and on the pastoral ministry to their believers in the Armed Forces and Armed Corps (No. 270/2005), which also followed the principles of the sub-agreements between the Slovak Republic and the Holy See, but were signed later. As a result of the adoption of these treaties, a hierarchy of churches and religious groups in the broadest sense was established in Slovakia.

Two fields and two approaches to restitution and church financing

In fact, at approximately the same time, the religious fields in the Czech Republic and Slovakia were shaped into hierarchical relations, albeit in different constellations of mutual arrangement. While in the Czech Republic the adoption of the so-called Church Law in 2002 led to the creation of four groups of registered (and two unregistered) religious actors, where the so-called specific rights became decisive for sorting (Figure 1), in Slovakia (Figure 2) it was the contracts with the state, where the contract between the Slovak Republic and the Catholic Church became their model with a unique status.

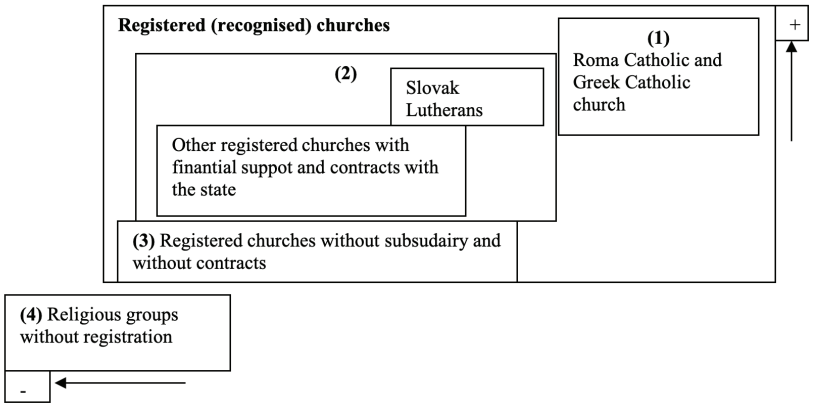
Figure 1. The religious field in the Czech Republic after 2002 (with an indication of the situation after 2012).



Note: The symbols + expresses the amount of symbolic privilege and – expresses the degree of distance from the field of power.

As Figure 2 shows, three groups of actors emerged among the registered groups in Slovakia, alongside which various unregistered religious groups still operated.

Figure 2. The religious field in Slovakia after 2000.



Note: The symbols + expresses the amount of symbolic privilege and – expresses the degree of distance from the field of power.

The most significant difference between the two countries was the way they dealt with the issue of restitution of churches' property and the financial separation of state and churches. While in the Czech Republic these two issues were combined and resolved only with the adoption of a law in 2012, in Slovakia only the issue of restitution of property and churches has been dealt with in a long-term and systematic way, without linking this issue to the financial or other separation of churches. Moreover, the restitution of church property was one of the first legal norms adopted by the legislators in the newly established Slovak Republic in 1993. Unlike in the Czech Republic, where the issue was linked to financial separation, the situation in Slovakia was essentially the opposite. Despite the definitive end of restitution already in 2005, a new law on the financing of churches was adopted in 2019, which only modified and extended in favour of churches the possibilities of using state subsidies in relation to the previously registered churches, compared to the original 1949 law.

In 2012, the so called Separation Law (Law on Property Compensation with Churches and Religious Obligations, No. 428/2012) was finally adopted in the Czech Republic. The law has undergone several amendments over the following years. The Law emphasizes its purpose of redressing wrongs and defines the period (25 February 1948 – 1 January 1990) to which it applies, while explicitly stating that it applies only to churches registered on the date of the Law's entry into force. This indicates that it refers to all churches and religious societies that suffered harm during their existence under the rule of the Communist Party of

Czechoslovakia. The law also contains a list of churches with the specific amount of financial compensation. However, from the list provided in the law, one religious group eventually decided not to accept financial compensation – the Baptist Brethren.

In Slovakia, the restitution procedure was implemented differently in terms of content and time. Already in the first year of independence, the Law of the National Assembly of the Slovak Republic (Law No. 282/1993) on the alleviation of certain property injustices caused to churches and religious associations was adopted with effect from 1 January 1994 (Moravčíková, 2011). The Slovak Republic was the first of the post-Communist states to address the issue of restitution of churches' property with this law (Čeplíková, 2001, p. 117). The law literally covered the mitigation of the consequences of certain property injustices caused to churches and religious communities by the deprivation of property rights to immovable and movable property on the basis of decisions of state authorities, civil and administrative acts issued in the period from 8 May 1945 (to Jewish religious communities from 2 November 1938) to 1 January 1990. Here we can see the different time definition of restitution, which goes beyond the government of the Communist Party of Czechoslovakia and also goes beyond the period defined in other laws, whether from the time of the federation (on the restitution of property to religious orders and others) or even the laws on the period of non-freedom. In Slovakia, however, restitution was not directly linked to the financial separation of churches and religious societies.

The completion of the restitution processes can be linked, although not consistently, to the last law of 2005 and the subsequent resolution of the National Assembly of the Slovak Republic (Law No 161/2005). In connection with the adoption of this law, the National Council of the Slovak Republic adopted a resolution (No. 1551) declaring the restitution of the properties of the churches in Slovakia to be completed. Despite the declaratory end of restitution, an amendment to the law on restitution (No. 125/2016) was adopted in 2016, modifying the 1993 Restitution Law, thus creating the possibility for churches to restitute additional property.

Following the last, albeit indirect, enabling of restitution in Slovakia in 2016, a new law on the financial support of churches and religious associations (No. 370/2019) was adopted three years later. The content of this law put an end to the debate on the financial separation of the state and churches and disconnected the issue of state funding of churches from the topic of restitution of churches' property. By its principles, the new law has fundamentally opened up the possibilities for the disposition of financial subsidies by churches compared to the previously applicable law from 1949.

The law from 2019 was prepared in a very short period of time which, however, maintained the model of direct financial contributions to those registered churches that request it, except for those that were already receiving a contribution as of the year of the adoption of the law. With the entry into force of this law, the 1949 Laws on the Economic Security of Churches ceased to apply. The second difference is in the calculation of the amount of money allocated to specific churches. In the old model, the amounts for churches were calculated on the basis of the sum of the salaries for the clergy and the costs of running the churches' headquarters (including other unspecified costs of providing for the needs of the clergy), so an important principle was the number of paid clergy in a particular church. In the new model, the main distinguishing criterion for calculating the amount of the contribution is tradition, *i.e.*, the amount of the subsidy in 2019. In addition, unlike the previous law, the state no longer earmarks funds for churches.

From universal rights to specific rights

The legal regulation of the possibilities of different religious actors developed differently in the Czech Republic and Slovakia, essentially immediately after the change of the social and political regime in Czechoslovakia at the end of 1989. However, while during the existence of the federation the official religious fields in both parts of the federation only started to take shape and the differences were only small, later they started to diverge more fundamentally and now, after 2019, it can be stated that they are already two paradigmatically different systems. But despite the differences in the current models, some similarities can also be seen, which are mainly related to the legacy of the common legal system regulating religious life during the Communist Party rule in 1948-1989, but also to the earlier legacy of the between war Czechoslovakia and in some aspects also the legacy of the Habsburg monarchy.

However, the formal, *i.e.*, legislative, pluralization of the environment of registered churches in Czechia after 2002 was associated with a change in the rights of registered churches, when the new legal conditions created three hierarchically arranged groups of recognized churches in terms of their possibilities of activity in the public space – religious groups possessing all specific rights, groups with some specific rights, and groups without any specific rights.

In Slovakia the situation was different. However, the restoration of religious freedom in Slovakia did not mean a more fundamental pluralisation within the world of registered religious groups, and in the first 17 years of state independence three groups managed to register. Subsequent adoption of more

restrictive laws has made further eventual recognition by the state impossible. In Slovakia, the closing field of registered churches did not vary in the rights acquired through registration, but rather in the consequences that registration allowed and that were related to other legal norms adopted by the state. Thus, a system of hierarchically arranged churches in Slovakia emerged in terms of the degree of privilege, state protection or connection with the state. In this, the adoption of the Basic Treaty of the Slovak Republic with the Holy See in 2000 and later other partial treaties became decisive, which was accompanied by legally "weaker" and less comprehensive treaties with eleven registered churches. These two groups of churches with a specific relationship with the state were also the ones that negotiated a new model of church funding with the state, in which they retained the principles of the previous funding but with expanded possibilities of how to dispose of the funds.

The most significant difference between the models of regulation of religious life in the two countries is the handling of the issue of restitution of church property confiscated from the churches before 1989. Here, fundamentally different approaches have emerged, not only in the definition of the period to which restitution applies. In Slovakia, restitution took place immediately after the establishment of the independent state in 1993 and took place in three waves and without being linked to financial separation. In the Czech Republic, on the contrary, the restitution of church property was directly linked to the enforcement of the separation model of state-civil society relations, and this model was not enforced until twenty years after the establishment of the independent state.

In terms of the type of regulation of religious life, its basic principles changed in both countries around the same time. While the initial period of building the principles of religious freedom and the recognition of religious groups by the state was based on the construction of universalistic and universally applicable legal norms, in Slovakia in 2000 and in the Czech Republic two years later a legal model based on the principles of specific relations with different actors in the religious arena was established. This, together with the registration rules in both countries, led after 2000 to the creation of "elite clubs" of religious groups which, because of their traditional status, were granted various privileges to which no new actor can access on the basis of established criteria. Paradoxically, the principle of membership in such a club became legal during the Communist Party rule before the end of 1989. As can be seen, in the Czech Republic the models of relations have changed from a cooperative model, through restitution, to a secessionist model, *i.e.*, a relatively religiously neutral state, with a system of privileged traditional churches. In Slovakia, the processes of restitution have moved towards the establishment of a hegemonic asymmetrical Catholic-

Evangelical dualism as a principle of dominance between hierarchically arranged recognized religious actors and its dominance in the symbolic character of the state (Tížik, 2021). Both models, however, retain to varying degrees the strong hegemonic position of the Catholic Church, thus abandoning one of the key pillars of the identity of Czechoslovak statehood – the declared and in various forms more or less cultivated religious neutrality. At the same time, the example of the Czech Republic demonstrates the possibilities of protecting religious freedom and maintaining a democratic state governed by the rule of law even without international treaties, and shows the possibilities of very thorough religious rights solutions in the pursuit of separation of state and churches.

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CHAPTER 10

Religious freedom, civic rights and magical heritage: The case of Sintra, Portugal

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Sintra: Monumentality and sacredness as heritage

Sintra is a charming village situated circa 30 km away from the Lisbon city centre, used since the Middle Ages (and even before, during the Muslim period), as a second residence by the nobility and the royal family. But Sintra is much more than the village itself: it encompasses a large area of mountain, with forests, lagoons and waterfalls, private parks and large estates with magnificent villas, palaces, chapels. Known to have a micro-climate, much fresher in the summer than the capital, it became, in the eighteenth centuries and nineteenth, a trendy place for the high bourgeoisie and the aristocracy. From being a refuge from summer heat and plagues for the Portuguese court, and a renowned hunting ground, the fame of Sintra grew. In the 19th century both the village and the mountain became part of the European Grand Tour. Ferdinand II, came to Portugal to marry Queen Mary II, fell in love with the place, and had a fairy-tale palace built at the top of the hill, over the ruins of the ancient Hieronymite monastery. Following the Romantic taste of the epoch, he surrounded the palace with a magnificent park, full of exotic plant species, mixed with local species, and he reforested the Sintra mountain.

With a combination of both landscape and architectural richness, Sintra was classified by UNESCO in 1995 as a World Heritage Site. It achieved this award because it represents a model of Romantic landscaping, together with architecture that portraits different historical periods, revealing also who lived there throughout the centuries, and how.

The past and the sacred

The magical aura of the "Moon Hill" [1]Sintra which caused such a strong impression on the prince of the Saxe- Coburg-Gotha dynasty, has a long reputation for its religious uses. There are testimonies of settlements and religious uses of the Sintra region since Neolithic times. Mysticism envelops this mountain and area, positioned right in front of the westernmost point of Europe, the Roca Cape. This magical aura is present in testimonials, from megalithic monuments to Celtic, Roman and Islamic ones, which attest to the various religious traditions that have praised, used and somehow transformed that space. The archaeological site of Alto da Vigia, overlooking the Atlantic, records occupations in Roman, Islamic and modern times, and was a Roman temple dedicated to the Eternal Sun, the Moon and the Ocean [2]. Other megalithic pre-historic monuments, as the Adrenunes dolmen (amongst others), the Tholos dos Monges, a burial site from 4,500 years ago, and monasteries in this region, dating from the Middle Ages on, smaller chapels and hermitages co-exist. The Penha Longa convent, built in 1355 and donated to the Hieronymite order in 1390; the 12th century chapel of São Saturnino, besides the seventeenth century Peninha sanctuary, both overlooking the ocean and the Roca Cape; the Hieronymite monastery, on the top of the hill, built on the site of a former hermitage dedicated to Our Lady of Penha, are some examples of this.

The serra has been known as a place of retreat, esoteric experiences, but also of popular religiosity related to its magical properties. The holy waters cult in Santa Eufémia is placed in a spot supposedly inhabited since 4000 BC[3]. São Mamede de Janas, a protector of cattle, had a chapel built in the 16th century, presumably to substitute a temple dedicated to Diana, a roman goddess also known for her relationship with animals and cattle (Rodil 2018). The feasts in honour of the Holy Spirit, in Penedo, Sintra, instituted in Portugal in the 14th century by Queen Leonor, the Holy Queen, known for her charitable deeds and sanctified in the 16th century[4], almost disappeared in continental Portugal after the 16th century. This

1 As the Sintra mountain is called: *Monte da Lua*, in Portuguese.

2 See Cardim Ribeiro (1998); Cardim Ribeiro (1999); Gonçalves & Santos (2020). The archeological research that confirms this data has been carried out under the supervision of the Archeological Museum of Odrinhas; further information can be found at http://museuarqueologicodeodrinhas.cm-sintra.pt/escavacoes/1/alto-da-vigia.html.

3 See J. Cardim Ribeiro (1998); see also the official site of the Heritage Division of the Ministry of Culture. http://www.monumentos.gov.pt/Site/APP_PagesUser/SIPA.aspx?id=3859.

4 But still fully alive in the Azores Islands and regions of Azorean diaspora, namely the eastern coast of the United States, California and parts of Canada.

is one of the few places where they were kept alive (and still exist nowadays), and included the payment of promises with the offer of large meals to the poor, made from the meat of an animal slaughtered on the site as a sacrifice for the divinities[5]. One of the most famous convents is the Capuchos Convent of the Holy Cross, also known as the Cork Convent, founded in 1560 and handed over to Franciscan friars. The life of these monks followed the ideals of the Order of St. Francis of Assisi: search for spiritual perfection, alienation of the world, renunciation of pleasures associated with earthly life, the perfect antagonism to the glamour of the royal and noble palaces. The rusticity and austerity of the construction (using the natural boulders as part of the walls,) and its relationship with nature, dialogued with the life of suffering and atonement followed by the monks. As part of the World Heritage sites, in the midst of the green Sintra valley, one of the unique spots where one can find the remains of the ancient original vegetation (oak and cork trees), it is nowadays an obligatory site to visit.

These examples attest to popular and collective devotions in Sintra. Beyond Catholic hermitages, chapels and monasteries, there is also evidence of other types of religiosity, from a more diffuse idea of the supernatural to specific personal and intimate connections that legends and stories account for. Famous writers and anonymous travellers all account for the energy felt upon approaching Sintra, either coming from the side of the Atlantic, with the magic Cape at one's back, or coming out of Lisbon, and entering the sacred woods of the mountain. The imagery of this encapsulated site that one penetrates thus incorporates the notion of the space as a site of the sacred and the awesomely fearful and enthrallingly captivating aspects of "The Holy", elaborated by Eliade (1959) on the basis of Rudolf Otto's influential book Das Heilige, one of the founding works in the phenomenological study of religion (Saraiva & de Luca, 2021).

The notion of Sintra as a sacred place interacts with concepts of heritage, legitimating (secular or sacred) identities by establishing an ownership of the past (Hafstein, 2012; Hafstein & Skrydstrup, 2020). The various actors at stake value heritage in different ways, highlighting the ways in which the multiple religious groups occupy the space (both symbolically and in reality). There is also an important connection to the history of the relations between the Portuguese State and religion over the past century, in ways that allow for a better understanding of what constitutes the politics and poetics of Sintra's heritage regimes nowadays. The politics of religion are in tune with the overall situation in Portugal, marked by a clear hegemony of the Catholic Church and an acceptance of this supremacy by the State. This is relevant not only if we analyse the religious uses of Sintra in the past, but, above all, when we look at what happens nowadays.

[5] See: http://riodasmacas.blogspot.com/2017/08/a-aldeia-do-penedo-e-sua-historia.html.

Old heritage, new religiosities

If Sintra was an elected place for the Romantic bourgeoisie and nobility, it became more popular as times changed, the country abolished the monarchy and embraced Republicanism (1910). More people, beyond the eighteenth and nineteenth centuries elites, came to visit the sites, the palaces, for walks in the parks and monasteries. With the 1995 UNESCO classification, the fame of Sintra exploded, in a world already globalized and where travelling and tourism are no longer an elite privilege.

Every day, and even more during the spring/summer high season, tourists queue in front of the Pena gate, to buy their tickets to visit the famous palace and its renown park. If they have not bought it on-line, they may risk a deception, as queues are long, and they might not make in time, as there are quotas to get in, so that it does not get overcrowded. While waiting, they take selfies and look up at the Moorish castle on the either side of the hill, their desired next tour destination. After these two monuments, they will surely take a bus, a horse ridden carriage or a tuk-tuk to return to the village centre, where they will buy the famous Sintra pastries and check out when they will be able to visit the National Palace, situated in the village centre.

With this continuous inflow of thousands of tourists every day, Sintra and its surroundings became impossible for locals. There are long traffic lines to enter the area, as buses queue to reach a spot closer to the centre where they may drop off everyone. Traffic rules and senses were modified, obliging residents to make a long detour to reach their houses or working places, or just for simple recurrent errands (Saraiva & de Luca, 2021; Cardeira da Silva & Saraiva, 2022).

Local associations fight for the resident´s rights, namely the municipalities 'decisions (as the traffic constrictions) and try to also counteract the decisions of the enterprise that, since 2001, manages the Sintra World Heritage Site, the Parques de Sintra-Monte da Lua (PSML). But resistance and contestation to that management and the way things are decided is also strong, coming from other civic associations, which are religious groups or movements.

In the last 30 years, several new religious movements have been using the serra for the implantation of their temples, and for rituals and ceremonies, from neo-druids, neo-shamans, neo-pagans, to Afro-Brazilian religions or masonic movements. Many of them fall into Fuller's (2017) classification of secular spirituality. They may also be regarded as "alternative spirituality" (Huss, 2014), within a wider setting of post-secularism (Parmaksiz, 2018) and "re-enchantment" (Isnart & Testa, 2020). These multiple constituencies imply different ways of conceptualizing religion and the relation of these religions with the Sintra space, but also the conflict between what we can call multiple

heritage regimes (Bendix *et al*., 2012) related to what each considers religious, sacred or profane, and different views of the use that should be given to the various heritagized spaces of Sintra (Saraiva & de Luca, 2021). Processes of "heritage-making" are often interwoven with those of "re-enchantment" and "ritualization", and Sintra is surely a good case-study to observe such relations, where issues of collective memory, religious forms and practices (Isnart & Testa 2020, p. 2; Testa, 2020, p. 20) come together, and where a symbolic capital coming from the past is used in diverse ways, connecting the realms of politics and religion (Isnart & Testa, 2020, p. 6).

Sintra embodies the idea of sacred landscape in various ways, which were constructed over time and yet simultaneously transmit a sense of timelessness still felt today. Besides the specific rituals, there are also day and night walks, organised by guides wishing to show the natural beauty of the site, or developing on local stories and legends, with episodes involving "holy individuals", as historical or invented characters, but also many of them with specific spiritual tendencies and approaches. By emphasizing the serra's sacred natural elements the religious groups expand on the magical nature of the place (Saraiva & de Luca, 2001, pp. 155-156).

Nation and Religion

Drawing on all the elements listed above—sacred spaces from pre-historic times, medieval cults of sacred waters, enchanted romantic palaces, chapels and humble monasteries dedicated to atonement—we can form a picture of what constitutes Sintra today. It is this UNESCO classified landscape that is nowadays used both by crowds of tourists, and by small groups of New Agers that roam the mountain at night, embracing the trees and meditating as they follow the dark forest paths, or Afro-Brazilian religions placing their offerings to Oxum (one of the *orixás*, gods) in a waterfall?

How did this scenario come to existence, from Middle Age and Renaissance Catholic chapels and monasteries to Afro-Brazilian offerings? Let us take a voyage in time, going back to the connections between the religious history of Portugal.

Portugal has been seen as a traditional Catholic country, together with Spain and Italy, which allowed for many comparative studies within this "Mediterranean enclave" (Peristiany, 1966). But much has changed in Portugal, mainly since the 80s of the 20th century, following the 1974 revolution, and the opening of the country to political and religious freedom, after 50 years of harsh Salazar dictatorship. Portugal is known as an emigration country, but in the last decades it has also become a country of immigration. The democratic transition,

European integration and implementation of Schengen agreements changed the position of Portugal regarding global flows of migration (see Castles & Miller, 1998; King *et al*., 2000). These include not only the arrival of populations with historical/colonial connections with Portugal – such as Cape Verdeans, Guineans, Mozambicans, and Angolans, to mention just a few – but also other and quite "unexpected" population flows. Chinese, Bangladeshis, Pakistanis, Senegalese and populations from Central and Eastern Europe – Romania, Ukraine – are now part and parcel of the country´s socio-cultural scenarios.

From the late 1980s onwards, Portugal became the locus of a multicultural and multiethnic society. We now have a diverse religiouscape where Brazilian charismatic Catholicism coexists with Punjabi Sikh or Hindu temples, Jewish congregations (Pignatelli, 2020), Islamic groups (Mapril, Soares & Carvalheira, 2019), Evangelical, Neo-Pentecostal (Mafra, 2002), and African churches (Sarró, 2009; Blanes, 2009), Afro-Brazilian religions (Pordeus Jr., 2009; Saraiva, 2008, 2013, 2016, 2020), Orthodox (Vilaça, 2016), Buddhists (Vilaça & Oliveira, 2019), as well as neo-pagan, neo-shaman and neo-druid groups (Fedele, 2013; Roussou, 2015).

One of the important variables in such dynamics is the history of the church-state relations, and more broadly the secular and the religious, from the second half of the 19th century onward. Portuguese monarchy was Catholic, from the founding of the nation in 1147 with the so-called conquest of Lisbon from the Moors led by the first king of Portugal, Afonso Henriques; throughout the glorious centuries of Portuguese overseas voyages and missionization, and the various convents erected to celebrate such accomplishments, such as the grandiose 16th-century Hieronymites convent in the Lisbon Belém neighbourhood. A Catholic monarchy prevailed, and the long-established relations between the monarchy and the Church, in spite of periods of tensions and ambiguities, showed that Catholicism was in fact the religion of the kingdom.

The 19th century was marked by a larger context of liberalism and constitutionalism that lead to a civil war; anticlerical movements and sentiments had grown, based on enlightenment ideals of free consciousness, free will, laïcité and the separation of powers. This climate and the political situation led to the extinction of the religious orders in 1834 and the confiscation of their properties. Nevertheless, during the second half of the 19th century several concordats were celebrated with the Vatican (Vilaça, 2006). The establishment of the republic in 1910 enacted a significant change in the relation between church and state, based on a clearer and broader separation between the religious and the political and a concerted effort to develop a secular, non-religious, society. A 1911 law separated the state from the Church, with the Republicans attempting to implement the project of a truly secular society. Still, at the level of the so-

called popular religion, people kept their traditional rituals and practices and the common religious popular feasts (including the ones in honour of the patron saints) escaped the control of the ecclesiastic authorities (Silva, 1994), or were even implemented by the clergy, as a way to give continuity to that popular religion. Later, though, with the military regime (1926) and the implementation of the Estado Novo-Salazar dictatorship (1933), the Catholic Church gained a new centrality in the political spectrum. The ideology of the Estado Novo reinforced a "Christian Reconquest" (Dix, 2010, p. 12), marked by a strong nationalist spirit. In 1940 a new concordat with the Vatican was signed, and the Portuguese state became financially responsible for the presence of the Catholic Church in several state institutions, such as schools, the army, and hospitals. This agreement implied a regime of privilege awarded to the Catholic Church and a hierarchy of religions, which resulted in the creation of categories according to their religious belonging and persecution of minority religious groups (Protestant churches were by then considered the enemies of the church and the state, which had implications in colonial spaces).

Even in the face of several changes, including the second Vatican Council, with its reformist and ecumenical concerns, and a law (1971) that pretended to safeguard religious freedom, the Catholic Church kept its regime of privilege, and religious minorities were often persecuted. This scenario changed with the 1974 revolution and the 1976 new constitution, which reiterated the freedom of consciousness and religion, condemned all religious persecutions and separated the state from the church. But the former law of 1971 still prevailed. In the decades following and due to the pressure from several sectors of Portuguese society in the late 1990s, including minority religious communities, debates were promoted in the parliament, and a new religious law was finally drafted and eventually approved in 2001. This new legal regime applied to all religious groups present in Portugal for at least 30 years, and to all those religions internationally recognized for at least 60 years, attributing to everyone the same rights and duties (Vilaça, 2006). But this time frame excluded several religious groups that were seen as the main competitors in the religious field. In the same process and despite the contestation from several sectors of Portuguese society that argued for a complete secularization of the state, the Catholic Church renegotiated the concordat in 2002 due to, so the argument goes, the sociological importance of Catholicism in Portugal, and thus maintained a regime of privilege when compared to other religious groups.

In 2004, the Commission for Religious Freedom was finally created (it had been proposed in the new religious law of 2001), the objective of which was to denounce the violations to religious freedom, the production of recommendations in relation to the settlement of specific religious communities in the country, and

the dissemination of issues and events pertaining to religious liberty – and which lasts until the present day. Its composition includes representatives of the state, two members of the Catholic Church, several minority religious institutions (namely representatives of Sunni and Ismaili Muslims, the Israeli congregation, the evangelical alliance, the Hindu community) and two academics (Côrrea, 2022; Cardeira da Silva & Saraiva, 2022).

The minority religious groups referred to above – most of them religions that escape the categorization of "religions of the book" – try to organize themselves as NGOs in order to achieve some empowerment. To acquire the official status of religious associations they must go through a long and complicated process to prove that they have been in the country for a long time, the number of followers, in addition to requiring approval from the Commission for Religious Freedom. If they obtain such a status they are exempt from taxes; however, beyond the legal and economic advantages, what matters the most to them is their official recognition as religious groups (Saraiva, 2009). Nevertheless, most minority religious groups defend they are treated differently from the larger traditions, as the "religions of the book"; they feel discriminated against for not being represented, and for struggling for years to achieve recognition as religious groups with a legal status (Côrrea, 2022)[6].

Sintra is a UNESCO classified site where religion undoubtedly has played an important role, with its religious uses since Neolithic times one component of its mystic aura, highlighted in the UNESCO proposal; and yet, the minority religious groups that seek to use the space exactly for its mystic atmosphere find it nowadays quite difficult to access, since many sites have been fenced off following the UNESCO classification, there are regular PSML security patrols and they do not fell at ease as they used to.

Old heritage, new religiosities

In spite of the heavy tourism, Sintra has continued its tradition as a magic and sacred space, and is used by various religious groups – neo-druids, neo-shamans, neo-pagans, Masonic movements, neo-Pentecostals, Hindus, Buddhists, Afro-Brazilians, satanic groups, as well as many other New Age practitioners – in the most diverse ways. Some establish their temples in the area, others use its innumerable spaces to perform contemplation, ceremonies and rituals, or for their sacred offerings. Others relate certain architectural traits of some of the monuments to specific philosophical and religious orientations. Some organize

[6] This is the case, for instance, of many of the religious associations of Afro-Brazilian religions in the country.

night walks to experience the magic of Sintra, where people follow unknown trails and hidden paths. The increase of such events in the last thirty years is in line with the rise in religious diversity in the country. They all praise the mystical aura of Sintra, all make use of this heritage site and claim the right to enjoy it. They support their claims by invoking the Portuguese Law of Religious Freedom (2001), their identities as religious groups and the way their religious essences tie in with the "magic of Sintra" and how, as citizens, they are therefore entitled to benefit from a space that they postulate was used by their ancestors, practicing cults in the area for centuries. Many of these new religions in Portugal may be categorized as falling into the realm of New Age philosophies and spiritualities, and many of their followers were brought up as Catholics, but have withdrawn from the religion, having turned to alternative spirituality in search of a meaning for life. It is in this search for personal growth that the connection with Sintra comes in. They feel Sintra is indeed a special place, with a unique energy, that does not relate to the Catholic historical hegemony, and that the excess of tourism and commodification are superficial aspects that do not reveal the real essence of Sintra. They therefore criticize the way PSML has fenced out many of the spaces previously used for rituals, as well as the way the enterprise has security guards patrolling the area throughout the night, thus constraining their practices. As Astor *et al*. (2017, p. 129) state for the Spanish case, what minority religious groups do when they try to acquire the status of official religions is that they use their counterhegemonic discourses on freedom of religion rights and combine it with heritage discourses in order to challenge existing power relations (Cardeira da Silva & Saraiva, 2022, pp. 167-168).

As elsewhere in Europe, Portugal has been the stage for increasing public discussions on the proliferation of religious diversity as problematic and as an obstacle to modernization, democracy, individual liberty and civic rights, in parallel with discourses that frame religion as cultural heritage (Astor *et al*., 2017, p. 127). On the one hand, several articles in the constitution proclaim religious freedom; on the other, some individuals feel that their rights are under attack if they go for a walk in the Sintra park and find a *despacho*, an offering made by members of an Afro-Brazilian congregation. Such *despachos* often include unpleasant items, such as bones, blood, or daggers, which cause panic and discomfort, especially to individuals with a mainstream Catholic affiliation (Saraiva, 2013), which, in fact, is still the great majority. To reinforce this displeasure, the use of candles or fires in the rituals presents a real fire hazard. The question of whether the expansion of official heritage discourses to include minority heritages necessarily generates an expansion of minority rights (Astor *et al*., 2017, p. 130) is suitable in this case, as is the acceptance of religious heritage as a basis for collective recognition and group rights (Astor *et*

al., 2017, p. 132). Even if minority religious movements and groups (as the ones relating to a mystical-esoteric nebula, not following any of the religions of the book) have grown immensely in the past thirty years, they are still minorities.

Sintra is a space engendered by a plurality of competing discourses and practices, where categories as secular and spiritual clash, coexist and often blur in its multiple ontologies and power relations. For UNESCO, the managing enterprise (PSML) and other local stakeholders, Sintra is an accurately charted heritage site that needs to be protected; therefore, heritage sites have been fenced off, the forest is controlled and regimented, and some passages are prohibited. But in the perception of local people and of various religious groups, Sintra emerges as a space in continuous transformation, bounded to histories and personal wanderings. For some religious groups in particular, the heritage regime collides with the right to use the forest and sites for ritual purposes. The serra has developed, over time, as a space of domestication where different forms of spirituality take place. While all these groups have various religious views, they share the belief that there is in Sintra a special sacred atmosphere, one that goes beyond the Catholic chapels and monasteries.

As a devotional space, Sintra is continuously "generated and generative" (Tweed, 2011, p. 117). The mountain, the vegetation, the chapels, convents and quintas are evoked and dismantled, put together and distinguished, which make the place what Massey defines as "the coming together of the previously interrelated, a constellation of processes rather than a thing" (in Pink, 2011, p. 348). The serra elicits discourses of authenticity and legitimacy that appeal to historical and religious pasts and feed the production of narratives that often reveal conflicting lineages.

Sintra, with its special energy, is believed to be divine, falling into what many New Agers classify as a "centre of light" (Ivakhiv, 2007) when they adopt the hypothesis that the earth is akin to a living organism, with its own energy, consciousness and intelligence, but also a clear and strong sacredness (Rocha, 2017, p. 137). If we look at Sintra from Casanova's perspectives on the concepts of the secular and religious (2009), we can easily state that in Sintra, nothing is secular; even a possible secular view is endowed with the enchantment that the notion of heritage as sacred brings to the light (Macdonald, 2013). The thesis of the decline and privatization of religion in the modern world – central components of the theory of secularization – falls apart once we look at what goes on in Sintra. The religious groups and individuals that praise Sintra blur the concept of modern secularism, in the sense that there is no clear cognitive difference between science, philosophy and theology (Casanova, 2009, p. 1051). This ties into the notion of secular spirituality, which refers to the potential for all experiences to assume a spiritual quality, not limited to any

one religious or transcendent realm. Fuller (2017) defends that many forms of contemporary religiosity – such as the ones we find in Sintra – often embrace most of secularism's basic premises. This secular spirituality can be described as pertaining to eclecticism, self-growth, relevance to life, self-direction, openness to wonder, authenticity beyond official Churches, metaphysical explanations, and communal and ecological morality.

Walks and retreats

Many of the religious groups that praise the magic of Sintra fall into the general classification of New Age spiritual culture. As Ivakhiv notes, since the beginning of the movement in the 1970s, New Agers are attracted to the "centres of light", linked in a network providing the infrastructure for a "new planetary culture" (Ivakhiv, 2007, p. 264; in Rocha, 2017, p. 137). For New Age Spirituality, "the Earth is alive and divine, and sacred sites give access to the energy they harbour". As Rocha mentions, such imaginaries of a pure and sacred land relate to what Said (1978) referred to as a discourse of "Romantic Orientalism", the nostalgic yearning for a pure and pristine past (Rocha, 2017, p. 144). In the case of Sintra, a Romantic site per excellence, this pristine past discloses the idea of a connection with that very specific magic and original energy of the Moon Hill.

Neopagan and New Age groups claim a transcendent spirituality that interlaces Sintra to ancient traditions such as the Celts – once again, a process mostly based on re-appropriation, cultural bricolage, syncretism, and ritual inventiveness[7]. Neo-shaman groups organize night walks where the walk intercalates with moments of meditation, embracing trees and engaging with the spirit of the forest. In such cases the participants are asked not to use the lights and to get used to the darkness of the serra, in order to mingle with nature and its magic. For the leader of these walks, the serra is indeed a magic space, that belongs to everyone, and it does not matter if there are fences dividing properties, as "a person is not the owner of a space; he (or she) is simply a temporary occupant of that space". Another organizer of the night walks uses various themes for these hikes – "Haunted Sintra", "Extraterrestrial Sintra", "Templar Sintra". A sympathizer of the Theosophy and Eubiose movements, she acknowledges that she indirectly calls upon the esoteric and especial energies of the place, in which she firmly believes: "The Moon Hill has a very specific energy, it is entirely feminine, with a strong magnetism, so people come here to achieve their goals…".

[7] Since otherwise we know very little about the actual ritual life of the Celts, or the Celtiberians.

The new religions that praise Sintra and use its spaces all relate to the late-modern search for contact with spiritual dimensions outside of religious institutions, and the quest for radical experiences of the sacred. Nevertheless, no matter how personal such quests may be, the longing to find a "pure" feeling of the sacred nature of Sintra involves the pursuit of a sense of community which puts people in contact-physical, when they hold hands in a night walk in the darkness of the hills, and mental, when they sit together, feeling the wind and meditating. As Rocha (2017, p. 9) points out, following Appadurai (1996, p. 8) they form a "community of sentiment, a group that begins to imagine and feel things together". Many of the individuals that take part in walks, rituals or spiritual and yoga retreats in Sintra search for spiritual healing, feeling at peace with the self and nature, a meaning in a fragmented world, trying to reconnect with the spiritual world, "finding community, and ultimately transforming the self" (Rocha, 2017, p. 12). It is a community of feeling, and the feeling that binds people together is Sintra's magic, which they all adhere to.

Most of the individuals believe they will find in Sintra the path to personal growth, much in tune with New Age philosophies and world views. The actions they undertake in order to achieve this also relate to the concept of "spiritual tourism" (Norman, 2012, p. 20-33), if we reflect on what they are searching for in Sintra: alternative life styles, quests for personal discovery and knowledge, escape from everyday life, looking for ritual renewal, as well as collective shared experiences.

For the religious groups of our ethnographic research, the Serra de Sintra and its tangible heritage sites are primarily spiritual sites that the UNESCO classification has simply confirmed in secular terms. They maintain that it is the spiritual energy of Sintra that has made it a historically privileged place before and beyond the spatial boundaries drawn on UNESCO's maps, and a spirituality much more ancient than Catholicism. In their discourses the heritage component collapses into the spiritual and is reinforced by it (Saraiva & de Luca, 2021).

The variety of new religions that use the serra for their ritualities mirrors the multiplicity of religious groups that are part of the present-day Portuguese religious scenario. If the Catholic Church still holds a position of power compared with all other religions despite the 2004 law and the creation of the Commission for Religious Freedom, the followers of the new religious traditions also feel that, in spite of the democratization of the country, the fencing off of the Sintra spaces reproduces the hegemony of the ancient days of monarchy,

A magic place defending civic rights?

In 2019 Sintra was full of tourists[8], crowding the palaces, monasteries, chapels. But behind this gaze of heritage there is also the perspective of the religious and mystical enchantment linked to the spirit of the place. Night walks in the woods, the varied ritual ceremonies of new religious groups, the persistent celebrations linked to popular religiosity and older cults, all enjoy the scenery that heritagization has made all the more fascinating.

The fame of Sintra's joins heritage with the rise of new religious movements making use of the serra. For UNESCO and its conventions is as systems of values, sets of practices, and formation of knowledge, that is, a structure of feeling and a moral code. As Hafstein (2012, p. 504) stresses, it is also true that in Sintra there has been a "democratization of heritage" (ibid., p. 505): individuals in general, and especially people who live there, the new religious groups that use the serra for their rituals feel that such spaces are "theirs" – and no longer a privilege of nobility or high clergy. Nowadays, tourists go to Sintra in search of the romantic aura that the UNESCO classification enhanced; and new religious groups go there looking for a special energy. They both value heritage, whether in the form of the monumental palaces of long-gone kings, or the nature and ritual spots used by our Neolithic ancestors or by medieval friars.

Heritage is indeed a mechanism of power and a transformative process. In this sense the new religions help preserve the "spirit of the place" that the institutions (such as PSML and UNESCO) defend. Each one creates its own stories around Sintra – various creative ways of re-inventing the past, going beyond the official Christian-centric narratives around kings and noblemen who erected chapels and monasteries. The past is used and manipulated in multiple ways, organized into diachronic stratified layers: the new spiritual groups prefer to use the "ancient" past, stretching back to the Celts (and even to the Neolithic) to legitimize their presence, relating their existence as religions to those ancient traditions. Catholics invest in a more "recent past", of the history of Portugal in the last centuries, when it became known as a nation of intrepid navigators and a colonizing power. New religious groups and local residents both claim for "free heritage", that they can enjoy without restrictions. Restrictions come both from the regulations imposed by the Catholic perspective (due to the fact that they have no representation or acknowledgement in the Commission for Religious Freedom), and from the PSML enterprise, with all the control and fencing out of the spots in Sintra. For them "free heritage", and free religious practice are interconnected and are legitimized claims.

[8] Before the start of the 2020/2021 Covid 19 worldwide pandemic that stopped the flow of tourists everywhere.

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d.
The impact of religious groups on the regulation of religion by the state

CHAPTER 11

Muslim and Jewish responses to safeguarding refugees and asylum seekers in England before and during the Covid-19 pandemic

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Introduction

In the British context of neoliberal governance, marked by state reliance on the third sector organisations to paper over the cracks in welfare provision (Williams *et al*., 2012; Jawad, 2012), questions of faith-based social capital and activism (Baker, 2006) have become central to public discussions about refugee welcome and integration. The global climate of political uncertainties and austerity, coupled with the refugee crisis and the pandemic, provided a further impetus for faith-based organisations to play a more visible role in civil society initiatives to welcome and support refugees and asylum seekers.[1]

Academic studies examined the dynamics of Christian-based social action (Pathak & McGhee, 2015), including Christian participation in 'settling those seeking sanctuary and unsettling negative attitudes' towards them (Snyder, 2011). However, little research focused on the role of religious minorities in supporting asylum seekers and integrating refugees into British multicultural society. The chapter contributes to academic scholarship by critically examining

[1] The terms 'refugees' and 'asylum seekers' envisage different legal status and entitlements to benefits, employment or accommodation in relation to vulnerable migrants. Both terms will be used intermittently, echoing a similar way of referencing used by participants from different organisations that took part in my research.

similar practices and discourses from Muslim and Jewish organisations about refugee protection in response to safeguarding regulations.

Public debates about British multiculturalism, with its moderately secular state-religion connexions (Modood, 2019), recognise the importance of accommodating minority interests in the public sphere. In this chapter, I discuss the role of Muslim and Jewish organisations not in relation to seeking accommodation for their religious and cultural interests from the state, but rather in their intermediary capacity. Drawing on the dialogical and dynamic character of multicultural citizenship (Modood, 2007), I argue that minority faith groups act as agents of multicultural integration for newly arrived refugees on the level of organised civil society.[2]

Using examples of Muslim and Jewish-led welfare and social activities in the context of protecting vulnerable refugees from harm and social isolation before and during the Covid pandemic, I suggest that religious minorities mediate refugee experiences of integration by facilitating and contesting safeguarding regulations based on risk and vulnerability. This reveals complex linkages between the notions of risk and resource,[3] vulnerability and safeguarding in relation to religion and civil society. Considering a typically less privileged status of some members of minority faith groups and the growing risk of the pandemic to public health, the boundaries between these concepts become rather porous, resisting a simple binary differentiation between vulnerable refugees in need of protection and resourceful religious minorities ready to help.

Regulatory approaches to safeguarding, vulnerability, and risk

Safeguarding is a key area of governance regulating the work of organisations supporting groups and individuals at risk, with refugees and asylum seekers deemed vulnerable migrants in the British policy context. The Care Act (2014, 14.7) defines safeguarding as:

[2] The chapter is based on the analysis of data from qualitative interviews with Muslim and Jewish organisations in England conducted in 2019-2020 and policy documents and reports. This work is part of research undertaken during my Leverhulme-funded early career fellowship, entitled 'Minority faith and civil society responses to refugee integration in Britain (2018-2021). The pre-Covid findings were complemented with a more recent study of policy and community reports written during the pandemic, including those from groups who were not part of my original sample.

[3] See Lundgren (2021) for a theoretically informed discussion of religious minorities as a risk to be managed vs. a useful resource for tackling societal problems.

> protecting an adult's right to live in safety, free from abuse and neglect [...] while at the same time making sure that the adult's wellbeing is promoted including [...] having regard to their views, wishes, feelings and beliefs in deciding on any action.

Specific safeguarding discourses aimed at regulating charities and their trustees include the requirement to protect 'beneficiaries at risk' and 'charity staff and volunteers' that can be 'classed as adults at risk' (The Charity Commission, 2017), acknowledging the dual vulnerability of those seeking and offering protection.

Religious, non-religious and mixed community groups which participate in the refugee resettlement programmes, such as the UK Community Sponsorship Scheme introduced in 2016 as part of the Vulnerable Persons Resettlement Scheme, are required to put in place 'a robust safeguarding policy' (Home Office, 2021). They must recognise that those they support 'should not experience distress, harm, or abuse [...] as a result of [their] actions', with their 'welfare and safety [being] paramount' (Home Office, 2020). The same safeguarding regulation mandates community groups to engage with the Prevent Duty to ensure that vulnerable refugees are not exposed to the risks of terrorism and radicalisation (Ibid). The inclusion of the Prevent statute was considered by some groups as an extra burden of responsibility placed on the sponsors, particularly from Muslim communities, as some recalled their own vulnerabilities as a minority at risk of securitisation.

During the Covid-19 pandemic, narratives of safeguarding focused on public health risks and increased concerns for the clinically vulnerable. Safeguarding measures included national lockdowns under the Health Protection (Coronavirus, Restrictions) (England) Regulations (Covid Act, 2020) (revoked in July 2021). Socio-economic inequalities created difficult conditions for refugees and asylum seekers worldwide, with the UNCHR classifying them as 'the most marginalised and vulnerable members of society [...] particularly at risk during the Covid-19 pandemic.' With a view of safeguarding British public, some restrictions had a disproportionate effect on religious minorities and their congregational approaches to religious worship and communal activities. These included the closure of places of worship 'during the emergency period' (Regulation 5) and restrictions on gatherings 'in a public place of more than two people' (Regulation 7). Collective concerns over safety and particular interpretations of vulnerability based on age over 70 and underlying health conditions (Covid Act, 2020) had a strong impact not only on religious services but also on minority faith groups providing continuous refugee support from their premises.

A brief outline of safeguarding narratives calls for a more contextualised interpretation of what constitutes vulnerability and how it is conceptualised in policy literature. Some academic scholars questioned narrow interpretations simply based on harms and risks. Not only do such accounts 'have a profound effect on the lives of refugees interacting with service providers' (Smith & Waite, 2019, p. 2296), but also they obscure the linkages between vulnerability and social control which undermine the agency of those who receive the services (Ecclestone & Lewis, 2014). To redress some of these gaps, some called for further empirical research to reflect experiences and perspectives from various stakeholders (Brown *et al.*, 2017, p. 506). Although a more theoretical engagement with vulnerability and safeguarding is beyond the scope of this chapter, I will examine how Muslim and Jewish stakeholders engaged with some of these regulatory practices and discourses in relation to supporting refugees.

Refugee support practices before and during the Covid-19 restrictions

Faith-based organisations in Britain support vulnerable members of society, including refugees and asylum seekers, in different ways: from running welfare and foodbank services in places of worship and community centres to offering hospitality, friendships, and social interaction – sometimes with co-religionists and sometimes together with other faiths and non-faith groups (O'Toole & Braginskaia, 2016). Whilst my research accounted for religious, ethnic, and social diversity within Muslim and Jewish communities in Britain, I found similar practices of support offered by Muslim and Jewish organisations to their service users (often referred to as clients or guests), namely in their efforts to address food poverty and social isolation.

Safeguarding practices are about protecting vulnerable groups from harm and looking after their emotional and physical wellbeing. A brief comparison of how Muslim and Jewish organisations engaged in offering food assistance and social activities before and during the pandemic demonstrates how they worked to comply with and facilitate these practices.

(i) Supporting refugees and asylum seekers before the pandemic

The host-guest relationship is central to understanding different forms of hospitality, including religious, community and refugee-based practices and responses to displacement (Mavelli & Wilson, 2017; Berg & Fiddian-Qasmiyeh, 2018). Interview participants typically highlighted the importance of both religious and humanitarian values in informing their practices of welcoming

those in need. They spoke of religious obligation to help the stranger and framed their actions through humanitarian concerns for the vulnerable. In the Muslim tradition, offering food and hospitality is considered synonymous with 'the act of giving' (Siddiqui, 2015, p.31), and prescribes that a guest must be 'treated with kindness, dignity, and respect' (El-Aswad, 2015, p. 462). In the Torah, 'there are no commandments repeated more frequently [...] than the commandments regarding the kindness toward the stranger' (Patterson, 2018, p. 613). A notable finding was that Muslim and Jewish groups produced multicultural discourses of protection, rooted in both universality of humanitarian needs of their clients and specific religious teachings underpinning social action.

Research participants mentioned their personal, or family experiences of coming to Britain, and emphasised the value of their perspectives from the position of 'already settled' minorities. Drawing on their own struggles with integration and social isolation, some felt they could help new arrivals to engage with similar social and regulatory issues. A respondent from the Liberal Judaism synagogue, noted that as a 'another minority group [they] wanted to ensure that others had the same benefits and possibilities that some of the ancestors of the Jewish community.' (Interview with Rabbi, London, 29 January 2019). A Muslim respondent from the Shia community suggested that Muslims 'found a way to navigate through the spaces [of inequality] and [were] able to share of the best practices with refugee communities' (Interview with a Muslim activist, Islamic centre, London, 15 March 2019).

The empirical data suggested that Muslim and Jewish groups considered their religious and communal premises as 'spaces of care' (Cloke *et al*., 2017, p. 704), safe and welcoming to newcomers. A foodbank supported by Muslim donors, encouraged refugees resettled in the area to talk to people from different backgrounds and participate in their events and projects, such as growing fruit and vegetables with other refugees and volunteers (Interview with a foodbank volunteer, London, 26 February 2019). Jewish volunteers from a Reform synagogue invited refugees who used their drop-in centre to visit together museums and art galleries in London, as well as encouraged everyone to sing together in the choir. Emphasising the social value of visiting places, one respondent noted that refugees 'know that in the winter, they don't have to be at home – they can sit somewhere else nice and warm and look at nice pictures' (Interview with a Jewish volunteer, Reform synagogue, London, 7 March 2019).

The importance of building friendships between volunteers and asylum seekers was emphasised by a member of Orthodox Jewish community synagogue (Interview with representative from United Synagogues, London, 13 February 2019) as they described the work of one of their drop-in centres that supports asylum seekers. A play area full of toys offered a safe space where children of volunteers and asylum seekers could play together and facilitate

adult interaction with 'the parents [being] happy because they had their kids integrating [...] in a controlled environment' (*Ibid*.).

Multicultural narratives of facilitating welfare support and creating safe spaces may have been based on a more nuanced understanding of specific challenges of minority integration by some of the respondents. However, they were not always free from power imbalances between those offering and those seeking protection. Although I found some evidence of patronising narratives towards those in need, some of the more critical, decolonial approaches, included not only looking after their clients' wellbeing but also empowering them by inviting to give something back – for example by preforming or cooking together.

(ii) Supporting refugees and asylum seekers during the Covid-19 restrictions

Covid disrupted support provisions available to refugees and asylum seekers, with welfare and food services scaled down and risks of social isolation increased (Beck & Gwilym, 2022). During the lockdown, the interruption of services included a pause on refugee resettlement programmes, the lack of available accommodation, face-to-face support services, and access to digital services. Regional surveys of refugee and migration organisations in England found 'isolation and loneliness, deteriorating mental health and homelessness' to be the most pressing issues. (Refugee Action Data Hub, 2020, p. 3). Moreover, 65% of respondents said they had to adapt their safeguarding procedures during the pandemic, not least because of the increased safeguarding risks arising with remote service delivery' (*Ibid*., p.12).

The Covid Act (2020) forced faith and community organisations to close their premises and stop in-person gatherings to ensure safety and wellbeing of both volunteers and service users, although with some exceptions for 'urgent public support service (including the provision of foodbanks [...] or support in an emergency).' Community sponsorship groups supporting refugee families showed 'resilience and adaptability' in negotiating new hurdles of staying connected across the digital divide during the pandemic (Reyes, 2021). The following analysis of online reports and official statements from several Muslim and Jewish groups – including examples from the groups I had previously interviewed as well as new ones – demonstrates that increased health risks and safeguarding restrictions called for more resourcefulness and innovation during the pandemic.

The closure of premises and foodbanks forced organisations to adapt their food deliveries and social activities. For example, Sufra started 'a new community kitchen delivery service that operated 7 days a week', and 'scaled up [..] food growing project in St. Raphael's Edible Garden.' (Sufra, 2020). They expanded their advice and refugee services by moving them online and operating remotely

(*Ibid*.). Green Lane Masjid in Birmingham, which had welcomed a Syrian refugee family before the first lockdown, contemplated a more flexible engagement with Islamic faith (Hamill-Stewart, 2021) as they transferred their group prayers and social events online.

With many synagogues moving their services online, some transformed their face-to-face provisions of refugee support to a phone drop-in service to continue supporting their clients who did not have access to internet. Volunteers from Alyth Synagogue would 'telephone guests regularly to ensure that no-one felt neglected or forgotten' and get signposted to the right services (Grossman, 2022). They developed collaborations with other organisations, including Barnet Refugee Service and Muslim Aid to deliver emergency food parcels and foodbank services.

Some drop-in centres sought to protect vulnerable clients as well as volunteers by moving their services outside. For example, United Synagogues had to scale down their work and operate their drop-in services out of one synagogue, but on a more regular basis (Frazer, 2020). With social distancing in place, regular users could no longer visit the centre to enjoy a cooked meal or find essential items, so volunteers decided to 'pack up bags of clothing in the right sizes, shirts and trousers according to age groups, and hand them over' (*Ibid*.). By taking some of their work outside, the group continued offering welfare support in line with safeguarding restrictions. However, they were no longer able to offer legal or medical advice to their clients as any efforts to discuss sensitive information at close range 'would require a breach of social distancing regulations' (*Ibid*.).

Religious minorities continued to mitigate against food insecurity, digital poverty, and social isolation by adapting and innovating their activities in compliance with health safeguarding restrictions. This correlates with similar findings from research about support provisions for refugees and asylum seekers during the pandemic (Finlay *et al*., 2021). It also exemplifies potential tensions between collective and individual forms of vulnerability, with organisations facing increased responsibility to safeguard and protect during and from the pandemic not only their clients but also their volunteers.

Multicultural challenges of safeguarding, equality, and accommodation

A brief look at the narratives used by Muslim and Jewish groups to discuss practices of refugee protection and health-related vulnerabilities, reveals that rather than playing a role of resourceful but uncritical partners of the state, some groups voiced opposition to hidden inequalities within these practices. The first issue of contestation related to concerns about securitised aspects of safeguarding provisions used in the community sponsorship documentation

that could potentially stigmatise Muslim organisations interested in participating in sponsoring refugees. The second issue concerned more differentiated approaches to easing Covid-19 restrictions in places of worship, based on recognising health vulnerabilities of Muslim and Jewish communities.

(i) Safeguarding as an extra burden of responsibility

The Home Office guidance regarding community applications to sponsor refugees includes a specific provision for safeguarding policy to be put in place and approved by local authority. The group must confirm they will 'provide a safe and supportive environment for a vulnerable resettled family', including safeguarding from the risks of terrorism and radicalisation in line with the Prevent statutory duty (Home Office, 2021). The Prevent Duty was introduced in 2015 as a requirement of public-sector personnel, including charities working with vulnerable members of society, to undergo extremism awareness training to monitor and report signs of radicalisation. In the context of community sponsorship, the lead sponsor or the designated safeguarding officer is responsible to undertake online or in person training provided by the Home Office. The group must also state on their application that they will 'report to the respective local authority any concerns they have about a person's potential radicalisation' (Home Office, 2020).

Academic studies about regulatory practices of monitoring religious minorities found comprehensive evidence of Muslim communities in Britain being subject to increased scrutiny by government counterterrorist agenda (O'Toole, 2021; Qurashi, 2018). Muslim participants emphasised their commitment to work with the Home Office in engaging with vulnerable individuals. However, some found the inclusion of the Prevent stipulations and discourses in the Community Sponsorship documentation problematic, not least because of their moral objection to the already controversial role of the Prevent agenda in stigmatising British Muslims.

A Muslim group involved in promoting community sponsorship among Muslim organisations noted that some were wary of the negative brand of the Home Office. For example, some voiced fears that 'mosques will be viewed unfavourably when they put themselves forward to be a community sponsor, due to great scrutiny on Muslim communities when it comes to things like extremism' (Interview with Muslim community development organisation, London, 21 February 2019). Another volunteer noted that mosques were concerned about an additional burden of responsibility and worried that wrong actions of the ones they sponsor might negatively impact them (Interview with an activist, Islamic centre, London, 15 March 2019).

Some respondents questioned the securitised dimension of the programme supposedly designed to create a welcoming rather than discriminating environment, while others reported anecdotal evidence of Muslim members in an interfaith community group feeling reluctant to become a lead sponsor to avoid endorsing the Prevent agenda. However, not all Muslim organisations were critical of the need to engage with the Prevent duty as part of community sponsorship and saw it as just another bureaucratic hurdle to tick off the list and focus on creating more equal opportunities for newcomers. For example, a Muslim school did not find any difficulties in engaging with this element of safeguarding as they had already incorporated it into their policy of safeguarding school children (Interview with senior representative, Muslim Faith School, London, 7 October 2019).

Although inclusion of the Prevent Duty was not mentioned as an issue of concern by Jewish respondents, several organisations reflected on difficulties of working with the Home Office, with reference to its problematic treatment of some refugees as deserving/underserving of support. Some respondents were critical of the ways in which the two-tier system of hostile environment disadvantaged asylum seekers in comparison to government resettled refugees and did not respect their equal right for protection (Interview with a Jewish activist, 15 February, London, 2019).

(ii) Multicultural approaches to the proposed easing of the Covid-19 restrictions

The two lockdowns in 2020 (26 March – 4 June, 5 November – 2 December), and subsequent easing of restrictions, were met with different levels of acceptance and criticism by British Muslims and Jews, particularly in relation to congregational aspects of religious and community practices. Both communities mobilised grassroot resources to actively contribute to the local and national efforts to mitigate against public health risks of the pandemic, whilst also considering the toll on their own members and communal vulnerabilities. Emerging research suggests that the pandemic affected different parts of Muslim and Jewish communities differently, which helps account for complex and sometimes diverging responses from different groups to the pandemic restrictions (Staetsky, 2021; Al-Astewani, 2021). A report from Public Health England (2020) found that ethnic minorities experienced some of the worst impacts. The Muslim Council of Britain (2020) and the Institute for Jewish Policy Research (Boyd 2020) found that members of their communities were disproportionately affected by the highest mortality rates.

In June 2020, the UK government announced a gradual reopening of places of worship for individual prayer and 'for limited permitted activities, in a manner that is safe and in line with national lockdown restrictions' (Ministry of Housing, Communities & Local Government 2020). However, government guidance about restrictions and their gradual easing 'lacked clarity' and resulted in faith communities 'making their own risk assessments and imposing their own limits on numbers' (Cranmer & Pocklington, 2020; p. 29). Whilst Church leaders welcomed the move to reopen places of worship in England, Jewish and Muslim representatives criticised the government's hasty announcement on the grounds that it was not 'appropriate for the way they practise their faith' (Sherwood, 2020). Chief Rabbi Mirvis (2020) wrote that 'different religious communities must apply the government's advice in a suitable manner at their own pace, so that it is safe in their own context'. He urged Jewish community to 'proceed with extreme caution', considering 'the intensely social atmosphere [...], age profile and availability of space, as well as the evolving national picture'. Harun Khan, the secretary general of the Muslim Council of Britain, urged the government to 'give clear and unambiguous guidance' for Muslim communities about opening for private worship so that 'mosque trustees, staff, volunteers [...] [would] plan effectively to ensure the safety and wellbeing of everyone' (Muslim Council of Britain, 2020).

These debates reflect wider issues of multicultural accommodation of congregational aspects of religious worship by religious minorities at a time of increased public health risks to all. The ways in which safeguarding guidelines were narrated and negotiated by Muslim and Jewish groups indicated a degree of multicultural agency exercised by religious minorities. Muslim and Jewish communities not only adapted their services, including community worship and welfare support of refugees and asylum seekers, but also critically engaged with safeguarding guidelines as they attempted to reconcile vulnerability of service users and their volunteers, in line with regulatory precautions regarding social distances, cleaning, and further restrictions on indoor activities.

Conclusion

The chapter examined how religious minorities, exemplified by Muslim and Jewish organisations in England, supported refugees and asylum seekers before and during the Covid pandemic in the regulatory context of safeguarding vulnerable individuals. Safeguarding guidelines created opportunities for minority faith groups to develop safe environments to assist with welfare provision and promote refugee emotional wellbeing by drawing on their humanitarian and religious capital, resourcefulness, and organisational capacities. The same safeguarding measures equally restricted support and integration activities by

introducing additional bureaucratic procedures for developing safeguarding policies, while the Covid-19 legislation significantly limited availability of safe spaces, with places of worship forced to close and social interactions curtailed. Whilst these opportunities and constraints were not that different for Christian or other faith and secular groups, I found that some Muslim and Jewish groups felt exposed to additional risks of government scrutiny and were disproportionately affected by the pandemic.

Muslim and Jewish groups navigated the regulatory landscape of safeguarding by facilitating provisions of welfare and wellbeing or adapting their services to comply with health regulations. They also contested safeguarding practices, criticising their inequalities and lack of recognition for minority-based differences. Although some multicultural aspects of their campaigning about health risks involved seeking accommodation from the state, most of the activities discussed in this chapter emphasised the importance of conceptualising their multicultural agency in relation to protecting vulnerabilities of new 'others'. The multicultural dimension of their engagement with safeguarding highlighted tensions between collective and individual risks and vulnerabilities. The pandemic may have posed health risks to the public, but its regulatory safeguards exacerbated inequalities and restricted modes of support, ultimately calling for greater resourcefulness from religious minorities.

The discussed complexities of how Muslim and Jewish groups mediated not only the vulnerabilities and risks of their clients but also their own, as well as their multiple ways of engaging with safeguarding regulations, suggests the need to develop a more flexible framework to conceptualise risks and resources/resourcefulness, vulnerabilities and safeguarding in relation to religious minorities and social action.

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CHAPTER 12

Dealing with neo religious pluralism: Regulating Islam in Italy

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Abstract

This article analyses the religious changes within Italian society. These changes are not only caused by the presence of Islamic groups. Yet, given the specificity of the Islam (especially when compared to Italy's "traditional religions") and its problematic interconnected issues (which implies the emergences of immigration and/or religion-inspired terrorism), Islam highlights the most striking facets of Italy's new plural religious landscape. This implies other legal matters, like those related to the bilateralism principle, as traditionally stated in Articles 7.2 and 8.3 of the Italian Constitutions, as well as the 1929 law (no. 1159) on admitted religions (*culti ammessi*). Both the practice of state-church bilateral relations and the 1159/1929 law, combined with the highly discretionary powers granted to the Government in this matter, can lead to unreasonable and discriminatory distinctions between religions that benefit from bilateralism and Islamic organizations. This is even more evident in light of the fact that Islamic communities are not only are excluded from the benefits of bilateralism but also are legally recognized as nonreligious association.

Introduction

The religious changes witnessed within Italian society are not only caused by the presence of Islamic groups. However, given the specificity of these groups, especially when referring to traditional religions, Muslim communities highlight the most striking facets of the Italian neo pluralism. As a relatively new religion, Islam indicates and signals the speed tendency to foster plurality within the

country, which implies more or less interconnected issues: gender roles, clothing codes, family models, religion-inspired terrorism, the relationship between religion and politics.

In this chapter I will focus on Italy's State-confessions relationship system, under which the Catholic Church and few other denominations have traditionally played a vital role. In particular, I will analyse how the bilateralism principle (Articles 7.2 and 8.3 of the Italian Constitution) performs in the current religious pluralism, with the rising presence of 'other' communities, which not by accident are considered as new *nomoi* groups (Shachar, 2000, p. 394). Indeed, this is the case of Muslim communities, whose presence has a greater impact on the bilateralism principle that, while used for traditional religions, especially Judeo-Cristian ones, can hardly be considered for other minority groups.

In this way, Islam is testing Italy's State-confessions relationship system within a society that, due to immigration and globalization, is no longer monocultural.

1. Regulating religions

Article 7.2 declares that the 1929 Lateran Pacts governs the relationships between the State and the Catholic Church. However, Article 7.2 also claims that any change to the Lateran Pacts, when accepted by both parties, does not require the procedure of Article 138 in regulating constitutional amendments. This entails that when there is a bilateral agreement, a legislative (not constitutional) act is sufficient in order to amend the 1929 Pacts that, together with the procedure of Article 7.2, are thus seen as legal prototypes of the bilateralism principle, which is also incorporated into Article 8.3 of the Constitution. Accordingly, only legislative acts can regulate the relationships between minority religions and the State (Bouchard, 2004; Varnier, 1995). However, these acts must be based on *intese*, meaning an understanding between the State and religions other than Catholicism (Casuscelli, 2008, p. 304). In other terms, once the Italian Government and the representatives of a given religion have signed an agreement (Article 7.2 related to Catholic Church) or an *intesa* (Article 8.3 referring to denominations other than Catholicism), these two documents need to be ratified (for the agreement) or approved (for the *intese*-understandings) by specific legislative acts of the Parliament.

On the 18th of February 1984, under Article 7.2 of the Constitution the Holy See signed its agreement with the State, also known as Villa Madama agreement. This agreement nearly changed the entire content of the 1929 Lateran Pacts, except for the first part called Treaty. In 1985, the Villa Madama agreement was ratified by the Parliament with the 1985 law (no. 121), which is an atypical legislation, meaning it can be amended only on the basis of a new state-church agreement. Italian

Government also signed the first *intese* with the Waldensian Church in 1985. Since then, the State authorities have engaged other understandings following Article 8.3, thirteen of which have been approved by the Parliament to date.

In theory, the bilateralism principle protects religious groups from being overpowered by the State's unilateral laws. Due to their highly general nature, the unilateral legislations are reluctant to meet the requirements for specific religions. In contrast, bilateral legislations have a more consistent implementation of the constitutional principle of equality, which implies the rights to be different and equally free before the law. Bilateral legislation promotes new rules that aim to combine respect for general constitutional obligations and attention to specific religious claims (Barry, 2001; Bedi, 2007; Festenstein, 2005; Minow, 2007). Moreover, bilateralism is even more relevant in the light of the principle of *laicità* (secularism), which is not expressly enshrined in the 1948 Constitution. Yet, this has not prevented the Constitutional Court to specify that, on the basis of a series of constitutional provisions[1], secularism is one of the supreme principles (*principi supremi*) (Finocchiaro, 1992, p. 67) of the Italian legal order[2]. *Laicità* does not imply indifference towards religions, rather, it acknowledges the special status of denominational religions while also affirming the equidistance and impartiality of the State (Oddi, 2005, p. 241; Lariccia, 2004, p. 1251; Sicardi, 2004). In other words, Italian secularism has a positive attitude towards confessions, whose importance is precisely delineated through the principle and the method of bilateralism. It is also important to note that the Italian bilateralism principle related to Article 8.3 of the Constitution has been characterised by the so-called "copy & paste" phenomenon (*intese fotocopia*). Meaning, in this case the bilateralism principle is by the substantial similarity of all *intese* which have been signed by minority religions until now [3]. This has led to the creation of a 'common legislation' that, as such, is

1 Namely Articles 2 (under which "[t]he Italian Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled"), 3 (regulating the principle of equality); 7 (concerning the relation between the State and the Catholic Church), 8 (1st para.: "[a]ll religious denominations are equally free before the law"; 2nd para.: "[d]enominations other than Catholicism have the right to self-organization according to their own statutes, provided these do not conflict with Italian law), 19 ("[a]nyone is entitled to freely profess their religious belief in any form, individually or with others, and to promote them and celebrate rites in public or in private, provided they are not offensive to public morality), and 20 ("[n]o special limitation or tax burden may be imposed on the establishment, legal capacity or activities of any organization on the ground of its religious nature or its religious or confessional aims") of the 1948 Constitution.

2 See *Corte costituzionale*, especially the following decisions: no. 203/1989; no. 259/1990; no. 13/1991; no. 195/1993; no. 421/1993; no. 334/1996; no. 329/1997; no. 508/2000; no. 327/2002.

3 See: http://presidenza.governo.it/USRI/confessioni/intese_indice.html (accessed 30 May 2022).

far from being considered general law: it is common to all religious denominations that have signed an understanding, but it cannot be applied to other minority confessions (Crisafulli, 1968; Carnelutti, 1951; Ricca, 1996; Randazzo, 2008).

In practice, the coexistence between the supreme principle of secularism and the method-principle of bilateral legislations is complicated by at least five problems. First, the system of bilateral state-churches relationship presupposes a clear distinction between the Catholic Church and other confessions, which risks undermining the status of the latter ones. Second, the bilateralism principle concerning minority religions presupposes a relatively comprehensive religious institution capable of representing a denomination at the national level. Third, the system of the bilateral legislations seems attractive to some confessional organisations while creating unfavourable distinctions for others. Four, religions without *intese* are subject to the 1929 law (no. 1159) that, having been approved during the Fascist regime, is not always congruent with constitutional provisions.[4] Fifth, there is no formal procedure of using *intese* under Article 8.3 of the 1948 Constitution: this can turn the discretionary power of the Government into unreasonable and discriminatory distinctions between denominations with *intese* and those without *intese*[5].

All of these factors are proved to be challenging for a number of minority religions. That is even more evident when referring to Islam(s)[6].

4 According to this law, the Minister of Interior will take into consideration the characteristics of the denomination or religious entity that claims recognition. For example, the Minister of Interior will take into account: 1) the number of the claimants' members and how widespread they are in the Country; 2) the compatibility between the claimants' statute and the main principles of the Italian legal system; 3) the aim of the denomination that claims to be recognised by the State, an aim that has to be 'prevalently' of religion and worship. In contrast, religious groups possessing an understanding with the State are no longer subject to the 1929 law whose rules are entirely replaced by those, more favourable, of legislative acts approving intese. On this aspect see Zaccaria R., Domianello S., Ferrari A., Floris P. & Mazzola R. (Eds.). (2019). *La legge che non c'è. Proposta per una legge sulla libertà religiosa*. Il Mulino.

5 See *Corte costituzionale, no.* 52/2016.

6 When one compared Islam to religions that have long been present in Italy and considering its problematic history (which currently implies the emergence of transnational fundamentalism and terrorism), this religious minority highlights the most striking aspects of the Country's neo cultural-religious pluralism: it indicates and signals the pluralisation of Italian society. Islam has in other words become the discursive substitute for religious and cultural pluralism, which implies other sensitive matters that, in a way or another, are correlated to this religion: gender roles, clothing codes, family models, the relationship between religion and politics, the role of religions within a democratic system, the rights and duties of the major religion, the rights and duties of religious minorities. So, in the light of these issues, Islam has become the most extreme example of 'other' religions, other than traditional ones. See Allievi S. (2013). Immigration, Religious Diversity and Recognition of Differences: The Italian way to Multiculturalism. *Indentities*, 24-737; Decaro Bonella C. (2013). Le questioni aperte: contesti e metodo. In Decaro Bonella C. (Ed.), *Tradizioni religiose e tradizioni costituzionali. L'islam e l'Occidente* (pp. 34-34), Carocci. The most relevant Muslim organizations existing in Italy are: the Italian

2. Regulating Islam

From a legal point of view, it is important to remember other provisions of the 1948 Constitution, which state that community with religious aims can operate within the Italian legal system. Religious communities can do so without authorization or prior registration. From this point of view, the only limit is based on the protection of public order and common decency. In theory, this gives Muslim groups the opportunity to choose among various types of legal capacity, including those referring to confessional organizations (paladin, 1967). Yet in practice, they have been regulated by the general legislation concerning association in its double version, recognised and non-recognised associations.

More specifically, many Muslim organizations constitute themselves as 'non-recognised associations,'[7] which is the simplest model of association. It is true that this kind of associations does not provide control from the State's authorities; but it is also true that their legal capacity within the public space is reduced to basic, limited services. Muslim organizations can also choose the form of 'recognised associations,' which provides legal personality through registration at the local Prefecture. However, this legal capacity is not comparable to other confessions[8].

In sum, not only the legal capacities of recognised and non-recognised associations are incomparable with those related to confessions with *intese*. These kinds of associations also prevent Muslim organizations to be legally recognised by reasons of their religious under the 1159/1929 law (Ferrari, 2001; Allievi, 2003).

Some Muslim organizations have tried to engage forms of cooperation with the Government in order to sign an *Intesa*. In 1990, two years after its establishment, the Union of Islamic Communities and Organizations in Italy (UCOII) publicly stated their intentions by issuing a draft agreement and sending it to the Italian government. Similar attempts have been made by other Islamic

Islamic Confederation (CII); the Islamic Cultural Centre of Italy (CICI); the Union of Islamic Communities and Organizations of Italy (UCOII); the Italian Islamic Religious Community (COREIS); the Union of Muslim Albanians in Italy (UAMI); the Association of Muslim Women in Italy (ADMI); the Cheikh Ahmadou Bamba Association; the Association of Somali Mothers and Children; the Islamic Association of Imams and Religious Leaders; the Pakistani Islamic Association 'Muhammadiah'. All these organizations in 2017 signed the *National Pact for an Italian Islam, expression of an open and integrated community, adhering to the values and principles of the Italian legal system*. It is interesting to note that, in accordance with the 1929 Law, no. 1159, only the the Islamic Cultural Centre of Italy has been recognised as a religious legal entity (see *Decreto del Presidente della Repubblica 21 dicembre 1974, n. 712, Riconoscimento della personalita' giuridica dell'ente "Centro islamico culturale d'Italia"* (https://www.gazzettaufficiale.it/eli/id/1975/01/11/074U0712/sg (accessed 30 May 2022) .

7 Article 36-38 of the Italian Civil Code.

8 Articles 14-35 of the Civil Code and the 2000 decree of the President of Italian Republic (no. 361).

organizations, such as the Association of Italian Muslims (1994) and the Islamic Italian Community (1996) (Musselli, 1997, p. 295; Tedeschi, 1996, p. 1574; Cilardo, 2009, p. 94). Yet their efforts have not been taken into consideration by public authorities who, instead of using Article 8.3 of the Constitution or the 1159/1929 law, have chosen other solutions.

3. Administrative way of regulating Islam

In 2005, the Italian Minister of the Interior (IMI) established the Consultative Council for Islam in Italy (*Consulta per l'Islam italiano*) (Ferrari, 2007). This council issued documents that aimed at reaffirming the values of a secular State and religious freedom as well as encouraging the creation of a federation of Islamic groups. In this context Charter of values for the integration and citizenship (*Carta dei valori per l'integrazione e la cittadinanza*) was approved. The Charter was conceived as the basis for a future understanding between the State and Islam(s) (Cardia, 2008, p. 8; Colaianni, 2009). The Italian Committee for Islam suggested that if imams should subscribe to the Charter, they had to do so in accordance with the 1159/1929 law which had to be accompanied by a circular of IMI.[9] Likewise, IMI established in 2010 a Committee for Islam in Italy (*Comitato per l'Islam Italiano*) which was made up of 19 members, including not only Muslim representatives but also non-Muslim academic experts on Islam and even anti-Muslim prominent figures in journalism. This choice was clearly intended to soften the vague attempt of representativeness of the 2005 Consultative Council.

A few years later (March 2012) the Minister for Cooperation and Integration created a "Permanent Conference on Religions, Culture and Integration (CRCI)," where representatives of Muslim organisations and experts on Islam and on other religions were properly represented. However, the CRCI was essentially conceived as a space for meetings and seminars rather than a consultative body. In 2015, it was the turn of another Council for an Italian Islam, consisting of university professors and experts, who set up a common agenda with representatives of the major national Muslim associations in Italy[10]. In 2016, the Council elaborated a document, which was delivered on the 1st of February, 2017

[9] See *Parere del Comitato per l'Islam Italiano*, *Parere su Imam e formazione*, 31 May 2011, p. 6, http://www.coreis.it/documenti_13/6.pdf (accessed 30 May 2022).

[10] Namely: the Islamic Cultural Centre of Italy (CICI); the Union of Islamic Communities and Organizations of Italy (UCOII); the Italian Islamic Religious Community (COREIS); the Union of Muslim Albanians in Italy (UAMI); the Association of Muslim Women in Italy (ADMI); the Cheikh Ahmadou Bamba Association; the Association of Somali Mothers and Children; the Islamic Association of Imams and Religious Leaders; the Pakistani Islamic Association 'Muhammadiah'.

(Naso, 2017) called the "National Pact for an Italian Islam expression of an open community, integrated and adhering to the values and principles of State laws"[11].

By reviewing all these documents helps us to gain a better appreciation of how public authorities are trying to promote collaborations between the State and Muslim groups. A similar approach has been followed at the local level, where consultative forums with representatives of Muslim communities and experts in religion have been established.[12] This is the case of the so-called mini-understandings (*mini intese*) between branches of the public administration and minority religions that do not have an *intesa* yet.[13] For example, following the example of the agreement between the Department of Penitentiary Administration (DAP), the Jehovah's Witnesses and some Protestant Churches, the DAP and UCOII signed a Protocol on 5 November 2015, which was replied on 8 January 2020 and extended to the Italian Islamic Conference (IIC) on October of the same year. These new protocols allowed Muslim 'religious ministers' to enter prisons[14].

These protocols reaffirm that instead of relying on bilateral legislation related to Article 8.3 of the Constitution and the relative instruments of *intese*, public actors and Muslim leaders can explore other solutions, like those performed during the pandemic outbreak of Covid-19. The attention focuses on the "Protocol concerning the resumption of public Masses", which was signed on 7 May 2020

11 This Pact is divided into three parts: the first one refers to the constitutional principles and regulations concerning religious freedom; the second and third contain two 'decalogues' engaging representatives of Muslim communities and the Interior Ministry to support the establishment of Italian Islam that, among other things, should contribute in the prevention and the contrast against religion-inspired radicalization. See athttps:// www. interno. gov.it/ sites/default/files/ patto_ nazionale_ per_un_islam_italiano_en_1.2.2017.pdf (accessed 30 May 2022).

12 On February 2016 the City of Florence and a local Muslim community also signed a Pact for integration and citizenship. In the same period the City of Turin and twenty local Islamic organizations signed the Pact of shared values (*il patto di condivisione*) approved in the context of Turin Islamic Forum.

13 Alicino F. (2013), La legislazione sulla base di intese. I test delle religioni "altre" e degli ateismi. Cacucci.

14 These Protocols allow imams to offer spiritual assistance to Muslim inmates detained in Italian prisons. UCOII and IIC will provide prison administration with a list of people who "perform the functions of imam in Italy" and who are "interested in guiding prayers and worship within prisons nationwide." The list will also specify at which mosque or prayer room each imam normally performs his worship. Imams will have to indicate their preference for three provinces where they would be willing to lead prayers for inmates. See Belli M. (2020), Religione in carcere: intesa tra Dap e Comunità Islamiche. *gNews*, https://www.gnewsonline.it/religione-in-carcere-intesa-tra-dap-e-comunita-islamiche/ (accessed 30 May 2022). See also at https://it.italiatelegraph.com/news-40724 (accessed 30 May 2022); Angeletti S. (2018), L'accesso dei ministri di culto islamici negli istituti di detenzione, tra antichi problemi e prospettive di riforma. L'esperienza del Protocollo tra Dipartimento dell'Amministrazione penitenziaria e UCOII. In *Stato, Chiese e pluralismo confessionale*, https://riviste.unimi.it/index.php/statoechiese/article/view/10331 (accessed 30 May 2022).

by the President of the Council of Ministers Giuseppe Conte, the Ministry of the Interior Luciana Lamorgese and the CEI's President Cardinal Gualtiero Bassetti.[15] Few days later very similar (copy&paste) documents were signed by other representatives of religions, including those referring to groups without *intese* or even not formally recognized as religious denominations, such as the case of many Muslims communities[16]. It is worth remarking that these Protocols fall into neither Articles 7.1 (related to the relations between the Catholic Church and the State) nor Article 8.3 (referring to the relations between the state and religions other than Catholicism) of the Constitution, which means that these protocols have nothing to do with the bilateralism principle. On the contrary, they are part of the unilateral law regulating public administrative procedure according to which associations or committees (that have concrete interest for the defence of legally important situations and that could be prejudiced by the measure taken by public authorities) have the right to intervene during rulemaking proceedings[17]. The administrative nature of the 2020 Protocols is also confirmed by the fact that they were approved by the Technical Scientific Committee[18] before going to the State's authorities and the religious representatives for their signature[19].

Apart from the confusion over their possible or perceived legal effects, all those documents stress the ability of the bilateralism principle to govern the Italian existing pluralism. They could in fact be interpreted as its failure or as a signal for its lack of ability, perseverance and goal commitment.

15 *Protocollo circa la ripresa delle celebrazioni con il popolo*, available at http://www.governo.it/sites/new.governo.it/files/Protocollo_CEI_GOVERNO_20200507.PDF (accessed 30 May 2022).

16 See the Italian Government, *Protocollo con le Comunità Islamiche*, available at https://www.interno.gov.it/sites/default/files/2020.05.14_protocollo_comunita_islamiche.pdf (accessed 30 May 2022).

17 Law 7 August 1990 no. 241, *Nuove norme sul procedimento amministrativo*. See Cimbalo G. (2020). Il papa e la sfida della pandemia: *Stato, Chiese e pluralismo confessionale* https://riviste.unimi.it/index.php/statoechiese/article/view/13416 (accessed 30 May 2022).

18 This is an advisory board of experts supporting the Head of the Civil Protection Department. See t*he Ordinance of the Head of the Civil Protection Department n.663 of April 18, 2020,* http://www.protezionecivile.gov.it/amministrazione-trasparente/provvedimenti/dettaglio/-/asset_publisher/default/content/ocdpc-n-663-del-18-aprile-2020-ulteriori-interventi-urgenti-di-protezione-civile-in-relazione-all-emergenza-relativa-al-rischio-sanitario-connesso-all *(*accessed 30 May 2022).

19 See The above mentioned *Protocollo circa la ripresa delle celebrazioni con il popolo*, where it is stated that "during the meeting of 6 May 2020 the Technical-Scientific Committee has analysed and approved this 'Protocol concerning the resumption of public Masses'" (*il Comitato Tecnico-Scientifico, nella seduta del 6 maggio 2020, ha esaminato e approvato il presente 'Protocollo circa la ripresa delle celebrazioni con il popolo'*) (translation mine).

Conclusion

The historical roots of the Italian system of State-Churches relationship and the presence of some different conspicuous forms of religious affiliation complicate the role of the bilateral legislations, especially in light of the requirements of the supreme principle of secularism. While these legislations ensure a potentially greater diversity in the public sphere, they do not necessarily promote the interests of all religious communities, including those that are part of neo-religious landscape such as Islam. This attitude is even more evident in view of the fact that in the past two decades, the debate on Islam has been marked by violence, politically exploited, and covered extensively by the media (Saint-Blancat, 2014; Coglievina, 2013) even though the presence of Muslims and Islamic groups in Italy is not as significant as it is in other European states[20].

In other words, Islam and its related groups are often suspected of being potentially undemocratic religions that, for instance, do not accept the separation of church and state and, further, drive believers to illicit practices and conducts. As such, these communities are constantly subject to at least two kinds of tests: the test of being a religion under Article 8 of the Constitution, and the test of being a religious organization that is compatible with Italy's constitutional democracy. It should not be forgotten that this happens at the same time that Italian political rhetoric increasingly suggests combining security policies, economic strategies, and immigration concerns with religion-orientated values of democracy and popular sovereignty reinforcing the idea that Muslims are "the others". Evidence of this phenomenon can be seen when considering other problematic issues, like those related to religion-inspired extremism, upon which Islam and the related groups are often judged as a potential war-like religion that pushes believers into the spiral of violent radicalization, if not terrorism.

It is important to underscore that this situation is also a result of Italy's unique historical process, which has left significant traces in the country's religious identity. As such, this process has strongly influenced the way the State governs religious issues, including those related to pluralism. From this point of view, Italy seems to be more and more trapped in its own past and, consequently, in a limited secularism that, as such, is no longer able to manage a new plural religious landscape.

[20] It is not by chance that in Italy the population overestimates the presence of Muslims by a staggering amount. That is even more evident in the IPSOS-MORI survey, *Perceptions are not reality: what the world gets wrong* (2016), https://www.ipsos.com/ipsos-mori/en-uk/perceptions-are-not-reality-what-world-gets-wrong (accessed 30 May 2022).

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CHAPTER 13

Regulating religion and the Protestants in Turkey

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Introduction

This chapter outlines the regulation of religion in Turkey and presents the major problems faced by the Protestant communities against this background. There are three legal foundations for the regulation of religion in Turkey; the Turkish Constitution, the Lausanne Treaty, and the international human rights covenants with some reservations. There are two separate regulatory systems for the majority religion and the minority religious groups. On the one hand, Sunni Islam is treated as the majority religion. The Ministry of National Education and the Presidency of Religious Affairs provide religious education for lay Muslim citizens as well as training for the religious functionaries. Religious education cannot be offered in private institutions. (Kuru 2009, p.165). All Islamic services have to be delivered by the Presidency of Religious Affairs. (Gozaydin, 2008, p. 221) The Constitution prescribes its duties to be exercised "in accordance with the principles of secularism, removed from all political views and ideas, and aiming at national solidarity and integrity." (Article 136) There are no other state agencies and legislation available for minority religions.

On the other hand, the Treaty of Lausanne set up the minority regime for the Turkish Republic and provided some exceptional remedies. The state has identified three groups as minorities in accordance with the treaty: Armenian Orthodox Christians, Greek Orthodox Christians, and Jews, which had been granted autonomous millet status in the ancien regime (İçduygu & Soner, 2006, p. 453). The other non-Muslim minorities[1] are not protected under the minority regime

[1] For contesting arguments that the provisions of Lausanne Treaty encompass all non-Muslim groups. See Oran (2007, p. 38), and Oran (2004).

as well as non-Sunni Muslims are not recognized as minorities. In this context, the Protestant communities cannot benefit from the exceptional remedies that the Treaty of Lausanne guaranteed.

Brief Overview of Regulation of Religion in Turkey

In this section, I will briefly present how the regulation of religion is formulated and how the interpretation of these formulas has changed over time. Except for the rights protected under the Treaty of Lausanne, the regulation of religion is mainly structured based on the constitutional principle of secularism (*laiklik*) in Turkey. The Turkish Constitution requires religion to be excluded from politics, yet, it does not prescribe complete separation between state and religion; it rather generates state control and supervision in all religious affairs. The Presidency of Religious Affairs is the epitome of the unique features of Turkish secularism. It is designed to teach and execute the enlightened version of Islam through its civil servant personnel; all mosques are operated under its establishment (Sakallıoğlu, 1996, p. 234). In other words, the Turkish Constitution ensures that religion would not intervene in state affairs, but vice versa is not required. In this context, secularism serves as a set of substantive commitments to protect the state and citizens rather than a separation between religion and state affairs (Bali, 2018, p. 236).

In a case decided in 1971, the Turkish Constitutional Court (TCC) explains that, unlike Christianity, Islam does not have ordained clergy, hierarchical religious leadership, and independently institutionalized mosques. Because of these organizational differences, the doctrine of separation between state and religious affairs created distinctive political structures in Turkey compared to the Christian nations in the West. Furthermore, according to the Court, unlike Christianity, Islam regulates not only individual beliefs but also social and political life, which necessitates the state closely regulating all religious affairs. Therefore, while independent churches do not pose a threat to the order of the state in the West, independent mobilization and institutionalization of Islam through religious groups endangers the secular unity and order of the state in Turkey[2]. The Court highlights that modern countries have developed their unique secular political modalities in their respective historical backgrounds. Indeed, there are differences even among the Western nations that are dominated by the same religion[3].

[2] TCC, 21 October 1971, no. 1971/76.

[3] TCC, 16 Jan. 1998, (Welfare Party Closure case), no. 1998/1.

The TCC provides two main justifications for the regulation of religion by the state. First, religion is regulated "to prevent religious fanaticism by training skilled religious functionaries and to render religion a tool for moral discipline, and hence, to reach the level of modern civilization"[4]. Second, religion is also regulated "to provide for religious needs regarding religious functionaries, worship places and maintenance of those"[5]. Religion is considered a type of social need, and the state is assigned positive responsibilities to provide for that need just as it is responsible for other needs of the society[6].

Furthermore, secularism is interpreted as a modern lifestyle and outlook that the state and citizens alike should embrace. According to this interpretation, clearly stated in a 1989 TCC decision regarding headscarf, "secularism cannot be narrowed down to the separation of religion and state affairs. It is a milieu of civilization, freedom, and modernity whose dimensions are broader and whose scope is larger. It is Turkey's philosophy of modernization, its method of living humanly. It is the ideal of humanity"[7]. In this context, for instance, secularism creates a disposition that necessitates modern clothing and requires citizens to be bare-headed. Thus, it becomes a civic duty for each citizen to espouse secularism and its corollary, modern clothing.

In a 2012 decision, the TCC shifted this interpretation of secularism explained above and broadened the religious liberties of the individual citizens. The TCC stated as follows:

> Secularism is not an essential attribute to individuals or society, but to the state. Examining the historical development of secularism, one can see that there are two different interpretations and practices of secularism. According to the strict understanding of secularism, religion is a private matter in the consciousness that absolutely must not exceed into the social life and public sphere. On the other hand, the more inclusive and liberal interpretation of secularism draws on the appraisal that religion is not only a private phenomenon but also a public one. This interpretation of secularism does not constrain religion to the private sphere. It sees religion as an important part of the individual as well as collective identity and permits religious visibility in society. In a secular political system, while individual choices about

[4] TCC, 21 October 1971, no. 1971/76.

[5] TCC, 21 October 1971, 1971/76.

[6] TCC, 23 Nov. 1993, (OZDEP Party Closure Case), no. 1993/2.

[7] TCC, 7 March 1989, no. 1989/12, (Translated in Ozbudun and Genckaya 2009, p. 106).

religion and individual practices are protected from state interference, the state has a positive responsibility to protect them. In this context, the principle of secularism is the guarantor of the freedom of religion and conscience."[8]

Overall, this shift illustrates a departure from an exclusionary version of secularism to a version more inclusive of the religious practices widespread in Turkish society. While this shift has answered the main grievances of the religious majority regarding individual religious liberties, the expansion of Turkish democracy requires further re-evaluation of the current interpretation of secularism and citizenship in order to address the problems of religious minorities.

Having said that, this new interpretation of secularism did not create any new implications against the state's role as the only guarantor and legal provider of religious education and services. During the first period of the Turkish Republic, by establishing the Presidency of Religious Affairs, the Ministry of National Education, and the Directorate General of Foundations, the state seized all the power of Islamic institutions in order to eliminate the traditional and modern duality in the state institutions that the Ottoman modernization projects had produced (Hanioğlu, 2008, 72-75) (Berkes, 1998, p. 483).

Since the foundation of the Republic, the political pendulum has swung between repression and accommodation of Islam in the public sphere, yet the state's control over Islam always remained intact without legalizing any autonomous Muslim religious group. The early years of the Republic were replete with harsh measures against the sufi brotherhoods (Sakallioglu, 1996, pp. 232-236). Although religious brotherhoods were outlawed in 1925, numerous brotherhoods continued to form communities underground and spread their Islamic teachings (Yavuz, 2003, p. 9, 47-48). When the political setting became less constrained, the brotherhoods had more public visibility (Ozdalga, 1998, p. 28). During the tenure of the AKP government, religious brotherhoods (*tarikats* and *cemaats*) enjoyed defacto freedoms to conduct some community organizations such as operating *madrasas* and college student dormitories/houses. Along the same lines, Aksit and others' findings show that the impact of the official religious education decreased more and more during this period. According to these sociologists, the type of religious education that religious individuals receive is a crucial determinant of their religious outlook (Bahattin *et al*., 2020, p. 282). Having said that, religious brotherhoods have no legal standing to teach their interpretations of Islam or create autonomous religious institutions for their communities.

[8] TCC, 20 September 2012, no. 2012/128.

In short, as illustrated above, the state is responsible to teach the correct version of religion and provide services for believers so that harmful religious practices can be eliminated as well as national solidarity and integrity are consolidated. The state's monopoly over religious services and education holds the key to understanding the constitutional ground upon which the grievances of the religious minorities should be evaluated.

Protestants in Turkey

Exact demographic data is not available, but it is estimated that all non-Muslims make up less than 1 percent of the current Turkish population. While the non-Muslim population gradually decreased since the establishment of the Republic (Aktar, 2001, p. 208), their problems drew more public attention in recent decades (Akgönül, 2011, p. 149). Members of the Protestant communities are estimated to be around 7000 to 10.000 (The US Office of International Religious Freedom Report on Turkey, 2020). Approximately, there are 186 Protestant groups (churches and fellowships) concentrated in Istanbul, Ankara, and Izmir (TeK, 2022). The majority of the Protestants established a joint association called the Association of Protestant Churches (TeK). The association publishes annual religious freedom reports covering problems faced by the Protestant communities and hate crimes committed against them[9].

Current major Protestant groups in Turkey can be categorized as follows (Malkoç, 2006; Malkoç, 2011):

- Minority Churches: They are the offshoots of the historic Eastern churches that existed in the Ottoman Empire for centuries. Armenian Protestant Church, Syriac Protestant Church, and Greek Protestant Church were the churches in this category. However, only the Armenian Protestant Church has survived in Turkey with two active churches, Gedikpaşa Armenian Protestant Church and Aynalicesme Protestant Church both located in Istanbul. There are about 500 Armenian Protestants living in Turkey. There is also a handful of Syriac and Greek Protestants who worship in other Protestant churches.
- Anglican Church: the Anglican Church has churches and chapels in Ankara, **İstanbul,** and **İzmir.**[10] Anglican Protestants are one of the oldest Protestant groups in Turkey. A very small number of Anglican believers live in Turkey.
- Baptist Churches: The churches under this category follow the Baptist teachings or embrace similar teachings to those. Some of these churches have 'Babtist' in their church's title while some others don't use it.

[9] See: http://www.protestankiliseler.org/eng/.

[10] See: https://europe.anglican.org/where-we-are/church-locations/turkey.

- Lutheran Churches: The majority of the members in these churches have ethnic or national ties with European Lutheran majority countries.
- Pentecostal and Charismatic Churches: Many of these churches under this category were founded in the last two or three decades.
- Presbyterian and Reformed Churches. Several churches that identify themselves as such or follow similar theological and organizational paths can be mentioned in this category.
- Churches of the Istanbul Protestant Church Foundation: The foundation has several congregations in **İstanbul, İzmir, İzmit,** Bursa, and Eskişehir.[11] The foundation's church organization is independent and its teachings are close to evangelical Protestantism.

Problems Faced by Protestants in Turkey

Religious minorities deal with problems related to the structure of regulation of religion in Turkey as well as social problems such as pressure, discrimination, and hate crimes by some members of the majority culture. It is crucial to separate these two types of obstacles not only for the purpose of this chapter but also in order to propose practical solutions for the problems faced by minority religious groups in Turkey (Unlu, 2020, p. 796). In this section, I will introduce major issues of the Protestant groups emanating from the structure of regulation of religion.

Based on the Protestant communities' religious freedom reports[12], the grievances of the Protestant groups appear to be concentrated in three areas: first, the lack of legal personality, second, the obstacles to building and maintaining worship places, and third, the lack of legislative and administrative measures to allow training religious personnel. Another hot debate with regard to religious freedom in Turkey is the compulsory religion classes. Obligatory declaration of faith in the process of exemption from the compulsory religious classes continues to be a threat to the right not to declare one's religion or belief (Yıldırım, 2022, p. 19). However, while compulsory religion classes raise major complaints among non-Sunni Muslims, deists, atheists, and agnostic citizens with Muslim background, they do not seem to create unsolved problems for the Protestant community (TeK, 2022).

[11] See: http://www.istpcf.org/about-us/.

[12] See the reports through 2006-2022: http://www.protestankiliseler.org/?page_id=638.

Legal Personality

As the state has a monopoly over religious affairs, it does not grant legal personality to any religious organization, Muslim and non-Muslim alike. One of the key grievances that the Christian minorities express is the lack of legal personality[13]. Only the Catholic Church has a special legal status as a diplomatic representative of the Vatican State, yet this is not a legal status on the basis of religion per se (Kılınç, 2020, p. 7). The demand of non-Muslim groups to obtain legal status as religious communities has been refused by the Turkish authorities on the grounds that it would violate the principle of secularism. The Turkish authorities were concerned that Muslim communities could claim rights for themselves by using the analogy with the rights granted to the non-Muslim communities (Goltz, 2006, p. 179).

The lack of legal personality renders churches as such unable to engage in legal transactions, pursue their rights in courts, employ religious personnel, and conduct religious services more efficiently (Öktem, 2016, p. 53). Furthermore, some scholars argue that legal personality can provide better social prestige and acceptance which are particularly vital for minority religious groups (Yıldırım, 2016, p. 178). The protestant communities operate and obtain legal representation via foundations and associations. Organizing via associations and foundations proved to be a useful alternative formula for religious communities to gain a kind of legal status.

According to TeK, the Protestant groups have 119 legal entities including 13 religious foundations, 20 representative branches of the religious foundations, 33 church associations, and 53 representative branches in 2022 (TeK, 2022). They had one[14] foundation, 26 associations, and 12 representative branches in 2013 (TeK, 2013), which demonstrates the growth of Protestant legal entities in the past decade. Small communities have more association-based organizing because establishing a foundation is more costly and the procedure is relatively longer. However, in recent years, the trend among Protestants has been to establish foundations for their communities (TeK, 2022).

After the amendments in the Law on Associations that lifted the ban on establishing an association for religious activities, Protestant communities started to organize via associations in 2005 (TeK, 2009). Through associations, Protestant

[13] Various religious freedom reports mention the issue as a major prolonged problem. See the reports by Association of Protestant Churches, Freedom of Belief Initiave, the US Office of International Religious Freedom, the US Commission on International Religious Freedom.

[14] This report does not include 4 historical Protestant foundations that belong to the minority groups, Armenians and Syriacs. https://www.cemaatvakiflaritemsilcisi.com/index.php/vakiflar.

communities are able to become legal entities as civil society organizations, which provides them with legal and social status. They can gather at the association centers and collect donations for the association whereas actual persons need proper permission for such gatherings and collecting donations. Associations can own assets, employ staff, and publish works to educate the public about their teachings. Associations can also open branches in other cities and towns in Turkey. According to TeK, "while church associations are not legal churches, they are able to run virtually all activities that a real church can" (Şahin, 2013, p. 9). On the other hand, associations have to complete regular bureaucratic responsibilities and keep their account books, receipts, and documents for auditing by state officials. Furthermore, the Law on the Prevention of Financing of the Proliferation of Weapons of Mass Destruction adopted in 2020 amended the Law on Associations, which allows the authorities to remove board members without judicial review and to replace them with trustees (Yıldırım, 2022, p. 46).

Although forming an association was a useful means to gain legal status, it did not answer all the needs of the communities. In 2017, the Protestant communities started to encourage establishing foundations and the trend continues (TeK, 2018, 2022). While an association has to be a non-profit depending on donations, a foundation can earn income. Although the process of establishing a foundation is lengthier and more expensive, it provides more legal protection. While an association can be closed by the governor's office, a foundation can only be closed by a court decision.

According to Article 101 of the Turkish Civil Code, a foundation cannot be established to support only one particular religious community. Thus, except for the historical religious community foundations that were registered before 1936, there cannot be a foundation to promote a religious community. New religious groups can register their foundations as 'new foundations' that do not possess the exceptional rights available to the historical communities.

Worship Places

Protestant communities encountered legal limitations in establishing worship places until 2003 as the Turkish zoning laws assumed that all worship places would be mosques and hence, did not provide regulations for opening churches in construction and city planning (Kılınç, 2020, p. 55). Several articles of the Law on Construction were rephrased and the word "mosque" was replaced with "place of worship" to include all worship places in 2003.[15] Thus, non-Muslim communities obtained the right to build places of worship with the approval

[15] The Law on Construction, Law no. 4928.

of the administrative authorities (Grigoriadis, 2008, p. 36). This amendment allowed churches to obtain de jure the same status as mosques, and hence to use public resources such as free utilities and the allocation of public real estate to those who want to build a place of worship (Goltz, 2006, p. 176). Yet, in order to open a church, the community has to establish a legal entity (association or foundation), a certain number of followers has to live in that area, and the church has to possess the required amount of land (2500 square meters for the Istanbul municipality). The procedure is under the initiative of local administrations, which leads to inconsistent outcomes in the applications of the Protestant communities to open churches (Kılınç, 2020, p. 56).

As many Protestant communities are new establishments, they do not have proper church buildings as part of their cultural heritage unlike the traditional Christian communities rooted for centuries in Turkey. Therefore, building and receiving recognition of worship places continue to be a major problem for the Protestant groups. As mentioned above, the Protestant groups have 119 legal entities including 13 religious foundations, 20 representative branches of the religious foundations, 33 church associations, and 53 representative branches. The rest of the Protestant groups do not hold legal entity status. There are about 13 Protestant groups that use historical church buildings. The remaining either rent various places or meet in houses and offices (TeK, 2022). Most Protestant groups assemble and worship on premises that are not legally recognized as places of worship. Although the worship services in these places are generally tolerated by the authorities, these congregations cannot secure the same benefits that are available to the legally recognized ones (Yıldırım, 2013, p. 210). Officially recognized worship places enjoy financial advantages such as tax exemptions and free utilities as well as some conveniences such as extra layer of security from social pressure and possible hate crimes. The utilities of mosques, synagogues, Catholic and Orthodox churches are paid by the Directorate of Religious Affairs. Utilities of some Protestant worship places are paid by municipalities while some others do not receive paid utilities. No systematic administration is available for Protestants and some other minorities such as Alevis and Jehovas Witnesses (Şirin *et al*., 2016, p. 67). According to TeK, a small number of churches have built their own free-standing churches, but they could not receive official recognition yet (TeK, 2021).

Legal recognition of places of worship also provides more protection against criminal incidents. According to Article 152 of the Turkish Penal Code, destroying, demolishing, or breaking religious property is punishable by one to four years in prison. Defacing religious property is punished with three months to one year in prison. According to Article 115 of the Code, interfering with the service of a religious group is punished with one to three years in prison.

Training of Clergy

The right to educate and train religious personnel is an indispensable element of freedom of religion as religious communities would slowly dissolve without them (Özbudun, 2010, p. 222). Religious freedom reports highlight that non-Muslim minority groups experience continuous obstacles to training their religious personnel. Law on Private Education Institutions does not allow private religious education. Thus, the religious minorities cannot establish independent clergy training schools; and no legislation is available to accommodate minority religions in the national education system that provides training for Sunni religious functionaries. It is often argued that this situation creates glaring inequalities as the large public resources are allocated to the training of Sunni Muslim religious functionaries and their salaries (Şirin *et al*., 2016; Yıldırım, 2022).

Many Protestant communities train their religious personnel through mentorship programs within the community, providing seminars in Turkey, and sending students abroad. On the other hand, some Protestant congregations have to rely on foreign pastors for religious services. These groups face problems with obtaining residential visas for their pastors and their families because a special visa regime does not exist for religious workers (Yıldırım, 2022). According to the Association of Protestant Churches, some religious officials and their families were forced to leave due to rejection of visa renewal as well as receiving entry bans or preliminary permit requirements (TeK, 2022).

Conclusion

There are two possible approaches to address the grievances of the Protestant communities in Turkey. In order to provide equal opportunities for the Protestant communities within the existing system, either they have to be assimilated as another 'state religion', as in the case of Islam; or another paradigm shift is needed in the interpretation and application of Turkish secularism, which would encompass all religions, the majority and minority alike. Because the Protestant communities seek to obtain independent organization in religious affairs, the first option appears to be out of the question even though it is relatively easily achievable. This solution would make them a part of public administration and hence, would necessitate the exercise of tutelary state control over them. If such a solution is forced, it would be tantamount to a violation of the European Convention on Human Rights, of which Turkey is a signatory. In several cases, the European Court of Human Rights ruled that state intervention in the internal religious affairs of groups infringes the right to religious freedom (Öktem, 2016,

pp. 49-50). The second option, on the other hand, appears capable of offering systematic and desirable remedies; yet, it requires a much more complicated process filled with broader social, political, and legal entanglements.

The Turkish nation-building process rested on the idea of a homogeneous society, and hence, Turkish secularism limited the manifestation of religion in the public sphere without allowing religious organizations to develop independently. The three major problems of the Protestant communities emerge because of the main framework set up for the regulation of the religion. First of all, obtaining a legal personality is at the heart of all the major problems at hand in this article. Muslim and non-Muslim religious groups are not recognized as such because according to the current implications of Turkish secularism, the state is charged with the responsibility to provide for religious needs and in return build national solidarity. The issues around training clergy, as well as building and maintaining worship places, emerge because of the state's will to closely supervise religion.

The religious freedom reports highlight the discrimination against the Protestant groups in receiving public resources for religious services, education, and employment of clergy, which is provided solely for the Sunni Muslim community. They argue that this seems to be in contradiction with the prohibition of discrimination and the principle of equality that the state has to uphold. The Turkish state allocates a large amount of public funding to the religious affairs of the majority. However, the state does not grant funding to Sunni Muslims, rather, the state itself manages the allocated budget to teach the state's Islam. The fine line between granting and spending money for religious affairs explains the main criterion for eligibility. Therefore, state Protestantism could be eligible for public funding, but the Protestant communities could not. Training clergy is entrapped in the same entanglement. If the state incorporated the education of Protestant religious personnel in the public education system, it would necessarily create a state religion.

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This book brings together contributions from scholars of law, sociology and other social sciences, who discuss religious regulation in late modern society. The relationship between the state and religion is an important issue for contemporary democratic societies characterised by increasing plurality. Their analysis, however, has most often focused on models centred on the majority/minority dichotomy, which supposedly explains the diversity of national strategies of religious regulation. This book, on the contrary, is based on a plural approach, and aims to expose the elements that allow a broader definition of the configuration of the contemporary religious field. It sheds light on the relationship between the state and religion in late modern society, offering new analyses of how religion is regulated, taking into account both formal and informal aspects of this regulation.

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