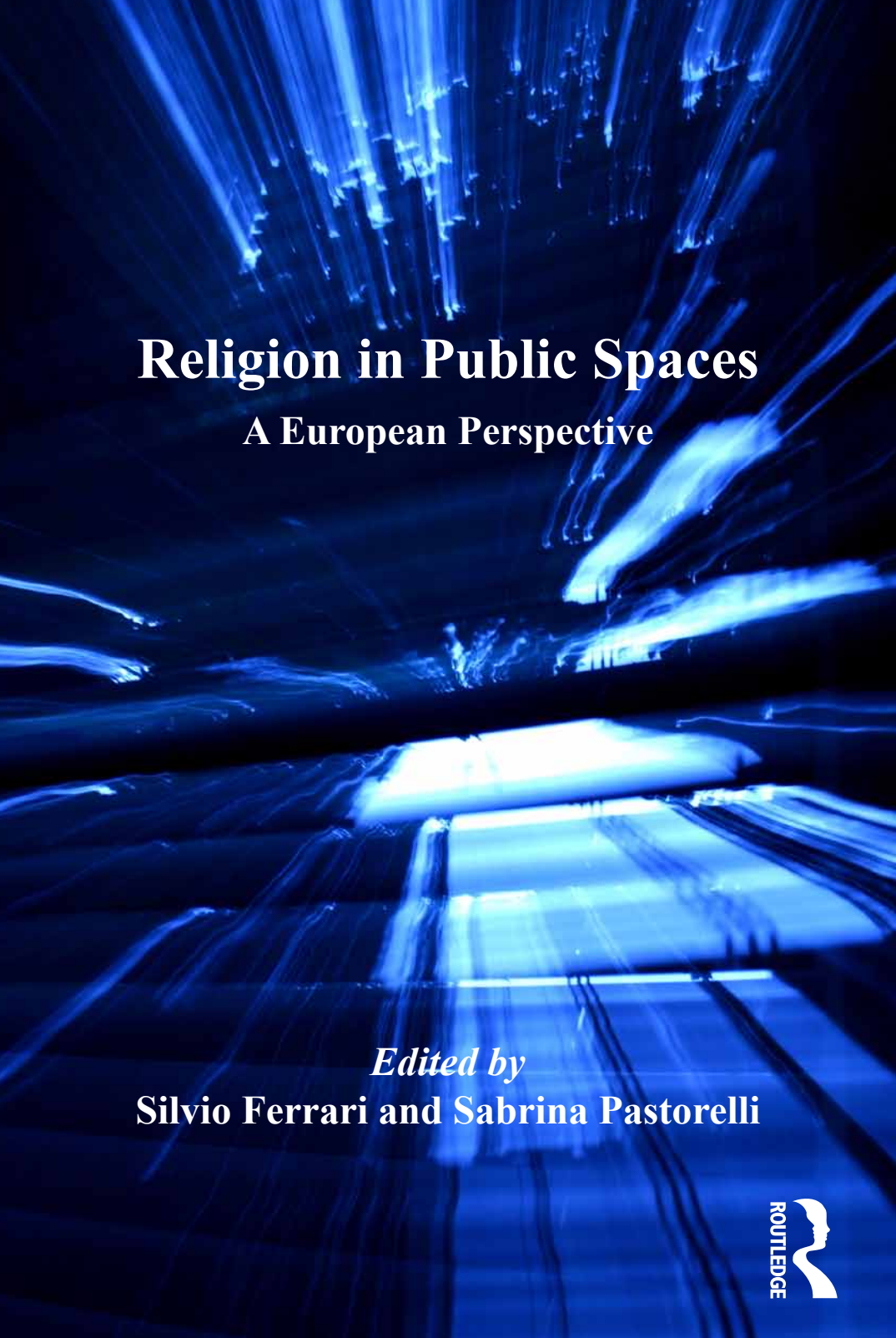
Religion in Public Spaces
A European Perspective
Edited by
Silvio Ferrari and Sabrina Pastorelli
ROUTLEDGE

RELIGION IN PUBLIC SPACES

This book offers more than its title promises. It is not only about Europe or about religion. Insightful, suggestive and as diverse as its contributors, it contains a persuasive reflection on the need to rethink the very notion of public space that Western democracies have used since the nineteenth century.

Javier Martinez-Torron, Complutense University School of Law, Spain

This is a highly important book in a remarkable controversy. Silvio Ferrari and Sabrina Pastorelli present a rich volume full of information, thought, and insight – presenting masterpieces of interdisciplinary research and political guidance. The book is a most valuable contribution to freedom and equality throughout Europe.

Gerhard Robbers, University of Trier, Germany

Cultural Diversity and Law in Association with RELIGARE

Series Editor: Prakash Shah, Queen Mary, University of London, UK

RELIGARE is a project on Religious Diversity and Secular Models in Europe funded by the European Commission under the Seventh Framework Programme. The project brings together an interdisciplinary team of high profile researchers and 13 academic institutions to collaborate on examining how existing policy and practice is suited to the demands of religious diversity within Europe and what legal models can be recommended to accommodate such diversity in future. More details on the project can be seen at its website: http://www.religareproject.eu/. 'Cultural Diversity and Law in Association with RELIGARE' provides an outlet for the results of specific research undertaken within the RELIGARE project.

Other titles in this series:

A Test of Faith?
Religious Diversity and Accommodation in the European Workplace
Edited by Katayoun Alidadi, Marie-Claire Foblets and Jogchum Vrielink

Religion in Public Spaces

A European Perspective

Edited by

SILVIO FERRARI
The University of Milan, Italy

SABRINA PASTORELLI
The University of Milan, Italy

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2012 by Ashgate Publishing

Published 2016 by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN
711 Third Avenue, New York, NY 10017, USA

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
Religion in public spaces : a European perspective. --
(Cultural diversity and law in assocation with RELIGARE)
1. Religious observances on public property--Law and legislation--Europe. 2. Freedom of religion--Europe. 3. Clothing and dress--Law and legislation--Europe. 4. Clothing and dress--Religious aspects. 5. Public spaces--Law and legislation--Europe.
I. Series II. Ferrari, Silvio. III. Pastorelli, Sabrina.
342.4'0852-dc23

Library of Congress Cataloging-in-Publication Data
Ferrari, Silvio.
Religion in public spaces : a European perspective / by Silvio Ferrari and Sabrina Pastorelli.
p. cm. -- (Cultural diversity and law in association with RELIGARE)
Includes index.
ISBN 978-1-4094-5058-0 (hardback)
1. Freedom of religion--Europe. 2. Religion in the workplace--Law and legislation--Europe. 3. Religious minorities--Legal status, laws, etc.--Europe. I. Pastorelli, Sabrina. II. Title.
KJC5156.F47

2012012006

ISBN 9781409450580 (hbk)
ISBN 9781315604930 (ebk)

Contents

This page has been left blank intentionally

List of Figures and Tables

Figures

Tables

This page has been left blank intentionally

List of Contributors

Katayoun Alidadi is currently a PhD candidate at the Catholic University of Leuven, Belgium, and a researcher in the European project RELIGARE (FP7, 2010–2013). She holds a law degree from the Catholic University of Leuven and an LLM degree from Harvard Law School (2005). Her research focuses on religious freedom, anti-discrimination law and reasonable accommodations, in particular as it relates to the workplace.

Veit Bader is emeritus Professor of Sociology (Department of Political and Socio-cultural Sciences) and of Social and Political Philosophy (Department of Philosophy) at the University of Amsterdam and a member of IMES (Institute of Migration and Ethnic Studies). At present, he is leader of the Dutch teams in two European FP7 projects: RELIGARE (Religious Diversity and Models of Secularism in Europe) where he is also leader of WP7, and ACCEPT (Tolerance, Pluralism and Cohesion) where he is also leader of WP3. He has written on a wide range of issues in critical social theory; social inequalities and collective action; democracy and the rule of law (particularly in the EU); racism, ethnicity and citizenship; ethics of migration and incorporation of minorities; global justice; governance of religious diversity. His most recent book is: *Democracy or Secularism? Associational Governance of Religious Diversity* (Amsterdam University Press, 2007).

Alessandro Ferrari teaches Law and Religion and Comparative Religious Laws at the University of Insubria (Como-Varese). His main interests focus on the present changes of the right of religious freedom in the globalized context. His lastest book is *Diritto e Religione nell'Islam Mediterraneo* (Law and Religion in Mediterranean Islam) (Il Mulino, Bologna, 2012).

Silvio Ferrari is Professor of Canon Law, University of Milan and President of the International Consortium for Law and Religion Studies, Italy. His research interests are in the areas of Church and State in Europe; comparative law of religions, and Vatican–Israel relations. He has published widely on these and related areas.

Marie-Claire Foblets, Lic. Iur., Lic. Phil., Ph.D. Anthrop. (Belgium) is professor of Law at the Universities of Leuven (Louvain in Belgium) and since 2012 also Director of the Department of "Law & Anthropology" at the Max Planck Institute for Social Anthropology in Halle/Saale (Germany). She has held various

visiting professorships both within and outside Europe. She has conducted extensive research and published widely on issues of migration law, including the elaboration of European migration law after the Treaty of Amsterdam, citizenship/nationality laws, compulsory integration, anti-racism and non-discrimination, etc. In the field of anthropology of law, her research focuses on cultural diversity and legal practice, with a particular interest in the application of Islamic family laws in Europe, and more recently in the accommodation of cultural and religious diversity under State law.

Anne Fornerod is a researcher at the National Centre for Scientific Research (CNRS-PRISME). After gaining a PhD in public law on religious heritage, she currently works on various issues dealing with law and religion (among others: religious assistance in public institutions, interaction between secularism or *laïcité* and the integration process of foreigners and religious pluralism in cemeteries).

Jean-François Gaudreault-DesBiens is Associate Dean, Research, and Canada Research Chair in North American and Comparative Juridical and Cultural Identities. He has also taught at the faculties of law of the University of Toronto and of McGill University, in addition to having been visiting professor at various universities outside of Canada (Paris-II, Bordeaux-IV, Aix-Marseille, Sciences Po, Case Western). His teaching and research interests are constitutional law (domestic and comparative), civil liberties, legal theory and epistemology, and the sociology of legal cultures. His work currently focuses on the legal treatment of religious claims in multicultural liberal societies, on the relations between the civil law and common law traditions in a globalized economy, and on the legal theory of federalism. He is a member of the Québec and Ontario Bars. He serves as the Canadian correspondent for the British journal *Public Law*. (Publications disponibles sur le site: http://ssrn.com/author=143689)

Noura Karazivan is Professor of Constitutional Law, Faculty of Law, University of Montreal.

Maya Kosseva holds a PhD in History and is project coordinator and researcher at the International Centre for Minority Studies and Intercultural Relations, Sofia, Bulgaria. Her main interests are in the field of Bulgarian history, minority issues and social anthropology.

Iva Kyurkchieva holds a PhD in Ethnology and is a research fellow in the Institute of Ethnology and Folklore Studies with Ethnographic Museum – Bulgarian Academy of Science, Sofia, Bulgaria. Her main interests are in the field of social and cultural anthropology. The main subjects of her research are the Bulgarian Muslim communities as one of the considerable minorities in Bulgaria.

Kjell Å Modéer, dr. jur, dr.h.c. mult., is a former holder of the Torsten and Ragnar Söderberg Foundations' Professorship in Memory of Samuel Pufendorf, and is currently Senior Professor in Legal History at the Law Faculty, Lund University, Sweden.

A. Emre Öktem is an Associate Professor of International Law at the Faculty of Law of Galatasaray University, Istanbul. He is the author of books entitled *Freedom of Religion in International Law* and *Terrorism, Humanitarian Law and Human Rights* and articles on human rights, humanitarian law, minority rights, terrorism, international recognition, continuity and succession, and other fields of international law, as well as historical essays. He a member of the Advisory Council for the Freedom of Religion and Belief at the Organization for Security and Cooperation in Europe, Office of Democratic Institutions and Human Rights.

Javier García Oliva (Manchester University) studied Law at the University of Cadiz, where he obtained his first degree, LLM and PhD (cum laude and European distinction). After finishing his first degree, he became a lecturer at the University of Cadiz (1996–2000) and a Research Fellow at the Centre for Law and Religion, Cardiff University (2001–2004). Javier was appointed as a lecturer at the University of Wales Bangor in 2004, where he stayed until January 2011, when he joined the University of Manchester. He is also a Teaching Fellow at University College London (UCL) and at the University of Oxford. Furthermore, he is a Research Associate at the Centre for Law and Religion (Cardiff University), the Convenor of the SLS Public Law stream and the Book Review Editor of *Law and Justice*.

Vincenzo Pacillo is Associate Professor at the Law Faculty of Modena and Reggio Emilia University, where he teaches Canon law. He is a member of the Executive Committee of the Institute of Canon Law and Comparative Law of Religions (DiReCom) at the Theological Faculty of Lugano, where he teaches and where he carries out regular research activities.

Sabrina Pastorelli is Research Fellow at the Institute of International Law – section of Ecclesiastical and Canon Law – University of Milan, Faculty of Law. She is also a member of the Groupe Sociétés, Religions, Laïcités (GSRL-CNRS/ École Pratique des Hautes Études-Sorbonne) and teaching assistant at the Catholic University of Paris – Faculty of Social and Economic Sciences. Her research interests include sociology of religion; new religious movements; law and religion in the Europe; religion and education; regulation of religious pluralism; state public policy and religion. She is a member of the International Society for the Sociology of Religion (ISSR); the Italian Sociological Association (AIS); the Association for the Sociology of Religion (ASR) and the Association International des Sociologues de Langue Française (AISLF).

Hanne Petersen has been Professor of Legal Cultures at the Center for Studies of Legal Culture, University of Copenhagen since 2009. She was Jean Monnet Scholar at the European University Institute in Florence 1993–1994, professor of jurisprudence and sociology of law at University of Greenland, Ilisimatusarfik 1995–1999, professor of Greenlandic sociology of law at University of Copenhagen 2001–2006 and adjunct professor of law at University of Tromsø 2007–2010. Since 2011 she has been Hedda Andersson guest professor at Lund University as part of the university's Gender Equality priority.

She has participated in a number of international research projects, amongst others an EU-project 'Gender Relations at the Turn of the Millennium. Women as Subjects in Marriage and Migration' (2001–2004), and a Nordic project 'Nordic Legal Maps in Transition' (2005–2009).

Adam Seligman is Professor of Religion at Boston University and Research Associate at the Institute on Culture, Religion and World Affairs there. He has lived and taught at universities in the US, in Israel and in Hungary where he was Fulbright Fellow. He lived for almost 20 years in Israel where he was a member of Kibbutz Kerem Shalom in the early 1970s. His books include *The Idea of Civil Society* (Free Press, 1992), *Inner-worldly Individualism* (Transaction Press, 1994), *The Problem of Trust* (Princeton University Press, 1997), *Modernity's Wager: Authority, the Self and Transcendence* (Princeton University Press, 2000) with Mark Lichbach *Market and Community* (Penn State University Press, 2000), *Modest Claims, Dialogues and Essays on Tolerance and Tradition* (Notre Dame University Press, 2004) and with R.P. Weller, M.J. Puet and B. Simon, *Ritual and its Consequences: An Essay on the Limits of Sincerity* (Oxford University Press, 2008). His work has been translated into over a dozen languages. He is director of the International Summer School on Religion and Public Life which leads seminars every year on contested aspects of religion and the public square in different parts of the world. He lives in Newton, Massachusetts.

Sara Silvestri holds a PhD and MPhil from Cambridge University (UK) and a 'laurea' from La Sapienza University (Italy). She is currently Senior Lecturer at City University London, where she teaches courses on Religion and Politics, the EU, and Islamist movements. She is also a Research Associate at Cambridge University and has directed the Muslims in Europe programme for the European Policy Centre in Brussels. Her research and publications focus on Islamic organizations and Muslim–government relations, counter-terrorism, migration, Europe's Muslim women, faith-based lobbies in the EU.

Mehmet C. Uzun (LLM) is a Research Assistant on Public International Law at the University of Bahçeşehir Faculty of Law and a PhD candidate on Public Law at the University of Galatasaray. His published work essentially focuses on human rights law, with specific emphasis on religious freedom issues and international humanitarian law.

Tymen J. van der Ploeg (1947) studied Dutch Law at Leyden University. He has worked at the law faculty of the VU-University in Amsterdam since 1992 as professor in company law (law on partnerships and legal persons). His research includes (comparative) law on not-for-profit organizations and on religious organizations, as well as the relation between the government and these organizations.

Noel G. Villaroman obtained a Master's degree in International Human Rights Law from the University of Notre Dame in the United States and another Master's degree (by research) from Monash University in Australia. As a PhD candidate at Monash, he researches on the impact of local planning regulations on the right of minority religious groups in Australia to build places of worship. He is a member of the Law and Religion Scholars' Network (LARSN).

This page has been left blank intentionally

Chapter 1
Religion and Rethinking the Public–Private Divide: Introduction

Marie-Claire Foblets

The demographic and cultural profile of European societies today is highly dynamic and in constant change. These changes are inextricably linked, at least in part, to the many and complex effects of globalization, including the blending of cultures; they also reflect increasing diversification as well as an individualization of lifestyles and modes of thought.

As a result of these changes, long-standing ways of managing the social fabric are breaking down, and the question inevitably arises as to how to ensure that relations among groups and individuals within a social context that is in constant flux remain fair and equitable and respectful of individual freedoms and civic duties. At the heart of the debate are the controversies between 'liberals' and 'communitarians' regarding the meaning, the scope as well as the limits of the role of public authorities in the face of identity issues, that is, religious diversity, different moral sensibilities and cultures that wish to preserve their particular identity. In Europe today, it is most specifically religious identity and its public expression that appears at the core of the debate.[1] Questions concerning religion are invariably associated either with the challenge of multiculturalism or with the migratory flows of the past few decades, thereby rendering the topic a politically sensitive one.

When, in 2009, the European Commission published a call for proposals for research projects on the theme of religious pluralism under the Seventh Framework Programme (Socio-Economic Sciences & Humanities: SSH-2009. Activity 8.3.3.2), this is the issue to which it referred. The initiative of this volume is linked partly to that call, since it consists of the proceedings of a colloquium held in October 2010 in Como, Italy, within the framework of the research project that had been chosen by the Commission. This research project is known as 'RELIGARE' ('Religious Diversity and Secular Models in Europe. Innovative

1 See especially W. Brugger and M. Karayanni (eds), *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law*, Heidelberg; Springer, 2007; M.D. Evans, *Manual on the Wearing of Religious Symbols in Public Areas*, Strasbourg: Council of Europe Editions, 2009; N. Hosen and R. Mohr (eds), *Law and Religion in Public Life: The Contemporary Debate*, London: Routledge, 2010, J.-P. Willaime, *Le retour du religieux dans la sphère publique*, Lyon: Olivétan, 2008.

Approaches to Law and Policy'). The project, entitled RELIGARE, an acronym for 'Religious Diversity and Secular Models in Europe. Innovative Approaches to Law and Policy', is funded by the EU under the Seventh Research Framework Programme (Socio-Economic Sciences & Humanities) under the heading of 'Religious pluralism and secularism' that, as noted above, was one of the themes launched by the Commission in 2009.

This introduction comprises two sections: the first briefly situates the RELIGARE project, explaining its main objectives and the method adopted; the second offers an overview of the chapters that make up the volume.

The RELIGARE Research Project

The project of which this volume forms part is currently still in progress, and hence at this stage it is impossible to anticipate the results of the work. The acronym RELIGARE takes its inspiration from the Latin verb 'religare', which means to connect, form a society by creating bonds among individuals and communities.

The following presentation of the project covers three points: the *first* point explains the reasons why the partners decided to form a consortium. There are 13 teams from 10 different countries involved (nine Member States of the European Union and Turkey). The *second* point has to do with the working method. Finally, the *third* point identifies a few observations – albeit very preliminary ones – that can be helpful in understanding the chapters collected in this volume as well as the topics that have been selected. The documents for the project that are currently available are accessible on the website: www.religareproject.eu.

As regards the *first* point: the RELIGARE project involves the participation of 13 teams of researchers and covers 10 different countries, including nine European Union members (Belgium, Bulgaria, Denmark, Germany, Great Britain, France, Italy, the Netherlands, Spain) and Turkey. The research is focused on the study of the situation in these 10 countries, and hence the RELIGARE project does not cover all Member States of the European Union. The teams are made up largely of jurists and sociologists.

The starting point for the subject of the research – the protection of the freedom of religion in Europe – is practically identical for all the countries involved in the project. The approach is twofold: *on the one hand*, in Europe we are heirs, as regards the management of religious and philosophical diversity, to a range of constitutional models that almost systematically privilege the traditional religions.[2] The power relations between what were once the principal currents of thought within society are reflected in the mechanisms put in place to manage a pluralism of beliefs and opinions. Some of these mechanisms are now outdated, in part because

2 See especially G. Robbers (ed.), *State and Church in the European Union*, Baden-Baden: Nomos, 2005; European Consortium for Church-State Research, *Church and State in Europe. State Financial Support. Religion and the School*, Milano: Giuffré, 1992.

the demographic and sociological profile of European societies has changed, giving rise to new (im)balances among groups and tendencies, secularization, on the one hand, and the fragmentation of belief systems on the other, have rendered some of the existing arrangements anachronistic in the face of the present reality. The result is that legal solutions developed in the past to regulate relations between the State and religions, and the freedom of religion in the broad sense, and that are now outdated, serve to maintain certain privileges for the traditional religions from which the others are excluded. They are, in effect, anachronisms that can no longer be justified. *On the other hand*, case law reveals much hesitation in the face of the religious question and, in particular, its protection in law. Such ambivalence leads to terrible legal uncertainty.

The partners of the RELIGARE project agree that there is an urgent need today to carfully listen to the chemins of the new communities that are made up of minorities in Europe, primarily because their presence in our midst is (still) relatively recent. Most of the persons identifying with these minorities wish to become full citizens. In the face of an outdated approach that is no longer appropriate for the purpose, they may feel excluded. The principle of neutrality which means that public authorities maintain a certain reserve on questions to do with religion and/or metaphysics lacks consistency vis-à-vis these groups. A legislative framework that sometimes still reflects a historical preference for certain religions or currents of thought in this regard is an obstacle. Confronted by this reality it would seem justified, if not urgent, to raise the question of the part that law could play in remedying this injustice: should the law be given a more important role?

The partners associated with the RELIGARE project all agree as well that in the area of religious freedom and its protection, it is essential to invoke the rules of law to achieve precisely that which one might expect of them, namely, to be systematic and fair *to all*.

Moreover, they have taken as their goal the study of the extent of protection *effectively* granted to religious freedom and freedom of conscience in the 10 aforementioned countries, by constituting as comprehensive a collection as possible of the solutions that have been drawn up, whether in legislative and regulatory texts or in case law. The collection covers four fields in particular, each of which addresses a priority area of participation (equitable, if possible) in social life: (1) family law, (2) access to the labour market and protection of freedom of religion in the workplace, (3) access and the use of public space, and, finally, (4) the different forms of support that may (or may not) be offered by the State to religions and philosophical beliefs.

The project is funded for a period of three calendar years (February 2010 to January 2013), which is. The work had therefore to be organized in such a way as to enable data to be collected in the most efficient way possible.

This leads to the *second* point: the working method. The 13 teams involved in the project have split the work up among them in such a way that the data may be collected initially for each country separately and then studied on a comparative

basis. The aim, as explained above, is to identify solutions that offer, in each participating country, optimal protection for each person's freedom of belief, without endangering the social cohesion necessary in a plural democratic society. In a second stage the aim is to establish whether certain solutions that appear to ensure a sustainable balance in a given context (national or local) of diversity of religions and beliefs, may in due course serve as an inspiration to other countries, and if so, under what conditions.

This division of labour also applies to the two principal scientific approaches drawn upon for the project: legal enquiry and sociological survey. The task of the teams of jurists is to draw up a repertory of legal responses, whether formulated by the legislators or the courts of the 10 countries involved, to the question of protection for religious freedom and of its scope. The aim is to target the existing protection more closely – be it via legislation or case law, or in exceptional cases via legal doctrine. The period before January 2010 is distinguished from that which coincides with the period of the project. For the earlier period, only the judgments which at the time were considered landmark decisions because of their influence on the debate have been selected. However, for the period starting in January 2010 (start-up of the RELIGARE project), the aim is to be as exhaustive as possible.

The sociologists, in turn, have taken on the task of drawing up, for each country, a questionnaire that, with the aid of the information coming from the case law, can be used as a sort of template for semi-directive interviews. These interviews are being conducted in six of the 10 countries chosen (Turkey, France, the Netherlands, Denmark, Bulgaria and Great Britain). The objective is to collect testimonies, especially from persons of minority background who are likely to have been affected directly by issues of freedom of religion and its legal protection: how did the persons in question experience that protection, in their view does it have any gaps, and if so, in what specific areas? On which questions might they feel inadequately understood?

By supplementing the legal data – which are generally better known or at least more easily identified – with sociological data – often less well known – the 'RELIGARE' project will contribute, it is hoped, an important body of knowledge to the study of growing religious diversity in Europe, that is, the concrete lived experience of the latter and the tensions it can generate for people involved and who are expecting political – and thus legal – solutions appropriate to their situation. The topics selected for the sociological surveys, i.e. the questionnaires, are based on the main tensions and difficulties that emerge from the legal decisions of the past few years in the countries mentioned above as regards the question of legal protection for religious liberty and respect for the principle of non-discrimination.

Through adopting this procedure, the RELIGARE project should ultimately yield three types of research instruments: (1) a database of case law for the 10 countries involved in the research; (2) a series of thematic templates that reproduce, in a synthetic fashion, the arguments made both by the legislative branch and by the courts and tribunals in order to address a number of particular situations;

(3) sociological reports, drawn up for each of the countries on the topics repertoried on the basis of case law and the templates.

The purpose of the first instrument (the case law database) is to make more easily accessible the legal judgments relating to religious freedom handed down in recent years in the 10 countries chosen. The database is maintained in close collaboration with PRISME in Strasbourg, a research unit (CNRS) that has many years of experience in this area and already manages several different case law databases that deal with religious freedom.

A second instrument is the thematic templates. These forms make it possible to sum up in a standardized format, by issue and by country, the arguments made in law, either to ensure protection for freedom of religion or to subject the latter to certain restrictions, and to identify, likewise in schematic form, how the solution adopted is experienced by the target groups. The templates serve as a sort of prism that reveals, via a single format, the legal reasoning used for a specific question *and* the way in which that reasoning is received by those to whom it applies.

One of the thematic templates, for example, relates to places of worship and the conditions either for their construction or for the redeployment of existing buildings to create a space for prayer or devotions.[3] The templates show, for each country, where the existing legislation is now: what is the procedure to be followed? Is there case law that points to the presence of particular problems? And what about potential gaps in the legislation? Is there a demand on the part of certain communities for a problem to be resolved, and if so, what proposed solutions are currently under debate? What do surveys say in this regard? The templates could turn out to be particularly useful to the public authorities as well, when they find themselves having to address questions relating to religious and philosophical pluralism and wishing to know more about the way other countries in Europe deal with these matters. They are of course under no obligation to draw upon them, but at least they will have at hand a richly documented instrument based on an interdisciplinary – legal and sociological – and comparative examination. The idea underlying the decision to create this type of instrument was the controversy in 2009 on the construction of minarets in Switzerland, and the referendum that caused such a stir. A comparative template on the question would have made it possible to find out immediately, without additional research, how the question of the issuance of permits to build and/or open a place of worship is regulated in other European countries, and how the matter is perceived within minority religious communities.

The third and last type of research instrument is the sociological survey. The aim is to make publicly accessible the entire result of the surveys, that is, the lived experience of the communities concerned as regards the legal protection of their freedom of religion and belief. The aim is thus to give a voice to those who are not (yet) or only rarely consulted or listened to. The surveys are conducted on a

3 On this issue, see especially F. Messner (ed.), *Les lieux de culte en France et en Europe*, Leuven: Peeters, 2007.

semi-directive basis, which means that the persons questioned remain free to set their own priorities. This methodology is certain to differ depending on the person whose testimony was collected as well as according to the country and topic at hand, and depending on current events. Certain problems do not come up in all of the countries, and hence the surveys on a given question will remain silent for certain countries; in other countries, if a new problem arises, the interviewers couldgive the interviewees complete freedom to set their own priorities and express their opinions on the question.

A few very tentative conclusions could perhaps already be drawn. This leads to the *third* point. In what follows, three observations are made, ending with a warning.

The *first* observation has to do less with a difficulty in terms of the scientific research, but raises a true problem in practical terms. This has already been mentioned above. It has to do with the sharply divided nature of the case law on the protection of freedom of religion and belief. This division is evident at all levels of jurisdiction and the observation applies to the vast majority of the European countries being studied by the RELIGARE project. The case law sometimes displays relatively improbable about-turns on certain questions that are thus difficult to explain to anyone who is not a specialist in the area. A recent judgment – one that has received extensive commentary – illustrates clearly the hesitation of the judicial authorities in the face of the question of the scope of protection that should be granted to religious freedom: this is the second judgment handed down by the European Court of Human Rights in Strasbourg, sitting as a Grand Chamber on 18 March 2011, in the case of *Lautsi and Others* v. *Italy*.[4] In its judgment, the Court states two things: on the one hand, it raises the awareness of States of the question of the protection of this freedom, while on the other hand, it in a sense places in the hands of the same States the responsibility for determining the balance between the different freedoms at stake, thus taking account of the wide margin of appreciation which they enjoy. In sum, in the opinion of the Court it is up to the States to regulate their relationships with religion. By returning

4 ECtHR, Judgment of 18 March 2011, no. 30814/06, *Lautsi and Others* v. *Italy*. See among others D. McGoldrick, 'Religion in the European public square and in European public life – crucifixes in the classroom?', *Hum. Rts. L. Rev.*, September 2011, 451–502; J. Weiler, 'Lautsi: crucifix in the classroom redux', *EJIL Talk!*, www.ejiltalk.org/lautsi-crucifix-in-the-classroom-redux/; S. Mancini, 'The crucifix rage: supranational constitutionalism and counter-majoritarian difficulty', *EuConst* 6, 2010, 6–27; C. Panara, '*Lautsi v. Italy*: the display of religious symbols by the State', *European Public Law* 17, 2011, 139–168; G. Andreescu and L. Andreescu, 'The European Court of Human Rights' *Lautsi* Decision: context, contents, consequences', *Journal for the Study of Religions and Ideologies* 9, 2010, 47–74; P. Annicchino, 'Winning the battle and losing the war: the Lautsi case and the holy alliance between American conservative evangelicals, the Russian Orthodox Church and the Vatican to reshape European identity', *Religion and Human Rights* special issue, 6/3 2011, 213–219; L. Zucca, 'A comment on Lautsi', *EJIL Talk!*, www.ejiltalk.org/a-comment-on-lautsi/.

the ball to the signatories to the European Convention on Human Rights and Fundamental Freedoms, the Court implicitly reinforces the need and the relevance of the sort of research that RELIGARE seeks to conduct, in view of showing how religious pluralism is regulated, in very concrete terms, within the national and local legal orders.

A *second* observation is in fact more of a question, and has to do with the necessity of legislative intervention. Is such intervention necessary? There are two possible positions in this regard. Either one retains the existing legal frameworks and applies them as best one can, or one argues in favour of a thoroughgoing overhaul. In the latter case, it remains to be determined what amendments are necessary. The observation suggested by the research done by the RELIGARE consortium to date is that the legal frameworks in force are partly outdated, and where amendments are adopted, they are eclectic, haphazard, and often badly received by minority communities, who see themselves as subject to restrictions that they consider unjustified and that, in their view, constitute discrimination against them. In the surveys, they talk about a double standard. The sociological interviews show, in this regard, a need for clearer and more explicit justification on the part of the authorities whenever an amendment is made to the existing legislation. If this is not done, any new restriction is likely to be seen automatically as undue hardship.

The notion of 'undue hardship' is borrowed from the doctrine of reasonable accommodation in labour law, a concept that originates in North America, and refers to the obligation on the part of employers to ensure that they do not discriminate indirectly against persons with physical handicaps. Except in cases where the obligation of accommodation may impose 'undue hardship' on the employer, the latter is required to make sure that a person with physical handicaps does not suffer indirect discrimination, be that in terms of access to a job or the provision of accommodations at the workplace or in the latter's organization.

A position that does not enjoy unanimous support, but that nonetheless deserves to be examined, is one that stipulates that what applies to persons with a physical handicap may, in some cases, be extrapolated to the situation of persons who demand protection for their freedom of religion. The study of the case law shows that, as a rule, such situations are poorly understood. Certain restrictions are not justified in the eyes of persons belonging to religious minorities, who consider that they have not been properly listened to. In the surveys, some members of these communities speak of true suffering, even though they consider that they are entitled to adequate legal protection.

A *third* observation relates to a term that is very much in vogue these days, namely, the concept of 'best practices'. In light of the diversity of the contexts under study, the value of these practices as identified by a project such as RELIGARE is quite limited. Each practice is inevitably linked to a particular context, which explains why it is not automatically transferable to other contexts. As regards reasonable accommodation, a project such as RELIGARE could limit itself to inventorying practices which, notably as regards access to the labour market

(a European framework has been put in place on this matter) might help combat indirect discrimination on grounds of a person's beliefs and/or religious adherence. As things stand, it is nevertheless very likely that there is a need to go further than this and look also at the question of whether a more binding commitment on the part of Member States of the European Union than those currently in place might make it easier to combat more effectively – and thus more fairly – indirect discrimination linked to the religious or philosophical identity of persons who are or wish to be active in the labour market. It is quite probable that the RELIGARE project will put forward suggestions aimed at giving the technique of reasonable accommodation a more binding quality.

This first section of the introduction ends with a reflection that should stand as a warning against the temptation to place too much hope in the concrete results that a research project such as the one currently undertaken by the partners of RELIGARE could hope to deliver. As mentioned above, the RELIGARE project consists of research that was commissioned and is entirely funded by the European Commission. However, the subject of the research – the management of religious and philosophical diversity within contemporary European societies – does not fall within the competence of the European Union. On the contrary, it is to this date jealously guarded by the Member States wishing to retain sovereignty over the question of their relationship to religious and other beliefs present on their territory and over the way in which they protect their freedom. Unless the power(s) are transferred to the EU, so far the States have the last word on the way in which they manage religious pluralism in their society, that is, within their territory. They are of course bound by the provisions of the European Convention on Human Rights and Fundamental Freedoms and more recently also by the principles enshrined in the European Charter, but they maintain a considerable margin of appreciation as regards their implementation. National and local traditions are very tenacious, as is evident in each of the countries. As a consequence, the recommendations to be made at the end of the RELIGARE project, and that are addressed primarily to the Commission, will most likely not be taken into account by the Member States, unless a country should wish explicitly to translate into a policy decision and incorporate into its legal order a solution or practice that has been brought to light through the research.

One must therefore be realistic, recognizing that it is not because thematic templates have been filled out that national legislative and/or judicial authorities will make use of them as inspiration for developing concrete solutions to the problems they face. National traditions remain highly diverse, and the way countries manage pluralism is rooted in their history, which explains in part the differences in their perspectives. The option of 'Muslim arbitration tribunals', for example, which Great Britain is experimenting with today, does not (yet) seem easily transferable to other European countries. In time, perhaps, the solution of religious arbitration could find its way into the internal order of other States, but it is too soon to say for sure. Another example is that of the funding of religious bodies – the question is of course meaningful only in countries where religions are

entitled to a State subsidy. A final example is that of countries which are heirs to the 'concordat' tradition. The concordat as a tool for managing religious pluralism may inspire countries such as Spain, for instance, but does not make sense in countries that have no experience of this particular form of relationship between the State and certain religions. Other illustrations could undoubtedly be found.

In sum, the difficulty lies in the fact that in the area of management of religious pluralism, countries have developed their own individual policies without an explicit transfer of power(s) to the European level – with the exception of respect for fundamental rights and the prohibition against discrimination based on religion and/or belief. The solutions that a project such as RELIGARE would make possible to repertory could thus be applied only in the specific context from which they emanate. Moreover, the questions relating to religious freedom and its protection are highly sensitive, politically red-hot issues. For some, the status quo is very convenient; it suits the interests of the traditional religions. They do not necessarily feel a need to innovate. For others, one would need to go much further in the practice of State neutrality. An illustration of this latter position, strictly linked to the French context, is the opinion issued in early September 2011 by the 'Haut Conseil à l'Intégration' in France, which calls for a radicalization of the concept of neutrality in the workplace.[5] Still others focus on the existing anachronisms, proposing for instance that one should also revise the calendar of statutory holidays that in most European countries is (still) a Christian calendar, or should rid the public space of religious symbols.

Religion and Public Spaces: Major Conflicts

The Secularist Thesis: Should we Revise the Separation between the Public and the Private Sphere?

Among the topics the teams participating in the RELIGARE project have taken as their joint aim to investigate is the issue of religion in the public space, or to put it more precisely, religious freedom and the public–private divide.

No doubt, the above-mentioned resurgence of the importance, since some time in 'secularized' Europe, of the relationship between positive State law and religion also defies the private–public distinction (see Chapter 8 by Silvio Ferrari in this volume).

Bhikhu Parekh accurately identified the problem in his book *Rethinking Multiculturalism*:

> Religious persons see life as a whole and seek to live out their deeply held beliefs in their personal and collective lives. This confronts the civil assimilationist with

5 *Expression religieuse et laïcité dans l'entreprise*, Haut Conseil à l'Intégration, www.hci.gouv.fr.

> a dilemma. If he confined religion to the private realm, he would discriminate against religious people, alienate them from public life, provoke their resistance, and endanger the very unity for whose sake he excludes religion from the public realm. If he admitted it into the public realm, he would jettison or at least blur the private-public distinction and face the acute problem of how to deal with what would now be a multicultural public realm.[6]

With a view to ordering these relationships, national legislators in Europe have made the – historic – choice to secularize positive law, that is, the official law enacted by the State:[7] from a secularist point of view, religion and State law (and politics) pertain to different areas of life and should therefore be scrupulously kept separate. This choice can take several forms: in a weaker form, State authorities should in general refrain from identifying with any belief and take a neutral

---

6 B. Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory*, Hampshire: Palgrave, 2000 (2006), 203.

7 Regarding this choice, one that is quite recent in the history of democratic societies, see especially G. Motzkin and Y. Fischer, *Religion and Democracy in Contemporary Europe*, London: Alliance Publishing Trust, 2008; V. Bader, *Secularism or Democracy? Associational Governance of Religious Diversity*, Amsterdam: Amsterdam University Press, 2007; A. Dierkens and J.-P. Schreiber (eds), *Laïcité et sécularisation dans l'Union européenne*, Bruxelles, Ed. de l'Université de Bruxelles ('Problèmes d'Histoire des religions'), Tome XVI, 2006; M. Grimpret, *Dieu est dans l'isoloir*, Paris: Presses de la Renaissance, 2007; Y. Lambert, 'Le rôle dévolu à la religion par les européens', *Sociétés contemporaines* 37, 2000, 11–33; G.J. Larouche and M. Maesschalck, *La religion dans l'espace public*, Université Laval, Ed. Liber, 2006, n. 8, 60–70; B. Massignon, 'L'Union européenne: Ni Dieu, ni César', *Esprit*, special issue 'Effervescences religieuses dans le monde', March–April 2007, 104–111; M. Milot, *Laïcité dans le nouveau monde, le cas du Québec*, Turnhout: Brepols, 2002; J.-C. Monod, *Sécularisation et laïcité*, Paris: PUF ('Philosophies'), 2007; M. Milot, P. Portier and J.-P. Willaime (eds), *Pluralisme religieux et citoyenneté*, Rennes: P.U. Rennes, 2009; P. Portier, 'Les laïcités dans l'Union européenne: vers une convergence des modèles?', in: G. Saupin, R. Fabre and M. Launay (eds), *La Tolérance* (Colloque international de Nantes, mai 1998, Quatrième centenaire de l'Edict de Nantes), P.U. Rennes, 1999; P. Portier, 'La critique contemporaine du religieux. Essai d'interprétation', in: D. Carsin (ed.), *La liberté de critique*, Paris: Lexis-Nexis, 2007, 67–85; F. Randhaxe and V. Zuber (eds), *Laïcités-démocraties: des relations ambigües*, Turnhout: Brepols ('Bibliothèque de l'Ecole des Hautes Etudes, Sciences religieuses'), 2003, 11–22; E. Tawil, *Norme religieuse et droit français*, Aix-en-Provence: P.U. Aix-Marseille, 2005; R. Torfs, 'Models of freedom of religion in the European Union and in the United States', in: *Between Caesar and the Lord – Relation between Religion and the State in the Countries of Asia and Europe*, Beijing: Kungcki Cultural Group, 2004, 225–252; J.-P. Willaime, 'Religion in ultramodernity', in: J.A. Beckford and J. Wallis (eds), *Theorising Religion: Classical and Contemporary Debates*, Aldershot: Ashgate, 2006, 73–85; J.-P. Willaime, 'Reconfigurations ultramodernes', *Esprit*, special issue 'Effervescences religieuses dans le monde', March–April 2007, 146–155; Willaime, *Le retour du religieux dans la sphère publique*, 2008.

stance toward religions, which means that if any protection or facility is granted to religion, it should apply to all religions on an equal footing. In its stronger version, State policy should be conducted in terms of secular laws – based on secular grounds – alone and therefore kept strictly separate from religious beliefs. In a secularist view, religion is a personal matter and belongs to the private sphere, while State (secular) politics, on the contrary, is a public matter that deals with matters of public interest, which in a democracy require open and public debate. Politics therefore necessitates a public sphere that is considered neutral.

Following upon significant changes within European societies – not least, as a consequence of migratory waves from various geographic regions and cultures of the world – this secularist assumption is now being challenged, in particular on the grounds that the requirement that citizens, as well as newcomers and members of religious minorities, who wish to participate in society and claim the application of the law must set aside (relegate to the private sphere) their religious beliefs, is undemocratic, discriminatory and probably also unwise. To be required to do so is likely to create a crisis of legitimacy by alienating religiously minded citizens from the formal legal system, thereby rendering it ineffective in practice. The convictions most often cited when discussing these risks of alienation are those linked to Islam.[8] Several recent studies, notably in sociology, have warned of the

8 M. Abou Ramadan, 'The misperception of the European Court of Human Rights on the immutability of Shari'a'', *Nordisk tidsskrift for menneskerettigheter* 23, 2005, 375–390; A. An-Na'im, 'Global citizenship and human rights: from Muslims in Europe to European Muslims', in: J.E. Goldschmidt and T. Loenen (eds), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?*, Antwerp: Intersentia, 2007, 13–55; R. Aluffi and G. Zincone (eds), *The Legal Treatment of Islamic Minorities in Europe*, Leuven: Peeters, 2004; J. Cesari and S. McLoughlin (eds), *European Muslims and the Secular State*, Aldershot: Ashgate, 2005; J. Cesari, *When Islam and Democracy Meet: Muslims in Europe and in the United States*, New York: Palgrave, 2004 (2nd edn 2006); V. Bader (ed.), 'Governing Islam in Western Europe. Essays on governance of religious diversity', Special issue of *Journal of Ethnic and Migration Studies* 33/6, August 2007; S. Ferrari and A. Bradley (eds), *Islam and European Legal Systems*, Aldershot: Ashgate, 2000; F. Fregosi (ed.), *Lectures contemporaines du droit islamique: Europe et monde arabe*, Strasbourg: P.U. Strasbourg, 2004; J. Klausen, *The Islamic Challenge: Politics and Religion in Western Europe*, Oxford: Oxford University Press, 2005; B. Marechal S. Allievi, F. Dassetto and J. Nielsen (eds), *Muslims in the Enlarged Europe: Religion and Society*, Leiden: Brill, 2003; J.S. Nielsen, *Muslims in Western Europe*, Edinburgh: Edinburgh University Press, 1992 (3rd edn 2004); J.S. Nielsen, *Towards a European Islam?*, London: Macmillan, 1999; R. Potz and W. Wiesharder (eds), *Islam and the European Union*, Leuven: Peeters, 2004; M. Rohe, *Islamisches Recht: Geschichte und Gegenwart* [Islamic Law: Past and Present], Munich: C.H. Beck, 2009; M. Rohe, *Muslims and the Law in Europe: Chances and Challenges*, New Delhi: Global Media Publications, 2007; M. Rohe, 'Muslims between Qu'ran and constitution – religious freedom within the German legal order', in: L.A. Tramontini (ed.), *'East is East and West is West'? Talks on Dialogue in Beirut*, Beiruter Texte und Studien 80, Beirut: Orient-Institut Beirut, 2006, 151–176; M. Rohe, 'Islamic norms in Germany and Europe', in: A. Al-Hamarneh and J. Thielmann (eds), *Islam and Muslims*

gap experienced by an increasing number of people – now living in Europe – between the official State law and their religious or philosophical conviction.[9] If the reality of this gap – so difficult to live with – is not taken seriously, it could threaten the social cohesion of Europe.[10]

The debate is now in full swing:[11] which legal framework is best suited to guaranteeing the 'very unity' Bhikhu Parekh is referring to and worries about? If

---

in Germany, Leiden: Brill, 2008, 49–81; W.A.R. Shadid and P.S. Van Koningsveld (eds), *Intercultural Relations and Religious Authorities: Muslims in the European Union*, Leuven: Peeters, 2002; P. Shah, 'Thinking beyond religion: legal pluralism in Britain's South Asian diaspora', *Australian Journal of Asian Law* 8, 2006, 237–260; P. Shah, 'Transforming to accommodate? Reflections on the *shari'a* debate in Britain', in: R. Grillo , R. Ballard, A. Ferrari, A.J. Hoekema, M. Maussen and P. Shah (eds), *Legal Practice and Cultural Diversity*, Aldershot: Ashgate, 2009, 73–92.

9 See especially: N. Alsayyad and M. Castells (eds), *Muslim Europe or Euro-Islam: Politics, Culture, and Citizenship in the Age of Globalization*, Lanham: Lexington Books, 2002; S. Benhabib, I. Shapiro and D. Petranovic (eds), *Identities, Affiliations and Allegiances*, Cambridge: Cambridge University Press, 2007; Cesari and McLoughlin, *European Muslims and the Secular State*; H. Coward, J.R. Hinnells and R.B. Williams (eds), *The South Asian Religious Diaspora in Great Britain, Canada and the United States*, New York: State University of New York Press, 2000; A. Erdemir, H. Rittersberger-Tiliç, A. Ergun and H. Kahveci (eds), *Rethinking Global Migration: Practices, Policies, and Discourses in the European Neighbourhood*, Ankara: KORA, 2008; M. Howard Ross (ed.), *Culture and Belonging in Divided Societies: Contestation and Symbolic Landscapes*, Philadelphia: University of Pennsylvania Press, 2009; G.F. Levey and T. Modood (eds), *Secularism, Religion and Multicultural Citizenship*, Cambridge: Cambridge University Press, 2009; A.F. March, *Islam and Liberal Citizenship: The Search for Overlapping Consensus*, Oxford: Oxford University Press, 2009; J. Nielsen and S. Allievi (eds), *Muslim Networks and Transnational Communities in and Across Europe*, Leiden: Brill, 2002; Y. Yazbeck Haddad (ed.), *Muslims in the West: From Sojourners to Citizens*, Oxford: Oxford University Press, 2002.

10 O. Roy, *La sainte ignorance: Le temps de la religion sans culture*, Paris: Seuil, 2008; F. Dassetto, *Paroles d'Islam: individus, sociétés et discours dans l'Islam européen contemporain*, Paris: Maisonneuve, 2000; A.H. Sinno (ed.), *Muslims in Western Politics*, Bloomington: Indiana University Press, 2009; N. Tietze, *Islamische Identitäten: Formen muslimischer Religiosität junger Männer in Deutschland und Frankreich*, Hamburg: HIS Verlag, 2001.

11 In the application dossier to the Commission the following works are referred to in particular: J.-G. Boeglin, *Etats et religion en Europe*, Paris: L'Harmattan, 2006; P. Cane, C. Evans and Z. Robinson (eds), *Law and Religion in Theoretical and Historical Context*, Cambridge: Cambridge University Press, 2008; H. Goris and M. Heimbach-Steins (eds), *Religion in Recht und politischer Ordnung heute*, Würzburg: Ergon, 2008; H. Lehmann (ed.), *Multireligiosität im vereinten Europa: historische und juristische Aspekte*, Göttingen: Wallstein, 2003; J. Norgren and S. Nanda, *American Cultural Pluralism and Law*, Westport: Praeger Publishers, 2006 (3rd edn); H.S. Richardson and M.S. Williams (eds), *Moral Universalism and Pluralism*, New York: New York University Press, 2009; A. Sarat and T.R. Kearns (eds), *Cultural Pluralism, Identity Politics, and the*

frameworks are to be developed that are respectful of the right of each person to freedom of belief/religion and to non-discrimination on religious grounds, in the context of (European) societies that are increasingly diverse, must the constitutional frameworks that are in place be revised – more or less radically – or is it simply a matter of providing for pragmatic adjustments? Should the relationship between the private and the public sphere be revised, and if so, how thoroughly? Since different European societies have different institutional histories and traditions when it comes to appreciating religious diversity, it is very likely that they will each need to develop their own appropriate framework.

This volume explores some major conflicts revolving around religion and public life that have occurred in contemporary Europe in the past few years and that, as is shown throughout the case studies, are challenging the public–private divide and a number of common assumptions on which this divide is based. The contributions discuss the way(s) in which these conflicts are handled, sometimes by judicial and sometimes by legislative means, or in some cases remain unresolved.

The Public–Private Divide from a Theoretical Angle

The book is divided into three parts. The first contains seven contributions which look at the public/private distinction from a theoretical angle. They provide a rich and stimulating background, which is tested in the following two sections of the book, one devoted to dress codes and the other to places of worship.

Through an historical analysis Kjell Å. Modéer traces the legal 'transnational deep structures', going back to medieval times, which govern the place of religion in the public and private sphere. The author concludes that recent developments in the US Supreme Court case law and transformations of the Church–State systems in the Northern European countries can be considered examples of the search for a new balance between 'progressive private market-oriented theories (new liberalism) and traditional welfare state programs (social democrats)'.

Adam Seligman seeks an explanation for the 'current and reigning confusion in matters pertaining to the public and the private' and focuses on the triumph of a modern culture 'resting on the idea of the individual as moral absolute' and 'enshrining the individual and the private as the arena of virtue and conscience, as the fount of moral obligation'. According to Seligman, 'with the terms of representation defined by the autonomous, rights-bearing individual, the representation of the public sphere (and so of relations between public and private) becomes increasingly problematic'. Once 'the realm of value' is 'relegated to the sphere of the private', it is 'increasingly difficult to represent the collective whole, the realm of the public'.

Law, Ann Arbor: University of Michigan Press, 1999; A. Wagner and V.K. Bhatia (eds), *Diversity and Tolerance in Socio-legal Contexts: Explorations in the Semiotics of Law*, Farnham/Burlington: Ashgate, 2009.

Veit Bader's chapter offers some further 'conceptual, theoretical and empirical clarifications of "private", "public" and its shifting divide from a sociological point of view'. Framed in the context of a political theory based on the principles of liberal-democratic constitutionalism, his contribution aims at providing inputs 'to discuss whether and, if so, what kinds of intervention in religious associations/organizations are compatible with the guarantee of associational religious freedom'. In the second part of his analysis, Bader applies these inputs to the case of non-governmental religiously oriented schools, examining the problems connected to their public funding, regulation and (State) control. He concludes that in this field the public/private divide is not decisive and argues for replacing 'the "shield of privacy" with substantive arguments from minimal morality and from more demanding liberal-democratic morality'.

The two contributions by Alessandro and Silvio Ferrari are more directly focused on the transformations of the relationship between the State and religion that are taking place in Europe. Alessandro Ferrari highlights the dangers of a double-standard secularism: due to the increasing willingness of the European States 'to read secularism in the light of a social cohesion interpreted as a collective good reflecting specific national identities', the right of religious freedom has increasingly taken on the goal of protecting 'a public order unilaterally assessed by the States themselves' rather than autonomies of individual consciences and religious groups. In this situation the right of religious minorities to access the public space is increasingly made dependent on their ability 'to pass a very identitarian and "thick" "reasonable"/"unreasonable" test'. Silvio Ferrari identifies three patterns of relations between States and religions in Europe (connected to the ideal-types provided by France, Italy and the United Kingdom) and maintains that none of them can adequately govern the processes of religious pluralization and publicization that is taking place in Europe. According to Silvio Ferrari it is necessary to deconstruct the notion of public sphere, making a distinction between its personal and spatial dimensions and, in reference to the latter, between common, political and institutional space.

Jean-François Gaudreault-DesBiens and Noura Karazivan's analysis begins with the observation that legal traditions 'constitute "reasoning templates" that may provide deep reasons for adopting one broad regulatory approach over another'. They go on to contrast the common law and civil law traditions 'along three axes: the relative importance of the State in each tradition; the consequence on the treatment of fundamental rights; and the impact on certain legal doctrines such as that of abus de droit'. Their threefold analysis sheds some light on a few important points. According to the authors, 'the civil law tradition seems more prone to accept intrinsic limitations to fundamental rights' (including freedom of religion) and a civil law State may be more likely to 'insist on the religious neutrality of its civil servants' than a common law State, which 'might be more inclined to allow its employees to wear' religious symbols 'because they are deemed not to represent an abstractly defined, sovereign, State but a particular

community, with its tapestry of colours, that must be served and represented by the State'.

Finally, Hanne Petersen looks at the public/private divide from a very specific perspective, that of gender. This approach enables her to formulate a few general statements that deserve attention. She writes that 'monotheistic religions are based on distinct gender hierarchies and divisions, which are inherited by secular state organizations and regulations. The "Atlantic-European" inspired secular normative culture introduces a division in public and private spheres, which continues a tradition of gender division and class privilege'. This remark returns to Modéer's 'deep structures' and 'longue durée' processes on the one hand and, on the other, to the impact of different religious conceptions on the legal traditions (including those that are indicated with the expressions 'common law' and 'civil law' mentioned by Gaudreault-DesBiens and Karazivan). How much is the public/private distinction the outcome of a monotheistic or even Christian background, hidden but not deleted? And how far would such a descent, if proved, make this distinction non-exportable outside the West and inadequate even to govern the contemporary religious plurality of the West?

Two Types of Major Conflict: Dress Codes and Places of Worship

It would be presumptuous to claim that the RELIGARE project managed to draw up a comprehensive list of those conflicts which arise in daily life and which revolve around the public–private divide. Two types of conflict have been selected: the *first* broad area relates to the sensitive issue of religious dress codes. Dress codes and the wish of a growing body of believers to accommodate these codes, both in a school context and in the workplace, have been the object of vivid discussions in the past few years in nearly every European country, and have also led to an impressive body of case law. The *second* type of conflict addressed by several contributions in this volume regards places of worship. Various matters may raise serious problems – and therefore need to be settled – in particular in cases where specific requests on the part of the communities involved and/or practices clash with the rules that apply within the jurisdiction of the place where a conflict occurs, or where there are no clear rules on hand.

As the contributions in this book make clear, both types of conflict put into perspective the relations – institutional and other – between a State and the various convictions and/or religious and philosophical communities with which it has to deal. They focus in particular on the constitutional and legal framework set up to govern these relations. The tensions that accompany the conflicts may take different forms and be more or less easily manageable. Much will depend on the willingness of the parties involved – the State and the believers or their spokesmen – to come to an agreement. Rather than set aside or prohibit religion as a fact of social life, the solutions to be preferred by far should be those that take as their starting point two fundamental rights in particular: *the freedom of religion* and *the right to equality of treatment*, as enshrined in the European Convention on

Human Rights and Fundamental Freedoms and more recently also the Charter of Fundamental Rights of the European Union. In principle, applying a classical conception of liberal democracy, equality takes no account of a person's belief(s) and/or philosophical convictions unless, paradoxically, that very indifference were to lead in practice to the opposite result, that is, that the person in question were to be excluded or disadvantaged *because* of his or her belief(s)/convictions. Legal frameworks should offer ways of recognizing, respecting and – within limits – accommodating legitimate differences.

Dress codes Six contributions address the issue of religious dress codes (Katayoun Alidadi, Maya Kosseva and Iva Kyurkchieva, A. Emre Öktem and Mehmet C. Uzun, Sara Silvestri, Javier Garcia Oliva, Sabrina Pastorelli). All eight authors agree that the issue of religious dress codes – directly or indirectly – touches upon a highly symbolic matter. Yet, the question is what makes a religious symbol. M. Evans in his *Manual on the Wearing of Religious Symbols in Public Areas* concludes that there is no universal legal definition of a religious symbol. However, he distinguishes two different approaches: the first approach limits the notion of religious symbols to figures of religious devotion; the other approach includes everything which forms a relevant element in the religious life of a believer.[12] Whether one takes the first or the second approach, in both cases what is to be understood as a religious symbol will to a large extent depend on the concrete context and consequently on factors linked to time and space. Conflicts over the wearing of religious symbols through dress and over the grounds that may be invoked to prohibit it or, on the contrary, to place no restrictions on it – or if at all then only very few – have become increasingly frequent in three contexts: in public schools, in the workplace (see Chapter 9) and more recently also, with regard to the full veil, on the street.

The symbols most vividly discussed these past few years, almost everywhere in Europe, are no doubt the Muslim headscarf – and more recently also the full veil (see Chapter 14) – and the Sikh turban and 'kirpan'. In some EU countries, the issue of dress codes attracted the attention not only of the mass media but also of political authorities. While some countries voted for legislative measures that limit in no insignificant way the wearing of specific religious symbols, as is the case in France, Belgium and Turkey (see for this last country Chapter 10), other countries have not (yet) enacted any specific regulation in this domain, as is the case for example of Bulgaria (see Chapter 13), and there public policies vary from banning to accommodating attitudes.

Here again, three perspectives can be adopted and will lead to different conclusions depending on the angle of approach: a spatial, a personal or a functional approach.

12 M. Evans, *Manual on the Wearing of Religious Symbols in Public Areas*, Strasbourg: Council of Europe Editions, 2009, 62–87.

From the point of view that makes reference to the person(s) involved and the service that is (to be) offered, a distinction needs to be made between persons who are offering a public service in the capacity of judge, clerk or teacher, working in and for public institutions, and persons who do not perform but instead use the public service in the capacity of a private person, such as students, patients, litigants, etc. In the case of a judge or a clerk the choice of wearing – and thereby exhibiting – a religious symbol can raise doubts about the neutrality of the institution, while in the case of persons who do not offer any public service, but instead are users of it, wearing religious symbols is a matter of private choice.

Yet, public space can be conceived as *open* – such as a bus, the street, etc. – or as *institutional* – such as a law court, a school, a hospital. While public *institutional* spaces have to comply with rules of access and conduct, public *open* spaces are theoretically equally accessible to all, but in practice, distinctions based on religion or belief can be relevant. One of the first domains on which lawmakers and judges focused, at national as well as at European level, was the school.

In France, a much debated law of 2004[13] bans visible religious signs in schools. In application of this law, Muslim students wearing headscarves as well as Sikh students wearing turbans – all signs revealing a religious belonging – were excluded from public schools. The law aimed at banning mainly Muslim headscarves, in order to preserve the principle of secularity ('laïcité'): in a school context students must be neither distracted nor influenced by religious issues. In the *Kervanci* v. *France* and the *Dogru* v. *France* cases, the ECtHR declared that the law does not infringe upon the principles of the European Convention on Human Rights and Fundamental Liberties.[14]

In the United Kingdom, the debate arose over the *Begum* case in 2002 (see Chapter 11). In the UK wearing the hijab is generally allowed in public schools. The French concern with 'laïcité' is not an issue here. The *Begum* case concerned the 'jilbab', a long, loose tunic that Shabina Begum wished to wear at school.[15] Since the jilbab did not comply with the regulations concerning the school uniform, her claim led to her exclusion from the school. This raised questions concerning the interpretation of article 9 of the ECHR: were the limitations to

---

13 Assemblée nationale, Loi no. 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics, *Journal Officiel*, no. 65, 17/03/2004, www.legifrance.gouv.fr. See also: Commission présidée par B. Stasi, *Laïcité et République*, Paris: La Documentation Française, 2004; A. Ferrari, 'Velo musulmano e laicità francese: una difficile integrazione', in: S. Ferrari (a cura di), *I simboli religiosi dei diritti del Vecchio continente*, Roma: Carocci, 2006, 93 ss.

14 *Case of Dogru* v. *France*, Application no. 27058/05, Strasbourg, 4 December 2008; *Case of Kervanci* v. *France*, application no. 31645/04, Strasbourg, 4 December 2008, http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en. See also: Conseil d'État, décision 5 décembre 2007, requête n. 285394; n. 285395; n. 285396; n. 295671, www.conseil-etat.fr/.

15 For a comment on the case, see among others: M. Mazher Idriss, 'The defeat of Shabina Begum in the House of Lords', *Liverpool Law Review* 3, 2006, 417–436.

her freedom of religion justifiable? At first, the Court of Appeal acknowledged a violation under the Human Rights Act of 1998.[16] However, in March 2006, the House of Lords overturned the Court of Appeal's decision on all counts, assessing that the right to manifest a belief under article 9 of the ECHR had not been violated by the school.[17]

In other countries, the debate focused on the right of *teachers* to wear a religious symbol. In the case of *Dahlab* v. *Switzerland*, concerning the dismissal of a school teacher wearing the Islamic headscarf, the ECtHR considered that the dismissal was legitimate as it was applied in order to grant a religiously neutral teaching to young and easily influenced students.[18] In Germany, a teacher was not hired because she was unwilling to remove her headscarf: the Constitutional Court decided that in doing so the lower court had violated her religious freedom and infringed upon the principles of non-discrimination.[19] In any case, the question is the competence of the Länder, which explains why some of them later adopted legislation that prohibits teachers from wearing Islamic headscarves in public schools.

Religiously oriented private schools are entitled to deal differently with the issues concerning the wearing of religious dress, as they are not obliged to respect the principle of neutrality.

More recently, as mentioned above, some countries have started to express worries about the wearing of religious dress on the street. The argument here is that of public order and security. In Italy so far, no law prohibits dressing in accordance with one's belief and/or wearing religious symbols (see Chapter 12). Yet, in the past few years local authorities have started prohibiting full veils (the 'burqa') in the streets. Some municipalities in the north of the country, where the Northern League Party is particularly strong, began to apply a 1975 law (originally conceived against terrorism) that forbids circulating in public spaces with the face completely covered. Some municipalities enacted council decrees (based on this

16 *Human Rights Act 1998*, www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1.

17 House of Lords, *Judgments – Begum (FC) (Appellant)* v. *London Borough of Tower Hamlets (Respondents)*, www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030213/begum-1.htm; House of Lords, *Opinions of the Lords of Appeal for Judgment in the Cause R (on the application of Begum (by her litigation friend, Rahman)) (Respondent)* v. *Headteacher and Governors of Denbigh High School (Appellants)*, www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060322/begum.pdf. See also: Mohammad Mazher Idriss, 'The defeat of Shabina Begum in the House of Lords', *Liverpool Law Review* 27/3, December, 2006, 417–436.

18 *Dahlab* v. *Switzerland*, Application No. 42393/98, Strasbourg, 15 January 2001, http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=55553349&skin=hudoc-en.

19 BVerfG, 2 BvR 1436/02 of 09/24/2003, paragraphs No. (1–138), www.bverfg.de/entscheidungen/rs20030924_2bvr143602en.html (accessed 18 June 2010). The Court recognized that 'there is no sufficiently definite statutory basis in the current law of the Land (state) Baden-Württemberg for a prohibition on teachers wearing a headscarf at school and in lessons'.

law) to ban the burqa. The case law, however, disagrees with that view. Several courts in Italy ruled in favour of the religious freedom of women, considering that since the wearing of the burqa can be considered the manifestation of a particular religious tradition, it constitutes a 'justified exception' to the 1975 law. There is one condition, however, under which women are required to accept being identified – if requested by the police.

In Cremona, a city in Northern Italy, another case related to public order and security issues arose in 2007. In a shopping centre an Indian national of Sikh religion was approached by a policeman because he carried a sword: the 'kirpan'. The Criminal Court of Cremona acquitted him of the crime of carrying a weapon or an object, though not conventionally a weapon, which can be employed as one. The Court considered the carrying of a kirpan as an expression of one's religious faith and recognized the religious character of carrying it as a justified reason to exclude the application of the public security law.[20]

In various EU countries, a further issue is that of identity documents. In principle, in most countries, pictures on identity documents show the person without a scarf or any other (religious or non-religious) headgear. That is the case, for example, in France[21] and Portugal. Other countries, such as Italy[22] and the UK,[23] provide dispensation for religious reasons. The case law on this issue, notably in Finland, Belgium,[24] Germany and Ireland, generally shows understanding.

---

20 Criminal Court, Cremona, 19 February 2009, no.799/08.

21 Conseil d'État, décision n. 289947, 6 mars 2006, www.conseil-etat.fr. On the current debate about the niqab, see: Mission d'information sur la pratique du port du voile intégral sur le territoire national, *Rapport d'information fait au nom de la mission d'information sur la pratique du port du voile intégral sur le territoire national*, no. 2262, le 26 janvier 2010, www.assemblee-nationale.fr/13/rap-info/i2262.asp (accessed 18 June 2010); Sénat de France, *Le port de la burqa dans les lieux publics, Étude de législation comparée*, n. 201, 23 octobre 2009, www.senat.fr/lc/lc201/lc201.pdf (accessed 18 June 2010).

22 Ministero dell'Interno. Direzione generale dell'amministrazione civile, circolare 14 marzo 1995, n. 4: 'Rilascio carta di identità a cittadini professanti culti religiosi diversi da quello cattolico – uso del copricapo'.

23 A case concerned the refusal of the British High Commission in Singapore to renew the passport of a Muslim woman wearing a hijab. Since this case and the consequent public debate, the Home Office has adopted new guidelines allowing Muslim women to cover their heads on their passport photographs. UKBA Photograph Guidance for immigration applications made in the UK, version 04/2009: 'Photographs must also be taken on the full head, without any covering unless worn for religious or medical reasons'. www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/flr/photoguidance0409.pdf (accessed 18 June 2010).

24 See the decision of the Cour de Cassation, 22/12/2000, C990164N, http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20001222-4 (accessed 18 June 2010).

With a view to protecting the religious freedom of the person involved, courts usually accept these kinds of headdresses on identity documents.[25]

Places of worship Four contributions in this volume address the public–private divide in relation to the construction and subsequently the maintenance of places of worship (Anne Fornerod, Tymen J. van der Ploeg, Vincenzo Pacillo and Noel G. Villaroman).

Article 9 of the European Convention on Human Rights as well as article 10 of the Charter of Fundamental Rights of the European Union, guarantee freedom of thought, conscience and religion. This right includes freedom to manifest religion or belief, in worship, teaching, practice and observance. The right to build places of worship is considered part of this right. This represents a major consolidation of the position of religious communities in many European countries. In the past, the question of the places of worship was ruled within the context of the (mainly historical) relations between a State and the religious communities established on its territory. It explains why, in most cases, the right to have a place of worship depended on the quality of these relations and in case of tensions, the right was simply denied or subjected to various limitations. This was unfortunately the case with many minority religions. A new approach came with the introduction of a system of religious liberty. Under this approach, having a place of worship came to be regarded as the manifestation of one's religious freedom.

From this new perspective any religious group, independently from its relations with the State, is entitled to have its own place of worship and this right cannot be made dependent on an authorization by or an agreement with the public administration and cannot be limited to the religious communities that have been registered or recognized at national or local level. As a manifestation of religious liberty, the right to have a place of worship can be limited only by general rules governing land use, planning, construction or intended to protect health and safety in buildings where a large number of persons can gather.

This new approach has been affirmed in a number of international documents, confirmed in several international court decisions (see Chapter 15) and reiterated in various State laws, for example the laws on religious freedom of Spain and Portugal.[26]

Despite this sound foundation, the availability of a place of worship as part of the right of religious freedom is far from being universally recognized. Certain States have simply not accepted it and are therefore not willing to implement the

25 Migration Policy Group, European Group of non-governmental experts in the field of combating discrimination on the grounds of religion or belief, *Rapport de synthèse relatif aux signes d'appartenance religieuse dans quinze pays de l'Union Européenne*, juillet 2004, www.migpolgroup.org/public/docs/42.rapportdesynthesesignesreligieuxUE_FR_09.11.pdf (accessed 18 June 2010).

26 For Spain see article 2.2 of the Organic Law 7/1980 on religious liberty (5 July 1980) and for Portugal art. 23 of Law 16/2001 on religious freedom (22 June 2001).

principle. More recently, the right to have a place of worship is being increasingly questioned even in countries that previously adopted a liberal approach. In the last 10 to 15 years various laws have been enacted that limit the right to establish a new place of worship either by requiring a municipal licence or via the imposition of environmental and architectural prerequisites so strict that a new place of worship cannot be built unless its external appearance follows that which is customary and characteristic of the religious tradition already in place (as is the case in Austria and Switzerland: see Chapter 17). In other countries, like Italy and France (see Chapters 16 and 18), the application of the rules regarding the allocation of land for building places of worship or the transformation of an existing building into a place of worship is very rigid, especially if the requests come from Muslim communities or the Jehovah's Witnesses.

Achieving pluralism that can benefit European societies The issues on which the contributions in this book focus reveal an increasing sensitivity to religious identity claims in the public space. In practice, it is mainly the historical majority religions that are being granted exceptions to the principle of neutrality of the public space; in some cases these exceptions are constitutionally guaranteed. They have for the most part developed over the course of the country's history. But the arrival of new groups and communities across Europe makes it necessary to review certain forms of protection, and to adapt the private–public divide to accommodate these new groups. A gradual familiarization with the reality of an ever-increasing religious and philosophical diversity in European societies will likely mean that, over time, the legal frameworks in place will be modified thus offering more adequate responses, in order to arrive at a sustainable solution and one that takes full cognizance of the plurality of religions and beliefs.

There may not be a fully satisfactory response to all the issues that arise around these matters. Nonetheless, publications like this one are a valuable means for achieving a pluralism that can benefit European societies as a whole. It may do so in two ways: first, by offering a careful collection of basic comparative data drawn from the legislative policies and the relevant case law of the States involved; and second, by providing a selection of significant testimonies on contentious issues of religious pluralism.

This page has been left blank intentionally

PART I
Religions and the Public/Private Divide

This page has been left blank intentionally