FRAMING MULTICULTURAL CHALLENGES IN FREEDOM OF RELIGION TERMS
Limitations of Minimal Human Rights for Managing Religious Diversity in Europe

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Abstract

Multicultural challenges in Europe are being framed in human rights language, and in particular in terms of the freedom of thought, conscience and religion. The question is whether the practical case-by-case application of the fundamental right to freedom of religion in national and European case law facilitates a 'deep (and normative) diversity' in Europe or rather only allows space for a limiting or 'conditioned diversity' instead. While opening up possibilities for minorities to live out their lives in accordance to their deeply-held convictions, it seems to us that the human rights working frame in a predominantly 'minimalist' conception comes with its inherent limitations as to the management of Europe's religious diversity. While human rights purport to liberate and protect, they also impose conditions, criteria and standards that are grounded in a Western vision of law, society and religion. Religious minorities stand to gain from playing by the human rights rules as long as they accept to mould, shape and limit their claims to fit dominant conceptions, which perhaps diverge from their own understandings, needs and aspirations. Drawing on case law collected through the RELIGARE project network, this article aims to illustrate some of the limitations and confines that Europe's diverse communities face in the areas of the workplace, the public place, the family, and State support to religions.

Keywords: employment; family life; freedom of religion; minimal/maximal human rights; State support to religion; the public space

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1. INTRODUCTION

Over the last three decades much emphasis and reliance has come to be placed across Europe on the framework of human rights, both when it comes to longstanding struggles and new societal challenges. Europe's multicultural condition, closely linked to the issue of Islam in Europe, has given new vitality to the tool of human rights, in particular by shedding new light on the debate on the meaning and limits of fundamental rights such as the freedom of religion, the freedom of expression and the right to non-discriminatory treatment. While freedom of religion is not conceptually limited to religious minorities, in the European context it is highly minority-relevant. The frequent mobilisation of the tool of human rights to address the new societal reality of Europe’s increasing religious heterogeneity will, in the long run, no doubt transform our understanding of the human rights system itself. In the more short term, the question is what type of diversity our current understandings and conceptions of human rights and, in particular, the freedom of religion allow for: a truly 'deep diversity' where minorities or 'nonconformists' are allowed space to live out their lives on their own terms according to own norms and aspirations, or rather a more limited diversity which restricts practices and ways of life that are considered beyond the acceptable confines surrounding dominant/majority-biased (even if implicit) Western standards. By 'deep diversity', we refer to an open-ended engagement with the already-there factual heterogeneity in beliefs, practices and values on the ground in Europe, which is not a priori limited by conceptions and categories motivated by more common or majoritarian values in society. Under such an approach, individual interests (of minorities) are 'taken seriously' and not easily trumped by considerations derived from 'social cohesion' or 'common values', which are the marks of a more 'utilitarian' approach.

When considering certain limitations and shortcomings of the human rights system for managing and giving breathing room to Europe’s religious pluralism, one could argue, as will be illustrated below in a number of areas, for more progressive or ‘horizon’ conceptions of human rights. However, we want to argue that, at least in the more immediate timeframe, it is also justified to look beyond the sometimes rigid tool of human rights into better responsive legal and policy solutions. While human rights form the unconditional minimum threshold to which European States should strongly commit, the challenging questions surrounding religious pluralism in our

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quickly evolving societal conditions should not and cannot solely depend on it for answers.

The fact that a variety of ‘multicultural issues’ are being argued and thus ‘framed’ in terms of human rights, in general, and the freedom of religion, in particular, is easily overseen, which demonstrates how paradigmatic the human rights frame has become in some areas of social life where people and groups from different (or no) religions meet. When a Muslim woman is fired for wearing a headscarf, the invocation of her religious freedom now seems evident to us. The role of religion seems so obvious in fact that when a Muslim woman herself objects to an interpretation attaching religious connotation to her practice of covering her head, many eyebrows are raised. The issue of framing multicultural issues in terms of human rights is the subject of this special journal issue of the NQHR. This topic merits close consideration in the European context. A number of explanations have been offered for the recent ‘turn towards religion’, both at the global and national level, in the legal sphere and other public areas (media, politics, and so on). In response, changes in the law are brought about by certain societal/political developments in which various stakeholders play major roles. Law is, in the words of June Starr, ‘a discourse fought over by very real agents with different political agendas’. Why do some actors pull in arguments of religious freedom and discrimination, for instance in the paradigmatic headscarf case noted above, but also when a Muslim man refuses to work under a female superior, or when a Jewish woman requests time off to start preparations for Yom Kippur? In these cases, the issue could easily focus (solely) on ‘secular’ labour law and open norms such as good faith, loyalty and the regulation of working time. When the religious argument is utilized, does it in fact strengthen claims, as advocating actors presumably hoped for or counted on?

Many neutral rules have implications for the freedom of religion, but some rules formulated in a neutral fashion target religious observances in particular (for example ‘burqa’ bans in France and Belgium, the now retracted slaughterhouse bill in the Netherlands, which rejected any religious exemptions, and so on). Certain actors or stakeholders (such as lawyers and advocates, politicians, journalists, religious leaders, the general public) play a role in suggesting an initial frame for understanding a problem. This initial frame of reference can be hard to overturn by others who advocate competing understandings of the issue at hand, since it triggers a debate within that reference frame. Yet, some actors have purposefully tried to pre-emptively evade this dilemma by framing effectively multicultural problems, such as the presence of

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3 See, however, the case of multicultural family issues, infra 3.2.
4 See Administrative Court of Toulouse, 17 April 2009, Sabrina Trojet vs Université Paul Sabatier, No. 0901424, unpublished decision; infra note 36.
the burqa and niqab in European cities, in alternative terms of safety and security, public order, and other pragmatic arguments distanced from the language of (human) rights. One can imagine that when assessments and strategies which incorporate these alternative framings are adopted, the weight of the countering dominant human rights frame of reference was taken into account and played a role. Thus, while human rights framing may seem obvious in many multicultural issues, it does not mean that alternatives which explicitly reject this dominant frame are not being advocated. They are indeed being utilized, but with different rates of success.

No doubt, any framing will have unforeseen consequences, whether or not it leads to the aspired success in a given case or issue. When it comes to wearing a headscarf on the job, employers may seek to distinguish some cases from others in a rather consequent manner. In the Belgian context, for example, there is a tendency to allow the headscarf only in back-office positions, or rather to prohibit the wearing of this controversial religious symbol in front-office positions where there is visible and personal contact with the business’ clientele. Winning a case for a back-office employee may have as undesirable effect that it incidentally strengthens the argument that in front-office jobs, for example, in work contexts where there is contact with clientele or the general public, religious expressions can or should be limited. In front-office cases, what the freedom of religion initially gives, the public/private divide takes back upon further review. When working with the tool of human rights, there can be genuine concern that historic conceptions – grown out of and suitable for the then-existing conditions or understandings of law – have been internalised to such degree that their deep and continued influence on current presuppositions and interpretations of human rights goes largely unnoticed. The public/private divide thinking is no doubt a prime example.

For the period 2010–2013, the European Commission has funded a European research project on Religious Diversity and Secular Models in Europe, in which the two authors are engaged in different capacities. The theme of religious diversity and its management in the European context is at the centre of the RELIGARE project.

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8 One such idea is that religion is mainly an issue of belief, another is that we can (easily) distinguish between religious beliefs and practices/manifestations. These conceptions are being challenged by non-Christian religions in Europe which emphasise practice and the place of religious commitments in everyday activities.

9 Prof. Marie-Claire Foblets is the scientific project coordinator of this project. Katayoun Alidadi is a project researcher within the work package on religious diversity and accommodation in the labour market.

10 The full title of this project is ‘Religious Diversity and Secular Models in Europe – Innovative Approaches to Law and Policy’. The acronym RELIGARE seeks to evoke the original meaning of the word religion, that is, ‘to link’ or ‘to form a bond’. A total of 13 research units from 10 States are involved: 9 EU Member States (Germany, France, the Netherlands, the United Kingdom (England), Denmark, Spain, Bulgaria, Belgium and Italy) and Turkey. In six selected countries – Denmark,
Within RELIGARE, the focus is on four domains of social life where ‘multiculturalism questions’ are prominent: the labour market, the public space, the family and State support to religions. One ‘tool’ that moderates the religious diversity in Europe is no doubt human rights. In all four areas of inquiry, in particular the practical implementation of two fundamental rights, the freedom of religion and the right to equal treatment and non-discrimination, is examined. One goal of RELIGARE is to inventorise the major conflicts which in practice arise in the four domains and which indicate discords between, on the one hand, the official law of the countries involved in this project and, on the other hand, other norms arising from personal, religious and philosophical convictions. Moreover, the project aims at looking at the ways in which these conflicts are currently handled, either by judicial or by legislative or regulatory means and in some instances simply through the use of certain (good) practices. This is done by tracing and analyzing the available case law in the target countries.\(^{11}\) Case law involving human rights issues can serve to demonstrate how, in concrete disputes, the official State law institutions handle unfamiliar or ‘foreign’ concepts and arguments, and to which extent recognition is given to these. Approaches here range from a broad openness and willingness to accept religious norms to more conditional acceptances, such as only allowing claims insofar as these do not collide with principles which have achieved a higher status under formal State law, for instance the principle of gender equality.

This article draws from the observations and examples registered in the four aforementioned areas of the labour market, the public space, the family and State support to religions. Before we address some case law examples,\(^{12}\) which aim to illustrate the dynamics of human rights framing, we will first discuss some general considerations and concerns that in our view apply transversally to these areas. These include considerations related to the dynamics of framing multicultural issues in (religious) human rights terms and the evolution and current state of human rights law discourse (section 2.1), the limits of human rights when considered as a tool of management of religious pluralism (section 2.2) and the role of various stakeholders and advocates in adopting human rights discourse and bringing multicultural conflicts to human rights forums (section 2.3).

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\(^{11}\) Thematic and country templates have been agreed upon as the working instrument for the teams to collect and compare the relevant national case law. The project thus has a clearly legal and case-oriented methodology (supplemented by a socio-legal component).

\(^{12}\) The reliance on case law and judicial decisions to trace reality can be criticised. After all, issues that come up in court proceedings present a ‘filtered’ version of the facts, narrated and argued according to the legal culture and following incentives internal to the system. Still, this approach first allows for pinpointing ‘issues’ that come or do not come up in certain national contexts, which, in turn, allows for comparative lessons. Second, decisions include the legal reasoning of judges and point to the background and certain attitudes that enable the finding of certain solutions or compromises (or the lack thereof).
2. MULTICULTURALISM, HUMAN RIGHTS AND FREEDOM OF RELIGION

2.1. FRAMING DYNAMICS AND MINIMALISM-MAXIMALISM

From the outset, one may observe that the dynamics of framing multicultural issues in terms of human rights and freedom of religion are in many ways similar to other (non-multicultural) issues which can turn legal. Therefore, insights derived from (empirical) litigation research and studies about access to justice will be of much relevance to the dynamics involved in framing the multicultural issues of today. Framing multicultural issues in terms of the right to freedom of religion implies three steps or decisions: the decision to make a legal case and to bring it before a legal (State) forum (the so-called process of ‘naming, blaming, claiming’), the decision to adopt the language of human rights, and the decision to underline the religious element (as opposed to e.g. the cultural or gender aspects). All three steps can involve advocates or other actors going through implicit or almost mechanical processes or making more or less conscious or strategic decisions. Indeed, the decision to call upon the protection of religious freedom need not necessarily be taken consciously. It may also be part of a strategy of defence. In sum, one could say that opportunities, resources, and perspectives for (legal or other) success to a large extent determine if and how an issue experienced by an individual or group in everyday life turns into a legal conflict and is thus framed in some form of rights talk. Actors’ decisions, whether consciously or strategically motivated, will have consequences on the issue at hand but also on related matters and future developments. Minorities are not immune to framing claims in response to opportunities and incentives under State law, and thus will consider the advantages and disadvantages of formulating (multicultural) claims in one way or another. However, part of the challenge in addressing multicultural

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13 One can think, for example, of a conflict involving the non-performance of a contract or the denial of a city building permit. Note that both issues could become ‘multicultural’ depending on the parties involved and/or the underlying problem: for example the breach of an Islamic finance contract or the construction of a synagogue or mosque.

14 Munger, F., ‘Law, Change, and Litigation: A Critical Examination of an Empirical Research Tradition’, Law & Society Review, Vol. 22, no. 1, 1988, pp. 57–102, at p. 57 (arguing that one must take account of the social organization of relations between litigants outside of courts, as well as the organization of the courts themselves. Data analysis must address the measure of power, litigation capacity, and perceptions of usefulness of litigation held by litigants’).


16 One decisive element that may explain why a person is willing to make a legal case is whether the conflict, presenting a multicultural challenge, is ‘internal’ to the community to which he or she belongs, such as the request of Jewish ex-spouses for the recognition of their foreign divorce decree, or rather to be considered ‘mixed’, such as the refusal of a Muslim teacher or manager to shake hands with female colleagues and customers.
issues is to look beyond the language of argumentation and into the realm of interests, values, and intentions of the various stakeholders.

Human rights have been a staple of Western legal thinking for some time now. When the UN human rights treaties and the European Convention on Human Rights were adopted, the Holocaust and other religious persecutions were fresh in the world’s and the drafters’ minds. The Second World War and its atrocities stood at the cradle of modern human rights, as embodied in the legal instruments which still form the basis of our human rights analyses (such as the Universal Declaration of Human Rights, and with regard to civil and political rights – the International Covenant on Civil and Political Rights and the European Convention on Human Rights). Europe and the world have since changed considerably: new challenges have been added, including the multicultural question as one of the newer challenges for Europe. The new religious landscape means that States now not only have to cope with the (already considerable) diversity within the majority population with regard to religious or philosophical beliefs, orientations, identities and practices (secular, atheist, and agnostic individuals and groups; those who do not consider religion central to their world view; and those with varying commitments to the dominant or minority strands of Christianity in the community), but also with the position of established minorities and newcomers who in certain urban settings present a ‘super-diverse’ range of (unfamiliar) religious cultures and traditions. The fact that Islam and other less familiar religious traditions are introduced in Europe through immigration complicates and charges the nature of the debate, in particular by entangling the debate on religious pluralism with that concerning assimilation, integration and citizenship.

Today, religious persecution is rare in Europe and religious freedom test cases centre predominantly around the issue of religious symbols in the public sphere (Leyla Sahin v. Turkey, Lautsi v. Italy). In the period following the Second World War, the focus was clearly on the negative aspect of religious freedom, such as the right to non-interference by the State, while today issues of positive State obligations are more and more important. The issue of religious freedom has grown in importance with regard to private relations between individuals or parties (horizontal relations), and not only when it concerns relations between the State and its inhabitants (vertical dimension of human rights). How much space is given to individuals and groups to live out their religious identity and practices depends in part on interpretations and limitations given by State and human rights courts to the human right to freedom of thought, conscience and religion. There is a debate on the ‘right’ scope of human rights protection: minimal versus maximal. Brems has noted the ‘unsatisfactory

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consequences’ attached to the ‘centrality of the concept of human rights violations in human rights discourse’.20

The single borderline approach obscures the differences between good and excellent human rights records. Take two states’ national security programmes that do not violate human rights. There is a good chance that nevertheless one of the two offers a lot more protection to human rights than the other. In fact, there are not only degrees in human rights violations, but also in respect for and protection and fulfilment of human rights. The single borderline approach renders these invisible and therefore misses an opportunity to provide incentives for states to do more than the minimum for human rights. Best practices have no place in a violations approach. […] in reality, there is a world of potential progress open to them beyond that borderline/bottom approach.21

Brems accordingly argues that human rights discourse should move beyond the minimalist ‘violations paradigm’, and she draws lessons from the alternative progressive realisation approach which is common place in the area of economic, social and cultural rights.

This debate on minimalism and maximalism in human rights law is highly relevant for the question of how much room for religious diversity the human rights regime can create: under a violations-focused approach more restrictions will be allowed on individuals’ beliefs and practices and room for religious diversity will be much more limited than under an approach where States aim for good practices and commit to ‘gradually realising these rights, their available resources determining the precise extent of their obligations’.22 While we personally find the argument for more progressive or ‘horizon’ human rights compelling, we argue that, at least in the short run and under the current freedom of religion frame of understanding in a number of areas, it is also justified to look beyond the tool of human rights into other legal or policy solutions.23

2.2. MANAGEMENT OF RELIGIOUS PLURALISM AND THE LIMITS OF HUMAN RIGHTS

Does the human right to freedom of religion, in its practical case-by-case application in various State legislative frameworks and human rights forums, facilitate a ‘deep (and normative) diversity’, or does it rather lead to a limitation or ‘conditioning’ of diversity in Europe instead?

The answer to this question cannot be given in a resolute and unidirectional fashion. Understandings and interpretations of human rights in general and particular human rights such as the freedom of religion evolve over time, and can diverge from

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20 *Ibidem* at p. 349.
21 *Ibidem* at p. 354.
22 *Ibidem* at p. 355.
23 One such example is the right to reasonable accommodations for religious beliefs or practices. While such right can find support in the freedom of religion or the principle of non-discrimination, it can be rooted in a legal provision inserted in the labour law or anti-discrimination law.
one area of social life to another. Thus, human rights both enable and limit diverse conceptions of life, according to widely divergent religious beliefs and practices and philosophical worldviews. And while human rights facilitate diversity, including in its religious component, case law shows that such religious diversity is limited in various ways. It is generally accepted that since the pre-modern and early modern times, the focus in Western society has moved from religious tolerance to religious freedom. Yet the question remains:

Has the politics of tolerating other religious groups, and the concomitant striving for the religious superiority and power of one’s own faith, been totally superseded by respect for and recognition of all religious groups, including their right to unrestricted practice of their religion?

In practice it appears that the human right to freedom of religion does not necessarily work to enable the full religious experiences [belevingen] of individuals as they would like it if it was left to their interpretations and religious precepts. Instead, it accepts and thus allows for diversity only under certain limitations, thereby conditioning and at times even distorting these religious experiences based on interpretations that form, what some do not hesitate to call, the core of a (contentious) ‘Eurocentric approach’. Freedom of religion derives its language and working categories from historical and dominant values. It therefore seems that ‘asymmetric tolerance’ has not been superseded by ‘symmetrical religious freedom’.

Yet, case law also shows that breakthroughs are possible, even if on a very prudent and ad hoc basis. For instance, there are instances where a reliance on Article 9 ECHR has challenged and exposed ‘secular’ norms that upon review are seen to unjustifiably limit religious beliefs or practices. This has enabled a more full enjoyment of religious freedom for members of religious minorities. In the UK, the claim of an orthodox Hindu man to an open air cremation had been rejected under the legislation related to cremations, but the High Court saw this as an instance of unjustifiable interference with the right of religious observant Hindus to manifest their freedom of religion. The applicant had argued that ‘in India open air funeral pyres are an integral component for the transmigration of peoples’ souls, and that the absence of this in Britain led bereaved families to suffer remorse’. The case law of the European Court can also to some extent lend proof to the ‘liberating’ effect of the freedom of religion.

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25 *Ibidem* at pp. 265–266.
26 *Ibidem* at p. 266.
28 *Idem*. 
But there remain numerous instances where that is not the case. In fact, sometimes human rights – or better, the underlying value-judgments of Western human rights – will ‘impose’ protection upon a party, such as a Muslim wife who does not object to her husband’s consecutive polygamous marriage or Muslim wives who did not object to their status as co-wives but whose family situation faces objections from authorities in the new country of residence. Their right to freedom of religion (or their husband’s, for that matter) does not allow for this full ‘living out’ according to their interpretation of Shari‘a: the diversity that is promoted through this route is a conditional one – in particular, conditioned by (Western) commitments to gender equality and anti-patriarchy. The same goes for banning full-face veils for women testifying in court rooms,29 or indeed in any public space. This religious practice seems to be beyond the limited confines of the freedom of religion as currently understood in Europe.

There can be good reasons to limit the span of religious practices in view of other important considerations such as other fundamental (human) rights, and, in some cases, social cohesion and security, which could receive priority depending on the circumstances. Indeed, the conditions imposed through human rights on religion and certain practices in particular need not necessarily be unjustifiable. In the example of the polygamous marriage, various reasons could justify non-recognition.30 Similarly, many believe allowing niqabs in the courtroom context is a step beyond what should be acceptable in a Western liberal-democratic society.31 However, one ought not to generalise and, instead, remain critical of his or her own standards of salvation. It is important to nuance the sometimes taken-for-granted ‘liberating’ effect of human rights on (especially) minority groups. If the human right of freedom of religion serves only (or predominantly) its original/historical goals (such as fighting religious persecution and other gross violations on human dignity), it may be necessary to look for other tools to manage and to fine-tune the promotion of protection of religious freedom, and to prioritise forms of it that are more sensitive to and in line with the expectations of the persons involved.32

30 E.g. the effects on society and the pressure on other women to acquiesce to polygamous relationships. It could also be taken into account that polygamy is never a religious duty under Islamic law so that infringements seem less of an intrusion.
31 See Bakht, N., ‘Objections, Your Honour! Accommodating Niqab-Wearing Women in the Courtrooms,’ in: Grillo, R. et al. (eds.), Legal Practice and Cultural Diversity, Ashgate, Aldershot, 2009, pp. 115–133. This illustration here may, perhaps, appear overstated, as this debate constitutes one of the most controversial issues at the moment. But other such practices as praying, obedience, and signs of deep piety may at times also be seen as clashing with the right to autonomous critical thinking and individual self-determination as protected under human rights.
32 In addition to the tool of the right to reasonable accommodations in a number of contexts (workplace, public services, etc.), adjustments to the Private International Law system or recognition of legal pluralism in family matters can also be regarded as possibilities. A thorough discussion of
threshold, to which liberal democratic States should deeply commit, but upon which the more encompassing project of the management of religious diversity in the increasingly plural context of European societies should not and cannot solely depend.

Even apart from applications in particular cases, limitations to the enjoyment of (most) human rights and the freedom of religion in particular are ingrained in the human rights system. In fact, the formulation of Article 9(2) ECHR itself is such that it offers a justification for the limitation of religious liberties. Article 9 ECHR distinguishes between beliefs and practices/manifestations of beliefs, and allows for the limitation of the latter under certain conditions. Moreover, limitations to particular freedoms may also be the effect of tensions or clashes between various (or the same) human rights, also inherent to the human rights system. For instance, the right to equal treatment on the basis of gender, sexual orientation or religion/belief versus the freedom of religion, or freedom of religion of X (collective dimension) versus the freedom of religion of Y (individual). These ‘openings’ have been utilised by those seeking to exclude religion from the public space all together (such as the French ban on headscarf in public schools, burqa bans, and so on) and led to applicants in peculiar cases denying the religious connotation of their practices. In the French Trojet case, a doctoral student with civil servant status was dismissed because she was donning a headscarf while conducting her research at the University of Toulouse. In an attempt to evade this consequence, the doctoral student, an observant Muslim, argued that the way she wore her headscarf – in bonnet – meant it could have no religious connotation. However, accepting this would have also meant that the dress would lose the ‘special status’ because of its link with religion and belief and would simply have to be regarded as a regular dress code issue.

Considering the formulation of Article 9(2) ECHR, it should not come as a surprise that the human rights system does not provide a carte blanche for minority expressions and practices. It is, moreover, clear that ‘human rights’ as such cannot be considered a panacea; they cannot be expected to provide a remedy for all these measures, however, falls outside the scope of the current article, which aims to address the usefulness and limitations of the tool of human rights for managing religious diversity in Europe.

33 Gedicks, F.M., ‘The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States, Emory International Law Review, Vol. 19, pp. 1187–1275 (noting that the ‘permissible scope’ of ‘legal limitations’ on freedom of religion is the European ‘syntax’, and ‘The American law of limitations on freedom of religion is not easily stated in this grammar, because freedom of religion in the United States is less a liberty right than an equality right’).

34 Art. 9(2) ECHR states that the freedom to manifest one’s religion or beliefs is subject to 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 the protection of the rights and freedoms of others’.


issues, including many ‘hard cases’ involving religious pluralism. However, the way in which individual and group experiences are being limited and conditioned in practice merits closer examination. Thus, the fact that religious diversity is limited when it goes through the lens of human rights is not the issue. Instead, it is the way in which that diversity is scrutinised and moulded that in our view should be of concern.

For instance, Article 9 ECHR not only distinguishes between beliefs and practices/manifestations, but in its mainstream interpretation it also prioritises the forum internum over the forum externum. This distinction, however, feels very unnatural and counter-intuitive to practitioners of certain minority religions that have now made their way into Europe – whether it be through migration or conversion. For these individuals, the practices at stake are part and parcel of their belief system, identity and general way of life. Below, in section 3, we offer some illustrations from national and European Court of Human Rights case law of what can be considered as the current human rights approach to religious freedom, an approach which may be deemed unsatisfactory because of the way it moulds and conditions practices, experiences and identities.

2.3. ACTORS AND CHOICES FOR (LEGAL) FORUMS

We have described the framing dynamics so far in a rather impersonal fashion. However, human rights protection maintains its dynamic and evolutive nature thanks to the advocacy of individuals and groups. Indeed, stakeholders and various actors have a decisive role to play in moving the beacon of human rights high and dry: the way in which the functioning of human rights is viewed not only determines whether certain actors use that mode of argumentation at all or to what extent, but also which forum they turn to.

On the one hand, it has become commonplace to state that multicultural tensions are more and more finding their way into (European) courts. For instance, in a number of European countries issues regarding Muslim religious dress (in particular the headscarf and now also the niqab/burqa) in various social settings (schools, workplaces, airport terminals, on official ID pictures) have taken a ‘legal turn’, often being framed in the language of the fundamental right to religious freedom in official legal forums (so in this context, besides the juridification of multicultural conflicts, at the same time the ‘religionisation’ of tensions and conflicts has also become more prominent). Yet, the increasing use of various legal forums is seen by some critics as problematic, since it is perceived as the sign of a lack of integration or of the ‘demand strategy’ that minority groups are supposedly using: the call for a non-legal approach of ‘concerted

37 On juridification, see Teubner, G., The Juridification of Social Spheres, de Gruyter, Berlin/New York, 1987, p. 446 (in the preface, referred to as ‘a disquieting modern trend in several national cultures’).
adjustments’ in the Canadian context can be understood as a counter-reaction to a perceived overzealous use of the court system for issues of a multicultural nature.

On the other hand, the reliance on ‘unofficial law’ or religious institutions to moderate and resolve conflicts amongst minority groups has become a cause for concern in Europe. In the UK, the reactions to the 2008 speech of the Archbishop of Canterbury Dr. Rowan Williams on the place of Shari’a in the UK were symptomatic.

A recent Danish study found that Muslim women, in particular those of the second generation and with better social status/who enjoy their family’s support, ‘shop around’ to find a like-minded imam to assist them with the dissolution of their broken-down marriages (as there are no Shari’a councils or the like in Denmark): after a civil divorce some imams consider the nikah (Muslim marriage) to be automatically dissolved, while others require an explicit talaq (repudiation under Islamic law; some imams require an oral pronunciation, others accept a written talaq as well) by the husband.

There is an apparent contradiction in this; on the one hand, minorities are using the State law system too easily, or solely for ‘profit maximisation’, while, on the other hand, minorities separate themselves from the mainstream legal system, thereby endangering the ‘one law for all’ principle. But this is perhaps partly explained by the different nature of the conflicts at play: some cases involve ‘mixed’ conflicts, between an ‘outsider’ and a group ‘insider’ (such as between a secular employer and a pious Muslim employee, or between parents seeking to raise their children in a way that contradicts the dominant standard in the chosen school system), other cases concern ‘internal’ issues (such as a divorce between Jewish or Muslim spouses, or between two Alevi or Roma neighbours).
In addition to distinguishing the nature of the issues at stake in the debate on the legal turn of multicultural conflicts, it seems important to distinguish national contexts in Europe. Indeed, when conducting comparative research and comparing the case law in various countries in the RELIGARE project, one issue that frequently comes up is the non-availability of case law in some areas, in some jurisdictions. For instance, the issue of religious dress in the workplace does not seem to come up in the Bulgarian context. Why cases do not reach the courts is a very interesting question on its own. The question of why that is the case is equally interesting as why issues do come up with a certain frequency in, for instance, the Belgian, Danish or German contexts. The problematisation of the absence of judicial decisions is based on the – perhaps contestable – idea that tensions must be present and are dealt with in some shape or form by one or various actors. In the case of Bulgaria, sociological interviews performed within RELIGARE offer a glance into the existence of tensions but point to the non-bridgeable distance from and subsequent disuse of the official legal system. The history of communism and the general repression of religion from public domains may well explain why religious ‘multicultural’ conflicts do not reach the courts, as can the lack of trust in legal institutions, the geographical concentration of an established Muslim minority in certain areas of the country (leading to less intergroup interactions and a low level of ‘mixed conflicts’), the unfamiliarity with (religious) anti-discrimination laws amongst even some institutional actors (such as labour union leaders!) and so on.

Hence, the absence of litigation is part of the dynamics operating in a specific context. Paradoxically, we might consider that the existence of some (legal) conflicts arising, for instance, in the labour market contexts (most likely to be ‘mixed’ conflicts, at least when it concerns the mainstream labour market) are a good or reassuring sign, because they point to a minimum level of integration and opportunities in the labour market. The same, perhaps, could be said of the tendency to bring multicultural (even internal) issues before official forums, and frame them in the language of human rights. After all, this tendency implies the adoption or at least utilisation of the human rights system as a frame of analysis and evaluation, which points to a level of integration.

contacts with excluded/banished members. The Cour de Cassation held that a religious banishment may be considered as an incitement to discrimination, and the burden is on the community to show an objective and reasonable justification.


45 Idem.

46 While the existence of some legal cases (especially if they are supported/funded by institutional or interest groups) does not necessarily mean that there is a high degree of access to justice, the lack of legal cases can point to a problem with regard to access to justice (courts or other forums).
3. FRAMING IN RELIGIOUS TERMS (OR NOT): CASE LAW EXAMPLES

The general observations noted above, and the argument that the human rights framework falls short of protecting a ‘deep religious diversity’ in Europe, allowing instead only for practices and ways of life that do not exceed the acceptable boundaries set by predominant Western standards, deserve some illustrations. We will subsequently discuss some case law examples in the areas of the public space and the workplace (section 3.1.), the family (section 3.2.) and State support to religions (section 3.3.).

3.1. THE PUBLIC SPACE/THE WORKPLACE

In the school and workplace settings, freedom of religion has been invoked in a number of cases involving religious dress, grooming and other practices such as prayer and observances of religious days of rest. Often religious discrimination claims have been formulated in conjunction. The law itself enables the framing of religious-based claims and defines its effectiveness and success. Actors, such as human rights organisations, equality bodies and representatives of religious groups, make use of these legal frames, but also advocate for amendments to the frame so that their claims will be more successful.

A change in the legal framework can substantially alter prospects for success in the legal arena. Under the UK Race Relations Act 1976, there was talk of a ‘legal anomaly’ because Muslims were not covered by the Act. To fall under the protection, Muslims had to argue they were an ethnicity, which was not successful, but neither was the framing in terms of religious identity. In Mandla v. Dowell Lee, the House of Lords saw religion as one element for identifying an ethnic group, and found the Sikh community to constitute such distinct racial/ethnic group protected under the Race Relations Act 1976. Jews were also protected under the Race Relations Act, but Muslims (who range from a large variety of ethnic backgrounds) still were not.

47 For more complete case law examples, we refer to the thematic templates which were collected for each of the four areas and will be made accessible on the project website.

48 These two closely related areas are discussed together, as there are significant overlaps. For instance, a school is a place of work for teachers but can also be considered a public place. Consequently, sometimes the same legal framework is applicable. Also, legislation with limiting effects on the manifestation of religion in the public sphere has consequences for the situation in the workplace, and vice versa: a burqa ban in the public space has implications for a woman seeking to wear a burqa at work.


Since then, the legal equality framework in the UK has been extended as it has across Europe to cover the ground of religion or belief: the Employment Equality (Religion or Belief) Regulations 2003 first implemented the EU Equality Framework Directive by banning religious discrimination in the work setting. Subsequently, the Equality Act 2006 expanded the scope of application of the prohibition of religious discrimination, and the 2010 Equality Act, which is now in force and has repealed an array of prior provisions, includes a harmonised public sector equality duty, including on the basis of religion. Under the current legal framework in the UK, legal options have opened up for ethno-religious groups as there is no longer a need to argue in terms of ethnicity (alone).

Thus, the importance of the EU Employment Equality Directive,\(^{51}\) prohibiting discrimination on the basis of religion or belief under EU law, is clear. The European network of legal experts in the non-discrimination field has noted a 'gradual increase in case law arising since the adoption of the Directives stemming from controversy over requirements on dress codes and religious symbols, thus indicating that manifestation of religious belief through dress or symbols is one of the key issues in the practical implementation of the Directives'.\(^{52}\) The same is noted by the EU Fundamental Rights Agency, namely that '[c]ase law has continued to develop in the Member States, in particular around the issue of displaying religious and cultural symbols on clothing in the workplace'.\(^{53}\)

Still, in some circumstances protection can also be claimed on the basis of other grounds, in particular because the protected ground of religion or belief has the potential to overlap with the protected ground of racial, ethnic origin or gender. This leads to the interesting question of what in a concrete case determines/influences the choice to pursue a claim (mainly/only) on the basis of religion.\(^{54}\) As mentioned,

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52 Chopin, I. and Uyen Do, Th./European Network of Legal Experts in the Non-discrimination Field, Developing Anti-Discrimination law in Europe: The 27 EU Member States Compared, Publication Office of the European Union, Luxembourg, 2011, p. 24 (noting that cases have arisen in Belgium, Denmark, France, Germany, Greece, Italy, the Netherlands, Sweden and the UK).
54 The same matter can thus be treated as gender, religious and/or gender discrimination (Loenen, T., 'The Role of Human Rights Law in Framing Headscarf Issues as Religious, Cultural, Racial and/or Gendered’, Paper presented at the Seminar ‘Framing Multicultural Issues in Terms of Human Rights: Solution or Problem?’, Utrecht University, 14 November 2011; arguing that a justification would be much less readily accepted in case of gender discrimination than in case of religious discrimination, but that the gender frame is applied in a small minority of cases involving the Islamic headscarf), and parties could have principled or rather strategic reasons to argue in one way or the other; See also European Union Agency for Fundamental Rights, Challenges and Achievements Report, 2010, p. 91, available at: fra.europa.eu/fraWebsite/attachments/annual-report-2011-chapter5.pdf (‘A case in which an individual of Sikh religion was refused entry into a public building because he would not remove his ceremonial sword, was dealt with as one of discrimination on the basis of ethnicity by the Austrian Equal Treatment Commission’); UK High Court, 29 July 2008, R (Watkins-Singh)
with the expansion of the legal equality framework in Europe, including banning discrimination on the basis of religion or belief, opportunities to formulate claims based on the religious dimension of identity or practices have indeed opened up further. This might offer some ‘internal’ explanation as to why the freedom of religion argument is now also being applied in conjunction with (religious) discrimination claims.

One general consideration that applies to almost every decision whether or not to enter a claim, not just in multicultural matters, is that usually also ‘political’ consideration are guiding actors: an overly zealous ‘rights talk’ can be counter-productive for parties, as it might foster resentment against a ‘claim making group’. Besides this more political consideration, the expected legal success will be important as well: the fact that presenting a claim in terms of religious identity (freedom-discrimination) from a strictly legal point of view is possible, does not mean it is always, strategically speaking, the wise thing to do. Here, the question is whether the interpretations usually given and common parameters defined by courts with regard to the human right to freedom of religion (such as in Article 9 ECHR) ultimately justify the use of this human right for argument’s purposes. Often there will still be a legal basis for invoking one’s freedom of religion but in certain situations/forums this particular argument may nonetheless be seen as detracting from the overall strength of an applicant’s case.

In particular, the practical value of the freedom of religion argument (under Article 9 ECHR) in the employment context can be questioned in this regard. Under the European Convention on Human Rights protection system, surprisingly few claims formulated in terms of religious rights have proven to be successful in the context of the workplace.55 On the contrary, the ‘freedom to resign doctrine’ developed by the Strasbourg institutions has in some cases prevented consideration for the employee’s religious interests.56 For instance, in a number of cases, no interference

\[\text{v Governing Body of Aberdare Girls School, [2008] EWHC 1865 (Admin), available at: www.bailii.org/ew/cases/EWHC/Admin/2008/1865.html (case involving a Sikh school girl who wanted to wear a ‘Kara bangle’, a Sikh religious symbol, at school which went against the uniform code prohibiting all personal jewellery. The case was argued under racial or ethnic discrimination (mainly) and it was emphasised that Sikhs are an ethnic as well as a religious group); UK Supreme Court, 16 December 2009, R (E) v Governing Body of JFS, [2009] UKSC 15 (religious discrimination can be justified by a religious-ethos company but racial discrimination cannot, so under the adopted interpretation no defence was available to the Jewish school).}\]

\[55\text{ For such a rare success case, see ECtHR, Thlimmenos v. Greece, 6 April 2000, (Appl.no. 34369/97). Here the Court, however, noted that ‘difference of treatment does not generally come within the scope of Article 14 in so far as it relates to access to a particular profession, the right to freedom of profession not being guaranteed by the Convention’ (at para. 41).}\]

\[56\text{ See Ouald Chaib, S., ‘Religious Accommodation in the Workplace: Improving the Legal Reasoning of the European Court of Human Rights’, in: Alidadi, K., Foblets, M.-Cl., Vrielink, J. (eds.), A Test of Faith? Religious Diversity and Accommodation in the European Workplace, Ashgate, 2012, pp. 33–58. See also ECtHR, Francesco Sessa v. Italy, 3 April 2012 (Appl.no. 28790/08) (involving a Jewish attorney who sought adjournment of a hearing set on an important religious holiday). Four UK cases are currently pending before the ECtHR (hearings were held on 4 September 2012): Eweida and Chaplin v. UK (Appls.nos. 48420/10 and 59842/10); Ladele and}\]
was found under Article 9(2) ECHR with the right to manifest religious beliefs when an employee’s work schedule conflicted with the observance of religious holidays or Sabbath.\(^{57}\) Hence, it can be argued that international human rights law in this field offers little protection, leaving it up to the national States to decide the extent of protection they grant to the freedom of religion in the workplace or other ‘voluntary settings’ within their particular contexts, including various arrangements in the State-church relationships and political ambivalences towards religion in society. This means that minority religious groups or individuals, who need supra-national human rights protection the most, depend on the national State’s protection. It is in this context that historical arrangements and attitudes potentially leading to ‘double standards’ in the treatment of various religious groups become a cause for concern. Also, by relegating to the ‘lower’ (or local) level, the European Court’s decision implies a downgrading of the human right: what is not worth protecting on a ‘uniform’ level seems less ‘fundamental’.

In the educational context, the European Court has generally emphasised the ‘margin of appreciation’ of States with their particular national and societal contexts to regulate in such sensitive and controversial issues as religious manifestation and religious pluralism.\(^{58}\) This has had the same effect as in the case of the workplace (for example the limited practical guidance given by the European Court in that context). In emphasizing the margin of appreciation in this sensitive area, the strength of the freedom of religion is made dependant on the national context once again and left to the discretion of particular States. Here, it can be argued that what has been said about the European Court, namely that it seems more empathetic to claims involving Christian beliefs or practices, would seem to hold true for national courts (in fact, it is also said to be the case in the case law of the US Supreme Court – Wisconsin v. Yoder),\(^{59}\) again with the real risk of ensuing ‘double standards’ in treatment of religious claims.

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\(^{57}\) E.g. EComHR, Kontinnen v. Finland, 87 DR 68 (1996); see Knights, S., ‘Approaches to Diversity in the Domestic Courts: Article 9 of the European Convention on Human Rights,’ in Grillo, R. et al. (eds.), Legal Practice and Cultural Diversity, Ashgate, Aldershot, 2009, pp. 290–93 (noting how this ‘clear line of authority’ from Strasbourg has caused domestic courts to take on a restrictive approach).

\(^{58}\) ECtHR, Leyla Sahin v. Turkey, 10 November 2005 (Appl.no. 44774/98), para. 109 ‘where questions concerning the relationship between States and religions are concerned, on which the opinion in democratic society may reasonably differ widely, the role of national decision-making body must be given special importance’.

3.2. THE FAMILY SPHERE

The family is the second area of the RELIGARE inquiry. Under (many) religious and secular perspectives the family is seen as the ‘nucleus of society’. Rules, customs, and practices with regard to family relations and family life are often so deeply ingrained that it would feel unnatural to part ways. This is not different when people migrate. Empirical data unsurprisingly shows that in many cases minorities, even after years of residence in Europe, continue to live their (family) lives according to their religious beliefs. The religious personal status can however conflict with State rules. In Europe, family law is considered to be ‘secular’, which legitimises its uniform application to all, but upon further consideration various rules applicable to family relations have strong religious roots and still contain religiously based institutions and assumptions. This is, for instance, the case with respect to the definition of ‘marriage’, the admission and the modes of divorce and even the restrictiveness of rules with regard to abortions. For long, many civil codes have applied the Christian definition of marriage and still give it a privileged position. In the same vein, divorce was either prohibited or rendered very difficult. Thus, presenting the conflict as between, on the one hand, secular State law and, on the other hand, religiously inspired personal statuses may be misleading since secular family laws, in most European countries, to a certain degree reflect the past in terms of culture and religion. And this past is closely linked to the history of Christianity, with its impact on public morality. Therefore, even if concepts of canon family law have been gradually abandoned through the process of secularization, it would be unwarranted to speak of State law today in family issues as being totally unconnected from a (particular) religious worldview.

The conflict between religious family laws and State family laws in Europe can be tangibly illustrated in the case of Shari’a. Under Shari’a law, the religious law applies to all Muslims (religious adherence as connecting factor) while under most Private International Law systems in Continental Europe the connecting factor for the applicable law is the law of the parties’ nationality or domicile. This creates

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61 Antokolskaia, M., ‘The Process of Modernisation of Family Law in Eastern and Western Europe: Difference in Timing, Resemblance in Substance,’ Electronic Journal of Comparative Law, Vol. 4, No. 2, 2000, p. 2, available at: www.ejcl.org/42/abs42–1.html. (noting that ‘[i]n countries with a persisting strong religious influence, such as Greece, Italy and Ireland, this [secularization] process has plodded along wearily and slowly. In Scandinavia and Eastern Europe, where secularisation took place at an earlier stage and canonical concepts did not obstruct reform, the process was speedier and more radical.’).

62 In the case of double nationality, only the nationality of the forum country (and not the country of origin) is relevant.

63 Traditionally, civil law countries tended to use the criterion of nationality as the connecting factor while common law countries used the criterion of domicile. Traditionally ‘emigrating’ countries
a dilemma: under State law, the secular personal status would thus apply, regardless whether the parties wish to live and arrange their family relationships conforming to religiously-inspired norms and laws.

In practice, religious minorities thus challenge several key principles of secular family law(s) and the non-application or the non-recognition of religious law can create various problematic ‘limping situations’. The problems are exacerbated by the fact that gender equality considerations, generally not a staple of religious family law, play an important role under the *ordre public* exception that applies in the legal order of secular State law. Religious minorities in Europe have sometimes imported or set up their own alternative dispute resolution mechanisms (ADR). This has attracted attention and research is being conducted into these mechanisms.

So far, surprisingly few multicultural family law issues have been debated in a human rights language. When it comes to the recognition of marriages or divorce, it seems that Private International Law and the *ordre public* exception are applied as the ultimate and straight-forward tools for moderating intra-family affairs, even if these can generate unworkable ‘limping situations’ for the parties (most often, for the woman involved). Human rights (or the notions that also underlie human rights, such as gender equality) have a strong influence on these decisions: through setting minimum bars and giving meaning to ‘the public interest’ (which often coincides with dominant standards) minorities are pushed in a dead-end street. The law only offers a negative response to their situation. The resulting ‘limping situations’ are prime examples of what we wish to warn for and, as stated above, warrants that human rights be complemented with more targeted and principled solutions. These solutions should allow for the governance of religious diversity, not by just denying recognition of controversial practices and institutions but also by formulating clear standards for their assessments.

64 The criticism of gender inequality can sometimes be considered to be a pretext for venting hostile attitudes towards the immigrant population; see e.g. Baer, S., ‘A Closer Look at Law: Human Rights as Multi-level Sites of Struggles over Multi-dimensional Equality,’ *Utrecht Law Journal*, Vol. 6, No. 2, 2010, pp. 56–76 (discussing the ‘othering of sex equality’ at p. 61 et seq.). It is then not surprising that tensions between ‘secular’ family law and religiously inspired rules are translated into polemic debates in the political arena (with the speech by Rev. Rowan Williams and the responses it generated as a prime example).

65 In various countries Christians have their own institutions settling particular kinds of disputes as well, mainly in the family sphere. Besides the fact that these religious ADR mechanisms do not always meet fair trial standards, their operation is contentious because it unsettles the ‘one law for all’ principle.

For instance, in 2008 the German Federal Court of Justice held that a rabbinical get (Jewish divorce document) could not be recognised in the German court as it violated the (German) ordre public and proceeded to dissolve the marriage of the spouses under German law. The divorce case involved two German nationals of Mosaic religion who also had a case pending before an Israeli rabbinical court. The German court – fully aware of the fact that a German court divorce leads to serious problems for the wife but finding that this was due to the religious law in question, not State law, held that under the applicable German law (the spouses holding the German nationality) a divorce can only be granted by an official State court or institution. It also considered that the German law on divorce would not be recognised before the rabbinical court as the indispensable get based on the husband’s autonomous decision was missing according to Mosaic Law.

The notion of gender equality, infiltrating the decision through the exception of the ordre public, leads to a limping situation, which, as the court recognises itself, is problematic for the wife involved. This demonstrates the limited ‘liberating’ effect of human rights (operating here in an indirect way).

Similarly, the German Federal Constitutional Court in 2006, following a constitutional complaint concerning the non-recognition of a divorce, held that the recognition of an Iranian talaq, ‘a simple record in an Iranian department for documents and estates’, could be refused. It held that in the case of spouses who had acquired the German nationality a court-rendered divorce decree was required. Again, this creates a limping situation for spouses: even if they agree on the occurrence and validity of the talaq divorce (under the religiously-inspired foreign personal status regime), it merits no recognition under German State law as it violates ‘basic notions’ of gender equality. Here, the meaning of freedom of religion – although not explicitly referred to – is limited and moulds the confines of a conditioned diversity in practice: only a religious divorce that meets gender equality standards merits recognition.


68 Idem: ‘Thus she cannot remarry and her children of the first marriage would be a mamzer (a person born from certain forbidden relationships or the descendant of such a person). This is a century old problem which has its roots in the Mosaic Law and can only be solved by this law’ (see RELIGARE case law database).

69 German Federal Constitutional Court, 4 December 2006, No. 2 BvR 1216/06, available at: RELIGARE case law database.

70 The agreement between the German Empire and the Empire of Persia signed in 1929 (‘Niederlassungsabkommen’) could not be applied. If it could be applied, the foreign country divorce would be recognised as an exception. It can only be used for consensual divorces and German or Iranian citizens (single citizens).

71 This is not to say that it cannot be in the wife’s favour to play the ‘gender equality card’—sometimes going against religious precepts, e.g. a woman who objects to her husband’s polygamous marriage can argue that the second marriage is not recognised under State law.
Multicultural family cases coming before the European Court of Human Rights tend to be treated under Article 8 ECHR which guarantees respect for private and family life, rather than under Article 9 ECHR, even if the issue at stake also involves the wish to live out according to religious beliefs and practices. When it comes to human rights protection for non-Western family patterns in the migrant context, Dembour argues that the Strasbourg institutions so far have given very limited consideration in this regard to Article 8 ECHR. She points to the first judgment which the European Court of Human Rights rendered in a migrant case where the claims of three ‘immigration widows’ to be joined by their husbands abroad (who could not join them because of the UK’s family reunification rules) was rejected as the European Court considered that the couples could live together in the husband’s country of residence if they wanted to pursue a family life together. Dembour argues that ‘European human rights law is by and large impervious to the pain suffered by families whom state immigration laws force to live in a condition of dislocation’. Under the current European jurisprudence, applicants who are denied family reunification ‘are successful only if the poignancy of their personal circumstances outweighs the public interest in controlling immigration, as in Tuquabo-Tekle and Others v. The Netherlands, but this is a very rare finding’. The fact that, in addition, ‘non-conventional’ modes of family life have received limited attention should not surprise, and it is exactly this that can serve as another illustration of the ‘conditional diversity’ that human rights law produces.

### 3.3 STATE FINANCING FOR RELIGIONS

Finally, we turn to the issue of State support for religion(s). Europe is home to a variety of regimes or models when it comes to State support or funding for religions, with State-religion arrangements often being the result of historical developments. Constitutional models in Europe in this regard illustrate the diversities of histories and approaches to religion: ranging from the French laic model, via various ‘selective cooperation’ models without established church, to countries with established churches. Although in some constitutional traditions a ‘wall of separation’ between the State and

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72 Dembour, M.-B., *Migrant First, Human Second? Contrasted Rulings from the European and Inter-American Courts of Human Rights*, forthcoming (arguing that ‘Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory’).


74 *Idem* (‘the recognition of family arrangements not following an immediately recognizable Western pattern, however by now diverse, has hardly generated any case law. This is not surprising given the general closure of the Strasbourg Court to migrant issues. It is nonetheless another striking failure of European human rights law’).
Churches is envisaged as a guarantee for religious liberty,\textsuperscript{75} in practice it appears that in all countries some form of mechanism functions as support for religious groups, sometimes less explicitly, for instance through the tax (exemption) system. In very few countries has this support system so far been extended to secular groups.

Although in the past few years the principle of State support to religion as such has been vividly criticized, various reasons and justifications seem to remain sufficiently relevant for States to continue supporting churches and religious and faith-based organisations financially in the present-day context.\textsuperscript{76} We identify four of these reasons together with some restrictions. First, there is the historical reason. In its conception, financial support to religions was based on the State’s obligation to guarantee freedom of religion by enabling religious communities to set up an institutional framework, and allow for religious activities and the effective practice of religion. While this argument of securing freedom of religion may remain valid, the alteration and diversification of the religious landscape would call for an updating of the age-old systems.

Second, religion and religious groups are seen as social organizations which advance the social cohesion in society, by emphasizing altruism and creating a sense of solidarity. This positive role in society would justify State financing or other support. Of course, one may argue against this that non-religious groupings can take up similar roles and religions can create division, conflict, violence and disorder.

Third, the important cultural importance of religious activities and patrimony is a frequently invoked argument in favour of State support to religious institutions. With the secularisation of European societies Churches were ‘culturalised’ and now form part of Europe’s cultural patrimony. Notably, the ‘cultural character’ of the Christian symbol of the crucifix has been emphasised in both the Bavarian school crucifix case and the well-known Italian \textit{Lautsi} case before the European Court of Human Rights in an attempt to justify the continuing display of this religious symbol in public State schools.\textsuperscript{77} This could also form an argument for State support only for the cultural aspects and values of religions, and not for mandating support to enable the thriving of the Church and religious groups as such. For instance, this argument taken alone could justify the State funding the maintenance of historic religious monuments and sites, but not necessarily

\textsuperscript{75} Even in the US it is argued that the reality is not that of a full separation but that of separate spheres, see Gedicks, F.M., ‘The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief,’ \textit{loc.cit.}, p. 1187.

\textsuperscript{76} For this part, we borrow our data and analysis from the work of Francis Messner and his team who take the lead in the RELIGARE project with regard to the issue of State support to religions. See also the publications in the frame of the European Consortium for Church and State Research, in particular: Basdevant-Gaudemet, B. and Berlingò, S. (eds.), \textit{The Financing of Religious Communities in the European Union. Le financement des religions dans les pays de l’Union européenne}, Peeters, Leuven, 2009.

the paying of the salaries of priest and pastors. In so far as newer or more individualised religions have failed to build up similar culturally significant patrimonies, this would allow for the privileging of socially and culturally established religions.

A fourth reason often invoked for arguing in favour of maintaining State support lies in the role Churches and religious organizations continue to play as social actors, intensely involved in offering services such as education and health care through well built out networks. In this respect, it is interesting to note that the majority of the new EU Member States place the support to Churches and religions on equal footing with the support granted to other intermediary social groups. Again, this argument could justify an approach not focused on religions as such but on the services they can offer, by for instance setting up a system of tenders under which religious and non-religious organisations alike could compete.

Thus, the most encompassing argument for State support to religions as religions still seems to be the freedom of religion argument. In countries which accept (direct) funding under their State-church regime this still forms an aspect of the freedom of religion: by supporting religious communities and helping them to thrive the State is seen to effectively guarantee the full enjoyment of (individual’s and communities’) religious freedom. The challenges to meet the new religious reality in this area, however, do not concern religious liberty per se (as a French or US style separation of Church and State demonstrates) but rather the test of historically grown systems of financing and support of religion against the principle of non-discrimination towards newer and less established religions in Europe.

The particular State-Church regimes in place in various countries have considerable importance for the framing exercise stakeholders go through. Although empirically religious realities may not differ dramatically between European countries, the divergent constitutional models to which we referred above have given form to distinct strategies for religious groups in search of support or funding. In laïc France, direct or formal funding of Churches and religious organizations is not accepted (except in the department of Alsace-Moselle). Under the French legal framework, emphasising the religious nature in drawing characterisations may be unwise (if one’s aim is to receive funding). However, there are other – cultural and operational – opportunities for State funding that guide the framing exercise by de facto religious groups. Because of the legal framework, de facto religious organisations should present themselves as ‘cultural centres’ to be eligible for funding of their operations and services. These new stakeholders are hereby operating within the confines of the law and drawing benefit from it, by seeking out (financial) opportunities for their activities. However, in order to reach their objectives, they are forced to mould and cast themselves as not-distinctly religious. In this way, the legal framework gives strong incentives to not frame proposals or identities in terms of religion, but to do so in more vague cultural terms.

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78 Idem.
One can wonder whether this only limits religious diversity in nominal terms, or also on a more substantial level. Perhaps the solution several new EU Member States, such as Estonia, have adopted, which finances religious and non-religious organisations on par for social and cultural activities, is preferable. For instance, Estonia gives modest financial support to the Council of Estonian Churches while financing the activities of various other religions. Lithuania finances only the educational and cultural activities as well as the maintenance of historic monuments of churches and religions. Slovenia has put in place a system of invitations to tender: religions which seek to benefit from the system have to complete a cultural project and justify the utilisation of the received funds.

In Belgium, an idiosyncratic solution has been adopted. The Catholic Church has a de facto privileged position, but formally minority religions and the secular/humanist community are recognized under the same terms. As these terms were initially designed with the dominant Catholic community in mind, this has created considerable difficulties for non-faith based and minority religious communities (Jewish, Muslim, Orthodox, and so on) to take on or shape themselves according to the same conditions and standards, and the various minority communities have done this with varying success. Under this system it is not the cultural or operational argument that perseveres, as secular/humanist organizations [vrijzinnige levensbeschouwelijke organisaties/organisations laïques] are not funded for their cultural value or because of the services they render, but rather because they are seen as fulfilling a quasi-religious function in society. For instance, it is stressed that Humanists also have ‘rites of passages’ to celebrate important transitions in life. Hence, for non-faith based groups such as the Humanists a quasi-religious characterisation is the conditio sine qua non for financial support from the State. This could be seen to encourage a type of strategy for funding use for which the ‘State-church’ framework was not originally designed, and this raises the question of whether the framework itself is in need of revision to meet the needs of the new religious-philosophical landscape. Currently, the situation pushes religious and other groups to mould themselves into the shape of the State criteria and standards. The better a group can manoeuvre its way through the official system, the more success is to be expected. In the tier system that is the


Belgium appears to be one of the only countries that funds an explicitly non-religious group under its church-religion support framework. However, it must be stated that other forms of support are provided to humanist groups via financing particular services in, e.g. the Netherlands, where the services of secular officers in the prison context are funded as well.

consequence of recognizing some religions but not others in Belgium, religions in the
top tier will receive more resources and consequently yield more power in social life.
However, the problem is that the criteria and standards which form the threshold are
themselves no longer corresponding to the new social realities.82

It must be noted that the idea of separation between Church and State itself has
grown out of a Christian conception of separate spheres, that is the well-known
‘render to Caesar the things that are Caesar’s, and to God the things that are God’s’.
It is in this particular Western and European context that State neutrality is seen
as a precondition for the full enjoyment of religious freedom.83 Certain (theocratic)
States would instead argue a non- or anti-religious State is not conducive to the full
enjoyment of religious freedom. In the European context, even though the UK is
generally regarded as a secular system, it is home to two established churches: the
(Anglican) Church of England in England and the (Presbyterian) Church of Scotland
in Scotland. It is notable that Muslims and other religious minorities are generally
staunch supporters of the State Church, seeing it as not only the protector of the
position of Christianity but of all faiths in general. At the same time, and perhaps
similarly surprisingly,84 it is also said that Muslims are sometimes supporters of laïcité
in France or oppose disestablishment of the Church of England.85

These situations in both the UK and France, in which minorities seem in favour of
the (very different) status quo, can be explained in several ways. It can be considered
counterproductive to challenge or engage in debate on the current framework as
this could draw unwelcome attention and scrutiny to the minority group, and even
lead to intrusions; the minority groups might feel the dominant and more powerful/
influential religious group is better placed to advocate on their behalf as well; or,
still, certain minority groups do not feel they are in a position (yet) to challenge
historically grown institutions or arrangements even if these are sign of a ‘double
standard’.86

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82 See Christians, L.-L. et al., La réforme de la législation sur les cultes et les organisations philosophiques
non confessionnelles, Report of the working group established by the Royal Decree of 13 May 2009,
83 Gedicks, F.M., ‘The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief,’
loc.cit., at p. 1202.
84 Gordner, M., ‘Challenging The French Exception: “Islam” and “Laïcité”’, In-Spire Journal of Law,
archive/vol3-no2/Gordner32.pdf.
85 Modood, T., ‘Is There a Crisis of Secularism in Western Europe?’, Sociology of Religion,
86 Besides rules and interpretations, certain attitudes are also embedded in national values or
culture. These values, to a great extent, influence the acceptability of certain ‘accommodations’ for
minorities, in the various contexts (schools, workplaces, the family, etc.).
4. CONCLUSION: THE CHALLENGE TO MOVE FROM RESEARCH TO POLICY

Within the limited confines of this article, we have sought to illustrate how the law guides framing disputes in terms of religious freedom/discrimination (or not) and how actors take the law’s incentives into account, both unconsciously when a form of framing becomes paradigmatic as well as explicitly and strategically.

In the area of the public space and the workplace, the freedom of religion framework is frequently at work in cases involving religious symbols, dress and other practices. Invoking Article 9 ECHR has however clearly failed to protect a genuine deep religious diversity, making the protection against religious or belief-discrimination a very welcomed addition in this area. In the area of the family, religious freedom discourse is overall less utilized; multicultural family issues are dealt with under domestic Private International Law rules and under Article 8 ECHR, but with similar restricted results concerning the management of religious diversity. Finally, concerning State support to religions, the issue is not so much the guaranteeing of religious freedom to old and new religions, but the non-discriminatory treatment of the various religious and other philosophical communities in a given system.

Arguments based on the freedom of religion and other human rights or values underpinning these rights can empower individuals and groups in Europe to live according to their deeply-held beliefs and practices. However, arguing a claim in terms of human rights also implies adhering to a particular frame, which limits the confines of religious diversity to a ‘modest’ kind as opposed to a ‘deeper’ kind of diversity. Because our understanding of human rights is so embedded in our legal culture, we risk not recognizing dominant norms which, sometimes explicitly, sometimes implicitly, are apparent/visible in the current legal frameworks (and other established realities) and interfere with or disadvantage minorities and their way of life. These norms are to be found in every one of the four domains under investigation in the RELIGARE research project: in the family field there is the norm of monogamy and the nuclear family; in the workplace there is the organisation of the workweek and the yearly calendar (official holidays); in the public space there is the (contested) idea that religion is to be confined to the private sphere and, in addition, there are a number of burqa bans (being) adopted in European countries that more or less target the Muslim niqab/burqa; in the various State support regimes, mechanisms can be identified which were designed with the majority (Christian) religions/‘Churches’ in mind and which still work to advantage the majority beliefs while at the same time discriminating against other religious communities (for example because the latter fail to meet the conditions designed with the majority in mind). Therefore, the ‘secular norm’ seems to be a very coloured Christian normalcy that is being challenged by (mainly) newcomers, whose integration in various respects is considered problematic.
As a consequence, ‘demands’ or ‘requests’ are frequently met with defensive attitudes, affirming the abnormal condition of the minorities.

At times, operating within the human rights framework means a number of conditions are set before protections are awarded to groups and individuals. By framing certain claims in human rights terms, (minority) religious practices are moulded and fashioned within acceptable ‘modest’ confines, thus rendering practitioners unable to ‘fully’ live out their religious beliefs and practices, and preventing ‘deep diversity’. By accepting human rights as the dominant discourse, the claim for protection of beliefs and practices that go beyond the ‘modesty hoop’ are forfeited. Western commitments to gender equality and anti-patriarchy can rationalise these limits. However, there are cases where this approach yields undesirable effects. Considering the inherent limitations of the tool of human rights for management of religious diversity, two (non-exclusive) paths are revealed.

First, we could argue a more ‘maximal’ approach to the freedom of religion, extending from a focus on religious persecution towards reasonable accommodations. Not just the law, but also the attitudes of some social players – for example labour union advocacy for religious (minority) concerns – may have a decisive impact here. Also, many cases seem to have been explicitly chosen by institutional actors (national equality bodies) or other stakeholders (powerful religious or secular organisations) to prove a point or spark or direct the public debate: strategic litigation also takes place in this area (see for example the UK cases of Eweida and Shabina Begum87).

Second, given that the first approach is a long-term one, it is justified to look beyond the human rights scope and ask what this could or should mean for legal policy-making today. Obviously, this should not be interpreted to mean that the basic threshold set by the contemporary human rights framework should not be cherished, nor that we should aim for anything less. This is all the more the case in the current societal reality, in which the presence of new groups challenges various status quo’s, risking a lowering of minimum thresholds.

A core question that must be addressed is whether this necessitates – at least for some jurisdictions – a revision of the existing constitutional and legislative frameworks, as opposed to solely relying on human rights or pragmatic solutions and piece-meal adjustments on an ad hoc basis. In practice, it is not only the law that can provide workable solutions. The focus on ‘cases’ is not meant to distort the basic picture, which also includes many pragmatic and workable solutions found ‘on the ground’. Exactly these solutions often are the reason why some issues do not come up in the case law of certain countries. ‘Trouble-less cases’ or ‘non-cases’ in this field are a potentially rich source of illustrations showing that arrangements need not be (explicitly) grounded in legal talk to meet parties’ interests. For instance, a

kindergarten may accommodate kosher food, or a workplace (or prison) canteen can serve *halal* dishes for Muslims, or serve a fish dish on Fridays to meet the request of Italian Christians. One can draw lessons from these pragmatic good practices, but we must bear in mind that these solutions are also embedded in the law (often being negotiated ‘in the shadow of the law’) and remain fragile as they often depend on the goodwill of stakeholders and can alter as conditions change. Some ‘anchoring’ of good practices in the law is thus justified.

Human rights will remain an important – albeit not exclusive – tool for managing religious diversity. How adequate the human rights system can avail itself of that ambitious role, and to what extent supplementation with other policy solutions is required, depends on its capacity to transcend the law’s traditional inertia.