

## 2.3 Access to and use of public spaces

### 2.3.1 Two thematic foci

The RELIGARE research on issues relating to the (neutrality of the) public space focused on two cases in particular: **religious dress codes** and **places of worship**. The empirical findings of the RELIGARE research with regard to public space issues show that the debates in the countries under scrutiny tend to revolve particularly around these two cases. These issues are prominently present in the media and also in the parliamentary debates, but it also appears that in the past few years a significant number of disputes have been settled through the courts.

#### 2.3.1.1 Religious dress codes

The RELIGARE data show that each of the ten countries under scrutiny has to date followed a different route to regulating the question of religious dress codes.

##### *Full-face veil*

Regarding the full-face veil, France<sup>43</sup> and Belgium<sup>44</sup> have adopted laws that prohibit appearing in public with one's face covered. In both cases the prohibition applies to the entire public space. At the opposite end of the spectrum is the UK, where the minister for immigration in 2010 qualified any provision aimed at banning the *burqa* or *niqab* as “unBritish”<sup>45</sup>. There are no legislative or administrative provisions forbidding the *burqa* or the *niqab* at the national or local level, nor are there any directives by professional organisations on this matter. A third route hinges on local law: the State abstains from outlawing the use of the full-face veil throughout its territory, but the ban may be introduced by mayors or other local authorities by means of administrative provisions. This is what happened in Spain<sup>46</sup> and, for a certain period, also in Italy<sup>47</sup>. A different approach is taken in Denmark, where, apart from a single piece of legislation prohibiting the wearing of religious or political symbols in court, there is no law forbidding the wearing of the full-face veil; neither are there any local administrative provisions outlawing its use. Instead, there is some case law and also a series of documents issued by professional bodies and government directives that supply guidelines for dealing with the most controversial cases. By these means, for example, it has been established that women wearing the *burqa* or *niqab* can ride public transport, but photo IDs require the identification of the bearer; that schools and universities may (but are not obliged to) prohibit the full-face veil where it hinders non-verbal communication between students and teachers. In these and other cases a pragmatic and functional approach has been adopted. The full-face veil as such is not perceived as a garment that violates fundamental human rights, and thus the general attempt has been to find a solution that guarantees, as far as possible, women's right to wear the *burqa* or the *niqab*; only for functional reasons has the wearing of this garment been forbidden.

RELIGARE data indicate, however, that current debates on the full-face veil are frequently driven by an ideological approach that focuses on values and principles, claiming their general and undifferentiated application, but they fail to examine, case by case and within their own context, those situations where the full-face veil ban might clash with the principle of the non-discriminatory access and use of the common public space. The debate tends to be monopolised on the one hand by those

who believe that the full-face veil – always and everywhere – offends women’s dignity, public order, security, and gender equality, and on the other by those who consider it a manifestation of faith, personal self-determination, freedom of expression and practice of religion that must be guaranteed without exception.

**Based on the RELIGARE findings, which include the sociological reports, it appears that the two yardsticks of ‘inclusive State neutrality’ and ‘justice as even-handedness’ would permit a less radical or confrontational and a more balanced way to tackle this issue, namely by carefully assessing the different problems that the full-face veil can present to an orderly enjoyment of the common space.** A general ban on wearing a full-face veil affects the accessibility of the common space, for women in particular. Yet it is a space where the right to move freely within the territory of a State is, in principle, granted to any person and the scope for limitations is thus restricted (see, in this sense, the ECtHR decision in the *Ahmet Arslan v. Turkey* case<sup>48</sup>). Evidently, there are situations where seeing the face of a person is necessary (when checking identity documents, for example), and there are also certain activities that can be hindered by a veil covering the whole face, such as when driving a car, and occasions when appearing with one’s face covered can give rise to social alarm. In these and (a limited number of) other instances, it appears to be legitimate to prohibit the wearing of the full-face veil in common areas, based on a pragmatic rather than an ideological approach, that is, on the basis of a concrete examination of the situation that takes account of the rights of others to the enjoyment of the (same) common public space, and their right to free movement as well. In these cases it is not the symbolic meaning of the full-face veil (which varies from person to person and can never be ascertained with certainty) that is at stake, but rather the social difficulties it may cause. This (functional) approach allows for measures to be adopted that are proportionate to the practical problems raised by the wearing of the full-face veil and that also take account, as far as possible, of the individual’s freedom of religion and expression. If there is evidence that wearing the full-face veil is not a matter of free choice but the consequence of an imposition (by others), for example, public authorities may be expected to prioritise the protection of individual freedom. Once this freedom is safeguarded, however, wearing clothes that are part of a religious practice or manifest a religious and cultural conviction cannot be limited in the public space as long as there is no evidence of infringement upon the right of others to freely move within that same space.

#### *Religious symbols worn by teachers at school*

As far as religious symbols worn by teachers and students at school are concerned, a general prohibition is in force in French public schools.<sup>49</sup> In Belgium the trend is to follow the same approach. Some German Länder prohibit teachers from wearing religious symbols, but the prohibition does not apply to Christian symbols.<sup>50</sup>

Here again, an inclusive and even-handed approach would offer a more nuanced solution. A first step in the reasoning is to take for granted that fostering tolerance and respect for pluralism is (or should be) one of the most important goals of the educational process in a context of pluralistic democracy. This goal can be reached only if teachers provide an education based on an impartial approach to the religious and philosophical convictions<sup>51</sup> of the students and their parents (see Article 2 of the First

Protocol to ECHR), in order to prepare students to recognise the role played by religions and other beliefs and world-views in individual and social life. At the same time, students should be shielded from any bias or false comparisons as well as from any ostentatious and/or imposed manifestation of religion or belief on the part of the teachers. In performing their work, teachers should be guaranteed the right to freedom of thought, conscience and religion and cannot be prevented from manifesting their religious or philosophical convictions except if these were to conflict with the school's secular character. However, these manifestations must respect the right of students and (depending on the students' age) of their parents not to be exposed to forms of indoctrination that violate their freedom of thought, conscience and religion.

Teachers can thus be prohibited from wearing religious symbols and clothing that, in a given context, might have an indoctrinating' effect on students, provided that this prohibition is proportionate to the specific situation and is applied in a non-discriminatory manner. By way of a provisional conclusion and considering that each educational context has its own specificities, it appears sensible to adopt a case-by-case approach that refrains from applying the same rule to different situations: an even-handed approach offers more possibilities for taking into account the distinctive circumstances that impact on the delicate balancing of teachers' and students' rights. At the same time, such an approach requires some guidance, to ensure that it offers the necessary legal certainty.

#### *Religious symbols worn by students at school*

In the case of religious symbols worn by students at school, the reasoning is slightly different: manifesting one's religious or philosophical conviction through the wearing of symbols and religious items of clothing by students at school is an expression of the right to freedom of thought, conscience and religion granted by Article 9 ECHR. According to the ECtHR case law, such manifestation can be subjected only to the restrictions "necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others" (Article 9 ECHR). As repeatedly affirmed by that Court, there is less potential for students to indoctrinate others than for teachers. The right to manifest one's religion or philosophical convictions through symbols and clothing should therefore be limited only when it represents a concrete danger to the principles of tolerance and mutual respect that are essential for any educational environment. Once again, each case has its own specificities that need careful (even-handed) consideration. Moreover, a general ban on religious symbols worn by students, though accepted by the ECtHR when the State's policy is to safeguard the secular character of its schools, may be problematic in light of another fundamental principle of the educational process, namely, pluralism. Justice understood as even-handedness requires that a general prohibition should be the last resort, to be used only in cases where other less restrictive means do not allow for an adequate solution. The arguments in favour of an inclusive case-by-case approach (as well as those that require recourse to even-handed means), already mentioned in reference to teachers, apply *a fortiori* in the case of students.

#### *2.3.1.2 Places of worship*

Places of worship play a key role in the expression of any religion or belief. The RELIGARE research has addressed three sub-issues in particular: the construction and the opening of places of worship, the

reassignment of former places of worship for other purposes and the location as well as the rules and regulations that apply in the case of (public and private) burial grounds or cemeteries. The cross-country comparison indicates that although, in principle, all religious communities can expect to be treated equally (this applies explicitly to Belgium, Bulgaria, Italy, the Netherlands and Spain), in practice this is clearly not the case. In Turkey, for example, non-Sunni groups or different sects/denominations within Islam are not granted the treatment enjoyed by Sunni Islam; in Italy, although the law is the same for all and does not distinguish between religions, in practice it is extremely difficult to open or build any type of religious monument that is not a Catholic church. In some cases formal procedural reasons are invoked to withhold administrative permission: protest by neighbours, sometimes accompanied by threats of violence (in Bulgaria, England and Wales), excessive noise at night (Germany), and traffic congestion combined with a lack of parking space (France).

There are also important differences between national policies as to the financing of places of worship. The Danish State supports the building of places of worship belonging to the (Lutheran) state church. In Belgium, the government does not generally give financial support to the building of places of worship, but it does offer, to recognised religions, the right to such support for maintenance and renovations of their buildings. Bulgarian law allows the government to support the building of a place of worship, but when and how this is done is at the discretion of the local authorities. In France, the government may not in principle fund places of worship, but recent legislation allows local authorities to issue leases for places of worship, especially where the building in question is also used for other purposes (see also pp. 33-34 below).

### *2.3.2 A key conceptual proposal: not one public space, but three kinds of public space*

The data collected within the framework of the RELIGARE project on the different ways European States have opted to achieve the neutrality of the public space clearly indicate the intricacy of the question whether the public space can ever be neutral (from a religious or philosophical point of view).

The answer to this question depends on what one understands by ‘neutral’: if a neutral public space ought to be one that has no distinctive quality or characteristics, then the answer cannot but be negative. Public space, in all its various manifestations, has always had distinctive characteristics that derive from the history, culture and belief of the people who live in it. As religion is one of these characteristics, a public space cannot be expected to be entirely religiously neutral: even the most anti-religious States (e.g. Enver Hoxha’s Albania) could not, in practice, build a public space totally devoid of religious characteristics. If, however, the term ‘neutral’ is used in the sense of ‘having no preference’, being even-handed, fair and impartial, the conclusion cannot be so clear-cut, and one needs to distinguish between the various possible meanings underlying the expression ‘public space’; in combination they allow for a more *accurate analysis of the comparative data*.

The RELIGARE team posits a new conceptual understanding that distinguishes between three different public spaces: common, political and institutional. These three types of public space need not

necessarily be seen as physically or temporally separate; rather, they coexist and overlap to a considerable extent. A square, for example, is typically a public space that can be common, political and institutional at the same time, depending on the use made of it. The same applies to the school: it is a space that is common, political and institutional at the same time. With this consideration in mind, it is possible to differentiate some characteristics of these three dimensions of the public space:

- a) Under this classification, the *common* space is understood as the physical space that people have to enter in order to meet their basic needs; in this sense, it is inescapable. This space is not accessed with the intention of participating in a political debate, but simply to get to and from work, for example, or to buy daily necessities. The communication process that takes place in this space is not primarily political. Of course, wearing a cross, a *kippa* or a turban may convey a message concerning the religious belief of an individual, even when that individual is doing his or her shopping. But the same kind of message can also be conveyed by his/her haircut, earring or tattoo and there is no reason why religious symbols should be regulated more restrictively in such situations than other symbols. From a normative point of view, the *common* space must be kept as accessible as possible to avoid segregating in their homes people who feel bound to manifest their religion or belief in some way when entering the public space.
- b) The *political* space in this schema can be understood as the space of debate and discussion where the public discourse takes shape. It should not be regarded only as a space of intellectual “argumentation about the truth value of propositions”, but more broadly as “a realm of creativity and social imaginaries in which citizens give shared form to their lives together, a realm of exploration, experiment, and partial agreement”<sup>52</sup>; it is the space where new “normative worlds”, as Robert Cover calls it, take shape.<sup>53</sup> It is frequently also a metaphorical space, although it can take the form of physical locations (Speaker’s Corner in London, or a political rally in a square, for example). In order to perform its function of providing room for open and democratic debate, the political space should be free and pluralistic: the visible presence of different religions and beliefs in this area is indispensable to the pluralism on which a democratic society is based (as affirmed by the ECtHR’s decision in *Metropolitan Church of Bessarabia v. Moldova*, 2001).
- c) Finally, the *institutional* public space can be understood as the place where binding deliberations, which are compulsory for all, are conducted (parliament, the law courts, public administration, etc.). It is not (only) the space of debate and discussion, but the place of decisions that, once taken, have to be respected by everybody. A law court is not a TV talk show: a court delivers an enforceable judgment that determines who is right and who is wrong. In order to gain the general respect and recognition that is required for the enforcement of such binding decisions, this space must not only be, it must also be seen to be, fair and impartial.

In the three public spaces identified above, individuals act in a different capacity according to the role they take or the task they are expected to perform in that space. A public school, for example, is attended by students and teachers. Once they have entered the school doors, students retain their private status, while teachers acquire a more public status. Consequently, when a student wears a headscarf she is manifesting her personal conviction/belonging; when the scarf is worn by a teacher,

this private dimension cannot be dissociated from the public one. This role differentiation may help explain why the case law in most countries investigated within the framework of the RELIGARE project indicates greater willingness to accept the students' scarf than the scarf worn by a teacher. One speaks of the same space (the school), but seen through the lens of the various roles performed by the actors, one distinguishes two different groups of people who take different roles within that (same) space. Even-handedness implies that one takes a different position depending on the role and responsibility of the person(s) involved.

One can also look at the public space issue from an angle that is neither spatial nor personal, but *functional*. From this perspective, the notion of public service comes to the fore: the school or the hospital provides a public service, independently of whether it is a public or a private school or hospital. A public service can be provided both by a public and by a private institution. At present, the tide seems to be turning towards the expansion of public services rendered by private institutions (including in fields that were traditionally reserved to the State, like security, management of prisons, etc.). From this functional point of view, new questions arise: are all public services, without distinction, to be provided in a 'neutral' way? When a religiously or belief-oriented private institution provides a public service, is it obliged to give up its religious/belief characteristics?

The distinction between the three spaces, each with its own characteristics and uses, allows for the application of differentiated solutions to different situations. The typology also yields two yardsticks of equal treatment, through the combined test of '*inclusive State neutrality*' and '*justice as even-handedness*', to play the role assigned to them; by emphasising the diversity of spaces, the inclusivity test focuses not so much on the *substance* of religions or beliefs, but distinguishes instead between *modalities* of management of the public space, and it makes this management depend on the functions one particular space has within a particular context. By focusing on the various functions a particular space may have in a concrete situation, no actor in the public space is confined to a single identity. The aim is to include all parties (individuals) concerned, through a careful examination of the characteristics of each situation placed in its own context.

It is against this backdrop that a number of specific recommendations have emerged from the RELIGARE project. These are listed in the section that follows.

### *2.3.3 Recommendations with regard to public spaces*

#### *2.3.3.1 Recommendations with regard to religious dress codes*

(1) *Combating discrimination.* Both the EU Commission and the Member States should assess whether the existing rules concerning the wearing of religious symbols or clothing by students and teachers in public schools – insofar as public schools that provide vocational guidance, vocational training, advanced vocational training and retraining are concerned – respect the national provisions adopted pursuant to the proposed horizontal directive. While pursuing the discussions on the proposal for the horizontal directive, one relevant question to assess is whether the prohibition on wearing the full-face veil in public spaces and the provisions concerning the wearing of religious symbols by

students in public schools, which are in force in France and Belgium, constitute a form of discrimination in light of Art. 2(2) of the proposed directive.<sup>54</sup>

(2) *Providing guidance.* Drawing inspiration from best practices that have proven successful at national and local levels, the Commission should help disseminate information that can aid the public authorities of the EU Member States in addressing the issues of the full-face veil and of religious symbols worn by students and teachers at school, in a way that is in compliance with the ECHR norms and the EU laws. EU Member States should also consider the possibility of establishing advisory bodies at the local level, with the participation of different stakeholders, which would provide guidelines on the issue of religious symbols/clothing worn by students and teachers at school in a way that respects the specificities of each situation.

(3) *Protecting women's freedom of choice.* EU Member States should assess the effectiveness of the existing legal frameworks aimed at protecting women against being forced to wear religious or special clothing and, where there may be such compulsion, increase the level of protection.

(4) *Avoiding unnecessary prohibitions.* Legislators should refrain from enacting a *general* prohibition preventing teachers from wearing religious symbols and clothing at school, provided it is possible to address the issue on a case-by-case (school-by-school) basis through the intervention of the school authorities. Authorities should limit the prohibition for students to wear symbols and clothing expressing their religious or philosophical convictions to situations where such restriction is strictly required to guarantee the carrying out of school activities and no reasonable accommodation of the religious needs of the student seems negotiable. In both cases, if the competent authorities deem that a general ban on religious symbols and clothing worn by teachers or students at school is required, this should be formulated in terms that are non-discriminatory and that place as few limits as possible on the freedom of thought, conscience and religion of students and teachers alike, as well as the right to education. Finally, EU Member States should refrain from introducing a general ban on the full-face veil in all public spaces, in particular by recourse to criminal law provisions, and should assess the suitability of limiting the wearing of the full-face veil only in those places and situations where seeing the face of an individual is required for security purposes or where public or professional requirements demand that civil servants wear religiously neutral attire or that their face can be seen.

### 2.3.3.2 Recommendations with regard to places of worship

(1) Government authorities should effectively apply the principle of equal treatment to the building and opening of places of worship. It cannot be accepted that the discretionary powers of local authorities allow them to treat different religious groups differently when it comes to the acquisition or lease of a place of worship.

(2) Religious communities are entitled to be treated even-handedly with respect to bell-ringing or calls to worship. Even-handedness also means that government authorities take into account all contextual factors, looking for a fair balance between what is acceptable – preferably, through negotiation – to impose on a neighbourhood and the requirements of the protection of religious freedom.

(3) If a place of worship is no longer used for its initial purpose, it is recommended that the owner (most often the religious community concerned) be allowed to link the selling of the building to conditions governing its future use and that are legally enforceable on the buyer and his successors.

(4) Finally, it is recommended that legal steps be taken to ensure equal treatment of all religious groups as regards burial or cremation. Restrictions imposing serious constraints on the wishes of various religious communities concerning burial or cremation, should be critically assessed: are they still justified in light of contemporary means of protecting public health?

## 2.4 State support mechanisms

The RELIGARE project has also investigated the issue of State support to religious and other communities of conviction, in particular the funding of clergy salaries and the financing of a number of core religious activities and institutions. Special attention has been paid to the funding of places of worship, the access to and funding of religious and philosophical broadcasting on public media channels, as well as the funding of training for religious leaders. Subsidies for charitable, educational or social activities under the guardianship or responsibility of religious or philosophical organisations have not been taken into account. Where religious institutions receive public subsidies for these activities, it is generally conceived of as remuneration for a public mission. Such “secular” activities carried out by institutions or individuals sharing a common religious conviction therefore fall outside the scope of the RELIGARE research strictly speaking.

At first sight, the issue of public financing of religious and philosophical organisations seems remote from the competencies of the EU. Article 17(1) and (2) of the TFEU confirm this. Sociological and demographic changes in European societies mean, however, that the financing of religions and philosophical organisations poses a key challenge to constitutional arrangements and regulations of State support as they have been elaborated in the past in the internal legal order of the Member States. In order to assess the challenges that State support to religious groups (and occasionally also to secular organisations, as is the case for the humanist movement in Belgium and the Netherlands) actually poses to public policies, closer attention needs to be paid to the impact, in practice, of State support: who are these groups and is State support even-handedly distributed among them? Two recent developments that are characteristic of European societies appear of particular relevance here; they challenge policy- and decision-makers ever more pressingly in an increasingly diverse societal context: individualisation of life styles and (personal) convictions and the steady increase of secularisation. They are reflected in policies of deregulation and privatisation which, in turn, result in the financing of religious groups being left to market forces and the private sphere.

The RELIGARE project undertook a comparative examination of the various regulations that apply in the countries under scrutiny. The method adopted has been an analysis in two steps. First, it distinguishes five models of State support to various religious groups,<sup>55</sup> paying special attention to certain injustices that are the consequence of a lack of adaptation (of the historical legislative framework in place) to recent socio-demographic developments in contemporary European societies. Secondly, the analysis looks toward the future: what models offer better alternatives, and is there a