



Religious Diversity and Secular Models in Europe Innovative Approaches to Law and Policy



Basic Tensions of Governance of Religious Diversity

Item-list for the socio-legal research (WP7)

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General Tensions/conflicts between Basic Rights

The focus on basic tensions or conflicts between basic rights may be easily misunderstood. Tensions or conflicts between rights are, indeed, normative tensions but not of the kind of ‘normativity’ characteristic for moral philosophy. Quite to the contrary, these are tensions inherent in empirical norms (i.e. norms claiming legal validity) both in International Covenants of Civil and Political Rights or the ECHR as well as in (Constitutional) Law of Member States, whether we call these constitutions ‘liberal democratic’ or ‘constitutional democracy’ or not. In this ‘socio-legal’ part of RELIGARE, we are interested in the *empirical way* in which Courts and Equal Treatment Commissions practically deal with them, how they argue for – often widely diverging – balancing and weighing in judging cases in specific contexts and circumstances – and whether and, if so how these processes are influenced by deeper, implicit cultural biases. In addition, we are interested in how our respondents (preferably also judges and chairpersons of Commissions amongst them) perceive these tensions and deal with them. Last but not least, we are also interested in conflicts that do not end up before courts (‘non-cases’) and in divergent non-jurisprudential practices and resolutions of (potential) conflicts. We present the items (in all thematic work packages WP3 – 6) in the following order: (i) (*empirical*) practices (of case law and conflicts or good practices that do not appear in case law); (ii) (*normative*) what, if anything, should be changed?

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1. Tension between individual and collective autonomy.

In terms of religious freedoms: tensions between individual or internal religious freedom (freedom of conscience) and collective or external religious freedoms (religious practices and associational freedoms of (organized) religions).

2. Tensions between collective religious freedoms and other basic human rights

(ICCPR Art. 9,2: “protection of the rights and freedoms of others”), such as: freedoms of speech/expression and anti-discrimination (both with regard to ‘religious speech’ and ‘secularist speech’); protection of essential basic rights of individuals and religious minorities (particularly minors, dissenters, women, ethnic and gender minorities (vulnerable minorities)) within religious minorities and within religious majorities and their organizations.

3. Tensions between religious freedoms and ‘public order’ and ‘security’

(ICCPR Art. 9,2: “public safety, public order, health or morals”), **particularly in an age in which security-issues get ever more prominent.**

4. Tensions between (formal) equal treatment (of religions and non-religions) **before and in the law and more substantive equal treatment (if any)** (commonly phrased in terms of ‘negative freedoms of religion’ versus ‘positive freedoms’).

Family Law (WP 3)

1. Basic Tensions in cases in which rules and practices of (minority or majority) religious family and divorce laws and customs are at odds with basic principles of international family and divorce law and general civil or state marriage and divorce law: equality between the sexes and favor divortii (marriage, divorce, custody (and inheritance, excluded from WP 3) [It has already been decided in the RELIGARE project proposal that we do not research cases of conflicts with rules and practices of modern criminal law such as wife beating, child beating, genital mutilation, honour killing]. Because of the increasing importance which the ‘legal regulation of intimate relations’ has recently gained with issues of same-sex marriage and adoption, we include issues of polygamy and same-sex marriage and the respective challenges and defenses of the ‘norm’ of monogamy and nuclear family.

Domains: (i) Private International Law (PIL); (ii) domestic religious law(s) versus state law; (iii) Alternative Dispute Resolution (ADR) (e.g. Islamic Arbitration Tribunals)

Items:

(i) Private International Law (PIL):

- (1) In case of difference between nationality and residence of the persons involved should the legal order of the former or the latter prevail (or should there be the option of choice)?
- (2) If traditional practice and customary marriage- and divorce- and adoption law of religious communities (e.g. Hindu-Law in India; kefala) is not legally recognized by ‘modern’ (e.g. English) PIL law, how do judges deal with such cases?
- (3) Should Private International Law rules be more flexible and if so, how?
- (4) What is the place of the principle of the separation of religion and State in private international law? What is the relevance of reasonable accommodation?

(ii) Domestic religious law(s) versus state law:

(1) is there/should there be ‘one civil marriage and divorce law only’ for all citizens/residents and, if so, why?

(2) Is there/should there be the option of religious marriage and divorce law parallel to or as a replacement for civil marriage and divorce law? If parallel, under which conditions and limitations? If religious marriage and divorce laws only, under which conditions and limitations? (Include: voluntariness vs. marriage under duress; freedom of exit (favor divortii); equality amongst the spouses (in all types of possible ‘marriages’: monogamous, polygamous, same-sex, civil partnerships (in its different forms, eg PACS: pacte civil de solidarité); minimal responsibilities for childrearing)

(iii) Alternative Dispute Resolution (ADR):

(1) is there/should there be separate religious dispute resolution and, if so, why?

(2) Is there, should there be state recognition of religious court? Of religious arbitration tribunals? Of religious arbitrators? Of arbitral awards? Under which conditions and limitations?

Labour Law (WP4)

Basic Tensions: religious interests of employees versus interests of other interested parties (employer, co-workers, customers, general public) and other liberal values such as secularism, non-discrimination (sex and gender equality) (the *individual religious freedom cluster*). Collective autonomy (practices of majority or minority religious organizations and associations that are protected by collective religious freedoms) versus labour law principles of non-discrimination on the basis of religion, gender, sexual orientation (and possibly race) (the *collective religious freedom cluster*).

Domains: (i) ‘non-religious’ or not ‘faith-based’ workplaces (including private, semi-private and public employers) (ii) (organized) religions (including the whole variety of religious core-organizations as employers, not only ‘churches’) (iii) ‘Faith-based’ organizations as employers (including not only ‘religion’-based ‘ethos’ employers but all non-religious ‘ethos’ employers)

Items with regard to legal/legitimate *exemptions from general labour law rules and standards*:

(1) Is there/should there be a special (non-) employment status of church staff (ranging from ministers of cult to lay cleaning and gardening staff) and what is/should be the role of existing/ developing (member-state and European) law and jurisprudence?

(2) What is/should be the role of labour union advocacy in this regard?

(3) How are claims for the accommodation of religious exemptions in the workplace (dress codes, food-prescriptions, prayer-facilities, time schedules etc.) and for equal access and inclusion in the labour market perceived and dealt with and what is/should be the role of existing/developing law and jurisprudence in this regard?

Public Space (WP5)

Basic Tension: Basic principles of liberal democratic constitutionalism (such as ‘state neutrality’ (as ‘strict’ or ‘formal’ versus ‘benevolent’ or ‘relational neutrality’; as ‘neutrality by subtraction’ or ‘by addition’) and fairness (as ‘hands-off’ or as ‘even-handedness’) versus traditional historical ethno-religious ‘national (majority) culture’ (and quite often highly questionable assumptions regarding ‘necessary *social cohesion*’ and ‘*political unity*’). The reluctance to or rejection of reasonable accommodation is based on (i) intrinsic problems of all forms of *pragmatic*, administrative accommodation (working out practices by way of talking and negotiating) and (ii) on more or less deeply entrenched cultural majority-bias opposed to public *symbolic recognition*. Both reasons work out very differently in countries and ‘national jurisdictions’. The core conflict is how ‘neutrality and fairness’ are interpreted and how much weight is given to legitimate claims to protect/develop ‘national culture’. The core normative issue is – given all this (legitimate) variety – to defend and implement accommodation that is minimally required in countries characterized by wide and deep religious diversity.

Domains: (i) religiously oriented private schools; (ii) dress codes; (iii) building/maintaining places of worship

Items:

(i) Non-governmental religious schools: (1) Does/Can the state forbid or limit the existence of non-governmental schools? Which is/should be the justification of the limitations or conditions that the State impose on the existence or management of this type of schools? Does the State treat differently governmental and non-governmental schools and if so, why? (2) What is/could be their contribution to plurality in education? (3) to learning and practicing minimal civic virtues and liberal-democratic virtues? (4) Do they threaten minimal social cohesion and national unity and, if so, why? How can/should the state ensure that they do not threaten minimal social cohesion and national unity?

(ii) Dress codes: (1) Are there/should there be any legal prescriptions against wearing religiously prescribed dress codes in public spaces and, if so, which dress and in which spaces, and why (again: social cohesion, national identity and, in addition: equality and security)? What is/should be the role of member-states and EU courts in balancing individual and collective religious freedoms with other basic rights and with ‘national values’?

(iii) Building and maintenance of places of worship:

(1) Should every religious community have the right to build a place of worship? On what conditions? (2) Should the government consult the citizens of the area where the place of worship is planned to be build? (3) Should the government cover the costs for maintenance when a place of worship is a monument? (4) Should the place of worship then be open to the public? (5) Do you consider a place of worship in general as a public place ? (6) Is the use of a building that is abandoned as a place of worship open to the choice of the seller, or should he former religious use be respected in some way?

State Support (WP6)

Basic Tensions: (i) ‘**strict neutrality**’ = **no financing and recognition** (obviously only in an imaginable world, not in any existing regime of religious governance) versus **relational neutrality and equality as fairness**: (ii) if any public money, then ‘**equality before the law**’ instead of privileging the entrenched majority religion(s) and/or ‘**substantive equality**’ minimally requires to take history into account (e.g. in cases of very recent ‘disestablishments’ or the many hidden forms of financing churches via ‘cultural heritage’). (iii) For religious and religion related organizations: (a) *autonomy dilemma: trade-off between autonomy and privileges*. Less or no scrutiny and control by the state, on the one hand, and money and other privileges (connected to public/political scrutiny and control) and political influence, on the other; (b) *organization and mobilization dilemma* (see Bader (2007), p. 228f). (iv) Basic tensions for liberal-democratic states (p. 229-31).

Domains: (i) religious core organizations; (ii) FBO’s (such as religious schools, media)

Items

1. Should there be a public funding of religions and FBO’s? Why?
2. Do you feel that all religions and FBO’s are entitled to public funding?
3. What kind of public funding for religions and FBO’s is available in your country? What type of funding can it be compared to? Which would be the best way for the State to finance religions and FBO’s? (Suggested Typology for (organized) religions):
 - (i) subventions to the sustained religions (ii) subventions granted according to precise projects (iii) tax deduction granted to religious institutions (iv) church tax according to the religious affiliation (iv) possibility to grant a part of the income tax to religious denominations
4. Is there a control over the use of the public support? Is there a demand of transparency / accountability? If so, how do religious bodies deal with it?

Project Identity

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| Project Managers: | Dr. Jogchum Vrielink Dr. Myriam Witvrouw |
| Duration: | 1 February 2010 – 31 January 2013 (36 months) |
| Contact e-mail: | info@religareproject.eu |
| Short Description: | The RELIGARE project is about religions, belonging, beliefs and secularism. It examines the current realities in Europe, including the legal rules protecting or limiting (constraining) the experiences of religious or other belief-based communities. Where the practices of communities or individuals do not conform to State law requirements, or where communities turn to their own legal regimes or tribunals, the reasons behind these developments need to be understood. |
| Partners: | 13 (10 countries) |
| Consortium: | Centre for European Policy Studies (CEPS), Belgium Université Catholique de Louvain (UCL), Belgium International Center for Minority Studies and Intercultural Relations (IMIR), Bulgaria University of Copenhagen (UCPH), Denmark Centre National de la Recherche Scientifique: Politique, religion, institutions et societies: mutations européennes (PRISME), France Universität Erlangen-Nürnberg (UEN), Germany Università Degli Studi di Milano (UNIMI), Italy Vrije Universiteit Amsterdam (VUA), The Netherlands Universiteit van Amsterdam (UvA), The Netherlands Universidad Complutense Madrid (UCM), Spain Middle East Technical University (METU), Turkey Queen Mary, University of London (QMUL), U.K. |
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