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Rossella Bottoni
Rinaldo Cristofori
Silvio Ferrari *Editors*

Religious Rules, State Law, and Normative Pluralism - A Comparative Overview

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Chapter - APPLICATION OF RELIGIOUS LAW IN A MULTI-RELIGION NATION STATE. THE ISRAELI MODEL; Asher Maoz signed non exclusive consent form

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Chapter 1
Religious Rules and Legal Pluralism: An Introduction

Silvio Ferrari

Abstract This chapter analyzes the interplay between religious rules and State law from the angle of legal pluralism, discussing how State recognition of religious rules can affect the degree of legal diversity that is available to citizens. This issue is approached through an examination of religious law, that is rules that are considered to be different from secular rules, particularly in those legal traditions that have been more strongly influenced by the Christian religion. As the latter rules are frequently identified with State law, religious laws are regarded as a challenge to the State monopoly of law. First, the chapter defines what is meant by religious rules; second, it examines the tensions between religious and secular rules; and finally discusses the different strategies and tools implemented and used by States to govern these tensions.

Introduction

This chapter, and most of the book, concerns the interplay between religious rules and State law. This issue can be approached from different angles. I shall consider it from the angle of legal pluralism, discussing how State recognition of religious rules can affect the degree of legal diversity that is available to citizens. I am aware that religious rules and State law are two normative systems among many others, and their interaction cannot be fully understood outside this wider horizon. As incisively highlighted by Martin Ramstedt (2016, p. 57), "the existence and interplay of multiple written and unwritten normativities in a certain social field, their scalar range, their spatialization and temporalization, and the worldviews they are embedded in" need to be carefully taken into account to make sense of the global pluralism of today. However, as any good legal anthropologist knows, focusing on a tessera can help to shed light on the entire mosaic, provided that the part which is the object of the analysis is not mistaken for the whole. In this particular case, focusing on the intertwinement and interplay of State law and religious rules can help to answer two

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questions. First, scholars have observed that "opposition to political power and to the law based on religious grounds is notoriously difficult to overcome or to override, for a variety of reasons, including the possibility that many religions have to call upon beliefs relating to an after world, or to a supernatural world, to take position on every aspect of social life" (Graziadei 2016, p. 32). This remark seems to imply that the transcendent character of religious rules gives them a particular strength vis-à-vis State law. This issue will be discussed in the two following sections of this chapter. Second, scholars debate "whether and how the bond of citizenship can be reconciled with the bonds deriving from adherence to a religion, and in particular whether religion is to be considered different from other cultural phenomena in this respect" (Graziadei 2016, p. 30). This question is connected to the relationship between religious equality and liberty, that is, the problem of how equal treatment of non-believers and believers of different religions can be reconciled with the respect of the different beliefs and practices connected to each religion or non-religious worldview. This issue will be discussed in the two final sections of this chapter. The data and information contained in the chapters devoted to specific countries provide the materials on which the answers to these two questions are based.

There is a growing consensus that, all over the world, legal pluralism is on the rise. Although the expression 'legal pluralism' can have many and different meanings (Turner 2016; Ramsted 2016; Twining 2000, pp. 82–88), it is generally claimed that legal centralism –a system based on the State monopoly of law – is declining and that, as a consequence, State legal systems are becoming more pluralistic. Support for this conclusion comes from different circles. Lawyers point to the extension of human rights provisions over States and at the limits posed by international law to State sovereignty; anthropologists underline the increasing importance of customary laws and the rights of indigenous people; sociologists observe that mass migration has increased cultural, religious and therefore also legal diversity; economists highlight the impact of financial globalization in reducing State independence in economic issues and in making them weaker vis-à-vis transnational corporations; political scientists look with interest at the de-centralization of nation States and the transfer of law-making power from central authority to local and regional entities.[1] They all conclude that legal pluralism is an inevitable consequence of these processes (Turner and Possamai 2015, p. 12).

This picture can be one-sided and overlook the fact that some of these transformations can encourage a re-centralization trend as well: in Belgium the "uncertainty about the position of Islam (even a fear of "Islamisation") have progressively destabilized" the "traditional pluralist policies" (Christians and Overbeeke 2016, p. 110) and in the US "a number of state legislatures passed amendments to pre-empt the use of non-state legal principles in private dispute resolution, specifically singling out both Shari'a law and international law as competing normative orders that must be avoided" (Shachar 2015, p. 327). However, it is to be expected that, in the long

[1] The evolution of Belgium from a unitary State into a federation, mentioned in the chapter written by Louis-Léon Christians and Adriaan Overbeeke in this book, is an example of this process.

run, this fear-driven attitude will lose ground, so that it is reasonable to take the growth of legal pluralism as a sound working hypothesis for this chapter. My introduction will focus on the following questions: is this development to be welcomed as a recognition of individual and collective freedom or is it to be feared as a threat to equality of citizens before the law?; Is it to be interpreted as a manifestation of inclusion of diversities in the social fabric or as a step towards segregation and civil unrest?; Is it to be understood as a way of allowing citizens to manage their life according to their own choices? These are very broad questions that cannot have clear answers without taking into account the historical and cultural background of each country. However, it is possible to identify some conditions that the legal systems of different countries should meet in order to achieve a positive outcome from this process.

These questions will be approached through an examination of religious law: namely, rules that – for some reasons still to be determined[2] – are considered to be different from secular rules, particularly in those legal traditions that have been more strongly influenced by the Christian religion. As the latter are frequently identified with State law, religious laws are regarded as a challenge to the State monopoly of law. First, I shall define what I mean by religious rules; second, I shall identify the tensions between religious and secular rules; and third, I shall examine the different strategies and tools implemented and used by States to govern these tensions, in this way returning to the questions posed earlier in this section.

Religious Rules

As stated in the Belgian report, "courts very often use the concept of "religious rules", but its precise content remains undefined" (Christians and Overbeeke 2016, p. 93).[3] There are various criteria that in abstract could be helpful to distinguish religious from secular rules.[4]

The first is based on the distinction between spiritual and temporal matters, which is one of the central features of the Christian doctrine. Religious rules, as opposed to secular rules, have a religious content. But, although not unknown in many religions, this secular-religious distinction has different borders and contents in each of them. A matter that is considered to be secular in a religious legal system (for example, inheritance laws in contemporary Roman Catholic Canon law[5]) is

[2] See the next section.

[3] The ambiguity of the notion of "religious rules" is also noted by Paulo Adragão and Anabela Leão (see pp. 305–07) with reference to Portuguese law.

[4] For a discussion of the different meanings of the expression "religious law" see Sandberg (2011, pp. 170–82).

[5] Consequently, in compliance with Canon 22, the 1983 Code of Canon law refrains from regulating inheritance and refers on this matter to State laws as long as they are not contrary to divine law.

regarded as religious in another (the same laws in the Islamic legal system[6]). To say the least, their content does not always offer a precise yardstick to separate religious from secular rules or, to be more precise, the distinction between the two is far from being consistent once we try to transplant it from Christianity (where this distinction has a long and strong theological and philosophical background) to other religions (where it has weaker roots and plays a much lesser role). Moreover, even limiting the analysis to the law of the Christian Churches and of the States with a Christian background (where the distinction should be stronger), it is easy to observe that religious matters are the subject of State law and secular matters are the subject of Church law: as noted by Sandberg, "there is considerable overlapping between the subject-matter of religious law and that of other forms of regulation, such as State law" (Sandberg 2011, p. 177).

A second method to identify a religious rule is based on its source, and is grounded on the idea that religious rules are enacted by authorities different from the State.[7] This argument is partially true for the Roman Catholic Canon law,[8] but it is already questionable with reference to the law of other Christian Churches: if we take as an example the Church of England, the ordination of women to priesthood became an applicable law only after the English Parliament endorsed the measure approved by the General Synod.[9] When we come to other religions that do not have a centralized authority, like Islam and Judaism, the State quite frequently enacts and enforces rules that are considered to be religious in their content and nature: in the chapter devoted to Malaysia, Chew Li Hua underlines that "Islamic law is implemented via the numerous state legislations and rules passed by the State Legislative Assemblies on Islamic Law matters".[10] A different version of this argument underlines that religious rules are not part of the sources of State law,[11] which is basically

[6] Consequently, in a number of countries with a Muslim background, State laws make reference to Islamic law for the regulation of inheritance. See Rohe (2015, pp. 263–66).

[7] See Mazzola (p. 234): "En ce qui concerne les normes religieuses, la nature confessionnelle de celles-ci dépend, en général, de l'autorité d'où elles proviennent, c'est-à-dire que le caractère confessionnel de l'autorité législative donne la substance à la règle religieuse, quel que soit le contenu de celui-ci". See also Augsberg-Korioth (2016, p. 179) where, speaking of the self-determination of religious groups by means of religious rules, the latter are defined as "rules which derive from religious authorities and form a set of rules strictly separated from the law of the state": while "they mostly concern religious items", they "do not necessarily have a direct religious content". In the same vein see Martinez-Torrón (2016, pp. 358–59), Adragão and Leão (2016, pp. 305–07, with some nuances), Wolfgang Wieshaider (2016, pp. 80–81), and Fathally (2016, p. 315).

[8] It does not come as a surprise, then, that in countries such as Colombia, where the Catholic religion has had a strong influence on the development of the State legal system, the relationship between the State and the Catholic Church (and to a lesser degree also with other religious organizations) "is understood as a relationship between autonomous legal systems", so that Canon law is seen as "a legal system independent from the State" (Prieto 2016, p. 139). However, as correctly noted by Coriden (1991, p. 47) State laws and concordats are important sources of Canon law.

[9] See Holm-Oliva (2016, p. 380).

[10] See Chew Li Hua (2016, p. 253).

[11] See Martinez-Torrón (2016, p. 358): "the sources of the Spanish legal system are of secular nature, and no religious law – Catholic or other – is per se a legal source for State law". See also

true for most Western countries, due to the secularization of their State legal systems, but is not a tenable statement for many countries with a Muslim majority population, where *shari'a* is frequently listed among the sources of State law.[12]

On a general line, these content- and source-based criteria seem to reflect too closely the dualistic approach that is typical of Christianity, and insist upon a distinction between God and Caesar, religion and politics, Church and State, which does not have the same importance in other religious and legal traditions.

Aware of this problem, some legal experts prefer to focus on the organizational purpose of the religious rules and affirm that they are "the rules that religions develop for their own internal functioning".[13] This may be partially true for the modern Roman Catholic Canon law and for the law of other Christian Churches, that progressively reduced their scope to the discipline of the clergy and the activity of the ecclesiastical institution (see Ferrari 2002, p. 75 ff.). But Jewish and Islamic law did not experience the same shrinking process undergone by the law of many Christian Churches, and continued to discipline matters that affect almost all facets of the individual and collective life of the faithful and go well beyond the borders of a regulatory system of religious personnel and institutions.

Confronted with these difficulties, other legal experts claim that religious rules frequently have a supernatural and transcendent goal (the attainment of salvation, spiritual illumination, eternal life, etc.) that is extraneous to secular rules (see Ferrari 2002, p. 275 ff.; Sandberg 2011, pp. 172–74). While this statement is correct in many cases (the last provision of the Roman Catholic Code of Canon law says that "the salvation of souls […] must always be the supreme law in the Church"), sometimes it is difficult to see this supernatural character in rules that are normally regarded as religious and vice versa. The Koran *suras* devoted to the inheritance shares due to men and women are not so different from the provisions that could be found in many States' civil codes, while the Constitution of Ireland opens by stating that "all actions both of men and States must be referred […] as our final end" to "the Most Holy Trinity", a statement that could easily find place in a religious legal text.

Finally, many authors of this book underline that it is difficult – sometimes impossible – to disentangle religious from cultural rules (see, for example, Maoz, p. 215). Christians and Overbeeke (2016, p. 93) write that "courts do not seem to clearly distinguish culture and religion nor make a coherent distinction between cultural customs and religious traditions". This inability is not without consequences. The same authors go on to note that "it is possible to observe a strategy of balancing between a *cultural* understanding for previous dominant religious customs

Fathally (2016, p. 319).

[12] See Ferrari 2013, pp. 437–478. The same remark applies to Israel: although Jewish law is not explicitly mentioned among the sources of Israeli State law, it "serves as an important source of legislation and adjudication" (see Maoz 2016, p. 215).

[13] See Coertzen 2016, p. 345. Contra, Sandberg 2011, p. 174, who underlines that "in addition to fulfilling the purpose of order […], religious law also fulfils the deeper purpose of facilitating religious life".

(e.g. Sunday rest) and an accentuation on *religious* aspects to describe any minority practice. This variation of either cultural or religious understanding pushes the judge to deem neutral the former but not the latter" (Christians and Overbeeke 2016, p. 93). In this way, the classification of a rule as cultural or religious entails a different degree of acceptation (and therefore of legal protection) of a religious group in the public space. In some chapters of this book it is acknowledged that many State recognized holidays have a religious origin and their enforcement as general days of rest in a secular society and by a secular State is supported with the reference to their cultural significance. But this justification applies only to the majority religious festivities and days of rest and cannot be employed to recognize the festivities of minority religions without strong cultural roots in the country. It would be naïve and also dangerous to think that it is possible to draw a clear-cut distinction between religious and cultural rules: we need to accept the existence of a middle ground where these rules overlap and blend, and learn how to deal with this intermingling on a pragmatic basis (for example, maintaining the State recognition of the holidays based on the religion of the majority but allowing minorities to abstain from work on their religious holidays[14] or replacing some majority religious holidays that have a weak religious significance –think of Easter Monday in the Christian tradition – with holidays of different religions[15]), without denying the role and significance of cultural heritage but considering it as a living entity open to change.

What conclusion can be drawn from these remarks? Religious rules cannot be defined in a comprehensive and clear-cut way because religion itself – its nature, content, characteristics – cannot be defined in abstract from the cultural setting of which each religion is part (see Asad 1993, pp. 27–54; Cavanaugh 2009, pp. 57–122). This conclusion does not mean we cannot understand what religion and religious rules are: it means that our understanding is inevitably embedded in history and culture. More precisely, while there are a number of rules that are regarded as religious in many cultural and geographical regions of the world (the rules concerning liturgy, for example), there is also an equally wide grey area where the distinction between religious and non-religious rules depends on the cultural traditions prevailing in a specific part of the world and in a specific period of time. The operative indication stemming from this conclusion is that we need to apply a fairly wide and comprehensive criterion, qualifying as religious rules all the "commands and injunctions […] posited by conscious manifestations of belief that may or may not have to do with traditional religions (as Roman Catholicism, Protestantism and Judaism), but that play, in the lives of people, a role analogous to that played by traditional religious commandments".[16] Although not exempt from criticisms,[17] this

[14] As it happens in a number of countries, including Belgium, Austria and Italy.

[15] An experiment that, to my knowledge, has been carried out nowhere in the world.

[16] Reis 2016, p. 120. Also Christians and Overbeeke (2016, p. 93) note that "«religious rules» are often (and even wrongly) referred to norms coming only from recognized religion", while "the judiciary seems to be reluctant to take into account religious "rules" affirmed by non-recognized churches or traditions".

[17] Mainly based on the fact that, in this scenario, traditional religions would provide the yardstick to assess the religious nature of new religious doctrines or practices.

concept is the "most suited to the dynamic character of religious phenomena" and, encouraging the inclusion of different religious experiences and manifestations, "is most adequate to the requirements of neutrality on the part of law and the state in an increasingly plural and diversified social scenario" (Reis 2016, p. 120).

Tensions

The chapters of this book show that the widespread tensions between religious rules and State law do not have a recognizable pattern: tensions emerge in different areas of the State-religions relationship and do not depend on variables such as the existence or absence of a system of religious jurisdiction or of religiously based personal laws. These tensions can have different manifestations according to national historical backgrounds and legal systems, but affect equally secular and confessional States as well as countries with different religious majorities and State-religion systems. It is then natural to wonder whether religious rules have some structural characteristics that can help to explain these tensions with State rules. I am aware it is a dangerous question that can easily be regarded as tainted by an "essentialist" approach. However, branding this question as one of essentialism and dismissing it without further consideration is not the right answer. I am not arguing that the tensions between religious and State rules can be explained with exclusive reference to their different "essence" or "nature": I am saying that the particular features of religious rules cannot be ignored when taking into account the various historical, social, and cultural factors that explain the country-specific manifestations of these tensions. Two examples can be helpful to elucidate this statement.

Personal-Territorial

This tension stems from the fact that most State laws have a territorial area of application while most religious norms have a personal area of application. Religious norms follow the member of the religious community wherever he/she is: from their point of view national borders are scarcely relevant. On the contrary, State norms do not apply beyond the borders of the State, except in limited and carefully circumscribed cases. Of course there are exceptions to this rule on both sides: Islamic law knows the difference between *dār al-Islām* and *dār al-Ḥarb* and in certain circumstances Israeli law can be applied to Jews living outside Israel (see Maoz 2016, p. 218). Nevertheless, these exceptions have a limited scope and do not affect the general validity of the principle that religious laws, like human rights law, "are able to transcend the law of the land and to survive the crisis of traditional State-based sovereignty" (Ventura 2015, p. 162).

This personal-territorial tension is an ancient one. In nineteenth century England Catholics were called "papists" because they obeyed an authority, the Pope, who

lived outside the State: as a consequence they could not be fully trusted as English citizens and their political rights were curtailed. Something analogous happened in France, where the most conservative Catholics were called "ultramontanists" because they looked for guidance beyond the mountains (the Alps) to the Roman Pontiff. After the First World War this mistrust declined[18] but recently it revived again: many European States are uneasy with their Muslim citizens or residents who listen to *fatwas* pronounced in Cairo or Mecca and tend to consider this behavior a threat to national security (see Laurence 2012, p. 132 ff.). The same happens in some predominantly Muslim States of North Africa and Middle East. Arab Christians are looked upon with suspicion by part of the Muslim population, which thinks that it is impossible to be truly Arab without being Muslim.

For a long time this tension was successfully governed through the secularization of the State legal system and, in a small number of residual cases, through the tools provided by international private law (IPL). Now the secular character of the State is increasingly questioned and the IPL tools are becoming less and less effective because the people who are giving rise to these tensions are no longer foreigners but citizens. National States feel threatened by the ability of the great religions to overcome national borders and to provide citizens of different States with a supranational bond and identity. Governments are in search of new tools to grant social cohesion but are uncertain between two different strategies: reaffirming the exclusiveness of State law as a way to recreate a strong national identity, or accommodating religious laws within the State legal system as a way to "domesticate" religions and exploit their new power in favor of the State.[19] How much room is left to the application of religious rules in a State legal system depends on the choice between these two strategies.

Autonomous-Heteronomous

This second tension attains an even deeper level as it directly questions the foundation of law itself. The problem had already been underlined, more than a century ago, by Max Weber, who pointed to the fact that it is impossible to proceed to a full rationalization of religious rules (see Weber 1978, p. 809 ff). Just because their foundation is heteronomous and is attributed to an authority that is external and superior to human beings, in the legal systems of most religions there is a core set of rules that cannot be explained in purely rational or ethical terms. The strength of this set of rules does not reside in their ethical or rational foundation, nor can it be explained by reference to tradition and customs only: they are obeyed simply because they are dictated by God (for some religions) or rooted in the cosmic order

[18] For an analysis of this change see Ferrari 2006, pp. 625–639.

[19] The State-supported creation of representative organizations of "moderate Islam" in many European countries is an example of this strategy. See Laurence (2012).

(for others).[20] To give a few examples, the Jewish prohibition of eating meat and milk together may have been supported, at its origins, by reasons of practical nature, but today it is respected only because observant Jews consider it an expression of God's will, not because it has a rational basis or responds to an ethical imperative; the debate on the ordination of women to priesthood has been closed by the Roman Catholic religious authorities with the statement that no human being, not even the pope, can modify what is taught on this point by the Tradition, which is part of divine revelation.[21] From this perspective, the compelling strength of a religious precept is based on its origin from a power that comes from outside, and is accepted because of this origin. Although these remarks apply only to a limited number of religious rules (while the majority of them can easily be defended on rational and/or ethical grounds), there is a difference with secular rules, whose legitimacy, at least in the States inspired by liberal constitutionalism, is based on the will of citizens and is explained with reference to their rational or ethical nature. This lack of rational or ethical justification explains the suspicion with which some religious rules are considered in contemporary Western society, as shown by the recent and heated debates on Jewish circumcision, ritual slaughtering or the Roman Catholic ban on female priesthood.

This tension between the heteronomous and autonomous foundation of religious and non-religious rules should not be exaggerated. Elements of heteronomy can be found in the law of some non-religious organizations (the military, for example), while religious organizations have always strived to find ethical and rational explanations for the observance of their divine or cosmic law. But a margin of diversity remains: the ultimate foundation of the religious rules can be found neither in reason nor in human conscience, but in a reality that is external to both. Sometimes – perhaps even most of the time – there is no conflict between what is dictated by reason and human conscience on the one hand and what is commanded by this transcendent reality on the other. But the latter is never fully reducible to the first two. This tension also has an impact on the recognition of religious rules within the State legal systems as States are afraid that broadening the space for religious laws paves the way to uncontrollable dynamics based on principles and values that are incompatible both with State law and with human rights.[22]

[20] An echo of this conception can be found in Maoz (2016, p. 215) where he refers to the clashes between State and religious organizations due to the fact that the latter "regard their powers as emerging from God Almighty".

[21] See the Apostolic letter *Ordinatio Sacerdotalis* 22 May 1994, http://www.vatican.va/holy_father/john_paul_ii/apost_letters/1994/documents/hf_jp-ii_apl_19940522_ordinatio-sacerdotalis_en.html, n. 4.

[22] The somewhat disproportionate reactions to the Archbishop of Canterbury's invitation to make room for Islamic law within the borders of the UK legal system are a good example of these fears. See Williams (2008, pp. 262–82) and, for the ensuing debates Bradney (2010, pp. 299–314).

Strategies and Tools

The States deal with these tensions through different legal strategies and tools that reflect the different historical, social, and cultural background of their country. In most cases various strategies overlap, at least partially, in the same country. However, it is frequently possible to identify a prevalent trend that largely determines the choice of legal tools. Strategies can be classified according to the different importance given to community and individual rights[23] on the one hand and to religious freedom and equality on the other. Some strategies favor group rights and collective religious freedom, giving a lesser position to individual rights and equal treatment of citizens. Others give the precedence to the rights and freedoms of individuals in a framework dominated by the notions of equality and non-discrimination.

Community Oriented Strategies

A first set of strategies is focused on group rights and obligations. The community takes center-stage and rights and obligations are attributed to the group. Individual rights may be limited as a consequence of group membership, and the emphasis is placed more on the respect of religious diversity than on the protection of citizens' equality, irrespective of their religious convictions. Different examples of community-oriented strategies are provided in the chapters of this book.

1. *Minority rights*. Minority rights can come in different forms but they all are grounded on the idea that religious minorities (whose definition and identification is not a simple matter in itself: see Rivoal 2010, pp. 718–25) are entitled to enjoy a set of rights aimed at making up for the disadvantages inherent in their minority status. A first example is provided by Greece, where the Muslim community living in Thrace enjoys certain privileges concerning family and inheritance law. Disputes on questions related to these matters are solved on the basis of Islamic law and are attributed to the jurisdiction of the religious leaders of the Muslim community, the Muftis. In Greece's case, minority rights have been granted through international law instruments: the status of the Muslim community of Thrace is defined in the Treaty of Lausanne, concluded in 1923.[24]

   A second example is provided by Singapore where Art. 152 of the Constitution grants State protection of the (*inter alia*) religious interests of the Malay community, which consists overwhelmingly of Muslims (see Thio 2012, pp. 446–69; Thio 2008, pp. 73–103). This protection extends primarily to

[23] The new centrality acquired by the tension between individual and collective freedom of religion is underlined by Casanova (2012, pp. 140–41).

[24] On the minority rights system governing the Muslim community of Thrace see Akgönül 2009, pp. 279–292.

matters of family law (like in Greece) that are regulated by the Muslim community itself, through the operation of special *Shari'a* courts. The analogy with Greece is quite obvious and is reinforced by the fact that, like in Greece, "no other religious community has a structure for its religious law established by statute"[25] or special courts in charge of the application of its religious laws. However, there is a difference concerning the tools adopted to implement this strategy. In Greece they are provided by international law, while in Singapore the protection of the Islamic religious minority is based on constitutional law. It is not a small difference. The special regime for the Muslim community in Thrace has been largely imposed upon Greece as part of a larger settlement concerning the definition of the borders with Turkey after the collapse of the Ottoman Empire. This fact explains the "exceptionalism" of the Greek case, as religious minority protection systems are unusual in Western European countries (see European Consortium for Church-State Research 1994; Bastian and Messner 2007). The special regime for the Muslim community in Singapore is a domestic-found solution to the problem of the Muslim/Malay community, which represents "the indigenous people of Singapore" (Art. 152 Cost.).

Minority rights systems are not exempt from criticisms. In particular, they are sometimes blamed for fostering segregation and preventing the consolidation of a tradition of shared and equal citizenship. These criticisms are based on the conviction, strongly rooted in the post-Second World War declarations of Human Rights, that recognizing individual rights is sufficient to provide members of minorities with all the freedoms they need. In line with this approach, Art. 27 of the 1966 International Pact on Civil and Political Rights addresses the issue of minority rights in terms of rights of individuals who belong to a minority, without considering minorities as subjects of collective rights. Only in the last 20 years has this individualistic perspective been partially balanced against the recognition of States having the obligation to protect the existence and identity of minorities,[26] but this protection has been much more effective in relation to racial than to religious groups. In conclusion, while the issue of minorities has gained importance since the last decade of the twentieth century, minority rights have never become the main tool to protect religious minorities, whose problems have been and still are largely addressed through the general provisions on freedom of religion (see Ghanea 2012, pp. 57–79).[27]

[25] Although "for the Sikh and Hindus communities there are also State recognised bodies that administer the affairs of these communities" (Jamal 2016, p. 330).

[26] See the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992. However this Declaration, after affirming in Art. 1 that States have the obligation to protect the existence and identity of minorities, in the following provisions falls back on the traditional notion that only individuals can be right-holders.

[27] The examination of the case-law both of the UN Human Rights Committee and of the European Court of Human Rights confirms that "when religious minorities face discrimination and persecution as a group […] their case is addressed under the "freedom of religion or belief" umbrella in international human rights and not under minority rights" (Ghanea 2008, p. 309).

2. *Personal laws*. A different example of these community-oriented strategies is provided by the systems of personal law that are in force in South Africa, Malaysia and Israel (on systems of personal law see Aoun 2009). They are different from the minority rights systems because they are not restricted to minorities but apply to different groups, be they the majority or the minority(ies) of the population. In other words, it is not a matter of protecting minorities, it is a matter of conceiving society as a group of communities, each of them governed by their own rules. This is clearly expressed by Art. 15(3)(a) of the South African Constitution which states that previous constitutional norms do not "prevent legislation recognizing […] systems of personal or family law under any tradition, or adhered to by persons professing a particular religion".

   Israel, Malaysia and South Africa reflect well the variety of personal law systems. They may be limited to personal status and family law matters (as in Israel, where a significant process of limitation of the scope of personal law is in progress: see Maoz 2016, p. 217) or extended to some parts of criminal law (as in Malaysia as far as Muslims are concerned: see Adil and Ahmad 2016, p. 269); they may regard religious as well as ethnic communities; they may leave the citizens the possibility to choose between different systems (like in South Africa: see Coertzen 2016, p. 352[28]) or compel them to stick to the one established by their religion[29]; they may be supported by a system of religious adjudication (like in Israel but not in South Africa) which may be exclusive or concurrent[30] with other systems and so on. However, systems of personal law share at least one common feature: the legal status of citizens is not the same but is more or less largely defined by their religious (or ethnic) affiliation. This is true, not only in those areas of personal life and social relations that, in a Western and indirectly Christian perspective, would be considered "religious", but also in areas that (in the same perspective) would be regarded as "secular" and as such subjected to State law and to the principles of equal treatment and non-discrimination.

   Like the minority rights system, the personal law system also presents some problematic features, particularly when the membership of the individual in the group is not based on a personal choice but on involuntary ascription due to birth (for a list of these problematic features see Woodman 2008, p. 36). However, even when the right to leave the group is granted, personal law systems do not

[28] For a description of the system of personal law concerning marriage and family in South Africa see van der Vyer (2012, pp. 200–218).

[29] The Malay legal system includes both options: while Muslim citizens cannot conclude a valid civil marriage, as they do not have the option to choose secular laws when the matter falls within the jurisdiction of the *shari'a* courts (see Adil and Ahmad 2016, p. 269), non-Muslim citizens can perform a religious or a civil marriage. On this point see also Thio (2008, p. 79).

[30] In Israel "all religious courts have exclusive jurisdiction in matters of marriage and divorce of members of their respective communities" while "in other matters of personal status some courts enjoy exclusive jurisdiction while others exercise concurrent jurisdiction with the Civil Courts" (Maoz 2016, p. 212). In Malaysia *Shari'a* courts enjoy exclusive jurisdiction (see Art. 121 of the Federal Constitution of Malaysia 2016).

fully conform with the philosophical and legal principles underlying the declarations and conventions on human rights (and the constitutions of many States), based on a concept at the same time universalistic and individualistic of human rights. This concept goes back to the time of the Enlightenment and has been admirably summarized by the French politician Clermont de Tonnerre in 1789 with the sentence "we must refuse everything to the Jews as a nation and accord everything to Jews as individuals". Though formulated more than two centuries ago with reference to a specific religious group, this statement maintains its significance in today's debate and still serves as a reference point for those who believe that "l'émancipation se fait par l'accès à la citoyenneté et donc à des droits universels et abstraits et non pas par la reconnaissance de droits collectives spécifiques" (Woehrling 2007, pp. 134–35, with reference to the French strategy of minority integration).

This notion of citizenship supports the conviction that protection of freedom of religion and belief is better granted through universal rather than particular norms and therefore is unfriendly to the recognition of collective and particular rights connected to group membership.

Individually Oriented Strategies

The legal systems of other countries are more individually oriented, in the sense that center-stage is given to the individual whose rights to religious freedom and equal treatment are granted by the State. This does not mean that collective rights are unknown in these legal systems. However, they do not have a pivotal position, so that religious membership has a limited impact on the definition of the legal status of citizens.

In this book chapters concerning the countries that are part of this group, the statement "there is no system of personal laws based on religious affiliation" is recurrent (see Augsberg-Korioth 2016, p. 180, b; van Bijsterveld 2016, p. 281; Martínez-Torrón 2016, p. 360; Fathally 2016, p. 319; Christians and Overbeeke 2016, p. 103; Holm-García Oliva 2016, p. 381; Schanda 2016, n. 2.2; Adragão and Leão 2016, pp. 298–300; Reis 2016, p. 126; Kiviorg 2016, p. 163). This statement is basically correct but it does not mean that a citizen's religious affiliation is completely irrelevant in the definition of his/her rights and obligations. For example, as noted in the chapter devoted to Portugal, State "law gives relevance to personal religious affiliation of citizens, allowing some degree of "choice of law" concerning marriage" (Adragão and Leão, pp. 298–300): this means that citizens professing some religions can perform religious marriages that are recognized by the State, while members of other religions are bound to celebrate a civil marriage, a religious marriage being impossible or devoid of civil effects. The same system, with some variants, is in force in Italy (see Ventura 2013, pp. 157 and 211–12), Spain (see Martínez-Torrón 2016, n. 1.3) and other countries. In Italy only students professing the Catholic religion have the right to receive the teaching of their religion in public

schools: students professing other religions do not enjoy this right but have the mere possibility to receive classes of their religion if a number of conditions are met (see Ventura 2013, pp. 198–208). In the United Kingdom only a member of the Church of England can become the head of the State (see Hill 2007, pp. 12–13). Therefore the declaration that no personal law system is in force in these countries must be understood in the sense that there is no substantial and coherent set of rules encompassing a whole area of legal relations (family, inheritance, etc.) that applies to citizens according to their religious affiliation.

A similar remark can be made with reference to systems of religious adjudication.[31] Also in this case it is frequently noted that the State legal system "does not allot formal jurisdiction to religious courts" (Wieshaider 2016, p. 86; see also Adragão and Leão 2016, pp. 305–06; Schanda 2016, p. 202; Christians and Overbeeke 2016, p. 107; Reis 2016, p. 129; Martínez-Torrón 2016, p. 362; Augsberg-Korioth 2016, p. 182; Kiviorg 2016, p. 163; Holm-Garcia Oliva 2016, p. 385) and also in this case such statement has to be qualified. In Austria, for example, the nomination and dismissal of the professors of the Roman Catholic Theological Faculties (which are part of State Universities) is decided by the competent Catholic bishop and "the professors have legal remedies only within Canon law" (Wieshaider 2016, p. 87). In a number of countries the Roman Catholic court decisions on the nullity of marriage have civil effects in the State legal system, without "any kind of judicial review on the part of State courts" (as in Colombia: Prieto 2016, p. 141) or provided they are confirmed by the competent State courts (as in Italy, Spain, and Portugal). In England and Wales the Church of England courts, which adjudicate upon issues falling within the scope of the Church jurisdiction, "are at the same time State courts" (Holm-García Oliva 2016, p. 385). In the Greek peninsula of Mount Athos "minor offences of common penal law and police violations" are judged by ecclesiastical bodies (Papadopoulou 2014). More generally, the courts of many States are inclined to affirm the exclusive competence of religious courts in matters concerning the relations between the members of a religious community, such as the excommunication of one of them or the dismissal of a minister by the competent religious authority.[32] As in the case of personal laws, the absence of a system of religious adjudication has to be understood in the sense that there are no religious courts with a general competence in a specific legal field, not in the sense that there are no cases in which decisions of religious courts have effects in the State legal system.

However, it is not only a matter concerning the scope of recognition granted by State law to religious provisions and jurisdiction. There is a deeper difference that is highlighted by the distinction between State (or weak) legal pluralism and legal pluralism "conceived as the coexistence of two or more autonomous or semi-autonomous legal orders in the same time–space context" (Twining 2010, pp. 488–89; see also Turner 2016, p. 62). In contrast to the States that follow a

[31] For an overview of the legal systems of the European Union countries see European Consortium for Church and State Research (2014).

[32] The borders of this jurisdiction are sometimes uncertain and disputed. See Adragão and Leão (2016, pp. 305–06).

community-oriented trend, States that implement individual-oriented strategies fall more in the first group than in the second: they try to accommodate some specific religious rules within the State legal system, but are far from recognizing an autonomous or semi-autonomous religious legal order (except perhaps when the internal autonomy of religious organizations is at stake).[33] As noted by Alessandra Facchi in relation to Europe, "apart from cases of long-established communities, in contemporary multiethnic European societies we seldom find ourselves dealing with legal systems, "social bodies" or "semi-autonomous social fields" – namely, groups able to create or apply their own independent legal systems. We are more likely to find individuals who follow rules deriving from different legal systems […] norms that are neither systems nor institutions" (Facchi 2007).

A second difference between the community- and individual-oriented legal systems is shown by the default role played by State law. As a rule, the States following the latter trend have put in place a default mechanism that is available to citizens of whatever (or no) religious faith: in all these States, for example, it is possible to celebrate a civil marriage that is indistinctly accessible to all citizens, including those who have the option (but, according to the law of the State, not the obligation) to perform a valid religious marriage in compliance with their religious affiliation. This is not the case for a number of States (Israel, for example) included in the first group.

At the end of these remarks, a question is still unanswered. How do the countries of this second group deal with the demand for legal pluralism deriving from the increasing religious diversity of their populations? They do not make use of minority rights, personal laws or religious adjudication. What legal tools are implemented in their place?

To answer this question, we need to identify the main reason behind the rejection of these models of regulation of relationship between State and religions. They are not unknown in the history of these countries: actually, most of them have had a long past of personal statutes, religious courts and special laws for religious minorities. But they were progressively abandoned in connection with the strengthening of the conviction that freedom of religion can be better granted through equal treatment of citizens than through the legal recognition of religiously-based diversity. The most powerful instrument to achieve this goal – that is, to ensure freedom through equality – has been the secularization of the legal system that, expelling from it the rules that are based on and reflect the tenets of one or more religions, can ensure that all citizens are subjected to the same legal provisions.[34] The secularization of the legal system was directed against both confessional States and religiously-based personal laws: both were considered to endanger and limit religious freedom through the pressure put on individuals by the State or the religious communities. In this perspective, a secular legal system did not only grant the equal treatment of citizens: putting an end to the privileges and differentiations that are inevitably con-

[33] See infra, at the end of this section. For a discussion of autonomous and semi-autonomous orders in relation to religious issues see Sandberg (2015, pp. 10–11).

[34] For some consideration on this process of legal secularization see Ferrari 2014, pp. 25–40.

nected to the existence of confessional States and personal laws, it gave citizens the power to make their religious choices in absolute freedom, knowing that their religious decisions had no impact on the enjoyment of their civil and political rights.[35]

At this point it is helpful to consider that the chapters collected in this book show that this individual-oriented strategy is prevalent in the Western countries, that is in the countries where the influence of Christianity has been stronger. Their more or less implicit Christian background was instrumental in developing the idea that it is possible to distinguish two dimensions of human life, presided by two different authorities: one temporal, secular, profane and the other spiritual, religious, sacred.[36] The matters pertaining to the first area are placed under the control of the State, which applies secular rules based on the equality of citizens[37]; the affairs concerning the second are left to the religious authorities' guidance, which enjoy (within limits) the freedom to deviate from non-discrimination and equal treatment rules in their own domain. From this perspective, religious rules maintain their significance in the religious sphere but have only a residual relevance in the secular sphere. And, as the practical distinction between the two spheres took shape at a time when nation States wanted to affirm their undisputed sovereignty over their subjects, most of the subject matters that were at the border of the two spheres – *res mixtae* in the language of Canon law: family law, marriage, education, welfare, and so on – were attracted into the sphere of competence and regulation of the State (see on this process Modéer 2012, pp. 30–31).

This chain of events explains why, in the countries included in this group, State recognition of religious rules is much less widespread. The State legal system does not give them the power to regulate entire areas of human affairs (as it happens in the countries belonging to the first group) but deals with them on an *ad hoc* basis, through instruments that give effect in the State legal system only to those religious rules that are required to avoid tensions and govern conflicts.[38] In most cases this happens by employing legal techniques that are not specific to State-religions relations but are of general use. State recognition of the private autonomy of citizens and legal entities is a good example: in Austria "partners in commerce may validly

[35] This point is nicely made by Sophie van Bijsterveld (2016, p. 282), who underlines the connections between secularization, equal treatment, and freedom of religion: "The Dutch legal system excludes a system of legal pluralism based on religion. That would be contrary to the constitutional norm of equal treatment regardless of religion or belief. Secular law is the law applicable to all; this law guarantees freedom of religion. Being subject to religious law always includes an element of choice".

[36] Adragão and Leão (2016, p. 295) underline that "the constitutional and democratic State of western matrix […] considers State and religion as "differentiated sphere", autonomous and separated" (n. 3). The impact of this distinction on the building of the modern public sphere as a secular entity is underlined by Asad (2003).

[37] In the past, when confessional States were widespread in Europe, States were largely in control of these temporal matters but had the obligation to manage them through provisions that respected the principles of the State religion. In this sense such provisions could not be regarded as secular rules, at least according to the meaning this expression has in contemporary language.

[38] This is particularly evident in countries with a common law tradition: see Sandberg (2011, pp. 183–84).

agree on closing their shops on certain religious holidays, which are not generally recognized by the State" (Wieshaider 2016, p. 84) and in England and Wales a religious school can establish a preferential channel for the admission of students who are members of the religion professed by that school (see Holm-García Oliva, p. 383). International private law is another (see van Bijsterveld (2016, p. 285); Wieshaider (2016, p. 83); Christians and Overbeeke (2016, p. 103); Adragão and Leão 2016, pp. 302–03): within the limits of public order, a State can give effect to religious rules that are valid in the legal system of another State. Exemptions from the laws of general application is another widely applied legal technique. Many States have enacted laws that exempt students from attending schools on certain days (see Wieshaider, p. 84), citizens from serving in the military, and medical doctors from performing abortions. In all these cases the religious convictions of an individual are considered to be a legitimate reason for claiming an exemption from complying with a law that should otherwise be respected.[39] Close to the case of exemptions from laws of general application is the case of conscientious objection[40]: in those States that recognize a right to conscientious objection, like Colombia (Prieto 2016, pp. 148–49), most claims are based on religious convictions.

In other cases States have created legal tools that are specific to State-religion relations. One of the most frequently used is the conclusion of concordats and agreements between States and religious communities, like those in force in Portugal, Spain, Italy, Germany, the Czech Republic, Austria, Brazil, Colombia and other countries. They usually contain the specific regulation of certain issues – the teaching of religion at school, financing of religious communities, State recognition of religious marriages and so on – in which religious norms are given direct or indirect application in the State legal system. Another frequently employed instrument is the enactment of laws on freedom of religion or religious associations. They may have different content and, unlike concordats and agreements, are of general application and deal with problems that concern citizens of different faiths. However, frequently they also include provisions that answer the needs of the faithful of a specific religion.

Similar remarks can be made when we move from the area of legislation to that of adjudication. While rejecting religious adjudication, some States accept religious arbitration in the framework of their conflict resolution system: in this case a religious body can act "as an arbitration body in relation to matters that are arbitrable" according to the law of the State such as, in England and Wales, wills (Holm-García Oliva 2016, p. 386).[41]

[39] See, among others, Martinez-Torrón (2016, pp. 368–69), van Bijsterveld (2016, pp. 285–86), Adragão and Leão (2016, pp. 304–05). Sometimes these exemptions are very specific, like the English law allowing Sikh construction workers to wear a turban rather than a hard-hat (see Holm-García Oliva 2016, p. 384).

[40] For a discussion of conscientious objection (and its difference from exemption from legal obligations of general applicability) see Martínez-Torrón (2015).

[41] For a detailed examination of the Arbitration Act 1996 and of the limits it places on the adjudication power of religious courts, see Sandberg (2011, pp. 184–88). More generally on Muslim arbitration bodies in Britain see Bowen (2013, pp. 129–45). See also Wieshaider (2016, pp. 86–88).

Religious rules have a stronger position in the State legal system when the internal autonomy and self-administration of religious organizations are at stake. Most States of this group recognize "in general, the right of a religious organization to apply its own rules to the legal relations that take place within the religious organization itself or within institutions that are owned or managed by the religious organization" (Adragão and Leão 2016, pp. 301–02; see also Prieto 2016, p. 138) and, as already mentioned, most State courts recognize the jurisdiction of religious courts in this field (see European Consortium for Church and State Research 2014), sometimes with some limitations (see Papadopoulou 2014, for Greece; Friedner 2014, for Sweden). Here States are ready to accept important deviations from the rules that discipline the internal organization of non-religious associations and corporations, softening – or even giving up – the enforcement of the principle of non discrimination (see Adragão and Leão 2016, pp. 301–02). As a consequence religious organizations can apply rules – for example, excluding women from leadership positions – that could not be applied in other organizations and associations. In many countries this deference to religious rules extends to religiously-inspired institutions like schools and hospitals. Their activity is regulated by State law through particular provisions that reflect their religious orientation and, once more, allow them to apply rules – for example dismissing employees for reasons connected to their private life – that would be unacceptable in the corresponding secular institutions (see Prieto 2016, pp. 146–47). These exceptions are defended as a consequence of the principle of separation and the ensuing State incompetence to regulate the internal organization of religious communities and institutions, considered to be strictly connected to their spiritual mission. Interestingly, the terms 'separation' and 'incompetence' are conspicuously absent in the chapters of this book concerning Israel, Malaysia, Singapore, and South Africa. It is further proof of the cultural roots of legal categories and, in this case, of the weight of the Christian cultural background in the legal systems of Western States.

In conclusion, it would be wrong to affirm that the States pertaining to this second group do not know rules that refer to personal laws and religious adjudication. But it is correct to state that these rules do not have the breadth and the strength that personal laws and religious adjudication have in the countries of the first group. These laws and systems of adjudication are – if not exceptional – at least unusual legal instruments in a context that is dominated by the principle of equal treatment of citizens and of the irrelevance of religious affiliation in the definition of civil and political rights.

For a general overview of the law in force in the European Union countries, see European Consortium for Church and State Research (2014).

Conclusions

In this introductory chapter the dichotomy between individual and community rights on the one hand and equality and liberty on the other has been employed to read and systematize the data concerning the tensions between State law and religious rules, that are provided by the contributions collected in this book. The analysis shows that in some countries the guiding principle that determines the room given to religious rules in the State legal system is the protection of individual rights and equality of citizens, while in others, more emphasis is placed on the respect of community rights and freedoms. The latter group is likely to provide religiously-inspired systems of personal laws and adjudication, that are instead considered with some suspicion in the countries included in the first group, fearful that the equal treatment and individual rights of citizens are jeopardized by the recognition of group rights. This distinction between two groups of countries is largely a distinction between two ideal-types because, as already highlighted, in the legal system of each country these two orientations –individualistic and egalitarian on the one hand, communitarian and libertarian on the other- coexist and combine in different ways. However, drawing on the chapters devoted to national legal systems, it is often possible to identify a prevailing orientation in each country and observe that there is a deepening and widening rift dividing legal systems that privilege individual rights and equal treatment of citizens on the one hand and legal systems that stress community rights and freedoms on the other. This rift is rooted in competing conceptions of religion and religious freedom that are emerging with increasing clarity due to the process of globalization. In other words, the rift has been there for a long time but never before people who have been raised within these two different cultural universes have been so strictly intertwined in the same living space. This intermingling is one of the explanations behind the tensions created by religious diversity in many countries and particularly in the Western ones.

What to do, then? What conclusions can be drawn after reading all the chapters of this book? What suggestions does it offer in regards to managing these tensions? The reader would be disappointed if he/she looks for an answer to the following question: what is the State legal system that grants citizens the best chance to live their lives according to their religious (or non-religious) convictions? There is no answer because the question is wrong. It assumes that legal systems can be compared by abstracting them from their social, cultural, historical, and political background. For this reason the correct question is: what can be done by each legal system to give citizens the opportunity to live according to their religious (or non-religious) convictions without endangering social cohesion and fostering (auto) segregation?

Countries that follow community-oriented strategies are frequently accused of encouraging exclusion and segregation through the perpetuation of separate legal orders and systems of adjudication, endangering the respect of equal treatment of citizens and tolerating more or less serious violations of non-discrimination rules within religious communities (see Zapfl-Helbling 2009, pp. 293–302; Fretwell