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Religious minority rights in EU countries. What protection?

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Introduction. The debate on the rights of religious minorities seems to have been stuck in a sterile juxtaposition between equal rights for all and special rights for minorities and/or their members. That is why, before addressing the European context, a short summary of the debate on the need to give minorities a specific legal protection may be helpful. The conclusions highlight that a combination of freedom of religion and protection of religious identity can offer the best chances both for minorities and majorities.

Materials and methods. Once the terms of this debate have been described, it will be possible to discuss whether there is "a European way" to address the issue of religious minority rights, and how effectively it answers the need for the protection and promotion of religious minority identity.

Results. Some minority rights scholars believe that fundamental rights, including that of religious freedom, in their current formulation and interpretation do not provide adequate protection for religious minorities. On the other hand, many law and religion scholars are concerned about the weakening of respect of the right to religious freedom, subject to increasing violations in every part of the world. We live in a historical period in which both the right of religious freedom and the rights of religious minorities are threatened by the resurgence of nationalistic drifts, often defended through invocation of the role played by a specific religion in developing the identity and the culture of a people.

Conclusions. It is important that minority rights and law and religion scholars join forces to reflect on the synergies between freedom of religion and religious identity. Protecting and developing the religious identity of minorities is a way to strengthen freedom of religion for all, as this latter right is indivisible. A society where only religious majorities are free is not a society that respects freedom of religion. Better defining, within the framework of universal and indivisible human rights, the specific state obligations towards religious minorities and the special measures that states should adopt to ensure appropriate conditions for the preservation and development of group identity which go beyond what follows from universal human rights, goes well beyond the interests of religious minorities and concerns every human being.

Key words: religious minorities, freedom of religion, universal human rights, legal protection, law and religion scholars.

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Introduction. Why religious minorities need to be protected

The debate on the need to give minorities a specific legal protection is grounded in an apparently very simple principle: a minority is a vulnerable group that has the right to be legally protected[1]. Even in a democratic state, the vulnerability of minorities does not disappear, since the mechanisms of democracy entail that political decisions are taken by the majority and thus leave open the possibility that the majority use its power to oppress minorities. One of the most controversial decisions concerning the freedom of religion of a religious minority – the ban on the building of minarets in Switzerland – has been taken by a popular referendum, that is through a decision-making process that is democratic by definition (on this issue see: [16; 23]).

Therefore, the guarantees that the human rights attribute to all individuals and groups must be supplemented by further guarantees for minority groups or, at least, for the individuals who are part of them. The rights recognized to minorities can be attributed to the group or, as more frequently happens, to the individuals who compose it [13, p. 356].

Not all minorities have the right to this additional protection, which is usually reserved to national, ethnic, linguistic and religious minorities. Moreover, according to the prevailing legal doctrine, even these protected minorities do not enjoy this particular protection if they are in a dominant position or, in the case of national minorities, if they are not comprised of citizens (it should be noted that the latter is controversial) [20, pp. 56–57].

In any case, the whole system that international and constitutional laws have developed to protect minorities is based on the principle that the mere fact of constituting a minority places a group of people at a disadvantage. This disadvantaged position does not depend only on the fact that the majority has the power to approve measures that may penalize minorities. Even when the majority refrains from doing so, decisions and rules that are apparently neutral may be the product of a culture and legal policy that depends on the majority's convictions (including unconscious and implicit)[2].

[1] It is possible that a minority is in power in a country and therefore does not present the characteristic of being vulnerable. This is the reason why many minority definitions exclude the numerically minority groups that are in a position of power with respect to one or more numerically larger groups. (See Francesco Capotorti's definition of minority in: Study of the right of persons belonging to ethnic, religious and linguistic minorities, UN doc.1/E/CN.4/Sub.2/384/Rev.1, §.568).

[2] This is one of the two arguments put forward by Kymlicka to support the need to attribute specific rights to minorities; the other argument hinges on the need of minorities to obtain recognition of their cultural identity. See: [15, pp. 60–61].

Materials and methods

Even in today's secularized Europe, a significant part of family law or, to a more limited extent, labor and criminal law is imbued with elements deriving from Europe's Christian tradition and, indirectly and even unintentionally, plays in favor of the Christian majority in comparison to non-Christian religious minorities.

The very idea of state secularism, which has been long and bitterly fought by many Christian churches, is an implicitly Christian idea [8, pp. 25–40] that, according to Talal Asad and others, is based on a separation between religion, politics and the law that is functional to the Christian doctrine but not, for example, to the Muslim one [2, p. 28].

Should the majority wish to get rid of their cultural and historical background to attain a chimerical position of neutrality, they would not be able to. Therefore, the advocates of minority rights conclude that the only realistic way to prevent minorities from living at a permanent disadvantage is to provide rules that protect them from the interference of the majority. The right to develop one's identity is one of the two pillars of the system of minority protection (the other is non-discrimination) [11]. However, the provisions contained in the treaties and laws devoted to minorities go beyond the obligation of protection; they also impose on the state the duty to promote their identity[1]. This obligation translates into normative language the belief that the existence of minorities, by contributing to the common good in terms of their own values and interests [26, p. 160], enhances the social pluralism that is a fundamental condition of a democratic state[2]. In conclusion, protection of minorities and promotion of their identity are together with the prohibition of discrimination, the pillars of the current minority rights system.

One could debate at length about the soundness of these conclusions. Some object that the special legal measures that are invoked to protect minorities would be in and of themselves the product of a majority culture that would inevitably reproduce the same "bias" that should be eliminated.

Others argue that "we do not need to postulate special group rights intended to protect and support the identities of religious minorities": to protect them it is not necessary "to depart from a traditional liberal conception according to which all citizens have the same set of individual citizen's rights" – it is enough to implement it correctly [6, p. 95]. Even the state's obligation to promote the identity of religious minorities through positive action is controversial, on the grounds that it could lead to excessive social fragmentation.

[1] For example see: article 5 of the Framework Convention for the Protection of National Minorities (1998).

[2] See: European Court of Human Rights, Kokkinakis v. Greece, 25 may, 1993, § 31. available in English at: https://hudoc.echr.coe.int/eng#{%22itemid%22: [%22001-57827%22]}

However, this discussion goes well beyond the purpose of this paper. In this context, it is sufficient to mention that the instruments for the protection of minorities provided by international and domestic law are of two types: (1) instruments that prevent discrimination against minorities; and (2) instruments that protect and promote their identity granting them particular legal status through the enactment of "special measures safeguarding minorities as groups" [7, p. 345].

Although there are ongoing discussions about the notion of discrimination, the former instruments have gained a firm position in the legal culture of European countries. Instead, the provision of a special legal status for minorities – in the form of exemptions from general rules, affirmative action on the part of the state, recognition of specific rights to minorities as such and other – is a much more controversial issue.

In the context of an article devoted to religious minorities in EU countries, the first step consists in identifying the main features of the European system for the protection of religious minorities and assessing its soundness. Then I shall proceed to consider whether the protection of religious minorities guaranteed by international and national standards in Europe is still effective in the new cultural and religious landscape of the Old Continent. Does the appearance of "new religious minorities" signal a break with the past and call for a renewed approach to relations between religious majorities and minorities? In the following pages, I will try to answer these questions.

Results

1. *Protecting religious minorities "the European way"*

The survey of the EU countries legal systems shows that:

a) there is "no common minority policy in the EU" [25, sect. 1.2];

b) Constitutions mention national, ethnic and sometimes linguistic minorities but never refer to religious minorities[1] (apart from Sweden[2]);

c) a few EU States have enacted laws on national, ethnic or linguistic minorities[3] but none has passed a law on religious minorities;

[1] See: The report concerning Cyprus [25, sect. 1.2] affirms that the Republic of Cyprus "official[ly] refers to the three religious groups as religious minorities" (the groups in questions are the Armenian, the Maronite and the Roman Catholic). However, the expression "religious minority" does not appear in the text of the Constitution.

[2] See: article 2 of the Swedish Constitution.

[3] See, for example: Croatia, *Constitutional law on the rights of national minorities*, 13 Dec. 2001; Hungary, *Act CLXXIX of 2011 on the Rights of Nationalities*; Czech Republic, *Act on the rights of members of national minorities*, 10 July 2001; Poland, *Act of 6 January 2005 on National and Ethnic Minorities and Regional Languages*.

d) in their sub-constitutional laws, these countries rarely make use of the expression "religious minorities"[1] and, when they use it, do not provide a definition[2];

e) no international instrument concerning the protection of religious minorities is in force in EU countries, while almost all have signed and ratified a convention for the protection of national minorities[3] and many a charter for the protection of minority languages[4];

f) international provisions concerning the protection of minorities (in particular art. 27 ICCPR and the European Framework Convention for the Protection of National Minorities) do not play an important role in domestic debates on the relation between state and religions[5].

This assessment raises a first question: why did the EU States feel the need to protect national, ethnic and linguistic minorities but avoided protecting religious minorities[6]? There are different and equally convincing answers to this question. Some focus on history. Minorities (including religious minorities) have always existed but the concept of 'minority' found its way in legal texts only after the First World War,

[1] See: [25], reports concerning: Hungary ("Hungarian law does not apply a term of "religious minorities", sect. 1.2); France («Les sources juridiques sont aveugles à la notion de minorité»; «On ne trouve donc pas de référence aux «minorités religieuses» dans les sources constitutionnelles ou législatives, pas plus que dans les mesures administratives ou la jurisprudence»: sect. 1.2.a); Poland ("Polish law does not use the term 'religious minority": sect. 1.2.a).

[2] See: [25], report concerning: Austria (Première partie – "le droit ne définit pas la notion de "minorité", même s'il l'emploie"); the UK (sect. 1.2 – "There is no statutory definition of 'minority' as used in the context of religion"); Greece (sect. 2.a – "Neither in the constitutional text nor in other laws is there a legal definition of religious minorities"); The Netherlands (sect. 1.1 – "Definitions of 'religious minorities' are scarce"); Poland (sect. 1.2.a – "the executive and judicial authorities do not face the problem of defining a 'religious minority'. In judgments given by Polish courts and in documents signed by authorities at various levels, this term is used very infrequently and only incidentally"). See also: [25], reports concerning Germany (sect. 2) and Romania, (sect. 1.2).

[3] All EU countries have signed and ratified the Framework Convention for the Protection of National Minorities, with the exception of Belgium, Greece, Luxembourg (which signed but did not ratify it) and France (which did not sign it).

[4] The European Charter for Regional or Minority Languages has been signed by 20 and ratified by 17 EU countries.

[5] See: [25], reports concerning: The Netherlands (sect. 1.2 – "Article 27 ICCPR plays no specific role in the debate on freedom of religion for religious minorities"); Hungary (sect. 3.2 – "international or European law does not play a specific role with regard to religious minorities"). France did not sign the Framework Convention and, when ratified the ICCPR, declared that "l'article 27 n'a pas lieu de s'appliquer" [25, sect. 1.2.d].

[6] According to K. Henrard: "not that much attention is actually paid to the religious dimension of the minority rights to identity" [11, p. 6]. See also: [12, pp. 46–47]. Ronan McCrea underlines that: "Often we can see that where a religious minority is linked to a long established ethnic or national minority, many of the benefits accruing to the religious minority are in fact, piggybacking on protection of a national or ethnic group rather than being specifically religious rights" [18].

when new states were built from the ashes of the last European empires. At that time, nationality, not religion, was the issue and this explains why religious minorities were left on the margins [1, pp. 37–59].

Others offer a political explanation, emphasizing the link between minorities and national states. According to these scholars, a national state is inevitably pushed to marginalize groups that do not share the national narrative and ethos (as noted by J. Jackson Preece, national minorities "are by definition anomalies in the nation state system" [14, p. 10]). Granting rights to national minorities was the legal device adopted to keep the latter's aspirations towards independence under control, avoiding the potential destabilizing effects of their presence within national majority's territory [14, p. 11]. Again, the spotlight is on national, rather than religious, minorities. A third explanation is based on the new role played by religion in the public sphere. Since the end of the previous century, any matter related to religion has had a renewed impact on public life. Religions have become capable of supplying categories and language to express social, political, economic claims and in this way have extended their area of influence. The new political importance of religion, together with the increase of migration flows towards Europe, has placed religious minorities at the center of attention. However, this phenomenon is still recent and law-makers and judges have not yet had the time to devise strategies and develop tools to address the new challenges it poses[1].

Without questioning the soundness of these analyses, the issue of religious minorities should nonetheless be placed in a longer-term perspective that takes into account the processes of secularization and uniformization of the law that, at a different pace and with different intensity, have interested many European countries, particularly in the Western part of the continent. Since the second half of the 19th century and up to the end of the 20th, European societies and institutions have been reshaped via a process of marginalization of religion in the public sphere. Family law, education, welfare are just a few areas of human life where church power was replaced by that of the secular state. This model of state was based on the principle that all citizens must enjoy the same civil and political rights regardless of their religious affiliation, a principle that was not favorable to the provision of special rights for religious minorities, as they would have reproduced the legal disparity that the secular state intended to eliminate. In this perspective, the road to fight discrimination and ensure

[1] This explanation is supported by the remark of J. Temperman that: "Whereas on the whole, major demographical changes are charted, relatively few legal changes are to be noted […] on the point of religious minorities and legal ramifications of that notion specifically" (Temperman, J. (2018). The legal status of old and new religious minorities in the European Union: social and legal change, – see in: [25, part I]. See also the conclusion of Ronan McCrea's contribution [18].

equality to all citizens in religious matters (including those who professed minority religions) went in a different direction, that of the irrelevance of religion in defining the rights and obligations of individuals and groups [6]. This explains why religious-based systems of personal law, which had flourished in Europe for centuries, were abandoned in almost all the countries of Central-Western Europe during the nineteenth century[1].

This does not mean that the recourse to specific rights for the members of a particular religious minority is excluded. In some European countries, Jews have the right to abstain from work on Saturdays and in others, Sikhs can wear a turban instead of a helmet when riding a motorcycle. However, these measures concern a limited number of cases and a small number of people.

The history of Jews and their assimilation is emblematic of this trend. It ran along a double track, clearly indicated in the famous phrase pronounced by Count Clermont-Tonnerre at the French National Assembly in 1789: "We must reject everything to Jews as a nation and give everything to Jews as individuals"[2]. The recognition of individual rights to citizens of Jewish religion went hand in hand with the denial of particular rights to the Jewish religious minority.

On the basis of these philosophical and political premises, the main legal instrument to protect religious minorities has not been identified in the assignment to them of particular rights but in the assignment to all individuals and groups of the right to religious freedom. Even with frequent deviations and long periods of regression, in the course of the 19th and 20th centuries many countries of Central and Western Europe were able to take significant steps forward in the recognition of individual and collective freedom of religion. This process has not eliminated all disparities between majority and minority religions, but has triggered a progressive improvement of the latter's legal position enabling religious minorities to enjoy rights that they had previously been denied[3]. The fact that this improvement does not concern all religious minorities, but privileges "old" compared to "new" ones and that the leveling of differences between religious majorities and minorities was never completed con-

[1] For a discussion of these issues see: [9, pp. 535–548].

[2] S. M. A. de Clermont-Tonnerre, *Speech on Religious Minorities and Questionable Professions* (23 December 1789), available in English at: URL: http://chnm.gmu.edu/revolution/d/284/

[3] For a few examples of this process (and also of its limits) see what happened in Spain [24] and in Greece (Papadopoulou L. The legal status and constitutional protection of old and new religious minorities in Greece: [25, sect. II.2.a]). They provide two different models of the same process. The former is an example of an autonomous legal development while in the latter a significant role was played by the decisions of the European Court of Human Rights. The same trend towards the improvement of the religious minorities' legal status is discernible in Italy, Germany and other countries.

stitute elements of weakness of the whole process[1]. Regardless, the legal distance between religious majorities and many religious minorities today is significantly smaller than fifty or a hundred years ago.

In conclusion, the lack of a strong system of protection of religious minorities has been compensated in EU countries with the emphasis placed on the right to religious freedom. This leads us to conclude that where respect for religious freedom is stronger (and it is worth noting that on an international scale, EU countries rank fairly well) the urge to resort to a system of protection of religious minorities is weaker. Collective rights of religious freedom are considered sufficient to grant religious communities the autonomy and self-government ensured by the rules that protect religious minorities[2]. This also explains why, in the system of protection of minorities which is in force in Europe, the focus is on national, ethnic or linguistic minorities, rather than on religious ones: the protection of the latter was ensured by the legal provisions and court decisions granting religious freedom. As noted by Nazila Ghanea, while the issue of minorities has gained importance in the last decades of the 20th century, minority rights have never become the main tool to protect religious minorities, whose problems have been and are still addressed and solved through general provisions on freedom of religion [10, pp. 1–23].

The remarks contained in the previous paragraph do not wish to suggest that placing the spotlight on religious minority rights or on the right to religious freedom leads to the same results. As already noted, minority rights include both protection and promotion rights; the latter may result underdeveloped in an approach based exclusively on the right of freedom of religion. Therefore, it is likely that the combination of the two approaches will lead to a better outcome, than the choice of adopting one to the exclusion of the other. However, the significance of the secular state in the Western European history of the last two centuries helps understand why the protection of religious minorities in EU countries has been granted through legal strategies and tools different from those adopted to protect national, ethnic and linguistic minorities. It also explains why religious minorities have remained on the fringes of the system of minority protection in force in EU countries.

[1] The limits of an approach to the issue of religious minorities exclusively based on the right to freedom of religion are discussed by Johannes A. van der Ven [26, pp. 162–173].

[2] The European Court of Human Rights played a significant role in this area. As noted by K. Henrard: “A general feature of the Court’s jurisprudence on freedom of religion which is particularly positive for minorities and the accommodation of their special needs is the explicit protection of the group aspect of the freedom to manifest one’s religion. As minority identity is inherently a group identity, the Court’s protection of the community aspect of manifestation as an essential dimension of that right is surely to be welcomed” [11, p. 24]. See also: [12, pp. 52–53].

A second element that deserves to be considered is the development of system of uniform law in many European States. This is a byproduct of the consolidation of nation states that took place between the Congress of Vienna and the Paris Peace Conference. Within a hundred years, the last empires still existing in Europe were dissolved and the process of formation of nation states was completed. In the legal field, the main manifestation of this process was the strengthening of a uniform legal model based on the principle that the same law must be applied to all within the state through a unified system of national courts. The plurality of legal systems and jurisdictions within the same political entity that had characterized empires disappeared and left room for systems of uniform law, in line with the principle of coincidence between state and nation. This transformation had a negative impact on the rights of minorities, which the treaties for the protection of minorities that the new states were compelled to sign after the First World War, failed to eliminate. The self-government systems of minorities, which in various forms were in force in a significant part of Europe, disappeared and were replaced by uniform legislation. This shift from the internal plurality of legal systems to their uniformity is functional to the secularization of the law and institutions of the state. This process could not be completed without affirming the principle that civil and political rights are to be enjoyed by all citizens on an equal footing irrespective of their religious convictions. In this way, secularization and uniformization of the law are interlinked and place the question of religious minorities within the horizon of secular and uniform state law. In Western Europe, after the Second World War, this s the context for developing the right to religious freedom as a right granted by the state's secular law to all citizens on an equal and uniform footing. No space was left for special forms of protection of religious minorities that would have been scarcely compatible both with the secular and the uniform characteristics of state law[1].

However, (and this is the third feature of the European pattern) this drive towards the unification of law at a national level did not result an identical legal regulation of all religious communities. The idea that church and state are two distinct entities, which nation states inherited from the European Christian tradition, requires them to respect the internal organization and self-administration of religious groups. Therefore, once all citizens were granted the same political and civil rights, the state's legal systems refrained from applying the same uniform law model within the religious organizations. This meant, on the one hand, that states abstained from applying their own rules within religious groups and, on the other, that they adjusted their reg-

[1] On this process see: [9, pp. 535–548].

ulatory mechanisms to take into account the different organizational structures of religious communities. This is particularly evident in the countries that have adopted a system of agreements between state and religions, such as Italy, Spain, Germany and others, but also where other systems have been implemented, states have refrained from imposing a uniform pattern of legal organization on religious communities. Many countries have different mechanisms of registration or recognition of religious communities according to the number of their followers, the time they have been active in a country, their degree of social integration. Similar remarks apply to the public funding of religious communities or their access to public mass media. Sometimes the respect for the diversity of the religious community masks the intent to maintain unjustified disparities but, on the whole and in spite of the processes of secularization and uniformization of the law, the legal systems of many European States have been able to accommodate religious diversity. This explains why the need to protect the autonomy of religious groups has been addressed, without making use of the legal tools adopted for protecting national, linguistic or ethnic minorities.

Obviously, the impact of these three elements – (1) the secular character and (2) the uniformity of the state law on the one hand and (3) the accommodation of religious diversity on the other – differs from country to country and over time. The schematic explanation that has been provided here should be analytically verified, in light of the fact that in each country the path of secularization, uniformization and accommodation has been tortuous and marked both by progress and setbacks. In conclusion, from the vantage point of a scholar of law and religion, the lack of a system of protection of religious minorities comparable to that of national, linguistic or ethnic minorities can be explained by the convergence of the three elements for an alternative system of protection grounded in the right to religious freedom and non-discrimination. The pros and cons of this system will be considered in the next section of this article.

2. *Management of religious diversity vs. protection of religious minorities*

Taking into account this background, one can easily understand why scholarly discussions on the relations between state and religions (including minority religions) has never given the legal category “religious minorities” a central place. Law and religion scholars have traditionally preferred to frame the issue in terms of management of religious diversity, rather than in terms of protection of religious minorities. In this perspective, ensuring equal rights and freedoms to all religious groups is the main objective and, in the opinion of most law and religion scholars, this goal can be attained without envisaging special rights for religious minorities.

This approach emerges clearly from a remark concerning Spain: "There is not a specific catalogue or list of fundamental rights for minorities in the Spanish Constitutional system. Nevertheless, all religious minorities are protected by the generic principles of equality and non discrimination, and the general recognition of the fundamental right of religious freedom" [25, sect. I.1.][1]. It does not come as a surprise, then, that many scholars state that the structure of their national laws "relating to religion is such that no definition of a 'religious minority' is useful"[2]. As a consequence, they conclude that "special provisions safeguarding the rights and legal status of religious minorities do not seem necessary"[3] as "*une situation minoritaire sociale comme telle n'évoque pas des traitements juridiques différents*"[4].

Few minority rights scholars would accept these conclusions and this disagreement signals a significant difference between them and law and religion scholars. The former focus on vulnerable groups and are primarily interested in seeking out legal strategies and tools that can minimize their handicaps. They see the links between different minorities and include religious minorities in a family of groups that face similar problems because of their minority status[5]. The latter place religious minorities within another family, made up of different religious groups. They focus on the links between religious majorities and minorities and are primarily interested in developing a system of state-religions relationships that is fair to both. The interest in religious minorities is the point of contact of the two groups of scholars, but each of them looks at the issue from a different point of view.

Is the specific approach of law and religion scholars to the issue of religious minorities comprehensive enough? Are they right to show some restraint in making use of the legal category of religious minority or, in doing so, are they missing out on opportunities to grant freedom of religion and equal treatment to disadvantaged religious groups? In conclusion, is there something that law and religion scholars could learn from minority scholars?

[1] See also report concerning Latvia: [25, sect. 2.1] – "The Latvian regulatory enactments do not talk about "religious minorities" but rather underscore equality and freedom of religion".
[2] See: report concerning The Netherlands [25, sect. 1.2].
[3] See: report concerning Germany [25, sect. 8].
[4] See: report concerning Austria [25, Première partie].
[5] Minority rights scholars are convinced that minority groups: "have some basic common claims […], that they can be subsumed under a common definition and that the rationale for protecting them is fundamentally the same" [21, p. 216].

3. *The protection and promotion of religious identity*

To answer this last question it is helpful to consider the cultural context in which the current debate on "new" religious minorities is taking place and to compare it with the one that involved, a few decades ago, "old" religious minorities. In the 1960s and the 1970s, when the gap between religious minorities and majorities started being filled, the debate was grounded in the principle of equal treatment. In an increasingly secularized society, the justification for the legal disparity between religious majority and minorities had become less and less evident and a movement for their (at least partial) leveling could develop and succeed. Nowadays the context within which the majority-minorities debate takes place is completely different and the issue of identity has taken center stage in the debate. On the one hand, the majority is afraid to lose its identity (including its religious identity) because of the growing number of non-European and non-Christian immigrants[1]; on the other, religious minorities want to wear their turbans, eat their halal food, and build their minarets because they are seeking recognition of their distinct identity. Like all discussions centered on identity, this debate is muddled and frequently exploited for political aims. However, this new focus is a fact and this is enough to raise the question whether the law and religion approach to the issue of religious minorities, focusing on freedom of religion, is still capable of managing a discussion based on the juxtaposition of different identities. This doubt is grounded in the fact that, in an increasing number of cases, the appeal to religious freedom has been successfully neutralized through a strategy of "culturalization of religion". It is hard to uphold the prohibition to build minarets on the grounds of religious freedom; it is much easier to defend it by claiming that minarets are alien to the culture and tradition of a country like Switzerland. It is equally hard to defend the public display of the crucifix in schools as a manifestation of religious freedom; it is much easier to support it as an expression of the national culture of Italy. It would be easy to adduce other examples, but the trend is quite clear: the effectiveness of the right to religious freedom is limited by the affirmation that a specific religion is part (or not) of the identity of a people, a nation or a country. Can minority rights scholarship provide us with tools to counteract this trend?

Minority rights scholars are more familiar with the legal implications of the issue of identity than their colleagues working on law and religion [19, pp. 363–385]. The principle of the protection and promotion of religious identity is formulated in art. 5 of the Framework Convention for the Protection of National Minorities (FCNM) which declares that states have the obligation "to preserve the essential ele-

[1] "Immigration, more than anything else, has brought to the fore the question of national identity" [22, p. 45].

ments of their [national minority] identity, namely their religion, language, traditions and cultural heritage" and have been extensively interpreted by the Framework Convention Advisory Committee [11, p. 25]. It is true that in the FCNM, religion is regarded only as a component of national identity; hence, the lack of consensus concerning the Convention's applicability to religious minorities that are not national minorities at the same time [3, pp. 22–24].

However art. 1.1 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities is more explicit. It specifically takes into consideration the religious identity of minorities when it affirms that "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity"[1]. This "identitarian" language is uncharacteristic of international and domestic legal documents on freedom of religion and this explains why the protection of religious identity is an understudied topic by law and religion scholars.

The exact scope and content of the protection of religious identity remains a little unclear, however it includes positive action by the state, albeit limited by the European Court of Human Rights tends to a handful of cases [12, pp. 55–56]. The Advisory Committee on the FCNM has argued that the promotion of religious identity includes "a duty to revitalize the religious heritage of particular minorities" and to "provide the necessary financial support" for the construction of their cemeteries [11, p. 27] (for the Advisory Committee opinions on the places of worship and the religiously prescribed clothing see: [4, p. 12]).

Some scholars have correctly underlined that, "in their current interpretation", minority-specific rights (including the protection and promotion of religious identity) "do not add much to existing interpretations of the non-minority-specific right to religious freedom" [11, p. 44]. However, teleological and evolutive interpretation methods can be used to broaden the application of this underdeveloped legal principle and assess whether it has the potentiality to address the claims of religious minorities in a way that can integrate the protection granted by the right of freedom of religion.

The prohibition to build minarets in Switzerland is a good test to evaluate how much this is feasible [16; 23]. One of the reasons invoked to defend the prohibition of building minarets is that it does not limit the freedom of religion of Muslims, who can assemble and pray in the mosque. In the context of a minimalistic interpretation

[1] Similar provisions are contained in the OSCE Copenhagen Document on the Human Dimension (§§ 32 and 33).

of freedom of religion, this argument is not without foundation and it may be easier to respond focusing on religious identity rather than freedom of religion. For centuries, the minaret has been part of the Muslim religious and architectural tradition. Outlawing it entails placing a constraint on the Muslim religious heritage that states should not only protect, but also revitalize as part of their obligation to promote the identity of this specific religious minority. The same applies to confessional cemeteries. Where the law does not allow to build these facilities for any religion, it is difficult to argue in terms of violation of freedom of religion. It may be simpler and more effective to address the issue from the viewpoint of the protection and promotion of the religious identity of a minority group. These are just but a few examples, all pointing in the same direction: religious minority rights may be enhanced if the right to religious freedom is supplemented by that of protection and promotion of religious identity[1].

This is a sensitive matter that should be dealt with very carefully. In some cases, the protection of the religious identity of a group can conflict with the protection of the individual rights of its members (or the members of other groups); in others it can increase the state's burden to yield to the religious minorities demands and raise delicate problems of (un)equal treatment.

However, the presence of communities recently migrated to Europe – the new religious minorities – is an opportunity to reflect on the need to integrate more human rights provisions aimed at protecting religious freedom with minority law provisions aimed at protecting religious identity.

Conclusions

Some minority rights scholars believe that fundamental rights, including that of religious freedom, "in their current formulation and interpretation do not provide adequate protection for religious minorities. Notwithstanding their trigger function, religious minorities are currently neglected by the fundamental rights paradigm in that their special vulnerability in terms of identity and substantive equality is not matched by appropriate – that is not absolute but reasonable protection" [12, p. 85]. This opinion is shared by some law and religion scholars who underline the relatively limited positive obligations that have been developed under the freedom of religion and wonder why the development of positive obligations in this context has been less elaborated than in some other areas of human rights law [17]. These scholars con-

[1] This point is underlined by Berry, who writes that: "the standards established in the FCNM and by the AC to protect freedom of religion now confer a higher level of protection on religious minorities than Article 9 ECHR" [4, p. 12].

clude that, while the respect for the religious freedom of individuals and communities has been effectively guaranteed by the identification of precise State negative obligations, the fulfillment of this same freedom has been somewhat limited by the absence of equally precise provisions on the State positive obligations. On the other hand, many law and religion scholars are concerned about the weakening of respect of the right to religious freedom, subject to increasing violations in every part of the world [5, pp. 15–35].

Protecting and developing the religious identity of minorities is a way to strengthen freedom of religion for all, as this latter right is indivisible. A society where only religious majorities are free is not a society that respects freedom of religion. Better defining, within the framework of universal and indivisible human rights, the specific state obligations towards religious minorities and the special measures that states should adopt to ensure appropriate conditions for the preservation and development of group identity which go beyond what follows from universal human rights [21], goes well beyond the interests of religious minorities and concerns every human being.

We live in a historical period in which both the right of religious freedom and the rights of religious minorities are threatened by the resurgence of nationalistic drifts, often defended through invocation of the role played by a specific religion in developing the identity and the culture of a people. In this context, it is important that minority rights and law and religion scholars join forces to reflect on the synergies between freedom of religion and religious identity.

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