The Legal Status of Old and New Religious Minorities in the European Union

Le statut juridique des minorités religieuses anciennes et nouvelles dans l'Union européenne

Marco Ventura
(Ed.)

The Legal Status of Old and New Religious Minorities in the European Union

Le statut juridique des minorités religieuses anciennes et nouvelles dans l'Union européenne

Proceedings of the XXXth Annual Conference
Siena, 15-17 November 2018

Actes du XXX^{ème} colloque annuel
Siena, 15-17 novembre 2018

Granada, 2021

European Consortium for Church and State Research
Editorial Comares

WITH THE CONTRIBUTION OF

Università degli studi di Siena
Dipartimento di Giurisprudenza

Fondazione Bruno Kessler, Trento
Centro per le Scienze Religiose

and

Centro Studi e Rivista Confronti

La Chiesa di Gesù Cristo dei Santi degli Ultimi Giorni

Unione Cristiana Evangelica Battista d'Italia

Unione Induista Italiana – Sanatana Dharma Samgha

Unione Italiana delle Chiese Cristiane Avventiste del Settimo Giorno

This publication is a product of the Italian Ministry of University and Research 2017 PRIN project Representing religious diversity in Europe: past and present & features

Co-funded by the Erasmus+ Programme of the European Union, Jean Monnet Actions - Project - Boosting European Security Law and Policy: Focus on flows of migrants, data security and movement of capitals

Maquetación: Miriam L. Puerta

Polígono Juncaril
C/ Baza, parcela 208
18220 Albolote (Granada)
Tlf.: 958 465 382
www.comares.com • E–mail: libreriacomares@comares.com
facebook.com/Comares • twitter.com/comareseditor • instagram.com/editorialcomares

ISBN: 978-84-1369-248-7 • Depósito legal: Gr. 1293/2021

Impresión y encuadernación: COMARES

Dedicated to Richard Potz,
a scholar deeply committed to the advancement
of Church and State research in Europe,
a highly esteemed member of the Consortium since 1998,
and an emeritus member since 2016

TABLE OF CONTENTS

CENTRAL AND EASTERN EUROPE

NORTHERN EUROPE

THE TWO-WAY LEGAL MAKING OF RELIGIOUS MINORITIES. INTRODUCTORY REMARKS

Marco Ventura*

For the second time in its lifetime, the European Consortium for Church and State Research deals with religious minorities in an explicit and systematic manner. In fact, the meeting in Siena of November 15-17, 2018 on 'The legal status of old and new religious minorities in the European Union', from which this book emanates, took place 25 years after the meeting in Thessaloniki on November 19-20, 1993 on 'The legal status of religious minorities in the countries of the European Union'[1].

The need to return to the same topic a quarter of a century later stems from the historical threefold change that has occurred in Europe in the social reality of minorities, in the actors' perceptions, discourse and strategies, and in the framing of the very category of religious minorities, in society and the law. Such fundamental change can be looked at from the long period perspective of developments since the XIXth century colonial treaties, or from the recent perspective of social transformations in contemporary Europe. In both perspectives, the category of 'old and new minorities' is crucial.

For the purpose of this book, the expression 'old and new religious minorities' is meant to acknowledge the concern of scholars and actors for those 'new' minorities which, because they originate from recent migration, risk not enjoying the same protection as 'old' minorities. Responding to the concern, and encouraging ambitions, progress in law and policy has made it possible to consider today the equal protection of 'old' and 'new' minorities as an acquis of international human rights law[2].

* Università degli studi di Siena; Fondazione Bruno Kessler, Trento; DRES – CNRS, Strasbourg; 2019 Annual President of the European Consortium for Church and State Research.

[1] See the proceedings of the meeting: European Consortium for Church and State Research, *The legal status of religious minorities in the countries of the European Union* (Thessaloniki, Sakkoulas and Milano, Giuffrè, 1994). Available online on the website of the Consortium at http://www.churchstate.eu (last visited 15 January 2021).

[2] Fabienne Bretscher provides a clear example in her overview of the protection of new religious minorities in the framework of the European Convention on Human Rights and the UN system, arguing

Such a conventional understanding whereby 'new minorities' are identified with minorities originated by recent migration, and positing their entitlement to equal rights with 'old minorities', and with majorities, is the starting point for the presentations collected here.

Contributors to this book are equally aware that such conventional understanding of 'old and new religious minorities' could warrant inaccurate interpretations, especially when the migration factor is isolated and amplified, when the fluidity of religion is not fully acknowledged, and when recent change within historical minorities and majorities is ignored[3].

Indeed, 'new minorities' cannot be reduced only to those minorities which result from recent migration and migration itself needs to be relativized and seen in its interaction with other factors. Inspiring this book is the realization that 'new minorities' are far more complex and multiple than their conventional understanding, if not challenged and updated, might suggest[4]. Also inspiring is the observation that majorities are much less 'majority' (in perceptions if not in numbers), and 'old minorities' are much 'newer' than certain actors and experts could think.

In addition to minorities stemming from recent migration, it is possible to identify at least three further 'new minorities', variously associated with both migration and religion[5]. First, 'new minorities' can emerge from communities sharing other common denominators than culture, ethnicity and geography, and can have a very different origin than recent migration, as eloquently witnessed, for example, by the LGBT community and the humanist community, which can now see themselves as

---

that so far the United Nations Human Rights Committee has proved a better protective institution for new minorities than the European Court of Human Rights. See F. Bretscher, *Protecting the religious freedom of new minorities in international law* (Abingdon, Routledge, 2019).

[3] Roberta Medda Windischer underlines the need for an updated understanding of old and new minorities, stressing the importance of equal protection, and inviting to go 'beyond the old/new minority dichotomy'; see R. Medda-Windischer, 'The Nexus between Old and New Minorities', in *Junge Wissenshaft im Öffentlichen Recht*, 6 October 2017, online at https://www.juwiss.de/108-2017/ (accessed 15 January 2021). See for further background R. Medda-Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion. A Human Rights Model for Minority Integration*, (Baden-Baden, Nomos, 2009); and for an updated approach R. Medda-Windischer, C. Boulter, T. H. Malloy (eds.), *Extending Protection to Migrant Populations in Europe. Old and New Minorities* (Abingdon, Routledge, 2019).

[4] In particular, the conventional definition of 'new religious minorities' as stemming from recent migration is very problematic because of the inherently vague, and possibly misleading nature of the two defining factors. With regard to the time frame, how 'recent' should 'recent' migration be, considering that the United Nations referred to recent migration as a factor in the definition of minorities already in the 1980s? Also, how should we understand migration in the time of globalisation?

[5] I have presented the three cases at the European Academy of Religion, in my (unpublished) paper on 'New majorities and minorities. The impact of/on religion or belief', in the panel on 'Freedom to Believe or not to Believe. New Directions of Belief. The Religious Pluralism in Europe', Bologna, 21 June 2017.

'new minorities' in the context of emerging gender-based and/or non-religion-based agendas and rights. Second, 'new minorities' can coincide with 'old majorities'. Because secularisation has hit hard in the ranks of Christian majorities, or because legal reforms in sensitive areas such has same-sex marriage have disenfranchised portions of them, or simply because a multi-cultural, impoverished and vulnerable European society is experienced by many as a dramatic departure from the past, members of the 'old majority' can now feel they themselves form a 'new minority', possibly one committed to re-Christianising Europe and/or defending its Christian identity and culture. Third, 'old minorities' can be considered as 'new minorities'. Because they are faced with renewed hostility, as for the Jewish community, or with strong competition from 'new minorities', as for historical minority Christian communities challenged by more lively African, Asian or Latino groups of their own faith, 'old minorities' might feel they are becoming a 'new minority' as well, or at least a 'new' 'old minority'.

The conventional 'new minorities' originated from recent migration, as well as the unconventional 'new minorities' – and amongst them the three kinds illustrated above (agenda/rights based, former majorities, 'new' old minorities) – all point at a large range of reasons why actors come to see and present themselves as a minority (possibly combining, as indicated in the emerging category of multiple minorities). Paramount is the intermingling of objective and subjective reasons, and the varying degree to which the subjective sphere is understood as dependent or independent from the free will of the individual[6]. When combining in the trajectory of the individuals and the groups, objective and subjective reasons grounding the identification with a minority religion nourish expectations and strategies. Hence self-identification can be used to express different feelings – from anxiety to pride – as well as to articulate an agenda and pursue a goal. Since this is not possible without actively resorting, or being passively exposed to the law, the social complexity of living minorities is intimately interconnected with the no less complex experience of the law.

The interaction of the social and the legal dimension of minorities is bidirectional. On the one hand, minorities frame the law through their claims and the correlated arguments and actions. Therefore the very legal definition of minorities, and the resulting status, is the product of who and what minorities are, and intend to be in society. On the other hand, the law frames minorities by granting its symbolic and

[6] The contrast between religious belonging by revocable individual choice or by irrevocable transmission from the family, group and society is presented as key for contemporary, global law and religion in S. Ferrari, 'Law and religion in a secular world: a European perspective, in (2012) 14 3 *Ecclesiastical Law Journal*, pp. 355-370. With regard to contemporary developments in the Protestant church, the same paradigm is studied in M. Ventura, 'Faith vs. Identity. The Protestant Factor in Contemporary European Freedom of religion or Belief', in H. Schilling and S. Seidel Menchi (eds.), *The Protestant Reformation in a Context of Global History. Religious Reforms and World Civilizations* (Bologna, il Mulino and Berlin, Duncker & Humblot, 2017) pp. 193-209.

practical benefits under the inescapable condition that actors adjust to its conceptual and procedural constraints. As a result, the more minorities expect from the law, and the more they consequently engage with the legal infrastructure, the more they are forced to be moulded accordingly.

In the two-way legal making of religious minorities, these resort to the law because of their power to shape it, and because of the power of the law to shape them, hopefully to their advantage. Logically distinct, the two movements are simultaneous, and inextricable. While needing the law to advance their agenda, pursue their goals and protect and promote their rights, minorities need to engage in a process through which they make the law while being made by the law. Considered in its multifaceted reality, such bidirectional, two-way process is open to a variety of outcomes. In the face of the ambition to get as much as possible through the category of minorities in terms of equality-based and diversity-based status, equality and diversity are not as easy to achieve, and reconcile on the ground as they are in documents[7]. A win win outcome is thus far from granted, especially as individuals and communities might have conflicting visions and interests, based on which the very assessment of what is 'a win' could be extremely variable.

Religious actors know this only too well. Faced with the growing commitment of the human rights community to minority rights, rooted in the faith that the rationale, mechanisms and implementation of minorities protection do no harm to the agenda of equality and enhance the agenda of diversity, authoritative religious leaders have voiced their worries. In the Abu Dhabi document of 4 February 2019 on 'Human fraternity for world peace and living together'[8], Pope Francis and the Grand Imam of Al-Azhar Ahmad Al-Tayyeb declared: 'The concept of *citizenship* is based on the equality of rights and duties, under which all enjoy justice. It is therefore crucial to establish in our societies the concept of *full citizenship* and reject the discriminatory use of the term *minorities* which engenders feelings of isolation and inferiority. Its misuse paves the way for hostility and discord; it undoes any successes and takes away the religious and civil rights of some citizens who are thus discriminated against' (italics in the original online).

While not consisting in a wholesale rejection of the social and legal category of minorities, the caveat is a powerful reminder that the equality communities seek while advancing their diversity might be better served, depending on the circumstances,

[7] For a development of this argument see M. Ventura, 'Religious pluralism and human rights in Europe. Equality in the regulation of religion', in M. L. P. Loenen and J. E. Goldschmidt (eds.), *Religious pluralism and human rights in Europe: where to draw the line?* (Antwerpen-Oxford, Intersentia, 2007) pp. 119-128.

[8] See the document on the website of the Holy See at www.vatican.va (last visited 15 January 2021). Also see my interview to the Grand Imam in M. Ventura, 'Famiglia, gay. L'Occidente sbaglia', in *Corriere della Sera / La Lettura*, 1 March 2020, p. 9.

by other categories and mechanisms than those of 'minority', 'minority rights' and 'minority protection'. If the contrast between the 'equality of rights and duties' of 'full citizenship' and the status coming with the minority label is so problematic, it is not necessarily because the category of minority as such is irredeemably flawed. However, if the category elicits such a concern in Pope Francis and the Grand Imam Al-Tayyeb, there is something about it to be reconsidered, a challenge which cannot be avoided by simply putting all the blame for the shortcomings of the category on its discriminatory misuse[9].

Legal experts are particularly well-placed to discern implications and opportunities of the two levels at stake with legal definitions. They are aware of the role of formulations, and the forging of reality through the language, categories and concepts of the law[10]. They are no less aware of the complexities the legal machinery consists of, the distance between the theory and the practice, and the intricacies of the law in action. Both abstract law and real law, the law in the book and the law in the actors' hands are crucial when it comes to labelling individuals and groups as minorities, be this of their own making, or to the initiative of third agents. This is particularly true in the laboratory of the European Union[11], where supranational law is experimented to an unprecedented degree, and a multi-level system is being created through the integration of international human rights law, domestic law, local law, court cases including rulings from the courts of Strasbourg and Luxembourg, soft law measures, policy documents and projects, and even religious laws[12].

Key to the impact of the system on religious minorities, is the articulation of their category, and legal definition, with the category and legal definition of 'churches and religious associations or communities' and 'philosophical and non-confessional

[9] This comment is rooted in my analysis of equality, diversity, minorities and citizenship in M. Ventura, 'La dimensione religiosa della cittadinanza nello spazio mediterraneo', in F. Alicino (a cura di), *Cittadinanza e religione nel Mediterraneo. Stato e confessioni nell'età dei diritti e delle diversità* (Napoli, Editoriale scientifica, 2017) pp. 57-101.

[10] For this point, see the analysis of the formula 'freedom of religion or belief', in M. Ventura, 'The Formula «Freedom of Religion or Belief» in the Laboratory of the European Union', in (2020) 23 *Studia z Prawa Wyznaniowego*, pp. 7-53.

[11] For the expression 'laboratory' as an appropriate descriptor of the interaction of law and religion in EU law, see M. Ventura 'Diritto e religione in Europa: il laboratorio comunitario', in (1999) 30 4 *Politica del diritto*, pp. 577-628. Two years later, the concept of the EU laboratory was central in M. Ventura, *La laicità dell'Unione europea* (Torino, Giappichelli, 2001). Bérengère Massignon later resorted to the same expression in her overview on religion in the European construction. See B. Massignon, *Des dieux et des fonctionnaires. Religions et laïcités face au défi de la construction européenne* (Rennes, Presses Universitaires de Rennes, 2007) p. 10 and pp. 17-21.

[12] For an overview, see M. Ventura, 'Non discrimination and protection of diversity and minorities' in G. Amato, E. Moavero-Milanesi, G. Pasquino and L. Reichlin (eds.), *The History of the European Union. Constructing Utopia* (Oxford, Hart, 2019) pp. 239-255.

organisations' in EU law, and with the equivalent categories in EU members states.[13] Church and state and law and religion scholars have a distinct capacity and responsibility to describe such articulation and to prescribe how it should evolve. If this implies creative reinterpretation of principles such as establishment, neutrality and separation, legal pluralism, cooperation and accommodation, it also presents the church and state and law and religion community, in partnership with legal scholars and social scientists, with the unique opportunity to develop the heritage and instruments of European research and policy in the domain.

In this regard, as a venture with an Italian heart, this project could not but capitalise on the legacy of Italian legal scholarship. Building on the post WWII commitment of the Italian people to the European integration process and the peaceful development of the international community, in many ways Italian scholars have been crucial in the forging of European and international human rights law in general and in the protection of freedom of religion or belief, and religious minorities, in particular. To mention just a few brilliant examples marking European law in the XXth century, in 1901 Francesco Ruffini authored the first modern history of religious freedom, in 1917 Santi Romano was the early proponent of legal pluralism and the virtue of coordination between the law of the land and religious legal systems, in 1967 Francesco Margiotta Broglio was the first European scholar to highlight the revolutionary potential of the European Convention on Human Rights and its Court in the area of religious freedom, and in 1979 Francesco Capotorti contributed a capital Report on minority rights for the United Nations[14]. This book is built on such legacy, and the more recent effort of the Italian experts who figured amongst the founding fathers of the Consortium.

* * *

The structure of this research, and book, is shaped after the terms of reference produced in March 2018, with the fundamental inputs of Daniele Ferrari[15] the wisdom of Silvio Ferrari, the supervision of the Executive Committee of the Consortium, and

[13] This formulation is borrowed from article 17 of the Treaty on the functioning of the Union. See M. Ventura, 'L'articolo 17 TFUE come fondamento del diritto e della politica ecclesiastica dell'Unione europea', in (2014) 22/2 *Quaderni di diritto e politica ecclesiastica*, pp. 293-304.

[14] See F. Ruffini, *Religious liberty* (New York, NY, Putnam, 1912), ed. or. *La libertà religiosa: storia dell'idea* (Torino, Bocca, 1901); S. Romano, *The legal order* (Abingdon, Routledge, 2017), ed. or. *L'ordinamento giuridico. Studi sul concetto, le fonti e i caratteri del diritto* (Pisa, Mariotti, 1917); F. Margiotta Broglio, *La protezione internazionale della libertà religiosa nella Convenzione europea dei diritti dell'uomo* (Milano, Giuffrè, 1967); F. Capotorti, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* (Geneva, UN, 1979).

[15] For the wider research of Daniele Ferrari on the topic, see D. Ferrari, *Il concetto di minoranza religiosa dal diritto internazionale al diritto europeo. Genesi, sviluppo e circolazione* (Bologna, il Mulino, 2019).

published below. While articulating an approach conscious of both the bidirectional interaction of society and the law and the two-way legal making of religious minorities, the terms have offered the authors a common frame, meant to facilitate exchange and comparison, and encourage variations. Respecting the bilingual custom of the Consortium, terms of reference are also available in French as a grille thématique.

The book is opened by a cross-country section devoted to international and European perspectives. Also reflecting the 19 national reports drafted on the basis of the terms of reference, and now transformed into chapters for the purpose of this volume, the five chapters of this section are focused on the law and religion perspective, social and legal change, the legal definition, the EU law and policy, and the mapping of international and European instruments.

In the following sections, each of the 19 chapters presents a country case and develops a report initially presented and discussed at the Siena meeting in November 2018. These chapters are regrouped in three geography-based sections: Southern and Western Europe; Central and Eastern Europe; Northern Europe. Geography is not neutral and the identification of countries with one area or another is not always obvious. Nonetheless, it was helpful to have countries ranged in some order, and geography seemed the least arbitrary. Within the three geography-based sections, chapters are in alphabetical order, according to the name of the relevant country.

The authors of this book are solely responsible for the published content of their chapters. The views expressed in the chapters do not necessarily correspond to the views of the editor.

* * *

Amongst the many who have contributed to this project and book, I wish to express my gratitude to Daniele Ferrari for his constant support, to Silvio Ferrari for the guidance and the dialogue with his 'Atlas of religious minorities rights' project, to Miguel Rodriguez Blanco for his relentless assistance, and to Isotta Rossoni for the help with linguistic revision and editing. Special thanks to the contributors for their commitment and patience, and to the fellow members of the Consortium for their companionship and trust. Special thanks to Università degli studi di Siena, in particular to the Dipartimento di Giurisprudenza and Roberta Lelli, Violante Pirotta and Antonia Del Vecchio, to Fondazione Bruno Kessler di Trento, in particular the Centre for religious studies, and to the Italian religious organizations which have contributed financially and beyond.

As this book is the result of the European Union Jean Monnet project *Boosting European Security Law and Policy: Focus on flows of migrants, data security and movement of capitals* (BESEC), and the Italian Ministry for University and Research PRIN project *Representing religious diversity in Europe: past and present & features* (REREDIEU), I also wish to thank the colleagues partnering in those projects, at Università degli studi di Siena and elsewhere, for their stimulating contribution.