

# Religious Diversity: accomodation for Social Cohesion. Gaps in the legal protection of religious diversity: generic versus specific protection instruments

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## Abstract

The legal protection of religious diversity in plural societies is mainly supported by the human right to freedom of religion and belief, which is widely recognized under the international human rights law. However, interpretations of this law are far from univocal when it comes to managing the situation of persons whose religious beliefs are a minority. The so-called harmonisation practices are techniques to spread the content and exercise of this right. Similarly, the so-called Rights of minorities (as is the case of religious ones) also provide a protection framework, the scope of which has not yet been clearly defined. The current diversity of European societies and their commitment to protect the diversity and minorities lead us to seek a more focused and effective framework of protection, choosing between rights and generic or specific instruments.

**Key words:** Religious diversity, harmonisation practices, minorities, social cohesion.

## Resumen

La protección jurídica de la diversidad religiosa en sociedades plurales se vertebra principalmente sobre el derecho humano a la libertad de religión y creencias, ampliamente reconocido en el marco del Derecho internacional de los derechos humanos. Sin embargo, las interpretaciones de este derecho distan de ser unívocas cuando se trata de gestionar la situación de personas cuyas creencias religiosas son minoritarias. Las llamadas prácticas de armonización constituyen técnicas destinadas a pluralizar el contenido y el ejercicio de este derecho. Paralelamente, el denominado Derecho de las minorías (en su caso, religiosas) ofrece también un marco de protección cuyo alcance no ha sido aún nítidamente definido. La pluralidad actual de las sociedades europeas y su compromiso de proteger la diversidad y a las minorías obligan a buscar un marco más certero y eficaz de protección, optando entre derechos e instrumentos genéricos o específicos.

**Palabras clave:** Diversidad religiosa, prácticas de armonización, minorías, cohesión social.

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## 1. The context of religious diversity and the need for legal regulation

For some European countries religious diversity is almost a new experience. Even if they have always experienced a low degree of religious plurality, recent immigration and globalization processes have dramatically increased the real diversity of these societies in this respect. This is the case of the Basque society (as well as of the Spanish society), a formerly strongly homogeneous Catholic society which today hosts religious communities of over 30 different denominations.

Two phenomena have promoted the increase in religious plurality in recent decades. On the one hand, the secularization process, both in terms of the separation of Church and State and the decrease of practices and beliefs<sup>1</sup>; on the other hand, international migration movements, which affect religious plurality in two ways. First, they bring about an increase in the existing religious communities with the arrival of immigrants sharing their beliefs with already established communities. Secondly, they help to “import” new minority confessions, religions from the immigrants’ places of origin that were previously inexistent in the host society.

Despite the experience of the intense secularization process European societies have gone through, the religious fact has not disappeared for the sake of modernity; on the contrary, it has burst into the public debate. This “resurrection” of the religious fact occurs, indeed, in much more plural circumstances, with a wider range of religions, which, in a way, operate in a kind of globalized market. All these changes and alterations have produced a much more complex scene as regards relations between religion and identity, challenging our reading and enjoyment of human rights.

Religion is a complex phenomenon in itself and this obviously affects its legal regulation and the design of public policies corresponding to it. Both Law and Politics have great difficulty when having to regulate or plan an element like the religious one, which is closely linked to individual and collective identity.

In this paper we will try to demonstrate that legal responses to religious diversity are still far from being clear and secure, in particular from an international human rights perspective.

In addition, creating a generally accepted and valid definition of religion, one that is adjustable to any phenomena existing in our societies, is also a delicate matter. It is equally complex to trace the map of religious communities or groups and the relations that may be established among them depending on the dogmas or the organization they share. Added to this, within the current context there is also a growing complexity of identities as a result of syncretistic trends, the fusion of traditions or the emergence of new spiritual movements<sup>2</sup>. Today’s result is probably much more plural and diversified than ever before, and this causes great problems when it comes to defining which experiences or groups can be regarded as religious or when their members are exercising their own freedom of religion. Furthermore, it is also necessary to progressively broaden the proper concept of religion or belief in order to include new phenomena and expressions that do not coincide with traditional great religious facts<sup>3</sup>. All this significantly complicates the role to be played by Law, which partially consists, as in any other field of social life, of offering certain legal security.

However, Law is obliged to set boundaries to concepts, to limit the assumptions of fact and also to clarify, as accurately as possible, the content, entitlement and exercising of rights. And religion is and must continue to be an object of legal regulation. The fundamental reason for this is its close relationship with human rights, and with the interpretation of its content and exercise. Indeed, religion not only constitutes a right as such, freedom of religion, but it also affects, conditions or is related to the content of other rights protected by the legal system of any democratic country.

Finally, it would be contradictory if democratic and liberal societies, based on pluralism of opinions of any kind, nevertheless intended to create a homogenous public space within the scope

<sup>1</sup> Esteban, Valeriano (2007): “La secularización en entredicho”, in *El fenómeno religioso. Presencia de la religión y la religiosidad en las sociedades avanzadas*, Centro de Estudios Andaluces, Sevilla, p. 311.

<sup>2</sup> We may also consider the new phenomena of “believing without belonging” and “belonging without believing” pointed out by Grace Davie and Danièle Hervieu-Léger: Davie, Grace (2000): *Religion in Modern*

*Europe: A Memory mutates*, Oxford University Press, Oxford; Hervieu-Léger, Danièle (1993): *La religion pour mémoire*, Éditions du Cerf, Paris.

<sup>3</sup> Human Rights Committee, General Comment number 22, *The right to freedom of thought, conscience and religion (article 18)*, 30 July 1993: Doc. CCPR/C/21/Rev.1/Add.4, paragraph 2.

of the transcendental visions of life. Quite the opposite, what has to be regulated and arranged by the public apparatus is the plurality of such visions. Given that freedom of conscience is a basic value of democracy, we must admit, first of all, that religious pluralism is the normal and healthy condition of a democratic and free society<sup>4</sup>. Therefore, the public expression of religion must be the object of attention for any political community. Leaving religious facts to the private sphere is neither convenient nor feasible from the point of view of public administration, because religion participates in both the private and the public spheres simultaneously, bringing claims, needs and implications to the public space and resources<sup>5</sup>. The aim of Law cannot be fighting this pluralism, but regulating it in the most successful and enriching way possible. The point is whether the current legal system is validly drafted in order to do so in a fair and comprehensive way.

## 2. Legal instruments for managing religious diversity from a human rights perspective: Reasonable accommodation, non-discrimination and minority protection: an unsolved puzzle

Freedom of religion may be considered one of the first human rights to be conceived and developed in international legal regulations. The origin of its success is related to the division undergone in Western Europe resulting from the Protestant Reformation<sup>6</sup>. In the 20<sup>th</sup> century, with the appearance of Human Rights International Law, freedom of religion was universally recognized. The Universal Declaration of Human Rights, approved in 1948, refers to religion in Article 2 as one of the elements that prohibits any distinction in recognizing the ownership of the rights and freedoms proclaimed in the Declaration. More specifically, Article 18 of the Declaration acknowledges that everyone has the right to freedom of thought, conscience and religion, including “freedom to change his religion or belief, and freedom, either alone or in community and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”.

Very similar provisions were included in the International Covenant of Civil and Political Rights (hereinafter ICCPR) of 1966, as well as the European Convention on Human Rights (hereinafter ECHR) of 1950. In the latter, Article 9 recognizes everyone’s “right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with other and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.” And the International Covenant on Economic, Social and Cultural Rights, apart from the non-discrimination clause, also states the right to education in Article 13, including the freedom for parents to choose the religious or moral education that fits with their own beliefs for their children, within the framework of the state educational system.

In this ranking the Declaration of the United Nations General Assembly on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed on 25 November 1981 can also be highlighted; as well as several documents approved by the Parliamentary Assembly of the Council of Europe, such as Recommendation 1086 (1988) on the situation of the Churches and freedom of religion in Eastern Europe, which includes a list of faculties derived from freedom of religion. It is also worth mentioning Recommendation 1202 (1993) on religious tolerance in a democratic society that asks states for flexibility so as to accommodate the different religious practices, in order to build a truly democratic society. Finally, it is also worth referring to Recommendation 1396 (1999) on Religion and Democracy. This document also insists on the need to guarantee the same conditions for the development of all religions present in the society, and invites states to facilitate the accommodation of the diverse religious practices within their own institutional and legal framework.

As regards comparative constitutional law, the religious fact is also present in the constitutional texts of the different European countries, according to each one’s political tradition. The most extended constitutional provisions in our neighbouring countries are the ones recognizing the freedom of religion

<sup>4</sup> Relaño Pastor, Eugenia (2010): “Religious Pluralism in liberal democracies: Should the diversity of religious and secular conceptions of the good in a multicultural citizenship be privatized?”, in Rufino, Annamaria and Pizzo, Ciro (eds.): *Right, True, Reasonable. The Perception of Justice in the Global Era*, Scriptaweb, Napoli, p. 160.

<sup>5</sup> Novak, David (2009): *In defense of religious liberty*, ISI Books, Wilmington, p. 89.

<sup>6</sup> Ruiz Vieytes, Eduardo (1999): *The History of Legal Protection of Minorities in Europe (XVIIth - XXth Centuries)*, University of Derby, Derby.

or conscience as a fundamental right of everybody and the ones prohibiting discrimination based on religion or belief. The differences in the ways of managing the existing religious diversity in the different European societies lie in the interpretative scope of both principles.

### *Contents and interpretation of freedom of religion*

With respect to freedom of religion, the UN Human Rights Committee makes a distinction in Article 18 ICCPR between the right to religion and the right to manifest one's religion<sup>7</sup>. The former is protected in an unconditional and unrestricted manner, and no limit can be put over it<sup>8</sup>. As for the latter, its contents include not only ceremonial or liturgical events, but also reach such practices as the observance of certain food regimes, dress codes, traditional rituals linked to particular life moments, or even the use of a particular language. Restrictions or limitations to be applied to this right to manifest beliefs must be adopted in accordance with what it is established in paragraph 3 of Article 18 ICCPR. In any case, the Committee clearly states that this paragraph must be interpreted in a restrictive manner. When commenting on the use of common (but vague) legal concepts like public order, national security or public moral, the same Committee says that "*the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition*"<sup>9</sup>.

For the European Court of Human Rights (hereinafter ECtHR), Article 9 of the ECHR does not cover all acts based on a religion or belief<sup>10</sup>. Thus, it admits that it may be necessary in a plural society to impose some restrictions on the freedom to manifest religions, in order to reconcile the interests of different groups and to ensure that all beliefs are respected<sup>11</sup>. Like the UN Human Rights Committee, the Court of Strasbourg establishes that the manifestation of a given religious belief may include diverse aspects, such as physical appearance, dress codes, food codes, public religious demonstrations, the teaching of religion, rituals and other practices. On the contrary, any kind of related activity developed in order to obtain some kind of economic or commercial benefit is excluded<sup>12</sup>.

As for the relation between religions and the state, the ECtHR considers that it is admissible to make differences among groups or communities of the same religion according to their numerical or official importance<sup>13</sup>. Furthermore, there are European states officially or constitutionally linked to particular churches, which is not incompatible with the ECHR according to the Court<sup>14</sup>. What is important here is that there will always be an important margin of appreciation for states at a national level. However, at the same time, the Court of Strasbourg has also insisted on maintaining religious pluralism, something which it considers to be closely linked to the idea of democracy<sup>15</sup>. This also means that the state has to keep a neutral and impartial attitude with respect to the legitimacy of different religious beliefs<sup>16</sup>. The Court points out that religious pluralism correspond to a certain level of social division that must be respected<sup>17</sup>. In this sense the general principle of recognizing the different religious

<sup>7</sup> Human Rights Committee, General Comment number 22, *The right to freedom of thought, conscience and religion (article 18)*, 30 July 1993: Doc. CCPR/C/21/rev.1/Add.4.

<sup>8</sup> *Ibid.*, paragraph 3.

<sup>9</sup> *Ibid.*, paragraph 8.

<sup>10</sup> *Case Kalaç against Turkey*, judgment of 1 July 1997, paragraph 27.

<sup>11</sup> *Case Kokkinakis against Greece*, judgment of 19 April 1993, paragraph 33.

<sup>12</sup> *Case X and Church of Scientology against Sweden*, decision of 5 May 1979, DR 16, p. 68.

<sup>13</sup> *Case Chaare Shalom Ve Tsedek against France*, judgment of 27 June 2000, paragraph 80.

<sup>14</sup> The Advisory Committee of the FCNM has also admitted that the existence of an official church is not per se incompatible with the conven-

tion. However, in such a case, public authorities must pay special attention to the situation of the remaining religious communities, in particular in areas like education. Vid.: *Opinion on Norway*, adopted on 12 September 2002; doc. ACFC/INF/OP/I/(2003)003, pp. 39 y 40.

<sup>15</sup> *Case Metropolitan Church of Bessarabia against Moldova*, judgment of 13 December 2001, paragraph 119; *case Refah Partisi against Turkey*, judgment of 31 July 2001, paragraph 69.

<sup>16</sup> *Case Metropolitan Church of Bessarabia against Moldova*, judgment of 13 December 2001, paragraph 123; *case Manoussakis and others against Greece*, judgment of 26 September 1996, paragraph 47; *case Refah Partisi against Turkey*, judgment of 31 July 2001, paragraph 91.

<sup>17</sup> *Case Agga against Greece*, judgment of 17 October 2002, paragraphs 58-60.

communities or organizations in a given society is a consequence of the very right to religious freedom<sup>18</sup>. Moreover, the minority condition of a given confession cannot constitute per se an excuse for the prohibition of its expression<sup>19</sup>. This means that, at the end of the day, it is not in the sole decision of the majority how the public space has to be modelled.

The ECtHR also recognizes that it is not possible to find a common and unique conception of religion within European societies and that the impact of external manifestations of religious beliefs may vary significantly in different times and contexts<sup>20</sup>. In any case, freedom of religion is not an absolute right, some restrictions being legitimate in certain conditions. Thus, the Court has validated the prohibition of some dress codes in certain educational institutions, for both teaching staff<sup>21</sup> and students<sup>22</sup>. On other occasions, it has denied protection for absence in the workplace for reasons of unofficial religious festivities<sup>23</sup> and the ritual slaughter of animals<sup>24</sup>, to give only a few examples. In all cases, the issue at stake in the legal interpretation is the scope of the possible limitations or restrictions on freedom of religion based on eventual reasons of public safety, order, health, or a national option in favour of laicism.

#### *Harmonization practices, reasonable accommodation and non-discrimination*

Canadian courts have been using the concept of reasonable accommodation as a legal technique in relation to freedom of religion in a plural society. The central idea of this game is

that when the right to religious freedom comes into conflict with a neutral legislation, public or private actors have the duty to accommodate or adapt the application of such legislation, unless it can be proved that the adaptation may cause an undue hardship. The principle of religious neutrality is imposed on public authority, but not on individuals, and therefore, freedom of religion implies the duty to accommodate as far as it is reasonable<sup>25</sup>. The Canadian Supreme Court has recognized that when a piece of legislation pursues a neutral and valid aim, but its application implies negative (adverse) effects on a person's freedom of religion, this person has the right to obtain accommodation. This accommodation may be implemented through an exemption of the application of the law, as far as this is compatible with public interest<sup>26</sup>.

The concept of reasonable accommodation does not derive from a legislative recognition, but from an idea of equality formed through case-law and jurisprudence<sup>27</sup>. The first appearance of this concept regarding religious freedom happened in the so-called *Simpsons-Sears* case judgment. In this case, the Canadian Supreme Court stated for the first time that a prima facie neutral legislation (in this case a work calendar) may have a discriminatory effect on an employee because it is incompatible with his religious beliefs or practices<sup>28</sup>. Thus, issues related to dress, food, worship places, exhibition of religious symbols and others are at stake in the formulation of reasonable accommodations in the Canadian experience. What is relevant for us to point out at this moment is that, within this Canadian experience, the concept of reasonable accommodation is applied as a consequence of the principle

<sup>18</sup> Case *Metropolitan Church of Bessarabia against Moldova*, judgment of 13 December 2001.

<sup>19</sup> Case *Barankevich against Russian Federation*, judgment of 26 July 2007, paragraph 31.

<sup>20</sup> Case *Leyla Sahin against Turkey*, judgment of 10 November 2005, paragraph 109; case *Refah Partisi against Turkey*, judgment of 13 February 2003.

<sup>21</sup> Case *Dahlab against Switzerland*, judgment of 15 February 2001.

<sup>22</sup> Case *Leyla Sahin against Turkey*, judgment of 10 November 2005; case *Kervanci against France*, judgment of 4 December 2008.

<sup>23</sup> Case *Konttinen against Finland*, decision of 3 December 1996, DR 87-B.

<sup>24</sup> Case *Chaare Shalom Ve Tsedek against France*, judgment of 27 June 2000.

<sup>25</sup> Bosset, Pierre (2007): "Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable", in Jézéquel, Myriam (dir.): *Les accommodements raisonnables: quoi, comment, jusqu'où? Des outils pour tous*, Éditions Yvon Blais, Cowansville, pp. 9-10.

<sup>26</sup> R. v. *Edwards Books and Art Ltd.*, [1986] 2 *Supreme Court Review* 713, p. 32; judgment of 18 December 1986. Woehring, Jose (2006): "La liberté de religion, le droit à l'accommodement raisonnable et l'obligation de neutralité religieuse de l'état en droit canadien", *Revista Catalana de Dret Public*, no. 33, p. 380.

<sup>27</sup> Bosset, Pierre, *op. cit.*, p. 10.

<sup>28</sup> *Ontario Human Rights Commission versus Simpsons-Sears*, [1985] 2 *Supreme Court Review* 536; Judgment of 17 December 1985.

of non-discrimination, and with an individual basis. Therefore, the traditional or historical character of a given religious group is not a particularly relevant element when reasonable accommodation has to be implemented.

Reasonable accommodation is therefore definitely linked to the prohibition of discrimination and it has been defined as a “corollary” of the right not to be discriminated against. Reasonable accommodation is not conceptualized from the perspective of minority rights, since it is not a measure that has to be implemented collectively. It does not open the door to collective rights nor to parallel legal systems.

In the report by the Bouchard-Taylor Commission on intercultural harmonization practices, developed in Quebec in 2007-08<sup>29</sup>, reasonable accommodation appears as one of the possible harmonization practices, along with concerted adjustment or informal agreements. What makes reasonable accommodation different is the need for a fundamental right to be at stake and the legal/judicial procedure used to reach a solution that will consequently be binding for all parties involved<sup>30</sup>.

Within the European framework, the concept of reasonable accommodation has not been incorporated clearly and several debates have arisen over the possibility of “importing” this North-American institution. Reasonable accommodation could be regarded as a way of avoiding indirect discrimination situations. In this respect, it is relevant to mention the so-called Thlimmenos doctrine of the ECtHR, according to which, treating substantially different situations equally may also lead to discrimination. Moreover, religious differences may qualify for this substantial differentness as it proves the very case of Thlimmenos against Greece, ruled by the Court in the year 2000<sup>31</sup>.

The main obstacle to using this doctrine as a base for including the obligation to provide reasonable accommodation within European human rights law is that we cannot find further judgments and decisions where the Court has already found any discrimination following the same reasoning. It seems, therefore, that the doctrine, although occasionally repeated, has not been consolidated<sup>32</sup>. In this sense, the idea of reasonable accommodation would still be far from entering the European human rights system.

### *Additional protection of Religious Minorities*

In addition to the general recognition of freedom of religion as a fundamental civil liberty, international instruments on human rights also include references to religious minorities. In concrete, Article 27 of the ICCPR states the right of persons belonging to religious minorities to profess their own religion, “where they exist”. And Articles 8 and 9 of the Framework Convention for the Protection of National Minorities (hereinafter FCNM), adopted by the Committee of Ministers of the Council of Europe in 1994, recognizes the right of the persons belonging to minorities to practice in private and public their own religion and the States’ obligation to adopt the adequate measures to promote full and effective equality of minority groups in society.

Clauses of this kind are also repeated in other relevant documents, such as Article 30 of the Convention of the Rights of the Child of 1989, and in the Declaration on the Rights of persons belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the General Assembly on 18 December

<sup>29</sup> Bouchard, Gerard and Taylor, Charles (2008): *Building the Future. A Time for Reconciliation*, Consultation Commission on Accommodation Practices Related to Cultural Differences, Quebec.

<sup>30</sup> See also the impact of the so-called “multicultural clause” of section 27 of the Canadian Charter of Rights and Freedoms: Ruiz Vиейtez, Eduardo (2007): “Constitución y multiculturalismo. Una valoración del artículo 27 de la Carta Canadiense de Derechos y Libertades”, *Revista Española de Derecho Constitucional*, no. 80, pp. 169-197.

<sup>31</sup> Case Thlimmenos against Greece (application No. 34369/97), judgment of 6 April 2000, paragraph 44.

<sup>32</sup> Indeed, there are a good many later judgments which, despite a finding of non-discrimination, refer explicitly to the doctrine contained

in the Thlimmenos case. The following can be mentioned: the Chapman against United Kingdom, Beard against United Kingdom, Jane Smith against United Kingdom, Coster against United Kingdom and Lee against United Kingdom cases, judgments of 18 January 2001; Fretté against France, judgment of 26 February 2002; Pretty against United Kingdom, judgment of 29 April 2002; Posti and Rakho against Finland, judgment of 24 September 2002; Natchova and others against Bulgaria, judgment of 6 July 2005; Stec and others against United Kingdom, judgment of 12 April 2006; Zeman against Austria, judgment of 29 June 2006; Snegon against Slovakia, judgment of 12 December 2006; Dobal against Slovakia, judgment of 12 December 2006.

1992. Within this last document it is explicit that the states are obliged to undertake positive measures to ensure the fulfilment of the rights of persons belonging to such minorities and for the preservation of their own religion (and language and other elements of their identity). The same Declaration includes the obligation for the states to protect and foster the promotion of the “religious identity” of minorities (Article 1), as well as the right of their members to take part in the cultural and religious life of the society (Article 2).

In relation to Article 27 of the ICCPR, the United Nations Human Rights Committee has said<sup>33</sup> that the existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria<sup>34</sup>. The same treaty body affirms that Article 27 entails the obligation for the states to implement positive measures for the protection of minorities, which obviously also includes religious minorities.

In a nutshell, the right of persons belonging to religious minorities to profess their own religion cannot be fulfilled with the abstention of the public powers. On the contrary, it clearly requires the adoption of positive measures to ensure that possibility.

#### *A double (and parallel) track of protection? Two questions to be solved*

Therefore, from the point of view of public intervention, freedom of religion implies an attitude of respect and tolerance in relation to the religious beliefs of all people. But on the other hand, it is admitted that there is also the obligation of adopting those positive measures needed to guarantee the exercise of such a freedom. In other words, freedom of religion not only implies a non-interference of public powers in its essential content, but also, eventually, the adoption of positive measures to make the development of this right possible<sup>35</sup>.

The point is to determine what kind of measures may be required by state authorities for the protection of freedom of religion. It is also necessary to define what the legal basis is for the requirement of such measures. Do they derive from the non-discrimination principle or from the protection of minorities framework? Do these positive measures adopt the shape of reasonable accommodations or do they have to be incorporated into the legislative framework? In principle we can state that reasonable accommodation measures are conceived from an individual perspective, whereas positive measures to protect religious minorities tend to be permanent and collective.

For some authors, it is precisely the application of the principle of substantial equality that makes this freedom a credit right, giving the holders the possibility to demand given public behaviour or specific services or provisions<sup>36</sup>. At the same time, the adoption of positive measures, due or not, could not be carried out in a discriminatory manner among the different religious groups. And historical or even constitutional arguments may not be prevalent over this last consideration<sup>37</sup>.

However, the explicit recognition of the rights of religious minorities in Art.27 ICCPR or 9 FCNM places another problem on the table. This leads us to the problem of having to determine which religious communities qualify for the category of minority. Also, it is necessary to determine whether the practice of some specific religious communities considered minorities deserves greater state protection than one from other groups or individuals professing different religions.

This means that we are faced with two substantial issues that are far from being solved from the perspective of international law on human rights. The first one is to find objective and reasonable criteria to determine what religions constitute minorities in a particular country or region. The second one is to know what additional rights or faculties correspond to religious minorities as regards individual freedom of religion and non-discrimination, or to define what kind of positive measures

<sup>33</sup> Human Rights Committee, General Comment number 23, *The rights of minorities (article 27)*, 6 April 1994: Doc. CCPR/C/21/Rev.1/Add.5

<sup>34</sup> *Ibid.* paragraph 5.2, and CCPR/C/79/Add.80, paragraph 24.

<sup>35</sup> Contreras, Jose Maria (2007): “La libertad de conciencia y convicción en el sistema constitucional español”, *Revista cidob d’afers internacionals*, no. 77, p. 55.

<sup>36</sup> Contreras, Jose Maria, *op. cit.*, p. 50.

<sup>37</sup> Human Rights Committee, case Waldman v. Canada (communication 694/1996), decision of 3 November 1999, document CCPR/C/67/D/694/1996, paras. 10.4 and 10.7.

are required in each case, should there be a real difference in this respect.

As for the first problem, any criterion we may use to make the legal distinction would possibly be arbitrary. The distinction could lead to a differentiated treatment, not a reasonable and objective justification for such a difference. This would bring us directly to the risk of facing discriminations among religious groups or beliefs<sup>38</sup>. But, on the other hand, if we consider that all existing religious groups in a given society fall within the category of minority, in practice we would be deleting any possible difference in the level of protection offered by the general right to freedom of religion and the specific protection for religious minorities. This solution obviously encounters the problem of having to explain why international law includes specific clauses to refer to the protection of members of religious minorities. If there is no difference in practical terms, as the possible added value of these minority clauses would disappear.

Following this reasoning, there should be then some criteria to distinguish members of religious minorities from other believers or religious practitioners. But the Human Rights Committee points out that this criterion cannot be the national condition of their members, as is the trend in Europe (to define them as national minorities, following the FCNM). For the Committee, any person, including immigrants, and even visitors, may qualify as members of religious (linguistic or ethnic) minorities with respect to Article 27 of the ICCPR. This widens the scope of application of the minority condition a great deal. Differently, in Europe the dominant idea is to try to apply different legal regimes to both traditional and new minorities. However, again in the case of religious minorities, the traditional aspect is not always easily determined and a growing number of immigrants practising minority religions may have already acquired the nationality of the host country. This means that the nationality or citizenship criterion of the definition of religious (national) minorities is not practical. What is happening in practice is that the consideration of religious minority is being extended to all groups whose religion or beliefs are not those of the traditional majority of the country (unlike the case of linguistic minorities).

Another option would be to include new legal requirements to regard some religious groups, and not others, as minorities. This could be the case of the Spanish legislation when it recognizes

some confessions due to their condition as religions with social rooting within Spanish society. However, the adjudication of this category could also lead to discriminatory situations and we would be reverting to a very broad consideration of religious minorities, neglecting the more individually followed practices or beliefs.

The second problem is knowing whether minority protection offers additional rights as regards what is already protected by the freedom of religion. If there is a difference, it is probably related to the positive measures that have to be adopted in order to protect religious minorities, according to the doctrine of the Human Rights Committee and the Advisory Committee of the FCNM. The instruments deriving from non-discrimination clauses, such as reasonable accommodation, probably do not correspond to minority rights, since they are individually applied mechanisms. But if minority rights means something else, this "else" should be defined in a better way. If minority rights recognized in Article 27 do not add anything to what is already protected in Article 18 of the same ICCPR, then Article 27 would simply be superfluous or rhetorical, contrary to the doctrine of the same Committee. But if Article 27 incorporates a specific set of religious protection for members of minorities (whoever they may be), there must be a specific differential treatment in favor of these groups. This brings us to the last difficult question regarding the relation between religious minorities and the majority. A specific protection of religious minorities through positive measures would also mean that the treatment given to those minorities is in fact better than that offered to the religious majority. This would be consistent with a social perspective of the (welfare) state, but more often than not contradictory to the normal policies in many of our European countries.

### 3. Public management of religious diversity at the local or regional level: the case of worship places in the Basque Country: what is required from human rights law protection?

The Spanish Constitution of 1978 includes an explicit acknowledgement of freedom of religion as a fundamental right, a prohibition of discrimination based on religion and a declaration of absence of official confessions. However, this does

<sup>38</sup> See the aforementioned case *Waldman v. Canada*.

not represent a mandate of fundamental separation between the State and religious entities, but it is not opposed to an institutional collaboration, explicitly recognizing the majority or traditional condition of the Catholic Church, which, in turn, does not impede the State's relations with other beliefs present in the Spanish society<sup>39</sup>.

Laicism, implicitly established in Article 16 of the Constitution<sup>40</sup>, includes both the institutional separation between the State and the churches as a guarantee of religious freedom, which also implies its promotion<sup>41</sup>. The regulation of this article is developed through two different channels: on the one hand, through the Organic Act 7/1980, 5 July, on Freedom of Religion, and on the other hand, through the diverse cooperation agreements signed between the State and certain churches or confessions.

The Organic Act on Freedom of Religion covers the right of religious communities to establish worship or meeting places with religious purposes, to designate and train their ministers and spread their own beliefs, and maintain relations with their own organizations or with other religious confessions, either within the national territory or abroad. The Act includes a number of concrete obligations for public authorities, such as adopting the necessary measures to provide religious assistance in public centres, military centres, hospitals, social aid centres, prisons and other institutions under their responsibility, as well as religious education in state education centres. However, the Act has no developing legislation (bylaws) and some of the rights remain vague, with no clear undertakings for the public authorities. The latter is the case of the right to establish worship places for religious communities.

The Spanish state has so far established formal agreements with four different confessions. On the one hand, the agree-

ments reached between the Spanish State and the Holy See on 3 January 1979, settling the relationship of the State with the Catholic Church, which should be legally considered International Treaties. On the contrary, the Cooperation Agreements of the State with the Federation of Evangelical Religious Entities of Spain, the Federation of Israeli Communities of Spain and the Islamic Commission of Spain are settled in their respective ordinary acts 24/1992, 25/1992, and 26/1992, all of them of 10 November 1992.

As regards the question of opening worship places, no specific or explicit positive measure is mentioned in the different agreements, in the case of the Catholic Church probably because it was not necessary, taking account of the deep historical rooting of this Church in Spain. In the case of the minority religions, the agreements apply to every community inscribed in the Registry of Religious Entities that are part of or may be later included in their respective federation with which the State is executing the agreement. The agreements regulate the condition of the worship places or cemeteries, guaranteeing their sacred character for urban purposes, although there are no provisions related to their location. In the same way, the agreements deal with other matters such as burials, recognition—for civil purposes—of marriages celebrated according to their respective confessions, teaching religion in the education system, religious assistance in the army, hospitals, prisons and other public institutions, the right to respect religious holidays in certain contexts, as well as taxation exceptions for religious entities.

Lastly, if we descend down the legal pyramid to the autonomous or local sphere, we soon identify the regulatory moderation existing in the Basque Country as regards this<sup>42</sup>. In any case, it seems clear that autonomous (regional) and local institutions have so far been unaware of the need to develop

<sup>39</sup> Article 16: "1. Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law.

2. No one may be compelled to make statements regarding his or her ideology, religion or beliefs.

3. No religion shall have a state character. The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions."

<sup>40</sup> Ollero, Andrés (2005). *España: ¿un Estado laico? La libertad religiosa en perspectiva constitucional*, Thomson-Civitas, Cizur Menor, pp. 50-51.

<sup>41</sup> López Castillo, Antonio (2002): *La libertad religiosa en la jurisprudencia constitucional*, Aranzadi, Cizur Menor, p. 86.

<sup>42</sup> See a description of it in Labaca Zabala, Lourdes (2008): "La regulación del factor religioso en la Comunidad Autónoma del País Vasco", in García García; Ricardo (dir.): *La libertad religiosa en las Comunidades Autónomas. Veinticinco años de su regulación jurídica*, Institut d'Estudis Autònoms, Barcelona, pp. 603-645.

regulatory or administrative measures that allow the exercise of religious freedom for citizens belonging to religious minorities, or at least for those belonging to confessions with which the State already has collaboration agreements or that have been recognized as having “social rooting”.

As regards Basque public institutions, the traditional abstention on the matter seems to respond to an alleged lack of jurisdiction. Initially, because the trend was to confuse the fact of religious diversity with immigration or foreigners’ integration, but also because the matter of relations with religious organisations has traditionally been considered an exclusive power of the central (state) authorities. These, and a possible ignorance of the religious diversity fact, are the main reasons why Basque public institutions have washed their hands of religious subjects, convinced that they were out of their jurisdiction. In spite of this, there are a great number of transversal questions affecting other jurisdiction questions on which the autonomous and local institutions exercise legislative or executive competences. This has compelled Basque public authorities to redefine their traditional abstention (or non-systemic intervention) in the matter, as has already happened in other Autonomous Communities, with Catalonia leading the way.

From the field work developed in a previous research project carried out among a large number of religious communities in the Basque Country<sup>43</sup>, one of the most important discoveries has been the general ignorance of the existing regulatory framework. Such ignorance does not only exist among members of religious minorities, but also among the majority population and within the Basque public institutions. However, also important is the fact that the legal system is not specially detailed for it, and therefore the scarce existing rules do not offer solutions to the specific problems that appear in daily life.

The specific and possibly most urgent problem with a hard solution for many communities in a reality like the one in the Basque Country is the shortage of worship places. On the one

hand, accessing a place implies an economic capacity that the recently born communities cannot guarantee. This seriously affects the exercise of a fundamental right and public authorities do not offer any positive measure to guarantee it. On the other hand, the communities consider the usual regulation applied to worship places unfair, owing to its symbolic and practical implications. In that sense, the provision of municipal licenses granted for the opening of sites for religious purposes is a complex matter because there is no specific regulation thereto. Additionally, the specific cases of some special celebrations where the use of public spaces is necessary for specific ceremonies such as weddings or baptisms<sup>44</sup>, or important holidays belonging to the religious tradition of each community come up against additional difficulties. There are also cases in which the majority religion (Catholicism) is in charge of providing adequate spaces for different confessions so they can celebrate their worship are not few, and this is obvious as regards Christian Orthodox communities<sup>45</sup>.

This situation led the regional authorities in Catalonia to pass a new regional Act to regulate the proceedings for opening new worship spaces in that Autonomous Community<sup>46</sup>. This initiative has recently been invoked by the Basque Government, which has publicly announced a bill on the matter to be sent to the regional parliament before the end of 2011. If is enacted, it will be the first specific piece of legislation at the regional level concerning religious matters.

The first text of this bill has already been drafted by a small group of legal experts. However, the problems in the regulation of the matter are relevant, since there is no clear political principle behind it, and also because the standards of international human rights law are far from being sufficiently clear. It is true that the issue is affecting many believers’ exercise of their own freedom to religion, and this has been proved by the research work carried out among Basque religious communities other than Catholics. On the other hand, the bill could also be considered an issue of the regulation of religious minorities in a demo-

<sup>43</sup> Research project no. HU2009-30, funded by the Ministry of Education of the Basque Government and developed by the Human Rights Institute of University of Deusto and Ellacuria Foundation.

<sup>44</sup> It must be taken into account that celebrations such as weddings or baptisms have, in some confessions, a highly communitarian character, which increases the need to have wide spaces.

<sup>45</sup> In this case it is worth highlighting the work carried out by the Ignacio Ellacuria Social Centre in Bilbao, from the Society of Jesus, providing different confessions with spaces both for prayer and other related activities.

<sup>46</sup> Act of the Autonomous Community of Catalonia 16/2009, of 22 July on worship centers.

cratic society. Finally we could also try to bring the philosophy of the so-called intercultural harmonization practices to the matter and, in particular, the instrument of reasonable accommodation to see if this could be a convenient way of respecting the rights at stake.

Within the Basque bill on worship places, a non-discrimination clause has been introduced, yet no reference to specific religious minorities. This would mean that all possible communities of believers in the Basque Country should be regarded as religious minorities and, accordingly, entitled to the specific protection (if any) that international treaties offer such groups. If the new bill just includes a protection of the freedom of religion, we would be missing this additional protection deserved by minorities. One possible explanation of this is to consider the whole issue of opening worship places as a collective right (or a collectively defined right). In this sense it would not derive from the individual freedom of religion but from the rights of religious minorities. And any religious community, other than Catholic, willing to establish a religious worship place in the Basque Country would be considered a religious minority in this perspective.

But in this case the positive measures that correspond to the public authorities in order to facilitate or ensure the implementation of this right (of the members of religious minorities to profess their own religion through the opening of worship places) should be clarified. The only clear positive measure prescribed in the bill (as well as in the Catalan Act) is the obligation for municipalities to reserve some public space for religious purposes. If this is the case, the next question would be to determine if any kind of reservation fulfils this undertaking. Should this reservation just be reasonable, considering the availability of space in the municipality, or are local public institutions obliged to ensure access to spaces for religious minorities? Obviously this second option is far more demanding and it could lead to problems if we take small municipalities as references. On the other hand, a vague obligation to reserve space in the urban planning can also produce effective discrimination if the municipality just does it in a nominal (practically empty) way. This is why in this case, the term "reasonable" can play a role. In fact, in Canada an attempt was made to use the reasonable accommodation concept (at least its theory) when a given religious community was not able to find a proper place for a worship space within the reserved urban planning of the municipality. This means that local au-

thorities must try to be effective when reserving the space, but probably cannot be totally obliged to ensure access to spaces, depending on the local situation of the estate market.

Another additional question is to decide whether the reservation of public space is the only positive measure that public authorities must fulfil when protecting the right to open worship places. We may ask if there can be any kind of obligation, under certain circumstances, to help, religious minorities in this respect, even financially (e.g., at least, when a given minority has no other worship places in the same municipality or in a nearby area). No such concrete measures have been introduced in the Basque draft bill, but a vague clause has saying that public institutions may facilitate access to worship places if required. This could be one of the clear consequences of having a minority protection system that stipulates the adoption of positive measures. The obligation of financing (or giving other kinds of help) should be balanced according to the situation of the religious community wishing to gain access to a worship place. But any different treatment among communities should be based on objective and reasonable justifications.

Again, we could ask if this possible obligation to provide material help in the opening of (the first, or sufficient) worship places in a given territory (e.g. a municipality, although it might be reasonable to take greater areas into consideration, such as counties or metropolitan areas, bearing in mind the transport facilities) has to be given to religious minorities only. In the particular case of the Basque Country, the only legal key to restrict this concept would be to follow the category of "socially rooted" confession which the state authorities may recognize. It may also be possible to create a regional category of social rooting, but in this case, it should probably be defined in addition to the state categorization, and possible discrimination claims might be easily raised.

Finally, an additional non-rhetorical issue arises at this stage. If the specific protection given to religious minorities is the legal basis to justify the adoption of positive measures, such as the reservation of urban spaces and/or material help to the communities intending to open worship places, it is necessary to conclude that the public authorities are not obliged to provide the majority confession with the same treatment (or at least the traditionally majority confession). This could be seen by some as discrimination against the situation of the Catholic Church

in the case of the Basque Country; however, it would be totally consistent with the provisions of international law on human rights and with the principle of substantial equality, which obliges public authorities to remove obstacles that prevent weak groups from participating in equal conditions in public life. This is precisely what may happen in the field of religious diversity when small, new and weak communities encounter a great number of obstacles when wishing to open or renew adequate worship places. The point is not a minor one, since it seems to go against a high number of current policies in the field of relations with majority and minority confessions in most European countries, including Spain. However, a minority and/or equality approach would imply a profound review of the way state or local authorities are managing religious diversity, should the fundamental right to religious freedom and the protection of minority rights be properly protected.

#### 4. Conclusion

In a nutshell, the reasonable accommodation institution, in its technical sense, does not offer a clear solution to the shortage of worship places of minority communities. It may, on the contrary, prove useful when adapting specific regulations to individual situations. The shortage of worship places has to be faced either through an updated vision of the principle of substantial equality (which may be difficult to achieve in terms of avoiding indirect discrimination), or through the specific protection (positive measures) that states must adopt to protect religious minorities existing within their territories. And, as long as a clear, reasonable and justified criterion is not determined to differentiate religious minorities from other kind of religious communities, we must admit in principle that all religious groups wishing to open (stable) worship spaces in the country have to be considered religious minorities in the sense of Article 27 of the ICCPR. This extension of the minority concept would probably go in parallel with that of ethnic minorities, unlike the case of linguistic minorities, whose extension remains much more problematic, due to the fact that states still use language as an element of defining the official identity of the country. Religious neutrality opens the door to a wide legal identification of religious minorities and to the adoption of positive obligations for public authorities, not even applicable to the traditional religious majority group. Therefore, state authorities

at all levels, as well as the local and regional ones within their respective devolved powers, have to reasonably provide help to substantially facilitate the profession of minority religions, even facilitating the opening of new worship places or facilitating other ritual activities. State authorities should not refrain from financing worship activities themselves if this is necessary to ensure the fulfilment of freedom of religion for members of religious minorities.

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