



## ***Freedom of Religion and Freedom of Expression***

### ***Proposal on "French difficulties to challenge with religious offenses vis-a-vis Freedom of expression".***

**Blandine Chelini-Pont**

#### **Abstract**

There is no particular protection against a religious offense in the French Law<sup>1</sup>, even though respect for religious beliefs has its place in the French Constitution. The right to be respected for one's religious beliefs is indeed linked to the freedom of conscience, deriving directly from article 10 of the 1789 French *Declaration of Rights* (*Déclaration des Droits de l'Homme et du Citoyen*), according to the French Constitutional Council<sup>2</sup> (Conseil Constitutionnel). Respect for religious beliefs is also linked to article 1 of the French Constitution, which defines the French Republic as secular (*laïque*) and requires that "all beliefs" be respected. Of course this respect is well insured for protecting freedom of faith in relation to individual and collective freedom of religious expression, but it becomes quite inexistent if we attempt to include, as logical, the protection against a religious offense.

We will explain the two major reasons of this particular lack of protection:

1. The first is that religious beliefs are respected as one of the forms of French "freedom" of opinion. Yet, the French *Declaration of Rights* doesn't make a distinction between categories of opinion in its article 10, as the European Convention on Human Rights does, with its two separate articles, one on freedom of thought, conscience and religion (article 9) and the other on the freedom of expression including "the freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers" (article 10). It is therefore the freedom of opinion, "including religious views," that the French Declaration protects. Article 1 of the present Constitution (1958), on the "respect of all beliefs," is an undetermined quantitative article in that it doesn't qualify the term "belief." There's a fundamental and voluntary lack of precision between the notions of opinion and belief, between the nature of opinion and belief and between faith and conscience. All in all, in the different texts on the protection of Civil liberties, we find a general trilogy of "political, religious and trade union" opinions. But there is no distinction between religious beliefs and other beliefs. Freedom of opinion protects all beliefs and ordinary guarantees in general. It is not possible to find a hierarchy between an ordinary freedom of opinion and an "extraordinary" one, based on article 10 of the 1789 Declaration of Rights, even when combined with article 1 of the 1958 Constitution on the respect for all beliefs.

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<sup>1</sup> For an overview on the question, between 1980 to 2000, see B. Beigner, "L'Honneur et le Droit", LGDJ, 1995, pp. 330-337, Emmanuel Derieux, « Diffamations, injures et convictions en procès. Etat de la jurisprudence nationale », *Annuaire Droit et religions*, 2005, PUAM, pp. 105-126, Pascal Mbongo, « Le traitement juridictionnel des offenses aux convictions religieuses », in *Mélanges en l'honneur de Jean-François Lachaume*, Paris, Dalloz, 2007, pp. 691-708.

<sup>2</sup> The freedom of conscience derives from France's Declaration of the Rights, article 10: "No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law". In a first step, the Constitutional Council seemed to dissociate this freedom from this article, defining it as a « fundamental principle recognized by the laws of the Republic » (Decision n° 77-87 DC, November 23 1977, related to the freedom of teaching, Rec. p.42). But after decision n° 2001-446 DC June 27 2001, the Constitutional Council made sure it endorsed article 10 and also the 1946 Preamble to again declare that freedom of conscience is a "fundamental principle recognized by the laws of the Republic" (Decision n° 2001-446 DC June 27 2001, Rec., p.74).

Consequently, no right for (legal) recourse against criticism of religions or intimate beliefs exists either, even when of the most "blasphemous" nature; freedom of opinion, renders all opinions, even anti-religious ones, perfectly free. Intimate convictions are treated equally with any form of beliefs or opinions.

2. The second reason for the relative protection against religious offenses is that freedom of expression is extremely large and secured under French law. It derives from article 11 of the French Declaration of Rights, which states: "*Free communication of thoughts and opinions is one of the most precious rights of man. Every citizen may therefore speak, write, and print freely, if he accepts his own responsibility for any abuse of this liberty in the cases set by the law*". Freedom of the press<sup>3</sup> and audiovisual freedom<sup>4</sup> consequently have their place in the Constitution. In other respects the French Constitutional Council has presented freedom of expression as being of particular importance: it is "*a fundamental freedom, especially since it exercises one of the essential guarantees for the respect of the rights and liberties of others*."<sup>5</sup> Making ones owns convictions public and carrying them onto the public scene necessarily exposes the believer to various but legitimate reactions in the framework of democratic pluralism. The believer or man of conviction cannot expect to be protected in his convictions. This sort of logic turns out to be close to the *Handyside* judgement, rendered by the European Court of Human Rights (ECHR): Freedom of expression implies the risk that information or opinions can "*offend, shock or disturb the State or any sector of the population*."<sup>6</sup> According to the ECHR, this freedom also constitutes one of the essential foundations of a democratic society. And, combined with democratic principles of equality and pluralism, it doesn't push to invoke, in order to protect the offended religious conviction, any opinion that would attack the aforesaid conviction. "We cannot imagine a case, where freedom of expression is at stake, which is not initiated by speeches judged shocking, afflictive, troubling or disturbing toward one or several individuals, or toward one or several public authorities. We cannot imagine the debate of ideas, including those about religion, without a confrontation between the protagonists who wish it"<sup>7</sup>.

Nevertheless, we will see how constitutional indifference vis-a-vis "religion" has highly advantaged freedom of expression in France, when it "attacks" religion. In the second section we will present the limits that nevertheless exist on freely expressing anti-religious views due to general legal constraints that weigh on freedom of expression and equally due to the more sustaining comprehension of the notion of pluralism, recently considered as constitutional value according to the French Constitutional Council. The respect of pluralism is slowly gaining the legal context, especially the mediatic one and permits new perspectives on the subject.

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<sup>3</sup> Decision n° 84-181 DC, October 10 and 11, 1984, G.D. n°36

<sup>4</sup> Decision n° 82-141 DC, July 27, 1982, Rec. p. 48

<sup>5</sup> Decision n° 84-181 DC, October 10 and 11, 1984, G.D. n°36

<sup>6</sup> ECHR, December 7, 1976, *Handyside v. United Kingdom*, § 49; See also, *Otto Preminger Institut v. Austria*, § 49. Commission, July 14, 1980, *Church of Scientology v/ Sweden*, §5. Commission, November 27 1986, *Universelles Leben v/ BRD*. Commission, April 18, 1997, *Dubowska and Skup v/ Poland*)

<sup>7</sup> Pascal Mbongo, « Le traitement juridictionnel des offenses aux convictions religieuses », in *Mélanges en l'honneur de Jean-François Lachaume*, Paris, Dalloz, 2007, pp. 698-699.

## ***Blasphemy, Defamation of Religions & Human Rights Law*** **Jeroen Temperman\***

### **Abstract**

Blasphemy is a serious wrongdoing in all monotheistic world religions.<sup>8</sup> Blasphemy prohibitions in states with a population that predominantly adheres to a specific religion have traditionally been brought into being and enforced so as to protect that dominant religion specifically. The same holds true for more recent domestic legal practices surrounding the issue of defamation of religion.

Religions as such, however, are not protected by international human rights law. Human rights law protects and empowers people: every person has the right to freedom of religion or belief -- a right that encompasses the freedom to have or adopt a religion or belief and the freedom to practice that religion or belief. Human rights law does not recognize a right to have one's religion or belief at all times exempted from criticism, ridicule or insult, or a right, in other words, to respect for one's religious feelings.<sup>9</sup> The right to freedom of expression is not an absolute right as it carries with it special duties and responsibilities. This right can be restricted on the basis of certain grounds for limitation; however, the interest of 'Religion' as such is not among those grounds.<sup>10</sup>

In this paper it is argued that contrary to popular belief the two rights, though very much interdependent, do not *in abstracto* 'clash'. Moreover, with the view of optimally guaranteeing human rights law in actual practice, the two rights do, as a rule, not need to be balanced -- for it is precisely when the two rights are balanced without a legal necessity to do so that human rights law is undermined. The broader intent of this article is to present a human rights based assessment of blasphemy prohibitions and counter-defamation (of

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<sup>8</sup> E.g. the Old Testament prescribes the death penalty by means of stoning: HOLY BIBLE (English Standard Version), Leviticus 24: 10–23: "Now an Israelite woman's son, whose father was an Egyptian, went out among the people of Israel. And the Israelite woman's son and a man of Israel fought in the camp, and the Israelite woman's son blasphemed the Name, and cursed. Then they brought him to Moses. His mother's name was Shelomith, the daughter of Dibri, of the tribe of Dan. And they put him in custody, till the will of the LORD should be clear to them. Then the LORD spoke to Moses, saying, "Bring out of the camp the one who cursed, and let all who heard him lay their hands on his head, and let all the congregation stone him. And speak to the people of Israel, saying, Whoever curses his God shall bear his sin. Whoever blasphemes the name of the LORD shall surely be put to death. All the congregation shall stone him. The sojourner as well as the native, when he blasphemes the Name, shall be put to death ..." So Moses spoke to the people of Israel, and they brought out of the camp the one who had cursed and stoned him with stones. Thus the people of Israel did as the LORD commanded Moses." The New Testament speaks of earthly punishments as well as possible repercussions in the afterlife, yet solely with regard to blasphemy against the Holy Spirit: HOLY BIBLE (English Standard Version), Matthew 12: 30–32: "Whoever is not with me is against me, and whoever does not gather with me scatters. Therefore I tell you, every sin and blasphemy will be forgiven people, but the blasphemy against the Spirit will not be forgiven. And whoever speaks a word against the Son of Man will be forgiven, but whoever speaks against the Holy Spirit will not be forgiven, either in this age or in the age to come." See also Mark 3: 28–29: "Truly, I say to you, all sins will be forgiven the children of man, and whatever blasphemies they utter, but whoever blasphemes against the Holy Spirit never has forgiveness, but is guilty of an eternal sin". The Quran speaks of earthly punishments as well as possible repercussions in the afterlife: THE HOLY QUR'AN (tranl. Abdullah Yusuf Ali), 9:74: "They swear by Allah that they said nothing (evil), but indeed they uttered blasphemy, and they did it after accepting Islam; and they meditated a plot which they were unable to carry out: this revenge of theirs was (their) only return for the bounty with which Allah and His Messenger had enriched them! If they repent, it will be best for them; but if they turn back (to their evil ways), Allah will punish them with a grievous penalty in this life and in the Hereafter: They shall have none on earth to protect or help them." Other Quranic references to blasphemy (including references that render Christian or Jewish doctrine blasphemous deviations from true doctrine) include: 2:88; 4:155; 5:17; 5:64; 5:68; 5:73; 6:19; 9:74; 11:9; 14:28; and: 39:8.

<sup>9</sup> Art. 18 of the *International Covenant on Civil and Political Rights*, 16 Dec. 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 Mar. 1976); see Human Rights Committee, General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18), CCPR/C/21/Rev./Add.4 (1993). See also, e.g., Bahiyyih G. Tahzib, *FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1996); CORNELIS D. DE JONG, *THE FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION OR BELIEF IN THE UNITED NATIONS (1946-1992)* (Antwerpen/Groningen/Oxford: Hart/Intersentia, 2000); and: PAUL TAYLOR, *FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE* (Cambridge University Press, 2005), on what art. 18 of the ICCPR does and does not offer in terms of protection.

<sup>10</sup> Art. 19 of the ICCPR. See Human Rights Committee, *General Comment 10: Article 19: Freedom of expression* (Art. 19) (1983), U.N. Doc. HRI/GEN/1/Rev.1 at 11 (1994)

religions) initiatives. In this context, both UN and European human rights law, policy and practice are analysed.

Both domestic as well as international legal initiatives can be perceived concerning the issue of 'defamation of religion(s)'. The question that emerges is how the issues of blasphemy and defamation of religion relate to international human rights law. *What standards, if any, does international human rights law provide in the context of blasphemy and defamation of religion?*

This paper will firstly endeavour to identify and analyse domestic approaches to dealing with blasphemy and defamation of religion (paragraph A). Subsequently, UN human rights law, policy and practice on the issue of blasphemy/defamation will be elaborated upon, with a special focus on the emerging 'Counter-Defamation Discourse' (paragraph B),<sup>11</sup> before moving on to an analysis of the manner in which the regional European Court of Human Rights has dealt so far with the issue of blasphemy and defamation of religions (paragraph C).<sup>12</sup>

It is concluded (paragraph D) that the emerging 'Counter-Defamation Discourse' is unacceptable because it:

- (i) seeks to shift the emphasis from protection of the rights of individuals to protection of religions per se;
- (ii) introduces grounds for limitation of human rights, particularly of the right to freedom of expression, that are not recognized by international human rights law (e.g. respect for religions, respect for people's religious feelings);
- (iii) and seeks to reformulate the right to freedom of religion or belief so as to include a right to have one's religious feelings respected.

It is contended that rather than focussing on strategies to counter defamation of religions, we should concentrate on and deal with practices that threaten individual human rights; that is to say, we should more effectively tackle the issue of advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence.<sup>13</sup>

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<sup>11</sup> Which will entail a discussion of: Commission on Human Rights Resolutions 1999/82 of 30 April 1999 (the first defamation Resolution was entitled "Defamation of Religions", an earlier draft spoke of "Defamation of Islam"), 2000/84 of 26 April 2000 ("Defamation of religions"), 2001/4 of 18 April 2001 ("Combating defamation of religions as a means to promote human rights, social harmony and religious and cultural diversity"), 2002/9 of 15 April 2002 ("Combating defamation of religions"), 2003/4 of 14 April 2003 ("Combating defamation of religions"), 2004/6 of 13 April 2004 ("Combating defamation of religions") and 2005/3 of 12 April 2005 ("Combating defamation of religions"); and the Human Rights Council's Resolutions on the same issue: Human Rights Council Resolution 4/9 of 30 March 2007 ("Combating defamation of religions"); Human Rights Council Resolution 7/... of 27 March 2008 ("Combating defamation of religions"; symbol of the draft Resolution in question: A/HRC/7/L.15); as well as the UN General Assembly Resolutions on the issue: Resolution 60/150 ("Combating defamation of religions") of 16 December 2005, A/RES/60/150; Resolution 61/164 ("Combating defamation of religions") of 19 December 2006, A/RES/61/164; and Resolution 62/154 ("Combating defamation of religions") of 18 December 2007, A/RES/62/154.

<sup>12</sup> Which will entail an analysis of the European Court of Human Rights' jurisprudence on blasphemy and defamation of religions, predominantly: *Gay News Ltd. and Lemon v United Kingdom*, App. No. 8710/79 ECommHR, 5 EHRR 123 [1982] of 7 May 1982; *Otto Preminger-Institute v. Austria*, 19 EHRR 34 [1994], E.Ct.H.R., of 20 Sept. 1994; *Wingrove v. the United Kingdom*, 24 EHRR 1 [1997], of 25 November 1996; *Murphy v. Ireland*, 38 EHRR 212 [2004], of 3 December 2003; *İ.A. v. Turkey*, Appl. No 42571/98, of 13 September 2005; *Klein v. Slovakia*, Appl. No. 72208/01, of 31 October 2006.

<sup>13</sup> Art. 20, para. (2), of the ICCPR; and within the European context (since it lacks such a prohibition of advocacy of religious hatred) a renewed focus on art. 17 (*abuse of rights*) of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5 (entered into force 3 Sept 1953, as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on 21 Sept. 1970, 20 Dec. 1971, 1 Jan. 1990, and 1 Nov. 1998 respectively) would be well-advised: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."



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## ***Proselytism and the Right to Change Religion***

**Roberta Aluffi Beck-Peccoz**

### **Abstract**

Proselytism is the attempt to persuade other people to accept your religious beliefs, and consequently to change their religion. The freedom to change one's religion, as an essential aspect of the freedom of religion, has always been strongly opposed by Islamic States. Consistently, they do not favour proselytism; they tend to restrict it even in its lightest forms, such as the simple expression of one's intimate beliefs.

This peculiar conception of the freedom of religion could be described as static, as opposed to the more dynamic original international conception (UDHR, art. 18). But a closer examination, through the lenses of Arabic legal vocabulary forged by Muslim scholars, reveals the deeper character of this conception and the actual, ambiguous attitude of Islamic States towards proselytism and conversion. There is neither a general term meaning "conversion", nor "proselytism". The conversion of a Muslim to another religion is singled out as *ridda*, apostasy. *Ridda* is forbidden; on the contrary, other types of conversion are either of no relevance or welcomed (as for the case of the conversion to Islam). *Da'wa* means the call to Islam, the Islamic proselytism. The term can not properly apply to other kinds of proselytism. *Da'wa* is normally supported by the Islamic States. Other kinds of proselytism are tolerated, on the condition that they do not target Muslims. If they do so, they are prohibited.

The conception of the freedom of religion defended by Islamic States is intrinsically not egalitarian. It does not apply to every religion or to every believer in the same way. The legal vocabulary itself makes it impossible to speak of the different religions on an equal footing, thinking in the same terms of the freedom of all citizens, Muslims and non Muslims. In those countries, statehood is intimately linked to the Islamic religious tradition. Political membership almost coincides with religious membership. Proselytism is not restricted because of its interference with the right of individuals to be let alone, but rather because it is perceived as a major threat to the coherence and cohesion of the nation/*umma* : it can lead to *ridda*, the paradigm of political treason.

The analysis of the provisions governing proselytism in a number of Islamic States, such as Algeria, Morocco and Pakistan, will shed light on the ambiguities which stem from the persistence of Islamic legal categories beneath the international discourse on the freedom of religion.

***Proselytism and the Right to Change Religion  
in the Light of the Romanian Legislation***  
**Nicolae V. Dură**

**Abstract**

Unfortunately, the Proselytism is still an subject of discussion among the jurists, theologians, sociologists etc. of ours days. Therefore, to speak about such subject in the framework of an international congress is not only necessary, but also useful. But, we can't speak about Proselytism without to envisage the right to change religion.

In our paper, will present the proselytism and the right to change religion in the light of the Romanian legislation. In this case, we will study the text of Romanian legislation, witch will be evaluated in the light of the European legislation. This evaluation is needed since the actually Romanian legislation remained yet – in its letter – influenced by the communist legislation.

Concerning the right to change religion, we have to underline the fact that, theoretically, in Romania, this is possible, since the text of Constitution and the Status of religious cults approve this reality, but, practically, this is not so easy. Or, in our paper, we will present the cases of jurisprudence, witch certifies the often transgression of the law regarding the religious freedom in our country. Such cases are known even in the Court of Strasbourg.

Finally, we have to remember the fact that the subject of Proselytism and the Right to Change Religion remains one of the principal topics of our society. That is, a such subject has to be studied carefully not only from juridical point of view, but also historically, theologically, sociologically etc.

Taking in consideration this reality, we want to present our paper in the light of interdisciplinary approach, in order to achieve our study with news scientific contributions.

***Proselytism v. Freedom of Religion: The Israeli Case***  
**Aviad Hacoen**

**Abstract**

As written in its Declaration of Independence, The State of Israel is a "Jewish State". One of the conclusions derived from this is that there is no separation between State and Religion in Israel, and the State – by means of its different institutions, is deeply involved in various aspects of religious matters, such as education, marriage and divorce, conversion, religious courts, dietary laws ('Kashrut'), burial, etc.

In 1992 Israel enacted two "Basic Laws", considered to be quasi-constitution, which was followed by a "Constitutional Revolution" that entrenched the various Human Rights in all levels of the Israeli legal system. In both laws, there is a duty to implement all Human Rights according to "the values of a Jewish and Democratic State".

The problem is, however, that in many cases there is a **contradiction** between these values. For instance, according to Jewish Law it is prohibited for a person to change his religion and be converted to another religion.

In modern legal systems, this notion is unacceptable, since it contradicts the basic principles of democracy, such as Freedom in general, and Freedom of Speech and Thought and Freedom of Religion, in particular.

Moreover: not only does Jewish Law prohibit any kind of proselytism or conversion to other religions, but according to the Israeli Penal Code, enticement of a person to change his/her religion (for example. by the Christian Mission) is a **criminal offence**.

The presentation will try to explain the background – historical, sociological and legal – to the special Israely legal arrangement regarding the prohibition on free Proselytism, and to examine how such prohibition can co-exist with the basic principal of Freedom of Religion in a Democracy, and what are the reflections of this issue on the broad tension between Jewish Values and Democratic values as they have been reflected in the Israeli legal system in the past and in modern times.



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## ***Religious Symbols in Public Institutions***

***Religious symbols:  
a comparison between the United States and Italian experience  
Adelaide Madera***

### **Abstract**

In Western democracies the issue of religious symbols is nowadays the testing ground of the difficult balance between the principle of state secularism and religious freedom. The emergence of this problem in the European Union is connected with the increasing Muslim immigration, but also in the United States, where there is an established religious pluralism, the acceptance of religious minorities is not always without problems.

In the U.S.A., as in European countries, adhesion to a secular state model implies exclusion of religion from the public field, and its containment in the private ambit. This trend is emphasized by the self assertion of new religious groups: the need for their integration in the U.S.A., as in other juridical systems which qualify themselves as secular, requires the identification of the most suitable means to respond to the demands of religious pluralism. All this means an evolution of the very idea of secularism. The benevolent secularism towards some religious confessions is changing into stricter criteria of neutrality (U.S.A., Italy); for these reasons a national identity connected with the symbols of Jewish-Christian tradition is no longer understandable. Jurisprudence testifies that the interaction of Church-State relationships is being increasingly played on the field of the legitimacy of the forms of religious message diffusion, with the apparent state cooperation. Such cooperation, when it happens, seems to damage increasingly the need of new religious groups to participate in an effective pluralism.

In this framework, the American experience testifies both how in a pluralistic society the members of a religious confession may be subject to restrictions connected with their faith and the laws generally in force have a variable impact on religious citizens, imposing burdens because of their religious choices. We wonder whether either a State has to adopt an attitude of strict neutrality towards demands about religious freedom, creating that impenetrable wall of separation, which seems required by the strictest interpretations of the establishment clause, or a public action oriented to remove the burdens connected to the exercise of religious freedom (guaranteeing a reasonable accommodation of it) is acceptable, in which measure it is, and which are the most suitable instruments.

In a juridical context where every form of state endorsement of religion is forbidden, debate about religious symbols remains living and present, when it is connected with a claim both of the individual (active symbol) and of a more or less large community (passive symbol) in order to express their own religious identity either in public or in a place open to the public.

In the U.S.A. the Supreme Court is charged both with the definition of the "variable geometry" of religious freedom and its limits and with the duty to realize this difficult balance; the maintenance of this balance prevents the explosion of political divisiveness for religious reasons from time to time and maintains that coherence which permits all citizens to feel themselves full members of the political community, whatever race, gender, ethnic group and religion they belong to. It is however an acquired awareness that the choice of religious accommodation is more difficult to pursue than an aseptic formal neutrality.

The benefit of the comparison with the American model is clear, as nowadays scholars of ecclesiastical law swing between different interpretations of the principle of secularism: sometimes they hope for the acceptance of a strict religious neutrality (as in the French

model) sometimes they tend in the direction of a secularism consistent with special forms of recognition of democratically tolerable religious peculiarities. Within this framework the question of religious symbols is a catalytic element of greater problems, involving the identification of a model of a politically correct secularism, which guarantees the satisfaction of both individual and collective religious demands while still respecting constitutional values. The verifying of the correct measure of state legislative intervention in a pluralistic society, without causing obstacles or prejudices to the development of the free market of religions is essential.

In the light of the comparison of different models of Church-State relationships and their costs/benefits impact on both individual and collective religious freedom, a juridical system can pursue the aim to reach equality as a generalized extension of an equally favourable treatment to all religious groups, protecting their specific identities, rather than as an elimination of every regime of favour and as a realization of a model of formal neutrality.

The problem of religious symbols is an incentive to evaluate future methodological choices of the legislator about the protection of religion in an age of the globalization of rights, by making a comparison with different normative experiences: a widespread ecclesiastical law, regulated only by civil law and entrusted to the self-managed production of private people involved, with the (formal) technical support of professional jurists (by means of conventions, contracts, codes of behaviour, confirmed by administrative or judicial provisions) or rather (more coherently with the principle of equal liberty) an ecclesiastical law full of concrete contents (not through private conventions) but through democratically and secularly enforced laws subject to a control of constitutional compatibility.

***Civil Religion in the Framework of Religious Symbols in Public Institutions***  
**Elena Miroshnikova**

**Abstract**

1. Religion is one of the disputed legacies of human history. Private belief and public belief often conflict. How can a political regime harmoniously accommodate a range of private religious *weltanschauungs* into a structure of public belief that has been shaped by time and tradition? What are the place and the role of religious symbols in relations between states and religious communities? Why and for what reasons? Do existing relations promote societal harmony or do they disintegrate the peace? What corrections, if any, should be made with reference to existing public religious symbols? Are public religious symbols good for the national and cultural identities of the state? Answers to such questions do not come easily.

2. The phenomenon of secularization further complicates the picture. Is it possible now to say that secularization has achieved its goals and religion is now outside the public domain? Is religion now only the private thing of the person? The evolution of the world after the Enlightenment tends toward this conclusion, at least in some parts of the world. From one side, of course, the influence of secularization is very strong. In Continental Europe, from which Christian evangelization began, it is proper to speak of the need for "reevangelisation" (Pope Benedict XXIV). From the other side, the exodus from the churches does not necessarily imply a break from belief of any kind. Among European adults, about 70% still say they are religious (this figure parallels Russia). On the strength of figures like these, some might say that we are witnessing a process of desecularization. I disagree. Once born, secularization is not likely to diminish; the change in the issue of religion becomes a reality. Religious symbols might be a way of accommodating religion in a secularized world.

3. Globalization changes things too. Cultural and national particularities are melting away, so to say. Religion in this situation becomes the new status; it becomes a sign of national and cultural identity, a sign for the main population as much as for immigrants. Religious symbols in public institutions might be a way of acknowledging the reality of globalization. The conflicts between Islam and Christianity in the context of the use of religious symbols in public institutions show the practical difficulties in accommodating a range of private religious *weltanschauungs* into a structure of public belief.

4. In recent times the engagement of religious bodies in the body politic has grown to cover a wide range of issues, including the economic and social dimensions. E.g., the discussion about religious instruction in public schools is evidence of how much religion has become politicized. In the main, it is impossible to put religion outside of public life. The phenomenon of civil religion is an expression of a friendly state-church relationship and is a *via media* between separation and identification, between recognizing religion as a private right and as an institutional form. We are witnesses today of new forms of public religion. Hegel's dialectic--thesis, antithesis, synthesis--applies here. In this context I understand religion as thesis, secularization as antithesis, and the civil religion as synthesis (religion--secularization--civil religion).

5. Civil religion, as already suggested, might be part of the answer. Civil religion is generalized public belief that accommodates within its belief structure as many religious and nonreligious *weltanschauungs* as possible. It is a form of connection between religion and politics. But is it a revival or rejection of traditional religions? Perhaps both. Civil religion might be basic to the realization of the state's neutrality, to guarantee the equality of religions or beliefs of the citizens. Moreover, civil religion might be a way of accommodating religion in a secularized world. It might also be a way of acknowledging the reality of globalization.

6. Civil religion in the framework of religious symbols in public institutions in the Russian context might be a revival of older religious ideas, or it might be a rejection of older religious ideas. It might be a little of both, but whatever it is, I hope it will be fundamentally a tool to unite the nation, to give a moral ground for government policy and for embracing religious pluralism. Russia's religious tradition (state identification with Russian Orthodoxy) was broken

during the Soviet period. A form of separation appeared during the Soviet era, but it was a hostile separation of religion *from* national life rather than a friendly separation *of* religion from state activity. Soviet policy marginalized religion; it did not embrace it. Thus, in today's world, which is so strongly marked by diversity of belief, Russia has no broad tradition of religious pluralism. Civil religion is an innovative idea in the post-Soviet world that could aid Russian in embracing religious pluralism.

Conclusion:

The new Russia must find a way for religion and democracy to be mutually supportive. Civil religion might be of help in this respect, enabling Russia to embrace freedom of conscience in a polyconfessional state while also refusing to embrace religious nationalism under the motto of patriotism.

# ***Religious Symbols and the Fragmentation of Freedom of Religion or Belief through Freedom of Manifestation***

**Peter Petkoff**

To what extent the treatment of religious symbols as other belief symbols (civic, other competing political models) through the lens of freedom of expression/manifestation marks a departure from treating religious symbols in the context of freedom of religion or belief?

## **Methodology**

This is a comparative study of a sample of national and international cases against the background of legal and political theory with a focus on religious symbols.

## **Abstract**

The theme of external confrontation dominates the legal and political discourses on religious symbols which are frequently presented as a manifestation of an opposition to political symbols and constitutional principles. Religious symbols are often interpreted as something 'other than' civic symbols, something which dilutes civic symbols, misguides away from them and is therefore a kind of a civic subversion, a civic anomaly. By revisiting a number of 'religious symbols' landmark cases the paper examines the extent to which the adopted 'symbols' language and the chosen line of enquiry dominated by 'manifestation focus' have developed a legal discourse grounded primarily in the context of constitutional provisions and constitutional exceptions. This approach has evolved historically into a departure from interpreting religious symbols through the lens of freedom of religion or belief. The occasional cases where freedom of religion or belief has dominated the discourse religious symbols have been reduced to *forum externum*. Recent studies of current religious freedom jurisprudence have already highlighted the limitations of the public/private divide with regards to religious freedom claims and the need for religious freedom cases to be interpreted through a multi-vector approach which takes into account the complex and often indivisible relationship between *forum internum* and *forum externum* on a case by case basis. The fluidity of this approach has as its starting point protection of freedom of religion or belief through the lens of human rights seen as legal tools rather than as an ethical code. Applied to religious symbols this approach confronts head-on the obvious problem of religious symbols' jurisprudence - that religious symbols are not necessarily seen as part of the complex life of the concept of freedom of religion or belief, but as an exterior which could and should be isolated from the core concept.

Historically the legal discourse in relation to religious symbols has been focused on the exterior representation of religious belief. The 'semantic sting' to use Dworkin's term of this approach is that the term 'symbol' in different contexts has colliding connotations. While symbol sometimes refers to a visual association, in a religious context the term 'symbol' signifies the totality of a life choices, an existential pattern in its full complexity within which a notion of interior or exterior cannot be isolated. In this way a vague linguistic reference to a graphical representation could also mean life, way, truth and deeper meaning.

In this context this paper also attempts to explore the anatomy of emergence of religious symbols discourse, its roots, legal and political theory in the background of such discourse and the reasons why particular types of religious symbols receive higher visibility compared to others.

The author examines the ways courts handle religious symbols claims and highlights the differences between more systemic approaches and more practical case by case oriented approaches. One of the most significant features of such jurisprudence is the courts' uncertainty whether religious symbols should be approached via the route manifestation and freedom of expression and in isolation from freedom of religion or belief or primarily through the lens of freedom of religion or belief. The paper explores hermeneutic strategies which are likely to move religious symbols' discourse beyond expression and manifestation and beyond the notion that and religious symbols just as certain political symbols are reduced to those which challenge a constitutional order and those which do not.

Possible future strategies:

- Case by case human rights' hermeneutic strategies with an emphasis on freedom of religion or belief
- Proportionality and 'individual belief history' (a concept P Edge has convincingly borrowed from criminal law and applied in respect to freedom of religion or belief)

- Rethinking of neutrality

Departure from the civic-religious, and public-private dichotomies.

***The European Court OF Human Rights' jurisprudence on religious symbols in public institutions in comparative perspective: maximum protection of the freedom of religion through judicial minimalism?***

**Hans-Martien Th.D. ten Napel & Florian H. Karim Theissen**

**Abstract**

How should judges deal with the manifestation of religious symbols in public institutions? In light of the important role of human rights in our legal and political system, the freedom of religion should be central to the approach of the courts. As human rights should only be limited if this is strictly unavoidable (in a democratic society), courts should grant individuals and groups maximum protection under the freedom of religion. The central question of the proposed paper shall be: has the European Court of Human Rights (ECtHR) lived up to this standard? In order to answer this question we shall analyze case law by the ECtHR, compare that case law to that of the high courts of Canada and South Africa, and assess the case law of all three courts from the angle of interpretation theory and in particular judicial minimalism. The Turkish Constitutional Court is currently examining a constitutional complaint against the governing AK-Party. The lifting of the constitutional ban on headscarves in public educational institutions, which was introduced by the government recently is considered contrary to the Kemalist principles of secularism (*laïcité*).

Precisely a decade ago the Turkish Constitutional Court found the governing Refah party unconstitutional in light of the principles of secularism. The judgment was upheld in a Grand Chamber judgment of the ECtHR in 2003. The ECtHR considered that Turkey had not breached the boundaries of the freedom of religion and the freedom of association by prohibiting the party. In its argumentation the ECtHR referred to alleged statements made by prominent party members, who *inter alia* had encouraged the wearing of Islamic headscarves in public and educational establishments. Referring to its earlier case law (such as *Dahlab v. Switzerland*), the Court held that 'in a democratic society the State may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety'. In *Leyla Şahin v. Turkey* (2005) the Grand Chamber of the ECtHR again held that although a Turkish ban on wearing headscarves at state universities interfered with the right of students to manifest their religion, the interference can nevertheless be justified as 'necessary in a democratic society'.

These judgments by the ECtHR have raised severe concern and criticism. For example in 2004 Kevin Boyle qualified the judgment in the Refah case as 'unfortunate and wrong'. He argued that '[t]here seems little doubt that in Refah the European Court has sought to weld together human rights, democracy and secularism. (...) Is it laying down a European model of human rights and democratic pluralism that is predicated on secularism? What implications flow for the rights protected under article 9 of freedom on religion?'

A year later, during a conference in Strasbourg, T. Jeremy Gunn argued that (what at the time still was) the Chamber's judgment in *Leyla Şahin v. Turkey* 'serves as a warning of how failing to analyze the issues objectively and openly can result in the suppression of human rights by an institution that was created to protect them'. Ingvill Thorson Plesner warned that 'the approach of the ECtHR (...) exhibit[s] an understanding of the role of religious manifestations in the public realm that resembles what we might call "secular fundamentalism" or "fundamentalist secularism". (...) The "fundamentalist" aspect of this approach lies in the fact that it imposes a secularist way of life on all individuals when they enter the public domain, also on those whose religious identity calls for certain manifestations like wearing a particular jewel, clothing or other symbols.'

Finally, in an excellent book chapter published this year, Meerschaut and Gutwirth argue that 'the compatibility of the outspoken and strict brand of Turkish Kemalist secularism with the Convention can, contrary to the opinion of the Grand Chamber, be seriously challenged when it prevents the expression of religious symbols and practices in the public sphere in a very radical way, which is objectionable in the light of the freedom of religion of Article 9 of the ECHR'.

In order to establish whether the ECtHR has indeed not lived up to the standard of granting maximum protection under Article 9 we will compare its case law with respect to the

manifestation of religious symbols in public institutions to a selection of relevant case law of the Canadian Supreme Court and the South African Constitutional Court.

The relevance of such a comparison may be illustrated by the case of Multani which was decided by the Canadian S.C. more or less simultaneously with the Leyla Şahin case. Multani dealt with the decision of a school board not to allow a Sikh student to wear a metal kirpan (dagger) in school. The court unanimously found the ban to be a violation of the freedom of religion because it was disproportionate and would 'stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others'.

Cass Sunstein, professor of jurisprudence at the University of Chicago, argues that such striking differences in judicial outcome are caused by different theories of interpretation to which judges adhere. Sunstein himself proposes 'incompletely theorized agreements' and 'minimalist' interpretation as most suited for pluralistic, democratic societies, as it should be 'possible for people to agree, when agreement is necessary, and unnecessary for people to agree, when agreement is impossible'.

In the proposed paper we shall measure the case law of the ECtHR, the Canadian Supreme Court and the Constitutional Court of South Africa against the standards of minimalism and incompletely theorized agreements. According to Aagje Ieven, writing in the slightly different context of privacy rights in the ECtHR, 'both the features of the Court's jurisprudence and the reasons the Court offers for its decisions fit in with Sunstein's minimalism'. Yet, when we compare Şahin to Multani one might argue that the Canadian court approached its case in a much more minimalist fashion. By comparing the case law of the three high courts and the interpretation theories used, we will investigate whether any interpretation theory and minimalism in particular is to be favored as the approach by judges towards the manifestation of religious symbols in public institutions and whether this would lead to the maximum protection of the freedom of religion.



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## ***The Legal Status of Islam in Western Countries***

### ***Implementation of the 1992 agreement between Spain and the Islamic commission: development and perspectives***

**Carmen Garcimartín**

#### **Abstract**

The Agreement of Cooperation between the Spanish Government and the Islamic Commission in Spain was approved by Law on 1992, November 10th. Since then, no modification or revision of its articles has been formally proposed.

The context of implementation of the Agreement has deeply changed during the seventeen years it has been in force. Governments from different ideological backgrounds were in power in this period. Immigration -mostly immigrants from North Africa- raised the number of Muslims with permanent residence in Spain to unprecedented levels. Therefore, social life met transformations that make the Spanish scenario, if not new, at least different than the one that saw the enactment of the Agreement.

There have also been paramount legal modifications in matters regulated on the Agreement. Just as an example, from 1992 to present there had been three different educational programs, all of them with specific provisions for religious education in public schools, which puzzle all who try to find out how this matter is working out.

Moreover, some other issues had not been implemented due to the hindrances to this process, or because of the difficulties to put them into effect.

It is time, then, for a reflection on this Agreement, mainly on those matters of particular concern both for public authorities and Islamic communities, and set up proposals for a development of the Agreement. Several tasks are lying ahead. Although there had been important achievements, implementation of this Agreement claims for new or more accurate measures in order to attain its main goals.

Nevertheless, modification of the Agreement cannot be completely cast aside.

New problems that required a juridical answer stemmed from the present social situation. On the other hand, the constitutional principles of equality, religious freedom and cooperation have been developed by the Supreme and Constitutional Courts, and this doctrine can set light to the accomplishment of the aims of the Agreement.

#### ***Methodology and approach***

The paper will begin with a brief statement of the history of Muslims in Spain and its present situation, the process that led to the signing of the Agreement between the Government and the Islamic Commission, and the main problems that arose during the negotiation. Afterwards, it will analyze the legal development of the Agreement clauses. It includes legislative and statutory tools, both those that pursue an implementation of a specific provision of the Agreement, and those included on general laws that take into account the Government settlement with the Islamic Commission.

Case law will illustrate the practical problems that the Spanish juridical system had to deal with.

Literature on the topic is wide enough to act as a framework for the endeavour of attempting new proposals, although most of the articles consider the three Agreements with religious denominations signed on the same date jointly. However, there is not a comprehensive examination of the development of this specific Agreement, yet the distinctiveness of certain features and the particular social situation recommend a differentiate treatment.

# ***The Legal Status of Islam in the Western Countries: Models and Comparisons***

## **ISLAM AT THE THRESHOLD**

**Andrea Pin**

### **Abstract**

The paper is aimed to focus on the different ways of integrating Islam, according to some European Countries and with a comparison with the US model.

### **1. Tolerance, freedom and inclusion. Models of Islam-State relationships in Europe**

The shaping of a clear, stable relationship between Islam and the State in Europe takes different forms in each State. One could even say that Islam is a factor that makes the differences between the European Countries rise: if the European Union's motto was said to be "Unity in diversity", Islam helps putting the accent on "diversity".

Fears for Islam, the compelling principle of equality and the aim to integrate Muslims have been influencing State policies, which can be roughly divided into three models.

### **2. Toleration. Fear of Allah**

Countries like Bulgaria or France seem to handle Islam with much care, although their attitudes may vary, according to their own traditions.

**2.1.** Bulgaria is the most explicit example, since it has been trying to control Islamic communities, deeply influencing the election of their leaders (the European Court of Human Rights clearly censored this attempt); but Belgium is not far from Bulgaria, because the rising of a national Islam has been heavily pushed by the Institutions.

**2.2.** France has been reflecting on the implications of *laïcité*, coming to ban religious signs from public schools – precisely after a long controversy over Islamic headscarves. This has produced a serious damage for other religions, like Orthodox Jews who must wear the *Yarmulka* and therefore cannot attend public schools anymore.

**2.3.** Thus, it is not too strange that some of these Countries have been elaborating charters or declarations whose purpose is to reaffirm the secular character of the State, right after the increase of Islamic presence. This attempts can be seen as initiatives trying to control and define the borders of a peaceful coexistence of different identities.

### **3. Freedom. Equality rules**

Spain can be regarded as an example of the pursuing of equality also in the field of religious freedom. The government signed a pact with Muslims, as well as with Protestants and Jews, in 1992. The political meaning of this action cannot be underestimated, since it occurred exactly 500 years after the end of the *Reconquista*. The contents of the Pact with Muslims, which is almost identical to the other Pacts, seem to confirm that the aim of the State was to show its equality towards minorities which had been previously persecuted: the same Pact, at the very same moment, for all.

### **4. Inclusion – or preventing Islam from biting?**

**4.1.** Great Britain and the United States of America seem both pursuing security, religious freedom and the sense of a common ground. The Archbishop of Canterbury gave a speech supporting the Islamic demands for a separate jurisdiction, according to their religious law. The U.S. Congressman Keith Ellison was allowed to swear on the Koran in spite of the Bible. In much different ways, United Kingdom and the United States seem to care much of Islamic identity.

**4.2.** Rowan Williams seems to think that "*Shari'a Courts*" would help Muslim feel more British, while Bush invited Muslim leaders to join the Christian and Jewish ones – who traditionally surround him – in public commemorations, after 9/11. They both give room to Muslims, because this would make them enter American and British identity more completely.

### **5. Conclusion. Social Contract versus Alliance of Civilizations?**

**5.1.** As different models of integrating Islam are taking shape in each Country, one can try to focus on the two leading trends (although they may vary considerably): on

one side, Countries trying to fix a catalogue of values and rights that each culture and religion must respect and feel committed to (although they already have bills of rights within their own Constitutions); on the other side, some Countries trying to push Islamic communities to integrate into the National society and culture.

**5.2.** The British and American model seems to lead to a social confrontation of different cultures, whose relationship might have heavy effects on the public sphere. The French and Belgian one is perhaps a renewal of the Social Contract: they try to face Islamic claims in order to settle the boundaries of a liberal society precisely to avoid any strong social and political conflict and confrontation. This second path does answer the need to reaffirm the pillars of a stable political society, but it could show its weakness, because the pillars are discussed almost daily.

***Between State and Religious Orders:  
The Resolution of Family Conflicts by Canadian Muslim Women and the  
debate on religious arbitration : what is at stake?***  
**Anne Saris**

**Abstract**

This paper is based on data collected from a qualitative research project conducted between 2005 and 2007. The project was born in the context of the debates in Canada surrounding religious arbitration of family disputes. While in the province of Ontario faithbased arbitration was recognized by the state until recently, in the province of Quebec all family-related litigation must pass before a judge. To our knowledge, no research had yet been undertaken to explore the reality on the ground, particularly within the Muslim communities, even though alternate dispute resolution is documented to be an important part of the informal legal landscape in Western societies such as Britain, the United States and Canada. The aim of the project was to comprehend the ways that Montreal Muslim *women* in particular seek to resolve the family problems they encounter. More precisely the research sought to examine the alternative dispute resolution mechanisms and resources solicited by Muslim women. Some of the issues examined in the research were: the reasons that motivate their choice of resources to resolve family disputes; the functioning of the dispute processes and the extent to which any of the actors involved work together.

We therefore sought out, through semi-directive interviews, the experience and opinions of 24 women, representative of a variety of geographic and ethnic origins and immigration histories and who also reflected different relationships to Islam as a religion.

Eighteen of the 24 women had had direct experience of negotiating family conflicts while expressed opinions. Furthermore, we sought to establish a broader picture through interviews with a number of different actors who are involved in family conflict resolution. A total of 37 persons were interviewed including: five community workers, four social workers, 13 Muslim religious counselors (imams and others), six accredited family mediators, one lay mediator, two judges and six lawyers.

The main focus of this paper is on two interrelated questions, partly and only indirectly examined in our research reports: does there exist in the Montreal Muslim communities a parallel justice system for the resolution of family disputes and why is the State so concerned about the existence of such religious parallel justice in a multicultural society? Furthermore, to what degree are the Québec civil justice system and Muslim alternative dispute resolution processes (procedure+substantive norms) led by religious counselors insular or open to each other and what does it mean in terms of legal pluralism?

In order to answer these questions, we will look more closely - in part 1 of this paper - at the at the functions attributed to the existing faith-based and state-related dispute resolution mechanisms by the Muslim women participants and the actors of the institutions themselves confronting them to the legal and political theory literature regarding the role of the State in family matters in a multicultural society (Bakt, Eisenberg, GaudreaultDesbien, Fournier, Macklin, Schachar); in part 2 of this paper, we will examine how the actors of each set of institutions carry out their functions in particular situations to determine whether and in what way they let considerations related to the other set of institutions influence their own dispute resolution process (either in terms of procedure or in terms of substantive norms). In this second part, we will confront these practices with on the one side the views of different scholars on the evolution of islamic norms in the West (Cesari, Roy, Menski, Pearl, Asad) and on the other side the different theories of legal pluralism (Griffith, MacDonald, Vanderlinden).

This is a qualitative case study of discourse enabling us to illustrate the diversity of relevant perceptions and experiences. Our findings tend to show that, despite the recourse by Muslim women to faith-based resolution of family disputes, these processes do not tend to form a parallel justice system in Montreal. Rather, different and sometimes complementary functions are attributed by the participants to the existing dispute resolution mechanisms, and the recourse by Muslim women to one or more of these depend on the goals and other expectations they assign to them. When we turn to the discourse of the civil actors and religious counselors, we see that norms other than their own are sometimes acknowledged as an important element of the context of the parties but that nevertheless they are not recognised as having any independent force inside their own system or tradition. Finally, while

most of the religious counselors apply a rather patriarchal reading of Islamic law which shows little signs of influence from Quebec law, a minority of them refers to more equitable Muslim norms be they constructed internally without reference to Quebec law or in reference to such law. As well, the insularity of most of the religious counselors does occur as often regarding their view of divorce *as process*. Indeed the majority of religious counselors expressly recognize in the civil legal system an at least complementary role to theirs, that is once the Islamic substance of the divorce itself or the settlement is ensured, the expected approval by the civil court judge can guarantee better recognition and enforcement.