Religions and legal boundaries of democracy in Europe: European commitment to democratic principles

University of Helsinki, 2009

Religions and legal boundaries of democracy in Europe: European commitment to democratic principles

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Academic Dissertation

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I dedicate this book to my parents
as an expression of appreciation for their constant
support of my scientific endeavours.

Pracę tę dedykuję moim rodzicom, z podziękowaniami
za wkład, jaki włożyli w proces mojej edukacji i wsparcie
dla moich naukowych wysiłków.

Abstract

This dissertation's main research questions concern common European principles of democracy in regard to religious freedom. It deals with the modern understanding of European democracy and is a combination of interdisciplinary research on law, culture, politics and philosophy.

The main objective of this research is to identify common European legal principles and standards applying to religious freedom and compare them with standards and approaches in particular states. The bases for the analysis are the principles of equality and achievement of religious pluralism. It approaches issues such as the problems of defining religion and the pursuit of religious equality vis-à-vis principles of establishment or quasi-establishment of traditional European religions. In analytical part it critically approaches the commitment of European countries to principles of equality and religious pluralism on examples of selected problematic areas. These areas include women's reproductive rights, problems of blasphemy and hate speech and relationships between religion and education. It evaluates the impact of various legal regulations in Europe and their influence on religious or non-religious adherents. Finally, in the theoretical part the research deals with the sustainable model of democracy in the multicultural era. It evaluates the possibilities for extending the legal system's flexibility towards other legal systems, such as Sharia law. Finally, it joins more general discussion on European values, commitment of European states to these values and further perspectives for European integration on axiological level.

The analysis shows that currently European consensus and commitment to values of equality and religious pluralism lacks consistency. Even "religion" itself is not uniformly understood. The question whether the state should remain neutral towards doctrines and to what degree has neither been approached with sufficient coherence. While traditional Christian religions still enjoy a wide margin of religious freedom, even in public sphere, new religious movements or culturally new religions are often restrained. Without common commitment to European values, the principle of pluralism and equality is bound to be applied selectively. It is important that the model of European democracy adjusts to the conditions of religious pluralism. Without coherence in application of democratic principles and rights, Europe is bound to be plagued by guilty conscience of double standardisation and emptiness of the European "soul".

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"No one who achieves success does so without acknowledging the help of others. The wise and confident acknowledge this help with gratitude."

– Alfred North Whitehead

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Glossary

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
COE	Council of Europe
CRC	Convention on the Rights of the Child
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EComHR	European Commission of Human Rights
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
EU	European Union
FGM	Female genital mutilation
HSE	Health Service Executive
LPR	Liga Polskich Rodzin (League of Polish Families)
MP	Member of Parliament
NGO	Non Governmental Organization
NRM	New Religious Movement
PiS	Prawo i Sprawiedliwosc (Law and Justice)
RE	Religious Education
UN	United Nations

Introduction

The issue of religious resurgence has recently been the subject of interest all around the world. Today, traditional religions influence law, culture and society with an entirely new impact - and the discussion of the clash of civilizations has centred on religious problems.[1] As Habermas observed, the phenomenon can also be seen in secular Europe, even though the extents vary in different countries.[2] Europe, however, with its complex historical background and various religious traditions, is a difficult research ground for the study of the phenomenon. The variety of approaches towards religion in Europe is so wide, that Machado dares to call it a "potpourri" of different notions of religious freedom, religious confessions, equality, laicism, secularism and state neutrality.[3]

Against such a complicated background, the legal questions on the European level pose no less difficulty. Europe enjoys freedom of religion as provided by the ECHR and EU citizens and residents enjoy freedom from religious discrimination in employment. Yet, the problems start with the very attempt at even defining a "religion". Europe is not free from religious conflict or religiously based problems. In 2006 the Deutsche Oper (the German National Opera) in Berlin cancelled performances of Mozart's opera Idomeneo due to fear of offending religious feelings. The controversial scene, in which King Idomeneo presents the severed heads not only of the Greek god Poseidon, but also of Mohammad, Jesus

1. See: Huntington S.P, 1996.
2. Habermas J., 2005.
3. Machado J.E.M., 2004-2005.

and Buddha, was the main reason for the cancellation.[4] Other events in Europe, such as the crisis connected with printing caricatures of the prophet Mohammad in Danish newspapers, headscarf cases in France or Germany, or the restrictive and openly pro-Catholic policy of the Polish authorities between 2005-2007, all gave rise to questions about where the core of democracy and rule of law lie. For me as a Pole, examples from my home country's most recent history constantly provoked questions concerning the core and borderlines of European democracy.

On the other side of the spectrum of the discussion around the European approach towards religion appear issues of multiculturalism, religious pluralism and safeguarding the broadest possible choice in matters of conscience.

This research attempts to outline the relationship among religion, politics, culture and law - exploring whether the impact of religion on law and liberty can expand without limits. I attempt to balance religious and secular interests and offer a democratic model, which would in the best way secure both the pursuit of European democratic goals and individual religious goals. This dissertation offers a useful combination of interdisciplinary research on law, culture, politics and philosophy with the primary approach being legal-theoretical. Law is a phenomenon which cannot be separated from its social application and the application of law is always culturally influenced[5]. For this reason, the research has been set in a wider social context.

The dissertation is divided into three parts. Part one offers an introduction to the legal panorama of approaches towards religion in Europe. Part two is analytical, having as its subject particular cases and approaches to problems connected with religion. Part three is theoretical, drawing upon the previous analysis in order to offer a deeper theoretical understanding.

In part one I first look at the term "religion" and its understanding in law. I have used legal documents and case law from different legal cultures as well as theoretical works on the subject. I have addressed the question if the legal concept of religion is definable and the extent to which its

4. Fury as Berlin Opera Cancels Performance, Der Spiegel International, 26.09.2006.
5. See e.g.: Glenn, H. P, 2004.

modern understanding in Europe includes atheism, agnosticism, cults, non-mainstream religions and modern forms of occult movements. I propose a definition of religion that could be universally applicable in European conditions and discuss whether such a definition is necessary and helpful.

Secondly, I analyse various legal positions on religion in European countries. Initially I address European-wide principles concerning religion and religious pluralism and characterise the core of a common European standard. Furthermore, I deal with church-state relationships and offer a critical analysis of various approaches and their influence on the principle of religious pluralism.

In part two, I move towards legal problems of a religious nature in contemporary European society and outline the legal implications of the chosen case examples. Traditional religious communities still often influence the state to penalise or regulate public matters in accordance with their beliefs. As a result, non-religious individuals are affected and subject to limitations not consistent with their own philosophical convictions. I define the use of the term "non-religious individuals" in the chapter concerning the methodology employed in this research. If regulations based on the religious (or non-religious) beliefs of a "moral majority" are passed into legislation, they often create inequality *de facto* although not necessarily *de iure*. Legislation of this nature is usually supported by arguments that refer to more general concepts such as "morality" or "social order". However, in contemporary European society notions such as "morality" are still often interpreted exclusively as historically traditional Christian morality due to the long historical influence of Christianity on understandings of morals and social order. At the same time, Europe seems to reject morality as understood in Islam and defend its public sphere from its influence. On legal grounds, this tendency is evident in the judgments of the European Court of Human Rights in head scarf or blasphemy cases, for instance.

In part two of the research, I concentrate on legal aspects of specific conflict areas of religious freedom and other freedoms. As the three topics of legal analysis, I have chosen the issues of women's reproductive rights, blasphemy and hate-speech laws, and religious education. This choice was primarily dictated by the appearance of a common European approach

to these issues. The approach is reflected in the recent interpretive documents adopted by the Council of Europe and the European Union. The approach is compared with law and its application in countries where the national standards diverge from the recognised common standard.

In part three, I deal with deeper theoretical and philosophical questions based on the analysis of law and legal policies conducted in previous chapters. I base my theoretical analysis to a large degree on Rawls' theory concerning the co-existence of various fundamental doctrines in democratic society. I refer also to Habermasian and Dworkinian theories of multicultural liberal democracy and rights. I attempt to address the question of what the meaning of democracy is when we take into consideration different religious traditions present in society. In connection to this diverse picture I discuss the role of secularism in democratisation processes. I attempt to assess whether secularism and neutralism towards religions are necessary for the existence of a democratic state and if so, to what degree. I also evaluate whether secularism is incompatible with freedom of religion and how far the secularism or neutralism of the state in religious matters can be limited in order to secure the best facilitation of freedom of religion. I also analyse whether liberal democratic pluralism is the only possible democratic model or whether legal pluralism is possible to pursue and to what degree.

I next discuss issues of democracy and its understanding in Europe. I evaluate what a common democratic standard means in European conditions. I assess the role of rights as an essential part of democratic foundations and the instrument of democratisation of the European polity. Furthermore, I draw on other fundamental principles and their impact on European integration. I then evaluate the commitment of European countries to the agreed fundamental principles and values. I critically approach the cultural relativism of efforts promoting greater religious and cultural pluralism. Moreover, I ask questions about the future of European democracy and offer a critical perspective on its current development. Finally, I conclude by showing how the case of religion illustrates the larger picture of the essential problems associated with processes of European integration.

To understand the problem of religion in modern society and its

influence on law, this research addresses a wide area of problems and questions. However, the key questions reoccurring throughout this volume are: Is European democracy a secular democracy? Does secularism mean a strict separation of religion and the state? Does religious pluralism mean only pluralism for traditionally recognised religions? How freely can law be influenced by other rules such as moral or religious ones? Does Europe need changes in approaches towards religion in order to safeguard the peaceful coexistence of religions and avoid a clash of civilizations?

Part I:
Initial Considerations

1. How and by what means? A few remarks on the method

Legal research is an exceptional branch of science as far as methodology is concerned. It is disputed whether legal scholarship actually has any method at all - and in case it does not, what makes it a science?[6] Tuori reproaches legal science for its bad conscience:

> "Legal science seems to be constantly plagued by a bad conscience. It doubts its scientific status and has an insatiable need to prove, both to itself, and to others that it shares the defining features of a scientific paradigm. But why? Legal science possesses a particular normativity, which separates it from social scientific, such as sociological research on law."[7]

This dispute is caused by a multiplicity of legal science methods. Whereas some researchers like Tuori attempt to classify methods of, for instance, critical legal research[8], others like Koskenniemi argue that even a style can count as a method.[9] This research does not aim to take any position in the methodological dispute. Like the majority of legal researchers, I do not employ a fixed scheme of research methods, as understood in other social sciences. Nevertheless, since my approach to the issues discussed here has certain specific characteristics, and in discussions concerning my

6. For further discussion on methods and/or the lack thereof in legal science, see: Häyhä J. (ed.), 1997.
7. Tuori K., 2002, p 285.
8. Ibid., pp. 283-322.
9. Koskenniemi M., 1997.

work questions on the criteria for selecting the material have appeared, I feel obliged to clarify certain issues concerning how and by what means this research was conducted.

The leading themes of democracy and religion as well as the spatial setting of this research, being Europe, influenced the choice of unorthodox legal methodology. This research cannot be easily classified as human rights, constitutional, international or comparative law research. It includes elements of all these types of legal analysis but it focuses primarily on examples of insufficient commitment to common democratic principles in Europe. These examples naturally deal with various legal problems from the realm of constitutional, international or human rights law. The focus on the insufficient commitment to common principles aims at initiating discussion and providing a useful theoretical democratic model of the relationship between law and religion in increasingly multicultural Europe. It illustrates not only problems of religion but also of Europe as a legal and political polity. Therefore I attempt to guide the reader gradually from presenting the panorama of constitutional problems of regulating religion, through an analysis of the double standardisation of approaches towards "traditional" and "other" religions, to a discussion of the best available democratic models that could reduce problems of "otherisation", double standards or insufficient commitment to the common democratic principles of the European polity. As the underpinning for the theoretical model, I took a Rawlsian model of reasonable consensus, which could serve as the starting point for multicultural modification due to its focus on neutrality towards various doctrines as well as its striking similarity to the process of building common European identity.

1.1. Europe, modern law, hermeneutics and Rawlsian reasonable consensus in the context of religion.

Modern law has developed as a mirror of modern society and culture[10] and European law gave rise to what is nowadays considered modern

10. Tuori K., 2002, pp. 3-5.

Western law. The leading feature of modern law is its positivity[11]. This positivity means primarily that law is a system of rules created by human action and in large degree separated from morals. Modern law is not perceived as a reflection of higher moral norms of divine or other supreme origin. It is instead a logical structure, which needs to have legitimacy and coherence[12]. Traditional positivism, attempting to find the legitimacy of rules and norms in its hierarchical structure has, however, been criticised due to its potential to fall into formalism and totalitarianism[13]. Hermeneutic jurisprudence, while criticizing positivism, still attempts to ensure the coherence of the legal system[14]. Unlike natural law theoreticians, who seek external validation of the legal order, modern liberal democratic thinkers do not look for its legitimacy in any extralegal sources. Instead, they approach law rather as a certain coherent unity and look for its legitimacy and coherence in its own integrity. Dworkin, for instance, in his hermeneutical approach, treats law as integrity and claims that the object of law not only consists of rules but also principles[15]. These principles do not, however, stem from a basic norm or rule, like in classical positivism. The object of law is identified by bringing to light its underlying principles, which are shaped in the process of its application and interpretation. In Warrington's words, following the Dworkinian hermeneutic approach:

> "The law is approached as a seamless semantic tissue that is woven together inextricably and expands harmoniously as its principles are applied to new contexts. At each particular point in time this textual fabric is complete and closed."[16]

Law cannot be interpreted by selective application of rules but instead

11. Ibid., pp. 5-8.
12. For different ways of explaining legitimacy and coherence in positivist theory, compare for instance Kelsen's Grundnorm or Hart's distinction between primary or secondary rules in: Kelsen, H., 1960 or Hart H.L.A., 1961.
13. E.g. Tuori K., 2002, pp.15-21 .
14. Douzinas C., Warrington R,, McVeigh S., 1991, pp. 22-28.
15. See: Dworkin R., 1885, Dworkin R., 1986, or Dworkin R., 1978.
16. Douzinas C., Warrington R,, McVeigh S., 1991, p 57.

as integrity based on master principles, which in Dworkin's case are primarily principles of equal concern and respect.[17] Similarly Rawls, whose theory is taken as the underpinning for the theoretical approach of this research, offers a model of interpretation of the law, which recourses to certain principles that citizens agreed upon and which create a reasonable consensus under which a society has agreed to live. Therefore, individual legal rules must be interpreted in light of these principles.

Tuori distinguishes three levels of the law. Law on the surface consists of changeable norms:

> "At the surface level, the legal order assumes the form of linguistically expressed norms. Although its contents are in a continuous flux, the surface-level legal order can be delineated through fairly unequivocal criteria of formal legal validity; (…). But all in all, the major part of the surface-level legal order, that which the judges and other officials apply in routine cases, is relatively easy and reliably identifiable"[18].

Law on its middle level consists of legal culture, which has an important role in interpretation of the norms. Law in its deep structure consists of basic categories and fundamental principles.[19] Law in its deep structure is similar in majority of legal systems. In regard to legitimacy of the surface level norms, Tuori distinguishes various forms of legitimacy. One of them is justifiability. From the point of view of justifiability, modern law is normatively legitimate, if and only if it can be justified through the principles of subsurface level[20].

In this research I approach law in a similar manner. I treat the legal order in Europe as an integral whole based on common legal principles. Although in Europe rules and principles are created at various levels – national, international and domestic, common principles can be identified. Many individual legal rules and their application contradict one another. Differences, contradictions and conflicts between domestic law rules

17. Ibid., p 57.
18. Tuori K., 2002, p 193
19. Ibid., pp. 193-194
20. Ibid., p 245.

themselves and domestic and European rules are, however, gradually reduced through processes of supranationalisation of the European Union and the Council of Europe. This supranationalisation leads to greater harmonisation of domestic laws in the member states in various legal areas, including those dealing with understandings of democracy, religion and multicultural coexistence. This harmonisation happens both through legally binding instruments, like international treaties or EU directives, and case-law or interpretative documents, which aim to promote a common democratic approach. As the basis for formulating common standards in the process of supranational harmonisation, European institutions, courts and member state organs invoke common European legal democratic principles. The 2000 Employment Equality Directive as well as broad case law of the European Court of Justice concerning gender equality in employment illustrates how a common principle of equality leads to the creation of harmonising rules applicable throughout Europe. In the fragmented and complicated landscape of legal rules in Europe, democratic principles encoded in common treaties or the case law of European courts constitute the common basis of the democratic legitimacy of the law. In this research, law in Europe is treated as a coherent legal unity and the legitimacy of the law is sought in common democratic principles encoded in various legal and interpretative sources drafted at the European level. The basic assumption of this research is that for ensuring the coherence of the complicated mosaic of rules in Europe, domestic law in various countries, while it need not be identical, ought to be interpreted and applied in accordance with those underlying principles.

Europe as a supranational entity does not call for a traditional nation-state-based positivist approach. For these reasons, the common democratic principles of the European polity were taken as the test tool for measuring tensions and problems relevant to this research. The analysis conducted in this research illustrates that even in today's Europe, integrated through common democratic principles such as equality, traditional European religions and churches still influence legal regulations in accordance with their teaching, leaving religious "others" without the realistic possibility of exercising their religious and moral choices. While comparing the common basket of principles

and their application in the case of traditional and non-traditional religions, the research identifies major problems and their consequence for the coherence of European legal systems. Thus in the final part, I deal with questions concerning theoretical democratic models based on today's European approach towards democracy, religious pluralism and multiculturalism.

Taking into consideration common democratic principles stemming from European legal harmonisation, this research builds on the Rawlsian theoretical model. I took as the underpinning of my model the theory of reasonable consensus proposed by Rawls in his *A Theory of Justice* and *Political Liberalism*. The theory was chosen due to its emphasis on religious pluralism and equality, which are identified in this research as the underlying foundations of the developing approach towards religious issues in Europe. The Rawlsian model is a theoretical construction of a political community living together and consisting of groups with conflicting comprehensive doctrines. The idea of reasonable consensus assumes that the only way in which a political community consisting of persons adhering to conflicting doctrines is able coexist is to agree on the core of values that bind the community together. This core of common principles is reasonable consensus. Other values remain outside the scope of the consensus and members of the political community need to work out the way in which they merge in their lives both the principles contained in the reasonable consensus and those outside of it. The Rawslian conception of reasonable consensus resonates in the ideas expressed in the documents issued by the COE and analysed in this study in the context of religion. However, the communitarian critique by authors such as Taylor or Pharekh challenged liberal theory by accusing it of having monopolised thinking on democracy and ignoring in fact those communities whose values and principles are non-liberal. Those communities are treated as fundamentalists and thus left outside the scope of reasonable consensus.

In this study I have attempted to accommodate communitarian concerns and rework the Rawlsian model to fit the new context. This study's analysis of particular tensions between law and religion in Europe confirms communitarian concerns and illustrates how easily non-traditional religious adherents are subject to "otherisation". Therefore, in

this study the Rawlsian model is rebuilt to accommodate and recognise those communities whose basic values and principles are non-liberal and who cannot easily accept the leading positivist paradigm of Western law, in which law, morals and religious values exist as independent normative systems. The new rebuilt model attempts to prevent the "otherisation" of some religious and cultural communities while maintaining a democratic focus, the peaceful coexistence of individuals and groups with diverse religious or non-religious backgrounds, and a hermeneutic view of law as a coherent unity. Despite this communitarian critique, however, I am convinced that in liberal democratic conditions, liberal democratic theory must be taken as the starting point for any further development or adjustment. In legal and political reality, where liberal democratic values are embodied in law and the law's interpretation, like in the case of Europe, taking any other starting point would be deemed to fail, as MacIntyre has argued[21].

1.2. This research among other research on religious problems in Europe

This research is unique among other research on law and religion in Europe. Much of this research employs solely political science and sociological perspectives and methods, like, for instance that adopted in the work edited by Byrnes and Katzenstein in *Religion in an Expanding Europe* or Grace Davie's *Europe: the Exceptional Case: Parameters of Faith in the Modern World*.

In a strictly legal analysis of religious issues in Europe, a purely comparative focus and human rights analysis dominate. The works edited by Eneyedi and Madeley, *Church and State in Contemporary Europe, the Chimera of Neutrality* or Goldschmidt, *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* can be used as primary examples here.

Some other works, like Thorson-Plesner's *Freedom of religion and belief – a quest for state neutrality?* attempt to analyse European problems of law

21. MacItyre A.,1988, p 392.

and religion together with analysing the same issues in other countries of the world. Evans, on the other hand, for instance in *Freedom of Religion Under the European Convention on Human Rights* analyses the topics from the perspective of international law

This study is unique as it presents problems of law and religion in a multi-layered and multi-dimensional way. It adopts a legal perspective but is not limited to comparative law or purely human rights or international law analysis. It attempts to approach Europe as a unique polity, in which a multiplicity of various norms requires an interdisciplinary and holistic approach. It approaches religion as a part of cultural reality of Europe, which must be taken into consideration while constructing common principles of justice in a European legal community. It is a theoretical study on problems of religion, multiculturalism and democracy as well as the identity of Europe. Through research on problems of law and religion, this study offers insight into the current development of the European polity. Therefore sources and methods may vary in different parts of this research, but their goal remains the same – scrutinising and re-shaping the theoretical model of the relationship between law and religion in Europe in order to ensure religious pluralism and strengthen the democratic commitment and identity of Europe as a community.

1.3. The kinds of sources used

In order to address my research questions and illustrate problems regarding my research, I have drawn on a wide variety of sources: legal, extralegal and those collected from other academic and popular disciplines.

In terms of hard law, I have used legal sources on both the national and European levels and when needed referred also to wider international agreements. The European sources include first of all European treaties and conventions both under the European Union and the Council of Europe systems. However, the scope of the legal sources used is not limited only to treaties but also to other executive documents like directives. Further, on the national level constitutional sources as well as ordinary laws have been analysed.

In addition, I have used a wide variety of soft law and other non-binding interpretative documents concerning the interpretation and application of European law. They include documents such as resolutions, recommendations, strategies or reports issued by the organs of the COE or the EU. Occasionally, in the second part of the research, I have also used similar kinds of sources issued by national institutions and state organs.

Moreover, I have analysed case law, both on the European and in some cases national levels. Case law on the European level includes both judgments of the European Court of Justice as well as judgments and decisions issued by the European Court of Human Rights, including previous decisions on admissibility by the European Commission of Human Rights. In addition, when available, cases from national courts were analysed. Where the merits of the judgments were not available, a briefing into the legal dispute, as well as key findings were presented on the basis of available press materials. In each case reference to either the case number or the press source is indicated. The complete list of articles is included in the index of sources. They were chosen mainly on the basis of the language (English) and European sources were preferred.

In addition, in those parts of the dissertation that engage in theoretical discussion, the research refers to a wide range of literature comprising legal, philosophical, political science and sociological perspectives on law and religion. In order to employ an interdisciplinary approach, I did not limit the sources to strictly legal theoretical ones. References to broader social science literature are usually used in order to illustrate the social or political background of problems discussed in particular chapters. This interdisciplinary perspective, or 'multidisciplinary perspective' as Thorson Plesner calls it[22], is challenging for maintaining the legal perspective. This challenge was solved by applying the construct of a "non-religious" and "religiously different" individual, described below, for the majority of the analysed problems. These categories enabled me to maintain a legal focus, while referring to broader social implications

22. Thorson Plesner I., 2008, p 22. The author discusses more broadly the challenges of comparative and interdisciplinary approaches and observes similar difficulties in maintaining the focus and coherence while researching law and religion phenomena, as those observed in this volume.

of certain laws and policies. They were used as a legal test of evaluation whether like cases were treated alike and whether application of the principle of equality applied to traditional as well as differently religious or non-religious individuals.

1.4. Languages

Research concentrating on Europe is in large degree limited by the understanding of languages. Understanding norms depends very much on verbal nuances. It is therefore essential to mention what languages were used in conducting this research. The language of the included sources is primarily English, as that is the language of this research. The interpretation of legal sources relies in the majority of cases on the English translation. However, in specific cases other languages were relied on and include: Danish, Finnish, French, German, Norwegian, Polish, Spanish and Swedish. Those materials are indicated by reference to their titles in the original language. The interpretation of language texts other than English was based on my understanding of Polish, Finnish, Swedish, German, Norwegian and Danish as well as translations provided by native language speakers of Spanish, Danish, Norwegian and German and French.

1.5. Comparison as a background for further theoretical discussion

Since this research concentrates on Europe, it is by nature comparative. A comparative perspective usually calls for more detailed explanation as to how the comparison was done and what the purpose of it was. Like other legal research, comparative law struggles with the search for a proper method. De Cruz observes that: "There is no generally accepted framework for comparison, although most writers appear to assume that the comparative methods which should be employed are obvious."[23]

23. De Cruz P., 1999, p 5.

Comparisons require attention to things such as the comparability of the subjects of comparison. Such comparability does not necessarily mean an orthodox search for the identical nature of the sources compared. Comparability means also comparing those legal sources or practices that are similar in function.[24] And functionality was the leading criterion for the comparison made in this dissertation. The goal of this volume is a critical evaluation of the European commitment to democratic principles affecting religious coexistence – primarily equality and the achievement of religious pluralism. For that reason, certain specific areas were chosen as test cases of that commitment. The selection criteria of those areas are described below.

The comparison conducted in this book has not been carried out solely for the sake of comparison itself, but rather for the purpose of giving a point of departure to discussion covering broader and more general issues. It is used as a method of illustrating particular observed problems. In order to achieve functionality, it works on a few distinctive but intertwined planes. First of all, it concentrates on European-wide legal standards and discourses and compares them with legal standards and discourses in particular states. The European-wide standards are identified through an analysis of European legal sources as well as interpretation documents issued by the EU and the COE. The national standards were identified through an analysis of corresponding national legal sources and interpretation documents.

Secondly, in some parts the research engages in a comparison of national standards. Again, the purpose of such a comparison is functional. It is done in order to show certain observed patterns or solutions to observed problems.

Thirdly, as a natural consequence of employing a broad interdisciplinary perspective, it compares legal and non-legal standards. The challenge of this interdisciplinary approach was described above.

I want to underline, however, that a comprehensive comparison as such is not the sole purpose of this research. Comparison is an inherent characteristic of research that focuses on wider aspects of law both territorially and in regard to its relations with other non-legal aspects of social life. Comparison is treated as a basis for further theoretical

24. Platsas A. E., 2008, pp. 8-10.

discussion and the consideration of issues of Europeanisation and religious pluralism. A comparison of facts, approaches and disparities is employed in order to illustrate certain theoretical problems and support arguments used in the discussion on a wider theoretical plane.

1.6. The method of selecting examples

The method of selecting the analysis examples is unique and consists of two steps. The first step is identifying the European standard, whether strictly legal, based on hard law and case law or based on strengthened soft law and interpretation documents issued by European institutions. The second step is comparing this identified standard with national practices least compliant or totally non-compliant with it. When available, the standard is compared with practices most compliant with it.

The identification of the thematic examples – such as reproductive rights, freedom of speech or education, was dictated by the recent emergence of new standards and convergence criteria in regard to these topics on the European level. These new interpretative standards include *Resolution 1607 (2008), Access to safe and legal abortion; Recommendation 1675 (2004), European strategy for the promotion of sexual and reproductive health and rights; Recommendation 1804 (2007), State, religion, secularity and human rights; Recommendation 1805 (2007) Blasphemy, religious insults and hate speech against persons on grounds of their religion; Recommendation 1720 (2005), Education and religion and Recommendation 12 (2002), on education for democratic citizenship.* Also initiatives calling for greater commitment, like the *Report on the situation of fundamental rights in the European Union 2004-2008*, were used as interpretative documents regarding common European principles. At the same time, these thematic topics, due to certain widely disputed events, like the Mohammed cartoon crisis, have in many cases been the focus of broader social European discussion on the relationship between law and religion. The perspective on that discussion was employed in the analysis conducted.

The choice of national laws and examples may not be exhaustive for the particular theme, but as was explained previously, an exhaustive comparison is not an objective of the comparative parts of this research. Therefore the

basic criterion for the selection of state law examples was based on the tangible disproportion between the declared commitment to European principles of equality, religious pluralism and non-discrimination and the practical effect of the legal norms and their application on the surface level. All of the countries selected have a clearly stated commitment to the common democratic principles of the European polity through their ratification of relevant treaties and membership in the EU and the COE. However, particular policies, laws and cases associated with selected themes chosen for further scrutiny in this research do not comply with this declared commitment. On the other hand, some of the selected examples, especially in the part dealing with various systems regulating state and church relations, were selected to illustrate how commitment to these democratic principles can be strengthened. Since all of the countries are rooted deeply in the liberal democratic tradition, the selection was directed towards those examples which illustrate the following problems connected with the European liberal tradition — how:

- Western legal tradition is not always separated from religious morality;
- neutrality is understood as neutrality towards traditional religious movements;
- seemingly neutral policies can have an "otherising" effect on "non-religious" or "differently religious" individuals
- democratic consensus is often understood as the protection of traditional religious and national traditions.

This particular focus allowed me to develop a theoretical model that could eliminate the deficiencies of the liberal democratic approach observed both in these examples as well as by other critics of liberal theory.

1.1. The critical approach

Even though no fixed set of methods in the same meaning as they exist in the social sciences were used, a few techniques can be identified in the legal research. The legal method in this research employs nearly all of

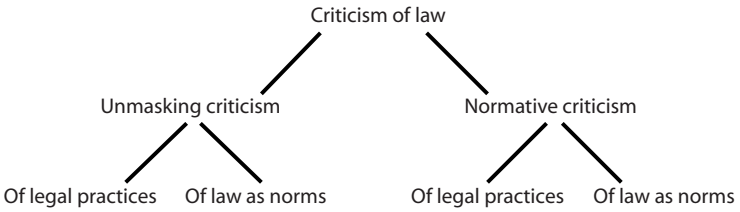

Figure 1: Tuori's forms of the criticism of the law[25]

the known techniques of legal research. In addition to the comparative element, the leading methodological approach is critical and corresponds in large degree to critical research methods identified by Tuori. His model of legal criticism distinguishes unmasking and normative forms of criticism. He illustrates this distinction in the following figure:

The difference between unmasking and normative criticism of both legal practices and norms lies in the direction of the criticism. Whereas unmasking criticism is content with explicating the existing state of affairs, the normative form of criticism engages in a discussion of the desirable direction of change. However, as Tuori underlines, existence of pure unmasking criticism is doubtful[26]. The author also distinguishes further divisions of various forms of criticism, but they remain irrelevant for describing the method of this research.[27] In this volume I engage in both forms of criticism. The first step consists of unmasking criticism of either legal practices or norms. The functionality is again the leading criterion for the selection of the object of criticism. Furthermore, I proceed to a normative criticism of those norms or practices and attempt to point out a possible desirable direction of development for the facilitation of religious pluralism and equality.

25. Tuori K., 2002, p 309.
26. Ibid., pp. 305-306
27. For further details on legal criticism and critical legal positivism see: Tuori K., 2002, pp. 304-322.

1.2. The important theoretical constructions

In order to provide a legal and philosophical perspective on the issues of law and religion, and take part in the discussion on the borderlines between religion and democracy, this volume uses repeatedly a few theoretical constructions. The perspective I employ is the liberal democratic perspective and further I explain why this and not, for instance, a communitarian perspective is applied. Due to the selection of such a perspective and bearing in mind the function of the analysis, certain important theoretical constructions are used as analysis tools.

The key term and the leading theme used is "religious pluralism". In line with Skeie, I distinguish plurality from pluralism.[28] Plurality indicates a state of multiplicity. Pluralism is a certain positive evaluation of plurality. In the context of religion, growing plurality is a fact in Europe while growing pluralism has not necessarily developed yet. Nevertheless, as this study shows, religious pluralism is one of the contemporary democratic goals in Europe. For that reason religious pluralism is chosen as the leading criterion for evaluating laws and policies. Steps facilitating or hindering pluralism measure the commitment to basic values such as equality and fundamental rights. For that reason, religious pluralism is the lens through which I view contemporary religious problems in Europe.

Secondly, I concentrate on equality as the founding value of the European polity. I adapt a Rawlsian view of all citizens as free and equal[29]. The selection of the Rawlsian perspective is justified below and in the last part of this research. Although equality does not always mean identical treatment, in the context of religion, I take the position that it cannot mean treatment leading to or increasing a discriminated social position in society of an adherent to a particular religion or belief. Although certain particular procedures may differ, they should not differ to such a degree as to prevent equal citizens from having equally valued choices. And in order to maintain equality, I believe these choices must be treated with equal respect and none should be favoured. Discrimination on the basis of

28. Skeie G., 2002, pp.48-55.

29. Rawls J., 2005 or Rawls J., 1971. The idea of free and equal citizens serves as the underpinning for the entire Rawlsian theory.

belief is understood as denial of an equal position solely on the grounds of adhering to another religious or non-religious doctrine than the one(s) supported or recognised by the state.

Thirdly, the category "non-religious individual", for the purpose of this volume, refers to an individual who does not belong to a major religious tradition and states that he or she is not religious at all. The category "religiously different individual" here refers to an individual who, for a variety of reasons, does not follow the religion that receives legally preferential treatment. The term "a religiously different individual" refers also to individuals who do not share the same worldview and belief as individuals belonging to the religious community(ies) best able to affect legislation. These categories have been constructed for the purpose of this volume and are not necessarily identical to other popular or scientific understandings of these terms. Their function is to include not only non-religious individuals in the traditional meaning of the word, including atheists, agnostics or secular humanists, but also persons belonging to religious communities sharing different values than those belonging the dominant and well-recognised religions in a particular society or having a highly individualised belief. Both of these categories refer to individuals belonging to communities less capable of influencing political and legal decisions or having a highly individualised belief. Both of these categories stand in contrast to the traditionally religious individual and are used as a test tool for evaluating the application of the equality principle.

In the process of the legal analysis, I use the term "othering", "other" and "otherisation". This terminology refers to the terminology used in social sciences in studies such as, for instance, Simone De Beauvoir's *The Second Sex*[30] or Edward Said's *Orientalism*[31]. De Beauvoir's construction of women as "the other" emphasises women's exclusion from what is considered masculine and thus normal. Said, on the other hand, while describing the Orient and Westerners' representation of the Orient, observed how the West is treated as a standard and how elements representing the Orient create the "Other", meaning that which is

30. Beauvoir S. de, 1988.
31. Said E.W., 1978.

inferior and alien to the standard. I refer to "othering" in the analysis of legal practices regarding religion. Since I treat religious pluralism as a principle and the leading theme of this work, I also observe how "religious pluralism" is treated primarily as acceptance of traditional, national religious (or non-religious) traditions[32]. Meanwhile, I observe the "otherisation" of traditions that are alien to a particular nation state's tradition(s). Depending on the traditional place of a religion in a nation state's legal system, religious (or non-religious) adherents of non-traditional religion (or non-religion) are often legally marginalised. Law is either shaped in a way which leads to "otherisation" or is applied in a way which leads to it. Other researchers have observed the phenomenon of "otherisation" in different contexts. Ward observes that generally: "Europe still fears the 'other', those it deems to be somehow un-European, even if they are indefinably so."[33] Similarly to "a non-religious" individual, measuring "otherisation" is used as a tool of evaluation of the application of the equality and pluralism principles.

32. See also e.g.: Evans C., 2006. The author observes similar problems and deals with the lack of Europe's readiness to abandon own Christian or secular religious paradigms on the examples of the cases of Dahlab and Sahin.
33. Ward I., 2004, p 7.

2. Definitional struggles with problematic concepts

2.1. How to understand "Europe"

"To define Europe you have to be a genius (…)" - Madeleine Albright

The topic of this dissertation is limited in its spatial scope to Europe and an understanding of democracy in Europe. However, when we speak of "Europe" we can encounter multiple definitions and multiple understandings and it proves to be impossible to reach any satisfying common understanding of the word. Thus it is always necessary to emphasise how we understand "Europe". We can speak of geographical Europe, the borders of which stretch from the Arctic Ocean to the Mediterranean Sea and from the Atlantic Ocean to the Caucasus Mountains, the Black Sea and the water divide of the Ural Mountains. However, it is also possible to look at Europe from an historical perspective and define the continent on the basis of common history. Last but not least, we can look at Europe from the perspective of integration efforts in the post-World War II period and especially the post-Cold War era.

But even the concept of an "integrated Europe", which I am most comfortable with for the purposes of this dissertation, is far from uniform. We can speak of two circles, namely countries belonging to the European Union or a broader circle of countries belonging to the Council of Europe. Both of these organizations and their member states express their deepest affirmation of democratic principles. The Treaty Establishing the Council of Europe in its preamble accentuates that the Treaty was adopted as a reaffirmation of the member states': "devotion to

the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all **genuine democracy**."[34]

The Convention for the Protection of Human Rights and Fundamental Freedoms also reaffirms the commitment to democratic principles common to the member states in the following wording:

> "Members of the Council of Europe, reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights(…) Have agreed as follows(…)"[35]

The European Union, on the other hand, has once more reaffirmed their democratic commitment in the recently adopted text of the Lisbon Treaty, which is in the ratification process. The Treaty declares in Article 2:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."

These values are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."[36]

And since democracy and its understanding are the leading themes of this work and since they are supposed to be the values common to the member states of the above-mentioned organizations, Europe in this dissertation will include primarily the countries of the European Union as the closest integrated community within geographical Europe.

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34. Statute of the Council of Europe, 1949, emphasis by this author.
35. Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol no. 11, 1950.
36. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007.

In addition, it also includes references to the documents issued by the Council of Europe as the forum where decisive actions concerning the European understanding of human rights, playing the role of fundamentals of modern democracies, take place.

2.2. Democracy as liberal and deliberative democracy

In this dissertation democracy is approached as liberal and deliberative democracy. Liberal democratic theories focus on liberty, pluralism and individualism. Leading theoreticians of liberalism, including both founding fathers of liberalism, such as Kant, Locke, Mill and those more contemporary to us like Arendt, Berlin or Rawls, all focused on similar assumptions. Liberal state should secure freedom of every member of society, secure equality of individuals and independence of each member of society[37]. Despite differences in liberal theories liberal thinkers are joined by the "priority of liberty". Holmes, however, underlines that such generalisation does not necessarily express the whole idea of liberalism. According to Holmes:

> "(…) we can say that the highest political values, from a liberal perspective, are psychological security and personal independence for all, legal impartiality within a single system of laws applied equally to all, the human diversity fostered by liberty and collective self-rule through elected government and uncensored discussion."[38]

These central concerns in the liberal thought lead liberal democrats towards focusing on the idea of rights. Individual rights lie at the heart of democratic approach towards law and relationship between state and the individual.[39] That is why liberal approach must be taken into consideration

37. For more detailed account of development and variety of liberal conceptions both modern and classical see e.g. Halldenius L., 2001, pp. 33-122, Holmes S., 1997 or Flathman R.E., 2005.
38. Holmes S., 1997, p 16.
39. Ibid., pp. 18-21.

while discussing issues of rights and their reciprocal influence.

Moreover, as Flathman observes, all liberalisms include and embrace pluralism. Even if pluralism's relationship to liberalism has been challenged mainly by communitarians in their desire to embrace more diversity and the concept of solidarity, pluralism is still a centrepiece of liberalism. [40] Therefore, liberal democratic theory ought to be considered while discussing issues of religious pluralism.

Liberal democratic theory is also strongly connected with deliberative theory of democracy. However, liberal democratic approach did not always imply deliberative approach. Broadly defined, deliberative democratic theory concentrates on ideals of rational legislation, participatory politics and political autonomy based on practical reasoning of citizens[41]. Aggregative conception of democracy stands in the opposition to the deliberative conception. In an aggregative democracy the focus is put on the voting mechanism. Voting is the mechanism for aggregating individual preferences[42]. In other words, in an aggregative democracy, collective decisions are positively responsive to the interests of individuals expressed in the voting[43]. In deliberative democracy, on the other hand, decision is collective, when it emerges from the arrangements of binding collective choice. These arrangements establish conditions of free public reasoning between individuals who treat one another as equals. In a deliberative collective decision, free and equal citizens focus not on individual interest, but instead on justifications for the exercise of collective power, that can be acknowledged by all of them as reasons[44].

Dryzek observes that liberal and deliberative conceptions were not always naturally reconcilable. Originally democratic theory focused on the individual interest and thus was closer to aggregative approach[45]. It was only in the twentieth century that liberalism, democracy and deliberation developed a tighter connection[46]. According to Dryzek,

40. Flathman R.E., 2005, pp. 180-185.
41. Bohman J., Rehg W., 1997, p IX.
42. Ibid., p XI.
43. Cohen J., 1998, p 186 .
44. Ibid., p 186.
45. Dryzek J.S., 2002, pp. 8-12.
46. Ibid., p 10.

there are three reasons why liberal democratic theory accommodated deliberative approach. First of all, deliberative principles justify liberal rights. Secondly, liberal constitutions promote deliberation. And thirdly, constitution making is in itself is a deliberative process[47]. Dryzek underlines that deliberative democracy took place at the heart of liberal democratic thinking when leading liberal democratic philosopher John Rawls in his "Idea of Public Reason Revisited", proclaimed that a well-ordered constitutional democracy should be understood also as deliberative democracy[48].

Deliberative democratic theory corresponds also with hermeneutic legal theory. Just as hermeneutic legal theorists, like Dworkin, see law as a certain unity based on principles, so do deliberative thinkers see democracy. Deliberative democracy is based on certain principles, thanks to which collective choices are found to be legitimate and justified by all as reasons. Cohen distinguishes such principles of political legitimacy as reasonable pluralism organised around the conception of the public good, egalitarianism and respect for citizens' identity in ways, which contribute to the formation of the public good[49]. The unifying and central value of the deliberative conception is the ideal of the public good, which can be justified by all citizens. In the Rawlsian theory the idea of reasonable consensus concerns the public good. Equal citizens through reasonable consensus agree on common principles of justice, which constitute the public good[50]. Legitimate political action can be justified through this public good.

Approach towards the law in this research is strictly connected with democratic legitimacy. This legitimacy, on the other hand, is understood as rooted in the common democratic principles constituting the public good. Law and its application are at the heart of liberal democratic and deliberative theory. Law's legitimacy is undividable from democratic legitimacy. Law does not only consist of rules that could be placed on its surface and change but it instead has also got its deep structure, which

47. Ibid., pp. 10-17.
48. Ibid., p 14.
49. Cohen J., 1997, pp. 68-70.
50. Rawls J., 2005, pp. 201-206.

determines of its validity and legitimacy. In Tuori 's model of structure of law fundamental principles are understood as foundations of the model of justice and are treated as crucial for legitimacy of the law and validity of legal rules[51].

In this research I am also aware of the communitarian critique of liberal and deliberative theories. Liberal presuppositions have been contested especially in the context of pluralism, religious diversity and multiculturalism. It may be argued that liberal democratic theory is not sufficient for the solution of the problems related to multiculturalism and multi-religious society. Communitarian approach criticises liberal democratic approach and offers different vision of democracy based on cultural and community identity.

Taylor observes that liberal politics of equal dignity, equal rights and immunities create an identical "basket" of standards applicable to everyone, regardless of their unique cultural identity. Such approach, according to Taylor creates the effect opposite to the intended. Instead of recognising distinctiveness, it creates a dominant identity of the majority:

> "The claim is that the supposedly neutral set of difference-blind principles of the politics of equal dignity is in fact reflection of one hegemonic culture. As it turns out, then, only the minority or suppressed cultures are being forced to take alien form. Consequently, the supposedly fair and difference-blind society is not only inhuman (because suppressing identities) buy also, in a subtle and unconscious way, itself highly discriminatory."[52]

Also MacIntyre argues that liberalism does not allow other conceptions to participate in objective discussion:

> "Liberalism (…) does of course appear in contemporary debates in a number of guises and in so doing is often successful in pre-empting the debate by reformulating quarrels and conflicts within liberalism, putting in question this or that particular set of attitudes

51. Tuori K., 2002, pp. 244-246
52. Taylor C., 1994, p 43.

> or policies, but not the fundamental tenets of liberalism with respect to individuals and the expression of their preferences. So so-called conservatism and so-called radicalism in these contemporary guises are in general mere stalking-horses for liberalism: the contemporary debates within modern political systems are almost exclusively between conservative liberals, liberal liberals and radical liberals. There is little in place in such political systems for the criticism of the system itself, for putting liberalism in question."[53]

MacIntyre criticises liberalism for rejecting claims of any overriding theory of justice and good, and in fact for embodying such a theory. The assumptions of liberalism are, according to MacIntyre, not only an overriding conception of the good but also a tradition, just like other traditions. Just like other traditions it provides a model of a just order. And therefore, any "hope of discovering tradition-independent standards of judgement turns out to be illusory."[54]

Parekh, similarly, criticises liberal theory for its monopolisation of the legal and political arena. Parekh argues that liberal theories, even those attempting to accommodate to multicultural conditions are inadequate. Thinning down liberal principles to their minimum content and making tolerance of non-liberal cultures conditional upon it is, according to Parekh not enough:

> "In other words, liberals need to rise to a higher level of abstraction than they have done so far, and distinguish between universal and a liberal moral minimum, insisting on the former in all circumstances and on the latter when it does not violate the universal minimum and can be shown to be central to a liberal society's historically inherited cultural character."[55]

Parekh disagrees that modern western society is liberal and therefore entitled to ask its members to live by liberal values. Parekh argues that

53. MacItyre A.,1988, p 392.
54. Ibid., pp. 326-348.
55. Parekh B., 2000, p 111.

modern western society includes non-liberal groups and that certain institutions, even if they are touched by liberal spirit, cannot be fully liberal. Such institutions, according to Parekh include family, religion and schools. Moreover, argues further Parekh, liberals are not and cannot be liberal in all areas of life and they live according to the mixture of liberal and non-liberals ideas and instincts, like habits, personal or political loyalties, moral values or religious beliefs.[56]

As Dryzek observes deliberative liberal democratic thinkers often fail to be critical towards their own ideas and appear to be reconciled with the status quo, without the need of challenging it[57]. He underlines that it is vital that critical voice in deliberative democracy be retrieved. For these reasons communitarian critique ought not to be dismissed as irreconcilable with fundamentals of liberal thought. The law and its application ought to be scrutinised and viewed through the lens of communitarian critique. The difference between liberals and deliberative critical liberals, claims Dryzek, is that classical liberals "fail to recognise that getting constitutions and laws right is only half the battle. They fail to recognise extra-constitutional agents of distortion that cannot easily be counteracted through such means."[58] This study's critical approach and its scrutiny of application of laws and its effect on the principle of equality and religious pluralism attempts to reach beyond such a narrow understanding of law and democracy. It contributes to the critical line of deliberative liberal theory of democracy. Through recognising practical limits to liberal thinking and communitarian concerns, it draws on liberal theory as the basis, but attempts to accommodate communitarian views and expand liberal model to prevent exclusion and "otherisation".

Liberal and deliberative theoretical setting of this research was dictated by the fact that in the analysis of laws and polices, I deal with the values that are considered to be a democratic credo in Europe. Liberal democratic values are at the legal foundation of the European polity. The European democratic core of common principles includes such liberal democratic principles like equality, non-discrimination,

56. Ibid., pp. 109-113.
57. Dryzek J.S., 2002, p 20.
58. Ibid., p 21.

the rule-of law, pluralism, tolerance, broadmindedness and solidarity. These principles are either explicitly included in European obligations, including human rights and EU Treaties or then have been developed in the process of interpretation done either by courts on the European level or by other European institutions. The Treaty on European Union in its current shape provides that the Union is based **on liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law**.[59] Lisbon Treaty extends these principles and in addition to currently included fundamental principles pronounces that the Union is based on principles of equality, and moreover it assumes that **pluralism, non-discrimination, justice, solidarity and equality of men and women** are common for European democracies.[60] The Statute of the Council of Europe provides that the founding principles of the Council are the principles of the **rule of law and of the enjoyment by all persons of human rights and fundamental freedoms**.[61] I analyse these principles in more depth in part III of this dissertation. European democracy due to the choice of its principles can be characterised as a liberal democracy.

For these reasons, I chose to approach the topics of democracy from the liberal and deliberative perspective and refer mainly to the Rawlsian conceptions as parallel to the conceptions lying at the foundation of the European democratic model. I use Rawlsian conception of reasonable consensus as the underpinning for further theoretical development of the model of justice in relationship between law and religion. This choice is dictated by the fact that Rawslian conception of reasonable consensus resonates in the ideas concerning religious and multi-cultural coexistence expressed in the documents issued by the COE and also in the European Parliament's report on the EU's commitment to fundamental rights. The *Recommendation 1804 (2007), State, religion, secularity and human rights* can be used as an example illustrating this tendency. The key findings presented in the recommendation conform to the Rawlsian ideas of reasonable consensus and public good. The COE confirmed

59. Treaty on European Union, article 2.
60. Treaty of Lisbon, article 2.
61. Statutes of the Council of Europe, article 3.

that religion is an individual matter and reaffirmed its commitment to plurality of ethical, moral and ideological conceptions of individual European citizens'. It also underlined the necessity of neutrality of the state in approach to these conceptions and advocated that governance and religion should not mix and that states should exclude from consultations any religious groups not supporting fundamental values of democracy. Fundamental values of democracy are treated as the public good while such exclusion of certain groups from deliberation resembles the Rawlsian notion of "unreasonable doctrine". As explained further in part III, the model of European democracy in large degree corresponds to the Rawlsian model. Also creation of a common "European identity" is a similar project to the creation of an "overlapping consensus".

Being aware of the communitarian critique, however, I do not claim the value of neutrality for the liberal conception. On the contrary, I argue that liberal democratic model is a value-laden conception. It requires compliance with certain common principles in order to make it possible for the multicultural society to function. From the point of view of the legal principles currently present in Europe, an approach different than liberal democratic would require rethinking the concept of democracy. As I argue, in Part III, the concept of democracy is nowadays broader than that based purely on the equality of political participation and it corresponds better to deliberative rather than aggregative understanding of democracy. It includes democratic fundamentals that are intertwined and reciprocally influence each other. In my analysis of the democratic model, I recognise the concerns of the communitarian critics and argue that liberal democracy has a potential for pluralistic adjustment. However, I remain within liberal assumptions and agree with Habermas[62] that communitarian rights in a democracy must stem from individual's rights. But I do not support Habermasian argument that doctrines must adjust themselves to democratic model. On the contrary, I argue that liberal democracy has space for potential expansion of legal pluralism and greater inclusion of those who identify their rights with the rights of their religious or cultural community. These problems are explored more thoroughly in part III.

62. Habermas J., 2008a, pp. 271-311.

2.3. "Religion" and "belief" – well-understood concepts beyond definition?

2.3.1. "Religion" as understood in various branches of science

In order to speak of religion and religious problems, it seems rather natural to attempt to define the phenomenon we are dealing with and to set at least some guidelines regarding its understanding. But as difficult as it is to define Europe, it is as difficult, or even more so, to define "religion". As far as the concept of "Europe" is concerned, it is possible to agree on adapting a certain concept and operating within it. The same will not be possible, however, with the term "religion" due to the very nature of the concept itself. Not only that the meaning of the word is obscure, but the approach of every branch of science towards it produces new questions and new inquires into its nature.

In 1994 seven European philosophers gathered on Capri in order to discuss the problems of the so-called "religious revival" in contemporary Europe. As the culmination of this event, the book titled simply *"Religion"* was published a few years later. Surprisingly, the main problem the participants had to confront was defining "religion". As Derrida observed, the mere problem of the variety of languages in Europe may have affected different understandings of the term:

> "We met, thus at Capri, we Europeans, assigned to languages (Italian, Spanish, German, French) in which the same word, religion, should mean, or so we thought, the same thing. (…) But everything remains problematic in this respect."

The word "religion" in most of the European languages is derived from the Latin word "religio". But even the etymology of the word "religio" remains unclear. Hoyt[63] in her search for the etymology of the word arrived at the conclusion that careful analysis would lead to the preference for the interpretation of Cicero , who derived the word "religio" from

63. Hoyt S. F., *The Etymology of Religion*, Journal of the American Oriental Society, Vol. 32, no. 2. (1912), pp. 126-129.

"relegere" (*to go through again in speech, thought, reading*) and not from another verb: "religare" (*to bind*). But the option of accepting "religare" as the etymological root cannot be excluded either. However, the mere etymology in itself cannot provide answers to the problem of defining what religion is.

Among the major branches of the social sciences that deal with the phenomenon of religion, theories of what religion is differ depending on the approach.

Anthropologists have been attempting to see religion as a space of human practice. One of the most influential anthropological definitions of religion was offered by Clifford Geertz in his *Religion as a Cultural System*. Geertz defines religion as

> "a system of symbols which acts to establish powerful, pervasive, and long lasting motivations in men by formulating conceptions of a general order of existence and clothing these conceptions with such an aura of factuality that the moods and motivations seem uniquely realistic."[64]

However, this definition did not remain without critique. Asad[65] disagreed with Geertz's *symbolic definition* on numerous grounds. According to Asad, Geertz's definition claims universality and such universality cannot be reached due to constituent elements of religions and their historically specific relationships. Asad proposed that an anthropological definition of religion as a system of symbols must include historical relations with non-religious symbols and their articulation in social life.

Another symbolic anthropological definition was drawn by Spiro, who defined religion as "an institution consisting of culturally patterned interaction with culturally postulated superhuman beings" [66]. This definition includes the existence of Supreme or at least supernatural symbolic beings, like gods, idols, elements. The existence of these symbols, though, is for Spiro an effect of culture.

64. Geertz C., 2002, p 63.
65. Asad T., 2002, pp. 116-129.
66. Spiro, M. E. 1966, p 122 .

According to Bowie[67], symbolic definitions in anthropology were most vociferously criticised by Robin Horton. The definition which Horton[68] has proposed referred to the fields of *social relationships*. Religion is, in his meaning, an extension of the relationships of purely human society to relations with non-human alters.

Firth[69], on the other hand, described religion by referring to its functions in society. The functions that Firth ascribed to religions include: the integrating function, the function of vesting interests in social and economic affairs, and the function of providing an outlet for individual sentiments and finally the cathartic function. However, since each religion differs and may not share these functions, Firth proposes the following unifying definition to describe the beliefs that can be considered religious: "a man's attempt to make the supreme, final and unique but really unattainable adjustment – the search after the complete formula for the synthesis of human conduct".[70]

Frazer[71], on the other hand, saw religion as a stage of intellectual development of mankind, parallel to a stage in evolution. Mankind was, according to him, passing through three stages of intellectual development: from magic, through religion, to science.

Another famous anthropologist of religion, Evans-Pritchard[72], in his research on primitive religions, criticised the scientific approach and attempted to define religion in *psychological categories*. **Psychological definitions** see religion as an emotion or even an illusion arising from various grounds, like the experience of ghosts, a soul or fear of death. Evans-Pritchard criticised other psychological approaches, of among others, Freud[73] and Tylor[74], which perceive religion as a sort of emotional illusion claiming that:

67. Bowie F., 2006, pp. 20-21.
68. Horton R., 1994, p 23.
69. Firth R., 1996, pp. 44-47.
70. Ibid., p 47.
71. Frazer J., 1890.
72. Evans-Pritchard, E.E., 1965.
73. Freud S., 1975.
74. Tylor E. B., 1958.

> "Desires and impulses, conscious and unconscious, motivate man, direct his interest, and impel him to action; and they certainly play their part in religion. That is not to be denied. What has to be determined is their nature and the part they do play. What I protest against is mere assertion, and what I challenge is an explanation of religion in terms of emotion or even, in the sway of it, of hallucination."[75]

Further approaches to defining religion can be found in **sociological** research. In one of the most highly quoted sociological work on religion, *The Elementary Forms of the Religious Life*, Durkheim defines religion as a collective, social phenomenon:

> "A religion is a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden beliefs and practices which unite into one single moral community called a Church, all those who adhere to them."[76]

For Durkheim, religion is inseparable from the Church and it is a social experience rather than an individual one. Without a community of worshippers, according to Durkheim, there is no religion.

Berger, on the other hand, in *The Sacred Canopy* attempts to define religion as "the human enterprise by which a sacred cosmos is established."[77] In other words, through religion, social institutions are given a cosmic, universal status, which is transcendental to everyday life.[78]

Davie points out two types of definitions, substantive and functional[79]. While substantive definitions deal with what religion is, functional definitions are concerned with what religion does. She observes various problems in the application of a definition. A substantive approach limits the scope of recognised religions by putting emphasis on beliefs in the

75. Evans-Pritchard, E.E. 1965, p 47.
76. Durkheim, E., 1971, p 47.
77. Berger PL., 1990, p 25.
78. Ibid., p 36.
79. Davie G., 2007, pp. 19-21.

supernatural. Especially non-Western forms of the supernatural often "sit uneasy within frames of reference which derive from Western culture"[80]. Functional definitions, on the other hand, may not include all the aspects of religion[81]. In the study of religion, underlines Davie, one should look both at religious goals and the means of achieving them[82].

Hervieu-Léger observes that in the era of modern belief all forms of religious syncretism are possible and thus the definition of religion must be dynamic and cannot refer either to particular articles of belief, nor to specific social observances[83]. A typical definition runs the risk of particularising certain features. Thus Hervieu-Léger proposes to abandon traditional definitions and concentrate on the type of legitimation applied to the act of believing. Her assumption is that there is no religion without an authority of tradition invoked — a religion in "a chain of memory" [84]. One would describe any form of belief as religious, if the person holding it sees in it his or her commitment to a historical chain of belief[85].

Philosophers and theologians, though, in addition to the social aspect, recognise also the role of the individual religious experience. Ninian Smart[86] underlines the necessity of identifying the individual aspect: "Though typically religion is a group affair of some sort, I do not deny that an individual can have his own, private faith." Smart deals with all the difficulties of defining religion and he admits that the definition of religions need not be simple:

> "The fact that we use a single word does not entail that the definition has to be simple. If it has to be disjunctive—to give alternative conditions for the application of the word in question—this is no tragedy."[87]

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80. Ibid., p 20.
81. Ibid., p 42.
82. Ibid., p 42.
83. Hervieu-Léger, 2000.
84. Ibid., p 76.
85. Ibid., p 81.
86. Smart N., 1979.
87. Ibid., p 26.

Thus, for him, religion may include both the experience of the Holy, as described by Rudolf Otto[88], the ritual and the belief in the transcendental or after-life. Smart acknowledges that there are problems with the connections of the different aspects and some religions do not necessarily include all the elements. Therefore, he analyses all the parts of the definition and identifies examples which do not follow the general understandings, for instance the understanding of the Holy, which does not denote faith in God or any supreme being, like in the case of Theravada Buddhism.

Derrida, on the other hand, in his *Faith and Knowledge*[89], proposes three approaches, similar to some already mentioned before. The first approach is the etymological approach, which includes examination of the origins of the word. But Derrida, like Hoyt, admits that perhaps answering the question whether the word "religio" originates from "religare" or "relegare" might be impossible and thus not useful for understanding the concept itself.

The second approach is a search for historio-semantical filiations of genealogies in order to determine historical transformations of religion. This approach, according to Derrida, would lead to the conclusion that taking into consideration historical usage of the word and its origin, only Christians would be allowed to use the term "religion" or at least it would be useful only in the circle of Indo-European languages. Such an approach remains unsatisfactory.

Finally, the third approach is concerned with pragmatic and functional effects of religion. Derrida also considers the "religious" or "religiosity" to be associated with the experience of the sacredness of the divine, the holy and the unscathed as well as the belief in the possibility of the Holy itself. The emphasis here is put on the individual experience and individual belief in sacredness of some sort.

Tillich devotes all of his work *What is Religion?* to the concept of religion and its interconnections with culture. In a religious act, the cultural is formal and religion is directed towards grasping the

88. Otto R.,1969. According to Otto, the experience of the Holy includes the sense of something which is a *mysterium tremendum et fascinans*.
89. Derrida J., 2002.

Unconditional, Tillich postulates[90]. Sacramental religion can use certain symbols but when symbols are dissolved, religion can be pushed into mysticism. Thus religions can take more or less organised and culturally conditioned forms. The distinguishing factor, however, for a "religion" is the intention of grasping the Unconditional and the Unconditional is something which is not bound by conditioned reality but includes something ultimate, something beyond the conditioned.

2.3.2. The terms "religion" and "religious" as used in law

There are numerous occasions on which the term "religion" or "religious" appears in legal texts, be it laws concerning the registration of religious communities, the rights of individuals to the freedom of religion or concerning recognised grounds for granting a refugee status. Some concrete examples of laws existing in European states and dealing directly or indirectly with the concepts of "religion" and "religious" will be mentioned in this work, while discussing particular problems concerning religion in contemporary European society.

It is useful to realise that the usage of the term "religion" in law may include either reference to an abstract notion, the one that I have been so far trying to clarify, or on some occasions to a specific religion or denomination. When, instead of a reference to an abstract term "religion", which might include various religions or beliefs, the term is used to signify a concrete religion, further clarification or interpretation of the term is in most cases unnecessary. Such examples might be concordat treaties with the Holy See, where "religion" or "religious", refer to a concrete recognised denomination of Christianity, namely Roman Catholicism and forms of religious pursuits characteristic of it. For instance, the text of the Portuguese concordat includes the following provision:

> "The Holy See, the Portuguese Bishops' Conference, dioceses and other ecclesiastical jurisdictions (…) appointed by competent ecclesiastical authorities for the pursuance of religious ends, (…), are exempt from any form of tax or general payment, regional or local, on

90. Tillich P, 1973, pp. 59-62.

(…) seminaries or other such institutions designated for ecclesiastical training or for the teaching of the Catholic religion (…)"[91]

In European-wide legal instruments, the notion "religion" appears in the first, abstract form, including a category which often requires interpretation and clarification. At present at least two European-wide legal acts use expressly the term "religion" and "belief". The first is the European Convention on Fundamental Rights and Freedoms, which establishes the right to freedom of religion in the member states of the Council of Europe in Article 9:

1. Everyone has the 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 others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

The second is the Employment Equality Directive adopted in the year 2000 and binding the countries belonging to the European Union:

"The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."[92]

As shown below, these terms remain undefined in the European context.

91. Concordat with the Holy See and the Portuguese Republic, 2004, Article 26.2.
92. Council Directive 2000/78/EC, Article 1 establishing a general framework for equal treatment in employment and occupation, emphasis added by this author.

2.3.3. Direct interpretation of the term "religion" in the United Nations materials

The term "religion" has been a subject of interpretation by the Office of the United Nation's High Commissioner for Refugees in the context of one international law document, namely the Refugee Convention[93]. In 2004 the UNHCR issued guidelines on international refugee protection based on religious claims[94]. The guidelines include the section titled *Defining "Religion"* and for the needs of the Refugee Convention include a definition of "religion" based on three aspects of the religious phenomenon.

First of all, religion should be understood as a "belief", which "should be interpreted so as to include theistic, non-theistic and atheistic beliefs. Beliefs may take the form of convictions or values about the divine or ultimate reality or the spiritual destiny of mankind. Claimants may also be considered heretics, apostates, schismatic, pagans or superstitious, even by other adherents of their religious tradition and be persecuted for that reason."[95]

Secondly, religion could be understood as "identity". This aspect is connected with the sense of belonging and being identified as a member of a particular group or community and has less to do with theological beliefs, rituals or traditions.

Thirdly, the report observes, for some, religion is a "way of life". This aspect should be understood in such a way, that the person relates to the world through particular religious activities, like wearing distinctive clothing, observing particular practices, observing particular holidays or dietary requirements.

Identifying one or more of these aspects should lead to recognition of religion as the ground for a refugee claim. However, finding only one of them is, according to the document, sufficient.

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93. Convention relating to the Status of Refugees, 1951.

94. Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06, 2004.

95. Ibid.

This model is based on the proposal prepared by Karen Musalo and Jeremy Gunn[96]. Later, the same concepts were developed further by Gunn in *The Complexity of Religion and the Definition of "Religion" in International Law*.

These three aspects of "religion" suggested in the guidelines and in the related articles attempt to include most of the formerly discussed scientific and legal approaches towards the notion of a "religion". This definition might be considered as relatively universal and suitable for embracing all sorts of beliefs. It also embraces different forms of feeling about the individual's religious or non-religious convictions. As the distinctive feature of "a belief", this definition concentrates on the notion of divine, ultimate reality and the spiritual destiny of humankind. These notions are based on the understanding of "a religion" in the traditional meaning related to understandings offered by Tillich, Otto or Smart. However, in order to include various modern types of religions, the definition postulates that the notion must include also non-theistic and atheistic beliefs, which do not necessarily include or by definition do not include faith in a divine, ultimate or spiritual destiny. Moreover, the important part of the definition is the emphasis on the fact that the "religion" of a claimant might not be considered "a religion" by other adherents, but instead it might be seen as heresy, superstition etc. This approach seems to recognise the individual aspect of the belief and attempts to broaden the traditional views in order to include notions not commonly recognised as religious as well as to sensitise those who apply the law to non-traditional views and beliefs. In addition, it includes two other aspects of religion as "identity" and religion as a "way of life", which do not require theological considerations. Those two aspects, while on the surface correct in their attempt at reaching the ideal of universality and broadness, might still constitute certain problems.

This definition of religion seems to be well constructed so as to avoid exclusion of any form of modern or traditional belief or disbelief. It includes three important aspects of religious conducts. Yet, the problem

96. Gunn J, Musalo K., 2002, Claims for Protection Based on Religion or Belief: Analysis and Proposed Conclusions, Commissioned by the Office of the United Nations High Commissioner for Refugees.

of the definition, as mentioned above concerns its two last parts, referring to "identities" and "ways of life". Should every "identity" and every "way of life" count as religious? If only one of the three facets of religion is required to consider the views as religious, the last two facets allow for over-interpretation and over-inclusion. In order to avoid the protection of beliefs that are evidently not religious, interpreters in the process of applying the guidelines are likely to refer to the analogy to traditional beliefs so as to avoid misuse of the notion "religion". Such a danger can limit significantly the usage of two other facets of recognition of a belief as "religious". It can lead to a simple definition by analogy to traditional concepts. Not every identity or belief is religious. Can, for instance, a belief in the ultimate value of getting rich be considered "religious"? Certainly belonging to the club of millionaires can become an identity and way of life and certainly it can also be the ultimate concern of one's life. Yet, hardly anyone would consider such a belief to be religious. This definition would be far more complete if it included the functional aspect, like the approach introduced in *Seeger,* which will be mentioned in the following sections. Belief or something considered as "religious" should play a role and occupy a place in the life of the adherent similar to that of religion in the life of an adherent of something that is undoubtedly religious. Including this aspect would require that the analogy be interpreted not strictly and narrowly but in such a way that the relevant function of the belief, identity or way of life be considered.

2.3.4. Examples from afar: American and Australian approaches towards defining religion

In his article *Defining "Religion" in the First Amendment: A Functional Approach*, Ben Clements[97] summarises and evaluates weaknesses of the main legal theoretical definitions of "religion" based on an interpretation of the American First Amendment. Though these interpretations originate from a non-European system, they might be helpful for outlining possibilities of a legal understanding of "religion" in a religiously plural society.

97. Clements B., 1989.

The first approach called the "ultimate concern approach" is based on the previously mentioned approach of Paul Tillich. Such an approach should be tolerant and assure that no religion is excluded. Yet, Greenawalt[98], and following him Clements, expresses a concern about the hierarchy of concerns in human life. In the ladder formed of different concerns, it might be impossible to determine the ultimate concern. Moreover, the ultimate concern need not be necessarily of a religious nature. Greenawalt, who in his *Religion as a Concept in Constitutional Law* supports a different, so-called analogical approach, notes the following:

> "Many people care a great deal about a number of things – their own happiness, the welfare of their family, their country, perhaps their religion, without any clear ordering between these and without any single ordering principle for clashes between them."

Regarding the centrality of the ultimate concern in the person's life, Greenawalt observes that the lives of people addicted to drugs may centre around using and obtaining drugs and they may be willing to do anything in order to obtain drugs. Nevertheless, such an ultimate concern will not be of a religious nature.

The second approach met in American scholarship is a "non-rational, transcendent approach". According to this view a "religion" or "religious belief" is faith in something beyond the mundane observable world – faith that some higher or deeper reality exists than that which can be established by ordinary existence or scientific observation. However, Clements underlines that it seems highly unlikely that an acceptable line could be drawn between the realm of scientific demonstrability and the realm of faith. Moreover, this might be an overly broad definition, since every view not subject to scientific proof could be classified as religious.

Another American constitutional approach is referred to as an "extratemporal consequences approach". According to this approach, supported strongly by Choper[99] in *Defining "Religion" in the First Amendment*, a person's belief is of a religious nature if the effects of the

98. Greenawalt K., 1984.
99. Choper J.H., 1982.

action taken pursuant or contrary to the dictates of a person's beliefs extend beyond his lifetime. However, Clements and Greenawalt approach this view critically for the primary reason that it excludes all the beliefs which do not include faith in an afterlife.

A "non-definitional analogical approach" is supported by Greenawalt in *Religion as a Concept in Constitutional Law*. Greenawalt claims that the mere concept of "definition" is potentially misleading and argues for the following solution:

> "My basic thesis is that for constitutional purposes, religion should be determined by the closest of analogy in the relevant aspects between the disputed instance and what is indisputably religion"[100].

This view has many strong points. Greenawalt claims that no single condition is necessary for religion. Thus the definition would encompass various religions. It also relates to modern, non-legal concepts of religion. However, this approach produces a few dangers. First of all, as Clements observes, the approach has little to offer to really determine which beliefs could be considered to be religious. The definition is potentially both overinclusive and underinclusive. Moreover, the danger of the analogy to only a very traditional understanding of religion also occurs. The judges might reject modern spirituality and religiosity concepts as non-religious on the basis of comparison to "what is indisputably religious" in their own views and thus this approach could bring about the effect exactly opposite to that intended.

Another analogical approach could be possible. Clements calls it an "analogical approach based on external manifestations of traditional religions". Such an approach would recognise as religious those beliefs that show any formal, external or surface signs that might be analogised to accepted religions. Those signs might consist of the existence of formal services, ceremonial functions, clergy, structure, organization, observation of holidays, and other similar manifestations associated with traditional religions. The weakness of this approach lies, according to Clements, in favouring organised religions over individualised personal approaches.

100. Greenawalt K., 1984, p 762.

Also those beliefs which are not shared by any of the major religions or sects might not receive protection.

Finally, the approach accepted by the US Congress and strongly supported by Clements is named in the theory "functional approach". This approach is based on the *Seeger v. United States* case and further developed in *Welsh vs. United* States. It defines religion on the basis of the function that it has in the life of the adherents. A "religion" for the purposes of the First Amendment should be understood as:

> "a sincere and meaningful belief, which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[101]

Further development of this reasoning in *Welsh vs. United States* embraced also beliefs of a non-religious nature. The understanding of "religious" should be as broad as to embrace beliefs that "play the role of a religion and function as a religion in [a person's] life". To refer to the role that religion occupies, the justices turned again to Tillich's ultimate concern concept. Clements supports the functional definition as the least discriminatory. Yet, he himself notices that the flaws of this definition are similar to the flaws of other definitions: the over-inclusiveness and under-inclusiveness of the approach.

The Australian approach to the definition of religion has developed on the basis of article 116 of the Australian Constitution and the *Church of the New Faith* case. Article 116 provides non-establishment principle similarly to the American First Amendment. However, the understanding of religion is far narrower. In the *Church of the New Faith* judgment the Australian High Court stipulated a twofold criterion for religion. Firstly, it should be a belief in a supernatural Being, Thing or Principle and secondly, it should include acceptance of canons of conduct in order to give effect to that belief.

Evans criticises generally narrow and rather conservative approach towards religion in the Australian Constitution[102]. She does not, however,

101. Seeger vs. United States.
102. Evans C., 2008.

find the definition too narrow and argues that the definition of this kind captures majority of recognised religions[103]. However, Sadurski[104] criticises this approach and observes that the word "supernatural" might exclude some of the minority religions and philosophical approaches. Taking into consideration the Australian Free Exercise Principle, seeking to eliminate coercive pressure imposed on the individual who is in pursuit of his or her moral choices, and the Non-Establishment Principle, securing the non-interference of the State in the actions of religious bodies, Sadurski proposes reference to the American theory. He argues in favour of the functional approach based on *Seeger vs. United States*. He justifies it, among other arguments, by referring to the fact that it may include both religious and non-religious beliefs, which when held sincerely by an individual, constitute motivating grounds for his or her actions.

2.3.5. European Court of Human Rights and avoidance of the definition

The European Convention on Fundamental Rights and Freedoms is the main document unifying the approach towards religion in European countries. The Convention uses, in addition to the concept of "religion", another very important concept of "belief" that is similarly difficult to define. Neither of the terms is defined in the text of the Convention itself or by the European Court of Human Rights.

The term "religion" is used in most cases as self-evident and not needing further elaboration. The Court rarely explicates what elements are constitutive for the existence of a religion or a belief, even though in their case law, they had to choose on many occasions what beliefs or religions should enjoy protection.

The provision concerning the freedom of religion can *per se* be used as the first source for deriving features that characterise a "religion" or "belief". Activities characterising a "religion" or "belief" include manifesting the "religion" or "belief", in worship, teaching, practice and observance alone or in community with others. However, all of these characteristics tell us little

103. Ibid., p 292.
104. Sadurski W., 1989.

about the nature of the phenomenon in question and if separated from that specific provision could be used to describe various other activities of life than those which are connected to the sphere of religion and belief. One can manifest alone or in a community with others a particular taste in films or music or practice a particular lifestyle not determined by any particular belief or religion. One can, for example, teach others about one's hobby, manifest a fondness for a particular kind music at a festival together with others or practice jogging every morning without the necessity of having any specific beliefs concerning these activities. Although at the same time similar activities might be motivated by a belief or a religion. Thus the characteristic activities proper for a worshiper of a religion can tell us little about the nature of the phenomenon itself. Perhaps, among all these protected activities only "worship" is an element which might be considered inseparably associated with a "religion" or a "belief". Yet, it is impossible to say that worship is exclusively of a religious nature. There might be instances of worship that is not religious in nature, like worshipping a person as an idol.

One of the most relevant cases concerning religious freedom is the case of *Kokkinakis vs. Greece*. In this case, as well as in many later cases, the ECTHR outlined a few elements that are essential for the existence of a religion or a belief:

> "(…) the Convention protects acts of worship and devotion which are aspects of the practice of a religion or belief in a generally recognised form."

Moreover:

> "While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions."

These elements, however, are just the same as discussed above and are already enumerated in the provision itself. A new term appearing is "devotion", yet it can be similarly understood as "worship". Moreover, one

can demonstrate one's devotion to his or her work, for instance. The term religion itself thus remains undefined.

Though religion has not been defined, the Court did admit that religion is a matter of individual conscience and thus should not be limited only to recognised religions. This view was also articulated in *Kokkinakis vs. Greece*:

> "the religious dimension, [is] one the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned."

The same statement does refer to religious dimensions as the most vital elements concerning the conception of life. This is perhaps the closest to the definition that the Court has so far come. It underlines the connection of a "religion" or "belief" with the conception of life.

The Court, however, does not seem to follow fully its own views regarding equal protection for all beliefs. Atheists, agnostics, sceptics and the unconcerned should receive equal protection according to the above-mentioned principle. However, in cases of less recognised beliefs, the Court's statements usually refrain from recognising them as religions. In the case of *X. vs. the United Kingdom*[105] the Commission refused to establish whether Wicca could be regarded as a protected religion or belief:

> "In the present case the applicant has not mentioned any facts making it possible to establish the existence of the Wicca religion."

This vague statement is at least sceptical towards recognising believers' individual conceptions of life. It might be surprising, especially when varied and rich research on Wicca as a belief (or religion) has been conducted[106]. The studies have outlined basic elements of Wicca, the core of the belief, the ritual and historical sides and all the other elements helpful for determining the existence of a religion. On the other hand, we must take into consideration the time when this judgment was issued. In the 1970s the availability of information about various rare beliefs, among

105. X vs. the United Kingdom, Application 7291/75.
106. E.g. Hutton R., 2000 or Kirkpatrick R.G., Rainey R., Rubi K., 1986..

them Wicca, was far more limited than today and new beliefs were only starting to appear on the previously almost uniformly Christian scene. Therefore we might consider that back then the Court wanted to ensure that no fictional belief would be used as an instrument for misusing the Convention for other purposes. This tendency to underestimate the importance of minor religions, however, appears to be more general and the Court itself has emphasised the existence of advantages flowing from the fact of belonging to a well-recognised religion:

> "Jehovah's Witnesses accordingly enjoy both the status of a "known religion" and the advantages flowing from that as regards observance."[107]

Well-known religions recognised by the Court without questioning are: the variety of Christian denominations[108], Islam[109], Hinduism[110], Buddhism[111] or Judaism[112]. The term "religion" ascribed to them is so self-evident that it requires no further consideration or examination.

In cases of religions or beliefs which are not as commonly recognised as the above-mentioned ones, the Court has generally shown reluctance in establishing whether they constitute "religions" or protected "beliefs".

In the case concerning a Druidic order, the Commission refrained from admitting whether druidism was a religion. It stated briefly that for the purpose of the application, which was manifestly ill-founded, an examination whether druidism was a religion was not necessary. In a few cases, though, rare religious movements have been recognised, although usually not granted protection like the Divine Light Zentrum[113] or The Church of Scientology[114]. In the case of scientology, however,

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107. Kokkinakis vs. Greece.
108. E.g. Knudsen vs. Norway, (1986) 8 EHRR 48.
109. E.g. Serif vs. Greece, Application no. 38178/97.
110. E.g. ISKCON and others vs. the United Kingdom 20490/92.
111. E.g. X vs. the United Kingdom 5442/72.
112. E.g. D. vs. France 10180/82.
113. Swami Omkarananda and the Divine Light Zentrum vs. Switzerland, Application 8118/77.
114. Church of Scientology Moscow and Others vs. Russia, Application no. 18147/02.

the approach is not uniform and it is once referred to as a religious movement[115] and at other times as an organization[116].

Neither has the Court put much emphasis on the differential points between religions and beliefs. In the case of *Young, James and Webster vs. the United Kingdom*[117], the Commission referred to the opinion of the British government according to which a belief meant an opinion akin to religion but based on thought and conscience. The Commission refused to support or reject this opinion saying:

> "Even if the Commission were to take the view that terms "belief" and "manifesting his belief" should be given a wider meaning, it could not possibly be so wide that the state was required to refrain from stopping a person doing anything he wanted regardless of the objections of others (…)"

Thus we can define the belief only negatively, as something which cannot be as wide as allowing doing anything that the person considers to be in the scope of a belief, regardless of the objection of others. Similarly to resisting defining "religion", the Court offers no definition of "belief" either. However, certain requirements for the existence of "philosophical convictions" have been outlined in this judgment:

> "The term "philosophical convictions" denotes views that attain a certain level of cogency, seriousness, cohesion and importance."

No explanation is offered, however, whether the term "philosophical convictions" covers the term "belief" or whether it is narrower. Can there be any protected beliefs which do not bear the nature of philosophical convictions? The term "philosophical convictions" covers at least non-religious beliefs such as atheism, which is well-recognised in the case law of the Court. The important characteristics of seriousness, importance and

115. X. and Church of Scientology vs. Sweden 7805/77.
116. Scientology Kirche Deutschland e. vs. v. Germany 34614/97.
117. Young, James and Webster vs. the United Kingdom, Application no. 7601/76; 7806/77.

cohesion have been, however, established as the threshold for recognition of a protected "belief"[118].

2.3.6. The European Union and the lack of definition

The Treaty establishing the European Community and Treaty on the European Union both refer to human rights and non-discrimination on the grounds of religion. So does a special Employment Equality Directive[119] from the year 2000. Yet, no judgements dealing with religious problems in particular have been issued by the European Court of Justice.

In November 2006, at the request of the European Commission and under the framework of the European Community Action Programme to combat discrimination, a special report "Religion and Belief Discrimination in Employment - the EU Law" by Lucy Vickers was published[120].

The report devotes an entire chapter to the definition of religion. Yet the author emphasises that there is currently no uniform definition of religion or belief in Europe. The Luxembourg court, similarly to the Strasbourg court, has refrained from getting tangled in the definitional cobweb. The report refers to American or Australian approaches to the definition, in search of an explanation for what "religion" or "belief" means. It also presents some approaches in the EU countries. Yet, in itself, it does not propose any new approach. It refers to the dangers and advantages of avoiding a definition, but it does not strongly advocate in favour of any.

The case law based on the Employment Equality Directive does not yet include any case brought before the court on religious grounds. A vague reference to the religious dimension of the Directive was expressed

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118. The same repeated in X,Y and Z vs. UK (1982) 31 D&R 50 and Campbell and Cosans vs. UK (1982) 4 EHHR 293.

119. 2000/78 EC.

120. This report was drafted by Lucy Vickers on the authority of the European Network of Legal Experts in the non-discrimination field and its contents do not necessarily reflect the opinion of the European Commission: Vickers, L., 2006, Religion and Belief Discrimination in Employment - the EU law.
Recently Vickers published a comprehensive monograph dealing with the issues of religious discrimination at the workplace, where she discusses problems of the definition, see: Vickers L., 2008.

in the opinion of Poiares Maduro, the Advocate General, in S. Coleman vs. Attridge Law[121] and Steve Law. Maduro referred to the possibility of the existence of discriminative provisions, which are dictated by the Directive, but in fact led towards completely the opposite effect. In this example, Maduro referred to the example of religion as a basis for the possible discriminatory nature of non-discrimination laws, e.g. a measure offering protection from discrimination based on religion to adherents of only some, but not all, religions. But this reference did not shed any light on the definitional problem itself.

2.4. Some European definitions

2.4.1. The Charity Commissioners on "religion" in light of the Charities Act in England and Wales

In 1999 The Charity Commissioners for England and Wales issued their widely discussed decision concerning the application of the Church of Scientology for registration as a charity. The Commissioners concluded that Scientology is not a religion for the purposes of charity law. According to the Commissioners, the core practices of scientology do not constitute religious worship as they "do not display the characteristic of reverence or veneration for a supreme being". The Commissioners referred to other cases, and agreed that the definition of "religion" in English charity law was characterised by "a belief in a supreme being and expression of that belief though worship". This definition has been criticised among others by Gunn[122] on the grounds of evaluating and ranking some religions as better and some as worse.

The deficiency of this approach is limiting the notion of "religious" exclusively to traditional theistic religions. Any beliefs close to neo-paganism or even Theravada Buddhism could not be classified as religions under this definition.

121. Opinion of Advocate General Poiares Maduro, Case -303/06.
122. Gunn J., 2003.

2.4.2. German courts on the notion of "religion" and "religious" – the battle for the recognition of the Church of Scientology

In their decisions concerning the Church of Scientology, the German Federal Constitutional court[123], Federal Labour court[124] and Federal Administrative court[125]expressed their opinion concerning the meaning of the word "religion" and "religious" in German law primarily in cases concerning recognition of the Church of Scientology as a religion. Like in England, Scientology had problems in having its beliefs recognised as religious in Germany. The courts, though, took a far less restrictive interpretation than the English Charity Commissioners. Religion and religious community, according to the German courts, should have spiritual content and assign transcendent value to human life. The active presence of a religious community in public life should be based on that spiritual content. According to the German courts, Scientology did not meet these conditions and their religious commitment was not objective and adequately verifiable and thus they were not a religion and the Church of Scientology was not a religious community.

However, the latest decision of the Higher Administrative Court for North Rhine-Westphalia[126] of 12th February 2008 changed this line of reasoning and recognised Scientology as a religion and the Church of Scientology as a religious community. The Federal Office for the Protection of the Constitution[127] claimed that Scientology is an organization that has anti-constitutional ambitions. The court dismissed that claim and based their decision on a careful reading of the L. Ron Hubbard works and other documents on which the Church bases its activity. In this judgment, Scientology for the first time found recognition of their religious activity after a long wave of judicial battles.

123. BVerfG 1 BvR 632/92.
124. 5 AZB 21/94.
125. 8 C 12/79.
126. 5 a 130/05.
127. Bundesamt für Verfassungsschutz.

2.4.3. The Spanish Constitutional court and their strategy of avoiding a definition

Javier Martinez-Torrón[128], in *Freedom of religion in the case law of the Spanish Constitutional court*, deals with the notion of religion in Spanish law and observes that the traditional understanding of "religion" in Spanish courts was rooted in the traditional and monotheistic heritage. A "religion" was characterised by three elements: the belief in a Supreme Being developed into tenets and commands, external worship and a certain institutional organization. The change in this understanding came together with the case of The Church of Unification, which upon being refused registration as a religious group, filed a complaint to the Constitutional Court. The Court ruled in favour of the Church and rendered the concept of "religion" inoperative. The Court simply decided that administrative authorities do not have any discretion, or margin of appreciation to examine the religious nature of any group. In practice, though, observes Martinez-Torrón, the authorities must refer to the Organic Law of Religious Freedom in order to determine whether the group is excluded from protection as stated in Article 3: "activities, purposes and entities relating to or engaging in the study of and experimentation with psychic or parapsychological phenomena or the dissemination of humanistic or spiritualistic values or other similar non-religious aims do not qualify for the protection". Martinez-Torrón observes that the lack of guidelines places the authorities in a difficult position where it is safest to avoid any control and accept every application.

Such a strategy provides easy entry for any community to register as religious. The point of departure is correct from the point of view of religious pluralism. The communities wanting to register must themselves determine their religious character. This leads us into an absolutely individualistic approach, in which anything that the group of people considers to be of a religious character should be considered as such. Yet, this approach leads to an inevitable dilemma, how to avoid the registration of fictional applicants and communities which in fact do

128. Martinez-Tórron J., 2001.

not exist. On the other hand, there were no special benefits stemming from the fact of being placed in the register, the existence of fictional entities should not be considered a problem. In fact, however the mere existence of registries of religious communities is usually connected with acquiring a legal personality and the benefits stemming from such status. In a religiously plural society, in order to avoid the "otherisation" of any religious group, it is preferable to allow a fictional group to register than to prevent a genuine group from registering and enjoying the privileges that other religious communities enjoy.

2.4.4. The Dutch Equal Treatment Commission on "religion" and "belief"

The Dutch Equal Treatment Commission is responsible for the enforcement of equality and non-discrimination law. Dutch law recognises freedom from discrimination on the grounds of a religion or belief. In that context, the Commission in its opinions has taken a position concerning the definition of a "religion" or a "belief". In its opinions CGB 2003-114 and CGB 2004-06, the Commission defines a "religion" as convictions about life having a Supreme Being as a central point, while a belief is defined as existential convictions that do not necessarily recognise a Supreme Being. Moreover, recognition of a belief requires that the convictions be formed into a more or less coherent system of ideas concerning fundamental views on human existence. This definition is very exact and the definition of religion is rather narrow and limited to religions similar to traditional religions. The broad definition of belief compensates for it as long as a religion or belief enjoys equal protection, like it is in the Dutch anti-discrimination laws. In some opinions the Dutch Commission had to specify which beliefs are regarded as religions[129] and which as beliefs[130].

129. E.g. Rastafarianism was recognised as a religion in CGB 2005-162.

130. E.g. Osho, beliefs formulated and named after Bhagwan Shree Rajneesh, concentrating to a large degree on meditation, were recognised as a "belief" and not as a "religion" in CGB 2005-67.

2.4.5. Polish and Austrian traditional approach towards "communities of faith"

Like in most other countries, the definition of religion in Polish and Austrian law appears in the context of communities of faith. Polish Law on the Guarantees of Freedom of Conscience and Religious Denomination[131] defines requirements that the community of faith must meet in order to be able to register in the Registry of Communities of Faith. Similar requirements can be found in the Austrian law on Legal Personality of Communities of Faith. These requirements in both of the countries are rather traditional and accept only very well organised religious communities. The approach does not bind the religious aspect with faith in a Supreme Being but instead bases it on an analogy to religious communities in the traditional meaning and their functioning. A community of faith, according to Polish law, is a "religious community founded for the purpose of worshipping and propagating a religious faith, which has got its own organization, doctrine and practices. Thus, in order to register as a religious community, it is necessary to provide, among others, the following: signatures and personal data of at least 100 followers, information about forms of religious life and methods of functioning and a written statute of the community. The high number of followers excludes small communities from registering. Also the requirements of having a doctrine, organization and practices exclude less organised religions from registering. Although Pawel Borecki[132] underlines that small and less organised communities can register in other forms, like as public foundations, their status in my opinion is not the same. Before the amendment of the law, the required number of followers was only fifteen. The change increased the difficulty of the registration process. I disagree with Borecki that registration as a foundation or association can solve the problem. For an adherent of a certain faith it might be a matter of identity to have recognition as a religious adherent and not merely as a member of a foundation or association.

In Austria the concerns are similar and the requirements are even

131. Dz.U.00.26.319.

132. Borecki P, 2006.

stricter[133]. Before being recognised as a religion, a community must be first recognised in a register of "confessional communities" and only after spending 10 years in the register, can it be recognised as a "religion". In order to be entered into the register as a community, an application must be filed by at least 300 residents of Austria who must provide the description of their beliefs and other necessary documentation concerning their religious practices. In order to be recognised as a religion, the community must be organised for at least 20 years, during at least ten of which it must be registered in the register and moreover have a total number of members equal to 2 per every 1000 Austrians. Even though the possibility of acquiring legal personality is considered to be progress towards greater recognition[134], the preconditions of acquiring legal personality have been criticised[135].

This law was especially heavily criticised by Miner[136], who notes that the requirements concerning the high numbers of followers and spending many years as a "confessional community" discriminates against minor and new religions. Miner observed that the discrimination occurred due to the fact that recognised religions enjoy benefits which non-recognised ones do not. Moreover, the non-recognised religions, according to the author, are exposed to being treated as "dangerous sects" and thus risk hostility and discrimination in the society.

Recently, in 2008, in regard to the Austrian law regulating the registration of a new religious community, the ECTHR found a violation of the Convention. Austria refused to register the Jehovah's Witnesses despite the elapse of the statutory waiting period. The Court emphasised that:

> "Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is, thus, an issue at the very heart of the protection which Article 9 affords."

133. Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften, BGBl. I Nr. 19/1998.
134. Schinkele B., 2001, p 570.
135. See e.g. Kalb H., Potz R., Schinkele B., 1998, pp. 108-118 .
136. Miner C., 1998.

The judgement found the prolongation of the waiting period to be disproportional and thus illegitimate in a democratic society. The Court also stated that waiting periods might be justified in case of newly appearing religious movements, but not in the case of religious communities recognised internationally and with a long tradition. Moreover, the Court found that Jehovah's Witnesses were discriminated against on the grounds of their religion. [137]

2.5. Could a definition or a guideline help in European conditions?

Thinking about defining a "religion", we must necessarily ask ourselves whether having a definition could help us. How is it possible to define a concept beyond definition and is such defining needed at all? Is the meaning it has in natural language perhaps enough?

I claim it is not. I would argue that for the purpose of safeguarding the equality of the rights of various believers and non-believers, an intuitive approach is not sufficient. Neither is an analogical approach or persistent avoidance of a definition. The silence about the meaning of the term leads to inconsistencies in the treatment of the same faiths in various European countries or to the favouring of well-established religions above those that are new. Similarly Vickers observes ambiguity in approach towards defining religion and argues in favour of a more limited definition of religion in the context of labour law regulations in Europe[138]. Her approach aims at greater coherence and eliminating singular beliefs like veganism or pacifism in contrast to comprehensive beliefs.

In Europe, which strives for gradual integration on all levels, clear discrepancies in the approach towards the rights of individuals should not exist to such a degree. In order for the rights to be effective, an approach towards the freedom of religion and choice of those who can and cannot enjoy it should not be arbitrary. Leaving it dependant entirely on the local

137. Religionsgemeinschaft der Zeugen Jehovas vs. Austria, Application no. 40825/98.

138. Vickers L., 2008, pp. 13-24.

conditions, often based on traditional religious sentiments or affiliations, will not allow Europeans to enjoy freedom of religion equally and will lead to discrepancies in the functioning of the system of rights. Thus the Tyrolean population will be allowed to contest films on the grounds of having their religious feelings offended by those who do not share them[139], Scientologists will be considered a religion in Hungary, but a sect in Austria, Belgium[140] will be allowed to segregate who deserves to be protected as a religion and who needs to be placed on the list of existing sects. Without having guidelines concerning the notion of religion and belief, local authorities will be still bound to follow their traditional patterns of thinking, their traditional prejudices and their traditional conceptions of those who "deserve" freedom and those who do not.

Now, one might ask why Europe needs uniformity on such a question. Why do we need unification in a matter which has been considered local since the time of the Reformation? Why create uniform norms when local conditions vary so greatly? In order to answer this question properly, we would have to go in detail into a discussion of the universality of human rights. Taking the very small segment of this discussion, referring to the current topic, I would argue that if uniform norms exist, and European countries profess to follow those uniform norms and moreover treat them as the fundamentals of democracy and a necessary condition of it, then the application of these norms should be uniform and allow as few exceptions as possible and only in circumstances which absolutely require those exceptions. If we allow for an innumerable number of local exceptions, the standard is lost and deprived of its meaning. I agree with the opinion expressed by Judge Spielmann in his dissenting opinion in the case *Müller and others vs. Switzerlan*d, that the margin of appreciation of countries should not be too broad, "otherwise, many of the guarantees laid down in the Convention might be in danger of remaining a dead letter, at least in practice".[141] If we do allow local communities to determine without any guidelines who "deserves" the protection on the basis of

139. Otto-Preminger Institut vs. Austria, Application no. 13470/87.
140. Denaux A., 2002.
141. Müller and others vs. Switzerland, 10737/84, Dissenting Opinion of Judge Spielmann.

"religion" or "belief" then we are left at the point of departure. Everything that departs from the traditional for that particular community is likely to be deprived of the protection. The "right" becomes non-existent and the purpose for which the right was recognised remains unfulfilled.

Moreover, in the growing number of issues based on religion, the growing fragmentation of legal systems creates chaos and difficulties in approaching common goals and integration on an axiological level.

For those reasons, I would opt for creating a definition or rather a guideline concerning the interpretation of the notions "religion" and "belief" in the Convention and in the Directive, which are at this particular point the only unifying norms and the cornerstones of religious freedom in Europe.

2.6. Universal or purpose-based definition?

The attempt at creating a universal definition might meet understandable resistance. Is it feasible to create one universal definition valid in any circumstance? Is it not more reasonable to define belief for the purpose of each individual legal act itself? Why not keep purpose-based norms in their wide variety?

Again, this question leads me back to the argument on universality and the understanding of human rights as fundamental to European democracy. To go even further, I believe that a definition or a guideline should be created in order to strengthen religious pluralism, which is professed among others in recommendations of the COE regarding religious issues in Europe. "Religious pluralism is an inherent feature of the notion of a democratic society (…)", states the Parliamentary Assembly of the Council of Europe and adds: "where religious pluralism gives rise to religious divisions, with attendant tensions, the public authorities' response should not be to eliminate religious pluralism, but to strive to ensure that the various groups respect each other"[142]. The universal definition or guideline should facilitate achievement of the goal of a religiously plural society and prevent the "otherisation" of

142. Recommendation 1396 (1999).

religions not traditional for the particular society. In order to create a religiously plural society where all the faiths and beliefs enjoy equal status, a universal guideline should be formulated in such a way as to serve the purpose of preventing arbitrary limitations concerning who should enjoy which privileges on the basis of his or her religion or belief. The universal guideline should be for that reason broad and useful for numerous purposes, and ensure that various uncommon, new or even not entirely systematised beliefs would enjoy the protection guaranteed in the Convention and the EU Directive. For the purpose of pluralism, all beliefs that only bear a sufficient degree of "cogency, seriousness, cohesion and importance"[143] should be recognised and enjoy freedom on an equal basis.

2.7. Problems with definitions: flexibility of the legal language and the need for preventing arbitrariness

The primary problem applying to legal definition is that no definition is ever perfect and in fact there can be many advantages of not having a formal definition. A lack of a definition allows for openness and prevents the law from becoming inflexible. Hart says: "(…)we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case was always settled in advance and never involved, at any point of actual application, a fresh choice between open alternatives"[144]. He also underlines that human legislators can have no such knowledge of all the possible combinations of circumstances which the future may bring and since the legal language uses words of the real language, the indeterminate open texture is the price to pay[145]. Yet, Hacker disagreeing with Hart, asks: "Words such as 'love', 'fear', 'anger' stand for 'things' in a simple way. Are they not susceptible to analytic definition? (…) Is the notion of a person, event

143. Young, James and Webster vs. the United Kingdom, App.lication no. 7601/76; 7806/77.
144. Hart H.L.A., 1994, p 128.
145. Ibid., p 33.

or quality not in need of philosophical clarification? And if so, then in Hart's view, all definition by genus and differentia is illegitimate. And is not this almost a reductio ad absurdum?"[146] In a similar way, Mattila reminds that "accuracy and precision are considered fundamental characteristics of a legal language. (..) To avoid arbitrariness, legal rules should be formulated without ambiguity"[147], even though he does not directly support or dismiss the need for definitions of legal concepts[148]. According to Hart, though, if, in order to define a word, we use a synonym which will equally puzzle us, then it means that some words cannot be defined[149]. This would seem to be the case with the puzzling word "religion". Hart would opt rather for a definition in a context than for a definition of the word itself.

If we agree with Hart, it would be rather difficult to support the argument for needing a definition of "religion". Religion as an ambiguous concept could only be replaced with another ambiguous synonym. Yet, in order to avoid arbitrariness, like Mattila reminds, I still support the need for at least guidelines on how the term "religion" should be understood. Those guidelines should be similar to those issued in the context of the Refugee Convention. The guidelines could remain more open and avoid strict limitation. As can be observed, all of the above-proposed definitions share the same danger of using rigorous analogies for determining what a "religion" or "belief" is and what is not. All of them share also the same problem of limiting the scope of protection and creating rigorous frames that will be difficult to overcome later. Thus, perhaps, guidelines rather than a definition *sensu stricto* would be a better solution. The role of the guidelines is exactly the opposite of the definition and includes prevention of arbitrary limitations of the protection of "religion" and "belief". The guidelines (which are missing in regard to contemporary European-wide documents unifying the approach to religions) could prevent uncontrolled arbitrariness in denying protection to those who belong to religions that are not commonly recognised and those who share rather

146. Hacker, P. M. S., 1969. p 345.
147. Mattila, H. E. S., 2006, p 65.
148. Ibid., at 36, pp. 66-67.
149. Hart, H.L.A., 1954, p 47.

individualistic beliefs. As Martinez-Torrón observes, the guarantee of behaviour consistent with the dictates of one's conscience "should apply whether the individual is practising an institutionalised religion, or alternatively, simply acting upon a personal belief system. It should be irrelevant whether the individual's conscience is grounded on religious or non-religious beliefs"[150]. The guidelines as how to understand belief and religions and what to include in the protected scope could prevent the under-protection of the individual aspect that Torrón criticised in the jurisprudence of the ECTHR.

One could ask, however, how flexible guidelines, which in fact do not exclude anything, would differ from the lack of the definition. Vickers argues against too broad approach including singular beliefs[151]. I, on the contrary, claim that flexible guidelines could prevent too stringent analogies and too narrow interpretations, which are allowed in a situation when no definition exists at all. At this moment, when no definition or guideline exists, such rigorous frames and such analogies are applied[152]. And the other aspect of the lack of definition is that it prevents the judges and those who apply law from dealing with the concept itself and creates a fear of approaching the nature of the protected concepts[153]. On numerous occasions the determination of what is "religion" or "religious" remains avoided and considerations are based on other, rather formal and procedural arguments, without approaching the heart of the problem itself. The same could happen if purely procedural application of the EU non-discrimination law were applied, but the question whether or not that will guarantee sufficient non-discrimination protection remains to be discussed. Such "avoidance" strategies might be useful in a European forum, where no clear European identity yet exists, but they create the problem of disharmony and lack of coherence. Basing considerations on merely formal grounds deepens the differences between member states in religious matters and in the protection of religious freedom. As long as

150. Martinez-Torrón J., 2001a, p 197-198.

151. Vickers L., pp. 13-24.

152. E.g. in: X vs. the United Kingdom, Application no. 7291/75.

153. This is visible in cases concerning Wicca or Druidism, when the nature of belief was not approached but instead the considerations were based on formalistic grounds.

the formal side remains clear, the countries are free from violations of the rights. And since the European system as far as religion is concerned is based on rights, avoidance of inquires into the nature of problems and basing the argumentation on the formal side, is a slippery slope creating the way to inequalities, fragmentation and numerous inconsistencies in the system.

2.8. Guidelines of what kind? Some final observations regarding the nature of definitional considerations

Definitional struggles appear mainly in the cases of new religious movements (NRM). NRMs are the test cases of flexibility and the openness of European legal systems and the European-wide rights instruments. In the case of Europe, the most often tested "guinea pig" is the Church of Scientology, which is treated as a church in some countries, while in others it still bears the stigma of a dangerous sect. I believe that the question of the limitations put on religious communities in order to protect public security should be separated from the argument whether any organization is of a "religious" nature and whether some claims are based on the "belief" argument. The consideration of whether we deal with a belief or a religion should be primary and not confused with questions of public security. Application of article 9.2 ECHR ought not to be confused with the fact whether the case concerns a religious community. The protected nature of a religion or a belief should be established first. Only in the next step of the application of law should the issues of possible limitations prescribed in article 9.2 and their allowed democratic and proportional character be considered.

Also, as mentioned above, I agree with Martinez-Torrón that the individual religious aspect is often underestimated. The notion of "religion" is used as synonymous with the notion of "church". In modern religiously plural society, such an understanding is no longer legitimate. New religious movements are not always organised, but they nevertheless provide life guidelines and sources of strong convictions for those who consider themselves their adherents. Durkheim's sociological definition of "religion" as a community of believers is no longer justified in modern

society, where the boundaries of the religious and non-religious became far more blurred and far more flexible and where the individual aspect is often the most important.

I believe that twofold guidelines could help in creating a more uniform standard of recognition. I would choose the one used in the Refugee Convention broadened by the functional aspect from American jurisprudence. The individualistic approach is nowadays necessary and in order to allow equal protection of religious beliefs of Europeans, it is advisable to see whether a sincere belief or conviction "occupies in the life of its possessor a place parallel to that filled by God" and whether it can or cannot "play the role of a religion and function as a religion in [his/her] life".[154]

154. Welsh vs. United States.

3. The Mosaic of Europe: legal problems stemming from the current church and state relationships in European countries

3.1. The mosaic of Europe – national identities and various churches

Europe has been for long considered a secular continent by the majority of scholars looking at religious phenomena in Europe[155]. Declining church attendance rates have been considered as an inevitable indication of that tendency. Legally, however, this secularisation paradigm should be viewed more critically and undergo further scrutiny. In the process of analysing legal norms that are valid in particular in European countries, one is forced to face the European legal **"potpourri" of different notions of religious freedom, religious confession, equality, laicism, secularism and state neutrality,** as Machado named it[156], or the "salad bowl" as Katzenstein did[157]. Taking a deeper look at Europe appears to be an unsolvable puzzle of principles aiming at achieving an increasingly pluralistic liberal democratic standard, mixed with tradition and national religious sentiments stemming still from the Reformation. The Reformation divided Europe's House[158] and over time led to the identification of national interests with particular religions. Religious wars and struggles for independence strengthened this tendency and on some occasions led to the development of strong

155. See among others: Anderson B.C., 2004, p 143 or: Keane J., 2000, pp. 5-19.
156. Machado J.E.M. (2004-2005), pp. 451-535.
157. Katzenstein P J., 2006.
158. I paraphrase the title of MacCulloch's historical research here: MacCulloch, D., 2003, *Reformation: Europe's House Divided 1490-1700*.

national identities based on religions[159].

In the process of European integration, countries have avoided open confrontation between their religious traditions and newly developing democratic standards. This approach was confirmed in the declaration accompanying The Treaty of Amsterdam on the status of churches and non-confessional organizations[160]. The influence of traditional religions in particular states on democracy and developing standards of rights have not been legally questioned or challenged. The approach towards religious issues developed as the "freedom of religion" of particular religious adherents rather than as a "wall of separation" between states and churches, as understood in the American context of the First Amendment. Some nations developed a special commitment to their religions, elevating them to the level of national values and understanding the proper professing of them as patriotism. Such an attachment can be particularly visible in the traditionally Catholic countries, especially Ireland, Poland or Malta, where the Catholic religion became a part of national identity in the struggle for independence or freedom from oppression[161]. Some states even today endow certain religious value in their constitutions[162].

But a state does not necessarily have to endow any religious value formally in order to favour certain religions above others. Countries like Poland, Spain, Austria or Portugal formally separate state and church, yet they are bound by concordat treaties with the Holy See, which factually strengthen the position of a certain religion in the society. In the case of Poland, the special position of the church is so clearly visible, that the constitutional principle of secularism and non-endowment does not correspond at all to the situation *de facto*. The recent history of Polish politics and open referral to the Catholic values

159. More on the topic of connection between nationalism and religion see, e.g.: Rieffer B-A.J., 2003.

160. See e.g.: Declaration on the status of churches and non-confessional organisations (Treaty of Amsterdam), which secures position of national churches and relations between states and religious communities.

161. See among others: Rieffer, 2003 and, Casanova, 2006.

162. Further in this volume, in part I and part II, I describe examples of Malta and Ireland in greater detail.

as the leading political theme serves as one example[163].

The institution of a state church as a concept is, though, primarily a Protestant one. Thus traditionally all the Nordic states, as well as England, had had the institution of a state church. The institution of the state church survived over time and is still established constitutionally, for instance in Denmark. The Nordic countries have despite this establishment become pioneers in the human rights area and are among the first states whose legal systems recognised the idea of women's rights[164], including reproductive rights[165] and allowing for same-sex unions to be formally registered[166]. Soon progressive, liberal democratic changes in the Nordic countries were followed by democratisation inside church institutions. It became visible, for example, by allowing the ordination of women, including higher church positions like that of bishop[167], or the recognition of gay marriages by the Church of Sweden[168]. Meanwhile, conservative tendencies among clergy have been discouraged[169]. The Catholic and Orthodox Churches in Europe have remained conservative and further condemn the majority of practices

163. See e.g.: Casanova, 2006, Ramet S.P, 2006. and Chapter 3 in part II in this volume.

164. Finland was the notable pioneer in admitting universal suffrage for men and women as early as in the parliamentary elections of 1907.

165. Sweden, Denmark and Iceland were among the first European countries to legalise therapeutic abortions already in the 1930s.

166. Denmark was the first to introduce a law on registered partnerships through the Lov om registreret partnerskab (no. 372, 07.06.1989).

167. The Church of Norway, Church of Sweden and Church of Denmark and the United Evangelical Lutheran Church of Germany began to allow women to become bishops in the 1990s.

168. Homosexuella par kan vigas i kyrkan, Dagens Nyheter, 16.03.2007.

169. The Evangelical Lutheran Church of Finland openly condemned those male pastors who oppose working with female pastors. In a press release sent to the Finnish news agency, the Archbishop of Finland, Jukka Paarma, said that the Finnish church would no longer tolerate colleagues who refused to conduct services with female pastors. This declaration was also soon reinforced by the state, in the court sentence against a priest in Hyvinkää, who refused to work with a female pastor. Three persons were fined by the court for discrimination at work. For details see: *Naispapit ovat tyytyväisiä arkkipiispan tukeen*, Helsingin Sanomat 30.03.2007, *Käräjäoikeus: Naispapin poistuminen kirkosta Hyvinkäällä oli syrjintää,* Helsingin Sanomat 30.11.2007.

that the Protestant churches nowadays allow for: reproductive freedom, divorces or gay marriages, for example.

The two most often mentioned countries maintaining very strong separation of state and church are France and Turkey. Although the Dutch system can be considered as a separation system, too, the French example will be used here since it has brought controversies and the French laïcité principle has been described as hostile towards religion, for example by Davie[170] and Stepan[171].

The present situation in regard to the regulation of religious issues indeed brings to mind the image of a puzzle. Within this European puzzle any discussion of the general limits of democracy and its capacity for multicultural inclusion appears extremely difficult. A "Europe of different speeds" is mentioned in the context of economic development. However, also in the sphere relating to religion, an image of a "Europe of different speeds" emerges. It is a Europe of different speeds in achieving goals of religious pluralism. While in some parts the discussion of the limits concentrates on post-secularism and multiculturalism, in other parts the discussion is rather how to reach secularism and liberalism first[172].

This chapter deals in more detail with the relations between the state and churches in European countries and their implications both for the individual believer and non-believer and for democratic principles as understood in Europe these days. It is, however, not an exhaustive comparative catalogue and should not be referred to as such. It introduces the understanding of democratic limits in Europe as the platform of common consensus and shows examples of solutions that are troublesome from the point of view of that consensus or that appear to be the closest to the agreed standard.

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170. Davie G., 2002.

171. Stepan A., 2000.

172. This difference is visible when comparing two studies. Loenen M.L.P, Goldschmidt J.E. (eds.), 2007 shows the problems of post-secular societies, while Eneyedi Z., Madeley J.T.S., 2003 shows the picture of a struggle to reach the liberal democratic standard and the conservative role of traditional European religions in that process.

3.2. Europe on religion and equality - the ideal of religiously plural Europe

As mentioned above, Europe restricted itself from interference into the church-state matters of particular countries in the declaration supplementing the Treaty of Amsterdam. At the same time, however, it has committed itself to human rights and principles of equality and non-discrimination, which can nowadays be considered as the cornerstone of European democracy. Although binding provisions concerning religion are not numerous, Article 9 of the ECHR and the EU Employment Equality Directive are important for sketching the democratic limits concerning religious problems in Europe. In addition to those norms, there are also other rules that can be applied to problems of a religious nature.

The first additional set of norms that can apply to religious beliefs are norms forbidding discrimination and supporting diversity and the equality of all persons in Europe. Except for Article 14 of the ECHR banning discrimination, which is to be read together with Article 9, also EU has committed itself to ideals of equality in legally binding agreements.

As mentioned above, the Treaty of Nice confirms in Article 6 the commitment to liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. The Lisbon Treaty, which consolidates currently binding treaties and is at present in the difficult and stormy process of ratification, reaffirms the commitment to equality and non-discrimination. Article 2 of the Treaty underlines that:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

Moreover, Article 3 places these values and the well-being of its peoples as the aims of the Union. It also establishes the obligation to combat

social exclusion and discrimination. In the latest communication from the Commission to the Parliament on non-discrimination and equal opportunities, the necessity of strengthening commitment to prevent discrimination was underlined:

> "The European Union is founded on the shared principles of liberty, democracy, respect for human rights and fundamental freedoms. Common to all our European societies is a fundamental recognition that every individual is of equal worth and should have fair access to the opportunities of life. Discrimination undermines these shared values."[173]

If the Lisbon Treaty comes to force, also the Charter of Fundamental Rights of the European Union shall have the same legal value as the treaties and Article 10 shall become part of the Union's law[174]. In regard to religion and freedom of conscience, Article 10 of the Charter provides the same rights as Article 9 of the ECHR and also includes a provision referring to conscientious objection, which should be recognised in accordance with national laws.

The second kind of norms and sources concerning the position of religion in Europe is rooted in the recommendations and resolutions of the Council of Europe's bodies. The Parliamentary Assembly of the COE has adopted a few recommendations and resolutions dealing with religious issues: *Recommendation 1396 (1999), Religion and democracy*; *Recommendation 1720 (2005*), *Education and religion*; *Resolution 1580 (2007), The dangers of creationism in education; Recommendation 1804 (2007)*, *State, religion, secularity and human rights, Recommendation 1804 (2007), State, religion, secularity and human rights;* or *Recommendation 1805 (2007) Blasphemy, religious insults and hate speech against persons on grounds of their religion.*

In these recommendations the leading idea is the creation of a

173. Communication: Non-discrimination and equal opportunities: A renewed commitment, 2008

174. With the exception of the United Kingdom and Poland, which did not agree to ratify the Charter.

multicultural and religiously plural democratic society. They all emphasise that religious pluralism is an inherent feature of the notion of a democratic society and where it gives rise to religious divisions, public authorities should not eliminate religious pluralism but strive to ensure that the various groups respect each other[175]. They encourage religious diversity and discourage the demands of religious fundamentalism. In further chapters, I deal in detail with particular recommendations in connection with problem areas introduced in this volume. *Recommendation 1804 (2007), State, religion, secularity and human rights* underlines in particular that: "one of Europe's shared values, transcending national differences, is the separation of church and state" and that governance and religion should not mix. The recommendation expresses concern that legislation of several COE member states still contains anachronisms dating from times when religion played a more important part in European societies.

In my analysis of the relations between states and churches, I concentrate on these European legal and interpretative commitments. I look at state-church regulations from the perspective of an individual and religious pluralism. I include both the perspective of believers and non-believers. As emphasised in the same Council of Europe recommendation, freedom of religion is the same important asset for non-believers as it is for believers. As mentioned in the introductory remarks concerning the method, I believe that multiculturalism requires taking such a perspective.

The main recognised models in Europe are those of separation, neutrality, establishment and the so-called mixed system. In this analysis, I offer five models, which are based on the most often recognised models but differentiate them on the basis of the varying level of religiosity of the population. At the same time, these five models do not together create an exhaustive model and do not encompass an entire religious panorama. In regard to the method of this study, the examples referred to are aimed at showing practices which are the furthest and most controversial from the point of view of religious pluralism and European commitment to its basic values. At the same time, it attempts to show the best practices from the point of view of pluralism, when available.

175. Recommendation 1396 (1999)

Religious tradition	Country	Pattern of secularisation	
		LEGAL	SOCIAL
CATHOLIC	France	strong	medium
	Ireland	medium/weak	medium
	Italy	medium	medium
	Malta	weak	weak
	Portugal	medium	medium
	Poland	medium	weak
	Spain	medium/strong	medium
PROTESTANT	Denmark	weak/medium	strong
	Finland	medium	strong
	Norway	weak/medium	strong
	Sweden	medium/strong	strong
ORTHODOX	Greece	weak	weak
MIXED	Germany	medium (depending on the region)	strong (depending on the region)
	United Kingdom	weak/medium	strong

Figure 2: Patterns of legal and social secularization.

Figure above shows an extended pattern of social and legal secularization. In the further analysis I have omitted the division into religious tradition based on various denominations of Christianity, which stem still from the era of Reformation and the Great Schism. This figure includes also division into various Christian traditions in order to give a better overview of the religious and legal patterns present in Europe.

The omission of this division in the further analysis is dictated by the methodological approach of this volume. This work's critical objective is aiming at identifying problems of commitment to European democratic values or relativist interpretation of these values when non-traditional religions and beliefs are concerned. Therefore, in further part of this analysis, I have concentrated on the pattern of legal secularization *vis-à-vis* the pattern of social secularization and their implications for a believer and a non-believer.

The levels of legal secularization are graded from weak to strong. This degree corresponds to the degree of separation of church and state. Strong solutions mean full separation; weak solutions mean either the existence of a state church or high influence of traditional religion on the legal system. Medium solutions include seemingly secular systems, where certain traditional influence of religion is maintained, for instance thanks to the existence of concordat treaties. Weak/medium and medium/strong show the tendency of change towards stronger secularization. It describes for instance those countries, where facilitation of multiculturalism and religious pluralism is recognised as a legal goal but where traditional state churches still exist. The pattern of legal secularization has been identified through analysis of national laws and their implications.

Social secularization corresponds to the degree of influence of the traditional Church over the population. It includes also a degree of its influence on public life. Strong secularization signifies also tendency of strengthening multiculturalism, religious pluralism and equality of various religions. The pattern of social secularization has been identified by usage of statistical data as well analysis conducted by other scholars. In this process, *The Changing Religious Landscape of Europe* by Hans Knippenberg[176] and detailed analysis of social influence of religion conducted therein was the main source.

176. Knippenberg H., 2005.

3.3. The established state Church in otherwise secular states

3.3.1. Legal foundations and historical roots

The United Kingdom, Denmark, Iceland and Norway can serve as examples of societies which have state churches and at the same time a high level of secularisation. While religion is not strongly present in public life or politics and the societies show signs of secularisation and growing pluralisation, the institutions of state churches dating back to the times of Reformation have been sustained. I will deal here with Denmark, the United Kingdom and Norway. Although Norway is not a part of European Union, it is an important member of the Council of Europe and the efforts for the revision of the legislation on the church-state relationship provide an important example of the current development of European democratic standards.

The Church of Denmark is constitutionally regulated. Article 4 of the Danish Constitution establishes the Evangelical Lutheran Church as the established church and gives the state responsibility for church matters. Article 6 obliges the King to belong to the Evangelical Lutheran Church, while Article 68 provided an obligation of regulation of the church's status by law. In practice, though, the leadership of the church belongs to church authorities and the church enjoys a high degree of independence. In regard to the pluralism debate, the idea of the separation of church and state has also been disputed lately[177], but no legal changes have yet been introduced.

In the United Kingdom, the Church of England is the institution established since the Reformation and still strongly connected with the Crown. The Act of Supremacy of 1558 and the Bill of Rights of 1688[178] establish the position of the Church and the King or Queen's relation to the Church. The Act of Supremacy[179] guarantees that all spiritual jurisdiction is united in the Crown, while the Bill of Rights requires that the King or Queen must be protestant and cannot marry a Catholic. The

177. Når stat og kirke skilles, Kristeligt Dagblad, 28.08.2008.
178. Bill of Rights 1688 c.2 1_Will_and_Mar_Sess_2.
179. Act of Supremacy, 1558 c.1 1_Eliz_1.

King or Queen is the Supreme Governor of the Church and as such approves the bishops and opens the meetings of the General Synod, which is the governing body of the Church of England.

Moreover, the legislature is influenced by the establishment of the Anglican Church. The House of Lords includes 26 so-called Lords Spiritual, who are the Archbishop of Canterbury and York, the Bishop of London, Durham and Winchester and 21 Bishops in order of appointment to a diocesan see. This regulation dates back to 1878. Their task in is to bring religious ethos to the legislative process. The planned reform of the House of Lords aims at reducing the amount of Lords Spiritual however "the Government believed that the Church could continue to be well represented with fewer Bishops"[180].

In addition, non-written traditions connecting the Church and the state are present in British political life. Tony Blair was expected to avoid changing his religion to the religion of his wife and family during his term of office as Prime Minister. The position of Prime Minister is traditionally expected to be filled by a person connected with Anglican Church. Thus Blair converted to Catholicism only after his term of office elapsed[181].

In Norway, the position of the Church is established constitutionally and legal connections between the Church and the state remain strong. Articles 2 and 16 regulate the position of the Church. Article 2 declares the Evangelical Lutheran Church to be the state religion and Article 16 gives the state the responsibility for the organization and financing of the Evangelical Lutheran Church. The authority for regulating the matters of the Church is mainly assigned to the King, who is responsible for the organization of the Church and ensuring that the Church follows the regulations. Using this authority is the King's prerogative[182]. However, these privileges have been to a large degree delegated to the Church

180. The House of Lords: Reform, p 47.

181. After 30 years as a closet Catholic, Blair finally puts faith before politics, The Guardian, 2007.

182. See more on the meaning of this prerogative in: Samme Kirke- Ny Ordning, 2002, p 38.

authorities[183]. The bishops however, are still employees of the King and the King must belong to the Evangelical Lutheran Church.

In 2001 a committee appointed by the National Council of the state Church evaluated the state and church system in Norway. The Committee proposed new regulations for the relations between the state and the Church. On the 10th of April 2008, political parties present in the Parliament agreed to introduce a programme of democratic reform of the Church[184]. The programme proposed a reform of the Constitution in regard to the relation between the state and the Church. The current Article 2 establishing the church is to be replaced with a new provision stating that:

> "Basic values stem from Christian and humanist heritage. This Constitution guards democracy, rule of law and human rights."

It was also proposed that Article 16 include provision concerning freedom of religious worship although the church would not to be entirely separated from the state and should be symbolically connected to the state. However, the "spiritual" leadership of the King, provided in article 21 and 22 of the Constitution shall be removed from the Constitution. The change was motivated in part by growing religious pluralism in Norwegian society and the obligation of a democratic state to safeguard religious equality[185]. The decision to change constitution was approved by Storting in September 2008[186]. The changes will be introduced by the end of the year 2011.[187]

3.3.2. The social dimension of establishment countries — secularity and multiculturalism

All of the societies with an established church show a high degree of secularisation and growing religious pluralisation. The church membership and church attendance rates are in decline and the number of new

183. Ibid., p 38.
184. Innstilling fra kirke-, 2007–2008.
185. Samme kirke- ny ordning, 2002, p 30.
186. Dokument nr. 12:25 (2007–2008), www.stortinget.no.
187. Innstilling fra kirke-, 2007–2008.

religions and religiously neutral individuals is increasing, even though in the Nordic countries they remain seemingly high.

In Norway the Church observed again an increase in the number of persons who resigned from membership in the Church: from 6,038 resignations in the year 2005 to 8,134 resignations in the year 2006. The total number of members of the Church of Norway was 3,871,006 in 2006, which still comprises 81% of the population[188].

In Denmark the decrease in Church membership has followed a similar pattern and declined since 1984, when the membership of the Church of Denmark totalled 91.4% of the population, to 84.3% in 2002[189].

In the United Kingdom, the percentage of the population that are members of the Church of England totals only 22.2%[190], while the total amount of non-Christians has reached 28.2%[191]. The average Sunday church attendance in the Church of England is 983,000[192], which equals about 1.67% of the total population of the United Kingdom[193].

At the same time, the number of different religious beliefs in the UK has increased. The United Kingdom is far more multicultural compared to the Nordic countries. Even though 72% of the population, according to the census of 2001, still belonged to various Christian denominations including the Church of England, Church of Scotland, Church of Wales, Catholic, Protestant and all other Christian denominations, the number of non-believers and people of non-Christian faith is noticeable. People with no religion formed the second largest group, comprising 15 per cent of the population, and 5 per cent of the population belonged to a non-Christian religious denomination. Among the non-Christians, Muslims were the largest religious group after Christians, comprising 3 per cent of the total population. Hindus were the second largest non-Christian

188. Statistisk sentralbyrå, Church of Norway 2005-2007: Members and church ceremonies, Church of Norway 2005-2007: Church services and participants.

189. Folkekirkens medlemmer og de kirkelige handlinger, Danmarks Statistik.

190. "Religion by Year". British Social Attitudes Surveys (2006).

191. Census, April 2001, Office for National Statistics.

192. Church Statistics 2006/7, Average weekly attendances 2006 and 2005.

193. The total population of the United Kingdom according to the 2001 census equalled 58.800.000, Source: National Statistics Online: www.statistics.gov.uk.

religious group, comprising 1 per cent of the total population. Other religious groups included Jews, Sikhs, Pagans, Wiccans, Baha'i, Jain and others[194].

In Denmark, along with the established church, various other Christian churches are represented and have been accorded the status of officially recognised religious communities. These are (in order of size): the Roman Catholic Church, with approximately 35,000 members, the Danish Baptist Church with about 5500 adult members and the Pentecostal churches with approximately 5000 members. Communities with 3000 members or less are: the Seventh Day Adventists, the Catholic Apostolic Church, the Reformed Churches in Fredericia and Copenhagen, the Salvation Army, the Methodist Church, the Anglican Church and the Russian Orthodox Church in Copenhagen. In addition, the Jehovah's Witnesses comprise approximately 15,000 members and the Church of Jesus Christ of the Latter-Day Saints (Mormons) with about 4500 members. Outside the National Church, there are nine other independent, recognised Lutheran congregations of Grundtvigian origin. During the last decades of the 20th century, the largest of the non-Christian communities has been dominated by Muslim immigrants. The number was estimated to be c. 119,000 in 1998[195].

In Norway, the population not belonging to the state church has mainly included Christians, comprising 56% of that population, Muslims (18.8%) and the population with non-religious philosophical beliefs (20%). The rest shown in statistical records includes adherents of Buddhism, Hinduism, Baha'I and Judaism.[196]

Although the statistics on church membership are seemingly high for the Nordic countries, it has been asserted that the level of religiosity is rather low and the church is simply a service place for performing ceremonies such as weddings, funerals and christenings. Halman has argued that being a church member in Scandinavia is less religiously

194. Census, April 2001, Office for National Statistics, National Statistics Online: www.statistics.gov.uk.

195. The Royal Danish Ministry of Foreign Affairs, *Denmark 2006*.

196. Statistisk sentralbyrå, *Et mangfold av tro og livssyn*.

meaningful than in other countries[197]. According to Sundman, belonging to the Lutheran Church in the Nordic countries is seen as a natural part of citizenship and is not necessarily connected with religiosity. The countries differ between themselves in the level and seriousness of this identification but the general explanation for this high proportion of church members is the same in all Nordic countries[198].

Meanwhile, in the United Kingdom, multiculturalism has been the leading theme of the Labour government, and despite criticism from more conservative groups[199], it is largely supported by the British society[200].

For these reasons, despite the establishment of a national church, the secularization of political life in these countries is high. All of them accept same-sex unions[201], allow for abortion[202], support gender equality[203] as well as recognise growing multiculturalism[204]. Also many of the churches, as mentioned above support many of these stances.

3.3.3. Establishment and the principle of equality and religious pluralism

Since the official state religion does not usually interfere in the realm of legislation and politics and new religious groups enjoy freedom of religion

197. Halman L., 2004 .

198. Sundman, S., 2007, pp.- 262-280 .

199. Multicultural Britain is not working, says Tory chief, Daily Telegraph, 0*4.08.2005* or Multiculturalism has betrayed the English, Archbishop says, The Times, 22.11.2005.

200. UK majority back multiculturalism, BBC News, 10.08.2005.

201. The Civil Partnership Act (2004), Lov om registreret partnerskab (1989), Lov om ekteskap LOV-1991-07-04-47 with latest amendment: LOV-2008-06-27-53.

202. Lov om svangerskapsavbrudd LOV-1975-06-13-50, The Abortion Act 1967, Lov nr. 177 af 23.06.1956. om foranstaltninger i anledning af svangerskab m.v., som senest ændret ved kongelig anordning nr. 151 af 21.03.1988.

203. E.g. Ministry of Justice (UK): Gender Equality Scheme 2008-2011, London, March 2008; Norwegian Ministry of Children and Equality, Gender Equality 2009? Objectives, strategy and measures for ensuring gender equality, Oslo, 2009, Denmark establishes a special Ministry of Equality and the legislation includes special law on gender equality: Ligebehandlingsloven LBK nr 734 af 28.06.2006.

204. See e.g. Knippenberg H., 2005.

and confession in the establishment countries, it might be argued that the establishment of an official religion is not a problematic issue from the point of view of a religiously plural democracy. From the point of view of the ECHR, the establishment of a state church is not against democratic principles as long as freedom of religion is secured[205]. Also the declaration supplementing the Amsterdam Treaty suggests the same. Some scholars, like Adhar and Leigh, agree with this opinion, attempting to defend a 'mild establishment' as they call it[206]. Also Modood has concluded that establishment does not have implications for the religiously plural society[207]. Meanwhile some, like Weller, have disagreed, arguing that establishment has substantial consequences for individuals as well as religious communities[208]. Weller ascertains that the symbolisation and operationalisation of the state are affected by the establishment of the church and it inevitably renders other traditions second-class.

I join the voices of those who speak against the principle of constitutional establishment for several reasons. My arguments are based primarily on the European commitment to principles of equality and religious pluralism. My arguments could be characterised as pragmatic pluralism in Adhar and Leigh's classification of pluralistic conceptions[209]. This view takes into consideration primarily the need for harmony among the religious communities. I want to argue that even symbolic establishment introduces distortion in the equality of believers and non-believers and thus constitutes sufficient reason for religious disharmony.

Firstly, the establishment is done through documents of a constitutional nature. Let us take into consideration the role of a constitution whether written or not. One of the functions of a constitution is to consolidate the people that are governed by it and provide a common platform of identification with the principles expressed by it. In a Rawlsian understanding, a constitutional consensus is the agreement of the society concerning principles that are of such a fundamental nature,

205. Darby vs. Sweden. Application no. 11581/85
206. Adhar and Leigh, 2005, pp. 75-97.
207. Moodod, 1992: 59-60.
208. Weller P, 2000, p 62f.
209. Adhar and Leigh, 2005, p 87.

that they become chosen as the conception of justice. Citizens, despite their own moral doctrines, agree to follow these chosen principles as the foundation of their society[210]. The establishment of an official church puts certain faiths and beliefs in a symbolically stronger position than others. Such a consensus is at the outset unequal. In fact, establishment symbolically advances a religious conception of life. While in practice it might be of little meaning, in the symbolical context it creates privileged conceptions of life and "others". "Otherness" never leads to peaceful coexistence. Embracement of a state religion creates symbolically an authoritative recognition of what conceptions are valuable. "Otherness" is usually feared and often rejected.

Secondly, establishment equates the interests of faith with the interest of the nation. While this was indeed the situation still a hundred years ago, broad changes towards toleration and equality have transformed the landscape of Europe. I disagree with Adhar and Leigh, who argue that to dismantle national churches in pursuit of an abstract notion of neutrality would do violence to history and the actual exigencies of religious life in certain nations. Firstly, as mentioned above, the relationship between actual religious life and the established churches is weakening. Secondly, religion became to a large degree a matter of private individuals and religious communities. This phenomenon has been called the "unchurching of Europe"[211]. Regardless of its practical importance, establishment symbolically imposes what religious identity a certain nation due to its history "ought to" have. In the conditions of postulated pluralism, such an equation places other faiths, beliefs or non-beliefs out of the scope of national identification. Of course, an individual may leave the Church, which is usually easily possible in Protestant churches. However, does an individual remaining outside the Church remain unaffected by the fact that a specific religious conception is constitutionally advanced? Again, however symbolic this dimension may be, it should not be dismissed as unimportant on the modern religious map. The equilibrium of religious equality is disrupted between citizens who follow the basic national religious values and those who do not.

210. Rawls J., 2005, pp. 154-172.
211. Davie, 2006.

Adhar and Leigh argued that disestablishment reflects secular philosophy about religion and political life. I believe, however, and I will return to this argument later, that a religiously neutral constitution with strongly established freedom of religion guaranteed to all without discrimination offers the most balanced solution. It allows individuals to identify with the constitutional principles of their legal community.

Thirdly, these considerations lead to the problem of the connection between church and state organs. Is it legitimate today, in times when belief, disbelief, new religions or religions not traditionally connected with the state are present in modern European societies, to require that rulers not enjoy freedom of religion? As far as the king or the queen is concerned, the limitation of their religious liberty might be still defendable by tradition and cultural heritage, which are under the protection of European law[212]. Here, the argument on the violation of historical heritage could even today be plausible. The king or queen is still today a symbolic representative of the history of a nation and as such is the function of modern monarchies – to consolidate the symbolism of the nation and its history in the person of the monarch. But why should the queen's or king's spouse be limited in their religious freedom, as in the British case? Or why could not the Prime Minister convert to another denomination in secular Europe before the end of his term of office? The preservation of this historic heritage affects individuals even if they are individuals exercising special functions. Could not a Muslim become a British Prime Minister? Does religion different than the established religion hinder the capacities of persons to hold official positions? It appears discriminative to an unjust proportion to assume that believers of certain faiths are in a better position to act in a neutral manner consistent with the interests of the state than believers of other religions or non-believers.

Fourthly, even though the influence of church organs on the legislative process may be limited or close to none, it again affects the symbolic aspect of such legitimacy. Europeans today defend themselves against

212. See: Treaty of Nice, article 6.3: "The Union shall respect the national identities of its Member states." Or Treaty of Lisbon, article 3.3: "It [The Union] shall respect its rich cultural and linguistic diversity, and ensure that Europe's cultural heritage is safeguarded and enhanced".

the influence of new religious on the democratic system. Defence against Islamic values is visible in the ECTHR's judgements[213], the Council of Europe's declarations[214] as well as in socio-political discourse[215]. However, if the traditional European religions are not separated from the state organs and continue to influence on legislative, even if only symbolically, why expect religions perceived as less democratic to refrain from attempts at influencing the law? When a privilege is given to one faith, it naturally raises the demands of other faiths to be privileged in the same way in accordance with equality and non-discrimination principles. While the establishment countries perceive their own churches as "civilised" and positive in their attitude towards democracy, they ignore the symbolic dimension that such establishment may have for those religions whose values are considered non-democratic.

I agree with Weller that establishment systems do have implications in the wider European context and thus countries should re-evaluate their historical traditions and inheritances in the context of integration and religious pluralism[216]. In the later discussion on a theoretical model of European democracy and its relationship to religion, I will expand this argument further in light of liberal democratic theory.

3.4. The state Church and homogeneous religious population

Another group of countries comprises those who maintain state churches and whose religious population is homogeneous compared to the previously mentioned secularised and multicultural societies. In this group of countries we can place two other countries with established churches which are not

213. For instance, in the cases concerning the veil: Dahlab vs. Switzerland, Application no. 42393/98 and Sahin v. Turkey, Application no. 44774/98. See also the discussion in the following chapters.

214. See further references in the chapter concerning blasphemy and the justification for adopting the common European standpoint towards blasphemy as a result of the Mohammad caricature crisis.

215. Bilefsky, D., Fisher I., Doubts on Muslim integration rise in Europe, International Herald Tribune, 12.10.2006.

216. Edge, 2000, pp. 59-60.

Protestant: Malta and Greece. In both of these cases, the identity of the church is closely connected with national values and the historical identity of the nation. At the same time, the influence of the church on political and social life is higher than in the countries previously mentioned.

The Maltese Constitution from the year 1964, with the latest amendments from the years 1994 and 1996, in Section 2 titled 'State religion' establishes that:

1. The religion of Malta is the Roman Catholic Apostolic Religion.
2. The authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and which are wrong.
3. Religious teaching of the Roman Catholic Apostolic Faith shall be provided in all State schools as part of compulsory education.

At the same time, Article 1 of the constitution adheres to the democratic values of respect for human rights and freedoms of the individual. The establishment of the Catholic Church as the state church is connected with Maltese history and the conflict between British and Italian influences over the island. [217] As will be further discussed in the chapter on reproductive rights and abortion issues, the impact of this regulation on the life of the individual can be significant and the Maltese constitution is a true rarity on the European scene in legitimising religious authority in moral issues through constitutional provisions.

In Greece, the established church is the Eastern Orthodox Church. Similar to Malta, the Greek Constitution establishes in Article 3 of its basic provisions that:

> 1. The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions.(…)

217. Malta Church and State: 1930-1931.

Moreover, the Constitution deals with certain internal regulations of the Church concerning scripture and the ecclesiastical regime. Even though the Greek regulation gives the church authorities the right and duty to teach about moral rights or wrongs, the establishment is not so strong in wording, like the Maltese.[218] The influence of the Greek Church on Greek life has been extremely strong. It was summarised by Mavgrogordatos in the following wording: "Unless one is willing to bear very substantial costs, one can neither live nor die outside the churches: the Orthodox Church and the few others recognised or tolerated"[219]. The Church's Archbishop Christodoulos himself expressed publicly his sentiment towards the equation of a religion with a nation in his comment in 2000:

> "For Greeks, to be an Orthodox Christian is a defining attribute of our identity'[220].

Due to this prevailing understanding of nationality, attempts at separating church and state failed in the constitutional revision of 2001 even though some changes concerning the influence of religion have been introduced, for example in removing religious affiliation from identity cards[221]. As Alivizatos noted, these changes, while slow, happen because Greece, like all other European countries, is facing the challenge of converting itself from a monocultural to a multicultural society[222].

In the case of Greece and Malta, we see a religiously homogenous population and more conservative societies and churches than in the United Kingdom or Scandinavia. These churches protest against reproductive rights, birth control practices or rights concerning non-discrimination on grounds of sexuality[223]. Thus the impact of the church

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218. The Constitution uses the word "prevailing" religion, meaning dominant. It does not declare it as the religion of the country.

219. Mavgordatos, G.Th, Orthodoxy and nationalism in the Greek case, p123.

220. Athens News Agency, Daily News Bulletin in English, 30.05.2000.

221. This was dictated by the requirements concerning identity documents standards in the Schengen zone, see: Athens News Agency, Daily News Bulletin in English, 18.05.2000.

222. Alivizatos N.C., 1999, p 33.

223. On the views of the Greek Church on reproduction matters including

on the rights of an individual is greater. The principle of pluralism and equality of faiths does not remain uninfluenced by the establishment of a conservative church, which is in fact dominant and whose values are associated strongly with national values. Whilst it is plausible to argue that in a multicultural and plural society like Great Britain, the establishment does not infringe the principle of equality, in the case of the Maltese and Greek churches, the situation is more complex. There is no doubt that the result of the equality between religious and other moral conceptions in these countries is entirely different. Moral ideas of certain religious doctrines are enforced by the social pressure of a religiously homogenous population. And such social pressure is additionally supported through the special recognition given to those religions by the law. Such a factual establishment reinforced by a legal one places adherents of other religions or non-believers in a discriminated position. It creates the religious "other", which is distant from the accepted standard due to non-belonging to the dominant religion. Not without reason, one of the most important judgements concerning the violation of freedom of religion was issued against Greece. The *Kokkinakis* case established the first European standards in the approach towards religious freedom and challenged Greek religious conservatism. When a state chooses to actively protect the established religion through law and state actions, the principle of non-discrimination on the grounds of religion remains void and illusory towards non-believers and in some cases adherents of other minority religions. In Rawls' theory, such a state would be characterised as 'sectarian' in character[224].

The main arguments against establishment remain the same as those above. However, when a religion becomes the basis for social persecution or when law attempts to introduce legal sanctions against those who share a different belief, it becomes a tool of discrimination rather than a freedom. State support leads towards the differentiation of the country's residents

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contraception and abortion, see: Georges E., 1996, pp. 509-519. Concerning the Greek Church's stand on in vitro fertilization, read more: Paxson H., 2003, pp. 1853-1866. Wider concerning Greek Orthodox Church and its stance on European Values see: Payne D.P, 2003, pp. 261-271.

224. Rawls J., 2005, p 179.

into those whose religion is accepted and identified with patriotism and support for national values and "others" whose religion and philosophy are not welcome in the society. From the point of view of a democratic European standard of tolerance, equality and non-discrimination as well as religious pluralism, such support is nowadays questionable.

Moreover, there is a substantial difference between the Catholic Church or the Orthodox Church and national Protestant churches. Democratic European principles and human rights are not always compliant with the teachings of these churches. The values of Protestant churches have evolved over time and are currently similar to European democratic commitments. This is especially true in Scandinavia. Meanwhile, more conservative Catholic and Orthodox churches remain resistant especially to sexual freedoms and rights stemming from it. Thus the delegation of the "duty to teach which principles are right and wrong", in a European democratic country like Malta is troublesome from the perspective of its commitment to European values and standards. Constitutional reference to the power of the Church to establish moral norms creates a reference to a higher authority in the meaning of natural law doctrines. Such authority is understood as higher than the constitution or the law, both national and European. In the era of integration, such a delegation of power to a certain religious community undermines the Maltese commitment to European principles of democracy and the rule of law. European countries have agreed to follow certain common principles, which are not based on any religious moral doctrine but on values of democracy, equality and human rights, which might contradict some religious doctrines.

3.5. Non-endowment and historical factual endorsement of religious values

Throughout most of the twentieth century Ireland was a country considered to be one of the most religious on the European scene and the Irish national identity developed as a Catholic identity[225]. The Irish

225. Ingils T., 2005, pp. 66-69.

Constitution from the year 1937 ensured the dominant position of the Catholic Church, which lasted until the amendment of 1974. During that period, the doctrine of natural law was developed in the judicial review[226]. Further implications of this legal doctrine and its subsequent modifications are discussed in detail in the chapter concerning reproductive rights. In the Irish case, women's reproductive rights became the main reason for changes in the understanding of the Church's influence on law and social life.

As of today, the Irish Constitution in Article 44.1 still prescribes that:

> "The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion."

Moreover, it constitutionally forbids seditious, blasphemous and indecent publications and abortion. At the same time, as if in contrast to the first paragraph, Section 2 of Article 44 guarantees that the state shall not endow any religion and guarantee everyone's freedom of religion:

> 2.1. Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
> 2.2 The State guarantees not to endow any religion.
> 2.3. The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.

In the context of state and church relations, the principle of non-endowment combined at the same time with acknowledgement of the natural law's doctrine, according to which the state's authorities hold God's name in reverence, is self-contradictory. The reference to God is an endowment in itself. It endows a certain religious conception, a theistic view of life. In light of the non-endowment principle, the state and thus the law should remain religiously neutral to religious conceptions. This paradox of including both the non-endowment principle and the factual

226. Whyte G., 1996-1997, pp. 725-746.

endorsement can hardly be explained except by the above-mentioned historical factors. The inclusion of two contradicting provisions allows for the free choice of principles depending on the legal need. Theoretically speaking, in case of legislation supporting traditional religious conceptions, invocation to God could be used. In case of legislation introducing liberal changes and aiming at increasing democracy and pluralism, the non-endowment clause could. In today's situation, however, in light of growing multiculturalism and religious pluralism and in light of growing European commitment to the value of equality, such ambiguity should be resolved in order to prevent the dominant position of any religion. Also legitimising such laws by appealing to majoritarian premises loses its support. Ireland seems to follow general European trends in regard to religiosity. The media have reported a change in the religiosity of the Irish population. A crisis is currently underway in Ireland in the vocation of the priesthood[227] and religiosity in general is in decline. The census of 2002 for the first time showed that the proportion of Catholics is below 90%[228]. Moreover, further changes in the law, not complying with the teaching of the Church, are currently being prepared, like the bill on civil partnership, which would allow homosexual couples to register their relationships[229].

3.6. Concordats – the variety of approaches

3.6.1. From factual endorsement to neutralism

Concordats are agreements between the Vatican state (the Holy See) and another state concerning the position of the Catholic Church in that particular state. From the perspective of international law, these agreements are of more importance than simple agreements between a state and a religious community within its territory. The Vatican enjoys

227. Catholic Church faces new crisis — Ireland is running out of priests, The Times, 27.02.2008.
228. Ireland's changing religious face, BBC News, 11.04.2004.
229. General Scheme of Civil Partnership Bill, Ireland, 2008.

the international status of a state and such agreements enjoy the status of international bilateral treaties. The generalisation of problems connected with concordat treaties is difficult since countries bound by the treaties with the Vatican vary greatly in the degree of religiosity and religious influence of the church over their population. Also the position of such bilateral international treaties in their national systems varies[230]. Some general problems, however, can be pointed out here. European countries bound by these special agreements with the Vatican are currently: Italy, Austria, Portugal, Germany, Poland, Luxembourg[231], Spain and Slovakia. In 2003 the Czech Republic, after reviewing constitutional principles, rejected the proposed concordat, basing the argumentation on the fact that it gave the Catholic Church preferential treatment and violated the state's neutrality in regard to religious matters.[232]

The texts and the provisions of concordats differ as much as the countries that are bound by them, even though many provisions are repeated in numerous texts. Those repeating norms deal with especially the organization of the church and its internal regulation by Canon Law. Since it is impossible in this chapter to analyse each concordat in detail, I try to mention essential provisions characteristic of particular states and their concordats.

The original Italian concordat dating back to 1929 initially gave the dominant position to the Catholic Church. Later amendments from 1984 removed the dominant position of the Church. However, the concordat gives the Catholic Church, among others, the sole right to provide religious education in public schools; the authority to recognise marriages celebrated in the Church; the right to establish Catholic schools. The concordat also establishes an obligation to seek solutions to problems in its application by a joint commission appointed by the state and the Vatican.

The Austrian concordat from the year 1933 is among one of the

230. In some countries, like Poland or Slovakia, the constitution guarantees the international agreement's position above ordinary laws.

231. Luxembourg's concordat applies more broadly to all Benelux countries.

232. Kolar, P, 2003 or: Czech Cardinal Vlk not satisfied with President Klaus", ČTK, Čseké Noviny, 13.03.2007.

oldest in Europe and the latest amendment dates back to the year 1968. It guarantees, among other rights, that the Catholic Church may enjoy the freedom of worship, obliges the state to protect the exercise of spiritual responsibilities by the Church, and obliges the state to recognise the Church's legal personality. It also guarantees compulsory Catholic religious instruction for Catholic students and recognises marriages celebrated in the Church as well as the right of the Church to legally dissolve marriages in accordance with Canon Law.

The Polish concordat from the year 1993 guarantees the Church privileges such as the right to provide compulsory Catholic religious education in public schools, a legal personality and the inviolability of religious places and the recognition of marriages celebrated in Church. It also obliges the state to cooperate with the Church in "protecting and respecting the institution of marriage and the family".

The Portuguese Concordat from the year 2004, supplementing the concordat of 1940, recognises the Church's legal personality, its right to carry out its religious mission, its right to teach "Religion and Catholic Morality" in public educational institutions and obliges the state to recognise marriages celebrated in the Church as well as annulments. The state is also required to help with providing religious assistance to members of the Armed Forces as well as inmates. The novelties introduced by the concordat of 2004 are the provisions concerning the tax exemptions of the clergy and the Church and most importantly, those incorporating the Church into the state system of tax collection, like in Germany or Scandinavia.

However, there are also less elaborated concordat texts, like those concerning Belgium, the Netherlands, Luxembourg and Hungary, which provide only basic regulation concerning the appointment of Catholic bishops and communication between the Church and the Vatican[233] or the position of the Nunciature in the country[234].

More complicated concordat systems are found in Germany and Slovakia, where more than one concordat exists. Germany is bound by the concordat concluded during the Third Reich and by local concordats

233. Dutch Concordat 1827.

234. Hungarian Concordat 1990.

with particular states, like Bavaria or North-Rhine Westphalia. This localization of concordats is dictated by the tradition of religious coexistence of the Catholic and Protestant 'länder'.

Slovakia, on the other hand, is bound by a set of concordats referring to different issues: the Basic Concordat (2000), the Concordat on the armed forces (2002) and the Concordat on Catholic education (2004).

3.6.2. Regulating matters of religion by an international agreement

The concordats, like the state church systems, pose several interesting questions from the point of view of religious diversity and equality. The main issue is whether *de facto* privileges given to a certain church constitute discrimination against other religions and non-believers. In 2005 the Network of Independent Experts on Fundamental Rights was set up by the European Commission to examine the issue of the influence of concordats on the right to conscientious objection[235]. The document was issued in 2004 and dealt with the question of adopting another Slovak Concordat on Conscientious Objectors arose. The document is, though, broader than the Slovak issue and examines various questions concerning the influence of concordats in general on the international obligations of states, including human rights obligations.

The draft concerning conscientious objectors emphasised the right of various professionals to object to performing certain services especially in areas concerning health, dignity, family and marriage. It would allow refusing to perform an abortion or distributing contraceptives. The Network experts agreed that such a broad interpretation of conscience clause, legalised through international agreement, could in some circumstances, like those of a legally allowed abortion, endanger human health or life. Thus they found the text of the draft incompatible with the existing international and European law. The Experts estimated that the violations would result from restrictions being imposed on access to counselling in the field of reproductive health and to access to certain medical services, including in particular abortion and contraception. They agreed that such a regulation would disproportionately affect women.

235. E.U. Network of Independent Experts on fundamental Rights, Opinion 4-2005.

However, the questions concerning concordats are broader than those connected with the conscience clause. Are any other concordats except those binding Luxembourg and Hungary compatible with principles of European law, particularly those of equality and non-discrimination? In many ways, concordats resemble the establishment of state churches, even though they are not constitutional. The argumentation against the maintenance of state churches could be evoked here again. When a certain religion receives greater support from the state, it symbolically affects non-believers and adherents of other religions. However, in the case of concordats, the issue goes even deeper. Countries maintaining state churches are in their sole competency to regulate these relations and legislative bodies are in a position to change these regulations and agree on conducting constitutional amendments. The case of Norway shows recent activity of this kind. Amending a concordat, on the other hand, takes two parties – the state in question and the Vatican. And because of principles of international law affirmed explicitly in the Vienna Convention[236] "pacta sund servanda", it is practically speaking impossible for the state to cancel the agreement of its own will without breaking this legal principle. Conundrum of international law poses a question regarding the legitimacy of a state to become bound by such agreements with a religious state. If a concordat gives certain privileges to the Catholic faith, like that of conducting classes of religious instruction in schools or the right to conscientious objection of professionals, which other religions do not enjoy due to a lack of similar agreements, it creates disparity between this faith and other faiths that are not enjoying these benefits. In instances when such disparity is disproportional, it could amount to discrimination. In any case, it introduces privileged religion and those less privileged "others". At the same time, this situation is legitimised by an international agreement, which in some countries enjoys a higher position in the hierarchy than national laws. In some constitutional systems, human rights obligations belong to the same

236. Vienna Convention on the law of treaties, Articles 26 and 27. These provisions apply to those Concordats concluded after entry into force of the Convention, that is 1980.

category, since they are concluded in a similar manner.[237] In a situation of conflict of norms, both the concordat and, for example the ECHR would be placed on an equal level in the hierarchy of legal sources.

The legitimacy of a state to become bound by such an agreement is questionable. The state becomes bound by international agreements as a representative of the totality of the inhabitants. If a country chooses to become bound by an agreement with a Catholic state concerning that faith's privileges on its own territory, it chooses to act on behalf of its Catholic population. However, the effects of this agreement extend beyond the religious population concerned, since the agreement becomes one of the international obligations of the entire state representing both Catholics and other adherents and non-believers. And, more importantly, from the moment of ratifying such an agreement, it cannot be dissolved by the sole will of the state like it is in the case of national churches. In case of disproportionate privileges given to the Catholic denomination in comparison to other faiths, such a situation is legitimised by an international agreement. In summary, in addition to its establishment-like nature, concordats pose problems of legitimacy, stemming from their nature as treaties under international law.

3.7. The separation or French laïcité

3.7.1. Legal grounds and historical roots

France is the member state of the European Union that adheres particularly strongly to the principle of full separation between the state and religions. In that approach France resembles the United States and the approach could be described similarly as relations based on the "wall of separation".

The law on the separation of the churches and the state from the year 1905[238] establishes the principle of laïcité, which could be translated as

237. E.g. Polish concordat enjoys the position of an international agreement higher than national law, in accordance to article 91.2.

238. Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État.

secularism or laicisation. Torfs[239], following Bauberot[240], distinguishes secularisation from laicisation. Secularisation, assumes Torfs, has a social dimension while laicisation has a legal dimension, concerning the position of religion in the legal system. Laicisation means separation of the state apparatus from any religion. The level of laicisation of a country does not necessarily correspond to the level of secularisation. A country following the principle of laicisation can be still very religious, for instance the United States, while a comparatively secular country can still embrace a state church system, for example Norway or Denmark. This understanding would be compatible with Keane's analysis of the word 'secularisation' or to 'secularise' meaning to reduce the influence of religion[241]. Separation does not necessarily mean secularisation. The French laïcité could be in Torfs' terms described as laicisation although in the English language, it is most often referred to as 'secularisation'.

The principle of laïcité is historically rooted in the French Revolution and the first attempt at separating the state from the Catholic Church. As Gunn[242] reminds, at that time laïcité did not embody the principles of tolerance, neutrality and equality as understood today, but emerged rather from periods of violent conflict with the Catholic Church. The Church and the clergy, as one of the estates against whom the Revolution was directed, were put under the control of the state. During the period of the French Revolution, the Church's property was first nationalised in 1789. In the following year, the Church's influence was minimised by the adoption of the Civil Constitution for the Clergy. The Civil Constitution placed clergy under the control of the government and required priests to swear an oath of allegiance to the state. In 1791, during the rule of the Legislative Assembly, divorce was legalised and the state took control of population registers. In the most radical phase of the Revolution, Christianity was replaced by the cult of the Supreme Being, with Robespierre as high priest. After Bonaparte's victory in 1801,

239. Torfs R., 1996, pp. 964-965.
240. Bauberot J., *Laïcité, laicisation, secularisation* as cited in : Torfs R., 1996.
241. Keane J., 2000.
242. Gunn J., 2004, p 433.

France signed a concordat with the Vatican[243]. The law of 1905 ended the concordat era and started the period of laïcité as understood today.

The period of the French Revolution produced, however, one of the foundations of today's approach to religion in France. In 1789 the National Assembly adopted the Declaration of the Rights of Man and of the Citizen, which were revolutionary at the time. Article 10 of the Declaration included a provision that could be compared to the current freedom of religion regulations. It forbade disturbing anyone's peace on the grounds of their religious opinions and could be compared to today's freedom of religion and the non-discrimination on religious grounds included in the ECHR.

Laïcité is understood in French political life as one of the basic foundations of the French Republic and the source of religious tolerance and understanding. The legal system, according to Article 1 of the law on separation, guarantees everyone freedom of religion, but according to Article 2, the state does not recognise, support or subsidise any faith[244]. Furthermore, Article 1 of the 1958 Constitution declares that:

> "France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs."

In addition, the Declaration of the Rights of Man and of the Citizen was recognised by the Constitution of 1958 as a part of the French constitutional system. Article 10 is thus binding also today.

Contemporary French politicians have referred to laïcité as the basis for religious respect and tolerance, the foundation of French democracy and the non-negotiable principle. Former president Chirac underlined in his address to the nation in 2003, that:

> "It is the neutrality of the public sphere which enables the harmonious existence side by side of different religions. Like all freedoms, the freedom to express one's faith can only have limits in the freedom of others, and in the compliance with rules of life in society. Religious

243. Stearns P.M., Langer W.L., 2001, pp. 431-435.

244. In French: "La République ne reconnaît, ne salarie ni ne subventionne aucun culte."

> freedom, which our country respects and protects, must not be abused, it must not call general rules into question, and it must not infringe the freedom of belief of others. This subtle, precious and fragile balance, constructed patiently over decades, is ensured by respect for the principle of secularism... This is why it is included in Article 1 of our constitution. This is why it is not negotiable." [245]

Scholars have been, though, more sceptical as to the actual effect of the principle on individual freedom and tolerance. The principle has been characterised by Gunn as a utopian founding myth[246]. Davie, on the other hand, underlined the intolerant nature of laïcité, manifested in discouragement from developing any cultural or religious group identity[247].

3.7.2. Discussion of the French headscarf ban

One of the contexts in which laïcité was used as an argument was banning wearing religious symbols in public schools. Since the legislation was aimed primarily at headscarves, the ban echoed the discussion concerning the limits of religious freedom all around Europe and has been both criticised and defended[248]. The problem started in 1989 when three Muslim girls in Creil refused to remove their headscarves in school and were therefore expelled. The scandal ultimately brought the issue to the Conseil d'Etat, which is the body advising the government on the preparation of governmental bills and is the judge of last instance for cases regarding executive power, local authorities or independent public authorities. One of its roles is to protect individual liberties and freedoms. Regarding school regulations banning headscarves in school, Conseil answered that laïcité in state education means that students are allowed to express and manifest their religious beliefs in schools, while respecting pluralism and the

245. Chirac on the secular society, BBC News, 18.12.2003.
246. Gunn J., 2005-2006.
247. Davie G., 2006, p 31.
248. See further references in this chapter: Gunn J., 2005-2006 or Gey S.G., 2004-2005.

freedom of others[249]. This decision did not, however, end the discussion on the issue. After years of intensive disputes[250], President Chirac created a commission to study the issue, called the Stasi Commission[251]. The tasks assigned to the commission were summarised as "conducting an analysis of the principle of laïcité in the Republic"[252]. After the report of the Commission had been issued, the National Assembly adopted the law on secularity and conspicuous religious symbols in schools[253]. The law banned wearing "conspicuous religious symbols in schools" and targeted mainly Muslim girls wearing various head-covering garments, usually referred to as "headscarves". The findings of the Commission referred primarily to Muslim girls and concentrated on the examples of those girls who are forced to wear a headscarf by their religious community[254].

Some scholars like Gey[255] have attempted to defend the new law using arguments similar to those of the Stasi Commission's. Gey argues that the French ban creates a religion-free zone, which is aimed at protecting the religious freedom of students. This religion-free zone provides an environment in which a student can choose his/her beliefs and decide which views to adopt. Gey, like the Stasi Commission, expresses concern for Muslim girls living under the coercion of the fundamentalist Muslim community and expresses the view that a school free from religious symbols offers a kind of safe "shelter" from that coercion. He understands the ban as the state's responsibility to ensure freedom of conscience. The state chooses to defend the principle of secularism by ensuring that citizens are able to freely choose from among the various options available

249. Conseil d'Etat no. 346893, 27.22.1989.

250. See further analysis of the political discourse connected with drafting this law in: Gunn J., 2004 and on further social dimensions of the veil issue: Freedman J., 2004.

251. Named after the chairman Bernard Stasi.

252. Decret no. 2003-607, 03.07.2003

253. Loi no. 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics.

254. French National Assembly, Report no. 1381 fait au nom de la Commission des Lois Constitutionnelles, de la Législation et de L'Administration Générale de la République sur le projet de loi (no. 1378) relatif à l'application du principe de laïcité dans les écoles, collèges et lycées publics, 28.01.2004.

255. Gey S.G., 2004-2005.

and are not forced by their religious community to follow religious norms.

However, in regard to the protection of the freedom of choice, which Gey believes to be the foundation of the new law, other commentators have remained less enthusiastic. In his critical response to Gey, Gunn pointed out that Gey's vision is the utopian version of laïcité and not the doctrine as it exists in practice[256]. For Gunn, a state that interferes into religious expression and the right of parents to decide their children's religious expression is in fact the coercer. He reminds that alongside those girls forced to wear a headscarf and facing persecution from their religious community, there are other girls who voluntarily wear a headscarf[257]. Moreover, Gunn addresses another question, how the banning could possibly reduce violence and coercion instead of increasing the number of girls expelled from school. He equates the Stasi Commission and the law drafters as well as law's supporters with the fundamentalists:

> "While proudly exclaiming that the desire to give the schoolgirls the freedom to explore their identity and values and to question the religious beliefs of the community, they do exactly what the fundamentalists are doing: deny the girls the freedom of choice".[258]

Also Freedman[259] saw the veil legislation as a barrier and an instrument of exclusion rather than integration. There is a danger, underlines Freedman, that the exclusion faced by Muslim immigrants will be multiplied and intensified and with time lead to further exclusion. The real problem, Freedman continues, is not the religious symbol but the economic and social handicaps, which carry risks of growing cultural conflicts.

3.7.3. Laïcité and democratic religious pluralism?

Although the main discussion concerning the topic of the veil and general relations between the state and religion in education will be subject to

256. Gunn J., 2005-2006, p 84.
257. Ibid., p 99.
258. Ibid., p 99.
259. Freedman, 2004.

further scrutiny in later chapters, the question of the relationship between the French laïcité and democracy in the context of religion should be addressed here.

The current French president Sarkozy, unlike his predecessor Chirac, has expressed the view that French secularism should change in order to become friendlier towards religions and see religions not as a danger but as an asset. He has been strongly criticised for expressing this opinion and accused of compromising the principle of laïcité and the fundamentals of the French state[260].

Is the French version of radical separation hostile towards religions? At first glance, the French solution, similar in certain aspects to that of the United States[261], appears to be the answer to the tensions between the state and religions. Complete separation of the institutions of the state from religious influence and no subsidies for religious organizations appear to keep the state out of any possible religious disputes or conflicts. It creates a religion free zone, which separates public issues from religious arguments and places religion in the private sphere. Such absolute separation at first glance appears to be the best method for dealing with inevitable tensions. When religions remain in private and the public space is free from religious manifestations, all should theoretically enjoy equality.

To a large degree, this model resembles the Rawlsian reasonable consensus, which I support as a model[262]. However, the ban on wearing a headscarf brings distortion to this otherwise harmonious picture. We need to look at this situation from the perspective of a believer as well as a non-believer. As the state coerces an individual to give up an item constituting a part of his/her religious identity when present in an institution which is as unavoidable as school, and directs the legislation towards as vulnerable a group of its residents as school children, the religious non-involvement of the state is no longer valid. Such coercion

260. See e.g.: McNicoll T., The President's Passion Play: Nicolas Sarkozy embraces God as good for society , igniting debate over church and state in France, Newsweek, 18.02.2008.

261. Comparisons of these two systems are not uncommon, see for instance previously mentioned: Gey S. G., 2004.

262. See further analysis of the current democratic models for Europe in Part III, Chapter 1.

pushes the pendulum of equality towards a model of secular coercive ideology, which creates a visible inequality and imbalance between the believer and non-believer. Although the ECTHR's decisions such as *Dahlab* and *Sahin* legitimised the French approach[263], I believe the balance between believers and non-believers was distorted. Even though the legislation appears to create equal treatment for all, since no one is allowed to wear religious symbols, the burden of this ban does not affect the believer and the non-believer in the same way. It differentiates not only between non-belief and belief but also between different beliefs. For some, wearing religious symbols is not necessary and constitutes a matter of choice, like for the majority of Christians, while for others, like some Muslim groups, wearing a headscarf constitutes part of a broader dimension of religion, namely identity.

Coercion preventing individuals from manifesting religion increases inequality among them. In a religiously plural democratic society, the key is to create a balance between believers and non-believers and between various forms of religious belief. Naturally, creating an absolute state of balance is utopian and unachievable in practice. However, in a democratic society, the principle of equality is a goal, the objective of which is safeguarding democracy and protecting individuals from the coercion of an arbitrary state targeting any group of individuals in particular. Limitations and differentiations should be allowed only for a just purpose and conducted in a proportional manner. Only such discrimination could be justified and found to be non-discriminatory. But Sadurski reminds that: "a 'working' test of non-discriminatory discrimination should be capable of being accepted by people who are on different sides in disagreements about justice'[264]. Actively preventing someone from manifesting his/her own belief through clothing, which can hardly be found harmful to anyone, is certainly difficult to accept by those on the religious side of this argument about justice. French "secularism" expressed in legislation such as the headscarf ban employs the equality arguments to support actions that can be characterised rather as ideological coercion than neutral democratic

263. See further discussion concerning these decisions as well as other issues concerning education in Part II, Chapter 3.
264. Sadurski W., 2008, p 110.

non-involvement in the struggle between faiths. Justification of the law, which is supposed to introduce an equal burden on all, using arguments directed against a particular religious group, remains doubtful as just in purpose and disproportional in regards to burdens put on various religious and non-religious believers. Denial of the freedom of choice is one of the essential characteristics of non-democratic systems[265].

Moreover, when a state arbitrarily chooses to influence a particular group of residents due to their religious convictions, it creates selective discrimination and the "othering" of that particular belief. And in such a situation those discriminated against have indeed difficulty in identifying with the common core of principles and values. The effect gained is exactly the opposite of the one attempted. The "secular democrat" becomes a "secular terrorist" when he or she chooses a particular faith to target and in doing so becomes as fundamentalist as the religious fundamentalist that is feared. Religious pluralism becomes impossible when religions on the level of individual practice are perceived as a threat to the democratic system. The balance between believers and non-believers is shaken deeply and draws analogies to those systems which choose to persecute non-believers for not complying with religious dogma.

3.8. Pluralism and neutralism

3.8.1. Changes on the legal level in the Church of Sweden

Sweden used to belong to the countries having an established state church. Like in Denmark, Norway, Finland and Iceland, the tradition of the state church dated back to the times of the Reformation and Swedish national identity and participation in the church were naturally connected. As Gustafsson notes, it was a criminal offence to leave the Church as late as 1858 and still until 1951 it was impossible to exit the Church without joining another Christian denomination[266]. The year 2000, however, brought a historical change in the relations between the state and the

265. Gunn J., 2004-2005.
266. Gustafsson G., 2003, pp. 51-52.

church in Sweden. The novelty of the law, which entered into force on the 1st of January 2000, separated the state from the church and, although the church still enjoys certain support from the state, it is no longer part of the state system as such. The new law was the result of long preparations, during which there were many phases and reaching the conclusive version was not done without compromises both on the part of the state and the church[267].

The current legal setting puts all the faiths in a similar position and is primarily regulated by the Freedom of Religion Act and the Religious Denomination Act. Freedom of religion guaranteed in those acts concentrates on the individual religious aspect, which is similar to the regulation of the ECHR on freedom of religion. It allows an individual to freely belong to or resign from belonging to a religious community and both the joining and the resignation from the participation in a religious community are matters between the individual and the community itself. The Religious Denomination Act provides general protection for religious freedom and refers in that aspect to the ECHR[268]. Moreover, it allows a religious denomination to register in order to protect their right to perform religious activities[269]. The purpose of the law was to allow as many religious denominations to apply for protection as possible; so the law does not require any special conditions, unlike the Austrian law, which recognises only a limited number of denominations that have to meet special requirements in order to be registered[270]. At the same time, there is still a special law governing the status of the Evangelical Lutheran Church, which was drafted in order to preserve the historical continuity of the Church of Sweden and prevent too harsh and too rapid a break between the tradition and modernity. The Church of Sweden Act regulates the status of the Church of Sweden (Folkkyrka), which is a common church open to all and based on democratic organization. It regulates organizational aspects of the Church but leaves the right to decide the details of doctrines and

267. For detailed historical and political background on the reform, see: Stegeby K., 1999, pp. 703-768 or Gustafsson G., 2003.

268. The Religious Denomination Act, Section 1.

269. Ibid., Section 2.

270. For more on this issue, see the chapter on the definition of religion in this volume or: Miner C.J, 1998.

teachings to the Church, leaving the state out of the process. The pastors of the Evangelical Lutheran Church are no longer the employees of the state and the government no longer has any influence in the process of choosing bishops. The new regulation did not, however remove the requirement that the King shall belong to the Evangelical Lutheran Church and as Stegeby reminds, this anachronism was a result of a political compromise, which made the reform possible in the first place[271].

The Church, moreover, continues to receive some support form the state. The state still collects Church taxation on behalf of the Church and it allows the Church to administer the graveyards.

3.8.2. The ambiguous nature of the Finnish Church

The Constitution of Finland from the year 2000 does not recognise any state church. Instead, in Article 76 it refers to the special enacted laws concerning these churches traditionally considered as national. The law on the Church[272] and the law on the organization of the Orthodox Church[273] are the main laws that regulate the position and organization of traditional churches in Finland. The state supports partially these two churches, for example in the collection of church taxes. In addition, there are numerous specialised laws issued by the state concerning employment in the Lutheran Church, maintaining cemeteries, financing and other organizational matters. Pekka Leino observes that the Church Council is the main law legislative body drafting laws applying to the Church and the state is in the position of either rejecting the law or accepting it, but is not allowed to introduce amendments[274].

In addition to regulations concerning the two traditional churches, a new law on religious freedom was introduced and entered to force on the 1st of August 2003[275]. According to that law, a religious association of at least 20 members can register as a religious community. The legal position

271. Stegeby K., 1999, p 765.
272. Kirkkolaki 26.11.1993/1054.
273. Ortodoksisen kirkon kirkkojärjestys 12.12.2006/174 vs. 2007 .
274. Leino P, 2005, p33.
275. Uskonnonvapauslaki 06.06.2003/453.

of the Evangelical Lutheran Church as well as the Orthodox Church is equal to the position of registered communities, although these two churches do not need to register. Everyone above the age of 15 can enter or exit a religious community.

The Evangelical Lutheran and Orthodox Churches are, due to tradition, considered to be national churches but according to their current legal status they cannot be considered state churches. The nature of the churches remains ambiguous – on the one hand they are considered traditional national churches, but on the other hand their current legal position is on a par with other churches and associations. As Sundback notes, participation in national churches in Finland, like in other Nordic countries, is connected to an understanding of nationality and identification with nationality[276]. Thus such an ambiguous nature and certain privileges enjoyed by the traditional churches are explained by history and tradition.

At the same time, however, secularization of life is high and in Finland, as in other countries, the number of people belonging to the church and participating in religious activities is on the decrease. According to research on the Evangelical Lutheran Church in Finland, the percentage of the Church membership decreased from about 92% in the 1970s to about 81% in 2007[277]. Furthermore, church attendance remains low and starting in the early 1990s, the share of church members who attend church services more rarely than once a year or never dropped to about 50%[278]. The influence of the church on political life remains small and the church follows the general trends of democratization mentioned previously in the context of other Scandinavian countries.

3.8.3. Neutrality regulation and the principle of religious pluralism

The reform in Sweden was inspired by growing religious pluralism and multiculturalism. One of the main principles followed in the long negotiation process was that the state must not favour any denomination

276. Sundback S., 2007, pp. 265-272.

277. Monikasvoinen kirkko, pp. 26.-28, These estimates are based both on the statistical data of the Church and the Statistical Office of Finland (Tilastokeskus).

278. Monikasvoinen kirkko, p 33.

and remain as neutral as possible in its regulations in the religious arena[279]. It was motivated by the fact that Swedish society had become more pluralistic and thus no denomination should receive preferential treatment above others[280]. Gustafsson asserts that also the church was seeking greater liberty and thus was ready to pay the price for it[281].

Despite the fact that the traditional churches enjoy certain benefits, like tax collection by the state, both Swedish and Finnish regulations remain neutral towards religious denominations as far as possible. This neutralism rather than strict separationism, like in the French case, is a more favourable approach towards reaching the democratic goals of religious pluralism, equality and freedom of religion. A state that does not defend itself against religion, but instead is ready to allow protection for as many denominations as possible without advancing any of them through law is perhaps the closest to the European goals of equality, non-discrimination and religious pluralism. Such neutralism also affects the individual dimension of the belief in an affirmative way. No individual can feel less or more appreciated by the state because of his or her secular or religious beliefs, regardless of whether it is the belief of the majority or a minority. The religious factor becomes irrelevant for the identification with the state and its policies and various approaches to life remain equally valuable and thus cultivate the growth of pluralism itself. This approach resembles again the Rawlsian constructivist approach to social justice and the position of different doctrines in a democratic vision of a society. Doctrinal views of particular citizens do not disrupt the creation of common rules of justice that do not prioritise any doctrine, but instead offer a reasonable consensus and principle of treating citizens as equal.

Of course, two lines of objections may appear. Firstly, that the functioning of the Church of Sweden and the Finnish churches did not really change, as Gustafsson observes regarding the Swedish Church.[282]. Thus it might be asserted that the change was not important. However, since the focus here is on legal principles and abstract constructs such as

279. Stageby K., 1999, p 726.
280. Ibid., p 722.
281. Gustafsson G., 2003, p70.
282. Ibid., pp. 70-71.

equality, I do ascertain again that symbolism in law does have meaning. Symbolic separation and neutrality on the legal level is of major importance for achieving equality and pluralism. The law must remain neutral to religious conceptions, so that none is placed above others solely on the grounds of tradition.

Secondly, another objection claiming that traditional churches receive greater support may appear. And that objection is valid. However, the support is mainly support of a technical and administrative nature. These issues could be, of course, the subject of further scrutiny regarding their proportional and non-discriminative nature. But since in this volume I deal primarily with principles, this important quality of neutralism towards religious beliefs as a continuously developing principle of liberal democracy is the main focus.

Thirdly, it might be argued that the state does not truly remain neutral but chooses a certain secular conception of life which is not value-free and thus discriminatory towards individuals sharing a religious view of life. But democracy is not a value-free concept in itself, but rather a concept that is highly value-based. And I argue later in this volume that the current notion of European democracy is a specific concept that has lately developed into a particular form of liberal democracy and which has integrated into its meaning values such as human rights, equality, non-discrimination and rule of law as inherent and unquestionable. And such a conception is not a value-free construct but rather a construction based on particular values and principles. I return to these problems in the last part of this volume.

3.9. Democracy and the current setting – the religious puzzle as the source of problems

This panorama does not serve the purpose of drawing a full picture of religious regulation in Europe. Such an attempt would be a topic for a full comparative project requiring a few volumes. These pictures are solely to show the systems that fall far from the paradigm of secularization on the legal level and those that seem to be the closest to the goals of reaching religious pluralism and equality in religious and other beliefs. The last

paragraph is to show the systems that were reformed lately in order to fulfil better the democratic ideal as understood today. In the majority of these pictures a tendency towards separation or rather neutralism between state and church or state and religions emerges slowly as a necessary condition of democracy. The expanding area of rights, including sexual minorities' rights or female reproductive rights or freedom of expression, cannot be reconciled with some of the objections of certain religions or states' endorsement of any particular set of religious values[283]. The contemporary set of European values, which the countries taking part in the integration processes agreed to affirm, includes democracy, tolerance and the idea of rights as fundamentals of their systems. Endorsement of any religious system will lead to increasing fragmentation of integration law and human rights standards and will uphold situations in which religious interest is identified with national interest and placed above the common European commitment to rights and equality principles. Religious pluralism and religious equality in a multicultural society comprise a new democratic credo in an era when European societies are becoming increasingly heterogeneous. Even countries traditionally considered to be culturally uniform are slowly experiencing the influence of multiculturalism. Increased migration within the European Union, both internal and external, makes values, cultures and religions collide. As I further attempt to show in part III, the main issue in this multicultural era is how to adapt liberalism to the requirements of a multicultural society and strengthen internal commitment to those values.

Later chapters of this dissertation illustrate the plurality of standards and lack of effective means to achieve a common standard of commitment to values considered to be European. While interpretative documents concerning these values are currently being issued with increasing frequency, the internal commitment of particular countries to those standards remains uncontrolled and in regard to some issues is extremely diverse. In some cases, the liberal democratic standard is rather far from being achieved. Europe doesn't always "practice what it preaches" when it comes to liberal values. While reproaching other cultures and exporting

283. See the above mentioned: E.U. Network of Independent Experts on fundamental Rights, Opinion 4-2005.

democratic values, the issues of internal commitment remain currently an internal challenge. Part II includes three chapters which serve the purpose of illustrating these diversities and which I hope can form a starting point for further theoretical discussion in Part III of this volume regarding a model of European democracy.

Part II:
Critical Analysis of Contemporary problems of law and religion in Europe

Introduction

The aim of this part is not to provide a full or overall view of all contemporary problems of a religious nature in contemporary European society. Such a full overview is impossible due to the limits of this volume. It is designed merely to highlight certain inconsistencies in the contemporary European approach towards religion and law. The practices and conservatism of newly growing religions, in particular Islam, are usually strongly addressed and opposed and lead to legal changes.[284] The same strong actions, however, are not taken in regard to traditional European religions and their conservatism. As illustrated above, in some cases the bonds between state and church in Europe are still strong and influential. In this part I chose three different areas where law and religion collide and which are at the moment sources of what I would call a "double standard" in approach towards problems emerging due to friction between law and religion. This double standard is shown in different approaches to traditional European conservatism and new religious conservatism. These sketches are not meant to draw a full picture of problems. They were selected based on the fact that in those very areas the legal and political discourse is inconsistent and creates different standards for different religions. First of all, I approach problems of women's rights and in particular reproductive rights. Furthermore, I analyse issues of blasphemy and hate-speech and finally I move into areas of friction between religion and education.

284. E.g. the rights of Muslim women in Europe are often used as political rhetoric, as, e.g., in the case of the French headscarf ban.

4. Relationship between religions and women's rights

4.1. Women's rights as the foundation of the European polity and the complicated nature of reproductive rights

Women's rights are at the foundation of the European Union and the Council of Europe. The legal and political discourse in Europe is concentrated on achieving gender equality. As the European Commission's Unit for Equality between Men and Women informs the reader on their official pages: "EU policy as regards equality between women and men takes a comprehensive approach which includes legislation, mainstreaming and positive actions"[285]. And indeed the legislation of the Community as well as the case law of the ECJ concerning gender equality comprise an enormous number of norms and rules.

Sexual morality, on the other hand, has traditionally been influenced by religion. For centuries, the dominant sexual morality in Europe was Christian morality. And it was a Christian morality which produced traditional attitudes towards questions of family role division, motherhood, abortion and contraception. Traditionally, Christian morality perceived sexual acts as acceptable only for the purpose of having children[286]. In the twentieth century, with the development of effective contraception, like the birth control pill, traditional attitudes were challenged and women were given the opportunity to change their

285. European Commission; Employment, Social Affairs and Equal Opportunities; Gender Equality: http://ec.europa.eu/social/main.jsp?catId=418&langId=en.
286. Fleishman R., 2000.

passive family role. Also the international human rights instruments expressed the ideas of women's equality and challenged discrimination on the grounds of sex.

On the international level, the year 1979 brought the adoption of the Convention on the Elimination of All Forms of Discrimination against Women (further: CEDAW), which explicitly challenged the traditional family patterns and introduced the legal obligation of assuring equality of men and women in all aspects of life, including family life. In order to reach this goal, CEDAW included the obligation to ensure individuals the possibility of deciding on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights. Meanwhile in Europe, similar aims of gender equality were phrased in new European documents. The ECHR in Article 14 forbade discrimination in applying the rights included in the convention, among others, on the grounds of sex. In 1997 the ratification of the Amsterdam Treaty elevated gender equality to the level of a fundamental principle of the Community[287]. These documents did not, however, make any specific reference to reproductive rights or the possibility of deciding about the number and spacing of children in a manner similar to the CEDAW. Reproductive rights in Europe were not embraced by any common policy, even though feminist scholars have ascertained that reproductive rights are necessary for advancing gender equality. Freedman and Isaacs, for instance, have insisted that, without the right to reproductive choice, other economic or social rights have only limited power to advance the well-being of women[288].

On the international level, firm commitment to the idea of reproductive rights as the necessary corollary of gender equality was expressly reaffirmed only as late as during the world summits in Cairo in 1994 and Beijing 1995. The Beijing Platform for Action specifies that, "The explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment;."[289]

287. Treaty of Amsterdam, Official Journal C 340, see: changes concerning Article 13.
288. Freedman L.P, 1993, p19.
289. United Nations, A/CONF.177/20, 1995.

However, religious opposition to the idea of reproductive rights has prevented any decisive development in that area worldwide. Next to Muslim countries, in particular the Catholic Church, who through the Vatican has a status of a permanent observer in the United Nations, was in firm opposition to recognising reproductive rights and especially abortion and obstructed the discussion[290]. Also the traditional influence of religion on reproductive matters in European countries did not change within a day's time.

4.2. Europe's new commitment to a female's rights

During the 10 years following the agreements of the Beijing platform, Europe did not firmly approve of the existence and importance of reproductive rights within its own territory even though the European Union's countries are parties to the CEDAW and were present at the drafting of the Beijing Platform's goals. In 2002, two years before the 2004 accession of a new group of 10 countries, the European Parliament's Committee on Women's Rights and Equal Opportunities adopted a report on sexual and reproductive health and rights. It was called the Van Lancker report, from the name of the Rapporteur. The adopted report called for a common resolution on the matters in question. The motion for a resolution was accepted but the adoption of an actual resolution never followed. The report considered all relevant international documents and actions and the state of disparities in sexual and reproductive health and rights within the EU, especially in matters relating to women's access to health services, contraception and abortion. It called for common action that would urge the governments to engage in efforts in providing contraceptives at low cost or free of charge for less privileged groups in the society, promoting sexual education in a gender-sensitive way and with special attention to the problem of sexually transmitted diseases, ensuring counselling for pregnant women and making abortion legal, safe and accessible to all.

In 2004 also the Council of Europe adopted a resolution[291] and

290. Fleishman R., 2000.
291. Resolution 1399 (2004).

recommendation[292] observing that there is an enormous disparity of standards between member states in matters of reproductive health and called to develop a comprehensive European strategy for the promotion of reproductive health and rights.

In 2008, facing the difficult question of abortion, the Council of Europe adopted a report[293] and resolution[294], calling countries which uphold the abortion ban to decriminalise abortion, guarantee the effective exercise of the right to abortion and adopt appropriate strategies to promote sexual and reproductive health and rights as well as access to contraception in order to prevent unwanted pregnancies and abortions. The report and resolution underlined that abortion is not a family planning method and it should be avoided but the ban on abortion does not result in fewer abortions but leads to clandestine abortions and abortion tourism, which are costly and endanger women's lives and health.

The necessity of further commitment to rights inside Europe was also acknowledged by the European Union. In January 2009, the European Parliament adopted a resolution on the status of fundamental rights in the European Union[295]. The resolution contained many important acknowledgements concerning, among others, relationships between traditions, religions and rights inside the Union as well as the Union's commitment to the rights and its credibility as a promoter of a rights-based democracy. All of these issues will be subject to further scrutiny in the later chapters of this volume. In regard to women, however, the resolution stated that member states should withdraw their reservations to the CEDAW[296] and assure that women can fully enjoy reproductive rights, access to contraception and avoid high-risk illegal abortions. In regard to women's rights, the resolution in particular stressed that invoking customs, tradition or religious considerations to justify any form of discrimination against women, including adoption of any policies that

292. Recommendation 1675 (2004).

293. Report, Access to safe and legal abortion, Doc. 11537 rev., 08.04.2008.

294. Resolution 1607 (2008).

295. Resolution 2007 (2145) (INI), 2009 and: Report on the situation of fundamental rights, 2008.

296. As analysed below, among others, Malta included a reservation that the Convention would not challenge the Maltese ban on abortion.

might endanger their lives, is unacceptable in a democratic state based on the principle of gender equality.

While the amount of interpretative and advisory documents like reports and resolutions has grown recently, none of the European-wide binding legal documents includes specifically reproductive rights. Most competence for action in the field of health is held by member states, but the EU has the responsibility, set out in the Treaty, to undertake certain actions which complement the work done by member states, for example in relation to cross-border health threats, patient mobility, and reducing health inequalities. The question of reproductive rights, though, is treated mainly from the perspective of health issues rather than rights issues. The variety is thus still enormous. Reproductive rights have been, however, recognised in another area of competence of the entire Union, namely in regard to foreign relations. Regulation 1567/2003[297] obliges the Community to support actions to improve reproductive and sexual health and rights as defined in the Beijing Platform Programme for Action in developing countries. Thus the Union as such has a competence to promote and aid reproductive rights outside its territory, but no competence to interfere with the internal regulations of its own member states in this area.

A binding interpretation of legal principles is, however, provided in the judgements of the European Court of Human Rights and the European Court of Justice. In regard to abortion, two such judgments will be introduced in the section dealing with the Irish ban on abortion. Lately, the ECTHR issued another judgment on this matter in the case of *Tysiac vs. Poland*[298], which is analysed in the chapter concerning the Polish commitment to reproductive rights.

4.3. Discourse versus practice in the European countries

These general aims mentioned in the section above, do not meet a favourable reception in some member states like Malta or Poland[299].

297. Regulation 1567/2003.

298. Case of Tysiac vs. Poland, Application no. 5410/03.

299. Maltese MEPs oppose move promoting abortion and same-sex marriages,

Ireland, on the other hand, as one of the states with the longest membership in the EU and the COE, is the perfect historical example of how strongly the religious factor can influence women's rights, and that such influence does not prevent membership in the Union or in the Council. Throughout its membership in the Union and in the ECHR system, Ireland has successfully maintained its absolute ban on abortion, which has been softened mainly due to internally arising cases.

The adoption of the Van Lecken Report aimed at preventing further fragmentation of policies within the Union in regard to reproductive rights and in particular in the accessing countries. It did not, however, manage to pressure Malta or Poland to change their policies and laws in order to conform to the postulated standards. The example of Ireland and its former restrictive rights concerning access to contraception or maintenance of the ban on abortion could be used as justifying arguments by the accessing countries. The accessing countries could use references to the Irish policies and history in order to avoid European pressure to change their own conservative laws and policies.

The following sections analyse the influence of Catholicism in Ireland on the sphere of women's reproductive rights and their development through case law. Then I analyse the Maltese absolute ban on abortion and the complicated situation of Poland in regard to abortion and women's reproductive rights. In the case of Poland, the conservative government between the years 2005-2007 challenged the idea of reproductive rights as a whole and instead attempted to introduce Catholic family values into the realm of law and reproductive mainstreaming in Poland. Thus the chapter regarding Poland employs less legal methods but instead methods of analysis of the political discourse in order to estimate the potential and actual impact of those policies on rights.

4.3.1. The situation in Ireland

Almost 60 years of membership in the Council of Europe and 35 years of membership in the European Community have not managed to significantly

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The Times of Malta, Saturday, 17.01.2009., Europejska rezolucja w sprawie aborcji [European Abortion Resolution], Gazeta Wyborcza, 16.04.2008.

change the position of the Catholic Church in Irish law as far as reproductive rights are concerned, or at least as far as the issue of abortion is.

Ireland's complicated history, including the struggle with the British Empire for independence, strengthened the position of the Catholic Church in the society. The Church became a unifying characteristic of Irish society during the independence struggle[300]. Thus the new constitution of the independent Republic (Bunreacht na hÉireann) drafted in 1937 was implemented in the spirit of Catholicism. It affirmed its position and legitimised the impact of religious values on the legal system.

Originally Catholicism received a constitutionally privileged position and held it until the amendment of the Constitution in 1973. Regardless of the amendment, though, most of the history of the legal interpretation of the Constitution has been occupied by the Thomistic understanding of natural law. Some of the Justices of the Irish Supreme Court, like Gavan Duffy, have been particularly devoted to the idea of protecting this Catholic understanding of natural law and amending common law where it did not conform to Catholic ideology[301]. The Irish Constitution has since evolved and experienced many amendments, including the amendment removing the special position of the Catholic Church[302]. However, certain natural law elements of the Constitution itself have still not changed until now. The Preamble of the Constitution still proclaims that it is drafted "in the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred." A similar affirmation can be found in the text of the Constitution itself in Article 44, which confirms that: "The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion."

Until the case of *McGee*, the natural law interpretation of the Constitution was valid also in areas pertaining to private life, including reproductive life and choices. The legal order of Ireland for many years considered practices found to be morally sinful by the Roman

300. See: Whyte G., 1996-1997.
301. Ibid., pp.729-739.
302. Amendment no. 5/1972, 1973.

Catholic Church to be illegal. The prime examples are divorce[303], contraception[304], gay relationships[305] and abortion. Abortion has always been illegal in Ireland, yet the explicit ban on abortion was introduced to the Irish constitution in 1983 by the Eighth Amendment, which was incorporated into the text of the Constitution as Article 40.3.3[306]. The article protects the life of the unborn, which can be compromised only by danger to the life of the mother[307]. The protection of the unborn life in addition imposes an obligation on the state "to defend and vindicate that right". The Irish authorities have been active in fulfilling that obligation as the cases mentioned later will show. Through its jurisprudence, however, the Highest Court has with time introduced certain changes to the strict interpretation of this provision and shaped the current understanding of the abortion ban in Ireland. Pro-feminist scholars have argued that this ban is non-conforming to the standard of human rights and seen it as an instrument of women's oppression and a hindrance to the successful implementation of the reproductive as well as other rights of pregnant women[308]. The violations seen by the feminist scholars are foremost those of the right to privacy, health and non-discrimination. They have been also seen as an expression of nationalism[309]. Meanwhile, the defenders of natural law have been arguing that states should be allowed to decide on matters of morality and that the right of the life of the unborn must override the right to privacy of a pregnant woman[310].

303. Allowed by introduction of Amendment no. 15/1995, 1996. This amendment was a result of a referendum conducted in November 1995.

304. Amended by: McGee vs. the Attorney General and the Revenue Commissioners, [1974] IR 284 at 298.

305. Norris vs. Ireland, Application no. 10581/83.

306. Amendment no. 8/1983, 1983. The ban on abortion existed even before but did not enjoy constitutional status and was sanctioned by very old provisions from the time of British rule: Offences Against the Person Act, 1861.

307. The exceptions to the law were developed in the judicial review. See below.

308. See more on feminist discourse in regard to abortion: Smyth L., 2002.

309. Fletcher, R., 2005.

310. See more on the pro-life discourse and its contemporary impact: Oaks L., 2003.

4.3.2. The cases before the Supreme court of Ireland that influenced the contemporary understanding of the reproductive rights of Irish women

The *McGee* case[311] from the year 1973 was the first case which could be called "revolutionary" in the history of tensions between natural law and women's reproductive rights in Ireland. The case addressed a married woman's right to use contraceptives. Mrs. McGee was a married woman and a mother of four. Her second and third pregnancies, the latter of which was a twin pregnancy, were complicated by serious attacks of cerebral thrombosis, which caused complications such as temporary paralysis. Mrs. McGee's medical adviser warned her that further pregnancies could cause danger to her life. Thus, the McGees decided to resort to the use of contraceptives and attempted to import a contraceptive jelly. The jelly was seized by the authorities in accordance with Section 17 of the Act of 1935, which prohibited the sale and importation of contraceptives. The use of the contraceptives *per se* was not considered illegal. Yet, due to the sales ban, the Irish population was effectively prevented from using them.

The judges in this case departed from the natural law interpretation of the Irish law and Constitution. They ruled against the Catholic Church's views on reproductive issues and legalised usage of contraceptives in marriage. The judges agreed that the regulation of such private matters of intimacy as those concerning the choice between sexual abstinence and usage of contraceptives in marriage is not a matter which should be regulated by the State. The departure from the religious stance was not absolute, though, as none of the justices went far enough to extend the same rules to non-marital relationships.

Justice Fitzgerald drew a distinction between the legal and religious aspects of the case, expressing the opinion that the religion of the plaintiff was not the issue in the case, but rather the privacy aspect. Justice Walsh, on the other hand, ruled in favour of the couple and departed from the interpretation, which upheld the State's obligation to vindicate natural law doctrine:

311. McGee vs. Attorney General.

> "It is a matter exclusively for the husband and wife to decide how many children they wish to have; it would be outside the competence of the State to dictate or prescribe the number of children which they might have or should have. (…)What may be permissible to husband and wife is not necessarily permissible to the State. For example, the husband and wife may mutually agree to practice either total or partial abstinence in their sexual relations. If the State were to attempt to intervene to compel such abstinence, it would be intolerable and unjustifiable intrusion into the privacy of the matrimonial bedroom."

In this judgement, the issue of reproductive rights and the choices of a married woman challenged the traditionalist and conservative interpretation of the Irish law. The judges deciding on the case for the first time departed so clearly from the teaching of the Catholic Church and separated the issue of religion from the issue of the law's application.

The next important case, connected with women's reproductive rights and the constitutional ban on abortion, was the shocking case from the year 1992, named the *X case*[312]. X was a 14-year-old girl who was raped by her friend's father. Her parents arranged an appointment in an abortion clinic in London and issued a formal question to the authorities if the foetal tissue could be used as evidence in the rape case. The response was negative and the authorities referred the case to the Attorney General, who obtained an order to restrain the girl from leaving the country for the period of 9 months. Although the girl was already in London, she and her parents returned to Ireland. The girl however, displayed suicidal tendencies and according to the opinion of a clinical psychologist, experienced in similar cases, was ready to end her life to avoid bringing her pregnancy to full term. Thus the legal issue that arose in this case was balancing between the right to life of the mother and the right to life of the unborn. The legal dispute was based on the mother's freedom to travel. The majority of judges agreed that the life of the mother required protection equal to that of the foetus and in circumstances when it was possible to establish a substantial danger to the life of the mother, abortion should be allowed. Justice McCarthy observed that when the life

312. The Attorney General vs. X and Others.

of a mother is in danger, there might be no possibility to vindicate the life of the unborn. Only one of the justices objected to this interpretation. Justice Hederman sustained the opinion that the state must secure the mother's duty to carry the pregnancy to term as a moral duty. The judgment in the *X case* established a new constitutional exception, which allowed for the termination of pregnancy in cases of real, imminent and substantial risk to the life of the mother, including the risk of death by self-destruction, which could be avoided by terminating her pregnancy.

The *X case* was followed by the *C case*[313], which considered a raped Traveller girl. Travellers are an old ethnic minority distinguished by a nomadic lifestyle and own language – Shelta. The rape victim was 13 years old and she was initially supported by her parents in their wish to terminate her pregnancy. Initially, it had been decided with the approval of the parents that the Health Board would not seek a further interim care order but that instead the parents would take her to England so that she could have her pregnancy terminated there. The arrangements were to be made by the parents, but they were subsequently approached by pro-life activists and changed their mind. The issue at stake was whether such a situation put an affirmative obligation on the state to arrange the procedure in order to protect the girl's life. The victim's parents tried to stop her from travelling and stop the Eastern Health Board from arranging the abortion procedure for their daughter.

The High Court decided, however, that there was strong evidence that a pregnant child is likely to commit suicide unless she has her pregnancy terminated. In this case, termination of the pregnancy was in the view of the Court a medical treatment for C.'s mental condition. Since C. showed clear suicidal tendencies, the Court established a real an imminent danger to her life, which now allowed abortion. In accordance with the Child Care Act of 1991, the Court regarded the welfare of the pregnant child and protection of her life as the first and paramount consideration. As a result of this judgement, C was allowed to travel and it was in practice the Eastern Health Board who arranged for her travel and procedure in England. The ban was slightly re-interpreted towards the understanding of abortion as a medical treatment, which must be provided in case of

313. A. and B. vs. Eastern Health Board.

danger to the life of the mother.

Meanwhile, the cases discussed below, *Open Door* and G*rogan*, found their way to the ECTHR and ECJ and brought further amendments to the Constitution. As a result of these judgments, the Constitution was amended by the addition of two further subsections to the paragraph dealing with the life of the unborn. The thirteenth Amendment introduced a provision which forbade limitations on the right to travel of pregnant women[314] while the Fourteenth Amendment stated that the ban on abortion "(…) shall not limit freedom to obtain or make available, in the State (…) information relating to services lawfully available in another state."[315]

Despite the introduction of these provisions, another dramatic case occurred as recently as in 2007. A 17-year-old girl known only as Miss D. won a case against the Health Service Executive (further HSE), who attempted to prevent her from travelling abroad for an abortion[316]. Miss D.'s foetus was diagnosed with anencephaly, a condition in which the head or part of it is missing. Facing the situation that the baby would survive no more than a few hours, Miss D. decided on an abortion to be performed in England. However, the HSE considered that she had no right to travel to obtain an abortion if her life was not in danger. The case received wide coverage in the media and an analysis of the majority of the commentaries showed that the society was very understanding and compassionate towards the applicant, sometimes referring to the "cruelty" of HSE professionals[317].

The case was ultimately resolved in the High Court of Dublin on the 9th of May 2007. The judgement underlined the responsible attitude of Miss D., who did not claim she was suicidal. Justice McKechnie emphasised in the judgement that the case considered the right to travel and not the rights or wrongs of abortion. The constitutional position

314. Amendment no. 13/1992, 1992.

315. Amendment no. 14/1992, 1992.

316. Due to unavailability of the judgment's text, references to press materials and scientific articles are used in this section, e.g.: Irish teen in court abortion plea, BBC News, 03.05.2007 or: Bowcott O., Irish judge stirs up abortion debate by ruling 17-year-old can travel to UK for termination, The Guardian, 10.05.2007.

317. More on the analysis of the press discourse: Smyth L., 2008.

concerning the established right to travel was thus reaffirmed. However, a precedent which would modify the law in order to include the right to abortion in cases of severe foetal abnormality was not made.

4.3.3. Open Door and Grogan – Europe's word on Irish abortion law

The *Grogan* and *Open Door* cases introduced the Thirteenth and Fourteenth Amendments to the Irish Constitution. They both concern similar situations, namely delivering information on abortion, but with different actors involved. The cases were considered nearly simultaneously but before different Courts on the European level. The ECTHR dealt with *Open Door vs. Ireland* in the issue of freedom of expression and the ECJ with *The Society for the Protection of Unborn Children Ireland vs. Grogan* in the issue of the nature of abortion as a service.

A short time before the *X case*, the Irish High Court was faced with a case brought by the Attorney General on behalf of the Society for the Protection of Unborn Children (SPUC) against Open Door Counselling. The question considered the lawfulness of providing information and counselling for women seeking abortion abroad. Open Door Counselling and another organisation named Dublin Well Women were providing a broad range of services for pregnant women, from health tests through information on abortion services in the United Kingdom to occasionally arranging the procedure for women willing to undergo abortion abroad. The SPUC claimed that the activity of Open Door and Dublin Well Women violated the constitutional protection of the unborn and applied to the High Court to restrain the organizations from distributing information and leaflets. The High Court referred this issue to the ECJ for a preliminary ruling according to Article 177 of the EEC Treaty in regard to the nature of abortion under Community law (*SPUC vs. Grogan*). The SPUC appealed the High Court decision to the Supreme Court[318]. The Supreme Court agreed with the SPUC and granted an injunction restraining the organizations from publishing or distributing, or assisting in the publication or distribution, of information on the identity and location of clinics where abortions were performed.

318. A.G. (S.PU.C.) vs. Open Door Counselling Ltd.

The judges saw the restraint as the necessary corollary of the ban on abortion expressed in Article 40.3.3 of the Constitution and as Justice McCarthy commented in the case, the court was obliged to enforce the constitutional ban.

In *SPUC vs. Grogan*, the ECJ agreed that abortion as a medical service provided legally in another Member State for remuneration should be considered as a "service" in the meaning of Article 60 of the EEC Treaty. The arguments on a moral plane, explained the Court, cannot influence the judgement, since the assessment deals with legal systems in which the activities in question are provided legally. The termination of pregnancy, where it is practiced lawfully, is provided in exchange for remuneration and is a part of professional activity and thus meets the definition of a "service" under Community law.

However, the information provided by Steven Grogan and other organizations included in the case was provided free of charge and was not a representation of the economic activity of the clinics in the United Kingdom. Thus, spreading such information, the ECJ underlined, should be treated exclusively as freedom of expression. And judging on the matter of freedom of expression was considered to fall out of the scope of the ECJ's jurisdiction. Thus, the ban on the distribution of information was not found illegal under the Community law. This judgment was criticised, both by those who contested the nature of abortion as a service and by those who agreed with the judgement in this matter. If abortion was considered a service, why should the information concerning obtaining this service not be considered a necessary corollary of the freedom to receive services, asked Colvin[319].

The aspect concerning freedom of expression was ultimately decided before the ECTHR. Open Door Ltd, another organization providing free information on abortion services, filed a complaint concerning the ban on providing information to the European Commission of Human Rights. The case was admissible. The Court delivered its judgment in October 1992 and found a violation of the right to freedom of expression, as embodied in Article 10 of the Convention. The ECTHR refused to examine further complaints whether Irish law was violating the right to

319. Colvin C.M., 1991-1992, p 525.

privacy and freedom from discrimination of pregnant women willing to undergo abortion. The Court found that the absolute and perpetual restraint on the provision of information to pregnant women concerning abortion failed to meet the requirement of proportionality of legal limitations necessary in a democratic society. The Court underlined that the State's discretion in the field of the protection of morals is not unfettered and unreviewable even though the ECTHR once more, like in multiple other judgements, underlined the "wide margin of appreciation" of states in moral matters. However, restrictions introduced on moral grounds must be necessary and proportional, which was not the case here in the Court's conclusion.

Mrs X and Ms Geraghty, who applied together with Open Door on behalf of women of child-bearing age who were prevented from receiving information concerning their reproductive health, e.g. information necessary for pregnant women, were also found to be victims in the meaning of Article 25.1 of the Convention:

> "Although it has not been asserted that Mrs X and Ms Geraghty are pregnant it is not disputed that they belong to a class of women of child-bearing age which may be adversely affected by the restrictions."

The Court also agreed that their complaint was not done *in abstracto*. The decision affirmed that the content of the questioned law put the applicants at risk of being directly prejudiced by its provisions. Therefore, the complaint was made *in concreto*.

Thus, the *Open Door/Grogan* case together with the previously described *X case* influenced the change introduced to the Irish Constitution. Local restrictions on information and access to services abroad were found illegal and incompatible with Irish international obligations in two different European legal fora. The ban on abortion inside the state's territory remained, however, to be considered as an internal matter. Neither of the Courts decided to deliberate on the morality or immorality of abortion. No considerations of the influence of the ban on the privacy of women or the influence of abortion on the right to life of the unborn were made in either of the cases. However, a slight movement towards recognising the importance of a woman's choice occurred in the *Open Door* judgement:

> "…the corporate applicants were engaged in the counselling of pregnant women in the course of which counsellors neither advocated nor encouraged abortion, but confined themselves to an explanation of the available options. The decision as to whether or not act on the information was that of the woman concerned."[320]

The conclusions reached in the cases were not unanimous. The *Open Door* judgement was issued with a total of five dissenting or partially dissenting opinions, one separate opinion and one concurring opinion signed together by ten of the twenty-three judges. The legal protection of the right to life of the foetus was not dismissed as incompatible with women's rights and the incorporation of the religious values of the moral majority into the national legal system was not found to be per se incompliant with the requirements of the Convention.

4.3.4. Malta's absolute ban on abortion and the state of reproductive health and rights

Ireland is nowadays not the only country belonging to the European Union that maintains strict law concerning abortion. Malta, member of EU since the year 2004 and a member of the COE since the year 1965, maintains an even stronger ban than the Irish one.

Malta has been an independent republic since 1964. This previous British colony is almost uniformly Catholic with as much as 98% of the population professes the Roman Catholic faith. The Constitution of Malta proclaims that the state religion of Malta is Roman Catholic and, as previously mentioned, constitutionally legitimises the authority of the Catholic Church to teach on the rightness and wrongness of moral principles.

With this particular socio-religious and legal setting, it is no wonder that the Catholic principles regarding reproductive rights are, like in Ireland, legally sanctioned in law. Malta forbids abortion in all circumstances. Article 241 of the Criminal Code bans abortion without any legal exceptions and imposes imprisonment ranging from 18 months

320. Open Door vs. Ireland, Application no. 14234/88, paragraph 75.

to 3 years both for the person administering the procedure and the woman undergoing it. Moreover, Article 243 imposes the same penalty for prescribing medical means which might cause a miscarriage. In addition, it foresees a penalty of perpetual interdiction from the exercise of the profession for the administering doctor. Recently, debate on entrenching the ban in the Constitution has been taking place[321] but no action towards introducing such an amendment has taken place.

Malta has also protected its system from international pressure concerning the matter of abortion by including reservations to its international obligations. Maltese reservation to CEDAW's Article 16 states that:

> "The Government of Malta does not consider itself bound by sub-paragraph (e) of paragraph (1) of article 16 in so far as the same may be interpreted as imposing an obligation on Malta to legalize abortion."

Amending the legislation and decriminalising abortion seems to be out of discussion and Malta opposes any suggestions of international organizations appealing for such decriminalisation. In 2004, the UN Committee for Social, Cultural and Economic Rights urged Malta to liberalise its abortion law. In the same year, the UN Committee on the Elimination of Discrimination against Women urged the proper implementation of the CEDAW, pointing out numerous concerns, including the position of women in the family and domestic violence. The Committee also called for withdrawal of the reservations, including the reservation concerning abortion[322].

The Permanent Representative of Malta to the United Nations underlined again in 2008 in his statement on the advancement of women that abortion is illegal in Malta and is not considered a method of

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321. See e.g.: Ameen J., Government proposes abortion ban to be included in the Constitution, The Malta Independent, 07.05.2005, or: Updated: Muscat has reservations on proposed Constitutional ban on abortion, The Times of Malta, 18.09.2008.

322. CEDAW: Malta A/59/38(SUPP).

family planning and thus all use of terms such as "reproductive health" or "reproductive services" to cover abortion are treated with reservation by Malta[323]. As mentioned above, also the recent resolutions by the COE and the European Parliament called for decriminalising abortion and withdrawing reservations but Malta is firmly opposing taking such steps[324].

Also the state of other reproductive rights in Malta has followed the traditional teaching of Catholic countries. The importation of condoms was prohibited still in the 1970s and pharmacies were prohibited from selling them and could lose their license for doing so[325]. Nowadays, the school curriculum includes minimum sexual education and the usage of contraception is allowed, but Camilleri-Cassar observed that information on sexual health is scattered and sporadic and the usage and accessibility of contraceptives follows irregular patterns[326].

4.3.5. Reproductive rights in Poland – return to conservative Catholic family values as the core of Polish politics between the years 2005-2007

The question of reproductive rights has since 1989 been a problematic issue in Poland. The Catholic Church played an important role in the re-establishment of the democratic system in Poland in 1989. In a country where above 90% of the population is considered to be Catholic[327], the Church naturally supported the movements leading to the fall of the former Eastern Bloc. The election of a pope from Poland also strongly reinforced the role of religion in Polish society and politics. At the time of the Solidarity movement, the involvement of the Church in the processes leading to the fall of the old regime was seen as a political victory of freedom of religion rather than as a danger to other

323. Statement by Permanent Representative of Malta to the United Nations, 2008.
324. Maltese MEPs oppose move promoting abortion and same-sex marriages, The Times of Malta, 17.01.2009.
325. Milne R.G., 1973, pp.378-379.
326. Cammileri-Cassar F., 2005.
327. According to the Statistical Centre of the Catholic Church (SAC), the proportion of Catholics in the Polish population in 2006 was 95.4%, http://www.iskk.ecclesia.org.pl/statystyka_2006.htm.

democratic freedoms[328]. After the re-establishment of the democratic system, the Church started gaining more and more political power. The political parties originating from the Solidarity movement declared their Catholic commitment and during the period of their domination in the parliament brought into force new laws introducing Catholic religious instruction to schools and tightening abortion regulations. During the 19 years of democratic changes in Poland, the centre and right-wing parties affirmed their origins in the Solidarity movement and their commitment to Catholicism and Catholic values or at least Christianity and Christian values. The post-Solidarity political bloc refused cooperation with the social democratic bloc, advocating for human rights, including reproductive rights and the *de facto* separation of church and state. This political polarisation became particularly visible in the pre-electoral discourse in 2005. During their election campaign, PiS [pl: Prawo i Sprawiedliwosc – eng. Law and Justice] and other right-wing parties in their programmes gave an even stronger role than before to Catholic values as one of the means of reaffirming Polish national interests and opposition to the "communist" and "anti-national" values professed by the socialists. In the political discourse led by right wing parties, Catholic values became synonymous for patriotic values and opposed to socialist, "post-communist" and even European values, seen as foreign and oppressive. The Church itself did not oppose the right wing's usage of Catholic slogans and in the instance of the Catholic radio station discussed below, Radio Maryja openly supported PiS and other right-wing parties.

From the autumn 2005 to the autumn 2007 the reproductive rights of Polish women were under the influence of conservative and religious ideology promoted by the governing parties. When the conservative party PiS won the parliamentary elections in September 2005 in Poland and subsequently succeeded to lead their candidate to the position of the President of the Republic, their first step was closing down the institution of the Governmental Plenipotentiary for Gender Equality in November 2005. The conservative politicians found the institution to be highly controversial. The right wing, strongly affiliated with the Catholic Church, could not forgive the speech of Professor Sroda, the

328. See: Sila-Nowicki W., 1984-1986, pp. 703-707.

former Plenipotentiary, at a conference in Stockholm in 2004, where she stated that Catholicism, by influencing culture, might have an indirect influence on increasing family violence against women. These words met an immediate reaction after the elections were won. The first political decision of the government led by PiS was closing down the institution. Some of the tasks of the Plenipotentiary were transferred to a division in the Ministry of Labour. The other "institution" was, however, created — the Parliamentary Committee for Family Matters and Women's Rights, led by the ultra-conservative MP Alina Sobecka (LPR).

The exceptionality of this political "experiment" requires a fuller analysis of the political content as well as the legal. Unlike Malta or Ireland, where old traditions, based on Catholic morality, are protected, Poland before 1989 had liberal reproductive health policies. Only after the 1989, did the return to Catholic values begin. Yet, even though present in Polish politics ever since 1989, the pressure towards the re-institution of Catholic morality into law had never been as strong and open as during the years 2005-2007. The governing politicians of the time spoke primarily of "Catholic" or "Christian family values" and the "traditional role of the family", sometimes openly opposing the idea of gender equality.

4.3.6. Catholic values as a political programme

The situation of Polish women in the context of the pressure of the Catholic Church and its role in the abortion issues has been thoroughly researched[329]. The perspectives on gender equality development in Poland outlined by researchers before its accession to the EU were usually optimistic and underlined the growing importance of the activist movement and future accession. These processes were seen as hope for improvement in the sphere of women's equality.

The victory of the ultra-conservative powers came as a shock to those with such expectations. The official political programme document of PiS affirmed that:

329. See among others: Nowicka W., 1996, pp. 21-29; Girard F., Nowicka W., 2002, pp. 22-30 or Heinen, J., Matuchniak-Krasuska, A., 1991, pp.27-33.

> "PiS considers Christian values the basis of our culture and the fundamental basis of a strong family. We therefore oppose abortion, euthanasia, cloning or embryo cell research (…) We want to propagate these values supporting the family and proper family models and ethics."[330]

During their governance PiS also actively tried to maintain and strengthen the belief that Poland had always been Catholic and true Polish values equalled Catholic values. This equation of Catholicism with patriotism has always been very common among right-wing Polish parties. PiS affirmed it in another programme document titled "Catholic Poland in Christian Europe":

> "Throughout all our history – from the baptism of Mieszko the First, through the coronation of Boleslaw Chrobry, death of priest Popieluszko to the pontificate of John Paul II and the existence of the Solidarity movement, Christianity has been an essential part of our nationality.[…]

100 years ago Catholicism was considered to be the Truth for the believers and civilization for non-believers. Unfortunately, nowadays we live in a reality where this civilization is questioned and subject to attack."

Basing their political programme on the last of the above-quoted sentences, PiS chose defending Catholicism as one of their political aims. Politicians of the PiS intensified their connections with the Church, partly by cooperating actively with the fundamentalist Catholic radio station Radio Maryja and the television channel Trwam, belonging to the convent of Redemptorists.

The conservative programme and ideological fundamentals became even stronger when another ultra-conservative and ultra-Catholic party, Liga Polskich Rodzin (LPR, eng. The League of Polish Families), joined the governmental coalition together with the populist party Samoobrona (Self-defence) in May 2006. The leader of the LPR was appointed to the position of Minister of Education, which shocked intellectuals, teachers and

330. See: Programme of PiS, 2005, p 81.

students and resulted in many protests.[331] The ideologisation of the school programmes had been ever since widely feared and numerous initiatives proposed by the Minister, like that of introducing patriotic education or the final high school examination in religion, proved the fears to be justified. The LPR had been always considered to be ultra-nationalistic and an ultra-Catholic party that never supported the neutrality of the state in ideological matters and promoted Catholicism in the public sphere in manner similar to that expressed in the Irish constitution. Among the main aims of the LPR, one can find the following:

> "Political, professional and social activity should be a service to God, Poland and Nation (…) We must protect the traditional Polish family (…) We oppose abortion, euthanasia, cloning, homosexual relations and all laws that are contrary to Christian ethics and morality"[332]

Women's rights were hardly ever mentioned during the governance of the conservatives or even openly criticised together with the idea of human rights in general[333]. The former Prime Minister Kaczynski said directly in his speech opening the activity of his government:

> "We differ from other countries (…). I want to emphasize that as far as gender equality is concerned, the position of women in the society and their role in the family, I support everything that should lead to protection of women from oppression that they often meet. But we are against gender equality as far as other questions are concerned. I sustain my former opinion on this."[334]

The legal discourse on rights was thus replaced by a discourse on values during the time of the conservative government. The issue of rights was

331. Keczkowska B., Nauczyciele i studenci idą na Sejm przeciw Giertychowi [Teachers and students march against Giertych], Gazeta Wyborcza, 08.06.2006.
332. Programme of LPR, 2005, pp. 1 and 7.
333. See: We mnie jest czyste dobro [There is pure good inside me], Interview with Jaroslaw Kaczynski: Gazeta Wyborcza 4-5.02.2006, p12-14.
334. See: Opening Speech of Prime Minister Kaczynski, 2006, p 8.

not addressed or re-interpreted according to Catholic understanding. This shift could be seen as typical for religiously inspired revolutions or social movements, where the pressure is moved from the tangible and identifiable individual to intangible and vague moral rules. The primary values promoted officially by the authorities in Poland were Catholic family values as those integral to the existence of the Polish nation. As dangers to the development of the Polish society, the conservatives mentioned proposals concerning gay marriage or the growing number of divorces, non-marital relationships and children born out of wedlock[335]. And therefore, the emphasis was put on the traditional Catholic family and the cooperation with the Church as the method of restoring the traditional family model.

4.3.7. Visions of changes in law in regard to reproductive rights and the activity of the Parliamentary Committee on Family Matters and Women's Rights

One of the first changes aiming at strengthening the role of motherhood was passing the bill on social support for mothers of newborn babies and lengthening maternal leave without lengthening parental leave. It was only partially introduced by the amendment of the Labour Code passed in October 2006 but in the long-term plan the government aimed at introducing maternal leaves as long as 52 weeks by the year 2011. However, the plan did not offer the possibility of equal sharing of the leave between both parents. Had the amendment been introduced in full, it would have likely influenced women's chances in the difficult Polish labour market rather negatively.

Further proposals of legal amendments were of an even more serious nature in regard to the reproductive rights of Polish women and they concerned the Constitution. LPR put to the vote a proposal for introducing a provision on the protection of life from the moment of conception. This amendment would have led to introducing an absolute ban on abortion, which was one of the political aims of the LPR. The child would have been considered superior in every case and the health or life of the mother would no longer be grounds for allowing abortion. The proposal failed in the voting even though the majority of the Parliament

335. See: Political Programmes of PiS and LPR.

members voted in favour of it. 269 out of 443 supported the motion. This was, however, not enough to meet the qualified majority of 2/3 of all votes required for accepting constitutional amendments. But only 27 votes were missing in order to pass this requirement and as many as 24 out of 90 members of the PO, the party that won the elections in October 2007 and formed the new government, supported the motion[336].

Another proposal, which was widely and for a long time discussed, was initiated by the chair of the Parliamentary Committee for Family Matters, Alina Sobecka, together with the above-mentioned Parliamentary Member, Marian Pilka. Sobecka and Pilka proposed at first changing the pharmacy law by either expressly limiting access to contraceptives or by introducing a conscience clause for pharmacists. The conscience clause would allow refusing to sell contraceptives on the basis of religious convictions. Later, knowing that no such radical limitation proposal would be passed and that, as a matter of fact, the pharmacists agreed to use the conscience clause in their professional code in 2006[337] , Sobecka and Pilka intended to propose a bill that would label contraceptives as "hazardous to health"[338]. The warning would have been placed on contraceptives, in manner analogous to the warnings on cigarette packages. This proposal was drawn up during the preparation of the law proposal of the National Programme for Family Support and approved of by the Sejm through a resolution concerning the preparation of the Programme. The justification for preparing the Programme included the growing number of relationships other than marriage, divorces and the demographic crisis. Its introduction, however, was never finished due to the collapse of the government and new elections.

The Parliamentary Committee for Family supported the general line of

336. See: Details concerning ROD's voting on the Parliament's pages under http://orka.sejm.gov.pl/SQL.nsf/glosowania?OpenAgent&5&39&79.

337. Kodeks Etyki Farmaceuty-Aptekarza Rzeczypospolitej Polskiej [The Ethical Code of Pharmacists] Naczelna Izba Aptekarska, Warszawa 2006, article 4. The legality of using such a clause to refuse selling medication, which is legally approved for sale in a democratic country, could be disputed here in manner similar to Conscience Concord Slovakia': see previous discussion in Part I of this dissertation.

338. Klauzula "niebezpieczne dla zdrowia" na lekach antykoncepcyjnych?" [Heath Hazardous Warning on Contraceptives], Gazeta Wyborcza, 10.11.2006.

the chosen political course and put the main emphasis in its activities on the protection of unborn life. During numerous meetings concerning this subject, most of the experts providing opinion in front of the Committee could hardly be called impartial. They were representatives of Catholic hospitals, schools and the Episcopate of Poland. Most of the opinions presented included negative conclusions concerning abortion and contraception[339].

During the time of the conservative coalition's governance, the Committee also debated on a proposed parliamentary resolution on the defence of life, family and the rights of nations, which included three clauses. The first stated that abortion is evil and should be forbidden in every country. The second opposed the "propaganda of homosexuality" as a phenomenon harming a natural family, while the third affirmed that all nations of Europe should have the right to self-determination. The resolution was never accepted by the Parliament[340].

4.3.8. International community on the Polish situation

Ratified international treaties are one of the constitutional sources of law in Poland. A ratified international agreement is a part of the domestic legal order and is to be applied directly. International agreements of major importance take precedence over statutes if they cannot be reconciled with the provisions of such statutes.

However, the problem in applying international obligations in situations like that of Poland between 2005 and 2007 is such that it might be very difficult to show an infringement of any specific rights. As far as education, abortion or reproductive rights are concerned, there are so far no binding rules that could effectively prevent introducing ideology to school programmes or law. The recommendations and recent developments are not yet firmly entrenched in the legal sphere. On the EU level, effective measures could be only taken in the cases of laws and

339. See details of the ROD minutes: http://orka.sejm.gov.pl/Biuletyn.nsf/fkskr5?OpenForm&ROD
The exact minutes of these meetings are available as well as each of the provided opinions.

340. For a more comprehensive analysis of this situation see: Gozdecka D. A., 2009

actions affecting women's working conditions. No strong actions were taken against Poland regarding the negative gender mainstreaming. The concerns about the situation of European women that the organs of the Community expressed, concerned primarily labour market conditions.[341] No particular actions were taken or recommendations made in the context of Poland.

As far as human rights are concerned, one case against Poland concerning the refusal of legally allowed abortion was won before the Tribunal during the time of the conservative coalition.[342] The judgment, however, concerned a situation which occurred before their electoral victory. In their judgement, the Tribunal agreed with the complaint of A. Tysiac against Poland and affirmed that the Polish system lacked an effective mechanism for securing her right to privacy in the decision whether she was entitled to an abortion due to the substantial danger to her health. The Court acknowledged that the system did not ensure that the right provided by Polish law would be practical and effective and not only theoretical and illusory. The Court refused to examine the question of whether the applicant was discriminated against in her right to privacy on the grounds of being a woman. Nor did the decision construct the right to abortion on the basis of the right to privacy. The judgment stated only that the applicant had no way of exercising effectively her legal right to abortion, which Polish law theoretically granted her. Denying the procedure in the situation when it was legally allowed infringed upon her right to privacy. However, conservative politicians took that judgment as a decision creating the right to abortion and the government appealed the decision of the Tribunal. The appeal was rejected and the judgment sustained just a month before the elections ending the era of the conservative coalition's governance. The applicant was later a victim of stigmatisation by religious organizations such as the Committee for the Promotion of Marriage, Family and Life supported by the Episcopate of Poland, which distributed a protest appeal among Church members to condemn the decision and mount a social protest against the Tribunal and the President of the Republic. In their speeches, the priests compared

341. Communication from the Commission, COM/2008/0760.
342. Tysiac vs. Poland, Application no. 5410/03.

the judges of the Tribunal to Josef Mengele and Rudolf Hess[343].

International community has, however, expressed some concern over the situation of Polish women. In February 2007 the Committee on the Elimination of Discrimination against Women, in the monitoring process of the implementation of the Convention, issued their Concluding Comments on Poland's report. Comments included numerous critical remarks, concerns and recommendations. Among others, the Committee regretted that the Polish Parliament rejected the comprehensive law on gender equality and abolished the institution of the Plenipotentiary for Gender Equality. Moreover, the Committee expressed their deepest concern at the persistence of deep-rooted prejudice and stereotypical attitudes regarding the traditional division of roles and responsibilities of women and men in the family and in society and the lack of gender studies at Polish universities. Further, the Committee urged Poland to ensure access to health care and to strengthen measures aimed at the prevention of unwanted pregnancies, including providing extensive availability of contraceptives at an affordable price and increasing knowledge and awareness about different methods of family planning by providing age-appropriate sex education as a part of educational curricula. The Committee condemned the use of a conscience clause for refusing legally allowed abortion. In addition, the Committee recommended cooperation between the government and the NGO sector promoting gender equality and requested wide dissemination of their Concluding Comments in the country.

The abortion situation in Poland has also been a subject of interest of the UN Committee on Human Rights. The observations concerning the Polish report submitted to the Committee in 2004 included advice on the liberalisation of abortion laws and practices. The Committee also expressed concern at the high costs of contraceptives.

343 Alicja Tysiąc skarży do sądu księdza i kurię [Alicja Tysiac is suing the priest and the parish], Gazeta Wyborcza, 08.07.2008.

4.4. Why are some life-endangering practices less tolerated than others? – life-hazardous abortion laws versus condemnation of female genital mutilation (FGM)

Abortion and the lack of reproductive choices can be dangerous for the life and health of women. Such are the findings in the European documents and international bodies' comments on conservative national abortion policies. Nevertheless, certain European countries still refuse to recognise this standard and maintain very strict abortion laws without meeting strong condemnation from the European community.

However, these practices are not the only dangerous practices against women's health. Practices inspired by other religions than traditionally European have been, on the contrary, very easily condemned. The universal condemnation of FGM, as a practice dangerous to life and health led to a common resolution of the Council of Europe on banning FGM in Europe already in 2001. Already then the Assembly declared that the universal principles of respect for individuals and their inalienable right to bodily integrity, as well as complete equality between men and women, must take precedence over customs and traditions. The European Parliament also took action in the same year by drafting a resolution on female genital mutilation[344]. Special proposals sponsored by the European Union's Daphne Programme to prevent and combat violence against children, young people and women allocated funds for research preparing a common European approach towards condemnation of FGM already in 1997[345] and has ever since been very active. Meanwhile the same kinds of strong actions have not been taken in regard to securing reproductive freedom and access to safe abortion in all of Europe.

Whereas I in no way attempt to defend practices dangerous to life and health, such as FGM, I want to pay attention to certain relativist aspects in the European approach towards practices that are dangerous to the life and health of women. FGM is a practice that is alien in the European tradition, but from a medical point of view as risky as forcing a woman to carry to term a pregnancy that was medically evaluated as likely to

344. Resolution A5-0285/2001 on female genital mutilation, 20.09.2001.
345. Female Genital Mutiliation (FGM), 1997-096-WC.

result in the death of both her and the baby. Both the condemnation of abortion and the requirement of carrying out FGM are religiously inspired and in the arguments of their defenders the custom, tradition, religion or even broader morality standards are invoked. Developing a common strategy and commitment against the legal maintenance of the abortion ban is far harder to achieve than a condemnation of FGM. The ban on abortion, which is only now expressly condemned in the new documents as dangerous to the life of women, has been usually justified by the European religious traditions. These traditions have been protected as a part of national traditions and not openly confronted. Even though European judgements have allowed travelling to obtain abortion, and provided that information about such services should be available and in cases when abortion is allowed, should be practically available, none of the judgement approached the core of the problem of "a right to abortion" as a corollary to the right to privacy and life. None of the judgements ever condemned the implications of Irish or Maltese legislation for pregnant women and none approached the concept of bodily integrity and the right to privacy of women. European religious and moral tradition invoked to defend abortion bans has been so far tolerated and not openly challenged. The readiness to exclude foreign religious tradition and custom was far greater than the readiness to condemn traditional European religious and moral customs.

But such cultural relativism, as shown later in this work, is visible also in other areas where religions and laws collide. It is easier to defend what is considered as traditional, and condemn what is considered foreign. Meanwhile, the principle of equality and the lack of preferential treatment of any of the religious group would suggest, rather, that one coherent approach should be adopted in regard to the relation between religions and women's rights. The European approach should not favour influence of traditional European religions on the grounds of their historical connections with the legal system, and openly condemn only such religiously inspired practices which are culturally alien. Women's rights are not to be circumscribed by religious traditions and morals, as the European Parliament observed. It is essential for both women and all religions traditions that an equality of approach is maintained. Of course, further considerations may be brought up here about the different

nature of these two practices and the matters of choice connected with them. My point was, however, to highlight certain bigger problems, which I see appearing in the European approach to issues of religion. Religion understood as traditional for a European state does not receive great condemnation in regard to its impact on the rights of individuals, whereas religious customs considered new and alien are always carefully scrutinised and easily condemned.

4.5. Religions, religious pluralism and the reproductive rights of women

The area of reproductive rights is a relatively new one and its relation to religious and philosophical beliefs very strong. Where liberal European policies and strategies see rights, religions see the domain of their traditional control. And without a doubt, many if not the majority of people will give the religious aspect an important role in their sexual choices. The question is, though, whether religions should influence the legislator in making moral choices possible or impossible for everyone.

I do not want to approach this area from a feminist point of view but from the point of view of religious pluralism. The activity of a state that aims at producing and enlarging the variety of choices can, in my opinion, be hardly objected to from the point of view of religious pluralism and freedom of religion. Maximally broad possibility of moral choice does not impose any ideology on individuals. Women — both those adhering to any religious community equally with those who do not — are able to decide in accordance with their own conscience. The state allowing for choice does not coerce anybody to choose the secular option. No religious woman is coerced to undergo an abortion. A deeply religious person is free to choose not to use contraception and not undergo an abortion. The principle of religious pluralism remains maintained.

However, if the contrary is true and the state's activity aims at restraining the choice or mainstreaming according to any religious ideology, such a situation, in my opinion, raises concerns for a variety of reasons.

Of course, the opponents to the freedom of choice will refer to matters of morality and the fact that pro-choice options might be considered

just one of the available ideologies to select from. I disagree with such a view. Selection of any other option than that allowing for free choice limits the equality of citizens having different conceptions of life. The decision on abortion or the usage of contraception is a personal decision dictated by personal convictions. Regardless of how much the religious adherents would like to convince the entire population of the validity of the arguments on the right to life from the moment of conception, there is no moral agreement of the entire society on when the foetus becomes a person. Even in various religious doctrines themselves the agreement on this issue is a matter of doctrinal discussion. Even in the Catholic Church abortion was not always considered illegal.[346] In order to prevent the destruction of a well-developed foetus, the majority of legal systems allowing for abortion establish a limited period for taking such a decision. Invoking a moral argument calling to accept the foetus as a person from the moment of conception is not valid for every citizen. In a religiously plural society, the state, in order to avoid silencing any views, should avoid getting into doctrinal disputes on when a life begins. When the state chooses to ban abortion or limit access to contraception, it chooses to impose a moral or religious doctrine on non-religious or differently religious individuals. Following the Rawlsian conception of citizens as free and equal in their moral choices[347], I believe that the ideological coercion in matters that are clearly regulated by individual conscience, is not acceptable. By denying a choice, it discriminates disproportionally between citizens following the religious or moral conception defended by the state, and those who do not. In a democratic society, with freedom of religion and belief and adhering to the principle of equality and religious pluralism, the plurality of choice must be available. Otherwise, equality remains illusory and in fact, only certain religious and moral conceptions can enjoy freedom.

A state which remains neutral and allows different religious and secular communities to take part in a debate on moral issues, but does not impose any moral stance, maintains in the best way the ideal of a religiously plural democracy. Conceptions of neutrality will be discussed further in the theoretical part of this dissertation.

346. See e.g., Rhode D.L., 1993, pp. 305-321.
347. Rawls J., 2005, p 15f.

5. Freedom of expression versus freedom of religion and discussion of the essence of democracy

5.1. Introduction: the struggle between faith and reason and between faiths

It has been almost 150 years since John Stuart Mill, one of the founders of what is contemporarily considered a model of a liberal democracy, published his essay *On Liberty*[348] in which he deplored the fact that still in the year 1857 "an unfortunate man" was sentenced to 21 months of imprisonment for writing some offensive words against Christianity[349]. In his essay, Mill portrayed, bringing the examples of Socrates and Saint Paul, how easily the protection of a religion can change into persecution and on the other hand how easily the persecutor can become the persecuted during the same lifetime[350]. Yet, still 150 years after, in liberal and secularised Europe, the offence of blasphemy has not everywhere been discarded as a legal archaism. On the contrary, together with a religious resurgence, the debate on the limits of freedom of expression and its borderline with freedom of religion gained new importance.

While in some of the European countries, those who speak against religion or speak critically of religion, still meet prosecution[351], in others, those who pursue their religious goals and speak against issues they consider as improper or immoral, meet the same consequences. The legal standards applied in the case of pastor Åke Green are in vivid contrast

348. Mill J.S., 1859.
349. Ibid., p 30.
350. Ibid., pp. 25-30.
351. See: following chapter concerning the cases after the year 2000.

to legal standards applied, for example, in Haderer's conviction for blasphemy in Greece for the publication of his caricature book *The life of Jesus*. Whereas Swedish hate-speech bans aim to protect all groups in society from discrimination, the Greek ban still protects the deity from offense.

The attempt at replacing the offence of blasphemy with an offence of hate speech has also entered the realm of legal dispute. While some countries are eager to extend the hate speech bans in order to protect a possibly wide range of persons from discrimination, others are not willing to give up their blasphemy laws. Although the COE Parliamentary Assembly recommended replacing blasphemy with hate speech bans, hate speech in itself has also been treated critically. As shown below, commentators have approached it as another potential impediment to freedom of expression and a likely pretext for instrumental usage in the struggle between faiths[352].

Both blasphemy and hate speech can result in a struggle between those who dismiss religious arguments as irrelevant and irrational, and believers. They can as well provoke tensions between those who hold beliefs incompatible with the dominant religious views present in a society and the religious majority. In this struggle the question at this moment is not only whether religion as such or religious believers should be or should not be protected, but whether the dominance of secular reason in public law over religion is justified? Post-secular debate begins to question whether the liberal state is in a position to impose the secular humanist view over the religious views of people. Whom to censor and why to censor any speech at all? The debate concerning these issues in particular puts forward questions of how far liberalism can go and what the essence of democracy is.

In this chapter, I deal with the issue of blasphemy and hate speech. I analyse first older blasphemy cases including their critique and later discuss the new European approach towards blasphemy and speech against religion. Later I will the offence of hate speech and discuss whether blasphemy or hate speech offences are necessary in a democratic society. I will compare the essence of the two offences and analyse their

352. See: Heinze E., 2007, pp. 295-309.

effect on both religious and non-religious individuals. Finally, I try to answer the question if and why a common European approach is welcome and needed for achieving the goal of a religiously plural Europe.

5.2. Older blasphemy and morality cases - the judicial principles of the ECTHR

Blasphemy on a European-wide level has been approached strictly from the perspective of human rights. For that reason, the principles of the European approach have been shaped by the case law of the ECTHR.

In order to trace current changes in the European approach, it is necessary first to describe briefly the 'old' blasphemy cases that were brought before the ECTHR[353] and the arguments of the State Parties accepted by the Court. Only later do I proceed chronologically to today's new approach. In all of the older cases, the Court allowed for a wide margin of appreciation of the member states and let them decide in matters of morals. The key cases concerning blasphemy included *Wingrove vs. the United Kingdom, Gay News and Lemon vs. the United Kingdom, Otto-Preminger Institut vs. Austria and Choudhury vs. the United Kingdom.* Similar principles concerning other forms of offensive expression were established in *Müller and others vs. Switzerland* and *Handyside vs. the United Kingdom*.

In *Wingrove*[354] the decision of the British Board of Film Classification preventing a blasphemous film from distribution was found lawful and compliant with the principles of the Convention. The film *Visions of Ecstasy* portrayed a woman dressed as a nun and having erotic experiences with the body of Christ. There was also another almost naked woman appearing in the picture. According to the author, the film portrayed St. Theresa of Avila and her Psyche (the other woman) and was a metaphor of St. Theresa's ecstatic visions. The Board did not agree with the author's

353. I use ECTHR to indicate the European Court of Human Rights and in some instances also the European Commission of Human Rights as it existed before the amendment introduced by Protocol 11.

354. Wingrove vs. United Kingdom, Application no. 17419/90.

argumentation and prevented the film from being distributed. In the final stage of the proceedings concerning this case, the ECTHR found that the state party had a right to do that in order to protect the religious sensitivities of people. It did not agree with the applicant that the law on blasphemy was impossible to foresee and thus subject to unlimited discretion. The ECTHR did not question the law on blasphemy as such. Quite the opposite, it affirmed that such an offence is by nature subject to a state's discretion and the state was in position to act on this margin of discretion, called hereafter the 'margin of appreciation'[355].

In an earlier case, *Gay News and Lemon*[356], an issue arose around a poem by James Kirkup *The Love That Dares to Speak Its Name*, imagining a Roman centurion having gay sex with Jesus of Nazareth. The publisher, Denis Lemon, was given a £500 fine and a nine-month prison sentence, suspended for eighteen months by a national court. The proceeding was initiated by a private prosecutor, Mary Whitehouse. The EComHR, deciding back then on the admissibility of the case, found the application of the publisher and the newspaper to be heard by the Court to be inadmissible. In the decision on inadmissibility, the Commission expressed the view that the offence of blasphemous libel is constructed to protect the rights of the private prosecutor not to be offended in her religious feelings. The nature of the offence as such and its possible contradiction with the right to freedom of expression was again not questioned.

In the *Otto-Preminger Institute*[357] case, a film, Das Liebeskonzil by Werner Schroeter[358], was seized and forfeited by Austrian authorities on the grounds of violating section 188 of the Penal Code on the criminal offence of disparaging religious precepts. The film showed God the Father as a senile, impotent idiot, Christ as a cretin and Mother Mary as a wanton who together decided to punish the world for immortality. The punishment was achieved through the devil's daughter, who was

355. Ibid., para 53.

356. X Ltd. and Y vs. United Kingdom, Application No 8710/79.

357. Otto-Preminger-Institut vs. Austria, Application no. 13470/87.

358. The film was based on the play of Oskar Panizza , Das Liebeskonzil (The Love Council),1894.

spreading syphilis by having sexual relations with, among others, leaders of the church. The Commission initially found a possible violation of the freedom of expression but the Court disagreed and found that the state was in the best position to evaluate whether the rights of others required protection. In this case, Austria was allowed to execute a wide margin of appreciation in order to protect the religious feelings of the Tyrolean Roman Catholics, who instigated the proceedings.

Similar conclusions on the 'wide margin of appreciation' were reached in two other cases, which did not deal expressly with blasphemy, but with related offences concerning morally offending art. Both in *Müller and others vs. Switzerland*[359] and in *Handyside*[360] the Court applied the same rules as in the three cases described above and decided that the state parties had the right to limit freedom of expression on moral grounds. Both of the cases concerned sexually explicit art.

At the same time, in all those cases the Court applied a solution contrary to the proposed principle that, in a democratic society, not only expressions that are favourable but also those which shock and offend should enjoy protection.

In only one case concerning blasphemy that appeared before the ECTHR were the religious feelings of the applicant not given protection. The case of *Choudhury* was found inadmissible. The case concerned the book by Salman Rushdie, *Satanic Verses*. Because British law recognised blasphemy as an offence exclusively directed against Christianity, the claims of the applicant that the book offended Allah, Prophet Mohammed and Prophet's wives and thus interfered with the applicants' freedom of religion were not accepted. The decision of the Commission was correct in the sense of protecting the principle *nullum crimen sine lege*. It did not extend the law to actions that were not covered by the scope of penal prohibition. However, the commentaries on the discriminative nature of the British offence of blasphemy and the necessity of a reform appeared[361].

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359. Müller and others vs. Switzerland, Application no. 10737/84.

360. Handyside vs. United Kingdom, Application no. 5493/72.

361. More of the critique concerning these issues can be read in articles referred to below. As a natural consequence of the fact that most of the blasphemy cases before

As a consequence of refusing to examine the nature of blasphemy law as such, the Court's jurisprudence created a 'right' – which does not exist in the text of the Convention – the right 'not to be offended' in one's religious beliefs[362]. The freedom of expression was limited in order to protect national and regional religious sensitivities and particularly Christian religious sentiments. The margin of appreciation of the states became very wide and the rules according to which the countries could use it as an excuse to limit rights difficult to foresee. I agree with the opinion expressed by Judge Spielmann in his dissenting opinion in the case *Müller and others vs. Switzerland*, that the margin of appreciation of countries became too broad and it should not be as wide as to allow any kinds of limitations prescribed by local law, *'otherwise, many of the guarantees laid down in the Convention might be in danger of remaining a dead letter, at least in practice'*.[363] Meanwhile, the 'right' to be offended could be shaped and used rather freely by national authorities, including the choice of which religious groups should or should not enjoy legal protection. Such an authoritative choice as to which denominations should be protected did not lead to the facilitation of religious pluralism.

5.3. Legal critique concerning the ECtHR's judicial principles in blasphemy cases

The commentators of the blasphemy and morality cases in mainly advocated for the revision of the laws, basing their argument on various rationalisations and pointing out various problems. Even authors attempting to find justification for the existence of the offence admitted that contemporary opinion seemed almost uniformly against retaining a legal prohibition against blasphemy[364]. The critics appealed to various

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the ECTHR were directed against the United Kingdom, the critiques dealt largely with the nature of the British law on blasphemy.

362. See: Leader S., 1983.

363. Müller and others vs. Switzerland, Application no. 10737/84, Dissenting Opinion of Judge Spielmann.

364. Mongomery, J.W., 2000.

arguments against the offence itself or against the argumentation of the ECTHR, which in practice led to sustaining it.

Shealdon Leader[365] in his commentary on blasphemy and human rights pointed out difficulties arising from the above-mentioned cases and the creation of '*the right of citizens not to be offended in their religious feelings*'[366]. Problems pointed out by Leader included the extension of the interpretation of the 'rights of others' to a right that the convention did not recognise, namely freedom from being offended in one's religious feelings[367]. The creation of such a right constitutes a dangerous precedent and allows for creating other "rights" not present in the Convention. The creation of such a right is also in visible contrast with another principle recognised by the Court, namely that protection of freedom of expression extends not only to favoured publications but also "to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'"[368]. Moreover, the justification of the necessity of protection from blasphemy by its mere existence as an offence in the domestic law was also questioned by Leader. "How does one then indentify restrictions arising from successful domestic prosecutions that are not necessary in a democratic society", asks the author? [369] If the mere existence of criminal provisions in domestic law is recognised as sufficient justification for limitations of rights, how should one challenge regulations that are essentially unjustified in a democratic society? In this respect, Leader's comment follows the argument of judge Spielmann, mentioned above and is similar to my own concern about the approach of the Court. A too wide margin of appreciation and concentration on procedural grounds solely leads to a situation in which rights become illusory. Leader noticed that problems concerning the legal interpretation arose from the fact that the Court (and before 1998 the Commission) refused to examine the merits of a domestic court's

365. Leader S., 1983.
366. Ibid., p 339.
367. Ibid., p 340.
368. See eg: Handyside vs. United Kingdom, Application no. 5493/72, para 49.
369. Leader S., 1983, p 342.

decision in terms of domestic law[370]. The refusal to examine national law as to its compliance with the standards of the Convention, and basing the arguments solely on procedural grounds, seriously endangers the existence of the rights included in the Convention and may lead to a situation in which they become illusory. The Court in the blasphemy cases examined only whether the application of domestic laws and not their essence was meeting the requirements of necessity in a democratic society[371]. I agree with Leader's concerns regarding the lack of examination of the nature of the domestic law and its impact on the right in question.

Clive Unsworth[372] identified the nature of the offence, and the ECTHR's argumentation leading to the prolongation of its existence, as a legal archaism and pointed out that the offence's existence is possible grounds for future cultural conflicts:

> "The law of blasphemy provides a coercive weapon which can be deployed in this kind of struggle within and between faiths. It is a legal trump card in a contest over how far the sacred images and myths which are the heritage of different elements within the broader culture can be adapted in the depiction of meaning."[373]

He also identified blasphemy as one of the most decisive indicators of the future cultural direction of the British state[374]. Looking from the perspective of 13 years since the publication of his observations, one can only agree that the case of blasphemy grew to be an indicator of not only the cultural direction of the British state but also Europe as a whole and its approach towards liberalism, secularism, rights and the growing importance of the religious factor on the European cultural stage.

Christopher Nowlin[375] in his article concerning the protection of morals under the ECHR system criticised the ECTHR's contrariety

370. Ibid., p 344.
371. Ibid., p 342.
372. Unsworth C., 1995.
373. Ibid., p 677.
374. Ibid., p 677.
375. Nowlin C., 2000.

professing broadmindedness, pluralism and tolerance on the one hand and maintaining legal moralism on the other. Nowlin argued that restricting freedom of expression in order to protect morality was problematic first of all due to the fact that the judges rely upon an 'undefined, ill-defined, or simply contentious notion of morals'[376] that traditionally have a distinctive sexual bearing[377]. He argues that the Court should rather adopt Mill's definition of morals, which is concerned primarily with social relations and disassociated from sexual morality[378]. He relies on Mill's notion that moral interest is directed to such behaviours that affect others without their free, voluntary and undeceived consent and participation[379].

Nowlin firmly disagreed with the argumentation of the Court in the 'moral' cases, seeing Mill's definition of morals as the only option for a pluralist society:

> "(…) the ECHR has not clearly rejected legal moralism as being inappropriate to civil and human rights analyses. The Strasbourg Court will not likely do this until it wholeheartedly accepts that in a tolerant and pluralistic society, the very idea of protecting morals can be incompatible with genuine recognition of various rights and freedoms, such as the right to privacy, freedom of expression, and the right to equal treatment under the law."[380]

The blasphemy cases before the ECTHR seem to confirm Nowlin's observation regarding the perception of morality by the Court. The cases discussed above concentrated primarily on sexual notions. I agree with Nowlin on the usefulness of Mill's approach in a democratic society. Especially in regard to the sphere of sexuality, different moral standards can be found in a modern plural society. What for one religion is sexually immoral and offensive, for a believer of another religion might even be of spiritual or ritualistic value and for a non-believer might be absolutely

376. Ibid., p 265.
377. Ibid., p 265.
378. Ibid., p 270.
379. Mill J.S., 1992, p 54.
380. Ibid., p 285-290.

irrelevant. The value of tolerance and broadmindedness is best applied when the limits of what is permissible protect from deception and abuse but not from facing another point of view or another opinion.

Adhar and Leigh also rejected the existence of the offence of blasphemy on the grounds of its incompatibility with values of tolerance, non-discrimination and religious liberty:

> "Our argument… is strongly in favour of free speech. We believe that this is the best defence for a tolerant open society in which diversity of religious expression flourishes. There are clear signs, however, that these values are under threat, both for reasons concerned ostensibly with protecting public order, non-discrimination and paradoxically, religious liberty itself."[381]

They also found it peculiar that blasphemy is often justified by the protection of religious liberty itself. In fact, they saw the effect of the offence as being exactly opposite and resulting in the loss of religious free speech. They found it essential for liberal democracy to open up the discussion and criticism for everyone[382]. The abolition of the offence of blasphemy would, according to Adhar and Leigh[383], produce equal treatment of religions, since none would be protected to a greater extent than others and only general laws preserving public order should be applied to the cases of blasphemous expression[384]. Concerning the offence of incitement to religious hatred, which is postulated to replace the offence of blasphemy, the authors found it to be potential grounds for abuse and silencing free speech. The offence might, they argue, have an effect similar to blasphemy in provoking religious disharmony and silencing religious criticism, dissent and debate[385].

Javier Garcia Oliva[386], on the other hand, noticed that many morally regrettable practices do not receive criminal punishment, and the law

381. Ahdar R., Leigh I., 2005, pp. 365-366.
382. Ibid., p 396.
383. Ibid., p 374.
384. Ibid., p 374.
385. Ibid., p 374.
386. Garcia O. J., 2007.

is in certain cases not the best regulator of social conduct. Especially in matters affecting freedom of speech, the limitations should be applied extremely carefully and as far as possible freedom of speech should never be compromised[387].

I agree with the observations of the majority of critics concerning the older judicial principles of the ECTHR in blasphemy cases. From the point of view of equality of religions and non-religions, I particularly agree with those who find the argumentation of the Court to lead to unnecessary and disproportional differentiation between beliefs and hindering the development of religious pluralism. This differentiation can be seen on two levels. First of all, religious beliefs were given greater protection than non-beliefs. The believers were granted the "right not to be offended". A similar right could not be practically stretched over to cover non-believers. The justification of such a "right" based on an unequal approach to belief and non-belief by necessity is dubious in a democratic society. Secondly, the Christian belief in particular was given protection. The case of Choudhury, although procedurally correct, showed a reluctance to accept other beliefs than Christian as worthy of protection.

5.4. Silence before the storm – new cases arising after the year 2000

However, in spite of all the arguments of theoreticians, the offence of blasphemy remained in many European states[388]. After *Otto-Preminger Institut*, no spectacular prosecutions took place for a while. Advocates of free speech seemed to celebrate a victory in events such as re-reading the poem that was in question in the *Gay News* case, in public in Trafalgar Square in 2002[389], without facing any legal response or prosecution. The

387. Ibid., p 86.

388. See: Council of Europe Report, Doc. 11296, 08.06.2007 or: European Commission For Democracy Through Law (Venice Commission), Report 17-18.10.2008.

389. This took place on the stairs of St. Martins-in-the-Fields Church, London, on 11.07.2002.

offence seemed obsolete for awhile.

However, quiet always precedes a storm. It was no sooner than 2001 that the prosecution of blasphemy-related offences was revived. Proud of its religious Catholic revival, Poland became a pioneer in the 21st century's growing number of charges and prosecutions on blasphemy in Europe.

In 2001, Dorota Nieznalska exhibited her installation *Pasja* in the gallery *Wyspa* in Gdansk. The installation was composed of a metal cross of equal arm-lengths (Greek). One side of the cross contained a photo revealing the lower part of a male body - stomach, abdomen, loins and genitals. The other part of the installation showed a close-up film of the face of a male exercising in a gym. The film provided a background for the cross, which was suspended by a chain.

The artist was prosecuted and convicted[390] of ridiculing and offending an object of worship and the court in its justification of the decision stated that in a Catholic country like Poland, a person with an academic education should be aware what sort of repercussions are connected with placing genitals on a cross. The intent was constructed not as an intent to commit an offence and offend. Instead it was constructed as an awareness of the religious feelings of the audience. The appeal re-directed the case for a new proceeding in the first instance. Nieznalska received support from European artists and artistic associations, who collected signatures on various open letters against the conviction of the artist[391].

Another prosecution within a very short period followed the Nieznalska case. In 2002, Jerzy Urban, the editor in chief of a critical and often shocking weekly magazine, NIE, was charged with offending a head of a state, Pope John Paul II. In one of his articles, Urban described the Pope as sędziwy bożek' (old worship idol), 'gasnący starzec' (fading old man) and 'Breżniew Watykanu' (Brezhnev of the Vatican)[392]. The prosecution brought subsequent conviction. Although the legal grounds were the offence against the head of a state, the proceeding had the nature of a blasphemy case.

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390. Judgment of a Regional Court in Gdansk, 4K638/02.

391. Art Liberated was one of the organizations collecting signatures of support for the artist, www.artliberated.org.

392. Jerzy Urban znieważył Papieża [Jerzy Urban Defamed the Pope], Gazeta Wyborcza, 09.03.2006.

Reporters without Borders, who supported Urban, stated: *'We are perfectly aware that criticising John Paul II is an absolute taboo in Poland'*. The reason why the prosecution was not possible on the offence of blasphemy was that it would have been improper to consider the Pope as 'an object of worship'. Thus, another archaic offence was used as legal grounds in the case.

The year 2005 brought another relevant case in a different part of Europe, also known for its conservatism in religious matters. The case of Gerhard Haderer's comic book *The Life of Jesus* occurred in Greece[393].

"He meant it as a piece of religious satire, a playful look at the life of Jesus. But Gerhard Haderer's depiction of Christ as a binge-drinking friend of Jimi Hendrix and naked surfer high on cannabis has caused a furore that could potentially land the cartoonist in jail. Haderer did not even know that his book, The Life of Jesus, had been published in Greece until he received a summons to appear in court in Athens in January charged with blasphemy" summarised the Guardian.

The book was banned in Greece and Haderer received a suspended six-month jail sentence. Like in the Nieznalska case, artistic and writers' associations collected supportive signatures on petitions for the effective exercise of the freedom of expression. Ultimately, the ban and sentence were reversed on appeal.

However, none of these events received any special attention besides artistic and local circles. Those events continued to be considered rather local curiosities than serious legal problems of common European importance.

5.5. The groundbreaking case – the Mohammad caricatures and endangered identity of 'Europe'

The approach towards the archaic offence of blasphemy was change suddenly by another case from the year 2005. The case did not deal with offending Christianity, but the European religious "other". When the Danish newspaper Jyllands Posten a comic strip featuring the prophet Mohammad, the Islamic community raised a protest, having argued that their religious feelings were offended. Islam does not allow for portraying

393. Cartoonist faces Greek jail for blasphemy, The Guardian, 23.03.2005.

the Prophet and even less ridiculing him. The caricatures brought a wave of protest and became a topic of discussion all around the world. Facing the events following the publication of the cartoons, European countries began to defend almost unconditionally freedom of speech. Freedom of speech suddenly became a symbol of Europe and European democracy. It was because of the impact the cartoons caused. Around 100 people were shot in the resulting protests, European flags were burnt in front of embassies and death threats towards publishers[394] eventually opened Europe's eyes to the paradox of sustaining the '*wide margin of appreciation*' of states in matters of morality and professing values of tolerance, pluralism, free speech and broadmindedness at the same time. This uniform European effort for the revision of archaic blasphemy laws and expressing a uniform opinion would likely never been possible without intense feelings connected with the event: Islamophobia versus growing Islamic fundamentalism on the one hand and national religious identities versus a sudden re-affirmation of secularism as a European value on the other hand.

The difference between the former cases and the Mohammad caricature seems obvious. As far as the former cases were concerned, they dealt with offending traditional attitudes and the values professed in the countries concerned and were not perceived as forms of religious oppression but rather mild weaknesses justified by tradition and the 'protection' of religious sensitivities often associated with national identities. Thus, nobody felt in a position to speak against them openly and in a European-wide forum. In the Mohammad caricature crisis, Europe had to face its 'foreign' element — a religion, which was not essentially 'European', with which Europeans did not identify themselves and on which they never built their values. And it was that religion, Islam, that dared to speak its name and appeal for protection equal to other religions that received protection from blasphemy in some European countries. European identity was challenged by the Islamic protest. And as an opposition to it, Europe no longer could appeal to its Christian roots, in times of religious pluralism and professed freedom of religion. It was left with no choice but to embrace pluralism and secularism as a boundary of democracy. It was one of the few instances in which Europe ever expressed as a whole a strong opinion in controversial

394. See e.g.: Storm grows over Mohammad cartoons, CNN, 03.02.2006.

religious matters. Inspired by the Mohammad caricature crisis, The Venice Commission started its work on issues of blasphemy in 2006. As a result of this work, a new report on blasphemy was issued by the Parliamentary Assembly of the Council of Europe in 2007 and a new recommendation was adopted by the Parliament in the same year. In October 2008 the Venice Commission adopted its own report.

5.6. The new approach and its principles

New documents representing a new European approach towards blasphemy issues were created in the aftermath of the Mohammad events. They were the work of the Venice Commission for Democracy and the COE's Parliamentary Assembly.

The new approach is visible in all of the adopted documents, both in the Commission's report as well as in the Parliamentary Assembly's report and recommendation. The new approach acknowledged the previously mentioned theoretical concerns. The change in the approach to blasphemy is substantial and decisive. All the documents agree on the fundamental questions. They underline that a common European approach is necessary with regard to freedom of expression as a value of vital importance for democracy. They advocate revising and abolishing blasphemy laws as reflecting the historically dominant position of certain religions in certain member states. They insist that the public debate must be open for expressions which may offend, shock and disturb and only expressions that incite to hatred and discrimination against a person or a certain group of persons should be penalised. Moreover, they call for greater understanding between members of different religious groups and greater tolerance towards activities which are critical and even offensive. Critical dispute, satire, humour and artistic expression should not be seen as provocation. They uniformly reaffirm and reemphasise the rule established by the ECTHR, which was not sufficiently put into practice:

> "freedom of expression is not only applicable to expressions that are favourably received or regarded as inoffensive, but also to those that may shock, offend or disturb the state or any sector of the population

within the limits of article 10 of the European Convention on Human Rights"[395].

The Assembly also drew a line between hate speech and blasphemy and a borderline between what is permissible and what is non-permissible in modern democracies. This approach agrees with critics like Oliva[396]. The protection of the believer on the non-believer, analogical to protection from discrimination, instead of the protection of belief, should be favoured. To distinguish between blasphemies and hate speech, the report elaborates:

> "Hate speech is always directed against persons or a group of persons, but not against a religion or ideas, philosophies, a political party, state organs, a state or nation or mankind as such".

The new approach underlines the importance of introducing such changes in order to bring to life the ideal of a religiously plural Europe.

5.7. Current blasphemy regulations in some European countries

Regardless of the new recommendations, the offence of blasphemy as such or in similar forms still exists in a few European Union countries. The Venice Commission's report lists Austria, Denmark, Finland, Greece, Italy, Lichtenstein and the Netherlands as those countries where the blasphemy offence exists. In addition, also Ireland maintains blasphemy bans. Also until recently, the United Kingdom had recognised the offence of blasphemy. However, in 2008 Section 79 of the Criminal Justice and Immigration Act 2008 abolished the offences of blasphemy and blasphemous libel. The Act was adopted by the House of Lords on the

395. Council of Europe, Parliamentary Assembly, Blasphemy, religious insults and hate speech against persons on grounds of their religion, Report, p 1 and e.g. Handyside vs. United Kingdom, Application no. 5493/72.
396. Garcia O. J., 2007.

8th of May 2008 and entered to force on the 8th of June 2008. In 2006 the Racial and Religious Hatred Act entered into force, banning hate speech on the grounds of religion or/and ethnic origin.

According to the Commission's report, in Cyprus, the Czech Republic, Denmark, Spain, Finland, Germany, Greece, Italy, Lithuania, the Netherlands, Poland, Portugal, and the Slovak Republic, laws forbidding religious insults or offending religious sentiments exists.[397] I have also observed that a similar provision exists in Malta.

Since an exhaustive legal comparison of each European country's legislation is not the focus of this research, below I briefly analyse some examples of contemporary blasphemy laws. I include European Union member countries with legislation that strictly bans blasphemy, those that recognise it in law but not in practice, those with legislation that protects a particular faith and those whose penal provisions have been recently used in front of national courts either as blasphemy laws or religious insult laws. Additional comparative information on the legislation of other European countries is available in the reports of the Venice Commission. The Commission's analysis refers to those countries of the COE where the offence exists; the analysis was created on the basis of a questionnaire delivered by the member states to the Commission.

Due to its placement in the Constitution, Ireland seemingly maintains one of the strongest blasphemy bans. Article 40.6.1.i of the Irish Constitution declares that: "The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law". Section 13.1 of the 1961 Defamation Act provides that every person who composes, prints or publishes any blasphemous libel shall be liable to a fine not exceeding five hundred pounds or to imprisonment for a term not exceeding two years. In addition, section 13(2) allows the court to order the seizure and detention of all copies of the libellous material and members of the Garda Siochana[398] may enter if necessary by force and search buildings for copies of the material. In 1991, however, the Irish Law Reform Commission issued a Consultation

397. Venice Commission's Report, par. 27-30.

398. Irish equivalent of police force.

Paper on the Crime of Libel[399]. The conclusions of the Commission in regard to blasphemy stated the following:

> "In Ireland, the abolition without replacement of the offence of blasphemy and blasphemous libel is impossible under the existing constitutional provision. A referendum which had as its sole object the removal without replacement of that provision would rightly be seen as a time wasting and expensive exercise. Our provisional conclusion, however, is that in any more extensive revision that may be undertaken of provisions of the Constitution which, for one reason or another, are generally considered to be anachronistic or anomalous, the opportunity should be taken to delete the provision relating to blasphemy."

Such a removal of the offence of blasphemy from the Constitution has not yet happened. The last prosecution, which took place in 1999[400], however, established a precedent of non-prosecution. In *Corway*, after having analysed the successful blasphemy prosecutions from the 19th century, the Court arrived at the conclusion that the law lacks a legislative definition of blasphemy. The judges also added that the task of defining a crime is that of a Legislature, not the Court. Thus, in the absence of legislation defining the crime, the provisions of the Constitution remain void. As a result of *Corway*, legal practices in Ireland do no longer recognise the crime of blasphemy.

Malta is one of the countries where the state religion receives higher protection of the law than other religions. Article 163 of the Maltese Criminal Code provides that anyone who publicly vilifies the Roman Catholic Religion, as the religion of Malta, shall be on conviction liable to imprisonment from one to six months. Such a vilification may be done by any means including in print, speech or even gestures. Also vilifying those professing Roman Catholicism is punishable in the same way. Article 164 extends this protection to "any cults tolerated by law". The term of imprisonment however, is shorter in the case of "cults" and amounts to

399. The Law Reform Commission, Ireland, 1991.
400. Corway vs. Independent Newspapers (Ireland) Limited.

one to three months. The Catholic Religion receives stronger protection on the basis of its status as a state religion.

Also Greece, previously mentioned in the context of Haderer's case, maintains a blasphemy ban. The Greek Penal Code includes a section entitled "Plots Against Religious Peace". The section, in addition to two other offences, contains offences of malicious blasphemy and blasphemy concerning religions. Malicious blasphemy forbidden by Article 198 provides a punishment of imprisonment up to two years for anyone who publicly and maliciously blasphemes God. Showing a public lack of respect towards God is punishable by imprisonment up to three months. Blasphemy concerning religions includes blaspheming the Greek Orthodox Church or any other religion tolerable in Greece. Upon conviction, article 199 provides a punishment of imprisonment of up to two years for blaspheming a religion. As the Venice Commission's report underlines, the object of penal protection in the Greek case is the sole existence of God, regardless of beliefs of any individual. The victim of the crime is not a religion or a believer but the divine. Such a protection is an expression of the dominant position of the Greek Orthodox Church as a state religion and its influence on the state apparatus. Moreover, the report underlines that trials related to blasphemy are rather frequent in Greece.[401]

In Poland, where previously mentioned cases occurred, the Criminal Code provides for the protection of the believers and the objects of worship. Article 196 of the Polish Criminal Code provides a punishment of limitation of personal freedom or imprisonment of up to 2 years upon conviction for those who publicly offend others' religious sentiments by ridiculing an object or place of worship. In the year 2007 a few new convictions on the grounds of Article 196 occurred. They included a conviction of the metal band Gorgoroth's producer for organizing a 'blasphemous' concert in Krakow[402] and a conviction of the creator of a

401. European Commission for Democracy through Law, Annex II: Study no 406/2006.

402. Grzywna za satanistyczny koncert [Fined for a satanistic koncert], Gazeta Wyborcza, 26.06.2007

programme with an Internet version of the Catholic confession.[403] The concert was a typical black metal concert and symbolism typical for the black metal scene was used on the stage. The concert was recorded for television and one of the local television directors informed the Prosecutor's Office about a blasphemy case. The Internet programme, on the other hand, imitated the Catholic confession by asking to write down sins and offering absolution. The proceeding was initiated by a private person, who informed the Prosecutor's Office. Another proceeding before a local court in Torun took place when another two private persons informed the Public Prosecutor's office about a photographic manipulation offending their religious sentiments. The manipulated photograph showed the face of Joseph Stalin on a well-known painting of Jesus. Initially the accused accepted the sentence of 6 months of imprisonment, but finally he was acquitted by the Court, having apologised for insulting religious sentiments.[404]

Also Finland maintains blasphemy laws that have been recently in use. Chapter17, Paragraph 10 of the Finnish Penal Code[405] sets out a crime of breaking religious peace. Paragraph 10 declares that anyone who publicly blasphemes God, offends or ridicules what a religious community, including both the Church and other registered religious communities, consider as holy is liable to a fine or imprisonment of up to six months. The same punishment is provided for disturbing religious ceremonies. Preventing religious ceremonies by violence or threats is regulated in paragraph 11 and punishable by imprisonment of up to 2 years.

Although Denmark after the Mohammed caricature crisis took a stance unconditionally protecting freedom of expression, Finnish jurisprudence took a contrary turn. In 2008 two persons in Tampere were convicted of agitating against an ethnic group and defamation as well as disturbing the religious peace in the meaning of Chapter 17, Paragraph

403. Grzywna za parodię spowiedzi w sieci, [Fined for a parody of confession], Rzeczpospolita,Issue 136, 13.06.2007.
404. Przeprosil za fotomontaz Jezusa I Stalina [(The accused) apologised for the photo-manipulation of Jesus and Stalin], Gazeta Wyborcza, 10.02.2007.
405. Rikoslaki , 17 luku, 563/1998.

10.[406] The crime they committed in 2005 included publishing offensive comments on Internet blogs. They included, in addition to offending particular individuals, hate speech against people of African and Russian origin as well as offensive words against the Prophet Muhammad and "what the Islamic community regards as holy".[407] The offensive material included also offensive caricatures of the Prophet. The Court acknowledged that freedom of expression is not limitless and the aim of the blasphemy law is to protect the religious sensitivities of people and maintain religious peace. And religious peace was in the consideration of the Court a higher common good providing safety and order. For that reason, it required protection and limitation of speech.[408]

Also as recently as in the beginning of the year 2009, the Public Prosecutor's Office in Helsinki issued official charges against another person suspected of hate speech and breaking religious peace.[409] The charges concerning blasphemy and breaking religious peace regard offensive words against the Prophet Mohammed and Islam. The words used by the accused suggested that Islam and the Prophet himself encourage paedophilia. The case was decided in the local court in Helsinki in September 2009 and the defendant was found guilty of violating religious peace[410].

The Danish Public Prosecutor, on the other hand, took exactly the opposite position. The Criminal Code in section 140 prohibits the mocking or ridiculing of public religious doctrines or acts of worship of any lawfully existing religion. The punishment upon conviction amounts to imprisonment up to four months. Since the 1970s the discussion on the abolition of the offence has been ongoing. In 2004, the Danish People's Party proposed a Bill of Abolition of section 140. The proposal, however, was not adopted.

When Mohammad caricatures were published in 2005, the Muslim

406. Tampereen käräjäoikeus 30.05.2008.
407. Ibid., par. 6.
408. Ibid., Syytekohta 6.
409. Dnro R 09/8, Syytemääräys, 27.03.2009.
410. Paakkanen M., Halla-aho tuomittiin sakkoihin uskonrauhan rikkomisesta [Halla-aho found guilty of breaking religious peace], Helsingin Sanomat, 10.09.2009.

community informed the police about the crime of blasphemy. After an investigation in March 2006, the Danish Director of the Public Prosecution announced that there was no basis for criminal proceedings in response to the publication. Since the offence of blasphemy is subject to public prosecution only, the decision was final. Even though the Prosecutor observed that freedom of expression is not unlimited, the publication was not found to be sufficiently scornful to fall under the criminal provisions.[411] Danish Public Prosecutor, in contrast to the Finnish, did not consider that religious peace is a value of its own that should be protected at the expense of freedom of expression.

5.8. The importance of blasphemy abolition for religious pluralism

As the position of this volume is based on the notion of facilitating religious pluralism and greater religious freedom for everyone, I must agree with the position of the new documents in regard to blasphemy. Freedom of speech is essential for the expression of both religious and non-religious opinions. The protection of certain beliefs, regardless of the broadness of the definition of such beliefs, in every case excludes non-believers in the traditional meaning of atheists and agnostics. First of all, it may be a point of personal belief, that God or any other divinity is the essence of what an atheist or another non-believer considers essentially non-compliant with his or her values. The protection of divinity excludes critique and at the same time excludes the expression of atheistic belief. Even if the blasphemy law were to be stretched to protect typical non-believers, the protection of an atheistic type of belief is impossible due to the lack of the sacred object or symbol that could be ridiculed. Like Smith, I would like to quote Feinberg's thought presented in *The Moral Limits of Criminal Law*:

> […] a sense of fairness has never impelled a legislature to penalize clergymen and their congregations for savage denunciations in their

411. For more details on the decision see: Lagoutte S., 2008.

> churches of law abiding atheists […] the resentment of the atheists at the mockery of their beliefs does not constitute a profound offence since nothing they hold sacred is impugned by it.[412]

Even though the hate speech as shown below has changed these limits slightly in some of the countries, the essence remains the same. There is a fundamental inequality between a belief and a non-belief created by the offence of blasphemy. Whether it is blasphemy against religion or divinity as such, a non-believer cannot be offended in his or her belief and thus remains the religious "other" when the offence of blasphemy is entrenched in national legislation. Similarly to the ban on religious symbols, which creates the "otherness" of religious believers and protects the non-existent "freedom of not being affected by a religion", the blasphemy ban protects a non-existent "freedom from being offended". However, if we attempt to justify such bans, from the perspective of religious pluralism, they carry a message of what is "accepted as a religious/non-religious norm" and what "the other" is and condemned as improper. From the point of view of the equality of all faiths and beliefs, such bans create an imbalance based on the core of the person's convictions and in a democratic society, where religious pluralism and equality are key principles, these bans are nowadays hard to justify.

The protection of the divinity goes even further and undermines the essence of a non-belief as such. Atheism *per se*, by denying the existence of God, offends the divinity and ridicules it. Thus protection of the divinity violates the freedom of non-belief in its essence and compels non-believers to restrain from expressing their sincere convictions in public.

In regard to religious adherents' arguments that a lack of protection shows the domination of secular beliefs in the society, I must disagree. The neutrality of the state allowing for open debate among all actors on the religious scene allows for the open critique of any kind of faith or view. The state does not choose to favour any worldview, while by choosing to maintain a blasphemy law, a religious option is favoured.

412. See Smith S..D., 1999.

A religious or a broader social peace is a value that is considered to be important enough to require special protection from the State in a majority of European countries. Thus the majority of the countries of the European Union and COE include provisions banning hate speech towards different social groups. According to the Venice Commission's report, however, the scope of the offence varies greatly in each of the countries. Whereas in some, incitement to hatred is a necessary element of the offence[413], in others both incitement and hatred are punishable[414]. Moreover, the "incitement" as such is not clearly defined or uniformly understood in Europe. Also the punishable grounds of discrimination and hatred differ. In some countries coverage is wide and includes incitement to religious, racial, ethnic or national hatred as well as hatred based on language, political convictions, disability or social status. Among the European Union countries, only Malta and Slovakia do not include bans on religious hatred[415]. In some others, like in the Netherlands, Sweden or Denmark[416], also sexual orientation is one of the forbidden grounds for discrimination and hatred. Denying the Holocaust and glorifying terrorism as forbidden contents of speech belong to a similar category of limitations of speech.

From the point of view of religion, two of these grounds are especially important. The first one is obviously religion and the second, sexual orientation. In regard to religion, it is important to emphasise the legal difference in the protection scope between blasphemy and hate speech on the grounds of religion. Whereas the notion of blasphemy regards religion and religious symbols and their core, the notion of hate speech protects the believer from being ridiculed and offended. As the recommendation on blasphemy and hate speech emphasised, religion or religious symbols cannot be protected as such. But a believer, like other groups in the society, should be protected from discrimination or hatred he or she

413. Austria Cyprus, Greece, Italy, Portugal, source: Venice Commission's Report, par. 33.
414. Lithuania, source: Venice Commission's Report, par. 33.
415. Venice Commission's Report, par. 34.
416. Venice Commission's Report, Annex II, 2008.

could face because of being a believer. Such a distinction is formally clear and constitutes an approach more compatible with the principles of democratic pluralism. In practice, however, it may cause substantial difficulties, which I will analyse below.

In those democracies that forbid hate speech on the grounds of sexual orientation, a few cases including religious individuals speaking against homosexuality have occurred.

In the Netherlands, the Penal Code in Article 137c bans insults or incitement to discrimination or hatred on grounds of sexual orientation. The Dutch Courts dealt with charges based on this article in two well-known cases. The first one from the year 1996 concerned a Dutch politician. Mr Van Dijke expressed publicly, in a weekly magazine, an opinion that homosexuals are no better than thieves in breaking God's commandments. Upon prosecution, Van Dijke was in the first instance convicted. But the Court of Appeal acquitted him and the ruling was upheld by the Supreme Court.[417] Similarly, in the case of Imam El Moumni, who declared in a television broadcast that homosexuality was harmful to the Dutch society, the court of the first instance convicted the accused. Later, however, upon appeal, the Imam was acquitted and the sentence was upheld by the Supreme Court. In both of those cases, the charges concerned speeches made in public and to a wider audience than just a religious congregation.[418]

Lately, however, a more interesting case, of Pastor Åke Green, occurred in Sweden. The case considered expressions that the Pastor directed to his own congregation during one of his sermons. It concerned expressions that were supposed to support the religious arguments of the pastor and his teaching on homosexuality to his religious congregation.

Chapter 16, Section 8 of the Swedish Criminal Code criminalises agitation against a group by making a statement or otherwise spreading messages that threaten or express contempt for an ethnic group or any other group of people with reference to their race, nationality, ethnic origin, religious belief or sexual orientation. The amendment protecting from hatred on the grounds of sexual orientation entered into force in

417. Loof J.P, pp. 267-278.
418. Ibid.

January 2003. In the legislative process, the Swedish Council of Free Churches demanded the exclusion of sermons and similar situations from the scope of the amended provision. In response, the government replied, that the purpose of the law was not to restrict free speech in churches or anywhere else any more than in regard to incitement to hatred against an ethnic group, for instance.[419]

In July 2003, Åke Green held a sermon titled: "Is homosexuality congenital or the powers of evil meddling with people?" The sermon included statements such as:

> "Legalizing partnerships between two men or two women will clearly create unparalleled catastrophes. Already, we are seeing the consequences through the spread of AIDS. Although not all HIV infected people are homosexuals, AIDS once stemmed from homosexuality."

Or:

> "The Bible discusses and teaches us about these abnormalities. And sexual abnormalities are a serious cancerous growth on the body of a society".[420]

In addition, Pastor Green compared homosexuality with paedophilia and bestiality and expressed the opinion that all sexual perversions stem from sinful changes in normal sexual behaviours. In his sermon he widely used references to verses in the Bible.

The Court of the first instance convicted Åke Green of violating Chapter 16, Section 8 by agitating against a group on the basis of their sexual orientation. The Court of Appeal acquitted the defendant and the ruling was sustained by the Supreme Court in November 2005. The Supreme Court in its judgement referred to the case law of the ECTHR and expressed an opinion that limiting Åke Green's freedom of expression

419. Govt. Bill 2001/02:59, p 35, quoted in: The Supreme Court of Sweden, case B 1050-05.
420. Green Å, 2003.

and freedom of religion would be disproportionate. The Court quoted the famous ECTHR declaration repeated in many judgements, that freedom of expression is applicable not only to ideas favourably received but also to those that offend, shock or disturb[421]. The Court considered that even though the Swedish law's intent was to protect from statements such as those expressed in the sermon, the European Convention should be applicable directly and thus it must be possible to depart from the national law in order to secure conformity with the Convention. The Court believed that the ECTHR might find the limitation of Åke Green's speech disproportionate, since the sermon should not be analysed on the basis of exact wording but in a wider context. Even though the words Green used might be considered more derogatory than the verses in the Bible, the preaching was done to his congregation and regarded a theme found in the Bible. And the belief as such should not be analysed in the terms of legal legitimacy or the lack of thereof. Limiting the core of a belief might be considered as a disproportionate limitation on freedom of religion and in connection to it, freedom of expression.[422]

5.10. Hate speech – necessity or another form of limiting speech?

From the point of view of religious pluralism, hate speech bans constitute a curious example. They are advocated for by the COE in their recommendation and are believed to facilitate religious as well as other forms of pluralism in a democratic society. Looking at the principle itself, that indeed appears to be true at a first glance. Hate speech bans do not differentiate between believers and non-believers and do not resort to the legal "othering" of anyone on religious grounds. Both believers and non-believers are theoretically protected from possible hateful attacks based on their beliefs. Moreover, religion is just one of many grounds of possible discrimination. For that reason, hate speech bans appear more democratic, since they do not favour religious or non-religious aspects in any way.

421. Handyside vs. UK, Application no. 5493/72.
422. The Supreme Court of Sweden, Case B 1050-05, 29.11.2005.

From this theoretical and seemingly democratic perspective, we should, however, see the possible practical implications. First of all, as the examples of Malta and Slovakia show, it should not be taken for granted that a believer (or a non-believer) is protected from discrimination. For that reason, it might be argued that the hate-speech ban itself is shaped in a discriminatory way. The grounds of possible hate speech may be shaped freely and in fact express an ideological or even religious approach of a state. The lack of protection from hate speech on the grounds of religion and sexual orientation may ideologically mean nothing, but taken in context, may express conservative religious values. A society which will protect against racial or ethnic hatred but will not protect against hatred towards homosexual atheists, for example or any other non-traditional faith adherents, ceases to remain ideologically neutral. In that way, the mere shape of a hate-speech ban may cause the "othering" of non-protected groups.

Secondly, like the cases of Åke Green or Van Dijke and Imam El Moumni showed, either of the social groups will be dissatisfied as a result of the application of the bans. Social equality and protection from discrimination will be always compromised for either side of a conflicting discourse. In the above-mentioned cases, the homosexual minority may argue that their rights have been compromised and a religious outlook on life was favoured. If the outcome had been different, religious individuals could have argued that secular values were given preference. As Leigh put it:

> "If non-discrimination law requires the silencing of any views other than those positively approving of homosexual lifestyles, equality has become dominant over freedom of religion and freedom of expression to a remarkable degree."[423]

Either of the arguments puts the state and its neutrality towards religious views into an impossible and inconvenient position. The state is bound to be labelled as either a religious or secular values supporter.

But even if we dismiss this argument, remembering that legal conflicts

423. Leigh I., 2007, p 263.

always favour either of the sides, we should consider other practical issues as well. Can religious freedom grant a leeway to utter any kind of discriminatory speech then? Loof argues that differentiating between religious motives and other motives for speech would be a regrettable development as it would force the courts to decide whether certain opinions could be seen as religious.[424] Remembering the difficulty of defining "a religion" and "a belief", which I discussed in the first chapter of this volume, I believe such a development could lead to an impossible unpredictability of the law. It may cause an absolutely free interpretation of each case unbound by any common standard of rights. In each case the arbitrariness of deciding would be left to the courts. The law and the boundaries of rights would remain absolutely unpredictable.

Another method of balancing conflicting rights might be an approach where religiously motivated discriminatory speech is directed to a religious congregation and not to the general public. Loof, however, again points out the possible difficulties of such an approach. He argues that such an approach negates freedom of religion as such and denies religious speech's place in public debate.[425] I disagree with Loof. Religious speech is directed primarily to religious adherents and the mere existence of religious communities, places of worship and confessional schools marks the existence in a public sphere. I find such a solution to be one of the possible ones in which freedom of religion and religious expression does not limit the freedom of others, but still serves its purpose of providing moral standards to those interested. I will also return to the public versus private dichotomy in regard to the place of religion in a society in the theoretical discussion in later chapters.

Some absolutist critics, like Heinze, reject hate-speech bans due to their sole nature as completely unnecessary for a democratic society. Heinze ascertains that hate-speech bans are incompatible with democratic citizenship for two reasons. First of all, they ban speech solely because of the speaker's opinions and secondly, because they produce uncertainty in judicial weighing and balancing. All viewpoints should be allowed to be expressed in a democratic society and a majority of whatever kind

424. Loof J.P., 2007, pp. 276-277.
425. Loof J.P., 2007, p 277.

cannot silence minorities. [426] Moreover, Heinze believes that democracy today is able to defend itself, due to substantial changes in education and preparation for democratic citizenship. He believes that there can be no comparison between the seemingly democratic overthrow of democracy in the Weimar Republic and dangers that European democracy meets today.[427] At this point, I am bound to disagree with Heinze. I am convinced that while speaking of laws and legal principles, we should refrain from speculations concerning the possible self-destructive force of democracy. It can be argued and speculated, on the contrary, that hate-speech bans are necessary right now, when Europe as a whole is facing the challenge of multiculturalism. When different fundamentalisms collide, prejudices and discriminatory policies are likely to increase intolerance and social conflict and with time grow into a destructive force. It is impossible to estimate whether hate-speech bans facilitate or hinder democracy. Such speculations remain fruitless for the legal argument.

Nevertheless, taking into consideration previous concerns, I must express the opinion that whereas hate-speech bans might improve tolerance and the peaceful coexistence of various social groups in a society, they might as well bring an unnecessary uncertainty to the law. Occasionally, if not shaped with careful enough consideration, or applied without careful balancing, they may act against the principle of democratic pluralism as such and increase religious "othering". Although I am reluctant to accept complete absolutism as a principle, I do agree with Brandt's conclusions, expressed in regard to the ban on glorifying terrorism:

> "The measure of tolerant society is not how well we co-exist when we all agree, but how we remain inclusive when we don't. In a democracy, especially one divided along ethnic or religious lines, tolerance of free speech is paramount, for only in 'relevant discussions about social order' can divisions become tolerable. Of course there are those who will be insulted, afraid, deeply offended by what may be said on both sides. (…) We must hold on to the idea that both sides are capable of

426. Heinze E., 2007, p 301.
427. Ibid., pp. 306-307.

and have the duty to give a rational, if rigorous response to the other's critique within public debate, without interference by a government telling them what not to say."[428]

In Europe, scarred by the history of ethnic and religious conflict, hate-speech bans, Holocaust denial bans and similar, appear plausible for the time of growing multiculturalism and pluralism. Their purpose is to increase tolerance, facilitate pluralism and mutual peaceful coexistence and prevent the possible self-destruction of democracy. However, even though the very purpose of maintaining hate-speech bans is increasing pluralism in a multicultural society, the legislators and the courts must remain careful. Hate-speech bans, similar to blasphemy bans or any other bans on speech, may instead of facilitating greater tolerance, bring an effect that is exactly opposite. They may discriminate and chill public debate. A liberal democrat is bound to agree with Mill's claim, that a mature democracy defends itself best when the open market of ideas remains unrestricted.[429]

5.11. Conclusions

The Venice Commission's report and recommendation and the COE's Parliamentary Assembly report and recommendation are an important step towards the European common commitment to basic values. In a multicultural era, revoking national sentiments to defend laws and policies incompatible with the ideals of democratic religious pluralism and equality of religions (or non-religions) is no longer plausible. Whereas each country has its own religious traditions, those traditions cannot hinder the facilitation of rights of non-believers. However, a certain cultural relativism of this common European effort cannot go unaddressed. It seems that without the Mohammad caricature crisis, the Venice Commission's work and the Parliamentary Assembly's report and recommendation could have never been possible. As long as blasphemy

428. Brandts Ch., 2007, p 294.
429. Mill J.S., 1869.

was 'our' problem, connected with 'our religious tradition' it was tolerable. As soon as it became 'their' problem, connected with the cultural 'other', it had to be immediately examined through the lens of democracy. 'Our' fundamentalism was tolerable, 'theirs' was not[430]. The inspiration for the reports and recommendation brought about by the Mohammad caricatures is visible also in the text of the COE's recommendation, in the deep condemnation of life threats against artists and journalists issued by Muslim leaders. Only such drastic threats could make Europe speak in one voice. This tendency toward democratic "othering", as will be summarised further in part III of this volume, has been visible in almost each of the example areas chosen in this volume. Only a challenge by a foreign religious identity made Europe notice possible problems and clashes between archaic laws concerning religion and democracy.

In regard to blasphemy and hate-speech bans, the questions for the future are: can the new approach of European institutions influence people and lessen their sensitivities? Can Europeans distance themselves from the offensive works and accept them as representing the freedom of those who do not share their world and religious views? Can the ideal of free speech ever be reached in both theory and practice? Will the offence of hate speech simply replace blasphemy? And will the EU also strengthen its commitment to democratic values, following Danish Prime Minister Anders Fogh Rasmussen's call to defend freedom of speech[431]?

430. See: European elite scrambles to defuse furore over caricatures of Mohammad, The Guardian, 03.02.2006.

431. See: Denmark calls for fight for freedoms after cartoons row, EU Business, 07.10.2008.

6. Religion and education – between equality and indoctrination

6.1. The school as an institution of unavoidable tensions between doctrines

School environments are special and bring multiple difficulties connected with drawing boundaries between the religious and the secular. School, in this chapter primarily meaning institutions of basic education, are places attended by persons usually below the age of 18, who are considered to be children in the meaning of the Convention on the Rights of the Child. School is an institution which cannot be avoided and the purpose of the schooling system is to provide adequate education, which can prepare children to function as fully capable members of society. The places of education are usually chosen by parents in accordance with their best knowledge and convictions concerning what type of education should be provided for their children. The majority of European schools providing basic education are public schools with curricula approved by the educational authorities of a state. Children cannot of their own will change or resign from education and schooling. The school obligation is recognised by all countries of the European Union.

It is essential to recognise the essential problem regarding the influence of religious or secular ideologies in education. The education of the young determines the future of the entire society. Thus whatever types of ideology are passed along within the school programmes, they might become with time the living ideologies of the society. Therefore, issues connected with education and religion are of even greater sensitivity than those that touch upon the rights of adult members of the society. For these reasons, both advocates of secular doctrines as well as religiously inspired ones struggle to ensure what is to be considered by them as "adequate education".

6.2. The complexity of rights involved

In addition to the socially sensitive role of the school, the educational area is challenging from the legal point of view. The rights that are involved in the process of education involve a complicated puzzle of different types of rights held by different categories of persons. They involve the political and social rights of children, their parents and their teachers.

These rights stem from various national and international regulations. The rights of children, in addition to other constitutional and international sources of rights, are entrenched in the Convention of the Right of the Child from the year 1989, which explicitly includes the right to receive education, as well as the right to possess own religious beliefs. The interpretative body of the convention, the CRC Committee, has also developed a right to receive information on sexual health on the basis of the right to education, information and the highest attainable standard of health[432].

Parents' and teachers' rights stem from the national constitutions, international and European human rights conventions, EU law and other international agreements include, in addition to the freedom of religion, the right to decide the religious education of their children.

This tangled web of mutual rights and obligations is certainly difficult to unfold in regard to the leading themes of this work, which include the principles of equality and religious pluralism. I identify several areas that are particularly sensitive from the point of view of the possible philosophical or religious coercion of believers by non-believers and vice versa.

6.3. The right to education in European and international law

The cornerstone of the rights regarding the relationship between education and religion is the right to education itself. It is guaranteed by international and European legal obligations and provided in accordance with national laws of European countries.

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432. General Comment, CRC/GC/2003/3.

The right to education is recognised as a social right under the International Covenant on Economic, Social and Cultural Rights and the European Social Charter. The previously mentioned Convention on the Rights of the Child was, on the other hand, the first legally binding international instrument to incorporate the full range of human rights, including civil, cultural, economic, political and social rights. The right to education is one of the fundamental rights guaranteed by the Convention.

In Europe the possibility of access to legal redress in regard to the right to education was strengthened by the addition of Protocol 11 to the European Convention on Human Rights. The protocol established the right to education and in addition determined its connection with parents' freedom of religion:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

The right to education, as understood in the Protocol, may be grounds for an individual complaint to the ECTHR.

The European Union has also recognised the importance of education although not immediately. The Maastricht Treaty however, recognised the legal status of education and made the European Council and the European Parliament responsible for cooperation in matters of education. Article 126 states:

> "The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity."

Educational programmes, like the Erasmus, Socrates or Leonardo da Vinci programmes, have intensified cooperation in matters of education.

Growing amount of common strategies and processes, like the Lisbon strategy 2010 in regard to education or the Bologna process, underline the fundamental importance of education in the European Union. The Lisbon Treaty currently undergoing ratification imposes an obligation on the Union to contribute to the development of quality of education in a similar manner as the Maastricht Treaty in regard to the Community.

Moreover, the European Charter of Fundamental Rights, which in accordance with the Lisbon Treaty shall become the part of the EU Treaties, guarantees in regard to education and religious or philosophical convictions that:

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

6.4. European strategies for education and religion and equity in education

As demonstrated above, education belongs to the realm of competence of the states but is crucial for Europe and European integration. Therefore developing the best possible strategies and coordinating those strategies is essential for achieving of quality education.

Although religion at first glance may not be at the heart of educational integration strategies, it is one of the cultural factors which influences the quality and accessibility of education. Therefore, recently there has been increased activity of European institutions in interpreting certain principles regarding education and equity and the relationship between the state and religion in education.

The European Union's strategies refer to migrant children[433] and the importance of intercultural dialogue. Therefore, the European Union's strategies concentrate on the concept of equity in education. European cooperation for schools should: "enhance the essential role which schools play in promoting inclusive societies […] in accordance with the principle of equity"[434]. The Strategy paper on equity in education underlines that equity is viewed as the extent to which individuals can take advantage of education in terms of treatment, opportunities and access[435]. Moreover, the strategic framework for European cooperation in education and training sets at the centre of the strategy promoting equity and active citizenship. Education, according to the strategy, should promote intercultural skills, democratic values, respect for the fundamental rights and the fight against discrimination.

A stronger emphasis on the importance of the relationship between religion and education has been expressed by the Council of Europe. The Parliamentary Assembly of the Council of Europe has adopted a specific recommendation on education and religion[436], which reaffirms that issues of religion belong to strictly private matters and that the family has a paramount role in the upbringing of children, including the choice of a religious upbringing. Nevertheless, due to the growing misunderstanding between religious and non-religious communities, education should, according to the recommendation, combat ignorance, stereotypes and misunderstanding of religion. This could be done only through teaching comprehensive knowledge of all religions. However, the recommendation also underlines that even in countries where one religion prevails, the teaching should comprise knowledge of all religions, not only the dominant one.

433. Migration & mobility, COM(2008) 423.
434. Conclusions of the Council, (2008/C 319/08), p 2.
435. Communication from the Commission, COM(2006) 481.
436. Recommendation 1720 (2005).

6.5. Types of religious instruction

Types of religious instruction can be classified in various ways. Skeie[437], for instance, distinguishes between strong and weak solutions in regard to models of religious education. Strong models include systems of confessional religious education, where religion is a part of school curricula. The previous Spanish model and the current Maltese or Greek one are included in this category. On the other side of the strong models is the French model, where religious education is not at all included in the school curriculum. The model is also strong as it takes a decisive secular stance. Weak models include solutions which balance a secular approach with a religious approach. Among others, the British multicultural religious education system (RE) was included by Skeie in this classification. Skeie's classification is far more complex and touches upon more complicated administrative questions such as who the provider of the curriculum is, who employs the teachers, etc. However, for the problems considered in this volume, these three most important features of Skeie's classification correspond with the topics that I discuss in this volume: how doctrines influence the non-religious, or, on the other hand, religious individuals and what the role of the state is in the process. For that purpose, I distinguish between confessional models of religious education, non-confessional models as well as models with no religious education at all.

Some, like Diez de Velasco, question classifications based on the confessional versus non-confessional dichotomy, arguing that they lead to a dead end and serve no purpose in attempts to suggest a model of education for peace.[438] However, education for peace is similar to education for citizenship and therefore not applicable to the problems of religious education *per se*. The problems of education for peace (or citizenship as I call it in this volume) will be mentioned in one of the following paragraphs. For the purpose of discussion on religious education *sensu stricto,* I sustain the basic classification based on a confessional/non-confessional dichotomy in order to illustrate the problems that such models pose for the development of religious pluralism and equality. This

437. Skeie G., 2001.

438. Diez de Velasco F., 2007, p 80.

classification also vaguely corresponds to a classification made previously in this volume in regard to types of state and church relationships. States where the influence of religion on public life and the constitution is high usually opt for confessional models. Those states, where the influence of religion is rather symbolic or which adhere to multiculturalism, most often offer the non-confessional multi-religious model. In addition, France, which adheres strongly to the separation principle, offers no religious instruction in schools. This model is treated here as a separate model.

In order to identify central issues concerning the influence of religious education or the lack of it on religious equality and pluralism, I compare the essential qualities of these three types on the examples of Spain, the United Kingdom and France.

6.5.1. Confessional instruction and principles of pluralism

In order to illustrate problems concerning the confessional model of religious education, I use an example of the Spanish system. The Spanish model has undergone recent rapid evolution from a typical confessional model to an increasingly multicultural model. Therefore it is useful in showing tendencies and the direction of the development of the models of religious education in Europe.

The Spanish religious education system was for a long time confessional and based on the agreement between Spain and the Holy See on education and cultural matters.[439] This agreement was signed as a result of obligations stemming from the Concordat of 1978 and the constitutional obligation of the state to take into account the religious views of the society and maintain cooperation with the Catholic Church.[440] The agreement on cultural matters obliged the Spanish state to include the Catholic Religion teaching in all Educational Centres under conditions comparable to other subjects. The agreement stipulated that, due to respect for freedom of conscience, such education was not to be considered mandatory for those who wished to be exempted, but all public schools were obliged to offer it to students as an option. Thus

439. Agreement, 1979, BOE N1 300.
440. Spanish Constitution, 1978, art. 16.3.

the obligation was laid on the state to provide the classes. The obligation to participate was not laid on the students when they applied and qualified for exemption. Initially the educational privilege of providing religious education was reserved only for the Catholic Church. In 1990 a new law[441] allowed other confessions than Catholic to sign cooperation agreements with the state. This amendment allowed for optional teaching of other confessional religious classes than Catholic.[442]

Gomez-Quintero notes that in its case law regarding religious education in Spain, the Supreme Court on numerous occasions dealt with the proper balancing of constitutional principles. The Court emphasised also other constitutional requirements than cooperation with the Catholic Church, like the obligations of assuring pluralism, neutrality and religious freedom. For that reason, the Court ruled that under such a regime, where a religious confession enjoys the privilege of teaching in a public school, requiring students who are exempted from religious classes to take other compensating subjects instead was a disproportionate burden for them and posed unreasonable inequality based on their lack of a religious confession.[443] In striving to assure the most reasonable model of religious education that would secure equality and equal burdens on the students, a new law was adopted in 2002.[444] The law introduced a major change in the previous system. It put an obligation on every student to participate in religious education classes. The classes were, however, differentiated and the schools had an obligation to organise both confessional religious education as well as a non-confessional equivalent. In this new setting, the legal difference was the obligation imposed on the students. Participation in non-confessional education was no longer an additional burden imposed on non-religious students due to the fact that their religious peers chose at the same time to receive education in their religion. The law introduced rather an obligation of all students to participate in education concerning religion and left it up to the students and parents whether they preferred to receive confessional instruction or religiously neutral instruction about

441. Organic Law of General Order of the Educational System, 1990.
442. Maritnez-Torron J., 2005, p 145.
443. Gomez-Quintero A.S., 2004, pp. 563-566.
444. Organic Law on the Quality of Education, 2002.

society, religion and culture. This trend approximated the Spanish approach to the non-confessional, multicultural model described below.

In addition, a new law concerning education for citizenship was introduced in 2006 to strengthen multiculturalism and pluralism, but it did not replace religious education. This law will be discussed in detail in the following sections of this chapter, while discussing other areas in education where religious rights might be involved.

Providing compulsory confessional religious education from which one may be excluded by the expressed objection of the parents, does not *prima facie* discriminate against any religion. In largely religiously homogeneous societies, it might be argued that the state mainly facilitates the freedom of religion of the majority of students. Yet such education should be provided carefully and with regard to certain conditions guaranteeing freedom of religion and preventing the religious coercion of non-religious and differently religious individuals. The principles of careful balancing have been drawn up in the case law of the ECTHR concerning religious education and the rights of parents to decide the education of their children in conformity with their own convictions.

In *Angeleni vs. Sweden* (1041/83) the ECTHR (the Commission) acknowledged that the Convention protects against religious indoctrination by the state. In this case, however, EComHR decided that religious instruction concerning a particular religion does not automatically amount to indoctrination nor infringe the Convention. The teaching of Christianity was not found disproportionate, due to the historical role of Christianity in Europe.

In a more recent judgement, however, *Folgeró vs. Norway*[445], the Court took a more decisive stance. The judgement confirmed the approach expressed in *Angeleni* that teaching about Christianity cannot be as such seen as indoctrination and is justified due to history and national traditions. A further part of the sentence, though, took a more decisive approach as to the acceptable limits of such teaching. The Court found a violation of the freedom of religion by the former Norwegian model of religious education. The model included partial exemption from religious classes but since religious education elements were deeply integrated

445. Case of Folgero and Others vs. Norway.

in the entire educational system, it did not allow for exemption from all activities potentially indoctrinating into Christianity. The Court explicitly emphasised that a democratic state is forbidden to pursue the aim of indoctrination and that such a limit must never be exceeded. Teaching does not amount to indoctrination when it is knowledge-based but exceeds those limits when it amounts to preaching and religious upbringing.

The ECTHR in *Folgerø* underlined that the state must make sure that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. Moreover, in another case concerning problems of religious education, *Hasan and Eylem Zengin vs. Turkey vs. Turkey*, the Court emphasised that a course on specific religion, which is designed to preach that religion, cannot be compulsory.[446] The exemption must be granted in order to comply with principles of democracy and pluralism.

There are, however, certain other factors which should be taken into consideration while discussing the equality between denominations in systems of confessional religious education. First of all, students who do not follow compulsory religious teaching often must follow substitute courses instead, or at least apply through their parents for a formal exemption from religious instruction classes. An individual who does not participate in the compulsory course in confessional religious instruction is burdened with extracurricular requirements in the form of substitute courses and parents are burdened with the extra requirement of applying for exemption. These extra requirements are imposed due to the fact of not being religious in the same way as the majority of pupils. This differentiation is not of course per se disproportional. However, in cases when it imposes a heavy burden and a risk of exposure of convictions, it might exceed what is legally considered proportional. In *Folgerø* the ECTHR established that the partial exception system violated the Convention by imposing a heavy burden on the parents, including the necessity of disclosing their own philosophical/religious convictions to the school in the process of applying for particular exemptions.

Following the Court's reasoning in regard to exception, it is impossible not to observe that the element of disclosure applies to any kind of exemption system, whether partial or complete. The child or his or her parents not

446. Hasan and Eylem Zengin vs. Turkey, Application no. 1448/04.

belonging to the religion allowed to provide teaching in school must in any case disclose their belief. This disclosure includes at least admitting that they do not belong to the religion that enjoys the privilege of teaching, in order to be granted the exception. Following the Court's reasoning, this aspect would in principle be the first and the leading argument speaking against the maintenance of confessional religious instruction. Such instruction differentiates unnecessarily among pupils and their parents on the basis of their belonging or not belonging to a religious group allowed to provide confessional teaching in public schools. Achieving equality may be done by adopting a system closer to the Spanish system from the year 2002. When the obligation to study about religion applies to all students, then it is an option of choice to participate in confessional religious instruction if such is offered in one's own religion. The burden of disclosing one's own convictions to the school is theoretically minimised as no explanation why a non-confessional option was chosen is needed. Yet, the practical implications of such a system may vary depending on the religious profile of the population. In a religiously homogeneous population, applying for non-confessional education may have effects that are the same for the equality of the students as applying for an exemption. It may contain an element of "disclosure" of one's own convictions if they are different than those of the majority's.

Taking into consideration the goal of achieving religious pluralism, we must consider the social, not purely legal aspect. Education is a special social sphere. Differentiation between pupils participating and exempted, does not apply to matured and developed individuals, like university students, who are prepared to approach differences. It instead affects pupils in the process of learning tolerance and non-discrimination. Pushing non-religious and differently religious individuals into the margin of religious "otherness" certainly does not improve the facilitation of religious pluralism and equality. Otherness, offered at an early age, influences segregation more than the pluralist coexistence of categorisation into "insiders" and "outsiders" and at the same time advocates for a "middle way approach" in the context of Europe. Jackson observes that in modern pluralistic societies an individual might identify with aspects of a cultural tradition, argue with other aspects and creatively reshape his/her cultural (and religious) identities.[447] Therefore,

447. Jackson R., 2001, pp.35-36.

law creating a possibility of "otherness" does not facilitate an achievement of religious equality and pluralism.

In principle, all these arguments can be dismissed by appealing to the aspect of facilitation rather than coercion. Yet, from the overall perspective of facilitating religious pluralism, another aspect is the symbolic support given by the state to a particular confession. Such symbolic support is often an expression of identification of national interest with an interest of a particular religion, rather than the equality of all religions. In a similar manner, as an embracement of a state religion, support for confessional religious education for the majority, affects the perception of various religions, beliefs and values. And such a perception cannot be based on equality, if only one religion receives factual support of the state and the law. This leads back to the discussion of "otherness", "insiders" and outsiders".

6.5.2. Multicultural compulsory education and the principle of equality and pluralism

British and recently changing Scandinavian approaches constitute a relatively new, but increasingly popular, approach towards religious education. They have evolved into multicultural and multi-religious models offering comprehensive education on various religions[448]. I take the British example here as the one enjoying the longest tradition.

The British system of religious education owes its origins to a philosopher of religion, Ninian Smart. His *Secular education and the Logic of Reason* published in 1968 laid the foundations for today's approach to religious education in Britain. Smart argued against confessional religious education and instead advocated for a non-confessional approach, which would help to promote religious tolerance. As Barnes notes, Smart:

> "[…] appeals to the increasingly pluralist and secular character of society and for the need for the state to be neutral with regard to religious matters. Finally he proposes that close attention to the nature of religion […] establishes the case for a non-dogmatic, multi faith approach."[449]

448. See e.g. Slotte P, 2008.
449. Barnes F.L., 2001, p 1.

The influence of Smart's approach is visible still today in the British religious education model. The National Framework for Religious Education from the year 2004 sets out a multicultural approach for the curricula of religious education.[450] The aim of religious education is, according to the Framework, to include enquiries into the nature of religions and beliefs, investigation into teachings and ways of life. The goal expressed in the Framework is to develop pupils' skills in interpretation and communication in relation to questions of identity and belonging. A broad and balanced curriculum should include teachings on Christianity, Buddhism, Hinduism, Islam, Judaism, Sikhism as well as other religious traditions, including pupils' own. The curricula should encourage interfaith dialogue and reflect the important contribution of religion to community cohesion. The Framework establishes both goals and methods of reaching those goals in religious education. Currently all publicly maintained schools provide religious education in a manner that should be consistent with the Framework's fundamental suppositions.

Such a model conforms to standards recommended by the Council of Europe in regard to religious education. The religious education, although compulsory, is a course about religions and their doctrines and it does not give preferential treatment to or marginalise any confession. This assertion may be questioned by the disproportionally large proportion of time given to instruction on Christianity. Given, however, that the teaching of Christianity is provided in the same manner as teaching on other confessions, this disproportion may be justified by the historical influence of Christianity on European culture. In order to answer the question, whether such a disproportion is similar to that present in confessional religious education, it should be approached individually case by case.

If disproportions can be balanced and teaching is provided without preaching and without discrimination between religions, such a form of religious instruction helps to improve the standard of equality and non-discrimination. From an early age, pupils are faced with the fact that differences exist and people may profess various beliefs, which should not be ridiculed. Religious children of various confessions learn about other confessions or the lack thereof. Atheistic or agnostic children, on the

450. Qualifications and Curriculum Authority, Religious education – the non-statutory national framework, 2004.

other hand, learn to understand their schoolmates' religious perspectives on life. Even if particular religious principles are not taught, children, as is underlined in the above-mentioned European recommendations, recognise the diversity of the religious landscape. They advocate for changes in religious education that will recognise this diversity rather than propagate confessional religious instruction.

Compulsory multicultural religious education in public schools helps prepare students for life in a religiously plural society. Schreiner reminds that multiculturalism influences the understanding of religious education and points out the elements that should be included:

> "Violent conflicts and wars in Europe with religious implications, anti-Semitism, nationalism, racism and sexism are challenges and phenomena which are not limited to national contexts. These areas should be parts of RE [religious education] teaching"[451]

If a national context is insufficient in the new multi-religious era, so is often confessional instruction in comparison to multicultural non-confessional religious instruction. Confessional instruction is usually offered on a traditional national religion. Multicultural religious education extends the perspective beyond the national interest and helps prevent associating the national interest with the interest of any particular religion. Subsequently, such form of religious education is better able to deal with the difficult challenge of growing European multiculturalism and religious pluralism. In order to assure balanced and adequate multicultural religious education, the content and form must also be carefully thought through. Jackson reminds that critical multicultural religious education must offer more sophisticated analyses of culture and religion than simple descriptive reifications.[452]

6.5.3. Should religious education be compulsory?

As it has been discussed above while analysing the ECTHR case law dealing with religious education, confessional religious education should

451. Schreiner P, 2001, p 265.
452. Jackson R., 2004a, p 7.

never be compulsory, without the possibility of exemption. However, in regard to multicultural religious education, the same question may be posed. Why should there be compulsory religious education at all? Some, like White, claim that in a secular era, teaching of religious education is a relic of the past, when moral choices were unimaginable without backing them with a religious background.[453] White argues that morality does not have to be based on religion and that the 'deep-rooted practice of using religious material for moral lessons is now way out of touch with twenty-first century life'.[454] White firmly argues that religious education, no matter whether confessional or non-confessional, should be excluded from obligatory school curricula and, if not, at least the education on negative features of religions should be included.

The majority of scholars, however, argue the contrary. Non-confessional and multicultural religious education should be provided by public schools. Schreiner, as previously mentioned, argues that religious education is a necessity in today's world torn apart by religious disputes and plays the role of preparing students to deal with these arguments.[455] Also Cush argues that teaching on religion via other curricular subjects does not play a role and religion is not possible to be taught via other secular subjects, without diminishing the importance of religions for human life. Religions are inseparable from the rest of human life, claims Cush and therefore multicultural education on religious values is important. It gives children from varied backgrounds the opportunity of having a dialogue on issues that are important for them.[456]

Similarly Skeie underlines that knowledge that supports different kinds of believing and non-believing and gives opportunities to exchange values and opinions without being threatened or ridiculed helps children become better equipped to engage in struggles in society.[457]

Wright, in response to White's opposition to religious education, points out that teaching morality is not the purpose of multicultural

453. White J., 2004, pp. 151-164.
454. Ibid., p 161.
455. Schreiner P, 2001.
456. Cush D., 2007, pp. 217-227.
457. Skeie G., 2006, p 30.

non-confessional religious education. Instead, critical religious education prepares children to function in a society where different kinds of beliefs have relevance. It prepares them to engage in a meaningful discussion on fundamental questions essential for different persons.[458]

Thorson Plesner, while analysing different approaches to religious education, observes that "successful religious education" contributes effectively to fostering tolerance and freedom of religion.[459]

From the point of view of an individual's freedom of religion, general compulsory religious education can be justified under certain conditions. The teaching must be under no circumstances aiming or be likely to influence pupils in the direction of embracing a particular belief.[460] When this condition is met, the rights to individual freedom of religion are not in danger of being violated. Teaching about different religions and moral views provides knowledge that is necessary for the development of religious pluralism, democracy and tolerance. As the COE recommendation on education and religion underlines: "each person's religion, including the option of having no religion, is a strictly personal matter. However, this is not inconsistent with the view that a good general knowledge of religions and the resulting sense of tolerance are essential to the exercise of democratic citizenship."[461] Each example of possible conflict, though, must be carefully examined, like in the case of education for citizenship or sexual education. Whenever a threshold of indoctrination, instead of an impartial transfer of knowledge is crossed, the boundaries of justification are no longer maintained.

6.5.4. Secularism and lack of religious instruction and its influence on the principle of equality and religious pluralism

In France, on the other hand, no religious instruction in public schools is offered, except for Alsace-Lorraine. France adheres particularly strongly to the principle of full separation between church and state. The principle of laïcité applies also to the public education system, which discourages

458. Wright A., 2004, pp.165-174.
459. Thorson Plesner I., 2004, pp. 791-812.
460. Ibid., p 808.
461. Recommendation 1720 (2005).

the development of any religious identity. Legislation from the year 2004 banned wearing religious symbols in public schools.

Despite the strong separation tendencies, a debate began in 1980 whether some elements of education on religion should be included in school curricula. In 1989 some elements containing information on religion were added to history and geography courses[462].

The French model of state and church relations has been mentioned previously in this volume, and an example of education was brought to the discussion. I do want to emphasise here, again, the same position. The absolute separation of religion from the public sphere of education and discouraging from developing any religious identity does not in my opinion enhance the equality of either religions or religious pluralism. It pushes religion into the margin, in the same way in which confessional religious instruction marginalises non-religion. It creates an image of "otherness": a religious individual versus a secular standard. And otherness, like mentioned before, does not influence diversity positively, especially when it is communicated already at an early age. Skeie reminds that the French "blindness" to religion might have been a virtue for a long time, but it is difficult to maintain as a position in multicultural and multi-religious Europe.[463]

6.6. Other areas where education and religion collide

6.6.1. Sexual education

One of the controversial areas where a potential conflict between religious and moral values and a secular system of education may appear is the area of sexual education. Like mentioned previously, in the chapter regarding women's reproductive rights, the area of sexuality is traditionally strongly connected with religious morality. Thus possible moral objections may arise in regard to sexual education and providing religious education compliant with parents' convictions. Education on reproductive health was confirmed to be essential for the realisation of children's rights, especially the right

462. Jackson R., 2004, p 174.
463. Skeie G., 2001, p 240.

to health. The CRC Committee in, for instance, General Comment no. 3 concerning HIV and children's rights underlined the importance of such education. Many European countries provide such education as a part of school curricula. While religious parents might have objections to sending their children to sexual education classes, the European position on the matter rejects religious objections in these matters. This position was created by the ECTHR in the case *Kjeldsen, Busk Madsen and Pedersen vs. Denmark*.[464] In this case practising Christian parents protested against their children's participation in sexual education classes in Denmark. The ECTHR disagreed with the applicants and found no violation of the Convention. The Court admitted that the right of parents to have their children educated with respect to their convictions applies to the entire State education programme and not only religious instruction. The sentence underlined, however, that allowing for extensive exemption systems from integrated school curriculum is not covered by Protocol 1, Article 2. The Court expressed an opinion that such an exemption system would make the institutionalised teaching run the risk of proving impracticable. The Court admitted that various instructions might encroach on the religious-philosophical sphere. However, the availability of private confessional schools, where children can learn about these topics in a manner compliant with their creed, was in the opinion of the Court a sufficient method of balancing religious and secular interests.

The part of the judgement advocating for private schooling in case of contentious objection of parents can be seen a most practical solution. It must be observed, however, that the argumentation of the Court in regard to exemptions is strikingly different than in the above-mentioned case of *Folgerø*. Exemption from integrated religious teaching is not that strikingly different from exemption from integrated sexual education teaching. The burden placed on the school system to organise the exemption is comparable.

However, participation in classes of sexual education can be seen not only from the perspective of the right of the parents to decide their children's education in accordance with their convictions. It can also be seen as the right of a child to the highest attainable standard of health. Although the religious convictions of the parents are extremely important and are to be

464. Kjeldsen, Busk Madsen and Pedersen vs. Denmark, Application no. 5095/71, 5920/72, 5926/72.

taken into consideration, so are the rights of the children. Even though these two rights do not arise from the same legal plane, they can be both invoked by the state in the planning of educational curricula. All EU countries have ratified the CRC, which in accordance with the CRC Committee gives the grounds for the right to sexual education. The question whether parents can deprive their children of that right is far more complex. It can be argued that sexual education does not automatically infringe anyone's freedom of religion, if it is taught in a neutral manner and does not advocate for any specific sexual behaviour but instead presents available knowledge. Similarly, like the Education for Citizenship discussed below, sexual education facilitates deeper social goals and helps protect the right to health. From the point of view of a religiously plural society, the provision or non-provision of such education remains, in my opinion, neutral. The students are merely faced with objective knowledge, not with indoctrination.

Even though religious communities may object, the issue does not touch the community as such but individuals and their rights, on the one hand religious adult individuals and on the other sensitive members of the society such as children. In a democratic pluralist society religious communities still have all their rights to preach on what sexual choices their adherents should or should not do. The problem for the facilitation of a religiously plural society would arise if the state imposed similar burdens of teaching sexual education on confessional schools. Such a requirement might be seen as "secular indoctrination". Confessional schools should be allowed a maximum margin for the interpretation of controversial social areas in accordance with their doctrines.

From the point of view of a religiously plural society, also an opposite situation might pose a difficulty. When a state chooses not to provide sexual education, because of its affiliation with any specific religious doctrine, it could infringe the rights of non-religious individuals. Whilst neutral information does not indoctrinate, a conscious refusal supported by a religious choice may. Such a conscious choice made by a democratic state in order to protect a religious doctrine is not defendable and links us back to the argumentation invoked in this volume in the chapter concerning women's reproductive rights.

The best model, which takes into consideration the concerns of all parts of such a discussion, should integrate the maximum of knowledge and

perspectives on moral choices in regard to such controversial areas. Although extremely difficult to realise in practice, a democratic state should strive to facilitate both the teaching of impartial sexual education, as a measure to secure the right to health and information, as well as multicultural religious education, which can give pupils and students a deeper understanding of various available moral choices, whether religious, philosophical or secular. In addition, in order to secure the rights of those citizens who are particularly sensitive in regard to their beliefs, confessional schools should enjoy a maximum freedom to provide teaching compliant with their religious dogma.

6.6.2. Headscarves in educational establishments

One of the areas of intersection between education and religion is the headscarf ban in educational institutions. In the chapter concerning church-state relationships in Europe, the French example of headscarf ban was used. The headscarf has, however, been an issue in other European countries as well and the problems regarding headscarves affect both students and teachers. The national legislation of European countries differs considerably concerning this matter. Skjeie compares European approaches and distinguishes between models that allow for a headscarf with different modifications and those that do not. Permissive models are divided by Skjeie according to the classification made in the VEIL project[465]. They include systems of 'soft selective regulation' and systems with 'no selective regulation'. Strict regulation systems are classified as systems with 'established selective bans'. In addition, there are also those countries where no regulation exists.

Established selective bans exist in France and in Turkey. Systems with no selective regulation can be found, for instance, in Austria, the Netherlands and Spain. Soft selective regulation exists, according to Skjeie, in Sweden and Finland. Soft selective systems permit headscarves but demarcate between headscarves and those body covering garments which cover parts of the face or the whole face. Some systems, like those in Hungary, Poland or the Czech Republic, include no regulation, as the

465. The VEIL Project on Values, Equality and Differences in Liberal Democracies. The project addresses the questions of equality and is sponsored by the European Commission: http://www.veil-project.eu.

headscarf issue has not yet become a problem calling for legal regulation.

Even though the majority of European countries permit headscarves, whether all or just certain types, the ECTHR found that introducing a ban on headscarves was compliant with democratic principles and met requirements of proportionality and necessity. In *Dahlab vs. Switzerland* and *Sahin vs. Turkey,* the ECTHR expressed its view on the relationship between a headscarf and other principles of European democracy, like gender equality.

The case of *Dahlab* and *Sahin* concerned different categories of individuals involved in the educational process. Ms Dahlab was a teacher whereas Ms Sahin a student. Ms Dahlab was forbidden to wear a headscarf while performing her duties as a teacher in a primary school, while Ms Sahin was not allowed to wear a headscarf while studying in a university. The argumentation of the Court in both cases concentrated on the headscarf's impact on women's equality and the influence of a headscarf as a religious symbol with the potential for being used in proselytizing. The Court constructed a negative image of the veil as a symbol that is non-compliant with the values of European democracy:

> "The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils."[466]

Moreover, the Court saw the bans in both cases as necessary for protecting the rights of others. In this case, the Court constructed a "right not to be affected by a religion", which in every way resembles "a right not to be offended", discussed previously in regard to blasphemy cases.

466. Dahlab vs. Switzerland, Application no. 42393/98, p 10.

Although this discussion was briefly touched upon in the chapter concerning the French ban, let us return to the discussion taking into consideration the wider European impact of the cases of *Dahlab* and *Sahin*. Constructing the perception of the veil as a non-democratic symbol contradictory with principles of tolerance and respect for others pushes Islam as such to be seen as necessarily undemocratic and intolerant. Such a construction has effects exactly opposite to those promoting understanding between religions and the growth of religious pluralism. This problem was also observed by Evans[467]. The Courts reasoning, underlines Evans, is based on stereotypes of Muslim women. First is that of a victim and the second that of an aggressor[468]. Such stereotypes promote a vision of religion as "foreign" and as a negative social phenomenon. Propagating stereotypes of this kind, directed to a vulnerable group of students, about whose indoctrination the Court expressed such concern, nourishes rather religious intolerance more than multiculturalism and religious pluralism. It strongly concentrates on "otherness" and chooses to classify this otherness as undemocratic, without paying attention to differences between Muslims themselves and the actual possibility of choice for the women involved.

The concerns of the Court about securing gender equality are understandable. Gender equality is one of the foundations of Europe and it is an undeniable fact that many Muslim women/girls do not wear the veil voluntarily. Looking at cultural traditions of various branches of Islam, even the existence of the religious obligation to wear the veil is questionable.[469] However, the veil is often not only a question of religious choice, but also a question of identity choice. As Weldmölder observes, the wearing of the veil is often the free choice of a woman to underline her ethnic background and occasionally might be even perceived as a modern symbol of Muslim femininity.[470] Pushing all Muslim women into the position of victims of gender equality violation is at least an abuse of facts. And since the approach to women's rights clashing with traditionally

467. Evans C., 2006.
468. Ibid., pp. 71-73.
469. Weldmölder H., 2007, pp. 155-165.
470. Ibid., p 159.

Christian religious perceptions, is not even close to being so strict[471], "othering" Muslims carries a message of Europe's relativism in its approach to Islam and Christianity. It also carries a danger of perceiving a state and, more widely, Europe as an enemy of religious freedom, which can have no other consequences than the intensification of fundamentalism. This way, these judgements' effect may be exactly the opposite to prevention of fundamentalism, what seems to have been the key concern of the judges.

Finally, from a strictly legal point of view, protecting the rights of others in this context lacks actual legal foundation. Similarly, like in the case of older blasphemy cases, it constructs "a right" that does not exist in the convention nor in any of the legal systems, "the right not to be affected by a religion". Such artificial legal constructions impose disproportional exclusions of either side of the participants in the religious versus secular values argument. Whereas "the right not to be offended in religious feelings" excludes atheists or agnostics, "the right not to be offended by a religion" discriminates against religious individuals. I firmly disagree with Weldmölder, who sees the introduction of a headscarf ban as necessary for protecting the freedom of others and as fulfilling a democratic state's duty of neutrality. As argued above, such a ban hardly carries a message of neutrality. Moreover, the freedom of others is constructed by Weldmölder as a kind of collective secular morality demanding protection from religious symbols. As Rawls emphasises, a liberal democratic state does not rely on a collective understanding of morality.[472] Regardless of what kind of collective morality it is, secular or religious, it is not shared by all members of a democratic society. Moreover, basing legal argumentation on rights that do not exist and pose a danger of undermining legal principles such as tolerance and the achievement of religious pluralism is dubious. If limitations are based on non-existent rights, the margin of appreciation in limiting freedoms due to protecting the rights of others becomes unpredictable.

To finish this brief discussion, I want to remind of a quotation from the latest COE approach to blasphemy and religious and non-religious coexistence in a religiously pluralist society:

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471. See the previous discussion on reproductive rights.

472. Rawls J., 2005, e.g., pp. 40-43 or 174-176 .

> "(…) in a democratic society, religious groups must tolerate, **as must other groups**, critical public statements and debate about their activities, teachings and beliefs(…)".[473]

A democratic society cannot construct a right to be offended by either religion or non-religion, but must facilitate the coexistence of both.

6.6.3. Education for peace/education for citizenship

In 2002 the Council of Europe adopted another resolution regarding education, a recommendation on education for democratic citizenship.[474] The recommendation advocated the adoption of education for citizenship, which was seen to be "a factor for social cohesion, mutual understanding, intercultural and inter-religious dialogue, and solidarity". The recommendation and its appendix focused on both objectives of introducing such as subject as well as methods of its teaching. The objectives of such education included promoting a free, tolerant and just society and defending the values and principles of freedom, pluralism, human rights and the rule of law as foundations of democracy. In accordance with this recommendation, many countries have introduced subjects such as education for citizenship or education for democracy. At first glance, these new subjects do not have a lot in common with religious education and potentially should not be an area of conflict between a state and religious communities. On the contrary, the purpose of these subjects is to build religious and multi-cultural dialogue. The Spanish example, however, illustrates that a seemingly neutral subject like Education for Citizenship may be grounds for a legal dispute involving the right of parents to determine about the education of their children in conformity with their own beliefs and conscience.

Spanish Education for Citizenship was introduced by an amendment of the Organic Law on Education[475]. The amendment introduced a new compulsory subject for all students and imposed an obligation on private

473. Blasphemy, religious insults and hate speech against persons on grounds of their religion, Report, par. 13.
474. Recommendation (2002) 12.
475. Decree 1513/2006 and Decree 1631/2006.

schools, including Catholic ones, to provide the subject in the school curricula. The purpose of the new subject was to teach, among other things, about human rights and constitutional rights as well as about principles of pluralism and democracy. The introduction of the law was inspired by the above-mentioned recommendation of the COE. Soon, however, the issue raised an objection by the Catholic Bishops of Spain and the Episcopal Conference of the Spanish Bishops issued a special Instruction[476] and a press release[477]. The instruction commented on the negative influence of secular ideology on the Catholic population and the press release concentrated solely on the new subject and its moral influence on Catholic pupils and students. The Bishops argued that the state had no right to impose any particular set of morals on the students, whether secular or religious, and that Education for Citizenship did morally influence students both through its form and content. They also argued that the state had no right to control private schools, primarily Catholic ones, by imposing on them the obligation of teaching Education for Citizenship.

Ultimately, Catholic parents in a few Spanish provinces requested the right to exempt their children from attending the classes. The exemption was not granted and the case culminated in the recent judgement of the Spanish Supreme Court.[478] In January 2009 the Court sustained the obligatory nature of the course without exemption. The Court declared that the exemption and the right to determine the moral education of children apply to matters of religion and morals and that Education for Citizenship was different in nature from religious education. The Court stated that, indeed, the state must remain ideologically neutral, but Education for Citizenship as such was not meant to teach any particular moral views but instead introduce a variety of views present in a pluralistic society and teach respect for basic rights. As long as the subject was taught in a morally neutral manner, without imposing any moral stance on the students, it was found to be in conformity with the Constitution

476. Plenary Assembly of the Episcopal Conference of Bishops, Pastoral Instruction, Madrid, 23.11.2006, Article 18.

477. Press Release of the Episcopal Conference of Bishops, 01.03.2007.

478. Supreme Court, Sentence on Education for Citizenship and the existence of the right to conscientious objection, no. 905/2008, 29.01.2009.

and the European obligations of Spain. The Court also confirmed that law places an obligation on the state to control education, including control over the obligatory nature of education and assuring that curricula comply with democratic principles both in private and public education.

Although no case on the European level has yet emerged, it is reasonable to expect that the ECTHR would agree with the line of reasoning of the Spanish Supreme Court. After all, the introduction of such a subject was done in accordance with the COE recommendation, which encouraged the promotion of democratic values through such types of education. The issue arising from the perspective of equality and religious pluralism is whether the promotion of democratic values can conflict with sincere religious views. As we saw, for instance, in the example of the Åke Green case, in regard to hate speech, it can. However, the difference lies in the element of coercion. While the state in the Green case attempted to force a person to silence or perhaps even change his beliefs, the panoramic education for citizenship does not attempt to force anyone into any thinking, but to present the variety of views of the modern society.

The issue of balancing rights and ideological influences will be discussed in detail in the further theoretical chapters in part III of this volume dealing with understandings of European democracy. But as mentioned before, democracy is not an ideologically neutral conception and resignation from the promotion of democratic values leads to further political discussion on just governance models. To sum up briefly, the key issue in cases of conflict of democratic values and the "secular indoctrination" of religious citizens is a broader question. European democracy is nowadays not only an electoral system of governance but also additional principles promoting a just and pluralist society. Moreover, democracy is an agreed common European value, confirmed in the law, both on the EU and COE levels. Thus "democratic indoctrination" can hardly be seen as equivalent to religious indoctrination as they are essentially different by nature. Whereas religious indoctrination limits moral choices, "democratic indoctrination" promotes respect for different choices. And although some democratic values might not be consistent with some religious doctrines, it is important for both religious and non-religious citizens to understand and accept the moral choices of others, so that a democratic society can function.

Another issue is the "democratic indoctrination" imposed on confessional schools. Although it is always controversial to say that some religious principles do not comply with requirements of democracy, such a fact cannot be seriously denied. Religion and modern democratic principles do not always go hand in hand and religious teaching on, for example, sexual minorities can clash with modern European approaches, expressed, for instance, in the European Charter. Can a state require religious schools to teach on rights that religious communities do not recognise? On the one hand, a state should ensure the realization of democratic principles and the promotion of rights and democratic values. On the other hand, the right to practice and preach religion should also be recognised. Drawing a line here cannot be simple and depends on the conceptual stance on democracy. Although the promotion of democracy is essential for maintaining pluralism and the facilitation of moral choices, I believe the state should refrain from influencing religious organizations as such. First of all, such influence, as the Spanish example has shown, creates resistance and objections. Such objections lead to juxtaposing democracy and religion. Even though, as explained later in this volume, a certain degree of secularism and neutralism is unavoidable for the maintenance of a democratic society, multiculturalism should leave a certain margin of interpretation of democratic principles to religious communities and individuals choosing to belong to them. Education on rights and democratic principles is essential, but in the case of confessional schools, the state should allow them to interpret such education in line with their own moral choices and principles.

A certain objection may arise. It may be argued that such leeway will increase the danger of creating religious extremism. I would, however, argue the contrary. In the case of confessional schools, some doctrines non-compliant with secular standard will be passed in any case. If the state takes a very strong secular stance on the issue and forces confessional schools to teach according to a secular standard, extreme religious doctrines will receive additional reinforcement. They will be taught as a clear opposition to the obligatory secular subject and treated as a defence against secularism. In this way, the purpose of introducing the secular subject will be brought to naught. Allowing religious communities to interpret these principles in according to their doctrine allows students

to learn in ways consistent with their consciences. After all, confessional schools are not the same as public secular schools. Allowing for the existence of confessional schools includes a certain pre-agreement of the state, for communicating ideologically influenced knowledge. Imposing an obligation to teach about secular principles, without the possibility of their re-interpretation, may indeed seem to be "secular indoctrination". This argument could be developed further and deal with the existence of confessional schools as such. But I believe hardly anyone would argue against the establishment of such schools. Banning such schools could hardly be defended as democratic or supportive of religious pluralism.

6.7. Securing religious pluralism and equality in education – convergent standard under European law?

Although there is no strictly binding legal common standard in regard to religious education in Europe and models differ considerably, certain criteria for the convergence of the models are visible. Due to the complicated matrix of the rights of children, their parents and teachers, the issue of religious education is not purely a question of law but also of pedagogy and politics. Even if areas of education belong to the sole competence of the nation states of Europe, legal issues arising in his area on the European level have shaped certain standards that cannot be exceeded. Christoffersen sees the source of these converging standards primarily in the ECHR but also in other European developments.[479] In addition to legal sources, I see the convergence criteria in recommendation documents and European policies that have at their core the promotion and facilitation of greater religious and cultural pluralism and equality. These documents have shaped a new multicultural and religiously plural standard, which is not yet legally binding, but strongly recommended. Some of the agreed European standards, like those concerning the veil, are questionable from the perspective of increased religious pluralism and respect for freedom of religion and freedom of expression in religious matters. The majority of developing approaches and convergence criteria,

479. Christoffersen L., 2006, pp. 21-58.

however, lead to the facilitation of greater choice and greater respect for individual questions of conscience. The limits in regard to education, which cannot be exceeded, are those of attempting religious or ideological indoctrination or not securing an efficient system of exemption. Strategies that are advocated by the COE and in the judgments of the ECTHR include offering a comprehensive course on religions taught in a non-preaching manner.

Although no common standard exists, guidelines as to the recommended standards are clearer than ever before. These standards include the obligation of states to avoid as far as possible any form of ideological coercion in the field of education. Even though the facilitation of everyone's choice is impossible, if the functionality of educational systems is to be sustained, I am convinced that the systems should avoid implementing measures that would amount to "othering" of pupils on the basis of their religious or non-religious convictions. In cases of unavoidable conflict of religious values with democratic rights and values, confessional schools should be allowed the maximum choice of interpretation of such a conflict in accordance with their doctrines in order to allow alternatives to strictly secular approaches. Although the promotion of democratisation is at the heart of ensuring religious and cultural pluralism, the democratic state cannot benefit from "secular indoctrination" imposed on confessional educational centres. Such an attempt inevitably puts religion and the state as well as democracy at opposite ends of the spectrum. Such a contrast is extremely dangerous for the development of tolerance and unnecessarily leads to the perception of European democracy as hostile to sincere religious beliefs.

Part III:
Theoretical Considerations of a Democratic Model for Religiously Plural Europe

7. Religion and democracy – a constructivist approach

7.1. From problems of law and religion in Europe to problems of European democracy

As illustrated so far, despite the fact of sharing the same principles concerning religion and equality, law on the surface level differs significantly in European countries. Even the interpretation of what is and what is not considered a religion or belief[480] can lead to the marginalisation or otherisation of some individuals. Law on the surface level in European countries does not necessarily correspond with the underlying common democratic European principles. These principles often tend to be treated superficially or even ignored in the process of building democratic consensus in particular European societies[481]. Public reason is still often understood as comprising common principles of a culturally homogenous population. Meanwhile, as Young observes, differences may be as strong a deliberative resource as similarity[482]:

> "If citizens participate in public discussion that includes all social perspectives in their partiality and gives them a hearing, they are most likely to arrive at just and wise solutions to their shared problems. Group difference is a necessary resource for making more just and

480. See the discussion in part 2.4 and 2.5.
481. See an earlier discussion on Greek and Polish constructions of national identity as religious identity in the respective chapters of Part II.
482. Young I. M., pp. 398-404.

wise decisions by means of democratic discussion (…)"[483]

In order to: increase the recognition and inclusion of religious "others"; increase the coherence of the legal system; and minimise the disparity between legal principles and the application of the law on its surface level, democracy must be approached in a deep and substantial way. It cannot be understood only as a way of reaching political decisions and the cultivation of national traditions. In this part, I present a deliberative approach to democracy. I deal first with the set of principles that are considered democratic and analyse their importance for religious equality and pluralism. Finally, basing my conceptions on the classical liberal democratic and deliberative approach presented in Rawls' *Political Liberalism* and *A Theory of Justice*, I attempt to construct a theoretical model of principles of justice that ought to be taken into consideration in a multicultural society. The aim of the model is to combine liberal and communitarian concerns so as to avoid the otherisation and exclusion of differently religious individuals and communities. It puts emphasis on common European principles and understands law in the European polity as a unity, which despite its various sources and levels ought to strive for coherence. The source of this coherence is sought in common democratic principles, which are understood as the deep structure of the law.

7.2. Democracy - secular versus post-secular approaches

In previous chapters, I have in certain parts of the discussion referred to the fact that democracy is not a value-free concept. As previously underlined, I am convinced that democracy is, on the contrary, a concept with a fixed and firm set of values that constantly develop and expand. Modern democratic requirements influence religions and religious communities and their position in a democratic society. In this chapter I analyse what the modern requirements of democracy are and how they influence religious coexistence. I argue that the Rawlsian model of "reasonable consensus", with certain adjustments to the demands of religious communities in the post-secular multi-religious era, constitutes the most sustainable model of a democracy.

483. Ibid., p 402.

In a post-secular society, as Habermas reminds, in contrast to the prediction of modernism, religion and communities of faith still demand public influence and relevance.[484] This demand clashes with the current vision of democracy, which is inherently a humanist secular construct. The demand of religious communities to exist actively in a public sphere meets varied responses. On the one hand, traditional religions still enjoy substantial freedom to exist in a public sphere in certain countries. The examples used in this volume as well as many others illustrate this tendency. Greek blasphemy laws, limitations on women's reproductive rights or the endorsement of natural law in the Maltese constitution can be highlighted here. Other religions, on the other hand, meet difficulties in gaining social and legal acceptance. Islam is defended against by invoking secular arguments. New religious movements, on the other hand, meet difficulties in seeking registration and recognition as religions.

But not only approaches to various religious traditions differ. Also the religious communities themselves differ in their demand to be present in the public sphere. Some of them demand a large influence in public matters. The Catholic Church, for instance, sees its role as a moral guide for society. Islam consists of both moral and legal systems that are intertwined and difficult to divide. Some others, like various new religious movements, see religion and its practice as an individual issue.[485]

Religious groups that demand a large influence in the public sphere often accuse democracy of imposing a secular set of values and ignoring religious values in public life. The Spanish veto of the Catholic Church against the introduction of Education for Citizenship serves as a good example. In a democracy, religious groups see their set of morals as one of many competing moral models, which could be equally useful for the existence of a democratic state. In this chapter I will argue why not all the moral models are equally helpful and why neutralism and a certain margin of secularism are necessary for the existence of a democracy. At the same time, I will argue why a strict separation between religion and public life, which pushes religion completely out of common social life, is no longer sustainable as a democratic model in a multicultural society. I will analyse

484. Habermas, J., 2008, pp. 17-29.
485. Ibid.

if the democratic model based on Rawlsian postulates could be readjusted to the demands of religious communities and what benefits and dangers such a readjustment may bring. I will use primarily references to the theorists of modern liberal democracy – Rawls, Dworkin and Habermas.

7.3. Democracy as a moral conception and a set of values

In this volume I argue that democracy is not value-free but in fact is a fixed conception based on certain assumptions, which are necessary for its existence.

Dworkin bases the ideal of democracy on the possibility to vote and have an equal share in the choice of political representation. He traces all other features of democracy to the equality of the vote. Free speech or basic liberties are all a result of the equal opportunity to vote. And that equality of vote rights is according to Dworkin a sufficient reason to demand equality for various conceptions of life. Dworkin argues that the majority who believe in a single best way of life do not have the right to impose these conceptions on others because of the equality of their vote.[486] Like Dworkin, I argue that the moral majority is not in a position to impose their preferred way of life on others. But, unlike Dworkin, I see the justification of this assumption not only in the equality of the political vote itself. I am deeply convinced that the "democracy" born in ancient Greece, would not be considered a democracy today. It would be rather seen as an oligarchy of men, who if they were born in a particular privileged class called "citizens" could decide by voting on the matters of the entire Athenian society. The possibility of voting and participation in the political decision-making is undoubtedly still today an essential and underpinning feature of a democracy. But the possibility of voting in itself no longer guarantees the democratic nature of a state. A state in which the election procedure functions but some citizens are deprived of rights would not be considered a democracy today. Rawls calls this distinction a procedural versus constitutional democracy.[487] I believe that in light of

486. See e.g.: Dworkin R., 2002, pp. 184-210 .
487. Rawls J., 2001, pp. 145-148.

international and constitutional obligations, any other "democracy" than a constitutional one would be deemed undemocratic today.

I argue that there are three essential conditions, in addition to the functioning of an impartial electoral procedure, which are necessary for the existence of a democratic state. First of all, a democratic state is nowadays based on certain fundamental principles or, if preferred, values, which I briefly analyse below. Secondly, a democratic state today has an obligation to secure the rights of its citizens. And thirdly, a democratic state is bound by its international obligations, which it should respect. The lack of any of these three conditions or the lack of the possibility of voting negates the democratic nature of a state in its modern understanding. These three conditions are intertwined and reciprocally influence each other. International agreements play an extensive role in the understanding and development of human rights. Human rights influence our understanding of democratic principles. Democratic principles, in turn, influence both the development of international law and our understanding of particular rights. This reciprocal influence of democratic conditions is illustrated in a figure below.

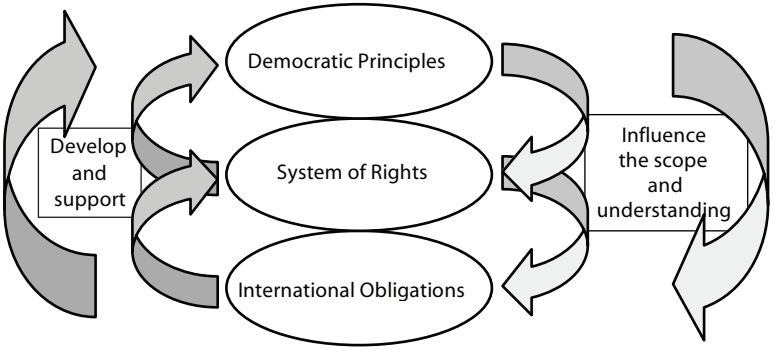

Figure 3: Correlation of democratic fundamentals.

These underlying democratic foundations are not value-free. For instance, the principles of equality, pluralism and non-discrimination in fact constitute a certain set of moral values. They include a particular vision of the society which could be seen as a particular moral vision. But in contrast to other moral visions, these principles allow various moral systems to coexist within this system to the greatest extent in a modern pluralistic and multicultural society. The principles on which a democracy is based are not merely secular moral concepts, as religious communities may choose to see them. They are the essential requirements; it could be said practical requirements, that allow for a plurality of moral concepts within. They allow for a plurality, without which a democracy cannot function these days. And if a state chooses to be based on different moral foundations, based on any particular religious view of life, it may be difficult or impossible to secure the equal respect of every citizen's way of life. Other moral worldviews than those which are based on the presumption of equality of all moral conceptions could and in all likelihood would influence the core of the beliefs of citizens in a way impossible to accept in a religiously plural society.

7.4. Legal principles as fundamentals of liberal democracy

I approach democracy as a political and legal construct. As mentioned above, I argue that a democratic state nowadays is based on a set of principles. The set of principles may vary and be broader or narrower. In a welfare state, social welfare and equality of the distribution of goods is a leading principle to achieve, but in another democratic state, social welfare may not be of equal importance. International law, as mentioned above, has influenced understandings of common democratic values and principles. These principles include primarily equality, non-discrimination and the rule-of law.[488] Smaller regional international law systems, like those specific to Europe, have developed a more complex common set of democratic principles. These principles have evolved over time and some of them that were not considered necessary for a democratic state until

488. See discussion below.

recently are considered to be such nowadays. Some principles have been derived from others. Just like the pre-conditions of democracy influence one another, so do the principles as show in the figure below.

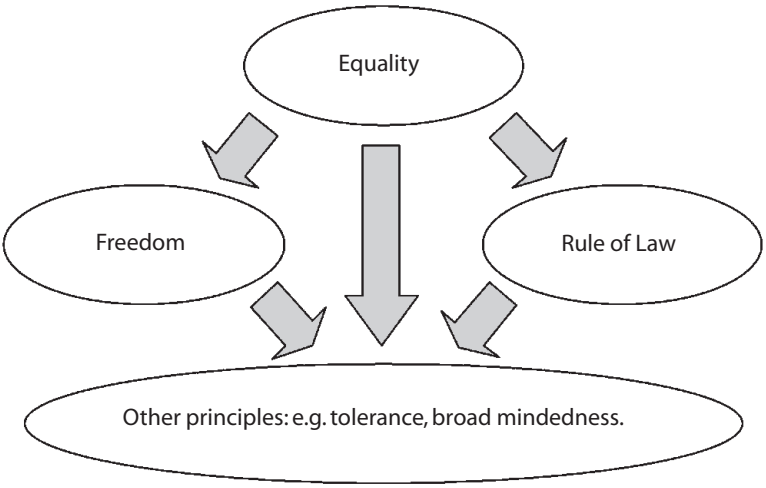

Figure 4: Correlation of democratic principles.

For the purpose of this dissertation, I deal in this chapter with the values that are considered to form a democratic credo in Europe. In addition to the previously mentioned equality, non-discrimination and rule-of law, the European democratic core includes pluralism, tolerance, broadmindedness and solidarity. These principles are either explicitly included in European-wide legal obligations, including human rights and EU treaties, or then have been developed in the process of interpretation carried out either by courts on the European level or by other European institutions. The Treaty on the European Union in its current shape provides that the Union is based **on liberty, democracy, respect for human rights and fundamental freedoms, and the rule of**

law.[489] The Lisbon Treaty extends these principles and in addition to the currently included fundamental principles, declares that the Union is based on principles of equality. In addition, the Treaty assumes that **pluralism, non-discrimination, justice, solidarity and the equality of men and women** are common principles for European democracies.[490] The Statutes of the Council of Europe provides that the founding principles of the Council are the **rule of law and the enjoyment by all persons of human rights and fundamental freedoms**.[491] These European principles are comparable to what Dworkin includes in the catalogue of liberal principles.[492] European democracy can thus be characterised as a liberal democracy. Below I analyse briefly each of the principles and explain their importance and origin. I start with analysing the equality principle as the most important and explain its relevance for every subsequently analysed principle.

7.4.1. The principle of equality as the fundamental democratic principle and the source of other principles

Let us first deal with the principle of **equality** of individual members of democratic societies. I believe this principle is the fundamental principle in a liberal democracy. Liberal democracy focuses on an individual and his or her rights. Such a focus leads to the principle of equality. If all individuals are in focus as individuals it is impossible to treat them differently due to their characteristics. If the political goal is to assure the rights of everyone, liberal democracy must approach all individuals as equals. Dworkin traces the principle of equality back to the equal right to vote and explains the whole functioning of democracy as the consequence of the equality of voting rights. Certainly, the origin of the principle of equality can be traced back to the equality of the vote. Nowadays, however, the principle of equality is not only a simple corollary of the

489. Treaty on the European Union, Article 2.
490. Treaty of Lisbon, Article 2.
491. Statutes of the Council of Europe, ETS no. 001, London, 05.05.1949, article 3.
492. Dworkin R, 2002, pp. 181-204.

right to vote. Its understanding has evolved and broadened. In Europe the understanding of the principle of equality has attained characteristic qualities that have been systematically expanded in the process of European integration and judicial proceedings before European courts.

According to Dworkin, the principle of equality is more important than the absolute right to liberty.[493] Liberties are a consequence of equality. Indeed, without the principle of the equality of each member of a democratic society, the realization of other principles or rights would not be possible. If members of a society were not assumed to be equal, it would change the scope of rights including the basic democratic right to vote. The legal and political construction of a state would be based on premises other than democratic. The classic example of Athenian democracy shows how a lack of equality affected the right to vote. Only those who enjoyed the status of citizens were included in the decision-making processes. But we need not go as far back as ancient Greece. Still a hundred years ago women were not allowed to vote in the majority of European countries, with the notable exception of Finland[494]. When the principle of equality is removed or circumscribed, even the democracy's leading feature, political participation, is affected.

The assumption of equality is necessary for the existence of a democratic state. The understanding of equality may, however, differ. We can distinguish many kinds of equality. Dworkin, for instance, in *Sovereign virtue: the theory and practice of equality* distinguishes equality of resources, equality of welfare and political equality.[495] Habermas, on the other hand, explains equality from the perspective of distributive justice and equal inclusion. He argues that the principle of equal treatment from the perspective of distributive justice requires that all citizens have equal opportunities to make use of formally equal rights and liberties in realising their individual life plans. From the perspective of inclusion, the principle of equality requires the promotion of sensitivity to the claims of groups suffering discrimination.[496]

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493. Dworkin R, 1978, pp. 240-258 .
494. See: Markkola P, Nevala-Nurmi S-L., Sulkunen I., 2009.
495. Dworkin R., 2002, pp. 11-211.
496. Habermas J., 2008a, p 266-267.

Rawls defines equality by using a negative definition, which explains what inequality means. In Rawls' *A Theory of Justice*, inequality is a state of affairs in which one class of persons has greater liberty than another or liberty is less extensive than it should be.[497] Equality is thus not simply an equal distribution of power over political decisions. Equality means equal respect for fundamental differences, such as race, sex, religion or ethnic background. Nowadays in Europe, this also means equal respect for a person's sexual orientation.[498] Equality means that these differences cannot justify different discriminatory treatment and different access to rights.

Absolute equality is utopian. For the purpose of the achievement of other principles, however, the principle of equality has the greatest importance. Equality, meaning more than just simple equality of political participation, is essential for the achievement of other democratic principles. This volume to a large extent approaches equality from the Habermasian perspective of inclusion and draws on the Rawlsian explanation of inequality as best corresponding to "otherisation".

7.4.2. The principle of freedom

The principle of individual freedom is another fundamental principle on which the modern understanding of democracy is built. It can be also named liberty. Liberal democracy recognises the personal liberty of each person, which the state as far as possible should respect. The rights of an individual embody the principle of liberty. Liberal democracy guarantees its citizens certain uninfringeable area of personal freedom, which can be limited only for a just purpose of protecting the liberty of others.

The relation of the principle of equality and the principle of freedom determines the nature of democracy. Dworkin in *Taking Rights Seriously* analysed the relation between these two principles. In Dworkin's analysis the principle of equality appears to be superior to the principle of liberty as he calls it. He ascertains that a government that respects the principle of equality can restrain liberty only with very limited types of justification.

497. Rawls J., 1971, pp. 203-204.

498. See: European Charter, Employment Equality Directive.

These types of justification can be mainly based on the protection of the liberty of others.[499] This view expresses the idea of balancing different rights. In Europe and the ECHR system, the idea of balancing different rights is essential. No freedom is absolute. The principle of equality may require limiting a person's freedom in order to protect the freedom of another. Therefore, I agree with Dworkin, that the principle of freedom (or liberty) is not absolute. "There is no such thing as any general right to liberty" reminds Dworkin.[500] There are only particular liberties and the principle of maximal respect for these liberties. In a liberal democratic society, the principle of equality ultimately shapes the extent of personal freedom.

Habermas approached freedom as a natural condition manifesting in free will and accessible by self-experience. One's inner nature enables the conditions of freedom through somatic impulses, strivings, moods and free will.[501] Rawls, in his conception of justice, sees citizens as free primarily in the aspect of moral choices. This conception is important for this volume as it touches directly on the topic of religious freedom. The Rawlsian conception of free citizens implies that citizens are free if they conceive of themselves and of others as having the moral power to have their own conception of the good and the ability to pursue this conception or change it.[502]

The principle of freedom requires that each individual's freedom of fundamental life choices be guaranteed. In the situation of conflicting freedoms, the principle of equality is ultimately the decisive factor defining the borderlines of particular freedoms.

7.4.3. The principle of the rule of law as the guarantee of stable democracy

The principle of the rule of law is strictly linked with the idea of securing equality and rights. It protects individuals from the arbitrariness of the authorities and secures the proper and balanced functioning of the entire

499. Dworkin R., 1978.
500. Dworkin R., 1978, p 277.
501. Habermas J., 2008a, pp. 191-200.
502. Rawls J., 2001, pp. 21-23.

legal system. It ensures that the will of majority will not be introduced into the system outside of legal procedures.

As Rawls reminds, a tyrant may change laws without notice, but they would not be laws, since they would not provide the basis for legitimate expectations. The rule of law allows citizens to expect how law is created and what law is.[503] Rawls in *A Theory of Justice*[504] observes that the rule of law implies a few precepts. First of all, he argues that the system of rules organises the conduct of members of the society and that such rules must not impose a duty to do what cannot be done. In other words, it includes limits to arbitrariness. Secondly, it includes a duty to enact and execute laws in good faith. Authorities chosen by a majority cannot enact laws with the intention of securing solely their own interest. Rawls argues that laws and commands are accepted as laws and commands only if they are believed to be possible to be obeyed and executed. The rule of law thus affects the social acceptability of the law.

Habermas argues that modern coercive law must be generated in accordance with legitimacy guaranteeing procedure. The procedure of law-making must be legally institutionalised and take into consideration the principle of equal inclusion of all members of the political community. At the same time, Habermas reminds that only a rule of law without other conditions of democracy is not sufficient.[505]

All in all, the rule of law serves the purpose of securing the social coexistence of the members of the society. In a modern democracy, the expectation of respecting the rule of law is not only a construct of legal theory or interpretation. It is also legally sanctioned in various documents of a constitutional nature. It implies respect for fundamental democratic principles. In a liberal constitutional democracy it is a safeguard guaranteeing that fundamental principles including equality and the freedom of an individual cannot be replaced by other principles by the sole will of the majority.

503. Rawls J., 1971, pp. 235-243.
504. Ibid.
505. Habermas J., 2001, pp. 766-81.

7.4.4. Other principles as the necessary corollary of equality, freedom and the rule of law

Equality, freedom and the rule of law are the foundations on which other democratic principles have been developed. I concentrate here on those principles which the Lisbon Treaty lists as common European principles: non-discrimination, pluralism, toleration, broadmindedness and solidarity.

The principle of non-discrimination is a safeguard of the principle of equality. Differences in treatment do occur and absolute equality is utopian. The fact is that human beings are not born equal with natural capacities nor do they enter society with equal economic resources. The principle of non-discrimination helps to prevent marginalisation and further disadvantaging in the enjoyment of freedom of individuals burdened by unprivileged social conditions. The principle of non-discrimination establishes whether differences in treatment are proportional and necessary in a democratic society. In the ECHR system the non-discrimination principle is assessed by examining whether the limitations of equality are well-balanced, based on just purpose and proportional to the aim. And even then, the principle of equality will ultimately require evaluation whether the difference in treatment is necessary in a democratic society. Discrimination is a state of affairs where a group of persons does not receive the same treatment as other groups due to some inherent characteristics they possess. The ECTHR has summarised in its case law that:

> "For the purposes of Article 14 of the Convention, a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised".[506]

The principles of tolerance and broadmindedness are also based on both the principle of equality and the principle of freedom. Tolerance, in a Habermasian understanding, is an agreement of citizens to draw

506. See e.g. Mazurek vs. France, Application no. 34406/97, par. 48.

boundaries that compel the parties involved to adopt each other's perspectives and give them equal consideration.[507] In this understanding tolerance is similar to what Rawls calls "the duty of civility". The duty of civility is a form of strengthening the agreed political construction of justice, liberal democracy. It implies the acknowledgment by citizens that they do not expect others to share their own religious or moral doctrines. Instead the citizens in their "duty of civility" should attempt to seek how to endorse the political conception of justice from the perspective of an individual's doctrines.[508] The Rawlsian "duty of civility" appears to be highly idealistic especially in regard to religious doctrines. The Habermasian assumption that we should respect fellow citizens even if we regard their beliefs as false or their way of life as bad is similarly idealistic. It is in practice nearly impossible to expect that every citizen be tolerant and broadminded. Especially when religious and moral conceptions are at stake, citizens often have difficulties with acknowledging other ways of life as equally worth protection. It is, however, the task of the state to discourage intolerance and prejudice. The state also has a duty to be tolerant and broadminded in framing its policies and laws and in the judicial procedures of applying these laws. This duty includes prevention of prejudice and intolerance.

In European conditions, principles of toleration and broadmindedness have been derived from other principles primarily in the jurisprudence of the ECTHR. The ECTHR has on many occasions repeated, especially in regard to freedom of expression, that it

> "is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[509]

507. Habermas J., 2008a, p 254.
508. Rawls J., 2005, p 465.
509. Vereinigung Bildender Künstler vs. Austria, Application no. 68354/01, par. 26.

The same principles have been reaffirmed in recommendations issued by the COE that have been analysed in this volume, for instance regarding blasphemy laws. These principles strengthen the principle of equality and non-discrimination. Equal respect for other ways of life, other religious views and any otherness requires broadmindedness and tolerance. Although these principles might be interpreted differently by different people, their importance in the interpretation of rights and democratic boundaries in Europe has increased, as can be seen in the COE recommendation.

The principle of pluralism has only recently acquired increased importance in Europe. From the principles of equality, non-discrimination, tolerance and broadmindedness, it is only natural to deduce the principle of pluralism. If all people are equal and tolerant it is natural to assume that the society will differ in its choices, including religious choices. The principle of equality allows the differences to be equally appreciated and accepted. In regard to religion, the principle of pluralism has not been obvious in Europe until lately. Historically, the countries of Europe have been based on particular religious traditions. The populations have been religiously homogeneous or at best have tolerated a few religions different than the dominant ones. Although freedom of conscience was professed as a principle, religious pluralism was not until recently an obvious fact in every country. In some countries like Greece, Malta, Poland or the Scandinavian countries, the population is still relatively homogenous. Like shown on the analysed examples in part II of this dissertation such a situation leads to various problems concerning the application of the principle of pluralism. Migration and the exchange of cultures, however, started to affect even those comparatively homogenous societies. Multiculturalism drew attention to the necessity of strengthening commitment to pluralism as a principle. This tendency is visible in the analysed recommendations and other interpretative documents. Pluralism, both religious and other, must be respected if the democratic model is based on the principle of equality.

Finally, the Lisbon Treaty mentions the principle of solidarity. The principle of solidarity may be, in addition to tolerance, understood as a dimension of the Rawlsian "duty of civility". In this case, solidarity would mean support for the common principles of justice regardless of one's

own doctrinal and moral conceptions. For the purpose of maintaining democracy as a political and legal construct, solidarity as "the duty of civility" is particularly important. Solidarity, like tolerance, strengthens the democratic foundations of the society. Citizens' commitment to fundamental principles is as important as the commitment of the state as an institution.

But solidarity may also include a collective aspect. Solidarity as a principle can refer to the maintenance and empowerment of cultural groups. It may mean solidarity in preserving the group identity of a particular social group. In this understanding, solidarity would be a corollary of cultural rights.[510] From the perspective of an individual, group solidarity is a more natural form of solidarity than the general solidarity of the whole society for the purpose of advancing political goals. Individuals having different conceptions of life will more naturally solidarise with other individuals sharing similar moral conceptions, rather than with those whose ways of life differ considerably. Similar to tolerance, the assumption of all citizens' readiness to support the chosen political construction is very idealistic. For this reason, the principle of solidarity opens the door to varied interpretations. In conjunction with the principle of equality, it may give rise to increased demand for acceptance of and respect for cultural and religious group rights.

7.5. The role of rights in democracy

Rights are a concretisation of the principle of freedom. The principle of freedom is moulded into various rights and freedoms of an individual. A modern constitutional democracy does not exist without the concept of rights. The rights stem from equality and vice versa. The principle of equality and the ideal of rights are indivisible. In Europe, human rights stem from the national constitutions and the European Convention on Human Rights. Moreover, if the process of ratification of the Lisbon Treaty succeeds, the European Charter of Rights will become a part of the Treaties and the EU will become a party to the Convention. The

510. Habermas J., 2008a, p 297.

human rights documents have undoubtedly shaped both the ideal of rights and the understanding of the democratic principles that were described above. The states can include a broader scope of rights than those secured by the international agreements. The scope of secured rights must not be, though, narrower than the catalogue of rights guaranteed in the international obligations ratified by states.

The process of understanding these boundaries of rights in Europe is nowadays influenced by the process of integration and the development of understanding of democratic principles. The principles play a greater and greater role in judicial procedures concerning rights, their conflicts and their boundaries. The role of rights is to protect the individual from the state's arbitrariness as well as the majority's arbitrariness. In Rawlsian theory, the rights, or as he calls them 'basic liberties' are the first and primary condition of justice:

> "Each person is to have an equal right to the most extensive basic liberty comparable with similar liberties for others."[511]

For Rawls, a just and democratic society does not exist without citizens having basic equal rights. Those rights, according to him, should include at least: the right to vote, freedom of speech, freedom of assembly, liberty of conscience and thought, freedom from arbitrary arrest and the right to hold personal property.[512]

For Dworkin, on the other hand, the rights are a consequence of a chosen political theory and are necessary for advancing the goals of that theory. The goals might be different, like the achievement of social welfare, for instance. Failure to protect the rights is unjustified within the selected political and legal theory. The goals and their importance may be gradual. Thus some rights may serve the purpose of achieving a goal that serves a more fundamental goal.[513] In the context of democracy, chosen as a political model, the achievement of democratic principles can be seen as the goal for which the existence of rights is necessary. And

511. Rawls J., 1971, pp. 60-65.
512. Ibid., p 61.
513. Dworkin R., 1978, pp. 169-171.

in the hierarchy of democratic principles, as argued above, the principle of equality appears to be the most fundamental. In European democracy, as analysed above, also other principles, such as pluralism, tolerance and broadmindedness, could be treated as goals. In this dissertation the leading goal that was used as the prism for the analysis was achieving religious pluralism. I agree with Dworkin, that rights are a consequence of a chosen political theory. In Europe this theory is liberal democratic theory. And thus the rights and their boundaries should be shaped and interpreted in accordance with the underlying principles of the theory. The question of the post-secular and multicultural era, however, is how far the exception from the universality of rights may be granted? Can a religious community appeal to the principle of equality in selecting the catalogue of rights important for it? Or can members of a religious community give up their rights in the process of pursuing their religious goals? I return to this problem at the end of this chapter.

The borderlines of rights end where the rights of others begin. It is often impossible to foresee how a particular collision of rights will be solved. In the case of rights connected with religion, multiple conflicts may occur. They may be conflicts between freedom of religion and freedom of expression, or between the right to privacy and the freedom to convert as an aspect of religious worship. Therefore, I underline again that the principles as forming the primary foundation of democracy must be treated as guidelines in every singular case of the rights clash. If rights are separated from principles, their boundaries become impossible to determine and might bring contradicting solutions in similar cases.

Therefore, throughout this volume I have repeatedly referred to democratic principles. I ascertain that invoking solely rights in a discussion on religious issues is fruitless. The boundaries of rights can be shaped freely if they are not interpreted according to a currently recognised set of principles. The principle of equality, and in the case of

Europe, the principle of religious pluralism growing in importance should be taken into consideration both in the creation and in the application of law.

7.6. The role of international obligations in a democracy

International obligations are in large degree a leading force shaping the understanding of the principles considered nowadays as universally democratic. The UN Charter of Human Rights has in particular developed and strengthened the idea of protecting of an individual from the state's arbitrariness and "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[514] The Charter has entrenched the principles of equality and non-discrimination. Habermas refers to this role of international law as constitutionalisation[515]. Due to the growing role of international law, Habermas observes that the understanding of the role of a nation state must be adjusted and the concept of national sovereignty must be adapted to governance beyond the nation state.[516]

In Europe, the European Union and the Council of Europe as the centres of European integration are based on international treaties. Even though the European Union is these days to a large degree a legal system of its own in certain respects similar to national legal systems, the origins of this legal system lie in international obligations. Although Europe is currently going through the processes of new adjustment of the role of a nation state the processes of integration were initiated through international law.

Being bound by international obligations, expressed in the maxim *pacta sund servanda*, is a part of the rule of law in a broader international context. A democratic state cannot choose to quit being bound by its international obligations and then choose freely to be bound again at any convenient point in time. A breach of obligations is sanctioned by various procedures before international courts. Leaving international organizations where the treaties are drafted and ratified, solely to avoid being bound by certain obligations, will affect the international position of the state. In Europe such a case occurred in the late 1960s and early 1970s. Greece, after the military junta's takeover, was accused by the European Commission

514. Charter of the United Nations, Article 1.3.
515. Habermas J., 2008a, p 318.
516. Ibid., p 319.

of Human Rights of breaking most of the obligations stemming from the Convention on Human Rights. Disrespect for these international obligations was sanctioned with a suspension of the rights of Greece as a member of the Council of Europe. In order to avoid suspension, Greece left the organization in 1969. That move was not considered democratic and Greece under the Regime of the Colonels, due to rights violations and international law violations, was not considered a democracy.[517] The readmission of Greece into the Council was considered in 1974.[518] The key consideration confirming the democratic nature of the Greek state and its readiness for readmission was compliance with Article 3 of the Statutes of the Council of Europe. Article 3, in addition to the obligation to secure the rights of citizens, requires acceptance of the principle of the rule of law and the obligation to cooperate sincerely for the realisation of the aims of the organization. International cooperation and respecting international obligations are among the foundations of democracy. Habermas sees this obligation of a liberal democratic state as a part of fulfilling a "social contract" lying at the foundations of a democratic polity.[519]

7.6.1. Rawlsian reasonable consensus as a model for religious peace

As explained above, I assume that democracy is a political construct based on democratic principles, the idea of rights and compliance with international law. This understanding resembles and in large degree is based on John Rawls' idea of justice as a political construct. Due to this similarity, I naturally agree with the Rawlsian model of religious coexistence based on the idea of reasonable consensus. However, I believe that in a multicultural and religiously plural democracy, a certain margin of exception should be considered in regard to religious communities.

In his *A Theory of Justice*, *Political Liberalism* and *The Idea of Public Reason Revisited*, John Rawls deals primarily with the problem how a democratic conception of a state can be reconciled with what he calls "comprehensive religious, political and philosophical doctrines". He

517. Hammarberg Th, Viewpoint, 2007.
518. The Council of Europe, Memorandum Strasbourg 1974.
519. Habermas J., 2008a, p 320.

attempts to establish how it is possible that citizens who share different sincere beliefs based on their religious, political or philosophical doctrines can create a society which can agree to be bound by common rules of political life. He touches upon problems that have been present for a long time in American jurisprudence and which have been troubling the European scene for a relatively recent period of time in comparison to its trans-Atlantic democratic counterpart.

This difference is a result of the historical dissimilarity in the development of religious regimes on these two continents. While America developed a concept of separation of church and state, which Rawls refers to as a conception essential for the development of democracy[520], Europe still today is divided by different religious traditions linked to the national and historical sentiments of particular European countries. While America has attempted to cultivate and adjust to the practical requirements of the separation, Europe still today has countries the constitutions of which recognise a moral power of a particular church to give binding guidelines on moral rights and wrongs[521].

I believe that John Rawls' conception of political liberalism characterised by the central role of justice as fairness and citizens as free and equal is the only model offering a workable solution for the current understanding of European democracy. It offers a practical approach to religious problems of the new Europe in the era of integration, increased migration and growing multiculturalism. I also argue, however, that this model requires a certain careful readjustment to the demands of religious communities in the religiously plural era. Although Rawls himself did not mean his conception to be an actual response to real constitutional problems, but rather a guiding framework for reflection for jurists and citizens, I nevertheless attempt to show why this conception is in fact a conception that can be workable in practice and should be taken into consideration in the process of solving the difficult questions stemming from religious problems of Europe.

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520. Rawls refers to A. de Tocqueville's ideas concerning the role of this separation. See more: The Idea of Public Reason Revisited, Rawls J., 2001.

521. See further details concerning the Maltese constitutional position of Catholicism in the remainder of this volume.

I do not attempt to propose a legal clone of the American system. Rawls' conception of liberalism, although referring to the American system, was not meant to be an illustration of that particular democracy, but a conception of a democracy. Rawls' democracy is an ideal construct not referring to any system in particular. In the parts where it refers to the American system, it does so solely to illustrate the role of particular democratic institutions used in building the ideal democratic conception.

7.6.2. The concept of citizens as free and equal

Rawls takes as the underpinning for his theory a model of a society which is characterised by diversity and pluralism. He calls such diversity "a permanent feature of the public culture of democracy"[522]. This pluralism and diversity apply to what he calls comprehensive religious doctrines and, in connection to them, to individuals' conceptions of the good. Rawls ascertains that all citizens, or let us call them members of a society, can be characterised by certain common features. These features include, first of all, regarding themselves as self-authenticated sources of valid claims concerning life. Secondly, and connected with those claims, is that they have their own conception of the good. And, finally, the last feature is the capability of taking responsibility for their life goals that might be and often are connected with these conceptions and claims. As a natural consequence of this diversity and everybody's conviction of the validity of their own claims, the society members' conceptions collide and clash with one another.

Rawls' model treats all the members of the society and all their conceptions of the good, comprehensive doctrines and other features as equal. In all the above-mentioned features, citizens must be treated as equals and the development of the entire theory of political liberalism is meant to sustain this conception of equality as the ideal to achieve and maintain. Concepts such as liberty or equality are, in *A Theory of Justice* and *Political Liberalism*, considered as inherent to the conception of a democracy and inseparable from it. Citizens cannot be treated as unequal due to their particular reasonable comprehensive doctrine.

522. Rawls J., 2005, p 36.

The equality of all members of society is the underpinning of all democratic liberal ideas and the foundation of the systems of rights. This conception of equality was taken as the underpinning for the analysis conducted in this volume. Also as argued above, the principle of equality is treated as the fundamental principle of democracy and the source of other principles in the democratic model presented here. The principle of equality is also the leading principle of European documents concentrating on the meaning of democracy. For that reason, Rawlsian assumptions are essential for the solution of European problems connected with religions.

However, as illustrated in previous chapters, European states and societies often offer preferential treatment to traditional or well-recognised religions. In Rawlsian theory, if a political society is understood as a community united in affirming one and the same comprehensive doctrine, then such a regime ceases to be democratic. In order to sustain such a regime, a state must use oppressive power to sustain the political community. Criminal law provisions banning offending God, like those in Greece, or the criminal ban on abortion, like in Malta or Ireland, can be pointed out as examples of such oppressive power. Finally, there are states, like Austria, that have very strict laws on the registration of religious communities. Such laws differentiate between legitimate religions and religious "others". Can a state recognising only certain comprehensive doctrines as legitimate be considered democratic or not? Rawls ascertains that the government cannot act to maximise the fulfilment of citizens' religion or religious doctrines, since none such view is affirmed by citizens generally. Such a pursuit gives a society a sectarian, not democratic character. The recognition of all religious conceptions as equal is essential for a democratic state in an era of multiculturalism and growing religious pluralism.

7.6.3. The citizens and doctrines as reasonable and rational

Other requirements necessary for maintaining the liberal democratic model concern doctrines and the citizens themselves. In Rawsian theory, these necessary characteristics are reasonableness and rationality. Reasonableness and rationality are understood differently in the Rawlsian

model and these features apply both to citizens as well as religious, political and philosophical doctrines.

Reasonable persons are those who are ready to propose principles and standards as fair terms of cooperation and abide by them willingly if others do the same. Thus the reasonable is a social element which requires reciprocity. Unreasonableness, on the other hand, is characterised by an unwillingness to honour or propose any general terms of cooperation. Meanwhile, the rational applies to an individual's choices in achieving his/her own aims and the ability to rationalise, balance and prioritise those choices into a coherent scheme. However, the rational should not be only self-centred but should also include the goals and aims of an individual, which are meant to improve and change the individual's community, environment etc. In justice as fairness, the reasonable and the rational are seen as complementary. The reasonable refers to the public, while the rational rather to the private.

In Rawls' theory the reasonable and the rational refer not only to persons but to the doctrines themselves, too. In defining what reasonable doctrines are, Rawls remains cautious in order to avoid arbitrariness. He points to certain essential features of doctrines in general. They cover major religious, philosophical, and moral aspects of human life in a more or less consistent manner and they organise and characterise recognised values so that they can be compatible with one another and express an intelligible view of the world. Finally, what is essential for doctrines is that they do not remain unchanged over time but evolve slowly in light of what, according to the doctrine, can be seen as good and sufficient reasons. These criteria are comparable with criteria presented in various general definitions of religions and beliefs, for example those provided in the studies conducted by Tillich[523] or Smart[524].

The essence of a doctrine's reasonableness is connected with certain democratic characteristics of the entire society. Reasonable doctrines, in Rawlsian theory, recognise that they are one of many reasonable doctrines that reasonable citizens might affirm. Reasonable doctrines recognise that their claims may be of no meaning or value to other reasonable citizens

523. Tillich P, 1973.
524. Smart N., 1979.

adhering to other reasonable doctrines. Thus what determines a doctrine's reasonableness is the recognition that even in a situation of having political power, the persons adhering to the doctrine will not attempt to prevent the rest of the citizens from affirming their own reasonable views. If a doctrine attempts to do that, it is understood by Rawls as unreasonable:

> "When there is a plurality of reasonable doctrines it is unreasonable or worse to want to use the sanctions of state power to correct, or to punish those who disagree with us."[525]

Such self-limitation of the doctrines makes room for reasonable pluralism. Reasonable pluralism, according to Rawls, differs from ordinary pluralism in such a way that in ordinary pluralism comprehensive doctrines would suppress, if they could, the liberty of thought of others. In reasonable pluralism they understand other views even if they do not believe in them.

This aspect of the Rawlsian model puts the burden of sustaining pluralism on citizens and doctrines themselves. In this respect, the theory is very idealistic and corresponds to the principle of tolerance. Adherents of the doctrine very often are unwilling to compromise and do not see other world views as equally worthy. The confirmation by Pope Benedict of the theory of the primacy of the Roman Catholic Church over other Christian denominations may serve as one example of unwillingness to engage in dialogue.[526]

The European democratic model, however, in theory agrees with the Rawlisian assumption that only reasonable and rational citizens and doctrines can build a democracy. COE's interpretative recommendations deeply discourage and condemn fundamentalisms that are seen as unreasonable.[527] Such fundamentalisms are excluded from the public discussion due to the very fact of their unreasonableness. The

525. Rawls J., 2005, p 138.

526. Pope highlights primacy of Church of Rome, asks for prayers, Catholic News Agency, Vatican City, 22.02.2009.

527. E.g. Recommendation 1396 (1999), par. 3, Recommendation 1804 (2007), par. 16.

unreasonableness of a doctrine justifies refusal of its equal treatment in comparison to other doctrines. For the maintenance of the political conception of democracy, such an approach appears to be necessary. It is impossible to achieve democratic goals and sustain democratic principles if we guarantee the equality of non-democratic or anti-democratic conceptions with democracy supporting conceptions. The concept of reasonable doctrines, however, is essentially based on the understanding of Western and primarily Christian religions. And as such it may not be sensitive enough to cultural differences. On the contrary, applying the analogy to Christianity may lead to an automatic labelling of different conceptions as "unreasonable" or in other words, "fundamentalist". Such labelling was used in the *Dahlab* and *Sahin* cases, where the wearing of a headscarf was considered to be an expression of fundamentalism and as such found incompatible with democracy[528]. In such contexts, culture is understood as Western culture. Nuotio observes that modern law fails to recognise the importance of culture. From the cultural and communitarian approach, such a failure may seem wrong and lead to misjudgement and the rejection of unfamiliar or untypical beliefs:

> "A person whose beliefs are strange to us might be measured with false yardstick if we do not take this fact into account. A person with irrational beliefs might even be regarded as insane and lacking the capacity to be a reasonable person." [529]

7.6.4. The overlapping consensus as the essence of the constructivist model of democracy

The features mentioned above do not solve the problem of how citizens with different comprehensive doctrines, which are often incompatible with each other, can coexist together in a just, democratic society. Rawls admits, after all, that religious conceptions contain the idea of the right and the good and they include the conception of justice themselves. The majority of them assume that by following these conceptions, the

528. See: the discussion on education in this volume.
529. Nuotio K., 2008, pp. 18-44, 24 and 33.

common good of all the society can be achieved and think that they are correct in those views: "(…) we always think our own view is not only reasonable but also morally speaking true, or reasonable" reminds the author[530].

Thus for achieving the goal of political liberalism, a certain political construction is necessary. This construction must be based on political values and not on the understanding of truth based on comprehensive doctrines. And those doctrines which assume no authority beyond the church, and do not accept state authority or political values beyond the church, are deemed to be unreasonable[531]. The political construction of justice must be based on what Rawls calls "an overlapping consensus". This consensus is an agreement between reasonable citizens to create, follow and accept agreed principles of political justice and settle for themselves how these principles relate to their comprehensive doctrines. This consensus is not entirely separate from citizens' conceptions of the good, but neither does it aim to advance either of those conceptions. Instead, it creates a certain common core, where the political agreement overlaps with citizens' conceptions. If we could graphically draw this model it would look like a flower, where the petals are various comprehensive doctrines of citizens and the core holding these petals together is the overlapping consensus concerning the political conception of justice.

This overlapping consensus is the foundation of public reason. It includes the agreement on the conception of the society and citizens, principles of justice and basic rights. And it is based on the idea of reciprocity, which means that all citizens agree to follow this political agreement in order to create a society based on equality and liberty and they expect others to be bound by the same rules. It does not attempt to answer the moral and philosophical questions concerning the truth and the ultimate conception of the good, but instead puts emphasis on the idea of social coherence and peaceful coexistence as a political value as such. A society that reaches such a consensus and lives by its rules is in Rawlsian meaning a "well-ordered" society.

530. Ibid., p 128.
531. Ibid., p 138.

The well-ordered society's overlapping consensus must be as deep as to reach a common core of ideas on society, a fair system of cooperation and of citizens as reasonable, rational, free and equal. It must be also as broad as to cover the principles and values of a political conception of justice as fairness. It all is possible due to what Rawls calls slippage in the citizens' comprehensive doctrines. They rarely are entirely comprehensive in regard to all aspects of life and thus leave room for adjustment.

To the objection that an overlapping consensus is indifferent or sceptical to comprehensive doctrines, Rawls answered in the following way. Although an overlapping consensus indeed avoids the general conceptions contained in comprehensive doctrines, it does not attempt to deny any of the comprehensive religious, philosophical or political views. Instead it attempts to make it possible for all to affirm their views and the only measure to do that is to work out a common political conception of justice.

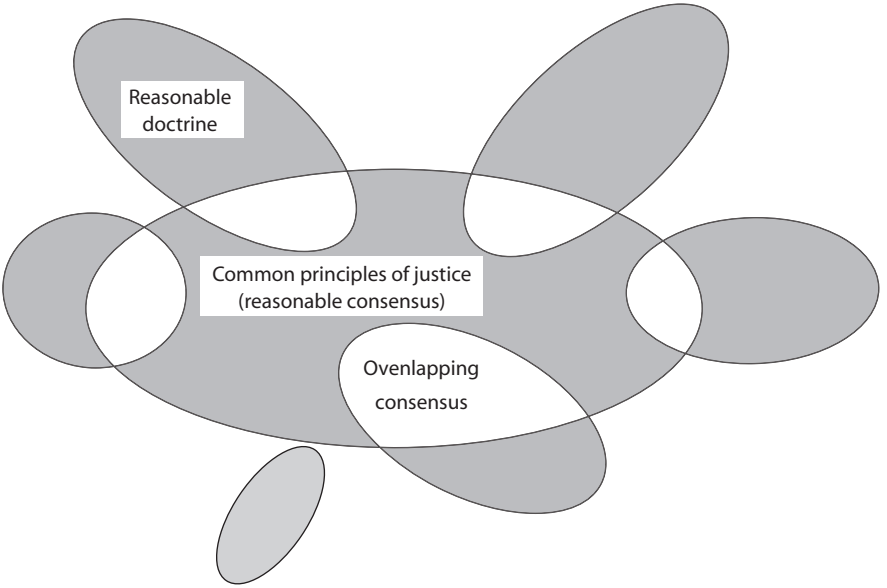

Figure 5: The idea of overlapping consensus.

The political conception of justice must distinguish between those questions which can and cannot be removed from the political agenda in order to achieve an agreement. Avoidance of referring to comprehensive doctrines in those controversial questions allows reaching a stable consensus.

In the case of Europe, the political conception of justice equals the liberal democratic conception of justice. In advancing this conception, the Rawlsian idea of "reasonable consensus" can serve as a beneficial tool. Without the idea of democratic consensus and the reasonable approach of various doctrines to the common model, democracy is torn apart in doctrinal conflicts. The Rawslian conception of reasonable consensus resonates in the ideas expressed in the documents issued by the COE and in the European Parliament's report on the EU's commitment to fundamental rights.[532] *Recommendation 1804 (2007), State, religion, secularity and human rights* can be used as an example illustrating this tendency. The key findings presented in the recommendation conform to Rawlsian ideas. The COE confirmed its commitment to the plurality of ethical, moral and ideological conceptions of individual European citizens and the necessity of state neutrality in approaches to these conceptions. It also advocated that governance and religion should not mix and that states should exclude from consultations any religious groups not supporting fundamental values of democracy.[533]

7.6.5. Why the political must be separated from the doctrinal

Rawls, in his *A Theory of Justice*, *Political Liberalism* and *The Idea of Public Reason*, attempted to justify why political and doctrinal issues must be separated from one another. This necessity is supported by the requirement of equality. Comprehensive doctrines that cannot support democratic society are not reasonable:

> "Their principles and ideals do not satisfy the criterion of reciprocity, and in various ways they fail to establish the basic equal liberties. As examples, consider the many fundamentalist religious doctrines, the

532. See the next chapter for details.

533. Recommendation 1804 (2007), par. 3, 4, 10 and 23.

doctrine of the divine right of monarchs and the various forms of aristocracy, and, not to be overlooked, the many instances of autocracy and dictatorship."

As Rawls further explained, the focus points of the religious and the political spheres are different. Whereas the religious values represent concern over supreme values, the political values of a constitutional democracy concentrate on the conception of a just society of equal citizens, which allows different conceptions to flourish in the society. Without citizens' support for public reason and without them honouring the political conception of justice and reciprocity, divisions and hostilities between doctrines are bound to exist. Harmony and concord depend on citizens' willingness and devotion to realise the ideal of public justice. Only a common idea of justice and social rules distinguished from controversial doctrinal arguments can be the foundation of a just and well-ordered society. Without state and citizen support for the model, the core of the principles remains empty and the will of the majority ultimately determines who enjoys what rights and whether the principle of equality applies at all.

7.7. The critique of the Rawlsian conception

The Rawlsian constructivist approach has been a subject of critique for a variety of reasons. In a multicultural and religiously plural society, the core of the critique concentrates on the premise of equality and neutrality.

Wenar criticises the Rawlsian construction, claiming that it is not neutral but instead is in fact a comprehensive doctrine of its own.[534] He argues that the reasonable consensus is too expansive to be neutral and that reasonable persons who are sincere religious believers would have problems in supporting such a construction. He argues that many doctrines and beliefs could be listed as incompatible with becoming a part of the consensus due to their core. He argues also that many philosophical approaches could be excluded. Wenar reminds that the majority of doctrines include a political element and the requirement to support a

534. Wenar L., 1995.

political conception contradictory with the doctrine's political elements would mean requiring citizens to be politically "schizophrenic".[535]

Habermas in his *Between Naturalism and Religion: Philosophical Essays* engages in a polemic with Menke's critique of Rawls. Menke's critique follows the line of Wenar. According to Menke, the Rawlsian conception is faulty, because the complete neutrality of aim is not true.[536]

The neutrality of the aim should be measured by the complete inclusion of all citizens. However, the idea of a reasonable consensus excludes many incompatible doctrines, causing the neutrality of the aim to be unattainable. Moreover, the idea of equal liberties can never be "specified" in a neutral way. Habermas defends the notion of liberal democratic equality, arguing that the asymmetric restrictions of personal ethical judgements are an expression of civic equality: "The norm must be legitimated by democratic means in an awareness and assessment of non-neutral effects by all those who must live with the consequences." I agree with Rawlsian and Habermasian arguments supporting the idea of reasonable consensus. Neutrality of aim is not assumed in a liberal democracy. Like I argued above, similarly to Wenar, I do believe that liberal democracy is indeed a certain moral conception comparable to a "comprehensive doctrine". In order to achieve the goals of this conception, a common core of values must be created and aimed for. And only a reasonable consensus of citizens is a solution that can realistically advance the achievement of this goal.

I see similar problems as those observed by Wenar or Mencke. However, since I agree with Habermas, that the individual should remain the focus in a liberal democracy, I approach the problem from the perspective of an individual member of a community. The idea of a reasonable consensus and common core of political values burdens a citizen with the requirement of tolerance, the acknowledgment of other doctrines and the adjustment of his/her own conceptions to the core of the political model of democratic justice. In case of many religions and many citizens, imposing such a burden is possible due to what Rawls calls "slippage" in the doctrines themselves. Moreover, thanks to education and

535. Ibid., p 53.

536. Menke, Können und Glauben, *Philosophie der Dekonstruktion*, quoted in Habermas J., 2008a.

the strengthening of democratic values, a gradual increase of commitment to these values is possible. However, it is impossible, or at least highly idealistic, to expect all doctrines or all citizens to have such a slippage and agree to compromise their own moral conceptions. Whereas it is possible to burden the state to remain as neutral as possible to shape laws and policies in a way which does not discriminate against religious or non-religious adherents, the same is hard to expect from all citizens. Even for modern democratic states, due to their national traditions, the state's neutrality is still, even in seemingly secular Europe, a challenge or a quest, as Thorson Plesner terms it.[537] Requiring neutrality and tolerance from all citizens of various cultures is a burden of considerable weight. In a multicultural society it is natural to have more and less flexible doctrines. The automatic labelling of proponents of all doctrines who are unwilling to adhere to the idea of a reasonable consensus as "unreasonable", might unjustifiably marginalise considerable groups of the population. Such marginalisation may as a result affect the idea of a reasonable consensus negatively. The result may bring a growing fundamentalisation of the marginalised groups. The reasonable consensus and democratic values may easily become the target of such groups. If compliance with democratic values is forced, growing resistance is natural. The challenge for a multicultural democracy is how broad a margin of toleration could be given to those who are considered intolerant? And how far is it possible to accommodate those who are unwilling to resolve the conflicts between democratic values and their own values in a manner of conscientious compromise? Can cultural or religious identity serve as a legal excuse allowing for different cultures not compatible with democratic rights and principles to be governed by their own normative systems?

7.8. The necessary margin of secularity in a democratic state

The principles of democracy and the idea of rights are certainly secular concepts. This volume does not argue that they are not. However, their social and legal function extends beyond their role as secular moral

537. Thorson Plesner I., 2008.

conceptions. Safeguarding the equality of various religious and non-religious groups requires employing these secular concepts in practice. Employing any religious values would discriminate against the non-religious and differently religious individuals. Secular principles such as equality and non-discrimination allow both secular and religious individuals and groups to exist in a democratic society.

The endorsement of any religious doctrine in public life limits the principle of equality. In terms of a Rawlsian reasonable consensus, it imposes a certain conception of the good, which may be inconsistent with the particular religious conception of an individual.

A religious individual may argue that a secular conception is inconsistent with his or her religious conception of the good. And that may be true. However, a religious individual is still in large degree free to choose a religious way of life even in a liberal democratic system based on secular democratic principles. A religiously neutral system ought to allow for a variety of religious choices. A system based on religious values, on the other hand, nullifies the possibility of such choices for all the religious "others". A system of religiously neutral political and legal principles is, if nothing else, a practical necessity. It makes it possible for all the citizens professing different religious or non-religious beliefs to coexist. If democracy is the selected construction and conception of justice, neutralism is important for maintaining it. Any departure of the state from this practical necessity of neutrality will necessarily produce inequality and undermine the democratic commitment of the state. And then it is a question of the degree of this departure that ultimately determines whether a system is still democratic or should be considered as a different conception and construction of justice. The secular system burdens primarily the state, even though, as I argue below, it also has consequences for religious individuals. And such consequences should be examined in order to determine how far a democratic state is obliged to intervene into a sincere religious belief in the pursuit of democratic goals and how far, on the other hand, religious individuals could be allowed to give up their rights and duties in the pursuit of religious goals.

7.9. Religion and collective rights – the role of cultures and the addendum to the Rawlsian conception

7.9.1. The role of culture

Liberal democracy, as illustrated, concentrates on an individual and his or her rights. This individualistic approach towards society has been criticised as discriminative towards cultures and non-European religions.[538] The communitarian approach towards rights has been proposed as an approach that guarantees equality of not only individuals but of various conceptions of life. However, how far can a culture or a community as a continuation of tradition rather than as an expression of the will of individuals be appreciated in a liberal democracy?

Culture is important for this volume's discussion primarily because modern cultures are in large degree based on religions. Cultural diversities concentrate on religious aspects.[539] Religion is understood as the core of the cultural identity of an individual and of a cultural community. The demand of cultural rights is dictated by the demand of equal freedom of moral choices for everyone. It is based on the principle of equality for different conceptions of rights themselves. In Habermas' words:

> "Collective rights empower cultural groups to preserve and make available the resources on which their members draw in forming and stabilizing their personal identities." [540]

While strong multiculturalism argues that liberal democracy is discriminative and based solely on Western conceptions[541], liberal democrats defend the internal coherence of the system and its ability to deal with internal conflicts.

Habermas in his latest book *Between Naturalism and Religion:*

538. See the chapter on critique of Rawls above. See also: Parekh and Taylor as quoted in Nuotio K., 2008.
539. E.g. Huntington S. P., 1996.
540. Habermas J., 2008a, p 297.
541. Shah P., 2005.

Philosophical Essays to a large extent deals with the topic of culture.[542] Presenting a wide variety of arguments appearing in a multicultural discussion, he ultimately defends the liberal democratic model and argues that the system of rights is sufficient for protecting cultures. Habermas argues that although culture and cultural rights are important, a dogmatically protected culture will not be able to reproduce itself. Collective rights can strengthen culture only when individual members are given the ability of critical choice in the appropriation, revision or rejection of the culture.[543] In a liberal system, group rights are legitimate only when they are derived from the rights of individual members.[544] He underlines the role of individual rights and the necessity of their sensitivity to individual differences:

> "Only the egalitarian universalism of equal rights that is sensitive to difference can satisfy the individualistic requirement that the fragile integrity of unique irreplaceable individuals should be granted equally."[545]

Moreover, although the expectation of tolerance does not have a neutral effect on believers and non-believers it would be, according to Habermas, disproportionate of believers to reject the demand for tolerance because its burdens are not shared equally.[546] He concludes this argument by asserting that the challenge for cultures perceived as less democratic is to find functional equivalents for the separation of church and state. He argues that such adaptation is today no more of a submission to alien cultural norms than it was for religious communities in the West when they had to adjust to the change in mentality.[547]

I agree with the Habermasian assertion that in a liberal democracy, collective rights should be derived from individual rights. Collective rights

542. Habermas J., 2008a, ch. Equal Treatment of Cultures.
543. Ibid., pp. 302-303.
544. Ibid., p 300.
545. Ibid., p 290.
546. Ibid., p 310.
547. Ibid., p 311.

not based on the rights of individuals do not guarantee a choice between personal adjustments, revisions or even the rejection of the doctrine or culture in question. Liberal democracy's focus is based on the individual. However, the focus on the individual should allow for the maximal range of choices in matters of personal conviction. In such a case, a believer may choose to give up partially his or her rights in the pursuit of the religious goals of his or her religious community. In fact, such situations do exist. I choose to illustrate this with an example of a culturally traditional European religion, in order to show that such an abdication of one's own rights is not only a domain of non-tolerant and culturally alien non-European religious traditions. Catholic women are expected to accept the fact that the Church does not apply the principle of equality of men and women in employment and does not employ women priests. Such a principle is in clear contradiction to European principles of equality in employment. However, an individual adhering to the Catholic tradition is expected to accept giving up her rights in the pursuit of her religious goals. The religious community is in this case allowed to regulate its internal functioning and limit the rights of individuals in employment in accordance with its own doctrine. As this example illustrates, giving up universally recognised rights and relying on a religious community's normative system is not only the domain of immigrant and primarily Islamic religions demanding equal recognition for their culture. For that reason, I believe, the principle of equality can and ought to offer a certain margin of adjustment of the liberal democratic model to requirements of religious communities.

7.9.2. Private versus public presence as an inadequate measure in discussion on religious communities

The leading problem of a religiously plural society lies in the fact that the paradigm of gradual secularization as a necessity proved to be in some degree wrong.[548] In Europe, just as elsewhere, religious communities started demanding more space in public life. This space is impossible to offer in political life to any great extent as a consequence of safeguarding equality in a democratic society. Therefore it is assumed that

548. Katzenstein P J., 2006.

democratisation pushed religion to the domain of private life and banned it from the domain of the public.[549]

I argue, however, that the dichotomy private-public is inadequate in a discussion of religion. First of all, if we approach religion as a matter of private choice, it naturally belongs to the domain of the private. The COE approaches matters of religion in this way: "The Parliamentary Assembly forcefully reaffirms that each person's religion, including the option of having no religion, is a strictly personal matter."[550] Such an approach leads to the assumption that even if religion is a part of an individual's communal life from his or her childhood, it is a matter of private choice of conscience to change the religion, quit the religious community or continue to be a believer. The same applies to a person who was raised in a secular manner. He or she can choose to become a believer, if his or her private conscience dictates such a necessity. If some communities enforce the norms more strongly than others, any religious community forbidding changing one's religion, in an individualistic approach does not carry democratic qualities since it limits the aspect of freedom. Even if a community forbade conversion, the honesty of a belief is ultimately a question of individual conscience. An individual whose conscience has changed will in all likelihood profess his or her values in private. And even if he or she ultimately returns to the values and conceptions professed in the community, such a choice is still a private choice of conscience. For that reason, if individualistic approach is adopted the private aspect is an inherent quality of a religion. Individualistic approach would correspond to two aspects of understanding religion proposed previously in Part I. It would correspond to religion understood as a belief and as that what would in a life of a believer account for a religion

However, if we approach religion from two other aspects: as identity and a way of life, the private-public dichotomy is still of little use. I believe that the assumption that the political arena is the only area of public life is not entirely true. Public life happens not only via politics. Public life happens via publications, assemblies and social dialogue and all other dimensions of a civil society. Religious communities in a democratic country should be allowed to have wide access to these dimensions of

549. Among others: Habermas J., 2008.
550. E.g. Recommendation 1720 (2005).

public life. Encouraging other people to consider the community's values and moral foundations is an expression of public life. Identifying oneself with one's community and its way of life is thus inherently a public aspect. A community that issues a newspaper or organises public events where other people can learn about its moral conceptions is a successfully existing public entity, just like any other public entities based on common interests in any other area of life. The public life area does not exclusively consist of the domain of law and politics.

While discussing the problem of religiously motivated discriminatory speech, I referred to Loof's arguments that allowing religious adherents the freedom to engage in discriminatory speech exclusively to the forum of his or her religious community would push religion out of public life.[551] Although I agreed that limiting speech for any reason is always problematic, I disagreed with Loof's assumption that freedom only within a religious community pushes religion to the realm of the private. As mentioned above, I do believe that the existence of religious communities capable of forming an association, founding schools, and participating in public discourse is an essential expression of public life. Therefore I consider a religious community to be a public forum of expression. It is a forum in which the widest extent of religious freedom is exercised. And as such a special forum, a religious community should enjoy the widest possible freedom in its internal activity. It offers a religious individual the opportunity to express his or her convictions in public and exercise the dimension of religion understood as identity and the way of life. Religious communities should not be treated as potential criminal organizations, as is often the case in the process of registering new religious movements[552]. Although it is arguable what private and public are, even those who propose that private sphere is broad, like Taylor, agree that the understanding of the public may differ: "There seem to be two main semantic axes along which the term public is used. The first connects public to what affects the whole community ("public affairs") or the management of these affairs ("public authority"). The second makes publicity a matter of access ("This park is open to the

551. Loof J. P, 2007.

552. See the discussion in this volume concerning the Church of Scientology's problems with registration in Germany..

public") or appearance ("The news has been made public")."[553] I argue that the public aspect of access and appearance is no less important than the aspect affecting the whole community. If these aspects are enjoyed, it can be no longer argued, that religion is pushed solely to the sphere of the private.

The dichotomy private-public remains is of little use if we take into consideration these different dimensions of understanding religion. Individualistic understanding of some religions will place them automatically in the realm of private, while identity aspect of other religions will place them in the realm of public. Differences between religions and beliefs make such a dichotomy unsustainable if public sphere is not exclusively understood as political sphere.

7.9.3. Legal pluralism or one neutral system applying to all? To what extent can a liberal democracy allow for different cultural approaches to fundamental values?

The Rawlsian conception of reasonable consensus supports in the best practical way the conception of democracy based on principles and rights. It applies mainly to the political aspect of life that creates consequences for all individuals professing various conceptions of life. This Rawlsian conception does not, however, deal in detail with the aspect of public life which is expressed through the inner activity of a religious community.

In the multicultural critique, the liberal democratic model is accused of being discriminatory towards religious communities and cultural rights.[554] In this volume, I have defended the position that in political and legal life, which affects all citizens equally, a certain margin of secularity is necessary as a corollary of neutrality. However, I also argue that in order to secure in the best way the possibility of life dictated by one's own convictions, religious communities, as a forum for the broadest extent of religious freedom, should be guaranteed a maximally broad margin of freedom in their activities. Legal pluralism has been a disputed topic in connection with religious pluralism and I want to analyse briefly the possibilities and difficulties of legal pluralism based on religious conceptions.[555]

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553. Taylor C., 2004, p 104.
554. E.g., Parekh B., 2000.
555. E.g., Tamanaha B., 2000.

First of all, it is worth pointing out that, contrary to what is believed, legal pluralism connected with religion is not a new phenomenon in Europe. It is not exclusively a phenomenon brought by the demand for establishing Sharia law. In fact, as the analysis of the concordat systems illustrated, certain aspects of family law are regulated by both state and religious systems. I refer here to marriages and annulments granted according to the canon law of the Roman Catholic Church. According to the majority of concordat treaties, the states bound by those treaties accept marriages and annulments of marriages done in accordance with canon law provisions. Such an acknowledgement of a religious institution's normative decisions and giving them the state validity equivalent to civil law decisions is an acknowledgment of the possibility of legal pluralism based on religious tradition.

In September 2008, Sahria courts were given the power to decide Muslim cases in the United Kingdom.[556] The rulings of 5 Sharia courts can now be officially enforced through the county courts or High Court. Sharia courts have received increased attention primarily due to their possible impact on women's rights. Can a European democracy accept Sharia courts, the judgments of which may likely affect women's rights? In the year 2007 a court in Bologna accepted the arguments of defendants, a father and a brother, who severely beat up the daughter of the family, for living contrary to Muslim tradition by dating a non-Muslim. The court acknowledged that the girl was beaten up for her own good. [557] Also in Germany, a battered woman who applied for a fast divorce had her application rejected after the judge argued that the Koran allows a man to beat his wife.[558] These judgments pose interesting questions concerning the relation between religiously motivated conduct and fundamental rights and principles. How far can religion justify exceptions in the application of the rights system? Can religion or culture justify the limitation of the rights of an individual? Should legal pluralism apply to such situations or should it apply solely to situations where religious adherence guarantees extra privileges, such as the recognition of marriages and divorces by one's

556. Revealed: UK's first official Sharia courts, The Sunday Times, 14.09.2008.
557. Guitta O., Sharia's Inroads Around the World, Middle East Times, 02.03.2009.
558. A German Judge Cites Koran in Divorce Case, Der Spiegel International, 21.03.2007.

own religious community? Or perhaps it should not apply at all so that the coherence of the democratic system can be sustained?

From the point of view of liberal democracy and its foundations, the problem should be approached from the perspective of the individual. A potentially oppressive religious normative system cannot be imposed on anyone against their will. If a liberal democracy allowed for such an imposition solely on the grounds of cultural or religious identity, it would equal the state's failure in safeguarding the principle of freedom (of choice) and basic rights. Principles of democracy put an obligation on the state to protect an individual from rights violations.

However, can a secular democracy impose rights on those who do not wish to enjoy them? And how far could individuals give up their rights in pursuance of their religious goals? Let us assume that as a result of freedom and equality of choices of the available ways of life an individual willingly agrees to be under the jurisdiction of a religious system that consists of its own religious, moral and legal norms. And if those religious and moral norms do not comply with the requirements of a secular system of rights, the individual in question is willing to give up his or her other rights in pursuance of the right to freedom of religion. Can a democratic state allow for such a voluntary resignation of rights? Are there rights that should be considered of such a fundamental nature that they could not be given up?

Giving up of certain rights under informed consent is an imaginable solution, which in a certain way resembles contract law. The parties to a possible conflict or any other legal situation that arises agree to apply a different set of rules than those universally applied. If we look at such exceptions from this perspective, they do not present themselves as a revolutionary novelty. Under the principle of equality of choice and equality of all religious and moral conceptions, such a solution is, I believe, possible. However, I am convinced that in a democratic system certain limits must be introduced in addition to the requirement of full and informed consent. Some rights are of such fundamental value that voluntary abdication from their protection could introduce chaos and the decomposition of the legal system. If one could agree to give up the right to life, ritual murder would become possible under a cultural excuse. Similarly, other forms of violence should not be allowed under cultural excuse. If a liberal democracy extends its toleration to cultural, moral and religious choices incompliant

with standards securing basic social coherence, there is a danger of falling back into anarchy and chaos. If we admit the possibility of abdicating some rights, the challenge is how to draw the line between rights that can and cannot be given up by one's own consent.

The theory of rights assumes their indivisibility. However, as some ascertain, there is in fact a hierarchy of rights, and non-derogable rights enjoy a higher position than others.[559] Those non-derogable rights, which must be guaranteed by a state at any time, could be a useful category for establishing the core of rights that an individual cannot give up. Those rights under the ECHR would include the right to life, the prohibition of slavery and the prohibition of torture and degrading treatment. Abdicating those rights would introduce anarchy to the legal system and make it impossible to successfully balance between the obligations of the state to secure democracy and legal order and the will of individuals.

Similar approach to conflict between collective and individual rights was proposed by Scheinin[560]. In his article concerning possible conflict of individual rights and rights stemming from collective identity, he insisted that solutions of conflict between individual and collective rights should be based on the concept of non-derogable rights. In the case of a conflict the priority cannot be simply given to individual rights but the solution must be sought on the basis of non-derogable rights, untouchable core of particular rights and difference between forbidden violations and allowed limitations of rights[561].

Legal pluralism could possibly to some limited extent apply to exemptions from punishment in the realm of penal law. The British exemption for the Sikhs who are allowed to use turbans instead of motorcycle helmets is frequently raised as an example. Shah in his discussion of pluralism approaches the issue of homicide as a cultural issue of legal pluralism. He ascertains that when South Asians kill they make choices under legal pluralism rather than simply break the law.[562] However, the pursuit of equality is different than allowing for the destabilisation of a

559. Teraya K., 2001.
560. Schenin M., 2005.
561. Ibid., p 190.
562. Shah P, 2005, p 20.

democratic legal system. Nuotio reminds that in Western liberal societies, the law has developed into a sphere separate from tradition. As such it imposes on everyone the obligation to comply regardless of their culture, religion or tradition. If culture were to be regarded as a force that could diminish criminal responsibility, then we would be forced to abandon many of the underlying presuppositions of modern law.[563] Including culture in the catalogue of legal exemptions limiting criminal responsibility could pose serious problems for maintaining the coherence of the legal system. Questions that would need re-considering would be, for instance: what kinds of offences should be excluded from penalisation — only minor offences or serious crimes as well? How to ensure the equality of those who are not excused from criminal liability due to not having any "privileged" sincere belief guaranteeing a legal exception? Drawing any clear theoretical lines here is not easy and requires further research in penal law. Allowing for exceptions from criminal liability of religious adherents for hate speech, for instance, may raise an argument concerning the privileged nature of religious adherents. Finally, the question of what should be punishable and what should not be in light of respect for sincere beliefs calls for in-depth criminal law research. Currently religious communities are criminally liable just like any other communities. But as we have observed in the examples of discriminatory speech or Sikhs' exemption from security obligations, religious adherents enjoy a certain wider margin of freedom in certain respects. The problem is how to balance equality between religious and non-religious individuals, if religion could be used as a legal excuse exempting someone from receiving criminal punishment.

Another area where legal pluralism could apply is the realm of family life and contract law. As mentioned above, in the states bound by concordat treaties, such jurisdiction of Church institutions in matters of marriage and annulment is generally accepted. Such jurisdiction is an extra privilege granted to a religious community. If such privileges are granted to one community, the principle of equality would require that other communities have equal possibilities if they so request. The problem arising is: How to secure the equality of those who do not belong to any community granted such privileges? Moreover, the questions concerning

563. Nuotio K., 2008, pp. 23-31.

what areas of competency could be delegated to religious authorities are problematic as well. The delegation of all competencies can, as in the abdication of rights, pose challenges to the coherence of the legal system.

Legal pluralism is certainly a possibility that could help ensure the equality of all conceptions of life and all religious and moral beliefs. In a multicultural society it is a possibility which cannot be simply dismissed. It requires further research due to its complicated nature and the effects that it may have for the understanding of a democracy and the coherence of a legal system. As illustrated above, the discussion on religious pluralism involves at least questions of three kinds: exclusion from universal obligations (mainly criminal law), extra privileges (mainly civil law) and resignation from universal rights and principles (constitutional law). This theoretical division is based on a traditional European understanding of the legal system. In an analysis of the possible effects of legal pluralism, it must be remembered that such a division may be unnatural for some religions and cultures and thus in practice impossible to apply. Religious and moral normative systems may include solutions and procedures that affect all or a few of these areas at the same time.

Thus detailed research of the possibilities of legal pluralism is required in order to explore these issues further. This volume's focus was illustrating inconsistencies in approaches to various religions in Europe. Deeper analysis of legal pluralism would fall out of the scope of this research. The discussion of legal pluralism was introduced in order to illustrate that the modern democratic model, based on principles of neutrality and values inherent to Western, secular conceptions, is capable of incorporating new legal solutions. Such legal solutions can help in realising the underlying principle of democracy – the principle of equality. Habermas points out that the introduction of rights based on collective identity might bring disputes between different groups about the scope of their privileges and equal treatment between them as well as disputes concerning the disadvantaged position of those not belonging to any of the privileged groups.[564] Certainly, the issues surrounding legal pluralism are complex. But the complexity should not discourage us from analysing the possibilities of legal pluralism in detail. Although certain boundaries

564. Habermas J., 2008a, p 297.

of democracy cannot be crossed, it is not impossible to find a margin of adjustment to the demands of religious communities and their internal activities. The reasonable consensus must apply to all those rules that bind all citizens equally. Imposing any doctrine on other citizens should be considered unreasonable from the perspective of equality. In other words, religious communities cannot actively change the scope of the consensus in order to adjust it to their own doctrine. But the idea of a reasonable consensus is not affected by imposing normative religious conceptions on the freely participating members of a particular religious group.

Careful balancing based on democratic principles could allow for greater flexibility in the law. Such flexibility could allow various religious citizens to choose the system consistent with their values in those matters that do require the intervention of a secular system necessary for maintaining democracy. In other words, the passive aspect of the consensus, expressed in conformity to a common standard, could leave a margin for multicultural adjustment. It could allow for governance by one's own system in certain areas. The idea may be better illustrated by the graph above.

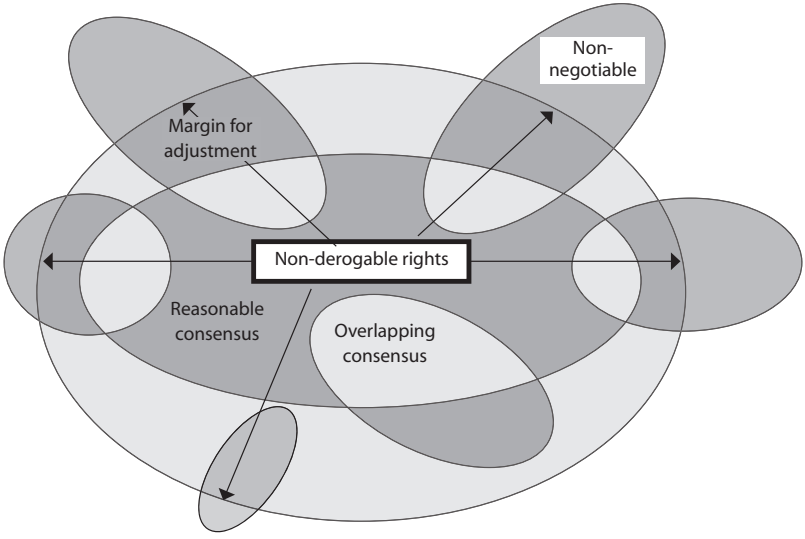

Figure 6: Margin of legal pluralistic adjustment governed by the principle of non-derogable rights.

8. Europe's commitment to democracy and basic values in the context of religion

In the previous chapter I discussed the concept of democracy in general and its application to the European conditions. The proposed democratic model was based on the common European principles. The analysis in previous chapters, however, showed that commitment to those principles is not the same in all examined countries. Rights and approach to democratic principles applying to religious issues is not coherent and depends in large extent on national traditions. Previous analysis and the proposed model did not, however, discuss the problems of European integration on axiological level. Below, I will discuss the concerns relating to "giving soul to Europe"[565] and the problems of commitment to axiological integration and the common principles of justice. Further, I will evaluate whether Rawlsian conception of "overlapping consensus" can be a helpful model for multicultural Europe and whether it can help in strengthening the common consensus on fundamental principles. Finally I will end this volume's discussion by addressing the problem of what kind of Europe we want today. In this chapter I concentrate primarily on the European Union as a special kind of legal polity based on supra national laws and striving for greater coherence. I do however, similarly to the preceding chapters, also refer to initiatives of the Council of Europe.

8.1. European democracy or European democracies?

"A European democracy" is a concept that may refer to common European democratic principles or to democracies in various European countries.

565. See below.

Historically, formation of European democracies was a local process connected with creation of nation states and their gradual development. There was thus British or French democracy, but no general concept of "European democracy". Even today it is disputable whether we can speak of a "European democracy" or European democracies. However, the processes of European integration aiming at achieving harmonisation of laws and policies in certain public areas have identified certain principles common for various European democracies. The areas of legal unification or harmonisation have been constantly expanding over time. Loughlin and Aja argue that democracy is primarily a concept based on the nation state tradition. The historical role of the states cannot be underestimated and the lack of democratic legitimacy of the European Union system caused by the democratic deficit leads to fragmentation and situations when democracy is not practiced in the manner consistent with liberal-democratic principles.[566] Also Ward argues that there is still more potential for fragmentation that for further integration.[567] This tendency could be seen in majority of cases concerning religion. Common European principles of equality and freedom of religion have been often interpreted in such a way that could protect other social and often national values. The examples of blasphemy cases showed that traditional feelings of the local population are still often more protected than equality of freedom of conscience. Head-scarf ban in France on the other hand depicted the protection of läicite as the fundamental national value of the Republic. Polish, Maltese and Irish reproductive rights struggles revealed how protection of national tradition, understood as history of national religion, is protected from the influence of the growing arena of women's rights. Originally, as Katzenstein reminds, the process of European integration was seen as an initiative of Christian Democracy.[568] For that reason the issues of position of the religion and its potential influence on non-religious persons was left for the countries participating in the integration processes to decide. The freedom of religion has been often interpreted by the ECTHR in the light of the "wide margin of appreciation" of the

566. Loughlin J., Aja E., 2001.
567. Ward I., 2004.
568. Katzenstein P J., 2006, pp.15-18.

member states. For that reason, as illustrated by case studies in this volume, despite of growing secularization or "unchurching" of Europe[569], the role of traditional religions in European societies and their influence on other rights has for long remained legally unchallenged. And the influence of religions on law and politics in Europe has developed differently in different countries. Katzenstein refers to the European development as development of "multiple modernities". These multiple modernities, as he argues, have left the core of European identity empty:

> "Institutional and political hypocrisy capture the tensions between legal compliance or harmonization of law on the one hand, and policy compliance or policy implementation on the other. (…) Lack of capacity, unclarity of priority, and obfuscation of responsibilities are characteristic of a European polity marked by the coincidence of both binding European rules and discretionary national applications."[570]

8.2. European Union's commitment to basic values

The report of the European Parliament issued in January 2009 concerning the situation of fundamental rights in the European Union concentrates on the above mentioned problems of the commitment of European Union members to basic values and rights.[571] The report underlines that European Union working in its pillars is not an efficient organization for monitoring its members' commitment to fundamental rights. Human rights issues cannot be artificially divided into pillars. Due to such artificial division, different kinds of rights fall into different pillars. It leads to impossibility of efficient monitoring. Monitoring is also hindered by the fact that member states of the Union refuse to accept the scrutiny of the EU over their own human rights policies and practices and endeavour to keep the protection on purely national basis. The report reminds that Article 7 of the EU Treaty provides for a procedure to make

569. Davie G., 2002 and Davie G., 2006.
570. Katzenstein P J., 2006, p 24.
571. Report on the situation of fundamental rights in the European Union 2004-2008.

sure that violations of human rights do not happen but such a procedure has never taken place, even if human rights violations have been proven by the judgements of ECTHR. Such an approach is a result of the fact that the application of the ECHR is monitored by another European organization. These divisions of competences undermine the commitment to common values on which, according to Article 6 of the EU Treaty the Union is based.

The report suggests strengthening the practical application of fundamental rights in the Union and taking human rights as the foundation and objective of all European policies. It welcomes establishment of a European Union Agency for Fundamental Rights[572] as a body that could be the first step in establishment of an integrated framework designed to put to effect the European Charter of Fundamental Rights. The report also underlines the importance of the perspective of the EU acceding to the ECHR.[573] The Convention would become an integral part of the EU legal system. Such incorporation would allow for closer cooperation between the organizations and institutions.

The focus of the report, similarly to the focus of this dissertation concentrates on the credibility of Europe as a preacher of democratic values. The report emphasises that for the credibility in the world the EU should not practice double standards in external and internal policy. Such standards could be observed for instance on the example of reproductive rights, where consensus was reached as to the external policies but not internal.

8.3. European identity?

These problems pose a question whether there actually is any "European identity"? Are there in fact any "common values" around which the European countries are integrated? The statistics show that European citizens identify themselves primarily with their own national identity. According to a Eurobarometer survey published in May 2008, 91% of the interviewees felt

572. Council Regulation No 168/2007.

573. Such accession will take place if the Lisbon Treaty ratification process succeeds.

attachment to their nations and only 49% to the European Union.[574]

Creation of a "European identity" is a similar project to the creation of an "overlapping consensus". The European states agreed to identify the political core of the conception of Europe. The problem is how to put this conception to life and create commitment of the member states and their citizens to the idea of Europe. European identity is parallel to the conception of common principles of political justice. The European identity is supposed to be the common core of values that binds Europeans in spite of their differences and national identities. At the moment, this construction appears empty.

Struggles for strengthening European identity can be observed not only through the initiatives of the COE analysed in this volume. An initiative of the former president of the European Commission, Romano Prodi aimed at discussion how to strengthen European identity. The final remarks of the Spiritual and Cultural dimension of Europe initiative included observations and recommendations for the process of creating European identity. The experts concluded that economic integration is incapable of substituting genuine values of a public polity. They also observed that European states and citizens must adapt themselves and their institutions so that they can be a basis for common identity. Otherwise any effort of codifying European values is confronted with "diverging national, regional, ethnic, sectarian, and social understandings".[575] Without common effort to understand European values as common values and not values replacing national, regional and other values any such codification effort is bound to meet difficulties. The Experts agreed also that in the process of creation of "European values" the role of religion is not to be overlooked. Whereas religion may be divisive, not conciliatory and religious institutions may possibly invade public sphere and be used as justification of ethnic conflicts, religion has also got the potential of unifying people. The Experts underlined that European identity and European values should not be constructed as an

574. Eurobarometer 68, May 2008.

575. Reflection Group Initiated by the President of the European Commission and coordinated by the Institute for Human Sciences, The Spiritual and Cultural Dimension of Europe, Concluding Remarks, Vienna/Brussels, October 2004, p 8.

opposition to any religious values, like Islam. Unfortunately, like seen on the example of the veil cases, such constructions are present not only in national laws but also in judgments of the ECTHR who influence the understanding of European values, identity and democracy.[576]

Creating "A Soul for Europe" is a challenge. Since the year 2004 the Berlin Conference "A Soul for Europe" has been concentrating on the social and cultural aspects of the struggle for European identity. The initiatives of the Conference have been concentrating among others around the roots, ideas and aims of the European development, the internal structure of Europe and Europe's role in the world.[577]

Attempts of the codification of European values show how difficult the process of building the "European identity" is. The failure of the European Constitution project or subsequent Irish veto to the Lisbon Treaty picture the emptiness of the "European Soul". Although both European Union and the Council of Europe have worked on the development of common European values, the existence of such values seems to be largely artificial at this moment. The creation of common European identity appears to be the greatest challenge of European integration. The activity of international courts, ECJ and ECTHR, in large degree affect and shape the understanding of European values and influence the process of forming the European identity. But as the Experts working on the spiritual dimension of Europe underlined, European solidarity and values cannot be achieved only by institutional imposition from above. The challenge is how to make Europeans as individuals feel committed to European values and identity.

This study concentrated and commented on certain aspects of European relativism, double standardisation and lack of actual common values in approach to religious issues. In the discussion on the "European identity", it is important to remember that religion is an essential part of identity. Approach towards religion impacts the approach toward common European values. Whether "European values" are constructed

576. See: Dahlab vs. Switzerland, Application no. 42393/98 and Sahin vs. Turkey, Application no. 44774/98 cases.

577. A Soul for Europe, Brief Concept of the Initiative, Berliner Konferenz "A Soul for Europe", 2008

as values completing one's identity or values opposed to one's identity will in large degree determine of the future of the "European Soul". Otherisation of some groups of Europeans due to their religion or lack of it will certainly not help in the process of building European values. As Bankowski observes, building European identity as "Fortress Europe", keeps the other out of the European conception:

> "In the name of this 'fortress Europe' that we are trying to create and the European identity that it entails, we also try and purify from within. We see those who are different in culture, religion and values as danger. We can see this in the growth of European chauvinisms and racism, and the problem of EU citizenship, asylum and migrant labour (…)"[578]

According to Bankowski, the desire to cure the worst excesses of nationalism has resulted in creation of European universalism that is affected by similar excesses. The Union replicates the ways in which smaller states act. It attempts to keep the alien out and secure the enjoyment of common Europe only to those who are "really" European[579]

Neither forceful exclusion of "the other" nor identification of national values with particular religious values can help in the project of creating European identity. "European values" must be identified on the basis of the common core of values that Europeans agree upon. And since absolute agreement is never possible, this chosen set of European values must also allow for the maximally broad possible interpretation in accordance to one's own culture or the possibility of legal pluralism.

8.4. Can Rawlsian conception be the leading model for Europe in search of European identity and religious pluralism?

Finally, looking at the complicated European picture it is necessary to ask whether the democratic model presented here and based on the Rawlsian

578. Bankowski Z., 2004, p 45.
579. Ibid., pp. 37-48.

theory could be useful in the case of Europe. Although Rawls claimed that the model of an overlapping consensus as the foundation of public reason was utopian, I want to argue that it can be more than mere utopia in European conditions. Although ideal theoretical conceptions are never fully workable in reality, they are necessary to show us the boundaries of what is possible[580]. Just like the "common values" on which the EU is supposed to be based, they can be goals which the society as a political and legal construction aims to achieve. In order to prove that, I must argue that the initial step of the constitutional consensus has already been achieved in Europe and currently we are striving at the next step, which is the overlapping consensus.

European countries, meaning here the countries belonging to the European Union, who are all at the same time members of the Council of Europe, have all agreed upon their internal constitutional agreements concerning the rules of regulating public political life, fair rules of representation, as well as their constitutional rights. Although, as in constitutional consensus, the borderlines of these rights, their content and mutual relations have been in dispute, European countries agreed for taking the next step forward. In the process of European integration European countries agreed to ignore the disputable differences between them and work for achieving common standard of basic rights as well as principles concerning common market. Moreover, this agreement has been not only expressed verbally, but also legally in form of the treaties and treaty obligations stating, among many other agreements, the following in regard to the European Union:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." [581]

580. See: Dworkin R., 2006.

581. The version as repeated in the Treaty of Lisbon, 2007.

Why this is more than just a constitutional consensus requires further explanation. While constitutional consensus is based on the principles of political fight and concentrates primarily on procedural aspects, the overlapping consensus goes further. The European approach takes into consideration the same aspects the overlapping consensus does. It creates a vision of a society, its structure and principles of justice. It expressly affirms the idea of citizens as free and equal and it creates an ideal of a well-ordered society bound by common political values. It is in fact a political construction, just as the construction of Rawlsian public reason, which is based on the overlapping consensus, not touching upon what is disputable but what is common and valued. These values are democracy, equality, rule of law and respect for human rights, which would fit into the Rawlsian concept of basic rights having the primacy in a well-ordered society.

Concerning religion, the values affirmed by the European overlapping consensus are those of equality and freedom of conscience expressed in the European Convention for Human Rights and Fundamental Freedoms and in Employment Equality Directive. In the documents that have recently been adopted to clarify the role of religion in the European society, the ideals of pluralism, equality and respect to all religions prevail[582]. These ideals follow the Rawlsian conceptions, too. The foundations of these European notions are based on the ideas that none of the religious or philosophical doctrines should use power to coerce citizens, directly or indirectly to follow rules or principles that their own comprehensive doctrine does not include. These ideals concerning religious pluralism and equality of doctrines as the primary European values in approach to the matters of conscience are nearly exact expressions of the Rawlsian reasonable pluralism. This is confirmed by condemnation and discouragement of fundamentalism, which also in Rawlsian understanding is considered as unreasonable[583].

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582. See for example documents issued by the Council of Europe and its advisory bodies, such as: Recommendation 1396 (1999).

583. See articles 13 and 17.7. of Recommendation 1805 (2007), which condemns such religious behaviours, which penalise in any way threatening life or integrity of persons, those who do not follow the values of this particular religion.

Europe has achieved a consensus as to the basic democratic principles, primacy of human rights and commitment to international law. In various recent documents European institutions have expressed more and more exact views concerning the position of religion[584], which remind strongly Rawls' conception. However, the practice of particular countries remains controversial and inconsistent with this approach. In fact some of those legal solutions resemble unreasonable pluralism in which certain doctrines force others to follow their conceptions of the good and the just while marginalising and "othering" of non-traditional religions. Such legal solutions in particular countries undermine the common approach and the very idea of equality in regards to freedom of conscience. In order to achieve the standard, which is currently envisioned in article 8 of the European Convention for Human Rights and Fundamental Freedoms or in the Employment Equality Directive, Europe requires commitment to its own political conception. The foundations of both European Union and Council of Europe create the ideal of European political justice. In order to achieve this ideal and avoid inequality between particular comprehensive doctrines, European countries should avoid legal solutions granting either superior position, even if symbolical, to various doctrines identified with particular national traditions, or legal constructs sanctioning religious offences, like blasphemy, by law. These rights and principles that Europe has agreed to adhere to should be enjoyed by all persons in Europe equally. Rawls reminds that:

> "When political liberalism speaks of reasonable overlapping consensus of comprehensive doctrines, it means that of these doctrines, both religious and nonreligious, support a political conception of justice underwriting a constitutional democratic society whose principles, ideals and standards satisfy the criterion of reciprocity. Thus all reasonable doctrines affirm such a society with its corresponding political institutions: equal basic rights and liberties for all citizens, including liberty of conscience and freedom of religion."

584. See the previously mentioned recommendations issued by the Council of Europe's advisory bodies.

If countries representing doctrines, which used to be and are traditionally associated with national values or identities, do not re-evaluate their policies leading to religious otherisation, they will continue to represent the "unreasonable doctrine". In order to achieve the ideal and indeed influence change towards greater religious pluralism, equality and tolerance, commitment to these values is necessary. Without commitment on national level, the argument of relativism of European approach is bound to reappear in religious struggles. Discouraging certain religious conceptions, such as Islam, is bound to meet the appeals of that doctrine's adherents for equality of religions. And such arguments are difficult to dismiss in a credible manner when Christian religious traditions of some countries sustain formal or practical superiority.

8.5. Religious pluralism as a new challenging common principle

The appearance of multiculturalism has challenged European approaches to religion[585]. It confronted the European chaos of multiple and parallel conflicting standards. The democratic discourse had to face the reality of new religions and new cultures arriving to Europe. It also was forced to face the internal migration. The dynamics of cultural exchange have intensified.

These changes have influenced the understanding of religious equality. The analysed recommendations and changing attitude of ECTHR embraced more decidedly the principles of religious pluralism. The judgements in the case of *Religionsgemeinschaft der Zeugen Jehovas vs. Austria* or *Hasan and Eylem Zengin vs. Turkey vs. Turkey* have emphasised the nature of European society as religiously plural society.

This relatively new principle poses a considerable challenge in European conditions. Without common commitment to European values, the principle of pluralism and equality is bound to be applied selectively. It is important that the model of European democracy adjusts to the conditions of religious pluralism. Like shown in this volume, such

585 See more, e.g.: Knippenberg H., 2005.

adjustment is likely possible. However, it is even more important that commitment to common principles is reached first. Without coherence in application of democratic principles and rights, Europe is bound to be plagued by guilty conscience of double standardisation and emptiness of the European "soul".

8.6. What kind of Europe do we want?

Paraphrasing the title of Ward's article, Europe is still in search of its meaning and purpose. The potential for fragmentation is still large, even though new initiatives aiming at strengthening commitment and unification of approach to fundamental values have recently emerged. The question, however, remains the same: What kind of Europe do we want? And in which direction will the European integration go from this point? These questions naturally relate primarily to the European Union and its future. Success or failure of the ratification process of the Lisbon Treaty will have a decisive impact on this future direction of European integration.[586] If the Treaty is ratified and the amendments enter to force, it will mark the beginning of the new era in European integration. This era will have as its goal, among others an increased commitment to basic values and principles of equality. It will also gradually lead to the ideal of "common Europe" as a legal and political pan-European entity. If this construction is accepted and develops, Europe indeed may gradually move closer to a federal European state more than federation of European states.

However, if Europe does not find its common identity and the processes designed by the Lisbon Treaties do not take place; European Union will remain a forum of disagreeing countries pursuing their own national goals rather than common European principles. With the enlarged number of 27 members, the decision making processes will be increasingly more and more difficult and achievement of European consensus in matters of vital importance will be as hindered as they are today.

586. See: e.g. Nuotio K., Lissabonin sopimus parantaisi yksilön oikeuksia unionissa, Helsingin Sanomat, 25.09.2009

The issue of religions may have a decisive impact on the direction that Europe will choose. The fear of new religions and new values, which are currently present in the European legal and political spheres, may catalyse the renewal process. Fear of the religious "other" may unify Europe around the core of its common values and prepare it for taking the next step in internal integration. And paradoxically, this fear may also catalyse changes towards greater coherence and commitment to the common values of European democracy.

Conclusions

The analysis conducted in this volume shows that approach to issues of religion in Europe is diverse and incoherent. Starting from defining religion and ending at approach to religious education everything seems to be problematic in regard to religious issues in Europe. New efforts of European organs attempt to intensify commitment to values of religious equality and pluralism and call for higher tolerance and broadmindedness. Despite these efforts, however, commitment of European countries to common principles is not uniform. The multiplicity of norms, on various levels, affect the status quo. Some countries, like Sweden or Norway, strive to facilitate religious pluralism. Some others, like Greece, Poland or Malta, protect their traditional religions as national values. In other countries, while the law seems to promote equality between religions and religious pluralism on the surface, the effect of the law leads to "otherisation" of religious adherents different than those traditionally protected. Sometimes, the otherisation is only symbolic, like in the case of the majority of the states maintaining church state. "Otherisation", however, occurs also in the case of extreme separation between church and state, like shown on the French example. "Otherisation" of the Muslim populations appears to be the strongest and happens not only in the European countries, but has been also expressed in judgements of the ECTHR, such as *Dahlab* or *Sahin*. Symbols such as the veil are contrasted with the values of European democracy and treated as undemocratic.

The lack of coherence and difficulties of commitment to common European values, leave the discussion on the model of democracy extremely difficult. However, if the principles of equality of religions and religious pluralism are taken as the foundation for democratic model for Europe, the model of reasonable consensus appears to be a plausible solution for religious problems of Europe. In the era of multiculturalism and growing religious pluralism, traditional model of reasonable

consensus can be adjusted to demands of those who identify themselves with their religious community rather than with the secular democratic standard. Careful study on the possibilities of legal pluralism is essential, in order to find the possible margin of adjustment.

Ultimately, however, it will be the commitment of European countries and citizens to the common principles of European democracy that will determine what kind of religious landscape in Europe will emerge in the years to come. Whether it will be Europe torn in violent religious conflicts and constantly fearing the "other" or Europe striving for greater inclusion and understanding between adherents of various religions and non-believers depends in large degree on each of the European countries and their citizens. The future of European institutions and the EU will also have an impact on religious issues. If the Union is reformed, it will increase the possibility of greater coherence. However, if the states continue to see the EU as well as the COE as impostor of external values, rather than institutions creating common set of values, changes are unlikely to occur. Religious issues, just like other social issues in Europe, will in large degree depend on the success or failure of "giving soul to Europe". And in this process taking European common legal principles as the lens through which the laws and approaches, both on national and European level are analysed is not only an exercise for theoretical legal researchers. In my conclusions, I agree with Thorson Plesner's dissertation conclusions that legal principles matter for the protection of religious freedom of each individual. However, only coherent application of these principles can prevent religious "otherisation".

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