
RICHARD POTZ & WOLFGANG WIESHAIDER (Eds.)

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Religious Adjudication and the State

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These proceedings are dedicated to Professor David McClean
who was elected to the European Consortium for Church and State Research
in 1990 and became an emeritus member in 2014.

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PRÉFACE

Le colloque du Consortium européen pour l'étude des relations Églises-État, qui s'est tenu à Vienne en novembre 2014, a été consacré à la question des juridictions religieuses et de la pluralité des décisions juridiques. Ce livre présente l'ensemble des contributions rédigées sur la base des rapports qui avaient établis afin de permettre les discussions pendant le colloque.

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Vienne, en automne 2015

Richard Potz & Wolfgang Wieshaider

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ABRÉVIATIONS

AAS	Acta Apostolicæ Sedis	eds.	editors
c.	circa	et al.	et alii
can.	canon	EU	European Union
cann.	canons	f.	following
cap.	capitulum	ff.	following
cf.	confer	i.e.	id est
ch.	chapter, chapitre	ibid.	ibidem
CIC 1983	Codex Iuris Canonici 1983	leg. cit.	legias citatæ
CJEU	Court of Justice of the European Union	marg.	marginal
conv. cit.	conventionis citatæ	n.	note
dir.	directeur de publication	no.	number, numéro
e.g.	exempli gratia	nos.	numbers, numéros
ECHR	European Convention on Human Rights	OJ	Official Journal
ECJ	European Court of Justice	p.	page
ECommHR	European Commission of Human Rights	para.	paragraph
ECtHR	European Court of Human Rights	pp.	pages
ECR	European Court Reports	R.	Regina, Rex
ed.	editor; edition	TEC	Treaty on European Community
		TFEU	Treaty of the Functioning of the European Union
		v.	versus

INTRODUCTION

Richard Potz, Vienna

In the famous decision of the Grand Chamber in the *Refah Partisi* Case,¹ the ECtHR took – for the first time, as far as I can see – a stand on legal pluralism in the context of the legal consequences of Europe’s increasing religious diversity.

In its reasoning for its decisions, the court refers not only to the constitutional principle of *laïcité* in Turkey but also gives the more general argument that a plurality of legal orders is incompatible with the values of the ECHR. Such a plurality means the State would no longer remain the sole custodian of individual rights and could also lead to discriminating differentiation within the concept of citizenship. In his concurring opinion, the Russian judge Kovler regrets – referring to J. Griffiths² –

“that the Court [...] has missed the opportunity to analyse in more detail the concept of a plurality of legal systems which is linked to that of legal pluralism and is well-established in ancient and modern legal theory and practice.”

With reference to P. Gannagé,³ Kovler emphasises that

“[n]ot only legal anthropology but also modern constitutional law accepts that under certain conditions members of minorities of all kinds may have more than one type of personal status.”

Kovler was not only referring to the increasing importance of legal pluralism in general, but was also pleading for an unbiased approach to the Islamic Shariah.

This reasoning reflects a remarkable development over the last two decades. Initially, the term ‘legal pluralism’ denoted the co-existence of State law and traditional customary law in European colonial territories, especially in the British⁴ and

¹ ECtHR, 13 February 2003, 41340/98, 41342/98–41344/98 (*Refah Partisi and others v. Turkey*).

² J. Griffiths, ‘What is legal pluralism?’ (1986) 24 *Journal of Legal Pluralism and Unofficial Law*, pp. 1–55.

³ P. Gannagé, *Le pluralisme des statuts personnels dans les Etats multicommunautaires – Droit libanais et droits proche-orientaux* (Bruxelles 2001).

⁴ The two most important British legal anthropologists were Paul Bohannan and Max Gluckman. Bohannan tried to avoid the distorting effects of European judicial concepts in their use for social realities in Africa. Gluckman used English and Roman legal terms to describe legal realities in Africa. His aim was to deal with the problem by using the instrumentarium of comparative law and thus ensuring the legal character of the ‘customary law’; cf. R. Kuppe, ‘Legal Pluralism – Basic Concepts and Debates’, in S. Haas (ed.) *Fam-*

Dutch⁵ colonial systems, where local Muslim practices of law have played an important role. The underlying problem had therefore long been known when the legal historian John Gilissen⁶ organised a meeting with this title in 1969. With the publication of the contributions to this meeting in 1971, in particular the fundamental paper of Jacques Vanderlinden⁷, the term 'legal pluralism' was scientifically established and led to lively scientific debates. In the subsequent decades, the term was extended far beyond its legal anthropological origins and finally reached the ECtHR in the *Refah Partisi* case of 2003.

At first glance, a historic central achievement of the modern democratic constitutional State, namely the unity of the legal system, is brought into question by the acceptance of legal pluralism. It is, therefore, hardly surprising that the reference point for the issue of legal pluralism by most of the authors is seen in the relation to the state legal system. Nearly all approaches refer to the Unitarian State legal system and differentiate other systems of social order; whether they are incorporated or legitimised by the constitutional order of the State. In the first case, the one-tier concept is maintained, since the other systems of social order are inserted in the hierarchy of state law. In the second case, the legal status of the system in question is denied; it is subsumed under the terms of habits and customs which can only be relevant in exceptional cases by special legal regulation, such as the *lex mercatoria*.

Against this narrow understanding of law, Franz Benda-Beckmann decoupled the exclusive connection between the concept of law and the modern State and underlined the legal quality of non-state normative orders.⁸ This led to a fundamental debate, in which many experts, especially Simon Roberts⁹ and Brian Tamanaha¹⁰,

ily, Law and Religion. Debates in the Muslim World and Europe and their Implications for Co-operation and Dialogue (Wien 2009), pp. 21–36.

⁵ Cornelis van Vollenhoven's research on 'adat law', the customary law practised in the Dutch East Indies was not only important for pragmatic use in the administration of its colonies, but made him a founder of modern legal anthropology.

⁶ John Gilissen (1912–1988) was Professor for Legal History at the Free University of Brussels and Director of the 'Jean Bodin Society for Comparative Institutional History'.

⁷ J. Vanderlinden, 'Le pluralisme juridique: essai de synthèse', in J. Gilissen (ed.), *Le Pluralisme juridique* (Bruxelles 1971), pp. 19–56.

⁸ F. v. Benda-Beckmann, 'Who's afraid of Legal Pluralism?' (2002) 47 *Journal of Legal Pluralism and Unofficial Law*, pp. 37–82 (p. 37).

⁹ S. Roberts, 'Against Legal Pluralism. Some Reflections on the Contemporary Enlargement of the Legal Domain', (1998) 42 *Journal of Legal Pluralism and Unofficial Law*, pp. 95–106.

¹⁰ B. Z. Tamanaha, 'A non-Essentialist Version of Legal Pluralism', (2000) 27 *Journal of Law and Society*, pp. 296–321 (p. 301).

pointed out that the differences in form, structure and effectiveness of sanctions between law and other normative orders were so fundamental, that trying to apply the European legal concept would unacceptably distort them. Submitting them to a foreign scheme by using the term of legal pluralism for non-state normative orders would constitute an ethnocentric approach. These criticisms led to the provocative paper “Who’s afraid of Legal Pluralism?” by Benda-Beckmann.¹¹ The essay addresses the crucial dilemma of legal anthropological studies in legal pluralism, which is focussed on the juxtaposition of modern state law and traditional customary systems.

Although these current discussions by legal anthropologists on legal pluralism provide some fundamental insights on legal concepts, they cannot be elaborated upon here.¹²

In the last two decades, discourses on legal pluralism have left behind this narrow focus of legal anthropology and turned to a surprising number of legal fields, which are to be partially treated with the conceptual tools of legal pluralism. This happens at different levels; the intra-national, the transnational and the supranational.

At the intra-national level, there are three areas of development supporting legal pluralism within the national States. Firstly, in different social spheres we can observe the rise of self-regulating associations, ranging from trade and economics, to autonomous sports federations. Secondly, the lack of implementation of state law in conurbations and slums of modern urban agglomerations is leading to the declining efficiency of police and other state representatives and to the development of self-regulating communitarian forms of justice. Thirdly, the emergence of parallel societies of immigrants with different cultural and religious backgrounds with their own forms of alternative dispute resolutions based thereon. In this context, there is a pan-European discussion taking place on the acceptance of *Islamic Shariah Councils*, Arbitration Tribunals and traditional forms of Islamic mediation, which brings us back to the views of judge Kovler in his concurring opinion with the *Refah Partisi* case decision.

Transnational law is neither international, supranational, nor national law. Rather, it refers to the activities of International Non-Governmental Organisations, which have an increasing presence as international actors

¹¹ Cf. *supra*, n. 8.

¹² The latest, most interesting experiment is found in some Latin American States where the coexistence of widely differing legal systems in structural terms – the legal system of the State according to the European tradition and the customary law of indigenous peoples – is enshrined in the constitutions.

with political and economic significance, independent of state control. These transnational corporations and international organisations also include religious actors. Until recently, scepticism towards global religious players referred almost exclusively to the Catholic Church and her cosmopolitan model. Over the last decades, however, American Evangelical Protestants, Islamic Organisations and Orthodox Churches have increasingly played a role as transnational players as well. The activities of these new global religious identities have led to greater religious engagement with regard to issues such as conflict resolution and transitional jurisdiction. Therefore, people are turning to normative religious frameworks and authorities to a greater degree when dealing with these matters.

Finally, since the end of the last century, models for the European Union have been under discussion, in which the authors try to understand the coexistence of national and supranational law with the help of concepts of legal pluralism.¹³

In all of these cases, the monopoly of power and law held by the modern State is at stake. This effective political system which emerged in the late Modern Ages has ended historical European legal pluralism and has bound all the other political and social reference systems to it with a degree of legitimation hitherto unknown. It therefore raises the question, whether an indispensable achievement of the modern State based on the rule of law is endangered by these developments. In this system, religious affiliation as a general starting point for the legal relationships of citizens is incompatible with the guarantees of fundamental rights. This does not mean, of course, that religiously based lifestyles could not be taken into account. Their implementation is the result of the fundamental rights which guarantee a self-determined way of life. There are functional equivalents for legal pluralism, however; if the legal order allows forum shopping, if the freedom of contract allows a manifold shaping of contracts, if, in respect for privacy, increasingly alternative ways of life are admissible in marriage and family matters. However, any form of discrimination must be avoided. The indispensable elements of the legal order must be ensured: rule of law, fundamental freedoms and human rights, private autonomy for the self-determination of the individual, recognition despite otherness, and what has been called public use of reason in European tradition since Immanuel Kant.

¹³ Cf. for instance the concepts of J. Shaw, 'Postnational Constitutionalism in the European Union', in (1999) 6 *Journal of European Public Policy*, pp. 579–597, and N. MacCormick, *Questioning Sovereignty, Law, State, and Nation in the European Commonwealth* (Oxford 1999).

RESOLUTION OF DISPUTES WITHIN RELIGIOUS COMMUNITIES*

Mark Hill QC, London

I. Introduction

Richard Potz, a distinguished elder statesman of the *European Consortium for Church and State Research*, and a dear friend and colleague, is to be commended for selecting for the Consortium's gathering in Vienna the subject of dispute resolution within religious communities and the extent to which States recognise religious courts and tribunals. Not only is this subject of pressing topicality, it necessitates genuine research since these tribunals are by their nature private and function below the radar of conventional legal practice. If the Consortium is to fulfil its potential, in answer to the recent passionate call to arms from Ivan C. Ibán,¹ then it is in original scholarship such as this. For some, the national reports might appear disappointing: thin on detail and short on relevance.² But, in any scientific survey, the absence of evidence can sometimes be as significant as its presence.³ What does the material tell us about the resolution of disputes within religious communities?

II. The Concept of Multiple Identities

Identity is constantly being created and re-created, negotiated and re-negotiated. As the great Bard, Shakespeare famously said: "All the world's stage and all the men and

* [Editors' note: This article was submitted for publication in its original version as presented at the Conference.]

¹ I. C. Iban, "Towards the Golden Jubilee of the European Consortium for Church-State Research" (2014, unpublished).

² In Estonia, for example, the topic of alternative religious adjudication is 'rarely if not at all discussed'.

³ At the time of writing this summary, I had received only ten national reports, namely: Czech Republic, Estonia, Greece, Hungary, Ireland, Netherlands, United Kingdom, Poland, Spain, and Sweden, together with Rynkowski's erudite paper on Article 267 of the Treaty of the Functioning of the European Union.

women merely players.”⁴ The philosopher Charles Taylor wrote that, while previously “what we would now call a person’s identity was largely fixed by his or her social position”,⁵ we now live in an “age of authenticity”.⁶ Since the end of World War II, writes Linda Woodhead, “subjectivities of each individual became a, if not the, unique source of significance, meaning and authority”.⁷ Life is no longer necessarily lived in terms of external roles, duties and obligations, but instead by reference to the citizen’s subjective experiences. This new focus was spurred on by the social changes which occurred in the sixties which have been characterised by Russell Sandberg, amongst others, as the “death of deference”.⁸

The constructive nature of personal identities includes religious identities. As a result of the rise in subjectivity, people draw upon aspects of their religious identities, constantly re-constructing them, in various aspects of social life. As with other forms of identity, religious identities are likely to mutate over time and place, ebbing and flowing in response to internal and external stimuli. Further, even where a person identifies with a particular religious group, his beliefs are likely to be personal to him (in some degree) with the interpretation or emphasis differing between that person and other members of his faith community.

Lord Nicholls in *Williamson*⁹ stated that: “Freedom of religion protects the subjective belief of an individual”, recognising that an individual’s beliefs would not be fixed and static but rather that the “beliefs of every individual are prone to change over his lifetime”. A rise in legislation and litigation concerning religious rights in recent year is suggestive of a “juridification of religion”.¹⁰ However, courts and tribunals have been slow to recognise the dilemma where those who assert their religious rights have often been required to choose between adherence to their faith and the rights that they would normally enjoy by virtue of their citizenship. This is most clear in the case law concerning religious dress and symbols following the case of *Begum*,¹¹ where a rights-based approach often leaves claimants with an impossible

⁴ W. Shakespeare, *As You Like It* (c. 1598), Act 2, scene 7.

⁵ C. Taylor, *The Age of Authenticity* (Harvard University Press, 1991), p. 47.

⁶ C. Taylor, *A Secular Age* (Cambridge Ma. 2007), p. 473.

⁷ P. Heelas and L. Woodhead, *The Spiritual Revolution* (Blackwell, 2005) pp. 3-4.

⁸ R. Sandberg, *Religion, Law and Society* (Cambridge 2014), p. 167.

⁹ House of Lords, 24 February 2005, *Regina v. Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15 at para. 22 f.

¹⁰ Sandberg, *supra*, n. 8, ch. 1. I am grateful to Dr. Sandberg for allowing me to draw upon this chapter in my introductory observations.

¹¹ House of Lords, 22 March 2006, *Regina (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15; on which see M. Hill and R. Sandberg, ‘Is Nothing Sacred? Clashing

compromise: either to confine their religious identity to their home (and place of worship), or to select a public sphere (workplace, school etc.) which accommodates their religious needs.¹²

This ‘binary’ approach is underpinned by the failure to accept that believers will owe allegiances both to their religion and to the ‘secular’ world, and an assumption that a clear dividing line can be drawn between the two. It fails to appreciate that religious beliefs will differ between co-religionists and that a direct, causal link from creedal assent to behaviour cannot be assumed. Note the hysterical responses to the continued existence of religious courts and tribunals, following the 2008 lecture by the then Archbishop of Canterbury, Rowan Williams.¹³ The media response was invariably framed in ‘binary’ terms: it was a question of either becoming an Islamic State or prohibiting all forms of religious tribunals. This simplistic over-reaction has recurred whenever media attention is given to questions concerning religious law. For example, in March 2014 the publication of guidance by the Law Society to “assist solicitors who have been instructed to prepare a valid will, which follows Shariah succession rules” was met by front page headlines in the *Telegraph* asserting that “Islamic Law is adopted by British Legal Chiefs” and a quotation attributed to Baroness Cox calling the guidance “deeply disturbing”, and “violating everything we stand for”.¹⁴ This simplistic ‘all or nothing’ approach (which I suggest is not limited to the United Kingdom) ignores the fact that religious legal systems and their norms already exist. Instead of creating a dialogue, it is assumed that all religious legal systems are to be outlawed. Those who sought to use such tribunals are treated with suspicion, and are given the ‘binary’ choice of their citizenship rights or their religion.

Symbols in a Secular World’ (2007) *Public Law*, pp. 488–506.

¹² Recent Strasbourg jurisprudence suggests a welcome departure from this approach: ECtHR, 15 January 2013, 48420/10, 59842/10, 51671/10 and 36516/10 (*Eweida and Others v. United Kingdom*), as discussed in M. Hill, ‘Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg’s Judgment in *Eweida and others v United Kingdom*’, (2013) 15 *Ecclesiastical Law Journal*, pp. 191–203.

¹³ For the text of the lecture see R. Williams, ‘Civil and Religious Law in England: A Religious Perspective’, in R. Griffith-Jones (ed.), *Islam and English Law: Rights, Responsibilities and the Place of Sharia* (Cambridge 2013), pp. 20–33, and for an analysis of the media reaction see R. Griffith-Jones, ‘The “Unavoidable” Adoption of Sharia Law – The Generation of Media Storm’, *ibid.*, pp. 9–19.

¹⁴ For the guidance see <http://www.lawsociety.org.uk/advice/practice-notes/sharia_succession_rules/>] and for the newspaper response see <<http://www.telegraph.co.uk/news/religion/10716844/Islamci-law-is-adopted-by-British-legal-chiefs>> (both 7 November 2014). [Editors’ note: The above indicated note was withdrawn from the website on 24 November 2014, see <<http://www.lawsociety.org.uk/news/press-releases/law-society-withdraws-sharia-succession-principles-practice-note/>> (17 September 2015)].

III. The Fact of Joint Governance

The work of Ayelet Shachar, particularly her monograph *Multicultural Jurisdictions*,¹⁵ elements of which were cited by Rowan Williams in his lecture, argues that, although some secularists object to the very existence of religious tribunals, for most critics the ‘problem’ with religious tribunals is what she refers to as the ‘paradox of multicultural vulnerability’.¹⁶ This refers to the conception – which may well be false – that those who use religious tribunals are denied the citizenship rights that they would otherwise enjoy under secular law.¹⁷ This may occur, for example, where the religious norms differ from those of the State as regards gender roles or sexual orientation.¹⁸ While it is important not to overplay the paradox of multicultural vulnerability, the focus must be on the agency of those who use religious tribunals. Shachar’s work urges us to recognise that these citizen-insiders are both ‘culture-bearers and rights-bearers’;¹⁹ and as such they enjoy rights and responsibilities according to both the norms of their culture and the law of the land.

Shachar advocates the recognition of ‘joint governance’, that is, the appreciation that people “jointly belong to more than one community and will accordingly bear rights and obligations that derive from more than one source of legal authority.”²⁰ This notion of joint “governance rests upon the acceptance of the complex and multi-layered nature of multicultural identity”. We cannot remain blind to the web of complex and overlapping affiliations which exist between these competing institutions and entities. It means recognising that the citizen who simultaneously belongs to, and is affected by, both the religious community and the state authority. This may require activity on the part of the State to foster ongoing interaction between these different sources of authority, as a means of improving the situation of traditionally

¹⁵ A. Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge 2001).

¹⁶ *Ibid.*, p. 3.

¹⁷ As Shachar, *ibid.*, p. 4, puts it, the paradox refers to the concern the ‘accommodation of different cultures can conflict with the protection of certain members’ citizenship rights’; that the recognition of the rights and obligations that result from belonging to a religious group can paradoxically reduce the rights and obligations that a person would ordinarily enjoy by virtue of their citizenship.

¹⁸ For a discussion of the tensions which have emerged between laws protecting religious freedom and those which prohibit discrimination on grounds of sexual orientation, see R. Sandberg, ‘The Right to Discriminate’, (2011) 13 *Ecclesiastical Law Journal*, pp. 157–181.

¹⁹ A. Shachar, ‘Privatising Diversity: A Cautionary Tale from religious Arbitration in Family Law’, (2008) 9 *Theoretical Inquiries in Law*, p. 573–607 (p. 593).

²⁰ Shachar, *supra*, n. 15, p. 13.

vulnerable insiders without forcing them to adhere to an either/or choice between their culture and their rights.²¹

People belong co-terminously to more than one community. English law has long recognised this. Indeed the medieval period was characterised by a ‘radical state of legal pluralism.’²² Church Courts were the earliest courts to have the appearance of courts of law;²³ and even though their jurisdiction is now much reduced, the modern ecclesiastical courts of the Church of England remain part of the English legal system, their decisions are subject to judicial review by the High Court.²⁴ Moreover, the English legal system has long accepted the autonomy of religious groups to function and has administered multiple forms and sources of law.²⁵

The term ‘joint governance’ is synonymous with ‘legal pluralism’: it is normal for more than one ‘legal’ system to co-exist in the same social arena. Although there can, of course, be some dispute as to what might properly be styled as ‘law,’²⁶ the acceptance that there is more than one form of governance should be non-controversial.²⁷ People are not only loyal to the State but are loyal to other groupings they form (including their family, their religious community and their peer and interest groups). These groupings will lead to norms and obligations to which individuals will wish to adhere day-to-day in living out their identity, and these will vary according to time and place.

²¹ *Ibid.*, p. 88.

²² B. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford 2001), p. 180.

²³ S. Milsom, *Historical Foundations of the Common Law*, 2nd ed. (London 1981), p. 25.

²⁴ Section 81 of Ecclesiastical Jurisdiction Measure 1963, no. 1; see M. Hill, ‘Judicial Review of Ecclesiastical Courts,’ in N. Doe, M. Hill and R. Ombres (eds.), *English Canon Law* (Cardiff 1998); on the legal status of the Church of England and its law, see M. Hill, *Ecclesiastical Law*, 3rd ed. (Oxford 2007).

²⁵ “The general approach remains that ‘everything is permitted except what is expressly forbidden’”: Chancery Division, 28 February 1979. *Malone v. Metropolitan Police Commissioner* [1979] Ch 344; see also House of Lords, 13 October 1988, *Attorney General v. Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at para. 178 per Lord Donaldson MR: “the starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law [...] or by statute.”

²⁶ Hans Kelsen’s ‘pure theory of law’ provides a contrary approach to that taken by legal pluralists contending that ‘law’ could be sharply contrasted with ‘other social orders which pursue in part the same purposes as the law, but by different means’: law can be distinguished from other social or moral rules in that laws are compulsory and result in sanctions if they are broken: H. Kelsen, ‘The Law as a Specific Social Technique,’ (1941) 9 *University of Chicago Law Review*, pp. 75–97 (pp. 79–80).

²⁷ As M. Malik, *Minority Legal Orders in the UK* (London 2012), p. 21, has argued, the use of the word law leads to considerable confusion. She writes that: “It is of crucial importance for public debates to recognise that in a large number of situations a cultural or religious community is using a ‘folk’ concept of law to describe its normative practice rather than competing with, or displacing law.”

Why is the operation of religious tribunals so controversial? For Shachar, the concern is that those within religious groups are denied their citizenship rights.²⁸ The reaction to Rowan Williams' lecture and the subsequent media panic suggests that some have a problem with religious tribunals *per se*. There seems to be a perception that religious law is primitive and that religious tribunals have no place in modern (secularised) society.²⁹ Coverage of religious law is often accompanied by pictures of stonings, suggesting that religious law is regarded as being something practised by other people in less sophisticated societies.³⁰ Part of the problem may be terminological. Talk of religious law or of religious tribunals often invokes an understanding that such phenomena are largely historical relics.³¹ In secularised societies, where religious authorities play a less important social role than they once did, the very notion of religious legal systems appears regressive. It is not readily accepted that the term religious law describes both the rules found in sacred texts and also the more practical rules developed by religious groups themselves.³² As Silvio Ferrari puts it:

“Religions (and religious laws) are born and die every day: it is a dynamic phenomenon, rooted in the present as well as the past.”³³

Every society and community produces its own kind of law which includes ‘social law’ based on mutual trust, aid and cooperation. Other writers, however, have sought a narrower term so as to distinguish law from normative social order or social relations. Maleiha Malik favours the term ‘minority legal orders’ and states

“to be classified as a minority legal order, norms need to be sufficiently distinct, widespread and concrete to ensure that they are distinguishable from general social relationships.”³⁴

It matters not whether the adherents define their obligations as ‘law’, what is significant is whether they treat their obligations like ‘law’. Wherever there is any mechanism, however informal, for resolving disputes about validity, interpretation and enforcement, then this ‘institutional’ aspect will be properly identified as legal order. Malik observes that Jews, Christians and Muslims are the three religious groups “most commonly assumed to have a legal order.”³⁵ This is borne out by the national

²⁸ Shachar, *supra*, n. 15, p. 3.

²⁹ For discussion of the secularisation thesis, see Sandberg, *supra*, n. 8.

³⁰ Images of stoning were used in the press coverage of R. Williams' lecture.

³¹ A. Huxley, *Religion Law and Tradition: Comparative Studies in Religious Law* (London 2002), p. 6, states “what critically differentiates these [religious] systems from the normal Comparative Law fodder is oldness, obsolescence or, if you prefer, history.”

³² See R. Sandberg, *Law and Religion* (Cambridge 2011), p. 170.

³³ ‘Religious Law: A Discussion’ in Huxley, *supra*, n. 31, pp. 148–156 (panel debate, p. 155).

³⁴ Malik, *supra*, n. 27, p. 23.

³⁵ *Ibid.*, p. 16.

reports prepared for this conference but those reports also illustrate that majoritarian Churches themselves have often quite sophisticated systems of internal regulation.³⁶ Legal orders do not have to be religious and they can vary considerably in their formality and structures.³⁷ Self-defining communities feel able to generate and enforce their own norms, rules and laws. A faith community is thus an autonomous source of authority for its members in the construction and re-construction of their religious identities.

IV. Towards a Synthesis of the National Reports

There are obvious practical difficulties in attempting a synthesis of the national reports when a significant number are not yet available, and where there may be a subconscious bias on my part since I am the author of one of them. However, I list below themes and emphasises which I believe I have identified. I list them below (in no particular order) in the hope that some or all may prove fruitful sources of discussion and debate in the plenary session which is to follow.

1. Availability of Information

First, it would appear that the subject is not well developed in terms of academic scholarship. In Estonia, the topic of alternative religious adjudication is 'rarely if not at all discussed'. In many countries, meaningful data are only available from mainstream 'monolithic' Churches:³⁸ the Orthodox Church in Greece, the Dutch Protestant Church in the Netherlands, the Lutheran Church in Poland, the Church of Sweden in (naturally) Sweden etc. However, the industry of the authors the national

³⁶ I understand that a trans-national report has been commissioned to deal with the Canon Law tradition of the Catholic Church which will (I anticipate) provide evidence of highly formalized institutional legal structures.

³⁷ Indeed, this is true of religious legal orders. Contrast the highly formal religious laws of the Roman Catholic Church with Islam, Hinduism and Buddhism which "lack single authoritative organisations for regulating their national and transnational activities": J. Beckford and J. Richardson, 'Religion and Regulation' in J. Beckford and N. Demareth (eds.), *The Sage Handbook of the Sociology of Religion* (London, Thousand Oaks 2007), p. 399.

³⁸ It is noteworthy that many reports felt obliged to consider the Roman Catholic Church (notwithstanding the separate paper which is expected on this subject) due – perhaps – to the absence of material on other faith communities.

reports has produced information on dispute resolution concerning Jews, Muslims, the Uniting Church in Sweden, etc.

2. Prevalence of Parallel Jurisdictions

As Augustin Motilla observes, “Generally speaking all religious denominations have ways of resolving internal disputes.” The report from the Republic of Ireland ventures seven general propositions which, I suggest, have a universal character to them and are capable of applying throughout the member states of the European Union. The following features seem to be widespread and non-contentious:

- Membership of a faith community requires recognition of the spiritual or moral authority of the religious body;
- Members are usually required to avoid disunity and to resolve disputes between themselves;
- Conciliation and reconciliation is to be preferred to adversarial litigation;
- Formal structures in the form of courts and tribunals nonetheless exist to resolve disputes.³⁹

3. Competence

There seems to be general recognition that there are mutually exclusive spheres of competence between that of the state and that of the faith community. Estonia seems to be eagerly awaiting a test case. State courts will not adjudicate on matters of doctrine (Hungary, Czech Republic, United Kingdom) nor will they investigate the spiritual or moral suitability of individuals to hold ecclesiastical office (Hungary, United Kingdom). Religious institutions have exclusive jurisdiction in matters of doctrine (Czech Republic); religious adjudication is recognised as part of the autonomy of faith communities and a civil court will not enter into a purely religious dispute (Estonia). The decision of the ‘supreme authority’ of a religious community is final: there is no appeal to the courts or tribunals of the state (Czech Republic). Sophie van Bijsterveld identifies the concept of Church autonomy as the starting point, whereas Piotr Stanisiz talks of the separation of political and religious structures. These are in essence different articulations of the same principle which is common to all the nations comprised in the current study.

³⁹ The precise nature of these formal structures is discussed more fully below.

In Estonia it would appear that religious courts and institutions are expressly prohibited from interpreting the laws of the State and assessing their conformity to religious rules; but the by-laws of various Churches (including provisions concerning dispute resolution) are afforded official recognition by the State. The muftis in Western Thrace, for example, are high-ranking civil servants, appointed by presidential decree and funded by the Greek State.

4. Hierarchical Recourse

In many instances, rather than convening religious courts and tribunals (in the conventional sense), disputes among the faithful are resolved by and within the communities themselves through a superior or a representative body (Czech Republic, Estonia, Greece). The sophistication of procedures for dispute resolution varies (Czech Republic, Estonia, Greece).

5. Mediation

Alternative dispute resolution is encouraged (Czech Republic, Ireland). It is interesting that the arbitration is the mechanism for dispute resolution for the Jewish community in the Netherlands, but not for doctrinal disputes, presumably because this is a matter for the magisterium there is no room for compromise in declaring what the doctrine of any religion might be.

6. Qualifications and Training

There seems to be a wide diversity of approach in relation to the qualifications requires by faith communities for those to whom it entrusts the resolution of disputes and as to the nature, quality and extent of training which is given. Mediators, arbitrators and judges receive particular training (Czech Republic). The report from the Netherlands is one of the few which raises the possibility of social pressure or coercion: it does so in relation to Shariah courts but the same concern may affect other religions.

7. Subject Matter

Religious tribunals tend to deal with internal matters of concerning the conduct and discipline of members (usually clergy and sometimes laity as well). Increasingly they deal with matters of family law: annulments of marriage (Roman Catholic), division of property on divorce (Muslim Tribunals, *Beth Din*). In some countries the law relating to marriage is an entirely civil (state) function. Thus there can be a dissonance between marital status in the eyes of the State and those of the Church. In Estonia recently, some Muslim marriage contracts (*nikah*) were solemnised by Imams, which (presumably) would not be recognised under State law.

8. Formal Court Structures

Formalised courts and tribunals are perhaps more plentiful than might at first have been thought. Examples include the ecclesiastical court (*kirikukphus*) of the Evangelical Lutheran Church and those of the Estonian Apostolic Orthodox Church (Estonia),⁴⁰ the Diocesan Courts of Ireland (based on the pre-disestablishment English model), the ecclesiastical courts of the autocephalous Church of Greece, and Hungarian Reformed (Calvinist) Church. Generally, as the Irish report notes, there is a right of appeal to an appellate body from first instance adjudications (Estonia). Concerns have been voiced in some instances at the ‘independence’ of religious tribunals.

⁴⁰ It would seem that the by-laws for these Churches (and those of the Muslim Congregation).

RELIGIOUS ADJUDICATION IN AUSTRIA

Wolfgang Wieshaider, Vienna

Austrian law provides for two tiers of legal personalities, reserved for religious communities:

- at a lower level the private law status of Registered Confessional Communities with fewer legal and organisational requirements to be met;
- and at a higher level the public law status of Recognised Religious Societies.

Their establishment has been explained and discussed in other places.¹ For the following considerations it may suffice to enumerate the current list of registered or recognised bodies.

At present, public law status is granted to the Catholic Church, the Protestant Church (Lutheran and Reformed), the Orthodox Church (Greek, Serbian, Rumanian, Russian, Bulgarian), the Armenian Apostolic Church, the Syrian Orthodox Church, the Coptic Orthodox Church, the Old Catholic Church, the Methodist Church, the Church of Jesus Christ of the Latter Day Saints, the New Apostolic Church, the Israelite Religious Society, the Islamic Faith Community, the Buddhist Religious Society, the Religious Society of Jehovah's Witnesses, the Islamic Alevi Faith Community and the Free Churches.²

Private law status is granted to the Old Alevi Faith Community, the Bahá'í Religious Community, the Christian Community, the Hindu Religious Society, the Is-

¹ Cf. only H. Kalb, R. Potz and B. Schinkele, *Religionsrecht*, (Wien 2003), pp. 93–126; K. W. Schwarz, 'Das Anerkennungsrecht aus der Sicht der Kultusbehörde', (2010) 57 *österreichisches Archiv für recht & religion*, pp. 228–236; R. Potz and B. Schinkele, 'Eintragung bzw gesetzliche Anerkennung alevitischer Gruppen in Österreich', (2011) 58 *österreichisches Archiv für recht & religion*, pp. 137–155; ECtHR, 31 July 2008, 40825/98 (*Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*); ECtHR, 26 February 2009, 76581/01 (*Verein der Freunde der Christengemeinschaft and others v. Austria*); Verfassungsgerichtshof, 1 December 2010, B 1214/09.

² <<http://www.bka.gv.at/site/4735/default.aspx>> (30 June 2015).

lamic Shiite Faith Community, the Seventh-day Adventist Church and the Pentecostal Church of God.³

Only these recognised or registered bodies will be taken into the following considerations. Where the issues at stake do not require a distinction between the two tiers of legal personality, both will be addressed as religious communities unless otherwise specified.

Religious legal systems are generally not confined to States, but apply to the members of the corresponding communities. Hence, their judicial structures can overlap with State borders, even if administrative ecclesiastical districts⁴ do not do so.

Religious communities act within the law of the land. This is why it appears consistent to look at this framework first and then at ecclesiastical solutions and responses.

I. Religious Disputes: The Approach of the State

1. Separation of Legal Orders

State's Basic Act on the General Rights of the Citizens⁵ of 1867 is part of the Federal Constitution.⁶ Its Article 15 guarantees the legally recognised Religious Societies to freely administer their own or internal affairs.

The status of Confessional Communities is primarily meant for newly established communities, as can be deduced from the differentiating waiting period after which a registered Confessional Community can apply for the status of a legally recognised Religious Society. The jurisprudence of the Constitutional Court considers the status and hence the autonomy of Confessional Communities less extensive,⁷ these communities act under closer supervision of the State.

³ <<http://www.bka.gv.at/site/3405/default.aspx>> (30 June 2015).

⁴ Cf. e.g. R. Potz and E. M. Synek, *Orthodoxes Kirchenrecht (Kirche und Recht 28)*, 2nd ed. (Freistadt 2014), p. 244.

⁵ *Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger*, Reichsgesetzblatt 1867/142 as amended.

⁶ Article 149(1) of the Federal Constitution (*Bundes-Verfassungsgesetz*), Bundesgesetzblatt 1930/1 as amended.

⁷ Verfassungsgerichtshof, 3 March 2001, B 1713/98 and others.

The mutual domains or external affairs are governed by the Concordat for the Catholic Church,⁸ by individual acts for some Societies,⁹ by the general Recognition Act¹⁰ for other legally recognised Religious Societies and by the general Confessional Communities Act¹¹ for Confessional Communities.¹² Concordat, in particular, takes the unique nature of the Catholic Church into account better than the other norms. Nonetheless, even Concordat does not mention ecclesiastical courts except for marital issues, which are no longer relevant to the present subject.¹³ On principle, the State neither recognises religious jurisdiction and mediation nor takes a stand against them. These domains are considered to fall within the religious communities' autonomy.

2. Recognition in Few Selected Areas as an Exception

An exception to this aforementioned rule is provided by section 5(4) of Cultural Heritage Protection Act¹⁴, which refers to the pertinent ecclesiastical liturgical provisions. Where they motivate or require an alteration of protected heritage, in order to render liturgy more dignified, the competent public authority is obligated to sustain the motion.¹⁵ These liturgical heritage provisions are interpreted by the ecclesiastical authorities. This forms the frame for a consultative procedure where a compromise is being sought.¹⁶

⁸ *Konkordat zwischen dem Heiligen Stuhle und der Republik Österreich samt Zusatzprotokoll*, Bundesgesetzblatt II 1934/2.

⁹ *Gesetz betreffend die Regelung der äußeren Rechtsverhältnisse der israelitischen Religionsgesellschaft*, Reichsgesetzblatt 1890/57 as amended; *Islamgesetz 2015*, Bundesgesetzblatt I 39; *Bundesgesetz über äußere Rechtsverhältnisse der Evangelischen Kirche*, Bundesgesetzblatt 1961/182 as amended; *Bundesgesetz über äußere Rechtsverhältnisse der griechisch-orientalischen Kirche in Österreich*, Bundesgesetzblatt 1967/229 as amended; *Orientalisch-orthodoxes Kirchengesetz*, Bundesgesetzblatt I 2003/20.

¹⁰ *Gesetz betreffend die gesetzliche Anerkennung von Religionsgesellschaften*, Reichsgesetzblatt 1874/68.

¹¹ *Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften*, Bundesgesetzblatt I 1998/19 as amended.

¹² See the critical comment by Kalb, Potz and Schinkele, *supra*, n. 1, pp. 80 f.

¹³ See *infra*, ch. I.3

¹⁴ *Denkmalschutzgesetz*, Bundesgesetzblatt 1923/533 as amended.

¹⁵ W. Wieshaider, 'Die Weitergabe von Kultusbauten vor dem Hintergrund des Denkmalschutzrechtes,' in B. Schinkele, R. Kuppe, S. Schima, E. M. Synek, J. Wallner and W. Wieshaider (eds.), *Recht – Religion – Kultur, Festschrift für Richard Potz zum 70. Geburtstag* (Wien 2014), pp. 923–934 (pp. 923 f.).

¹⁶ *Ibid.*, pp. 923–934.

3. Personal Status

Religious Societies recognised by the State used to civilly register births, deaths and marriages, and religious marriages had civil effects until 1938; the respective Religious Societies are still the competent authorities retaining the old registers.¹⁷

Nowadays, the civil personal status of people is exclusively governed by State law. Neither current religious registers nor religious marriages have any civil effect. The strict separation in this domain causes a situation where the religious authorities' decisions are confined solely to the autonomous religious sphere.

4. Arbitration

Within their constitutionally guaranteed religious autonomy religious communities have conciliation or arbitration boards, resolving internal conflicts, deciding on membership questions and the like. These boards may even be prescribed by an act governing the external relations of a Religious Society.¹⁸ In these questions the arbitration boards act according to their own systems without recognition by the State and its authorities. The State courts are not competent to decide, as long as there are no civil obligations involved, as for instance due membership fees. These arbitration boards may be viewed in a similar light as those of associations, in regard to which section 8(1) of Associations Act¹⁹ stipulates that they can, but need not be organised according to the principles set forth by sections 577 ff. of Civil Procedure Code^{20, 21} The decisions of such arbitration tribunals are recognised by the State and final. They have the same effects as State court rulings, as stipulated by section 607. In exchange, a basic set of procedural guarantees and two public policy clauses have to be complied with; otherwise, a State court can quash a decision of an arbitration tribunal seated in Austria according to section 611.²² These guarantees and clauses are exhaustively defined by section 611(2) *leg. cit.* Thus, an arbitral award can be quashed when

¹⁷ Kalb, Potz and Schinkele, *supra*, n. 1, p. 165

¹⁸ See *infra*, ch. II.1

¹⁹ *Vereinsgesetz 2002*, Bundesgesetzblatt I 66 as amended.

²⁰ *Zivilprozessordnung*, Reichsgesetzblatt 1895/113 as amended.

²¹ H. W. Fasching, *Lehrbuch des österreichischen Zivilprozessrechts*, 2nd ed. (Wien 1990), marg. no. 2239.

²² C. Hausmaninger in H. W. Fasching and A. Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen IV/2, Schiedsverfahrensrecht §§ 577–618 ZPO*, 2nd ed. (Wien 2007), § 607 ZPO, marg. no. 19 and § 611 ZPO, marg. nos. 12–20.

- a valid arbitration agreement is lacking,
- the very arbitral procedure was not notified to a party,
- a party was excluded from nomination of an arbitrator or denied the proper use of procedural rights,
- the arbitral award concerns issues not covered by the arbitration agreement,
- the tribunal's composition is inconsistent with sections 577 ff. *leg. cit.* or with the arbitration agreement,
- the procedure itself or the arbitral award (not the statement of reasons²³) contradicts public policy
- the requirements according to section 530(1) *leg. cit.* concerning the re-opening of the proceedings are met,
- the subject matter is not arbitrable according to Austrian law.

section 582(1) *leg. cit.* qualifies – broadly defined – proprietary claims and matters which parties can settle by compromise as arbitrable.²⁴ Family and housing law is not arbitrable according to section 582(2) *leg. cit.* The same applies to collective labour and social insurance law according to section 9(2) of the Labour and Social Security Courts Act²⁵. Issues of individual labour law can be made subject to arbitration only after they have occurred.²⁶

According to section 588 of Civil Procedure Code arbitrators can be rejected if their impartiality or independence are doubted. Parties cannot renounce their right to reject a partial or dependent arbitrator in advance, but can renounce their right in respect to a specific reason which has already emerged.²⁷

Pursuant to section 603 *leg. cit.* the parties can choose the set of legal provisions of various origins to be applied. The underlying concept is broad, its aim is to facilitate an agreement.²⁸ In addition, the parties can stipulate that the arbitration tribunal

²³ Oberster Gerichtshof, 31 August 1995, 3 Ob 566/95; Oberster Gerichtshof, 5 May 1998, 3 Ob 2372/96m; Oberster Gerichtshof, 1 April 2008, 5 Ob 272/07x; Oberster Gerichtshof, 18 February 2015, 2 Ob 22/14w.

²⁴ *Ibid.*, § 582 ZPO, marg. no. 29.

²⁵ *Arbeits- und Sozialgerichtsgesetz*, Bundesgesetzblatt 1985/104 as amended.

²⁶ Cf. W. H. Rechberger and W. Melis in W. H. Rechberger (ed.) *Kommentar zur ZPO*, 3rd ed. (Wien 2006), § 582, marg. no. 4.

²⁷ Hausmaninger, *supra*, n. 22, § 588 ZPO, marg. no. 147.

²⁸ *Ibid.*, § 603 ZPO, marg. no. 13.

will decide *ex aequo et bono* – with due regard to the rule of equality and to the public policy clause.²⁹

The public policy clause has two aspects: a substantive and a procedural. Substantive aspects of the public policy clause do not cover all matters of public interest, but refer to the basic values of the legal order.³⁰ Situations need to be scrutinised individually. The fact that some specific regulations contradict public policy,³¹ does not render the whole religious legal order from which they stem, problematic.³²

Procedural aspects of the public policy clause do not comprise any breach of procedural law whatsoever, but need to be severe errors in procedure, which are equivalent to those explicitly mentioned by section 611(2) *leg. cit.*³³

An arbitral award which was rendered according to the aforementioned principles entrains incompetency *ratione materiæ* of State courts.³⁴

Within this framework religious law can serve as the legal basis for arbitral awards.³⁵

5. Labour Law

Religious communities act as employers, religious teachers employed by the State teach doctrine of their religion. Section 202(3) of the Employment Act for Civil Servants³⁶ requires teachers of religious instruction and of religious pedagogy to prove that the competent ecclesiastical authority declared the teacher's ability and authority to give the appropriate lessons in compliance with the relevant ecclesiastical regulations.

²⁹ *Ibid.*, § 603 ZPO, marg. no. 21.

³⁰ Oberster Gerichtshof, 8 June 2000, 2 Ob 158/00z; Oberster Gerichtshof, 26 January 2005, 3 Ob 221/04b; Oberster Gerichtshof, 1 April 2008, 5 Ob 272/07x; Oberster Gerichtshof, 18 February 2015, 2 Ob 22/14w.

³¹ Cf. W. Posch, 'Spannungsfelder zwischen Scharia und österreichischem Zivilrecht', (2010) 57 *österreichisches Archiv für recht & religion*, pp. 66–89 (p. 79).

³² Cf. B. Verschraegen in P. Rummel (ed.) *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch II*, 3rd ed. (Wien 2004), § 6 IPRG, marg. nos. 1–7.

³³ Fasching, *supra*, n. 21, marg. no. 2231.

³⁴ A. Konecny in H. W. Fasching and A. Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen I, EGJN, JN*, 3rd ed. (Wien 2013), Einleitung I, marg. no. 180/1.

³⁵ J. Adolphsen and F. Schmalenberg, 'Islamisches Recht als materielles Recht in der Schiedsgerichtsbarkeit?' (2007) 5 *Zeitschrift für Schiedsverfahren – German Arbitration Journal*, pp. 57–64.

³⁶ *Beamten-Dienstrechtsgesetz 1979*, Bundesgesetzblatt 333 as amended.

Pursuant to section 38(1) of University Act,³⁷ which refers to Article V(3, 4) of Concordat, both the nomination of a professor at a Catholic theological faculty and his dismissal depend on the authorised Catholic bishop's consent.³⁸ The professors have legal remedies only within Canon law.³⁹ In this respect the ecclesiastical jurisdiction is prescribed and exclusive, and considered already enshrined in the constitutional guarantee of the Church's autonomy by some authors;⁴⁰ others however argue a stronger position of the freedom of science and research against which freedom of religion has to be balanced in the individual cases.⁴¹ Compared to this strong impact, section 38(2) University Act and section 15(4) of Protestant Church Act⁴² just grant the Protestant Church the right to be heard in the analogous situation.⁴³ An equivalent to the latter stipulation was introduced into section 24(4) of Islam Act 2015⁴⁴. Pursuant to section 24(1) *leg. cit.* the State will provide Islamic theological studies at the University of Vienna as from 1 January 2016. Section 24(2) *leg. cit.* guarantees the establishment of an individual branch of studies for each Religious Society recognised under this act.⁴⁵

Labour law is a delicate area where the border of the religious communities' autonomy is crossed.

Religious communities may regulate their ecclesiastical offices autonomously.⁴⁶ Accordingly, the Constitutional Court rejected an appeal of a parson of the Reformed Church against a disciplinary decision of the appeal board of his Church.⁴⁷ Yet, within the frame of the State's labour law their constitutionally guaranteed freedom is opposed by the employees' rights to equal treatment.⁴⁸ In this respect section

³⁷ *Universitätsgesetz* 2002, Bundesgesetzblatt I 120 as amended.

³⁸ Can. 810 CIC 1983; Articles 25–30 Sapiientia Christiana, AAS (1979) 71, pp. 469 ff.

³⁹ G. Muzak in H. Mayer (ed.) *Kommentar zum Universitätsgesetz*, 2nd ed. (Wien 2008), § 38 UG, no. III.3.

⁴⁰ R. Potz and B. Schinkele, 'Im Spannungsfeld von kirchlichem Selbstbestimmungsrecht und Universitätsautonomie: Das konkordatäre Zustimmungsrecht des Bischofs', (2002) 49 *österreichisches Archiv für recht & religion*, pp. 401–448 (pp. 418 f.).

⁴¹ S. Hammer, 'Zur konfessionellen Bindung der Theologie aus Sicht der Wissenschaftsfreiheit', in Schinkele, Kuppe, Schima, Synek, Wallner and Wieshaider (eds.), *supra*, n. 15, pp. 117–132 (pp. 129–132).

⁴² See *supra*, n. 9.

⁴³ Muzak, *supra*, n. 39, § 38 UG, no. III.3.

⁴⁴ See *supra*, n. 9.

⁴⁵ At present the Islamic Faith Community (see sections 9–15 *leg. cit.*) and the Islamic Alevi Faith Community (see sections 16–22 *leg. cit.*).

⁴⁶ Cf. C. D. Classen. *Religionsrecht*, (Tübingen 2006), marg. nos. 274, 579.

⁴⁷ Verfassungsgerichtshof, 28 November 2011, B 1220/11.

20(2) of Equal Treatment Act⁴⁹ – which is based on Article 4(2) of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation⁵⁰ – lays down that a different treatment with regard to professional activities within religious communities or other organisations whose ethos is based on religion or belief, does not constitute an unlawful discrimination where the employee's particular religion or belief is genuinely and legitimately required for the corresponding occupation in respect of the organisation's ethos.⁵¹

The employees work on the basis of a contract of employment which is subject to adjudication by State courts; as nobody who seeks legal remedy shall be rejected by State courts.⁵² This constitutional guarantee is anchored in Article 83(2) of the Federal Constitution and Article 6(1) of the ECHR⁵³. Religious communities cannot exclude such a guarantee of access to State courts,⁵⁴ the origins of which can be traced back to section 19 of General Civil Code⁵⁵ of 1811.⁵⁶ Their constitutionally guaranteed autonomy does not restrict this access, but merely limits the scope of justiciability by State courts,⁵⁷ whose frame is State law.⁵⁸ State courts are bound by decisions of religious bodies on preliminary questions of religious doctrine, ceremonies and

⁴⁸ B. Schinkele, 'Religionsfreiheit und Diskriminierungsverbot aus arbeitsrechtlicher Sicht', in U. H. J. Körtner, S. Müller, M. Kletečka-Pulker and J. Inthorn (eds.), *Spiritualität, Religion und Kultur am Krankenbett* (Ethik und Recht in der Medizin 3), (Wien, New York 2009), pp. 46–60 (pp 48 f.).

⁴⁹ *Gleichbehandlungsgesetz*, Bundesgesetzblatt I 2004/66 as amended.

⁵⁰ OJ L 303/2000, pp. 16–22.

⁵¹ Cf. B. Schinkele, 'Staat – Kirche – Schule und das neue Gleichbehandlungsrecht', (2008) 55 *österreichisches Archiv für recht & religion*, pp. 290–303; W. Schrammel, 'Diskriminierungsverbot, Privatautonomie und Religionsfreiheit', *ibid.*, pp. 219–227; M. Windisch-Graetz, 'Antidiskriminierung und Selbstbestimmungsrecht der Kirchen', *ibid.*, pp. 228–237.

⁵² Cf. H. Schäffer, 'Grundrechtliche Organisations- und Verfahrensgarantien', in D. Merten and H.-J. Papier (eds.), *Handbuch der Grundrechte in Deutschland und Europa VII/1: Grundrechte in Österreich* (Heidelberg 2009), pp. 525–567 (pp. 527 f. = § 200 marg no. 7); P. Unruh, *Religionsverfassungsrecht* (Baden-Baden 2009), marg. nos. 213 f.

⁵³ Bundesgesetzblatt 1958/210, part of the Austrian Federal Constitution by dint of Bundesgesetzblatt 1964/59, as amended.

⁵⁴ Unruh, *supra*, n. 52, marg. no. 215.

⁵⁵ *Allgemeines bürgerliches Gesetzbuch*, Justizgesetzsammlung 1811/946 as amended.

⁵⁶ M. Schauer in A. Kletečka and M. Schauer (eds.), *ABGB-ON* (Wien 2010–2014), § 19 ABGB, marg. no. 1. (October 2013).

⁵⁷ Fasching, *supra*, n. 21, marg. no. 742; Konecny, *supra*, n. 34, Einleitung I, marg. nos. 177, 185; Unruh, *supra*, n. 52, marg. no. 217.

⁵⁸ Classen, *supra*, n. 46, marg. nos. 594, 600; A. von Campenhausen and H. de Wall, *Staatskirchenrecht. Eine systematische Darstellung des Religionsverfassungsrechts in Deutschland und Europa*, 4th ed. (München 2006), pp. 324 f.

rites, pastoral issues, religious instruction, internal structures and offices, the administration of property, donations and fees as well as the religious status of the members of the respective group, which fall within the religious communities sole competence.⁵⁹ Here, the jurisprudence of the ECtHR⁶⁰ indicates a graded system of loyalty duties.⁶¹

II. The Resolution of Disputes: The Practices and Norms of Religious Communities

Disputes may be classified in various ways. There are disputes between units of a religious community or between a member and a unit, which concern statutory questions, such as obligations and rights deduced from the statutes of the community or the unit.

Other disputes involve questions of a personal status, i.e. whether an individual qualifies as a member or whether two individuals are considered married or divorced.

A third group of disputes between both units or members may be based on matters which are not strictly enshrined by the constitutionally guaranteed religious autonomy, but could be brought before civil courts as well. Sales, rents or other monetary issues may serve as an example.

1. Statutory Issues

The religious communities recognised in Austria must have and have statutes approved by the competent minister (currently the Federal Chancellor), in order to be recognised and to acquire the corresponding legal personality. Such statutes need to regulate the composition of the various units, their basic competences and the oblig-

⁵⁹ Verfassungsgerichtshof, 28 November 1987, V 69/87; I. Gampl, *Österreichisches Staatskirchenrecht* (Wien, New York 1971), pp. 171–174; Kalb, Potz and Schinkele, *supra*, n. 1, pp. 65–71; G. Lienbacher, 'Religiöse Rechte', in Merten and Papier (eds.), *supra*, n. 52) pp. 319–349 (p. 345 = § 193 marg. no. 55); Schinkele, *supra*, n. 48, p. 50; Classen, *supra*, n. 46, marg. nos. 594 f.; Unruh, *supra*, n. 52, marg. no. 218.

⁶⁰ ECtHR, 23 September 2010, 425/03 (*Obst v. Germany*); ECtHR, 23 September 2010, 1620/03 (*Schiüth v. Germany*); ECtHR, 3 February 2011, 18136/02 (*Siebenhaar v. Germany*); see hereto B. Schinkele, 'Kirchliches Arbeitsrecht in der aktuellen Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte', (2012) 59 *österreichisches Archiv für recht & religion* pp. 155–173.

⁶¹ Schinkele, *supra*, n. 48, p. 49.

ations and rights of the members.⁶² The status of the Catholic Church is based on agreements, i.e. the Concordat and its amendments, and therefore somewhat different. They regularly include a procedure for the resolution of conflicts between the units or members and units regarding the obligations and rights anchored in the statutes. These conflict resolution tools can be addressed as internal arbitration, such as Article 61(2)2 and Article 114(7)33 of the Constitution of the Lutheran and Reformed Church⁶³. Section 3/9 and section 5(4)8 of Israelite Religious Society Act⁶⁴ even require such procedures to be implemented into the statutes of the umbrella organisation and of the individual communities. Article 45 of the Constitution of the Islamic Faith Community⁶⁵ may be mentioned in this regard, as well.

Where these arbitration tribunals are not explicitly established according to the principles of section 577 of Civil Procedure Code, all legal issues which they decide, remain justiciable by State courts, analogous to section 8(1) of Associations Act.⁶⁶

2. The Personal Status

Every religion has rules on membership, adherence and the personal status of members. This includes procedures to adjudicate questions of status. Respect for the communities' autonomy requires that their decisions on membership be recognised. These decisions cannot be challenged.

In contrast thereto, religious decisions in marital law do not have repercussions in State law. Religiously married people are considered unmarried unless they marry before State authorities. Religiously divorced people are considered married unless they divorce before State authorities.

The great majority of questions brought before Muslim and Jewish judiciary boards pertains to marriage and divorce. Such procedures fall within the autonomy of the religious communities concerned. Furthermore, they are necessary, just because of the separation between the State and the religious communities and of the parallel approach in this realm.⁶⁷ Consequently, these decisions have internal effects

⁶² Cf. Classen, *supra*, n. 46, marg. nos. 600 f.

⁶³ *Verfassung der Evangelischen Kirche A. und H.B. in Österreich*, Amtsblatt 2012/295 as amended.

⁶⁴ See *supra*, n. 9.

⁶⁵ *Verfassung des Islamischen Glaubensgemeinschaft in Österreich*, [http://www.derislam.at/?c=content&cssid=Verfassung der IGGÖ&navid=870&par=10](http://www.derislam.at/?c=content&cssid=Verfassung+der+IGGÖ&navid=870&par=10) [14. 10. 2014].

⁶⁶ Cf. Hausmaninger, *supra*, n. 22) § 577 ZPO, marg. nos. 54–57; see *supra*, chapter I.4

⁶⁷ Cf. F. Hötte, *Religiöse Schiedsgerichtsbarkeit. Angloamerikanische Rechtspraxis, Perspektive für Deutschland (Jus Ecclesiasticum 104)*, (Tübingen 2013), pp. 170 f.

exclusively. Therefore it is irrelevant whether the procedures comply with any formal procedural requirement set forth by the State or not. Individuals are protected by the general limits of religious liberty and by their constitutionally guaranteed freedom to leave their religious community (Article 9 of the ECHR).⁶⁸

Religious communities may voluntarily establish judiciary boards modelled after State courts, such as the Protestant Churches did,⁶⁹ yet the principle of neutrality and the respect for religious autonomy bars the State from imposing such structures.⁷⁰

3. Contracts, Damages and the Like

Religions concern immanent and transcendent aspects of life. What they enshrine exactly, is defined by religious doctrine. Doctrine varies from religion to religion. Hence, religious law, too, may comprise wider or narrower spheres of life. A particular given religious concept cannot be applied automatically to other religions.

Some religious communities, such as Baptist Churches,⁷¹ are embedded into a religious system which focuses on spiritual matters exclusively, which are beyond the scope of State law. Their law is set forth accordingly. Other religious bodies, such as Muslim or Jewish communities, can rely on an extensive legal order which offers solutions to contracts, damages and the like, i.e. questions resolved by State law as well.⁷²

These internal lawsuits may sometimes be restricted to a single instance and sometimes open to appeal to appellate religious courts. In any case, they have to be considered optional and its parties cannot be barred from appealing to State courts both instead and after a religious instance's decision. In order to bind State courts, the religious adjudication boards need to be organised pursuant to sections 577 ff. of Civil Procedure Code and conduct their proceedings accordingly.⁷³

⁶⁸ Classen, *supra*, n. 46, marg. no. 438; cf. Hötte, *supra*, n. 67, pp. 182–189.

⁶⁹ See *infra*, chapter II.6

⁷⁰ Classen, *supra*, n. 46, marg. nos. 438, 601.

⁷¹ Cf. N. Doe, *Christian Law* (Cambridge 2013), pp. 23 f., 61 f.

⁷² Cf. e.g. M. Elon, *Jewish Law. History, Sources, Principles* (Philadelphia, Jerusalem 1994), pp. 93 f., 105, 1281–1302, 1323–1327; L. Millio and F.-P. Blanc, *Introduction à l'étude du droit musulman*, 2nd ed. (Paris 2001), pp. 173, 181 f.; S. Ferrari, *Lo spirito dei ciritto religiosi. Ebraismo, cristianesimo e islam a confronto* (Bologna 2002), pp. 75–93; A. Strauss, *Das rabbinische Schiedsgericht im Lichte schweizerischen Rechts (Basler Studien zur Rechtswissenschaft A 72)*, (Basel, Genf, München 2004), pp. 111–119.

⁷³ See *supra*, chapter I.4

4. Disciplinary Cases

Next to marital matters disciplinary cases are most widespread before religious adjudication boards,

- first, because all religious communities have employees holding certain spiritual and representative positions, who need to comply with the basic doctrine and internal law,
- second, because the instruction of religion and doctrine is incorporated into State structures and institutions, such as schools and universities and State employed teachers and professors are obliged by a double allegiance to their employer and to the religious community.⁷⁴

Whereas some religious communities established permanent courts – as in the case of the Lutheran and Reformed Church even modelled on patterns of State constitutional law⁷⁵ – adjudication and arbitration is pursued by *ad hoc*-instances and much more informally.

5. The Catholic Church

Can. 113§1 CIC 1983 assumes the independent character of the moral persons ‘Catholic Church’ and ‘Apostolic See’, set forth by divine ordinance.⁷⁶ The power of governance (cann. 129–144 CIC 1983), divinely instituted as well, is considered synonymous to the power of jurisdiction. Pursuant to can. 129§1 CIC 1983, those who have received sacred orders are qualified to exert this power.

The Church adjudicates cases which regard spiritual matters or those connected to spiritual matters, and the violation of ecclesiastical laws and all those matters in which there is a question of sin by proper and exclusive right, as can. 1401 CIC 1983 stipulates. The same holds for marriage cases of the baptised, which belong to the ecclesiastical judge by proper right according to can. 1671 CIC 1983.⁷⁷

It is noteworthy that ecclesiastical marital jurisdiction is practised in a way strictly independent of the State; family law is not arbitrable according to State law.⁷⁸

⁷⁴ See *supra*, chapter I.5

⁷⁵ See *infra*, chapters II.5 and II.6

⁷⁶ J. Listl, ‘Die Lehre der Kirche über das Verhältnis von Kirche und Staat’, in J. Listl and H. Schmitz (eds.), *Handbuch des katholischen Kirchenrechts*, 2nd ed. (Regensburg 1999), pp. 1239–1255 (pp. 1247 f.).

⁷⁷ *Ibid.*, p. 1249.

⁷⁸ See *supra*, chapter I.4

6. The Lutheran and Reformed Church

The Constitution of the Lutheran and Reformed Church⁷⁹ establishes adjudicative bodies which are profoundly inspired by current State law, as the quoted provisions will support.

According to its Article 13(3) its members exercise their functions independently, autonomously and free from instruction.

There are Disciplinary Senates of two instances pursuant to Article 13(2) which are called to dispense justice to ministers, congregational functionaries, religious teachers, teachers at protestant schools, permanent church employees and the like as well as to lay members of the adjudicative bodies, active or retired (section 1 of the Disciplinary Code⁸⁰).

Article 13(7) of the Constitution establishes a Senate of Appeal considering conflicts of competence between constitutional offices of the Church, potential contraventions of the Church Constitution by canon laws, interim junctions or by agreements with other religious communities or federations of churches; illegalities of ordinances, directives or repromulgations, final appeals against ecclesiastical decisions and measures and violations of the onus to decide, as stipulated by Article 119(1) of the Constitution. In addition to this the Senate of Appeal considers constitutional and legal contraventions and electoral disputes, pursuant to Article 119(2–3) of the Constitution. According to Article 119(4) of the Constitution disciplinary affairs and any matters pertaining to contributions to the Church are, however, excluded from its competences.

III. Religious Perspectives on State Approaches to Religious Disputes

The issue at stake is rarely covered by newspapers, and then mostly in connection with developments in other countries, such as Great Britain⁸¹ or with private international law and references to *Shariah* as part of the legal order of other countries.⁸² The latter short debate was provoked by a judgement of the Supreme Court ruling

⁷⁹ See *supra*, n. 63.

⁸⁰ *Disziplinarordnung der Evangelischen Kirche A.u.H.B. in Österreich*, Amtsblatt 1985/58 as amended.

⁸¹ Cf. *Wiener Zeitung*, 12 June 2009, p. 11.

⁸² Cf. *Die Presse*, 21 March 2011, p. 17.

that *Shariah* does not contradict Austrian public policy *per se*, but that the courts are obliged to investigate the specific situation at hand.⁸³ Due to the restrictions in the specific frames of recognised arbitration, debates refer rather to matters of private international law and the application of religious law through foreign State law by Austrian State courts⁸⁴ than to activities of religious boards based in Austria; and the religious communities pursue their issues as described above.

⁸³ Oberster Gerichtshof, 28 February 2011, 9 Ob 34/10f.

⁸⁴ Posch, *supra*, n. 31, pp. 66–89.

RELIGIOUS JURISDICTIONS IN BULGARIA

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I. Introduction

Forums established by religious denominations to resolve disputes among their members, as well as the acceptance, recognition or validation of their decisions under the enforcement rules of a legal system, are all aspects of the plurality of normative orders that now permeate various systems of laws. They are part of the Bulgarian socio-legal spectrum and without being in the focus of public discourse, still express the evolution of pluralism in the constitutional system.

Legal pluralism is traditionally perceived as a vertical rule-making and law-enforcement dimension of multi-level governance. It also has a horizontal form shaped by cultural diversity, albeit perhaps less dynamic, as it is rather one reflecting the state of social affairs² rather than a response to the interaction of various systems of governance. In both cases, the degree of plurality of forms of legal or quasi-legal adjudication is determined by the margins left by the national constitutional framework which allow such law-enforcement bodies to exist.

Traditional legal instruments that provide for imperative legal norms, norms of validation and rules of recognition, determined by the choice of laws, help maintain

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² About the distinction between legal pluralism as a descriptive state of affairs versus its understanding as a normative position, see P. Shah, 'Religion in a Super-Diverse Legal Environment', in R. Mehdi, H. Petersen, E. Reenberg Sand and G. R. Woodman (eds.), *Law and Religion in Multicultural Societies* (Copenhagen 2008), pp. 63–81 (p. 64).

the coexistence of legal orders.³ Additionally, they can further be used to analyse how legal systems accept, tolerate, respect or recognise adjudicatory-like practices within religious communities. As mediation practices and other forms of voluntary dispute settlement are applied to religious matters, another instrument could be added; notably the design of applicable law rather than a choice of rules adopted from different legal sources.

This paper provides a commentary on the Bulgarian socio-legal system with its ethnic and religious diversity. It starts with a constitutional analysis and then reflects on the current state of religious adjudication using the statutes of certain denominations where this issue is most elaborately reflected upon.

II. Constitutional Framework

1. The Constitutional Question

Religious bodies entrusted with adjudicatory functions do not form part of the Bulgarian judiciary. Article 119 of the Constitution provides that justice shall be administered by the Supreme Court of Cassation, the Supreme Administrative Court, courts of appeal, regional, district and military courts. Specialised courts may be set up by law. However, there shall be no extraordinary courts.

Neither the Law on Denominations, nor any other legal act, provides for the establishment of specialised courts on religious matters pursuant to Article 119 (2) of the Constitution. A law does not delegate such an empowerment to religious denominations either.

Whether religious adjudication is in compliance with the law and whether it is binding is very much an issue shaped by questions of legitimacy and lawfulness:

- whether such an adjudication is legitimate in terms of the protection of fundamental rights and particularly the freedom of religion and the right to effective legal remedy;
- whether it complies with the principles governing relations between church and state established under the Constitution;

³ For a systematic analysis of the use of instruments in relations to religious matters see G. R. Woodman, 'The Possibilities of Co-Existence of Religious Laws', in Mehdi, Petersen, Reenberg Sand and Woodman, *supra*, n. 2, pp. 23–42.

- whether it is allowed in accordance with the rules that establish the system of courts.

2. Constitutional Principles

The Bulgarian constitutional framework is founded on the principle of autonomy of religious communities. Its Article 13(2) of the Constitution provides that religious denominations shall be separate from the State. In 1998 the Constitutional Court ruled that the main purpose of the constitutional framework is to separate the Church from the State.⁴ It further established the secular nature of the State.

The Constitution remains out of the mainstream of the post-communist constitutions adopted in the same period, which rarely refer to 'separation'.⁵ Nevertheless, its usage in Article 13(2) *leg. cit.* is not fully supported by the law. Practice of church and state relations in Bulgaria is marked by the official recognition of the status of the Bulgarian Orthodox Church as well as by a degree of involvement of the State in religious matters, such as the recognition of denominations, financial support but also cooperation, for instance in education.

3. The Traditional Role of the Eastern Orthodox Christianity

Article 13(3) of the Constitution explicitly recognises the traditional role of Eastern Orthodox Christianity. In 1998 the Constitutional Court clarified that the rule is an expression of the historical role and significance of the Eastern Orthodox religion and its current significance, which can be seen mostly in the system of national holidays. The Court did not go as far as the German Constitutional Court in recognising Orthodox Christianity as a formative historical and cultural experience.⁶

Article 10(1) of the Religious Communities Act⁷ expands further on this characterisation by recognising the Bulgarian Orthodox Church as a sole denomination that represents Bulgarian Orthodox Christianity, thus automatically recognising its status, resolving claims for this title and dispensing with the need for recognition by state authorities, while also indirectly establishing titles of property rights.

⁴ Конституционен Съд, Decision 2 of 18 February 1998, no. 15/1997, Държавен вестник no. 22/1998.

⁵ According to R. Uitz, *Freedom of religion* (Strasbourg 2007), p. 16.

⁶ Bundesverfassungsgericht, 17 December 1975, 1 BvR 428/69, *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) 41, 65 ff., see Uitz, *supra*, n. 5, p. 20.

⁷ Закон за вероизповеданията, Държавен вестник no. 120/2002 as amended.

At the same time, although automatic recognition provides an important exception to the principle of separation of Church and State, this constitutional status of Orthodox Christianity does not elevate it to the position of a genuinely established church.

The legal status of the Bulgarian Orthodox Church seems to be rather one determined by reasons of national historic importance, cultural identity and motives firmly based on certain historical moments, rather than a statement of an established constitutional stand from which specific rules could be derived, such as recognition of the decisions of its bodies, notably those with adjudicatory functions.

4. Social Aspects of Church-State Relations

Historically, relations between Church and State in Bulgaria have oscillated between various extremes – from cesaro-papism in ancient times and the early Middle Ages, to established atheism during Communist times.

The principles of separation of Church and State and the recognition of the traditional role of the Bulgarian Orthodox Church seem to address mostly questions marked by the preoccupations of the transition from Communism to democracy, rather than elaborating on a construct that more comprehensively reflects the true form of these relations in the current dynamic social context. In this sense, the constitutional framework governing Church State relations still needs to find its true form.⁸

A closer look at current practices would further illustrate some common features of traditions of neutrality as exemplified in the practice of the Spanish and Italian constitutional courts,⁹ which view the role of the State as one promoting respect for religious practices, while not remaining indifferent to their social role and contributions. Such an attitude has marked the role of the Orthodox Church in the first half of the twentieth century when it maintained a large network of charitable organisations but also adopted a vociferous position to defend Bulgarian Jews during the Second World War.

⁸ The position that strict constitutional principles that seem to propose a strict church-state divide are marked of various weaknesses and should be revisited has already been expressed in the academic field; see e.g. L. Zucca, *A Secular Europe – Law and Religion in the European Constitutional Landscape* (Oxford 2012), p. xix.

⁹ *Ibid*, pp. 18–19.

III. The Resolution of Disputes: The Practices and Norms of Religious Communities

Adjudicatory or quasi-adjudicatory bodies of religious communities do not enjoy the recognition of their decisions by courts or administrative bodies. Without legal empowerment, the functions of entities set up by religious denominations are therefore purely an expression of their self-governance and a manifestation of their freedom of religion.

The statutes of some denominations establish bodies with dispute resolution functions. Their functions, however, remain mostly confined to members of the clergy, or part of the denomination, issues of doctrine and practice of a specific religion. They are not legally binding for the courts.

The Bulgarian Orthodox Church and the Muslim denominations have established special adjudicatory structures governed by detailed rules while other denominations, such as the Pentecostal Church, attribute adjudicatory functions to their autonomously established bodies. In this case, the managing body of the Pentecostal denomination is competent to resolve disputes among local churches and their management and the Spiritual Council, which rules over disputes regarding infringements of discipline within the church, according to Article 75 of the statute of the Pentecostal Church¹⁰.

1. The Bulgarian Orthodox Church

Title II of the statute of the Bulgarian Orthodox Church¹¹ sets out a relatively developed system of so-called religious courts and provides detailed rules for governing their substantive and procedural jurisdiction, provides for an appeal system and also establishes relations with general courts of law.

In accordance with Article 176(4) of this statute, a legal liability subject to the jurisdiction of the general courts does not exclude a liability provided under the Statute and the acts of the Patriarchate and the Synod; the latter being the highest adjudicatory body within the Bulgarian Orthodox Church.

The scope of the jurisdiction of these bodies with certain adjudicatory functions is set out in Article 181 of the statute. It covers: infringement of the rules of the de-

¹⁰ 'Устав на Съюза на евангелските петдесатни църкви в България' <http://propovedi.org/?page_id=6908> (30 June 2015).

¹¹ 'Устав на БПЦ' <<http://www.bg-patriarshia.bg/index.php?file=statute.xml>> (30 June 2015).

nomination, disputes involving the church and appeals against acts adopted by bodies of the Orthodox Church.

The Synod may also act as a quasi-administrative jurisdiction and is further competent on questions of dogma and ritual, pursuant to Article 182 of the statute.

Article 199 of the statute recognises the binding nature of decisions taken by the various bodies with adjudicatory functions – namely, denominational courts, the Synod and patriarchal assemblies. Pursuant to its Article 176(1), the courts are entitled to seek, when necessary, the cooperation of the state authorities to enforce their judgements.

There is no case-law so far which could possibly clarify to what extent these provisions are enforceable and balanced against the right to legal remedy and the mission of the general courts to ensure the uniform application of the law in light of the principles of legal certainty and equality before the law.

The statute of the Orthodox Church appears to seek to set a transparent structure of instances in proceedings before denominational courts but their material jurisdiction still remains delimited by the constitutional principles that shape the scope of relations between Church and State. Therefore it should not go beyond the limitations on the freedom of religion as set out in Article 37(2) of the Constitution, nor may it prejudice the power of the courts to apply the law uniformly and equally to all citizens.

There is a certain overlap in the material jurisdiction of these denominational courts and general courts. Examples of which are property claims under Article 195 of the statute and certain labour and administrative disputes under its Articles 196, 197 and 198. There is, however, no legal basis to establish a jurisdictional relationship between these denominational courts, on the one hand, and the general courts of law, on the other.

2. The Muslim Communities

Article 20, read together with Articles 81–87 of the statute of the Muslim Communities¹² also provides for the establishment of a *Shariah* Court as a body elected by the Chief Muslim Council. Pursuant to Article 87 of the statute, it is a central collective body for control of the observance of religious rites and provisions in accordance with the Holy Quran, the Sunnite of Mohammed and the *Fatwas* of the Su-

¹² 'Устав на Мюсюлманското изповедание в Република България' <http://www.grandmufti.bg/images/phocadownload/NORMATIVNI_DOKUMENTI/USTAVI/USTAV_2011.pdf> (28 August 2015).

preme Muslim Council and the Chief Mufti. Article 89 of the statute also extends the jurisdiction of the court to disciplinary proceedings.

IV. Religious Disputes: The Approach of the State

1. Adjudicatory Powers of Denominations and the Courts

Article 37(1) of the Constitution recognises the freedom of religion and its Article 13(1) provides that religious practice shall not be restricted. Article 6(2) *leg. cit.* guarantees that citizens are free and equal before the law regarding their religious convictions. Religious communities are free and equal according Article 4 of the Religious Communities Act and Article 13(2) of the Constitution stipulates that religious institutions are separate from the State. Therefore, it is the right of believers to organise themselves, accept and be subject to the jurisdiction of bodies established within the denominations of their choice.

Article 4 of the Religious Communities Act implements the principle of separation of Church and State by tracing clearly its link to fundamental rights and principles. In Bulgarian legal thinking, religion remains not only distinct from political relations but it seems to be closely associated with the freedom to express and practice a religious conviction as a fundamental human right. This conclusion follows the analysis of the Constitutional Court of 1998¹³ where it interprets Article 13 of the Constitution in relation to Article 6(1) *leg. cit.*, which recognises the principle of equality of human beings before the law. The judgement proceeds to establish a relation between the free and autonomous nature of religious communities and the value of dignity of every human being.

Exercising the right to freedom of religion imposes certain limits on the adjudicatory power of the State and Article 4(2) of the Religious Communities Act provides that State intervention in the internal organisation of religious communities and their institutions shall not be permitted. According to Article 4(3) *leg. cit.*, the State shall ensure appropriate conditions for free and unhindered exercise of freedom of religion by contributing to ensuring tolerance and respect between believers among different denominations as well as between believers and non-believers.

¹³ *Supra*, n. 4.

Article 6(1) *leg. cit.* provides that freedom of religion covers the right to have and to maintain religious communities and institutions whose structure and mode of representation are suitable for the freedom of their members to hold on to their convictions. In accordance with Article 7(4) *leg. cit.*, however, the rights and freedoms of the members of religious communities cannot be limited by the internal rules, rituals and customs of the community or institution in question. This provision covers the protected constitutional scope of freedom of religion as recognised in Article 37 of the Constitution, as well as the legal guarantees pursuant to the legal principle of the rule of law established under Article 4(1) of the Constitution.

Furthermore, Article 8(1) of the Judiciary Act¹⁴ provides that courts shall ensure that laws are applied accurately and in a uniform manner to all concerned persons. When an adjudicatory body established under the statutes of a denomination infringes a law, courts must provide an adequate legal remedy to those concerned, in accordance with Article 56 of the Constitution. Therefore, State institutions may intervene in disputes relating to certain religious matters:

- matters of secular nature such as disputes related to property or social security which are governed by general civil or public law, or
- when the dispute concerns constitutional principles and the protection of fundamental rights, such as the freedom of religion.

The material scope of the adjudicatory bodies that denominations may establish shall be limited by the jurisdiction of general courts and other legally established law-enforcement institutions, such as the Commission for the Protection against Discrimination.

Non-judicial methods for settling disputes such as mediation and arbitration are regulated in a neutral manner, making them available to members of any religious community to employ if applicable. Only secular issues fall under their scope.¹⁵

Therefore, while religious communities may establish dispute settlement bodies, their jurisdiction remains limited. They can be overruled by a decision of a secular court.

¹⁴ Закон за съдебната власт, Държавен вестник по. 64/2007 as amended.

¹⁵ For instance the Mediation Act (Закон за медиацията), Държавен вестник по. 110/2004 as amended, remains neutral and generally applicable.

2. Legislation and Inter-Denominational Institutional Disputes

The Law on Denominations aims to establish a balance between the principles governing Church- State relations on the one hand, and the enforcement of freedom of religion on the other. The human rights framework of the law provides for a more inclusive, secular legal framework. In this context, recognition of the role of the Bulgarian Orthodox Church is legitimate. By resolving its internal schism, it uses the constitutional rule on the traditional role of a single Orthodox Church to the benefit of orthodox Christians and for the sake of social stability, which constitutions in general aim to establish and uphold. At the same time, it is an example of indirect regulation of internal disputes within a specific denomination, deferred to the legislator.

V. Conclusion

Adjudicatory bodies established to resolve disputes among believers are not part of the court system. The material jurisdiction of such bodies is derived from the constitutional principle of separation of Church and State and the protection of fundamental rights; in particular, the freedom of religion. It was established pursuant to the autonomy of self governance that religious denominations enjoy. At the same time, their jurisdiction seems to remain distinct from the powers of the courts to objectively resolve disputes of private and public law and the supremacy of the constitutional principles.

The social role of bodies that denominations entrust with certain adjudicatory functions remains closely related to the right of freedom of religion. As such, it is also subject to its limits as established by the constitutional legal framework and the balancing of rights and legitimate interests which are protected and enforced by the rule of law.

RELIGIOUS JURISDICTIONS AND PLURALISM OF LEGAL ADJUDICATION IN CYPRUS

Achilles C. Emilianides, Nicosia

I. The Resolution of Disputes: The Practices and Norms of Religious Communities

1. Historical Introduction

With the exception of sporadic Arab invasions, Cyprus remained for more than eight and a half centuries, between 325 and 1191, a province of the Byzantine Empire. Thus, Christianity was the State religion of the island, similar to other parts of the Byzantine Empire; the ecclesiastical courts of the Orthodox Church applied Byzantine Law and had competencies over religious matters and matters of personal status, including family law matters.¹ During the subsequent period of Frankish and Venetian rule of the island (1191–1571), the ecclesiastical courts of the Greek Orthodox Church applied, with respect to the family affairs of members of the Orthodox Church, the so-called *Hellenic Laws* of Cyprus, which essentially consisted of a codification of Byzantine Law.²

The competence of the ecclesiastical courts was maintained during the Ottoman rule of the island (1571–1878) during which the only exception to the exclusive competence of the Sheri courts was the law of personal status and family relations of

¹ See C. Tornaritis, *The Ecclesiastical Courts Especially in Cyprus* (Nicosia 1976), p. 15; D. Seremetis, 'The Administration of Justice in Cyprus during the Byzantine and Post-Byzantine Era', in *Proceedings of the First International Cyprological Conference*, vol. III (Nicosia 1973), pp. 309 ff.

² A. K. Αιμιλιανίδης, 'Οι Ελληνικοί Νόμοι της Κύπρου επί Φραγκοκρατίας' (2004) 25 *Επετηρίδα Κέντρου Επιστημονικών Ερευνών (Κύπρου)*, pp. 51–74; A. C. Emilianides, 'The Hellenic Laws of Cyprus and the Hexabiblos of Armenopoulos', (1951) *Επιστημονική Επετηρίδα Σχολής Νομικών και Οικονομικών Επιστημών Αριστοτελείου Πανεπιστημίου Θεσσαλονίκης*, pp. 33–38; D. Simon, *Zyprische Prozessprogramme* (München 1973); J. Maruhn, 'Eine Zyprische Fassung Eherechtlicher Titel der Epitome', in D. Simon (ed.), *Fontes Minores, IV (Forschungen zur Byzantinischen Rechtsgeschichte 7)*, (Frankfurt am Main 1981), pp. 218–255.

members of the Orthodox Church. The ecclesiastical courts of the Orthodox Church continued to be the only competent courts with regard to the family relations of their members and continued to apply Byzantine Law. During that period, the Orthodox Church was considered to play the primary role in the preservation of faith, national identity and traditions of the Greek Cypriots.³ The right of all Christian Communities to administer their religious and family affairs was eventually recognised, following the Tanzimat reform of the Ottoman Imperial rescript of 18 February 1856, *Hatt-i-Humayun*.⁴ It is indisputable that the *Hatt-i-Humayun* also applied in Cyprus.⁵ The *Hatt-i-Humayun* granted spiritual advantages and exemptions, as well as a form of religious autonomy to the various Christian and non-Muslim religious communities living within the boundaries of the Ottoman Empire. As a result, the Maronites and the Roman Catholics gradually referred their family law disputes to their ecclesiastical courts in Lebanon and Jerusalem respectively, while the National Constitution of the Armenians was confirmed by a *firman* of the Sultan of the Ottoman Empire.⁶

During the British rule of the island (1878–1960) Great Britain maintained the existing state of affairs,⁷ with the sole exception that the Islamic faith was no longer the prevailing religion. Essentially, the system could be characterised as post-Millet,

³ See T. Papadopoulos, *The History of the Greek Church and People under Turkish Domination*, 2nd ed. (Aldershot 1990); H. Luke, *Cyprus under the Turks 1571–1878: A Record Based on the Archives of the English Consulate in Cyprus* (London 1921); M. Michael, *The Church of Cyprus during the Ottoman Era* (Nicosia 2005); H. Alasya, 'The Privileges Granted to the Orthodox Church of Cyprus by the Ottoman Empire', in Θ. Παπαδόπουλος and Μ. Χριστοδούλου (eds.), *Πρακτικά του Πρώτου Διεθνούς Κυπριολογικού Συνεδρίου*, vol. Γ (Λευκωσία 1973), pp. 23–26; N. Pantazopoulos, *Mythical and Pragmatical Elements in the Concept of Islamic Privileges to the Christians* (Athens 1970); G. Dionyssiou, 'Some Privileges of the Church of Cyprus under Ottoman Rule', (1992) 19 *Επετηρίδα Κέντρου Επιστημονικών Ερευνών (Κύπρου)*, pp. 327–334.

⁴ G. Dionyssiou, 'The Ottoman Administration of Cyprus and the Tanzimat Reforms', (1994) 20 *Επετηρίδα Κέντρου Επιστημονικών Ερευνών (Κύπρου)*, pp. 361–366; G. Young, *Corps de Droit Ottoman*, vol. II (Oxford 1905), 22 ff.; Δ. Νικολαΐδης, *Όθωμανικοί κώδικες, ήτοι συλλογή άπάντων τών νόμων τής Όθωμανικής Αύτοκρατορίας, διαταγμάτων, κανονισμών, όδηγιών και έγκυκλίων*, vol. Γ', 3rd ed. (Κωνσταντινούπολη 1890), pp. 2858–2866.

⁵ Supreme Court, 10 February 1894 (*Parapano and Others v. Happaz*), (1893) *Cyprus Law Reports*, no. 3, pp. 69–77; Supreme Court, 23 May 1910, (*Tano v. Tano*), (1910) 9 *Cyprus Law Reports*, no. 9, pp. 94–116. See also the observations of G. Serghides, *Internal and External Conflict of Laws in Regard to Family Relations in Cyprus* (Nicosia 1988), 32 ff.

⁶ C. Tornaritis, 'The Legal Position of the Armenian Religious Group', in C. Tornaritis (ed.), *Constitutional and Legal Problems of the Republic of Cyprus*, 2nd ed. (Nicosia 1972), pp. 85–90; Nicosia District Court, 172/32 (*Takvorian v. Nassibian and Others*).

⁷ A. Κ. Αμιλιανίδης, 'Το Ιδιωτικών Διεθνές Δίκαιον εν Κύπρω', in *Συμπόσιον περί Κυπριακών Νομικών Θεμάτων* (Θεσσαλονίκη 1974), pp. 79–134.

in the sense that the right of all religious communities, either Moslem, or non-Moslem, to administer their religious and family affairs without any State intervention, was recognised. The system of State-Church relations prevailing in Cyprus was thus, one of loose separation.⁸ Thus, the ecclesiastical courts of the Orthodox Church continued to enjoy exclusive jurisdiction regarding the family law disputes of their members, while the Canon Law of the Church continued to be applicable in those disputes.⁹ Smaller Christian religious Communities of the island also continued to enjoy spiritual autonomy with respect to their internal affairs. In addition the ecclesiastical courts of the smaller Christian Communities maintained their exclusive jurisdiction with respect to family law disputes of their members, until the enactment of the Courts of Justice Law no. 38/1935.

2. The System in General

Religious communities are therefore in general free to set-up formal or informal structures in order to resolve disputes amongst the faithful. However, with the exception of family law disputes and the provision of ecclesiastical penal courts which resolve all disciplinary disputes, there do not seem to be any formal structures for resolving such disputes. Informally the Bishop or members of the clergy might act as mediators for resolving a dispute amongst the faithful; however, as this might occur only informally there is no procedure governing this attempt. There are no written or unwritten norms governing such attempts of reconciliation, nor are these viewed as an official form of mediation by the Church. The Holy Synod of the Orthodox Church may of course resolve, at its exclusive discretion, any disputes which refer to doctrinal issues or questions whether opinions expressed correspond to the doctrine of the Orthodox Church.

⁸ Χ. Παπαστάθης, *Περί την Διοικητικήν Οργάνωσιν της Εκκλησίας της Κύπρου* (Θεσσαλονίκη 1981), p. 31; Κ. Χρυσοστομίδης, 'Το εν Κύπρω Ισχύον Εκκλησιαστικόν Δίκαιον', in *Αναμνηστικόν Λεύκωμα επί τη Εικοσαετηρίδι 1948–1968. Ιερός Ναός Αγίων Πάντων Λονδίνου* (Λονδίνο 1968) pp. 129–141 (p. 130).

⁹ See further A. Κ. Αμιλιανίδης, *Το Κυπριακό Δίκαιο του Ίμμου και του Διαζυγίου στη Διεγκυστίναδα Εκκλησίας και Πολιτείας* (Αθήνα, Θεσσαλονίκη 2006), pp. 48 ff.; G. Serghides, *Internal and External Conflict of Laws in Regard to Family Relations in Cyprus* (Nicosia 1988), pp. 54 ff.

3. Adjudication of Family Law Disputes

Article 111 of the 1960 Constitution of Cyprus¹⁰ provided for certain privileges of the Orthodox Church, with respect to the adjudication of issues relevant to marriage and divorce of members of the Greek Orthodox Church. Prior to the First Amendment of the Constitution of 1989,¹¹ Article 111 of the Constitution provided that family law matters would continue to be governed by the law of the Orthodox Church and to be cognizable by the ecclesiastical courts of such Church.¹² The same privileges were recognised for the ecclesiastical courts of the three religious courts of the Republic (Maronites, Armenians, Roman Catholics). Following the First Amendment of 1989, however, all family law matters of members of the Orthodox Church and the three religious groups came under the jurisdiction of the (State) Family Courts; further, only issues relating to betrothal or ecclesiastical marriage, or nullity of ecclesiastical marriage have continued to be governed by the Canon Law of the Orthodox Church even after 1989.¹³

The Orthodox Church considered the First Amendment of the Constitution as an affront to the religious sentiments of its members.¹⁴ In a announcement of the Holy Synod, it was declared that no one had ever imagined that one day, representatives of our people in the House of Representatives, would try to take such rights away from the Church.¹⁵ The Holy Synod decided that the celebration of a civil marriage by a member of the Greek Orthodox Church, or the petition to the Family Courts for the dissolution of a religious marriage, would be punished by the deprivation of the participation of such persons in every aspect of religious life. However, the Holy Synod eventually mellowed, since in 1991, it acknowledged that petitioning before the Family Courts is obligatory, so as to have the religious dissolution of marriage recognised by the State; the Church therefore accepted that its members may petition the Family Courts for divorce, so long as they first petition the ecclesiastical

¹⁰ *Σύνταγμα της Κυπριακής Δημοκρατίας* 1960 as amended.

¹¹ No. 95/1989, Παράρτημα Πρώτο της Επίσημης Εφημερίδας no. 2419.

¹² See Serghides, *supra*, n. 9.

¹³ See Αιμιλιανίδης, *supra*, n. 9.

¹⁴ See A. K. Αιμιλιανίδης, 'Η Διαμαχή Εκκλησίας και Πολιτείας για την Αναδιάρθρωση των Οικογενειακών Θεσμών', in Π. Παπαπολυβίου (ed.), *Ιστορία της Κυπριακής Δημοκρατίας 1980–1989*, vol. III (Λευκωσία 2011), pp. 110–115; Γ. Α. Αντωνίου, 'Οικογενειακό Δίκαιο: Εκκλησιαστική Προσέγγιση', (1984) 8 *Επιθεώρηση Κυπριακού Δικαίου*, pp. 1353–1361; Γ. Α. Αντωνίου, 'Πώς Βλέπει η Εκκλησία το Διαζύγιο', (1993) 41 *Επιθεώρηση Κυπριακού Δικαίου*, pp. 6149–6157; Π. Ι. Μπούμης, 'Λύση του Ίδμου από τα Πολιτικά Δικαστήρια', (1990) 51 *Αποστόλος Βαρνάβας*, pp. 43–49.

¹⁵ Announcement of Ίερά Σύνοδος, (1989) 50 *Αποστόλος Βαρνάβας*, p. 324.

courts and a dissolution of their marriage is granted by both courts. The Roman Catholic and Maronite Church have also refused to recognise the competencies of the Family Courts of the Religious Groups.

In view of the fact that the Orthodox Church, as well as the Maronite and Roman Catholic Church, did not recognise the competencies of the Family Courts, in essence, if people wanted to obtain a divorce and then perform a new religious marriage according to the rites of their respective Church, they had to obtain both a divorce from the family courts which would be recognised by the State only, as well as a divorce from the ecclesiastical courts which would be recognised by the Church authorities only; if, however, a person did not wish to perform a new religious marriage, but they wished to perform a civil marriage, then they only has to obtain a divorce from the family courts. This peculiar situation undoubtedly caused many problems with respect to the application of family law with regard to members of the Orthodox Church and the religious groups of the Republic.¹⁶ Eventually, with the enactment of its new Charter in 2010¹⁷, the Orthodox Church impliedly recognised the jurisdiction of the Family Courts, retaining only its competences for spiritual dissolution of the marriage.¹⁸ This ended the period of parallel application of the State family courts and the religious ecclesiastical (family) courts of the Orthodox Church. Grounds of divorce provided in ecclesiastical law continue in some cases to govern disputes, even before the State Family Courts, since Article 111 of the Constitution provides for the application of the grounds of divorce provided in the pre-existing 1980 Charter of the Orthodox Church¹⁹; however, they now apply in parallel to existing grounds of divorce provided in State legislation.

The Attempt at Reconciliation and Spiritual Dissolution of the Marriage Law no. 22/1990²⁰ provides that no petition for a divorce may be filed unless the competent Bishop provides the petitioner with a certificate that there has been an attempt of reconciliation which has failed, or if three months have lapsed from the date when the notification was sent to the Bishop. In cases where a party has not complied with the

¹⁶ See Γ. Α. Σεργίδης, 'Παρατηρήσεις επί του Κυπριακού περί Ίξμου Νόμου του 2003', (2004) 58 *Αρμενόπουλος*, pp. 661–678 (p. 677); Η. Νικολάου, 'Οικογενειακό Δίκαιο: Νομοθετικά και Διαδικαστικά Προβλήματα', (1995) 49–50 *Επιθεώρηση Κυπριακού Δικαίου*, pp. 7255–7262 (pp. 7259 ff.).

¹⁷ Ο Καταστατικός Χάρτης της Αγιοτάτης Εκκλησίας της Κύπρου (Λευκωσία 2010).

¹⁸ See in detail Α. Κ. Αιμιλιανίδης and Κ. Β. Κατσαρός (eds.), *Ο Νέος Καταστατικός Χάρτης της Εκκλησίας της Κύπρου* (Λευκωσία 2013).

¹⁹ Ο Καταστατικός Χάρτης της Αγιοτάτης Εκκλησίας της Κύπρου, (1979) 40 *Απόστολος Βαρνάβας*, pp. 407–512.

²⁰ *Νόμος που προνοεί για Απόπειρας Συνδιαλλαγής και Πνευματικής Λύσης του Ίξμου*, Επίσημης Εφημερίδας, Παρ. Ι, no. 2485 as amended.

requirements of Law 22/1990, the petition shall be dismissed as premature;²¹ The means employed by the Bishop may not be judicially reviewed. In practice the Orthodox Church of Cyprus was not attempting any reconciliation of the marriage up to 2010, since it did not recognise the jurisdiction of the Family Courts; instead it was sending a formal letter whose text was determined by the Holy Synod on 2 May 1991 and which informed the parties that the Family Courts have no jurisdiction to dissolve a marriage which was celebrated in accordance with the rites of the Orthodox Church.

Ever since the enactment of its new Charter in 2010, however, the Orthodox Church attempts the reconciliation of all religious marriages celebrated according to its rites. Section 87 of the 2010 Charter provides that prior to the spiritual dissolution of the marriage and consequently the petition for divorce, there should be an attempt of reconciliation of the spouses before the Bishop of the habitual residence of either spouse in Cyprus. A person has to appear in person before the Bishop, or an experienced priest who has been authorised by the Bishop to conduct the attempt for reconciliation. The attempt for reconciliation has to be completed within a period of three months. The 2010 Charter further provides for the spiritual dissolution of the marriage. Section 88 of the 2010 Charter provides that the Bishop who undertook the attempt to reconcile the parties, or if that could not take place the Bishop of the place where the petitioner habitually resides, may spiritually dissolve the marriage. The petition for spiritual dissolution is not subject to a specific form and can be filed either personally or through a proxy, or even through the priest of the petitioner's parish. If the marriage has objectively or subjectively dissolved and its spiritual dissolution shall not further burden the established legal and factual situation, the spiritual dissolution shall be granted. There is no time limit for submitting a petition for a spiritual dissolution of the marriage.

4. Religious Penal Courts in the 2010 Charter

The 2010 Charter provides for the existence of religious organs/courts which may, by virtue of Article 78 of the Charter, adjudicate any ecclesiastical offences of members of the clergy, monks or laypersons who are members of the Orthodox Church of Cyprus, irrespective of the place where the offence occurred. Membership in the Orthodox Church of Cyprus, as in all other Orthodox Churches, is defined by resid-

²¹ Ανώτατο Δικαστήριο, 25 July 2002, no. 128, *Ζένιου v. Ζένιου* (2002) *Cyprus Law Reports*, no. 1, pp. 1175 ff.; Ανώτατο Δικαστήριο, 16 October 2001, no. 135, *Παπαπέτρου v. Παπαπέτρου* (2001) *Cyprus Law Reports*, no. 1, pp. 1578 ff.

ence in Cyprus. They may also adjudicate ecclesiastical offences of clergymen, monks or laypersons of another Orthodox Church so long as the offence occurred in Cyprus. Whereas, the Charter describes the disputes as penal, these in essence refer to the ecclesiastical discipline of members of the Orthodox Church and not to criminal offences or criminal sanctions; criminal law is reserved for the State, whereas religious organisations may discipline their members for religious offences.

In particular, the following organs may try religious offences in accordance with Article 79 of the Charter:

- The Prelate adjudicates ecclesiastical offences of presbyters and deacons which are deemed to be of lesser importance and may impose the penalties of written reprimand, removal from office, suspension for up to three months including deprivation of salaries, and transfer to another parish. The Bishop may also impose ecclesiastical sanctions to monks and laypersons.
- An Episcopal Tribunal functions in each metropolis. It is chaired by the prelate of the metropolis and two active members of clergy who are appointed for a five-year term. The tribunal adjudicates ecclesiastical offences of presbyters and deacons and may impose the penalty of suspension for up to six months including deprivation of salaries. It also acts as an appellate court for the decisions of the disciplinary organs of the monasteries.
- A Synodical Court is composed by five prelates appointed by lot. The Archbishop does not participate in the synodical court. The synodical court adjudicates ecclesiastical offences of presbyters and deacons which are deemed to be of major importance and may impose the penalties of: i) suspension of up to six months, including deprivation of salaries, ii) defrocking. It also acts as an appellate court to the decision of the episcopal tribunals.
- The Holy Synod acts as the appellate court to the decisions of the synodical court. Those members who participated in the composition of the synodical court are exempted. Furthermore, the Holy Synod exclusively adjudicates the ecclesiastical offences of prelates and may impose the penalties of reprimand, suspension including deprivation of salaries, removal from office, and defrocking. The Holy Synod is further the only organ which may impose the penalty of excommunication for any member of the Church, clergymen, monks or laypersons.

Article 81 of the 2010 Charter further provides that a convicted Bishop may request that his case is examined by the Ecumenical Patriarch, a provision which is an innovation as it did not exist in the previous Charter.

II. Religious Disputes: The Approach of the State

The Constitution recognises wide autonomy of religious communities. Article 110 of the Constitution provides that the Orthodox Church, the three religious groups and the Islamic religion, all enjoy exclusive competence with respect to their internal affairs, as well as the administration of their property. The State has accordingly recognised broad discretionary powers in their favour and does not have the right to intervene in their internal affairs, or in the administration of their property. The model prevailing in Cyprus is essentially a pluralistic model, which recognises and embraces the public dimension to religion, while at the same time attempting cooperation with all religions. The significance of faith in people's lives is considered as worthy of protection by the State and where the function of the State overlaps with religious concerns, the State seeks to accommodate religious views, insofar as they are not inconsistent with the State's interests. In consequence, pluralism is achieved through the recognition that the State and the various religions occupy, in principle, different societal structures; religious neutrality is not, however, achieved simply because there is religious autonomy, but also through positive measures on behalf of the State, which aim at the protection of religions.²²

Whereas, the administrative organisation of the five main religions of the island (Orthodox, Islamic, Armenian, Maronite, Roman Catholic) is explicitly safeguarded in Article 110 of the Constitution, other religions also enjoy, to their full extent, the religious freedoms safeguarded by Article 18 of the Constitution, including organisational freedom.²³ Thus, religious communities enjoy a considerable extent of religious autonomy according to Cypriot Law and are regulated not by State laws, but by their own internal Canon Law provisions. The only exception is the Turkish Islamic religion, since due to the Kemalic reforms, the administration of *vakfs* and the election of Mufti had been regulated by State laws appertaining only to the Turkish Community of the island. Most religions and creeds in Cyprus do not follow specific 'Cypriot' Canon Law provisions contained in charters or internal regulations; thus, the Roman Catholics and the Maronites adhere to the Canon Law provisions followed generally by the Roman Catholic Church and the Maronite Church respectively. However, the Orthodox Church, the Church of the Orthodox Christians who

²² A. Emilianides, 'Secularism, Law and Religion within the Cypriot Legal Order', in P. Cumper and T. Lewis (eds.), *Religion, Rights and Secular Society. European Perspectives* (Cheltenham 2012), pp. 169–188.

²³ Supreme Court, 14 April 1989, 176/88 (*Ktimatiki Eteria Neas Taxeos Ltd. v. The Chairman and Members of the Municipal Committee of Limassol*), (1989) *Cyprus Law Reports*, no. 3, p. 461 ff.

follow the Old Calendar and the Armenian Church, have enacted specific Cypriot Canon Law instruments which regulate their internal affairs. In view of the above, it is suggested that the Constitution has introduced a system of coordination between the Republic of Cyprus and the major religions and Christian creeds.²⁴

The State would therefore not interfere with the exercise of the right of religious freedom to organise their internal affairs, including how to formally or informally resolve disputes amongst the faithful, to the extent that such practices do not violate State legislation. However, State courts would not necessarily refrain from judicially examining issues referring to the property or even the legal title of members of a religious community in the appropriate case.²⁵ State courts would, however, in general be reluctant from resolving disputes of a purely ecclesiastical nature, unless it is shown that these disputes cannot be expected to be resolved by the appropriate religious authorities. State courts would not in general express any opinion in so far as doctrinal issues are concerned. In principle State courts would not interfere with disciplinary cases adjudicated by the competent religious organs. In a case adjudicated during the British rule of Cyprus, the right of the Church to elect its Archbishop and generally administer its internal affairs without any State intervention was confirmed by the District Court of Nicosia in 1948.²⁶ In the aforementioned decision, it was held that the procedure for electing a Bishop is of a religious character and thus, the Orthodox Church has exclusive competence on the matter. Thus, the internal affairs of the Orthodox Church were governed by the Canon Law of the Orthodox Church and not by State laws.

III. Religious Perspectives on State Approaches to Religious Disputes

With the exception of the dispute between the Orthodox Church and the State with regards to the adjudication of divorce by the State Family Courts instead of the ec-

²⁴ A. Κ. Αμιλιανίδης, 'Το Συνταγματικό Πλαίσιο των Σχέσεων Εκκλησίας – Πολιτείας στην Κυπριακή Δημοκρατία', (2006) 1 *Νομοκανονικά*, pp. 37–78; Παπαστάθης, *supra*, n. 8, p. 34; A. Χ. Γαβριηλίδης, *Νομοκανονική και Πολιτική Μελέτη περί Καθαιρέσεως των Επισκόπων εν Κύπρω εν Συνδυασμό προς την Ενάσκησιν των Εθναρχικών των Δικαιωμάτων*, 2 vols., 2nd ed. (Λευκωσία 1973).

²⁵ This is the legal question in an ongoing dispute between the Bishop and the Abbot of the Old-Calendar Church of Cyprus which has been the subject of adjudication before the Cypriot State courts since 2006.

²⁶ District Court of Nicosia, 24 March 1948, 343/1948 (*Michael Georgiou Manoli v. Makarios Archbishop of Cyprus*); see A. Χ. Γαβριηλίδης, *Τα Εθναρχικά Δικαιώματα και το Ενωτικόν Δημοψήφισμα*, 2nd ed. (Λευκωσία 1972), pp. 72–76.

clesiastical family courts, the State approach towards religious disputes has not been the subject of substantial debate. In the early years of the Republic Makarios was both the Archbishop and the President, so that any dialogue between the Orthodox Church and the Government would be mostly a theoretical notion. Following the death of Makarios, the fact that the Orthodox Church represented the great majority of the population and further enjoyed significant economic power, enabled the Archbishop of the Orthodox Church to discuss his concerns with the President of the Republic as an equal. The representation of the three religious groups of the Republic in the House of Representatives, albeit in a limited manner, also enabled religious minorities to discuss their main concerns with the members of the House of Representatives and the Government. From 1998 to 2003, the State had appointed a Presidential Commissioner for Religious Groups, Overseas Cypriots and Repatriates, who represented the State in this dialogue with the representatives of the three religious groups.²⁷ In 2013 a new Presidential Commissioner for Religious Groups, Overseas Cypriots and Repatriates was appointed, for the first time since 2003.

Since the State recognises broad autonomy to religious organisation, public debate on the matter has been virtually non-existent, with the exception of family law disputes. However, since 2010 even in family law disputes the debate has been of lesser importance and extent. Public debate emerges whenever the Orthodox Church decides to examine a case referring to disciplinary action against members of clergy, or much more pointedly laypersons. In these cases, such as a recent case when the Orthodox Church decided to advise its members against the ecclesiastical positions expressed by former MEP and MP and theologian Andreas Pitsillides, there were voices in the media which criticised the right of the Church to discipline its members.²⁸ A recent decision of the Archbishop of the Orthodox Church to unilaterally confiscate the monetary fund of the Church of Trahona²⁹ also led to voices in the media implying that the State should have power to adjudicate such disputes. These remain, however, isolated incidents and the question has not yet received serious consideration by academics.

²⁷ See Γραφείο Δημοσίων Πληροφοριών, *Δέκα Χρόνια Διακυβέρνησης Γλαύκου Κληρίδη 1993–2003* (Λευκωσία 2003), pp. 255–261; J. McMahon, ‘Presidential Commissioner Manolis Christofides Oversees Relations With Cyprus’ ‘Other’ Minorities’, (1999 September), *Washington Report on Middle East Affairs*, pp. 74–75.

²⁸ “Πόλεμος” Ιεράς Συνόδου – Πιτσιλλίδη ΒΙΝΤΕΟ’, <<http://www.sigmalive.com/news/local/216660/quotpolemosquot-ieras-synodou-pitsillidi-vinteo>> (19 March 2015).

²⁹ ‘Αρχιεπίσκοπος: Εγώ ασκώ διοίκηση, όποιου δεν αρέσει, έξω’, <<http://www.philenews.com/el-gr/top-stories/885/250779/archiepiskopos-ego-asko-dioikisi-opoiou-den-aresei-exo>> (7 April 2015).

RELIGIOUS JURISDICTIONS IN SPAIN

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I. The Resolution of Disputes: The Practices and Norms of Religious Communities

Generally speaking, all religious denominations have ways and means for resolving internal disputes. Although, it can be said that these are not well developed (with the exception of the Roman Catholic Church) on account of doctrinal and sociological reasons.

Religious pluralism in Spain is a very recent phenomenon due to our past of intolerance. The number of Spanish residents belonging to non Roman Catholic denominations does not exceed 3 % of the population. To this sparse number we must also take into account the division and fragmentation of religious communities as well as their recent implantation in Spanish society. This is especially significant regarding the greatest religious minority in Spain: Muslims. Most of the Muslim population reached Spain in the 1980's and 1990's, migrating from the *Maghrib* countries, especially Morocco. Their fairly recent arrival means they haven't had enough time to develop judicial or quasi-judicial jurisdictions in the country yet.

Referring to non-Roman Catholic Christian denominations, the split between faith and church and moreover, the lack of an internal Law to be enforced by courts on an *ad hoc* basis, could explain the absence of religious jurisdiction systems. This is especially true for Protestant traditions, Churches and Established Churches: they historically rely on civil jurisdiction in order to solve internal disputes.

For this article, I have chosen two religions which have been declared deeply rooted in Spain by civil authorities. Both, Judaism and Islam signed cooperation agreements with the State and have developed an intricate religious Law enforced by judges and courts.

1. Jewish Communities

In the Middle Ages, Islamic and Christian Kingdoms recognised the right of Spanish Jews (*sefardíes*) to apply their own religious law (*Halakhah*) by judges elected by communities (*albedies*). Examples of this are the King's Charters (*fueros*) given to the cities conquered from the Moors with the main aim of increasing the population.¹ Tolerance of Jewish communities ended, however, in 1492, when those who had not been converted to the Roman Catholic Church were expelled from the Castile and Aragon Kingdoms. Therefore we can rightly conclude that the traditional Jewish institutions of rabbinical courts, whose remit it was to apply and enforce the Law, disappeared in Spain in around 1492.

Only in recent years were certain institutions, charged with the application of Jewish Law, established but these can not be considered courts with any real jurisdiction.

In 1982 the Federation of Israelite Communities² was created. The Federation includes fourteen orthodox communities.³ One of the aims of the Federation is the constitution of the Spanish Rabbinical Court (*Beth Din*). Formed by the principal rabbis of the communities appointed by the Federation, the Rabbinical Court enforces Jewish Law in Spain.⁴ This Court has not been born yet. Actually, in November 2008 another institution was founded: the Supreme Rabbinical Council. But at the behest of the Jewish Federation, its competences are more related to imparting advice than enforcing jurisdictional powers as a real court: the Council is empowered to resolve questions raised by other rabbis in order to define a uniform criteria about the application and enforcement of *Halakhah*.

However, few law-cases must have been submitted to the Council if we consider several facts:

- the number of Jews in Spain (less than 30,000 in a global population of 47 million),
- the number of Jewish marriages performed (only 15 in a whole year),⁵

¹ A study of one of these Charters, the Cuenca *fuero* given by the Spanish King Alfonso the Eighth to the city in 1177, see S. Catalá Rubio, 'El Estatuto Jurídico del Pueblo Hebreo en el Fuero de Cuenca', in *Judaísmo, Sefarad, Israel*, (Cuenca 2002), pp. 215–223.

² *Federación de Comunidades Israelitas de España*.

³ Outside the Federation there is the progressive Jewish community *Comunitat Jueva-Atid de Catalunya Progressiva*.

⁴ Article 2.D. of the statutes of the Federation of Israelite Communities.

— and the fact that Jewish people tend to bring law-cases before civil courts and in preference to rabbinical courts.

In 2014, the Spanish Government awarded citizenship to descendants of Spanish Jews living in Israel, creating dual nationality. That means decisions on personal status matters made by Israeli rabbinical courts are recognised by the Spanish jurisdiction if they are not against Spanish public order.

2. Muslim Communities

As far as Islam is concerned, conclusions do not differ so much from Judaism, despite the diversity of the Muslim population. Due to the strong immigration from North Africa we can estimate there are about 1.4 million Muslims living in the country (nearly 2.5 % of the Spanish population). There are 878 Islamic communities registered in the Religious Entities File of which 576 belong to the Islamic Commission of Spain,⁶ which signed the 1992 Agreement with the State.⁷ As far as I know, there is no jurisdiction which applies *Shariah* equivalent to those existing in the age of Classical Islam: neither a single judge (*qadi*) created by the Umayyad Caliphate, nor an Islamic Legal expert (*mufti*) who resolves the controversies of Muslim believers by issuing an opinion (*fatwa*) based on the knowledge of *Qur'an* and *Sunna* rulings.⁸ As an advisory institution, the 'High Council of Imams' was established in 2002. Its members are the imams of the most relevant mosques with knowledge in Islamic Law. This 'independent religious, scientific and cultural entity' (as it is named in its Statutes) has as its main objective issuing *fatwas* based on the common interpretation of the five most relevant Schools of *Shariah* in the orthodox *sunni* system, as well as unifying the opinion of the *muftis* about important matters of Islamic Law.

However, the Council of Imams, as the Rabbinical Council referred to before, is more nominal than real:⁹ legal cases relating to specific *fatwas* are unknown. If they

⁵ The data is provided by C. Pons-Estel Tugores, 'El matrimonio celebrado en forma religiosa judía en España', in I. Martín Sánchez-M. González Sánchez (eds.), *Los judíos en España. Cuestiones del Acuerdo de Cooperación con la FCJE de 1992*, Delta Publicaciones (Madrid 2010), p. 131.

⁶ *Comisión Islámica de España*; see J. Ferreiro, *Islam and State in the EU. Church-State Relationships, Reality of Islam, Imams Training Centres*, (Frankfurt am Main 2011), pp. 265 f.

⁷ Annex to *Ley 26/1992, por la que se aprueba el Acuerdo de Cooperación del Estado con la Comisión Islámica de España*, Boletín Oficial del Estado no. 272/1992, pp. 38214–38217 as amended.

⁸ In the past the *fatwa* collections of the well-known *muftis* were an important source in the Islamic Law.

⁹ There is not reference of the High Council of Imams in the internet.

exist at all they are of no significance to public opinion – not even among Muslims – or in the mass media. We can point out some reasons for the failure of this institution or even other institutions dealing with the same concerns:

- Firstly, the strong divisions that split Spanish Islam into different factions based on ethnicity, doctrinal, political, theological and even legal differences.¹⁰
- Secondly, it should be stressed that Islamic justice through *qadis* was a political creation established during the Caliphate period and it is not prescribed by *Shariah*. In modern Islamic countries, *Shariah* used to be enforced by State tribunals and not by *Shariah* courts. These have disappeared in most of the Islamic States. Muslims have got used to suing before civil tribunals in their own countries and their adoptive European cities.
- Finally, means there has not been enough time for a significant increase in lawsuits before Spanish tribunals yet, since most Muslims have immigrated to Spain only recently.

3. The Roman Catholic Church

The situation of the Roman Catholic Church in Spain, however, is totally different. As it is well known, the Church developed a complete rule of Law, Canon Law. Being the main Church in Spain, Canon Law was also enforced by an administrative and court jurisdiction, ruled by a specific proceeding Law.

Certainly we should take into account the ‘Catholic’ dimension or universal character of the Roman Church: the procedural law as well as the court system are mostly ruled by CIC of 1983. Therefore we must firstly refer to *cann. 1446–1752 leg. cit.* (about Roman Catholic Church proceedings rules) and *cann. 1417–1445 leg. cit.* (that contain the court organisation). Nevertheless, some aspects of the particular Spanish Canon Law should also be underlined.

To summarise, the first courts of the Spanish Roman Catholic Church are those of the Dioceses and Archdioceses. The Bishop is the natural judge in each Diocese, although judging functions are delegated by law to a vicar on an *ad hoc* basis (*can.*

¹⁰ Most Spanish Muslims, i.e. about 800,000, come from Morocco. This explains the importance of the *Maliki* School in the interpretation of *Shariah*. In 2010 the “Imam Maliki Islamic Studies Foundation” was registered. Its aim is to spread the theology and legal knowledge of this Islamic school.

1419 *leg. cit.*). So the 69 Spanish dioceses judge all the claims at the first level.¹¹ Dioceses are divided into 14 ecclesiastical provinces. An Archdiocese is in charge of each Province. Its tribunal, called Metropolitan Court, judges appeals from all the Dioceses of the Province. Decisions of the Metropolitan Courts could (or should) be appealed before the Spanish Rota Court.

Pope Clement V created the Spanish Rota Court in 1529 as the Nuncio Tribunal in Spain. In 1771, Pope Clement XIV gave King Carlos III the privilege of nominating the Rota Court's judges by appointment of the Spanish King.¹² As previously mentioned, the Rota Court resolves the appeals of the Metropolitan as well as the Diocesan Courts.

Due to the existence of the Spanish Rota Court, appeals to Rome (to the Roman Rota Court) are rare, but possible. The Roman Rota Court could also judge cases related to suits against bishops or other special cases appointed by the Pope.¹³ Finally, the Apostolic Signature Court in Rome, as the high tribunal of the Holy See, oversees cases regarding the nullification of ecclesiastical court resolutions.¹⁴

II. Religious Disputes: The Approach of the State

1. Approach of the State to Religious Communities' Autonomy

Religious denominations enjoy the general autonomy recognised in Spanish law to associations of common law. As the Constitutional Court stated,¹⁵ the right of self-organisation to resolve their own affairs in order to achieve their legitimate aims, is an essential part of the constitutional right of freedom of associations enshrined in Article 22 of the Spanish Constitution¹⁶. This right can be qualified as a 'relationship' right: it is affirmed against the State and civil associations live and develop in accordance with this law. Therefore, autonomy means that the State is not allowed to interfere in the internal matters of these associations. They have to be solved in accordance with the statutes freely given by each of them.

¹¹ Exceptions are cases related to personal rights or patrimonial belongings of the bishop.

¹² Apostolic Breve *Administrandae Iustitiae Zelus*.

¹³ See article 128 of the Apostolic Constitution *Pastor Bonus*.

¹⁴ See articles 121–125 of the Apostolic Constitution *Pastor Bonus*.

¹⁵ See, among others, Tribunal Constitucional, 22 November 1988, 218/1988, Boletín Oficial del Estado, Suplemento no. 306/1988, pp. 6–8 and Suplemento no. 43/1989, p. 50.

¹⁶ *Constitución Española*, Boletín Oficial del Estado no. 311/1978, pp. 29313–29424 as amended.

Regarding religious denominations, the right of autonomy relies on the very core of the collective right of the freedom of religion. It has to be stressed that the internal organisation could be an essential part of the doctrines of many churches and, so, a part of their dogmatic beliefs. The State should be neutral and not interfere in the doctrinal or theological issues of religious groups. We can rightly state that religious denomination autonomy is wider and has to be strengthened in relation to common law associations. Certain limits established by law to civil associations do not bind religious communities.

- (1) The Freedom of Association Act¹⁷ does not apply to religious communities (Article 1(3) *leg. cit.*). They are entirely free to organise themselves and to decide about their internal affairs (within some limits to be referred to henceforth), which constitutes an essential part of their doctrines. While according to the Second Final Disposition *leg. cit.*, its articles could have the function of supplementary law, the Constitutional Court Ruling stressed the speciality of the rules applied to religious communities.¹⁸
- (2) The right of members to appeal against agreements adopted by their their association before civil courts (Article 21 *leg. cit.*) and their powers to monitor internal actions do not apply to religious communities in the same way either.¹⁹

Therefore, Article 6(1) of the Religious Freedom Act²⁰ states that registered Churches, faiths and religious communities²¹ shall be fully independent and may lay down their own organisational rules, internal and staff by-laws without prejudice to the rights and freedoms recognised by Constitution and in particular those of freedom, equality and non-discrimination.

Hence, religious autonomy includes the rights to create and preserve own organisational structures, to manage and decide on their own internal (spiritual and

¹⁷ *Ley Orgánica 1/2002, reguladora del Derecho de Asociación*, Boletín Oficial del Estado no. 73/2002, pp. 11981–11991 as amended.

¹⁸ Tribunal Constitucional, 15 February 2001, 46/2001, Boletín Oficial del Estado, Suplemento no. 65/2001, pp. 83–94 (p. 87 = section II no. 5) and Suplemento no. 91/2001, p. 123.

¹⁹ Tribunal Constitucional, 22 November 1988, 218/1988, *supra*, n. 15; Tribunal Constitucional, 11 April 2011, 42/2011, Boletín Oficial del Estado TC no. 11/2011, pp. 19–25.

²⁰ *Ley Orgánica 7/1980 de Libertad Religiosa*, Boletín Oficial del Estado no. 177/1980, pp. 16804 f.

²¹ As the autonomy right is an essential condition of the collective exercise of freedom of religion, some scholars stress that this right should be extended to non-registered denominations, see e.g. A.-C. Álvarez Cortina, 'La autonomía de las confesiones', in A.-C. Álvarez Cortina and M. Rodríguez Blanco (eds.), *La Libertad Religiosa en España. XXV Años de Vigencia de la Ley Orgánica 7/1980, de 5 de Julio (Comentarios a su Articulado)*, (Granada 2006), pp. 187–188.

other) matters,²² to name ministers and other individuals (lay or cleric) to ecclesiastical office, to establish identity clauses in order to point out their main beliefs and dogmas, or, among others, to determine the content and choose the teachers of Catholic Religion as a subject in schools.²³ The constitutional Bill of Rights and Liberties as well as other principles or values set down in the Spanish Constitution, however, limit the religious communities' autonomy.²⁴

The category of religious autonomy develops all its potential in Spanish Law vis-à-vis the Roman Catholic Church. This is because of the deeply rooted position of the Church in Spanish society and the extension and complexity of Church institutions acting within Spanish Law. In Article 1(1) of the Agreement with the Holy See on Legal Affairs²⁵ the States recognises the right of the Catholic Church to carry out its apostolic mission and guarantees the Church free and public exercise of those activities inherent in it, especially that of jurisdiction. As far as adjudication is concerned and pursuant to Article 2(4) of the Agreement with the Holy See of 1976²⁶, the Spanish State recognises and respects the exclusive legal authority of the Church courts over offences which exclusively violate Canon law. Civil authorities shall have no right to appeal sentences served by Church courts.²⁷ The examples listed by these agreements comprise the rights of the Church:

- to create, modify or suppress Dioceses, parishes and other territorial circumscriptions: Article 1(2) of the Agreement on Legal Affairs;
- to name and nominate ministers of worship and other offices with jurisdiction: Article 1 of the Agreement of 1976;
- to approve the constitution of religious orders, or of Catholic associations or foundations: Article 1(4) of the Agreement on Legal Affairs;
- the inviolability of archives, registers and other documents belonging to the Catholic hierarchy: Article 1(6) *conv. cit.*;

²² Tribunal Supremo, 10 May 2004, STS 3137/2004.

²³ Tribunal Constitucional, 15 February 2007, 38/2007, Boletín Oficial del Estado, Suplemento no. 63/2007, pp. 90–104 and Suplemento no. 100/2007, p. 66.

²⁴ See e.g. Tribunal Constitucional, 141/2000, Boletín Oficial del Estado, Suplemento no. 156/2000, pp. 40–46 and Suplemento no. 171/2000, p. 21, referring to commercial transactions with third parties.

²⁵ *Acuerdo entre el Estado español y la Santa Sede sobre asuntos jurídicos*, Boletín Oficial del Estado no. 300/1979, p. 28781 f.

²⁶ *Acuerdo entre la Santa Sede y el Estado Español*, Boletín Oficial del Estado no. 230//1976, pp. 18664 f. and no. 259/1976, p. 21179.

²⁷ Cf. can. 1401 of CIC 1983. The last sub-paragraph of Article 2(4) of the 1976 Agreement refers to the *ius appellationis*, given to the plaintiffs of a canonical proceeding by secular law to appeal to Royal courts.

- the freedom of ecclesiastical authorities to publish documents: Article 2 *conv. cit.*;
- and, lastly, the freedom to establish places of worship and the inviolability of them: Article 1(5) *conv. cit.*

Certainly this autonomy is also reflected in a wide range of matters and activities, such as the patrimonial issue²⁸ or the legal capacity of religious entities to rule internal affairs by their statutes.²⁹ Internal law is applied unless it breaches mandatory State law.

Concerning religious minority groups, the Agreements of 1992³⁰ do not include, as the Roman Catholic ones do, an express recognition of organisational or jurisdictional autonomy of Jewish or Muslim communities. Nevertheless, they can enjoy the general autonomy enshrined in Spanish law for all religious denominations as an essential part of the collective right of freedom of religion. It may also be stated that the legal autonomy of the Catholic Church could be extended to other denominations.

The Articles 6 of all three Agreements of 1992 indirectly refer to some aspects of religious autonomy of Jewish and Muslim communities, which are out of the remits of State scrutiny. Worship, ritual religious practice, training of rabbis or imams, and spiritual support can only be determined by internal law. This autonomy is limited by the constitutional rights and liberties of the believers. The right to resolve internal disputes according to religious law and apply a fair process also has to be stressed.

²⁸ Aspects mentioned by jurisprudence are the patronage, the benefit, the tithe, or the burying ground, see Tribunal Supremo, 10 May 2004, STS 3137/2004, section *Fundamentos de Derecho*, no. 3.

²⁹ See e.g. the regulations concerning Catholic universities according to the Covenant of 5 April 1962 – *Convenio entre la Santa Sede y el Estado Español sobre reconocimiento de efectos civiles de estudios de ciencias no eclesiásticas realizados en España en las Universidades de la Iglesia*, Boletín Oficial del Estado no. 173/1962, pp. 10132–10134 –, ecclesiastical science centres according to Article 11 of the Agreement on Education and Cultural Affairs of 3 January 1979 – *Acuerdo entre el Estado Español y la Santa Sede sobre enseñanza y asuntos culturales*, Boletín Oficial del Estado no. 300/1979, pp. 28784–28785 –, the Spanish Council of Bishops according to Article 1(3) of the Agreement on Legal Affairs, religious orders according to Article 1(4) *conv. cit.*, or Church charities according to Article 5(1) *conv. cit.*

³⁰ See *supra*, n. 7; as well as Annex to *Ley 24/1992, por la que se aprueba el Acuerdo de Cooperación del Estado con la Federación de Entidades Religiosas Evangélicas de España*, Boletín Oficial del Estado no. 272/1992, pp. 38209–38211 as amended; and Annex to *Ley 25/1992, por la que se aprueba el Acuerdo de Cooperación del Estado con la Federación de Comunidades Israelitas de España*, Boletín Oficial del Estado no. 272/1992, pp. 38211–38214 as amended.

2. Approach of the State to the Resolution of Religious Disputes

Broadly speaking, Spanish Law does not recognise any religious tribunals. Constitutional principles such as the separation of Church and State, the State's religious neutrality, anchored in Article 16(3) of the Constitution, and the exclusive jurisdiction of the State courts according to Article 117 *leg. cit.* excludes any possibility of religious jurisdiction.³¹ Nevertheless, an exception prescribed by law or international treaties determine which resolutions of religious courts could achieve civil effects and which proceedings should be applied.

As stated earlier, during the Middle Ages, Statutes given by the King (*fueros*) recognised a religious jurisdiction to Jewish and Muslim communities as part of their personal status. Muslims were subjects of the Christian King (*mudéjares*) and used to enjoy that personal status during the re-conquering process. One example is the Aragon King James I, who, having conquered the Valencia Kingdom, gave a charter to the city where he expressed his will that all Muslims should be ruled by the *Sunna* in their marriages and in all other personal affairs and that they could name a *qadi* if they wished to do so.³² Times of tolerance finished in the 15th century during the reign of Kings Isabel of Castile and Fernando of Aragon.³³

Moving on to the present day, in the 1992 Agreements there is not a single statement about Jewish or Muslim jurisdictions having any kind of recognition: neither the resolutions of Rabbinical or Islamic courts in marriage issues have any civil effects, nor their rulings in any other matter. However, it seems that Jewish or Muslims communities do not have problems suing in civil courts to try to solve their internal disputes.³⁴ In accordance with Islamic Law, Muslims in foreign countries (*dar al-harb*) must comply with the Laws of those countries unless these impede on *Shariah* rulings. Regarding Jews, they must obey the secular laws where they live as well, but they uphold the superiority of the *Torah* in their own internal affairs.

³¹ Pursuant to Article 117(1 and 3) of the Constitution justice emanates from the people and is administered on behalf of the King and is exclusively vested in the tribunals as laid down by the law. Article 117(5-6) *leg. cit.* prohibit any special jurisdiction with the exception of the military court.

³² See also the charters given by King Alphonse I, called the Battler, after having conquered the Kingdom of Navarra, and by King Alphonse X, called the Wise, after having conquered the city of Morón.

³³ The *mudéjares* or *moriscos* were finally expelled at the beginning of the 17th century during the reign of Philippe III.

³⁴ See e.g. Tribunal Supremo, 17 June 2013, ATS 5992/2013, deciding that the civil jurisdiction has to resolve the lawsuit of some Muslim communities filed against the Islamic Federation, alleging that the latter unlawfully modified its statutes.

However, within Spanish law minority groups are still entitled to gain civil recognition of resolutions adopted by their own judicial or quasi-judicial institutions in enforcing religious law.

One way is to apply the foreign law in cases established by Spanish private international law. According to Article 9(1) of the Civil Code³⁵ individuals' civil status and their family rights and duties are governed by their nationality. Thereby Muslim immigrants can obtain civil recognition (*exequatur*) of the rulings of the courts of their Islamic countries in accordance with *Shariah* especially in family affairs. Jewish descendents of Spaniards with Israeli nationality (*sefardíes*) can have Spanish and Israeli nationality. If they domiciled in Spain, the rulings of Israeli rabbinical courts regarding their personal status can have civil effects under Spanish law. Any aforementioned civil effects are excluded where foreign resolutions conflict with Spanish public order.

A second way to achieve civil recognition of religious jurisdiction is that of the arbitrage institution. Article 2 of the Arbitration Act³⁶ allows arbitrage to all matters of free disposition of the plaintiffs. Issues related to Spanish public order and those ruled by imperative law are therefore excluded. As is well-known, they are especially significant in marriage laws: protection of good faith, of the weaker part of the relationship, or of minors should be taken as part of arbitrage matters.

Concerning imperative law matters, the parties could freely sign an arbitrage agreement. In it and among other issues, they have to name an arbiter (or arbiters) in charge of solving the dispute. According to Article 34(2) *leg. cit.* the arbiters will apply the rules chosen by the parties, otherwise choosing themselves. Consequently, matters not excluded from arbitration may be submitted to arbiters who are experts in religious law, on which they will base their decisions. Such decisions are enforceable by State courts according to Article 44 *leg. cit.* I must add here that I do not know any cases where the institution of arbitrage has been chosen by any religious believers at all!

Regarding State recognition of the jurisdiction of the Roman Catholic Church, we must apply the principle of Spanish law already mentioned: the State does not grant civil effects to any resolution or ruling of ecclesiastical courts, unless laws or treaties say a different thing. The only exception of the general irrelevance of Catholic Church jurisdiction that mentioned by Article 6(2) of the Agreement on Legal

³⁵ *Ley de 26 de mayo de 1889, por la que se dispone la publicación del Código Civil Español*, Gaceta de Madrid de 28 de mayo de 1889 as amended.

³⁶ *Ley 60/2003 de Arbitraje*, Boletín Oficial del Estado no. 309/2003, pp. 46097–46109 as amended.

Affairs. Plaintiffs in canonical nullification or a specific type of dissolution of marriages given by the Pope could have civil effects if either of the parties asked for these before a civil court and if the ecclesiastical resolution is declared in compliance with the State law by sentence of the civil court. Beyond this exception the ecclesiastical resolutions have an effect within Canon law but not in Spanish civil law.³⁷

Nullification rulings by ecclesiastical courts and dissolutions of the Pope have civil effects and are enforced in Spanish law if they comply with the same conditions as resolutions of foreign States following the *exequatur* requirements.³⁸ To summarise, Spanish law requires that they do not infringe constitutional rights and public liberties and, especially, the right to a fair proceeding with equal legal tools at their disposal and the right not to be submitted to a religious jurisdiction against the will of the individual. Having complied with the legal requirements, the civil court declares the Church resolution in compliance with State law and proceeds to enforce it.³⁹

Following State law, only the main ecclesiastical decision nullifying or dissolving a canonical marriage has any civil effects. Civil courts are not tied to other secondary pronouncements of the Church courts, regarding, for instance, the good or bad faith of the parties, alimonies, compensatory pension, custody or the guard of the children. Those issues should be freely decided by the civil courts.⁴⁰ Nevertheless, any facts provided as evidence in the canonical proceedings can be adduced before civil courts. These could admit them as documental evidence and the civil judges

³⁷ The Audiencia Provincial de Huesca, 4 March 2011, AAP HU 1/2011, dismissed the suit of the Barbastro-Monzón diocese and the Aragon Autonomous Community demanding to enforce the decision of the Signatura Apostolica of 28 April 2007 under Spanish law. The ecclesiastical resolution had commanded the restitution of some valuable artistic and historic goods nowadays in possession of the Lérida diocese to Aragón. The Pvincial Court of Huesca stated that this matter was ruled by an agreement with the Holy See, which grants civil effects only to declarations of nullity or dissolutions of marriages. Hence, other ecclesiastical rulings cannot be executed under Spanish law.

³⁸ Pursuant to Article 80 of the Civil Code the requirements of Article 954 of the Code of Civil Procedure – *Real Decreto de 3 de febrero de 1881, que aprueba la Ley de Enjuiciamiento Civil*, Gacetas de Madrid del 5 al 22 de febrero de 1881 – have to be met. It needs to be emphasized that ecclesiastical tribunals are rightly considered foreign jurisdiction in relation to the State despite the Spanish nationality of their plaintiffs and the fact that they operate on Spanish soil.

³⁹ It has to be pointed out that nullity rulings of Catholic Church courts can also have civil effects in Portugal and Italy and may be recognised by all member States of the European Union according to Article 63 of the Council Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, OJ L 338/2003, pp. 1–29.

⁴⁰ Tribunal Constitucional, 26 January 1981, 1/1981, Boletín Oficial del Estado, Suplemento no. 47/1981, pp. 1–4, and Tribunal Supremo, 28 July 2000, STS 6340/2000.

would award them value as evidence and the civil effects that they consider in accordance with justice and law.

Moreover we must point out that the State recognition of civil effects could be given to definitive rulings of ecclesiastical courts on Spanish soil (Diocesan, Metropolitan or Rota courts) or in foreign countries: either in third States⁴¹ or in the Holy See courts in Rome.⁴²

In cases of ecclesiastical entities affecting a third person or when a member of the Catholic association sues against the institution, civil courts may intervene to monitor the correct application of the Statutes and of the general canon law.⁴³

III. Religious Perspectives on State Approaches to Religious Disputes

The focus will be placed on the three religious denominations which have their own Law and jurisdictional institutions to enforce it.⁴⁴

Orthodox Islam states that Law derives from God's Will, not from man. Therefore and generally speaking, there is neither recognition of an autonomous secular power, nor of a non-religious jurisdiction to enforce the Law. *Shariah* only admits that secular power could approve administrative rules in order to enforce the religious Law and to fulfil matters not ruled by Islamic law.

Nevertheless, history and reality show the importance that secular rulings, autonomous from *Shariah*, have gained in Islamic countries and how State tribunals have substituted the *Shariah* courts. Muslims are accustomed to accepting Spanish civil law. They are also obliged to do this because of the religious law: as has been said, they must follow the law in the countries outside *dar al-Islam*, unless the secular rules impede *Shariah* prescriptions. In countries such as Spain where the consti-

⁴¹ See e.g. 23 January 1989, STS 235/1989 & STS 15022/1989.

⁴² Tribunal Supremo, 30 June 1984, STS 1302/1984, ordered the enforcement of an Apostolic Signature Court Ruling that declared the nullification of a Spanish ecclesiastical court resolution about a canonical marriage.

⁴³ Tribunal Supremo, 27 February 1997, STS 1372/1997, concerning the application of universal and local Canon law in the case of the sale of a real estate property belonging to a religious order. Tribunal Supremo, 6 October 1997, STS 5898/1997, declared the cession of a convent of a Catholic private association to a religious order lawful.

⁴⁴ For this chapter cf. particularly S. Ferrari, *El espíritu de los derechos religiosos. Judaísmo, cristianismo e islam*, (Barcelona 2004), pp. 274–294.

tutional law enshrines freedom of religion, they do not find many obstructions to comply with the religious requests. As far as I know, Islamic community leaders have not expressed criticism or disagreement with Spanish law, nor have they even asked for State recognition of a specific Islamic jurisdiction. It should also be stressed that Muslims can find recognition of the Islamic Law – mostly in family and marriage related law issues – through the application of the Law of their nationality. Spanish courts used to be tolerant and flexible in applying foreign religious Law in personal status matters through, for example, institutions such as the so-called ‘light or soft public order’ trying to accommodate the internal law to different cultures or beliefs.

We can reach similar conclusions in analysing the Spanish Jewish communities. In theory, the religious law or *Halakhah* does not distinguish between secular and spiritual law: Jewish law covers all temporal matters. In practice nowadays, Jews recognise the autonomy of the secular law. They are obliged to obey the law of the country in which they live unless it goes against the *Torah* or the *Halakhah*. Spanish Jews have also not complained about settling their disputes before Spanish courts, nor petitioned for a Jewish jurisdiction to solve their internal affairs. Perhaps there is no need, due to the few number of Jewish citizens living in Spain.

In contrast and in accordance with the rulings of the Second Vatican Council, the Roman Catholic Church accepts – without problems – the existence of an autonomous and independent secular law, that decides which rules should be obeyed by Catholic believers as well. Nevertheless, secular law submits to the primacy of God’s law. The Church is the highest interpreter of it, so it has the right to judge secular rules by moral and spiritual standards. Moreover, the Council and the Pope’s doctrine plead for the cooperation and the mutual collaboration of Church and State in matters of common interest (so called mixed matters, as e.g. marriage, education, the Church’s social action).

The said right of the Roman Catholic Church to express the moral judgement of Spanish law has led to a great number of bishops’ complaints⁴⁵ criticizing civil laws in matters of education, marriage, abortion, etc. But the Spanish Church hierarchy has never petitioned for further issues (the already recognised nullification or dissolution of canonical marriages already included) to award the Church jurisdiction more civil effects.

⁴⁵ For references to Spanish Bishop Conference’s documents concerning Spanish law and the policies of previous Spanish governments see A. Motilla, ‘The Mutual Roles of Religion and State in Spain’, in B. Schanda (ed.), *The Mutual Roles of Religion and State in Europe. Proceedings of the 24rd. Congress of the Consortium for Church and State Research. Budapest 8–11 November 2012*, (Trier 2014), pp. 209–232 (p. 227).

The lack of critics among the ‘Three Religions of the Book’ about this question explains that there has not been any reference to it in mass media, or discussions in the political or scholarly arena.

THE EMERGENCE OF RELIGIOUS PARALLEL JURISDICTIONS IN ESTONIA

Merilin Kiviorg, Tartu

I. Introduction

In theory, the resolution of purely religious disputes in Estonia are solved via the traditions of the respective religious associations. As will be discussed, since the Estonian constitution ensures the right of religious associations to conduct their affairs in accordance with their particular religious traditions and the public currently has little interest in changing these traditions, the matter of alternative religious adjudication or dispute resolution is rarely, if not at all, discussed in Estonia. No case has reached a civil court yet. Only in a couple of instances, described below, has the issue emerged as a matter of public interest in the media. Additionally, there has been very little qualitative or empirical research done in this area. It also needs to be noted that there is very little (official) data available.

With respect to the prevalent religious traditions in Estonia, according to the last population census, 54 % of the adult population (those aged 15 and above, or 1.094,564 from a total population of 1.294,455) declared that they do not adhere to any particular creed. Only 29 % considered themselves adherents to a creed. Of this figure, about 10 % (13.6 % in 2000) declared themselves as Lutherans. Currently, the largest religious tradition in Estonia is the Orthodox Church, with 16 % of the population considering themselves Orthodox (12.8 % in 2000). Since the census in 2000, the Orthodox community has grown in number and has outgrown the historically dominant Lutheran Church.

There is a small but slowly growing Muslim community – due to new arrivals and local conversions. For a very long time after the collapse of the Soviet Union, this community was mainly engaged in preservation of its ethnic rather than religious identity, as e.g. Tatars, or Uzbeks. This dynamic has been slowly changing. Estonia is not yet a country of significant immigration.

There is a small but active Jewish community in Estonia with a synagogue and one secondary school with an Orthodox Jewish ethos. Official statistics do not reflect the full picture. According to the latest population census from 2011, only 355 (from those aged 15 and above) declared that they adhere to Judaism.¹

All other Christian and non-Christian religious communities claim adherents of approximately 3 % of the adult population (aged 15 and above).² Among those, the largest religious communities are Roman Catholics, Old Believers, the Baptists, Pentecostals and Jehovah's Witnesses.

Since 2000, the number and diversity of registered religious organisations has grown, but the overall religious affiliation of the population has not. One of the major surveys conducted in 2014 indicates that there is a high degree of individualisation of religion. More than half the people questioned said they hold their individual beliefs, which are independent of a specific religion or church (58 %), and little less than a half (48 %) said that although they do not consider themselves believers, they have great interest in religions and spiritual practices (New Age).³

II. The Resolution of Disputes: The Practices and Norms of Religious Communities

The State itself does not provide any formal religious adjudication and does not give religious courts/institutions the power to interpret the laws of the State or to assess their level of conformity to religious rules. However, the State recognises religious adjudication within the autonomy of religious organisations. For example, the state recognises the existence and activities of the ecclesiastical court of the Estonian Evangelical Lutheran Church. The church's state registered by-laws include provisions relating to the institution of the Church Court (*kirikukohus*). According to these by-laws, the Church Court is entitled to review internal decisions of the church including, for example, disciplinary matters. The court consists of three members. At least one has to have higher theological and another higher juridical qualifications. The members of the court are elected for 4 years.

¹ 'Usk', <http://pub.stat.ee/px-web.2001/Database/Rahvaloendus/REL2011/07Rahvastiku_demograafilised_ja_etno_kultuurilised_naitajad/09Usk/09Usk.asp> (1 July 2014).

² 'Population and Housing Census 2011', <http://www.stat.ee/65352?parent_id=39113> (1 August 2013).

³ 'Uuring: eestlased usuvad vaimsesse enesearengusse ja maavälisesse ellu', <<http://www.ut.ee/et/uudised/uuring-eestlased-usuvad-vaimsesse-enesearengusse-maavalisesse-ellu>> (29 January 2014).

Article 9 of the by-laws of the Estonian Apostolic Orthodox Church sets forth a detailed description of the institution of the Church Court. According to the statutes, it has jurisdiction over internal disputes that fall under church law. There are lower courts (*alam-kirikukohtud*) and a higher (appeal) court (*ülem-kirikukohus*). The court may invite experts with juridical qualifications to consult the court. The *alam-kirikukohus* consists of three members (bishop and two ad hoc members appointed by the bishop, one of whom has to be a priest). The Bishops Council (*piiskoppide kogu*) carries out the tasks of the *ülem-kirikukohus*.

The state-registered statutes of Jewish Congregations do not include any provisions on adjudication or dispute settlement. There are only provisions on reviews of complaints about the activities of the board of the congregation. The by-laws of the Muslim Congregation, on the other hand, set forth that disputes between members are solved in the court of honour (*aukohus*). The board of the congregation nominates two representatives for each party and a mediator (*vahemees*). Disputes must be resolved within 30 days. The decision is reviewed and approved by the board of the congregation. The statutes specify that the decision is final and must be executed. Interestingly, it emphasises that the congregation itself solves disputes. This means that disputes are deemed to be solely an internal matter and should not be publicised. The statutes specifically point out that unnecessary disclosure of the disputes may result in temporary or permanent exclusion from membership of the congregation.

As there have been no cases in Estonian civil courts pertaining to the scope of autonomy of religious communities, it is hard to predict what the scope of religious autonomy in specific cases would be when, for example, an individual, disputes a decision made by a religious organisation or Church Court in a civil court. The individual would not be barred from taking his or her case to a civil court if the case has significance in terms of State law. Anyone whose rights and freedoms have been violated has the constitutional right of recourse to the courts. However, civil courts will not enter into a purely religious dispute. In that regard, some matters may be un-judicial.

The ECHR became legally binding for Estonia on 16 April 1996. The ECHR is part of the Estonian legal system and is directly applicable.⁴ Although the jurisprudence of the ECtHR regarding conflicts between individual rights and collective

⁴ Estonia became a member of the Council of Europe on 14 May 1993. The same day Estonia signed the ECHR. The Estonian Parliament ratified the ECHR on 13 March 1996. The letters of ratification were deposited on 16 April 1996. The Convention became legally binding for Estonia from that date.

autonomy has itself not been consistent, it is likely to be used if cases come before Estonian courts.

There is no information available as to what extent parties *de facto* resort to religious law and adjudication. According to the Department of Religious Affairs of the Ministry of Interior, there is no data collected or available in this regard. Only very few cases brought before church courts or institutions have captured media or public attention. One of these cases concerned an accusation of infidelity by a minister of the Evangelical Lutheran Church. There was only one incident that brought out tensions between civil and religious jurisdictions in employment matters. It concerned the dismissal of a minister due to his sexual orientation. This incident is going to be discussed later in this paper.

There is no exact data available as to what extent parties use freedom of contract to resolve their issues according to religious law; for example, in family matters. From the limited information available, it can be pointed out that the Estonian version of a Muslim journal, *Iqra*, has made readers aware of the opportunities to resolve family issues without the interference of state authorities. In 2012, twelve marriage contracts (*nikah*) were signed under the supervision of an imam. Inheritance can be apportioned according to Islamic regulations provided it is accepted by all parties involved.⁵ In the case of legal disputes, civil law applies in Estonia. In addition, universal laws may impose certain limits in the use of religious law.

III. Religious Disputes: The Approach of the State

The current legal and political framework of religion in Estonia was designed by the Constitution, which was adopted by the referendum of 28 June 1992. This Constitution entirely meets the standards of freedom, characteristic of Western democracies, European and international law and was a clear indication of how Estonia wanted to identify itself after years of Soviet occupation. Various national, international and supranational sources of law determine the normative framework for religious freedom. Of international or regional human rights instruments, the European Convention on Human Rights is the most influential, along with the Charter of Fundamental Rights of the European Union. Both instruments are legally binding in Estonia. Individual and collective religious freedom are also protected by Article 40 of

⁵ R. Ringvee, 'Estonia', in J. S. Nielsen, S. Akgönül, A. Alibašić, and E. Račius (eds.), *Yearbook of Muslims in Europe*, vol. 5 (Leiden 2013), pp. 229–236 (p. 236).

the Estonian Constitution⁶, while Part II of the 2002 Churches and Congregations Act⁷ establishes further guarantees for this freedom. Just as the international instruments, the Constitution and the Churches and Congregations Act protect the right both to choose and to manifest one's religion or beliefs both alone and in a community with others in public or in private, unless this is detrimental to public order, health or morals.⁸

The Constitution expressly protects freedom of religion for individuals and religious communities. It encompasses several important principles determining freedom of religion and the relationship between the State and religious communities. These principles are neutrality, equality and self-determination/autonomy. There is no State Church, but cooperation between the State and religious communities for the public good has been accepted within the limits of the law.

Autonomy of religious associations in their internal affairs is generally respected. This autonomy stems from the general right to self-determination of both individuals and groups guaranteed by Article 19 of the Constitution. Its Article 19(1) states that all persons shall have the right to free self-realization. The right to religious autonomy is also considered to be an essential part of the collective freedom of religion which is protected by Article 40 and by Articles 48, 19(1) and 9(2) *leg. cit.*⁹ Collective religious autonomy is clearly considered an important part of freedom of religion or belief. Autonomy of religious associations also means the right to self-administration in accordance with religious law and prescriptions. Restrictions on this freedom may be imposed only insofar as they are necessary in a democratic society, and their imposition may not distort the nature of these rights and liberties. It also needs to be noted that religious associations have more autonomy in their internal affairs than other non-profit organisations. Obviously, there are limits to this autonomy. Some of them are determined by universal laws, such as e.g. by the Penal Code¹⁰.

The activities of the Roman-Catholic Church in Estonia are regulated by the international treaty between Estonia and the Holy See¹¹. On 2 May 1995, the

⁶ *Eesti Vabariigi põhiseadus*, Riigi Teataja 1992, 26, 349 as amended.

⁷ *Kirikute ja koguduste seadus*, Riigi Teataja I 2002, 24, 135 as amended.

⁸ For a comprehensive overview of law and religion in Estonia see M. Kiviorg, *Law and Religion in Estonia* (Alphen aan den Rijn 2011).

⁹ This was expressly stated in the Presidential veto to the 2002 Churches and Congregations Act, Riigi Teataja Lisa 2001, 82, 1120.

¹⁰ *Karistusseadustik*, Riigi Teataja RT I 2001, 61, 364 as amended.

¹¹ AAS 91 (1999) 414–418.

Apostolic Administration of the Roman Catholic Church was registered with the Religious Affairs Department of the Ministry of Internal Affairs. The Ministry of Foreign Affairs, in co-operation with the Religious Affairs Department of the Ministry of Internal Affairs, prepared an agreement between the Republic of Estonia and the Holy See on the legal status of the Catholic Church, which came into force via an exchange of notes on 12 March 1999.¹² The agreement sets out the legal arrangement between Estonia and the Vatican. In order to resolve some issues regarding registration and the juridical status of the church, which was recognised with the 2002 Churches and Congregations Act, the Ministry of Internal Affairs developed an amendment to the law, which came into force on 12 February 2011.¹³

There is no specific reference to religion in the constitution or in the laws which define the principles and values that inspire the State legal system. The preamble of the Constitution states that the idea behind strengthening and developing the state is to guarantee the preservation of the Estonian nation, language and culture through the ages. The latter is a reflection of the classical German constitutional model, which presupposes the prior existence of a people, united by culture, language and ethnicity.¹⁴ However, in scholarly interpretation of the constitution, the emphasis is on individual rights.¹⁵ The Estonian Constitution is perceived as a liberal constitution based on natural and inalienable individual rights.¹⁶ Moreover, Articles 40, 9, 19 and 48 *leg. cit.* recognises collective religious freedom and Article 50 *leg. cit.* provides protection for cultural/religious minorities and their autonomy. Some policy papers adopted by the Government (not made into law) have made a link between preservation of culture in the preamble of the constitution and preservation of Christian Churches. For example, on 11 March 2003 the Estonian government approved a policy paper on Preservation and Development of Sacred Buildings. Although not a law, the paper provided a basis for several legislative and financial actions to support

¹² Riigi Teataja II, 22.04.1999, 7, 47.

¹³ Riigi Teataja I, 02.02.2011, 1.

¹⁴ See also J. Reingelheim, 'Minority Protection and Constitutional Recognition of Difference', in A. Verstichel (ed.), *The framework Convention for the Protection of national Minorities: A Useful Pan-European Instrument* (Antwerp 2008), pp. 33–49.

¹⁵ Ü. Madise, B. Aaviksoo, H. Kalmo, L. Mälksoo, R. Narits, P. Pruks and P. Vinkel, *Eesti Vabariigi Põhiseadus: Kommenteeritud väljaanne*, 3rd ed. (Tallinn 2012).

¹⁶ R. Narits, 'About the Principles of the Constitution of the Republic of Estonia from the Perspective of Independent Statehood in Estonia', (2009) XVI: 56 *Juridica International*, pp. 56–64.

the development of Christian churches over the period from 2004 to 2013. The programme was subsequently extended to 2018.¹⁷

Religious laws are not mentioned among the sources of State law. Religious laws and principles are also not mentioned in connection with specific parts of the State legal system (for example criminal law, family law, etc.). There is no system of personal laws based on religious affiliation. In Estonia, State laws do not include the religious rules applicable to all citizens.

However, there are some areas where religious communities are exempt from universal laws and very limited areas where the State may recognise religious laws, e.g. in the case of the application of private international law. Furthermore, religious communities have the autonomy to regulate their own affairs and their membership. However, as a rule, religious acts do not have a civil legal effect. Historically, the possibility of enforcing decisions by secular institutions – i.e. the Ministry of Internal Affairs and the Court – existed under articles 24 and 25 of the 1934 Act on Churches and Religious Societies¹⁸. Under this act, it was also possible to influence internal disputes in religious communities. This mechanism was once used at the end of the 1930s when the Minister of Internal Affairs suspended the activities of the governing body of the Estonian Evangelical Lutheran Church upon the request of eight Church ministers. In 1938 they requested the State to solve their internal conflict according to civil law. The conflict evolved from H. B. Rahamägi, the bishop at the time wanting to divorce, which the conservative members of the Church were very much against. The Estonian Government supported the opposition in the church and suspended the activities of the bishop and governing bodies of the Church according to Article 20 of the Churches and Congregations Act, on the grounds of restoring public order and peace.¹⁹

There are currently no exemptions which explicitly recognise religious family law in Estonia. Changes in family status (such as marriage, divorce) need to be conducted according to civil law in order to be legally recognised. In accordance with the law, a clergyman who has received authorization from the Minister of Regional Affairs is entitled to perform civil marriages. Thus, the state does not recognise the

¹⁷ Programm 'Pühakodade säilitamine ja areng 2014–2018', Kinnitatud kultuuriministri käskkirjaga no. 371, 28.11.2013, <<http://www.muinas.ee/sinule/omanikule/puhakodade-programm>> (30 June 2015).

¹⁸ Kirikute ja usuühingute seadus, Riigi Teataja 1934, 107, 840.

¹⁹ More details on the conflict in Kiviorg, *supra*, n. 8; M. Kiviorg, *Kirikuõigus avaliku õiguse osana Eesti Vabariigis (võrdlev analüüs 1918–1940.a. ja 1991–1996.a.)*, (Tartu 1996), pp. 36–37; S. Luiga, *Eesti Vabariigi territooriumil asuvate usuorganisatsioonide õigussubjektsus* (Tartu 1992), pp. 26–27; see also V. Vihuri, *Hugo Bernhard Rahamägi, Eesti Evangeelse Luterliku Kiriku teine piiskop 1934–1938* (Tartu 2007), p. 312.

concept of religious marriage *per se* but rather, has established the possibility of delegating the obligations of the registered office to a clergyman of a church, congregation, or association of congregations.²⁰ It needs to be mentioned that if held separately, the religious marriage as such, can be conducted before the civil registration but only civil registration has a legal effect.

However, application of religious family law as such, to a certain extent, is not prohibited either (see previous section). As noted above, there is some freedom of contract, for example, concerning heritage, subsistence, etc., provided that all parties agree. In that regard, the Estonian model can probably be described as a model of non-interference with internal alternative jurisdictions.

Estonian law also allows some exceptions in specific cases where a legal relationship falls under private international law. The Private International Law Act²¹ regulates legal relationships which are connected with the law of more than one state. For example, a marriage contracted in a foreign state is deemed to be valid in Estonia, according to section 55 *leg. cit.*, if it is contracted pursuant to the procedure for contraction of marriage provided by the law of the state where the marriage is contracted, and the material prerequisites of the marriage, such as age, consent, etc., are in compliance with the laws of the states of residence of both spouses. Section 56(3) *leg. cit.* provides that a previous marriage of a spouse does not hinder the contraction of a new marriage in Estonia, if the previous marriage has been terminated on the basis of a decision made or recognised in Estonia, even if such a decision is not in accordance with the law of the state of residence of the prospective spouse.

Although religious family law may be recognised in Estonia in cases where religious family law is recognised by the relevant State, there is one general restriction. Section 7 *leg. cit.* sets forth that a foreign law should not be applied if the result of such application would be in obvious conflict with the essential principles of Estonian law (public order). In such cases, Estonian applies. For example, this would most certainly be true in cases involving underage, forced marriage or polygamy. Where gender equality is at issue, it is possible that courts may consider Estonian law to take precedence; for example when ruling on subsistence, custody or inheritance. However, at the moment this is only speculative as there is no case law to rely on.

²⁰ On 7 November 2013, there were 135 persons with the right to conduct religious marriages with civil validity. The information is obtained from the Ministry of Internal Affairs, <<http://www.siseministerium.ee>> (31 March 2014).

²¹ *Rahvusvahelise eraõiguse seadus*, Riigi Teataja I 2002, 35, 217 as amended.

As for employment disputes in religious organisations, international and transnational developments in anti-discrimination law have become increasingly (and potentially) challenging for religious communities. However, the effects of the interplay between anti-discrimination legislation and collective freedom of religion or belief in Estonia remain to be seen. Currently, there is no case law in relation to this matter. Religious organisations are allowed certain exemptions from the Equal Treatment Act²². In the case of occupational activities within religious associations and other public or private organisations based on religion or belief, a difference in treatment based on a person's religion or belief shall not constitute discrimination according to section 10(2) *leg. cit.* when, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, because it is directly related to the organisation's ethos. Section 10(3) *leg. cit.* upholds the right of these organisations to require individuals working for them to act in good faith and with loyalty to the organisation's ethos. These exceptions are based on EU anti-discrimination directives, namely the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation²³ and the Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin²⁴. The explanatory note on the law also refers to Declaration No. 11 on the status of churches and non-confessional organisations, which was added to the Amsterdam Treaty.

Although there have not yet been any court cases in relation to employment disputes, there was an incident involving the application of the Equal Treatment Act within religious communities. In 2010 the Estonian Evangelical Lutheran Church decided to exclude from the ranks of priesthood a minister who had openly expressed his views in support of gays and had become a board member of the association for Gay Christians.²⁵ The incident fuelled some internal discussions in the church, but also attracted public attention. The minister turned to the Gender Equality and Equal Treatment Commissioner to investigate the matter. The post of Gender Equality and Equal Treatment Commissioner was established to monitor compliance with the requirements of the Gender Equality Act²⁶ and the Equal Treatment Act. Some church members were furious about the enquiries and demanded the

²² *Võrdse kohtlemise seadus*, RT I 2008, 56, 315 as amended.

²³ OJ L 195/2000, pp. 16–22.

²⁴ OJ L 180/2000, pp. 22–26.

²⁵ 'EELK praost nõuab võrdõiguslikkuse voliniku ametist lahkumist', *Delfi*, 07 November 2011.

²⁶ *Soolise võrdõiguslikkuse seadus*, RT I 2004, 27, 181 as amended.

resignation of the Commissioner for violating church autonomy. In its official response, the consistory of the Lutheran Church explained that the minister's sexual orientation as such was not the grounds for his dismissal but the fact that he broke his oath by not following and obeying the internal regulations of the church (including its 2009 declaration on homosexuality).²⁷ No further legal action was taken by the minister, church or the Commissioner.

As for further exemptions, the Gender Equality Act does not apply to the profession and practice of faith nor does it extend to a minister of a religion in a registered religious association according to its section 2(2). However, commentaries commissioned by the Ministry of Social Affairs state that in the future, it would be reasonable to extend the application of the law to religious organisations.²⁸

IV. Religious Perspectives on State Approaches to Religious Disputes

As noted above, alternative religious adjudication or issues related to the emergence of parallel jurisdictions have not really been discussed in Estonia. Occasionally, the media reflects on examples in other countries but without any analytical connection to the Estonian situation. Furthermore, religious communities themselves have not voiced any specific problems, apart from the one exception mentioned above. There is no case law in civil courts to provide material for criticism or praise of the State's approach. This seems to be an indication that the law generally respects the autonomy of religious communities to decide over internal matters, e.g. employment or appointment in accordance with the religious ethos of the community. There also seems to be room for accommodating alternative dispute settlements when all parties agree. On the other hand, the public silence on this matter may also be a reflection of the religious composition of the State and the relatively small institutional membership of religious organisations.

²⁷ 'EELK selgitas soovolinikule, miks tagandati üks vaimulik ametist', *Meie Kirik*, 11 October 2011.

²⁸ K. Albi, J. Laidvee, Ü.-M. Papp and M.-L. Sepper, *Soolise võrdõiguslikkuse seadus, Kommenteeritud väljaanne* (Tallinn 2010), p. 23.

V. Conclusion

Both individual and collective religious freedom is protected in Estonia. Relations between religious communities and the State have not produced significant conflicts. Since 1990, the only major religious and legal conflict in Estonia was the disagreement between two Orthodox Churches; one under the canonical jurisdiction of the Ecumenical Patriarchate, and the other under the canonical jurisdiction of the Moscow Patriarchate. The dispute between the churches was over legal continuity and ownership of property. Both claimed to be descendants *in iure* of the Estonian Orthodox Church, subordinate to the Ecumenical Patriarchate, which pre-existed the Soviet occupation of Estonia in 1940. The property dispute was decided in civil courts.

From the outset, Estonian laws were made flexible enough to take into account religious dispute resolution needs. However, there have been no specific court cases to bring out challenges, for example, regarding the interpretation of anti-discrimination principles and the possible need for accommodation of religious differences. The future of relations between state and religious communities in Estonia continues to evolve. Changes in societal attitudes, law and policy regarding religion may occur if the country were to face changes in the religious composition of the population, for example, due to migration. Currently we can only conceptualise and learn from other countries' experiences in order to prevent and tackle potential future problems in our own.

LES JURIDICTIONS RELIGIEUSES : LE CAS FRANÇAIS

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I. Introduction générale

Le système juridique français est un système purement moniste, qui ne connaît comme droit que celui que produit ou valide l'Etat. C'est un système qui tient de Kelsen plutôt que de Santi Romano. Les religions ne sont pas reconnues comme des ordres juridiques autonomes, qui produiraient dans leur sphère un droit propre dont l'existence s'imposerait à l'Etat. L'activité religieuse, même dans sa dimension normative ou juridictionnelle, ne constitue jamais pour ce dernier qu'une réalité factuelle. Pour l'essentiel, c'est donc à travers une qualification que lui donne le droit que le « fait religieux »¹ prendra une consistance juridique aux yeux de l'Etat. Par exemple, la fourniture par un prestataire de restauration d'une nourriture religieuse à un client s'analyse comme un banal contrat, même si l'objet de ce contrat est de nature religieuse. Et si d'aventure le prestataire fournissait une nourriture non conforme en lieu et place de la nourriture religieuse promise, ce manquement s'analyserait alors comme la violation d'une obligation contractuelle entraînant la responsabilité du fournisseur fautif. De même, le fait pour un médecin *mohel* de blesser un enfant à l'occasion de sa circoncision pourra entraîner la mise en cause de sa responsabilité médicale personnelle, ou celle de l'hôpital dans lequel l'intervention a eu lieu.² Mais la pratique même de la circoncision n'intéresse pas l'Etat, elle relève des institutions religieuses et de la communauté, dont l'autonomie est protégée au titre de la liberté religieuse.

¹ La doctrine juridique tend à opposer le « droit » étatique au « fait » religieux, pour mieux souligner que la puissance de contrainte qui caractérise la norme juridique appartient en propre à l'Etat. Voir par exemple l'article pionnier de P. Coulombel, « Le droit privé et le fait religieux en droit français », (1955) *Revue trimestrielle de droit civil*, pp. 1-56.

² Conseil d'État, 3 novembre 1997, 153686 (*Hôpital Joseph Imbert d'Arles*).

Cette observation préliminaire très brève vise à souligner que les procédures de résolution des conflits au sein des groupes religieux ne font l'objet d'aucune reconnaissance spécifique par l'autorité publique, et que leur efficacité repose sur la seule acceptation par les fidèles des mécanismes de conciliation, d'arbitrage ou de jugement qui existent au sein de leur communauté d'affiliation.

II. Les modes de résolution des conflits dans les groupes religieux

Par « modes de résolution des conflits », il y a lieu de distinguer outre la procédure juridictionnelle proprement dite deux procédés distincts : la conciliation et l'arbitrage. La conciliation vise à éviter la résolution judiciaire d'un litige, au moyen d'un accord entre les parties qui peut être obtenu par les parties elles-mêmes, ou avec l'aide d'un tiers conciliateur. La conciliation peut intervenir en amont de la saisine du juge, et elle permet alors de l'éviter. Elle peut également être opérée parallèlement à cette saisine. Les parties qui parviennent à se concilier décident de dessaisir le juge, à moins qu'elles ne lui demandent de valider l'accord intervenu entre elles.

L'arbitrage quant à lui est une procédure alternative de règlement des conflits. Ce n'est pas l'entente des parties qui met fin au contentieux, mais le recours commun à un arbitre qu'elles choisissent, et dont elles s'engagent à accepter la sentence.

Le recours à la conciliation est fréquent dans les groupes religieux, et notamment dans le christianisme qui privilégie l'entente et l'harmonie retrouvées, et se défie du recours au juge. En revanche le recours à l'arbitrage n'est guère en usage. Seul le judaïsme a mis en place une telle procédure, mais pour des litiges de nature essentiellement commerciale ou financière.

1. Islam

Il n'existe pas en France à notre connaissance de juridiction religieuse islamique, pas plus qu'il n'existe de structure institutionnalisée de conciliation ou d'arbitrage. La création de telles structures n'a jamais été évoquée de façon officielle par le Conseil français du culte musulman, dont la création remonte à 2003. L'évocation dans les médias des juridictions religieuses islamiques est généralement associée à la *charia*, et aux représentations qu'elle entraîne, c'est-à-dire l'idée une justice religieuse arbitraire et barbare soustraite aux garanties du droit national. Autrement

dit, il existe une prévention sociale extrêmement forte à l'encontre de ce qui est perçu comme un danger d'« islamisation » de la société française. Une réaction analogue avait pu être constatée en 2004, non pas en France mais au Canada, dans la province de Québec, à la suite de la publication du rapport de Marion Boyd, ancienne Attorney générale de l'Ontario. Ce rapport très controversé dans la Province de Québec évoquait la question des arbitrages privés en matière de droit de la famille et des successions, autorisés par le droit ontarien.³ Il envisageait favorablement la création de tribunaux musulmans aptes à délibérer selon la charia, au motif notamment que de tels tribunaux religieux existent de longue date chez les juifs canadiens sans que personne ait trouvé à y redire.

La création d'une instance d'arbitrage islamique, compétente pour les litiges commerciaux et financiers, et statuant d'après les exigences du commerce et de la finance islamiques, est par ailleurs régulièrement évoquée, mais sans aboutissement concret jusqu'ici selon ce qu'on en sait.

2. Judaïsme

a) Les tribunaux rabbiniques (*beth din*)

L'existence de tribunaux rabbiniques est de règle dans le judaïsme. Leur compétence est très générale, puisque leur fonction traditionnelle est de résoudre les conflits de toute nature au sein de la communauté. Aujourd'hui, cette compétence est toutefois restreinte du fait du monopole des juridictions étatiques. Elle porte notamment sur les mariages et les divorces religieux, la circoncision, les conversions et la *cacherouth*. Les consistoires de Paris, Marseille, Lyon et Strasbourg sont dotés d'un *beth din*. Par ailleurs certaines communautés Loubavitch ou ultra-orthodoxes possèdent leur propre *beth din*.

Une des attributions les mieux connues des tribunaux rabbiniques concerne la remise du *guett*, à l'issue d'un divorce prononcé par les juridictions civiles. La rupture du mariage religieux intervient lors d'une cérémonie au cours de laquelle le mari remet à son épouse, en présence du *beth din*, le *guett* dans lequel il est stipulé que la femme « est désormais libre d'épouser tout homme de son choix ». Si le rôle du *beth din* est d'établir une médiation entre les deux époux en situation conflictuelle, il

³ M. Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Toronto 2004) <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>> (30 June 2015) : « *The law of arbitrations permits people to arbitrate family law and inheritance disputes [...]. It also permits people to choose any rule of law, or none, by which the dispute is to be resolved.* »

n'a pas en revanche le pouvoir d'imposer à celui qui s'y refuse la délivrance du *guett* à son épouse, en sorte que c'est régulièrement le juge civil qui est sollicité à cette fin dans les hypothèses les plus conflictuelles.

La création d'un tribunal rabbinique national avait été évoquée en 2006 par le grand rabbin Sitruk, président du consistoire central, mais les consistoires locaux et notamment le consistoire de Paris s'y sont vigoureusement opposés, et le projet n'a jamais vu le jour.

b) L'arbitrage rabbinique

Les consistoires de Paris et de Lyon ont l'un et l'autre mis en place une Chambre arbitrale rabbinique, dont les principes d'organisation et de fonctionnement sont régis par le droit français de l'arbitrage (articles 1442–1492 du Code de procédure civile⁴). L'arbitrage consiste pour des personnes physiques ou morales à s'en remettre par une convention à d'autres personnes pour le règlement du litige qui les oppose. Le litige est donc soustrait à la compétence des tribunaux étatiques, pour être confié à des arbitres choisis par les parties.

Le droit français laisse une assez grande liberté aux parties quant au choix des arbitres. Il n'interdit en aucune façon leur désignation selon un critère religieux. La qualité de juge religieux (*dayan*) est ainsi requise pour siéger comme arbitre à la Chambre arbitrale rabbinique.

Le recours à l'arbitrage peut être prévu par une clause compromissoire insérée dans le contrat. Il peut également être décidé d'un commun accord par les parties, sous la forme d'une convention d'arbitrage désignant la Chambre arbitrale rabbinique. Les arbitres statuent comme juges du litige. La Chambre est tenue de respecter les principes directeurs du procès civil et notamment le principe du contradictoire. Ils rendent une sentence arbitrale qui revêt dès son prononcé l'autorité de la chose jugée. La sentence est susceptible de recours dès lors que les parties ne se sont pas engagées expressément à lui reconnaître un caractère définitif. La juridiction compétente pour l'appel est la Cour d'appel de Paris, qui ne statue pas sur le fond du litige, mais sur la régularité de la procédure.

Les sentences arbitrales de la Chambre arbitrale rabbinique sont exécutoires de plein droit. La procédure d'exequatur est mise en œuvre devant le Tribunal de grande instance de Paris. Le recours à l'arbitrage porte essentiellement sur les litiges à caractère économique et financier, pour lesquels les juges rabbiniques sont compétents. L'arbitrage n'a aucun caractère religieux d'un point de vue matériel.

⁴ Décret 75-1123 du 5 décembre 1975 instituant un nouveau Code de Procédure Civile, Journal Officiel 1975, p. 12521 f. dans sa forme modifiée.

3. Protestantisme(s)

La Constitution de l'Église protestante unie de France,⁵ qui régit les communions luthérienne et réformée de France depuis leur unification en 2012, comprend un article 28 consacré aux « Différends, manquements et sanctions disciplinaires ». Les différends, manquements et sanctions dont il est question dans cet article concernent l'exercice du ministère au sein de l'Église protestante unie de France. Autrement dit, les dispositions en cause intéressent l'ordre religieux interne à titre exclusif, ce qui signifie *a contrario* que tous les autres litiges relèvent de la compétence des juridictions étatiques. La voie privilégiée pour le règlement des différends est la conciliation (§1⁶). L'article 28 *leg. cit.* prévoit également la possibilité d'une admonestation fraternelle (§2), et de sanctions disciplinaires (§3⁷). Les sanctions sont administrées par une commission de discipline, dont les décisions sont susceptibles d'appel devant une commission d'appel. La sanction la plus grave, à savoir la radiation du rôle prononcée par la commission d'appel, peut faire l'objet d'un recours devant le synode national. La procédure disciplinaire est fixée par le règlement d'application de la Constitution des Églises et par le règlement des synodes. La présente recherche n'a pas permis d'établir l'existence de recours devant les tribunaux étatiques à propos de sanctions disciplinaires dans l'ordre interne.

4. Orthodoxie(s)

Il n'existe pas à notre connaissance en France de procédure institutionnalisée de conciliation, d'arbitrage ou de jugement qui aurait été mise en place au sein des Églises orthodoxes établies en France.

⁵ <<https://www.eglise-protestante-unie.fr/prod/file/epudf/upload/nation/Constitution%202014.pdf>> (30 juin 2015).

⁶ « Les différends relatifs aux ministres et à celles et ceux qui exercent des ministères au sein de l'Église protestante unie de France peuvent être soumis au conseil régional, qui désigne une équipe de conciliation. Si la conciliation ne permet pas de résoudre le différend, il peut être porté devant la commission d'appel mentionnée au §5 du Règlement d'application du présent article. »

⁷ Ce sont, dans l'ordre croissant de gravité : l'avertissement écrit ; le blâme ; pour les ministres qui occupent un poste : la suspension du rôle avec ou sans traitement pour une durée ne pouvant excéder trois ans ; et la radiation du rôle.

5. Catholicisme

a) Conciliation

Le canon 1446 du CIC 1983 s'attache à privilégier les solutions alternatives au procès canonique, que les juges comme les parties doivent s'efforcer d'éviter autant qu'ils le peuvent. Cet article évoque les procédures de médiation, de transaction et d'arbitrage des canons 1713–1716 *leg. cit.*, regroupés sous le titre évocateur, « Les moyens d'éviter les procès ». Le canon 1713 *leg. cit.* énonce que

« pour éviter les procès, il est souhaitable de recourir à une transaction ou à une réconciliation, ou bien de soumettre le litige au jugement d'un ou plusieurs arbitres ».

On retrouve un énoncé analogue au canon 1733§1 *leg. cit.* Quant au canon 1714 *leg. cit.*, il précise que

« pour la transaction, le compromis et l'arbitrage, les règles choisies par les parties seront observées ou, si les parties n'en ont pas choisi, la loi, s'il y en a une, portée par la conférence des Évêques, ou bien la loi civile en vigueur dans le lieu où la convention est conclue ».

En l'absence de reconnaissance par la loi civile française de la sentence arbitrale, celle-ci doit en France être confirmée par le juge ecclésiastique conformément au canon 1716 *leg. cit.*

La Conférence des évêques de France n'a pas établi dans les diocèses les organismes ou conseils compétents pour régler les litiges par la voie extra judiciaire, en sorte que conformément au canon 1733§2 *leg. cit.* ce sont les diocèses qui y ont eux-mêmes pourvu la plupart du temps, en mettant en place un Conseil de médiation. Les conflits soumis à l'arbitrage des Conseils de médiation concernent les actes administratifs particuliers pour lesquels une personne s'estimerait lésée, et en particulier les cas de retrait d'une lettre de mission confiée à des laïcs, à des membres d'instituts de vie consacrée ou de sociétés apostoliques, ou encore à des clercs n'ayant pas le statut de curé. Les membres du Conseil, qui peuvent être des laïcs, sont désignés par l'évêque, ils sont choisis compte tenu de leur communion avec l'Église, de leurs bonnes mœurs, de leur prudence et de leur compétence.

Le Conseil de médiation peut être saisi après que la partie s'estimant lésée ait fait parvenir ses observations à l'auteur du décret, et que ce dernier n'a donné aucune réponse, ou bien qu'il a décidé de le maintenir. Le recours à la médiation est vivement recommandé, mais ne présente aucun caractère obligatoire. Par ailleurs le Conseil de médiation remet des propositions que les parties sont libres d'accepter ou de refuser. En cas d'échec de la médiation, le recours est ouvert à la saisine du supérieur hiérarchique. De même, la saisine d'une juridiction pendant la procédure de médiation, qui reste possible, dessaisit le Conseil de médiation.

b) Juridiction

Dans le catholicisme, c'est le système canonique classique qui s'applique en matière de juridiction. Autrement dit, la France ici ne se distingue pas fondamentalement des autres pays européens. La justice est rendue par les officialités, au nom du titulaire du pouvoir judiciaire c'est-à-dire l'évêque. Ce pouvoir s'exerce d'abord et avant tout en matière spirituelle : la foi, la grâce, les célébrations, les prières, les dispenses, les bénéfices, les personnes morales de droit public ecclésiastique, les lieux sacrés etc. Le pouvoir judiciaire de l'Eglise s'étend largement à toutes les hypothèses de violation des lois ecclésiastiques. Outre les affaires religieuses, les officialités peuvent être saisies de contentieux concernant les diocèses ou les congrégations religieuses voire même de contentieux opposant des laïcs. Historiquement, le pouvoir judiciaire de l'Eglise s'exerçait sur les causes temporelles des clercs et des laïcs, mais cette compétence se heurte aujourd'hui au monopole de l'Etat en matière de justice. Il n'y a plus en France de matières considérées comme mixtes, en sorte que s'agissant des laïcs les officialités ont à traiter de façon exclusive des causes matrimoniales (mariage religieux), même si leur compétence aux termes du CIC de 1983 reste très générale.

L'officialité peut être saisie par toute personne, y compris (depuis le CIC de 1983) les non-baptisés, et c'est le cas parfois dans les procédures de divorce. On notera que les diocèses, les congrégations mais également les individus sont dotées de la personnalité juridique en droit français, et que par voie de conséquence les juridictions étatiques sont également compétentes pour traiter des litiges qui les concernent. Mais en ce cas ces litiges seront tranchés selon les règles du droit étatique et non selon les règles du droit canonique, et c'est ce que les autorités religieuses veulent généralement éviter à tout prix. Les officialités statuent quant à elles selon le seul droit canonique. Les jugements qu'elles rendent sont dépourvus de sanction étatique. Le jugement s'il est accepté par les deux parties pourra être pris en compte au plan civil comme une conciliation, évitant ou mettant fin à un contentieux, mais en aucun cas il ne pourra être validé comme un arbitrage ou un jugement et recevoir l'*exequatur* de l'Etat.

La procédure judiciaire canonique est organisée de façon hiérarchique. L'évêque est le juge de première instance, c'est lui-même ou le vicaire judiciaire (official) qu'il a désigné à cette fin qui rend les décisions. En France, les diocèses se sont regroupés en officialités régionales. Peuvent être désignés comme official les prêtres âgés d'au moins trente ans, docteurs ou licenciés en droit canonique. Des juges diocésains sont nommés par l'évêque pour les procédures collégiales. La procédure prévoit la dési-

gnation parmi les juges d'un rapporteur (ponent) et le cas échéant d'un auditeur chargé d'instruire le dossier.

La défense du bien public incombe au promoteur de justice, ou à l'évêque dans les causes contentieuses. Dans les causes de nullité ou de dissolution du mariage, ainsi que dans les causes de nullité de l'ordination, un défenseur du lien intervient dans la procédure. Enfin la régularité formelle de la procédure est assurée par le notaire. La représentation des parties dans les actes de procédure est assurée par les procureurs judiciaires. Les parties sont assistées par des avocats, dont la présence est obligatoire dans les causes pénales. Les avocats sont obligatoirement catholiques.

En appel, les affaires sont portées devant le tribunal de deuxième instance, dont la composition est collégiale. Le tribunal de deuxième instance est généralement celui de l'archevêque métropolitain, ou celui que l'archevêque a désigné avec l'approbation du siège apostolique pour la deuxième instance s'il a connu de l'affaire comme juge de première instance.

Le tribunal de la rote constitué par le Pontife romain juge en deuxième instance les causes jugées par un tribunal de première instance déferées au Saint-Siège par appel légitime, et en troisième instance les affaires déjà traitées en deuxième instance par elle-même ou par un autre tribunal. Enfin les affaires peuvent être portées devant le tribunal suprême de la signature apostolique.

c) Arbitrage

A notre connaissance, il n'existe pas dans le catholicisme, à côté de la procédure juridictionnelle prévue par le Code de droit canonique, une procédure institutionnalisée d'arbitrage telle que le prévoit le Nouveau code de procédure civile, et telle qu'elle existe on l'a vu dans le judaïsme.

III. Les conflits en matière religieuse : Le rôle de l'État

1. Le principe de libre organisation des cultes et le statut des juridictions religieuses

Si la libre organisation des cultes est le corollaire indissociable du principe de séparation des Eglises et de l'Etat, il reste que le cadre juridique aménagé en 1905 pour permettre aux religions de se structurer dans le respect de leur auto-compréhension

est pour le moins sommaire. Il a en effet été décidé au moment de la séparation que les religions devraient s'organiser sous la forme unique d'associations spécifiques conçues d'après le modèle élaboré par la loi du 1^{er} juillet 1901 relative au contrat d'association⁸, et qualifiées d'« associations pour l'exercice du culte ». Le caractère principal de ces associations cultuelles est qu'elles doivent avoir pour objet exclusif l'exercice d'un culte. La définition jurisprudentielle usuelle de la notion de culte n'inclut pas l'activité de résolution des conflits religieux,⁹ mais quoiqu'il en soit la résolution de tels conflits pourrait vraisemblablement rentrer dans l'objet légal des associations cultuelles. En revanche, les conflits de nature civile ne relèvent pas du « culte » au sens où l'entend le droit étatique français. Ce qui doit être retenu ici en tout état de cause, c'est que le droit étatique n'a pas prévu de cadre institutionnel spécifique pour les juridictions religieuses.

Initialement, les associations cultuelles devaient constituer le modèle unique de constitution des groupes religieux, si l'on excepte le statut de spécifique de congrégation organisé par la loi de 1901. Mais aujourd'hui le dispositif s'est libéralisé, et les religions ont la faculté de choisir les formes juridiques qu'elles estiment les plus appropriées en fonction de leurs intérêts, sans que l'autorité publique trouve à y redire. Les juridictions religieuses peuvent donc aisément être organisées sous une forme sociale spécifique, par exemple sous la forme d'une association de la loi de 1901. Mais elles peuvent également ne pas l'être, et fonctionner comme des structures de fait. En ce qui concerne l'Eglise catholique par exemple, les statuts des associations diocésaines ne mentionnent pas l'existence et le fonctionnement des officialités, qui n'ont donc d'existence propre que du point de vue du droit canonique. Il semble d'ailleurs que ce soit le cas d'une manière générale pour l'ensemble des juridictions religieuses établies sur le sol français. Les religions ne souhaitent pas que leur justice puisse faire

⁸ Journal Officiel 1901, pp. 4025–4027, dans sa forme modifiée.

⁹ Dans un avis, le Conseil d'État, 24 octobre 1997 Assemblée, avis, 187122 (*Assemblée locale pour le culte des Témoins de Jéhovah de Riom*), avait souligné que « les associations revendiquant le statut d'association cultuelle doivent avoir exclusivement pour objet l'exercice d'un culte, c'est-à-dire, au sens de ces dispositions, la célébration de cérémonies organisées en vue de l'accomplissement, par des personnes réunies par une même croyance religieuse, de certains rites ou de certaines pratiques. En outre, ces associations ne peuvent mener que des activités en relation avec cet objet telles que l'acquisition, la location, la construction, l'aménagement et l'entretien des édifices servant au culte ainsi que l'entretien et la formation des ministres et autres personnes concourant à l'exercice du culte. La reconnaissance du caractère cultuel d'une association est donc subordonnée à la constatation de l'existence d'un culte et à la condition que l'exercice de celui-ci soit l'objet exclusif de l'association. »

l'objet d'un contrôle par les juridictions étatiques, que faciliterait une institutionnalisation dans les formes du droit national.¹⁰

2. Le rôle de l'Etat dans la résolution des conflits religieux

La notion de conflit religieux n'est pas simple à définir. Un conflit peut être religieux à raison de ses acteurs, à savoir qu'il oppose les membres d'un groupe religieux. Un litige entre un curé et son évêque, à propos d'une question aussi concrète que la jouissance d'un presbytère, est un conflit religieux. De la même manière, les compétences du tribunal arbitral rabbinique portent sur des conflits « religieux » au sens où ils opposent des membres de la communauté qui entendent régler leur différend en son sein. Mais un conflit pourra également être qualifié de religieux à raison de son objet. C'est le cas lorsqu'est en cause une question de dogme ou de droit religieux. Enfin, et c'est la définition la plus étroite du conflit religieux, la nature religieuse d'un conflit pourra également être déduite de la compétence reconnue aux instances religieuses pour le résoudre.¹¹

Cette imprécision de la notion de conflit religieux permet surtout de souligner qu'il n'existe pas de conflit religieux « par nature », parce qu'un conflit religieux est d'abord et avant tout un conflit, c'est-à-dire une dispute qui oppose des personnes ou des institutions, et que comme toute dispute celle-ci a vocation à entrer dans la sphère de compétences des tribunaux étatiques, dont la fonction est précisément de régler les différends de toute nature. Autrement dit, les juridictions étatiques françaises lorsqu'elles sont saisies ne déclinent jamais leur compétence au motif que le conflit serait par nature « religieux » et donc étranger à leur sphère d'intervention. Elles pourront en revanche estimer que ce conflit religieux n'est pas un conflit au sens où l'entend le droit français, c'est-à-dire qu'il n'entraîne aucune perturbation de l'ordre juridique étatique générant un préjudice pour la société ou pour autrui.

Autrement dit, si l'Etat intervient dans la résolution des conflits religieux dont il est saisi, c'est pour les régler d'après les principes et les règles de droit qui sont les siens. L'Etat n'applique jamais que son propre droit, et non celui des ordres religieux qu'il ne reconnaît pas. On peut l'illustrer à partir de trois exemples différents relatifs

¹⁰ Les décisions rendues par la juridiction religieuse pourraient aisément être contestées par la voie d'une remise en cause de son fonctionnement statutaire.

¹¹ On procède ici par analogie avec le droit administratif français, qui a pu être défini en doctrine d'après un critère de compétence, comme le droit relevant de la compétence des juridictions administratives. De la même façon, constitue une matière religieuse toute matière relevant de la compétence des juridictions religieuses.

à la question du mariage, et qui attestent que cette position de principe de l'Etat n'est pas liée à une religion en particulier.

Le premier exemple concerne le mariage juif et plus précisément la question du divorce. Lorsqu'un tribunal civil est saisi à propos du refus de remise du *guett* à la femme dans un divorce entre deux époux de confession juive, il se refuse à apprécier la régularité d'un tel refus opposé devant le tribunal rabbinique. Mais parallèlement à la procédure religieuse, le divorce qui est admis par la loi juive a été prononcé par les juridictions civiles, et c'est pourquoi le tribunal ordonne parfois des dommages et intérêts civils à raison du préjudice qu'entraîne le refus du *guett*, lorsque le juge estime que ce refus est motivé par une intention de nuire.

Le second exemple concerne un mariage entre deux personnes de confession musulmane, célébré en 2008. Sitôt le mariage célébré, le conjoint a exercé une action civile en nullité, au motif de l'absence de virginité de son épouse, dont celle-ci ne l'avait pas informé au préalable. Dans cette affaire, le juge a choisi de faire prévaloir sur les prescriptions religieuses (la virginité au moment du mariage), les principes d'ordre public du droit français, en particulier « les principes de respect de la vie privée, de liberté du mariage, de prohibition de toute discrimination entre les hommes et les femmes ».¹²

Le troisième exemple concerne la religion catholique. En 2012, le tribunal administratif de Strasbourg a ordonné le versement d'une pension de réversion à la veuve d'un prêtre décédé, parce qu'à ses yeux l'état clérical n'est pas un empêchement au mariage.¹³ Ainsi que l'a estimé le tribunal, « la seule prise en compte des règles du droit canon imposant le célibat des prêtres » est étrangère par elle-même « aux règles devant présider à l'allocation de pensions de réversion aux veuves d'agents publics ». Comme on le voit à travers ces trois cas, le juge civil se prononce à propos de conflits religieux, mais il ne les résout pas d'après les règles du droit religieux.

3. L'absence de reconnaissance par l'Etat des institutions religieuses de règlement des conflits

L'Etat en France ne reconnaît pas les tribunaux religieux pas plus qu'il ne reconnaît les procédures de médiation ou d'arbitrage mises en place par les religions. L'explication à cette absence de reconnaissance réside dans le fait déjà souligné qu'il n'y a plus en France de matières dites « mixtes », c'est-à-dire relevant à la fois de la compétence

¹² Cour d'appel de Douai, 17 novembre 2008, 08/03786.

¹³ Tribunal administratif de Strasbourg, 14 novembre 2012, 1103360.

religieuse et de la compétence civile. L'Etat français depuis la révolution a repris à l'Eglise la plupart de ses compétences sociales, en matière d'état civil, de mariage, ou de funérailles, en sorte qu'il n'existe plus guère d'exemple de « cogestion » de la vie sociale entre l'Etat et les religions. L'exemple classique est une fois encore celui du mariage. Depuis la révolution le mariage civil est complètement dissocié du mariage religieux, en sorte qu'il existe pour ceux qui veulent se marier religieusement deux mariages, l'un civil, l'autre religieux, complètement indépendants.¹⁴ On peut illustrer le propos par un autre exemple, qui concerne la compétence des officialités catholiques. Dans une affaire qui concernait des poursuites pour viol aggravé à l'encontre d'un membre d'une congrégation religieuse, la chambre criminelle de la Cour de cassation a validé une perquisition judiciaire opérée dans les bureaux de l'officialité régionale de Lyon, au motif qu'elle rentrait dans les pouvoirs d'enquête du juge d'instruction.¹⁵ La Cour de cassation écarte dans cette affaire le raisonnement adopté par les juges de la Cour d'appel, qui avaient considéré que la procédure « telle que régie par le code de procédure pénale, procède de principes différents » de la procédure canonique, régie par des obligations particulières telles que l'obligation de dire la vérité fût-ce pour s'accuser, et par des règles procédurales particulières fondées notamment sur le secret absolu. Autrement dit, les structures religieuses de résolution des conflits ne sont compétentes que dans l'ordre religieux entendu au sens le plus étroit, c'est-à-dire dans la sphère où l'Etat s'abstient d'intervenir en respect de l'auto-compréhension des groupes religieux. En matière pénale en revanche, la spécificité de la justice religieuse n'est pas opposable à l'Etat.

Cette observation générale appelle toutefois une précision. En effet, les structures religieuses de règlement des conflits sont parfois organisées dans les formes du droit étatique. C'est le cas de la Chambre arbitrale rabbinique, constituée en conformité avec les dispositions du nouveau code de procédure civile, et dont les sentences arbitrales reçoivent l'exequatur du tribunal de grande instance. Mais il s'agit là de conflits particuliers, dont la nature matérielle est commerciale ou financière, et n'a rien de religieux. Plus généralement, lorsqu'une procédure de jugement, de médiation ou d'arbitrage est inscrite dans les statuts juridiques d'une institution religieuse, par exemple une association, alors l'Etat pourrait être fondé à intervenir en cas de litige

¹⁴ On notera toutefois que depuis la révolution le mariage religieux ne peut être prononcé avant le mariage civil, et que le droit pénal sanctionne un ecclésiastique qui célébrerait un mariage religieux si le mariage civil n'a pas été célébré au préalable. Il s'agissait alors d'affirmer la primauté du mariage civil sur le mariage religieux. L'interdiction n'a jamais été supprimée.

¹⁵ Cour de cassation, Chambre criminelle, 17 décembre 2002, 02-83.679, (2002) *Bulletin des arrêts de la chambre criminelle*, no. 231, p. 845.

au sein de cette association pour faire appliquer les règles statutaires, et donc pour imposer le respect des médiations ou des arbitrages en question aux membres qui les contesteraient. C'est pour cette raison on l'a dit que les structures religieuses d'arbitrage, de médiation et de jugement des litiges sont rarement organisées dans les formes juridiques du droit français.

4. La protection de la compétence étatique

Outre que l'Etat ne reconnaît pas les instances religieuses de règlement des conflits, il s'attache à protéger la compétence de ses propres juridictions. L'article 2059 du code civil¹⁶ énonce que « toutes personnes peuvent compromettre sur les droits dont elles ont la libre disposition », ce qui signifie a contrario qu'elles ne peuvent pas compromettre sur les droits dont elles n'ont pas la libre disposition. Précisément, l'article 2060 *leg. cit.* ajoute qu'

« on ne peut compromettre sur les questions d'état et de capacité des personnes, sur celles relatives au divorce et à la séparation de corps ou sur les contestations intéressant les collectivités publiques et les établissements publics et plus généralement dans toutes les matières qui intéressent l'ordre public ».

Autrement dit les matières énoncées à l'article 2060 *leg. cit.*, et qui pour certaines d'entre elles relevaient de la sphère de compétence religieuse traditionnelle, échappent désormais complètement à celle-ci. L'article 6 *leg. cit.* énonce quant à lui que

« les lois concernant l'état et la capacité des personnes régissent les Français, même résidant en pays étranger. On ne peut déroger, par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes mœurs ».

A contrario, les étrangers résidant en France restent régis par les lois concernant l'état et la capacité des personnes de leur pays d'origine, en sorte que les tribunaux français peuvent se trouver en situation d'appliquer un droit étranger d'origine éventuellement religieuse. Mais l'application en France des règles de droit étranger est subordonnée à l'exigence de conformité à l'ordre public international, qui inclut notamment l'exigence du respect de l'égalité des sexes.

¹⁶ Loi sur la réunion des lois civiles en un seul corps, sous le titre de Code civil des Français, promulgué le 31 mars 1804 (10 germinal an XII), dans sa forme modifiée.

5. Le contrôle étatique des instances religieuses de règlement des conflits

Il n'existe pas à notre connaissance de contrôle par l'Etat des instances religieuses de régulation des conflits. Celle-ci on l'a dit sont considérées comme des institutions autonomes, pour autant qu'elles exercent leur compétence dans l'ordre purement interne et sans interférer dans la sphère de compétence de l'Etat. Dans les affaires mettant en cause la nomination ou la révocation d'aumôniers, l'Etat s'en remet d'une manière générale aux décisions des autorités religieuses, et n'exerce aucun contrôle des procédures ni des décisions elles-mêmes. Dans une affaire jugée en 2012,¹⁷ le conseil d'Etat a considéré à propos de la décision de l'évêque de Metz de nommer un nouveau curé dans une paroisse et de lui attribuer le presbytère attaché, avec comme conséquence l'expulsion de ses occupants actuels, qu'

« autre règle ou principe général du droit, ne sauraient avoir pour effet de conférer aux décisions prises par les archevêques et évêques pour l'organisation du culte catholique dans leurs diocèses le caractère de décisions administratives soumises au contrôle du juge administratif ».

Il s'agit là d'un énoncé de principe de l'autonomie religieuse vis-à-vis de l'Etat qui concerne toutes les religions, et dont la fonction est de garantir leur droit à s'organiser librement. Ce principe d'autonomie s'impose aux autorités publiques tout autant qu'aux juridictions chargées de les contrôler ainsi que le souligne le Conseil d'Etat.

De ce postulat de principe, il résulte que l'Etat se refuse à exiger des religions qu'elles respectent dans leur propre droit tous les principes fondamentaux du droit national, pas plus qu'il n'impose à leurs structures de résolution des conflits de se conformer à l'article 6 de la CEDH. C'est une position qui peut être discutée, et qui pourrait très bien être remise en cause à l'avenir, par exemple en ce qui concerne la mise en œuvre du principe de l'égalité des sexes dans l'ordre religieux. Néanmoins, une telle position de l'Etat n'est pas complètement dépourvue de cohérence dans le cadre français, dans la mesure où comme on l'a dit la compétence des religions se limite à l'ordre interne, et qu'en respect de la séparation des Eglises et de l'Etat ce dernier n'entend pas s'immiscer dans le fonctionnement des groupes religieux, fût-il contraire à certains de ses propres principes fondamentaux. Un tel refus de contrôler l'ordre religieux interne serait incontestablement plus difficile à tenir si les religions étaient reconnues par l'Etat comme des ordres juridiques dotés d'une compétence sociale étendue.

¹⁷ Conseil d'Etat, 17 octobre 2012, 352742 (*Singa*).

IV. Conclusion

On a évoqué dans les développements qui précèdent la position de l'Etat par rapport aux mécanismes religieux de résolution des conflits. Il convient également, en conclusion de cet exposé, de dire un mot concernant le point de vue des religions, relativement à un système laïc qui associe étroitement le principe de justice à la compétence étatique, et pour qui l'expression même de justice religieuse sonne comme une forme d'oxymore. De fait, la position des autorités religieuses est difficile à définir précisément, dans la mesure où les expressions officielles sur cette question sont assez rares. La construction historique du principe de laïcité a des racines très anciennes, en sorte que la primauté du droit étatique n'est guère remise en cause, d'une manière générale, par les protestants et les catholiques. Pour les protestants, le recours au droit et aux juridictions de l'Etat pour trancher les litiges de la vie sociale va de soi, et la compétence des autorités religieuses ne s'étend comme on l'a vu qu'aux conflits purement internes concernant les personnels. La primauté du droit étatique est également acceptée d'une manière générale par les catholiques, qui dans leur immense majorité ne la remettent pas en cause. La hiérarchie catholique reste fortement attachée toutefois à la conception d'un ordre religieux spécifique distinct de l'ordre juridique étatique, régi par son propre droit et doté d'une organisation juridictionnelle particulière. C'est pourquoi la validation, par la Cour de cassation, d'une perquisition opérée en 2001 dans les locaux de l'officialité de Lyon par un juge d'instruction, afin d'y rechercher les preuves d'une infraction, a été vécue de façon traumatique. Elle a été comprise par l'Eglise comme une remise en cause de son droit à l'autonomie pourtant consacré par la jurisprudence.¹⁸ Le judaïsme est lui aussi très attaché à la préservation de son autonomie juridictionnelle. Mais le fonctionnement des tribunaux rabbiniques a été publiquement remis en cause au printemps 2014. L'enregistrement secret d'une audience du *Beth Din* de Paris a en effet révélé l'exercice de pressions financières dans les procédures de divorce, à savoir que la délivrance du *guett* aurait été monnayée par les juges rabbiniques. Quant à l'Islam, il n'existe pas on l'a dit à l'heure actuelle d'instance de résolution des conflits. Mais la revendication en faveur de l'application de la *charia* pour la résolution de certains conflits est récurrente dans une partie de la communauté musulmane.

¹⁸ On a évoqué *supra*, n. 17, comme illustration de la garantie juridictionnelle de l'auto-compréhension des groupes religieux, l'arrêt *Singa*. Voir également Cour de cassation, Chambre civile 1, 19 novembre 2014, 13-25.156 (*Lebouvier*) ; Cour d'appel de Caen, 10 septembre 2013, RG 11/03427 (*Association diocésaine de Coutances c. René Lebouvier*), approuvant le refus des autorités religieuses d'effacer un baptême des registres paroissiaux, demandé sur le fondement du droit à la vie privé et de la loi Informatique et libertés de 1978.

Ni les médias, ni même la doctrine juridique ne s'intéressent en France à cette question des juridictions religieuses, extrêmement difficile à appréhender avec les seuls instruments du droit national. Les développements qui précèdent ne constituent pas à proprement parler un article doctrinal, mais une forme d'enquête à partir d'un questionnaire général, pour laquelle il nous a été très difficile de recueillir des informations complètes, et surtout précises. Mais les juristes français ignorent ces questions qui pour eux n'en sont pas. Les juridictions religieuses lorsqu'elles existent s'astreignent à la discrétion. Les médias ne se saisissent que des questions polémiques, qu'ils traitent généralement de façon très superficielle. Les partis politiques n'interviennent quant à eux que pour défendre la laïcité c'est-à-dire le point de vue de l'Etat contre les religions. Quant aux travaux universitaires, ils ignorent à peu près complètement la problématique des juridictions religieuses, et c'est d'ailleurs ce qui a rendu cette enquête si difficile à conduire dans un temps limité. Une des raisons de cette ignorance généralisée tient à l'enseignement des facultés de droit, qui depuis la Troisième République a complètement évincé l'enseignement du droit canonique et par extension des systèmes de droit religieux, qui ne sont plus considérés comme des systèmes juridiques à proprement parler. La justice religieuse ferait pourtant la matière pour une thèse qui reste à écrire, mêlant à la fois des questions théoriques relatives aux rapports entre ordres juridiques dans un système qui s'affirme moniste, et des enjeux concrets de la plus grande actualité.

RELIGIOUS JURISDICTIONS IN GREECE

Lina Papadopoulou, Thessaloniki

I. The Resolution of Disputes: The Practices and Norms of Religious Communities

1. Introduction

In Greece the vast majority of the population belongs to the Christian Orthodox Church, which is constitutionally recognised as the ‘prevailing religion’, pursuant to Article 3 of the Constitution¹. Approx 1.5 % of the citizens are Catholics, Protestants, Jews or Muslims. The Muslim minority of Western Thrace is the only explicitly recognised religious minority in Greece and is protected by the Treaty of Lausanne of 1923. It is thus of special interest to present the religious jurisdictions of the Orthodox Church and the Muslim minority in Thrace.

Concerning the Jewish communities, the institution of the *Beth Din* existed in Greece, where the number of Jews was significant until World War II. Articles 12 ff. and 18 of Law 2456/1920² recognised these rabbinical courts, which were already functioning, with jurisdiction in family law matters. This law is still in force, regulating the organisational issues of the Jewish communities. However, with the introduction of the Civil Code³ in 1946, the *Beth Din*’s jurisdiction for Greek Jews was rescinded according to Article 6 of the Introductory Law to the Civil Code and common family law gradually came to be applied to all family law matters of the Greek

¹ *Σύνταγμα της Ελλάδας*, Φύλλα της Έφημερίδας της Κυβέρνησης 111/Α/1946 as amended.

² *Νόμος περί Ισραηλιτικών κοινοτήτων*, Φύλλα της Έφημερίδας της Κυβέρνησης 173/Α/1920, see also Law 1029/1946 (*Αναγκαστικός Νόμος περί ρυθμίσεως τών έκ τοῦ γάμου σχέσεων τών Ισραηλιτῶν*), Φύλλα της Έφημερίδας της Κυβέρνησης 79/Α/1946, regulating the marriage relationships of Israelites, which had a very brief life, lasting until the re-introduction of the Civil Code (see *infra*, n. 3) on 10 May 1946.

³ *Αστικός Κώδιξ*, 2250/1940, as amended, see Φύλλα της Έφημερίδας της Κυβέρνησης 151/Α/1946.

Jews. Theoretically, however, Law 2456/1920 remains in force for non-Greek Jews residing in Greek territory.⁴

It should be pointed out from the outset that the status of religions is governed by the principle of 'State-law rule', which means that the State regulates religious affairs by law.⁵ This leaves a narrow leeway for religions to regulate only those internal affairs which are related to spiritual issues, according to their internal law. It is possible, however, as will be shown below, that many spiritual issues may have repercussions on the legal and social status of the clerics and the faithful, thus often permitting intervention by the State courts.

2. The Ecclesiastical Courts of the Orthodox Church

Ecclesiastical judiciary covers all misdemeanours committed by clerics, monks and lay members of the Church, which violate ecclesiastical rules. The most important are apostasy, heresy, schism, simony, and sacrilege. The penalties imposed include excommunication, defrocking (i.e. *καθαίρεση*⁶), demotion, suspension, loss of seniority in the hierarchical rankings, dethronement, fines, transfers, and censure.⁷ In addition, there are criminal offences of religious character, which are laid down in the Penal Code,⁸ and tried and punished by State courts. Examples committed by clerics include: abuse of ecclesiastical office (Article 196 *leg. cit.*), treacherous abuse of minors, including indecent assault (Article 342 *leg. cit.*), and violation of professional secrecy (Article 371 *leg. cit.*); examples of offences by lay people include: blasphemy (Article 198 *leg. cit.*), abuse of religion (Article 199 *leg. cit.*), disturbance of religious congregations (Article 200 *leg. cit.*), distinctive forms of theft of things dedicated to worship, Article 374 *leg. cit.*) and usurpation of the status, dress or badges of office of a religious civil servant, laid down in Articles 175(2) and 176 *leg. cit.*

As far as the territorial divisions of the Greek Orthodox Church are concerned, the Greek territory is divided into five ecclesiastical provinces:

- the autocephalous Orthodox Church of Greece,
- the metropolitan sees of the 'New Lands',⁹
- the semi-autonomous Church of Crete,

⁴ Θ. Παπαζήση, 'Οι Έλληνες Εβραίοι και το οικογενειακό τους δίκαιο στο ελληνικό κράτος', (1994) 133 *Χρονικά*, pp. 13–18 (p. 16).

⁵ See *infra*, ch. II.

⁶ A cleric's removal from priestly office and the return to monastic status.

⁷ C. Papageorgiou, *An Introduction to Hellenic Ecclesiastical Law* (Thessaloniki 2012), pp. 143 ff.

⁸ Ποινικός Κώδιξ, Φύλλα της Έφημερίδας της Κυβέρνησης 1492/Α/1950 as amended.

the Dodecanese metropolitan sees, and
the self-administered monastic state of Mount Athos.¹⁰

a) The Autocephalous Orthodox Church of Greece

Concerning the organisation of ecclesiastical justice, Article 44(1) of the Statutory Charter of the Church (Law 590/1977¹¹) refers back to Law 5383/1932¹² on ecclesiastical courts. The latter are competent to judge clerics and monks¹³ for misdeeds concerning the execution of their mission and entailing canonical sanctions.

There is an Episcopal Court in every metropolis, composed of the local metropolitan as president and two more priests, with jurisdiction over misdeeds committed by any cleric or monk who resides in the metropolis, independent of the *locus delicti*, and for misdeeds that entail fairly light sanctions.¹⁴ The competence to judge is considered a manifestation of the hieratic power of the metropolitan, who is the only one with a decisive vote. Given the fact that the two lower priests are nominated by the former and appointed by the Permanent Holy Synod for a term of three years, it is self-evident that they are neither personally nor functionally independent. The First Instance and Appellate Synodical Courts have competence for offences which imply heavier sanctions than those mentioned above. The First Instance Court also functions as an appellate court for the judgements of the Episcopal

⁹ Macedonia, Epirus, Western Thrace and the Aegean Islands are the main 'New Lands', which joined Greece in the early 20th century. Although initially dependent upon the Ecumenical Patriarchate, since the adoption of Law 3615/1928 (*Νόμος περί ἐκκλησιαστικῆς διοικήσεως τῶν ἐν ταῖς Νέαις Χώραις τῆς Ἑλλάδος Μητροπόλεων τοῦ Οἰκουμενικοῦ Πατριαρχείου*), Φύλλα τῆς Ἐφημερίδας τῆς Κυβέρνησης 123/Α1928, and the Patriarchal and Synodal Act of 1928 they have been administered by the autocephalous Church of Greece.

¹⁰ The New Lands, Crete, the Dodecanese and Mount Athos still remain under the spiritual jurisdiction of the Ecumenical Patriarchate; cf. Ch. Papastathis, 'State and Church in Greece', in G. Robbers (ed.), *State and Church in the European Union*, 2nd ed. (Baden-Baden 2005), pp. 115–138 (pp. 122–124); Papageorgiou, *supra*, n. 7, p. 24.

¹¹ *Νόμος περί τοῦ Καταστατικοῦ Χάρτου τῆς Ἐκκλησίας τῆς Ἑλλάδος*, Φύλλα τῆς Ἐφημερίδας τῆς Κυβέρνησης 146/Α1977.

¹² *Νόμος περί τῶν Ἐκκλησιαστικῶν Δικαστηρίων καὶ τῆς πρὸ αὐτῶν διαδικασίας*, Φύλλα τῆς Ἐφημερίδας τῆς Κυβέρνησης 110/Α1932.

¹³ Ecclesiastical courts do not have jurisdiction over lay persons, whose religious misdeeds are dealt with according to the sacred rules, unless otherwise provided for.

¹⁴ More specifically: censure, deprivation of salary or pension for up to three months or a fine, suspension for up to one and a half years for married clerics and up to one year for monks, confinement for up to 15 days for married clerics and up to three years for unmarried clerics and removal from office, according to Articles 10–11 of Law 5383/1932, see Papageorgiou, *supra*, n. 7, p. 148.

Courts. It is composed of the top-ranking metropolitan, who is a member of the Holy Synod and who presides over it, and another four metropolitans, who are members of the Permanent Holy Synod. These are drawn by lot at the beginning of each synodical period. The Archbishop of Athens is the president of the Appellate Synodical Court, while another six metropolitans, who are members of the Synod, but not of the First Instance Synodical Court, also serve as judges in this court for a term of one year.

All twelve members of the Permanent Holy Synod – except for the Archbishop of Athens – are members of the First Instance Prelatic Court, where the most senior metropolitan serves as president. It has competence over prelates for offences bearing the penalties of censure, suspension from all rites, dethronement, and defrocking. Appeals against judgements of this court are heard by the Appellate Prelatic Court, where the Archbishop of Athens presides and the 14 most senior non-synodical metropolitans sit – half of them being from the autocephalous Church and the other half from the New Lands.

The Court for Synod Members is competent for offences committed by the president or members of the Permanent Holy Synod during the exercise of their duties. One third of the serving metropolitans (at least 15) sit in this court. They are selected by lot, except for those who were members of the Synod when the alleged offences were committed.¹⁵

b) Semi-Autonomous Church of Crete

Pursuant to Law 4149/1961,¹⁶ the following ecclesiastical courts adjudicate in Crete:

- the First Instance Episcopal Court,
- the Appellate Episcopal Court, over which the Archbishop of Crete presides, and another two metropolitans sit as members,
- the First Instance Synodical Court, composed of the members of the regional Synod of Crete and competent to judge in the first or second instance,
- the Synod of the Ecumenical Patriarchate, competent to judge upon alleged offences committed by the Archbishop of Crete, as well as offences allegedly committed by metropolitans for acts implying heavy sanctions.

¹⁵ Papageorgiou, *supra*, n. 7, p. 149.

¹⁶ Νόμος περί καταστατικού νόμου της εν κρήτη ὀρθοδόξου ἐκκλησίας καὶ ἄλλων τινῶν διατάξεων, φύλλα τῆς ἐφημερίδας τῆς κυβέρνησης 41/Α/1961.

c) The Dodecanese Metropolitan Sees

The Dodecanese metropolitan sees are subject to the Canon law of the Ecumenical Patriarchate,¹⁷ since the application of Law 5383/1932 was not extended to the Dodecanese when they were integrated into Greece in 1948.¹⁸

d) The Self-Administered Monastic State of Mount Athos

The self-administered state of Mount Athos is also subject to the canonical jurisdiction of the Ecumenical Patriarchate, and is regulated by Article 105 of the Constitution, the Charter of the Holy Mountain¹⁹ and further special legislation. Religious judiciary on Mount Athos covers both private and criminal issues. According to Article 43 of the Charter, the supreme legislative and judicial body on the Holy Mountain is the 20-member Synaxis, composed of monks from the 20 monasteries; while the Ecumenical Patriarchate with his Holy Synod, functions as the supreme judicial authority for spiritual issues. In the exercise of their judicial duties, the representatives of the monasteries, as members of the Holy Community, are subject only to their individual consciences and not to the guidance of the monasteries.

For misdemeanours and felonies of ordinary penal law committed on Mount Athos, the State criminal courts of Thessaloniki remain competent, whereas minor offences of common penal law and police violations by clergy, monks or laymen are tried by

the Holy Epistasis (if the *locus delicti* is Karyes, capital of the monastic State), or

the Elders of the monastery in whose territory the offence was committed.²⁰

For ecclesiastical offences committed by a monk in one of the monasteries, the following Athonite bodies are competent:

the Abbot and the Councils of the monastery in which the monk resides for offences implying light penalties,

¹⁷ See G. Papatomas, *Le Patriarcat œcuménique de Constantinople (y compris la Politeia monastique du Mont Athos) dans l'Europe unie (Approche nomocanonique)* (Katerini 1998).

¹⁸ Statement of the State Attorney of Άρειος Πάγος no. 5/1951, (1951) ΞΒ' Θέμις, p. 158; Συμβούλιο της Επικρατείας, 10 October 2000, 3237/2003; 27 November 2009, 3768/2009.

¹⁹ Καταστατικός Χάρτης του Αγίου Όρους, ratified by Legislative Decree of 10 September 1926, Φύλλα τής Έφημερίδας τής Κυβέρνησης 309/Α/1926.

²⁰ Papageorgiou, *supra*, n. 7, p. 187.

the Abbot and the Elders, at first instance for more serious offences, except for those which invoke the penalty of a monk's defrocking, the Holy Community, as an appellate court for the same acts, and a 20-member Extraordinary Synaxis, composed of metropolitans of the Ecumenical Patriarchate and monks residing on Mount Athos, functions as a further appellate court.

The Ecumenical Patriarch and the Holy Synod of the Ecumenical Patriarchate may judge, as a third instance court, any appeals against decisions of the Holy Community.²¹ The Ecumenical Patriarchate is also competent to judge offences punishable by defrocking, after a review of the relevant case file by the Court of Second Instance (Article 52 of the Charter). The Patriarchal Synod may assign the appeal trial to a special court, composed of three metropolitans and the Athonite abbots' convention. The State administrator of the Holy Mountain sits in this court, with a consultative and not decisive vote.

3. The Jurisdiction of the Mufti for the Greek Muslims in Western Thrace

Shariah also applies to Greek Muslims and regulates their personal status and family relations, especially issues of inheritance, marriage, divorce and, in the latter case, custody issues and the award of parental responsibility. The muftis in Western Thrace are not only the spiritual leaders of the Muslim minority, but they also exercise a judicial function while interpreting *Shariah*. They are high-ranking civil servants, appointed by presidential decree. They exercise their duties under the supervision of the Ministry of Education and are reimbursed by the State.

II. Religious Disputes: The Approach of the State

The approach of the State to the autonomy of religious communities is characterised by three main elements:

freedom of religion (Article 13 of the Constitution),

²¹ Papageorgiou, *supra*, n. 7, p. 188.

the ‘State-law rule’ principle, as laid down in Article 72(1) of the Constitution, according to which Parliament regulates religious issues, to wit in plenary sessions,²² and the recognition and promotion of a ‘predominant’ religion, that is, of the Greek Orthodox Church pursuant to Article 3(1) *leg. cit.*, to which the vast majority of Greeks are admitted in their infancy.

The Constitution also guarantees the self-administration of each religious community according to their internal law, as part of the right to associate with others for religious purposes.²³ However, the State retains supervision.²⁴ The Orthodox Church, the local Israelite Communities (Law 2456/1920) and, arguably, also the Roman Catholic²⁵ and Protestant Churches,²⁶ are legal entities of public law, whereas most non-Orthodox congregations form legal entities of private law.

The resolution of religious disputes and the functioning of ecclesiastical courts are special institutional manifestations of all religious communities’ autonomy – although in different aspects and dimensions – based on freedom of association (Article 9 of the Constitution) in conjunction with freedom of religion (Article 13 *leg. cit.*).

What is most important, is the functioning of the Orthodox ecclesiastical courts, whereas the application of *Shariah* law and the Mufti’s role as a family judge in Western Thrace, forms a particularity of the Greek legal order.

²² See, e.g., the Charter of the Greek Orthodox Church is a law of the State (see *infra*, n. 11); Law ΓΥΙΔ/1909 on the General Ecclesiastical Fund and the management of monasteries (*Νόμος περί Γενικού Ἐκκλησιαστικοῦ Ταμείου καὶ διοικήσεως Μοναστηρίων*), Φύλλα τῆς Ἐφημερίδας τῆς Κυβέρνησης 270/Α/1909; Law 5383/1932 (see *infra*, n. 12); Law 2456/1920 (see *supra*, n. 2); Law 3647/2008 (*Διοίκηση καὶ διαχείριση τῶν Βακουφίων τῆς Μουσουλμανικῆς Μειονότητας στὴ Δυτικὴ Θράκη καὶ τῶν περιουσιῶν τους*), Φύλλα τῆς Ἐφημερίδας τῆς Κυβέρνησης 37/Α/2008; cf. Papastathis, *supra*, n. 10, p. 116.

²³ N. Maghioros, ‘L’Église Catholique Romaine et l’état en Grèce: une approche juridico-canonique’, (2003) 45 *L’Année Canonique*, pp. 177–190.

²⁴ Ch. Papastathis, ‘Religious Self-Administration in the Hellenic Republic’, in G. Robbers (ed.), *Church Autonomy – A Comparative Survey* (Frankfurt am Main 2001), pp. 425–450.

²⁵ The ECtHR, 16 December 1997, 25528/94 (*Canea Catholic Church vs. Greece*), Reports 1997-VIII, has recognised the “legal personality *sui generis*” of the organisational subdivisions of the Catholic Church, even if they have not acquired a legal personality under Greek law.

²⁶ Papastathis, *supra*, n. 10, p. 118.

a) The Institutionalisation of Ecclesiastical Courts of the Orthodox Church by State Law

As mentioned above, State legislation incorporates the basic structures of the Greek Orthodox Church relating to religious jurisdiction according to Law 5383/1932 and Article 11 of Law 1700/1987²⁷ regulating ecclesiastical property issues. However, the interpretation of this law, and especially of the legal nature of the ecclesiastical courts, by State courts and legal doctrine has not remained stagnant over time.

From a constitutional point of view, the exercise of justice in the Orthodox Church has suffered due to a lack of transparency in its main procedures. Trials have been conducted ‘behind closed doors’, with limited oral presentation and the defence being provided only by a clergyman, not a lay attorney-at-law. These aspects were, however, altered by Article 11 of Law 1700/1987, which expressly abolished previous contrary provisions, allowed for lay attorneys and partly opened up the procedures, which thereafter only clergymen and monks could attend.

Despite procedural improvements, it is still common ground that the ecclesiastical tribunals do not function according to the procedural criteria guaranteed by both the Constitution and the ECHR in order to be characterised as ‘courts’ in the meaning of the Constitution. In other words, ecclesiastical procedures do not satisfy the requirements of a fair trial according to Article 6 of ECHR.²⁸ Since the judges are metropolitans and other clergymen, it is obvious that they are neither ‘regular’ judges enjoying all the guarantees of functional and personal independence, as stipulated in Articles 87 and 89(1) of the Constitution, nor are they subject only to the Constitution and the law but also to God and their own religion. Moreover, Article 93(2) *leg. cit.*, according to which court hearings shall be public only with a few exceptions, is not respected by the ecclesiastical courts.

b) The application of Shariah as an International Obligation

The application of *Shariah* to the Greek Muslims of Western Thrace is regulated by Article 4 of Law 147/1914²⁹, whereas Article 5(2) of Law 1920/1991³⁰ confirms the

²⁷ Ρύθμιση θεμάτων εκκλησιαστικής περιουσίας, Φύλλα της Εφημερίδας της Κυβέρνησης 61/Α/1987.

²⁸ Παπαγεωργίου, *supra*, n. 7, p. 155.

²⁹ Νόμος περί τής ἐν ταῖς προσαρτωμέναις χώραις ἐφαρμοστέας νομοθεσίας καὶ τής δικαστικῆς αὐτῶν ὀργανώσεως, Φύλλα τῆς Εφημερίδας τῆς Κυβέρνησης 25/Α/1914.

³⁰ Νόμος Κύρωση τῆς ἀπό 24 Δεκεμβρίου 1990 Πράξης Νομοθετικοῦ Περιεχομένου «Περί Μουσουλμάνων Ὁρησκευτικῶν Λειτουργῶν» (ΦΕΚ 182 Α'), Φύλλα τῆς Εφημερίδας τῆς Κυβέρνησης 11/Α/1991.

jurisdiction of the Mufti in a series of exclusively defined issues. These Greek laws follow a series of international treaties,³¹ which presumably but arguably oblige Greece to accept Islamic jurisdiction in family matters. The first of these treaties was the Convention of Istanbul, signed in 1881 by Greece and Turkey,³² whose Article 8 obliged Greece to award religious courts jurisdiction over ‘religious issues’ – a term signifying both family and succession law – amongst the Muslim population living in the newly annexed territories of the Greek state. This was followed by; the Athens Peace Treaty of 1913, which was implemented in Greece through Law 147/1914 and is still in force, the Treaty of Sèvres of 1920, through which the Ottoman Empire was de-constructed and new national states began rising on its soil, and, last but not most importantly, the Treaty of Lausanne of 1923.³³ Through the latter, the Greek Muslim minority was officially recognised as a religious minority.

However, Article 42 of the Treaty of Lausanne did not obligate the contracting States Turkey and Greece to establish religious courts, but only ensured that the personal status of the members of minorities would be regulated in accordance with their ‘religious customs’ in a mutual way, and that relevant decisions would be taken with the consent of the minority. While Turkey abolished religious laws in 1926 and subjected all Turkish citizens, regardless of their religion, to the Turkish Civil Code, the Greek Muslims of Western Thrace remained trapped in their history as *Shariah* still regulates their legal entities.³⁴

c) Intervention of State Courts

Generally, State courts do not intervene in cases of spiritual nature, such as those based on the statutes of the holy Canons, or matters relating to creed, worship, and ecclesiastical doctrine. In this respect, the Council of State³⁵ has declared that purely

³¹ See <<http://www.mfa.gr/en/the-ministry/international-conventions/major-international-treaties-concerning-greece.html>> (30 June 2015).

³² Ratified by Law ΠΛΖ/1882 (*Νόμος περί κυρώσεως τῆς μεταξύ Ἑλλάδος καὶ Τουρκίας συμβάσεως τῆς 20 Ἰουνίου (2 Ἰουλίου) 1881, ἀφορώσης εἰς τὰ νέα ὄρια μεταξύ τῶν δύο κρατῶν*), Φύλλα τῆς Ἐφημερίδας τῆς Κυβέρνησης 14/Α/1882.

³³ Ratified by Legislative Decree of 25 August 1923 (*Νομοθετικὸ Διάταγμα περί κυρώσεως τῆς ἐν Λωζάννῃ συνομολογηθείσης Συνθήκης περί Εἰρήνης*), Φύλλα τῆς Ἐφημερίδας τῆς Κυβέρνησης 238/Α/1923.

³⁴ L. Papadopoulou, ‘Trapped in history: Greek Muslim Women under the Sacred Islamic Law’, (2010) 5 *Annuaire international des droits de l’Homme*, pp. 397–418.

³⁵ The Council of State (Συμβούλιο τῆς Επικρατείας) is the highest administrative court, often acting as a quasi-constitutional court, since no constitutional court exists in Greece. It has the competence to annul executable administrative acts for violation of the law and the Constitution (Article 95 of the Constitution).

spiritual sanctions imposed on clerics or monks by ecclesiastical courts do not fall under its jurisdiction and may therefore not be annulled. One such very common spiritual sanction is the so-called penance of exclusion from the sacramental life of the Church (*επιτίμιον της ακοινωνησίας*). The minority opinions in the relevant Council of State cases recognise,³⁶ however, that this spiritual sanction bears the moral legal interest of the condemned cleric or monk and that such decisions by ecclesiastical courts, even if only spiritual in nature, should indeed be subject to judicial control by State courts. Moreover, the spiritual sanctions (*πνευματικά εκκλησιαστικά επιτίμια*) may directly violate the constitutional right to freedom of religion and worship, or the free development of the individual's personality, for example, by assuming a public office, such as a high ecclesiastical position.

In several cases, clerics and monks have disputed decisions taken by the Orthodox ecclesiastical courts and brought them to State courts, especially the Council of State, on the grounds that their constitutional rights were violated by both the procedure and the content of the decisions. Until 1988, State courts refused to intervene in disputes of this kind, arguing – not so convincingly – that only ecclesiastical courts could deal with spiritual matters. Later, they started to revise their stance and concluded that ecclesiastical courts are not ‘courts’ in the constitutional sense but act, in some cases, as internal organs of the Church, whose decisions concerning issues of a spiritual nature are incontrovertible, while in other cases they act as ‘disciplinary councils’, whose decisions may be measured by fundamental constitutional principles, especially the rule of law and human rights. If an act is of dual, i.e. both spiritual and administrative nature, it may be contested, but only with regard to its administrative elements.³⁷ This is in accordance with the more general status of immunity (not in a strict legal sense) that the Greek Orthodox Church enjoys in the country.³⁸

As a milestone of this new stance the Council of State overruled its previous case law in a plenary session in 1988 and held that ecclesiastical courts are not ‘courts’ under Articles 87 and 93 ff. of the Constitution but rather act as ‘disciplinary coun-

³⁶ E.g. Συμβούλιο της Επικρατείας, 13 May 1988, 2154/1988; 9 March 1022, 686/2011.

³⁷ Συμβούλιο της Επικρατείας (Ολομέλεια), 24 February 1978, 545/1978; 24 February 1978, 546/1978; cf. Ch. K. Papastathis, Greece, ‘A Faithful Orthodox Christian State’, in J. Martinez-Torron and W. C. Durham Jr. (eds.), *Religion and the Secular State. Interim National Reports, issued for the occasion of The XVIIIth International Congress of Comparative Law* (Provo 2010), pp. 339–375 (p. 355).

³⁸ V. Makrides, ‘Scandals, Secret Agents and Corruption: The Orthodox Church of Greece during the 2005 Crisis – Its Relation to the State and Modernization’, in V. Roudometof and V. Makrides (eds.), *Orthodox Christianity in 21st Century Greece* (Farnham 2010), pp. 61–87.

cils' when they impose sanctions which are not merely of a spiritual nature but also directly effect the clergymen's employee status, such as the deprivation of salary, suspension, or pecuniary penalties.³⁹ It should be borne in mind here that the clergymen of the Orthodox Church are on the pay-roll of the State itself and can therefore be viewed as civil servants.⁴⁰ Disciplinary councils are considered administrative bodies, which have to respect the rule of law, and especially the fundamental principles of disciplinary law, at least with regard to their composition and procedural rules.⁴¹ In this capacity, the ecclesiastical courts produce administrative acts that may be annulled by the Council of State for violating the law and the Constitution.

As a consequence, the Council of State has already quashed a series of decisions taken by ecclesiastical courts. It held⁴² that the sanction of defrocking is not only of spiritual nature, since it also effects the cleric's status as a civil servant in the Church, which constitutes an enforceable administrative act and may therefore be annulled by the Council of State.⁴³

In addition, the Council of State decided that a person under disciplinary prosecution has the right to be defended by an attorney-at-law, as an exemplification of the right to be heard.⁴⁴ The Court stressed that this right is guaranteed by both Article 20(2) of the Constitution and Article 6(3) of ECHR. Consequently, when ecclesiast-

³⁹ Συμβούλιο της Επικρατείας (Ολομέλεια), 11 February 1988, 825/1988.

⁴⁰ See also Law 536/1945 (*Αναγκαστικός Νόμος περί ρυθμίσεως τῶν ἀποδοχῶν τοῦ Ὁρθοδόξου Ἐφημεριακοῦ Κλήρου τῆς Ἑλλάδος, τοῦ τρόπου πληρωμῆς αὐτῶν καὶ περὶ καλύψεως τῆς σχετικῆς δαπάνης*), Φύλλα τῆς Ἐφημερίδας τῆς Κυβέρνησης 226/A/1945, and Law 469/1968 (*Αναγκαστικός Νόμος περί μισθολογικῆς διαβαθμίσεως τοῦ ἔφημεριακοῦ Κλήρου τῆς Ἐκκλησίας τῆς Ἑλλάδος*), Φύλλα τῆς Ἐφημερίδας τῆς Κυβέρνησης 162/A/1968.

⁴¹ In the same direction Συμβούλιο της Επικρατείας, 13 June 1996, 2928/1996; 3 July 1997, 2739/1997; 29 July 1998, 3145/1998; 13 November 2003, 3276/2003; 15 May 2003, 1294/2003; 8 December 2005, 4120/2005; 14 April 2005, 1123/2005; 5 November 2009, 3490/2009; 9 March 2011, 687/2011. See, however, Συμβούλιο Πλημμελειοδικῶν Πειραιᾶ, 406/2001, according to which the metropolitan, acting either alone or as a member of the Episcopal Court, does not function as an executor of the will of the state, but as a religious official. Neither the illegal disciplinary punishments imposed upon the cleric by the metropolitan, nor the illegal composition of the ecclesiastical court in which he participated, constituted a breach of duty of offence (Article 259 of the Penal Code) because his actions had a purely spiritual character, and could be tried by the ecclesiastical courts.

⁴² Συμβούλιο της Επικρατείας, 10 October 2012, 3824/2012.

⁴³ Συμβούλιο της Επικρατείας, 9 March 2011, 686/2011, decided that the sanction of demotion of an abbot (*ηγούμενος*) is an administrative act, given the fact that an abbot administers a monastery, which is a legal person of public law, according to Article 1(4) and Article 39(4–5) of Law 590/1977 (see *supra*, n. 11).

⁴⁴ Συμβούλιο της Επικρατείας, 15 May 2003, 1294/2003.

ical courts act as disciplinary bodies, they are obliged to allow clergymen to use attorneys in their defence.

d) The Mufti's decisions and civil courts

The Mufti lacks the constitutional prerequisites to occupy a judicial office. In order for his decisions to be finalised, they need to be found enforceable by a State Court of First Instance (Article 5(3) of Law 1920/1991), provided that the matter falls under the competence of the Mufti and the law applied does not violate the Constitution. The State court may not examine the content of a decision. The constitutionality check system was first introduced in 1991 and constitutes an important mechanism that can be activated in the attempt to enforce gender equality. However, State courts do not take these checks seriously, for both practical and political reasons. Firstly, the decisions are written in the Ottoman alphabet, a version of Arabic, and their translations are not always reliable, and secondly, such interference might undermine the protection of the minority and cause political unease between the community and Turkey.⁴⁵ Furthermore, this religious judicial system lacks an appellate court. Consequently, the decision of the Mufti cannot be revised.

Unless they have entered a civil marriage,⁴⁶ the Greek Muslims of Western Thrace are arguably considered by the courts to have an obligation – not just a right – to resort to the Mufti.⁴⁷ In contrast and based on both religious freedom in its negative sense and Article 8 of the Constitution, which – referring to State courts in this case as well⁴⁸ – stipulates that no one may be deprived of the judge assigned by law, legal doctrine⁴⁹ rightly points out that Greek Muslims have the right to choose their own jurisdiction. Needless to say, even if double jurisdiction and the right to opt out of the religious one were accepted, social pressure would not allow many litigants, especially women, who suffer from the inequality imposed by *Shariah*, to opt for State courts.⁵⁰ Taking this inability to make independent decisions into considera-

⁴⁵ Papadopoulou, *supra*, n. 34, p. 411 f.

⁴⁶ Μονομελές Πρωτοδικείο Ξάνθης, 1623/2003, (2004) 25 *Αρμενόπουλος*, p. 366.

⁴⁷ In favour of an obligation: Άρειος Πάγος, 1723/1980; Μονομελές Πρωτοδικείο Χαλκίδας, 1 August 2000, 1057/2000; Άρειος Πάγος, 21 June 2000, 1041/2000, (2001) 42 *Ελληνική Δικαιοσύνη*, p. 429; against an obligation Μονομελές Πρωτοδικείο Θηβών, 13 November 2000, 405/2000, (2001) 49 *Νομικό Βήμα*, p. 661.

⁴⁸ Against this opinion Άρειος Πάγος, 1723/1980.

⁴⁹ See A. Tsaoussi and E. Zervogianni, 'Multiculturalism and Family Law: the case of Greek Muslims,' in K. Boele-Woelki and T. Sverdrup (eds.), *European Challenges in Contemporary Family Law* (Antwerp, Oxford, Portland 2008), pp. 209–239 (p. 214); Papadopoulou, *supra*, n. 34, p. 409 with further references.

⁵⁰ Tsaoussi and Zervogianni, *supra*, n. 49, p. 221.

tion, one may therefore conclude that only the single unitary legal recourse to the civil courts and the application of the Civil Code to all citizens, regardless of their religion, is in accordance with human and fundamental rights.

III. Religious Perspectives on State Approaches to Religious Disputes

1. The View of Religious Communities and Their Authorities

The Orthodox Church has only hesitantly applied Article 11 of Law 1700/1987, which allowed lay attorneys and admitted clergymen and monks to the trials. In the meantime, many drafts have been prepared but remained unused, e.g. in 1987, 2006, 2009. Already back in 1987, Charalampos Papastathis, a founding member of the European Consortium for Church and State Research, proposed some changes.⁵¹ Their basic idea was that a special body of ecclesiastical judges, consisting of priests and deacons should be formed, with the right to participate in a decisive vote in the ecclesiastical courts, wherein a State judge, with a three-year mandate, should also sit. According to the same proposal, the investigating metropolitan would not simultaneously perform the role of judge and the defendant's advocates (either attorneys or clerics) would have the right to be present at every stage of the trial, including the preliminary proceedings. A limited amount of publicity (only for clergymen, monks and relatives of the defendant) would be permitted and the accused would enjoy all the guarantees provided for by state procedural penal law.

Commenting on a draft law intended to regulate ecclesiastical judiciary, a metropolitan⁵² denounced the proposed novel idea of introducing a quasi-public prosecutor (*ἔκδικος*), claiming that ecclesiastical courts were neither courts in the political sense, nor disciplinary councils in the administrative sense. According to him, they are rather Church institutions applying sacred rules on clergymen's misdeeds for their own cure, in a medical and not a judicial sense, and as a caution to others. He

⁵¹ Published in (1998) 19 *Αρμενόπουλος*, pp. 49–77. As Papageorgiou, *supra*, n. 7, p. 161, reports, this draft was submitted to the Committee studying the relations between State and Church of the Ministry of National Education and Religious Affairs.

⁵² Ierotheos, Metropolitan of Nafpaktos and Saint Vlasios, 'Νομοσχέδιο για την εκκλησιαστική δικαιοσύνη: καινοτομίες και ερωτήματα', *Το Βήμα* 12 November 2006, <<http://www.tovima.gr/opinions/article/?aid=176898>> (8 September 2015).

concluded that instead of a new detailed law, based on the ‘State-law rule’, a very minimal law should be promulgated, which would delegate the power to issue a regulation based on the Sacred Rules to the Church’s hierarchy.⁵³ In another statement, the same metropolitan invokes the 39th Holy Canon of the Holy Apostles, which decrees that the local bishop has full jurisdiction in his own region.⁵⁴

It is also significant that, based on a decision by the Holy Synod of the Orthodox Church, no ordinary clergyman or monk participated in the Special Lawmaking Committee which was set up in 2009 in order to draft a new law on ecclesiastical judiciary. In any case, this committee was not productive. At the end of 2009, the Church requested that no vote would be taken on the draft legislation and that Law 5383/1932 should only be modified, or if this was not possible, that a totally new piece of legislation should be adopted. Commentaries by clergymen and monks and ecclesiastical circles often criticise the intervention of State courts, and especially the Council of State, and underline those passages of the judgements that presuppose and accept that the Church is free to handle the misdemeanours of spiritual character.⁵⁵ However, the sides taken by the – usually anonymous – commentators online, are often biased.

2. Media’s Approach

Generally, Greek media rarely concern themselves with issues of ecclesiastical judiciary. They tend to do so whenever there is a scandal,⁵⁶ new draft legislation, or when they give the floor to an appellate of the Orthodox Church to express his per-

⁵³ This conclusion is based on the theological reminder that the Orthodox Church does not accept the satisfaction theory of Anselm developed by Canterbury and the restoration of the order of a ‘liege God’ but believes in the principle of God’s love and man’s cure.

⁵⁴ Ierotheos, Metropolitan of Nafpaktos and Saint Vlasios, ‘Περί Πρωτεκδικίου καὶ Ἐκδικίων’, *Το Βήμα* 13 January 2007, <<http://www.parembasis.gr/index.php/menu-teyxos-128/1981-2007-128-01>> (8 August 2015). Arguing against the proposed new institutions of *ἐκδικίος* and *πρωτέκδικος* as proposed in the draft of 2006, Metropolitan Demetrius of Goumenissa has claimed that this would inadmissibly displace the local bishop, <<http://www.imgap.gr/file1/EkkIDikastiria.html>> (29 July 2014). Metropolitan Demetrius, in the form of a letter to Archbishop Christodoulos, also pointed out as the greatest lacuna the lack of any provision applicable to the Archbishop of the Greek Orthodox Church.

⁵⁵ See, e.g., ‘Δύο σημαντικές αποφάσεις τού Συμβουλίου τής Επικρατείας’, <<http://www.parembasis.gr/index.php/menu-teyxos-178/1017-2011-178-12>> of May 2011 (8 August 2015).

⁵⁶ E.g. the conviction by the Supreme Court of the former Metropolitan of Attica, Panteleimon, for the embezzlement of 155,000 euro by a monastery. This conviction necessarily led to his defrocking by the Pre-latic Court (Article 160 of Law 5383/1932).

sonal opinion or that of the Church. The draft legislation of 2006⁵⁷ – initiated by the former and now deceased Archbishop Christodoulos – aiming at reducing the arbitrary power of the local metropolitans, was received quite positively by the press.⁵⁸ More may be found on internet sites in ecclesiastical circles, where views are often expressed anonymously.

3. Debate

As already analysed above, both the Orthodox and the Muslim religious judicial systems exhibit a number of features that violate constitutional principles. This fact, while sparking only a limited discussion in Greek society, has drawn criticism from human rights organisations, academics, political parties and the concerned faithful and clerics. Another institutional factor influencing this public debate is the State courts themselves.

Criticism mainly focuses on the outdated character of both religious regimes, Law 5383/1932 and Law 147/1914, which were drafted at a time when concerns for the protection of individual rights were absent or given much less consideration than they are today both in Greece and Europe.⁵⁹

In the case of the Orthodox judicial system, much of the criticism stemming from lower-ranking clerics⁶⁰ rests on the lack of checks and balances on the power of the local metropolitan, or other superior hierarchical bodies, who sometimes act arbitrarily, with a mere and obscure reference to the ‘holy rules’ of Orthodox Canon law, without respecting the right of the lower clergy to be heard before the imposition of punishment.⁶¹ Criticism is also directed –and rightly so – against the fact that the ability of the local metropolitan to judge on his own – since the other two mem-

⁵⁷ This concerns the follow-up of a series of scandals in 2005 which the newspapers were reporting, involving metropolitans across the country, see Makrides, *supra*, n. 38; <http://exagorefsis.blogspot.gr/2009_11_17_archive.html> (30 June 2015).

⁵⁸ See, for example, the newspaper *Ta Nea* of 15 September 2006, <<http://www.tanea.gr/news/greece/article/4484730/?iid=2>> (30 June 2015).

⁵⁹ See indicatively, ECtHR, 21 December 2010, 50973/08 (*Vassilios Athanasiou and Others v. Greece*); ECtHR (Grand Chamber), 15 February 2008, 27278/03 (*Arvanitaki-Roboti and Others v. Greece*); ECtHR, 10 July 1998, 26695/95 (*Sidiropoulos and Others v. Greece*).

⁶⁰ See e.g. E. Κολλάς, ‘Τα δικαιώματα του Επισκόπου επί ελαφρών παραπτωμάτων’, 973 *Ενορία* 12 March 2004 = <<http://ekklisastikos-sinigoros.blogspot.gr/>> (30 June 2015).

⁶¹ See, for example, Συμβούλιο της Επικρατείας, 31 October 1996, 5357/1996, which confirmed that the right to be heard applies also in the case of temporary suspension of the right to execute hieratic acts imposed by the local metropolitan on a cleric, according to Article 102 of Law 5383/1932.

bers of the Episcopal Court are appointed by him and do not possess a decisive vote – is neither compatible with the presuppositions of a court, nor of an administrative body exercising disciplinary power. In the same process, the metropolitan plays not only the role of a judge but also that of an inquisitor. As Constantinos Papageorgiou reports,⁶² the ‘Holy Association of Hellenic Clergymen’ representing ordinary priests, deacons and monks, has repeatedly expressed strong criticism of the operation of ecclesiastical judiciary⁶³ and asked for respect to be shown for the guarantees provided by both the Constitution and the ECHR relating to the operation of courts and disciplinary bodies.⁶⁴

This, however, may only be possible if the outdated Law 5383/1932 is replaced with a new piece of legislation. With the same token, European human rights necessitate the abolishment of *Shariah* in Thrace and equality concerns speak in favour of the universal application of Greek and European law for all Greek citizens.

⁶² Papageorgiou, *supra*, n. 7, p. 159.

⁶³ Papageorgiou, *supra*, n. 7, p. 159, fn. 18, further refers to the newspaper article ‘Δύο μέτρα και σταθμά από τους αρχιερείς’, *Ελευθεροτυπία* 27 January 1999. The title, based on accusations posed by the ‘Holy League of Clergymen in Hellas’ (Ιερός Σύνδεσμος Κληρικών Ελλάδος) referring to double standards applied by bishops, implies the differential treatment of lower-ranking clergymen and appellates by the ecclesiastical judiciary: while the former are treated very strictly, the latter enjoy a kind of tacit immunity, and rarely sit on the defendant’s bench. The article also negatively mentions the fact that in ecclesiastical courts, the metropolitan is both prosecutor and examining judge and also assigns the investigation to a priest who blindly obeys him. Papageorgiou, *supra*, n. 7, p. 162, himself speaks of ecclesiastical courts as a repression mechanism against ordinary clergymen or monks.

⁶⁴ There are plenty of voices on the internet, coming from ecclesiastical circles and especially the lower clergy, usually anonymous, arguing against the injustices imposed upon other clergymen and monks in the course of the administration of ecclesiastical justice. See, e.g., the posts <<http://www.exapsalmos.gr/η-εκκλησιαστική-δικαιοσύνη-θέλει-αλλ/>> of 24 March 2014 and <<http://www.exapsalmos.gr/να-μη-γίνονται-εκκλησιαστικά-δικαστή/>> of 12 April 2014 (both 8 August 2015), where the writer also pleads in favour of the draft law proposed by Archbishop Christodoulos in 2006).

THE EMERGENCE OF RELIGIOUS PARALLEL JURISDICTIONS IN HUNGARY

Balázs Schanda, Budapest

A professor – a pastor of the Reformed Church – was sent into retirement by the Faculty of Theology of Debrecen in 1995 following an initiative launched by students. He first accepted the decision but later challenged it and initiated an internal Church procedure. First he turned to the Synod Court of the Reformed Church and appealed his rejection at the presidency of the synod. After having lost his case within the Church, he sued the Church as well as the University at the local court for damages. The local court of Debrecen rejected his petition as it stated that the separation of Church and State rules out the possibility that breaking internal ecclesiastical norms could constitute financial damage according to State law. The court of appeal quashed the decision and transferred the case to the Synod Court as the court came to the view that this instance should have competence according to internal Church regulations. The Supreme Court withdrew the transfer of the case to the Church instance as such transfers are only possible between State organs on grounds of competence and a State court has no competence to interpret Church regulations. The Synod Court then addressed the case again and decided to transfer it to the local Labour Court. This court stated that the lack of its competence was because the internal Church service of a pastor is not based on a labour contract. The court of appeal upheld the rejection and so did the Supreme Court.

After three decisions of Church organs and six decisions issued by State courts, the retired professor filed a constitutional complaint. Courts in various instances remained uncertain if they had jurisdiction over a dispute between a Church and its pastor, as section 15(2) of the Act IV/1990 on the Freedom of Conscience and Religion and the Churches¹ states – as a consequence of the constitutional separation between Church and State – that no State pressure may be applied in the interest of

¹ *Törvény a lelkiismereti és vallásszabadságról, valamint az egyházakról*, Magyar Közlöny 1990/12, pp. 205–214 as amended.

enforcing the internal laws and regulations of a Church. The applicant considered this refusal as a lack of remedy in his case, which he considered a labour law case between an employer and a dismissed employee. The Constitutional Court – while dismissing the application – stated that the separation of Church and State cannot be interpreted in a way that it left those getting into a legal dispute with a Church without resolution. The resolutions, however, can only consider aspects regulated by State law. Aspects regulated by internal Church law (canon law, or the statute of the religious community) cannot be the subject of disputes at public resolutions. The Constitutional Court expressly referred to the possibility of private individuals to waive their right to seek a resolution in a number of legal circumstances.²

The new Act on Freedom of Conscience and Religion and on Churches (Act CCVI/2011)³ reflects the results of the dispute about the autonomy of religious communities with regard to internal Church disputes. Church and State are supposed to operate separately according to Article VII(3) of the Basic Law⁴. Section 8(2) of Act CCVI/2011 stipulates that no State power may be used to enforce decisions made based on the principles of faith, the internal laws, the statutes or the rules of organisation and operation of a religious community, or other internal rules equivalent to them. Public authorities may not examine such decisions. Neither may public bodies modify or override decisions made by a religious community based on internal rules and they have no competence to adjudicate legal disputes arising from internal legal relationships which are not regulated by the laws. Consequently, in the relationship between a religious community and its members, legal instruments and public power may not intervene. Certainly, if these parties enter into a contractual relationship under State law, this relationship can be brought before State bodies.

The new Church Law also mirrors a dispute over the jurisdictional autonomy of Churches. Béla Szathmáry, professor of Church law at the Reformed Theological College of Sárospatak repeatedly argued in favour of *apellatio ab abusu*, the possibility to appeal to State courts in internal Church disputes.⁵ According to his suggestion, not only Church decisions contrary to State law should be subject to scrutiny by State courts, but also Church decisions which violate internal Church regulations

² Alkotmánybíróság, 2 February 2003, 32/2003. (VI.4.) AB, Magyar Közlöny 2003/62, pp. 4998–5004.

³ *Törvény a lelkiismereti és vallásszabadság jogáról, valamint az egyházak, vallásfelekezetek és vallási közösségek jogállásáról*, Magyar Közlöny 2011/166, pp. 41621–41633 as amended.

⁴ *Magyarország Alaptörvénye*, Magyar Közlöny 2011/43, pp. 10656–10681 as amended.

⁵ B. Szathmáry, 'Az apellatio ab abusu a magyar jogrendszerben', (2010) *Magyar Jog*, pp. 416–422; response: B. Schanda, 'Egyházi önállóság és vallásszabadság. Válasz Szathmáry Béla: Az apellatio ab abusu a magyar jogrendszerben c. cikkére', (2011) *Magyar jog*, pp. 148–151.

(like canon law). The new law clearly rejects this possibility. The principle of separation still rules out that internal regulations should become the subject of litigation.

Since the State and the religious communities pursue their activities separately, internal Church decisions – including decisions of internal Church courts – have no recognised civil effect. Under the principle of separation, Churches administer the issues they regard to be within their competence independently. As a consequence of the same principle, the internal jurisdiction is of no significance to the State whatsoever.

I. Practices and norms of religious communities to resolve disputes

No other religious community has any comparable internal jurisdiction to the Catholic Church. Almost all cases at Catholic Church courts are related to marriage issues: annulments of canonical marriages also come under the remit of the Catholic Church in Hungary. As the Primate of Hungary has a court of third instance, practically all cases are completed in Hungary and do not come to the *Rota Romana* (in this way saving significant translation expenses). Annulments have no civil effects and in most cases the process is launched after a civil divorce, often when parties have entered into a new relationship and try to settle their new status in the Church. The number of annulments per year could be between 100 and 200 in the country, but there is no public data on annulment procedures.

Other denominations have no similarly developed internal adjudication. The judicial concept of the Reformed Church is based on the concept of universal priesthood of all the faithful. Theoretically, all members of the congregation share judicial power. The Church has an established internal judicial structure dealing with various disciplinary cases, internal disputes as well as appeals against administrative and synod decisions. Judges at parish level could be members of the congregation who could for example, warn another member of the congregation. Separate Church courts are structured into dioceses, Church provinces and the national synod. Courts always consist of panels where the number of ordained pastors and lay members must be equal. Lay members of Church courts have to be trained lawyers who are otherwise active in any field of legal practice, including legal scholars.⁶ Diocesan

⁶ For a detailed description of the judicial structure of the Reformed Church: B. Szathmáry, 'Református Egyházjog', in L. Rácz (ed.), *Felekezeti egyházjog* (Budapest 2004), pp. 373–422.

courts act as courts of first instance in administrative cases of parishes and disciplinary cases against pastors (the lawyer of the diocese acts as the persecutor in such cases). Provincial courts handle appeals brought against judgements of diocesan courts as well as cases of institutions of the Church province. The Synod Court handles disciplinary cases of bishops, professors of theology, national institutions and appeals against administrative decisions of the Church pension fund. The Synod Court may also issue decisions ensuring the coherence of court practice when different courts issue diverging decisions. Church courts focus on educating the faithful. The theoretically well structured court system covers, in practice, just a handful of disciplinary cases or cases related to the service and retirement issues of pastors. A widely reported case was a procedure against a far-right pastor of central Budapest who displayed a statute of Admiral Horthy, the governor of Hungary from 1920 to 1944. The case finished with a written reprimand. More common disciplinary cases concern financial misconduct of pastors – cases that would be dealt with in the Catholic Church in an administrative procedure. Doctrinal cases are rare whereas cases regulated by State law cannot emerge from a Church court. The Lutheran Church has a similar court system composed of diocesan and provincial courts and well as a national court. Cases relate to disciplinary issues and administrative appeals against the decisions of various Church bodies.⁷

Smaller religious communities have not established an internal judicial system, although some may have disciplinary procedures to handle disputes; for instance, the largest Jewish congregation, the Alliance of Jewish Communities commissioned a legal, organisational and economic audit by a professional agency in 2013. The audit was used as part of an internal dispute of various branches and forces within the community.

With regard to parallel jurisdictions, the most sensitive issues in Europe relate to religious communities with a migration background. The relevance of this challenge in Hungary, however, remains limited. The percentage of resident aliens is under 2 % of the total population and over 80 % of aliens come from other European countries; many of them are ethnic Hungarians from neighbouring countries. The Chinese community is the largest minority with a non-European background (estimated number between ten and fifteen thousand). Since immigration of non-Europeans has been rather limited, non-integrated religious communities do not seem to have much social relevance. The social attitude towards immigrants tends to be more dis-

⁷ B. Szathmáry, *Magyar egyházjog* (Budapest 2004), pp. 367–378.

trustful than welcoming. Hungary is probably the last remaining country in Europe where Jews outnumber Muslims.⁸

II. Religious disputes: the approach of the State

The State practically disregards internal disputes within religious communities; in other words, it respects the jurisdictional autonomy of religious communities. Neither marriage cases of Catholic courts nor disciplinary cases from Protestant Churches have any relevance to State organs. As Church jurisdiction is regarded as an internal issue without legal relevance, fair trial principles are not relevant at these instances. Certainly, Church courts are also bound by the generally applicable laws: a judge of a Church court can be found guilty of defamation if his statements qualify as such.

Church autonomy may be the most important difference between entities registered as religious communities and other registered legal entities,⁹ such as associations, political parties, or trade unions. Autonomy in this stricter legal sense means that the internal actions of organisations which are registered as 'Churches' are not subject to any kind of State interference. This means that whereas a resolution of an association can be brought before court (and courts have the power to strike it down if these internal actions are unlawful or violate the charter of the association), the resolution of an internal Church entity, like a bishop or a synod, cannot be challenged before State courts. Churches are also not bound by the principle of democratic internal structure, while associations have to be democratic. Churches determine their structure independently of the State; neither consent nor notification is required, for example, when creating new dioceses.

Hungary has no system of personal laws. The State marriage law was made secular in 1895. Jews were discriminated against from 1938 to 1945 and again from 1941 to 1945. Marriages between Christians and Jews were banned (based on racial criteria).

Hungary would qualify as a State demonstrating non-interference in internal alternative jurisdictions, respecting freedom of religion and self-determination of religious communities.

⁸ Census data available at <http://www.ksh.hu/nepszamlalas/vallas_sb> (23 June 2015).

⁹ Alkotmánybíróság, 23 February 1993, 8/1993. (II. 27.) AB, Magyar Közlöny 1993/22, pp. 1083–1085.

State law does not refer to religious laws or principles. Religious rules are generally not applicable in the State legal system but in certain cases, State law does refer to the internal rules of religious communities. This way, the internal statutes of religious communities may have some relevance. The internal law of the Churches is regarded as law by the State in certain cases, though lacking the enforcement of State authorities. State law makes a number of references to the internal laws of the Churches, even accepting them. The most important case of the application of the internal Church law by State authorities is the acknowledgement of legal entities by the State. According to section 12(1) of Act CCVI/2011, the statute of a Church may provide that the organisational units of the Church with an independent organ of representation (like institutions, parishes) are considered legal entities. This means that the internal law of the religious communities determines whether legal persons acknowledged by the State come into existence or not. No further State registration of these persons is required (in the case of the Catholic Church, the Code of Canon Law and the Code of Canons of the Eastern Churches determine which Church entities have legal status in the Hungarian legal system). If there is any doubt, the representatives of the given Church can refer to their charter, and judges may need to study Church codes to find out about the status of Church entities in State law.

According to a leading case passed by the Supreme Court, separation of Church and State does not mean that churchmen would not be liable for infringing personal rights in the course of religious activities. Lower level courts refused jurisdiction in the case, invoking Article 15(2) of Act IV/1990, with the Churches stating that no State pressure may be applied in the interest of enforcing the internal laws and regulations of a Church. The Supreme Court, however, held that in the given case there were no internal laws at stake, but personal rights were invoked regardless of the fact that the alleged infringement (a Church trial) took place in the framework of a Church.¹⁰ Certainly, the Church trial itself could not be appealed against in a State court.

According to section 13(3) of Act CCVI/2011, professional confidentiality embraces the seal of confession, but goes beyond it in a religion-neutral way: secrets may not be made public. In civil¹¹ and administrative¹² procedures, clergy may make

¹⁰ Legfelsőbb Bíróság, Pfv. IV. 21.686/2003., Bírósági Határozatok 2004.180.

¹¹ Section 170(1)c of the Code of Civil Procedure, Act III/1952 (*törvény a polgári perrendtartásról*), Magyar Közlöny 1952, pp. 422 ff. as amended.

¹² Section 53(3)b of the Code of Administrative Procedure, Act CXL/2004 (*törvény a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól*), Magyar Közlöny 2004/203, pp. 16142–16190 as amended.

use of a provision that allows for a refusal to testify in the case of professional secrets. The confessional secret is thereby protected as a professional confidence, in the same way as medical doctors' or advocates' privilege concerning the protection of confidential information with which they are entrusted in their profession. This means that clergy may refuse to respond to questions that relate to professional confidentiality. According to section 81(1)a of the Code of Criminal Procedure¹³, clergy enjoy a qualified protection, as they may not be questioned about issues which invoke the seal of confession. This means that it is not for the clergy to refuse to testify, but the court and the public prosecutor may not cross-examine them. No State authority has the right to challenge the scope of professional confidentiality.

The following are a few more examples where State law refers to the internal law of Churches: Tax laws and the law on social security established the term of a so-called ecclesiastical person, to refer to persons subject to some special regulations in these two fields. This definition is determined by internal law; that is, the internal law of the Churches determines who falls under this scheme provided by the secular State law. The same applies in the case of the National Defence Act CXIII/2011¹⁴, section 12(2)f of which grants privileges to clergymen working in their profession: they are not drafted, for example. It lies in the competence of the Churches to determine whom they regard as clergy. Procedural laws¹⁵ accept the professional codes of ethics concerning confidentiality (with regard to lawyers, doctors, and, as well as, clergy). Church regulations decide which kind of confidentiality require special protection.

Section 2(4) of Act XXXII/1992¹⁶, dealing with compensation for those unjustly deprived of their life and liberty for political reasons, uses the term of an ecclesiastical person under the ban of marriage. Compensation for such people cannot be granted to the widow or the descendant as in regular cases. Instead, the diocese of the person concerned receives the compensation. The constitutionality of this provision was challenged under the separation clause of the Constitution. The Constitutional Court refused the petition in its so-called seventh compensation decision. The

¹³ Code of Criminal Procedure, Act XIX/1998 (*törvény a büntetőeljárásról*), Magyar Közlöny 1998/23, pp. 1776–1872 as amended.

¹⁴ *Törvény a honvédelemről és a Magyar Honvédségről, valamint a különleges jogrendben bevezethető intézkedésekről*, Magyar Közlöny 2011/89, pp. 25638–25667 as amended.

¹⁵ Section 170(1)c of the Code of Civil Procedure, *supra*, n. 11; sections 53(3)b and 172/f of the Code of Administrative Procedure, *supra*, n. 12; section 81(1)a of the Code of Criminal Procedure, *supra*, n. 13.

¹⁶ *Törvény az életüktől és szabadságuktól politikai okból jogtalanul megfosztottak kárpótlásáról*, Magyar Közlöny 1992/56, pp. 1949–1952 as amended.

Court argued that in the case of so-called ecclesiastical persons under the ban of marriage, the widow and children of the deceased are not recognised. The legislator made the diocese – by applying a legal precedent – a quasi relative. This is down to compensation, not because the legislator wanted to grant compensation to the Church legal entity. The basis of equal treatment in this case is that the law also grants compensation for the death of ecclesiastical persons killed unjustly, who do not have a wife and descendants due to their ecclesiastical vow. The law does not violate the constitutional declaration of the separation of Church and State as the State takes into account the independence of Churches by taking their interests into consideration where necessary and guarantees their freedom.¹⁷

Similar provisions on the ban of marriage are applied to crime victims.¹⁸

This illustrates that State law makes, under certain circumstances, reference to the internal law of religious communities. In some cases, this is done out of practical considerations, as the legislator would not be able to set up a general framework that could be applied to all communities. In other cases, the principle of separation (the respect of Church autonomy) sets a limit on how far the State law can go. Consequently, the acknowledgement of the potential of Churches in making laws (internal laws) is an important sign of the recognition of their autonomy.

III. Religious Perspectives on State Approaches to Religious Disputes

Religious communities generally appreciate the separation model that has emerged in Hungary and Churches are keen to maintain their autonomy. When center-to-right wing governments suggested recognising religious marriages under State law, Churches were against this citing potential dangers arising from a different understanding of marriage and the eventual legal conflicts. Autonomy seems to be higher on the agenda than cohesion.

The internal disputes of religious communities only receive media coverage when the case is politically relevant, such as the one of the above mentioned Calvinist pastor. As the scope of religious adjudication is generally narrow, public attention is not significant either.

¹⁷ Alkotmánybíróság, 6 February 1995, 1/1995. (II. 8.) AB., Magyar Közlöny 1995/10, pp. 547–564.

¹⁸ Sections 46(6), and 51(3) of Code of Criminal Procedure, *supra*, n. 13.

Traditional religious minorities are well integrated into society and the challenge of integrating large numbers of migrants with a diverse religious background is not yet relevant. There is currently no data in Hungary about a significant number of citizens who apply religious rules in conflict with State laws. It is a legacy of the socialist regime that religion has become highly privatised and most citizens would rather avoid conflicts than stand up for their beliefs. There are no significant signs of religious conflicts or hostilities raised by religious practices.

IV. Conclusion

In Hungary, religious communities and the State function entirely separately. The new constitution of 2011, the Basic Law, has a kind of a religious rhetoric and shows openness towards Church-State cooperation but did not bring a change in the separation of Church and State. Internal religious norms have no relevance to the State, while the autonomy of religious communities is respected. The consequent legal separation of religious communities and the State law does not mean that cooperation between Church and State is not important in many fields of social life. Religion may also play an important role in fostering social cohesion. Traditional religious minorities are well integrated into society and the challenge of integrating large numbers of migrants with a diverse religious background has not yet gained much relevance. Religious practice for adherents of mainstream religious communities may be easier than for members of minority communities. This, however, has practical reasons and is not the result of a discriminatory State regulation but of a social reality. In general, the practice of any religion (traditional or non-traditional) may be more burdensome than not exercising religion. Religious communities are 'left alone' in handling their internal disputes according to their internal law. The interpretation of their internal law and their practice, however, may have relevance in legal procedures with State remedies.

RELIGIOUS JURISDICTIONS IN THE REPUBLIC OF IRELAND

Stephen Farrell, Dublin

I. The Resolution of Disputes: The Practices and Norms of Religious Communities

In the 2011 Census, 84.2 % of the Irish population identified themselves as Roman Catholics.¹ The largest minority group is the Church of Ireland, with 4 % of the population or 130,000 members. The Census showed Ireland to have 50,000 Muslims and just under 2000 Jews. These figures highlight that many religious groupings in Ireland are small and often they are part of new communities. In this context groups have not always developed formal means for dispute resolution amongst members. For instance, the very small Jewish community is largely centred in south Dublin. As there is only one Rabbi and the population is both ageing and declining in numbers, the community looks to England, in particular to Manchester and London for certain legal matters. There is no *beth din* in Ireland.

The Muslim population in Ireland is growing and is largely comprised of professionals. There are currently 35 Imams in Ireland and approximately 40 Mosques. The community is growing, with a degree of local autonomy. The community is not highly structured and there is no formal structure for dispute resolution. In 2006 the Irish Council of Imams was founded to act as an umbrella organisation for all Islamic Institutions in Ireland and to represent both Sunni and Shia Imams. In 2011 the Council declared its intention to establish a number of Committees of the Council, including one for Reconciliation and Arbitration.² Its most notable attempt to regulate internal disputes has been to set dates for Ramadan for all Muslims living in

¹ 'Profile 7 Religion, Ethnicity and Irish Travellers – Ethnic and Cultural background in Ireland. Central Statistics Office, 2011' <<http://www.cso.ie/en/newsandevents/pressreleases/2012pressreleases/pressreleasecensus2011profile7religionethnicityandirishtravellers/>> (31 July 2014).

² <<http://islamireland.ie/news/the-irish-council-of-imams-meeting-at-the-icc/>> (31 July 2014).

Ireland³. Eight Mosques did not accept the ruling and there have been calls from leading Muslim Cultural Centres to respect the authority of the Irish Council of Imams in order to avoid the embarrassment of disunity,⁴ suggesting a growing role for the Council in both making regulations but also in reaching solutions in disputes.

The Church of Ireland was once part of the Established Church of England and Ireland (it was disestablished in 1869⁵), and as such it retained many of the legal mechanisms associated with a branch of the State. Resolution of disputes is governed by the Constitution of the Church of Ireland. Chapter VIII relates to Ecclesiastical Tribunals, Offences, Sentences, Faculties and Registries. These provisions apply to clergy and laity alike. There are two parallel dispute resolution procedures. The old procedure has a hierarchy of courts, and the new procedure is A Disciplinary Procedure, which may only be used against clergy and bishops.

The court structure has a Diocesan Court as the normal court of first instance, though questions of doctrine or ritual may not be heard by the Diocesan Court. The judge of the court is the bishop or the bishop's commissary, assisted by the chancellor, who must be a judge or a barrister or solicitor of ten years standing. There is little evidence that a system of precedent operates in Diocesan Courts, though this may be moot as a Diocesan Court has not heard a disciplinary matter since 1940⁶. There is a right of appeal to the Court of the General Synod, which is also the court of first instance for matters pertaining to doctrine or ritual or the conduct of episcopal elections. The court is generally constituted of three ecclesiastical judges (bishops or archbishops) and four lay judges. Lay judges are invariably judges of the Supreme or High Court in the Republic or judges of the Supreme Court of Judicature of Northern Ireland, though they may be barristers or solicitors provided they are of ten years standing. Each diocesan court is assisted by a registrar, and the registrar of the diocese of Dublin is the registrar of the Court of the General Synod. Ecclesiastical judges are not trained but do not always defer to lay judges on matters of law. In *Grant v. Smith and others*⁷ the Archbishop of Armagh issued a dissenting judgement claiming the right of bishops to grant Faculties has not been affected by the Irish Church Act 1869 and disestablishment. The court operates a system of *stare decisis*. The Court has the power to consider any matter so appointed by the law of the

³ <<http://www.islamireland.ie/site/assets/files/1596/ici-ramadan-1435-statement-en.pdf>> (31 July 2014).

⁴ <<http://www.islamiccentre.ie/wp-content/uploads/lettertoallMuslimleaders2014.pdf>> (31 July 2014).

⁵ The Irish Church Act, 1869 (32 & 33 Vict. ch. 42).

⁶ High Court, 11 December 1935, *State (Colquhoun) v. D'Arcy and Others* [1936] Irish Reports 641.

⁷ Court of the General Synod, 18 November 1892, *Grant v. Smith and others* [1895] Journal of the General Synod of the Church of Ireland 204.

Church of Ireland, and any matter referred to it by the General Synod or the House of Bishops. The Court may not determine any matter which, in the opinion of the lay judges, is within the jurisdiction of a civil tribunal.⁸ The proceedings of the court are published in the Journal of the General Synod.

The disciplinary procedure has been in operation since 2008. It notes that

“[a]ll members of the church are called to exercise a ministry of reconciliation. It is preferable, therefore, that all complaints and disputes be resolved pastorally within each diocese; that complaints against clergy be dealt with pastorally by diocesan bishops; or, in the case of complaints against a bishop by the archbishop of the province; or in the case of an archbishop by the archbishop of the other province.”⁹

The procedure sees complaints referred to a Complaints Committee, made up of lawyers, clergy and lay people from across the island. They then refer any substantial complaint to a Disciplinary Panel which hears the complaint. The Complaints Committee acts as prosecutor, saving the original complainant the cost of legal counsel. There is a right of Appeal to an Appeal Tribunal. This disciplinary procedure has greater emphasis on reconciliation rather than litigation. The disciplinary procedure is also competent to deal with matters of doctrine and ritual. The disciplinary procedure is intended to replace the court procedure in disciplinary matters, though it is arguably still open for a Plaintiff to use the court system.

The Methodist Church deals with the resolution of disputes under Chapter 5 of its Manual of the Laws and Discipline of the Methodist Church in Ireland.¹⁰ The discipline of the Church is described as an exercise in spiritual authority for the benefit of members and the honour of our Lord. All members are under the care of the Church Courts. Disputes between lay members may be referred to the Church Council for resolution. Complaints against local preachers may be referred to the Circuit Executive with a right of appeal to the District Disciplinary Committee. For Ministers the District Pastoral Committee will investigate complaints and make a recommendation to the District Disciplinary Committee. All decisions of the District Disciplinary Committee may be appealed to the District Synod and in turn to the Conference. When the Respondent is a local preacher the District Disciplinary Committee is made up of three ministers and four local preachers. When the Respondent is a minister the committee comprises seven ministers, two chosen by the respondent, two by the complainant and two chosen by the District Superintendent,

⁸ Cap VIII. Part II. section 26(4) of the Constitution of the Church of Ireland, <<http://ireland.anglican.org/cmsfiles/pdf/Information/Constitution/08.pdf>> (31 July 2014).

⁹ Cap VIII. Part VI. section 19(a) of the Constitution of the Church of Ireland.

¹⁰ <<http://www.irishmethodist.org/legislation>> (31 July 2014).

the District Superintendent also taking the chair. There is no provision for any members of this committee to be legally trained, and on appeal the matter is heard by the entire District Synod or Conference. In addition to these formal procedures, the Methodist Church has guidelines for Churches on how to handle conflict and instances of breakdown in the pastoral relationship. They stress the need for reconciliation and suggest informal strategies for dealing with conflict at a local level.¹¹

The Presbyterian Church in Ireland has a Judicial Commission with a system of courts under it. The General Assembly is the supreme judicial authority of the Church. The Church encourages members experiencing conflict to resolve it by simply speaking to one another. Where this is not possible either party may contact the clerk of presbytery to help resolve the matter. Where this fails the service of the Presbyterian Conciliation Service may be sought and a conciliator will be provided free of charge to meet with the parties together until a resolution is reached.¹²

Disputes and conflict are normal parts of the life of any body. Reviewing the procedures put in place by religious bodies in Ireland there are some common norms to their approach to dispute resolution, where the details of such a system may be ascertained.

Members are called to resolve disputes between themselves, and to avoid disunity.

Members are called to recognise the spiritual or moral authority of their religious body.

A process of conciliation or reconciliation is preferred to more adversarial structures.

Court procedures may be available to hear disputes

There is usually a right of appeal from the court of first instance

There may be lay and ecclesiastical judges

The judges or disciplinary panel are generally not trained by the religious body for this role.

¹¹ <<http://www.irishmethodist.org/conflict-church>> (31 July 2014).

¹² <<http://www.presbyterianireland.org/Boards/General-Board/Good-Relations-Panel/Conciliation-Service>> (31 July 2014).

II. Religious Disputes: The Approach of the State

In Ireland the State is highly respectful of the right of religious groupings to govern themselves and their members. However, there is limited recognition of religious bodies as an alternative jurisdiction to the civil law, though this may be due to the fact that until recently most laws in Ireland were formulated so as not to antagonise the religious majority. Article 44(2)⁵⁹ of the Constitution¹³ deals with religious autonomy:

“Every religious denomination shall have the right to manage its own affairs; own, acquire and administer property, movable and immovable; and maintain institutions for religious and charitable purposes.”

According to the *Report of the Constitutional Review Group*, this subsection is designed to preserve the autonomy of religious denominations, and it seems to do so satisfactorily¹⁴. Church State relations in Ireland ought to be viewed in two sections, the formation of the State until the 1970's and 1979¹⁵ to the present day.

“Down to the 1970's the position of the Catholic hierarchy in Irish public life seemed fairly clear. While it would be an exaggeration to call Ireland a theocratic state, the hierarchy has immense influence, receiving a deference that marked it out from other influence groups [...] notably in education and family law Governments habitually consulted it before making policy changes, and acted in accordance with its advice. [...] their views could modify government policy.”¹⁶

Recent decades have witnessed more conflict between the State and the hierarchy, with reduced Church influence both leading to and resulting from legislative changes in education, family law and health. Towards the end of the 1970's, growing concern was voiced in Catholic and conservative circles at the liberal direction Irish society was taking. In *McGee v. Attorney General*¹⁷ the Supreme Court ruled the ban on the sale of contraceptives in section 17 of the Criminal law (Amendment) Act 1935¹⁸ had not survived the Constitutional protection of the Plaintiff's right to marital privacy enshrined in Articles 40 and 41. The court had in part relied on the U.S. Supreme Court decision in *Griswold v. Connecticut*¹⁹, a case that had also formed the

¹³ Constitution of the Irish Free State (*Saorstát Éireann*) Act, 1922 (no. 1) as amended.

¹⁴ The Report of the Constitutional Review Group of 1996.

¹⁵ 1979 is suggested as a turning point as this was the year when the *Oireachtas* passed the Health (Family Planning) Act, no. 20 of 1979, that rectified the legal anomalies introduced by the McGee decision five years earlier.

¹⁶ J. H. Whyte, 'Recent Developments in Church State Relations', (1985) 6 *Serbhís Phoiblí*, no. 3, 4–10.

¹⁷ Supreme Court, 19 December 1973, *McGee v. Attorney General* [1974] Irish Reports 284 at 298.

¹⁸ No. 6 of 1935.

¹⁹ Supreme Court of the United States, 7 June 1965, *Griswold v. Connecticut* (1965) 381 US 497, quoted in *McGee v. Attorney General*, *supra*, n. 17, at 302.

basis for *Roe v. Wade*²⁰. There was considerable academic speculation that an increasingly emboldened Supreme Court in Dublin would decide that the Constitutional right to privacy encompassed a right to abortion.²¹ This led to the Eighth Amendment to the Constitution of Ireland, the anti-abortion amendment, the effect of which is only now being clarified with the Protection of Life during Pregnancy Act 2013²².

The Irish State has been slow to interfere in the internal disputes of religious groups. When such cases come before the courts, they are generally unwilling to 'lift the veil' and consider either doctrine or the internal regulation of Churches. One notable exception was the case of *Re Tilson*.²³ A Protestant husband had agreed with his Catholic wife that any children would be raised as Catholics. He left the family home taking two of his sons and depositing them in a Protestant School. The wife sought *Habeas Corpus* and it was granted in the High Court by Gavan Duffy J., who applied the *Ne Temere* decree of the Catholic Church on the basis that the Irish Constitution recognised the 'Special Position' of the Catholic Church.²⁴ On Appeal the Supreme Court upheld the decision, but differed in its reasoning, relying on the agreement between the parents, not the special position provision.²⁵ In *O'Callaghan v. O'Sullivan*²⁶ the Supreme Court held that canon law is foreign law, which must be proved as a fact and by the testimony of expert witnesses according to the well-settled rules as to the proof of foreign law, but only where it governs a relationship that is at issue.

In recent decades the State has removed from religious bodies some of the historic privileges they have enjoyed, particularly around marriage. Whereas previously religious bodies could issue licences and special licences for the marriage of their members, following the Civil Registration Act 2004²⁷, the Civil Registrar must issue all marriage licences, and only when the Civil Registrar agrees can any marriage be conducted in a place of worship. Religious bodies wishing to continue to conduct

²⁰ Supreme Court of the United States, 22 January 1973 (1973) 410 US 113.

²¹ J. O'Reilly, 'Marital Privacy and Family Law', (1977) 66 *Studies*, pp. 8–24; W. Binchy, 'Marital privacy and Family law: A Reply to Mr. O'Reilly', (1977) 66 *Studies*, pp. 330–335; J. P. Casey, 'The Development of Constitutional Law under Chief Justice O'Dalaigh', (1978) 2 *Dublin University Law Journal*, pp. 1–20.

²² No. 35 of 2013.

²³ High Court, 27 July 1950, *Re Tilson* [1951] Irish Reports 1, (1952) 86 *Irish Law Times Report*, pp. 49–73.

²⁴ The Special Provision was repealed in 1973 – The Fifth Amendment to the Constitution.

²⁵ Supreme Court, 5 August 1950, *Re Tilson* [1951] Irish Reports 1.

²⁶ Supreme Court, 31 March 1925, *O'Callaghan v. O'Sullivan* [1925] 1 Irish Reports 90.

²⁷ No. 3 of 2004.

legally recognised marriage ceremonies had to register and as part of this process they had to draw up a their own legal code which would have to be accepted by the State, pursuant to sections 53–57 *leg. cit.* Thereafter Solemnisers of Matrimony who were members of registered religious groupings would be bound by both the civil code and their religious body's own internal regulations. Though this has removed some autonomy from religious bodies it has also removed the potential for legal liability if a marriage is solemnised between those not entitled to marry, and has thus been welcomed by many religious bodies. The State's insistence that each religious body adopt its own code is an instance of recognizing their jurisdiction to make rules for members which the State will insist are followed in order for a marriage to be binding.

One area where the State shows notable deference to the dispute resolution of religious bodies is in the area of sacerdotal privilege. Whilst the doctrine existed in Ireland pre-independence for sacramental confession, this limited precedent was not followed in the case of *Cook v. Carroll* where the judge, Gavan Duffy J. felt free to treat the law on the topic at the date of the Constitution as *tabula rasa*.²⁸ Gavan Duffy resolved to

“determine the issue raised in this case on principle and in conformity with the Constitution of Ireland. That Constitution in express terms recognizes the special position among us of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens.”²⁹

The term used throughout the judgement by Gavan Duffy J. was not ‘Seal of the Confessional’, but ‘Sacerdotal Privilege’, a term that would seem to have a much wider meaning than the sacrament of penance. He defines the term as describing

“a legal right for a priest to refuse in a court of law to divulge any confidential communication whatsoever made to him as a priest.”³⁰

Though this case has been said to create a new category to the communications which a witness is privileged from being obliged to disclose,³¹ there are efforts to dismantle the privilege. The Heads of the Children First Bill 2012³² and the Criminal Justice (Withholding of Information on offences Against Children and Vulnerable Persons) Act 2012³³ have both been said to incorporate an element of mandatory re-

²⁸ High Court, 31 July 1945, *Cook v. Carroll* [1945] Irish Reports 515 at 119.

²⁹ *Ibid.* at 116 f. See Article 44(1)2 (repealed) of The Irish Constitution.

³⁰ *Cook v. Carroll, supra*, n. 28 at 116.

³¹ J. M. Kelly, *The Irish Constitution*, 4th ed. (London 2004), p. 2039.

³² <http://www.dcy.gov.ie/documents/publications/CF_Heads_and_General_Scheme.pdf> (31 January 2014).

³³ No. 24 of 2012.

porting of knowledge of abuse. Indeed, the Minister for Justice has noted that the issue of sacerdotal privilege has never been considered by the courts in relation to information pertaining to child abuse.³⁴

The State makes a variety of concessions to the internal regulations of religious bodies when it comes to matters of employment and settling employment disputes. Religious bodies have the benefit of certain exemptions from equality legislation when offering employment.³⁵ Moreover, the State is slow to apply normal employment rights and obligations where the relationship in question is between a religious body and a spiritual leader. The leading case of *Fraser*³⁶, saw the court give a strong ruling

“[t]he claimant is an office-holder and not an employee. No contract of employment exists; the nature of the relationship cannot be analysed in contract terms because the tribunal does not accept that there was an intention to create legal relations. The nature of the relationship with the church is that of a vocation or a calling, which cannot be grounded in the common law notion of contract. The claimant's duties are defined and his activities are dictated not by contract but by conscience.”³⁷

The greatest level of scrutiny by the State of the internal procedures of any religious body has come in the form of the Inquiries into child sex abuse in schools, orphanages and Laundries run by the Catholic Church. The Reports focused mainly on documenting the abuse, but also considered the internal procedures used by the Church to deal with offenders who were priests and the desire to protect the good name of the Church. The Ryan Report, the Ferns Report,³⁸ the Cloyne Report,³⁹ and the Murphy Report⁴⁰ all criticised the internal disciplinary procedures of the Church as being unduly concerned with the avoidance of scandal and with moving priests from parish to parish. The Murphy Report into sexual abuse in the Archdiocese of Dublin concluded that

“the Dublin Archdiocese's preoccupations in dealing with cases of child sexual abuse, at least until the mid-1990s, were the maintenance of secrecy, the avoidance of scandal, the protection of

³⁴ <<http://www.justice.ie/en/JELR/Pages/SP12000130>> (31 July 2014).

³⁵ Section 37 of the Employment Equality Act 1998 (no. 21 of 1998). A Bill will be debated by the Oireachtas in the autumn that may erode these provisions. See <<http://www.oireachtas.ie/documents/bills28/bills/2013/2313/b2313s.pdf>> (31 July 2014).

³⁶ Employment Appeals Tribunal, 23 June 2005, PW 27/2004, *The Representative Church Body v. David Frazer* [2005] 16 Employment Law Report, pp. 292 ff.

³⁷ *Ibid.*, p. 296.

³⁸ The Ferns Report was not published online by the Irish Government, but can be found at <<http://www.bishop-accountability.org/ferns/>> (31 July 2014).

³⁹ <http://www.justice.ie/en/JELR/Pages/Cloyne_Rpt> (31 July 2014).

⁴⁰ <<http://www.justice.ie/en/JELR/Pages/PB09000504>> (31 July 2014).

the reputation of the Church, and the preservation of its assets. All other considerations, including the welfare of children and justice for victims, were subordinated to these priorities. The Archdiocese did not implement its own canon law rules and did its best to avoid any application of the law of the State.”⁴¹

Whilst the State has not sought to intervene in the canon law of the Church, it has been critical of the way in which the Church responded, and has announced details of further enquiries into mother and baby homes and the way in which the Church conducted adoptions in the early decades of the State. The State is becoming less deferential and more self assured in critiquing the law of the Church and in seeing the civil law as supreme.

III. Religious Perspectives on State Approaches to Religious Disputes

There is an inherent difficulty in Ireland in separating the attitudes of religious people from the attitude of the State in that the vast majority of the population, and even more so politicians, are Roman Catholics, at least nominally associated with the Church. That said, some religious groups sense a militant secularism in Ireland. Pan-denominational groups such as the Iona Institute seek to preserve and promote the place of marriage and religion in Irish Society.⁴² The newly formed Association of Catholic Priests occasionally comments in the media, trying to draw a distinction between the Church of the 1940’s and the Church of today. They sometimes criticise the government for the conduct of investigations, though they usually fall foul of public opinion in so doing.⁴³

Occasionally religious groups and religious individuals react to the perceived threat to their right to live out their faith in the public sphere, or in response to perceived State interference in matters of religious expression or governance. Recently Kerry County Council took the surprising decision to erect a crucifix in the new council chamber. The move was the idea of Councillor John-Joe Culloty, whose supporters reportedly argued that they were ‘tired of apologising’ for their religion and passed a motion calling for the erection of the crucifix “in light of our Christian faith

⁴¹ *Ibid.* at section 1.15: <<http://www.justice.ie/en/JELR/DACOI Part 1.pdf/Files/DACOI Part 1.pdf>> (31 July 2014).

⁴² <<http://www.ionainstitute.com/index.php?id=47>> (31 July 2014).

⁴³ <<http://www.irishcatholic.ie/article/acp-accused-lack-learning-sexual-abuse>>; <<http://www.irishcatholic.ie/article/acp-call-reinstate-abuser-priests-wrong-child-protection-expert>> (both 31 July 2014).

and the strong Christian values contained within our Constitution”⁴⁴. Writing about the development in the Irish Times, Dr Ronan McCrea of UCL noted

“[i]ndeed, in the *Lautsi* case the ECHR upheld the display of the cross in Italian schools because the decision was merely perpetuating a pre-existing cultural tradition. Kerry County Council’s decision is different. It decided to erect for the first time in its history a religious symbol in its chamber to ensure that the values of a particular faith would have predominance in an institution meant to make rules for all the people of Kerry. This has nothing to do with tradition or identity, but with the promotion of a particular faith by a State institution. State bodies should not promote Catholicism, Islam or atheism, but be committed to co-existence and equal respect for those of all faiths and none.”⁴⁵

The majority of press comment and public opinion is highly skeptical of the ability of religious groupings to be given free reign to settle disputes which govern the rights of citizens of Ireland. The abuse scandals and the high proportion of schools under the patronage of the Catholic Church have combined to create an impression of a powerful religious grouping that is barely subject to State control. The approach of the press is largely in favour of greater State intervention coupled with an impatience that the State is only now addressing these issues.⁴⁶

The public debate on the matter is not of a high standard. Many of the emotions relating to the past are still raw and the debate causes high passions and political opportunism. Academically there is an emerging interest in this sphere and in the interface of law and religion generally. Arguably the reason there is limited debate is that there is widespread consensus that the deference to the Church needs to change. This is shown in the fact that calls for change are often led by the Catholic Archbishop of Dublin, who has called for more inquiries into child abuse⁴⁷ and has been quick to apologise⁴⁸ and insist that the Church must change.⁴⁹ It will only be with the passage of time and the resolution of these issues that a proper debate on Religious Parallel Jurisdictions can happen in Ireland.

⁴⁴ <<http://www.irishtimes.com/news/social-affairs/kerry-county-council-crucifix-a-challenge-to-religious-diversity-1.1879912>> (31 July 2014).

⁴⁵ *Ibid.*

⁴⁶ <<http://www.irishexaminer.com/viewpoints/yourview/state-has-been-slow-to-get-own-house-in-order-163340.html>> (31 July 2014).

⁴⁷ <<http://www.independent.ie/irish-news/diarmuid-martin-calls-for-inquiry-after-tuam-baby-scandal-30338144.html>> (31 July 2014).

⁴⁸ <<http://www.rte.ie/news/2011/0220/297882-abuse/>> (31 July 2014).

⁴⁹ <<http://www.thejournal.ie/diarmuid-martin/news/>> (31 July 2014).

RELIGIOUS JURISDICTIONS IN ITALY

Roberto Mazzola, Alessandria

I. The Resolution of Disputes: The Practices and Norms of Religious Communities

The legacy of Santi Romano in the tradition of Italian Public Law is deep rooted. The principle of pluralism in legal systems means that other forms of domestic justice simultaneously contribute to the administration of state justice, among which, judicial organs of religious denominations may also be found. This concurrent system legitimises the use of the words ‘internal justice’; a term civil legal studies have long used to describe the resolution of disputes within associated groups.¹

In Italy, these forms of *autodichia* involve many churches and religious societies. The only exceptions are those of Muslims and Hindus, omitted by the Constitutive Act of Association, which explicitly refers matters to civil law. Article 7 of the Statute² of the Italian Hindus states that although not provided for in this Act or the Articles of Association, associate members refer to the laws in force in the field.

With the exception of the cases mentioned, the legal systems of all existing denominations have some form of internal administration of justice. These forms are characterised by some common factors:

- (1) the use of disciplinary measures are considered *extrema ratio*, on the basis of a superior principle of equity and mercy;
- (2) the system is mainly used for the resolution of disputes between organs of the religious organisation and co-religionists, or for matters of a disciplinary nature, for which the suggested measures of discipline are expulsion, loss of rights, or other sanctions. In addition, this also covers personal

¹ Cf. A. Licastro, ‘L’intervento del giudice nelle formazioni sociali religiose a tutela del fedele espulso’, (2005) 13 *Quaderni di diritto e politica ecclesiastica*, pp. 880–922.

² Atto costitutivo di Associazione “Unione induista italiana (U.I.I.) Sanatana Dharma Samgha”, Decreto del Presidente della Repubblica of 29 December 2000, *Gazzetta Ufficiale* 124/2001.

rights and personal status, for example, in matrimonial matters within the Jewish community and the Catholic Church.

- (3) Judicial proceedings administered within religious denominations are usually voluntary; that is, the litigating parties decide voluntarily and independently to participate in the proceedings and most importantly, as enforcement agencies do not exist within the religious structure, to abide by their decisions. An example can be found in Article 2 of the Waldenses' Agreement (Law no. 449/1984³) where it states that there can be no recourse to the court of State to enforce sanctions in spiritual matters or internal disciplinary procedures.⁴
- (4) The application of the principle of dual level jurisdiction⁵ and, more generally, adherence to the principle of due process, where not only are the parties permitted to appeal decisions rendered by courts of first instance, but, to completely enforce the principle of due process, albeit with different formal solutions compared to those of the state, ensuring compliance with this principle and the right of defence, while guaranteeing equality between the parties, impartiality of the judge and the defendant, as well as reasonable length of trials or disciplinary proceedings.⁶

1. Disciplinary Measures

It must be noted that most religious statutes suggest dealing with non-conformist believers with a charitable and fraternal attitude. Only persistent and continuous forbidden conduct justifies intervention with strict discipline by the competent authority. As an example, Article 46 of the rules of the Baptist Union⁷ states this in relation to serious violations on the part of the minister. In fact, when there is a serious violation of the duties inherent in the function of minister or pastor, the Executive Committee consults with the interested parties, gathering all necessary informa-

³ *Norme per la regolazione dei rapporti tra lo Stato e le chiese rappresentate dalla Tavola valdese*, Gazzetta Ufficiale 222/1984.

⁴ S. Dazzetti, *L'autonomia delle comunità ebraiche italiane nel novecento. Leggi, intese, statuti, regolamenti* (Torino 2008), p. 282; cf. also A. Licastro, *Contributo allo studio della giustizia interna alle confessioni religiose* (Milano 1995).

⁵ G. Dalla Torre, *Lezioni di diritto canonico*, 4th ed. (Torino 2014), p. 239 ff.

⁶ *Ibid.*, p. 240.

⁷ *Regolamento dell'Unione Cristiana Evangelica Battista d'Italia*, <[http://www.ucebi.it/pdf/documenti/Regolamento 2014.pdf](http://www.ucebi.it/pdf/documenti/Regolamento%202014.pdf)> (30 June 2015).

tion before imposing the penalties provided for under Article 45 of the rules, before sending the minister in question a ‘brotherly’ letter of reprehension. Only continuous unlawful conduct warrants the Executive Committee to bring the case before the Board of Elders so that they may proceed with the application of the penalties provided for under Article 45 of the rules. Even more explicitly in this sense, Article 39 of the 1974 General Regulations of the Evangelical Churches⁸ states that the most effective form of discipline is that which is exercised by a ‘means of persuasion and in a spirit of Christian charity’ and only the failure of this approach justifies the use of more persuasive and coercive forms of justice, such as suspension or exclusion from the privileges of the church.

Although written in a weaker tone, the 2004 Statute of the Lutheran Church⁹ provides for more delicate forms of justice. Its Article 11, which relates to the early conclusion of service, insists on prudence in the application of sanctions, such as the removal of a pastor from office or termination of the service relationship. Even more explicit, is the rule of the College of Conciliators (Article 31 of the statute). In this document it is expected that in the event of statutory disputes, conciliation between the parties is attempted first and more drastic means resorted to only when a resolution is impossible, according to Article 11(2) of the statute.

Article 51 of the Statute of the Union of Jewish Communities¹⁰, which covers rules regarding arbitration in certain circumstances, is even more indirect and advocates a friendly and fraternal approach to disputes as well.

2. Dispute Resolution between Organs of the Religious Organisation and Co-Religionists

It is not only the tone, but the object of the judicial function has some common features too. An analysis of the rules or instruments of the constitutions of some minority religious groups, shows that internal justice is developed mainly on two levels: through internal conflicts between statutory authorities, and with disciplinary action against defaulters and believers who fail to observe the statutory rules. Re-

⁸ *Disciplina generale delle Chiese evangeliche valdesi DV/1974* <http://www.chiesavaldese.org/documents/discipline/03_dv.pdf> (30 June 2015); cf. G. Long, *Ordinamenti giuridici delle chiese protestanti* (Bologna 2008).

⁹ *Statuto della Chiesa evangelica luterana in Italia* <<http://www.chiesaluterana.it/celi/statuto-della-chiesa-luterana/>> (30 June 2015).

¹⁰ *Statuto dell'Unione delle Comunità ebraiche* <<http://www.ucei.net/documenti/documenti-interni/statuto/>> (30 June 2015).

garding the first of the two dimensions of domestic justice, paradigms appear in the powers conferred to the Arbitration Board by Article 50 of the Statute of the Union of Jewish Communities. The jurisdiction of this union is divided between the individual communities and the Union. In fact, one of its roles, is to rule on appeals against decisions to refuse or remove members from the community register or from the electoral roll according to Articles 2(3) and 14(3) of the statute, provided that the appeal is not justified by reasons relating to the interpretation of the Torah and the *Mishnah*. In this case, material jurisdiction would fall upon the other judicial body, the Rabbinic Council.

In this regard, it should be noted, that although Article 52 of the statute calls for a similar organisation within trade unions and political parties, its authority has different dynamics when dealing with the legal organs of associations. In particular, the subject matter of judgements refers to the statutory autonomy of religious denominations and therefore does not fall under State competence. As a result, this organisation cannot be treated as the Council of Arbitrators of the legal system of internal associations, since its cause is a form of legal protection that provides a radical alternative to that offered by the Legal system of the State. Hence, the disciplinary function of the rules is to resolve internal tensions in the interest of unity within the religious community. This is stated in Article 5 of Jehovah's Witnesses' Statute¹¹, but can also be found in Article 45 of the statute of the Baptist Union. To this end, expulsion of members due to serious non-fulfilment of obligations, expected under the Statute for action contrary to the Holy Scriptures, finds its reasoning in the need to prevent these actions from damaging the religious organisation and causing unrest between members of the religious community. For the Baptist Church, in fact, the pastor who teaches or preaches doctrines that are contrary to the Confession of Faith is considered a danger in the church, as such teachings could be a source of potential disagreements and tensions within the community.

Similarly, if the Consistory of the Lutheran Church were to determine that a pastor has not fulfilled his official duties, Article 11 of its Statute would allow the organ of the Consistory to remove the pastor from office and dissolve the relationship of service, or in the case of the mission, to request its removal at the Church of origin. However, in some religions, the exercise of judicial domestic authority isn't limited to administrative and disciplinary cases alone; jurisdictional power extends to areas of personal rights of the believer. In this regard, the issue of rabbinical courts should

¹¹ *Statuto della Congregazione Cristiana dei Testimoni di Geova*, <http://host.uniroma3.it/progetti/cedir/cedir/Ist-rel/TGeova_stat.pdf> (30 June 2015).

be considered. These courts, while in a separate realm to that of the legal system governed by the statutes, constitute an important part of the internal life of the Jewish communities. Indeed, these courts have jurisdiction over all matters pertaining to the interpretation and application of Jewish law, meaning that jurisdiction is extended to problems occurring outside the administration of a community or the Union. Until 31 December 2008, the jurisdiction of *halachah* in Italy was in fact held by the three rabbinical courts in Rome and Milan. These courts primarily ruled on the resolution of disputes concerning the application of Jewish law, the certification of conversions or divorces. Rabbis may at times also be involved in cases of an administrative nature, such as situations of removal of members of the community from the register or from the electoral roll, but this happens only if there are clear referrals to Jewish Law. In such cases, the rabbis must verify their eligibility to deal with the specific administrative responsibilities of the person elected, interpreting Jewish law in an authentic form.

3. Judicial Proceedings

There are different forms of *autodichia* to build on the principle of voluntary jurisdictional action. In practice, the force of the decisions made under the applicable domestic law is based exclusively on the free acceptance of the faithful to recognise them as binding. The agreement to comply with judgements of the internal organs of the courts is tacitly endorsed at the time of entry into the community. A complex aspect of the judicial authority of the organs of religious organisation is that, it expresses a weakness, in particular based on the absence of a coercive power to enforce decisions, regardless of the will of a person on the one hand, while at the same time it testifies to the strength of confessional autonomy, founded on the force of social solidarity in the religious community. The choice made by Article 2 of the Agreement with the Church of the Seventh-Day Adventists (Law no. 516/1988¹²) and by Article 2 of Waldenses' Agreement, renouncing the secular arm to see internal disciplinary sanctions carried out in spiritual matters, is certainly an act of autonomy, based on the most rigorous separatism. However, a choice of this nature is possible only to the extent that it doesn't weaken the covenant between religious communities and believers. The experience of Judaism is a good example. The Jewish legal system did not have an autonomous use of enforcement in the last two thousand years,

¹² *Norme per la regolazione dei rapporti tra lo Stato e l'Unione italiana delle Chiese cristiane avventiste del 7° giorno*, Gazzetta Ufficiale 283/1988, Supplemento Ordinario no. 107.

or alternatively, in the period during which the Jewish legal system as we know it was formed.¹³ In such a situation, common and mutual obligation and the myth of the divine commandment became indispensable elements to the cohesion of the religious community, able to create a supportive network that allows for voluntary recognition that is free of prescriptive disciplinary measures.

The same ‘autopoietic’ mechanism is found in the *latae sententiæ* penalty, where the faithful face the penalty alone, attempting to use personal power to decide and to form the penalty to be handed down, becoming, if you will, the arbiter in deciding whether to limit rights by giving or not giving effect to the sanction.¹⁴

4. Due Process

Following this, examinations of the statutes and legal systems of religious organisations show full compliance with this principle. However, in this context, it should be emphasised that within the legal system or statute, respect of this particular principle should not necessarily be protected in the same form that is provided for by State law or the ECHR. In other words, it must exclude the requirement of loyal application – within the religious law – for the development of case law around Article 24 of the Civil Code¹⁵, or the development of case law for due process under Articles 111 and 24 of the Constitution.¹⁶

Assimilating this Civil law principle into the system, results in more rules on the part of religious organisations. Thus, Article 42 of the 1974 General Regulations of the Evangelical Churches begins by stating that disciplinary measures may be applied only if the rule of contradiction has been followed by all parties, or if the person has had a hearing and has been notified of the decisions taken against him. Moreover, when countering measures taken in disciplinary law, the statute provides that everyone has the right to appeal to the regional executive body, whose decision, in turn, can be appealed before the Regional Assembly.

The same rule also provides that despite the sanctions applied or decisions taken, both in the first and second instances, by the Waldensian Table, the regional assem-

¹³ R. Cover, ‘Obbligazione (“mitzvah”). Una concezione ebraica dell’ordine sociale’, (2008) 8 *Daimon*, pp. 173–182 (p. 176).

¹⁴ Cf. R. Mazzola, *La pena latae sententiae nel diritto canonico. Profili comparati di teoria generale* (Padua 2002), pp. 291 ff.

¹⁵ Regio Decreto no. 262/1942, *Approvazione del testo del Codice civile*, Gazzetta Ufficiale 79/1942 as amended.

¹⁶ Tribunale di Torino, 15 February 1996, (1996) *Le Società*, p. 1299.

blies, by the executive or regional ecclesiastical councils and consistories, it is possible to appeal in front of the sessions of the Synod of the area, whose rulings are final and take effect, but cannot be appealed, contrary to the above-mentioned rule.

What seems more incomplete are the rules contained in Jehovah's Witnesses' Statute. According to its Article 9, the Managing Committee is provided with the power to establish special Committees to carry out specific tasks which include judicial proceedings, but doesn't mention the two levels of jurisdiction and the contradictory principle. This omission is not to be found in Article 11 of the Statute of the Lutheran Church. Its Article 11(3) grants the pastor responsible for unlawful conduct a right of recourse to the College of Mediators; a rule that is also provided for in Article 35 of the Statute of the Union of Jewish Communities, where the Arbitration Commission decides on appeals concerning the assessment basis for the calculation of the amount of the community contribution from the decisions of first Instance handed down by Community Councils.

II. Religious Disputes: The Approach of the State

The forms of *autodichia* cannot prevent the right of the faithful to bring disputes to civil court when there is a reasonable suspicion that some fundamental rights have been violated. Regarding this, religious denominations cannot be autonomous movements in which the application of Article 2 of the Constitution¹⁷ is suspended, weakening the level of protection of human rights. Respect for the constitutional reservation of jurisdiction ratified in Article 8(2) of the Constitution which recognises and sanctions the autonomy of the religious order, cannot exclude the intervention of the state if an issue concerns the primary requirements related to the protection of persons, or if the supreme principles of state order are in danger.

In other words, all social groups, including religious groups, must respect human and fundamental rights. In particular, three issues merit more attention: first, how State law regulates the effect of decisions taken by religious courts. Second, whether the parties who have been handed a disciplinary action by a religious authority can call upon State courts to judge the action; and finally, the delicate question of the limits imposed by the State to exercise the right of religious freedom, in cases of conscientious objection.

¹⁷ *Costituzione della Repubblica Italiana*, Gazzetta Ufficiale 298/1947, as amended.

Regarding the first of the two aspects of the problem, it must be noted that the problem is usually resolved by judicial decision in strict compliance with the principle of separation. The question of the civil effectiveness of judgements passed down by the rabbinical courts regarding divorce is a perfect illustration of this. In fact, after a long period of legal uncertainty, State courts have decided to accept the rulings of the rabbinical courts in divorce cases by mutual consent. In particular, in 1991, the Court of Milan ruled to uphold the decision made by the Rabbinical Court of Rome in the dissolution of a marriage celebrated in Israel between an Italian citizen and an Italian-Israeli citizen, later transcribed in the Italian register of civil status.¹⁸ The decision of the Israeli Rabbinical Court is, in fact, a good precedent for a declaration of invalidity in the Italian legal system, since it comes from a recognised religious judicial authority, in the country of origin of the foreign spouse, it is federal and consequently, considered as being obtained abroad, according to Article 3(2)e of Law no. 898/1970¹⁹. To give effect to a *get*, it is therefore necessary to resort to channels of international private law, overcoming the prohibition provided for by Article 14(9) of Law no. 101/1989²⁰, which provides that the State recognises the right to celebrate and dissolve religious marriages according to Jewish law and Jewish tradition, to the Union of Italian Jewish Communities, providing that such decisions do not impact public policy. The issue is far from resolved, since the Bologna Court of Appeal denied the validity of a final judgement of the Rabbinical Court of Jerusalem some years ago, by refusing to recognise a marriage celebrated according to Jewish law in Padua.²¹ The Bologna Court of Appeal was of the opinion that in that case, the rejection of the transcription by the legal officer was justified because the judgement of the Rabbinical Court was contrary to the definitive judgement of the Venice Court of Appeal.²²

Further, the right to appeal to State Courts, in cases when it is considered that the decision of a religious authority has violated an individual right, can be found under Civil Section IV of the Ordinary Court of Bari of 2004.²³ There the court revoked the order made one year previously by the Section of Bitonto in the Court itself. In this,

¹⁸ Tribunale di Milano, 5 October 1991, (1992) 28 *Rivista di diritto internazionale privato e processuale*, pp. 123–127.

¹⁹ *Disciplina dei casi di scioglimento del matrimonio*, Gazzetta Ufficiale 306/1970, as amended.

²⁰ *Norme per la regolazione dei rapporti tra lo Stato e l'Unione delle Comunità ebraiche italiane*, Gazzetta Ufficiale 69/1989, Supplemento Ordinario no. 21.

²¹ Corte di Appello di Bologna, 1 June 2005, (2007) 43 *Rivista di diritto internazionale privato e processuale*, pp. 142 ff.

²² Corte di Appello di Venezia, 25 June 1996, (1997) 53 *Il Foro padano*, pp. 204 ff.

the expulsion order against the plaintiff, adopted by the Christian Congregation of Jehovah's Witnesses, was provisionally suspended, revealing that the limits of the Rabbinic Court was contrary to the definitive judgement of the Court of Appeal of Venice.²⁴

This illustrates that the State may interfere in the domestic judicial activities of religious organisations when it is considered that the decision of religious authority has violated an individual right. The salient points of the judicial reasoning were as follows:

- According to the Supreme Court, trials regarding expulsion from a religious organisation for religious reasons are prohibited, stating that State courts have no jurisdiction over disputes intended to censor a decision about expulsion.²⁵
- Respect for the autonomy of domestic justice within religious organisations does not necessarily mean, however, that justice within the domestic religion with regards to disciplinary sanctions is absolutely unquestionable. This is not only because the statutes of the organisation must not be contrary to State law (Article 8 of the Constitution), but primarily because the disciplinary measures and sanctions should always be respectful of the dignity and honour of the person, either with regard to how the decision is formulated, or with regard to how the decision is publicised.
- Freedom of religious organisations is a factor that must be incorporated and balanced with other fundamental values and principles of the constitution and legal system, including the right of defence.²⁶ However, generally this must occur with every essential and inalienable principle of the legal order.
- Finally, the freedom and defence of persons within religious organisations must also be incorporated and balanced with the freedom of the religious organisation, since these represent spirituality and faith which also merit

²³ Tribunale di Bari, Sezione IV civile, 6 December 2004, 6990/R.G. 2004, (2005) 166 *Il Diritto Ecclesiastico*, II, pp. 72–77 = <http://host.uniroma3.it/progetti/cedir/cedir/Eventi/Trib_Bari-Ord2004Rev.pdf> (30 July 2015).

²⁴ Cf. L. Musselli, "Il riformismo legislativo in diritto ecclesiastico e canonico: aspetti internazionalistici", (2010) *Rivista informatica Stato e Chiesa*, <http://www.statoechiese.it/images/stories/2010.7/musselli_il_riformismom.pdf> (9 September 2014).

²⁵ Corte di Cassazione (Sezioni Unite), 27 May 1994, no. 5213.

²⁶ See *supra*, p. 128.

protection. The difference between the individual and the group cannot be disregarded from the idiosyncrasies of the religious experience.²⁷

In addition to the discussion of religious intervention that limits freedom of conscience and its interactions with public policy, another particularly complex issue should also be considered: the position of the State regarding transfusions of blood or blood components and auto-transfusion, as well as the administration of blood products. In short, the decree of the Minister of Health on 1 September 1995 established clear guidelines on the subject,²⁸ which include the legal position of Jehovah's Witnesses. According to Article 4(2) of the decree,

- in the interest of protection, the transfusion will obviously be ordered by the judge;
- in situations where death is imminent, which must be documented in detail in the clinical files, the doctor is permitted to perform a blood transfusion without the consent of the patient;
- where the patient has formally declared that they wish to refuse blood transfusions, the doctor, even in cases where such a transfusion would be required, cannot proceed with the transfusion.

Statutory autonomy of religious organisations is much easier to establish. Article 8(2) of the Constitution states clearly that every religion is free to organise itself as it wishes, on the condition that the statutes are not in conflict with State law. The case of the Statute of the Union of Jewish Communities is illustrative of this. Awarded in 1931 by the State in accordance with the Union of Jewish Communities by Royal Decree no. 1731/1930²⁹, it was not until the 1989 agreement between the Italian Republic and the Union that an autonomous status was granted to the Jewish communities. This is emphasised in Article 1 of the Union's statute, which rejects any form of interference by the state in the activities of Jewish communities, thus qualifying the communities as social and original groups, organised according to Jewish law and Jewish tradition. This is also found in Article 5 of the General Regulations of the Evangelical Churches, where the prohibition of any form of interference or restriction by civil society is emphasised. Following this, it must be noted that a limit is

²⁷ Tribunale di Bari, Sezione IV civile, 6 December 2004, 6990/R.G. 2004, (2005) 166 *Il Diritto Ecclesiastico*, II, pp. 72–77 = <http://host.uniroma3.it/progetti/cedir/cedir/Eventi/Trib_Bari-Ord2004Rev.pdf> (30 July 2015).

²⁸ *Disciplina dei rapporti tra le strutture pubbliche provviste di servizi trasfusionali e quelle pubbliche e private, accreditate e non accreditate, dotate di frigoemoteche*, Decreto ministeriale of 1 September 1995, Gazzetta Ufficiale 240/1995.

²⁹ *Norme sulle Comunità israelitiche e sulla Unione delle Comunità medesime*, Gazzetta Ufficiale 61/1931.

set by Article 8(2) of the Constitution, which grants public authorities, particularly the Home Office, with a high level of discretionary power. This power extends, for example, to the recognition, or lack thereof, of the legal personality of the religious faith, knowing that this decision depends, in part, on the interpretation of agreements, and therefore the opportunity to enjoy more favourable legislation than that expressed in Law no. 1159/1929³⁰.

III. The Catholic Church

Regarding the exercise of the *potestas iudicialis* in the Catholic Church, can. 1401 of CIC 1983, grants the Church the full and exclusive right to judge cases dealing with spiritual affairs and those dealing with the violation of ecclesiastical laws as well as the subsequent determination of guilt and the imposition of penalties. This means that the ecclesiastical judge is the only judge with jurisdiction in these areas, excluding any other judge, in particular a State judge. In this sense, every worshipper can apply to the ecclesiastical judge competent in that area or on the basis of other parameters prescribed by the code. Can. 1407 of CIC 1983, in fact, provides for the criteria that may apply in cases regarding the domicile of the parties, the subject of the litigation, or the proceedings. There are also some areas, concerning cardinals, bishops or papal legates, for which there is a specific jurisdiction, such as in criminal cases, where in accordance with can. 1405 of CIC 1983, jurisdiction lies with the Pope. On the other hand, it must be remembered that objectively, the Pope can always decide to rule on any case, thus rendering the judge who would otherwise have been called to adjudicate the dispute, incompetent. In this regard, any member of the faithful, in any part of the world, has the right to recourse to the judgement of the Pope as the supreme judge in the Church, at any time and for any reason (can. 1417 of CIC 1983). Where cases involve bishops or superiors of monastic congregations or religious institutes of pontifical right, the designated court is the Roman Rota.

The judicial system of the Catholic Church thus forms a part of this framework and its domestic justice is governed by the courts of first instance (can. 1419 of CIC 1983) implemented in each diocese or religious institution, in accordance with the provisions of can. 1427 of CIC 1983. The courts of second instance are usually established by the archdiocese (can. 1438 of CIC 1983). This organisation is integrated

³⁰ Gazzetta Ufficiale 164/1929.

with the courts of the Holy See, or the Roman Rota, the Supreme Tribunal of the Apostolic Signatura and the Apostolic Penitentiary. Episcopal Conferences may, depending on the territory and with the consent of the Holy See, set up courts of second instance. In special cases, the canonical legislature may structure the organisation of courts in a different manner, as occurred in Italy with the *motu proprio* 'Qua cura' by Pius IX on 8 December 1938³¹, in relation to matrimonial matters; the only cases which can be judged by regional courts.

The challenge lies in understanding how the judicial system interacts with the state legal system; whether State and ecclesiastical jurisdiction compete with each other; whether ecclesiastical judgements are relevant to State law. Answers to these questions can be found within the legal framework of the Concordat,³² as amended by the Agreements of Villa Madama in 1984³³ and the case law of merit and legitimacy that has been consolidated around the normative treaty system since the mid-eighties onwards. What then, are the key problems in the system?

- limitations in the effectiveness of civil judgements on the nullity of marriage through the enforcement procedure;
- the controversial issue of competition between the civil and ecclesiastical jurisdiction in matters of matrimonial nullity;
- the complex relationship between the final civil judgement relating to separation and divorce and the judgements of nullity of marriage;
- the question of whether or not civil judgements on the dissolution of religious, non-consummated marriage are effective.

The need to provide a solution to these problems has forced both the legislature and judges to develop a framework of shared principles, which can be briefly summarised as follows:

- The exclusion of automaticity in the enforcement procedures of judgements on the nullity of marriage pronounced by ecclesiastical courts through the responsible court of appeal, must not violate public policy, according to Article 8(2) of Law no. 121/1985³⁴. It is unsurprising, in such cases, that in the end, jurisdiction favours the ecclesiastical courts.

³¹ AAS 1938/30.

³² Law no. 810/1929, *Esecuzione del Trattato, dei quattro allegati annessi c del Concordato, sottoscritti in Roma, fra la Santa Sede e l'Italia, l'11 febbraio 1929*, Gazzetta Ufficiale 130/1929, Supplemento Ordinario.

³³ *Ratifica ed esecuzione dell'accordo, con protocollo addizionale, firmato a Roma il 18 febbraio 1984, che apporta modificazioni al Concordato lateranense dell'11 febbraio 1929, tra la Repubblica italiana e la Santa Sede*, Gazzetta Ufficiale 85/1985, Supplemento Ordinario.

³⁴ *Ibid.*

- The competition between civil and ecclesiastical jurisdictions is only weakened by the ‘prevention principle’ in the nullity of religious marriages civilly recognised. State courts have to apply State law and not Canon law, according to Article 7 of the Constitution.³⁵
- Without prejudice to the fact that the matter of property relations between spouses is the responsibility of the State, the *exequatur* of an ecclesiastical sentence of nullity cannot overturn the ruling of the divorce decree concerning the assignment of property, as the judge trained in the field, pursuant to Article 324 of the Code of Civil Procedure³⁶ remains inviolable under Article 2909 of the Civil Code.
- Finally, the exclusion of the effectiveness of civil dispensation of a valid, unconsummated canonical marriage, fully satisfying the provisions of Article 34 of Law no. 810/1929³⁷ and Article 17 of Law no. 847/1929³⁸, was declared unconstitutional by the Constitutional Court.³⁹

The Holy See is not just an exponential part of the Catholic Church, but also the representative body of the State of the Vatican⁴⁰ In this regard, what matters most is the paradigm shift of interpretation given by the Agreements of Villa Madama in Article 23(2) of the Lateran Treaty⁴¹. If in the past, the latter recognised the immediate civil effect of judgements and measures taken by the ecclesiastical authority that were officially communicated to the civil authority by the ecclesiastical and religious individuals who dealt with the disciplinary procedures related to religious and spiritual matters, today, under no. 2c of the Additional Protocol to Law no. 121/1985, the effectiveness of such measures in the civil order is subject to their compliance with the constitutionally guaranteed rights of Italian citizens.

This rule does not fully cover the legal relationship between Italy and the Vatican. In the case of the service of civil and commercial documents, the agreement signed in 1932 and enforced by Law no. 379/1933⁴², provides that in the case of a notifica-

³⁵ Corte di Cassazione, 13 February 1993, no.1824.

³⁶ *Codice di Procedura Civile*, Regio decreto-legge no. 1443/1940, in materia di “Codice di procedura civile”, Gazzetta Ufficiale 253/1940, as amended.

³⁷ See *supra*, n. 32.

³⁸ *Disposizioni per l'applicazione del Concordato dell'11 febbraio 1929 fra la Santa Sede e l'Italia, nella parte relativa al matrimonio*, Gazzetta Ufficiale 133/1929.

³⁹ Corte Costituzionale, 2 February 1982, no. 18, (1982) 93 *Il Diritto Ecclesiastico*, II, pp. 89 f.

⁴⁰ Cf. F. Finocchiaro, *Diritto ecclesiastico* (Bologna 2003), pp. 242 f.

⁴¹ See *supra*, n. 32.

⁴² *Esecutorietà della Convenzione con dichiarazione annessa, stipulata in Roma, tra la Santa Sede e l'Italia, il 6 settembre 1932, per la notificazione degli atti in materia civile e commerciale*, Gazzetta Ufficiale 107/1933.

tion in the Vatican, the party must make an application to the Prosecutor's Office, who will then turn to the promoter of justice of the Court of First Instance in the Vatican, to proceed with the notification. If the party being brought before the court is the Pope or the Holy See, the summons shall be made in person by the Cardinal Secretary of State. Following this logic, if the Vatican is brought before the court, the summons shall be served to the Vatican Governor. Finally, with regard to criminal jurisdiction under Article 22 of the Lateran Treaty, it provides that the Italian judicial authorities will prosecute those responsible for crimes committed in the Vatican if the Holy See requires, or provides a permanent delegation. If the offender has taken refuge in Italian territory, the procedure may commence without the need to request a delegation. The Treaty also provides that the Holy See commits to handing over individuals who have taken refuge in the Vatican who are accused of acts committed in Italy against the Italian state, provided that such acts are considered criminal by both jurisdictions.⁴³ It should also be pointed out that in order to complete this framework, when the Vatican delegates criminal proceedings to the Italian courts for the punishment of crimes committed in the Vatican,⁴⁴ the Italian court must necessarily prosecute, in accordance with the judgement provisions and apply Italian criminal law in accordance with the preservation of sovereignty.⁴⁵

Finally, the Supreme Court⁴⁶, in discussing the sensitive issue of the electromagnetic emissions of the Vatican Radio, has confirmed the line of case law taken thus far regarding Article 11 of the Lateran Treaty, relating to the central body of the Catholic Church. This interpretation is particularly important since only the organs related to that category can enjoy immunity from Italian jurisdiction. In fact, the Supreme Court has reiterated the principle that the duty of non-intervention of the Italian State in the internal corpus of the Church does not imply the renunciation of sovereignty and thus, jurisdiction. Immunity should therefore be adjusted, and be given a restrictive interpretation in order to avoid limits being placed on the sovereignty of the State.

⁴³ E. Vitali and A. G. Chizzoniti, *Manuale breve di diritto ecclesiastico* (Milano 2007), pp. 64 ff.

⁴⁴ Corte di Assise di Roma, 22 July 1981, (1981) 92 *Il Diritto Ecclesiastico*, II, pp. 619-624; cf. <<http://www.notiziariogiuridico.it/agca.html>> (15 July 2015).

⁴⁵ Corte di Cassazione (Penale sezione III), 1 May 1955, (1956) 67 *Il Diritto Ecclesiastico*, II, pp. 201 f.

⁴⁶ Corte di Cassazione (Sezione I), 9 April 2003, no. 441.

LES JURIDICTIONS RELIGIEUSES AU LUXEMBOURG

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I. Introduction

Les juridictions religieuses, c'est-à-dire l'existence d'un droit autonome pour les cultes, son exercice et son efficience pour une société, ne peuvent plus être comparées à ce qui préexistait à l'Etat moderne. A partir des réflexions de Machiavel sur l'Etat et de Jean Bodin sur la souveraineté, s'est en effet forgée d'abord et de manière progressive la conception d'un Etat monopolisant l'entière du pouvoir, s'exerçant sur une population circonscrite à un territoire donné et sans concurrence possible au domaine de sa Loi.¹ Les juridictions religieuses ont alors été minorées (et parfois de manière violente) au profit des juridictions civiles.² Conséquence, l'Etat devint absolu pour tous alors que la religion n'était plus qu'un objet de droit public circonscrit par le Gouvernement. Baruch Spinoza le résuma de la meilleure des façons : « la religion n'acquiert force de droit que par le décret de ceux qui ont le droit de régir l'Etat »³. A présent, les détenteurs du pouvoir ont le droit de tout régler, dans le domaine civil comme dans le domaine sacré. D'une certaine manière les juridictions religieuses sont tolérées mais ne sont pas utiles pour l'Etat et la société. Pour autant deux conceptions de la démocratie à partir du XIX^{ème} siècle vont rouvrir la question de la place ou non de la religion dans la Loi en général et des juridictions religieuses en particulier: il s'agit des conceptions de la démocratie de procédure et de la démocratie de valeurs.⁴

La démocratie de procédure vise à considérer que le cadre juridique libéral (séparation et équilibre des pouvoirs, élections, décentralisation administrative, rejet de la violence dans les rapports politiques, etc.) suffit à lui-même pour que les individus qui

¹ J. Bodin, *Les Six livres de la République* [1576] (Paris 1993).

² L. Strauss, *Droit Naturel et Histoire* [1953] traduction française (Paris 1999).

³ B. Spinoza, *Traité théologico-politique* [1670] traduction française (Paris 1997), ch. 19.

⁴ J. Woehrling. « La Justice constitutionnelle, l'Etat de droit et la démocratie libérale au Canada », in C. Millon-Delsol et J. Roy (dir.), *Démocraties, l'identité incertaine* (Bourg-en-Bresse 1994), pp.179–194.

composent la société y adhèrent et y participent. Leur acceptation de la démocratie de procédure est d'autant plus forte qu'elle consacre la souveraineté et l'autonomie du sujet d'une part et la reconnaissance réciproque d'une égalité formelle entre chaque individu à poursuivre son propre dessein d'autre part. Les citoyens, indépendamment de leur état de nature ou social, munis des mêmes droits politiques, ont tous la liberté de participer et d'agir en politique et ont recours à la seule justice de l'Etat. Dans une telle conception, il n'y a donc plus de place pour des juridictions religieuses.

La démocratie de valeurs conçoit quant à elle que le cadre juridique libéral ne saurait être satisfaisant pour sa légitimité et sa pérennité. Les citoyens participent à la Politique car ils sont persuadés que leurs systèmes normatifs sont non seulement garantis par la procédure mais aussi que les décisions prises dans ce cadre les refléteront. Il s'agit d'admettre qu'une personne ne serait être une pure indétermination, *a fortiori* objet de sa seule volonté, mais inspirée dans ses actes aussi par une transcendance qu'elle soit d'origine culturelle, culturelle, communautaire, relationnelle, etc. Il s'agit aussi de reconnaître que la personne confrontée à la pluralité des « vérités » dans la société rechercherait d'elle-même à établir un minimum d'accords sur les valeurs qu'elle entend partager avec d'autres et qu'elle possède déjà en partie. Il s'agit *in fine* d'affirmer que ce système de valeurs transmis et négocié conditionnent l'ensemble des actions en politique et aucune loi ne saurait se soustraire à celui-ci, au risque sinon d'être illégitime bien qu'ils en respectent la procédure. L'Etat, la Constitution et les politiques publiques sont et doivent être porteuses de valeurs normatives pour tous les citoyens mais doivent aussi laisser la place dans certains domaines de la vie en société et en privée pour d'autres juridictions notamment religieuses.

De la construction de l'Etat moderne et ces conceptions de la démocratie découlent alors quatre idéaux-types de relations entre l'Etat et la Religion en Europe :⁵

- La religion est constitutive de la construction de l'Etat ou de l'émancipation nationale et conserve par conséquent une place de choix dans la définition de certaines politiques publiques.
- La religion remplit des fonctions de délégation de la puissance publique, d'éducation et parfois même de la formation citoyenne.
- La religion est considérée comme une organisation non gouvernementale parmi d'autres de la société civile œuvrant et reconnue comme telle par l'Etat dans le caritatif.
- Le domaine et l'action de la religion sont conditionnés par les règles de l'Etat.

⁵ P. Poirier, A. de Romanet et A. Arjakovsky, *La démocratie une valeur spirituelle* (Paris 2014).

Le Luxembourg jusqu'à l'année 2015 relève à la fois du second et du quatrième idéal type dans la mesure où le régime de coopération existe par un régime de conventionnement entre l'Etat et des religions qui est garanti constitutionnellement d'une part et d'autre part par l'héritage du concordat napoléonien et des règlements grand-ducaux successifs qui tiennent à distance la religion de la sphère publique (parfois même l'assujettisse) bien que son système politique fusse aussi fondé sur le clivage laïcité/religion au tournant du XX^{ème} siècle.⁶

II. Le Cadre constitutionnel au Luxembourg

Initialement, les relations entre les religions et l'Etat ont été déterminées par le Concordat napoléonien⁷ lorsque le Grand-Duché était le « département des Forêts ». Les dispositions constitutionnelles relatives aux religions ont été introduites par la suite avec les articles 20–23 de la Constitution du 9 juillet 1848⁸, et ont été incluses dans les articles 19–22 de la Constitution du 17 octobre 1868,⁹ toujours en vigueur en juillet 2015. L'article 22 *leg. cit.* prévoit à ce titre la ratification de conventions entre les religions et l'Etat qui ainsi contrôle et autorise les activités religieuses sur le territoire luxembourgeois. Ces conventions établies de 1982 à 2004 concernent par ordre chronologique : l'Eglise Protestante Réformée du Luxembourg en 1982,¹⁰ l'Eglise catholique,¹¹ les Communautés israélites du Luxembourg,¹² l'Eglise Protes-

⁶ P. Poirier, « State and Religions in Luxembourg: A « Reconciled » and « Secularized » Democracy », in F. Foret et X. Itçaina (dir.), *Politics of Religion in Western Europe Modernities in Conflict ?* (Abingdon 2011), pp. 91–98.

⁷ Convention entre le Gouvernement français et Sa Sainteté Pie VII, échangée le 23 fructidor an IX (10 septembre 1801).

⁸ Mémorial A 52/1848 ; basée sur la Constitution belge de 1831.

⁹ Mémorial A 23/1868, pp. 220–242.

¹⁰ Loi du 23 novembre 1982 portant approbation de la Convention de reconnaissance de l'Eglise Protestante Réformée du Luxembourg, octroi de la personnalité juridique à celle-ci et détermination des fonctions et emplois rémunérés par l'Etat, Mémorial A 96/1982, pp. 1993–2000.

¹¹ Loi du 10 juillet 1998 portant approbation de la Convention du 31 octobre 1997 entre le Gouvernement, d'une part, et l'Archevêché, d'autre part, portant refixation des cadres du culte catholique et réglant certaines matières connexes, Mémorial A 66/1998, pp. 1318–1323.

¹² Loi du 10 juillet 1998 portant approbation de la Convention du 31 octobre 1997 entre le Gouvernement, d'une part, et les communautés israélites du Luxembourg, d'autre part, Mémorial A 66/1998, pp. 1324–1327 dans sa version modifiée.

tante du Luxembourg,¹³ l'Église Orthodoxe Hellénique du Luxembourg¹⁴ toutes en 1997, l'Église Anglicane du Luxembourg¹⁵ et les Églises Orthodoxes Roumaine et Serbe du Luxembourg¹⁶ en 2004. L'Islam est la seule religion qui depuis 2006, avec le soutien des autres religions conventionnées, à demander de bénéficier de ce régime mais sans succès pour l'instant, notamment en raison de la difficile constitution d'organes représentatifs et stables pour ladite communauté.

Après la modification de l'article 22 *leg. cit.* a en 1998,¹⁷ toute communauté religieuse désireuse d'établir des relations permanentes avec l'État doit répondre à quatre critères :

- professer une religion qui est reconnue dans le monde ;
- être officiellement reconnue dans au moins un État membre de l'UE;
- être prêt à se conformer au cadre juridique et la Constitution du Grand-Duché ;
- être établi au Luxembourg et soutenu par une communauté suffisamment large et représentatif.

Ces dispositions sont toujours en vigueur bien qu'une réforme constitutionnelle, décidée par une coalition gouvernementale inédite au Luxembourg, issue des élections législatives d'octobre 2013, formée des Libéraux, des Socialistes et des Ecologistes sous la présidence de Xavier Bettel, est en cours et qu'une nouvelle convention dans cette perspective a été déjà signée entre l'État et les cultes déjà conventionnés et en y incluant pour la première fois la communauté musulmane ayant désormais une unique *Shoura*.¹⁸

Au-delà de l'article 22 *leg. cit.* établissant un régime conventionnel, les dispositions constitutionnelles régissant les relations entre l'État et les cultes consacrent la primauté de la Justice de l'État. Il est ainsi rappelé les principes d'égalité devant la Loi

¹³ Loi du 10 juillet 1998 portant approbation de la Convention du 31 octobre 1997 entre le Gouvernement, d'une part, et l'Église Protestante du Luxembourg, d'autre part, Mémorial A 66/1998, pp. 1327–1333.

¹⁴ Loi du 10 juillet 1998 portant approbation de la Convention du 31 octobre 1997 entre le Gouvernement, d'une part, et l'Église Orthodoxe Hellénique du Luxembourg, d'autre part, Mémorial A 66/1998, pp. 1333–1335.

¹⁵ Loi du 11 juin 2004 autorisant l'État à prendre en charge les traitements et pensions des ministres du culte de l'Église Anglicane du Luxembourg et conférant la personnalité juridique de droit public à ladite Église, Mémorial A 99/2004, pp. 1608 f.

¹⁶ Loi du 11 juin 2004 autorisant l'État à prendre en charge les traitements et pensions des ministres du culte des Églises Orthodoxes Roumaine et Serbe du Luxembourg et conférant la personnalité juridique de droit public auxdites Églises, Mémorial A 99/2004, pp. 1609 f.

¹⁷ Mémorial A 67/1998, p. 1338.

¹⁸ « Convention entre l'État du Grand-Duché de Luxembourg et les communautés religieuses établies au Luxembourg », < <https://www.gouvernement.lu/4369567/Convention.pdf> > (31 janvier 2015).

des citoyens et par extension de tous les résidents étrangers en conformité de l'article 9 du Traité sur l'Union européenne et des articles 9 et 14 de la CEDH.

Les dispositions constitutionnelles définissant les libertés du culte affirment également la primauté des droits de l'Etat (administratif, constitutionnel et public) sur le droit canonique des Eglises chrétiennes (anglicane, catholique, orthodoxes, réformées) et sur celle de la *halakha* du Consistoire Israélite de Luxembourg, seules religions qui sont conventionnées avec l'Etat. Il s'avère ainsi que dans la sphère publique, les religions auront la liberté d'énoncer leurs convictions religieuses en conformité du code pénal de l'Etat et d'une autorisation préalable de police pour les manifestations publiques à caractère religieux en dehors des lieux prévus pour le culte à cet effet (Article 19 de la Constitution). Aucun citoyen ou résident étranger ne saurait être par ailleurs forcé par une organisation ou juridiction religieuse, son conjoint ou tout membre de son environnement relationnel à suivre les préceptes et les actes publics d'une religion (Article 20 *leg. cit.*). De plus, le mariage religieux n'est permis qu'à la condition que le mariage civil le précède ce qui par conséquent consacre ce dernier comme la seule union légale au Luxembourg (Article 21 *leg. cit.*).

Les dispositions constitutionnelles formulent aussi l'organisation et le fonctionnement des associations à caractère religieux et fixent l'arbitrage des conflits juridiques à caractère pécuniaire lorsque les cultes ont passé une convention avec l'Etat.

III. Le cadre législatif et réglementaire

A côté de l'ensemble des dispositions constitutionnelles, il s'est développé un droit conventionnel et pénal concernant les religions. Ce dernier est composé à partir des dispositions législatives héritées de la période napoléonienne (tels que la Convention du 26 messidor an IX (15 juillet 1801), la Loi du 18 germinal an X (8 avril 1802) relative à l'organisation des cultes, le décret du 30 décembre 1809 concernant les fabriques des Eglises, etc.), de la législation souveraine et réglementaire du Luxembourg depuis 1815, d'actes administratifs et juridiques spécifiques au culte majoritaire, l'Eglise catholique, et des conventions à proprement parler signées entre l'Etat et les cultes depuis 1982 en plus du Code pénal. Une distinction est à faire entre les interventions prévues explicitement par la législation et généralement obligatoires et les interventions facultatives, lesquelles sont loin d'être négligeables, en faveur des cultes minoritaires au niveau des communes par exemple mais qui empêchent toute concurrence entre juridictions d'Etat et juridictions religieuses. Un autre élément qui est assez rare et à signaler est que dans les budgets des cultes accordés par l'Etat au

titre des conventions sous le régime de l'article 22 de la Constitution, il est prévu dans la Loi annuelle budgétaire, un crédit, certes modeste, en faveur du dialogue interconfessionnel, preuve supplémentaire de l'intervention du Gouvernement dans la vie interne aux cultes au-delà de son propre droit canonique ou apparenté. Les communautés religieuses dont l'ordre juridique contient des règles de justice spécifiques seront traitées en détail par la suite.

1. Dispositions particulières pour l'Eglise catholique

Comme il a été déjà abordé les dispositions particulières pour l'Eglise catholique ont servi en partie de modèles pour les autres religions. Cette situation tient non seulement au fait qu'elle fut et demeure la religion majoritaire du Luxembourg mais aussi aux conflits latents entre l'Etat et celle-ci tenant au risque supposé de concurrence entre les juridictions publiques et religieuses au moment de la fondation du premier.

En 1998, en conformité de l'article 22 de la Constitution, la convention entre la coalition sociale-chrétienne-socialiste menée par Jean-Claude Juncker et l'archevêque catholique fut ratifiée. Au moment de son examen, le Conseil d'Etat, seconde chambre législative, critiqua fortement l'article 3 quant à la définition accordée au service des ministres des cultes. Pour la « haute corporation », le libellé de son article risquait d'assujettir des citoyens laïcs au droit canonique sans qu'ils puissent recourir forcément aux juridictions de l'Etat en cas de litiges:

« [...] D'après le commentaire des articles accompagnant le texte de la Convention à approuver, ce régime de service est destiné à faire partie intégrante du droit canonique. Or l'Etat ne peut obliger personne à observer les lois de l'Eglise. Il semble d'autre part difficilement concevable de soumettre à la compétence des juridictions, que ce soit de l'ordre judiciaire ou de l'ordre administratif, un contentieux qui relèverait d'une prétendue inobservation des lois de l'Eglise. [...] »¹⁹

Dans le même temps, le Conseil d'Etat rappelait dans le même avis que l'Etat devait s'abstenir de toute immixtion dans la discipline ecclésiastique :

« [...] Il ne peut donc ni réformer, ni corriger, ni censurer les actes, même abusifs des autorités religieuses, à moins que ces actes ne revêtent un caractère délictueux [...]. Pour pouvoir se prononcer sur le respect des dispositions constitutionnelles, il faudrait donc pour le moins pouvoir se faire une idée tant sur le champ d'application personnel que matériel du régime de service des ministres du culte dont l'Etat devrait assurer la mise en application [...]. »

Face à cette opposition, le Gouvernement modifia ledit article qui libellé désormais ainsi consacre que le régime de service des ministres du culte (religieux et laïcs) ne saurait être « disputé » que par les juridictions de l'Etat après avis du Conseil d'Etat

¹⁹ Projets de loi et projet de règlement grand-ducal no. 4374/02, 4375/02, 4376/02, 4377/02, 4378/02, Avis du Conseil d'Etat du 31 mai 1998, J-1997-O-0365.

sans porter atteinte toutefois à l'autorité du Chef du Culte catholique sur lesdits ministres.²⁰

A l'annexe de la Convention entre l'Etat et l'Archevêché, il fut stipulé toutefois que l'autorité de l'Archevêque s'exerce conformément à la juridiction religieuse. En d'autres termes, depuis lors la hiérarchisation à l'interne de toutes les Eglises chrétiennes au Luxembourg relève des seuls droits canoniques et ces derniers l'emportent dans toutes les modalités de l'exercice du culte au quotidien à l'exception de sa territorialisation et des questions de gestion financière des Conseils de fabrique.

Les tribunaux catholiques sont organisés de deux manières au Luxembourg. Primo, il existe un Tribunal diocésain de première instance (Officialité) qui est de l'autorité de l'Archevêque du Luxembourg. Le canon 1419 du CIC de 1983 énonce d'emblée que dans chaque diocèse le Juge de première instance, c'est l'évêque, en vertu de la charge de gouvernement qu'il reçoit par la consécration épiscopale, et qui comporte les trois pouvoirs, législatif, exécutif et judiciaire. La première instance, c'est le Tribunal qui doit connaître en premier d'une affaire quelconque. En théorie, l'Archevêque peut retenir et juger lui-même n'importe quelle cause. Mais de manière habituelle, il juge par autrui, ne serait-ce qu'à cause de la masse de travail que cela représente. Il doit d'ailleurs obligatoirement constituer un Tribunal chargé ordinairement de juger en première instance des causes qui lui sont soumises. Secundo, dans la quasi-totalité des causes (et c'est le cas pour les nullités de mariage et d'ordination), une deuxième instance doit vérifier le travail de la première instance : respect de la procédure et conformité de la sentence au dossier. Une décision ne devient exécutoire qu'après une double sentence conforme. Le Tribunal d'appel pour le Luxembourg est du ressort de l'Officialité de Metz en France. Le personnel du Tribunal de seconde instance est le même que celui de première instance et il appartient donc en dernier ressort à l'Archevêque de Metz de confirmer ou d'infirmer les arrêts de la juridiction religieuse catholique du Luxembourg.

En 2012, suite à une question parlementaire sur la tenue des registres de baptêmes et de sortie de religion, le Gouvernement luxembourgeois a rappelé que l'état de « catholique » ne relève que de la juridiction religieuse et de l'autorité de l'Archevêque. Le Gouvernement, au nom du principe d'autonomie, n'entendait pas s'immiscer dans les règles définissant l'inclusion ou l'exclusion d'un culte religieux.²¹

²⁰ Voir *supra*, n. 11.

²¹ Question no. 2182 de Monsieur Claude Adam concernant Registres de baptême, Q-2011-O-E-2182-01 ; Réponse du Ministre des Communications et des Médias et du Ministre des Cultes à question no. 2182 de Monsieur Claude Adam concernant Registres de baptême, 2012 Q-2011-O-E-2182-02.

2. Dispositions particulières pour les Communautés israélites du Luxembourg

La Convention avec les Communautés israélites du Luxembourg reprennent des dispositions légales réservées jusqu'alors aux Eglises réformées et à l'Eglise catholique (comme la personnalité juridique, le serment, la notion de service des ministres des cultes) tout en s'adaptant aux spécificités de la religion juive. Ainsi, si le Consistoire Israélite constitue une personne juridique de droit public, il est représenté judiciairement et extrajudiciairement par son président (qui ne peut être un ministre du Culte à la différence des deux Eglises réformées). Les rabbins sont assimilés aux fonctionnaires de l'Etat quant aux régimes des traitements et des pensions et sont recrutés et révoqués par le Consistoire selon ses règles.

Les communautés se servent des tribunaux rabbiniques de Strasbourg et de Paris. Le *Beth din* n'a de valeur que privée et ne saurait constituer un supplétif à la justice de l'Etat du Luxembourg. Tout au plus, il peut être sollicité dans le cadre de la médiation familiale (mariage, divorce) et du statut personnel des litiges commerciaux – et de toute nature ne relevant pas de l'ordre public, conformément au droit luxembourgeois de l'arbitrage – et dans des pratiques et actes de la foi juive (règles alimentaires, l'ensevelissement).

3. Dispositions particulières pour les Eglises orthodoxes

Trois Eglises orthodoxes ont conventionnées au Luxembourg à travers deux lois (en plus d'une annexe et d'un avenant) : La première concerne l'Eglise Orthodoxe Hellénique et la seconde l'Eglise Orthodoxe Roumaine et l'Eglise Orthodoxe Serbe.

Les juridictions orthodoxes sont organisées de cette manière: Dans l'Eglise orthodoxe, il y a d'abord le prêtre de la paroisse (unique au Luxembourg) qui veille à ce que ses membres soient « en paix » et que les désaccords soient réglés « à l'amiable ». Si le problème persiste et risque de troubler la vie commune des membres de la communauté, il est du ressort de l'évêque. L'intervention du prêtre ou de l'évêque n'ont pas un caractère juridique mais plutôt un caractère consultatif. S'il y a des problèmes et des conflits qui ne peuvent pas être résolus par l'intervention du prêtre ou de l'évêque, il y a un tribunal ecclésiastique sous la présidence du Métropolitain-Archevêque de Belgique, des Pays-Bas et du Luxembourg qui peut infliger des peines purement spirituelles à la personne (par exemple la peine de l'excommunication pour les

membres laïques, ou de la destitution pour un clerc). La personne est jugée sur base du droit canonique de l'Église orthodoxe.

Les tribunaux ecclésiastiques à chaque Métropole-Archevêché sont composés par l'Archevêque-Métropolitain qui y préside, ses évêques auxiliaires, des prêtres ou des laïcs qui sont nommés par le Métropolitain et qui ont une bonne formation en théologie et surtout en droit canonique. Les questions abordées par ces tribunaux sont doctrinales, disciplinaires, patrimoniales, de moralité ainsi que de mariage et de divorce.

Si le prêtre ne respecte pas les conditions et les restrictions, il peut subir une peine ecclésiastique. Après avoir reçu une dénonciation de la part d'un membre de l'Église pour un prêtre ou un autre membre de l'Église, c'est au prêtre de la paroisse ou le cas échéant à l'Évêque ou à son délégué d'enquêter sur la vérité et de clarifier le problème. Si, selon la première approche, on voit qu'il y a matière à donner une suite, le Métropolitain-Archevêque convoque le tribunal ecclésiastique pour expliquer la situation. La personne qui est à la base du problème est aussi convoquée pour s'expliquer. Si ladite personne ne se présente pas, l'Archevêque doit convoquer l'accusé encore deux fois. Si la personne accusée ne se présente toujours pas, sans justification valable, le tribunal peut juger son cas. Si le tribunal ecclésiastique inflige une peine spirituelle à l'accusé, celui a le droit de faire appel au Synode Patriarcal du Patriarcat Œcuménique de Constantinople qui va se prononcer définitivement sur ce cas précis, en prenant en considération tous les éléments de l'enquête, du jugement du tribunal diocésain mais aussi le point de vue de l'accusé.

4. Dispositions particulières pour l'Islam au Luxembourg

Jusqu'à présent, l'Islam n'est pas conventionné. Un projet existe depuis 2007 sur le modèle du Consistoire israélite avec pour équivalent la *Shoura* du Luxembourg présidé par un laïc alors que le chef du culte serait le Mufti.²² Tout comme les autres cultes non reconnus, ce dernier s'organise dans le cadre du droit privé²³ et peut être néanmoins subventionné volontairement par l'État et les communes.

²² « Projet de convention entre l'État du Grand-Duché du Luxembourg et le Culte musulman du Grand-Duché du Luxembourg », <http://www.gouvernement.lu/765996/24biltgen_cultemusulman>, <<http://www.gouvernement.lu/766006/projet.doc>> (30 avril 2015).

²³ Loi sur les associations sans but lucratif et les établissements d'utilité publique, Mémorial A 23/1928, pp. 521–532 dans sa version modifiée.

En 2012, dans le rapport du Groupe d'experts mandaté par le Gouvernement pour réfléchir aux relations entre l'Etat et les religions et à ses possibles évolutions, il était stipulé que le régime constitutionnel et les lois qui s'y rapportent devaient mieux consacrer la liberté individuelle et l'autonomie collective, le principe d'égalité et de non-discrimination entre les religions, la neutralité et l'impartialité de l'Etat, la transparence dans l'organisation et la vie des cultes ; la promotion du respect et de la tolérance au sein des confessions, entre les confessions et les mouvements philosophiques et ce dans l'intérêt de la société. Constatant, notamment l'asymétrie dans le conventionnement existant des religions et l'absence pour d'autres religions, il recommandait une refonte du régime conventionnel et son ouverture à l'Islam.²⁴

Les communautés islamiques du Luxembourg, étant de facture récente, n'ont pas pour l'instant de tribunal islamique. Tout au plus, elles disposent d'un règlement d'ordre intérieur de la *Shoura* qui peut arbitrer certains différends renvoyés habituellement devant les tribunaux islamiques. Ledit règlement stipule en effet que la *Shoura* est chargée de gérer par voie exclusive l'ensemble des relations avec l'État ; interpréter et exprimer les besoins et les attentes de la communauté musulmane ; de fixer la position officielle concernant les modalités de la pratique du culte ; régler l'organisation et le fonctionnement des organes et établissements de la *Shoura* ; ratifier les accords signés par le Président ; donner les grandes orientations en matière de culte ; annuler certaines décisions des Organes si elle le juge nécessaire.²⁵

Si l'Islam comme religion est non conventionnée, la finance islamique est très présente au Luxembourg. En 1978 le Luxembourg a été le premier pays européen à accueillir une institution financière islamique et en 1980 le premier pays européen à accepter une compagnie d'assurance tagal. En 2002, la Bourse de Luxembourg a été le premier marché réglementé de l'Union à admettre un *sukuk* à la négociation. La Banque Centrale du Luxembourg a été la première en Europe à rejoindre, en 2010, l'*Islamic Financial Services Board*.²⁶ Lors de la création du premier *sukuk* au Luxembourg en 2013 (premier émis par un pays de la zone euro et du premier libellé en euros) l'Autorité publique de surveillance des marchés luxembourgeoise déclara être

²⁴ « Rapport du Groupe d'experts chargé de réfléchir sur l'évolution future des relations entre les pouvoirs publics et les communautés religieuses ou philosophiques au Grand-Duché », <http://web.cathol.lu/IMG/pdf/rapport_groupe_experts.pdf> (30 avril 2015).

²⁵ « Règlement d'ordre intérieur », <<http://www.shoura.lu/wp-content/uploads/2014/10/Règlement-dordre-intérieur-final-05-oct-2014.pdf>> (30 avril 2015).

²⁶ Réponse du Ministre des Finances à question no. 0588 de Monsieur Serge Wilmes concernant Premier *sukuk* luxembourgeois, Q-2013-U-E-0588-02.

« convaincue que le développement soutenable de la finance islamique au Luxembourg ne peut avoir lieu que dans le plein respect des valeurs profondes exprimées dans la Sharia ».²⁷

La Commission de surveillance du secteur financier luxembourgeois, à l'intérieur du cadre juridique luxembourgeois sur les organismes de placement collectif²⁸, a depuis lors créé un *Comité sharia* pour chaque organismes de placement collectif qui vérifie en outre la conformité du *sukuk* aux exigences de la finance islamique. La Commission de surveillance a toutefois appelé dans une première circulaire émise dès 2011 :

« En tant qu'institution laïque d'une part et en l'absence des capacités d'appréciation spécifiques des préceptes de la Sharia d'autre part, il ne revient pas à la CSSF de porter un jugement de fond sur la conformité de la politique d'investissement d'un « OPC sharia » par rapport aux enseignements de la sharia ».²⁹

Pour ce faire la dite Commission a conclu des accords de coopération avec une série d'autorités de surveillance telles que la *Dubai Financial Services Authority*, la Banque centrale du Bahreïn, les autorités de surveillance des marchés boursiers de la Malaisie, la *Qatar Financial Centre Regulation Authority* et l'*Egyptian Financial Supervisory Authority* qui font appel à des tribunaux islamiques de leurs Etats respectifs.

IV. Perspective

Comme il a été déjà évoqué, à la suite des élections d'octobre 2013, une majorité parlementaire s'est constituée sans les Chrétiens-sociaux seulement pour la seconde fois depuis 1945. Composée des Libéraux, des Socialistes et des Ecologistes, la nouvelle coalition au moment de sa formation réaffirma :

« le principe du respect de la liberté de pensée, de la neutralité de l'Etat à l'égard de toutes les confessions religieuses ainsi que de l'autodétermination des citoyens. »

Pour autant, la nouvelle coalition annonça vouloir aussi dénoncer

« les conventions existantes pour entamer des négociations avec les cultes, lancer une discussion sur leur financement et redéfinir les relations entre les communes et les cultes. La législation relative aux fabriques d'église sera remplacée par une réglementation qui garantira la transparence au niveau du patrimoine et des ressources des Eglises [...] »³⁰.

²⁷ « Finance islamique », <<http://www.cssf.lu/surveillance/finance-islamique/>> (30 avril 2015).

²⁸ Loi concernant les organismes de placement collectif, Mémorial A 239/2010, pp. 3928–3984, dans sa version modifiée ; Loi relative aux fonds d'investissement spécialisés, Mémorial A 13/2007, dans sa version modifiée.

²⁹ « Les OPC et la Finance Islamique », <http://www.cssf.lu/fileadmin/files/Finance_islamique/OPC_finance_islamique.pdf> (15 juillet 2015).

³⁰ « Programme gouvernemental », <<https://www.gouvernement.lu/3322796/Programme-gouvernemental.pdf>>, pp. 8–9 (30 juin 2015).

Dans un premier temps, le nouveau Gouvernement proposa de soumettre cette réforme constitutionnelle à référendum. Il se rétracta finalement en février 2015 préférant entériner ladite réforme par la voie parlementaire classique où une majorité des deux tiers est nécessaire (ce qu'il ne possède pas sans l'apport des voix des députés chrétiens-sociaux qui restent le premier groupe parlementaire). Il espère depuis y parvenir, fort de la signature d'une nouvelle Convention avec toutes les religions reconnues jusqu'alors avec en plus, cette fois-ci, l'Islam. Bien qu'il existe une très grande insécurité juridique et politique pour la nouvelle convention, celle-ci consacrerait l'autonomie des cultes, sans renoncer à un certain contrôle de l'Etat sur ceux-ci, maintiendrait certaines formes d'asymétries entre les cultes et accentuerait *in fine* d'une certaine manière l'assujettissement des juridictions religieuses à celles de l'Etat.³¹ Avec une telle convention, le Luxembourg relèverait principalement du quatrième idéaltype que nous avons présenté dans l'introduction : Le domaine et l'action de la religion sont conditionnés par les règles de l'Etat.

Plus particulièrement, les religions seraient en effet libres de leurs cultes à la condition de respecter non seulement l'ordre constitutionnel, mais aussi le principe d'égalité entre les hommes et les femmes et devraient agir pour écarter tous ceux qui, en leur sein, viendraient remettre en cause ces principes. L'organisation interne et les chefs des cultes seraient déterminés par les règles internes aux communautés religieuses mais pour les seconds, ils devront être sanctionnés par le Gouvernement.

Il n'existerait plus qu'un seul Consistoire pour les deux Eglises réformées du Luxembourg (article 24 du propos) ce qui constituerait donc une immixtion dans l'organisation desdites églises. Il serait institué une seule Eglise orthodoxe du Luxembourg, comprenant la grecque, la roumaine, la serbe, élargie à la communauté orthodoxe russe et toujours placée sous la seule autorité de l'Archevêque-métropolitain de Belgique, Exarque des Pays-Bas et du Luxembourg, relevant du Patriarcat Œcuménique de Constantinople (article 27 du propos). Les communautés juive et musulmane seraient structurées de la même manière et auraient seules la possibilité d'ester en justice civile pour trancher des conflits d'ordre organisationnel et religieux (articles 21, 22 et 30 du propos). L'Archevêque catholique serait le seul qui explicitement dirigerait sa communauté selon le droit canonique alors que de manière implicite cela serait aussi le cas pour les autres Eglises chrétiennes (article 15 du propos).

³¹ « Convention entre l'État du Grand-Duché de Luxembourg et les communautés religieuses établies au Luxembourg », <<https://www.gouvernement.lu/4369567/Convention.pdf>> (31 janvier 2015).

THE NETHERLANDS: LIBERTY WITHIN A UNITARY SYSTEM

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I. Introduction

Traditionally, the relationship between ecclesiastical dispute resolution and the secular system of dispute resolution is not much discussed. One reason for this is that it is a technical and mainly procedural field of law. Another reason is that secular case law concerning this relationship is not abundant. However, recently this relationship has not only gained academic interest, but it has also garnered political attention and has even become a subject of public debate. The main trigger for this development was news items in the press about the existence of Islamic tribunals in Canada and the UK.¹ A debate emerged on whether Islamic dispute resolution existed in the Netherlands and whether this was desirable or even allowed, often forgetting long-standing mechanisms for dispute resolution within Christian Churches and their Jewish equivalents. A report was commissioned by the government to investigate the situation.² Behind this debate lay fear of parallel jurisdictions or parallel societies in the Netherlands. The Netherlands is not unique in this. At the European judicial level, this fear was expressed by the European Court of Human Rights in its ruling in the Turkish case, *Leylah Şahin*.³ The court even stated that a system of parallel legal systems and parallel jurisdictions runs counter to the values of the ECHR. This article discusses the relationship between ecclesiastical dispute resolution and the secular system of dispute resolution in the Netherlands. It will briefly highlight the practices and norms of Churches and equivalent religious organisations in the

¹ See M. Berger, 'Shariarechtbanken en religieuze familierechtspraak in Nederland', (2010) 1 *Tijdschrift voor Religie, Recht en Beleid*, issue 2, pp. 49–62.

² L. G. H. Bakker, A. J. Gehring, K. Mourik, M. M. van Claessen, C. Harmsen and E. Harmsen, '*Sharia in Nederland. Een studie naar islamitische advisering en geschilbeslechting bij moslims in Nederland*' (Nijmegen 2010).

³ ECtHR (Grand Chamber), 10 November 2005, 44774/98 (*Leyla Şahin v. Turkey*).

Netherlands in ecclesiastical dispute resolution. Subsequently, it will analyse the secular legal approach to ecclesiastical dispute resolution; after which, it will give an impression of the different voices in the debate on this topic. A brief conclusion follows.

II. Ecclesiastical Dispute Resolution: The Practices and Norms of Religious Communities

As the system of ecclesiastical dispute resolution within the Roman Catholic Church is already dealt with in other chapters of this book,⁴ here we will just highlight the main features of the protestant Churches, the so-called Jewish Dutch-Israelite Church and of dispute resolution within Islamic communities.⁵

1. The Dutch Protestant Church

The Dutch Protestant Church is the result of the 2004 union of the then two main protestant Churches and the Evangelical Lutheran Church in the Netherlands. Its Constitution, Ordinances and General Rules were then newly established, including the rules on dispute resolution within the Church.

The Dutch Protestant Church distinguishes between various types of issues:

- disciplinary matters,
- (general) complaints and disputes,
- conflicts between a Church minister and his Church council, and
- disputes relating to property rights between the various bodies within a parish.⁶

⁴ See e.g. R. Mazzola, 'Religious Jurisdictions in Italy', *in this book*, pp. 127–140 (pp. 137–140); A. Motilla, 'Religious Jurisdictions in Spain', *ibid.*, pp. 49–62 (pp. 52 f.); P.-H. Prélôt, 'Les juridictions religieuses : le cas français', *ibid.*, pp. 75–90 (pp. 80–82).

⁵ See also A. H. Santing-Wubs, 'Geschilbeslechting binnen geloofsgemeenschappen', in L. C. van Drimmelen and T. J. van der Ploeg (eds.), *Geloofsgemeenschappen en recht* (Den Haag 2014), pp. 167–196.

⁶ F. T. Oldenhuis, J. G. Brouwer, D. N. R. Wegerif and F. E. Keijzer, *Schurende relaties tussen recht en religie* (Assen 2007), pp. 108–115 (p. 109). For the Constitution, Ordinances, and General Regulations of the Protestant Church in the Netherlands, see <<http://www.pkn.nl/actief-in-de-kerk/Kerkorde/Paginas/Kerkorde-en-Ordinantie.aspx>>; for an English version of only the Constitution, see <<http://www.pkn.nl/overons/protestant-church/Paginas/Church-Order.aspx>> (both 16 July 2014).

The resolution of disputes is assigned to independent dispute resolution bodies, operating at regional or national levels. Its members are appointed by the respective Church councils. Specialised bodies are established for each of these four types of issues, each with the possibility of appeal. In appeals, the body of appeal for the second type of dispute also adjudicates for the third and fourth. Both in the first instance and at appeal, special procedures for the second type of issues are established in urgent matters.⁷ At the time of the establishment of the various dispute resolution mechanisms, special attention was paid to include procedural safeguards, incorporating standards that secular courts had previously set in rulings in cases with an ecclesiastical dimension.⁸ Apart from specific procedural rules, a General Regulation with procedural standards is applied to all procedures.

Rulings in ecclesiastical cases are published by the Church anonymously, with the exception of rulings in disciplinary cases.

2. Other Protestant Churches

Other, smaller, protestant Churches that acknowledge the traditional reformed Constitution (the *Dordtse Kerkorde* of 1619) differ from the Protestant Church in the Netherlands in that they do not have independent dispute resolution bodies.⁹ Decisions are made by councils and disputes are resolved by the next higher council, whose members consist of members from the lower councils. This implies the possibility that persons who have taken part in the decision-making in a lower council are confronted with the same case as member of a higher council. Procedural safeguards are found in such mechanisms, such as the possibility to pardon oneself or to be challenged. The establishment of theologically and legally trained advisory bodies to advise the decision making council is another method of introducing safeguards and enhancing the quality of the decision-making process. Generally speaking, the competence of dispute resolution bodies within these Churches is limited to ecclesiastical matters. These may also coincide with civil matters.

⁷ Oldenhuis et al., *supra*, n. 6, p. 114.

⁸ *Ibid.*, p. 115.

⁹ 'Christelijke Gereformeerde Kerken' <<http://www.cgk.nl/download/Kerkorde2011.pdf>>, last updated in 2010; 'Gereformeerde Kerken Vrijgemaakt' <<http://www.gkv.nl/kerkorde/>>, the first stage of the current revision completed in 2012; 'Gereformeerde Gemeenten in Nederland' <<http://www.kerkrecht.nl/node/2769>> (all 30 June 2015).

3. Dispute resolution within the Jewish communities

According to the statute of the largest Jewish organisation, the so-called Dutch-Israelite Church (*Nederlands-Israëlitisch Kerkgenootschap*), arbitration is the mechanism for dispute resolution.¹⁰ This mechanism is not available for doctrinal disputes.¹¹

4. Dispute resolution within Islam

Not much is known about dispute resolution within Islam. Even the report commissioned by the government in the slipstream of the debates in *Shariah* courts concluded that empirical information is lacking. Nevertheless, informal advice or counselling seems to be a common method to mediate in (emerging) disputes.¹² This form of informal, non-binding counselling takes place within the overall context of Islam. Not much is known about the nature of such disputes but they are thought to include different issues, such as family issues or issues pertaining to the restitution of loans.¹³ It is unclear whether social pressure is exerted to follow the advice or to avoid approaching a secular court. Islamic groups are not known to actively advocate internal dispute mechanisms based on written internal rules. However, should they be established, they would fall within the general system that determines the relationship between ecclesiastical and secular mechanisms of dispute resolution. In the absence of such internal mechanisms, secular courts exercise their ordinary competence.

¹⁰ <<http://www.kerkrecht.nl/main.asp?pagetype=onderdeel&item=52&subitem=1636>> (6 February 2015).

¹¹ Rechtbank Amsterdam, 6 March 1994, NJ 1995, 701, upheld, in appeal, a preceding court ruling and rejected the statement that an implicit agreement of arbitration between orthodox Jews could withhold an interested party from the otherwise competent ordinary court, assuming that such agreement existed.

¹² Oldenhuis et al., *supra*, n. 6, pp. 143 ff.; see also Santing-Wubs, *supra* n.5, pp. 174 ff.

¹³ Oldenhuis et al., *supra*, n. 6, p.144.

III. The Approach of the State

1. Church autonomy as a starting point¹⁴

The approach of the State towards ecclesiastical dispute resolution is part of a wider approach to Churches as legal entities. State respect for Church autonomy forms the starting point. Institutional autonomy of the Church as a legal entity finds its concrete basis in the Civil Code¹⁵ and is underpinned by the principles of separation of Church and State,¹⁶ of State neutrality with regard to religion and belief (Articles 1 and 6 of the Constitution), and freedom of religion or belief (Article 6 *leg. cit.*).

Within the Dutch legal system, the various forms of legal entities have the right to determine their own legal order within the limits of the law. The Civil Code contains a closed typology of legal entities, e.g., foundations and associations, and determines basic rules for each specific entity as well as general rules that are applicable to all types of legal entities. Apart from these constraints, additional rules can be found in many other laws, such as in the field of labour law.

The Civil Code recognises Churches as legal entities *sui generis*.¹⁷ Article 2:2(1) *leg. cit.* states that Churches, their independent units, and structures in which they are united, have legal personality. They are governed by their own statutes in so far as they do not conflict with the law. This liberty is not restricted to the spiritual domain, but extends to other (substantive) issues as well: the organisational structure as well as internal legal matters.¹⁸

There are differences of opinion regarding the precise definition of the word ‘law’ in the clause that Churches and their units are governed by their own statutes, in so far as they do not conflict with the law. A recent, in-depth study concludes that law

¹⁴ This section and the following section are in part derived from sections of S. van Bijsterveld, ‘Church Autonomy in the Netherlands. The Distinctiveness of the Church – The Interplay between Legal, Popular and Ecclesiastical Perspectives. Church Autonomy as a ‘Test Case’, in H. Warnink (ed.), *Legal Position of Churches and Church Autonomy* (Leuven 2001), pp.146–163; and the contribution to the 2014 Conference of the International Academy of Comparative Law, ‘Religious Rules and the Law of the State’ (not yet published).

¹⁵ *Burgerlijk Wetboek, Boek 2*, Staatsblad 1976/228 in conjunction with Staatsblad 1976/342 as amended.

¹⁶ Separation of Church and State is not explicitly proclaimed in the Constitution or any other legislation, but is commonly accepted as a norm implicit in a number of constitutional provisions and must be interpreted in the light of these provisions.

¹⁷ The law does not provide any definition of a ‘Church’. It is the organisation itself that determines its status. Ultimately, this decision is to secular courts.

¹⁸ P. T. Pel, *Geestelijken in het recht. De rechtspositie van geestelijke functionarissen in het licht van het eigen recht van kerken en religieuze gemeenschappen in de Nederlandse rechtsorde* (Den Haag 2013), p. 149.

in this context means parliamentary legislation, with the exclusion of subordinate legislation. The Criminal Code certainly qualifies as law in this context.¹⁹

The Civil Code contains a set of general rules applicable to the various types of legal entities. Article 2:2(2) *leg. cit.* exempts Churches from these provisions. However, it states that analogous application of these provisions is allowed, in so far as this does not conflict with the Churches' statutes or with the nature of their internal relations. A ruling by the Civil Division of the Netherlands Supreme Court from 1985 held that analogous application should be the starting point for rulings in this field.²⁰ Thus, decisions of ecclesiastical authorities can be challenged e.g. on the grounds that they have not been taken in good faith.

Religious bodies can also opt for organisational types other than that of a Church. In the Islamic domain, foundations are established for the management of a mosque and the employment of an imam. Small Christian communities may organise themselves as a formal or informal association.²¹

2. Ecclesiastical Dispute Resolution: Competence, Admissibility of the Claim, and Secular Standards

Ecclesiastical proceedings are exponents of Church autonomy. In determining the relationship between ecclesiastical and secular mechanisms of dispute resolution, three issues are relevant. First, determining the competence of secular courts; second, the admissibility of a claim in a secular court; and third, the standards that civil courts require of ecclesiastical proceedings.

The competence of secular courts is determined by secular law. This means that courts do not rule on theological issues as such.²² In matters in which courts have exclusive competence, such as criminal law or family law, secular courts function or can be approached regardless of ecclesiastical procedures. This does not exclude ec-

¹⁹ *Ibid.*, p. 212, further includes fundamental mandatory rules with pretence of priority, fundamental principles of civil law, fundamentals of the legal system such as the principles of good faith, reasonableness, equity, and public morality, and rules of public order. For a less strict interpretation, see e.g. T. van der Ploeg, *Staan het recht en de geschilbeslechting in private organisaties en kerkgenootschappen onder of boven de wet?*, in R. J. C. Flach, L. M. Klap-de Nooijer, J. W. Rutgers and E. M. Wesseling-van Gent (eds.), *Amice (Rutgers-bundel)* (Deventer 2005), pp. 263–273.

²⁰ Hoge Raad, 15 March 1985, 12399 *Nederlandse Jurisprudentie* 1986, 191.

²¹ This section is largely derived from the contribution to the 2014 Conference of the Nederlandse Vereniging voor Rechtsvergelijking, '3.2. Religion and law: Internal rules of religious organizations.'

²² Hoge Raad, 15 February 1957, *Nederlandse Jurisprudentie* 1957, 201.

clesiastical disciplinary measures or ecclesiastical proceedings in family matters.²³ In the latter type of cases, they simply do not have civil legal effect. In the former type of cases, secular courts may be called upon at a later stage to rule on civil dimensions of the case; for instance, if the decision-making process were flawed or if civil claims ensue.

In cases where secular courts are competent but there is a parallel ecclesiastical proceeding, ordinarily, a secular court declares the claim inadmissible when an obligatory internal ecclesiastical proceeding has not been followed first.²⁴ Afterwards, the secular civil court can be addressed, which then exercises a marginal test.²⁵ In conducting such a test, the religious statutes can also be interpreted, only of course, in so far as the issue falls within the competence of the court. In their own internal procedures, ecclesiastical authorities must respect the fundamental norms of a fair trial.²⁶ The interpretation by secular courts of ecclesiastical rules is not open for cessation by the Supreme Court. The Supreme Court regards the application and interpretation of religious law as a matter of 'fact', not of 'law'.²⁷

In 1997, the question was raised of the extent to which civil courts should respect ecclesiastical court proceedings and their rulings. The immediate cause was the annulment of a marriage before a Roman Catholic ecclesiastical court; an annulment which both former spouses were in favour of. In the context of the proceedings, a damaging psychiatric report on the former wife was drawn up by a psychiatrist who had based her report on the testimonies of third-parties, but who had never actually spoken to the former wife herself; the report was subsequently used by the ecclesiastical court. The upshot of the legal proceedings in the disciplinary court as well as the civil court was as follows:

The claims in the civil procedure were rejected in the first instance; the president of the court concluded that, in civil law terms, neither the diocese, the president of the ecclesiastical court, nor the psychiatrist had committed tort.

In 1998, the court of appeal overturned the ruling in so far as it concerned the diocese and the psychiatrist. It disqualified the psychiatric report as totally unfounded and concluded that the wording and the conclusion of the report, because of its un-

²³ See e.g. the annulment of marriages within the Roman Catholic Church.

²⁴ See e.g. Hoge Raad, 19 December 2003, C02/215HR *Nederlandse Jurisprudentie* 2004, 559; Hof Arnhem, 19 January 2010, LJN BL0003 and BK9957 (Pel, *supra*, n. 18, pp. 157–158).

²⁵ Pel, *supra*, n. 18, pp. 157 ff; see also A. H. Santing-Wubs, *Kerken in geding: de burgerlijke rechter en kerkelijke geschillen* (Den Haag 2002).

²⁶ See also Oldenhuis et al., *supra*, n. 6, pp. 94–126; Pel, *supra*, n. 18, pp. 174 ff.

²⁷ Pel, *supra*, n. 18, pp. 216 ff.

founded character, impugned the claimant's honour and good name. The diocese and psychiatrist were, furthermore, jointly held responsible for the violation of the claimant's privacy and the impugning of her good name by initiating a psychiatric investigation without the claimant's knowledge and involvement, and by using the report in the ecclesiastical proceedings and thus informing others of the report and its content. The claimant was awarded immaterial damages.²⁸

In the disciplinary proceedings in first instance, a fine was imposed on the psychiatrist; in appeal, this ruling was annulled and the psychiatrist was suspended from her profession for a period of four months.²⁹

That civil courts do set standards on ecclesiastical procedures, in that the latter have to comply with the basic rules of fair trial, was also stated in a case in which the civil court concluded that the ecclesiastical proceedings had not complied with the principle of *audi et alteram partem*.³⁰ Article 6 of the ECHR has not been directly invoked, but implicitly plays a role.

Secular civil law may extend to internal religious manifestations in somewhat unexpected ways. The content of a prayer, for example, in which a former member was criticised for leaving the Church, constituted a wrongful act vis-à-vis that person.³¹ Also the violation of fundamental procedural rules in an ecclesiastical proceeding can be seen as wrongful vis-à-vis that former member.³²

3. Ecclesiastical and secular dispute resolution: specific issues

Two specific, unrelated issues are worthy of mention: one is the legal status of Church ministers and the other is the legal-political reaction to sex abuse scandals in the Roman Catholic Church in particular.

The legal status of Church ministers is a matter of Church competence. However, over the course of the last few decades, secular legislation and court rulings have integrated the spiritual office into the secular legal domain to a certain extent. This is particularly the case in the field of social security law. In other areas, the non-applicability of secular law is explicitly stated, such as the requirement of prior permission

²⁸ Hof 's-Hertogenbosch, 2 December 1998, C971117/ro.

²⁹ Civil ruling: Rechtbank Roermond, 23 October 1997, 23175 KGZA 97-226, Kort Geding 1998, 30; disciplinary ruling in appeal: Gerechtshof 's-Hertogenbosch, 24 February 1998, R9700503, *Nederlandse Jurisprudentie* 1998, 927.

³⁰ Rechtbank Zwolle, 7 August 1998, 40682 KGZA 98-236, Kort Geding 1998, 240.

³¹ Rechtbank Arnhem, 24 February 1989, KG 1989/131, Kort Geding 1989, 114.

³² Hof 's-Hertogenbosch, 2 December 1998, C971117/ro.; van Bijsterveld, *supra*, n. 14, pp. 146–163.

from the designated public body to fire someone. In various instances, Churches can determine whether they opt for applicability of secular law by the way they designate the labour relationship with a minister: as an ordinary labour contract or not.³³ In various cases, secular courts were called to decide whether a particular labour relationship within the Church was an ordinary labour contract or not. Secular courts do engage in such an inquiry. At the same time, they respected on the basis of the facts of the case, the specific labour relationship between the Church and its minister.³⁴ In cases involving Islamic imams, courts tend to come to the conclusion that an ordinary labour relationship does exist, based on the facts of the case.³⁵

Regarding sexual abuse within a Church, the question was raised in 1998, whether the State, in its capacity as judiciary, can bar a Church minister from exercising his profession as a punishment in addition to the ordinary criminal conviction, or whether decisions concerning the exercise of the office of Church minister are the prerogative of the Church itself. In reply to parliamentary questions, the minister of Justice did not consider that the separation of Church and State was relevant to such a matter and expressed his view that the Criminal Code allows the barring of a person from the exercise of a profession and makes no exception for Church ministers. In reply to additional questions, the Minister of Justice said that the law, furthermore, makes no distinction between the exercise of pastoral functions and preaching. In comments, it has been stated that this exceeds the boundaries of separation of Church and State.

The discussion was triggered by a ruling of the court of first instance in Dordrecht. The court convicted a Church minister for committing sexual offences while performing his duties. As an additional punishment, the court, on the order of the Public Prosecutor, removed the Church minister from his profession for a period of two years.³⁶

In the discussion on the competences of the Church, the authority of the State to convict a minister for criminal offences is by no means called into question. The discussion only concerns the competence to bar a Church minister from exercising his profession. It is clear that, in this case, there was no underlying difference in practice. At the same time, the court did go far into an area that is normally regarded as a matter of Church autonomy alone. Perhaps this can be explained - at least in part -

³³ Pel, *supra*, n. 18, pp. 413–478.

³⁴ Hoge Raad, 14 June 1991, 14220, *Nederlandse Jurisprudentie* 1992, 173.

³⁵ Hoge Raad, 17 June 1994, 15379, *Nederlandse Jurisprudentie* 1994, 757.

³⁶ See also E. C. M. Jurgens, 'Godsdienstvrijheid bedreigd? Over het rechterlijk verbod om te preken,' (1999) 48 *Ars Aequi*, pp. 252–253.

by the court's deprecation of the conduct of the Church minister. During the process of enactment of a bill *inter alia* to extend the offences for which the committer thereof may be barred from his profession, the government stated that Article 28 of the Criminal Code does not exclude spiritual office holders from such additional punishment.³⁷

In 2012 the Second Chamber of Parliament held a hearing with the independent commission set up by the Roman Catholic Church to inquire into historical and current sexual abuse within the Roman Catholic Church and its victims. This is remarkable since the issue itself is outside the direct sphere of activity of parliament.³⁸

IV. Religious and Other Perspectives on State Approaches to Religious Disputes

Both the Roman Catholic and the Protestant Church seem to be comfortable with the approach of the secular legal system with regard to ecclesiastical proceedings. Roman Catholic Canon Law is open towards the secular legal system.³⁹ It presupposes secular law and it also makes use of secular law. The system of ecclesiastical proceedings has a place within the secular legal system.

In the preparation of its new Constitution, Ordinances and General Regulations, the Protestant Church deliberately sought to incorporate procedural safeguards in its dispute resolution mechanisms and to meet the standards developed by secular case law. In this respect, the Church also sought specialised advice on civil and administrative legal standards. Other protestant Churches have adopted explicit procedural safeguards as well. In concrete cases, the secular courts step in, should these standards not be adequate, or should they not be followed in practice.

³⁷ Kamerstukken I, 2008–2009, 31 422 (R1853) en 31 386, B, pp. 6–9; <<http://www.eerstekamer.nl/9370000/1/j9vviasdcklgj/vi86f0o71max/f=y.pdf>> (17 July 2014).

³⁸ In detail R. Steenvoorde & E. H. Ballin, 'Een herleving van de departementen van Eredienst?' in S. van Bijsterveld, R. Steenvoorde (eds.), *200 jaar Koninkrijk: Religie, Staat en Samenleving*, (Oosterwijk 2013), pp. 325–352 (pp. 344–345).

³⁹ A. P. H. Meijers, 'Scheiding van kerk en staat – maar vervlechting van burgerlijke en canonieke recht-sorde', in *Op het snijvlak van civiel en canoniek recht, Rechtskundige Afdeling van het Thijmgenootschap*, (Zwolle 1994), pp. 7–29; A. P. H. Meijers, 'Gelijke monniken, gelijke kappen, Algemene Wet Gelijke Behandeling, Rooms Katholiek Kerkgenootschap en canoniek recht', (1994) 69 *Nederlands Juristenblad*, pp. 710–714.

As mainstream norms in society change over time, the extent of Church autonomy is continuously challenged, especially in areas in which Church autonomy leads to practices that diverge from mainstream societal law and practice. Two areas stand out: that of the legal position of Church ministers – an area in which secular law has been established and developed to also be applicable within ecclesiastical labour relationships; and, that of sexual abuse scandals within the Church – an area in which the judicial branch and subsequently the legislature have made it possible to bar a Church minister from exercising his profession as a punishment, in addition to his ordinary criminal conviction. Parliament has had direct involvement in this as well.

The media do not pay much attention to the relationship between ecclesiastical dispute resolution and secular dispute resolution. However, incidents are always picked up. This was the case, for instance, in the affair of the Roman Catholic marriage annulment in which the psychiatrist issued a report on one of the parties without having spoken to the person in question. As already mentioned in the introduction, norms and practices of Islamic dispute resolution have attracted much attention, surrounding the alleged introduction of *Shariah* courts in the Netherlands. This debate has faded at the moment, but it could surface any moment. A third issue that has been the topic of much media attention is the way the Roman Catholic Church handles and has handled sexual abuse cases.

In the academic world, various in-depth studies have been conducted into the relationship between ecclesiastical dispute resolution and secular dispute resolution. These have been consulted in the process of writing this article.

V. Conclusion

The relationship between ecclesiastical dispute resolution and the secular system of dispute resolution can best be characterised as liberty within a unitary system.⁴⁰ Dutch law, applicable to all, regardless of religious affiliation, respects the institutional autonomy of Churches, including the liberty to set up internal mechanisms for dispute resolution. The extent of institutional liberty is not unlimited, but is conditioned by law: legislation and court rulings. On the one hand, secular courts do not take sides in theological disputes. On the other hand, no one can be denied ac-

⁴⁰ A. C. M. Vestdijk-van der Hoeven, *Religieus recht en minderheden*, (Arnhem 1991), an early advocate of (a modest form of) legal pluralism, has not found much resonance.

cess to the secular court that secular law provides (Article 17 of the Constitution). Within these margins, secular courts have developed case law on how to deal with disputes for which ecclesiastical procedures are prescribed by ecclesiastical law and how to deal with cases which have already been dealt with by ecclesiastical mechanisms of dispute resolution. At the same time, ecclesiastical norms and practices integrate standards set by secular legislation and court rulings.

As far as dispute resolution within Islam is concerned, the same legal standards apply as for any ecclesiastical mechanisms of dispute resolution. In fact, dispute resolution within Islam appears to be highly informal and it appears the establishment of *Shariah* courts has not been advocated so far. Fear of the establishment of such courts and the unease with existing methods of dispute resolution can mainly be explained in terms of worries about the development of so-called parallel societies, informal social pressure in groups that are not fully integrated in society, and a worse position for women as a result.⁴¹

⁴¹ S. van Bijsterveld, 'Negotiating the Unfamiliar: Reflections from the Netherlands on the Archbishop of Canterbury's Lecture', in R. Ahdar and N. Aroney (eds.), *Shari'a in the West* (Oxford 2010), pp. 207–222.

RELIGIOUS JURISDICTION IN POLAND

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The approach to the mutual relationship between the State and ecclesiastical judiciary adopted and pursued in contemporary Poland primarily ensues from the accepted terms governing relations between the State and religious organisations. As a matter of fact, there is no law to offer precise terms for the relationship between both judiciary systems. Consequently, the principle of separation governing State-Church relations after World War II has had a major impact on the solutions adopted to date. For, although today's relations between the State and religious organisations are unquestionably different from those of the years 1945–1989, the validity of the separation of political and religious structures was not challenged after the political transformation of 1989.

I. The Resolution of Disputes: The Practices and Norms of Religious Communities

All religious organisations, with their growing number of members and expanding structures, typically develop specific rules for the resolution of conflict situations and disputes. With regard to religious organisations present in contemporary Poland, such rules primarily focus on conjugal and disciplinary matters.

In Poland, judicial structures of the Roman Catholic Church, which adjudicate for the vast majority of Polish society, are especially advanced. Ecclesiastical tribunals, whose activity *de facto* focuses on marital issues, are present in almost all of over 40 dioceses. Situations when one tribunal deals with cases from more than one diocese in the first instance are the exception. This is the case with the Warsaw Metropolitan Tribunal, which is the first instance for cases from the Warsaw Archdiocese, Warsaw-Praga Diocese and Military Ordinariate, as well as the Cracow Metropolitan Tribunal, which in the first instance deals with cases not only from the Cracow Archdiocese, but also from the Bielsko-Żywiec Diocese. The principles gov-

erning the functioning of these tribunals and the requirements for judges follow from the norms of universal canon law (especially the canons of Book VII of the CIC 1983). Therefore, they are no different from those applied in other States.

Other religious organisations often do not set up separate judiciary bodies. Due to the large number and diversity of religious organisations in Poland,¹ the following overview of the structures and methods of judicial bodies will be limited to the most representative religious organisations, distinguished by their affiliation to particular traditions, legal status and level of integration into Polish society.

In accordance with the Internal Statute of the Polish Autocephalous Orthodox Church, effective since 10 February 1995,² the exercise of judicial power is vested in diocesan bishops and the Holy Council of Bishops. A diocesan bishop constitutes the ecclesiastical tribunal of the first instance for the clergy and laity in matters concerning sins against the faith, piety and Christian morality. He also adjudicates, in the first instance, in matters of withdrawal of Church blessing from a marriage. The bishop's decisions can be appealed against to the Holy Council of Bishops as the second and last instance. The competence of the Holy Council of Bishops covers the resolution of disputes, misunderstandings and major doubts occurring in the life of the Church, ecclesiastical judicature in the second and last instance and adjudication in the last instance in matters relating to expulsion from the Church. In matters relating to bishops themselves, the only instance is the Holy Council of Bishops. At the same time, it was clearly set out in the Statute that diocesan bishops and the Holy Council of Bishops conduct their ecclesiastical judicial procedures in line with the canons of the Universal Orthodox Church.

Especially elaborate provisions govern the rules and procedures for disciplinary matters in the Lutheran Church³. According to its Fundamental Internal Law of 26

¹ As of 31 December 2014, 175 religious organisations are legally recognised in Poland. Among them, there are 15 religious organisations whose legal status is regulated by separate parliamentary acts (and also the Concordat in the case of the Catholic Church), as well as 160 religious organisations entered in the register maintained by the Minister of Administration and Digitization. See P. Stanisz, 'Relations between the State and Religious Organizations in Contemporary Poland from Legal Perspective', in W. Rees, M. Roca, B. Schanda (eds.), *Neuere Entwicklungen im Religionsrecht europäischer Staaten* (Berlin 2013), pp. 688–689; M. Rynkowski, 'State and Church in Poland', in G. Robbers (ed.), *State and Church in the European Union* (Baden-Baden 2005), pp. 426–427.

² Text available in: P. Borecki and Cz. Janik (eds.), *Prawo wewnętrzne nierzymskokatolickich związków wyznaniowych w Polsce – wybór aktów prawnych* (Warszawa 2012). Unless another source is clearly indicated, this publication will also be used as the source of other internal laws of religious organisations discussed below.

³ *Kościół Ewangelicko-Augsburski w Rzeczypospolitej Polskiej*.

October 1996 as amended, they were collated in a separate act, the Disciplinary Provisions.⁴ Such a disciplinary procedure is divided into two stages: pre-trial and trial proceedings. A decision to initiate disciplinary proceedings is taken by the Bishop of the Church, the Consistory or the Synod of the Church. The pre-trial stage is conducted by the Disciplinary Commissioner who, if there are relevant grounds, prepares the indictment and, subsequently, also prosecutes in trial proceedings which are administered by the Disciplinary Court of the First Instance and the Disciplinary Court of Appeal. The twelve disciplinary judges are appointed by the Synod of the Church from among candidates proposed by several authorised subjects. The candidates must be qualified to fulfil such a function, i.e. bear testimony to the sense of justice. They also have to be active members of the Church and be of impeccable character. At the same time, it is clearly prescribed that a disciplinary judge is independent in the exercise of his function and is subject only to the provisions of the law. The Disciplinary Court of First Instance is composed of three members selected by a draw from among all the appointed judges, with the exclusion of the judges related to the accused. As for the Disciplinary Court of Appeal, it is made up of the Synodal Council supplemented with two randomly selected judges who have not adjudicated in the first instance. However, if the accused is a Bishop of the Church, a Bishop of a Diocese, a member of the Consistory or a member of the Synodal Council, his appeal against the judgement issued by the Disciplinary Court of First Instance, is considered by the Synod of the Church. As far as the proceedings are concerned, they secure the conditions to realise the right to defence. The accused has the undisputed right to inspect the files and to appoint a defence counsel, which, if there is a risk of penalty of the permanent deprivation of the right to hold an ecclesiastical office, transforms into an obligation. The right to appeal against the decision of the Disciplinary Court of First Instance is also guaranteed. By way of exception, it is also possible to lodge a cassation appeal against the final and binding judgement of the Disciplinary Court of Appeal on grounds of a serious breach of the right to defence or a clear and gross violation of substantive law or the procedure, provided that it has a bearing on the decision of the Court. The appeal can also be based on the imposition of a penalty not included in the disciplinary provisions. Such an appeal is heard by the Synod of the Church. With regard to marriage, the Lutheran Church recognises State divorce judgements. The Official Practice of the Church⁵ states that the Church does not carry out divorce proceedings. However, a divorced

⁴ <http://www.bik.luteranie.pl/pl/strona_glowna/prawo_koscielne.html> (15 July 2014).

⁵ <http://www.bik.luteranie.pl/pl/strona_glowna/prawo_koscielne.html> (15 July 2014).

person willing to contract a new marriage is required to obtain dispensation from the Church's bishop, who takes a decision after considering the opinion of the competent pastor.

The Fundamental Internal Law of the Baptist Church⁶ of 1 October 2005 does not establish separate judicial bodies. Decisions on disciplinary matters are taken by the competent authorities of the community, district or the Church. The reason for a disciplinary dismissal of a pastor may be negligence with regard to the requirements imposed on the clergy (spiritual, moral and intellectual qualifications), and, in particular, teaching contrary to the Holy Bible and the principles of faith observed in the Church or adopting an attitude that causes disunity in the community. Should this be the case, the dismissal of a pastor becomes effective upon a resolution by the Community Conference or the Church Council. Such a resolution by the Community Conference can be appealed against to the Council, while a resolution by the Church Council cannot be appealed against. Moreover, the Church Council is also authorised to settle disputes between communities as well as between communities and clergymen. On the other hand, issues regarding the cessation of membership in a community are regulated by the procedures established in each particular community. In practice, such decisions are taken by the Community Conference or the Community Council. The deprivation of membership can be appealed against to the District Council. As for the situation of the divorced (i.e., the question of admittance to the Lord's Table), there are several models employed: either the relevant decision is made by the pastor or it is taken collectively by the Community Council or the Community Conference.⁷

According to the Internal Law of the Jewish Communities⁸ of 15 January 2006, there should be an arbitration court in each community. A separate arbitration court is also one of the authorities of the Union of Jewish Communities. A court of arbitration of a community consists of three to five members, elected by the community's general assembly by a simple majority of votes in a secret ballot. The procedure before the court is established by the court itself; however, it must take into account the constitutional rights of citizens and the established practice and tradition of the Jewish judiciary. The court's jurisdiction covers the resolution of disputes reported by community members and the handling of complaints against the decisions of the

⁶ *Kościół Chrześcijan Baptystów.*

⁷ I want to thank Prof. Tadeusz J. Zieliński (personal communication) for the information about the practice shaped on the basis of the Fundamental Internal Law of the Baptist Church.

⁸ *Gminy wyznaniowe żydowskie w Rzeczypospolitej Polskiej.*

community board in matters of membership. The Union's Court of Arbitration is composed of five members elected by the General Assembly. This court also determines its rules and agenda independently. Among its responsibilities are: resolving disputes between members (in conformity with the written and customary laws of Judaism), considering appeals against the decisions of community courts of arbitration and handling complaints in membership matters.

No separate religious courts are provided for in the Statute of the Muslim Community⁹, adopted on 28 February 2009. Under the statute, any matters relating to membership are settled by the authorities which have broader competence. A person deprived of membership may refer the case to the Supreme Board and can appeal against the decision of this body to the Congress of the Muslim Community, whose decision is final and cannot be appealed against. With regard to readmission to the Muslim Community of a previously expelled member, the final decision is taken by the Supreme Board. As can be inferred from the provisions of the statute, this body also settles potential individual disputes – as it is competent in all matters falling outside the competence of other bodies, and any matter involving the Muslim Community or its individual member can be decided at a meeting of the Supreme Board of the Muslim Community. The Supreme Board also deals with religious issues concerning the principles of Islamic teaching and religious practices to ensure that they conform to the Quran and Sunnah. With regard to disciplinary proceedings, the statute provides that the imam and muezzin can be suspended or removed from his function by the Supreme Board. In contrast, the mufti is appointed and dismissed by the Congress.

II. Religious Disputes: The Approach of the State

Polish law offers a broad range of guarantees for the autonomy of religious communities. Respecting their autonomy and independence in their own affairs is the responsibility of the State in accordance with Article 25(3) of the Constitution of the Republic of Poland of 2 April 1997,¹⁰ which provides that the relationship between the State and religious communities shall be based on the principle of respect for their autonomy and mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.

⁹ *Muzułmański Związek Religijny w Rzeczypospolitej Polskiej*.

¹⁰ *Konstytucja Rzeczypospolitej Polskiej*, Dziennik Ustaw 1997 no. 78, item 483 as amended.

Separate guarantees of autonomy are to be found in laws concerning individual religious groups. In Article 1 of the Concordat between the Holy See and the Republic of Poland, signed on 28 July 1993,¹¹ the parties made a commitment to respect their own autonomy and independence in their relations. Further, according to Article 5 of the Concordat, the State guaranteed the Catholic Church free and public exercise of its mission, as well as the exercise of its jurisdiction, management and administration of its own affairs, in accordance with Canon Law. Similar norms were established even earlier under the Act of 17 May 1989 on the relationship of the State to the Catholic Church.¹² According to its Article 2, the Church is governed by its own law in its own affairs; it is free to exercise its spiritual and jurisdictional powers and to manage its own affairs. Almost identical norms, or at least of similar significance, were also incorporated in all the acts defining the State's relationship to individual religious organisations, which were passed after the democratic changes of 1989.¹³

¹¹ *Konkordat między Stolicą Apostolską i Rzeczypospolitą Polską*, Dziennik Ustaw 1998 no. 51, item 318.

¹² *Ustawa o stosunku Państwa do Kościoła Katolickiego w Rzeczypospolitej Polskiej*, Dziennik Ustaw 1989 no. 29, item 154 as amended.

¹³ The regulations corresponding to Article 2 of the Act concerning the Catholic Church were included in Article 2 of the Act of 4 July 1991 concerning the legal position of the Polish Autocephalous Orthodox Church (*Ustawa o stosunku Państwa do Polskiego Autokefalicznego Kościoła Prawosławnego*, Dziennik Ustaw 1991, no. 66, item 287 as amended); in Article 3 of the Act of 30 June 1995 governing the relationship of the State to the Evangelical Methodist Church (*Ustawa o stosunku Państwa do Kościoła Ewangelicko-Metodystycznego w Rzeczypospolitej Polskiej*, Dziennik Ustaw 1995 no. 97, item 479 as amended); in Article 3 of the Act of 30 June 1995 on the State's relationship to the Seventh-Day Adventist Church (*Ustawa o stosunku Państwa do Kościoła Adwentystów Dnia Siódmego w Rzeczypospolitej Polskiej*, Dziennik Ustaw 1995 no. 97, item 481 as amended); in Article 3 of the Act of 30 June 1995 concerning the Polish Catholic Church (*Ustawa o stosunku Państwa do Kościoła Polskokatolickiego w Rzeczypospolitej Polskiej*, Dziennik Ustaw 1995 no. 97, item 482 as amended); in Article 2(1) of the Act of 20 February 1997 on the relationship of the State to the Catholic Mariavite Church (*Ustawa o stosunku Państwa do Kościoła Katolickiego Mariawitów w Rzeczypospolitej Polskiej*, Dziennik Ustaw 1997 no. 41, item 252 as amended); in Article 2(1) of the Act of 20 February 1997 concerning the Old Catholic Mariavite Church (*Ustawa o stosunku Państwa do Kościoła Starokatolickiego Mariawitów w Rzeczypospolitej Polskiej*, Dziennik Ustaw 1997 no. 41, item 253 as amended) and in Article 2 of the Act of 20 February 1997 on the Pentecostal Church (*Ustawa o stosunku Państwa do Kościoła Zielonoświątkowego w Rzeczypospolitej Polskiej*, Dziennik Ustaw 1997 no. 41, item 254 as amended). Analogous provisions were included in Articles 1(2) and 2 of the Act of 13 May 1994 on the Lutheran Church (*Ustawa o stosunku Państwa do Kościoła Ewangelicko-Augsburskiego w Rzeczypospolitej Polskiej*, Dziennik Ustaw 1994 no. 73, item 323 as amended); in Article 2(1–2) of the Act of 13 May 1994 concerning the State's relationship to the Reformed Church (*Ustawa o stosunku Państwa do Kościoła Ewangelicko-Reformowanego w Rzeczypospolitej Polskiej*, Dziennik Ustaw 1994 no. 73, item 324 as amended); in Articles 2–3 of the Act of 30 June 1995 governing the relationship of the State to the Baptist Church (*Ustawa o stosunku Państwa do Kościoła Chrześcijańskich Baptystów*, Dziennik Ustaw 1995 no. 97, item 480 as amended) and in Article 3

As follows from the regulations discussed above, the guarantee of autonomy and independence of religious organisations refers to their own internal affairs and therefore – as indicated in the doctrine – to religious and moral matters and the internal organisation of these communities.¹⁴ A kind of model of the extent of the independence of Churches and other religious organisations is given in the Act of 17 May 1989 on the guarantees of freedom of conscience and religion.¹⁵ In accordance with its Article 11(1), these entities are independent of the State in performing their religious functions. Article 19(2) *leg. cit.* contains an extensive, though not exhaustive, list of prerogatives of religious organisations following from the freedom to carry out religious functions. In the list of seventeen specific prerogatives there is, for example, defining religious doctrine, dogmas and principles of faith and liturgy, organising public worship, rituals and religious gatherings, ruling their own affairs by applying their own law, exercising spiritual authority and managing their own affairs in a free manner, as well as appointing, educating and employing the clergy.

The doctrine makes special emphasis on the right of religious organisations to rule their own affairs by applying their own law. However, it is clearly stated that the validity of this law is limited, in principle, to their organisational structure. It is not automatically effective in the Polish legal system. It may have an effect in Polish law only by way of exception and only when the State so decides in a parliamentary act or an international agreement. The basis for such a law to take effect must therefore be sought in clear reference to the internal regulations of religious organisations. The need to refer to this law may, in exceptional circumstances, also result from the construction of the regulations, which means that reference to the internal law of religious organisations is the only way to determine the norms contained in the provisions of Polish law.¹⁶

of the Act of 20 February 1997 concerning the Jewish Communities (*Ustawa o stosunku Państwa do gmin wyznaniowych żydowskich w Rzeczypospolitej Polskiej*, Dziennik Ustaw 1997 no. 41, item 251 as amended).

¹⁴ J. Krukowski, *Kościół i państwo. Podstawy relacji prawnych* (Lublin 2000), p. 285.

¹⁵ *Ustawa o gwarancjach wolności sumienia i wyznania*, Dziennik Ustaw 2005 no. 231, item 1965 as amended.

¹⁶ See W. Uruszczak, 'Recepcja prawa kanonicznego w obowiązującym prawie polskim', (2007) 3 *Annales Canonici*, p. 14; P. Borecki and Cz. Janik, 'Prawo wewnętrzne związków wyznaniowych a państwowy porządek prawny', in P. Borecki and Cz. Janik (eds.), *Prawo wewnętrzne nierzymskokatolickich związków wyznaniowych w Polsce – wybór aktów prawnych* (Warszawa 2012), p. 35; P. Stanisławski, 'Źródła prawa wyznaniowego Rzeczypospolitej Polskiej', in A. Mezglewski, H. Misztal and P. Stanisławski, *Prawo wyznaniowe* (Warszawa 2011), pp. 65–66.

Such a position was also adopted by the Supreme Court in 1992¹⁷ and by the Supreme Administrative Court in 2000.¹⁸ The basis for both decisions was Article 47 of the Act of 21 November 1967 on the universal duty to defend the Republic of Poland,¹⁹ in which the clergy were guaranteed the right to be transferred to the reserve, although it was not determined who should count as a clergyman. Consequently, the courts concluded that the decision regarding who is to be released from active military service depends on the qualifications following the internal law in force within religious organisations. With regard to the hierarchy of sources of law, this internal law is at the same level as the statute, which is submitted as part of a registration application to the competent State minister in the case of registered religious organisations.

The guarantees of freely exercising jurisdiction for religious organisations as well as ruling their own affairs by adopting their own law, lead to the legitimate conclusion that the ecclesiastical judiciary is autonomous²⁰ and State courts are not allowed to deal with disputes arising in the application of the internal law of religious organisations within their own structures.²¹ The principle of impartiality of public authorities in religious matters, as guaranteed by Article 25(2) of the Constitution, implies that public authorities are not competent to decide on religious matters.²² These theses were acknowledged in case law. In 2003 the Court of Appeal in Warsaw investigated the allegation made by a former member of the Jehovah's Witnesses, who argued that his expulsion from the religious community violated his personal interests. In deciding the case, the court explicitly referred to the constitutional guarantees of the autonomy and independence of religious organisations. It was stated in the judgement that the matters in question fall outside the jurisdiction of the common court, 'which is not competent to assess the behaviour of the followers of a particular religion from the viewpoint of the rules adopted by that religion or to assess the sanctions imposed by that religious organisation on a person who has violated

¹⁷ Sąd Najwyższy, 6 May 1992, I KZP 1/92, (1992) 7–8 *Orzecznictwo Sądu Najwyższego. Izba Karna i Wojskowa*, pp. 9–14.

¹⁸ Naczelny Sąd Administracyjny, 19 September 2000, III SA 1411/00, LEX no. 47198.

¹⁹ *Ustawa o powszechnym obowiązku obrony Rzeczypospolitej Polskiej*, Dziennik Ustaw 2004 no. 241, item 2416 as amended.

²⁰ J. Rapacz, 'Autonomia sądownictwa kościelnego', (2007) 3 *Annales Canonici*, p. 56.

²¹ D. Walencik, 'Prawo kanoniczne (wewnętrzne) związków wyznaniowych a prawo polskie', (2013) 5 *Przegląd Sądowy*, p. 16.

²² T. J. Zieliński, 'Niekompetencja religijna władz publicznych jako aspekt zasady bezstronności z art. 25 ust. 2 Konstytucji RP', in T. J. Zieliński (ed.), *Bezstronność religijna, światopoglądowa i filozoficzna władz Rzeczypospolitej Polskiej* (Warszawa 2009), pp. 141–167.

its rules.' The role of a State court is neither to judge the moral principles adopted by a religious organisation nor to assess their observance by the members or governing bodies of such an organisation. Finally, the court ruled that 'the refusal to admit a person to a community following a given religion, as well as the expulsion of a person, fall outside the jurisdiction of a common court.'²³

However, a debatable position of the Supreme Administrative Court in recent cases must be mentioned, wherein persons demanded that their disaffiliation from the Catholic Church was entered in the parish registers on the basis of declarations delivered by mail, which is not provided for by the law of that religious community. In several judgements of 2013,²⁴ the court indeed quoted the principle of autonomy and independence of Churches and other religious organisations. It also rightly concluded that the issues of both admission to and exclusion from a particular religious organisation is an internal matter of that organisation. However, it also made a reservation that such internal matters do not include issues concerning the external rights or obligations of a given entity guaranteed by the provisions of generally applicable law. It was stated in the judgements in question that the analysed cases concern exactly such rights (the protection of personal data and the freedom of conscience and religion), which means that State bodies, including courts, must undertake an independent evaluation of the effectiveness of the declaration of abandonment of the Church. If the abandonment was effective, the exclusion of the supervisory powers of the Inspector General for the Protection of Personal Data (concerning the data of persons belonging to the Church and processed by it) is repealed.²⁵

The position taken by the Supreme Administrative Court resulted in the decisions made by the Inspector General for the Protection of Personal Data to order parish priests to 'update personal data' of persons who demanded it by adding the requested entry to the baptism registers. However, the interested parish priests started to appeal against the decisions. Considering one of such cases, in 2014 the Regional Administrative Court in Warsaw showed greater sensitivity to the norms concerning the Church's autonomy and independence and revoked the decision of the Inspector General for the Protection of Personal Data. At the same time, the Court emphasised that the question of religious affiliation or the issue of abandoning a given religious organisation is first and foremost regulated by the principles of a

²³ Sąd Apelacyjny w Warszawie, 13 August 2003, VI ACa 81/03, (2005) 1 *Wokanda*, pp. 33–35.

²⁴ Naczelny Sąd Administracyjny, 18 October 2013, I OSK 129/13 and 1195/13, as well as 24 October 2013, I OSK 1828/12; see <<http://orzeczenia.nsa.gov.pl>> (15 July 2014).

²⁵ See Article 43(2) of the Data Protection Act of 29 August 1997 (*Ustawa o ochronie danych osobowych*, Dziennik Ustaw 2002 no. 101, item 926 as amended).

given religion. State law and State authorities can only interfere in cases when the activity of a given religious organisation directly and grossly breaches the basic legal norms which are in force in the State.²⁶ However, the matter may not be considered finally settled because the Inspector General for the Protection of Personal Data filed a cassation complaint. Other similar cases are yet to be finally settled.

The principle of autonomy of religious organisations also appeared in a case decided by the Supreme Court in 2010.²⁷ It involved a pastor of the Lutheran Church who, as a consequence of internal disciplinary proceedings, was first transferred to another parish (but refused to accept this function) and then was deprived of the right to exercise the office of the pastor in the Church and removed from the list of the clergy. The plaintiff demanded the recognition of the employment relationship between him and his parish and the consideration of his case under the Labour Code of 26 June 1974.²⁸ However, on the basis of the principle of autonomy and independence of the Church, the Supreme Court came to the rightful conclusion that the ministry performed by the pastor falls under the employment regime established by the Church. The autonomy of the Church covers the freedom in determining the status of persons who voluntarily perform functions related to worship. Therefore, the current legal situation concerning the employment of a pastor by a parish for purely religious ministry creates a different kind of relation from an employment relationship. Such a relation falls outside the competence of labour law, justifying the non-applicability of regulations regarding employment contracts to a pastor performing such a ministry. Consequently, as the appointment of a pastor is regulated by the internal law of the Church, State interference in this relationship is unacceptable.

The 1993 Concordat introduced a clear separation of competence of State courts and Church tribunals in matters relating to matrimony. According to its Article 10(3) it is within the exclusive competence of ecclesiastical authorities to make judgements as to the validity of canon law marriage, as well as any other marital issues laid down by canon law. Article 10(4) *conv. cit.* stipulates that passing judgements in matrimonial cases as regards the effects defined in Polish law falls within the exclusive competence of State courts. It clearly follows from the regulations dis-

²⁶ Wojewódzki Sąd Administracyjny w Warszawie, 21 August 2014, II SA/Wa 389/14, <<http://orzeczenia.nsa.gov.pl>> (10 February 2014).

²⁷ Sąd Najwyższy, 5 May 2010, I PK 201/09, (2011) 2 *Monitor Prawa Pracy*, p. 98.

²⁸ *Kodeks pracy*, Dziennik Ustaw 1998, no. 21, item 93 as amended.

cussed that judgements of ecclesiastical tribunals concerning conjugal issues are effective only in the ecclesiastical order.²⁹

Specific conclusions from the Concordat provisions under discussion as well as from the regulations of the Family and Guardianship Code of 25 February 1964,³⁰ laid down for the implementation of the Concordat, were drawn by the Supreme Court in 2000.³¹ The court found, among other things, that the fate of (secular) marriage is always decided by State courts. Referring to the significance of judgements of ecclesiastical tribunals in proceedings concerning divorce or annulment of marriage held before State courts, it was ruled that the decision of an ecclesiastical court concerning the validity of canon law marriage cannot have a pre-judicial influence on the decision of a State court regarding the validity or termination of secular marriage. At the same time, it was emphasised that the judgements of ecclesiastical tribunals may be treated as evidence in civil proceedings, although it is doubtful whether such judgements should be regarded as official documents or private documents of a special nature.

Nonetheless, it is true that a number of different types of disputes pertaining to religious matters or activities of religious organisations and their organisational units are decided by State courts. This is always the case when a given issue falls outside the scope of internal affairs, both in terms of its subject matter (going beyond religious matters and internal ecclesiastical organisation) and persons involved in a dispute (not belonging to a given religious organisation). Any matters related to the economic activity of religious entities are governed by State law and fall within State jurisdiction. For example, the case law on unfair competition recognised a Church supervising a cemetery as an entrepreneur who is obliged to adhere to the relevant legislation. The activity of this Church entity which consisted in restricting access of other entities to the provision of services of digging, constructing and reconstructing graves was found an unacceptable abuse of its so-called dominant position.³²

²⁹ W. Góralski and A. Pieńdyk, *Zasada niezależności i autonomii Państwa i kościoła w Konkordacie polskim z 1993 roku* (Warszawa 2000), pp. 67–70.

³⁰ *Kodeks rodzinny i opiekuńczy*, Dziennik Ustaw 1964, no. 9, item 59 as amended.

³¹ Sąd Najwyższy, 17 November 2000, V CKN 1364/00, *Orzecznictwo Sądu Najwyższego. Izba Cywilna* 2001, no. 9, item 126. The significance of this judgement is emphasised by M. Rynkowski, *Sądy wyznaniowe we współczesnym europejskim porządku prawnym* (Wrocław 2013), p. 140.

³² Sąd Okręgowy w Warszawie – Sąd Ochrony Konkurencji i Konsumentów, 12 January 2006, XVII Ama 105/04, *Dziennik Urzędowy Urzędu Ochrony Konkurencji i Konsumentów* 2006, no. 2, item 28. The case of a parish allowing one entrepreneur to provide cemetery services on an exclusive basis was interpreted in a similar way, see Sąd Okręgowy w Warszawie – Sąd Antymonopolowy, 23 April 2001, XVII Ama 49/00, *Dziennik Urzędowy Urzędu Ochrony Konkurencji i Konsumentów* 2001, no. 1, item 11.

Sometimes State courts also settle disputes arising within a single religious tradition, as a consequence of decisions leading to schisms. This is the case with a long-lasting and still unresolved dispute between the Union of Jewish Communities (acting in accordance with the Act of 20 February 1997) and Jewish communities that identify themselves as independent or progressive. The Union challenges the minister's decision to enter such entities into the register of Churches and other religious organisations. It also brings these cases before different courts with a view to obtaining the invalidity of the decision on the basis of the claim that in the Act of 1997, the Union was granted the exclusive right to organise Jewish religious life.³³

Matters related to religion also lead to legal disputes in which plaintiffs demand the protection of their freedom of conscience or religious feelings understood as personal interests that should be protected pursuant to Articles 23 and 24 of the Civil Code of 23 April 1964.³⁴ The Supreme Court found that such a violation of freedom of conscience occurred, for example, when the Sacrament of Anointing the Sick was administered by a hospital chaplain to a non-believer without his knowledge or consent during an induced coma.³⁵ On the other hand, the Supreme Court recognised a press statement libelling the Pope as the violation of the religious feelings of a Catholic priest who was bound to John Paul II by special religious ties of respect and friendship.³⁶ Under the same kind of procedure, yet unsuccessfully, some tried to obtain court decisions that their freedom of conscience was violated by the presence of the cross on the premises occupied by public administration³⁷ or by the distribution of a poster which, in the plaintiff's opinion, constituted a profanation of Christ's Cross.³⁸ Recently, State courts have passed a number of judgements con-

³³ See e.g. Naczelny Sąd Administracyjny, 3 March 2010, OSK 498/09, LEX no. 597644, which found that, contrary to the earlier decisions of the competent minister, the Union of Jewish Communities should be granted rights of a party in the proceedings for the invalidation of the decision on the registration of the Independent Jewish Community in Gdańsk. The court found that the proceedings for the invalidation of the decision petitioned by the Union of Jewish Communities were unjustly discontinued.

³⁴ *Kodeks cywilny*, Dziennik Ustaw 1964, no. 16, item 93 as amended.

³⁵ Sąd Najwyższy, 20 September 2013, II CSK 1/13, LEX no. 1388592.

³⁶ Sąd Najwyższy, 6 April 2004, I CK 484/03, *Orzecznictwo Sądu Najwyższego. Izba Cywilna* 2005, no. 4, item 69.

³⁷ Sąd Apelacyjny w Łodzi, 28 October 1998, I ACa 612/98, (1999) 11 *Wokanda*, pp. 44–47; Sąd Apelacyjny w Szczecinie, 25 November 2010, I ACa 363/10, (2012) 4 *Przegląd Prawa Wyznaniowego*, pp. 195–218; Sąd Apelacyjny w Warszawie, 9 December 2013, I ACa 608/13, <<http://orzeczenia.waw.sa.gov.pl>> (15 July 2014).

³⁸ Sąd Najwyższy, 12 June 2002, III CKN 618/00, *Orzecznictwo Sądu Najwyższego. Izba Cywilna* 2003, no. 6, item 84.

cerning the offence of insulting religious feelings, regulated by Article 196 of the Penal Code of 6 June 1997,³⁹ in which they assessed, for example, conduct involving tearing up, hurling and verbally insulting the Holy Bible by a musician during a concert.⁴⁰

The question of the application of the internal laws of religious organisations by State courts has caused some controversy. Both in case law and the doctrine, the opinion, accepted for years almost without reservations, that the internal laws of religious organisations are beyond all control of State courts⁴¹ is becoming less and less prevailing. Questions related to these issues have begun to arise along with cases of the clergy entering into agreements on behalf of ecclesiastical legal persons represented, without the permission required by the internal law of the Church to undertake the relevant legal action. Several times such issues were investigated by the Supreme Court, which, despite some changes in the adopted position, remained consistent in upholding the view that the restriction of the scope of the powers of the representatives of ecclesiastical legal persons, resulting from the internal law of a given religious organisation, should also be considered valid under State law. Consequently, in the relevant judgements, the Court refers to the internal law of religious organisations (Catholic canon law and the internal law of the Lutheran Church) by interpreting it and determining civil-law consequences.⁴² The position adopted by the Supreme Court, determining the rules applied in practice today, has however met with severe criticism of the doctrine as unjustified in Polish law.⁴³ It was even found that due to the adopted line of judicial decisions, the State (or more precisely, its courts) has be-

³⁹ *Kodeks karny*, Dziennik Ustaw 1997, no. 88, item 553 as amended.

⁴⁰ Sąd Najwyższy, 29 October 2012, I KPZ 12/12, (2013) 5 *Przegląd Prawa Wyznaniowego*, pp. 253–270.

⁴¹ Cf. M. Pietrzak, *Prawo wyznaniowe* (Warszawa 2010), p. 270.

⁴² Sąd Najwyższy, 27 July 2000, IV CKN 88/00, (2003) 9 *Orzecznictwo Sądów Polskich*, item 115; Sąd Najwyższy, 24 March 2004, IV CK 108/03, (2005) 4 *Orzecznictwo Sądu Najwyższego. Izba Cywilna*, pp. 48–60; Sąd Najwyższy, 2 February 2005, IV CK 480/04, (2009) 1 *Przegląd Prawa Wyznaniowego*, pp. 203–206; Sąd Najwyższy, 17 February 2005, IV CK 582/04, LEX no. 176007; Sąd Najwyższy, 19 December 2008, III CZP 122/08, (2010) 2 *Orzecznictwo Sądów Polskich*, pp. 114–120; Sąd Najwyższy, 12 January 2011, I CSK 182/10, LEX no. 784308; Sąd Najwyższy, 13 April 2012, I CSK 451/11, LEX no. 1168535). See Rynkowski, *supra*, n. 31, pp. 42–48, 57–59; B. Rakoczy, ‘Prawo kanoniczne w orzecznictwie sądów polskich’, in D. Walencik (ed.), *Prawo wyznaniowe w Polsce (1989–2009). Analizy – dyskusje – postulaty* (Katowice, Bielsko-Biała 2009), pp. 275–278.

⁴³ Numerous comments and opinions on these decisions are given by Walencik, *supra*, n. 21, p. 12.

come, to the extent discussed above, the guardian of the clergy's compliance with canon law.⁴⁴

Polish law offers some opportunities for non-State arbitration courts to adjudicate in a manner effective under civil law. These opportunities follow from Part V of the Code of Civil Procedure of 17 November 1964.⁴⁵ If the parties so decide, such a court may deal with disputes concerning property or non-property rights which may be subject to settlement, except for cases involving alimony. A judgement passed by such a court or a settlement reached before it (if accepted by a State court) are equally effective as a judgement passed by or a settlement negotiated before a State court. However, so far, religious organisations have not taken advantage of such possibilities, nor have they even been considered. At most, they incidentally use the opportunities created by mediation laws. Meanwhile, Polish law does not prevent a member of the clergy from acting in the capacity of a mediator within the parameters of State regulations. The doctrine even suggests that, for example, in matters concerning the family, the clergy are especially predisposed to act as mediators.⁴⁶ The weak activity of religious organisations in the field should be seen in the context of the unpopularity of alternative methods of conflict resolution in Poland.

It is worth mentioning a specific form of settling contentious issues between the State and religious organisations; namely, the so-called regulatory proceedings. They were adopted to make amends to religious communities for the loss of property in the period 1945–1989. This solution was first applied in 1989 in reference to the Catholic Church. Subsequently, it was used as a model for the norms concerning non-Catholic religious organisations. Apart from the Property Commission, examining cases pertaining to the Catholic Church, four Regulatory Commissions were appointed. Three of them were supposed to examine motions of the legal persons of the following organisations: the Orthodox Church, the Lutheran Church and the Jewish Communities. The fourth one (the Inter-Church Regulatory Commission) was given the task of conducting regulatory proceedings in reference to the remaining religious organisations.⁴⁷ The commissions were composed of representatives of both the government and the interested religious organisations on the basis of parity. The participants of the proceedings were granted the right to reach an agreement before the commission. Moreover, it was established that the matter can be de-

⁴⁴ Borecki and Janik, *supra*, n. 16, p. 40.

⁴⁵ *Kodeks postępowania cywilnego*, Dziennik Ustaw 2014, item 101 as amended.

⁴⁶ Z. Zarzycki, 'Mediacja osoby duchownej w postępowaniu o rozwód i separację', in A. Mezglewski (ed.), *Funkcje publiczne związków wyznaniowych* (Lublin 2007), p. 364.

⁴⁷ See Pietrzak, *supra*, n. 41, pp. 280–286; Stanisiz, *supra*, n. 1, pp. 699–701.

cided by a ruling made by the adjudication panel or the commission in its full composition. In cases where there is no consensus required to agree on a ruling, it is not issued. The interested ecclesiastical legal persons – if further conditions are fulfilled – can only ask a court to adjudicate the issue.⁴⁸ The commissions' activity cannot, however, be evaluated in a completely positive way. As it was initially conceived, the solutions concerning the regulatory proceedings were to be in force for a limited period of time. For this reason, there have been no such comprehensive guarantees that cases would be dealt with as thoroughly as during court proceedings. It has especially been emphasised that decisions of the regulatory commissions cannot be appealed against in a court. In some cases it was unfairly used by people involved, which became one of the reasons for abolishing the Property Commission. However, other regulatory commissions were not closed, even though they act according to the same rules which were criticised in reference to the Property Commission, and the activities of at least some of them also tend to be subject to severe criticism.⁴⁹

III. Religious Perspectives on State Approaches to Religious Disputes

The state of affairs outlined in Part II does not essentially raise any serious criticisms on the part of religious organisations in Poland. Currently, there is no serious debate addressing the need to introduce any major changes in the relations between the religious and State judiciary. For understandable reasons, religious organisations are particularly sensitive to issues related to their autonomy and therefore, they consider it appropriate to independently resolve disputes concerning religious matters and controversies arising in connection with the application of their internal law within their own structure. Meanwhile, they respect the competence of State courts to decide matters within the jurisdiction of the State. The proposed improvements relate only to specific issues.

⁴⁸ See D. Walencik, *Rewindykacja nieruchomości Kościoła Katolickiego w postępowaniu przed Komisją Majątkową* (Lublin 2008); W. Bendza, *Regulacja kościelnych spraw majątkowych na przykładzie Kościoła Prawosławnego w Polsce* (Warszawa 2011); D. Walencik, 'Regulacja spraw majątkowych gmin wyznaniowych żydowskich', in D. Walencik (ed.), *Prawo wyznaniowe w Polsce (1989–2009). Analizy – dyskusje – postulaty* (Katowice, Bielsko-Biała 2009), pp. 371–389.

⁴⁹ Cf. W. Sławiński, 'Działalność Komisji regulacyjnej ds. majątku Kościoła Ewangelicko-Augsburskiego w RP w świetle przepisów prawa i praktyki. Zarys problematyki', (2008) 2 *Roczniki Nauk Prawnych*, pp. 349–364.

Some authors taking the Catholic perspective criticise the solution excluding the possibility to recognise ecclesiastical judgements concerning nullity of marriage under civil law. They note that the solution departs from those adopted in some other countries. When defending their point of view, these authors also claim that the civil recognition of ecclesiastical decisions concerning nullity of marriage would better correspond to Article 10(1) of the Concordat according to which canon law matrimony is subject to such effects as marriage contracted under Polish law.⁵⁰ It is also claimed that changes modelled after the Italian solutions would be more advantageous for the interested parties.⁵¹ Nevertheless, a positive assessment of the solutions adopted seems to be prevalent at the moment. They are usually considered to be appropriate and fully justified and to follow from the adoption of the principle of mutual independence of the Church and State.⁵²

Judges of Catholic ecclesiastical courts formulate the proposals concerning better cooperation of their institutions with the State's courts and other institutions, which would require, for instance, a clearer definition of the status of ecclesiastical tribunals. As a serious impediment to fulfilling their tasks, they see the impossibility to obtain different types of documentation from public (especially healthcare) institutions.⁵³ Moreover, some conflicts arise in situations where State courts demand that ecclesiastical tribunals make available the documentation collected during their proceedings. The representatives of the Church already voiced their objections to such practices during the meetings of the Concordat Commissions.⁵⁴

⁵⁰ P. Majer, 'Uznawanie przez państwo wyroków sądów kościelnych w sprawach małżeńskich. Czy byłoby pożyteczne przyjęcie takiego systemu w Polsce?', in A. Mezglewski (ed.), *Funkcje publiczne związków wyznaniowych* (Lublin 2007), pp. 413–431; Uruszczak, *supra*, n. 16, pp. 12–13.

⁵¹ A. Mezglewski and A. Tunia, *Wyznaniowa forma zawarcia małżeństwa cywilnego* (Warszawa 2007), p. 81.

⁵² W. Góralski and W. Adamczewski, *Konkordat między Stolicą Apostolską i Rzeczpospolitą Polską z 28 lipca 1993 r.* (Płock 1994), p. 67. H. Misztal, 'Ustanie małżeństwa konkordatowego', in H. Misztal and P. Stanisław (eds.), *Prawo wyznaniowe* (Lublin 2003), p. 299, too, sees the solutions contained in the Concordat as a natural consequence of accepting the principle of independence of the Church and State.

⁵³ See J. Bar, 'Współpraca sądów kościelnych z innymi podmiotami życia publicznego', in J. Wroceński and J. Krajczyński (eds.), *Finis legis Christus. Księga Pamiątkowa dedykowana Księdzu Profesorowi Wojciechowi Góralskiemu z okazji siedemdziesiątej rocznicy urodzin*, vol. 1 (Warszawa 2009), pp. 223–239; H. Pietrzak, 'Dyskusja podczas konferencji', in J. Wroceński and H. Pietrzak (eds.), *Konkordat polski w 10 lat po ratyfikacji. Materiały z konferencji* (Warszawa 2008), pp. 194–196.

⁵⁴ According to the memo about the meeting of these commissions of 17 November 2009, the then Minister of Justice 'announced that these cases would be thoroughly examined'. Ministerstwo Spraw Zagranicznych. Departament Europy Zachodniej i Północnej, *Notatka informacyjna ze spotkania rządowej i kościelnej Komisji Konkordatowych. Warszawa, 17 listopada 2009 r.*

The Catholic Church levelled serious criticism against the position of the Supreme Administrative Court and the ensuing decisions of the Inspector General for the Protection of Personal Data. The latter has required parish priests to make entries regarding formal disaffiliation from the Church in the parish registers contrary to canon law. In 2014 the Secretary General of the Polish Bishops' Conference announced parish priests' intention to appeal against the decision of the Inspector General and concluded that the case needs to be regarded as interference in the internal affairs of the Church.⁵⁵

In the public debate, the jurisdiction of religious tribunals (and other religious institutions) over matters regarding religious organisations' own affairs, particularly when it comes to the validity of religious marriage and the disciplinary issues of the clergy, is not questioned. The competence of ecclesiastical authorities is not challenged even when some of their decisions are considered unfair or wrong by some mass-media. This was the case in 2014, when a Catholic priest was punished with various types of constraints, removed from his parish and transferred to a hospital as a chaplain, and subsequently suspended after voicing opinions considered too liberal and contrary to the teaching of the Church by his bishop.

IV. Conclusion

The character of the relationship between the ecclesiastical and State judiciary in Poland is determined by the idea of the separation of Church and State. Both sides protect their own competence in their own affairs. This is sometimes the source of controversy. Some doubts also pertain to the acknowledgement of the internal law of religious organisations under civil law. Finally, any collaboration between State and ecclesiastical courts remains, in practice, in the sphere of rarely formulated proposals.

⁵⁵ Statement from 16 January 2014 as recorded by the Polish Press Agency, <http://www.pap.pl/palio/html.run?_Instance=cms_www.pap.pl&_PageID=1&ts=infopakiet&dz=kraj&idNewsComp=&filename=&idnews=143014&data=&status=biezace&_Checksum=-542753965> (15 July 2014).

RELIGIOUS MECHANISMS OF DISPUTE RESOLUTION IN PORTUGAL

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I. Introduction

The Catholic Church has been the dominant religious community in Portugal throughout the country's history. During the centuries, it established a close public law relationship with the State's political and legal structures and the line between religious and non-religious questions got blurred. As a result, the Catholic Church has developed more sophisticated institutions and procedures for the settlement of religious disputes, compared with other minority religious communities.

After the rise of liberal constitutionalism, it became necessary to revise the relationship between the different religious communities and the State. This of course had a direct impact on the way religious disputes were settled. From then on, the normative standard employed was not limited to the internal norms of the religious confession, but also extended to the fundamental principles and rights of the new constitutional order. This has led to significant changes within the Catholic Church and other minority religious communities.

Within the space-time constraints this article must comply with, we will present the constitutional framework in which individual and collective religious freedom is exercised and through which different world views are accommodated. We will then consider the various settlement mechanisms within the Catholic Church and other religious communities for settling religious disputes and their relation to the constitutional framework.

II. The Constitutional Framework

1. Freedom of Religion

The Portuguese Constitution of 1976¹ guarantees individual, collective and institutional religious freedom. Article 41(1) *leg. cit.* states that freedom of conscience, religion and form of worship are inviolable. This provision is based on the assumption that individual conscience is important and worthy of protection as the locus of moral and spiritual autonomy and that religious conviction is only authentic and valid when based on personal free choice. The following provisions protect against discrimination on the basis of religion and privacy rights:

- Article 41(4) *leg. cit.* establishes an institutional right of religious freedom, stating that Churches and other religious communities are separate from the state and are free to organise themselves and to exercise their own functions and form of worship.
- Article 41(5) *leg. cit.* guarantees freedom to teach any religion within the ambit of the religious belief in question and to use the religion's own media for the pursuit of its activities.

Both provisions allow for substantial autonomy of the various religious confessions and organisations. These are afforded the right to develop their own body of beliefs and doctrines, to teach them and to organise their ritual and collective life and worship around them.

Interpreting these provisions, the Portuguese Supreme Court² acknowledged that freedom of religion includes the right to belong to whichever church or religious community one chooses and to take part in its internal life and in the religious rites thereof, as established by Article 10/a of the Religious Freedom Act³. At the same time, these churches and religious communities are free to autonomously dispose of the religious rights and duties of the believers according to Article 22(1)c *leg. cit.*

The Court held that the State does not take any position on the principles relating to church organisation, religious participation or confessional doctrines. These principles are freely established by the religious confessions themselves. However, the Court stated that, according to Article 20 of the Constitution, the State has the

¹ *Constituição da República Portuguesa*, Diário da República I, no. 86, pp. 738–775.

² Supremo Tribunal de Justiça, 8 November 2007, 07B2756.

³ *Lei da Liberdade Religiosa*, no. 16/2001, Diário da República I-A, no. 143, pp. 3666–3675.

power and duty to ensure legal protection to all individuals whose substantive rights or interests are violated, in order to stop any violations and compensate for damages.

2. Constitutional Accommodation of Different World Views

Religious beliefs are essentially world views. They generally presuppose an account of the origin, meaning and destiny of the Cosmos, life and Man, that is not strictly naturalistic, allowing for supernatural and metaphysical dimensions and expressions.

For many religions, the universe is not all there is and all that has always been. Far from being confined to the emotional and private sphere of individual feeling, the divine manifests itself rationally and publicly in the structure of the cosmos and in the immeasurable quantity and complexity of the DNA of living organisms. Moreover, history is full of events in which the divine is thought to have made Himself known, some of which, with a tremendous impact on all spheres of life.

This has important implications for an understanding of the law because religious confessions also believe that positive law is not all that exists. Positive law is generally perceived by many religious confessions as a purely human construct; the legitimacy of which depends on its substantive conformity with a pre-existing, superior, eternal and universal divinely established moral code. They believe that positive law, be it international, constitutional, civil or criminal law, is not neutral when it comes to religion and morality. It is not possible to entertain a neutral perspective above and beyond any world view.

For instance, when contemporary constitutional law and international human rights law proclaim the universal nature of the values of human dignity, equality, freedom, responsibility, solidarity, justice and peace – building on the thought of men such as Suarez, Vitoria, Luther, Calvin, Gentili, Grotius, Milton, Locke, Rousseau, Siéyes or Kant – they are but incorporating a secularised version of the values of the western Judeo-Christian tradition, and not, say, the values of irrational atomism, Aristotelian natural inequality, Buddhist holism, caste Hinduism or social darwinism.

This means that religious groups will naturally tend to develop their own moral and legal codes along with institutional mechanisms of enforcement. They establish norms of individual and collective conduct that they want their members and organisations to comply with. Furthermore, since they believe those norms have a transcendent source and universal range of application, and are not simply the result of

their own beliefs and desires, they wish to promote the values and principles of their own moral and legal code in society at large..

It also means, in some cases, that religious groups and confessions may dispute the positive law of their own country, especially when they perceive that it reflects the growing influence of a secular, naturalistic world view, or that of another religious community whose basic elements they do not share. On the other hand, far from being able to comfortably retreat to neutral ground, the State is forced to make some fundamental value choices, that may not be shared by all religious groups, thus making it difficult to grant full and equal religious freedom to those religious groups whose doctrines fundamentally differ from its own values.

Relations between religious groups and the State is a complex issue, both politically and legally. It is difficult to generalise since many political, historical and cultural variables must be considered. The amount of religious freedom and autonomy a particular religious group enjoys in a given State depends on the degree of substantive approximation between the two, or of the value both the group and the State place on religious freedom, although power politics may also play an important role.

For instance, if a non-liberal State shares the values of a non-liberal religious group, this group may enjoy a substantial amount of autonomy, assuming there are no power struggles between the two. On the other and, if a liberal State places a high price on freedom of conscience, thought and religion, even non-liberal religions will get a substantial amount of legal protection, although not enough to override the values of the liberal State and not as much as other more, liberal religious groups may enjoy.

The end result can be a clash of world views, which includes a divergence of the understanding of law and morality. In this climate, of actual or potential confrontation of world views, religious groups therefore attempt to organise their own legislative, administrative norm enforcing and dispute-solving institutions and procedures. Some, like the Catholic Church, are more centralised, hierarchical, organised and formalised, whereas others adopt more decentralised, democratic and less formal mechanisms.

III. Settling confessional disputes

1. The Concordat of 2004

Ever since its inception, Portugal has had a very strong Catholic cultural presence and tradition. However, this didn't prevent a history of political tensions between Church and State. The Authoritarian State of Estado Novo, led by the prominent Dictator Oliveira Salazar, attempted to regulate this relationship through a Concordat adopted in 1940.

Since then, many things have changed. Fundamentally, Portugal became a liberal democracy and its present Constitution of 1976, guarantees religious freedom for all individuals and religious entities. The Religious Freedom Act of 2001, intensified the level of protection of religious freedom and equality. However, the strong historical, social and cultural presence of the Catholic Church in Portuguese society is seen by many as a justification for a reasonable degree of differentiation, compatible with the constitutional principle of equal dignity and liberty of all citizens.

Currently, the relationship between the Portuguese State and the Catholic Church are regulated by the 2004 Concordat⁴. In Article 1, both the Portuguese State and the Holy See reaffirm their common engagement in the promotion of human dignity, justice and peace, which assumes the existence of shared values between State and Church, against a background of a common Catholic tradition. Some sectors of Portuguese society have been pressing for a more secular and humanist reading of the Constitution which, although not fully and consistently articulated, could create unexpected difficulties for the Catholic Church.

In Article 2 of the Concordat, the Portuguese State recognises the Church's right to promote its apostolic mission, along with the right to free and public exercise of its activities, such as worship, teaching, ministry, and ecclesiastical jurisdiction. This right goes hand in hand with the right to apply and enforce Canon Law within the organisation and activities of the Catholic Church in Portugal. The State courts cannot, however, interfere with Church autonomy. It is not their prerogative to review the acts and omissions of ecclesiastical authorities in the light of Canon Law.⁵

According to Article 9 *conv. cit.*, the different organs of ecclesiastical jurisdiction can be freely created, modified or extinguished. The competent organ of the State must be notified of the relevant canonical acts. Granting recognition of legal person-

⁴ Approved by the Parliament Resolution n° da Assembleia da República n° 74/2004, 16-11.

⁵ Supremo Tribunal de Justiça, 10 December 2013, 27/09.7TBHRTL1.S1.

ality to organs of ecclesiastical jurisdiction, depends on the notification of their constitutive acts. In Portugal, the Catholic Church has a complex network of ecclesiastical courts, providing several layers of jurisdiction, encompassing lower courts along with intermediate and superior appellate courts.

Articles 10–12 *conv. cit.* guarantee the legal personality and autonomy of Catholic Church institutions of Canon Law. *Prima facie*, State courts must abstain from interfering in the internal affairs of these institutions, leaving their supervision and the settlement of any disputes between them, to the ecclesiastical courts. For instance, it is for these courts to decide internal Church questions, such as the determination of the private or public nature of certain Canon Law legal persons. Ideally, there should not be any areas of interference, overlap or conflict between the competences of the ecclesiastical and State courts.⁶ However, this principle of non-interference is not absolute. In some cases, State courts may have to decide some of these issues as a matter of prejudicial question, when adjudicating other disputes in which they have jurisdiction.⁷

Although Article 11(1) *conv. cit.* determines that questions of Canon Law and Civil Law are to be decided by the respective authorities of Church and State, Article 11(2) *conv. cit.* provides that legal entities of Canon Law, such as Catholic charitable associations, have the same legal personality and standing rights as the corresponding private legal persons of the same nature. It is not always easy to know when one is dealing with a Canon Law question or a Civil Law one, though. This fact complicates the relationship between ecclesiastical and State courts.

For instance, some State courts claim that since Catholic charitable organisations are private associations, the decisions of their electoral assemblies may be impugned before a Court of Law.⁸ Other courts, however, consider themselves incompetent to review the dismissal of members of the bodies of these charitable organisations by the Bishop, as well as the electoral deliberations of their general assemblies.⁹ Besides, State courts have argued that disputes concerning the requirements of candidates, their suitability for office and the regularity of electoral procedures of office holders of those same charitable associations, should be settled by the competent Church bodies and ecclesiastical courts.¹⁰

⁶ Supremo Tribunal de Justiça, 17 December 2009, 743/08.0TBABT-A.E1.S1.

⁷ Tribunal da Relação de Coimbra, 5 May 2014, 692/11.5TBVNO.C1.

⁸ Tribunal da Relação do Porto, 5 June 2006, 0653050.

⁹ Tribunal da Relação de Coimbra, 17 May 2011, 646/09.1TBFND.C1.

¹⁰ Tribunal da Relação do Porto, 27 April 2009, 63/08.0TBALJ.P1.

This means that although State courts must, in principle, abstain from interfering in Church autonomy, they may be called to adjudicate disputes whenever association and property rights are being litigated¹¹. In this way, they may be called to protect the associative and property rights of some Catholic legal persons against other Church bodies¹². It seems difficult to draw a line in the sand on these issues.

Article 16 *conv. cit.* establishes that ecclesiastical courts are competent to decide on the annulment of marriages, and on the pontifical dissolution of marriages that have not yet been consummated. These ecclesiastical judicial decisions which apply Canon Law, are important from a personal standpoint because they state that there was never a marriage in the first place. They may acquire binding effect in the Portuguese legal system upon request of the parties and after review and confirmation by a State court.

This court must check the authenticity of the ecclesiastical court decision, the jurisdiction of the Court and whether the content of the decision infringes the principles of due process and equality, as well as the so-called international public order of the Portuguese State; a concept derived from private international law, which is taken as the supreme set of values of the State and society.

This means that the State court does not review the content of the decision, but limits itself to verification of the requirements mentioned in Article 16 *conv. cit.* Since the criteria of Canon Law and Civil Law differ when it comes to assessing the validity of marriages, there is a real possibility that a marriage that has been annulled based on the former will be deemed valid by the latter.¹³

2. Other confessional mechanisms

Article 3 of the Religious Freedom Act reaffirms the principle of separation between religious communities and the State, enshrined in article 41 of the Constitution. At the same time, it recognises the right of religious communities to self-organisation in the exercise of their functions and worship. This important act has a chapter on individual religious rights and another one on collective religious rights.

Amongst these, Article 22 of the Religious Freedom Act provides for the right of religious communities to self-organisation. This provision protects their right to decide on the creation, composition, competences and functioning of their internal or-

¹¹ Supremo Tribunal de Justiça, 22 February 2011, 332/09.2TBPD.L1.S1.

¹² Tribunal da Relação de Coimbra, 31 May 2011, 4680/08.0TBLRA.C1.

¹³ Tribunal da Relação de Évora, 16 December 2008, 1144/08-3.

gans with full autonomy, as well as on the rights and duties of their community members.. This right is limited by the duty, on the part of religious communities, to respect the freedom of religion of their members.

Article 8 *leg. cit.* elaborates on this individual right of freedom of religion. It encompasses the right to have, not to have, and to cease to have, a religion. It also protects the right to freely choose, change and abandon one's own religious beliefs. Furthermore, it guarantees the right to practice or not to practice, acts of private or public worship of the professed religion. This precludes any kind of religious coercion in matters of belief and practice. The individual member's right to freedom of conscience, thought, expression and action, is significantly protected.

However, this doesn't mean that the members have free reign to decide on their level of commitment and status within the religious community. In other words, if individuals want to be a part of a given religious community, they have to abide by its religious doctrines and ethical norms. Their personal and social conduct must comply with the requirements of the religious community. If they do not like nor accept those doctrines, norms and requirements, then they are free to leave.

The Religious Freedom Act does not explicitly allow for the creation of confessional tribunals. However, it follows from the reading of its Article 22, that this act protects the right of religious communities to create internal bodies with the normative competences to set the institutional and procedural rules for their respective functioning, and to determine the rights and duties of their members. It also grants them the possibility to create their own enforcement and dispute settlement mechanisms. If the Catholic Church can have its own ecclesiastical tribunals, the principle of equality requires that the same right be granted to other religious communities. However, the main reason is religious freedom.

Article 22 *leg. cit.* establishes that it is up to each religious community to establish and promulgate their own doctrines and to derive the corresponding institutional, moral and ethical corollaries. Different religions have different views on issues such as life, health, disease, death, food, dress, marriage, gender, sexuality, art, culture, science, money, work or leisure. Individuals associate with religious communities because they share a common world view (hence the terms 'communion' or 'community'). The rights of individual and collective freedom of religion, along with other expressive and associative rights, would be meaningless without these rights of doctrinal, moral and institutional self-determination.

As controversies arise around the interpretation, application and vindication of religious norms, religious communities are competent to enforce their norms and decide on matters concerning observance and compliance. There is ample room for

significant variation in this domain within divergent religious communities, according to their different institutional organisation. Some may have separate dispute settlement mechanisms, permanent or non-permanent, based on the principles and structures of mediation, conciliation and arbitration; sometimes with a quasi-judicial adversarial structure.

Other communities may leave it to the local church assembly of registered believers to deal with the disputes. Others still, might delegate the power of enforcing norms and solving disputes to an individual or collective religious authority. Given the fact that we are dealing with micro-religious confessions in an environment dominated by the Catholic Church, we do not find any formalised non-Catholic religious tribunals.

Any of the above mentioned dispute solving mechanisms may give rise to legal complaints and lawsuits. In principle, they do not preclude the members' right to invoke the internal substantive and procedural rules of the religious community in order to defend their own understanding of the issue *sub judice*, but the ultimate decision belongs to the religious community. An alternative may be for the member to vote with his or her feet and leave the religious community and, eventually, create a new one.

As a matter of principle, the State must accept and recognise the decisions of the religious communities' competent dispute settlement mechanisms. It should refrain from questioning their content, since they deal with norms and procedures that are specific to the different religious groups. Religious freedom requires the adoption of a kind of 'religious question doctrine,' according to which, State courts should show a reasonable amount of deference towards the judgements of religious dispute settlement mechanisms.

This deference is based on two grounds. Firstly, the Portuguese liberal State does not claim to be morally omniscient and able to generate and promulgate *urbi et orbi* objective and universal values and principles. Secondly, most of the values of the Portuguese Constitution, such as human dignity, freedom of conscience, equality, solidarity or justice, are but enlightened and secularised versions of the pre-existing Judeo-Christian axioms and doctrines as they matured throughout the centuries in Europe.

When they interact with values and norms derived from a specific religious source, State courts must bear in mind that Constitutional values are, ultimately, derived or borrowed from a religious source. Modern constitutionalism may be the *causa proxima* of the values of dignity, liberty and equality, but their *causa remota* is, undoubtedly, a religious one.

Constitutions are not that different, in form, from sacred texts, while religious settlement mechanisms and State courts are also not that different in nature as might be expected. This is one of the reasons why a reasonable deference towards the decisions of religious bodies is appropriate. State judges should approach the different religious world views with an awareness that constitutional values themselves derive, in the last instance, from a particular world view or set of world views.

Religious freedom requires a reasonable amount of deference, even considering that there may be significant differences between constitutional values and the values of a particular religious community, as well as between State and religious conceptions or interpretations of the same value.

Sometimes, deference may be inappropriate and unacceptable. For example, some religious norms may threaten important core dimensions of the constitutional values of human dignity, equality and autonomy. In extreme situations, State courts should not abdicate from their constitutional role as protectors of fundamental principles and rights. The coexistence of totally incompatible values and norms in the same legal order is not entirely possible. Some of the decisions taken by religious communities' settlement bodies may have important personal and patrimonial consequences.

For instance, they may relate to Church management and financial issues¹⁴ or to the personal, intimate or sexual conduct of a regular member or of a religious minister.¹⁵ The sanction imposed may significantly stigmatise the individual, affecting not only his / her status within the religious community, but also in wider personal or even professional circles. In the case of a religious minister and his or her family, the

¹⁴ Tribunal Judicial da Comarca Portimão, 2 February 2015, 5082/12, discusses issues of financial trust and accountability involving a foreign missionary A in Portugal and his sending and financing evangelical mission B. After missionary A left the evangelical mission B, because of a change in the executive office, mission B requires A to account for all the money received and demands that all churches founded by A, while serving in Portugal, must now be considered subsidiary churches of B.

¹⁵ Tribunal Judicial da Comarca de Tondela, 10 July 2007, 184/05-1 TATND, 2º J., acquitted Baptist Minister A accused of discussing, in the monthly general assembly meeting of the local Church, the sexual conduct of B, a senior member of the Church and President of the Board of the Church's Charity Foundation. Pastor A was charged with a criminal violation of the right to privacy. B was allegedly having an affair with C, a worker in the Church's Charity Foundation for elderly people, using its SUV for his meetings with C. The Judge held that B knew fully well the substantial and procedural disciplinary implications of his conduct and that a discussion of his affair in the general assembly meeting was unavoidable, so as to ensure that the President of the Church's Charity Foundation would comply with the ethical norms of the Church. The Judge also considered that the conduct of B and C could damage the reputation of the Church and the Church's charity within the city.

decision may have immediate and significant patrimonial consequences, since it may involve the dismissal from a paid position within the religious community.¹⁶

The violation of a constitutionally and legally protected fundamental right – such as privacy, reputation or salary – may trigger calls for the annulment of the religious community's decision and monetary compensation for damages. If these claims are not fully addressed within the religious communities' dispute settlement bodies, or if the parties are not pleased with the solution, the Constitution guarantees the right to an effective judicial remedy whenever a fundamental right has been violated.

State courts may be called to assess the application of substantive and procedural rules, and the factual basis that was invoked to justify their application.¹⁷ They may find themselves in unknown and uncharted territory, surrounded by values, institutions, norms and procedures which they don't know well or that are totally alien to them. In such a situation, the best option is to retreat to constitutional and human rights ground. From there, they may attempt to balance competing constitutional rights and assure that nuclear dimensions of fundamental rights are not violated. The Constitution requires that both rights should be optimised as far as possible, harmonised and made practically compatible.

When doing this, State judges must bear in mind that the various religious communities have their own legislative, administrative and jurisdictional autonomy. In principle, only those who adhere to their norms are required to comply with them. The protection of children's rights may require a more pro-active approach on the part of State courts, especially when their rights of life, physical integrity and personal development are significantly endangered by the norms and practices of a given religious community.

Throughout the balancing process, it must be remembered that individual members have the constitutional right to openly criticise religious doctrines, norms or institutional practices, to abandon their religious communities and, if they so desire, to start their own confessional reform movement or a new religion altogether. If the State courts have reason to believe that, in the case before them, such a possibility

¹⁶ Tribunal de Trabalho de Lisboa, 6 May 2015, 990/13, discusses the legal nature of the termination of a service relationship between evangelical Pastor A by his Church B. Pastor A claimed his labor law rights, whereas Church B says that there wasn't a labour contract between a Church and a Minister. Since Christian principles were not enough to solve this dispute, legal principles were called upon.

¹⁷ Supremo Tribunal de Justiça, 8 November 2007, 07B2756, held that a decision of the general assembly of a Baptist Church in the city of Matosinhos, concerning a dispute about the property of the Church's Charity, should be declared null and void because the statutory procedural rules of convocation had not been complied with.

does not exist in a realistic and plausible way, they should show less deference to the norms and decisions of religious bodies and go the extra mile in protecting the rights of individual members.

IV. Conclusion

The Portuguese Constitution and the Religious Freedom Act protect the fundamental right of freedom of religion, with its individual and collective dimensions. This protection takes place within a broader normative tableau, including other fundamental rights, such as confessional doctrinal, institutional and normative autonomy, on the one hand, and conscience, expression, privacy, reputation or due process, on the other.

This situation has given rise to multiple collisions of rights and to new problems and challenges. Religious communities have had to adapt to the norms of constitutional and fundamental rights that structure the legal system, and State judges have had to start taking into account certain institutional and normative features of different religious communities in order to balance conflicting individual and collective rights. In light of the current clashes of secular and religious world views, this particular area of law will most probably continue to face a turbulent road ahead.

RELIGIOUS JURISDICTIONS IN THE CZECH REPUBLIC

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I. The Resolution of Disputes: The Practices and Norms of Religious Communities

Religious communities resolve disputes among themselves, either through their superiors or representative bodies. On the basic level, it used to be assemblies of faithful of the local congregation or their leading authorities, such as a minister or a lay officer (e.g. an elder), or their boards. On the top level it was the assembly of deputies of subordinated bodies (ministers and elders, or only elders), and the central committee, and the chief superior (or several superiors) of the religious community. Some religious communities also have similar organs at the middle level of their administration. The provisions of a religious community determine which organs, either the assembly, or leading authorities, at all levels of the religious community, are competent for the resolution of disputes.

Both superiors of religious communities and their representative bodies, act as mediators, arbitrators or judges, according to the specific provisions of the religious community. They may even, entrust their discretionary power to special nominated bodies, founded in accordance with the provisions of the religious community. Many religious communities even have such internal tribunals or penal committees established according to their provisions.

Mediators, arbitrators and judges are appointed and removed by the religious community according to its provisions. They are trained at special courses in theology, management and application of provisions, organised by the religious communities. Some of the ministers and lay officers are trained at schools and higher schools founded by religious communities or at public theological faculties recognised by the religious community. All of them train not only ministers or candidates to ministry, but also a high number of lay officers.

There are five theological faculties in the Czech Republic.¹ All of them are part of public universities. Three of them are part of the Charles University in Prague (Catholic Theological Faculty, Evangelical Theological Faculty and its Ecumenical Institute, and Hussite Theological Faculty, and its departments for Judaism and Orthodoxy and a cabinet for Old-Catholic Theology). Two other catholic theological faculties belong to the universities of Olomouc and of České Budějovice. All of these faculties have both full-time and combined studies and each of them has more than a thousand students from a high number of religious communities. Faculties for catholic theology admit students regardless of their religious adherence.

Seven religious communities have founded thirteen public higher schools, providing theological and other special education for representatives of religious communities. They usually train students who belong to different confessions, i.e. much more religious communities. Each of them has hundreds of students.

Mediators, arbitrators and judges acting in the present or preparing for such activity in the future are sent by their religious communities to study religious sciences and principles of organisation of religious communities, not only at local schools and centres of learning, but they are also sent to study at foreign universities or other academic institutions. This is the case for both Christian and non-Christian religious communities.

Religious institutions have exclusive jurisdiction in doctrinal disputes. The representatives of every registered religious community have to notify its teaching and mission to the registering body, the Ministry of Culture. Provisions of the religious community determine which of its organs is the highest authority in this matter.

Authorities of religious communities also decide disciplinary cases according to their internal provisions.

The same applies to property disputes. They are decided according to the internal provisions of the religious community. In reality such disputes do not occur.

In most religious communities, marriage disputes do not exist because they usually have no special provisions concerning matrimonial matters. Their members solve their matrimonial disputes solely before the State and its organs.

Legal provisions on marriage only exist in a few religious communities. Such decisions are only relevant with regards to the inner relations of the respective religious community. Above all, this matter concerns the Catholic Church. Currently, there are six diocesan and metropolitan Catholic Church courts, founded by the Catholic

¹ J. R. Tretera and Z. Horák, *Religion and Law in the Czech Republic* (Alphen aan den Rijn 2014), pp. 107–108.

Church authorities in the Czech Republic. They decide on marriage disputes between both Roman and Greek Catholics, before all their canonical validity.

Marriage disputes with public relevance are only decided by the State courts, regardless of the fact that marriage with civil effects can be solemnised by twenty one religious communities registered with such a 'special right'.²

The procedures in all the above mentioned cases are governed by the internal provisions of the relevant religious community. These provisions specify which higher authority of the religious community is competent for an appeal against the lower authority. In several religious communities are some special cases decided by their tribunals. Decisions of the supreme authority are final. An appeal to State administrative bodies or courts is not permissible.

II. Religious Disputes: The Approach of the State

1. Principles of autonomy of religious communities

The Principles of autonomy of religious communities to make their own regulations, independent of the State and its bodies, are established in Article 16(2) of the Charter of Fundamental Rights and Freedoms,³ integral part of the Czech Constitution,⁴ which states that religious societies govern their own affairs. In particular, they establish their own bodies and appoint their own clergy, as well as found religious orders and other church institutions, independent of State authorities.

Section 4(3) of Act No. 3/2002 on Religious Communities⁵ expands on this, stipulating that religious societies establish and dissolve their own bodies, appoint and dismiss their own clergy, and set up and dissolve ecclesiastical and other institutions in compliance with their own regulations, independent of State authorities. Act No. 3/2002 makes reference to the regulations of religious communities in many other places, and the wording of the law implies that religious communities are regarded as organisations regulated by their own autonomous legal systems.

² *Ibid.*, pp. 110–111.

³ *Listina základních práv a svobod*, Sbíрка zákonů no. 2/1993.

⁴ Article 112(1) of the Constitution (*Ústava České republiky*), Sbíрка zákonů no. 1/1993 as amended.

⁵ *Zákon o svobodě náboženského vyznání a postavení církví a náboženských společností a o změně některých zákonů*, Sbíрка zákonů no. 3/2002 as amended.

The principle of the autonomy of religious communities and their legal systems benefits all religious communities, regardless of whether or not they are registered by the State. The principle of autonomy is not inconsistent with the registration condition which requires according to section 10(2)d of Act no. 3/2002 that a religious community presents, *inter alia*, a so-called basic document, i.e. a statement of the most fundamental provisions of its legal order. A State body is not, as a matter of fact, authorised to interfere with the basic document howsoever, i.e. approve it, reject it, or demand that it be changed. The purpose of the basic document is merely to make the legal system of a religious community and the principles of its organisation available both to State bodies and to third persons who come into contact with the religious community. Not only does each religious community present its basic document in the registration proceedings, but it is also entitled to alter and amend this document on its own initiative at any time after the registration.

2. Registration of religious communities

A religious community acquires legal personality and some tax advantages by registration as well as the right to create derived legal persons. The Ministry of Culture of the Czech Republic is a competent body of State administration that registers religious communities and unions of religious communities and administers a register of legal persons derived from religious communities. There are thirty eight registered religious communities in the Czech Republic to the date of 14 February 2015 (two of them, registered as Roman Catholic Church and Greek Catholic Church, belong to the Catholic Church). There are two unions of religious communities in the Czech Republic,⁶ and several thousand legal persons derived from religious communities.

An application to register a religious community must include: the general characteristics of the religious community, its teaching and its mission; the documentation of the founding of the religious community in the Czech Republic; the original signatures of 300 adult adherents, who must either be citizens of the Czech Republic or foreign nationals with permanent residence in the Czech Republic; and the basic document, i.e. a statement of the most fundamental provisions of the legal order of the respective religious community.

⁶ The first one is the Ecumenical Council of Churches in the Czech Republic. It consists of eleven religious communities as ordinary members, one associated member (Roman Catholic Church) and two observers (Federation of Jewish Communities in the Czech Republic and the Seventh-Day Adventists Church). The second one is Military Spiritual Service. It consists of five religious communities.

The State must not make any changes in the documents submitted by religious communities or ask them for changes. A religious community can change or amend its basic document at any time in the future. The basic documents of all religious communities are available to the public on the website of the Ministry of Culture.

Each of the thirty eight registered religious communities in the Czech Republic has its own legal system. They consist of provisions which specify the authorities of legislative, executive and judicial power within the religious community.

The relation of the State to the Catholic Church is principally the same as in other religious communities, despite the fact that approximately 80% of members of religious communities in the Czech Republic belong to this Church. The same State legal provisions apply to all religious communities. The Concordat Agreement between the Czech Republic and the Apostolic See was signed in 2002, but it has not yet been ratified. The Concordat specifies that the Roman Catholic Church⁷ and the Greek Catholic Church⁸ are represented before the State at the Czech Bishops' Conference, even in cases of exempted parts of the Church, e.g. religious orders. In spite of the fact that the Concordat Agreement has not yet been ratified, this requirement is still met in practise.

The approach of the State to the resolution of religious disputes (e.g. disputes among the faithful within a religious group and complaints or legal action against religious communities) is influenced by the principle of autonomy of religious communities. This principle is formulated by Article 16(2) of the Charter of Fundamental Rights and Freedoms and by section 4(3) of Act No. 3/2002 as mentioned above. According to Article 16(4) of the Charter of Fundamental Rights and Freedoms, limitations must be set by law and necessary in a democratic society for the protection of public safety and order, health and morals, or the rights and freedoms of others.⁹ The Constitutional Court concluded that the principle of autonomy of religious communities finds expression in maximum possible restriction of interference of the State into their activities so that internal matters of these subjects cannot in principle be matter of judicial review.¹⁰

Religious communities have the right to establish their tribunals or courts and to provide religious mediation or arbitration too. The religious courts decide disputes

⁷ Two ecclesiastical provinces, eight dioceses and some tens of exempt religious orders.

⁸ The Apostolic Exarchate of Greek Catholic Church in the Czech Republic.

⁹ Cf. Article 9(2) of the ECHR.

¹⁰ J. Kříž, *Zákon o církvích a náboženských společnostech, Komentář* (Praha 2011), p. 59.

according to the provisions of their own religious law, but the State does not recognise any civil effect of those decisions.

State courts basically do not intervene in cases involving religious disputes and do not confirm decisions issued by organs of religious communities. Above all, they do not intervene in cases involving doctrinal disputes, disciplinary cases and ritual decisions. As to the disputes concerning property, it is not known if such a case has been submitted to a religious body or to a State organ.

The above mentioned problems are, however, beyond public interest in the Czech Republic. At the centre of public attention there are other matters these days, such as the implementation of Act No. 428/2012 on Property Settlement with Churches and Religious Societies.¹¹ This act regulates partial natural restitution of property that the religious communities were dispossessed of between 25 February 1948 and 1 January 1990. This property shall be returned to the ownership of the religious communities when they make a claim to certain property with the State property administrators, who administered those assets until 2 January 2014 and adduce evidence of their original ownership. Such claims have already been raised by religious communities but only a small portion of claims has been dealt with. At this time, most claims are dealt with by State administrative bodies. Rejected claims are expected to be brought before State courts by the religious communities.

The State courts – above all the Constitutional Court – decide disputes between religious communities and their employees as parties to a contractually established employment of a non-pastoral nature. Their legal relation to the religious community is fully regulated by the Labour Code¹². A preliminary decision by the authority of the religious community is not relevant. The status of persons who have been taken on by religious communities in accordance with their own internal regulations as their ministers or lay pastoral workers is different. It is not based on an employment contract in the sense of the State legal system. Rather, it is a service relationship, which is regulated by the internal rules of the religious community.

The service relationship of ministers and other pastoral workers within a religious community has been dealt with in more detail by the Constitutional Court, which has adjudicated on this issue several times. In 1997 it rejected the jurisdiction of secular courts in disputes concerning the termination of a service relationship involving members of the clergy and other pastoral employees of religious communit-

¹¹ Zákon o majetkovém vyrovnání s církvemi a náboženskými společnostmi, Sbírka zákonů no. 428/2012.

¹² *Zákoník práce*, Sbírka zákonů no. 262/2006 as amended.

ies.¹³ The process was initiated by two former ministers of the Czechoslovak Hussite Church – a married couple *Z. Duda and E. Dudová* – who were dissatisfied with the repeated judgements of the Czech general courts. According to the Constitutional Court, persons carrying out pastoral service act on behalf of religious communities, and shall follow their internal rules. Only religious communities themselves can judge the abilities of these persons for pastoral service, and decide on their appointment or dismissal. As a result, State courts do not decide on the appointment of pastoral workers by religious communities, because in such a case they would unduly interfere with the religious communities' internal autonomy and their right to independent decision-making. As for salaries, or other civil claims of ministers, State courts are competent according to section 7 of the Code of Civil Procedure¹⁴ to decide on issues of labour law, where the private character of a religious community comes to the fore as a legal entity. In these civil cases, a judicial proceeding does not interfere with the internal autonomy of religious communities and their decision-making power. In 2001 the European Court of Human Rights decided the case and upheld the argumentation of the Czech Constitutional Court.¹⁵

In the Constitutional Court ruled with the same result in an analogous case, where the plaintiff was a former minister of the Unity of the Brethren.¹⁶

Regarding the Czech Republic, the European Court of Human Rights has ruled on several complaints regarding interference in the right to religious freedom. It has found all complaints inadmissible.¹⁷

The Czech Republic operates a system of freedom of religion and self-determination of religious communities. There are three limits to this right:

- (1) denial of registration, if the teaching and the activities of a religious community threaten the rights, freedoms and equality of individuals and their associations (including other religious communities), the democratic foundations of the State, its sovereignty, independence, and territorial integrity or public morals and order, or if they are in any other way contrary to law (section 5 of Act no. 3 /2002);

¹³ Ústavní soud, 26 March 1997, I ÚS 211/96.

¹⁴ *Občanský soudní řád*, Sběrka zákonů 99/1963 as amended.

¹⁵ ECtHR, 30 January 2001, 40224/98 (*Duda and Dudová v. the Czech Republic*).

¹⁶ Ústavní soud, 31 August 2000, III. ÚS 136/2000; cf. J. R. Tretera and Z. Horák, 'The Application of the Freedom of Religion Principles of the European Convention on Human Rights in the Czech Republic', in A. Emilianides (ed.), *Religious Freedom in the European Union* (Leuven 2011), pp. 101–102.

¹⁷ J. Kříž, 'Vliv judikatury Evropského soudu pro lidská práva na náboženskou svobodu v České republice', (2012) 21 *Jurisprudence*, no. 7–8, pp. 36–41 (p. 37).

- (2) dissolution of a religious community if its activities violate the law (section 22(1)c *leg. cit.*);
- (3) prohibition of the religious community by act of Parliament, in case a religious community seriously breaches human rights.

III. Religious Perspectives on State Approaches to Religious Disputes

Religious communities and their authorities in the Czech Republic do not raise objections to the State's approach to religious disputes. They express their satisfaction with the present model of their autonomy. This is as a reaction to bad experiences with State interventions in their internal regulations during the long lasting period of communist dictatorship (1948–1989).

Problems of religious disputes in the Czech Republic are almost not reported in the media. On the other hand, the Czech media expresses a huge interest in all matters concerning property restitution, in favour of religious communities. They are mostly critical of this process, and strictly follow the legality of restitution of particular items. Their criticism is often motivated by political interest and the election campaign of left wing political parties.

The problems of religious disputes in the Czech Republic are almost excluded from public debate. Academics, especially lawyers and historians, are interested in these issues, but from a longer term perspective. They compare the present situation not only with the period of totalitarian regimes (Communism and Nazism), but with the heritage of the enlightenment view on State-Church relations, typical for previous legal systems valid in Czech territory (legislation of the Austrian Monarchy before 1918 and the Republic of Czechoslovakia in the period 1918–1948). They prefer the present system, which emphasises the autonomy of religious communities over previous ones, with their more patrimonial relation of State to the recognised religious communities.

RELIGIOUS JURISDICTIONS IN ROMANIA

Emanuel Tăvală, Sibiu

The issue of religious courts of law adjudicating in Romania is by no means a novelty. From a legal historical perspective, their jurisdiction over *ratione materiæ* and *ratione personæ* dates back to the Middle Ages. Aside from judicial duties they also functioned in the royal courts as members of the royal entourage. Metropolitans and bishops often received special powers from the sovereign to rule on certain civil and even criminal cases. At the same time, it is worth pointing out that the king was able to judge cases which would normally fall under the jurisdiction of the Church and he had the authority to retry lawsuits already settled by religious courts which had been appealed against. The lord of the land could, if he so chose, judge offences committed by clerics and could even dismiss the leader of a religious court if it were proven that the leader in question had favoured one of the parties in settling the action.

Romanian kings would often seek out the highest possible religious authority in order to rule on the most onerous cases. However, mandates granted to representatives of the Orthodox Church to hear cases, take evidence and attest legal documents were much more common and constituted the undisputed law of the land following the old practice. At times, religious leaders carried out their judicial duties with the help of certain noblemen and high public servants. On other occasions, Church leaders would delegate clerics to complete some of their judicial duties. Given that religious leaders exercised judicial duties by royal mandate, their legal books were drafted very similarly to royal books and subject to royal approval, which was always granted. Cases judged by Church leaders were open to appeal to the royal court, unless the ruler decided otherwise.

Over the centuries, it was not only religious leaders and parish clergy who exercised judicial duties but also monks. Abbots and friars from monasteries had performed, judicial duties in the past, but this monastic justice had always had a certain patrimonial character. The ruler would grant monasteries the right to settle all legal issues brought before them by the dwellers of villages, towns and market towns

ascribed to each monastery and these rights were the result of material privileges they enjoyed over these communities.

All matters concerning marriage fell under the jurisdiction of ecclesial courts, as did all other civil cases for which the lord of the land granted special powers to the leaders of the Church on a case-by-case basis. The Church leadership was in a better position to hear and pass judgement because they brought the Christian spirit of conciliation to the case. Additionally, written testimonies have proven that the Church was granted and exercised its right to serve justice sometimes in an effort to protect the poor and oppressed. Stephen the Great, by rescinding the secular public servants' right to pass judgement over the downtrodden living in the villages and market towns of the metropolitanate, grants this right to the metropolitan, arch-priest or the person delegated by the metropolitan to serve justice in his stead.

The *ratione personae* jurisdiction had always been granted by the king via a special right of empowerment bestowed on religious leaders whenever he deemed it necessary, in order to settle conflicts arising between clerics or laymen, or via a charter granting a bishop or monastery the right to pass judgement over the inhabitants of certain villages and market towns.

The *ratione materiae* jurisdiction was also determined by the king. Documents from the time lead to the conclusion that following a royal mandate, the clergy was vested with the authority to rule on civil and criminal cases. Records of civil cases which the king awarded to clergy to pass judgement, paint a picture of metropolitans and bishops trying cases of testamentary succession, *ab intestate* succession, marriage and partition affairs and conflicts over borders, while seeking to appease the parties.

This historical presentation of the courts of law of the Romanian Orthodox Church is designed to help us better understand the current situation and conflicts that arise in contemporary society.

I. The Resolution of Disputes: The Practices and Norms of Religious Communities

In Romania, the relationship between State and religious organisations is regulated by the Constitution of Romania¹ and by Law 489/2006 concerning religious freedom and the general regime of religious organisations². According to its Article 23(2), the

¹ *Constituția României (republicare)*, Monitorul Oficial I no. 767/2003 (republished).

² *Legea privind libertatea religioasă și regimul general al cultelor*, Monitorul oficial I no. 201/2014 (republished).

personnel of religious organisations shall face disciplinary action for violating their doctrinal or moral principles, according to their statutes, canonical codes or regulations.

Article 26(1) *leg. cit.* recognises the religious organisations' right to establish their own courts for internal disciplinary problems, in accordance with their own statutes and regulations. Pursuant to Article 26(2) *leg. cit.*, statutory and canonical provisions are exclusively applicable to matters of internal discipline. Article 26(3) *leg. cit.* states that the existence of their own judicial bodies does not exempt religious organisations from the application of national legislation concerning misdemeanours and felonies.

These articles as well as the corresponding provisions of the statutes of the officially recognised religious organisations constitute special norms of labour law, norms which are supplemented by the common labour law, but only to the extent in which the applicable special norms do not contain specific derogatory provisions, as is established by Article 1(2) of Labour Code³.

1. Courts of law of the Romanian Orthodox Church

Pursuant to Article 148 of the statute of the Romanian Orthodox Church, recognised by Government Resolution 53/2008⁴, the religious disciplinary courts and religious courts of law with jurisdiction over non-monastic clergy, priests and deacons, active or retired, as well as singers, in doctrinal, moral, canonical and disciplinary issues are as follows:

- The Archpriestal Disciplinary Consistory⁵ and the Archdiocesan Consistory,⁶ as a court of first instance: Their judgements are legally binding subsequent to their approval by the diocesan bishop, while judgements issued by the diocesan disciplinary and trial courts are only legally binding with the diocesan bishop's consent.

³ *Codul Muncii* 53/2003, Monitorul oficial I no. 345/2011 (republished) as amended.

⁴ *Hotărârea privind recunoaşterea Statutului pentru organizarea și funcționarea Bisericii Ortodoxe Române*, Monitorul oficial I no. 50/2008.

⁵ Pursuant to Article 150 of the statute, the Archpriestal Disciplinary Consistory functions as a disciplinary and trial court for religious singers and as a reconciliatory body for all conflicts arising among Church personnel, as well as between laymen and priests. Where the parties are not appeased by its judgement, the case is ultimately transferred to the Archdiocesan Consistory. Decisions made by the Archpriestal Disciplinary Consistory regarding Church singers become legally binding subsequent to their approval by the Diocesan Bishop and cannot be appealed except for dismissal cases.

⁶ Such bodies are attached to every diocese and archdiocese.

- The Metropolitan Consistory,⁷ as a court of appeal, for pleas of appeal admitted, in principle, by the Metropolitan Council⁸ and the Holy Council.⁹
- the Metropolitan Council, which can, in principle, admit or reject appeals against judgements issued by an archdiocesan consistory for cases of deposition of title and the Holy Council, which admits or rejects, in principle, appeals to sentences of defrocking¹⁰, issued by an archdiocesan consistory, are the bodies that can rule on the admissibility of pleas of appeal. In cases where they do admit, in principle, the plea for appeal, they must forward the case to the Metropolitan Consistory for trial. Judgements issued by the metropolitan consistory are subject to the approval of the metropolitan of the land before they become final and enforceable. Decisions made by courts of appeal become enforceable subsequent to their approval by the metropolitan or Patriarch, depending on the case.

Article 156(6) of Government Resolution 53/2008 stipulates that, by virtue of the religious autonomy guaranteed by law and of their specific competences, religious courts are charged with settling issues of internal disputes and therefore any judgements issued by religious courts at all levels are not subject to appeal before civil courts.

2. Courts of law of the Russian Old-Rite Orthodox Church of Romania

Pursuant to Article 8 of its statute, recognised by Government Resolution 398/2008¹¹, religious hearings in the Russian Old-Rite Orthodox Church are held by

⁷ Attached to every metropolitan seat.

⁸ The Metropolitan Council deliberates under the leadership of the metropolitan of the land. This body receives and examines appeals filed by clergy deposed of priesthood by an archdiocesan consistory belonging to the metropolis. Appeals admitted, in principle, by the metropolitan council are forwarded to the metropolitan Consistory for trial and the sentence is approved by the metropolitan according to Article 154 of the statute.

⁹ The Holy Council receives and examines appeals filed by clergy defrocked by an archdiocesan consistory. Appeals admitted, in principle, by the Holy Council are forwarded to the Metropolitan Consistory for trial and its judgement is approved by the Patriarch according to Article 155 of the statute.

¹⁰ Church sanctions must serve the same purpose as the Church itself, namely salvation. Among punishing measures inflicted onto clergy, the most serious is defrocking, which entails the loss of the right to teach, sanctify and minister to the flock. It is similar to a dismissal according to labour law.

¹¹ *Hotărârea privind recunoaşterea Statutului Bisericii Ortodoxe Ruse de Rit Vechi din România*, Monitorul oficial I no. 365/2008.

three courts: the archdiocese judicial commission, the metropolitan judicial commission and the Grand Council.

Followers of this faith are not allowed to refer to governmental or judicial bodies for matters concerning the Church's internal activities, including canonical leadership, religious organisation, pastoral activities and divine service (Article 9 of the statute).

The Archdiocese Judicial Commission is the court of law of the archdiocese and it functions within a diocese.¹² Appeasement and, where necessary, trials of conflicts arising among the religious personnel of the diocese, fall in its purview. Its decisions are subject to approval by the bishop; in cases where the bishop disagrees with the judgement issued, the case is forwarded to the superior court. Final judgements issued by the Archdiocese Judicial Commission are valid and enforceable throughout all the parishes and in cases where one party objects, the decision may be appealed at the superior court, known as the Metropolitan Judicial Commission. Appeals must be lodged with the chancellery of the metropolis at least 15 days before the meeting of the Metropolitan Judicial Commission.

The Metropolitan Judicial Commission is the court of appeal and is attached to the Metropolis. It has jurisdiction over:

- actions ruled on by the Archdiocese Judicial Commission and appealed against;
- appeasement and, if necessary, trials of conflicts arising among the personnel of the Church in different parishes;
- appeasement and, if necessary, trials of conflicts arising among the personnel of the Church and followers from different parishes;
- passing judgement on complaints against bishops.

Judgements issued by the Metropolitan Judicial Commission¹³ are subject to approval by the metropolitan and in cases where the metropolitan disagrees with the decision, the case is forwarded to the superior forum, the Grand Council.

¹² It comprises three permanent and two substitute members, elected by the Parish Assembly for two year terms from clergy that is both experienced and has completed studies of Canon law. Persons tried and convicted by ecclesiastical or civil courts are not eligible or lose membership. Persons already serving in other administrative capacities of the Church are not eligible either. A member of the Archdiocese Judicial Commission with direct or indirect ties to a pending case is excluded from the hearings.

¹³ It consists of six permanent and three substitute members, appointed by the Grand Council for two year terms from experienced clergy originating from all parishes with solid knowledge of Canon law. The rules of eligibility and bias are analogous to those of the Archdiocese Judicial Commission, see *supra*, n. 12.

Definitive judgements issued by the Metropolitan Judicial Commission are enforceable throughout all parishes. A party may appeal against a decision at the Grand Council. The appeal must be lodged at the chancellery of the metropolis at least 15 days before the commencement of the Grand Council's meeting.

The Grand Council acts as the supreme court of appeal of the Russian Old-Rite Orthodox Church. Pursuant to Article 19(1)k of the statute, it organises hearings for all litigation and issues arising within the Church if the subordinate courts are either unable to settle the case or the judgements they issued are unsatisfactory.

The trials of deacons, priests, bishops, archbishops and the Metropolitan are carried out outside the public eye according to Article 19(2) of the statute.

Pursuant to Article 32/k of the statute, the metropolitan receives complaints levelled against bishops and proceeds to investigate them, communicating their findings to the Grand Council.

The office of the Metropolitan lies under the jurisdiction and control of the Grand Council, which may decide to apply retribution for offences and deficiencies relating to religious service and meekness. The Grand Council can even forbid to officiate divine services, pursuant to the Holy Canons and Article 36 of the statute.

3. Courts of law of the Armenian Church of Romania

Its statute has been recognised by Government Resolution 56/2008¹⁴. The bodies with judicial duties are

- the Eparchial Council¹⁵ deciding on appeals against judgements issued by parochial courts and personnel except for purely spiritual matters and
- the Eparchial Congress¹⁶, which, pursuant to Article 14/s, decides on complaints lodged against the Archbishop, vicars, clergy, the Eparchial Council and parish councils.

The archbishop receives, examines and decides on complaints against the clergy and applies retribution according to the canons and regulations used (Article 26/f). When

¹⁴ *Hotărârea privind recunoaşterea Statutului organic şi administrativ al Arhiepiscopiei Bisericii Armene din România*, Monitorul oficial I no. 57/2008.

¹⁵ It is the executive branch of the Eparchial Congress and the superior administrative body of the entire eparchy. It comprises the Archbishop, the administrative vicar, the religious vicar, the eparchy's secretary, two counsellor priests, two laymen for Bucharest and two for the rest of the country, appointed by the Eparchial Congress for five year terms.

¹⁶ It comprises the Archbishop, the administrative vicar, the religious vicar, all priests of the Archdiocese and lay representatives.

receiving complaints about priests, the Archbishop is responsible for taking evidence on site and after receiving both oral and written accounts from the priest in question, may apply sanctions according to the canons of the Armenian Church and its statute.

For serious offences which require urgent intervention, the Archbishop may, by his own action and within a maximum of 30 days, temporarily suspend, a priest deemed guilty, before actually commencing the investigation. The Archbishop has the authority to personally apply warnings as well as verbal and written reprimands.

The sanction of excluding a cleric from the Eparchy, namely his defrocking in accordance with the canons, may only be applied with the approval of the Eparchial Council. A priest may be defrocked if he no longer meets the requirements prescribed by canonical regulations, if he has been condemned for immoral deeds or if he has left the parish without official leave. The Eparchial Assembly is charged with taking stock of the situation, and forwarding their conclusions to the spiritual Committee of the Eparchial Council and to the Archbishop, who will then decide in accordance with the canons of the Church and the statute.

The statute does not contain any regulations concerning the Church body ultimately responsible for settling complaints levelled by the individual who was dissatisfied with the decision of the Eparchial Council or of the Archbishop. Since, pursuant to Article 5, the Eparchial Congress is the supreme instance for the whole Archdiocese of the Armenian Church of Romania in all matters concerning ecclesiastical issues, its decisions are not subject to scrutiny of any other religious authority. At the same time, it can be argued that the statute hereby intends to exclude the jurisdiction of State courts in settling complaints lodged against judgements issued by ecclesiastical bodies.

4. Courts of law of the Union of Christian Baptist Churches of Romania

The Baptist Union was recognised by Government Resolution 58/2008¹⁷, a normative act according to which its freedom and autonomy are substantiated by the right to have its own religious jurisdiction.

¹⁷ *Hotărârea privind recunoaşterea Statutului de organizare şi funcţionare a Cultului Creştin Baptist – Uniunea Bisericilor Creştine Baptiste din România*, Monitorul oficial I no. 59/2008. The Church is structured in local churches, territorial communities, the Hungarian Baptist Convention and the Baptist Union.

The local Church¹⁸ is charged with the spiritual discipline of its followers gone astray from the Word of God by attitude, teachings or facts of life. Disciplining consists of:

- reprimanding in committee or general assembly,
- temporary suspension of exercising certain rights that ensue from being a member and
- exclusion, which depends solely on the General Assembly according to Article 31(2)d of the statute.

Disciplinary action is taken with the objective of bringing the nonconformist back to the righteous path, while also considering the degree of guilt, as well as the impact on the faith and the attitude of the person in question. Discipline is normally applied gradually, according to the procedure established by the general assembly of the church.

Exclusion entails the termination of membership of the Church and is exacted on all those found guilty of grave straying and persistence in sin, as well as on all those who continue to spread heretical teachings. In such cases, at least 50 baptist churches organised as legal persons come together. They form the Community of Baptist Churches, a regional body of representation of general interests of churches within its sphere of competence, of spiritual and administrative coordination of their common activities, of supporting – upon request – the activities of the churches.

The Baptist Community Committee, which leads the activities of the community among general assemblies, is the body that analyses transgressions committed by or-dained religious leaders and that rules on the loss of the quality of ordained servants.

The Convention of Hungarian Baptist Churches of Romania comprises all Hun-garian congregations.¹⁹ One of its responsibilities is that of settling matters of litigation and religious discipline in crisis situations.

The Council of the Convention analyses transgressions within the Faith commit-ted by ordained religious leaders and rules on the loss of the quality of the ordained Minister.

The Union of Christian Baptist Churches of Romania (the Baptist Union) is the national body of representation. It comprises a pastoral commission, a biblical edu-

¹⁸ The governing bodies of the church are the general assembly, the church committee and the pastor of the church, who also serves as presbyter (old), also called bishop (supervisor). The general assembly represents the supreme body of leadership and control of the local church. The general assembly decides on all major problems faced by the church and may delegate a part of its responsibilities, depending on the case, to the church committee, to a church pastor or to the council of pastors (presbyters).

¹⁹ The leadership bodies of the Convention are: the Congress of the Convention, the Council of the Con-vention and the Executive Committee.

cation commission and a missionary department. Its governing bodies are the Union's Council and the Executive Committee.

The Union's Council deals with appeals lodged by the contracted personnel of the Baptist Union and of the Pension and Aid Fund in matters concerning working relations connected to decisions taken by the executive Committee or the Steering Committee of the Pension and Aid Fund, depending on the case. It also settles appeals lodged by persons whose ordainment have been revoked by the Community of Baptist Churches or by the Council of the Hungarian Baptist Convention.

The Congress is the Baptists' supreme governing body. Its decisions Congress are mandatory for all member parties and organisations belonging to this religious community. This position as governing body leads to the conclusions that decisions adopted by church bodies are exempt from the authority of courts of common law.

5. The courts of law of the Reformed Church of Romania

Its statute had been recognised by Government Resolution 186/2008²⁰. The supreme legislative and representative body of the Reformed Church is the Synod, while its supreme executive body is the Synod's Permanent Council. The leadership of both supreme bodies consists of the bishops and the prime-curators of the dioceses.

The interpretation of laws, regulations, internal church decisions, as well as passing judgements in legislative litigation fall under the remit of the Synod's Constitutional Court, whose members are appointed by the Synod. The power to interpret laws and regulations contravenes the provisions of Article 1(2) of Law 47/1992,²¹ according to which the Constitutional Court is the only authority with constitutional jurisdiction in Romania. There can only be one Constitutional Court, serving as a safeguard for the supremacy of the Constitution, independent of any public authority and subject to only the Constitution and Law 47/1992.

The control and appeal authorities of the parishes are the deaneries and the dioceses for the deaneries, while the control and appeal authority of the dioceses is the Synod. The settlement of disciplinary matters falls under the jurisdiction of the parish, deanery or diocese disciplinary commissions and, ultimately, under the jurisdiction of the Synod's Discipline Commission. The disciplinary commissions are elec-

²⁰ *Hotărârea privind recunoaşterea Statutului Bisericii Reformate din România*, Monitorul oficial I no. 171/2008.

²¹ *Lege privind organizarea și funcționarea Curții Constituționale (republicare)*, Monitorul oficial I no. 807/2010 (republished).

ted at the general assemblies of their corresponding levels or the Plenary of the Synod, respectively. They carry out their activities in open meetings, where all members are present, in accordance with the disciplinary regulation. They have the jurisdiction to rule on disciplinary matters regarding all followers, dignitaries, public servants and employees of the church. The legal process as envisaged by the church has two levels. The judgements issued by the court at first instance may be appealed against at the hierarchically superior disciplinary commissions, whose sentences remain final and irrevocable. The final decision ordering the exclusion of a priest may be appealed at the Synod's Commission of Discipline.

The statute makes explicit provisions regarding the jurisdiction of civil courts of common law in settling appeals against final judgements issued by the bodies of the church. Hence, people who received a final and irrevocable sentence may refer to courts of civil law.

6. Courts of the Christian Pentecostal Church – The Apostolic Church of God

Its statute has been recognised by Government Regulation 189/2008²². The leadership structure consists of the General Assembly, the Church Council and the Executive Committee.

Church discipline is exercised by the leadership of the church, under the guidance of the pastor. Disciplinary measures applicable in the church are

- a personal reprimand administered by the pastor or church leader;
- a reprimand before the church committee;
- the revocation of certain rights, such as the right to minister in the church or the right to partake in God's Supper, for a specific period of time;
- the revocation of all rights of membership for an undetermined period of time;
- an exclusion, which, depending on the case, may also incur interdiction from entering the place of worship of the church which decided the exclusion.

²² *Hotărârea privind recunoaşterea Statutului Cultului Creştin Pentecostal – Biserica lui Dumnezeu Apostolică din România*, Monitorul oficial I no. 214/2008. The Church comprises all local churches in Romania and abroad, which have freely adopted the Pentecostal faith.

The individual facing such disciplinary measures has the right to lodge a written appeal with the regional, territorial or ethnic community, as the superior hierarchical body, within 30 days of being informed of the sanction.²³

The most extreme form of disciplinary action, the exclusion is performed with the consent of the regional, territorial or ethnic community, for

- having fallen into mortal sin and persisting to live in sin;
- living a morally undignified life, which is seriously detrimental to the Church and to God's work;
- spreading teachings and practices contrary to biblical truth;
- deliberately undermining the Church's unity and authority by causing divisions or by spreading rumours which may cause such divisions;
- long and wilful absence from divine services and from activities taking place within the Church.

The Church Committee, together with the pastor, decide on and apply disciplinary measures in cases of transgressions.

The Church Council acts as a court of appeal and rules on transgressions from Christian conduct or from the Confession of Faith.

The committee of the regional, territorial or ethical community investigates transgressions of Christian morals or pentecostal doctrine committed by pastors and submits punitive proposals to the executive Committee in order to sanction transgressors. It also investigates transgressions of Christian morals or pentecostal doctrine committed by other servants and takes the necessary measures.

The statute exempts the Church members from facing civil charges in courts of common law.

7. Courts of law of the Christian Seventh-day Adventist Church of Romania

Its statute is recognised by Government Resolution 399/2008²⁴. The Church comprises three organisational levels: the Local Church, the Conference and the Union of Conferences.

²³ Local pentecostal churches located in one or more counties may choose to unite in order to constitute a regional pentecostal community. Local churches of one or more neighbouring countries may unite in order to form a territorial pentecostal community of the diaspora.

²⁴ *Hotărârea privind recunoaşterea Statutului de organizare și funcționare al Bisericii Adventiste de Ziua a Șaptea din România*, Monitorul oficial I no. 324/2008.

The Local Church is the lowest level. It does not function as a legal body as it is an integral part of the Conference. Local Churches located in a certain territory form a Conference.²⁵ The total of all conferences in Romania form the Union of Conferences.

The executive committee of a Conference is the body charged with the discipline of all Conference employees, organizing hearings at first instance for all transgressions committed and settling all manner of complaints.

The executive committee of the Union of Conferences tries transgressions committed by employees of the Union and of institutions subordinate to and appointed by the Union. It acts as a court of appeal against decisions issued by the committees of the Conferences and by the institutions subordinate to the Union.

8. Courts of Law of the Evangelical-Lutheran Church

Its has been recognised by Government Resolution 400/2008²⁶. The Synod is the supreme decision-making body, playing a legislative and electoral role of representation and administration. The General Assembly is the supreme electoral body of a parish and a deanery, charged with representation and administrative duties. The Church extends its disciplinary jurisdiction through its discipline commissions, which are the following:

- the Parish disciplinary commission consisting of members elected from the ranks of the presbytery;
- the Deanery disciplinary commission;
- the General Diocesan Disciplinary Commission and
- the Extraordinary Disciplinary Commission, which is in charge of taking disciplinary measures against members of the chairmanship of the Church and of the general discipline Commission.

The disciplinary commissions are authorised to pass judgement on transgressions of Church discipline, on complaints concerning the validity of elections, on complaints and controversial issues regarding the administration and assets of the Church as well as on cases of breach of faith and other obligations.

²⁵ The Conference acts as a legal body and governs all the local churches located in a certain territory, having jurisdiction over them.

²⁶ *Hotărârea privind recunoaşterea Statutului Bisericii Evanghelice-Lutherane din România*, Monitorul oficial I no. 296/2008.

9. Courts of Law of the Muslim Community

Its statute was recognised by Government Resolution 628/2008.²⁷ Pursuant to its Article 1(1), the community comprises the totality of followers of the Islamic faith. The legal representative body is the Mufti, seated in the Constanța municipality. The supreme body, with jurisdiction over the organisation and practice of the Muslim religion is the *Shura-i Islam*, the Synodal Council, whose members are elected once every five years. Its president is the Mufti.

Article 11/g of the statute obligates the Mufti to propose sanctions against religious and other personnel to the *Shura-i Islam*. Therefrom it can be concluded that the authority to apply sanctions for breaking the law, the statute or the internal order lies with the *Shura-i Islam*.

Sanctions may be directed against clerics, appointed by the Mufti according to Article 13/g of the statute, such as the *Imam hatip*, the muezzin and the personnel of the Mufti's religious centre, i.e. the religious counsellor, the diocesan secretary, the diocesan inspector, the technical counsellor, as well as the non-clerics, namely the administrative personnel required to ensure the proper functioning of the religion.

It can be noted that the statute does not make any provision concerning the referral of conflicts that may arise to courts of common law.

10. Courts of law of the Evangelical Church

Its statute was recognised by Government Resolution 629/2008²⁸. Pursuant to its Article 1(1), the Romanian Evangelical Church is an autonomous Christian organisation established between 1920 and 1924 by the Orthodox theologians Dumitru Cornilescu and Teodor Popescu.

The Church comprises all local Churches organised on grounds of doctrinal and organisational unity and consists of all followers, regardless of nationality, sex or age, who adhere to the Confession of Faith and the provisions of the statute.

Its base organisational unit is the local Church, also known as gathering, which is made up of at least 21 members and acts as a legal body. According to Article 84(2, 3) of the statute, Its members take the oath to undertake to tell the truth and never to hide anything of what they know, thereby using neither religious objects, nor sacramental formulas.

²⁷ Hotărârea privind recunoașterea Statutului cultului musulman, Monitorul oficial I no. 469/2008.

²⁸ Hotărârea privind recunoașterea Statutului Bisericii Evanghelice Române, Monitorul oficial I no. 462/2008.

The central organisation bodies are the General Assembly of Representatives comprising representatives of local Churches and their branches, the Nationwide Council of Brethren and the Executive Bureau.

The Council of Brethren of a local Church ensures the appropriate course of the moral, spiritual and administrative life of a local Church, *inter alia* it is charged with membership issues (Article 45 of the statute). It is allowed to dismiss all servants or employees who fail to fulfil their duties, as well as those found guilty of doctrinal or moral transgressions. In this sense, dismissal is nothing but a disciplinary termination (Article 38 of the statute). The council comprises between 3 and 9 members, who are seasoned followers and lead exemplary family, religious and social lives.

The Executive Bureau, subordinate to the Nationwide Council of Brethren, is charged with managing the administrative and financial departments as well as with supervising compliance with the statute and the Confession of Faith throughout the local Churches.

It is, however, not part of an ecclesiastical hierarchy, but an operative body made up of brothers who represent the interests of the Churches in their relations with the State or with third-party entities and who perform a wide range of activities of general interest to the Brethren.

It consists of three representatives. While two representatives may be hired and remunerated depending on the volume of work assigned and subject to the existing financial possibilities, one, called the main representative, signs an employment contract.

The Church is legally represented by one of the members of the Executive Bureau or one of their proxies.

To conclude, the body responsible for enforcing disciplinary sanctions on the personnel of the Romanian Evangelical Church is the Council of Brethren of a local Church. However, the statute makes no provisions concerning the possibility of appeal against applied disciplinary sanctions, just as it makes no reference to the courts of common law.

II. Religious Disputes: The Approach of the State

Examination of the normative acts through which the aforementioned organisations, subject to this analysis, have been recognised, lead to the conclusion that a member of a religious organisation affected by sanctions due to disciplinary transgressions is unable to take legal action by appealing in civil courts. However, even in cases where the civil court could be addressed by the plaintiff with a plea of appeal,

the action would have to be rejected as inadmissible because investigating such an action does not fall under its sphere of jurisdiction.²⁹

The provisions contained in the aforementioned statutes are grounded in the text of Article 26 of Law 489/2006.³⁰ Its provisions are corroborated by the provisions of the statutes of the religious communities as recognised through Resolutions issued by the Government of Romania. This requires further clarification.

In cases where recognised religious communities can be considered public authorities on grounds that, while they indeed count as private legal persons, according to the law, they enjoy a so-called public utility status.³¹ Therefore all examined jurisdictions are considered unconstitutional because any special administrative jurisdiction³² is optional, pursuant to Article 21(4) of the Constitution. Upon examination of all analysed statutes, the mandatory status of the respective jurisdictions is apparent.

But even if the different bodies of jurisdiction of recognised religious communities were to be considered bodies of private jurisdiction, whose archetype is private arbitration pursuant to Article 340 of the new Code of Civil Procedure 134/2010³³, all above mentioned jurisdictions would be considered unconstitutional as well.

In order to ensure that a form of private jurisdiction does not infringe on the fundamental right of free access to justice according to Article 21(1, 2) of the Constitution, it is necessary for the law to specify explicitly and unequivocally that such jurisdictions are predicated on the sine qua non condition of judging the litigations they had been invested to settle and that they function under an agreement of the parties, granted for each litigation separately. Such an agreement does not exist in any of the examined statutes, which, on the contrary, establish the mandatory jurisdiction of the jurisdictional bodies examined in this paper.

This implies that all but the Reformed Church's statutes are *a fortiori* unconstitutional, since they directly or indirectly deny the defendant the right to ultimately

²⁹ As an exception, Article 11(3) of the statute of the Reformed Church explicitly entitles a person with a vested interest to appeal to a State court against a definitive sentence issued by a Church body.

³⁰ See *supra*, n 2.

³¹ Pursuant to Article 2(1)b of Administrative Procedure Act 554/2004 (*Lege contenciosului administrativ*, Monitorul Oficial I no. 1154/2004), a body corporate which was granted public utility status, can also serve as a public authority. In this sense, Article 8(1) of Law 489/2006 declares all recognised religious organisations bodies corporate of public utility.

³² Pursuant to Article 2(1)e of Law 554/2004, special administrative jurisdiction is performed by an administrative authority and based on a special organic law, which deals with conflicts on administrative documents. The procedure is founded on the principles of contradictoriness, self-defence and the independence of the administrative-jurisdictional activities.

³³ *Lege privind Codul de procedură civilă (republicare)*, Monitorul Oficial I no. 247/2015 (republished).

seek justice before State jurisdiction. Furthermore these statutes do not establish procedural norms, including time frames for issuing the disciplinary judgement.

The fact that Article 26(2) of Law 489/2006 stipulates that for matters of internal discipline, the statutory and canonical provisions are exclusively applicable while, pursuant to Article 26(3) *leg. cit.*, State legislation is only incidental with regard to offences and crimes, might lead to the conclusion that the statutory provisions comply with Law 489/2006, but at the same time infringe Article 21(4) or Article 21(1–2) of the Constitution, depending on the case.³⁴

These arguments have been disproved by two consecutive decisions of the Constitutional Court,³⁵ overruling the exception of unconstitutionality of provisions under Article 26(1–3) of Law 489/2006 on the following grounds:

- The State does not exercise public functions in the internal activities of religious organisations and therefore, State legal rules concerning labour discipline do not apply to the personnel of religious organisations.
- The existence of individual statutes does not deny employees (to whom such statutes are applicable) the right to benefit from free access to the State's legal system (Article 21 of the Constitution), since religion cannot represent grounds for discrimination according to Article 4(2) *leg. cit.*

Free access to justice is a constitutionally guaranteed right of every citizen, which no law shall restrict. Similarly, pursuant to Article 6 of Law 304/2004 concerning the judicial organisation³⁶, any person may appeal to justice in defence of her legitimate rights, freedoms and interests in exercising her right to a fair trial.

The lack of opportunity to appeal in the legal system against judgements issued by religious jurisdictional bodies may represent, in fact, a suppression of the imperative of access to justice. It is worth pointing out, however, that certain statutes do regulate the possibility to appeal against the decisions made by one religious body before a hierarchically superior one:

- The statute of the Romanian Orthodox Church stipulates the possibility to appeal against judgements issued by the Archpriestal Disciplinary Con-

³⁴ G. C. Frențiu, 'Competența soluționării acțiunilor promovate împotriva sancțiunilor disciplinare aplicate personalului cultelor religioase', (2008) *Dreptul*, no. 10. pp. 56–77 as well as M. Barbu and D. Barbu, 'Posibilitatea clericilor ortodocși de a-și exercita drepturile în calitate de subiecți de drept procesual în virtutea unor acte normative noi', (2008) *Noua Revista de Drepturile Omului*, no. 2, pp. 28–47 present these aspects incompletely, neglecting the jurisdictional competence of religious courts based on religious autonomy.

³⁵ Curtea Constituțională, 6 May 2008, no. 506, Monitorul oficial I, no. 412/2008; Curtea Constituțională, 10 June 2008, no. 640, Monitorul oficial I, no. 506/2008.

³⁶ *Legea privind organizarea judiciară*, Monitorul oficial I no. 827/2005.

sistory and by the Archdiocesan Consistory before the Metropolitan Synod or the Holy Synod, respectively and paves the way for a new trial carried out by the Metropolitan Consistory, provided that the plea for appeal has been accepted.

- Articles 60/a, 66 and 158(9) of the statute of the Old-Rite Orthodox Church stipulate the possibility to appeal against judgements issued by the Archpriestal Disciplinary Consistory before its superior court, the Metropolitan Judicial Commission, or, subsequently, to appeal against a judgement issued by the latter before its superior court, the Grand Council.
- The statute of the Baptist Union entitles the Council of the Union to settle appeals against judgements issued by the Community of Churches or by the Council of the Hungarian Baptist Convention.
- The statute of the Reformed Church stipulates the possibility to appeal against judgements issued by the court of first instance before the hierarchically superior disciplinary commissions or to appeal against a definitive decision concerning the dismissal of a priest from the ranks of the clergy, before the Disciplinary Commission of the Synod.
- The statute of the Seventh-day Adventist Church provides for an appeal to the Executive Committee of the Union against judgements issued by the Committees of Conferences and by bodies subordinate to the Union.

These bodies do however not seem to be neither independent and impartial, nor in the position to guarantee free access to justice, as its members submit to the leadership of their religious community. Under European law, the independence and impartiality of a judge, who is in a subordinate position to one of the parties, may, understandably, be questioned.³⁷

Concerning the activity of religious courts of law in general and those of the Romanian Orthodox Church in particular, it can be said that the interdiction to seek justice before civil courts is supported from a canonical point of view, but cases exist where the said interdiction infringes on the rights and liberties of the defendants, such as, for instance, abuses perpetrated by bishops. Every appeal against a lower court judgement needs to be lodged with an higher court, which tends to consist exclusively of bishops, leading all the way to the supreme court, which consists of all active bishops of the Romanian Orthodox Church. A particular case worth mentioning is the Tanacu case, wherein the priest and nuns of a monastery in Moldova

³⁷ See C. Birsan, *European Convention on Human Rights. Commented Articles, vol. I: Rights and Freedoms* (Bucharest 2005), p. 490.

stood trial for performing an exorcism ritual on another nun from the same monastery, following which, she passed away. The courts of the Church were surprisingly quick in issuing a ruling, defrocking the priest and dismissing the nuns from the monastery on charges of manslaughter, while the civil courts prosecuted them a lot later, on other infringements, after it was determined that the death of the nun in question occurred as a consequence of inadequate medication and epilepsy.³⁸

III. State Court Interventions in Property Cases

One of the most difficult problems regarding interrelations between different religious communities after the events of December 1989, was the problem of restitution of property which required the intervention of civil courts.

By means of Legislative Decree 126/1990³⁹ the Greek Catholic Church⁴⁰ was recognised by the state after having been declared illegal by Decree 358/1948. Soon after its re-establishment, the Greek Catholic Church began an intense and sustained campaign of *restitutio in integrum* of its lost property. Article 2 of Legislative Decree 126/1990 established a commission composed of State and Greek Catholic officials who were tasked with identifying and returning the assets which had been seized by the State in 1948, back to the Church. However, originally Greek Catholic Church buildings and parish houses taken over by the Romanian Orthodox Church in 1948 were ordered to be dealt with by a special commission comprising officials of both Churches, pursuant to Article 3 *leg. cit.* In addition, the wishes of the affected communities' members should be taken into account. The lawmaker's efforts to appease become obvious in Article 4 *leg. cit.*, according to which the state will support the construction of new churches, in proportion to the number of the faithful in places where the amount of churches is not sufficient. In this way,

³⁸ M. Barbu and D. Barbu, 'Posibilitatea clericilor ortodocși de a-și exercita drepturile în calitate de subiecți de drept procesual în virtutea unor acte normative noi', (2008) 4 *Noua Revista de Drepturile Omului*, no. 2, pp. 28–47 (p. 32).

³⁹ *Decret-lege privind unele măsuri referitoare la Biserica Română Unită cu Roma (greco-catolică)*, Monitorul Oficial I no. 54/1990.

⁴⁰ The Greek Catholic Church, or the Unified Catholic Church, was established after a part of the Orthodox Church in Transylvania (1700) formed a union with Rome following the Habsburg conquest. The new church was later greatly shaped by the policy of Joseph II. Deeply penetrated by Austrian Enlightenment, the Greek Catholic Church proved very receptive to the modern national movement. Its Western educated intelligentsia played an important historical role in the emergence and development of a Romanian national ideology, while its ecclesiastical center from Blaj manifested throughout the time as a symbol of Romanian national identity.

“a favourable resolution of the justified Greek-Catholic demands were dependent on the good intentions of the [Romanian] Orthodox Church and their willingness to collaborate, as well as on the choice of believers at a local level.”⁴¹

In fact, as was soon proven, the Romanian Orthodox Church was slow in considering the restitution Greek Catholic demands, which led to open debates among prelates and many successive crises in their inter-confessional relations. The attitude of the Romanian Orthodox Church was sustained by such Orthodox congregations, which had been Greek Catholic prior to 1948. Most of them belonged to young a new generation baptised in the Romanian Orthodox Church. Based on canons 34, 35 and 37 of the Holy Apostles, canon 2 of Ephesus, canon 20 of Chalcedony and canon 22 of Antioch, the congregations have a certain autonomy in relation to other congregations and to the diocese. Buildings are property of the congregations. Therefore, it is their members and the Parish Councils who decide what should be done with these properties, albeit under strict supervision of the diocesan bishop.⁴²

The violent confrontation of 13 March 1998 between Romanian Orthodox and Greek Catholic believers in the Church *Schimbarea la Față* of Cluj was widely reported by national and foreign TV channels, and caused genuine emotion and consternation throughout the country. On 20 March 1998, the Orthodox Archbishop Bartolomeu Anania led an impressive protest march of 2,500 Orthodox priests and students in Cluj. In October 1998, a meeting between a delegation of the Romanian Orthodox Church led by Daniel, the Metropolitan of Moldova and Bukovina, and a delegation of the Greek Catholic Church led by Metropolitan Lucian Mureșan, was reported as a breakthrough in the settlement of the dispute.⁴³

In order to clarify matters between the two Churches, Parliament finally passed Law 182/2005, according to which the party interested in restitution needed to summon the other by communicating its claims and supplying evidence. If ensuing negotiations do not satisfy both parties, the interested party has the right to take legal action.

Nonetheless, relations between the two Churches are far from being solved. During the construction of new Romanian Orthodox churches some nearby former Greek Catholic churches were demolished. In such cases, where dialogue led nowhere, one party sought justice before the civil courts, which, however, passed

⁴¹ C. Iordachi, ‘Politics and Inter-Confessional Strife in post-1989 Romania. From Competition for Resources to Redefining National Ideology’, (1999) 3 *Balkanologie*, pp. 147–169.

⁴² According to can. 33 from Cartago “the priests may not sell Church properties without telling the bishop and the bishops may also not do this without informing the Synod of the Church.”

⁴³ ‘Dupa un razboi de cincizeci de ani’, (1998) *Evenimentul zilei*, 28 October.

different judgements at all levels.⁴⁴ That is why it is difficult to present a conclusive trend on decisions in this matter.

IV. Religious Perspectives on State Approaches to Religious Disputes

As was made clear above, it is the religious organisations which refer to legal and statutory provisions when dealing with appeals against disciplinary decisions before State courts. In the past few years, several complaints have been lodged by disgruntled priests, dissatisfied with judgements issued by ecclesiastic courts and the policy of the religious organisation in question was to postpone a final ruling until the action was settled in the civil court. This may be due to the haste of certain bishops to request investigation of priests from their dioceses by the respective religious courts, as well as to drastic measures against priests, who are often left defenceless before an ecclesiastical tribunal controlled by a bishop.

The position of the religious establishment can only be negative towards State court judgements contrary to those issued by religious courts.

Mass media only gets involved when there is a scandalous or sensational story to report, mostly siding with the priest in question and hardly ever with the religious organisation involved. Regarding the ‘Good Shepherd’ case, mass media positioned itself against the ruling of the small chamber of the ECtHR, as did many scholars. It is worth pointing out the lack of fundamental knowledge of canon law displayed by law professors, who ignored the special position of priests performing their duties not based on a labour contract, but on a mission which they freely accepted and consented to.

Criticism levelled against the Romanian Orthodox Church (but not limited to it) is mainly due to the profound secularisation of society, especially among people of higher levels, but also to unpopular decisions taken by the leadership of the Church. Many of them were disapproved of⁴⁵ by the vast majority of the population – who are, in fact, the believers.

⁴⁴ S. Ş. Zetea and D. Ruscu, ‘Zwischen Vorurteil und Tatsache. Zur Ergänzung der Sicht. Über die Konflikte zwischen Orthodoxen und Unierten in Siebenbürgen,’ (2007) *Studia Universitatis Babeş Bolyai Theologia Catholica*, no. 3, pp. 165–173; M. A. Fodor, ‘Biserica pierduta din localitatea Taga sau ecumenismul de birou versus ecumenismul de teren,’ *ibid.*, pp. 175–186.

⁴⁵ E.g. the decision to build the Cathedral of the Salvation of the Nation at a time of deep economic crisis, the constant construction of new churches, or the increasingly contested association with politics.

RELIGIOUS SUPPLEMENTARY JURISDICTIONS IN THE UNITED KINGDOM

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I. The Resolution of Disputes: Practices and Norms of Religious Communities

Grant Gilmore, a Yale Professor of Law once observed: “In Heaven there will be no law and the lion will lie down with the lamb [...] In Hell there will be nothing but law and due process will be meticulously observed.”¹ Religious communities do not always live in harmony, and as such they have developed sophisticated and nuanced processes of internal governance both for their clergy and their other members.² However, the established nature of the Church of England means that its courts and tribunals are state courts enforcing English law and the Secretary of State for Justice must be consulted before any judicial appointment is made.³

This national report concentrates on family disputes, principally the raising of children and making financial provision for former spouses and children. It has been informed by a research study carried out at Cardiff University whose findings were published in 2011.⁴ This ground-breaking study set out

“to collect information on the role and practice of religious courts in England and Wales in order to contribute to debate concerning the extent to which English law should accommodate religious legal systems”

¹ G. Gilmore, *The Ages of American Law* (New Haven, Connecticut 1977) pp. 110 f.

² See generally R. Torfs (ed.), *The Right to Due Process in the Church: A Comparative Ecclesiastical Approach* (Leuven 2014), including a specifically Anglican perspective in M. Hill, ‘Due Judicial Process as a Principle of Anglican Canon Law and in the Clergy Discipline Tribunals of the Church of England’, *ibid.*, pp. 52–70.

³ For a full discussion of this somewhat anomalous position see M. Hill, *Ecclesiastical Law*, 3rd ed. (Oxford 2007) paras. 2.46 ff.

⁴ G. Douglas, N. Doe, S. Gilliat-Ray, R. Sandberg and A. Khan, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* (Cardiff 2011).

and was granted access to three selected institutions: the Catholic National Tribunal for Wales in Cardiff; the Jewish *Beth Din*, Family Division; and the *Sharia Council* of the Birmingham Central Mosque. Its findings provide a unique snapshot of the practices and norms of these particular religions, and I have placed considerable reliance upon the Report in what follows, acknowledging in particular my colleagues in the Law School at Cardiff, Gillian Douglas, Norman Doe and Russell Sandberg.

There is no monolithic body representing the entirety of any of the three faiths studied. Even the much greater homogeneity of the Roman Catholic Church is influenced by its local cultural and social contexts.⁵ And within both Islam and Judaism, there are several degrees of orthodoxy and versions of interpretation. Similarly, there is a multiplicity of religious tribunals within the different communities, who may have separate religious tribunals ruling on matters relevant to their adherents.

There is no hierarchy of tribunals within the Jewish and Muslim communities, and no appeal structure. This has led to an interesting element of forum shopping by litigants.⁶ Litigants can, to some extent, choose which tribunal they go to according to the way in which (they think) the law will be applied. While a party cannot appeal against an adverse decision, it is apparently open to a Jewish or Muslim person to make use of a different religious tribunal if he or she is not satisfied the first time. For Jewish people, the rulings handed down by the more liberal wings of Judaism would not be recognised in the orthodox communities, so those who belong to such wings might still choose to make use of a more orthodox *Beth Din* in order to secure broader recognition. The Catholic Tribunal is in a different position being part of a hierarchical appeal structure which derives its authority from Rome.

Each religious tribunal applies a body of religious 'law' in the sense of a set of norms that are binding on adherents. However, the particular *Sharia Council* appeared to take a very flexible approach. It did not represent any single school of thought but rather drew on different ones to arrive at just decisions. There is no system of 'precedent'. This is also true of the *Beth Din*, which will look to a range of opinions and rulings from other *batei din* in reaching its judgments but again, as there is no hierarchy of tribunals, it is not *bound* by any prior ruling. The Catholic

⁵ A separate report is to be produced addressing the norms and practices of the Catholic Church, and I therefore treat them only briefly herein, where particular comparisons can usefully be made.

⁶ A recent example concerned an Orthodox Jewish couple who had a religious marriage in London followed by a civil ceremony in Toronto whose family proceedings in the English Courts were adjourned while the matter was the subject of an arbitration in the *New York Beth Din*: High Court, 30 January 2013, *A. I. v. M. T.* [2013] EWHC 100 (Fam).

Tribunal draws on commentaries as well as the Code of Canon Law and regards its own decisions and rulings from Rome as persuasive but not as binding precedents.

A commonality between all the Tribunals in relation to staffing is the degree to which their operation rests upon volunteers and the services of those who usually have other professional religious roles within their communities. There is clearly a fusion of religious and legal roles. Personnel in all three tribunals are seen as sources of guidance and advice outside the judicial process. Their authority may derive from their position in the tribunal, their standing in the community or their own personality.

None of the tribunals in the Cardiff study has a 'legal status' in the sense of recognition by the state. Their authority extends only to those who choose to submit to it: adherents to the particular faith must make use of the religious tribunal if they are to obtain sanction to remarry within their faith (as opposed to divorce and remarriage as a matter of secular civil law).

All three religions see marriage as based fundamentally on the volition of the parties. For Muslims and Jews, marriage is therefore a contract, to be ended at the parties' will. For Catholics, marriage is a sacrament as well as a contract, but the focus on consent as the basis for annulment reflects the same understanding of the essence of marriage as the other faiths. The basis for the ending of the marriage varies as between the three tribunals. For the *Sharia Council*, the focus is on determining whether the marriage is no longer workable, and there is a mandatory mediation stage prior to a ruling being given to see if the marriage can be saved. For the *Beth Din*, no grounds need be proved, and there is no ruling or judgment that the marriage has broken down. The function of the *Beth Din* is (in almost all cases) simply to witness the parties' mutual divorce and ensure that the writing of the *get* document which signifies the divorce, is conducted correctly.

None of the tribunals operates the kind of hearing common in the English civil courts whereby both parties hear and may cross-examine on the evidence brought by the other. All three religious tribunals are clearly aware of the emotional dimension to the process of ending a marriage and seek to recognise this by their procedures, through pastoral support or otherwise.

Religious tribunals generally have only a limited role in matters relating to ancillary matters such as arrangements for the parties' children, or money and property. Under Jewish law, it is possible for the parties to agree at the time of the marriage

- that they will consent to a *get* and
- that they will ask the *Beth Din* to resolve any ancillary disputes.

Such agreements would not amount to binding arbitration contracts, since the jurisdiction of the civil courts on such matters may not be ousted by the parties' agreement.⁷ In such cases, they are advised to seek a consent order in the family courts.⁸

II. Religious Disputes: The Approach of the State

Unlike many European countries,⁹ English law does not include detailed registration schemes for religious groups. However, this does not mean that religion is unregulated. A multitude of overlapping laws has been enacted to recognise and regulate both religious groups and religious individuals enabling them to benefit from legal and fiscal advantages.¹⁰ All religious groups are usually treated as voluntary associations.¹¹ The relationship of members as between themselves is governed by quasi-contract and the organisations are treated as a matter of law as unincorporated associations, their rules being considered binding on assenting members.

The English courts, by convention, adopt a self-denying ordinance whereby they decline to enter into doctrinal disputes or matters concerning the organisation or operation of faith communities.¹² Lord Justice Hoffman, in giving judgment in *R. v. Disciplinary Committee of the Jockey Club ex parte Aga Khan* indicated that,

“The attitude of the English legislator to [horse]racing is much more akin to his attitude to religion [...] it is something to be encouraged but not the business of government.”¹³

In *Maharaj v. Eastern Media Group*,¹⁴ Justice Eady referred to the

“well-known principle of English law to the effect that the courts will not attempt to rule upon doctrinal issues or intervene in the regulation or governance of religious groups.”¹⁵

⁷ Section 34 of Matrimonial Causes Act 1973, chapter 18, as amended; section 10 of Children Act 1989, chapter 41, as amended.

⁸ See by way of example, *A. I. v. M. T.* [2013] EWHC 100 (Fam), *supra*, n. 6.

⁹ See L. Friedner (ed.), *Churches and Other Religious Organisations as Legal Persons* (Leuven 2007).

¹⁰ See M. Hill, R. Sandberg and N. Doe, *Religion and Law in the United Kingdom*, 2nd ed. (Alphen aan den Rijn 2014).

¹¹ The Church of England (and to a lesser extent the Church in Wales) also have some recognition in public law, in consequence of their established status (or previous such status in the latter case).

¹² See M. Hill, ‘Judicial Approaches to Religious Disputes’, in R. O’Dair and A. Lewis (eds.), *Law and Religion* (Oxford 2001), pp. 409–420.

¹³ Court of Appeal, 4 December 1992, *R. v. Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 1 Weekly Law Reports 909.

¹⁴ High Court, 17 May 2010, *Maharaj v. Eastern Media Group* [2010] EWHC 1294 (QB).

¹⁵ See also High Court, 31 July 2003, *Blake v. Associated Newspapers* [2003] EWHC 1960 (QB).

In *Khaira v. Shergill*,¹⁶ Lord Justice Mummery held that the principle of non-justiciability means that the courts will

“abstain from adjudicating on the truth, merits or sincerity of differences in religious doctrine or belief and on the correctness or accuracy of religious practice, custom or tradition.”

However, on a further appeal to the Supreme Court, a more rigorous approach was adopted to this concept of judicial deference in doctrinal matters. In placing reliance upon the distinction between a religious belief or practice on the one hand and its civil consequences on the other, the Supreme Court declared:

“the courts do not adjudicate on the truth of religious beliefs or on the validity of particular rites. But where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment.”¹⁷

The courts will not adjudicate on the decisions of an association’s governing bodies unless there is a question of infringement of a civil right or interest, but

“disputes about doctrine or liturgy are non-justiciable if they do not as a consequence engage civil rights or interests or reviewable questions of public law.”

The role of the courts “is more modest: it keeps the parties to their contract.” Secular courts cannot treat a religious dispute as non-justiciable where its determination is necessary in order to decide a matter of legal right. The civil courts must not discuss the truth or reasonableness of any of the doctrines of a religious association:

“The more humble, but not useless, function of the civil Court is to determine whether the trusts imposed upon property by the founders of the trust are being duly observed.”¹⁸

Secular courts have similarly also declared themselves to be neutral in matters of religion, and have declared themselves not competent to “determine the truth of any religious belief.”¹⁹ In the context of charity law, it has been pronounced that, “the court does not prefer one religion to another and it does not prefer one sect to another.”²⁰ As to the composition of the judiciary who are required to determine disputes of a religious nature, Lord Carey, a former Archbishop of Canterbury, lent his support to an application for an appeal to be heard by a specially constituted court comprising judges who had “a proven sensitivity to religious issues”. In refusing the application, Lord Justice Laws observed:

¹⁶ Court of Appeal, 17 July 2012, *Khaira v. Shergill* [2012] EWCA Civ 983.

¹⁷ Supreme Court, 11 June 2014, *Shergill v. Khaira* [2014] UKSC 33 at para. 45.

¹⁸ House of Lords, 1 August 1904, *Free Church of Scotland v. Overtoun* [1904] Law Reports, Appeal Cases 515 at 644 f. See the Supreme Court took into consideration when examining the employment status of a Methodist cleric: Supreme Court, 15 May 2013, *President of the Methodist Conference v. Preston* [2013] UKSC 29.

¹⁹ House of Lords, 8 April 1949, *Gilmour v. Coats* [1949] Law Reports, Appeal Cases 426 per Lord Reid.

²⁰ High Court, 6 July 1973, *Re Watson* [1973] 1 Weekly Law Reports 1472, 1483, Justice Ploughman.

“the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled.”²¹

Courts recognise religious law in several other ways.²² For instance, religious law may enter the courtroom as part of the facts of the case²³ on which expert evidence is required. Moreover, legislation has been enacted to recognise the jurisdiction of religious bodies to regulate aspects of their adherents’ behaviour. The clearest example of this is through the Arbitration Act 1996²⁴ (discussed below). In addition English law may be said to recognise religious laws through private international law. A typical example of this would be the recognition of marriages conducted overseas. The key test is whether the recognition complies with public policy. This was underlined by the Court of Appeal decision in *K. C. et al. v. City of Westminster Social & Community Services Dept.*,²⁵ concerning a purported marriage by telephone link between England and Bangladesh and a lack of mental capacity of one party. The Court of Appeal held that while this was a valid marriage under Islamic law and Bangladeshi law it was not valid under English law: the circumstances made the marriage sufficiently offensive to the conscience of the English court that it should refuse to recognise it.

Religious jurisdiction over family matters has some limited recognition in the civil law of England and Wales.²⁶ Indeed, at common law, the basic validity of a marriage was satisfied by simple conformity with canon law rules, and the common law itself ceded control over marriage status, entry and exit, to the ecclesiastical courts. Since 1753, English law has recognised the jurisdiction of certain other religious groups over control of entry into marriage. Thus, Jews and Quakers were exempted from the requirements of the Clandestine Marriages Act²⁷. In 1836, new legislation

²¹ Court of Appeal, 29 April 2010, *McFarlane v. Relate Avon Limited* [2010] EWCA Civ 880, para. 21. See also the comments of the Court of Appeal in High Court, 28 February 2011, *Johns and Johns v. Derby City Council et al.* [2011] EWHC 375 (Admin).

²² See R. Sandberg, ‘Islam and English Law’, (2010) 164 *Law and Justice*, pp. 27–44.

²³ W Menski, ‘Law, Religion and Culture in Multicultural Britain’, in R. Mehdi, R., H. Petersen, E. Sand, and G. Woodman (eds.), *Law and Religion in Multicultural Societies* (Copenhagen 2008) pp. 43–62 (p. 45): “Some British judges, virtually every day, have to decide matters of Muslim law and are grateful for expert advice, while others resent expert involvement.”

²⁴ Arbitration Act 1996, chapter 23 as amended.

²⁵ Court of Appeal, 19 March 2008, *K. C. et al. v. City of Westminster Social & Community Services Dept. et al.* [2008] EWCA Civ 198.

²⁶ See E. Butler-Sloss and M. Hill, ‘Family Law: Current Conflicts and their Resolution’, in R. Griffith-Jones (ed.), *Islam and English Law* (Cambridge 2013), pp. 108–115.

²⁷ Marriage Act 1753, 26 George II, chapter 33.

enabled Catholics and others to register their premises to carry out marriages according to their own rites with recognition of the state. Relatively few Muslim, Sikh or Hindu places of religious worship have been licensed, with these groups preferring to retain their own control. The Church of Scientology recently won the right for their premises to be so registered.²⁸

In 1857, the jurisdiction of the ecclesiastical courts to regulate family matters was taken over by the state and a Divorce Court was created for the first time.²⁹ Under the Divorce (Religious Marriages) Act 2002³⁰ provides that a court may delay making a civil divorce final the parties have certified that a religious divorce has been granted by the appropriate authorities.

English law tends to provide recognition of religious bodies and their laws rather than their courts. As a matter of public law in England and Wales, the variously styled courts and tribunals of all religious communities (other than those of the Church of England) are not subject to review by the courts of the State. In *R. v. Chief Rabbi, ex parte Wachmann*³¹ the claimant sought judicial review of a decision by the Chief Rabbi, following a commission of enquiry, that Wachmann was no longer morally and religiously fit to hold rabbinical office, on grounds of procedural unfairness. The judge held that there was no “governmental interest in the decision-making power in question”, and that the Chief Rabbi’s

“functions are essentially to initiate spiritual and religious functions which the government could not and would not seek to discharge in his place were he to abdicate his regulatory responsibility.”

This has been followed in relation to decisions made by an Imam,³² a Jewish *Beth Din*³³ and the Provincial Court of the Church in Wales.³⁴

Decisions of religious courts are recognised through the Arbitration Act 1996. This provides that people are free to choose to have their disputes arbitrated outside

²⁸ Supreme Court, 11 December 2013, *R. (on the Application of Hodkin) v. Registrar General of Births, Deaths and Marriages* [2013] UKSC 77.

²⁹ Divorce and Matrimonial Causes Act 1857, 20 & 21 Victoria, chapter 85.

³⁰ Divorce (Religious Marriages) Act 2002 (chapter 27), introducing section 10A of the Matrimonial Causes Act 1973. This addresses the ‘chained wife’ who is denied a *get* and therefore is unable to remarry.

³¹ High Court, 6 February 1991, *R. v. Chief Rabbi, ex parte Wachmann* [1992] 1 Weekly Law Reports 1036.

³² Court of Appeal, 12 May 1993, *R. v. Imam of Bury Park, ex parte Sulaiman Ali* [1993] EWCA Civ 36 = [1994] Crown Office Digest 142.

³³ High Court, 18 November 1997, *R. v. London Beth Din ex parte Bloom* [1998] Crown Office Digest 131.

³⁴ High Court, 23 October 1998, *R. v. Provincial Court of the Church in Wales ex parte Clifford Williams* [1998] EWHC Admin 998 = (1999) 5 *Ecclesiastical Law Journal*, pp. 217 f.

the civil court system but recognised and enforced by the civil courts.³⁵ Accordingly, any appeal of an arbitration award is limited.³⁶ The Act emphasises that “parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.” The public policy limitation is exemplified by the Court of Appeal decision in *Soleimany v. Soleimany*.³⁷ In that case two Iranian Jewish merchants were exporting Persian carpets. This breached Iranian law. The two merchants fell out and took their dispute to the *Beth Din*. The *Beth Din* considered the illegality irrelevant under the applicable Jewish law and made an arbitration award. The Court of Appeal recognised this arbitration award made by the *Beth Din* as “a valid agreement”, but refused to enforce it on grounds that public policy would not allow an English court to enforce an illegal contract. This did not affect the court’s conclusion that the *Beth Din* had jurisdiction.

The Act only applies to civil disputes: the criminal law is outside its operation. Arbitration also has limited application under family law. Religious courts can grant religious divorces but not legal divorces. The Act enables parties to choose for disputes to be decided ‘in accordance with other considerations’ rather than ‘in accordance with law’ which can embrace religious doctrines, polity and practices, such as Jewish³⁸ or Islamic³⁹ law. The laws prohibiting discrimination on the grounds of religion or belief do not apply to a clause prescribing that an arbitrator be from a particular religious community.⁴⁰ Arbitrations conducted by the Jewish *Beth Din* are relatively common,⁴¹ but there are fewer examples in respect of Islamic courts: in at least one case a decision of the *Islamic Sharia Council* of London has not been enforced.⁴²

³⁵ Sandberg, *supra*, n. 22; and R. Sandberg, *Law and Religion* (Cambridge 2011) 169–190.

³⁶ See Supreme Court of Appeal of South Africa, 29 September 2014, *Ecclesia de Lange v. Presiding Bishop of the Methodist Church of Southern Africa* (726/13) [2014] ZASCA 151, discussed in M. Hill, ‘Religion, Same-Sex Marriage and the Courts in the Rainbow Nation of South Africa’ (2014), <<http://www.lawandreligionuk.com/2014/10/03/religion-same-sex-marriage-and-the-courts-in-the-rainbow-nation-of-south-africa/>> (30 June 2015).

³⁷ Court of Appeal, 19 February 1998, *Soleimany v. Soleimany* [1998] EWCA Civ 285 = [1999] Law Reports, Queen’s Bench 785.

³⁸ Court of Appeal, 3 April 2007, *Halpern v. Halpern* [2007] EWCA Civ 291.

³⁹ *Sharia* law has also been regarded as having the status of foreign law: see High Court, 22 February 1999, *Al-Midani v. Al-Midani* [1999] Commercial Law Cases 904 at 912.

⁴⁰ Supreme Court, 27 July 2011, *Jivraj v. Hashwani* [2011] UKSC 40.

⁴¹ The *Beth Din* sits as a “court of arbitration”: Court of Appeal, 16 December 1993, *Cohen et al. v. Baram* [1994] 2 Lloyd’s Rep 138; see also Court of Appeal, 24 October 2007, *Kohn v. Wagschal et al.* [2007] EWCA Civ 1022.

⁴² *Al-Midani v. Al-Midani* [1999] Commercial Law Cases 904, *supra*, n. 39.

Human rights instruments stress the importance of the right to a fair trial. Under Article 14 of the International Covenant on Civil and Political Rights protects the right to a fair trial. The Human Rights Committee has stressed that religious courts cannot hand down binding judgements recognised by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgements are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. The right to fair trial is also safeguarded by Article 6 of the ECHR and this is part of English law by virtue of the Human Rights Act 1998⁴³. The ECtHR has insisted that States are under an obligation to ensure that standards concerning the right to a fair trial are met by religious courts.⁴⁴

III. Religious Perspectives on State Approaches to Religious Disputes

In this final section, I discuss one matter which became a lightning rod for the matters addressed during the conference. The Archbishop of Canterbury gave a lecture on 'Civil and Religious Law in England' on 7 February 2008 in the Royal Courts of Justice. He was speaking about *all* faith-communities, not just Islam, particularly those challenged to comply with legislation that ran counter to their own convictions. He stated:

“it might be possible to think in terms of what [the legal theorist Ayalet Shachar] calls ‘transformative accommodation’: a scheme in which individuals retain the liberty to choose the juris-

⁴³ Human Rights Act 1998, chapter 42.

⁴⁴ ECtHR, 20 July 2001, 30882/96 (*Pellegrini v. Italy*), Reports of Judgments and Decisions 2001-VIII = (2002) 35 European Human Rights Reports 2, concerned Catholic annulment proceedings in an ecclesiastical court where the applicant was not told the nature of proceedings in advance and was not allowed to read her husband's witness statements. The Italian courts made operative the Curia's declaration of nullity. The ECtHR held that the proceedings in the ecclesiastical courts violated Article 6 in that the applicant's right to fair trial had been “irremediably compromised”. Since the Vatican State is not party to the Convention, the claim was made against the government of Italy, and a breach was found since the domestic courts “should have refused to confirm the outcome of such unfair proceedings” and that they had “failed in their duty to check [...] that the applicant had enjoyed a fair trial in the ecclesiastical proceedings.”

diction under which they will seek to resolve certain carefully specified matters, so that ‘power-holders are forced to compete for the loyalty of their shared constituents.’⁴⁵

But if what we want socially is a pattern of relations in which a plurality of diverse and overlapping affiliations work for a common good, and in which groups of serious and profound conviction are not systematically faced with the stark alternatives of cultural loyalty or state loyalty, it seems unavoidable.

The Archbishop did not directly address *sharia*, but the media stirred up an angry public response.⁴⁶ Most of this anger was directed at the Archbishop by displacement: what can no longer be said publicly about Muslims can be said about an Archbishop. Many in Britain are ignorant of Islam, and so frightened of it, and so angered by it. Islamic jurisprudence sees both law and religion informing all areas of life. A religion, after all, is a culture, and seeks to inform every part of its adherents’ lives. We may have been inclined to think that the purposeful observance of divine law informs the lives of Muslims in the West more widely and deeply than the lives of any other citizens. Islam is only one of the three Abrahamic faiths represented in the UK. And the diffusion of a diluted and secularised ‘Christian’ culture (invoking little more than the example and teaching of Christ and the roots of England’s polity in historically Christian soil) may disguise the similar rigour and vigour of many church congregations at all points on the ecclesiological spectrum. An appeal to divine law for the close daily management of communal, family and individual life is not symptomatic of some newly arrived otherness, alien to Western life and norms. Bernard Jackson commented

“that Dr Williams is seeking to build a religious coalition, led by the Church of England (as the ‘established’ Church), in favour of exemptions from secular law on grounds of religious conscience.”⁴⁷

In the Archbishop’s lecture is a poignant analysis of the place of all religions in public life.

⁴⁵ R. Williams, ‘Civil and Religious Law in England: a Religious Perspective’, (2008) 10 *Ecclesiastical Law Journal*, pp. 262–282 (p. 274).

⁴⁶ See R. Shortt, *Rowan’s Rule* (London 2008), pp. 390–402; C. Shelley, ‘English, Christian or Muslim Law: Deconstructing Some Myths’, (2015) 26 *Islam and Christian-Muslim Relations*, pp. 1–18.

⁴⁷ B. Jackson, “‘Transformative accommodation’ and religious law”, (2009) 11 *Ecclesiastical Law Journal*, pp. 131–153, (p. 150).

THE EMERGENCE OF RELIGIOUS PARALLEL JURISDICTIONS IN SLOVENIA

Blaž Ivanc, Ljubljana

I. The Resolution of Disputes: The Practices and Norms of Religious Communities

The formality of the system of internal dispute resolution of a particular religious organisation, depends on the formality of its internal organisational structure.

Slovenian Law on Religion, mostly enshrined in the Religious Freedom Act¹, allows believers to freely form religious associations. According to its Article 6(1), associations of believers may operate either with or without registration or may apply for formal recognition by the State through the registration procedure under Chapter III *leg. cit.* It is understandable that unregistered associations of believers mostly do not have precise or even any rules on internal dispute resolution.

Meanwhile, registered Churches and religious communities must have basic rules that regulate their structure, representation and operations. According to Article 14 *leg. cit.*, the basic ecclesiastical rules should regulate the rights and duties of members, together with election and appointment procedures for representatives and office holders. They should also regulate how a registered religious community ensures the publicity of its work. With the exception of the Catholic Church, most religious organisations do not provide open access to their basic and internal rules. Thus, the rules of registered and unregistered religious associations on internal disputes resolution are not transparent and are very hard to evaluate. Therefore no publicly reliable data could be found both about who acts as mediators, arbitrators or judges in internal disputes within various religious organisations, and about procedures used for dispute resolution. For the Islamic Community, one may assume that the *Shariah* council is the working body for dispute resolution.²

¹ *Zakon o verski svobodi*, Uradni list 14/2007, no. 599, pp. 1533–1538 as amended.

² *Cf. infra*, ch. II.2.

From the legal point of view, religious communities have the right to autonomously regulate issues related to doctrinal or property disputes, disciplinary or marriage cases etc. (Article 9 of the Religious Freedom Act). These are areas clearly within their jurisdiction, which are also protected by Article 7 of the Constitution³, that guarantees the autonomy of Churches and religious communities.

II. Religious Disputes: The Approach of the State

1. The Autonomy of Religious Communities

Before the democratisation in 1991, the Communist authorities strived to induce internal disputes and disagreements within various religious communities. The Catholic Church was affected most, but smaller religious communities, such as Jehovah's Witnesses, were also affected, for example in their procedures for appointing their leadership. True neutrality, positive State-Church separation and the guarantee of Church autonomy has been provided by the democratic Constitution of the Republic of Slovenia since December 1991.

The relationship between the Catholic Church and the Republic of Slovenia is regulated by a Concordat, whose Article 1 provides that the Republic of Slovenia and the Holy See shall confirm the principle that the State and Catholic Church are each confined to their own independent and autonomous system, and are obligated to fully respect this principle in mutual relations and to cooperate in the progress of society and the common good. The Catholic Church hence acts freely according to Canon law, in accordance with the legal system of the Republic of Slovenia.⁴

The constitutionality of this Agreement was challenged at the Constitutional Court which delivered an Opinion in 2003.⁵ The court stressed the importance of the principle of the separation of the State and Church, which requires non-identification with any denomination. The court held that, in the regulation of affairs within its jurisdiction, the State should not identify itself with a particular denomin-

³ *Ustava Republike Slovenije*, Uradni list, 33/1991, no. 1409, pp. 1373–1386.

⁴ Cf. B. Ivanc, 'Concordatos entre la República de Eslovenia y la Santa Sede: de un modelo negativo a otro positivo de separación entre el Estado y la Iglesia', *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* (2009) no. 21, <http://www.iustel.com/v2/revistas/detalle_revista.asp?id_noticia=408365&d=1> (20 July 2015).

⁵ Ustavno sodišče, 19 November 2003, Rm-1/02, Uradni list no. 118/2003 = *Odločitve Ustavnega sodišča* XII, 89.

ation and should therefore not be bound by any positions thereof.⁶ Furthermore, the court underlined that the principle of separation enshrined in Article 7(2) of the Constitution, prevents any extension of State powers to areas which are of an exclusively religious character or which belong to the internal affairs of religious communities. In areas where the activities of religious communities interfere with State powers, the freedom of activities of religious communities as a composite part of the principle of the separation of the State and religious communities, is limited by State sovereignty.

Later, the Constitutional Court reviewed the constitutionality of a Burial Order in the Moravče municipality.⁷ The Court annulled its Article 9(2) on the grounds that the Municipality as a local public authority could not interfere with the autonomy of Churches and religious communities in the field of religious burial rules. In principle, religious burial rules may only be regulated by the latter.

2. The Resolution of Religious Disputes

Since disputes among the faithful within a religious community are considered a matter of internal autonomy and self-regulation, the State may not interfere with internal ecclesiastical affairs.

Legal action against Churches and religious communities can only be a matter of legal review by the State when a disputed subject matter falls within State competence (e.g. property disputes⁸).

The most important case that demonstrates the State attitude towards internal religious disputes, is the so-called *Mufti* case. In July 2005, a first instance Court dismissed the petition of a former Mufti of the Islamic Community in Slovenia, who claimed that his removal violated the internal rules of the Islamic Community and that the Civil Court should annul its decision. Both the first instance Court and the second instance Court dismissed the petition.⁹ Both held that the very fact that a dispute arose between legal entities of civil law, is not sufficient to constitute State court jurisdiction. Instead, one needs to take into account the principle of Church and State separation in connection with the constitutional principle of the free func-

⁶ *Ibid.*, no. 20 of the reasoning.

⁷ Ustavno sodišče, 9 October 2008, U-I-354/06-13.

⁸ Cf. L. Šturm, 'Church-State Relations and the Legal Status of Religious Communities in Slovenia', (2004) *Brigham Young University Law Review*, pp. 607–650 (pp. 638–640).

⁹ Višje sodišče v Ljubljani, 1 February 2006, VSL I Cp 101/2006.

tioning of religious communities. A dispute about the internal organisation of religious communities, including freedom of ecclesiastical appointments, falls within the autonomous decision-making of a religious community. Consequently, the Court concluded that the illegality of acts regarding the appointment of Church officials, should be challenged in procedures provided for by ecclesiastical law and decided by the internal organs of a religious community. The State Court clearly found no room for its jurisdiction. The fact that the appointment procedure of a new Mufti called for joined action of the *Mešihat* council in Slovenia and of the *Riaset* Council in Bosnia and Herzegovina was irrelevant to the court's decision. Finally, the Constitutional Court also dismissed the constitutional complaint of the former Mufti with the explanation that the situation regarding the appointment of a Mufti does not and should not fall within the State's competence.¹⁰ Thus, the petitioner does not *prima facie* enjoy the right to legal remedy and judicial protection under Article 23 of the Constitution.¹¹

3. State Recognition of Religious Tribunals

In principle, the State recognises religious tribunals as long as their competence does not interfere with the State's competence.

Due to the lack of competence, State courts may not intervene in cases involving doctrinal disputes, disciplinary cases, ritual decisions (e.g. marriage) and similar decisions that are limited to the internal operations of a religious community.

However, a dispute concerning property ownership could be submitted to a State court. In one such case, the Court decided on the issue and used the internal ecclesiastical rules on property as the basis for its decision. The Supreme Court decided that persons who enter into a religious order and relinquish their property to the community are – even upon leaving – bound by its internal rules.¹²

With the exception of the *Mufti* case, no noticeable cases appeared in Slovenia that would invoke ECHR norms on fair trials. Afterwards, the former Mufti lodged a constitutional complaint, invoking violation of Article 23 of the Constitution that guarantees the right to legal remedy and judicial protection.

¹⁰ Ustavno sodišče, 28 May 2009, Up-2229/08-10, Uradni list, no. 43/2009 = *Odločitve Ustavnega sodišča* XVIII, 90.

¹¹ Cf. B. Ivanc, 'The Case Law of the Slovenian Constitutional Court in the Area of Freedom of Religion and Beliefs', in D. Čepar and B. Ivanc (eds.), *Legal Aspects of Religious Freedom* (Ljubljana 2008), pp. 249–259.

¹² Vrhovno sodišče, 15 June 2006, VSL I Cp 1088/2004.

Concerning the resolution of internal religious disputes within Churches and religious communities, Article 6 of ECHR is, in principle, not relevant and cannot be applied in matters within their internal autonomy.

III. Religious Perspectives on State Approaches to Religious Disputes

Religious communities have a very reserved attitude towards any kind of State interference into their autonomy. Historical reasons are evident. A council of Christian Churches and the Islamic Community decisively refused a draft for a new Religious Freedom Act in 2011 that would (again) introduce a State Commission, which should decide about so-called violations of the principle of State-Church separation.

Various Church affairs and financial problems of religious communities are a prime topic for the Slovenian media. Concerning the Catholic Church, one cannot overlook the strong negative campaign against it in the public media.

Public debate today almost resembles a cultural struggle (*“Kulturkampf”*), mainly oriented against the Catholic Church. Beside the establishment of a new extremely left wing political party, some new civil society organisations have also emerged in recent years that demand strict taxation of religious organisations, the prohibition of baptising etc. It is of great surprise that some prominent artists promote hate speech against Christian believers and even support post World War II mass killings of believers in Slovenia. However, various public debates are unrelated to issues of religious dispute, except in cases relating to child abuse and the sanctioning of religious ministers. Naturally, in the *Mufti* case, the media showed great interest in a case which questioned the true leader of the Islamic Community in Slovenia. Recently, allegations of the misuse of Church funds (intended for construction of a vicarage) and a State court criminal investigation against the high priest (*paroh*) of the Serbian Orthodox Church in Slovenia, also attracted media attention.¹³

¹³ ‘Srbski paroh Boškovič pod lupo preiskovalcev’ <http://www.siol.net/novice/slovenija/2014/03/boskovic_preiskava.aspx> (21. March 2014).

RELIGIOUS PARALLEL JURISDICTION IN SWEDEN

Lars Friedner, Bankeryd

I. Introduction

The matter of religious parallel jurisdictions has gained quite low interest in Sweden. So far, no comprehensive studies regarding this question have been carried out. For this contribution some basic research has, thus, been needed. However, it has not been possible to make a complete survey regarding all religious communities in the country. Instead, this contribution will aim at just a few case studies.

The focus will be on the Church of Sweden, which was the country's State Church¹ until the year 2000 but still counts a majority of the population as members.² In addition, the case of the Uniting Church (*Equmeniakyrkan*) will be described. It is a newly established merger of the former Methodist Church, the Mission Covenant Church and the Baptist Church.³ The Uniting Church has a good 100,000 members and is, thus, together with the Roman-Catholic Church, the Pentecostal movement, the Muslim communities and the Orthodox and Oriental Churches, one of the biggest religious communities in Sweden,⁴ beside the Church of Sweden.

¹ See the preparatory works: *Proposition* 1995/96:80, *Betänkande* 1995/96:KU12, *Riksdagskrivelse* 1995/96:84.

² <<http://www.svenskakyrkan.se>> (30 June 2015).

³ <<http://www.equmeniakyrkan.se>> (30 June 2015).

⁴ <<http://www.sst.a.se>> (30 June 2015).

II. The Resolution of Disputes: The Practices and Norms of Religious Communities

The Church of Sweden has, as the inheritor of the State Church system, a comprehensive system for resolving disputes. The first level of instances is the chapter, one in each diocese, according to section 6(8) of the Church's Ordinance⁵. At the second level is the Appeal Committee, pursuant to section 10(10) of the ordinance.

Section 9(1, 10) of the ordinance stipulate that the chapters consist of the diocesan bishop as chair person, the cathedral dean as co-chair, a priest or deacon, elected by the priests and deacons of the diocese, a judge, who is – or has been – a judge of a State court, appointed by the Government, and three lay persons.⁶ The judge and the lay persons are elected by the general assembly of the diocese according to section 9(19) of the ordinance. The diocesan bishops are appointed after being elected by the priests and deacons of the diocese, together with representatives of the laity, as anchored in section 8(7, 13) of the ordinance.⁷ Its section 34(12) requires the Cathedral deans to be appointed by special committees with representatives from the council of the cathedral parish and the diocesan board.

The Appeal Committee has a judge of the same qualifications as in the chapters as chair person. The other members are a priest with a doctor's degree in theology, another priest who has knowledge in and experience of ecclesiastical law, another lawyer, and a lay person, pursuant to section 16(2) of the ordinance. The judge is normally a person of high qualifications; for some time it has now been the retired vice president of the ECtHR. Section 16(3) requires the committee to be elected by the General Synod.

The diocesan bishops and the cathedral deans are members of their chapters as part of their job description. As long as they remain in these positions, they are also members of the chapter. The other members of the chapters, as well as the whole Appeal committee, are elected for a four-year period, according to sections 9(13, 19), 16(3) and 38(6) of the ordinance. There are some restricted possibilities to remove an elected person before the office period expires. One example, provided by section 33(11) of the ordinance, is if the person has committed a severe crime.

⁵ *Kyrkoordningen*, Svenska kyrkans bestämmelser 1999:1, <<http://www.svenskakyrkan.se/kyrkoordningen>> (30 June 2015).

⁶ Some special provisions apply to the diocese of Uppsala for being the seat of the Church's archbishop and to the Visby diocese for being responsible for the Church of Sweden congregations abroad.

⁷ Some special provisions apply to the election of the archbishop and of diocesan bishop in Visby.

There is no formal system of mediation, although the diocesan bishop or the rural dean supposedly often try to mediate in disputes that appear. A question that has been raised in the matter is if the bishop, having tried to mediate in a dispute but has failed, can then continue the handling of the matter by chairing the chapter. Another question that has been discussed in the case of misconduct of a priest is whether there should be any attempts to mediate between the priest and the victim. Regarding sexual offences, it has been stated though, that the case should be handled by the chapter, without any attempts at mediation, as an action to mediate could be regarded as an attempt to conceal the misconduct. The guidelines on this matter are common for all Christian Churches, adopted by the Sweden's Christian Council.⁸

The chapters and the Appeal Committee handle a great variety of cases; a large proportion of which are disciplinary measures against the clergy. But any member of a congregation within the Church may dispute a decision by the congregation, parish, or the diocese, arguing that it has not been made formally correct, according to section 57(8–10) of the ordinance. However, since only formal mistakes are handled, claims regarding the actual content of a decision will be dismissed. A special category of cases in the chapters and the Appeal Committee is about the right to see public documents as stipulated in section 11 of Church of Sweden Act⁹ and section 53(12) of the Church's ordinance.

The procedures in the chapters and in the Appeal committee follow normal court standards, as stipulated in sections 57(12, 13, 15, and 17) and 58(10, 11, 13, and 15) of the ordinance: the claimant has the right to see and read what has been brought into the case by anybody else, there are possibilities for oral hearings, there are provisions on disqualification for members of the deciding body who have a personal interest in the case, and the decisions have to be justified. As mentioned, it is possible to appeal against a decision of a chapter according to sections 31(18), 32(18), 53(12) and 57(19) of the ordinance.

The Uniting Church has a common committee for disciplinary matters regarding the clergy, called *Ansvarsnämnd*. According to section 16 of the Church's statutes¹⁰, the committee consists of five members; of which one represents the pastors and one the deacons. The committee is elected by the Church's synod for a four-year period.

⁸ Sveriges Kristna Råd, *Ekumeniska riktlinjer vid sexuella övergrepp i kyrkliga miljöer*. Sveriges Kristna (Råds skriftserie 5), (Sundbyberg 2003).

⁹ *Lag om Svenska kyrkan*, Svensk författningssamling 1998:1591 as amended.

¹⁰ *Stadgar för Equmeniakyrkan* of 2011 as amended, <<http://equmeniakyrkan.se/wp-content/uploads/2012/10/Equmeniakyrkans-stadgar.pdf>> (30 June 2015).

The Church's board decides who shall chair the committee. There are no provisions for removing a member of the disciplinary committee during the elected term.

An appeal against a decision by the disciplinary committee may be made to the pastor, who holds the position of Church leader. Section 16(5) of the statute requires the board to appoint two non-board members to handle the appeal cases together with the Church's leader. There is no specific term of duty for these two persons, but the leader is elected for a four-year period and may be re-elected twice by the synod, according to sections 12 and 13 of the statute.

The described system is – as mentioned – only for disciplinary matters regarding the clergy. Other disputes are handled informally by the Church's leader or the regional leaders. There is no formal system for mediation within the Church, although the Uniting Church follows the same principles as the Church of Sweden (and all other Christian communities in Sweden) regarding cases of sexual abuse as laid down in section 10 of the Disciplinary committee rules.

III. Religious Disputes: The Approach of the State

As already mentioned, Sweden had a State Church system until the year 2000. At that time the State Church had no autonomy and to a large extent, was legally considered part of the State.¹¹ Historically, other religious communities in Sweden emerged in opposition to the State's influence over the State Church.¹² It has thus been without discussion that the State respected the autonomy of the other religious communities. That said, the State has still not been ready to accept that religious communities have their own autonomous jurisdiction regarding employment or marriage. There have, on the other hand, not been any known law-suits on these subjects. The Church of Sweden has quite recently gained autonomy from the State, a situation where this autonomy – by request of the Church – was established by a special act of Parliament, the Church of Sweden Act. Within the framework of this act, the Church is autonomous. Although there has not been any public debate on the matter, the status of the Church of Sweden today is – with the mentioned limitations – the same as other religious communities already had during the State Church period.

¹¹ G. Göransson, *Svensk kyrkorätt – en översikt* (Stockholm 1993) p. 63 f.

¹² *Ibid.*, p. 39.

Against this background, the State recognises the different dispute solving systems within religious communities, as well as similar systems in other parts of society. One important example is dispute solving within sports associations. Concerning the Church of Sweden, a dispute solving system within the Church was part of the dissolving of the State Church system. An appeal committee in the Church with special legal competence among its members is based on section 13 of Church of Sweden Act. One of the reasons for the provision of strong legal competence in the appeal committee probably originates with the ECHR.

The State does not actively intervene in religious disputes. However, the courts are open to anyone and it is thus possible for a member of a religious community to bring a case to court, even if it has religious implications, as long as the dispute is within the normal competence of the court. An example of such a dispute occurred when a group of members within the Church of Sweden decided to organise a new synod. Their view was that they were acting within the Church, but when they consecrated bishops of their own, beside the normal order of the Church, the Church decided to take action against the group.

One of the consecrated bishops was a priest of the Church of Sweden. He was employed in a parish. As a consequence of the bishop's consecration, the chapter of his diocese decided that he could no longer be a priest in the Church. As a result of this decision, his parish dismissed him as he had no right to work as a priest. He went to the district court and got his job back by interlocutory decree. The parish then appealed to the national Labour Court, which concluded that the priest – by accepting to become a bishop in the synod – had been unfair to his employer. The decision of the district court was altered and the priest did not get his job back. The case never came to a final conclusion, as the priest – having received the interlocutory decision of the Labour Court – withdraw his claims.

Another case concerns a dispute between a parish in the Church of Sweden and its diocese in the matter of ownership of real estate. The final decision was made by the Supreme Court.¹³

The legal position of idealistic associations in Sweden is not decided through acts of Parliament but as case-law. This is also true for religious communities in general.¹⁴ The matter of membership in a congregation, which was not part of the Church of

¹³ Högsta domstolen, 30 November 2010, Nytt Juridisk Arkiv 2010 p. 583.

¹⁴ See *supra*, n. 9. There is also a Religious Communities Act (*Lag om trossamfund*), Svensk författningssamling 1998:1593 as amended. To the extent that the position of the religious communities are not decided by these acts, they probably follow the case-law for other associations with idealistic purposes.

Sweden, was already handled by the Supreme Court in 1906. The case was about a person excluded from the congregation who claimed that the courts should give him his membership back. The Supreme Court concluded that it was up to the congregation (and not for the courts) to decide whether a person should be accepted as a member or not. Since the claimant had not argued that the congregation had not followed its statutes, the Supreme Court dismissed the claim.¹⁵ Later, the Supreme Court confirmed the State's view, that internal questions of idealistic associations are not normally scrutinised by the courts. There are, however, two exemptions where claims may be made to the courts;¹⁶ in cases where the association has not adhered to its own formal rules, and in cases where the association has an economic aim.

Rumour has it, that some religious communities – mainly those which consist of newly immigrated members – practice their own jurisdiction in family matters, i.e. marriage, divorce, inheritance. Such decisions are, as mentioned, not recognised by the State.

IV. Religious Perspectives on State Approaches to Religious Disputes

The Church of Sweden has so far not had any opinions on the State's approaches to religious disputes. It does not object the State's point of view not to accept ecclesiastical jurisdiction in matters of family and labour law for example. Nor does this seem to have raised any problems for the other Christian Churches. As mentioned though, some minor religious communities may claim a jurisdiction of their own regarding such matters. So far, none of these – undocumented but probable – parallel jurisdictions have come to light for the public authorities. Thus, there have been no conflicts between them and the State's claim for supremacy.

There has been no public debate, either in the media or elsewhere, regarding the matter of parallel jurisdiction. As mentioned, it is a matter of course in Swedish society that different organisations have their own jurisdiction to some extent. No-one, thus, opposes the right of religious communities to have theirs while legislation in family and labour matters is in the hand of the State and religious communities are also subject to its jurisdiction in these areas.

¹⁵ Högsta domstolen, 14 June 1906, Nytt Juridisk Arkiv 1906, p. 317.

¹⁶ C. Hemström, *Organisationernas rättsliga ställning – om ekonomiska och ideella föreningar*, 8th ed. (Stockholm 2011), p. 130.

A RELIGIOUS COURT AS A COURT OF A MEMBER STATE UNDER ARTICLE 267 OF TFEU

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I. Introduction

This paper¹ deals with the so far hypothetical question of whether a religious court could submit a request for a preliminary ruling to the CJEU. The purpose of this request is to make sure that the courts across the EU apply and interpret the EU law uniformly: by asking a question to which a court of a Member State is seeking an answer from the CJEU on how to understand a provision of the EU law. The procedure is anchored in Article 267 of TFEU, which reads:²

“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before *any court or tribunal of a Member State*, that court or tribunal may request the Court to give a ruling thereon if it considers that a decision on the question is necessary in order to enable it to give judgment,

Where any such question is raised in a case pending before *a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law*, that court or tribunal shall bring the matter before the Court [...].”

Why would a religious court need to address the CJEU with a question concerning EU law? One has to bear in mind that EU law replaces the national law of the Member States in certain areas, and internal religious law frequently obliges a given community to apply the rules of the national law.³ The issues of interest for both Church and State, known as *res mixtae*, have been topics of Consortium meetings for years.

¹ This paper is based on M. Rynkowski, ‘Could the ecclesiastical courts submit the demand for “preliminary ruling” to the European Court of Justice?’ (2009) 4 *Derecho y Religion*, pp. 59–70. More on this topic in M. Rynkowski, *Sądy wyznaniowe we współczesnym europejskim porządku prawnym*, Wrocław 2013.

² Ex-Article 234 of TEC; accentuation by the author.

³ Such as e.g. labour law, see can. 1286 of CIC.

In brief, certain internal provisions of religious communities require them to apply the EU law indirectly, but effectively. This leads to the main question of this paper whether a religious court can ask the CJEU for an interpretation of EU law. In other words, can a religious court be considered ‘a court of a Member State’ according to Article 267 of TFEU? This paper is divided into three sections:

- The first section gives examples of ‘atypical’ bodies which were recognised by the CJEU as courts but not considered courts by their ‘own’ Member States.
- The second section lists and analyses criteria established by the CJEU as a basis for recognising of what is and what is not a court according to Article 267 TFEU.
- The third section contains conclusions regarding courts of various religious communities in various European countries in the light of Article 267 of TFEU. In short, courts of the same religious community have different standing in various States, but also within one State courts of various denominations may enjoy various rights.

II. ‘Atypical’ bodies recognised by the CJEU as a court

The procedure of a ‘preliminary ruling’ is statistically the most common procedure before the CJEU and constitutes half of all the cases handled.⁴ Over the decades, among the hundreds of requests from ‘regular’ courts, the CJEU received questions from a number of bodies which were not recognised as courts by their own States. By accepting to hear the case and give judgement, the CJEU recognised these bodies as courts according to Article 267 of TFEU, thus creating a number of exceptions.

It started in 1966⁵ when the CJEU recognised the Arbitration Court of the Miners’ Pension Fund as a court of a Member State. From a long list of exceptions,⁶ some will be quoted here, among which the last two seem particularly relevant:

⁴ According to the Annual Report 2013 of the CJEU, requests for preliminary rulings constituted 450 out of 699 new cases brought in 2013.

⁵ ECJ, 30 June 1966, 61/65 (*G. Vaassen-Göbbels v. Management of the Beambtenfonds voor het Mijnbedrijf*), ECR 261.

⁶ Based on B. W. Wegener in C. Calliess and M. Ruffert (eds.), *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (München 2011), Article 267 AEUV, paras. 18–20; see also C. Naomé, *Le renvoi préjudicial en droit européen. Guide pratique* (Bruxelles 2010), p. 95.

- a State court which acts as appeal from an arbitration court upon which judges base what is ‘fair and reasonable’,⁷
- courts of the French overseas departments,⁸
- courts on the Channel Islands⁹ and the Isle of Man¹⁰, none of them being part of the British judicial system,
- acting as the last instance described in a collective bargaining, the composition of which is not determined by the parties,¹¹
- court of a professional organisation; the decision of which has no judicial remedy,¹²
- institutions supervising procurement procedures,¹³
- the Italian *Consiglio di Stato*¹⁴ and the Dutch *Raad van State*¹⁵, acting as advisory bodies,
- Benelux Court of Justice, which is a court jointly established by Belgium, the Netherlands and Luxembourg,¹⁶
- a Board of Complaints; a body which hears appeals from the European schools,¹⁷ established by a treaty signed between the Member States and

⁷ CJEU, 27 April 1994, C-393/92 (*Gemeente Almelo and others v. Energiebedrijf Issehmij*), ECR I-1477, paras. 1, 23 f.

⁸ ECJ, 12 December 1990, C-100/89 and C-101/89 (*Peter Kaefer and Andréa Procacci v. French State*), ECR I-4647; ECJ 12 February 1992, C-260/90 (*Bernard Leplat v. Territory of French Polynesia*), ECR I-643.

⁹ CJEU, 16 July 1998, C-171/96, (*Rui Alberto Pereira Roque v. His Excellency the Lieutenant Governor of Jersey*), ECR I-4607, accepting a question from Bailiwick of Jersey without checking at all if he was authorised to submit such an application.

¹⁰ ECJ, 3 July 1991, C-355/89 (*Department of Health and Social Security v. Christopher Stewart Barr and Montrose Holdings Ltd.*), ECR I-3479, paras. 8–10.

¹¹ ECJ, 17 October 1989, 109/88 (*Handels- og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening, acting on behalf of Danfoss*), ECR 1989, 3199, paras. 7–9.

¹² ECJ, 6 October 1981, 246/80 (*C. Broekmeulen v. Huisarts Registratie Commissie*), ECR 2311, paras. 8, 16 f.; CJEU, 22 December 2010, C-118/09 (*Robert Koller*), ECR I-13627, concerning the Superior Appeal Body of Austrian Advocates.

¹³ CJEU, 17 September 1997, C-54/96 (*Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*), ECR I-4961; CJEU, 13 December 2012, C-465/11 (*Forposta SA and ABC Direct Contact sp. z o.o. v. Poczta Polska SA*).

¹⁴ CJEU, 16 October 1997, joined cases C-69/96 to C-79/96 (*Maria Antonella Garofalo, Giovanni Pagano, Rosa Bruna Vitale, Francesca Nuccio, Giacomo Cangialosi, Giacoma D’Amico, Giulia Lombardo, Emanuela Giovenco, Caterina Lo Gaglio, Daniela Guerrera and Cesare Di Marco v. Ministero della Sanità and Unità sanitaria locale (USL) n° 58 di Palermo*), ECR I-5603, para. 17.

¹⁵ ECJ, 27 November 1973, 36/73 (*NV Nederlandse Spoorwegen v. Minister van Verkeer en Waterstaat*), ECR 1299.

¹⁶ CJEU, 12 February 2004, C-265/00 (*Campina Melkunie BV v. Benelux-Merkenbureau*), ECR I-1699.

¹⁷ CJEU, 14 June 2011, C-196/09, (*Paul Miles and Others v. Écoles européennes*), ECR I-05105.

the EU itself. Although very closely linked to the EU institutions and law, it is not part of EU law, but a separate international convention. It has a registry office in Brussels, but it is not a court of a Member State.

At the same time, the CJEU refused to accept requests for a preliminary ruling from a number of institutions, which are recognised courts in the Member States, whenever they acted in their administrative and not judicial capacity.¹⁸ This also refers to courts dealing with real estate deeds.

The conclusion from this section is that for purposes of the preliminary ruling procedure, the CJEU has developed an autonomous notion of a court, by accepting questions from bodies not recognised as courts in the Member States, and by refusing questions from recognised State courts. This is an important finding, which allows us to go on to examine the status of religious courts.

III. Criteria of a ‘Court’ created by the CJEU

As shown above, the notion of a ‘court’ is neither defined in the TFEU, nor in other acts of EU law. The CJEU defined it over the decades in various judgements, by creating respective criteria.

In the *Dorsch* case¹⁹ the CJEU listed a couple of criteria which should be taken into consideration while deciding whether a body is or is not a court:

- (1) whether the body is established by law,
- (2) whether it is permanent,
- (3) whether its jurisdiction is compulsory,
- (4) whether its procedure is *inter partes*,
- (5) whether it applies rules of law,
- (6) whether it is independent.

In later judgements, the CJEU referred to the *Dorsch* case, other judgements and commentators, based on previous judgements, added to this list:

- (7) the composition of the body must be determined by an exercise of or entail a significant degree of involvement on the part of the public authority²⁰
- (8) the procedure must be similar to that of ordinary courts,

¹⁸ CJEU, 19 October 1995, C-111/94 (*Job Centre Coop. ARL.*), ECR I-3361; CJEU, 27 April 2006, C-96/04 (*Standesamt Stadt Niebüll*), ECR I-3561; CJEU, 12 January 2010, C-497/08 (*Amiraike Berlin GmbH*), ECR I-101.

¹⁹ See *supra*, n. 13, para. 23.

²⁰ Cf. the *Broekmeulen* case, *supra*, n. 12.

(9) the decision must bind the parties and therefore be enforceable,

(10) the court issues a judgement.²¹

I suggest adding as non-obligatory, yet essential and corresponding with the wording of Article 267 of TFEU:

(11) there is no judicial remedy from the judgement, hence it is final.

To qualify as a court, a body must simultaneously fulfil nine criteria; the criterion of proceeding *inter partes* is optional and the eleventh criterion underlines the particular feature of religious courts in some Member States, but does not constitute a *conditio sine qua non*. There is no consensus whether a religious court fulfils all the criteria. One extreme example are the courts of the Church of England which are royal courts, another are *Shariah* councils in France: courts we hardly know anything about and which function in a State which legally speaking ignores their existence.

This paper analyses whether the Catholic courts, courts of the Protestant Church in Germany (*Evangelische Kirche in Deutschland*) and courts of the Church of England fulfil these criteria, one by one. Some remarks refer to Orthodox, Jewish and Muslim courts. Sometimes the answer is quite obvious, sometimes it requires a deeper analysis. A kind of general summary is proposed at the end of this paper.

1. Criterion 1 – Established by Law

In many countries, the State acknowledges the existence of religious courts, either directly in the constitution²² or in concordats and other agreements with religious communities²³; the majority of them also explicitly mention Canon law as a separate system of law. In countries where a State Church or established Church exists, the situation is even more obvious. The courts of the Church of England are established on the basis of the Ecclesiastical Jurisdiction Measure 1963,²⁴ which itself is based on the Church of England Assembly (Powers) Act 1919²⁵. Measures of the Church of England hold the same legal force as acts of Parliament and must also be approved by the House of Commons and the House of Lords, signed by the Queen, and pub-

²¹ N. Solar, *Vorlagepflichtverletzung mitgliedstaatlicher Gerichte und ihre Sanierung* (Wien, Graz 2004), p. 31.

²² E.g. Article 111 of the Cypriot Constitution (*Σύνταγμα της Κυπριακής Δημοκρατίας 1960*) as amended.

²³ E.g. in Austria, Belgium, Croatia, Germany, Italy, Lithuania, Poland, Portugal, Spain, see R. Puza and N. Doe (eds.), *Religion and law in dialogue. Covenantal and Non-Covenantal Cooperation between State and Religion in Europe* (Leuven 2006) and various national reports in this volume.

²⁴ Ecclesiastical Jurisdiction Measure 1963 no. 1 as amended.

²⁵ Church of England Assembly (Powers) Act 1919 Chapter 76 (Regnal 9 and 10 George V) as amended.

lished by Her Majesty's Stationery Office together with the acts of Parliament. The State also approves the law of established Churches in Finland²⁶ and Denmark²⁷.

The fact that Catholic Canon law should be regarded as a law, was also stressed recently. In 2008, the Maltese Court of Appeal confirmed that where there is a gap in Maltese civil law, Canon law should apply.²⁸ Also in 2008, the German Federal Labour Court based a judgement on Protestant ecclesiastical law, thus recognising it as law.²⁹ While seeking confirmation for the CJEU that religious law is a law, Member States could certainly submit many precedents.

In conclusion, constitutions and laws of Member States, ratified international agreements and jurisprudence of State courts confirm that internal religious law, which establishes religious courts, should be regarded as law in the legal systems of Member States except for Ireland, Slovenia, and France without Alsace-Moselle.

2. Criterion 2 – Permanent Character

This criterion can be understood twofold: both as regards the institution itself and its judges. Institutionally, religious courts are not *ad hoc*-courts: the overwhelming majority of religious courts were created well before the ECJ was established in 1952. The Jewish *Sanhedrin* is already mentioned in the Bible. The Christian ecclesiastical courts existed in the 4th century, at the time of Emperor Constantine. It was William the Conqueror who clearly separated State courts from ecclesiastical ones.³⁰ The Holy Roman Rota has functioned since the time of Pope Innocent IV, with the first written rules of procedures dated 1331. Only the German *Beth Din* (2004) and English Muslim Arbitration Tribunal (2007) are quite new. However, they were preceded by various bodies fulfilling the same function. Since its establishment, the Muslim Arbitration Tribunal has been permanent body. Not only historically are religious courts permanent. According to can. 1468 of CIC, if possible, every tribunal is to be in an established location open during stated hours. The *Beth Din* in London, created in 1656, meets a few times a week; on the contrary, the German *Beth Din* meets only three times a year, for 3 or 4 days each time. The website of the Court and

²⁶ Article 76 of the Constitution (*Suomen perustuslaki*), 731/1999 as amended.

²⁷ Article 66 of the Constitution (*Danmarks Riges Grundlov*), Lov no. 169 of 1953.

²⁸ Qorti ta' l-Appell, 29 April 2008, 1791/2000/1, *Vincent E. Ciliberti v. Marianna & Lorenza Spiteri*.

²⁹ Bundesarbeitsgericht, 11 November 2008, 1 AZR 646/07, (2009) 26 *Neue Zeitschrift für Arbeitsrecht*, p. 512.

³⁰ *Halsbury's Laws of England*, vol. 14 (London 1975), p. 694.

Tribunal of the Protestant Church in Germany regularly lists the dates of upcoming hearings. Also in the sense of staff employed, the religious courts are permanent.³¹

3. Criterion 3 – Compulsory Jurisdiction

In the above mentioned *Dorsch* case, the European Commission noted

“that the Federal Supervisory Board does not have compulsory jurisdiction, a condition which, in its view, may mean two things: either it is required for the parties to apply to the relevant review body for settlement of their dispute or that determinations of that body are to be binding. The Commission, adopting the second interpretation, concludes that German legislation does not provide for the determinations made by the Federal Supervisory Board to be enforceable.”

In this section, the second meaning will be considered: the first would drastically limit the number of courts to be considered – to the courts of the Church of England and the courts of four Christian denominations in Cyprus; the situation in Germany is subject to the extensive and not fully coherent jurisprudence of State courts. The notion of ‘obligatory jurisdiction’ is slightly complicated: e.g. Catholics who want to enter into a second Catholic marriage must seek a religious annulment from a Catholic court; those who just want to get divorced or to remarry according to civil law, may ignore the religious court; hence the notion of ‘obligatory’ has more dimensions.

Following these preliminary remarks, this criterion could be reformulated thus: should the ecclesiastical courts be regarded as compulsory courts or as voluntary arbitration courts? For example, can. 1401 of CIC underlines, that by proper and exclusive right the Church adjudicates cases which regard spiritual matters or those connected to spiritual matters and the violation of ecclesiastical laws and all those matters in which there is a question of sin, in what pertains to the determination of culpability and the imposition of ecclesiastical penalties. Moreover, there exists in the Catholic Church the possibility of arbitration, as provided by cann. 1713–1716 of CIC, which again proves *a contrario* that the jurisdiction in cann. 1401 ff. of CIC is obligatory.

Within the Protestant Church in Germany, a regulation³² clearly states which ecclesiastical court is competent to judge and when the case should be submitted to a State court. In order to underline the compulsory character of the ecclesiastical courts, the Church’s statute of 2003 replaced the words settlement body (*Schlichtungstelle*) with ecclesiastical court (*Kirchengericht*).

German State courts occasionally rejected cases, arguing that they fall within the constitutionally guaranteed autonomous competence of the ecclesiastical authorities.

³¹ See *infra*, ch. 6

³² *Rechtswegverordnung*, Amtsblatt der Evangelischen Kirche in Deutschland 1985, pp. 401 ff.

This happened to a retired Catholic priest, who had married a woman and been deprived of his pension³³ as well as to a Protestant pastor who wanted to solve a question of his service apartment.³⁴ Only at the beginning of the 21st century the State courts seemed willing to adapt their case law. In particular, the Federal Supreme Court³⁵ seemed to have set a new trend herein in 2003, holding that the religious societies' autonomy does not imply that their jurisprudence cannot be controlled, because all bodies corporate have to respect State law.

Again, England is exceptional in its distinct separation. There are royal courts of the Church of England, while courts of all others Churches are private arbitration courts.³⁶ Articles 6–12 of the Ecclesiastical Jurisdiction Measure list the competencies of the courts of the Church of England. However, a State court may occasionally issue a *mandamus*, by which it denies its own competence to a judge and obliges an ecclesiastical court to issue a judgement. It is clear proof that the State recognises the obligatory competence of these courts. The respective case law dates back to the 16th century and is broadly commented on in English legal literature.³⁷

Cyprus also offers clarity: Article 111 of its constitution recognises the competencies of Orthodox, Armenian, Maronite, and Roman Catholic ecclesiastical courts in family matters.³⁸

In Ireland, the Court of the General Synod of the Church of Ireland, which is composed of three bishops and four lay judges, has the competence to judge whether the issue should be decided by the State or ecclesiastical court: four law judges of this court make a respective decision.³⁹

Interestingly, Jewish law prohibits pious Jews from having their case decided by a secular court, hence submitting a case to a *Beth Din* seems obligatory. However, a State court in Amsterdam declared a clause in an agreement between two Orthodox Jews in the Netherlands, which excluded recourse to a State court, null and void.⁴⁰

³³ Oberverwaltungsgericht Koblenz, 29 April 1985, 2 E 3/85, see G. Winands, 'Kirchliche Sanktion eines Zölibatsverstoßes und staatliche Gerichtsbarkeit', (1986) 39 *Die öffentliche Verwaltung*, pp. 98–101.

³⁴ Verwaltungsgericht Düsseldorf, 13 February 1998, 1 K 10671/95, (1998) 36 *Entscheidungen in Kirchensachen*, pp. 68–73.

³⁵ Bundesgerichtshof, 28 March 2003, V ZR 261/02, para. II.1a.

³⁶ Arbitration Act of 1996 chapter 23.

³⁷ See *The Digest. Annotated British, Commonwealth and European cases*, vol. 19/2 (London 1997); as well other volumes of the Halsbury's collection, relating to ecclesiastical law.

³⁸ A. Emilianides, 'State and Church in Cyprus', in G. Robbers (ed.), *State and Church in the European Union*, Baden-Baden 2005.

³⁹ See S. Farrell, 'Religious Jurisdictions in the Republic of Ireland', in *this book*, pp. 117–120.

⁴⁰ Rechtbank Amsterdam, 16 March 1994, H 92.0064, *Nederlandse Jurisprudentie* 1995, 701.

4. Criterion 4 – Inter Partes Proceedings

Ecclesiastical proceedings are usually *inter partes*. In Catholic cases concerning nullity of marriage the the defendor or of the marital bond, who acts in order to save the marriage, partakes in the proceedings. Property related cases, typical for the Church of England, are further examples of proceedings *inter partes*. A Jewish *Beth Din* handles a wide range of cases, all of them being *inter partes*. However, the criterion of *inter partes* is the only criterion which can actually be skipped as long as a court is independent,⁴¹ as confirmed by the CJEU.⁴²

5. Criterion 5 – Rules of Law Applied

This question has partially been answered under section A, which proves that religious courts are established on the basis of religious law. In most of the countries, State legislation recognises the legal character of internal ecclesiastical regulations: as mentioned above, the concordats refer to Canon law, while State courts mention internal religious law in their judgements, etc. Even the ECtHR did so, quoting for example the Basic Regulations of the Catholic Church for ecclesiastical service in the context of ecclesiastical employment relationships⁴³.⁴⁴ Italy, Ireland, Lithuania, Poland, or Spain attribute civil effects to marriages concluded according to religious (in particular to Canon) law.⁴⁵ Austria, Hungary, Italy, Poland, or Spain recognised the legal status of bodies acquired according to Canon law.⁴⁶ The Faculty Jurisdiction Rules 2000 of the Church of England which are statutory instruments approved by

⁴¹ For this, see criterion 6, *infra*.

⁴² ECJ, 14 December 1971, 43/81 (*Politi s.a.s. v. Ministry for Finance of the Italian Republic*), ECR 1039; ECJ, 21 February 1974, 162/73 (*Birra Dreher SpA v. Amministrazione delle Finanze dello Stato*), ECR 201; CJEU, 21 March 2000, joined cases C-110/98 to C-147/98 (*Gabalfrisa SL and Others v. Agencia Estatal de Administración Tributaria [AEAT]*), ECR I-1577; CJEU, 30 March 1993, C-24/92 (*Pierre Corbiau v. Administration des contributions*), ECR I-1277.

⁴³ ‘Grundordnung der Katholischen Kirche für den kirchlichen Dienst im Rahmen kirchlicher Arbeitsverhältnisse’, adopted by the German Episcopal Conference on 22 September 1993 as amended <http://www.dbk.de/fileadmin/redaktion/diverse_downloads/VDD/Grundordnung_GO-30-04-2015_final.pdf> (30 June 2015).

⁴⁴ ECtHR, 23 September 2010, 1620/03 (*Schüth v. Germany*).

⁴⁵ See G. Robbers (ed.), *State and Church in the European Union*, 2nd ed. (Baden-Baden 2005) and some national reports in this volume.

⁴⁶ Cf. M. Rynkowski, ‘Remarks on Art. I-52 of the Constitutional Treaty – New Aspects of the European Ecclesiastical Law?’ in P. Dann and M. Rynkowski (eds.), *The Unity of the European Constitution* (Heidelberg 2006), pp. 343–352.

the Parliament in Westminster and by the Queen.⁴⁷ Section 146 of the German Federal Act on Civil Servants⁴⁸ authorises religious communities as bodies corporate of public law, to create their own rules for the resolution of disputes.

As a consequence of various migrations and inter-religious marriages, State courts apply religious law or at least take it into consideration, as indicated by the rules of international private law. In family cases of Israeli citizens living in the EU, State courts must apply religious rules, because Israel does not have uniform family laws.⁴⁹ However, the courts of European States often object to applying religious law if it violates the basic principles of the rule of law and of democratic society, e.g. conducting proceedings in front of a rabbinical court, where a man divorces his wife by handing her a divorce letter,⁵⁰ or in the case of the dissolution of Muslim marriages.⁵¹ Also the gift of a Muslim husband to his wife after the wedding, was subject of various judgements of State courts, which did not take unanimous positions.

6. Criterion 6 – Independence

This criterion came up only in the case of *Pretore di Salò*,⁵² twenty years after *Vaassen-Göbbels*⁵³. It is generally recognised that independence is determined by the level of education of the judge in question, whom they are appointed by how they may be deprived of their function, and also the principle of *iudex inhabilis*. All religious communities require from their judges solid professional backgrounds and respective experience. According to Article 2 of the Ecclesiastical Jurisdiction Measure the chancellor of the Church of England must be 30 years old and have been a barrister or judge for at least 7 years. The Catholic judge should be a doctor or at least hold a licentiate in Canon law (can. 1421 of CIC) and can be removed from office only according to can. 1420 of CIC. Presidents of courts and chambers of the Protestant Church in Germany must be eligible to sit as judges in German secular courts. In Muslim Arbitration Tribunals, the jury consists of at least two members, one of whom must be a solicitor or barrister in England or in Wales.

⁴⁷ Faculty Jurisdiction Rules 2000 no. 2047.

⁴⁸ *Bundesbeamten-gesetz*, Bundesgesetzblatt I 2009, 160 as amended.

⁴⁹ M. Kałczewiak, 'Izraelskie prawo małżeńskie. Wybrane zagadnienia', (2012) 4 *Przegląd Prawa Wyznaniowego*, pp. 87–110.

⁵⁰ E. Jayme, *Religiöses Recht vor staatlichen Gerichten*, Heidelberg 1999, p. 8.

⁵¹ Oberlandesgericht Köln, 9 May 1996, 21 WF 151/95, (1996) 34 *Entscheidungen in Kirchensachen*, p. 172.

⁵² ECJ, 11 June 1987, 14/86 (*Pretore di Salò v. Persons unknown*), ECR 2545.

⁵³ See *supra*, n. 5.

Catholic and Anglican judges are appointed by bishops, German Protestant judges by the council of their Church. Also secular judges are appointed by an executive power in a number of cases. Wolfgang Peukert argues that such judges can still be considered independent, as long as they act independently.⁵⁴ As regards the duration of judges' terms, there are a number of variations: in most cases it is five years (Catholic), four years for the Church of Sweden or six years for the Protestant Church in Germany; a re-appointment is possible, judges have to retire at the age of 70. There is no determined duration for the Anglican Church. It is worth recalling that judges of the supreme national courts, as well as judges of international courts are also appointed for an certain time period. In the case of the CJEU, re-appointment is also possible (Article 253 of TFEU), which is basically perceived as a limitation of independence, because the judge may try to please the appointing authority.

For a given case, the independence of a judge is guaranteed by the notion of *iudex inhabilis*, which is precisely defined in cann. 1447–1451 of CIC. For the Church of England, if a chancellor believes that he should not judge a certain case, he appoints a judge *ad hoc* with the permission of his bishop.

The question of independence of religious courts and their judges was raised in a number of trials, even reaching as far as the ECtHR. Rev. Tyler⁵⁵ from the Church of England claimed that the consistory court was not independent from a bishop, and that it did not make sense to file an appeal to a provincial court, which is appointed in the same way by the Archbishop. The ECommHR, however, stated in the decision that the courts of the Church of England fulfil the criteria required by Article 6 of ECHR. Interestingly, the ECtHR once came to a different conclusion,⁵⁶ stating that a cathedral chapter of the Evangelical-Lutheran Church in Finland, acting as a court of first instance, is not an independent body, since a bishop is *ex officio* its chairman. The same would be true for the Church of Sweden, where a bishop is *ex officio* chair of the cathedral chapter.⁵⁷

On a national level, the question of the independence of Catholic courts was raised by a director of Caritas in Germany, who was dismissed by the bishop of Limburg. The director claimed that a judge appointed by the bishop may not be in-

⁵⁴ W. Peukert in J. Frowein and W. Peukert, *EMRK-Kommentar*, 2nd ed. (Kehl 1996), Artikel 6 EMRK, para. 125, with reference to ECtHR, 28 June 1984, 7819/77 and 7878/77 (*Campbell & Fell v. United Kingdom*), Series A 80; and ECtHR, 22 October 1984, 8790/79 (*Sramek v. Austria*), Series A 84.

⁵⁵ ECommHR, 5 April 1994, 21283/93 (*Thomas TYLER v. United Kingdom*).

⁵⁶ ECtHR, 19 December 1997, 20772/92 (*Helle v. Finland*).

⁵⁷ See L. Friedner, 'Religious Parallel Jurisdiction in Sweden', in *this book*, pp. 240–242.

dependent in such a trial, but the Hessian Administrative Court did not share his view.⁵⁸ The CJEU may wish to draw inspiration from these judgements.

The conclusion of this analysis is that religious courts are independent, except for the Cathedral chapters of the Evangelical-Lutheran Church of Finland and chapters in the Church of Sweden as bishops preside *ex officio*. Finally, that would be the case if the Archbishop of Canterbury would like to sit as a judge himself⁵⁹ or where the Pope would act as a judge, after appointing himself in this role (can. 1405 of CIC).

7. Criterion 7 – State Involvement in the Composition

The answer is again easy only for the Church of England, where the Queen appoints the Auditor and the Dean of Arches (one person being simultaneously the chairman of two provincial courts: of the Arches Court of Canterbury and of the Chancery Court of York), and the judges of the Court of Ecclesiastical Causes Reserved. The Queen acts on the advice of the Prime Minister.⁶⁰

In contrast, Germany guarantees the religious communities that they shall confer their offices without the participation of the State or the civil community. The Federal Supreme Court described State and Church authorities as equally positioned (“*gleichgeordnet nebeneinander*”).⁶¹ Hence, the State must not appoint any office within the Church – nor *vice versa*.

In other States, the public authorities are not involved in the appointment of any religious functions, except for the right of governments to be informed before a new bishop is appointed by the Pope. However, this detail seems superfluous for the purpose of this paper, except perhaps for the bishops of Metz and Strasbourg, who are still formally appointed by the President of France. Consequently, one could try to claim that the judges of the dioceses in Alsace-Moselle are indirectly appointed by the State, which does not seem to be a very convincing theory.

⁵⁸ Hessischer Verwaltungsgerichtshof, 11 November 1998, 24 DH 2230/98, see (1998) 36 *Entscheidungen in Kirchensachen*, pp. 492–495.

⁵⁹ Authorised in Arches Court [1680] 2 Show 146; 89 ER 849 (*Sheffield v. Canterbury*), *The Digest*, *supra*, n. 37, p. 236.

⁶⁰ D. McClean, ‘State and Church in the United Kingdom’, in Robbers, *supra*, n. 45, pp. 553–575 (p. 564).

⁶¹ Bundesgerichtshof, 1961, III ZR 17/60, *Entscheidungssammlung des Bundesgerichtshof in Zivilsachen* (BGHZ) 34, 372.

For the CJEU, the appointment of judges was decisive in accepting a question from one arbitration court⁶² and in refusing to accept such a question from another,⁶³ where both parties appointed the president of a State Court to act as arbitrator in his personal capacity. The method of appointing judges indeed constitutes an important criterion,⁶⁴ which is fulfilled only by the courts of the Church of England, and to a certain extent, by German religious communities with public law status.

8. Criterion 8 – Similarity of Procedures

Cann. 1400–1752 of CIC carefully and precisely determine the competent forum, the position of witnesses, the question of evidence and documents, the competencies of judges, the proceedings, possible exceptions, etc. Articles 123–130 of the Papal Constitution *Pastor Bonus*⁶⁵ regulate the functioning of the Apostolic Signature and the Roman Rota. Each of these tribunals issued their own rules for proceedings.⁶⁶ The ECtHR pointed out certain procedural irregularities in this case before the Catholic courts, but did not generally question their rules of procedures.⁶⁷

The Protestant Church in Germany adopted an internal statute, whose sections 16–24 regulate the details of proceedings.⁶⁸ In many places it refers to State legislation. For all questions not regulated by the law on the Constitutional Tribunal of the EKD, the provisions of law concerning the Federal Constitutional Tribunal shall be applied. Similarly, it refers to the already mentioned administrative courts of the Protestant Church in Germany. The Swedish report in this volume demonstrates how these rules are respected in the procedures of the Church of Sweden.⁶⁹

Concerning the Church of England, there are a number of Measures which establish various procedures: the Faculty Jurisdiction Measure from 1964, the Clergy Discipline Measure from 2003 and others acts, to mention but a few.

⁶² See the *Broekmeulen* case, *supra*, n. 12.

⁶³ ECJ, 23 March 1982, 102/18 (*Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG.*), ECR 1095.

⁶⁴ J. Steiner, L. Woods and P. Watson, *EU Law* (Oxford 2012), p. 220; M. Broberg, N. Fenger, *Preliminary references to the European Court of Justice* (Oxford 2010), p. 93.

⁶⁵ Acta Apostolicae Sedis 80 (1988), pp. 841–930; cf. P. V. Pinto (ed.), *Commento alla Pastor Bonus e alle norme sussidiarie della Curia Romana* (Roma 2003).

⁶⁶ So e.g. the *Normae Romanae Rotae Tribunalis*, Acta Apostolicae Sedis 86 (1994), pp. 508–540 as amended.

⁶⁷ ECtHR, 20 July 2001, 30882/96 (*Pellegrini v. Italy*), RJD 2001-VIII.

⁶⁸ *Kirchengerichtsgesetz*, Amtsblatt der Evangelischen Kirche in Deutschland, 2003, pp. 409–414.

⁶⁹ Friedner, *supra*, n. 57.

9. Criterion 9 – Binding and Enforceable Nature of the Decision

Decisions of religious courts are generally binding for the parties involved, but for the majority of them there are certain problems relating to enforceability. German State courts refuse to issue clauses ensuring enforceability if a certain issue is an internal ecclesiastical affair judged by a competent ecclesiastical tribunal.⁷⁰ In contrast, the Administrative Court in Hannover obliged a plaintiff in 2008 to pay the fees for a trial before an ecclesiastical court.⁷¹ However, this seems to have been the only case of this kind so far.

In Croatia, Italy, Portugal and Spain, once a State procedure recognises a judgement of the Catholic courts concerning nullity of marriage, it takes effect in civil law. However, this applies only to the Catholic courts and to the nullity of marriage.

Concerning the Church of England, since the proceedings are based on statutory instruments, there is no problem with enforceability.

10. Criterion 10 – Judgement Issued

Cann. 1611 f. of CIC explain the purpose of issuing a judgement and lists all the compulsory elements, which correspond with secular requirements in this area. As stated above, in some States, the Catholic judgements on nullity of marriages are regarded as judgements and undergo a specific State procedure in order to be recognised. For the Protestant Church in Germany and the Church of England, the procedures are very similar to those of State courts, which also have an impact on their judgements. Only the consistorial court of the Danish National Church, which issued an opinion for the Minister of Ecclesiastical Affairs, could not submit a request for a preliminary ruling, as it acted in its advisory capacity.⁷²

⁷⁰ Verwaltungsgericht München, 18 March 1963, 1005/63, (1966/67) 12 *Zeitschrift für evangelisches Kirchenrecht*, pp. 162–167; Oberverwaltungsgericht Münster, 28 March 2002, 5 E 286/01, (2003) 48 *Zeitschrift für evangelisches Kirchenrecht*, pp. 342 f.

⁷¹ Verwaltungsgericht Hannover, 30 May 2008, 2 A 813/07.

⁷² European Commission for Human Rights, 8 March 1976, 7374/76 (*X. v. Denmark*).

11. Criterion 11 – No Judicial Remedy

The case law of some Member States' courts sometimes refused to accept an appeal from a religious court, making the latter's judgement final. The most prominent examples are German courts which on many occasions confirmed such an approach. The ECtHR found both cases inadmissible.⁷³ From the point of view of the CJEU,

“[t]he appeals committee, which operates with the consent of the public authorities, with their cooperation, and which, after an adversarial procedure, delivers decisions which are in fact recognised as final, must, in a matter involving the application of community law, be considered as a court or tribunal of a Member State within the meaning of article 177 of the Treaty.”⁷⁴

On the other hand, this criterion cannot be obligatory, since the CJEU also clearly authorises lower courts to submit questions to the CJEU. Nevertheless, one could accept this criterion, recalling the main purpose of Article 267 of TFEU to ensure that EU law is interpreted and applied in a uniform way.

IV. Conclusions

Analysis of whether a religious court could submit a request for a preliminary ruling has to take into account the CJEU judgement in the *Paul Miles* case.⁷⁵ The applicant was a teacher in a “European School”, whose request concerning the raise of his salary following a change in the exchange rate of Euro and Pound was rejected by the school. He then addressed the schools' Board of Complaints in the second instance. In this judgement, the CJEU insisted on the notion of a ‘court of a Member State’ and on the fact that the question posed to the CJEU must refer to EU law. The notion of a court ‘of a Member State’ is narrower than the notion of a court ‘in a Member State’.

It is clear that certain courts could easily be regarded as courts under Article 267 of TFEU; for example courts of the Church of England, since their existence and functioning is approved by Parliament. Other courts would clearly not qualify; for example, the courts of the Evangelical-Lutheran Church of Finland known as the Cathedral Chapter, which are not independent bodies because the bishop presides *ex officio*. There are also many courts whose status depends on the State in which they are located. Along these lines, it is worth asking whether the highest Catholic

⁷³ ECtHR, 6 December 2011, 38254/04 (*Baudler v. Germany*); ECtHR, 6 December 2011, 39775/04 (*Reuter v. Germany*).

⁷⁴ Cf. the *Broekmeulen* case, *supra*, n. 12, para. 17.

⁷⁵ See *supra*, n. 17.

courts – the courts of the Holy See, located at the Piazza della Cancelleria, in the heart of Rome, but fully independent from Italy – could submit a request for a preliminary ruling. Due to this territorial aspect, one can draw some parallels with cases resulting from questions submitted to the CJEU by non-EU courts in Jersey or French Polynesia. Moreover, there are some (distant) similarities between the Roman Rota and the Benelux-Tribunal, in that both are courts common to more than one member State. As previously mentioned, there were interesting precedents where the CJEU admitted requests for a preliminary ruling from a particular body without verifying its status as a court.⁷⁶ This option may be considered with regard to religious courts.

The main conclusion of this paper is that there is no clear answer whether, *in abstracto*, a religious court could be deemed a court under Article 267 of TFEU. Certain answers seem however possible with regard to specific religious courts:

- Courts of the Church of England comply with all requirements.
- Cathedral chapters of the Evangelical-Lutheran Church of Finland do not comply with criterion 6 (independence), hence would not qualify as a court.
- The status of Catholic courts depends on the country in which they are located. Paradoxically, in Cyprus they would be entitled to submit a request to CJEU. Criterion 7 remains unfulfilled; an attempt could, however, be done in Germany, where the Catholic Church is deemed a public legal body.
- Protestant Courts in Germany are not appointed with the cooperation of State authorities, but since they are public law bodies, believed to be equal with State authorities, the CJEU could wish to ignore this criterion.
- None of the French courts could submit such a request (not even in Alsace-Moselle), just like any non-Church-of-England court in England.
- Orthodox courts in Cyprus could be regarded as courts under Article 267 of TFEU, but not in Greece, where the Orthodox Church is too independent from the State and where bishops preside over the courts.⁷⁷

⁷⁶ ECJ, 8 April 1992, C-166/91 (*Gerhard Bauer v. Conseil National de l'Ordre des Architectes*), ECR I-2797; ECJ, 16 July 1992, C-67/91 (*Dirección General de Defensa de la Competencia v. Asociación Española de Banca Privada and others*), ECR I-4785; CJEU, 1 April 1993, C-260/91 and C-261/91 (*Diversint SA and Iberlacta SA v. Administración Principal de Aduanas e Impuestos Especiales de la Junquera*), ECR I-1885; CJEU, 9 August 1994, C-447/93 (*Nicolas Dreessen v. Conseil National de l'Ordre des Architectes*), ECR I-4087; CJEU, 4 March 1999, C-258/97 (*Hospital Ingenieure Krankenhausstechnik Planungs-Gesellschaft mbH (HI) v. Landeskrankenanstalten-Betriebsgesellschaft*), ECR I-1405.

⁷⁷ L. Papadopoulou, 'Religious Jurisdictions in Greece', in *this book*, pp. 92–96.

- Jewish courts in Germany could try to claim that being public law bodies they fulfil all criteria.⁷⁸
- None of the Jewish courts in other States nor Muslim courts (MTA, *Shariah* councils) are courts under Article 267 of TFEU. However, it is quite likely that a *Beth Din* would be the first religious court ever to submit the question to the CJEU, since it may rule on any issue presented by the parties, including civil and commercial law – again, disregarding the fact that the *European Beth Din* which is competent for the majority of European States, is based in Basle, Switzerland.⁷⁹

Formal issues like the language of application can be disregarded: the highest Catholic tribunals proceed in Latin, Italian and French; the *Beth Din* in London in Hebrew and English; the Muslim Arbitration Tribunal exclusively in English. Furthermore, should the judges of religious courts be inexperienced and submit a question, upon which the CJEU could not adopt a clear position, the latter authorises itself to adapt the question.⁸⁰

From the point of view of the author, who disagrees with the CJEU in the case of *Paul Miles*, religious courts (or at least the majority of them in the majority of Member States) should nevertheless be perceived as courts under Article 267 of TFEU, because

- the primary purpose of Article 267 of TFEU is to ensure a unified interpretation of European law⁸¹ and because
- it is improbable that once a preliminary request from a religious court would be admitted, the CJEU would be inundated by requests from other religious courts in subsequent years or months.

One can hope that the CJEU would accept a request for a preliminary ruling from a religious court, without checking the admissibility issue, as it has done in many previous cases.⁸² However, this would still beg the question that is the subject of this paper.

⁷⁸ See the remarks on the German Protestant courts, *supra*.

⁷⁹ ‘The European Beth Din’ <<http://europeanbethdin.com/>> (16 February 2015).

⁸⁰ ECJ, 29 November 1978, 83/78 (*Pigs Marketing Board v. Raymond Redmond*), ECR 2347.

⁸¹ ECJ, 12 February 1974, 146/73 (*Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*), ECR 139; CJEU, 4 June 2002, C-99/00 (*Criminal proceedings against Kenny Roland Lyckeskog*), ECR I-4839.

⁸² See *supra*, n. 76.

