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The Law of (Religious) Diversity and the Case of the Islamic Communities in Europe: Fragmented Theoretical Approaches and the Need for a Comprehensive Standpoint

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Abstract

This article aims to propose an analysis of the European legal approaches to the management of religious diversity to illustrate the theoretical and practical conundrums that feature this area. This field is indeed marked by the existence of a theoretical and practical dichotomy between a “minority rights” approach and what is referred to as “religious diversity” perspective. This entails difficulties in finding an appropriate applicable theoretical framework as well as shortcomings as to the solutions that may be envisioned in this area to protect and promote diversity in line with the pluralist content of European contemporary constitutionalism. Using the European Muslim minority as a case study, with particular focus on its demands for the recognition of certain elements of religious law – primarily in the sphere of family

relations – and in the absence of specific guarantees for religious minorities, this study analyses three distinct levels at which these accommodation demands are addressed: 1) the normative recognition of difference through differential treatment; 2) the recognition of spaces for normative and institutional autonomy; 3) the use of the technique of reasonable accommodation by the judiciary. Based on this analysis, this article aims to test the hypothesis that the Law of Diversity may be a more appropriate theoretical framework to frame religious diversity management and fruitfully connect it with the various other forms of diversity accommodation.

Keywords

Religious diversity – Minority rights – Islamic minorities – Europe – Law of Diversity

1 Introduction*

The religious dimension represents one of the oldest aspects of diversity that has recently re-emerged as a focal point within the evolving legal discourse surrounding the accommodation of differences. Religious diversity inevitably pushes the liberal democratic state to re-evaluate its inherent position of neutrality and challenges the ethnocentrism typically associated with Western societies in defending their essential religious and cultural traditions.

Confronted with increasing religious diversity, the legal systems face the challenge of finding new, tailored mechanisms for accommodating it, keeping in consideration the principles of non-discrimination, reasonableness and substantial equality. This is particularly evident in the case of the European Islamic minorities,¹ characterised by inherent pluralism and significant expansionist potential, whose members – or at least a substantial portion of them – aspire to live according to Sharia precepts, especially in matters related to family law and personal status.

Against this background, it is the aim of this article to propose an analysis of the European legal approaches to the management of religious diversity to illustrate the theoretical and practical conundrums that feature this area. This

* This article was developed and written collaboratively. Maria Francesca Cavalcanti is chiefly responsible for sections 1, 4, 5, and 8, and Nicolò Paolo Alessi for sections 2, 3, 6, and 7.

1 In this article, the expressions “Islamic minorities” and “Muslim minorities” are used interchangeably to refer to minority groups that adopt Islam as a normative and cultural framework.

field is indeed marked by the existence of a theoretical and practical dichotomy between a “minority rights” approach and what is referred to as “religious diversity” perspective. This entails difficulties in finding an appropriate applicable theoretical framework as well as shortcomings as to the solutions that may be envisioned in this area to protect and promote diversity in line with the pluralist content of European contemporary constitutionalism.

It will be demonstrated how religious diversity accommodation is ill at ease with the consolidated classifications and models influenced by those two frameworks. The centrality of minority rights law concepts within diversity accommodation theory and practice in Europe has contributed to determining a partial separation of religious diversity from the general issue of minority rights. In turn, this has led to the specialisation of religious diversity research and its development as a partially isolated branch of study, research, and practice. Such developments are considered problematic, as they lead to epistemological limitations that in turn negatively condition advances in this area.

Using the European Muslim minorities as a case study, with particular focus on their demands for the recognition of certain elements of religious law – primarily in the sphere of family relations – and in the absence of specific guarantees for religious minorities, this study analyses three distinct levels at which these accommodation demands are addressed: 1) the normative recognition of difference through differential treatment; 2) the recognition of spaces for normative and institutional autonomy; 3) the use of the technique of reasonable accommodation by the judiciary.

Based on this analysis, this article aims to test the hypothesis that the Law of Diversity may be a more appropriate theoretical framework to frame religious diversity management and fruitfully connect it with the various other forms of diversity accommodation.

2 Accommodating Religious Diversity in Europe: Asymmetry at its Best

The accommodation of religious diversity in Europe is marked by a great deal of variety, which is the result of different constitutional approaches, in turn affected by historical and geopolitical developments.²

2 On the different classifications of the European (and Global North) states’ approaches to religious diversity, see M.F. Cavalcanti, *Giurisdizioni alternative e legal pluralism: le minoranze islamiche negli ordinamenti costituzionali occidentali* (Editoriale Scientifica, Naples, 2023) pp. 72–74, who distinguished the following contemporary European models:

Based on the different traditions and approaches, a religious non-majority group in Europe may fall under the following legal frameworks of accommodation.³

Firstly, few religious groups receive differential treatment in the framework of minority rights mechanisms if legally recognised as 'national minorities'. In

systems based on the separation between state and church, systems based on the cooperation between them, and systems that accord a special position to a denomination while granting the freedom of religion; R. Hirschl, *Constitutional Theocracy* (Harvard University Press, Cambridge, 2010) pp. 26–31, listed the following Global North approaches: “militant secularism” based on the French model; a “secularism-as-neutrality mode”, “that emphasizes the state’s impartial, neutral stance toward religious creeds rather than active advancement of secularism per se”; a “softer version of the formal separation accompanied by a true commitment to multiculturalism and diversity”, “whereby state and religion are separated, but the conception of citizenship is not tied to strict secularism or neutrality”; a “weak form of religious establishment—for example, establishment through the formal, mainly ceremonial, designation of a certain religion as the “state religion””; models “where formal separation of church and state, as well as religious freedoms more generally, is constitutionally guaranteed, but where long-standing patterns of politically systemized church hegemony and religion-centric morality continue to loom large over the constitutional arena”; and a model characterised by the “selective accommodation of religion in certain areas of the law”; M. Rosenfeld, ‘Constitution and Secularism: A Western Account’, in S. Mancini (ed.), *Constitutions and Religion* (Edward Elgar, Cheltenham-Northampton, 2020) pp. 21–40, DOI: 10.4337/9781786439291, focusing on religious diversity accommodation from the angle of secularism, illustrated the following models: The Militant Secularist Model, ‘which sets as its ideal the complete separation between the state and religion, is the one that most approximates the Enlightenment’s radical distinction between the realm of faith and that of reason’; the Agnostic Secularist Model, which ‘differs markedly from its militant counterpart by refusing to categorically exclude religion from state affairs and most of the public sphere, and instead maintaining an agnostic position as between all religion’; the Confessional Secular Model, which ‘incorporates elements of the polity’s majority religion by casting them primarily as cultural and identitarian symbols inherent in the fabric of its citizenry national identity’; the Official State Religion with Institutionalised Tolerance for Minority Religions Model, which ‘is characterized by the constitutional adoption of a particular religion as the official state one and thus differs from the confessional secular model in that it incorporates the state religion qua religion, as opposed to as an element of culture or tradition’; the Millet-based Model (still in force in Israel), which is premised on collective self-government by each religious community within the polity; see also S. Ferrari, ‘Constitutional Models of Law and Religion Relations in Western Europe’, in S. Mancini (ed.), *Constitutions and Religion* (Edward Elgar, Cheltenham-Northampton, 2020) pp. 96–110, DOI: 10.4337/9781786439291, who, similarly, listed the following models: the Model of *Laïcité*, the Majority Religion Model, and the Multi-Religious Model.

- 3 Notably, S. Ferrari, *Legal Code of Religious Minority Rights: Sources in International and European Law* (Routledge, London-New York, 2022) p. 6, indeed defined ‘religious minority’ as a “variable-geometry concept, which can be calibrated to different religious groups” depending on their legal status in different settings.

this case, the religious affiliation is seen as constituting (one of) the main element that determines the identity and culture of a 'national' group, i.e. a group of citizens recognisable in terms of ethnic, linguistic or religious diversity, in a non-dominant position, and a with a long-standing tie with the state territory.⁴ This entails that only national 'old' religious minorities are entitled this form of protection, while members of new religious groups with a migratory background are generally excluded.⁵

The national minority legal status may imply the entitlement to classic minority rights instruments, such as territorial autonomy, cultural rights in the public sphere, participatory rights, exemptions, and forms of legal pluralism (especially as concerns jurisdiction).⁶ The Islamic minority of Western Thrace⁷ and the Malay/Muslim minority of Singapore⁸ are beneficiaries of this model.

If not recognised as national minorities, other forms of legal recognition and differential treatment – also implying a collective dimension – may apply. The

4 According to the most prominent definition of traditional minority, coined by F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (UN, New York, 1977) (UN Doc. E/CN.4/sub.2/384/Rev.1, UN sales Nr. E.78.XIV.1)/Geneva UN Center for Human Rights, UN Doc E/CN.4/sub.2/384/Add.1–7, which has been the basis, albeit with various specifications, of all scholarly accounts in this field.

5 On the debate on 'old' vs 'new' minorities, see, among others, R. Medda-Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion* (Nomos, Baden-Baden, 2009); L.S. Bosniak, 'Being Here: Ethical Territoriality and the Rights of Immigrants', 8:2 *Theoretical Inquiries in Law* (2007) pp. 389–410; W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, Oxford, 1995); A. Eide, 'The Rights of 'Old' versus 'New' Minorities', in T.H. Malloy and J. Marko (eds.), *Minority Governance in and Beyond Europe: Celebrating 10 Years of the European Yearbook of Minority Issues* (Brill-Nijhoff, Leiden, 2014) pp. 23–38; R. Medda-Windischer, C. Boulter and T.H. Malloy (eds.), *Extending Protection to Migrant Populations in Europe: Old and New Minorities* (Routledge, London-New York, 2020).

6 For an overview of the models developed for national minorities and further references, see N.P. Alessi, *A Global Law of Diversity: Evolving Models and Concepts* (Routledge, London-New York, 2025), DOI: 10.4324/9781003493518; on the historical and contemporary models of minority rights protection for religious minorities, see R. Bottoni, 'Autonomy and Promotion of Religious Minorities' Rights: A Historical-Legal Perspective', in M. Leone (ed.), *Annali di studi religiosi* (Aracne Editrice, Rome, 2024) pp. 459–501, DOI: 10.53136/979122181466824.

7 S. Akgönül, 'Le statut personnel des musulmans de Grèce. Vestiges ottomans et réalités contemporaines', in M. Aoun (ed.) *Les statuts personnels en droit comparé. Evolutions récentes et implications pratiques* (Peeters, Leuven, 2009) pp. 279–292.

8 L.A. Thio, 'Religion in the Public Sphere of Singapore: Wall of Division or Public Square? in B.S. Turner (ed.), *Religious Diversity and Civil Society: A Comparative Analysis* (The Bardwell Press, Oxford, 2008) pp. 73–103; L.A. Thio, 'Relational Constitutionalism and the Management of Religious Disputes: The Singapore «Secularism with a Soul» Model', 1:2 *Oxford Journal of Law and Religion* (2012) pp. 446–469.

first example are agreements between the state and a religious denomination, or a religious association that is considered representative of a religious group. Through agreements, the religious communities are legally recognised and provided with a differential treatment that often has a public dimension. For instance, non-majority religious schools may be authorised, as well as the teaching of these religions in public schools and forms of participation in decision-making processes through consultative bodies; in addition, state funding or the power to levy taxes are also envisaged in some cases. Spain, Germany, and Italy follow – to different extents – this model of religious diversity accommodation, besides their general protection of the freedom of religion.⁹

In addition, legal recognition may take the form of judicial recognition, which allows the non-majority religious groups to access mainly forms of punctual differentiated treatment. More precisely, judicial recognition through ‘reasonable accommodation’ has often created the conditions for members of (often Islamic) religious communities to have some of their affairs ruled by religious courts or to benefit from exemptions from the general rules.¹⁰

Outside (and regardless of) these forms of accommodation, all the members of religious non-majority groups are formally legally granted the protection deriving from the framework of the freedom of religion. This mainly concerns the rights to exercise freely one own religion in the private sphere without interferences from the state and without discriminations. However, it must be noted that this framework has also been considered the theoretical and normative basis for all the forms of protection that do not correspond to minority rights mechanisms (thus, the two alternative forms of recognition that have been listed above).¹¹

Furthermore, within legal systems that are based on this framework, it may be possible for religious communities to exploit non-minority-specific regulations in their interest, and, in particular, alternative dispute resolution legal frameworks. It must anyhow be said that this possibility depends on the

9 On this, and for further references, see J. Martínez-Torron, *Religion and Law in Spain* (Wolters Kluwer, Alphen aan den Rijn, 2018); C. Joppke, ‘Constitutional Law and the Integration of Islam in Europe’, in S. Mancini (ed.), *Constitutions and Religion* (Edward Elgar, Cheltenham-Northampton, 2020) pp. 383–398, DOI: 10.4337/9781786439291; Bottoni, *supra* note 6.

10 On this, see Cavalcanti, *supra* note 2.

11 See S. Ferrari, K. Wonisch and R. Medda-Windischer, ‘Tying the Knot: A Holistic Approach to the Enhancement of Religious Minority Rights and Freedom of Religion’, 12 *Religions* (2021) pp. 689–706, DOI: 10.3390/rel12090689.

general constitutional approach of a state towards religion. Indeed, alternative dispute resolution systems are mainly present in what have been described multi-religious systems, such as in the UK. This may be a feasible option also in what are referred to as cooperative systems, while this tool is not compatible with settings based on a strict application of the *laïcité* principle.¹²

3 Theoretical and Practical Issues

The accommodation of religious diversity is today much conditioned by a duality of legal categories and approaches. Indeed, the differentiation of legal solutions for the management of religious diversity – which is an ordinary feature of any area of diversity accommodation¹³ – has been followed by (and has, to some extent, caused¹⁴) the formation of a theoretical and practical rift between (religious) minority rights perspectives on the one side, and a ‘religious diversity’ standpoint, on the other.¹⁵

Accordingly, a minority issues perspective and framework, applied to and interested in ‘national religious minorities’, is currently partially separated from a (dominant in Europe¹⁶) ‘religious diversity’ (also defined as ‘law and

¹² On this principle, its consequences on state regulation of religion, and the other European models for managing religious diversity, see Ferrari and Rosenfeld, *supra* note 2.

¹³ On the asymmetry and differentiation of diversity accommodation models, see F. Palermo and J. Woelk, ‘From Minority Protection to a Law of Diversity? Reflections on the Evolution of Minority Rights’, 3 *European Yearbook of Minority Issues* (2003–2004) pp. 5–14; F. Palermo, ‘Alla ricerca della società inclusive: il contributo della dottrina comparatistica alla tutela delle minoranze “deboli” e all’inclusione delle diversità nelle società contemporanee’, Special Issue *Diritto pubblico comparato ed europeo* (2024) pp. 295–312, DOI: 10.17394/114841.

¹⁴ See Ferrari, Wonisch and Medda-Windischer, *supra* note 11.

¹⁵ Similarly to what has been observed by Ferrari, Wonisch and Medda-Windischer, *supra* note 11, their account pointed to the separation between minority rights scholars and law and religion scholars, the first normatively focused on minority rights for religious minorities to ensure their protection and empowerment, while the second more inclined to accord centrality to general human rights as the best suited framework to protect religious diversity; this article, partially differently, considers two strands of (political and legal) research that both focus on religious communities and also consider the importance of differentiated measures, but from different standpoints that in the end provide a partial picture from both sides.

¹⁶ S. Ferrari, ‘Religious Rules and Legal Pluralism: An Introduction’, in R. Bottoni, R. Cristofori and S. Ferrari (eds.), *Religious Rules, State Law, and Normative Pluralism: A Comparative Overview* (Springer, Cham, 2016) p. 11, DOI: 10.1007/978-3-319-28335-7: “ [...] minority rights

religion') standpoint, mainly focused on religious diversity accommodation as a phenomenon *ex se* that does not communicate (or very limitedly so) with others. More precisely, on the one side, a 'religious diversity' theoretical and practical standpoint focuses on religious communities not in terms of national minorities but as *sui generis* communities – and addresses it from the perspective of freedom of religion, thus with a specific attention to state-religion relationships and without references to or strict application of minority rights models and mechanisms.¹⁷ While, on the other side, a minority issues perspective deals with few 'national' religious minorities within the wider discourse on minority rights, and usually limitedly deals with the other non-recognised communities from the theoretical framework developed by the other strand to manage religious diversity.¹⁸ In addition, this minority rights approach generally tends to theoretically and practically devote limited attention to religious minorities, compared to national, linguistic, and ethnic ones.¹⁹ Of course, this is connected to the concretely limited application of

have never become the main tool to protect religious minorities, whose problems have been and still are largely addressed through the general provisions on freedom of religion".

- 17 This perspective does not exclude that differential treatments on the basis of religious affiliation be accorded to communities (and does not theoretically overlook them) but they are not framed in terms of minority rights categories; *see*, for instance, the various contributions in S. Mancini (ed.), *Constitutions and Religion* (Edward Elgar, Cheltenham-Northampton, 2020), DOI: 10.4337/9781786439291; R. Bottoni, R. Cristofori and S. Ferrari (eds.), *Religious Rules, State Law, and Normative Pluralism: A Comparative Overview* (Springer, Cham, 2016), DOI: 10.1007/978-3-319-28335-7; S. Ferrari, 'The Protection and Promotion of Religious Minorities in European Union Countries: A Law and Religion Perspective', in M. Ventura (ed.), *The Legal Status of Old and New Religious Minorities in the European Union* (European Consortium for Churches and State, Research Editorial Comares, Granada, 2021) p. 24.
- 18 *See* Cavalcanti, *supra*, note 2; S. Ferrari, *supra*, note 16; Ferrari, Wonisch, and Medda-Windischer, *supra* note 11: minority rights scholars have tended to focus on the possible extension of minority rights mechanisms to these non-recognised religious minorities; K. Henrard, *The Ambiguous Relationship Between Religious Minorities and Fundamental (Minority) Rights* (Eleven International, The Hague, 2011); K. Henrard, 'Minority Specific Rights: A Protection of Religious Minorities Going Beyond the Freedom of Religion?', 8: 5 *European Yearbook of Minority Issues* (2009) pp. 5–44; there are of course authors that have tried to integrate these perspectives: for instance, *see* S. Angeletti, 'Religious Minorities' Rights in International Law: Acknowledging Intersectionality, Enhancing Synergy', 12 *Religions* (2021) pp. 1–20, DOI: 10.3390/rel12090691; R. Medda-Windischer, K. Wonisch and A.C. Budabin (eds.), *Religious Minorities in Pluralist Societies: Critical Perspectives on the Accommodation of Religious Diversities* (Brill-Nijhoff, Leiden-Boston, 2023), DOI: 10.1163/9789004446816.
- 19 Along with the UN monitoring bodies activity in this area: *see* N. Ghanea, 'Are Religious Minorities Really Minorities?', 11 *Oxford Journal of Law and Religion* (2012) pp. 57–79, DOI:

minority rights mechanisms to religious minorities,²⁰ the reasons of which are the subject of debate.²¹

This fragmentation of research and practice may determine problematic consequences, at least in two respects. First, it appears to limit the fruitful interaction, reciprocal learning, and cross-fertilisation among models of diversity accommodation.²² The mentioned rift has indeed somewhat reinforced the normative underpinnings of the current legal categories in this area and their isolation, thus hindering a neutral comparison among models based on their common function.²³ This limited interaction has been seen as an obstacle to the development of solutions for the accommodation of the increasingly (religiously) diverse European societies.²⁴

Secondly, the described scholarly and practical fragmentation prevents a comprehensive understanding of the dynamics, processes, as well as normative and theoretical issues concerning religious diversity accommodation, and the effects they have on the relevant legal categorisations.²⁵ The current

10.1093/ojlr/rwr029; M. Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press, Cambridge, 1997) pp. 42–82.

20 See, especially as concerns the developments in international minority rights law, N. Ghanea, 'Religious or Minority? Examining the Realisation of International Standards in Relation to Religious Minorities in the Middle East', 36:3 *Religion, State & Society* (2008) pp. 303–325, DOI: 10.1080/09637490802260385.

21 On this, see Ferrari, Wonisch and Medda-Windischer, *supra* note 11: the authors have observed the existence of a rift among basic normative accounts on religious diversity, which are, in turn, the representation of two separated scholarly approaches to religious diversity; an case is then made for the integration of these perspectives; Ghanea, *supra* note 19, argued for the (re-)integration of religious minorities within the framework of minority rights mechanisms, while also describing the possible difficulties in this endeavour.

22 Ghanea, *supra* note 19; Ferrari, Wonisch and Medda-Windischer, *supra* note 11.

23 Ferrari, Wonisch and Medda-Windischer, *supra* note 11.

24 Ghanea, *supra* note 19.

25 As illustrated by Medda-Windischer, K. Wonisch and A.C. Budabin, 'Introduction: Squaring the Circle: Critical Reflections on Religious Minorities, Diversity Governance and Pluralist Societies', in R. Medda-Windischer, K. Wonisch and A.C. Budabin (eds.), *Religious Minorities in Pluralist Societies: Critical Perspectives on the Accommodation of Religious Diversities* (Brill-Nijhoff, Leiden-Boston, 2023) pp. 1–15, DOI: 10.1163/9789004446816_002; on the need for addressing the deep ideological content of diversity accommodation within constitutionalism, see J. Marko, 'Law and Ideology: The Ideological Conundrums of the Liberal-Democratic State', in J. Marko and S. Constantin (eds.), *Human and Minority Rights Protection by Multiple Diversity Governance: History, Law, Ideology and Politics in European Perspective* (Routledge, London-New York, 2019) pp. 96–137, DOI: 10.4324/9781315544724; J. Marko, E. Marko-Stöckl, B. Harzl and H. Unger, 'The Historical-Sociological Foundations: State Formation and Nation Building in Europe and the Construction of the Identitarian Nation-cum-State Paradigm', in Marko and S. Constantin (eds.), *Human and Minority Rights Protection by Multiple Diversity Governance: History, Law, Ideology and Politics in*

fragmented perspective limits the possibility to critically analyse such issues by crystalising the traditional normative and theoretical approaches in this field.

4 Who is Afraid of Religious Minorities? Difficulties in Defining and Protecting Religious Non-majority Communities in Europe

As is well known, European constitutions generally include explicit references to national, ethnic, and linguistic minorities, but rarely, if ever, to religious minorities, with only a few notable exceptions.²⁶ It is therefore legitimate to ask why European states have generally refrained from directly and explicitly protecting religious minorities, leaving them instead under the broader umbrella of freedom of religion.²⁷ The answer to this question depends on the perspective from which it is approached.

Historically, religious minorities entered legal discourse only after World War I, when nationality, rather than religion, was the primary marker of a state's population identity. This emphasis on national identity relegated religious minorities to a secondary status compared to national minorities.

Politically, this phenomenon reflects the nation-state's tendency to marginalise groups outside the dominant national ethos. In this view, minority rights are recognised less to promote pluralism than to manage separatist

European Perspective (Routledge, London-New York, 2019) pp. 33–95, DOI: 10.4324/9781315544724; Alessi, *supra* note 6.

26 An exception can be found in the Swedish Constitution, whose Article 2 explicitly mandates public institutions to promote participation, equality, and the rights of the child, while combating discrimination on various grounds, including religion. It also calls for supporting the cultural and social life of the Sami and other ethnic, linguistic, and religious minorities. Several European countries—such as Croatia (Constitutional Law on the Rights of National Minorities, 2001), Hungary (Act CLXXIX on the Rights of Nationalities, 2011), and Poland (Act on National and Ethnic Minorities and Regional Languages, 2005)—have adopted laws protecting national, ethnic, or linguistic minorities. However, no European legal system has enacted legislation specifically dedicated to religious minorities. Most European states have ratified international instruments like the Framework Convention for the Protection of National Minorities (except Greece, Belgium, and Luxembourg) or the European Charter for Regional or Minority Languages. Yet, international norms – such as Article 27 ICCPR and the FCNM – have had minimal influence on domestic discussions regarding State–religion relations.

27 K. Henrard, *supra* note 18.

or autonomist claims, aspirations generally not associated with religious minorities.²⁸

A third perspective focuses on religion's role in the public sphere within secular legal systems. Although religion has gained political visibility, partly due to recent migration, its legal relevance is still recent. As a result, national legislators are still in the process of formulating strategies and developing appropriate tools to address the emerging challenges in this area.²⁹

The issue of religious minorities must therefore be situated within a longer-term perspective, one that considers the processes of secularisation and homogenisation that have shaped European societies over time.

From a legal perspective, the absence of a specific system of protection for religious minorities – comparable to those in place for national, ethnic, or linguistic minorities – may be explained by the convergence of the secular character of the state and the uniformity of state law with a framework based on freedom of religion and the prohibition of discrimination. This model, however, appears insufficiently responsive to the concrete needs of religious minorities. If such needs are not properly acknowledged and addressed, they may, in turn, prove difficult to reconcile with the principles of a secular and uniform legal order, thereby creating fertile ground for intercultural conflict.

One of the challenges that the study of religious minorities shares with that of national, ethnic, and linguistic minorities lies in the undeniable difficulty of identifying a universally accepted definition of “minority”. Building on this awareness, it is nevertheless possible to identify certain defining features that may serve as the basis for a general definition of religious minority – one that is sufficiently flexible to be adapted to the specific circumstances of each case.

- A) *Objective element*: a minority consists of a social group which is generally, though not necessarily, numerically smaller than the majority. What is relevant, however, is not the size of the group per se, but rather its position of subordination or marginalisation within society. This disadvantaged position exposes the group to a heightened risk of discrimination and to the neglect of essential needs specific to its members.
- B) *Subjective element*: a minority group is distinguished from the dominant majority by virtue of a distinct and specific identity—be it national, ethnic, cultural, linguistic, or religious. These identity markers are not monolithic and may overlap or combine in various ways. In the case of

²⁸ J. Jackson Preece, *National Minorities and the European Nation State System* (Clarendon Press, Oxford, 1998) pp. 10–11.

²⁹ S. Ferrari, *supra* note 16.

religious minorities, the defining element of differentiation lies primarily in religious affiliation. Members of the minority group are not only united by the faith they profess but are also bound by a sense of solidarity aimed at preserving and promoting their identity and traditions, as well as at achieving substantive equality with the majority.

- C) *Relational element*: Under international law, even if this is not yet an established practice at the national level, minorities do not need to be formally recognised by the state, nor do their members necessarily need to hold its citizenship to be entitled to protection. From this perspective, the distinction between “old” and “new” minorities should be irrelevant for the purposes of granting specific protection or differentiated treatment. In the case of religious minorities, there is generally no territorial link with the state, apart from a few exceptional situations. Rather, the relationship between the state and the minority is characterised by a dynamic of coexistence, in which the minority demonstrates a bond of loyalty towards the state. In return, the legal order may grant differentiated treatment, either to eliminate the minority’s condition of structural disadvantage or to formally institutionalise its status.

The concept of religious minority thus takes the shape of a fluid and variable category which, grounded in universal legal provisions for the protection of rights, is shaped and redefined in relation to the individual’s specific forms of affiliation.³⁰ Such a definition of religious non-majority group is in line with the most recent developments of international minority rights law that purport a flexible and adaptable conception of minority, while at the domestic level states show generally a more restrictive approach to the recognition of minority (and, above all, religious minority) rights. This condition of religious non-majority groups illustrates that the integration of religious groups within the framework of minority rights is not consolidated, while symbolically affirmed. Based on this, some authors have argued for a more structured extension of minority rights to religious groups (in addition to the protection

30 M.F. Cavalcanti, ‘The protection of the Islamic Minority Beyond Religious Freedom: Legal Pluralism and Reasonable Accommodation in Europe’, 6 *Stato, Chiese e Pluralismo Confessionale* (2024) pp. 58–92, DOI: 10.54103/1971-8543/22860.

ensured by the freedom of religion),³¹ while others have underscored that the latter are best protected within the framework of the freedom of religion.³²

4.1 *The Protection of Religious Minorities Between the Politics of Uniformity and the Politics of Difference*

Regarding the accommodation of religious diversity, the debate has long been shaped by the tension between two consolidated approaches: the politics of uniformity and the politics of difference.

A first approach reflects the view that religious freedom should be guaranteed to all individuals in a uniform manner. According to this perspective, the existing legal framework governing individual and collective freedom of religion is sufficient to protect minority groups from discrimination, while allowing them to preserve and develop their religious identity.³³ This is the normative basis of the 'religious diversity' perspective.

According to another view, however, it is necessary to adopt special legal measures specifically aimed at protecting the identity of religious minorities, safeguarding them against potential discrimination, and addressing the structural vulnerabilities in which minority groups often find themselves.³⁴

These two consolidated legal strategies rest on fundamentally different philosophical and political premises. The first approach is grounded in the principle of individual autonomy. At its core lies the idea that freedom of religion, as a universal right, provides sufficient protection, also in its collective dimension, to ensure that each individual can make free and informed

31 On this, see H. Bielefeldt, N. Ghanea and M. Wiener, *Freedom of Religion or Belief: An International Law Commentary* (Oxford University Press, Oxford, 2016), DOI: 9780198703983.001.0001; Ferrari, Wonisch and Medda-Windischer, *supra* note 11; Ghanea, *supra*, note 19; see also the footnotes in the next section.

32 M. Pulte, 'Religious Minorities in Germany: Practical Legal Challenges According to the Tried and Tested Principles of German Basic Law', in M. Ventura (ed.), *The Legal Status of Old and New religious Minorities in the European Union* (European Consortium for Churches and State, Research Editorial Comares, Granada, 2021) pp. 293–308; W. Wieshaider, 'Comme un kaléidoscope: le statut des minorités religieuses en Autriche', in M. Ventura (ed.), *The Legal Status of Old and New religious Minorities in the European Union* (European Consortium for Churches and State, Research Editorial Comares, Granada, 2021) pp. 185–200; E. Ruiz Vieytes, 'Religious Diversity, Minorities and Human Rights: Gaps and Overlaps in Legal Protection', 15 *Religions* (2024) pp. 87–102, DOI: 10.3390/rel15010087; see also the footnotes in the next section.

33 L. Binderup, 'Liberal Equality from Minority Rights to the Limits of Tolerance', 2 *Res Cogitans* (2007) pp. 95–109.

34 J.A. van Der Ven, 'Religious Rights for Minorities in a Policy of Recognition', 3 *Religion and Human Rights* (2008) pp. 155–183.

choices in matters of religious belief and practice.³⁵ Consequently, any distinction based on religious affiliation must be eliminated, with formal equality serving as the guiding principle for legal and political action.

The second approach is based on a different conception of the individual, not as an isolated subject, but as a member of multiple and diverse social groups. The universal value to be protected is the very existence of this plurality, which risks assimilation or even extinction if not actively supported. Accordingly, the effective exercise of individual religious freedom cannot be dissociated from a normative framework aimed at safeguarding the religious identity of minority groups.³⁶

The divergence between these two approaches does not preclude the possibility of practical convergence. Many legal systems accept a certain degree of accommodation to address the challenges posed by pluralist and multi-religious societies, and to defuse potential intercultural conflicts – without undermining the principle of equality.³⁷

The possibility of integrating minority rights and freedom of religion rests on their shared collective and institutional dimension. This aspect is intrinsic to religious freedom and simultaneously lies at the heart of minority rights. Minority rights, in turn, may serve to enrich the collective dimension of religious freedom by enabling minority religious groups to participate meaningfully in decision-making processes that concern them.

Today, the debate on religious minorities in Europe centres primarily on questions of identity. More specifically, on the majority's fear of losing its own cultural identity in the face of increasing religious and cultural diversity linked to rising migration flows into European countries. Public concerns in this regard have led many European legal systems to adopt more restrictive regulations concerning certain religious practices typically associated with minority faiths. Although such measures are often framed in neutral terms, their concrete application frequently results in a discriminatory impact on the daily lives of minority group members.³⁸

Religious minorities increasingly seek more targeted and effective protection and/or empowerment than that offered by general religious freedom. At

35 Ferrari, Wonisch and Medda-Windischer, *supra* note 11.

36 J. Neo, 'Religious Minorities in Asia: Between Scylla of Minority Protection and Charybolis of Religious Freedom Rights', 12:10 *Religions* (2021) pp. 881–898, DOI: 10.3390/rel12100881.

37 M. Ferri, 'How to Strengthen Protection of (Religious) Minorities and Cultural Diversity under European Law: Some Lesson from Human Rights Protection System', 12 (10), *Religions* (2021) pp. 864–885, DOI: 10.3390/rel12100864.

38 A. Kaya, 'Islamophobia', in J. Cesari (ed.), *Oxford Handbook of European Islam* (Oxford University Press, Oxford, 2014) pp. 745–770, DOI: 10.1093/oxfordhb/9780199607976.013.11.

the same time, their needs and claims may be best catered for by less institutionalised models than those that are provided by minority rights law mechanisms. The key challenge lies in identifying their specific needs and assessing whether these are met within the framework of religious freedom or if minority rights mechanisms and/or other innovative diversity accommodation instruments are needed. Given the individualistic nature of religious freedom, legal systems are under growing pressure to find and promote further solutions to accommodate diversity while respecting non-discrimination, reasonableness, and substantive equality. The universal rights stemming from religious freedom, while essential for the protection of non-majority religious groups, are primarily focused on the individual positions of the group's members rather than on the community as such. These rights, in fact, constitute a standard applicable to all individuals, regardless of their affiliation with a minority group.³⁹ However, this standard proves insufficient to protect the religious identity of the group, even when considered in its collective dimension. What remains inadequately safeguarded is the overlap between religious and cultural collective identity, as well as the very existence of minority communities that risk assimilation, if not extinction.

This issue has emerged in European legal systems primarily in connection with the growing recourse to Sharia law as an alternative normative framework, to which members of Muslim minorities turn in order to regulate specific aspects of their personal lives in accordance with their religious beliefs. The case of Islamic minorities thus offers an emblematic testing ground for examining models of religious diversity accommodation that move beyond the limitations of traditional religious freedom frameworks. It also provides a valuable opportunity to assess the hypothesis that the Law of Diversity may offer a more suitable theoretical framework for addressing the governance of religious diversity.

5 The Islamic Minority in Europe as a Case Study: Levels of Accommodation Between Minority and State Legal Systems

Being Muslim in Europe raises significant questions about how religious identity can be reconciled with the aspiration to participate fully in a secular society, shaped by the values of Western legal culture. This is not only a challenge for individuals and their communities, but also for legal systems,

³⁹ N. Ghanea, *supra* note 19.

which must respond to the demands of a minority group that is internally diverse, strongly defined by its religious identity, and characterised by a degree of normative ambition. Although Muslim communities are, in most cases, integrated into the social fabric of European states, certain core elements of their religious identity are regarded as essential and non-negotiable. It is these elements that many seek to regulate in accordance with Sharia, which thus emerges as a minority legal order that interacts, sometimes uneasily, with the state legal system.⁴⁰

Within the context of European Islam, there exist multiple ways of being Muslim, each reflecting different models of engagement between Islamic identity and European legal systems.⁴¹ These diverse expressions of Muslim identity reflect Islam's internal pluralism, making it more accurate to speak of Muslim minorities rather than a single Islamic minority.⁴² Overall, the Islamic minority in Europe is diverse but strongly identity-driven, generally open to integration while holding certain religious principles as non-negotiable.

Depending on the country in which they are located and the historical and political circumstances that led to their formation, Muslim communities in Europe can also be categorised as old or new minorities.⁴³ In most cases, with a few notable exceptions, such as the Muslim community of Western Thrace in Greece,⁴⁴ these communities fall within the category of new minorities: groups that have emerged through migration and whose members reside permanently in the state. Although they often share objective features with historical minorities, apart from a territorial link, they are generally not formally recognised by the state and, as a result, lack specific collective protection.⁴⁵

40 J. Cesari, 'Conclusion: Is There a European Islam?', in J. Cesari (ed.), *The Oxford Handbook of European Islam* (Oxford U.P., Oxford, 2014) pp. 802–806, DOI: 10.1093/oxfordhb/9780199607976.013.2.

41 F. Dassetto and J.S. Nielsen, 'Conclusions', in B. Marécal, S. Allevi, F. Dassetto and J.S. Nielsen (eds.), *Muslims in the Enlarged Europe: Religion and Society* (Brill, Leiden, 2003) pp. 531–542, DOI: 10.1163/9789047402466_020.

42 M.F. Cavalcanti, *supra* note 30.

43 M. Berger (ed.), *Applying Shari'a in the West: Facts, Fears and the Future of Islamic Rules on Family Relations in the West* (Leiden University Press, Leiden, 2013).

44 K. Tsitselikis, 'A Surviving Treaty: The Lausanne Minority Protection in Greece and Turkey', in K. Henrard (ed.), *The Interrelation between the Right to Identity of Minorities and their Socio-economic Participation* (Brill, Leiden, 2013) pp. 287–313, DOI: 10.1163/9789004244740_012.

45 J.S. Nielsen, *Muslim in Western Europe* (Edinburgh University Press, Edinburgh, 2004).

Within this framework, Muslim minorities in Europe appear to occupy an intermediate position between autonomist and identity-based minorities.⁴⁶ This classification reflects the nature of their claims, which typically involve requests for exemptions from general legal norms, the recognition and application of specific Islamic legal institutions, and a limited degree of jurisdictional autonomy for the purpose of applying their religious law.

These claims are accommodated to varying degrees across European legal systems.⁴⁷ Whether formally recognised or informally practiced within religious communities, they contribute to the development of Sharia as a minority legal order operating alongside the state system, one to which members of the minority increasingly turn to regulate specific aspects of their lives.

In particular, three main distinct levels of accommodation can be identified: a) the normative recognition of difference through differential treatment; b) the recognition of spaces for normative and institutional autonomy; c) the use of the technique of reasonable accommodation by the judiciary.

5.1 *The Normative Recognition of Difference Through Differential Treatment*

The recognition of special norms, preferential treatments, or exemptions for minority members varies depending on the legal system's openness to pluralism.⁴⁸ This level of accommodation represents the exception rather than the rule. A notable example of such incorporation can be found in the German legal system, which, despite considering polygamy contrary to public policy and criminalising it under Section 172 of the Penal Code, nevertheless recognises polygamous marriages validly contracted abroad for limited

46 This definition draws on a classification of minorities based on their claims, distinguishing between: (a) secessionist minorities, seeking separation from the state; (b) autonomist minorities, demanding forms of self-government within the state's legal framework; and (c) identity-based minorities, requesting legal guarantees to preserve core aspects of their cultural identity. W. Kymlicka, *Liberalism, Community, and Culture* (Oxford University Press, Oxford, 1989); M. Keating, *Nations Against the State* (Palgrave Macmillan, London, 1996).

47 L. Zucca, 'What is the Place of Sharia Law in European Legal System?', in R. Scarciglia and W. Menski, *Normative Pluralism and Religious Diversity: Challenges and Methodological Approach* (Wolters Kluwer, Alphen aan den Rijn, 2018) pp. 89–104.

48 M. Rohe, 'Reasons for the Application of Shari'a in the West', in M. Berger (ed.), *Applying Shari'a in the West: Facts, Fears and the Future of Islamic Rules on Family Relations in the West* (Leiden University Press, Leiden, 2013) pp. 25–46, DOI: 10.1515/9789400601055-002.

purposes. Specifically, under Section 34(2) of Social Code Book I, survivor's pensions may be divided among multiple spouses.⁴⁹

The idea of allowing the incorporation of religious norms into the state legal system is, at first glance, undeniably striking, as it challenges the secular character traditionally associated with Western legal orders. However, such incorporation always takes place under the supervision of the state, which ensures compliance with fundamental legal principles. It is grounded in the principle of party autonomy, whereby the legal system recognises individuals' capacity to shape certain aspects of their lives by combining non-negotiable elements of secular law with selected components of religious law. This level of accommodation seeks to safeguard the exercise of cultural and religious practices explicitly recognised by law, by permitting exceptions to general norms or by granting special treatment, without compromising the coherence of the general rule. However, it tends to produce only minor adjustments within the legal system, often in relation to issues that are not particularly contentious. Given its predominantly normative character, this form of accommodation is inevitably shaped by the preferences and sensibilities of the majority.

5.2 *The Recognition or Toleration of Spaces for Normative and Institutional Autonomy*

This type of recognition entails the institutionalisation of religious diversity, whereby minority institutions are entrusted with the authority to interpret, apply, and enforce the norms of their own minority legal order. As a result, the state relinquishes its exclusive monopoly over the production and interpretation of legal norms, as well as over the resolution of disputes—albeit only in specific areas and typically under the supervision of the state itself.⁵⁰

Examples of this form of accommodation can be found in models of personal federalism, as well as in systems that allow for the voluntary exercise of religious jurisdiction.

Personal federalism is a distinctive model in which the personalist principle prevails over territoriality. It allows minority communities to regulate matters central to their identity, such as family law and personal status, through norms rooted in religious or customary sources, applied by religious

49 G. Zaccaroni, 'Polygamous Marriages and Reunification of Families on the Move Under EU Law: An Overview', in S. Arnold and B. Heiderhoff (eds.), *Children in Migration and International Family Law* (Springer, Cham, 2025), pp. 313–323, DOI: 10.1007/978-3-031-71598-3_20.

50 A. Shachar, *Multicultural Jurisdiction: Cultural Differences and Women's Rights* (Cambridge University Press, Cambridge, 2001).

tribunals under state-defined conditions. It may also entail the recognition of spaces of self-governance in some specific areas, such as creedal education.⁵¹ Although not linked to a specific territory, this form of self-governance requires the group to be recognised as an autonomous or semi-autonomous entity, capable of negotiating with central authorities and managing its own community institutions.⁵²

This model finds application in the case of the historic Muslim minority of Western Thrace in Greece. For members of this recognised minority, the legal system provides for differential treatment through the application of a personal law regime, administered by Islamic tribunals in matters of personal status and family law.⁵³ The application of this system has over time revealed numerous critical issues, particularly concerning its compatibility with the principle of equality. These concerns were also addressed by the European Court of Human Rights in the 2018 case of *Molla Sali v Greece*.⁵⁴

Voluntary forms of religious jurisdiction are expressed under the framework of alternative dispute resolution (ADR) that are provided for by non-minority-specific regulations. These instruments address conflicts between state law and (also) religious norms in areas where state law applies but religious rules are seen as binding by the faithful. Their key feature is the option to resolve disputes through alternative procedures, allowing parties to choose the applicable legal framework—including religious law—within limits set by the state.⁵⁵ The use of religious law partially displaces state jurisdiction, though it is state law that authorises the mechanism and sets its scope.⁵⁶

An example of this form of accommodation can be found in the case of the Muslim Arbitration Tribunals (MAT), which operate within the British legal system under the framework of the Arbitration Act.⁵⁷ Each Muslim

51 This is, for instance, the case with the Islamic communities in Germany: on this, *see* Joppke, *supra* note 9.

52 J. F. Gaudreault-DesBiens, 'Religious Courts, Personal Federalism, and Legal Transplants', in R. Adhar and N. Aroney (eds.), *Shari'a in the West* (Oxford University Press, Oxford, 2010) pp. 159–180.

53 K. Tsitselikis, 'The Legal Status of Islam in Greece', in R. Poz and W. Wieshaider (eds.), *Islam in the European Union* (Peeters, Leuven-Paris, 2004) p. 109.

54 *Molla Sali v. Greece*, 19 December 2018, ECHR, Application no. 20452/14.

55 M. Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, Report published in December 2004, https://www.sfu.ca/mpp/archive/pdf_news/800-05-sharia.pdf.

56 S. Bano (ed.), *Gender and Justice in Family Law Dispute: Women, Mediation and Religious Arbitration*, (Brandeis University Press, Waltham, 2017).

57 UK Arbitration Act, 1996, para. 23.

Arbitration Tribunal (MAT) functions as an arbitral body whose decisions are subject to judicial review by civil courts and may be enforced in accordance with the applicable legal framework. The MATs are intended to offer members of the Muslim minority a forum for resolving disputes in accordance with Islamic law.

The MATs aim to deliver outcomes that are fair, protect the interests of the parties, and uphold the fundamental principles of the legal system.⁵⁸ At the same time, Islamic religious arbitration raises concerns regarding its compatibility with fundamental rights and the risk that social pressures within religious communities may undermine the genuine voluntariness of recourse to arbitration.⁵⁹

5.3 *The Use of the Technique of Reasonable Accommodation by the Judiciary*

Legislatures are often ill-equipped to address the complexities of cultural diversity, constrained as they are by general norms and political considerations. Courts, by contrast, are institutionally suited to engage with the particularities of individual cases. It is therefore increasingly within the judicial sphere that claims for exemption from general laws, especially those grounded in religious or cultural identity, are examined and balanced against the principles of the legal order. This, in turn, requires judges to rely on interpretive techniques aimed at recognising and protecting difference, such as that of reasonable accommodation.

This is a form of judicial reasoning that may be employed when constitutionally protected individual rights are restricted or denied by the enforcement of seemingly neutral legal provisions. It allows the judge to introduce an exception to the general rule in a specific case. The technique of reasonable accommodation permits certain individuals or culturally distinct groups to be exempted from the scope of a general norm. Such an exception is justified when the judge determines that, in a pluralistic and multicultural society, the strict and context-insensitive application of that norm would distort the principle of equality.⁶⁰ A necessary condition is that any exception

⁵⁸ W. Menski, 'Diritto matrimoniale inglese e legge musulmana', in A. Ferrari (ed.), *Islam in Europa/Islam in Italia tra diritto e società* (Il Mulino, Bologna, 2008) pp. 129–146.

⁵⁹ J. Brechin, 'A Study of the Use of Sharia Law in Religious Arbitration in the United Kingdom and the Concerns that This Raises for Human Rights', 15:3 *Ecclesiastical Law Journal* (2013) pp. 293–315, DOI: 10.1017/S0956618X13000434.

⁶⁰ L.G. Beaman (ed.), *Reasonable Accommodation. Managing Religious Diversity* (University of British Columbia Press, Vancouver, 2012).

to the general rule, in favour of differential rights, must not result in a violation of fundamental rights, public order, or the core values of the legal system.

While most developed in common law systems, where judges shape principles through concrete cases, this technique also resonates within civil law traditions, due to the judiciary's rights-protecting function. In both settings, a judicial approach attentive to cultural, religious, and legal pluralism offers a powerful tool for recognising and supporting minority religious identities.

The Dutch Supreme Court has repeatedly applied this interpretive technique in cases concerning marital captivity, stemming from unregistered religious marriages, particularly within Muslim and Jewish communities. The lack of effective coordination between secular family law and minority legal orders on marriage and divorce undermines the protection of individual rights. This situation has serious consequences, especially for women, who may lack legal protection and face barriers to obtaining a religious divorce without their husband's cooperation.⁶¹

This raises the question of whether the state can intervene in disputes that exist solely within informal religious legal orders and are invisible to the official legal system.

The Dutch Supreme Court gave an affirmative answer as early as 1982. According to the Court's now-settled case law, civil courts have no jurisdiction over religious marriage or its dissolution, as such unions are not recognised by civil law. However, the Court implicitly acknowledges their relevance by holding that a husband's refusal to cooperate in a religious divorce may, under certain circumstances, be considered an unlawful act.⁶²

First applied to a Muslim couple in 1989,⁶³ this case law developed notably after 2010, when Dutch courts ruled that a husband's refusal to grant a religious divorce constitutes a civil wrong, violating the woman's rights under Articles 8 and 12 ECHR, rights held to outweigh his religious freedom.⁶⁴

61 S. Rutten, 'Protection of Spouse in Informal Marriages by Human Rights', 2 Utrecht Law Review (2010), pp. 77–92, DOI: 10.18352/ulr.125; J. Van der Leun and A. Leupen, *Informeel huwelijken in Nederland, een exploratieve studie* (Leiden University Press, Leiden, 2009).

62 Hof Den Haag 21.11.2017 EB 2018/21, RB Oost-Brabant 3.8.2016 EB 2016/88.

63 HR 10.11.1989 NJ 1990/112. Contra RB Rotterdam 6.1.2016 EB 2016/40, RB Rotterdam 9.9.2016, ECLI:NL:RBROT:2016:6943, Hof Den Haag 21.11.2017.

64 RB Rotterdam 8.12.2010 ECLI:NL:RBROT:2010:BP8396, RB Den Haag 8.6.2012, 418988/KGZA 12-489, RB Amsterdam 10.4.2012, LJNBW 3800; RB Den Haag 21.10.2014 ECLI:NL:RBDHA:2013:5254, Hof Den Haag 21.11.2017 EB 2018/21, RB Ost-Brabant 3.8.2016 EB 2016/88, Rb Rotterdam 28.2.2018, ECLI:NL:RBROT:2018:1720; RB Amsterdam 21.12.2018 ECLI:NL:RBAMS:

Human rights thus become both a safeguard and a bridge between minority legal systems and state law.

While Dutch courts have relied on human rights to protect women trapped in unregistered religious marriages, this approach has been criticised for its broad interpretation of human rights norms, insufficient regard for the husband's religious freedom, and superficial engagement with Sharia, often based on a decontextualised understanding.⁶⁵ Though Islamic marriage lacks legal recognition, Dutch judges have nonetheless drawn on informal norms to uphold gender equality—reflecting a long-standing national commitment. Reasonable accommodation remains a key tool for addressing Muslim minority claims, but it depends on judicial sensitivity and institutional openness to otherwise invisible needs. Judges are frequently required to translate religious norms into civil law to achieve substantive equality.

The analysis of the European Islamic communities' case illustrates how their legal accommodation in Europe does not follow a single model but rather reflects a fragmented and evolving landscape, shaped by historical legacies, constitutional traditions, and the specific characteristics of each minority group. Also relevant in shaping this landscape is the specific model of state-religion relations adopted by each legal system,⁶⁶ which further diversifies national approaches to the accommodation of religious claims.

In (the few) cases where Islamic minorities are considered as structurally similar to national minorities, either due to their historical rootedness, territorial concentration, or formal recognition, they are included within the broader framework of minority rights instruments. This is the case, for example, of the Muslim minority in Western Thrace, protected under the 1923 Treaty of Lausanne,⁶⁷ or the Bosniak population in Bosnia and Herzegovina, which enjoys the status of a constituent people alongside other ethno-

2018:9363, Hof Den Haag 16.10.2018 ECLI:NL:GHDHA:2018:2893, RB Oost-Brabant 3.8.2016 EB 2016/2018, RB Den Haag 21.10.2014 ECLI:NL:RBDHA:2014:14191; GEHO Den Haag ECLI:NL:GHDHA:2019:1818, RB Oost-Brabant 13.8.2019 ECLI:NL:RBOBR:2019:4641; RB Rotterdam 14.4.2020 ECLI:NL:RBROT:2020:3468.

65 E. De Kroon, 'Islamic Law, Secular Law and Societal Norms: The Recognition of Islamic Legal Practice in the Netherlands and the Protection of Muslim Women's Human Rights', 36:2 *Journal of Muslim Minority Affairs* (2016), pp. 153–183; endorsing an approach based on human rights, Rutten, *supra* note 61.

66 Hirschl, *supra* note 2.

67 K. Tsitselikis, 'The Convention of Lausanne (1923): Past and Current Appraisal', in V. Lytra (ed.), *When Greeks and Turks Meet: Interdisciplinary Perspectives on the Relationship Since 1923* (Ashgate, Farnham, 2014) p. 215.

religious groups.⁶⁸ In such contexts, the religious component is embedded within a broader national or ethnic identity, and its protection is largely channelled through collective rights mechanisms originally designed for national minorities, but adapted to accommodate religious identity claims.

By contrast, when Islamic minorities are not considered analogous to national minorities – typically because they are more recent, more dispersed, or lack a territorial base – their legal accommodation tends to rely on alternative strategies rooted in the framework of the freedom of religion (‘religious diversity’ approach). These may include: forms of personal federalism that allow for a degree of institutional cooperation between religious groups and the state; spaces for normative and institutional autonomy; forms of reasonable accommodation, where individual rights and anti-discrimination frameworks take precedence.

A decisive factor influencing the legal framework addressing Islamic minorities is the “old” or “new” minority status. The few “old” Islamic minorities are more likely to benefit from well-established minority rights instruments, while the latter – the majority – must navigate more fragmented and discretionary systems of accommodation. This differentiation has significant implications for the coherence and inclusiveness of European legal frameworks, raising fundamental questions about equality, recognition, and the limits of multicultural governance.

6 What can one Learn from the Case of Islamic Minorities? Religious Minority Groups Within the Law of Diversity Framework

The previous sections have illustrated how very differentiated and precarious the condition of the members of the Islamic religious groups in Europe is. This situation should stimulate reflections on how constitutional systems may address the issue of religious diversity in a way that is (more) in line with their democratic, pluralist, egalitarian, and universalist content. In other terms, the case of the European Islamic minority is paradigmatic of the existent differentiations in the treatment of (religious) non-majority groups and urges to verify which *ratio* justifies them, and if this *ratio* is consistent with the principles that feature contemporary constitutionalism.

As seen, the current situation is the result of the fragmented legal and political approach to religious diversity described above.

68 S. Keil and V. Perry, *State-Building and Democratization in Bosnia and Herzegovina*, (Routledge, London, 2016).

The legal status and treatment of the Islamic non-majority groups in Europe derive indeed from the application of the abovementioned normative and theoretical frameworks (minority rights law and religious diversity tools as mainly separate models), and their assumptions. Accordingly, for instance, the Islamic non-majority groups, if not recognised as national minorities (as in most cases), are not deemed having access to minority rights mechanisms, but mainly to tools that create punctual legal derogations in their favour. At the same time, when differential treatment having a collective dimension is accorded in the interest of these groups, it is not framed nor understood as connected to minority rights mechanisms, with this reinforcing the idea that religious diversity follows a different and derogatory regulatory path.

This derogatory position of religious non-majority communities is often normatively justified by assuming that these groups – when, as frequently, not recognisable as national minorities and especially if considered as new minorities – do not claim for forms of protection similar to those accorded by minority rights mechanisms, i.e. full-fledged public recognition, promotion, and/or autonomy.⁶⁹ However, this perspective may entail the risk of an excessive simplification of the issue based on some traditional assumptions in this area. It should indeed be noted that the very instruments that are legally available to a group define the structure of opportunities of a non-majority group and demarcate the accommodation options it can claim for. In other terms, their claims are conditioned by the institutional system in which they live, and its theoretical and normative premises, which are based on an assumed distinction between types of non-majority groups, their needs, and the instruments for their protection and empowerment.⁷⁰ And, notably, it is not proven that if other tools were available, they would not be claimed for or used.⁷¹ Especially if the needs of several old and new religious groups are – or

69 On this, see Kymlicka, *supra* notes 5 and 46.

70 On this, questioning the categorisation that heavily relies on Kymlicka's work, see C. Boulter and R. Medda-Windischer and T.H. Malloy, 'Introduction: What's in a Name?', in R. Medda-Windischer, C. Boulter and T.H. Malloy (eds.), *Extending Protection to Migrant Populations in Europe: Old and New Minorities* (e-book version Routledge, London-New York, 2020) pp. 13–15.

71 On this, see F. Palermo and J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze* (CEDAM, Padua, 2021); for a political-philosophical critique of Kymlicka's position and his differentiation between old and new minorities based on the criteria of history and territory, see T.W. Pogge, 'Group Rights and Ethnicity', 39 *Nomos* (1997) pp. 187–221; D. Heim, '"Old" Natives and "New" Immigrants: Beyond Territory and History in Kymlicka's Account of Group-Rights', 13:2 *Migration Letters* (2016) pp. 214–227; S. Choudry, 'National Minorities and Ethnic Immigrants: Liberalism's Political Sociology', 10:1 *The Journal of Political Philosophy* (2002) pp. 54–78; R. Rubio-Marín, 'Exploring the Boundaries

can become with time – not dissimilar to those of the ‘recognised national minorities’, which is not unusually the case.⁷²

Notably, these considerations aim to shed light on the fact that the current treatment of most Islamic non-majority groups is widely assumed to be in line with their aspirations and needs, seen as more related to the guarantee of freedom of religion, but do not imply purporting the need for a simple extension of minority mechanisms to all Islamic non-majority communities. It instead entails challenging the assumptions that condition this area of law and, accordingly, consider all the variety of diversity accommodation mechanisms to respond to their needs, freed of not thoroughly proven framings.

Regarding the variety of instruments for the accommodation of diversity, it must be noted that research has shown that many more instruments than traditional minority rights tools have emerged and have been employed to foster diversity accommodation and empower non-majority groups beyond non-discrimination worldwide.⁷³ These are less institutionalised and more inclusive forms of personal federalism, participatory democracy, and legal pluralism. Such forms of diversity accommodation, potentially ‘less threatening’ and more integrationist – which thus could be models of particular interest especially for members of ‘new’ religious communities – risk being overlooked as concrete accommodation options a consequence of relying on the described consolidated theoretical and practical approaches in this area.

Based on this, finding a comprehensive theoretical framework on diversity accommodation that includes religious diversity may be necessary to create the conditions for the development of this area along the evolution of contemporary societies, and in accordance with the pluralist content of European constitutionalism. Methodologically, as the two mentioned consolidated strands of research and practice on religious diversity accommodation only have a partial shared ground, this implies that it is not possible to employ one of the two frameworks as a workable common basis for comprehensive analyses in this area. In particular, a minority rights perspective, which may appear – and is often suggested as – the most apt theoretical framework to be

of Language Rights: Insiders, Newcomers, and Natives’, in S. Macedo and A. Buchanan (eds.), *Secession and Self-Determination* (New York University Press, New York, 2003) pp. 136–173; to the authors’ knowledge, no empirical study on this issue exists to this date.

72 On the overlaps and differences between old and new minorities needs and claims, see the empirical study K. Crepaz, *“Old” and “New” Minorities: Regional Synergies, Differences and Perspectives*, Project Report: MinMig – Accommodating Linguistic, Religious and Cultural Diversity Through a Comparative Analysis of Minorities’ and Migrants’ Claims (Eurac Research, Bolzano/Bozen, 2021).

73 Alessi, *supra* note 6.

extended to further diversity accommodation phenomena, has recently been described as epistemologically limiting.⁷⁴

Indeed, a minority rights approach can be seen as an epistemological obstacle to a broader understanding and appreciation of the phenomenon of diversity accommodation as well as the solutions that can be put in place in this area. This is because it ontologically focuses on some specific forms of diversity and the legal responses to protect and promote them, while at the same time neglecting the wider phenomenon and the most innovative legal tools emerging in this area.⁷⁵ Notably, the broader perspective endorsed here is in line with the most recent developments in international law in this area, which have argued for a shift from a focus on (religious) minorities to one devoted to the accommodation of diversity as a complex phenomenon that informs the entire society.⁷⁶

7 The Law of Diversity as a Renewed and Comprehensive Theoretical Framework

Based on the described shortcomings related to the theory and practice of (religious) diversity accommodation, it is here purported that a renovated and larger theoretical framework may be useful to analyse and propose solutions for further protection and empowerment of religious (and in particular, Islamic religious) diversity in Europe. Recently, the Law of Diversity has been proposed as a renewed conceptual framework in the area of diversity accommodation.⁷⁷

The concept of the Law of Diversity has been introduced to illustrate that the legal instruments for the accommodation of diversity are evolving out of institutional experimentation, and emerging approaches are complementing those that have traditionally been studied. In addition, and particularly

⁷⁴ Alessi, *supra* note 6.

⁷⁵ Alessi, *supra* note 6; J.F. Gaudreault-DesBiens, 'Introduction to Part II', in M.C. Foblets, J.F. Gaudreault-DesBiens and A. Dundes Relteln (eds.), *Cultural Diversity and the Law: State Responses Around the World* (Bruylant-Yvon-Blais, Bruxelles-Montréal, 2010) pp. 367–380.

⁷⁶ On the turn of European international minority rights law from minorities to diversity, see OSCE High Commissioner on National Minorities (HCNM), *The Ljubljana Guidelines on Integration of Diverse Societies* (OSCE HCNM, The Hague, 2012); Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC), Thematic Commentary no. 4, *The Framework Convention: a key tool to managing diversity through minority rights*, ACFC/56DOC(2016)001, 2016; on this, see Alessi, *supra* note 6.

⁷⁷ Alessi, *supra* note 6.

important for this work, this notion aims to encourage scholars and practitioners to open their theoretical and applicative perspectives, free of the epistemological limits the dichotomy religious freedom (including non-discrimination)/minority rights discourse seems to be posing. In other words, the proposed notion is thought to act as an enabling conceptual framework that allows scholars and practitioners to appreciate the existing variety of legal instruments for the accommodation of diversity, their broad applicative possibilities and their current developments.

Accordingly, the “Law of Diversity” can be imagined both as a unifying conceptual framework and a practical toolbox containing all the instruments aimed at accommodating differential human aspects. It thus serves theoretical and practical functions. Indeed, first, a unitary framework that gathers all the instruments for the accommodation of diversity from a legal perspective, makes it possible to recognise their fundamental commonalities, foster their dialogue and somewhat relativise their normative content, i.e. the idea that some tools are to be applied to specific groups while others are not. A set of legal instruments detached from their specific addressees highlights what is the principal outcome of the increasing legal significance of diversity, namely the elaboration of a set of tools to manage differential human conditions. Unifying all the instruments illustrates both the commonality of their function, and, at the same time, what was defined the contingency of the selection of their addressees, determined by historical, political and philosophical factors.⁷⁸

Correlated to that, a unified standpoint on the models for the accommodation of diversity, freed from its normative content, can help practitioners look at the available options without biases connected to the fact that some diversities only deserve forms of protection or empowerment beyond non-discrimination and the latter only correspond to a specific model.

Furthermore, the proposed concept can be enabling, in the sense that it may help move this area of study's focus from the Global North and equally consider the Global South constitutional systems and models. Such a standpoint widens the constitutional scholars' observations and makes them more aware of the variety of legal instruments available for the accommodation of diversity in contemporary constitutional settings. As a result, this could raise the awareness that the (national minorities and indigenous peoples') rights

⁷⁸ E. Heinze, ‘The Construction and Contingency of the Minority Concept’, in D. Fottrell and B. Bowring (eds.), *Minority and Group Rights in the New Millennium* (Martinus Nijhoff, Leiden-Boston, 1999), pp. 25–74; see also Pogge, *supra* note 71.

discourse is but one side of diversity accommodation in contemporary societies.

Hence, the concept “Law of Diversity” is brought forward as a category of analysis that implies a renovated awareness of how (religious) diversity impacts societies and affects the evolution of legal systems, as well as, and consequently, a different methodological standpoint of legal inquiry.

Practically, this renewed perspective would allow for a better interaction among existing – consolidated and emerging – models and stimulate a reconsideration, and possibly for a relativisation, of the categories in the area of diversity accommodation, by shedding light on the contingent (geo)political and historical processes that have led to the consolidation of the current legal frameworks. Such a relativisation appears necessary to free constitutional categories and approaches to diversity from their national imprinting and foster a renovation of diversity accommodation along with the contemporary societal dynamics and in line with the egalitarian content of democratic constitutionalism.

In turns, this is supposed to create better conditions to reinforce diversity protection in Europe. Further inclusion and empowerment of religious diversity – without this leading to the creation of societies composed of ‘parallel communities’ – through the several tools and models of the Law of diversity is indeed in line with the principle of pluralism protected by constitutionalism.

Minority rights and ‘religious diversity’ approaches appear to be limiting to appreciate and provide solutions for accommodating the phenomenon of religious diversity. At the same time, as seen, a perspective that isolates religious diversity from the wider phenomenon of diversity accommodation seems ineffective, in view of achieving the objective of the promotion of pluralism enshrined in democratic constitutionalism. The Law of diversity appears thus useful to integrate the minority rights models with the studies on religious diversity, and to provide for a set of accommodation options (the Law of Diversity toolbox) for religious communities, freed from the strait-jacket of definitions.

8 The Law of (Religious) Diversity and the Case of the Islamic Communities in Europe: Concluding Remarks

The presence of a strongly identity-based religious minority, with considerable cultural influence and a demand for the recognition of a normative and

value system rooted in religion and tradition – often perceived as fundamentally opposed to European legal culture – has re-emerged at the centre of public debate. This has contributed to reinforcing the negative representation of Islam that has long characterised Western narratives. Yet, from the perspective of Islamic communities, and with few exceptions, the call for the application of Sharia before state authorities in Europe should be understood as a request for accommodation. Since such demands – made by both longstanding and newly arrived religious minorities – represent a complex and growing phenomenon across Europe, the state cannot avoid the responsibility of identifying appropriate responses capable of balancing cultural and religious pluralism with the fundamental principles of the legal system. The key challenge reflects a broader dilemma common to all state–minority relations: how to reconcile the collective identity claims of minority groups with the individual rights of their members and the constitutional core of the legal order.

Answering this question requires asking whether an approach to religious minorities based primarily on religious freedom is still adequate to address the evolving identity-based dynamics that shape multicultural constitutionalism. Doubts arise, among other reasons, from the growing number of cases in which claims once framed as matters of religious freedom are now understood through a cultural lens. To give just one example, it is difficult to justify bans on the construction of minarets – as seen in certain jurisdictions – on grounds of religious freedom limitations, when such restrictions are more clearly rooted in cultural considerations.⁷⁹

It follows that, within a multicultural society, the regulation of religious matters cannot be separated from the wider discourse concerning diversity as a general feature of contemporary European societies. The inherently collective nature of minority religious practices – shared and exercised by a plurality of individuals – calls for measures and instruments that go beyond the protection of individual rights. Accordingly, religious minorities, even within secular legal systems, require more complex (and sometimes more robust) safeguards than those offered by religious freedom alone. The intersection of religion with other markers of difference, combined with the growing presence of diverse religious minorities in European societies, compels states to complexify their approach to managing difference within a coherent and unified framework grounded in the principles of non-discrimination and reasonableness.

79 S. Ferrari, *supra* note 17.

As proposed in this article, an approach based on the Law of Diversity may help find appropriate solutions to the issue of religious diversity by connecting it to the wider discourse and research on diversity accommodation.

Firstly, as mentioned above, such a broad perspective would favour a strengthened interaction among models for the accommodation of diversity, with this creating the conditions for reciprocal learning. This is because this framework is able to span different environments and legal traditions and foster their comparison. While diversity has received different recognition and treatment, it has nevertheless been a common element in the organisation of societies. Taking this into consideration engenders an extension of the field of scientific observation that may lead to a deeper understanding of the phenomenon, especially as numerous countries currently experience the same condition of growing complexity mostly determined by migration flows. Employing the Law of Diversity, therefore, results in a wide standpoint and enlarged comparison among various models devoted to its accommodation, which helps relativise the centrality of the minority discourse,⁸⁰ especially when it comes to the study of models for the accommodation of diversity that go beyond non-discrimination. Related to that, this conceptual framework thus acts as a methodological gate-opener or enabling notion that encourages the observer and practitioner to take into account all the available instruments for the accommodation of diversity – from the most consolidated to the most innovative – and see them as communicating sets of tools that evolve over time in terms of structure and addressees in accordance with societal, political and historical developments. Concretely, this means increasing the options available for regulating religious diversity, and especially accommodating Islamic non-majority groups demands. Concerning minority rights instruments, this framework has the merits of encouraging more structured interaction of models coming from different areas: whereas some

80 On this, and especially on the need for broader frameworks in the areas of diversity accommodation and diversity studies, *see* the interview of M. Koenig carried out by the Max Planck Institute for the Study of Religious and Ethnic Diversity, <https://www.mmg.mpg.de/63140/interview-with-matthias-koenig>: “I think ‘diversity’ is a very good umbrella term for this agenda since it captures very different phenomena that were previously categorised in separate disciplinary fields of research, including migration studies, ethnic-conflict studies, political sociology of plural societies, and post-colonial studies. I think it is very important to have such an umbrella term, since it encourages us to draw comparisons between the many varieties in which different collectivities may coexist within a given social context”.

contributions exist in this sense,⁸¹ the mentioned duality of frameworks (and the separation it has engendered from general minority rights) has severely limited the potential cross-fertilisation of minority rights tools.⁸²

Endorsing the Law of Diversity also implies that one takes distance from the logic according to which further accommodation only means extending minority rights, with all the objections that are often raised, related to the economic and societal consequences of this operation. While in some cases minority rights models are appropriate solutions for accommodating the increasing religious diversity European states are experiencing, less institutionalised and more inclusivist models such as functional non-territorial autonomy and legal pluralist arrangements may be (and already are in some countries) of particular interest to manage an increasingly religiously diverse society without the risk of creating siloed communities.

Besides this, and above all, as seen, the Law of Diversity helps relativise the normative assumptions that characterise the area of minority rights and assess their conformity with the principles of constitutionalism.

Why is the religion dimension overlooked within minority rights research and practice? To what extent different conceptions of secularism have contributed to define which religious groups have legitimate claims to differentiated treatment, and which not? To what extent is the principle of secularism informed by a Christian content? To what extent have democratic values been equated to Christian principles, in contrast to (and possibly threatened by) the presence of other religious communities? What principles, normative assumptions, and legal arguments does the selection of legitimate beneficiaries of religious diversity accommodation measures (beyond non-discrimination) rely on? To what extent normative assumptions on religious diversity accommodation condition the development of legal instruments in this area? Is relying on these assumptions and the relevant legal categories compatible with the democratic and constitutional 'neutral' principles of the European legal systems? Are the current legal approaches based on these assumptions capable of regulating super-diverse societies?

81 For instance, see E. Ruiz-Vieytez, 'Protecting Linguistic and Religious Minorities: Looking for Synergies among Legal Instruments', 12:9 *Religions* (2021) pp. 706–720.

82 As observed by Ferrari, Wonisch and Medda-Windischer, *supra* note 11.

By relativising (and decolonialising⁸³) the consolidated assumptions within this area, the Law of Diversity may contribute to creating the conditions for more inclusive and equal legal frameworks that value (religious) diversity as a ubiquitous, ineliminable, and essential element of contemporary democratic societies.⁸⁴

83 Indeed, relativising the centrality of the consolidated approaches to diversity accommodation favours a better inclusion of other models and approaches stemming from less focused areas of the world; on the decolonial impact of the Law of Diversity, see Alessi, *supra* note 6.

84 On the importance of societal (cultural) diversity for democracy, see J. Rovny, *Ethnic Minorities, Political Competition, and Democracy: Circumstantial Liberals* (Oxford University Press, Oxford, 2024): with this study, the author confuted the democratic theory's assumption that ethnic diversity stokes divisions and destabilises democracy.