Religious Diversity and Secular Models in Europe – Innovative Approaches to Law and Policy

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Innovative Approaches to Law and Policy

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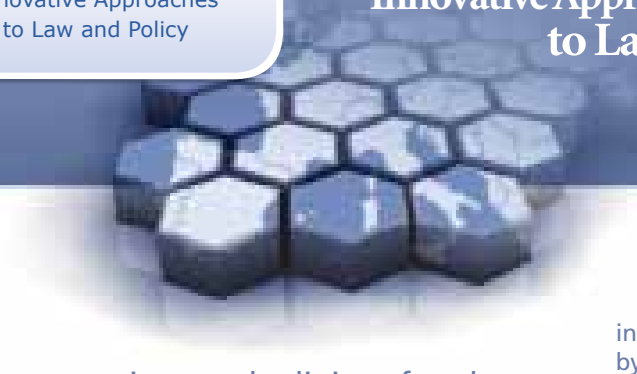

Same-sex marriage and religious freedom: an opened discussion

By Santiago Cañamares Arribas
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More than five years after the Spanish "Same-Sex Marriage Act" entered into force (2005), the public debate on the constitutional adequacy of the reform is still open. The Spanish Constitution declares that "Man and woman have the right to marry with full legal equality" (art. 32). Based on this article some have argued that same-sex marriage has no place in the Constitution because marriage is understood as a union between man and woman. Others consider such reference to man and woman as generic, supporting homosexual marriage.

While we are still waiting for the decision of the Spanish Constitutional Court regarding the constitutionality of same-sex marriages, it is significant that the heterosexual character of marriage is undergoing a process of consolidation in a number of countries. In the U.S., after the proposition 8 was passed, the Constitution of California restricts marriage to different-sex couples, against a trend of the judiciary in favor of same-sex marriage. Other examples can be found in Latin America. Honduras has amended the Constitution to define marriage as "legal union of man and woman". And recently in 2011, the Chilean Constitutional Court dismissed an appeal against the Civil Code, which excludes marriage between same-sex couples, affirming that there is no hint of discrimination.

Same-sex marriage in Spain also raised criticism regarding the exercise of the so-called "conscientious objection" by those that could be obliged to perform the celebration of these marriages. The Spanish legislation has no specific provision either recognizing or excluding the conscientious objection by public officials, and the Spanish Constitutional Court dismissed an appeal filed by a Judge in charge of the Civil Registry who rejected to take part in the celebration of this type of unions. However, this Court has recognized other types of conscientious objection by public officials, for instance the case of a member of the National Police who refused to take part in a religious parade performing non-police duties, because this would constitute a violation of his negative religious freedom.

From a comparative view, Canada has expressly recognized the conscientious objection to homosexual marriage in the Civil Marriage Act by declaring that "it is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs."

In my opinion, there is little doubt that the right to conscientious objection to same-sex marriages should be recognized, especially when considering that in practice it is not difficult to find alternative officials willing to take part in those ceremonies. As Douglas Laycock has recently pointed out, it is not "in the interest of the gay and lesbian community to create religious martyrs when enforcing the right to same-sex marriage. (...) It is far better, to respect the liberty of both sides and let same-sex marriage be implemented with a minimum of confrontation."

Second day's meeting

On 19-20-21 October 2011, a three days *Religare* consortium meeting took place in Sofia, Bulgaria. The first day session brought together the members of the Steering Committee and ended with a Consortium meeting during which the consortium members exchanged views on the preliminary outcomes of the four thematic work packages. In an open discussion with the members of the Advisory board, the *Religare* partners outlined challenges that have appeared in the 'testing out' of the templates which aim at formulating policy recommendations based on a comparative approach between countries and issues. The consortium meeting was followed on 20 October 2011 by a Workshop entitled 'Accommodating religion in the public space. Looking beyond Europe' organised by the University of Milan together with the International Center for Minority Studies and Intercultural Relations (IMIR) of Sofia.

This two days session was concluded by discussions on 21 October 2011 on the results of the sociological surveys conducted in Bulgaria, Denmark, France, the Netherlands, Turkey and the United Kingdom and ended with evening lectures given by Profs I. Becci, L. Beaman and L. Woodhead, and by two judges of the European Court of Human Rights, F. Tulkens and Z. Kalaydjieva. The next *Religare* policy dialogue meeting will take place in Strasbourg on 28 June 2012.

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FAMILY ...

This research field is a policy-oriented reflection on the challenges of religious diversity in relation to marriage, divorce and children custody.

This covers issues of parallel dispute settlement and respect of religiously driven requirements.

Panel of judges in Brussels

The judiciary facing religious pluralism in family matters

Brussels, 5-6 December 2011

RELIGARE organised a seminar for judges in Brussels on 5-6 December 2011. The purpose of the event was to arrange a dialogue between judges of various countries and the RELIGARE team, with a view to formulate policy recommendations. The event included an evening lecture on "Cross-border family cases and religious diversity: what can/must judges do", given by Professor Maarit Jänterä-Jareborg of the University of Uppsala.

The RELIGARE's researchers explained the findings of their semi-structured interviews conducted in Bulgaria, Denmark, France, the Netherlands, Turkey and the United Kingdom. The interviews ranged across a variety of topics, but the results for family law were rather limited, except for those of the United Kingdom. Some respondents thought that judges ought to be more flexible and more sensitive. Muslim marriages are under-registered in this country. The result of non-registration is that the marriage has no civil consequences and especially women lose out on civil remedies. Some of the interviewees raised concern about alternative dispute resolution. It seems that more Muslims are turning to Sharia courts for legal solutions that official courts cannot provide.

Panel of RELIGARE's researchers in Brussels

The difficulties that judges face are primarily related to the complexity of finding foreign law and applying it according to the interpretation given in the country of origin. The extent of the obligation upon judges varies in the different countries. In Germany for instance, the judge is presumed to know not only German law, but also all foreign law. German judges have the obligation to find the content of foreign law, but they face immense practical difficulties.

The Judges Seminar represented a preliminary step towards the formulation of policy recommendations. Pluralism is a fact that can no longer be denied. Judges and jurists more generally have to acknowledge this fact and seek appropriate approaches to inevitable tensions. At the same time, legislators should take care not to over-legislate and avoid hasty and symbolic legislation. Information about the existing rules should be readily available for immigrants, in order to allow them to grasp the effects of the arrangements they make in their personal and family affairs.

Assistance must be available for judges when they have to apply foreign law or take account of religious claims. Such assistance may include training, facilitating direct communication between judges, or the use of the British system of expert witnesses.

When responding to the challenges and tensions, it is important to bear the particular context of the European Union countries into account and not to blindly transpose approaches from other parts of the world.

The process of formulating policy recommendations will be continued at the conference on "Family Law International: Conflict and Accommodation in Cross-Border Legal Issues between States and Religion" in Erlangen on 1-2 March 2012 and the meeting on "Alternative Dispute Resolution in Family Matters and Unregistered Marriages" in London on 3-4 September 2012.

Thalia Kruger (*Researcher*)

Religious Perspectives on the Public Sphere: Neutrality, Pluralism and the Secular

Jerusalem, 13-15 December 2011

On the initiative of Silvio Ferrari (University of Milan), Shai Lavi (Minerva Center for Human Rights) and Suzanne Last Stone (Cardozo Law School), a Conference was held in Israel on the modern challenges triggered by the growing visibility of religion in the public space and the increasing attention paid to religious and cultural backgrounds in globalised societies, with the support of the RELIGARE project, together with the Minerva Center for Human Rights at Tel Aviv University, the Cardozo Law School in New York and the Israel Science Foundation.

The keynote address was delivered by Professor Silvio Ferrari who highlighted the characteristics of legal scholars' discourses in dealing with the notions of "public", "secular", "pluralism", and "neutrality" from the perspective of the modern state. In fact the relationship between State and Church has been commonly approached using the conceptual framework that is dominant in contemporary liberal constitutionalism.

The workshop's main focus was thus to address similar questions but from the internal perspectives of different religious traditions. Speakers provided elements of a response as to the significance of the public/private dimension in the religious legal traditions, the influence of the religious distinction between the secular and the sacred on the development of the modern concept of secularism and the comparative relevance in religious legal traditions of "neutrality" and "pluralism" as organizational principles of the interactions in the public sphere. Academics and specialists in religious legal traditions, coming from different European countries, USA and Israel, equally contributed to the debates of this three days event.

The proceedings will be published in an edited volume by professors Silvio Ferrari, Shai Lavi and Suzanna Last Stone in a forthcoming Ashgate publication within the series Cultural Diversity and Law in association with RELIGARE.

European Court of Human Rights

Focus on case law

the United Kingdom

Eastern High Court 14-01-2008
Radmacher v Granatino [2010] UKSC 42

Prior to their marriage, the parties signed a pre-nuptial agreement. They agreed not to make claims for maintenance against each other upon divorce. The wife was wealthier and the husband's income had declined after the marriage. The marriage then broke down. Section 25 of the Matrimonial Causes Act 1973 says that a court must "have regard to all the circumstances of the case".

The High Court held that the agreement was unfair but the Court of Appeal unanimously reversed that decision. The Supreme Court by a majority of 7 to 2 agreed with the Court of Appeal. It said however that here would be some safeguards such as entering into agreements by free will, without undue influence, and after being informed of the implications ; whether the reasonable requirements of the children of the family are prejudiced ; changes in circumstances or real need.

This judgment currently stands as a milestone for the recognition of pre-nuptial contracts. The judgment also appears to cover post-nuptial agreements. The Supreme Court clearly departs from previous law, signalling that there will be an assumption that nuptial agreements will be binding subject to vitiating factors.

the Netherlands

Court of Zwolle-Lelystad, 17-05-2010
n. 169293/JZ RK 10-233

The Board for the Protection of Children of the Netherlands brought an application to have seven children and one unborn child placed in foster care. The application was based on the fact that the parents were very religious (Orthodox) and brought up their children according to their strict religious values. This implied that the children were not permitted to have relationships until the age of 23 and they were not permitted to visit other children, nor where other children allowed to visit them. The parents at several instances refused consulting doctors for medical problems.

The Court applied Article 1:254 of the Civil Code, concerning protective measures for children. The provision determines that if minors are living in conditions that cause their moral, psychological or health needs to be seriously threatened, and other measures to avert the threats have failed, or foreseen measures will fail, the youth judge can place the children in foster care.

The Court considered parents' fundamental right to family life guaranteed by Article 8 of the European Convention on Human Rights. Therefore, it said, the State should in principle not interfere in the family life of citizens. However, the State also has a duty to protect minors; in this regard the Court referred to Arts 5, 6, and 19 of the UN Convention on the Rights of the Child. The Court concluded that the seven minor children and the unborn baby had to be placed in foster care.

ECHR, *Schalk and Kopf v. Austria*, 24-06-2010
n. 30141/04

No obligation for the state to recognise or authorise same-sex marriage

The facts **-** The applicants are male Austrian nationals living together as a couple. In 2002, they asked the competent authorities to allow them to contract marriage. Their application was dismissed by the town authorities. They ultimately lodged an appeal with the Constitutional Court, which upheld the previous rulings on the ground that neither the Austrian Constitution nor the European Convention on Human Rights implied that the concept of marriage, aimed at procreation, should be extended to relationships of another nature. Furthermore, it held that the European Convention did not impose a duty to modify the marriage legislation in force for the sake of the protection of same-sex relationships.

In addition, on 1 January 2010, an Act on registered partnership entered into force, which provides an official mechanism for the recognition of same-sex relationships, although it maintains some differences with the married persons' status.

The ECHR decision **-** Before the European Court, the applicants claim that the refusal by the Austrian authorities to allow them to contract marriage is in breach of article 12. Furthermore, they invoke article 14 combined with article 8: they were discriminated on grounds of sexual orientation and explain that they had no other choice than to marry before the entry into force of Registered Partnership Act in 2010.

Article 12:

As regards article 12 of the Convention, the Court assesses whether the right to marry granted to man and woman might apply to the applicants. It relies on its case law, according to which the Convention has to be interpreted in the light of present day conditions: applied to article 12, this cannot impose a duty on the Members States to provide marriage to same-sex couples.

Then, the Court refers to the Charter of Fundamental Rights of the European Union, which recognises the right to marry without mentioning man and woman and accordingly does not limit marriage to different sex couples. Nevertheless, the Charter leaves to each State the decision to authorise or not same-sex marriage, as they are better placed to assess social needs in this field.

The Court unanimously decides that there has been no violation of article 12.

Article 8 in conjunction with article 14:

The Court first states that same-sex relationships belong to « family life » within the meaning of article 8, taking into account the rapid evolution of social attitudes towards same-sex couples and the considerable number of States having affording them legal recognition. Then it observes that same-sex couples, just like opposite-sex couples, are capable of having stable relationships and therefore are in a similar situation with regard to their need to have their relationship legally recognised. However, given that the Convention must be read as a whole and having regard to the conclusion under article 12, no obligation can be derived from articles 14 and 8 to grant same-sex couples access to marriage.

Despite an emerging European consensus, same-sex couples are not legally recognised in a majority of States. Lastly, the Court observes that the status granted to same-sex couples does not necessarily have to correspond to marriage. The Court holds by 4 votes to 3 that there has been no violation of article 14 combined with article 8.

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RELIGARE EVENTS

What	When	Where
Religious communities and State support	June 27th, 2012	*CNRS and University of Strasbourg* *European Parliament, Strasbourg (France)* This international seminar seeks in particular to bring together religious leaders and experts in internal law of religions, in order to facilitate a genuine exchange of views and pluralistic debate on the public financing of religion depending on the religious group concerned, its minority status or specific situation in the national context.
Religare Policy Dialogue Meeting	June 28th, 2012	*CNRS and University of Strasbourg* *European Parliament, Strasbourg (France)* The meeting will focus on the key challenges faced by EU policymakers in the thematic research areas of the RELIGARE project: religious diversity and family affairs, religious diversity in the workplace; religious diversity and the public space; and state support for religious diversity, in order to allow the formulation of policy recommendations.

RELATED EVENTS

Title	Date	Venue
Annual CRONEM Conference "The Future of Multiculturalism: Structures, Integration Policies and Practices"	June 26th-27th, 2012	*University College London (UCL) / Roehampton University* *University of Surrey* This conference seeks in particular to provide an opportunity for interdisciplinary debate on the forms of multiculturalism, the alternative policy approaches for the management of cultural diversity issues, the relationship between multiculturalism, migration, social exclusion, democratic citizenship, political participation and other modern legal, economic and political challenges to multiculturalism.
UCSIA Summer School "Culture, religion and Society"	August 26th – September 2nd, 2012	*University Centre Saint-Ignatius Antwerp (UCSIA), Belgium* This interdisciplinary UCSIA summer school aims to better understand the dynamic interplay between the macro- and micro-social developments concerning religion that take place in much of the contemporary world. Guest lecturers : Rajeev Bhargava (Centre for the Study of Developing Societies, Delhi), Peggy Levitt (Wellesley College), Robert W. Hefner (Boston University) and John Hutchinson (London School of Economics). Deadline for applications: April 15th, 2012, www.ucsia.org/summerschool

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