Intersections between law and religion are increasingly permeating the public sphere. A brief consideration of the ‘controversial issues’ section (Part 4) of the present volume serves as a reminder of religion-related issues regulated by laws, on the one hand, and mobilising mass publics – religious and secular alike – on the other. In all these cases at some level we find a disconnect between the workings of the laws and the workings of the societies in which these laws operate. It is at precisely this point that sociology as a discipline can bridge the gap.

There are a number of themes at the intersection between religion and law that would benefit considerably from ‘a sociological perspective’. But in reality sociologists are struggling to make sense of the interplay between religion and law and thus ‘a sociological perspective’ remains essentially work in progress. One particular case serves usefully as a foil through which we can pinpoint certain themes with which sociologists grapple, with greater or lesser degrees of success: the *Lautsi vs. Italy* case decided by a Chamber of the European Court of Human Rights in 2009, and revisited by the Court’s Grand Chamber in 2011. In the Chamber’s 2009 decision the Court ruled that the presence of the crucifix on the walls of Italian public schools entails a violation of the European Convention on Human Rights (specifically, of Article 2 of the first Protocol, protecting the right of parents to educate their children in accordance with their religious or philosophical beliefs, when taken in conjunction with Article 9 on the freedom of thought, conscience and religion). In its defence, the Italian state argued, among other things, that the presence of crucifixes in classrooms was ‘natural’, on the ground that the crucifix was not only a religious symbol but also the ‘banner of the Catholic Church’, and thus had to be regarded as a symbol of the Italian state (*Lautsi v. Italy* 2009, para. 11).

The 2009 ruling attracted overwhelming media, scholarly and political attention. Meanwhile, the Italian state sought referral to the Grand Chamber, which resulted in a new hearing on 30 June 2011. During the intermediate period the Court received an unprecedented number of third party interventions from NGOs, Members of the European Parliament, and national governments.\(^1\) On 18 March 2011, the Grand Chamber issued its final judgment,

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1 Ten national governments (Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Monaco, San Marino, Romania and the Russian Federation), ten NGOs, and 33 MEPs.
overturning the original absolute majority decision with a 15–2 ruling in favour of the Italian state.

The *Lautsi* case, including the first 2009 decision, the politicisation of the case in its aftermath, the Grand Chamber’s reversal of the decision in 2011, and the scholarly discussion in its aftermath, effectively creates a research agenda for the sociological study of religion and law. Reading *Lautsi* line-by-line and between the lines, we find three interrelated themes which merit attention. I will explore each of these below in a section entitled ‘*Lautsi*’s call to sociologists’, indicating areas where sociology brings special insights to the table, as well as issues on which ‘the jury is out’ on how sociology might rise to the occasion.

In a second section I will focus on three research programmes which, each in their own way, move this research agenda forward. These include the Religare programme on religious diversity and secular models in Europe; the Religion and Political Theory Programme (RAPT) entitled ‘Is religion special? Secularism and religion in contemporary legal and political theory’; and the Grassrootsmobilise programme, examining how individuals, communities and NGOs at the grassroots level mobilise ‘in the shadow’ of the European Court of Human Rights religious freedoms case law. Each of these programmes is European in its base, but the insights go well beyond the European continent.

Finally, in a concluding section I will highlight certain cross-cutting themes arising from the discussion of all of the above.

**Lautsi**’s call to sociologists

*Religious symbols and ‘legal’ discourse*

*Lautsi* draws our attention to a now pervasive problem of the place – and, more importantly, the meaning and impact – of religious symbols in public spaces, whether these be crucifixes on public school walls, icons in court rooms, or headscarves and turbans donned by students and civil servants.

Throughout the *Lautsi* decisions, the reader finds remarkably in-depth and often loaded definitions and interpretations of the crucifix. Already in the first few paragraphs of the 2009 decision, the reader encounters the crucifix as: a symbol of Italian history and culture and thus of Italian identity; a symbol of equality, freedom and tolerance; and a symbol of the Italian state’s secular bias (these being characterisations made by the Italian Administrative Court, *Lautsi* 2009, para. 13). A few pages later we read the Italian government’s descriptions of the cross as also having an ethical meaning independently from the religious one, and evocative of principles that can be shared outside the Christian faith, e.g., non-violence, equal dignity of all human beings, justice and sharing, the primacy of the individual over the group, and the importance of freedom of choice, the separation of politics from religion, and love of one’s neighbour extending to forgiveness of one’s enemies (*Lautsi* 2009, para. 35).

Quite apart from whatever one may feel about the great breadth and validity of these characterisations, their mere airing in a courtroom is, from a sociological perspective, striking in a way: is this the place to determine the meaning of the cross and the crucifix? Beyond this broad exercise of interpreting and defining religious symbols in the *Lautsi* case law, we find also vivid value judgements of Christianity as a faith. For example, in the words of the Italian Administrative Court, ‘Christianity, and its older brother Judaism – at least since Moses and certainly in the Talmudic interpretation – have placed tolerance towards others and protection of human dignity at the centre of their faith’ (*Lautsi* 2011, para. 15).

Scholars have addressed the problematic nature of judicial engagement with the defining of religious symbols. Brett Scharffs explores the ‘pressures and perils’ that courts face when trying
to give authoritative meaning to religious symbols and concludes that interpreting religious symbols is a complex job at which courts tend to fail miserably, in the process ‘destroying and limiting religious symbols’ (2012: 37). From a different perspective Susanna Mancini also criticises this tendency, drawing attention especially to the prejudicial way in which this symbol-interpreting takes place. Namely, she describes how:

on the one hand, the religious significance of majority (Christian) symbols is watered down and interpreted in ‘cultural’ terms, not as the symbols of a given religion, but rather as indicia of the historical and cultural dimensions of national identity. On the other hand, minority — and particularly Islamic — symbols are interpreted as expressions of cultural and political values and practices which are at odds with liberal and democratic ones . . .

(Mancini 2009: 2631)

The practical result of the above is that crucifixes are allowed in public schools because secularised Christianity is considered not only compatible with but also a fundamental aspect of Western democracy, while the Islamic symbols such as the headscarf are often banned or restricted as representative of illiberal and undemocratic values. The quintessentially (though not exclusively) European process through which Christianity variably ceases to be religion and becomes culture or identity is a nuance that sociology can bring to the table.

Sociologists may generalise (and lawyers may joke) that lawyers do not like the colour grey and move only in the realm of hard facts and with a large degree of precision. In this caricatured perspective, law is specific, sociology discursive, and law should be wary of entering the world of religious symbols interpretation. Yet from legal scholars we also learn that law is a social practice (McCann 1994: 6), and a system of cultural and symbolic meanings perhaps more so than a set of operative controls, affecting us primarily through communication of symbols — e.g., ‘by providing threats, promises, models, persuasion, legitimacy, stigma, and so on’ (Galanter 1983: 127). The court, like the public school, is a state (read national) institution and as such will engage with the business of symbol-defining. Sociologists must anticipate this.

What sociologists can and should contribute to the equation is a deeper understanding of why such developments persist: why do we find this kind of discourse and material in a court setting? Only on this basis can we seek to resolve problems that may emanate from such trends. One line a sociologist can explain is the relationship between religion, national identity and nationalism (and/or patriotism) and, critically, variations in the above in different contexts and in accordance with different historical contingencies (Martin 1978). Clearly this relationship underlies both the arguments being put forth and the way they are put forth, in the Lautsi case and beyond (more on this below).

Second, sociologists may also usefully employ the notion of ‘vicarious religion’ (when discussing the European context at least). Vicarious religion as Davie (2000) describes it is difficult to trace: it entails religion performed by an active minority (representing, though, a majority faith), on behalf of the wider population who understand, approve of and anticipate what the minority is doing. There is a sense in which resistance to the removal of a religious symbol which, the defendant argument goes, is not so religious anyway, can be seen as a manifestation of vicarious religion at play: i.e., we may not really pay attention to the crucifix on the wall, but we want very much for it to be there. That desire is an example of vicarious

2 US Supreme Court Justice Antonin Scalia also made reference to the universalistic nature of Christianity (but not of other religions) in his oral argument in Salazar v. Buono (Mancini 2010).
religion; the perception and defence of a right to have the crucifix there takes us back to the religion-national identity-nationalism link mentioned above, and to the principle of subsidiarity, addressed below.

Finally, the sociologist can provide important nuance by contextualising religion in the public sphere. For example, there are some interesting transatlantic similarities and differences in the handling of religious symbols cases. In a US Supreme Court case about the public display of a cross on a federal plot of land as a memorial for those who fought in WWI (Salazar v. Buono 2010), defendants emphasised – as in Lautsi – the non-religious meanings of the cross. One commentator described the case as the ‘latest chapter of [an] odd project of saving religion by emptying it of its content’; ‘[I]t has become a formula: if you want to secure a role for religious symbols in the public sphere, you must de-religionize them’ (Fish 2010). Nationalising religious symbols is a natural next step in a sense, both because of the workings of vicarious religion (‘let the nation display the cross for us’), and because of the range of similarities (if not overlaps) between religion and nation (Brubaker 2012; Smith 2003). The close links between religion and national identity are an integral part of the complicated mess of trying to secularise public spaces. This brings us to our second lesson from Lautsi, regarding the ‘treacherously simple’ notion of state neutrality.

Defining neutrality

The definitions and conceptions of neutrality embedded in the Lautsi case are not as colourful as those for the crucifix, but they too are worth close consideration. This especially because the difference in conceptions points to a far broader problem of not knowing what neutrality really should look like and how to achieve it in practice. According to the Italian government, neutrality requires the public administration authorities to take all religions into account, and neutrality is inclusive, while secularism is exclusive (Lautsi 2011, para. 35). Meanwhile, national governments intervening in the case argue that favouring secularism is a non-neutral stance (Lautsi 2011, para. 47), and state neutrality more or less entails ‘no change’ (specifically, it ‘requires authorities to refrain from imposing a religious symbol where there had never been one, and from withdrawing one that had always been there’) (Lautsi 2011, para. 48). Particularly interesting is the applicants’ assertion that neutrality requires the state to adopt the same attitude with regard to all religious currents (Lautsi 2011, para. 43), ‘in other words’ [emphasis mine], neutrality obliges the state to establish a neutral space within which everyone could live freely according to his own beliefs (Lautsi 2011, para. 43). Despite the expression ‘in other words’, clearly the two assertions do not express the same concept; yet such confusion about the term is common and conspicuous.

The concept of neutrality occupies the broad space between positive and negative identification of the state with religion; thus a range of intermediate positions lays claim to ‘the legitimacy-conferring notion of neutrality’ (Daniel and Durham 1999: 123). But as Daniel and Durham explain, there are significant differences in the conceptions of neutrality expressed by

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3 From a legal studies perspective, a number of scholars have conducted a comparison of Lautsi v. Italy and Salazar v. Buono. See, for example, Witte and Arold 2011; Mancini 2010.

4 Indicatively, in the context of a discussion on the Lautsi case at an Orthodox theological institute in Greece, one Orthodox bishop called for the ‘nationalisation’ of icons, a re-branding of the concept of icons as an art form expressing national cultural identity, in order to ‘protect them from European harm’ (see Fokas 2012).

5 Rikki Holtmaat (2004) uses this expression to describe equality but it applies equally well to neutrality in the current context of increasing discussions and debates about its meaning.
Sociology at the intersection between law and religion

each position. The range of ‘neutrality models’ includes state inaction (e.g., the original theory behind the no establishment and free exercise clauses of the first amendment to the US Constitution); impartiality (suggesting the state should always act in religion-blind ways); state monitoring of an open forum (providing a venue where various ideas can be represented, and perhaps positioning itself on the quality of the truth claims but trying to remain neutral in the process); substantive equal treatment (offering differential treatment where it may be warranted, e.g., an accommodationist church-state theory); and actualisation of substantive rights as an affirmative obligation of the state (Daniel and Durham 1999: 123–5).

In other words, there is a considerable ‘grey area’ around the concept of neutrality. To a large extent, this has to do with the ambivalent relationship between neutrality, on the one hand, and equality, equity, and non-discrimination, on the other. Does neutrality require that all religious groups are treated equally, or are certain privileges for one or a select few religious groups acceptable? Or if equity is the aim, then must a neutral state offer extra support to ‘weaker’ minority groups rather than treating all groups equally? For example, although the Lautsi applicants call for neutrality as ‘same attitude towards all religious currents’ (cited above), they also indicate that ‘it is essential to give special protection to minority beliefs and convictions, in order to preserve those who held them from a “despotism of the majority”’ (Lautsi 2011, para. 45). Finally, in increasingly religiously pluralistic environments, is established religion an anachronism (Morris 2011; Smith 2012) and antithetical to non-discrimination and thus also to state neutrality? These are all interrelated questions to which we may find clear answers in legal texts but in the sociological reality around us the situation is far more complicated.

The latter may be illustrated with reference to another grey area which has to do with ‘symbolic clauses’ embedded in constitutions and/or laws on religion indicating the ‘special’, ‘historic’, or ‘traditional’ role or place of one or more (but not all) religious groups in a given country. Such clauses are usually, in theory, only symbolic and carry no legal weight and may thus be compatible with state neutrality. In her assessment of various models of religion–state relations from a political liberalism perspective, Cecile Laborde (2013) suggests that state preference of one religion is acceptable as long as it is ‘purely symbolic.’ But sociological research around such clauses questions the possibility of the ‘purely symbolic’: regardless of legal weight, preambles and other texts singling out certain faiths often carry practical, negative implications for other faith groups and their members.6

As Heiner Bielefeldt, UN Special Rapporteur on freedom of religion or belief explains, ‘On an abstract level, requirements of equality and non-discrimination receive an almost unanimous approval . . . [but] when it comes to drawing the necessary consequences from such general professions, things are often less clear’ (2013: 53). Martha Nussbaum is a prominent voice in the discussion as far as the ‘abstract level’ is concerned. According to Nussbaum (2008: 2):

[L]iberty of conscience is not equal . . . if government announces a religious orthodoxy, saying that this, and not that, is the religious view that defines us as a nation. Even if such orthodoxy is not coercively imposed, it is a statement that creates an in-group and an out-group. It says that we do not all enter the public square on the same basis: one religion is the [national] religion and others are not. It means, in effect, that minorities . . . must acknowledge that their views are subordinate, in the public sphere, to majority views.

6 This is a finding of a European Commission-funded project on ‘Pluralism and Religious Freedom in Majority Orthodox Contexts’ (PLUREL), 2009–2012, conducted by the author (Fokas 2013).
The applicant’s argument in the 2009 *Lautsi* case echoes this type of reasoning: the presence of the crucifix in the classrooms ‘led to pressure being undeniably exerted on minors and the impression given that the State was estranged from those who did not share Christian beliefs’ (*Lautsi* 2009, para. 32).

This is where the notions of ‘even-handedness’ and ‘reasonable accommodation’ come in. What such terms mean in practice cannot be defined abstractly; they must, according to Bielefeldt, be worked out in a case by case manner: ‘[B]ut when there is goodwill on all sides, practical solutions can usually be found’ (2013: 57–8). Subsidiarity, of course, is aligned with this ‘case by case’ approach, though not always accompanied by goodwill.

### The unfinished business of subsidiarity

The Italian royal decree of 1924 which set out the prescription that schools display crucifixes reads as follows: ‘Each school must have the national flag and each classroom a crucifix and the King’s portrait’ (cited in *Lautsi* 2009, para. 20). This is a powerful statement of how these three things together – flag, cross and King – framed Italian national identity at the time. In its defence in the 2011 hearing, the Italian government claimed that ‘the presence of the crucifix was the expression of a national particularity’, characterised notably by close relations between the state, the people and Catholicism, attributable to the historical, cultural and territorial development of Italy and to a deeply rooted and long-standing attachment to the values of Catholicism (*Lautsi* 2011, para. 36). It is this framing of the issue as a matter of preserving national identity which factored significantly in the Grand Chamber’s decision to rule in favour of the Italian state.

And the principle of subsidiarity, which in turn leads to the doctrine of the ‘margin of appreciation’, and which in its turn calls for consideration of whether a consensus (across the 47 signatory states) exists on the matter in question, legitimised that decision.

The ‘matrix’ formed by the subsidiarity principle, the doctrine of the margin of appreciation, and the consensus doctrine, all developed through the European Court of Human Rights’ case law, has been the focus of a great deal of critique against the Court (Fokas, forthcoming). According to Benvenisti (1999: 851):

> In the jurisprudence of the ECtHR, consensus is inversely related to the margins doctrine: the less the court is able to identify a European-wide consensus on the treatment of a particular issue, the wider the margins the court is prepared to grant to the national institutions. Minority values, hardly reflected in national policies, are the main losers in this approach.

Beyond opening the Court to criticism of moral relativism, the particular combination of subsidiarity, the margin of appreciation and consensus also leads to claims of double standards, as differential treatment of Islam has been noted (Gunn 2012; Martínez-Torrón 2012). Richardson and Shoemaker (2008) make a similar argument about bias towards Christian Orthodox cases. According to one scholar, writing specifically in the aftermath of the *Lautsi* Grand Chamber decision, ‘In the mid-1990s, Lord Lester affirmed that the margin of appreciation “has become as slippery and elusive as an eel”. Now consensus, too, has become as slippery and elusive as the margin’ (Ronchi 2011: 296).

Key to the problem, as exhibited conspicuously in the *Lautsi* case, is politics, at two levels: national politics, and the politics of sovereignty between contracting states to the European Convention on Human Rights, and the European Court of Human Rights. In the 2009 decision, the margin of appreciation is mentioned on three occasions, each time by the Italian government.
In the 2011 Grand Chamber decision, the margin of appreciation is mentioned 27 times in total, and eight times in the final paragraphs of assessment, which is indicative of the importance the margin is imparted in the Court’s overall reasoning (Ronchi 2011). In that decision the Court declares, ‘the fact that there is no European consensus on the question of the presence of religious symbols in State schools . . . speaks in favour of’ granting the Italian state a wide margin of appreciation (para. 70). Further, in their joint intervention 33 members of the European Parliament stressed, in particular, the principle of subsidiarity.

Well before the Lautsi case arose, legal scholars presaged, in a way, the problems to arise around the margin of appreciation in its relation to subsidiarity and consensus and in developments leading to the 2011 Grand Chamber decision. In 1999 Benvenisti writes:

> Given the importance of State sovereignty, the only way to impose on State parties newly evolving duties is by resorting to the notion of emerging custom, or ‘consensus’. By resorting to this device, the court eschews responsibility for its decisions . . . Its decisions reflect a respect of sovereignty, of the notion of subsidiarity, and of national democracy. It stops short of fulfilling the crucial task of becoming the external guardian against the tyranny by majorities . . . One wonders to what extent it is really possible to envision credible threats by member States to challenge the court’s authority in reaction to unpopular judgements. One wonders also to what extent that threat is actually open to abuse by those who wish to justify the perpetuation of ossified and untenable positions. (852)

The above-cited quotations of course reflect normative positions on the role of the Court. These issues are far from straightforward. As Mancini (2010: 26) notes, the collective reputation of a court largely depends on the audience at which its opinions are aimed, and judicial authority ultimately depends on the confidence of its citizens. European publics anticipate subsidiarity in matters of national identity and of religion. But the basic concept of subsidiarity remains on trial: if we are to leave important matters at the intersection between law and religion to the discretion of judges, politicians, educators etc. at the ‘lowest’ possible level of governance, to ‘those who have detailed knowledge of the facts on the ground’ (Malik 2013), what will the end result look like in terms of religious freedom and non-discrimination?

A research agenda in motion

A great deal of research has undertaken or is undertaking the task of exploring the intersections between religion and law. Here I will pay special attention to three particular research programmes – one recently completed, one ongoing, and one just begun at the time of writing – which, with very different aims and methodologies, address some of the research gaps set out above.

Religare

One such programme is on ‘Religious Diversity and Secular Models in Europe. Innovative approaches to law and policy’ (Religare), funded by the European Commission FP7 framework programme (2010–2013). The programme was based at the Katholieke Universiteit Leuven and included 13 partner institutions conducting research in 10 countries. According to the

7 Belgium, Bulgaria, Denmark, Germany, UK, France, Italy, the Netherlands, Spain and Turkey.
programme’s website, ‘Religare is about religions, belonging, beliefs and secularism.’ 

Specifically, the programme set out to investigate the religious diversity in contemporary Europe with a focus on questions related to management of religious pluralism under state laws. Comparative and interdisciplinary, the project combined legal analysis with sociological data and qualitative interviews in order to produce a database of case law for the ten countries studied; a series of thematic templates summarising relevant legislation, court cases and controversies in various countries; and sociological reports based on the fieldwork conducted in six of the ten countries.

The project has formally drawn to a close but publications based on its findings continue to proliferate (see http://www.religareproject.eu).

The Religare programme used four different themes as entry points to the topic, themes from within which concrete cases could be selected with ‘the potential of showing where the hotspots are and of proposing possible solutions for the conflicts between religious and secular values’. These are the family; the workplace; the public space; and state support.

The work conducted within Religare on each of these themes bears some relevance to the research questions pinpointed in the first section above as a ‘call to sociologists’. But most relevant for our purposes are insights arising from the project to do with state neutrality. The research programme usefully frames the topic with the context in which religion–state regimes were formed and the disconnect with the present situations across Europe. This disconnect is expressed in the project’s final report as follows:

[I]n a rapidly globalising world, one can observe in Europe both a de-traditionalisation, in the form of the rise of the ‘unchurch’, and an emergence of new religious movements and alternative, non-institutionalised spiritualities . . . Is the gap between an increasingly unchurched majority sentiment and the legal regulation of religion still in force evidence of hypocrisy, ethnocentrism, or perhaps just bona fide neglect of a developing trend? And what are (still) legitimate policy aims in this changing societal context? 

(Foblets and Alidadi 2013: 5)

The programme’s final report suggests a project emphasis on the latter question rather than the former, which addresses some of the ‘why’ questions set out above. Realistically, a measure of hypocrisy, ethnocentrism and neglect can be found behind most problems stemming from a lack of neutrality in religion–state relations. I will return to the policy focus of the work below.

The Religare researchers are highly aware of conceptual problems around the term neutrality and avoid them by proposing one specific approach most suited, they argue, to managing religious pluralism in a healthy manner: this is ‘inclusive state neutrality’. This notion rejects a strict separation and a ‘strict neutrality’ in the state’s approach to religion: ‘experience shows that it is impossible to rigidly uphold a strict separation between and a strict neutrality towards religion and belief’ (Foblets and Alidadi 2013: 9).

The programme’s researchers also show preference for the term ‘even-handedness’ over that of ‘reasonable accommodation’. Discussions of the latter, they argue, tend to focus on the limits of what may be a ‘reasonable burden’ for a state or an employer, for example, to undertake in their efforts to treat different religious groups and individuals in a non-discriminatory manner.

8 See http://www.religareproject.eu, where one can also download a number of reports emanating from the project. Unless cited otherwise, the information provided on the Religare project is taken from this website.
However, accommodation should be treated as a two-way street, with due recognition to the concessions made by the citizens and employees in question.

Summarising the main argument regarding religion–state relations, the Religare team explain that ‘inclusive state neutrality’ and ‘justice as even-handedness’, when taken together, mean that the state’s policy should be fair to all in granting recognition to religions, beliefs and practices. The underlying principle of this approach is respect (Foblets and Alidadi 2013: 9).

In theory this concept sounds healthy and desirable, but the programme’s final report falls short of examining the factors and mechanisms which challenge this neat combination of inclusive state neutrality and even-handedness in practice and, particularly, at the local and national level. Perhaps ironically, it is to political theory that we turn for some insight on this particular question.

**RAFT**

A second research programme which promises to generate important insights related to the open research areas outlined in the previous section is that entitled ‘Is Religion Special? Reformulating Secularism and Religion in Contemporary Legal and Political Theory’ (RAFT). RAFT is a European Research Council-funded project, led by Cecile Laborde at the University College London and including a team of post-doctoral researchers with expertise in political philosophy, law, and intellectual history. The programme also entails a ‘RAFT lecture series’ showcasing the work of prominent international scholars in the study of religion and political theory. The series aims to interrogate the special status of religion (ethics, epistemology and practices) in Western political and legal theory. The programme began in 2012 and is due to be completed at the end of 2016. As such, the focus here is more on project aims rather than outcomes, which are not yet publicly available.

Laborde’s research question is highly innovative and provocative: does religion have a special status in political and legal theory and if so, why and to what effects? Assuming a contemporary shift towards ‘post-secular’ approaches for the relationship between religion and politics, the project aims to assess the implications of the latter. Laborde’s point of departure is that disconnect between claims of a separation between religion and state, on the one hand, and the practice of states giving special protection to religious beliefs and organisations qua religious, on the other.

Laborde builds well on distinctions between theory and practice, and the ambiguity in both on certain issues. For example, she argues that no one questions the basic Aristotelian principle of equality whereby equal treatment does not mean identical treatment. But she encourages a much more substantive exploration of the term as it is played out in practice by asking such questions as: Equality of what? What are we trying to equalise? The success of religious minorities, for example, in pursuing their aims? Or their opportunities to participate in society on equal terms? Often we fail to ask such questions because of overarching norms to which we are desensitised. Laborde makes this point with reference to the term Catho-laïcité, suggesting an ‘invisible sacred’ wherein a norm may be neutral but discriminate indirectly and yet go unnoticed.

One reads in the RAFT project description a foreshadowing of the type of judicial engagement with interpreting religious symbols and with value judgements of religions discussed...
in the previous section: indicating that state neutrality and religious freedom are two central features of the relationship between religion, law and politics, the research programme suggests that ‘what is rarely recognised by political and legal theorists is that these features rely on a distinctive understanding of religion, born out of the particular trajectory of western secularisation’. 10

The ‘special status’ of religion is described as particular to Western politics and law. Sociologists of religion find in this work a welcome break from the predominant singling out of the European context as exceptional mainly in its secularism. This research programme takes the concept one step further and finds European exception in the special treatment of (i.e., positive identification with) religion in legal and political theory, made possible precisely because of that secularisation trajectory. In so doing RAPT encourages a rethinking of the concepts of secularism and religion and of their actual influence on contemporary religion–state relations in the European setting. Emphasis is placed on transformation and mutation of religion in contemporary societies and on fundamental ambiguities in the secular project as a whole. The programme hypotheses that the specialness of religion is defensible in light of important political and legal ideals, but that it requires substantial modification in response to philosophical, anthropological, historical, political and sociological post-secular critiques.

Again, this research programme is ongoing, without published results at the time of writing. But in the light of the stated gaps in research, the results may be eagerly awaited.

**Grassrootsmobilise**

Grassrootsmobilise is the short name for the research programme with the rather long title ‘Directions in Religious Pluralism in Europe: Examining Grassroots Mobilisations in Europe in the Shadow of European Court of Human Rights religious freedom jurisprudence’. 11 This too is a European Research Council-funded project, for the duration of 2014–end 2018, led by the author of this chapter at the Hellenic Foundation for European and Foreign Policy (ELIAMEP). Like Religare, it is a multidisciplinary programme, involving four postdoctoral researchers, three ‘team member’ scholars and a 13-member advisory board, representing legal, religious, theological, political, sociological, and historical studies. The research in the Grassrootsmobilise programme will entail fieldwork conducted in four countries – Greece, Romania, Italy and Turkey – examining ‘grassroots mobilisations in the shadow of the Court’s case law’, as well as mobilisations and lobbying around religious freedoms case law at the ‘tree tops’, as it were, at the transnational European level.

The rationale for this programme relates to the current juxtaposition of: the extreme state of flux currently characterising the place of religion in the European sphere, both at the European and national level and thus also instigating major crises of identity as the Christian component of national identities and of European identity is being challenged by secularisation (with ‘Islam’ as a real or perceived factor in this); intense negotiations of religion–state relations in the light of the above (where minority religions are pursuing their religious freedoms and, in many cases, majority religions are fighting to maintain the status quo of their privileged positions); and a European institution (the ECtHR) increasingly passing judgments related to religion–state relations and the place of religion in the public sphere, both because of and in spite of all of the above.

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10 Unless indicated otherwise, details about the RAPT project are taken from Cecile Laborde’s webpages on the UCL website (http://www.ucl.ac.uk/spp/spp-news/311010).
11 For more information, see http://www.grassrootsmobilise.eu
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The latter makes the ECtHR an important space to be watched by sociologists. The impact of the Court’s decisions, in terms of their implementation (or non) at the national and local level is one critical dimension. Another, thus far unexplored, dimension is how the Court’s decisions define the ‘political opportunity structures’ and the discursive frameworks within which citizens act. What is the aftermath of the Court’s religion jurisprudence, in terms of its applications (beyond but also including its implementation) at the local and national level? The question is important because ECtHR case law will shape, to a large extent, both local and national level case law and – less conspicuously but no less importantly – grassroots developments in the promotion of or resistance to religious pluralism. Both the grassroots developments and the local and national case law will, in turn, influence the future of the ECtHR caseload. The research programme works with the hypothesis that such mobilisations, at local, national and international level (i.e., at the grassroots and ‘treetops’), are one place we need to look to understand directions in religious pluralism in the European setting.

There is much debate in legal scholarship about the ultimate influence of case law over the issues which it targets. Do court judgments make a difference? This is a line of questioning well developed in the US but less so in Europe. In the US context scholars have argued that courts have little direct and independent impact on citizens’ behaviour and thus the notion that they can bring about social change is a ‘hollow hope’ (Rosenberg 1991): the courts’ decisions are implemented in practice and can influence policy only as long as they find support among government decision-makers. This line of argument suggests that courts by themselves are not very powerful and, at best, are important at the margins or in conjunction with other governmental bodies. Adding to this point the fact that actual resort to judicial intervention is more the exception than the rule, the message one gets is that courts are not always ‘where it’s at’: we need a closer look at the margins, and at local and national level developments on matters of religious pluralism.

An alternative approach then, and that taken in this programme, suggests an examination of what is happening in the aftermath of a law or judgment, at the grassroots level (as well as prior to judgments at the ‘grasstops’, among politicians, judges and NGOs). This ‘decentred’ approach shifts attention from the direct effects of case law and recognises that court decisions can significantly facilitate the placement of issues on the public agenda and thus serve as catalysts for significant social change – what Stuart Scheingold (1974) calls the development of a ‘politics of rights’. According to Scheingold, marginalised groups may capitalise on perceptions of entitlement associated with particular legal developments in order to initiate and to nurture political mobilisation. This process of ‘rights consciousness raising’, is a significant point at which law matters for many social movements.

Cross-cutting themes

One theme arising from the discussion of open research questions and current research projects regards the role of courts and their limitations. The intense scholarly debate around the Lautsi decisions revealed, at one level, a deep division among scholars on what the role of courts – particularly but not only supranational ones – should be in managing difficult matters at the intersection between religion and law. Several commentators cited above expressed high expectations of the European Court of Human Rights, both seeking European-level remedies for problems encountered at the national level and assuming that non-intervention entails non-universalism of human rights principles in so far as the European Court is concerned. Others emphasised instead the importance of the principle of subsidiarity and of national sovereignty on matters to do with religion (and identity and culture). Though the limitations of the ECtHR
were acknowledged by some (Benvenisti 1999; Mancini 2010), the accusation against the Court for not holding fast to its principle remains, and there is insufficiently developed discussion on whether, indeed, a court is the best place to resolve such issues.\footnote{I thank Javier Martínez-Torrón for emphasising this point in conversation with me.}

The Religare programme addresses this question with policy recommendations that would, in principle, resolve such sticky points between religion and law with legislative changes reflecting the two principles of ‘inclusive state neutrality’ and ‘even-handedness’. These proposals are set out in a text aimed mainly at informing EU policy and as such the proposals hit the right ‘pitch’, for the supranational level that is. However, for substantive change at the local and national level these proposals seem rather vague and somewhat distanced from the types of practical barriers to their implementation. For example, intense lobbying of the state by majority religious groups, where applicable and effective, and the political costs feared by politicians.

In this sense one remaining research gap is a response to one of the questions set out by Religare cited above: Is the gap between an increasingly unchurched majority sentiment and the legal regulation of religion still in force evidence of hypocrisy, ethnocentrism, or perhaps just \textit{bona fide} neglect of a developing trend? The answers to this question, for different national and local level contexts, are interesting in and of themselves for scholars, but for effective policy-making purposes, they are necessary, especially at those national and local levels. Without such insights in terms of explanations of the problems at hand, and the factors and mechanisms keeping them in place on the ground, concepts such a ‘inclusive state neutrality’ and ‘evenhandedness’ may be too far removed from the realities on the ground to be effective.

The RAPT programme is helpful in this regard, in emphasising the importance of asking detailed and practical questions, all the while maintaining a keen awareness of the invisible norms in place which tend to suppress the impulse for asking such questions. We may expect that the results of this research project will help scholars to understand better and to anticipate the tendency of courts and other state institutions to treat religion as special. Then on the basis of the latter we are in a better position to assess the reasonable boundaries for the ‘special treatment’ of religion. Scholars will likely be warned that if we hope to change this ‘specialness’ of religion within law, this will require much deeper change than might be expected because the special place of religion has far deeper roots than we tend to acknowledge – especially in Europe.

On the notion of neutrality the Religare programme significantly pushes the boundaries of the research by offering a thorough and empirically based exploration of the contours of equality and inequality, and of various forms of direct and indirect discrimination. The qualitative fieldwork conducted in the six selected countries for case study research yielded a rare and constructive groundedness in the project researchers’ exploration of neutrality as a concept and as a practice. The research results lend support to the notion that solutions are best worked out on a case-by-case basis, yet at the same time the project as a whole geared itself towards influencing European-level policy making. And certainly this project was fairly exceptional in its active engagement with policy makers throughout the research conducting and reporting process. It will be very interesting to follow the reception and impact of the Religare findings in both the academic and political spheres.

The question of whether neutrality requires non-establishment is highly relevant in the European context, and troubling to sociologists and lawyers alike. It is interesting to note that the main body of the European Convention on Human Rights lacks a general provision requiring the equality of all people before the law, and instead only prohibits discrimination in regards to rights set out explicitly in the Convention (Evans and Thomas 2006: 703). Thus in its case law,
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the ECtHR has held that establishment is not in itself a breach of the Convention but is only prohibited to the extent that it implicates one of the other Convention rights. The twelfth Protocol to the Convention, introduced in 2000, entails a broadening of the scope of the anti-discrimination requirement by stating that the enjoyment of legal rights must be ‘secured without discrimination’ on a number of grounds, including religion. However, according to Evans and Thomas, ratification of the twelfth Protocol is unlikely to make a great difference in this regard ‘because of the generous approach the Court has taken to state claims of an objective and reasonable basis for making a distinction between religions’ (2006: 717).

Of course, to an extent the ‘generosity’ of this approach is in the eye of the beholder. Malcolm Evans sees in the Court’s engagement with the question of religious neutrality ‘an attempt to brush aside the reality of church-state relations and with it a foundational element of national identity in many member states of the Council of Europe’ (Evans 2008: 303)

With this point we return to the principle of subsidiarity and to the question posed in relation to it above: what would the end result look like in terms of religious freedom and non-discrimination if subsidiarity were observed much more faithfully? This too is a highly relevant question at the current juncture, particularly given the review process under which the Council of Europe has placed the future of the entire European Convention on Human Rights and European Court of Human Rights system. But its applicability goes well beyond the European context: the subsidiarity principle is central to most of the federal systems across the world.

According to one perspective, subsidiarity ‘has long been admired for its ability to protect localized, diverse interests from the tyranny of a national majority’ (Bednar 2014: 1). This suggestion provokes a consideration of how well subsidiarity works at the various levels of governance. In the EU and the ECtHR context, equally conspicuous (if not more so, depending on the eye of the beholder) is the function of subsidiarity to protect the national majority from the ‘tyranny’ or threat to national sovereignty represented by ‘Europe’. Many will see the recent adoption of Protocol 15 to the European Convention on Human Rights, which inserts a reference to the principle of subsidiarity and the doctrine of the margin of appreciation into the Convention’s preamble, in this light; i.e., as a move to project national majorities from the threat to national sovereignty represented by the Court.

In Europe and beyond, finding the proper limits of subsidiarity is a constant struggle. One certain gap in scholarship is insight into exactly how subsidiarity operates in comparative context, across country cases and, simultaneously, vertically within each country case.

13 As of October 2013, 37 of the 47 Council of Europe member states are signatories to this twelfth Protocol, but only 18 of these have ratified (Greece s/nr (= signed, not ratified); Bulgaria ns.nr; Romania s/r; Russia s/nr. Other ns/nr: Denmark, France, Norway, Sweden, Switzerland, UK).

14 For example, in Iglesia Bautista v. Spain (1992), the Court ruled that because of the Spanish Concordat with the Catholic Church, awarding privileges for the Church in exchange for obligations placed on the Church, e.g., maintenance of certain historical places and objects, is an objective and reasonable basis for distinctions between treatment of the Catholic Church and other religious institutions. This case bears strong relevance to most Orthodox cases, where agreements and ‘exchanges’ on similar historically embedded grounds underlie many privileges enjoyed by the Orthodox Church.

15 For more information visit the Council of Europe’s webpage set up for this reform process: http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/consultation_en.asp

16 According to Calabresi and Bickford (2011), “We live in an Age of Federalism” with at least 12 of the G20 countries having federal constitutional structures (including the US, Canada, Germany, Australia, Argentina, etc.), and several others experimenting with federalism and the devolution of power (UK, Spain, Belgium, Italy, Japan).

17 Protocol 15 was adopted on 24 June 2013.
The latter is not a direct aim of the Grassrootsmobilise programme: more so the project relates to the first cross-cutting theme addressed above (the limits of the courts), in terms of turning attention from the direct effects of court to the indirect effects. However, painting a relevant picture of the various levels of subsidiarity in cross-country comparative perspective based on the in-depth fieldwork to be conducted in the four country cases is certainly possible and would yield useful results.

As it stands, by conducting in-depth interview research at the grassroots level over a five-year period, the programme should also generate important insight into what our world would look like if subsidiarity in the religious domain were to take stronger effect, placing power more in the hands of governments, and alternatively, of local authorities.

Concluding remarks

The topic of what sociology can contribute and/or has failed to contribute to our understanding of the intersections between religion and law is vast, and I have been necessarily selective both in highlighting potential contributions and in exploring a number of related research programmes. Both selections suffice though to communicate three basic concepts.

First, there remains a great deal of work to be done by sociologists in understanding, anticipating, and managing the potential effects of court approaches to law and religion. The same applies for the concept of neutrality: we are far from achieving interpretations, much less policies, that can be recognisable universally and effective locally, nationally and supranationally, and the current state of the research gives us pause to consider whether we do well to pursue that particular aim: contextualisation and translation of terms may prove better use of our time and energy. As for subsidiarity, at the current juncture scholarly perspectives seem to be dominated by normative approaches on either side of the subsidiarity/national sovereignty side (and there are other relevant dichotomies too, but with the same vulnerability). Quality grounded empirical research into how subsidiarity actually works and at which level will help dispel some of that normativity and serve as a firmer foundation for policy change.

Second, and as one might surmise based on the research projects described above, this work cannot be conducted effectively from within a single discipline: the nature of the questions ahead of us requires in-depth understandings from a broad range of disciplines, well beyond law, sociology and religion. Ideally we can perceive this as a welcome opening to exchange and engagement with other disciplines rather than as an intimidatingly steep learning curve ahead of us.

Finally, there is an important element of timing to all of the above. The rapid proliferation of voices, blogs, research projects, policy meetings, etc., all centred around religion and law largely reflects a pattern of reacting to events/debates/crises/cases etc., that take place at the intersection between religion and law and at alarmingly rapid rates. Meanwhile social change unfolds, legal change develops, and at different paces. It is not always clear which is in the lead in a given moment. The latter fact calls for a more active engagement with the historic and structural forces underlying changes we observe, rather than scholarship which either follows or reacts to the great wealth of information on law and religion now always at our fingertips.

Bibliography


