This chapter seeks to investigate the interplay among religion, politics and law through the prism of the main European constitutional and legal patterns in the framework of the European Court of Human Rights (ECtHR). Although influential scholars have emphasized the irreconcilable divide among them as the paradigm of modernity, a clear separation seems an unmanageable issue. At present, in modern democratic societies, religion has a growing role in the public sphere, legal systems must cope with “deep” religious diversity and the rise of an institutional dimension of religious freedom, and religious claims generate fierce judicial litigation. Moreover, there is increasing political and social polarization on extremely divisive moral-ethical issues, which gives rise to new “culture wars”, and nationalist-populist parties are driving forces which promote the politicization of religion. In the European scenario there is not a uniform legal approach toward religion: there is variable geometry concerning what is religion, whose religious freedom deserves protection, what degree of religious freedom can be granted in postsecular societies, and whether and to what degree third parties can suffer the impact of the exercise of religious freedom.

This chapter analyses the increasing complexity of the interplay between religion law and politics in Europe focusing on new challenges (including migration flows, health crisis, new religious movements, gender discrimination, conscientious objection and ethical pluralism) and recent legal changes, with a view to tracing future common legal trajectories.

The religious turn in the public space

In contradiction to the traditional theories of secularization and modernization, which predicted the disappearance of “the sacred” from the public discourse, the interplay between religion law and politics in Europe has given rise to new challenges to the two main pillars of a “secular age” (Taylor, 2007): the state and market economy (Casanova, 1994). Although influential scholars have emphasized the irreconcilable divide among them as the paradigm of modernity (Habermas, 2008; Rawls, 1971), a clear separation seems increasingly a controversial issue (Miller, 2016, p. 841). All over the world, there is a “religious revival”, generating two threatening trends: on one hand, the development of extremist strands (Christian...
The interplay among religion, politics and law in Europe

Fundamentalism, Revivalist Islam, Pentecostalism, Hindu and Buddhist nationalism), showing prejudice and skepticism toward “the others” (Hirshl and Shachar, 2018, pp. 515–531); and on the other hand, the emergence of transnational religious actors, spreading their message beyond national borders with a view to influencing public discourse (Haynes, 2001, p. 143). The crucial question is whether religion is a threat for constitutional order or whether it can be a driving force in the pursuit of more sustainable and inclusive public policies.

Indeed, modern democracies are expected to offer answers to the increasing demands of religious, cultural, moral, ethical, social and gender pluralism, and they have to cope with new social and religious actors claiming accommodation of their diversity. The clash between religious claims and the state need for neutrality are generating a process of increasing “juridification” (Aidadi and Foblets, 2012, p. 399). Western legal systems show their inability to provide satisfactory legal responses, emphasizing a process of “crisis of the rule of law” (Casuscelli, 2021, pp. 1–16), where the courts are becoming the main arena in which religious issues are regulated. The crucial concern is whether religion can be part of the problem or part of the solution with regard to new legal and political challenges and whether and to what extent they can give a contribution to the negotiation of diversities with a view to building a cohesive society. However, it goes without saying that in a multicultural society, religion can give rise to social conflicts, and a state has to identify effective mechanisms of management of religious diversity.

The re-politization of religion in a secular age

Thirty years ago, Richard John Neuhaus predicted the failure of a democratic model founded on the neutralization of religious presence in the public space (Neuhaus, 1984). Indeed, since ancient times religion has played the key (direct or indirect) role of factor of legitimacy of power. Commentators have analyzed the current interplay between religion and public space. They have dismantled both the connection between modernity and secularism, emphasizing the notion of “multiple modernities” (Eisenstadt, 2000, pp. 1–29) and eroded the link between secularization and the need for a privatization of religion (Casanova, 1994).

Furthermore, commentators have identified various factors justifying the impact of religion on state public policies, ranging from the establishment of a theocratic system to the rise of models of secular religion aimed at neutralizing religious influence (Mazurkiewicz, 2020, pp. 1–20).

Since Iran’s Revolution in 1979, led by Ayatollah Sayyid Ruhollah Musavi Khomeini, there has been a resurgence of religion in the public sphere. There is little doubt that such a phenomenon relates to a massive “repolitization” of religion in various parts of the world (Mancini and Rosenfeld, 2020, p. 471). A series of events, such as the pivotal role of the Catholic Church in the dismantling of the Communist regime in Poland and in Latin American political conflicts, the growth of religious parties in Turkey and Israel, the development of religious nationalist movements in India, Christian nationalism in the US context (Casanova, 2000), and the rise of populist Christian neo-nationalism in central and eastern Europe, such as the Solidarity movement in Poland (Casanova, 2021, pp. 5–6), shows such a religious turn at a global level, with approaches ranging from conservative to progressive. The Catholic Church gave its own contribution to this trend, as since Pope Benedict’s pontificate it promoted a new doctrine aimed at emphasizing the convergence between faith and reason, whose result is a universal moral law (Cartabia and Simoncini, 2015, pp. 3–9). According to influential scholars the main causes of “de-secularization” (Berger, 1999) are the crisis of secular ideologies, globalization and new technological developments (Ferrari, 2008, p. 10).
Such a “return of religion” has also promoted the development of competing narratives: although during the Cold War the issue was “eclipsed by the gigantomachia between capitalism and communism”, new patterns of “secular religion” have arisen (Ungureanu, 2012, pp. 1–2).

However, the role of religion in the public space has become a divisive issue which polarizes political debate, provoking an increasing “juridification” (Alidadi and Foblets, 2012, p. 399) of religious issues, supported by nationalist-populist parties emphasizing “culture wars” (Mancini and Rosenfeld, 2018, pp. 1–20) between secular and religious forces, and exacerbating the issue of accommodation of religion in modern democratic systems. Furthermore, the recent health crisis due to the spread of Covid-19, and the consequent restrictive measures indirectly affecting religious exercise have highlighted concerns about the special treatment of religion (Madera, 2020, p. 2) and have given rise to new religious discriminations and forms of “authoritarianism” (Hill, 2020, p. 1–19).

The controversial legal definition of religion

Dealing with religion in modern secular societies implies the search for a legal definition of religion. Although the issue has been analyzed by other sciences (Bellah, 1964, pp. 358–374), providing a legal definition seems an “undertaking bound for failure” (Miller, 2016, p. 841). However, the lack of state competence in providing a definition of religion clashes with its status of recipient of legal protection (Pacillo, 2007, p. 69). Indeed, the multiple phenomena that can be defined as religion have caused the abandoning of a theocentric view of religion and the need for a transcendent dimension, although a more cautious approach has been adopted toward new forms of spirituality and new religious movements. Following new theological trends, US case law has ranged between a functional and an analogical approach with a view to defining the scope and limits of religious accommodation (Madera, 2018, pp. 539–542).

The European approach to religion is extremely complex. Influential scholars have reversed the old stereotype of the clash between a religious America and a secular Europe, arguing that modernity is increasingly entangled with pluralism (Berger, Davie and Fokas, 2009, p. 12). Although some years ago the decline of traditional Christian churches was theorized and the rise of a new trend toward “believing without belonging” (Davie, 1990, p. 455), mainstream religions have “regained a strong public profile” showing their ability to “mobilize resources” (Griera, Ariño and Clot-Garrell, 2021, p. 2) and to influence public policies.

In Europe, states had to balance claims of public visibility of religion with preservation of public safety (Torfs, 1999, p. 37). Nowadays the controversial distinction between religions and sects shows increasing inadequacy in a context where secular ideologies (such as, secular humanism) and positions regarding the nonexistence of God (such as, atheism and agnosticism) claim increasing room in the public space.

ECtHR case law has adopted an inclusive approach, which has moved beyond the borders of established religions, covering both religious and philosophical beliefs. Thus, legal protection extends to all claims of conscience, including deeply held secular convictions. Furthermore, the ECtHR sets broad standards to define what deserves protection under the paradigm of religion, explaining that a belief must “be genuinely held; be a belief and not an opinion or viewpoint based on the present state of information available; be a belief as to a weighty and substantial aspect of human life and behaviour; attain a certain level of cogency, seriousness, cohesion and importance; and be worthy of respect in a democratic society, compatible with human dignity and not conflict with the fundamental rights of others”.1
The protection of religious diversity at European level

Within the ECtHR framework, the right to religious freedom is grounded on a robust architectural structure, aimed at protecting such a right in its internal and external, public and private, individual and collective dimensions. Although the protection of the internal dimension of religion is absolute, the external dimension cannot be immunized from a balancing process with other competing values. The ECtHR has been often charged with the task of striking balances, following well-known standards of necessity and proportionality. Such a task is extremely complex as European states do not implement a uniform definition of religion, adopting models of church-state relations ranging from established churches to cooperation and separation. Differing views of neutrality can result in “absence of coercion”, “absence of preference” and “exclusion” of religion from the public space (Ringelheim, 2017, pp. 1–24), resulting in differing “exclusive” or “inclusive” approaches to religion (Vanbellingen, 2015, p. 237).

According to some scholars such religious neutrality is part of the problem and not the solution: indeed, such neutrality seems a contradiction in terms as it barely masks its promotional attitude toward Christian faiths as well as indirectly singling out religious minorities (Ungureanu, 2012, pp. 1–18). However, we cannot underestimate that the current situation is the result of fierce conflicts between states and religions during previous centuries, which affects the current settlements. Taking into serious account different historical, social and cultural contexts, the ECtHR is reluctant to interfere in disputes where state relations are concerned and grants a broad margin of appreciation to national models of managing religious diversity.

Furthermore, we cannot underestimate that although its gradual process of transition from economic unity to the building of a political and social structure, the European Union (EU) does not hold any power in the field of religion. Article 17 of the Treaty on the Functioning of the European Union states that “The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States”. However, Article 17 also states European “recognition of the identity of the specific contribution” of religious and philosophical organizations, in the pursuit of an “open, clear, regular dialogue” with them. The crucial concern is whether and to what extent the clause implies that the EU is empowered to influence domestic policies and to implement such a dialogue (Mazzola, 2014, p. 3).

EU enlargement through the inclusion of countries of central and eastern Europe has emphasized the pre-existing conundrum, providing a new comprehension of Europe as a multi-religious space (Leustean and Madeley, 2013, pp. 3–18) where religious communities play the role of increasingly powerful transnational actors able to influence the political discourse (Haynes, 2001, p. 143).

The entanglement between politics and religion: the Islamic exception

During the last 50 years, in the European scenario, freedom of religion issues has underlined the tension between religious “deep diversity” (Alidadi and Foblets, 2012, p. 389) and an increasing “secular anxiety” (Nussbaum, 2012).

Migration flows and the rise of new religious movements emphasize new tensions in liberal democratic systems and the need for new ways of management of religious diversity, in the pursuit of a genuinely inclusive society (Foblets, 2017, pp. v–xii). In Europe religious diversity has been problematized rather than considered as a driving force able to trigger new social dynamics.
Adelaide Madera

(Alidadi, 2017, pp. 1–24), which emphasizes the inadequacy of both the models of assimilation and religious particularism (Madera, 2020, pp. 157–158).

Islamic religious claims of visibility in the public space have contributed to erode the idea of religion as a private issue and have given rise to an “alarmed” legal reaction, underlying political and cultural tensions (Ferrari, 2016, pp. 10–11). Focusing on the collective dimension of religion, Islam has put under stress an established European individualistic view of religion, more in line with the liberal approach of the ECtHR (McCrea, 2014, pp. 73–90). In an era of financial crises, increasing Islamic migration has exacerbated religious intolerance and skepticism toward the “other”, triggering fear about a political Islam which could represent a risk for democratic values (Colaianni, 2020, pp. 1–11). Many European countries have enacted restrictive migration policies and even discriminatory tests of selection of migrants, with a view to preserving the “Christian heritage” (Forlenza and Turner, 2019, pp. 6–7). During the most recent presidential elections in France, a commentator raised concern about a French politics’ “normalization of anti-Muslim sentiment” (Whiteman, 2022).

Growing Islamophobia is barely masked behind concern for the maintenance of public order, public safety and social cohesion. Such an otherization of Islam is increasingly connected with threatening religious political approaches which adopted an “anti-pluralist” and illiberal narrative (Danchin, 2011, p. 742) and a re-interpretation of human rights which exacerbates the marginalization of vulnerable minorities (Mancini and Rosenfeld, 2020, p. 469).

On one hand, religious nationalism has contributed to the development of an idea of national identity strictly connected with majoritarian religion, to the detriment of minority religions, deemed as a risk for social cohesion. As an example, in Poland, the Catholic heritage gave a valuable contribution to shape the post-communist regime, as well as other eastern countries taking advantage of religion to forge a new political identity (Russia, Bulgaria, Hungary) (Mancini and Rosenfeld, 2020, pp. 484–485).

It goes without saying that a nationalist approach to religion “selects” those aspects of religious doctrine which are coherent with its political aims and ignores “counterproductive” aspects of a faith (Mancini and Rosenfeld, 2020, p. 486).

An emblematic case is provided by Hungary, where the emphasis on a Christian identity in the Preamble of the Constitution turns into an anti-Islamic and anti-refugee xenophobic rhetoric in Orbán’s nationalism (Lamour, 2022, pp. 317–343). In Italy, certain right-wing politicians make political use of religious symbols and try to take advantage of Catholicism to promote anti-immigrant policies and anti-Muslim narratives, in contradiction with the Catholic Church’s attitude toward migrants (Caiani and Carvalho, 2021, pp. 211–230).

On the other hand, religious populism promotes a restrictive view of “the people” under the leadership of a “prophet”, which excludes those who do not share the mainstream religion, nationality, ethnic group (i.e. the populist regime in Hungary) (Lamour, 2022, pp. 317–343). Thus, religion has become a “marker” to distinguish insiders and outsiders, giving rise to “sacralized politics” and generating populism’s abuse (Greece) (Mancini and Rosenfeld, 2020, p. 491; Zúquete, 2017, p. 453). In many European countries (such as France, Austria, Germany and the Netherlands) certain political leaders have taken advantage of this “anti-strategy” funded on the need to protect a collective identity against the threat coming from “the others”, with a view to gaining electoral support, raising the risk of dismantling the core values of a democratic regime (Hirshl and Shachar, 2018, pp. 515–531).

With specific regard to Islam, some European countries, for example France, have enforced laws banning the use of religious attire in public spaces, or at least in certain public settings, embracing an assertive notion of secularism. Here, the indirect targeting of the Islamic veil symbolizes the national pattern of interaction with Islam (Tabatabai, 2011, p. 26): it has become a
The interplay among religion, politics and law in Europe

kind of self-proclamation of a secular national identity of a state engaged in a “religion of laïcité” (Dieni, 2006, p. 101). Indeed, the state has exacerbated a model of exclusive secularism which neutralizes religious claims and refuses alternative views of modernity (Licastro, 2018, pp. 1–29; Madera, 2020, p. 44). More recently, some countries have enforced laws banning face coverings (Howard, 2019, pp. 23–25; Narain, 2015, pp. 41–69; Madera, 2020, p. 158). Furthermore, prejudice and skepticism against Muslim communities have given rise even to defensive legal reactions towards applications for constructing/opening worship places (i.e. the minaret controversy in Switzerland). In Sweden, a Muslim woman was not recruited because of her religiously based refusal to shake the hand of her manager.2

European case law has been accused of subjectivity and unpredictability, and even of “secular fundamentalism” (Thornon Plessner, 2012, pp. 63–74) as it introduced a kind of “Islamic exception” (Chaibi, 2016–2017) barely masking an “asymmetric” treatment of majority and minority claims (Madera, 2020, p. 69).

Although the ECtHR has in several judgements reiterated that the role of state authorities with regard to religious matters “is not to remove the cause of tension by eliminating pluralism, but to ensure that competing groups tolerate each other”,3 its language fails to convey a message of inclusion and integration of minorities.

Upholding domestic exclusive views of neutrality (France and Belgium), the ECtHR defined the Islamic veil as a “powerful external symbol” having some kind of “proselytizing effect”, and unable to promote religious dialogue and tolerance4; likewise the European Court of Justice (ECJ) was reluctant to adopt an accommodationist approach toward Islamic clothing in the workplace.5

Instead, majoritarian symbols have been perceived as a “passive”, harmless and socially acceptable manifestation of religion. Their display is justified due to the overlapping of religious and cultural factors to the detriment of minorities who do not identify with such symbols. The presence of majoritarian symbols in public institutions identifies an “official state culture” which coincides with the majoritarian narrative, to the detriment of minorities whose marginalization risks being emphasized (Mancini and Rosenfeld, 2020, p. 506). As an example, in Romania the so-called “war of icons” emphasized a deep internal division within Romanian society about the role of the Orthodox Church in the definition of national identity, and a dangerous identification of religion with a certain approach to morality (Mancini and Rosenfeld, 2020, p. 507; Horvath and Bakó, 2009, pp. 189–206). Another example concerns the display of the crucifix in Italian classrooms, justified as an element of national identity, which promotes the building of social cohesion.6 The Lautsi case, which culminated before the ECtHR, was litigated before the administrative domestic courts, according to which the crucifix incorporates social values shared by believers and non-believers, such as dignity, tolerance and freedom and is coherent with state secularism, and teaches students to refuse fundamentalism (Toscano, 2011, pp. 1–48).7 The case reached the ECtHR, giving rise to a lively debate about the role of Christianity in the public space and the future identity of Europe (Mancini and Rosenfeld, 2020, p. 508). At a first stage the court condemned Italy, holding that the display of the crucifix conflicted with parents’ freedom to educate children according to their religious beliefs. However, the Great Chamber of the Court reversed the judgement. The overturning was the result of the shared effort of multiple actors forming a coalition, including ten confessional member states, the Vatican, the Orthodox Church and American conservative evangelicals. Such litigation is said to demonstrate a battle of Christian forces against secularism and relativism (Puppinck, 2010).

According to Forlenza and Turner, this is nothing new: European identity has been traditionally defined through “boundaries between ‘us’ and ‘them’”; nowadays such “religious borders” seem to be revitalized and they more strongly “challenge established forms of political
legitimacy, influence politics and policies and demand a reformulation of the rights and duties of citizenship” (Forlenza and Turner, 2019, pp. 6–7). However, in a global society every individual has multiple affiliations, and the authors argue that “narrow frameworks” are unable to “capture the complexity” of the European landscape (Forlenza and Turner, 2019, p. 7). Provided that European identity has become a more nuanced and complex issue, new political approaches are urged in the pursuit of a striking balance between the integration of diversity and preservation of social cohesion (Madera, 2015, pp. 9–17).

The rise of “culture wars” on ethical and moral issues in Europe

However, new challenges concern both religious minorities and mainstream religions. The rise of religious diversity due to immigration flows has coincided with the decline of historic churches. An analogous situation has been experienced in eastern Europe where, after the dismantling of the Iron Curtain the coalition between an atheist state and the official churches enjoying a privileged status was overthrown. Although mainstream religions have given an undeniable contribution to the building of European cultural heritage, they have no longer the ability to affect the convictions, the conduct and the lifestyle of most Europeans. On this point, Gracie Davie underlines that “Europeans are rapidly losing the concepts, knowledge and vocabulary that are necessary to talk about religion” (Davie, 2016, p. xvii–xx). Furthermore, in an open and free marketplace of religion, mainstream religions are no longer providers of a common ethos and a shared morality. Although in the past religious doctrines had an open and incisive influence on political choices, today states are no longer inclined to fully align with traditional religious doctrines, and there is an unavoidable clash between certain religious approaches (including the Catholic Church, conservative evangelicals, Orthodox Judaism, etc.) and liberal constitutional views.

Conflicting views generate increasing political and social polarization on extremely divisive moral-ethical issues, which gives rise to new “culture wars” (Mancini and Rosenfeld, 2018, pp. 1–20). They give rise to new dynamics in political processes (comparable to the recent American experience), namely to a strategic attempt of “preservation through transformation”: where mainstream religions have lost their ability to influence political processes in order to promote the enforcement of laws coherent with their religious-moral tenets, they “speak as minorities” and claim for broad exemptions to general rules, in order to restrict their range of application (NeJaime and Siegel, 2018, p. 187). Nationalist-populist parties are driving forces which emphasize such a “new generation” (Mancini and Rosenfeld, 2018, pp. 1–20) of conscientious objections. It goes without saying that certain religious leaders’ words have a valuable influence on the public discourse. However, in recent years there has been an increasing religious mobilization in terms of “cause-lawyering religious litigation”, “religious freedom agenda” activism, and lobbying, to promote and influence religion causes at a global level (Hirshl and Shachar, 2018, pp. 515–531).

In the clash between liberal constitutional language and religious claims, the rise of transnational religious actors is a factor of the equation that should not be underestimated. According to Hirshl and Shachar, religious “interests and resources may be managed on a global scale that evades the grip of any single state-based constitutional order” (Hirshl and Shachar, 2018, pp. 515–531).

Mancini and Rosenfeld argue that “nationalist and populist actors cast religious arguments in the language of ‘natural law’, to attack the very legitimacy of the dominant conception of constitutionalism and its nexus to institutional secularism, and to delegitimize the ‘culture of
The interplay among religion, politics and law in Europe

rights,” in the pursuit of a “selective” approach to human rights (Mancini and Rosenfeld, 2020, p. 485). Such an approach implies an over-expansion of conscience claims against general laws in contradiction to traditional religious morality (reproductive rights, same-sex unions, assisted suicide).

Indeed, there has been an increasing judicialization of religion where the judicial arena has become the main arena where a clash of values is fiercely litigated. “Judicialisation” raises the risk of a dangerous change in the balance of powers among the three powers of government, where the role of the lawmaker is “marginalized” (Casuscelli, 2021, pp. 1–16), reduced merely to provide detailed legislation following the court’s addresses. In this way, the lawmaker is exempted from regulating controversial issues, and the judiciary is charged with “tragical choices” (Calabresi and Bobbitt, 1978) between religious claims and competing interests. In what follows, I will examine three situations where the political use of religion risks substantially undermining public policies aimed at pursuing legitimate state aims and satisfying social expectations of civil society.

Abortion is the emblematic case. An over-expansion of the recognition of conscience claims, involving a broad range of actors, whose involvement in abortive services is attenuated (“complicity claims”), risks rendering less accessible a medical service, and undermining the enjoyment of a right, if a state does not provide alternative options to access the service. On this point, the European Committee of Social Rights held that the Italian system infringed Article 11 of the European Social Charter, which guarantees the right to health and Article E of the charter, which forbids unreasonable discrimination. With a view to reducing the gap, some Italian regions opened public competitions reserved to non-objecting practitioners, and bills have been submitted to amend the law in-force to grant the presence of a certain percentage of non-objecting staff in public hospitals (Colaianni, 2017, p. 8).

Other European courts have a cautious approach toward religious claims where they have a negative implication for third parties. The English Supreme Court adopts a restrictive approach toward conscientious objection to abortion, excluding activities which are not directly connected with the abortive performance. According to the ECtHR, conscientious choices cannot prevail in the judicial arena where they result in being imposed on individuals who do not share the same convictions. In the recent judgements Grimmark and Steen the ECtHR gave a strong message, holding that the Swedish authorities’ refusal to hire midwives who refused to take part in abortive services is coherent with Article 9 ECtHR, although religious actors claimed a violation of their employment rights.

However, the evolution of medical science and technology has given rise to new ethical and moral issues. The recognition of a right to self-determination has exacerbated a political polarization between the secular and religious narratives which embrace different understandings about the beginning of life and its end. In the European framework both the right to life and respect for private life are guaranteed protection under the ECtHR. The right to life can be subject to striking balances with other competing interests. Some states adopt a more conservative approach toward the preservation of life, while others recognize broader room for self-determination. The Catholic Church expresses deep concern about the legalization of euthanasia: the real question is how much longer it will be able to influence further legal developments. In Italy, although a recent Constitutional Court decision has defined strict circumstances where assistance to suicide is criminalized, it declared inadmissible the request of a popular referendum to amend the law in-force providing a general decriminalization of euthanasia. At the moment, the Italian Parliament self-restrained from updating the current legal framework, notwithstanding judicial solicitations. Although the only legal response (the
option of an interruption of life-sustaining treatment) does not satisfy urging social expectations, the Italian lawmaker is reluctant to de-align from the doctrine of the Catholic Church, even though it no longer mirrors the mainstream opinions of the civil society. However, other European courts provided broad recognition to self-determination, taking distances from conservative religious approaches.14

Finally, during the last ten years there has been an expansion of the recognition of the rights of the LGBTQ community, promoting their increasing integration in civil society. In many countries same-sex unions have been legalized as marriages or registered partnerships. The ECtHR was the first international court to recognize LGBTQ rights.15 Although the regulation of same-sex marriages is under the jurisdiction of the member states, the Strasbourg Court has strongly urged the legalization of same-sex unions.16 The ECtHR qualified the principle of non-discrimination as “fundamental” and stated that it is one of the core values underlying the Convention. The court established a positive obligation upon states to take action to guarantee the full enjoyment of the human rights of LGBTQ persons.17

However, the interplay between LGBTQ rights and religious exercise is still at the centre of a lively debate, as both claims are grounded on fundamental individual rights. The European Court seems reluctant to immunize religious freedom from comparison with legitimate state interests in relation to non-discrimination and equality.18 As an example, in the Ladele case (where a civil servant refused to register same-sex unions because of her faith), the court held that religious exercise can be subject to restrictions for the sake of the public interest of equality and elimination of discrimination and to protect the rights of others. Following this perspective, European courts are even less prone to recognize a right to conscientious objection to civil servants.19 However, the European attitude toward LGBTQ rights is not uniform, and it ranges from legal systems that assertively protect the LGBTQ community against dignitary harms (England) to the regressive approach of certain eastern European countries where the recognition of LGBTQ rights is a lively battleground.20

Not only in eastern European countries are LGBTQ rights at the centre of a lively political debate: in Italy, the recently proposed legislative decree, Zan, aimed at strengthening sanctions against discrimination and crimes against LGBTQ individuals was not approved, due to the strong opposition of right-wing parties. However, the bill gave rise to a strong reaction from the Catholic Church, which claimed an infringement of the church-state agreement and undermining the church’s freedom of organization. The church’s reaction was strongly criticized, as “unprecedented”. It was the first time in the history of church-state relationships in Italy that the Catholic Church activated a diplomatic intervention to interfere in the legislative process of passing a law.

Furthermore, in Europe, during the last years there has been an over-expansion of providers of goods and services refusing to provide cooperation to same-sex unions. When have religious exemptions to be granted and what religious actors can take advantage of them were still open questions in 2022.

European courts do not have a uniform approach toward for-profits claiming a religious conscience. In cases concerning for-profits who refuse to provide services or goods to same-sex couples because of their religious convictions, the UK supreme court firmly rejected claims for religious exemptions, as they caused dignitary harms.21 However the rise of “gay-cake” litigation in Europe22 and the recent inability of the ECtHR to provide satisfactory responses23 makes still uncertain the right of LGBTQ people to enjoy equal and non-discriminatory access to goods and services. A Christian organization (Christian Institute) had campaigned on the side of the for-profit concerned and declared that the decision was “good news for free speech and for Christians”.

262
The Ukrainian crisis: a new religious war in Europe?

Pope Francis condemned the war in Ukraine, which began in February 2022; he called the invasion “sacrilegious” and lashed out against “some potentate” with “anachronistic claims of nationalist interests”. However, the crucial concern was the effective link between religion and the Ukrainian war. It is extremely difficult to say whether and to what extent the war was provoked by genuine religious reasons or whether religious arguments mainly masked “core secular goals”, and religion was “just one more battlefield” (Vovk, 2022). According to Vovk, “religious identification goes beyond Christian Orthodoxy, goes beyond symbols of faith or some traditional practices. It includes the secularization of the Russian state and ‘Russian-ness’ as a part of their identity . . . it has as much to do with the sacralization of secular issues of Russian statehood as it does with Christian Orthodoxy” (Vovk, 2022).

According to Stoeckl, after the collapse of the Soviet Union, the Russian Orthodox Church symbolized the failure of a church to build its role independently from the state and its adaptation to the role of a “vehicle of a nationalist ideology” (Stoeckl, 2022). Indeed, after the erosion of the Soviet Regime and of Communism, a partnership gradually developed between the state and the Orthodox Church, following the traditional “byzantine” perspective governing church-state relations, aimed at establishing a “symphony of powers” (Cimbalo, 2022, p. 3), to the detriment of minorities. Although a regime of separation and mutual non-interference was established during the 1990s, subsequent laws gradually restored the privileged status of the Orthodox Church, restricted the scope of religious pluralism and condoned repression of religious minorities in the pursuit of public order against religious extremism. It goes without saying that the Orthodox Church has gained a privileged legal status, enjoying tax exemptions and public funding. Furthermore, an anti-pluralist approach has been adopted toward religious minorities (for example, Jehovah’s Witnesses suffered consistently discriminatory treatment) and sexual minorities (including “anti-gay propaganda” laws). An analogous anti-liberal approach to human rights was adopted towards reproductive services, providing broad recognition to conscientious objection and rendering it more difficult for women to access abortion facilities, in the pursuit of a convergence between public policies and Orthodox tenets (Mancini and Rosenfeld, 2020, p. 524). For all these reasons, the relationship between the Russian State and the ECtHR is called “turbulent” (Pomeranz, 2012, p. 17), culminating in the well-known Fedotova v. Russia decision, where the ECtHR imposed a positive duty on Russia to recognize same-sex unions. Whether the judgement will lead to changes in the Russian approach to human rights is uncertain. We cannot underestimate that in 2015 the Russian Constitutional Court held that the E CtHR’s judgements clashing with the constitutional text could not be implemented and in 2020 the Russian Constitution was amended, establishing the predominance of the constitution over international treaties in case of conflict. Referring to the annexation of Crimea in 2020, Mancini and Rosenberg predicted that the alliance between the Orthodox Church and the state raised “major challenges” in the field of foreign policy, expressing concern about Putin’s “narrative of shared religious and cultural roots to legitimize his intervention” (Mancini and Rosenfeld, 2020, p. 532).

According to Cimbalo, the current Ukrainian crisis is the result of a broader “institutional crisis” involving various eastern European countries who were part of the Soviet bloc (Cimbalo, 2022, p. 3). Among all the reasons that Putin cited, the crisis also had a cultural-religious dimension. After the fall of the Soviet Union, the Orthodox Church was perceived as “the bearer of hope of a humiliated nation” and a basic factor of national identity, generating a new “rise of religiosity” in Russia (Pollack and Rosta, 2017). Patriarch Kirill provided an ideological basis to the Ukraine war, as one of the main advocates of the doctrine of the “Russkii Mir” (Russian
Adelaide Madera

World, according to which Russia, Ukraine and Belarus are a unique civilization, giving rise to a “multinational space” (Denysenko, 2022). Putin revitalized the narrative traditionally adopted by Russian state and church leaders, since the Russian Revolution, according to which those who fight for independence are “radical nationalists, fascists, neo-nazis, schismatics”, namely enemies “aligned with West” against the “Right Church” (Denysenko, 2022). Such an alliance between religion and politics is founded on the above-mentioned refuting of liberal values: LGBTQ rights and cultural pluralism are perceived as a threat for Russian identity. Following this perspective, Kirill’s support for Russia’s war in Ukraine was perceived as an “ideological war” to protect conservative values (Pollack and Rosta, 2017) against the “depraved Western World” (Stoeckl, 2022). The “ideological divide” between capitalism and socialism translates into a “clash” between “conservative, communal” and “progressive, individualistic” views of society, giving rise to a dramatic transition from a “war of opinions” in a “war of territory” (Stoeckl, 2022). Putin even invoked the argument of an alleged “religious persecution” (Vovk, 2022) to justify the invasion, showing his ability to make a strategic use of human rights language.

There is little doubt that one of the elements that exacerbated the crisis in the relationship between Russia and Ukraine was the establishment of the autocephaly of the new Ukrainian Orthodox Church, called a “challenge to the Russian Neo-Imperialism” (Denysenko, 2022). Indeed, the religious narrative of the Orthodox churches in Ukraine has traditionally influenced Ukrainian political discourse. Such an establishment was the result of an extended period of fighting for religious independence of the Ukrainian Orthodox movement and forced religious annexations. Furthermore, in 2013–2014 Ukrainian religious leaders were deeply involved in Ukrainian political discourse, siding against Putin’s invasion of Crimea and war in Donbas. For his part, Putin accused Ukrainian religious leaders and their faithful of radical nationalism and schism, justifying the war in Donbas to protect Orthodox identity, and calling the Crimea a “sacred place”. The final recognition of autocephaly, notwithstanding the opposition of Patriarch Kirill, exacerbated the split within Orthodox churches, namely the Ecumenical Patriarchate and the Russian Orthodox Church, and “induced the different Patriarchates to take sides” (Cimbalo, 2022, p. 5). In any case, the establishment of an Orthodox Church in Ukraine was also the result of a view of religion as “a matter of national security” (Vovk, 2022).

It cannot be underestimated that at the beginning of April 2022, Ukrainian Orthodox clergy accused Patriarch Kirill of heresy in an open appeal and invoked the Primates of the Orthodox churches for his deposition. However, not only the Ukrainian Greek Catholic Church, but also the Ukrainian Autocephalous Orthodox Church and the Patriarchate of Constantinople blamed Putin for the invasion of Ukraine. Even some bishops of the Russian Orthodox Church in Ukraine are refusing to commemorate Patriarch Kirill during the liturgy. Such strong reactions emphasize a deep internal crisis within the Orthodox Church, where various dissenting voices are being raised worldwide: they are not no longer inclined to passively accept a “symphonic” alliance between Orthodoxy and an autocratic state and invoke respect of democracy and liberal values (Stoeckl, 2022).

Religion as a problem or as a solution?

De-privatization of religion cannot necessarily result in an enhancement of exclusive policies. Religious actors can offer a valuable contribution to public policies. Their narratives can influence individual conduct and social changes and contribute to facing global challenges. Indeed, nowadays religious narratives are undergoing a process of evolution. Religious systems are endowed with internal resources which promote the dynamism of religious doctrine and facilitate dialogue and communication with the secular world. Religious traditions do not have
a uniform attitude toward homosexuality, gender identity and sexual orientation and ethical matters are undergoing a process of revisitation in different religious traditions (Endsjo, 2020, p. 1684). Progressive actors within religious groups are developing changed attitudes towards sexual ethics and social justice (Endsjo, 2020, p. 1684). Baptists and Lutherans have adopted attitudes of openness toward same-sex unions, anticipating state legalization (Carmella, 2020, p. 544). Pope Francis is moving toward a growing openness toward the LGBTQ community, demonstrating solicitude toward all the situations of vulnerability. In many cases he spoke not only as a religious leader but also as a political activist, addressing crucial issues such as migration flows, environmental issues and gender equality.

An emblematic example was offered in 2020 by a devastating health crisis, due to the spread of Covid-19 infection. There is little doubt that the pandemic crisis exacerbated several political and social tensions on the role of religion in the public discourse (Haynes, 2020, pp. 1–20). As restrictive measures affected the enjoyment of fundamental rights (mobility, association, privacy), religious communities had different reactions. Some of them adopted an oppositional approach, refusing to comply with restrictive measures, while others self-enforced restrictive measures and provided guidance and support to their faithful and the community (Madera, 2021, pp. 1–10; Hill, 2020, pp. 1–19). Some commentators feared a “radical political experiment” undermining the role of religious freedom within human rights (Lévy, 2020, p. 32). According to Jocelyne Caesari, the main question is whether “COVID-19 will lead to increased nationalist exclusionary and defensive attitudes among the religious, or might the pandemic be the cure that leads to radical social re-orientation with a new emphasis on collective solidarity?” (Caesari, 2020).

On this point many scholars complain about the inadequacy or the lack of global strategies to combat the spread of Covid-19. It is not surprising that religious communities gave local responses to the pandemic, and the same religious tradition gave various responses depending on different national contexts. However, religion demonstrated its resilience and played a pivotal role in suggesting “a new path of solidarity” (Caesari, 2020). The pandemic underlined the need to reassess the role of religious communities within the “network of social actors” (Madera, 2021, p. 6). Religious communities enforced self-precautionary measures and adapted their practices and rituals to the needs of the pandemic situation showing their inner ability to make more flexible their religious tenets. They provided primary goods to vulnerable classes. They provided a valuable contribution to the immunization challenge, providing guidance to vulnerable classes of individuals and hosting vaccination centres in their premises (Madera, 2021, p. 6). In European countries, regardless of church-state systems of relationship, “new channels of communication” have been opened between religious and secular actors, giving rise to fruitful partnerships whose shared aim was the protection of public health (Martínez-Torrón, 2021, p. 8). Such a trend will not provoke the disappearance of religious nationalism and populism. However, the pandemic showed in an overwhelming way that between rigid exclusion of religion and recognition of an absolute protection there is the intermediate possibility of finding “spaces of compromise” (Minow, 2017, p. xvii) where cooperation between secular and religious forces can be fruitful and effective in the pursuit of the shared goal of preserving salus corporum in conjunction with salus animarum (Madera, 2021, p. 6). It demonstrated that all religious groups can provide an effective contribution to the implementation of a more inclusive and sustainable society, if they engage in a constructive dialogue with public actors, with a view to building a “common language” and negotiating differences (Farrar and Krayem, 2016, p. 168), even though such dialogue implies “mutual gains and sacrifices” (Cartabia, 2018, p. 677). According to Jocelyn Caesari, “While the role of religion in shaping the post-COVID order remains unclear, faith communities have the moral resources needed to help rebuild trust in political communities that are seriously weakened by the ongoing crisis” (Caesari, 2020).
Adelaide Madera

Notes


15. Italian Constitutional Court, no. 242/2019.

16. Italian Constitutional Court, no. 50/2022.

17. Italian Constitutional Court, no. 50/2022.

18. ECtHR, Fourth Section, Eweida and Others v. United Kingdom (App. Nos. 48420/10, 59842/10, 51671/10 and 36516/10), 26 May 2013.


25. ECtHR, Third Section, Chepmyrno and Others v. Russia, App. Nos. 74320/10 and four others, 22 February 2022; ECtHR, Third Section, Zharinova v. Russia, App. No. 17715/12, 22 February 2022.

26. ECtHR, Third Section, Bayev and Others v. Russia, App. Nos. 67667/09, 44092/12 and 56717/12, 20 June 2017.

References


The interplay among religion, politics and law in Europe


