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RELIGIOUSLY BASED PERSONAL LAWS AND MANAGEMENT OF DIVERSITY IN EUROPE

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This contribution aims to answer two questions: a) why legal regimes based on personal laws are almost entirely absent in Europe; and b) what conditions could make these regimes a helpful tool for managing the growing religious diversity in all European countries. The article makes a distinction between personal law regimes, where all individuals and communities are able to shape their lives according to their religious or non-religious convictions within the framework of the same legal system, and minority rights regimes that are grounded in the idea that religious minorities are entitled to enjoy a set of rights aimed at making up for the disadvantages inherent in their minority status. The article concludes that the inclusivity of the public sphere must be assured not through a system of personal law regimes, but rather through the pluralization of the legal options offered to all citizens (independently from being members of a minority) by the states' legal systems.

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INTRODUCTION

The idea that (religious) equality is the best way to grant (religious) freedom has played a leading role in the last two centuries of European history.[1] The link between equality and freedom has been firmly established in the first article of the Declaration of the Rights of Man and of the Citizen and since then it has been a guiding principle of all constitutional liberal democracies.[2] In the legal regulation of religion, this link is particularly evident. The liberal constitutions of the 19th and 20th centuries were written under the persuasion that religiously-based personal laws were against citizens' freedom of religion. Subjecting them to different legal provisions according to the faith they professed made the enjoyment of the civil and political rights dependent on their religious choices. In contrast, applying the same rules independently from their religion made citizens free to follow the dictates of their conscience without fear of any negative consequence on their legal status. This idea gave a powerful impulse to the secularization of many European States legal systems during the 19th and 20th centuries. This set of principles is today less challenged than in the past and more attention is devoted to the systems of personal law that are in force in other parts of the world. There are definite cultural, sociological and political reasons that explain why the current interest in personal law regimes in Europe is on the rise and they have been examined elsewhere in the context of the cultural decline of Europe.[3] In this contribution I shall address directly the legal profile of this issue and ask why, contrary to expectations,[4] personal law regimes are being considered

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1 On this idea, with specific reference to religion, *see* Frederick Mark Gedicks, *Religious Freedom as Equality*, *in* ROUTLEDGE HANDBOOK OF LAW AND RELIGION 133 (Silvio Ferrari ed., 2015); Silvio Ferrari, *Religion Between Liberty and Equality*, 4 J.L. RELIGION & ST. 179 (2016).

2 *Déclaration Des Droit de l'Homme et du Citoyen* 1789, art. 1 ("Les hommes naissent et demeurent libres et égaux en droits..."). The link between freedom and equality has since been a recurrent theme in most constitutions of the European democracies.

3 See Silvio Ferrari, *The Secular State in a Declining Europe: Beyond the End of the European Universal Dream*, 7 *J.L.* RELIGION & ST. 13 (2019).

4 In the second half of the last century, many scholars predicted the decline of personal law regimes, see for example Edoardo Vitta, *The Conflict of Personal Laws*, 5 ISR. L. REV. 170, 337, 350–1 (1970). ("The personal laws show a tendency to dissolve and become part of a new territorial legislation... tendency to legal uniformity is stronger than that towards the division of humanity into legal systems according to the ethnic, historical or religious peculiarities of the various peoples."); *see also* SIMEON L. GUTERMAN, FROM PERSONAL

with increasing attention by many lawyers and legal theorists. To answer this question a distinction between personal law regimes and minority rights regimes can be helpful. The latter are grounded in the idea that religious minorities are entitled to enjoy a set of rights aimed at making up for the disadvantages inherent in their minority status. In this case, personal law is a tool to grant the rights of a specific minority but, except for this minority, the State can enforce a uniform and centralized legal system that applies to all citizens independently from their religion.[5] This is the case in Greece, which is a legally monistic country with the exception of the Muslims living in Thrace.[6] Personal law regimes, however, move within a completely different horizon of significance.[7] What is at stake is not the protection of minorities; it is the relationship between State, law, and society. Personal law regimes strive to offer a model that is alternative to legal monism and the alternative consists in a different balance between freedom and equality on the one hand and collective and individual rights on the other. Within the constellation of liberal democracies, countries characterized by legal monism tend to follow the principle that freedom can be better granted through equality and, to attain this goal, place the accent on the equal rights of individuals. Within the same constellation, countries in which a religion-based legal pluralism is prevalent tend to follow the principle that freedom can be granted through diversity and, to attain this goal, place the accent on the different rights of communities.[8]

LAW TO TERRITORIAL LAW: ASPECTS OF THE HISTORY AND STRUCTURE OF THE WESTERN LEGAL-CONSTITUTIONAL TRADITION 65 (1972).

5 For the minority rights regimes in Europe, *see* JEAN PIERRE BASTIAN & FRANCIS MESSNER, MINORITÉS RELIGIEUSES DANS L'ESPACE EUROPÉEN: APPROCHES SOCIOLOGIQUES ET JURIDIQUES (2007); EUR. CONSORTIUM FOR CHURCH-ST. RES, THE LEGAL STATUS OF RELIGIOUS MINORITIES IN THE COUNTRIES OF THE EUROPEAN UNION (1994).

6 *See* Samim Akgönül, *Le statut personnel des musulmans de Grèce. Vestiges ottomans et réalités contemporaines*, *in* MARC AOUN (DIR.), LES STATUTS PERSONNELS EN DROIT COMPARÉ: EVOLUTIONS RÉCENTES ET IMPLICATIONS PRATIQUES 279–292 (Leuven, Peeters ed. 2009); KONSTANTINOS TSITSELIKIS, OLD AND NEW ISLAM IN GREECE: FROM HISTORICAL MINORITIES TO IMMIGRANT NEWCOMERS 326 (2012).

7 For an overview of the personal law systems that are in force in different countries see AOUN, *supra* note 6.

8 Silvio Ferrari, *Religious Rules and Legal Pluralism: An Introduction*, *in* RELIGIOUS RULES, STATE LAW AND NORMATIVE PLURALISM: A COMPARATIVE OVERVIEW 1 (Rossella Bottoni, Rinaldo Cristofori & Silvio Ferrari eds., 2016) [hereinafter RELIGIOUS RULES].

I am aware that these are broad generalizations whose soundness needs to be investigated through a careful examination of the legal systems of different States. Keeping in mind this caveat, I shall try to offer some considerations as to what are the advantages and disadvantages of these two ways of regulating the relationship between freedom and equality on the one hand and individual and community on the other. I will do so by means of three questions. However, before addressing them, a clarification is required. The statement that systems of personal law do not exist in Europe today does not mean that the religious affiliation of European citizens is irrelevant for the definition of their civil and political rights. On the contrary, these rights are frequently regulated in different ways according to the religion that is professed by a person. Just as an example, in many European countries citizens professing some religions can perform religious marriages that are recognized by the State, while members of other religions are bound to celebrate a civil marriage, with a religious marriage being impossible or devoid of civil effects. Therefore, the statement that no personal law regimes are in force in Europe must be understood in the sense that there is no substantial and coherent set of rules encompassing a whole area of legal relations (family, inheritance, etc.) that applies to citizens according to their religious affiliation.[9] As noted by Alessandra Facchi:

> "[In] contemporary multiethnic European societies we seldom find ourselves dealing with legal systems, "social bodies" or "semi-autonomous social fields" - namely, groups able to create or apply their own independent legal systems. We are more likely to find individuals who follow rules deriving from different legal systems [...] norms that are neither systems nor institutions."[10]

In other words, in Europe there are personal legal provisions and even personal laws but not personal law regimes.[11]

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9 *Id.* at 14–18.

10 Alessandra Facchi, *Customary and Religious Law: Current Perspectives in Legal Pluralism*, JURA GENTIUM, (2007) www.juragentium.org/topics/rights/en/facchi.htm.

11 This conclusion is confirmed by the fact that, even in the European countries where a minority rights regime is in force (as in the case of Muslims in Thrace, for example), the implementation of these rights is limited to the extent that they are contrary to some basic principles of the State legal system. For a recent application of this rule in relation to the European Convention of Human Rights, *see* Molla Sali v. Greece, Eur. Ct. H.R. (2018), hudoc.echr.coe.int/eng?i=001-188985.

From this point of view, there is nothing comparable to the personal law systems that are in force in India, Israel, or Malaysia. Why is it so, is the first question I would like to raise.

A. WHY PERSONAL LAW REGIMES ARE MORE WIDESPREAD IN ASIA THAN IN EUROPE?

When we think of personal law regimes, India, Malaysia, or Israel come to mind, certainly not Italy, France or Germany. Why is it so? There are many answers to this question and, to make matters easier, I will discard all explanations based on the political, economic, and social history of these countries and focus on religion. Although surgically separating religion from these other dimensions of human life is impossible, we can concentrate our attention on a single component of a larger puzzle, provided we keep its intertwinement with the other components in mind. Therefore my first question is whether there is something in the religious history, demography or culture of Asia and Europe that could help us to understand why personal law regimes are adopted more frequently in the former than in the latter continent.

Exploring different avenues might provide an answer. Most European countries have a Christian cultural background while the prevailing traditions in the Asian countries I just mentioned are Hindu, Muslim or Jewish. Shall we seek an answer, then, in the different religious backgrounds of Europe and Asia? This line of research seems to be refuted by the fact that in the few Asian countries with a predominantly Christian history—Lebanon or the Philippines, for example—personal law regimes are in force. Without excluding the possibility that one religion can be more conducive to these legal regimes than another, this answer appears to be insufficient in fully explaining the difference. Trying to link personal law regimes to polytheistic religions and their rejection of a single God is another dead end, as shown by the fact that systems of personal law are adopted in countries where a rigidly monotheistic faith like Islam or Judaism is predominant. The same can be said for explanations grounded on religious demography. Personal law regimes are in force both in countries characterised by a strong religious diversity (Lebanon and Singapore for example) and in religiously homogeneous countries (such as Jordan). Confronted with these difficulties we could conclude that religion is not a significant factor in the establishment of a personal law regime and conclude our search by pointing to

primarily non-religious events and processes – the colonial experience,[12] the patriarchal structure of society, etc. – as the main reasons for the existence of personal law systems. This, however, is not my answer. In my opinion, there is a religion-connected explanation of why personal law regimes are more widespread in some parts of Asia than in Europe and some historical considerations can help us to understand it. For a long time, personal law regimes have been the rule in Europe rather than the exception. They started being questioned only after the formation of the first European national States – France, Spain and England – in the 15th and 16th centuries. These new political bodies claimed their absolute sovereignty both at the supranational and subnational levels. In the first case, it was a matter of affirming the national State's independence from the power of the supranational entities embodied by the Emperor and the Pope. This goal was attained through the development of a strong notion of national sovereignty, based on the principle "*rex superiorem non recognoscens in regno suo*" (the king does not recognize any superior in his realm). At the subnational level, the national States engaged in a long struggle against all the local powers that had flourished during the Middle Ages. The autonomy of city-states, guilds, universities, religious orders was progressively limited and the sovereign strengthened his authority, reserving to himself the monopoly of the legislative, judicial and military power. A centralized system of government took shape creating new institutions at the national level and attracting in the State sphere of influence areas of human life – family, education, welfare, etc. – that were previously left mostly to private regulation. It is a long and complex process, which took centuries to be completed.[13] However, in the 19th century the State victoriously concluded its long battle against supranational and subnational competitors and could take the last step towards complete independence, severing its bonds with religion. Until the first half of that century, apart from the parenthesis of the French Revolution and Napoleon's empire, the European States had remained confessional States, recognizing their subordination to religion and their obligation to provide a privileged legal status to the

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12 *See* Jeffrey A. Redding, *Slicing the American Pie: Federalism and Personal Law*, YALE L. SCH. LEGAL SCHOLARSHIP REPOSITORY 2, 6 (2007), digitalcommons.law.yale.edu/fss_papers/10 ("it was the Western colonial powers themselves who had a tendency to initiate and entrench personal law within their African and Asian possessions").

13 On this process *see* WILLIAM T. CAVANAUGH, THE MYTH OF RELIGIOUS VIOLENCE: SECULAR IDEOLOGY AND THE ROOTS OF MODERN CONFLICT 123–180 (2009); HEINZ SCHILLING, EARLY MODERN EUROPEAN CIVILIZATION AND ITS POLITICAL AND CULTURAL DYNAMISM (2008); More specifically on the legal issues involved in the process *see* HAROLD BERMAN, LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION (2003).

faithful of the "true" religion. This dependence had prevented the development of a fully monistic legal system. Now the State affirms its secular nature and can provide its citizens with a uniform regulation of their civil and political rights irrespective of their religion. In this way, the secularization of the public sphere joins the centralization of the legal system and personal law regimes based on religion become doubly incompatible with modern national States because they contradict both secularization and centralization.

At this point, a long series of distinctions, specifications and warnings would be required, as the process I described is very general; it has been carried out differently in different places and times, and has never been fully implemented. For example, systems of personal law were in force in the Russian and Austro-Hungarian empires until the First World War[14] and even today systems of concordats and agreements between States and religious communities grant the latter's followers special rights. I will gloss over these caveats because I am interested only in pointing in the general direction taken by Europe where the consolidation of national States has been accompanied by the secularization of the public institutions and the decline of personal law regimes. Investigating whether a similar process is recognizable in Malaysia, Israel, India or other Asian countries can help to answer the first question I raised. The limited role played by secularization in the process of the formation of the State in these countries might offer an explanation.

B. ARE PERSONAL LAW REGIMES AN EFFECTIVE TOOL TO GOVERN CULTURAL AND RELIGIOUS DIVERSITY?

The second question I would like to raise is the following one: are personal law regimes an effective tool for governing cultural and religious diversity? The wisest answer to this question is: it depends. It depends on the legal tradition of the country we are speaking of; what is effective in a given place and time can be useless in a different context. It depends also on what we mean by "governing cultural and religious diversity". Even within the horizon of liberal constitutionalism, diversity can be seen as a threat to social cohesion or as a pre-condition for a vibrant civil society and, depending on these different perceptions, governing diversity can result in restricting or expanding it. Therefore, let me reframe the question in a way that is more consonant with the goal of liberal democracies. Are personal law regimes – and

14 This confirms that these systems are more functional to empires than to national States.

particularly those regimes that are based on religion – an effective tool to grant people the possibility of living according to their religious beliefs and practices? Here again the answer is "it depends", but this time it depends on the way the personal law regime is conceived and regulated.

Religious beliefs and practices are not immutable, they can change: a Christian can become a Muslim and vice versa. A religion-based personal law regime where changing or abandoning a religion entails negative consequences for the civil and political rights of an individual does not help people live according to their religious convictions. This is the line we draw in the sand and it marks the difference between a legal pluralism of choice and a legal pluralism of constraint. I am not thinking only of those countries where conversion from one religion to another is forbidden or restricted and people are chained to the personal law regime corresponding to the religion in which they were born. I am thinking also of the countries, like Israel, where abandoning a religion without taking up another places an individual in a no-man land where, for example, it is impossible to perform a State-recognized civil marriage. Granting effective opting-out rights from the religious group, putting in place mechanisms that offer a secular alternative to religiously-inspired legal practices,[15] and encouraging reforms that reduce the level of disparity that affects the weakest group members[16] are three necessary steps to bring under control the components of segregation and discrimination that can easily vitiate personal law regimes.

In my view, these steps constitute the bottom line of general application, in the sense that no religion-based personal law is acceptable if these conditions are not met. Once this threshold has been overcome, whether a personal law regime increases or reduces the chances of living according to one's religious beliefs and practices is largely a matter of legal engineering. Personal law regimes can be assembled in many different ways. They may be limited to personal status and family law matters, as in Israel,[17] or extended to some parts of criminal law, as in Malaysia as far as Muslims

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15 *See* Martin Ramsted, *Anthropological Perspectives on the Normative and Institutional Recognition of Religion by the Law of the State*, *in* RELIGIOUS RULES, *supra* note 8, at 55.

16 *See* Susan Moller Okin, *Is Multiculturalism Bad for Women?*, *in* THE GLOBAL JUSTICE READER 587–597 (Thom Brooks ed., 2008).

17 *See* Yüksel Sezgin, *Muslim Family Laws in Israel and Greece: Can Non-Muslim Courts Bring about Legal Change in Shari'a?*, 25 L. & SOC'Y 235, 242–247 (2018) [hereinafter *Muslim Family Laws*]; Asher Maoz, *The Application of Religious Law in a Multi-Religion Nation State: The Israeli Model*, *in* RELIGIOUS RULES, *supra* note 8, at 217.

are concerned.[18] They may allow citizens the possibility of choosing between different systems, as in South Africa[19] and Greece[20], or compel them to stick to the one established by their religion, as in Israel, or include both options as in Malaysia where non-Muslims can perform a civil or a religious marriage while Muslims cannot take advantage of the first possibility.[21] They may implement the personal law in its integrity, as in India where Muslims are allowed to perform polygamous marriages, or may exclude some of its parts, as in Israel where Muslims do not have this right.[22] They may be supported by a system of religious adjudication (as is the case of Israel but not of South Africa) which may be exclusive or concurrent with other systems and so on.[23] These differences have a significant impact on the operation of the personal law system and on the freedom of movement that citizens have within it. For example, when religious and civil courts have concurrent jurisdiction, litigants can forum-shop between them and this fact can generate competition and pressure religious courts "to

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18 *See* Mohamed Azam & Mohamed Adil and Nisar Mohammad Ahmad, *Applicable Religious Rules According to the Law of the State of Malaysia*, *in* RELIGIOUS RULES, *supra* note 8, at 269.

19 *See* Pieter Coertzen, *Religion and the Constitutional Experience of South Africa*, *in* RELIGIOUS RULES *supra* note 8, at 343; Johan D. van der Vyver, *Multi-Tiered Marriage in South Africa*, *in* MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION 200–218 (Joel A. Nichols ed., 2012) [hereinafter MARRIAGE AND DIVORCE].

20 *See Muslim Family Laws*, *supra* note 17, at 24.

21 The Malay legal system includes both options: while Muslim citizens cannot conclude a valid civil marriage, as they "do not have the option to choose secular laws when the matter falls within the jurisdiction of Syariah Court" Mohamed Azam & Mohamed Adil and Nisar Mohammad Ahmad, *supra* note 18, at 12. Non-Muslim citizens can perform a religious or a civil marriage; On this point, *see also* Li-AnnThio, *Religion in the Public Sphere of Singapore: Wall of Division or Public Square?*, *in* RELIGIOUS DIVERSITY AND CIVIL SOCIETY. A COMPARATIVE ANALYSIS 73, 79 (2008).

22 *See Muslim Family Laws*, *supra* note 17, at 12–13.

23 *See Application of Religious Law*, *supra* note 17, at 212. In Israel "all religious courts have exclusive jurisdiction in matters of marriage and divorce of members of their respective communities" while "in other matters of personal status some courts enjoy exclusive jurisdiction while others exercise concurrent jurisdiction with the Civil Courts."; In Malaysia Shari'a courts enjoy exclusive jurisdiction, *see* Art. 121 of the Federal Constitution of Malaysia; *See also* Nurjaanah Chew Li Hua, *Legal Pluralism and Conflicts in Malaysia: The Challenge of Embracing Diversity*, *in* RELIGIOUS RULES, *supra* note 8, at 256.

undertake self-reform in order to protect their jurisdiction and clientele".[24] When civil High Courts have supervisory powers over religious courts,[25] the latter can be placed in the alternative either to interpret religious law in a way that is compatible with civil law or to risk that their decisions will be systematically repealed.[26] This fact can trigger dynamics of transformation that are widely different from what happens in personal law systems where civil courts do not have the power to revise religious courts judgments.

These differences are far from being irrelevant. However, the significance and impact of each personal law regime on citizens' life cannot be considered abstracting from the context. It would be naïf to look for an answer to the question: what is the personal legal regime that grants citizens the best chance to live according to their religious (or non-religious) convictions? There is no answer because the question is wrong. It assumes that legal systems can be compared by abstracting them from their social, cultural, historical, and political background. The personal law systems of India and South Africa are different but there is no point in asking whether one is better than the other *in abstracto*. The correct question is: what is the system that is best suited to the conditions of the country in which it is implemented.

C. ARE PERSONAL LAW REGIMES A VIABLE ALTERNATIVE TO EUROPEAN LEGAL MONISM?

In the first pages of this contribution, I contrasted the legal monism prevailing in Europe to the legal pluralism of many Asian countries, where religion-based personal law regimes reflect the religious diversity of their societies. Considering that Europe is rapidly becoming a religiously plural society, is it possible and advisable to import here personal law regimes that have effectively managed cultural and religious diversity in other parts of the world?

All over the world politicians, opinion leaders, and academics discuss the advantages and disadvantages of personal law regimes. They are frequently blamed for encouraging exclusion and segregation through the perpetuation of separate legal orders and systems of adjudication, endangering the respect of equal treatment of citizens and tolerating more or less serious violations of non-discrimination rules

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24 *Muslim Family Laws*, *supra* note 17, at 31.

25 About the limits of these supervisory powers see Yüksel Sezgin, *Accommodation*, 16–17.

26 *See Muslim Family Laws*, *supra* note 17, at 7.

within religious communities.[27] In particular, it has been argued that a modern State cannot "provide its citizens, residents and others subject to its power with a *just* and *stable* legal order by referring them to norms associated with their several religions and enforced by state courts."[28] In a similar vein, others have underlined that "*l'émancipation se fait par l'accès à la citoyenneté et donc à des droits universels et abstraits et non pas par la reconnaissance de droits collectives spécifiques*".[29] This notion of citizenship supports the conviction that protection of freedom of religion and belief is better granted through universal rather than particular norms and is therefore unfriendly to the recognition of collective and particular rights connected to group membership.

On the other hand, personal law regimes have historically proved to be helpful in protecting religious minorities and safeguarding collective religious freedom.[30] For this reason, a number of scholars are convinced that, once some conditions are met, systems of personal laws can be an effective legal tool to satisfy the demand for a broader and more pervasive notion of religious liberty, which is exactly what—in their opinion—the uniform law of European States is not able to grant.

As already explained, in the legal experience of many European countries uniform and centralized legal systems have been instrumental in granting freedom of religion through the secularization of the institutional and public space. This project has been accused of adopting, at least implicitly, a conception of religion that is too thin and of considering it to be only a private affair and a matter of conscience, downplaying its

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27 See Rosmarie Zapfl-Helbling, *La problématique du relativisme Culturel ou religieux, en matière de droit fondamentaux dans les Etats membres du Conseil de l'Europe*, *in* AOUN, *supra* note 6, at 293–302; Robin Fretwell Wilson, *The Perils of Privatized Marriages*, *in* MARRIAGE AND DIVORCE, *supra* note 19, at 252–283; Bryan S. Turner, *Legal pluralism: freedom of religion, exemptions and equality of citizens*, *in* RELIGIOUS RULES *supra* note 8, at 71.

28 Adam S. Hofri-Winogradow, *A plurality of discontent: legal pluralism, religious adjudication and the State*, 26 J.L & RELIGION 57, 58 (2010).

29 Jean-Marie Woehrling, *Les minorités religieuses en droit français*, *in* JEAN-PIERRE BASTIAN & FRANCIS MESSNER, MINORITÉS RELIGIEUSES DANS L'ESPACE EUROPÉEN 134–135 (2007), with reference to the french strategy of minority integration.

30 *See* AOUN, *supra* note 6, at 11–12. According to Aoun, personal law systems can still fulfil a positive role if some conditions are met: "Le pluralisme des statuts personnels, du moment où il ne met pas en danger l'état politique et tout ce qui intéresse l'ordre public en général, pourrait représenter, de ce point de vue, une garantie de paix sociale dans une société pluriculturelle et/ou pluriconfessionnelle", *Id.* at 22.

communitarian and public dimension.[31] For a long time these arguments have been particularly popular in Christian circles, but more recently a different interpretation has been advanced that underlines the link between secularization and Christianity. In this second perspective, the process of secularization reflects a more or less implicit Christian background and in particular the idea that it is possible to distinguish two dimensions of human life, presided over by two different authorities: one temporal, secular, profane and the other spiritual, religious, sacred.[32] The matters pertaining to the former area are placed under the control of the State, which applies secular rules based on the equality of citizens;[33] the affairs concerning the latter are left to the religious authorities' guidance, which enjoy (within limits) the freedom to deviate from non-discrimination and equal treatment rules in their own domain. The legal systems based on these presuppositions are congenial to the Christian churches but are extraneous to the tradition of many other religious communities whose practices and manifestations of faith cannot fit this division between public and private space. The supporters of this European model of State–religion relationship reject this conclusion. They underline that in the last two hundred years it has effectively granted equal rights to all citizens, putting an end to the religious conflicts that had been raging in Europe for centuries and to the discriminations that had affected the Jews and other minority religious communities even longer.

Taking into account the mixed feelings raised in Europe by the personal law regimes and keeping in mind that the European modern tradition is against such regimes, one can wonder whether personal law regimes are a sound and effective way to deal with the increasing religious diversity of Europe or whether other options are available and preferable. There is no agreement about these alternative options. However, some legal experts and scholars suggest that, before resorting to personal law regimes, it is worth exploring the possibilities to strengthen the pluralistic potentialities that already exist in the legal systems of the European countries. This

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31 For a description of the process of interiorization and privatization of religion, *see* Peter G. Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 Mich. J. Int'l L. 663 (2011).

32 The impact of this distinction on the building of the modern public sphere as a secular entity is underlined by Talal Asad, Formations of the Secular: Christianity, Islam, Modernity (2003).

33 In the past, when confessional States were widespread in Europe, States were largely in control of these temporal matters but had the obligation to manage them through provisions that respected the principles of the State religion. In this sense, such provisions could not be regarded as secular rules, at least according to the meaning this expression has in contemporary language.

strategy is grounded on the assumption that the European legal systems can make strides in terms of internal pluralism and in this way can meet the needs of immigrant communities as well as of indigenous peoples. This claim needs to be carefully examined and family law is a good testing ground.

In the last 30 years, family law underwent an impressive process of transformation in many Western countries.[34] In some of them this change resulted in the pluralization of the legal patterns of family formation, giving citizens the possibility to choose among opposite- and same-sex marriages, civil partnerships, domestic unions and other forms of family relationships. In different ways, the same process of pluralization affected the dissolution of marriage and adoption. Gender, rather than religion, has been at the heart of these transformations and answering gender diversity has been the goal that States pursued through the reform of family law. One could wonder whether the same process can be replicated to address the issue of religious diversity. Instead of re-introducing personal law regimes in the European legal systems, this would mean enlarging the internal pluralism of State family laws so that people of different religions enjoy the same variety of family patterns that has been granted to people of different sexual orientations.[35]

What would be the practical implications of this choice is widely discussed. Some advocate the extension of the area of individual autonomy, allowing spouses to enter into prenuptial arrangements that can accommodate their religious demands.[36] For example, many problems concerning *mahr*, the Islamic dower, could be effectively dealt with through these contractual instruments.[37] Others place the accent on a mechanism of mediation and arbitration that grants citizens the right to choose between the jurisdiction of State courts and alternative dispute-resolution procedures and institutions.[38] A few scholars go one-step further and are in favour of enlarging

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34 For a description of this process in Europe, *see* JENS M. SCHERPE, THE PRESENT AND FUTURE OF EUROPEAN FAMILY LAW **(**2016).

35 For some reflections on this possibility, *see* MARK GOLDFEDER, LEGALIZING PLURAL MARRIAGE: THE NEXT FRONTIER IN FAMILY LAW (2017); RONALD C. DEN OTTER, IN DEFENSE OF PLURAL MARRIAGE, CAMBRIDGE (2015).

36 *See* BELIEF, LAW AND POLITICS: WHAT FUTURE FOR A SECULAR EUROPE? 24–25 (Marie-Claire Foblets et al. eds., 2014).

37 *See* Mathias Rohe, *Family and the Law in Europe: Bringing Together Secular Legal Orders and Religious Norms and Needs*, *in* FAMILY, RELIGION, AND LAW: CULTURAL ENCOUNTERS 49, 69–70 (Prakash Shah & Marie-Claire Foblets eds., 2016).

38 *See* JANE C. MURPHY, RESOLVING FAMILY CONFLICTS (2008); Mathias Rohe, *Alternative Dispute Resolution in Europe under the Auspices of Religious Norms*, Religare working

the range of marriage models offered by State law, for example ensuring the possibility to end covenant marriages as already happens in some parts of the United States.[39] Each of these proposals raises a number of serious questions that concern public order, equal treatment, and the rule of law. However, the weight of these reservations should not detract from the significance of this enlargement strategy, whose main point of interest is the fact that it is not reserved for the members of a (specific?) religious group, but is open to all citizens. These reforms of family law aim to respond to the needs of the whole society instead of to those of particular groups, starting from the principle that the increasing religious diversity of Europe is not a threat to be contained through special group rights but an opportunity to build a more inclusive European public space. For this reason, it is worth considering whether this option can be a valid alternative to the personal law regimes that are in force in other parts of the world.

This conclusion is strengthened by the consideration that, apart from family law, the same strategy has been successful in other areas. A good example is provided by the diffusion of Islamic banking and finance. In a number of European States, it is now possible to conduct banking operations according to Islamic law.[40] As already noted in reference to family law, in these countries the possibility to perform financial transactions in compliance to *Shari'a* is not limited to Muslims but is an option available to all citizens. Some scholars have underlined that these reforms are an expression of "State law pluralism" (or "weak pluralism") as opposed to forms of deep pluralism where "members of certain communities function in accordance with their own legal norms".[41] This type of pluralism is fully compatible with the European legal tradition and does not entail a differentiation of the rights enjoyed by citizens according to their religion.

At this point it is possible to get back to the initial question of what is the way to manage religious diversity that is best suited to the European historical and cultural background. To answer this question, we should reflect on the most salient

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Paper no. 6 (Jan. 2011), patternsofgoverningreligion.weebly.com/uploads/2/7/0/3/27037565/religare_report_alternative_dispute_resolution_in_europe.pdf.

39 COVENANT MARRIAGE IN COMPARATIVE PERSPECTIVE (John Witte, Jr. & Eliza Ellison eds., 2005).

40 For an overview, *see* Baljeet Kaur Grewal, *Islamic Finance in Europe* 146 Eur. Cent. BANK, 25–50 (European Central Bank, Working Paper No Occasional Paper Series No. 146, 2013), www.ecb.europa.eu/pub/pdf/scpops/ecbocp146.pdf.

41 Omar Salah & Christa Rautenbach, *Islamic finance: A Corollary of Legal Pluralism or Legal Diversity in South Africa and the Netherlands?*, COMP. & INT'L L. J. S. Afr. 488 (2015).

characteristic of the notion of freedom of religion that developed in Europe, distinguishing it from the models of religious freedom that are prevalent in other parts of the world: the idea that freedom of religion has to be granted through equality. This means that religion is irrelevant in reference to the enjoyment of civil and political rights granted to all citizens on equal terms, while it remains fully relevant for building a vibrant civil society. Therefore, it requires social and legal conditions that reflect the increasing religious diversity without creating different classes of citizens. In line with these distinctive elements of the European legal tradition, the inclusivity of the public sphere must be assured not through a system of personal law regimes but through the pluralization of the legal options offered to citizens by the States' legal systems. This conclusion requires that the questions posed by religious diversity to our legal regulation of freedom of religion go well beyond the need to reduce the disparities between majority and minority religions and the need to recognize the role that religion can play in building an inclusive and cohesive society. They require a much deeper and extensive reconsideration of how much freedom our law has left to individuals and communities to shape their lives according to their religious (or non-religious) convictions within the framework of the same legal system. Despite the negative impression that can be conveyed by the expression "weak pluralism", this may be the most promising path.