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Introduction

The challenge of law and religion

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The formation of law and religion (L&R)

The prophecy of André Malraux – "la tâche du prochain siècle ... va être d'y réintégrer les dieux" (1955) (the task of the next century ... will be the reintegration of gods into it) – seems to have come true: the "revanche de Dieu"[1] has characterized recent decades, starting with Khomeini's triumphant return to Tehran in 1979 and the establishment of the Islamic Republic in Iran up to the crowds that accompanied John Paul II's voyages all over the world and the spread of Islamic banking in the major financial markets. These are very heterogeneous events but, taken together, they show that, in a world characterized by the decline of the attractive force of the great secular ideologies, religions are capable of drawing the interest and mobilizing the participation of an increasing number of faithful. As a result, religion is no longer considered an irrelevantfactor in the world of politics, media, and economics as it had been in the West and particularly in Europe (although not necessarily in other parts of the world)[2] for several decades. However, the return of religion to the public sphere cannot be properly understood if its plural nature is overlooked: in the age of globalization Malraux's "dieux" live side by side in the same geographical space and their coexistence generates tensions that were previously unknown (again, at least, in the West). Sometimes the inability to find viable legal solutions to religious diversity paves the way to violent clashes and persecutions, such as those which can be observed in recent months in some countries of the Middle East; on other occasions States, religious organizations and the international community have been able to prevent or mitigate the conflict through rules that are shared and applied by the majority of the population. Even though it is well known that law alone cannot be the solution to the problem, governments rely heavily on law to regulate these tensions (thus expanding the process of juridification of religion[3]) and

1 It is the title of a book published by Gilles Kepel (Le Seuil: Paris, 1991; English translation, *The Revenge of God,* Polity Press: Cambridge, 1997).

2 See Jane Mair's remarks, in this book (pp. 250–1), on the Eurocentric bias of a narrative based on the decline of religion followed by its unexpected revival. This pattern is much less clear in other parts of the world.

3 See Sandberg 2011: 193–95 and, for the broader picture of which it is part, Turner and Kirsch 2009: 1.

lawyers are called upon to provide rules or even simple guidelines to address a situation that (mainly, but not only, in the West) is new: the coexistence in the same public space of people who profess very different religions.

These events explain why the relations between L&R are increasingly attracting the attention of scholars.[4] No doubt this relationship goes far back, up to the point that it is difficult to distinguish the origins of law from that of religion.[5] For many centuries the interferences between the former and the latter have been frequent and, according to some scholars, this was due not only to historical contingencies but to the fact that law and religion play a similar regulatory role in human life and thus present structural and functional similarities.[6] However, at least in Western countries, the secularization of the State legal systems had loosened these ties and had pushed religion towards the private sphere of human life, that is the sphere where the law's empire is less strong. The prominent public role recently acquired by religions has reversed this trend and has laid the foundations for the global emergence of a new field of legal studies called L&R.[7] In fact, these studies have had a long history in countries such as Germany or Italy where – with different names (Staatskirchenrecht, Diritto ecclesiastico) – they date from the second half of the nineteenth century. But only in recent years has L&R become a global brand recognized anywhere in the world. Its success is confirmed by many signs: the publication of journals[8] and book series[9] that specialize in this area of study; the increasing number of L&R teachings offered by the university departments of law, theology, and political science;[10] the foundation of research centers[11] and national and international associations[12] that gather scholars from every part of the world; the growing interest for L&R issues shown by large law firms; the space that these topics have gained in the newspapers and other media; and, not least, the publication of this *Handbook*, indicating that L&R studies have reached a significant level of maturity and complexity. Through these steps a body of experts in L&R has emerged, comprised

4 See, for example, Martin Ramsted's remarks concerning the interest of anthropologists for the relationship between law and religion (in this book, pp. 43–58). The same is true for scholars of other scientific disciplines.

5 Fundamental pages have been written on this topic by Weber 1978: 809 ff.

6 See in this book the chapters written by Michael Welker (Chapter 1) and John Witte Jr. (Chapter 2), who points out that law and religion have "been related conceptually, methodologically and institutionally" (p. 17). More broadly, see Berman 2000.

7 On the history of the L&R studies see Ferrari 2013: XI–XX.

8 To mention just a few of them: *Oxford Journal of Law and Religion* (Oxford University Press), *Journal of Law and Religion* (Cambridge University Press), *Journal of Law, Religion and the State* (Brill). Other journals dealing with issues related to L&R are: *Journal of Church and State* (Cambridge University Press), *Religion and Human Rights* (Brill), *Ecclesiastical Law Journal* (Cambridge University Press). For an exhaustive list of journals that deal with L&R, see www.iclars.org/resources.php.

9 See, for example, Law and Religion (Routledge), ICLARS Law and Religion Series (Ashgate), Emory University Studies in Law and Religion (Eerdmans). Ashgate has recently published a series entitled The Library of Essays on Law and Religion.

10 For an overview of the university courses that, with different names, are devoted to L&R in Europe, see González del Valle and Hollerbach 2005.

11 There are dozens of them but it is worth mentioning at least the following: International Center for Law and Religion Studies (ICLRS, Brigham Young University, Provo), Center for the Study of Law and Religion (CSLR, Emory University, Atlanta), Center for Law and Religion (CLR, St. John's University School of Law), Centre for Law and Religion (Cardiff University).

12 The most important of them are: International Consortium for Law and Religion Studies (ICLARS, founded in 2007); European Consortium for Church and State Research (founded in 1989); Consorcio Latinoamericano de libertad religiosa (founded in 2000); African Consortium for Law and Religion Studies (founded in 2014).

of scholars and practitioners who are professionally engaged in the legal regulation of religious beliefs and their manifestations. But are lawyers capable of grasping all the complexities of L&R relations? Although never expressed in these blunt terms, this doubt lingers in the mind of many non-legal scholars of L&R and needs to be dispelled.

The question of the interdisciplinary approach

L&R is a field of study, research, teaching and professional practice that is part of the legal sciences and shares with them a practical approach and aim.[13] Lawyers working in this field are expected to provide an adequate regulation of the many fields where L&R interact. Their task requires knowledge and expertise that, although not limited to the world of law, are functional to this aim. The bread and butter of this area of study and legal practice are issues like the registration and financing of religious communities, the building of places of worship, the display of religious symbols in public spaces, the teaching of religion at school and so on: all problems that require definite and appropriate solutions that lawyers are called upon to identify. However, the interest for the relationship between L&R has crossed the boundaries of the law and its "priests." Sociologists, political scientists, anthropologists, theologians (and the list could go on) are increasingly interested in the intersection of L&R and have already offered important scientific contributions to its study. In particular, approaching L&R issues from new angles, they have been able to pose questions that had escaped the legal experts' attention. Anthropologists provide a good example of this critical attitude, but the following remarks that concern their approach to L&R studies apply equally well to other human sciences scholars.

In many recent books anthropologists have started a discussion of the very meaning of the L&R category, wondering whether its use to interpret and regulate these two spheres of human life is functional to the power relations between different social groups and masks then a political purpose.[14] They are critical of the definitions adopted by lawyers, that are considered too abstract,[15] and tend to de-construct the category of L&R, challenging the possibility to define both terms univocally,[16] questioning the plausibility of their distinction[17] and the meaning of their relationship (see von Benda-Beckmann and von Benda-Beckmann 2009: 227 and 241–2). This deconstruction leads them to emphasize "the blending of 'religious' and 'legal' realms" and to criticize from this point of view the "custodians of the divide between 'the religious' and 'the

13 L&R is comprised of two areas of studies: one focused on the internal law of religious communities (Jewish law, Canon law, Islamic law and so on) and called "religious law," the other centered on the legal provisions enacted by States, international organizations and other subjects to regulate religion and its manifestations ("religion law"). This *Handbook* concerns only the latter. For the distinction between "religious" and "religion" law see Sandberg 2011: 2–16.

14 Turner and Kirsch 2009: 9 ("classifying entities and making categorical distinctions always involves power. Seen in this light, the question of what, in a specific context, counts as 'law' and what is reckoned to be 'religion' is entangled in a power/knowledge nexus that – in constraining and enabling ways – configures people's perspectives on the world. It is in this sense that the relationship between 'law' and 'religion' is and always has been a *political* issue: relevant to a given polity, and involving authority and power").

15 See *ibidem*, where the authors criticize Berman's and Witte's assumption that religion gives law its spirit and inspires its adherence to ritual and justice while law gives religion its structure and encourages its devotion to order and organization.

16 For religion, see Asad 1993; for law, see von Benda-Beckmann 2002.

17 See Turner and Kirsch 2009: 6 ("the modernist notion of a clear categorical distinction between 'the religious' and 'the legal' realms has increasingly been challenged in recent decades"). See also pp. 7–8.

legal'" and their "aversion against the contamination of 'pure dogma', be it 'secular legal', or 'religious'" (see Turner and Kirsch 2009: 16). In the view of these anthropologists, only a "multi-contextual analytical approach" is able to unravel the complexity of the L&R relationship, illustrating the multiplicity of meanings that it takes at the different levels and in the different processes and contexts in which human life is lived (see von Benda-Beckmann and von Benda-Beckmann 2009: 227).

Criticisms of this kind have the ability to make L&R scholars nervous, as they are afraid that their subject of study becomes so multiform and changeable that the end results are elusive. Hence their reluctance (with few exceptions) to engage in a serious dialogue with anthropologists about the epistemological possibility of using the category of L&R for descriptive and normative goals. However, answering the questions posed by anthropologists and other human sciences scholars is unavoidable if L&R scholarship wants to be up to the challenges of globalization and religious diversification. There is no space for fully discussing these issues here, so I shall limit myself to a general comment. It is difficult to deny that the distinction between L&R, as we know it today, is the product of a particular social and political context and reflects cultural presuppositions that are historically and geographically rooted. However, accepting this contextualization of the L&R distinction does not mean denying its hermeneutical significance to read what happens in today's world and its practical value to grant, here and now, the rights to freedom and equality on which an inclusive and fair society is based. Once this point is clear, lawyers can only benefit from a dialogue with anthropologists as it provides them with an antidote against the danger of "essentializing" the L&R relationship and offers materials and tools to answer more adequately the legal questions that they have to address.

Other criticisms by anthropologists are more specific but no less helpful. Franz and Keebet von Benda-Beckmann underline that, in many L&R studies:

> the field of relations and interactions is too restricted. The concept of "law" in these discussions chiefly denotes exclusively state and sometimes international law, notably human rights law. Other types of rules and institutions are referred to as customs, religion, or culture. The analysis of the relationship is then limited to the ways in which state law deals with religion and the space religions or a specific religion is granted within the state legal structure.
>
> *(von Benda-Beckmann and von Benda-Beckmann 2009: 227)*

Again it is difficult to disagree with these remarks and, although L&R scholars are among the least guilty of a positivistic approach to their field of studies, the invitation to widen the scope of L&R studies cannot but be welcome in times of growing legal pluralism and overlapping jurisdictions.

At least in part, this difficult dialogue between lawyers and anthropologists is a consequence of the different perspectives from which they consider the relationship between L&R. Lawyers' approach is essentially practical and normative and this explains why they are more immediately interested in legal provisions and court decisions; the cultural meaning of these rules is not ignored, but remains in the background of their legal reasoning. The interest of anthropologists is more theoretical and descriptive. They focus on the cross-cultural analysis of the ordering of human societies. The legal provisions and court decisions are not ignored but are considered as part of a web constituted by different normative orders, whose interaction at different levels of decision-making in various parts of the world is the focus of the anthropologists' interest.

The two perspectives – the legal and the anthropological – are not incompatible but complementary. A legal expert who does not take into consideration the inputs offered by the

anthropological analysis is likely to provide inadequate solutions to the concrete problems he has to solve and an anthropologist who gets lost in the maze of multiple meanings, levels and contexts that surrounds the subject he/she studies cannot offer a helpful background for the concrete answers the legal expert seeks legal expert. Until the capacity to perceive the synergies between the anthropologist's and the lawyer's task and to seize the opportunities they offer has been more fully developed, it is difficult to face the challenge of religious diversity and visibility, providing answers that are effective because they are based on the knowledge of all the elements that are at stake.

In different terms the same remarks apply to the relationship of L&R experts with sociologists, theologians, political scientists, philosophers and other human sciences scholars. This poses the question of the future of L&R studies: is it feasible, without disavowing the essentially legal nature of these studies, to open the field to the contributions that other human sciences can make? Will the lawyers be able to increase the interdisciplinary character of L&R studies, providing a reference point for scholars who are interested in these studies from a non-legal perspective? Is the interdisciplinary study of L&R a viable perspective? Is it possible to think of a sociology of law and religion,[18] overcoming the doubts of scholars who think that "over-reliance on sociology results in work which is 'law-lite'"? (Doe and Sandberg 2010: 329) Can we imagine an anthropology of law and religion?

It is a long journey, which is only just beginning. To give a signal in this direction, the present *Handbook* has collected – beside those of lawyers – the contributions of other scholars in the humanities. The first section of this book, in particular, has been conceived as a conversation-starter between lawyers, historians, sociologists, theologians, and anthropologists about L&R studies, their potentialities and future. In this light are to be seen Michael Welker's analysis of the Biblical roots of the L&R relationship (Chapter 1), the historical perspectives provided by John Witte's chapter (Chapter 2), the anthropological attention to "the different religious normativities of non-Western people" shown by Martin Ramsted's text (Chapter 3), the "disconnect between the workings of the laws and the working of the societies in which these laws operate" highlighted in Effie Fokas's sociological contribution (Chapter 4), and finally the detailed discussion of the inputs that lawyers can offer to "interdisciplinary conversations" provided by Peter Edge (Chapter 5). This last author underlines that law and lawyers have frequently been the "colonized" of interdisciplinarity, first by sociology, then also by anthropology, history, and theology. This remark is true but, nevertheless, surprising for an area of study like L&R, that is the primary preserve of lawyers (and, from a different angle, theologians[19]). Engaging with other human sciences scholars and taking seriously their questions, criticisms, and suggestions is the best way to strike a more correct and fruitful balance.

The controversial notion of freedom of religion and belief (FoRB)

The second section of this *Handbook* is devoted to FoRB. This choice is by no means surprising, given the importance this right has acquired in L&R studies. However, the central place it has been given in this area of scholarship is not uncontested and requires some reflection.

The success of the L&R brand has posed a few questions about the impact it may have on the governance of diversity and visibility of religion in the public space. The development of a

18 As proposed by Catto and Sandberg 2010.

19 Mainly from the angle of "religious law" (see *supra* fn. 13).

specific legal field of studies and practice is not a "neutral" event as it can easily influence the understanding and managing of the relations that take place in the L&R field. What suggestions and directions are provided by this group of experts to the public administrations, parliaments and courts that are engaged with the regulation of religious beliefs? Beyond the different political, ethical, and religious convictions of each scholar and lawyer working in the L&R field, are there some fundamental principles that guide their activity? In other words, what is the "heart" of L&R as a field of study and a body of experts? The answer is simple but at the same time is the subject of a heated debate: it is the right to FoRB.

It was not always so. A few decades ago, the studies that we now call L&R (but then they had different names) mainly focused on the relations between church and State. The shift of attention towards FoRB was the main factor that ensured the success of L&R scholarship as it widened its scope beyond the borders of Christianity (that were implicit in the use of the word "Church"), placed the individual at the center of the stage and thus connected with the broader field of research on fundamental human rights.[20] In this way L&R studies have entered a far larger cultural circuit and overcome the prevailing national perspective that had largely characterized the previous stage focused on Church and State relations. However, the emphasis placed on FoRB has not been equally appreciated by all.

To understand the meaning of this difference of opinions, a step back is required. The development of L&R studies, with their stress on FoRB, has been greeted with great favor by some scholars. They believe that the problems posed by religious diversity and visibility in the public space require a specific legal approach based on a set of principles and rules that reflect the "specialty" of religion (see Sandberg 2011: 195–7). According to these scholars, religious claims and commitments "involve matters of ultimate status and importance" and "tend, as a category, to be comprehensive in nature" (Berg 2013: 36–7). These two features (and others highlighted by different scholars) make religion "special" and support the demand that everything having to do with it is regulated by rules which take into account the specific characteristics of this unique dimension of human life. This approach leads to special prominence being given to religious freedom, regarded as the dominant principle that should inspire the work of lawmakers, judges and scholars in this field.[21]

These conclusions are not shared by all. Marco Ventura, in Chapter 11, mentions Jean-Philippe Schreiber's critical remarks on the "subordination of certain fundamental rights to a sacralised religious freedom" and the "prevalence of a sovereign religious freedom for reasons of politics or ideology on the one hand and of identity on the other."[22] Schreiber and other legal experts doubt that religion is something special that requires a specific system of legal regulation and are convinced that the tensions arising from the coexistence of different religious and belief communities in the same geographical space can be effectively addressed on the basis of the rules governing non-discrimination, freedom of conscience, expression and association, without conferring a particular legal status to religious freedom. This point was forcefully made a few years ago by Winnifred Fallers Sullivan. Given that State laws afford religion a special protection, Sullivan writes, "courts need some way of deciding what counts as religion if they are to enforce these laws." But it is impossible to decide on this point without embracing

20 For more details, see Ferrari 2013: XII–XIV.

21 See Report of the Georgetown Symposium on *What's So Special About Religious Freedom?*, November 17, 2011. Available at http://www.repository.berkleycenter.georgetown.edu/120901RFPWhatsSoSpecialReligiousFreedomSymposiumReport.pdf

22 Schreiber 2012: 28, quoted by Marco Ventura, in this book, p. 165. See also the pages 91–102 of Arif Jamal's chapter in this book (Chapter 6).

a particular conception of religion and setting up "a hierarchy of religious orthodoxy." In the past, when people lived in a much more religiously homogeneous world, this problem was not perceived with the same urgency. But today we live "in a world of diaspora religious communities in which all religions are everywhere, in which all religions everywhere are governed by secular legal regimes, and in which all religions everywhere are being reinvented by their adherents to suit new circumstances" (Sullivan 2011: 3). Therefore it is time to recognize "the impossibility of religious freedom" and give up the corresponding right. "Forsaking religious freedom as a legally enforced right might enable greater equality among persons and greater clarity and self-determination for religious individuals and communities. Such a change would end discrimination against those who do not self-identify as religious or whose religion is disfavored" (Sullivan 2011: 8). This is not just an academic discussion: as noted by Brian Leiter (2013) where he comes to conclusions that are not far from Sullivan's, taking one or the other way leads to give different solutions to issues like the kirpan worn by a Sikh in spite of the rules that forbid the carrying of weapons in public places or the religious soup kitchen opened in breach of zoning laws.

Other scholars are critical of the right to FoRB (as conceived and regulated today) from a different point of view. They do not think that FoRB is impossible, they think that FoRB is biased because it is a cultural construct that Christian and Western countries have imposed on the rest of the world. In a book written more than 20 years ago, Talal Asad argues that at a certain point of European history religion was defined as "a transhistorical and transcultural phenomenon."[23] This supposedly universal notion of religion is in fact loaded with implicit Christian theological concepts. In particular, it rests on the idea that religion is qualified by an autonomous essence which is separated from the essence of science, politics, law and so on.[24] According to Asad, "this separation of religion from power is a modern Western norm, the product of a unique post-Reformation history" (1993: 28) that is utterly incapable to understand religious traditions (the Muslim one, for example) where religion, politics and law are not separated. The right of FoRB, at least as it has been formulated in the human rights instruments and in most State constitutions, is based on this separation, that is reflected in the distinction between *forum internum* (the right to have a religion, to change it, to have no religion) and *forum externum* (the right to manifest religious convictions). This distinction is at the foundation of art. 18 of the UDHR and art. 9 of the ECHR and provides the yardstick to decide what deserves absolute (the *forum internum*) or relative (the *forum externum*) protection.[25] Like the notion of religion, Asad concludes, the right to FoRB is a product of a specific culture and as a consequence is functional to its needs and interests more than to those of other cultures.[26]

Sullivan's and Leiter's books pose a problem directly connected to L&R studies. They imply that there is no point in talking about L&R because there are many religions, secular worldviews, religious and non-religious claims of conscience and they are so different that it is impossible to place them within a unified framework labeled L&R without privileging (at least unconsciously) one form of religion over all others or religion over non-religion. Asad's books also question the soundness of the L&R category as they entail that these studies reflect a Western vision of the relationship between these two dimensions of human life. Confronted with these considerations, L&R scholars cannot avoid a difficult question: is their scholarship, with its insistence on FoRB,

23 On this process see Jakelic 2012: 15–46.
24 Asad 1993: 28. See also Chapter 8 by Prakash Shah in this book.
25 On this point see the consideration of Pamela Slotte, in this book, pp. 103–118.
26 These ideas have been expressed by Asad 2003.

really suited to understand and regulate the new role played by religions and secular worldviews in contemporary societies, or does it end up favoring discrimination and privileging established religions (and particularly those with Western roots)?

This question is at the center of the *Handbook* section devoted to FoRB. The chapters included in it approach the problem from different angles and provide different answers. However, they have at least one point in common. The books written by Sullivan, Leiter and Asad share the conviction that the right of FoRB is beyond repair, that is it has exhausted its capacity to be widened to include new religions or worldviews and to be adjusted in a way that makes it less dependent on a particular culture. The chapters of this *Handbook* take very seriously the considerations of these authors but most of them do not uphold their conclusions and focus on the changes that are required to bring the protection granted to FoRB up to the demands of a religiously and ethically plural society.

Becoming aware of the cultural presuppositions on which the notions of L&R and FoRB are based is the first step in this direction, Prakash Shah and Pamela Slotte argue in their chapters (Chapters 7 and 8). Shah challenges the "idea that all cultures have religion." He does not believe that "religion is a cultural universal" and, following Balagangadhara, holds that "some cultures have religion and others do not." Shah claims that the theoretical framework of this idea of religion as a cultural universal is provided by Christian theology, whose presuppositions – far from being erased – have been universalized by the process of secularization. The influence of Asad's ideas is perceptible, but the interest of Shah's contribution is mainly in their legal application. Through an exam of the caste discrimination law in Britain and of a US case on the teaching of yoga in State schools, Shah claims that "Western law acts as an agent in the secularization of the key claim of Christianity about the falsity of pagan traditions." He concludes that "secular law and freedom of religion," far from acting "as mechanisms for the neutral management of cultural diversity," incorporate key Christian claims that are discriminatory against other religions to say the least. Pamela Slotte approaches the same issue from the angle of international law. She dwells on "the implicit notion of religion" that permeates the ECtHR decisions and explores the avenues that connect it to the doctrine of traditional (and mainly Christian) religious communities, whose notion of FoRB presupposes the separation between belief and action on the one hand and politics and religion on the other. Echoing Asad's and Sullivan's considerations, Slotte highlights the danger that "established traditional expressions of religion become an exclusionary point of reference;" at the same time she is aware of the "inescapable embeddedness of ideas" and underlines that the Court's acknowledgment of its own prejudices is the first step to overcome them. Moving the focus from Asad's to Sullivan's and Leiter's considerations, Arif Jamal considers the different definitions of religion adopted by national courts and the impact they have on FoRB. He notes that "if we are to provide for freedom of religion and belief then it seems we should have a way of determining what this freedom protects, what limits there might be on the freedom and how freedom of religion interacts with other rights or considerations," but he does not conclude that the variety of religions and beliefs makes FoRB impossible. Rather, he supports "a broad and pluralistic approach to determining questions of what is a religious belief, centered on the sincere, albeit subjective, convictions of the individual(s) concerned." Fred Gedicks opens his chapter (Chapter 9) by writing that:

> the liberal democracies of the West have shifted their principal orientation from liberty to equality . . . The result has been a reconceptualization of religion and religious exercise, from a former understanding of religious exercise as the activity of distinct communities having no secular analogues and entitled to special solicitude by government, to the current

> understanding in which belief is increasingly viewed as one of many possible ways of orientation of one's life, no worse than secular ways of living, but also no better.

Gedicks too deals with the same issues discussed by Sullivan and Leiter, but his answer is different: getting rid of FoRB is not a necessity if more room is given to "a general norm of equality among religions and between belief and unbelief." Finally, John Madeley (Chapter 14) reminds us that, even within the Western cultural setting, there are important variations in the way FoRB is understood. Through an exam of the constitutional provisions devoted to its protection, he discusses the tensions between the "element of religious privilege" characterizing many State–religion national systems in Europe and the "American church–state separationism." He wonders whether:

> the advantages afforded by "protected area" status in Europe might, however, be presented as part of a Tocquevillean "tacit bargain" or trade-off: the protection of secular space from the claims of religious groups to influence the content and scope of legislation, in exchange for the special protection of the freedom of religious groups, institutions and individuals from state encroachment on their internal and/or private affairs.

The other chapters collected in this section are more directly devoted to the increasingly controversial interaction between religion and human rights and to the tensions that, in this framework, surround the right to FoRB. Sometimes religious rights and human rights are regarded as incompatible entities, competing universals that are bound sooner or later to clash. Eva Brems and Lourdes Peroni (Chapter 10), and Marco Ventura (Chapter 11) argue that they are related in a much more complex and nuanced way, as it develops through a play of reciprocal appropriations, rejections and variations both in the religious and the secular domain. All these authors stress the dynamic character of this relationship, explained by the fact that neither human rights nor religion are "monolithic, reified and fixed entities." The section is completed by the chapter written by Javier Martínez-Torrón (Chapter 13), who strongly argues in favor of recognizing that the protection of conscientious objection is a public interest, and Nazila Ghanea (Chapter 12), who invokes a more robust implementation of non-discrimination rules, particularly in reference to non-State actors, taking as model the anti-discrimination international instruments that concern race and sex.

Taken together, all these chapters show that L&R studies are fully engaged in the exploration of the new challenges presented by the globally emerging new religious landscape and are supported by the conviction that it is possible to effectively cope with them. Instead of giving up the right to FoRB as a chimerical or biased tool, they tend to rethink it along new lines. In my opinion this approach deserves to be supported and expanded to other lines of research. One is based on Veit Bader's notion of "embedded even-handedness" (see Bader 2007). This concept takes into account that our cognitive and normative frames are culturally embedded but it does not derive from this acknowledgment the consequence that attaining even-handedness requires a disregard for the symbols, rituals, traditions that are rooted in the history and culture of a people: as underlined by Joseph Carens (2002: 12), "being fair does not mean that every cultural claim and identity will be given equal weight, but rather that each will be given appropriate weight under the circumstances and given a commitment to equal respect for all." This principle provides a helpful criterion to evaluate country-specific disciplines of FoRB, underlining the need to consider both the goal that should be intrinsic to each legal system (granting even-handedness) and the legal system's roots ("embeddedness") that inevitably affect the paths by which that goal is attained. Another line of research is inspired by the notion of "particular

universalities" (see Espín 2007). Questions connected to FoRB need to be addressed through answers that aim to have a universal scope, in other words answers that are proposed as a solution that is not limited to a specific cultural context. At the same time the notion of "particular universalities" accepts the fact that these answers are rooted in a particular history and culture, and therefore represent one way (not the only way) to reach a solution: as a consequence the existence of other answers – grounded in a different context – must be accepted. Given that they address the problems with the same universal intent, these answers are not "incommensurable" and their effectiveness can be compared through an examination of their legal translations. From this point of view, comparing the solutions that different legal systems give to specific issues affecting FoRB makes it possible to assess how much these legal provisions offer answers that go beyond the particular cultural context in which they have taken shape and provide solutions that can be accepted (with the necessary adaptations) in other cultural and legal contexts.

Looking at the issues considered in this section of the *Handbook* through these two lenses leads to affirm the "possibility" of FoRB without identifying it with its Western model and without concluding that all models of FoRB are to be considered equally good (or bad). While retaining the concept that a general understanding of FoRB as a universal human right is feasible, such an approach recognizes that this right can take different forms and be implemented in different ways in different contexts. At the same time it does not conclude that these forms and implementations are equally respectful of the right to FoRB: some may be better than others and their comparative examination makes it possible to evaluate how effectively FoRB is granted in country-specific legal systems.

The changing system of the State–religion relationship

Although private subjects are playing an increasingly important role in L&R matters (as underlined in Nazila Ghanea's chapter), States still have a dominant position in this field. Without forgetting that State law is just one component of a larger picture, in many parts of the world family laws, education laws, and labor laws are largely State laws and provide the legal framework for the regulation of religion, including issues regarding FoRB. For this reason the third section of this *Handbook* is devoted to the relationship between States and religions.

The legal framework of this relationship is quickly changing all over the world. The signs of this change are quite evident, but a coherent picture showing the direction State–religion relations are taking has yet to emerge. It is possible to identify two broad trends that, with many variations, recur in most countries. The distinction can be drawn according to the different importance attributed to community and individual rights on the one hand and to religious freedom and equality on the other. Some legal systems privilege group rights and collective religious freedom, giving a lesser position to individual rights and equal treatment of citizens. Others give precedence to the rights and freedoms of individuals in a framework dominated by the notions of equality and non-discrimination. Many countries place themselves in a middle ground between these two extremes, trying to combine individual and collective rights, freedom and equality. The ideal of a strict separation of State and religions seems to be less strong today than two or three decades ago. The return of religion to the public square has encouraged strategies based on the cooperation, in many different forms, between States and religious organizations.

These issues are at the center of Rajeev Bhargava's chapter (Chapter 15), which provides the bridge between this section and the previous one. After distinguishing religious-centered and secular States, and further differentiating a number of versions of both, the author concludes that a particular type of secular State "can better protect freedom and build an inclusive

society and polity on fair and equal terms." It is "a secular state that keeps a principled distance from all religions and is able to both help and hinder their institutions and practices depending entirely on which of these strategies undermines intra and inter-religious domination. It neither actively disrespects religion nor passively over-respects it. It embodies a stance of critical respect." This idea of "principled distance unpacks the metaphor of separation" between church and State in a way that does not imply mutual exclusion, accepting "a disconnection between state and religion at the level of ends and institutions" but avoiding making "a fetish of it at the . . . level of policy and law." Without necessarily accepting Bhargava's view, the following chapters deal with the same problem – how to build a fair and inclusive society – through a specific analysis of the fields where State and religions meet more frequently.

In her examination of family law, Jane Mair (Chapter 16) endeavors to answer two basic questions: "To what extent are families a public or a private concern? What is the function of family law: the facilitation and accommodation of individual preference or the promotion of socially valued models?" The author insists on the shifting boundaries that divide public and private spheres, individual and collective interests, arguing for a careful broadening of "contractual settlements within a family setting" so as to make more room for individual choices in the ordering of family relations. Myriam Hunter-Henin (Chapter 17) discusses the place of religion in school education through an exam of the ECtHR decisions concerning the teaching of religion on one hand and the display of religious symbols on the other. She identifies a contradiction in the court case law. The emphasis on State neutrality that characterizes the religious education case law "leaves little space for RE courses that favor one religion over others," while when religious symbols are at stake the court has shown a greater deference to national arrangements "even when they confer greater visibility on the majority religion." A reconsideration of the margin of appreciation granted to States through "a more robust proportionality test" is the road the author suggests to balance State interests and individual rights. Lucy Vickers (Chapter 18) too concludes her analysis of religion in the workplace with an appeal to make larger use of mechanisms based on the concept of proportionality, so that the competing interests at stake can be evaluated through a careful and contextual analysis. At the same time, Vickers is aware that this approach "can be a cause for concern, because it can lead to difficulties in predicting the outcome of cases." Niels Kærgård (Chapter 19) explores a neglected field of L&R studies, the "interactions between economic development, law, moral, ethics and religion." The debate started by Weber and Sombart about the relation between religion and economic development lost much of its interest in the '30s when mainstream economics moved in a mathematical and statistical direction. Recently, however, the new institutional economics of Douglass North has reopened the discussion, reintroducing religion, ethics and cultural traditions as significant elements of economical analysis (although, Kaergard concludes, we are still far from fully understanding their impact on economic development). Christian Byk (Chapter 20), discussing the challenges raised by bioethics (another field that had been for a long time overlooked by L&R scholars) identifies the central problem with great clarity:

> Having expelled religion from the practice of medicine and science and further considered that physicians and scientists could not decide alone on ethical questions, our world is facing a crucial issue. How can we include ethical values in our law without importing the religious background which nourishes the old discussion between what should be morally permissible or prohibited?

Byk is aware that the diffidence with which some religious organizations considered the bioethicists' work has given way to a more balanced attitude, but he wonders whether the

invocation of "imprescriptible human values," that in the view of many Churches should limit scientific research, is a way to translate old religious dogma in a new language.

Generally speaking, the chapters collected in this section of the *Handbook* convey the impression of a "work in progress." They do not identify established global patterns of the State–religion relationship but rather describe processes and trends that are evolving and are frequently internally conflicting, contested and controversial. It is possible to identify some recurring themes: the accent on proportionality, for example, or the need to increase the internal plurality of national legal systems, but it is difficult to go beyond these general indications. The religious landscape of many countries is changing at a speed that does not allow us to clearly identify the legal principles on which a new system of State–religion relations is going to be based. Much will depend on how some particularly thorny issues are settled and this is the topic of the last section of this *Handbook*.

Controversial issues

A few years ago John Witte and Christian Green wrote that apostasy, blasphemy, conversion, defamation, and evangelization constitute the new alphabet of religious freedom, meaning that many offenses against FoRB concern these issues.[27] While this is correct, it is impossible to escape the impression that such new alphabet is in fact an old one: the same issues were discussed at the time of Voltaire and even before. What is new, then, are not the topics (Jane Mair notes in her chapter how "familiar" they are[28]) but the setting in which they are considered, that is largely defined by the notion of individual human rights. As a consequence of globalization and migration, this setting, that seemed to be solidly established (at least in the West), has been questioned once again.

With the addition of gender and religious symbols, the alphabet of religious freedom evoked by Witte and Green corresponds to the topics that are discussed in the last section of this *Handbook* under the title "controversial issues." The common thread that binds the chapters collected in this section is the endeavor to find viable solutions to difficult problems. Sometimes the authors are able to point to a road that offers better chances than others to lead to a satisfactory outcome. Addressing the thorny issue of the relation between freedom of expression and FoRB, Jeroen Temperman (Chapter 25) supports a "triangle of incitement" model, according to which legal restrictions of freedom of expression should be limited to instances where there is "an *Advocator* who incites an *Audience* to commit specific adverse acts – discrimination, hostility, or violence – against a *Target Group* (e.g. a religious minority)." Adopting this model leads to "decriminalize blasphemy and defamation of religion *whilst taking seriously* the issue of incitement to violence and discrimination." Tad Stahnke concludes his chapter on proselytism (Chapter 26) with six points that provide operative guidelines. Their gist is that proselytism (defined as "the purposeful attempt to change another's religious beliefs or affiliation") is an integral part of FoRB and therefore "must be protected irrespective of the content of the views asserted by the source, the manner in which those views are asserted, and whether the interference

27 Witte and Green 2012: 4.

28 Mair writes (in this book, p. 256) that "because of a presumed gap between the religious influence of the past and this contemporary redevelopment, the problems it has brought are often thought of as new. On the contrary, what is notable about much of the current writing about religion is the extent to which it is familiar. Theoretical re-workings of old debates are emerging in an attempt to make sense of new religious situations. Instead of being disturbed and deterred by these debates, to some extent we might be reassured by their familiarity."

stems from state or private action." Of course, restrictions on proselytism are possible but they must further a secular interest and must be proportionate to its realization. Sometimes the issues considered in a chapter are so complex and in evolution that a clear pattern of regulation is not available and the authors focus on the direction where such pattern has to be sought. Confronted with the irrepressible variety of meanings that a religious symbol can have, Hana van Ooijen is skeptical about the opportunity to address this problem through abstract and general legal provisions and supports a pragmatic approach characterized by a "renewed emphasis on proportionality," that is the "key to striking the proper balance between the various interests involved, and to attuning a balancing test to specific situations." Ayelet Shachar's chapter (Chapter 21) revolves around the question of "what is owed to those women whose legal dilemmas (at least in the family law arena) arise from the fact that their lives have already been affected by the interplay between overlapping systems of identification, authority, and belief – in this case, religious and secular law." She is convinced that "instead of asking women caught in the knots of secular and religious marriage laws to leave their cultural worlds behind, it is preferable to make these worlds visible and 'legible' to the official justice system." In her opinion, the best way to reach this goal:

> is to explore options for bringing non-statist sources of law, including certain aspects of religious law, into the fold of domestic, regional and international legal orders by introducing safeguards that will ensure that women who belong to minority religions are not forced to choose between their culture (or religion) and equality guarantees included in these multiple sources of law- and identity-making.

Nadirsyah Hosen (Chapter 22) considers the topic of religion and security in a broad perspective. The core of the problem is the "paradox of tolerance": liberal constitutionalism "grants a protected sphere to individuals and organizations that may not be inclined to reward the protection by being tolerant themselves with competing religions or with the state." The author is aware that law cannot be the only answer and wonders whether the legal definition of FoRB reflects adequately its complexity, as "religious freedom is more than the simple freedom to believe and practice a 'religion.' It is the power of ideas, values, beliefs, and related behaviors that support the ideals a society holds as aspirational." He concludes that "maintaining the rule of law is not the only option in dealing with terrorism. A holistic approach together is needed. This is to include an accommodation of pluralism in order to pursue communication and mutual understanding." Finally, Abdullah Saeed looks at the question of apostasy in the context of Islam, as part of a broader argument for freedom of religion among Muslims. He correctly underlines the fact that "to achieve a genuine and sustainable shift in attitude among Muslims, support for freedom of religion must come from the Islamic tradition." To this end he focuses on the notion of *Maqasid al-shari'a*, the goals and objectives of the *shari'a*, and more specifically on the principle of protection of religion, which is one of the most important goals of *shari'a*. Relying on ancient and modern authorities in Islamic law like al-Shatibi and Kamali, he applies a method based on "inductive corroboration" to bring together all the texts in the Islamic tradition that support freedom of religion. Concluding his analysis, Saeed writes that, although "the protection of religion is not explicitly concerned with religious freedom as articulated by Article 18 of the UDHR, [...] the notion of *maqasid* can be used to support a more expanded understanding of the protection of religion."

Saeed's contribution provides the right note to conclude this introduction. Our world is moving closer to Robert Cover's vision, where people live in different normative universes that Cover defines as "a world of right and wrong, of lawful and unlawful, of valid and void." Religious and belief communities are a good example of these normative worlds: they are the places where