CHAPTER 1

Regulation of religion in Europe: Theoretical perspective

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1. Introduction

In the last decades we have witnessed a significant development of regulatory activity followed by the incursion of regulation theory in many traditional domains of law. Many traditional legal disciplines, such as constitutional law, administrative law, competition law, securities law, media and entertainment law, tax law, sports law, criminal law and civil law (v.g. family law, property and torts) have been importing new conceptual tools from the regulatory theory toolkit. The studies of regulation are now all-encompassing. Regulation in general and responsive regulation in particular are often described as "a general theory of how to steer the flow of events". Modern theory of regulation goes far beyond the legal norms themselves, making use of rules and mechanisms little or not at all formalized (Drahos & Krygier, 2017, p. 1 ff). Especially important is the recognition of the importance of both rationality and emotions in the regulatory processes (Drahos & Krygier, 2017, p. 9ff). Its main purpose is to promote individual and collective well-being (Braithwaite, 2017, p. 25ff). This broad understanding of regulation may obviously be applied to the domain of religion. Drawing from some perspectives and basic concepts developed by the theory of regulation, this article will briefly describe some of the ways in which the regulation of individual, collective and institutional religious practices can be steered or influenced through the use of the concepts of responsive regulation and smart regulation, including its conceptual tools such as regulatory pyramids, combinations of policy instruments and the consideration of a broad range of regulatory actors. It is about carrying out a theoretical experiment, applying analytical structures to the domain of religion that have already been applied

and tested in other areas of regulation. The main objective of this article is to make more visible and clear some aspects of the regulation of religion that an exclusively legal and normative perspective tends to disregard.

2. Regulation of religion

2.1. Historical notes

The regulation of religion has always been a fundamental problem for all structures of political power, even when they were ostensibly religious. And it has never proved to be an easy task and free from political and legal tensions and problems. Although there is no time and space to elaborate on this subject, it is important to recall, topically, some critical historical moments in the regulation of religion, such the binding of the gods to the affairs of the Greek polis; the Roman doctrine of the open pantheon; the roman condemnation and execution of Jesus Christ; the establishment of Emperor worship in the Roman Empire; the Edict of Milan of freedom or religion (313); the convening of Council of Nicea by the Emperor (325); the Edict of Tessaloniki proclaiming Christianity as the oficial religion of the Roman Empire (380); the establishment of the Inquisition (1063); the proclamation of the Crusades by Pope Urban II (1095); the persecution of heretics, apostates and schismatics; the massacre of the Templars by Philip the Fair and Pope Clement V (1307); the attempts of the Emperor and european monarchs to control the Pope; Luther's appeal to the German princes to become emergency bishops; the Peace of Augsburg (1555); the toleration Edict of Nantes (1598); the proclamation of religious tolerance in the Peace of Westphalia (1848); the Act of Toleration (1689) the struggle of catholic absolute monarchs against the catholic religious orders; the Edict of Fontainebleau (1685); the Bill of Rights of Virginia (1776), the Napoleon Concordat (1803); the Reichskonkordat (1933). These are just a few of the many examples that go to show that the regulation of religion has always been most probably the biggest legal-political challenge in European history. The regulation of religion throughout history is inseparable from the dominant conception about the nature, purpose and limits of political power.

Things are not entirely different today. In spite of the enormous influence, in the the eighteenth and nineteenth centuries, of several anti-religion lines of thought, such as the Enlightenment, Modernism, Naturalism, Rationalism and Scientism, religion has made an impressive comeback in the twentieth and twenty-first centuries (Berger, 1999, p. 1ff). In the European Union, the United States, Russia, Turkey, Iran, Saudi Arabia, India, China or Brazil, the regulation of religion and the relationship between faith and politics have

acquired a fundamental acuteness (Casanova, 1994, p. 11ff; 75ff). Globalization and global movements of people and ideas have increased the importance of the problem. People with different and colliding worldviews are called to live peacefully together side by side. At the same time, consumerist, scientifically and technologically sophisticated modernity, seems far from providing a satisfactory answer to some perennial human questions about the origin, meaning and purpose of existence. Global risks such as pollution, nuclear, chemical or bacteriological catastrophe, pandemics, the drastic reduction of biodiversity, climate change and its effects, have helped placing the world in a pre-apocalyptic cultural mood and in a state of doomsday anxiety (Parfray, 1990, p. 17ff). More than ever before, people are turning to religion and spirituality in search of a sense of *existential security* they can't find elsewhere (Norris & Inglehart, 2014 [2011], p. 243ff).

Religion continues to make its impact on politics, law, economics, science, culture, art or sport on a global scale (Ventura, 2021, p. 1ff). Contemporary secular societies, supposedly neutral from the religious point of view, are faced with the need to make difficult choices in religious matters, regulating institutions, people and conduct. Because modern universities have largely neglected religion, politicians, legislators, administrators, and judges are often unprepared to understand the real dimension and all the ramifications of what they are called to regulate. Religious literacy is in short supply. Our reference to history also serves to alert to the fact that the regulation of religion always operates in a given civilizational, historical and cultural context, and not in a vacuum. This makes it politically impossible and socially undesirable to guarantee absolute regulatory neutrality in relation to different religions[1].

2.2. Concept of regulation

In general terms, there are four distinct strategies of control that can be followed in order to achieve social goals: market discipline, private litigation, public enforcement through regulation, and state ownership (Schleifer, 2005, p. 442). Although they all can be described as forms of regulation in a broad sense, regulation is often described as the intentional activity of attempting to control, order or influence the behaviour of others. In the last decades we have observed the development of a specific concept of regulation. It often starts with the idea that regulation is to control or direct others by rules or standards in order to achieve some pre-determined valuable goals thus strenghthening the social fabric. Understood from this perspective, regulation theory is generally

[1] Lautsi and Others v. Italy [GC], Application no. 30814/06 § 68 ECHR 2011-II.

associated with the quest for efficiency and rational design of institutions and policies. This concept of regulation is different from the general idea of the law, because it concentrates on specific areas of social life, where it identifies a set of given goals and tries to come up with various means (v.g. criminal law, civil liability, disciplinary measures, licensing, fines, agreements, letters, consent decrees) in order to achieve those goals. On the other hand, it underlines the regulatory role of informal and non-legal standards, values, habits, customs, practices, incentives or expectations. Far from being dismissed as a negative bureaucratic overload, regulation serves the positive and important role of assuring valuable community oversight. The concept of regulation emerged as a result of the need to deal with the political, legal, social, financial, economic and technological complexity of modern advanced societies, in many cases at a global level (Schleifer, 2005, p. 439ff).

The concept of regulation is mostly applied when dealing with specific sectors, such as food and drugs, communications, banking, securities, competition or civil aviation, where the specific rationality of ends and means is especially important. It often implies the existence of independent regulatory agencies (v.g. FTC, FDA, SEC, FCC, FAA) with the task of drafting legal rules, licensing companies, activities or products, supervising the activities of these companies, ensuring the enforcement of rules and preventing their violation, exercising supervisory and inspection functions and, where necessary, applying the appropriate sanctions. Regulation soon became a global task, involving States, International organizations and corporations in the areas of trade, finance, governance, telecommunications, maritime issues or international aviation (v.g. WTO, IMF, OECD, ITU, IMO, IACA).

Some of the main characteristics of regulation, in a specific sense, are: a) the recognition that there are market failures which require the government to structure a policy and regulatory framework and search for creative regulatory solutions, in order to promote the public good in the face of many challenges; b) the concerted action of various legal and non legal disciplines and of legal and non legal norms from different branches and traditional areas of law (criminal and civil, public and private, national and international) and society (v.g. education) along with technical standards to achieve certain regulatory objectives, c) the relativization of structural and substantive differences between these branches and areas of the law and, d) the creation of multilevel dynamic local, national, supranational, international and global regulatory partnerships and networks involving public and private sector entities, e) the use of soft-law and soft-regulation forms and strategies (eg letters, agreements, self-regulation, nudges, naming and shaming) for this very purpose. Regulation is also f) concerned with compliance and periodical monitoring and review of the actual results of the application of existing regulatory strategies in order to verify to what extent they

are achieving their intended objectives. Regulation is understood as a process of exploration and rebuilding, oriented towards the advancement of knowledge about regulatory processes in order to solve existing and emerging problems. Although regulation has a specific meaning, it has been used to explain and reconceptualize classical areas of the law, such as administrative law or criminal law. Even war itself has been described as a form of regulation (Knowles, 2017, p. 1953ff). For some authors, regulation is the essence of all law. In a broad sense, encompassing legal and non-legal dimensions, regulation, in a broad sense, can be seen as a complex set of means of "influencing the flow of events" (Parker & Braithwaite, 2003, p. 119ff).

2.3. The concept of religion

The definition of religion is not entirely straightforward, being preferable to understand the concept of religion as an ideal type. This means that religion is understood as having some characteristics and elements, but that doesn't mean that these will be present in all religious phenomena. Religion can be described as a worldview with metaphysical and supernatural overtones, being different in that regard from secular philosophies and ideologies (Iannaccone, 1998, p. 1466). This connotation of the concept of religion has allowed it to denote movements, such as Judaism, Christianity, Islam, Confucianism, Taoism, Buddhism and Hinduism, each with many different branches, both large and small. But there are also new religious phenomena arising today. However, all worldviews have a "a sense of taste for the infinite in the finite" (Schleiermacher, 1893 [1799], p. 33) that is, they purport to deal, in one way or another, with ultimate concerns and questions respecting the origin, meaning and destiny of the Universe, life and man, as well as the existence, source, nature and content of moral norms of universal validity (Tillich, 1957; Hoffman & Ellis, 2018, p. 1ff). This means that religious and non-religious worldviews can encounter each other in the same sphere of discourse. A neo-atheist and and a Preacher have God as their ultimate concern, and are this religious in a broad sense. That's why atheism and secular humanism have been described as forms of religion [2].

Far from being confined to a social autopoetic subsystem separated from politics and law, as some authors implied (Teubner, 1993, p. 1ff; 13ff), religion is related to all spheres of life. It refutes the notion that modern society is made of social systems that are code-specific, autopoietic and normatively closed

[2] Torcaso v. Watkins, 367 U.S. 488 (1961), footnote 11: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."

to one another (Luhmann, 1997, p. 16ff; 230ff). Furthermore, it offers basic axioms and presuppositions that structure an interpretative framework that individuals and communities may use to understand reality. It also creates spiritual and transnational epistemic communities that provide a sense of identity, belonging, meaning, comfort and hope. It has even been stated that the possibility of theoretical thought itself is grounded on axioms, motives and pressupositions about the nature and meaning of reality as a whole that are essentially and inescapably religious (Dooyeweerd, 1969, p. 1ff). The act of thinking theoretically rests on assumptions about the rationality of the human being, the intelligibility of the cosmos, the existence of objective truth and the universal validity of the laws of logic and mathematics. According to this view, religious neutrality is really impossible in the fields of politics, law or science (Queiroz, 2020, p. 26ff). Regulating religion is, in a way, a means of regulating many other domains. The opposite is also true. In fact, religious people move fluidly among social spheres and networked organisations. They are politicians, lawyers, journalists, economists, scientists and athletes, taking with them, as they go about their activities, their religious beliefs and practices, knowledge and contacts, thus allowing religion to influence different normative domains.

This is precisely what John Braithwaite (2006) has in mind when he said:

> In this regard my conception of responsiveness differs from Teubner's reflexiveness and Niklas Luhmann's autopoiesis. I do not see law and business systems as normatively closed and cognitively open. In a society with a complex division of labor the most fundamental reason as to why social systems are not normatively closed is that people occupy multiple roles in multiple systems. A company director is also a mother, a local alderman, and a God-fearing woman. When she leaves the board meeting before a crucial vote to pick up her infant, her business behavior enacts normative commitments from the social system of the family; when she votes on the board in a way calculated to prevent defeat at the next Council election, she enacts in the business normative commitments to the political system; when she votes against a takeover of a casino because of her religious convictions, she enacts the normative commitments of her church … So much of the small and large stuff of organizational life makes a sociological nonsense of the notion that systems are normatively closed. Nor is it normatively desirable that

> they be normatively closed ... there is virtue in the justice of the people and of their business organizations bubbling up into the justice of the law, and the justice of the law percolating down into the justice of the people and their commerce. (p. 885)

2.4. Regulating religion

Religion concerns all spheres of life. It influences how people understand and experience politics, economics, science, culture, art, entertainment or sports. Beliefs translate into habits, rituals and actions. Even critics of religion, such as atheist Sam Harris, recognize this, when they say that religion poisons everything. Religion is also influenced by politics, law, economics, science and culture. It has ontological, epistemological, deontological and normative dimensions. Modern theories of regulation can easily be applied to religion, since they generally assume that law exists alongside a variety of normative orderings. Since religion concerns every aspect of life, the regulation of religion must be assessed from an interdisciplinary perspective, involving law, theology, economics, sociology, political science and International relations, in a way that takes into account the existing complex network of connections and interactions between multiple individual and institutional actors, events and mechanisms. Regulating religion has an impact on the political, legal, economic, scientific, cultural and sports and entertainment systems.

The regulation of religion has to take into account its subjective and objective dimensions. That means it has to consider the significance and content of a) personal conscience, beliefs, convictions, experiences and practices; b) texts, traditions, symbols, rituals, clothing, food; c) institutions, collective enterprises, corporate structures and properties. Because of this, religion is to be seen as both a public or private concern, manifesting the tension between State and individual, sovereignty and freedom. Unlimited freedom of religion would most probably be significantly detrimental to human rights the public good. The main task of the regulation of religion is to consider potential policy pathways to address these concerns.

Some values that are used in regulating religion may not be entirely neutral from the religious point of view. They may be the result of a set of theological developments. For instance, Roger Williams, the founder of the Colony of Rhode Island, first defended religious freedom for all religious communities, both christian and non-christian, on the basis of his own theological beliefs. He thought that the center of gravity of religion should be uncoerced personal

conviction (Williams R., 1644). In fact, it has often been pointed out that the modern constitutional values of religious freedom and equality implicitly privilege the protestant theistic liberal perspective (Walter, 2006, p. 38 ff).

3. Theories of regulation

3.1. Public interest regulation

An important theory of regulation attempts to base it on the values of citizenship and common good, as opposed to consumer preferences. In modern constitutional democracies, this kind of regulation stresses the values of participation and public interest. However, in the last centuries, since the days of colbertism, mercantilism, metalism and protectionism, public interest regulation describes mainly a state-centered command and control approach to economic regulation that gave precedence to the public interest as defined by the absolute monarch or the chief of the executive. As far as the regulation of religion is concerned, the same approach was followed. During the centuries, religion was regulated as a means of attaining very clearly defined political and social goals. In England, the Anglican Church was created in order to free the monarch from the foreign influence of the Pope. In France, the galican theologico-political regime stressed the ideal of "Un roi, une loi, une foi", in which the catholic faith would be used to legitimate the absolute power of the monarchs. The provision of spiritual public goods concerning the salvation of the people was largely seen as a State responsibility (*salus publica*), giving rise to something like a spiritual welfare State. In order to do that, States would engage in the active reform of the Church (*jus reformandi*) (Vinding, 2019, p. 88ff). The statist and absolutist attempt to control religion, even at the cost of permanent conflicts with the Pope, was also present in catholic states such as Austria, Spain and Portugal in the 17th and 18th centuries. Many European absolute monarchs affirmed their sovereign rights over religious matters (*iura maiestatica circa sacra)*. Throughout Europe the religion of the king was the religion of the kingdom (*cuius regio, eius religio*). A similar approach was followed by the Napoleon Concordat and other Concordats with authoritarian regimes (Holmes & Bickers, 2021 [1983], p. 139ff; 199ff). A structured relationship with the dominant religious communities was seen as essential to secure public order and peace. In many countries there was the expectation that being a good citizen implied being a good Christian *(idem cives et christianus*). More recently, some lines of civic republicanism and communitarianism emphasised the role of religion in fostering the necessary civil virtues.

3.2. Market-oriented regulation

This theory of regulation stresses the regulatory importance and function of market structures. The market is understood as a framework of freedom, autonomy and decentralization of authority. Adam Smith was maybe the leading proponent of this notion. He saw the free market as an antidote to public protectionist and mercantilist economic structures as well as against private monopolies. Competition amongst small corporations was seen as the best way to maximize individual social and economic freedom and collective wealth creation. However, markets are regulatory constructs in need of regulation. Competition law is a form of regulation aiming at correcting market failures. These same principles were applied by Adam Smith (2007 [1776], p. 608ff) and his followers to religious communities, especially in the anglo-saxon world where the Protestant Reformation had given way to the creation of multiple Protestant factions. Religious freedom was understood as a kind of competition law for religious communities, protecting against abuses of dominant position.

The principle of separation of churches and State assured that the *magistrate* would be a neutral and impartial regulator, initially within a protestant playing field, leaving it to individual consciences to decide on matters of religious faith. According to John Locke, Catholics and Atheists should be kept at bay for political and moral reasons. The former were seen as an external threat, because of their connections with the French King and with the Pope in Rome (Stanton, 2006, p. 84ff; 91ff). The latter were seen as a moral threat to the political and legal system because of their disbelief in a superior moral authority (Numao, 2013, p. 252ff). This particular view showed that even the more liberal minds had a problem with absolute religious deregulation, accepting the intervention of the State to correct negative political, legal and social externalities of religious market failures. Even today, even the most generous defenders of religious freedom would have problems with accepting religious practices like burkas, the caste system, polygamy, genital mutilation, widow burning, etc. Complete deregulation of religion would be unthinkable. This regulatory state structure combines state oversight with "marketisation" of religious services provision and, in the responsive model, religious communities are expected to cooperate with state oversight.

3.3. Responsive regulation

In the last decades the concept of responsive regulation was developed, meaning that regulators should understand the context and motivations of those whose conduct they were regulating and then choose a response based on that

contextual understanding (Braithwaite J., 2017, p. 117ff). Responsive regulation requires a deep knowledge of the specific characteristics of the domain that is to be regulated. It understands that consistency and "one size fits all" approaches can only make things worse in the future (Braithwaite J., 2017, p. 118). It draws the regulator's attention to the particular actor and specific situation. Drahos and Krygyer explain that "[a] responsive regulator is not denied the option of penalties, but is denied their first and automatic application" (Drahos & Krygier, 2017, p. 5). This concept is relevant in all regulatory domains (v.g. crime, corruption, media, competition, securities, internet).

Responsive regulation is particularly important when it comes to regulating religion. First of all, it is important to have in mind the theological and theonomical aspects of a significant part of religious thought. It is perceived as based on revelation, and thus not entirely flexible. Although it can change over the course of the centuries, through internal and external discusión and pluralism, it has some very rigid parts, concerning doctrines and conduct that are seen as absolute, unconditional and unchanging divine imperatives that won't simply go away. Another important aspect of religion, it is its resilience in the face of changing political, social, cultural and economic circumstances. Christianity started in the periphery of the Roman Empire and its theologians always found a way to accommodate and adapt to different structures and strictures of political, ecclesiastical and economic power. Theology may also be highly responsive to context.

Another aspect, concerns its ability to empower the apparently humble and vulnerable. Through its religion, the small and weak Jewish people were able to resist and outlast the strongest Empires, such as Egypt, Assyrian, Babylonian, Persian, Greek, Roman, deal with the Respublica Christiana, the rise of the nation State, France, Prussia, Germany, Austria, and be here today, as we speak, having influenced the political decisions of successive American Administrations, and challenged the United Nations and International law. Religion empowered the african-american community in its fight against slavery, segregation and discrimination, providing an absolute claim to equal dignity. In East-Timor, it was largely catholicism that gave the necessary resilience against Indonesian occupation. It is also worth noting that theological differences and conflicts, within and between religious communities, are able to generate large amounts of spiritual and intellectual energy, that inevitably impact all other spheres of life.

Religious communities coexist in an atmosphere of spiritual competition and confrontation, as we see between and within Catholic, Orthodox, Protestant and Evangelical Christianity or between and within Shiite and Sunni muslims. In some circles, theological arguments may be used in a way that demonizes individuals, groups and peoples. For instance, the Protestant Reformation, which started as a theological dispute within the then recently created and largely unknown

University of Wittenberg, soon became a spiritual revolution with profound and lasting political, geopolítical, economic, social and cultural implications and effects. The different religious communities are always in a state of spiritual confrontation and competition, of actual or potential theological war of all against all, in which man can become the demon of man.

Responsive regulation must be context sensitive, going with the flow of events while trying to influence it and steer it towards socially desired outcomes. In doing that, it doesn't rely on state power alone, enlisting the civil society in a way that makes regulation a tripartite enterprise. Tripartism starts from the assumption that society cannot rely exclusively on law and its agencies of implementation, relying instead on informed and motivated public interest groups. There are different private and public layers of regulatory action, and multiple informal and formal pathways. A responsive regulator of religion is not denied the option of penalties, but is denied their first and automatic application.

4. Regulation of religion in Europe

A significant number of individuals and religious communities view the regulation of religion as a potential threat to freedom and well-being. For some of them, the simple formulation of restrictions on the use of temples for health reasons is understood as a state attempt to impose by force a secularist and materialist ideology. However, on the opposite end of the spectrum many are convinced that the regulation of religion is inevitable and desirable. This is why clarity about the agents, objectives, principles, strategies and techniques of the regulation of religion is so important. When dealing with individual believers and religious communities, in different settings, regulators should foster commitment, communication and cooperation and not suspicion, distrust and alienation.

4.1. The presence of history

The history of Europe is largely the history of the interaction between politics and religion. As far as the regulation of religion is concerned, each country has its own *historical background* (Torfs & Vrielink, 2019, p. 13; Tretera & Horák, 2019, p. 71ff). It must be taken into account the fact that different individuals and religious communities will attribute different meanings to the various regulatory strategies and actions according to their particular world views and historical experiences. Some religious communities have been around for centuries and keep memories of past interaction with public and private power. The regulation

of religion is characterized by the *presence of history*. The memories of the Crusades, the Inquisition, the Wars of Religion or the Holocaust still pervade this field. That's why the regulator or religion must be especially sensitive to historical and cultural context and the weight of tradition ["*le poids de la tradition*"] (Mazzola, 2016, p. 55). Christian and non-christian religious communities, being in a majoritarian or minoritarian position in different parts of Europe, will perceive the regulation of religion very differently, according to their collective or institutional memories. Although sharing many common features, European States have different specific historical experiences concerning the regulation of religion. However, this fact should not be used to justify significant restrictions to the right of religious freedom or discriminations in its exercise[3]. Some regulatory measures may have an impact likely to resurrect some "childhood traumas" recorded and repressed in the collective psyche of religious communities. For example, Jews would hardly fail to understand a ban on circumcision – however well-intentioned – in the context of the centuries-old history of anti-Semitic persecution. For this reason, the regulation of religion cannot be done without the history of religion.

4.2. Regulatory objectives

The pursuit of the right regulatory objectives may foster compliance, once individuals and religious communities feel that the regulatory framework is legitimate, fair and just. In Europe, the regulation of religion must pursue a reasonable and healthy balance of different human rights and constitutional objectives, as enshrined in European human rights documents, such as the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union and in the constitutional texts and traditions of the Europan States. At the core of these constitutional objectives are equal dignity and freedom, social cohesion and the common good. Here the concept of smart regulation is particularly helpful, since it draws attention to the fact that an intelligent and pragmatic combination of regulatory techniques must be sought (Gunningham & Sinclair, 2017, p. 133ff).

4.2.1. Individual conscience

In a free and democratic constitutional order, respect for the individual conscience should be a paramount goal of the regulation of religion. Conscience, therefore, is a key means to protect the moral autonomy of humans from the coercive power of the legal system. This can result in numerous possibilities of

[3] Lautsi and Others v. Italy [GC], Application no. 30814/06 § 68 ECHR 2011-II.

conflict of conscience requiring careful consideration. Individuals should remain free to hold any religious or non-religious views. No person should be forced to conduct an act which might reasonably be seen as pledging allegiance to a given religion or secular ideology. State authorities cannot directly or indirectly interfere with individuals' freedom of conscience. They cannot ask them about their beliefs, force them to express any beliefes or exert psychological pressure in order to "correct" their beliefs. Regulation of religion should try to avoid moral dilemmas as much as possible (v.g. allowing the refusal of blood transfusions on religious grounds) (Mancini & Rosenfeld, 2018, p. 1ff). Among other things, this means that those actors engaged in the regulation of religion should not adopt a naturalistic and materialistic worldview, for purely philosophical or ideological reasons, that *a priori* dismisses the possibility of individual conscience as an immaterial entity and assumes the neurological origin of all beliefs, including those particular regulatory assumptions. The regulation of religion should not be carried out as *if God did not exist* (*etsi Deos non esset*), but as if God could really exist (Corvino, 2019, p. 13ff). Respect for individual conscience calls for a regulatory strategy that aims at maximising opportunities for win–win outcomes.

4.2.2. Freedom of religion

The regulation of religion must be premised on an ideal of freedom as non-domination. Individuals and communities should have an equal freedom to investigate and develop their own views on and freely debate the ultimate questions of existence and their normative implications. The right to deeply hold any belief, religious or not, and to change one's mind is absolute and unconditional. This means that no one should be subjected to any political, legal, economic or psychological pressure in order to adhere to or to abandon religious or secular beliefs. Individual religious convictions, when developed freely in a context of freedom of conscience, opinion, expression and discussion, may themselves be powerful regulatory instruments, because they are able to significantly shape and influence the doctrine and behavior of religious communities. If religious individuals are not entirely satisfied with the nature and content of religious doctrines on this or that subject (v.g. gender and sexuality issues, climate change, social justice), they can always go to a different religious community, create a new one or abandon religion altogether. In a free, open and democratic society, religious and non-religious people are thus in a position to wield more regulatory power over the behavior of religious communities than are government officials. Under no circumstances can the State force individuals to adhere to the tenets of one particular religion or to follow the precepts of their own particular religion[4].

[4] Hassan and Tchaouch v. Bulgaria [GC], no. 30985/96, § 78 ECHR, 2000-II.

4.2.3. Equal dignity and freedom

Regulation of religion must promote the values of equality and non-discrimination. Although there is some room for reasonable disagreement as to what these values require, there are some red lines, such as the equal dignity of men and women that should not be crossed[5]. Equal dignity and freedom are fundamental principles of the regulation of religion, requiring that it will be pursued in an atmosphere of respect, participation in institutional processes of procedural fairness. The State should remain in a position of relative neutrality and impartiality, thus promoting order and tolerance. It should abstain from deciding on the legitimacy or truthfulness of the tenets of religious communities and from favoring some religious communities compared to others and from trying to resolve internal religious disputes[6]. On the other hand, it should take positive measures to promote the effective equal freedom of religion[7]. The balance of different and competing rights and interests should follow principles of consistency and proportionality. To the maximum extent possible, the State should adopt the principle of the most favoured religious community, meaning that, as a matter of principle, it should extend the treatment of the most favored to all religious denominations. This does not, of course, exclude the possibility of differentiated treatment, if and to the exact extent that there is a justification of a historical, sociological or cultural nature for this differentiation. There is some room for proportional and reasonable legal differentiation. It is important that the freedom of religion of individuals and religious communities is not burdened and limited in an unreasonable, unfair and disproportionate way. This is incompatible, for instance, with government keeping records of individual religious membership.

4.2.4. Protection of the sphere of public discourse

A free and democratic society requires an open sphere of public discourse, where all relevant topics of public interest are subjected to a permanent process of dialogical and critical examination. The regulation of religion must ensure that religious communities may actively participate in the sphere of public discourse. At the same time, religion and religious communities are also topics of conversation, since their worldviews, doctrines and practices impact all the different domains of social life. The regulators should assure the existence of

5 Staatkundig Gereformeerde Partij v. the Netherlands (dec.) no. 58369/10, ECHR 2012-III, Metropolitan Church of Bessarabia and Others v. Moldova, §§ 115-116, no. 45701/99, ECHR 2001-XII.

6 Miroļubovs and Others v. Latvia, no. 798/05, §§ 89-90 ECHR, I2009-III; İzzettin Doğan and Others v. Turkey [GC], no. 62649/10, § 121, ECHR, 2016-II; Serif v. Greece, no. 38178/97, § 51, ECHR, 2000-II.

7 Dubowska and Skup v. Poland, nos. 33490/96 and 34055/96, Commission decision of 18 April 1997, DR 89.

a broad freedom of religious speech and of speech about religion. This means that religious communities must be allowed to participate in the discussion of matters of public interest, while also being ready to withstand sharp public criticism and face the dissemination of doctrines hostile to the tenets of their faith[8]. Likewise, in respect for fundamental principles of ethics and discursive justice, religious communities can freely fight their spiritual battles, vehemently attacking ideologies they consider undesirable from their point of view.

4.2.5. Democracy and open society

Constitutional democracy is very much linked to the concept of open society, as advanced by Karl Popper (2002 [1945], p. 11 ff). This concept points to a polycentric view of governance and regulation, devoid of any teleological or theological historicism or sociological determinism. Law is just one system of ordering that exists. Religious norms can be another. In an open society, based on the rights of freedom of conscience, thought, expression, assembly and association, the formation and consolidation of nodes and networks of individuals and collective entities, including religious communities, or religiously inspired political parties, is a natural and expected manifestation of a decentred conception of governance with multiple sources and many forms. Religious individuals are free to interpret and even influence reality on the basis of their narratives and worldviews, but should not be allowed to capture the constitutional, institutional, normative and coercive structure of the State in order to advance it. Religious freedom is limited by the protection of an open democratic society, in which individuals are free to develop, express, revise and abandon their religious or ideological convictions[9]. Subjected to this understanding, non-state entities do not necessarily pose a threat of division, disorder, corruption or subversion of the free, open and democratic constitutional order. On the contrary, they should be seen as indispensable components of an open and democratic society, in which public, private, religious and non-government secular stakeholders collaborate towards mutually negotiated and commonly agreed goals. The State may intervene when there is a clear and present danger that a religious group is trying to impose its worldview or all-encompassing narrative on the political community, thus becoming a threat to democracy[10]. The regulators of religion should deliver

[8] Dubowska and Skup v. Poland (dec.)). nos. 33490/96 and 34055/96, Commission decision of 18 April 1997, DR 89, p. 156.

[9] Refah Partisi (the Welfare Party) and Others v. Turkey [GC] nos. 41340/98 and 3 others, ECHR 2003-II); Staatkundig Gereformeerde Partij v. the Netherlands (dec.), no. 58369/10, § 71, ECHR 2012-III.

[10] Refah Partisi (the Welfare Party) and Others v. Turkey [GC] nos. 41340/98 and 3 others, § 128, ECHR 2003-II; Hizb Ut-Tahrir and Others v. Germany (dec.) no. 31098/08, ECHR 2012-V.

procedural justice by treating those being regulated with respect, have clear and transparent procedures and provide reasonable and fair hearings for dissidents and engage constructively with alternative voices.

4.2.6. Rule of Law and checks and balances

The rule of law principle requires that laws must be publicly promulgated, equally enforced and independently adjudicated. This is the essence of procedural fairness (Braithwaite V., 2017, p. 30 ff). The concept of rule of law has, on the one hand, a substantive dimension, inseparable from human rights, democracy, separation of powers and effective judicial protection. The principle of the rule of law is an indispensable element in the regulation of religion. On the other hand, it has a procedural dimension, implying administrative compliance with formal law, equality and non-discrimination, proportionality of rights limitations, respect for legitimate expectations and the preservation of the essential core of fundamental rights. The rule of law principle also requires respect for the due process rights of individuals and religious communities as well as the right to judicial review of legislation and pecuniary compensation for serious human rights violations. It also requires public authorities to take all reasonable measures to ensure that all individuals and religious communities, especially minorities, benefit from the protection of existing general laws[11]. What's more, those who exercise legislative, administrative and judicial functions should not be permitted to do so in a way that violates the right of equal religious freedom[12].

Rule of law norms are generally inscribed in legal instruments such as conventions and treaties, legislative and administrative acts, best practices and standards, legislative guides and model laws, International, European and national court rulings and the rules of global regulatory bodies. As far as the regulation of religion is concerned, doctrines, canons, determinations of religious institutions and private association norms may also be relevant. The regulation of religion goes beyond the strictures of formal law. The regulation of religious involves the concerted efforts and actions of legislative, administrative and judicial branches, according to a classical perspective of the principle of separation of powers.

However, a new conception of separation of powers might envisage state, market and community actors, including religious communities, holding each other in check through the permanent dialectical confrontation of their different institutional objectives, doctrinal perspectives and interests of social action. The principle of separation of Church and State, even if not understood in a strict, full and absolute sense (Torfs & Vrielink, 2019, p. 18 ff), can be seen as

11 Karaahmed v. Bulgaria, no. 30587/13, §§ 91-96, ECHR 2015-IV.

12 Pitkevich v. Russia (dec.). no. 47936/99, ECHR 2001-II.

a manifestation of the objective of dispersing political and social power. In this way, the free and democratic constitutional order guarantees the existence of ideological checks and balances, preventing the capture of the political, legal and educational apparatus by a single worldview.

4.3. Responding to religion

Responsive regulation, as developed by regulatory theory, can and should be applied to religion. Among other things, it stresses that in deciding whether a more or less intrusive form of regulation is needed, regulatory authorities should be responsive to the regulatory environment and to the behaviour of the regulated. In the regulation of religion that means that historical, cultural, etnographic and demographic realities must be taken into account. Regulation of religion must account for variations in intensity, time and place of the religious phenomenon. Regulating religion in a historical context of religious strife, as in Northern Ireland, requires a different approach than in a country with a history of quasi-religious homogeneity.

Another important insight of responsive regulation is that regulating religion requires a deep understanding of religion as a social phenomenon. Religion distinguishes human beings from other living beings. Purporting to give the ultimate answers to questions concerning the origin, destiny and meaning of the Universe and life, from which the axioms that will guide human interaction and the relation with the world, religion puts forward a core of immovable doctrines and a set of categorical assertions about good and evil, right and wrong, the discussion of which often generates a kind of *odium theologicum* and rhetoric of demonization, both within and between religious communities.

Religion requires a kind of regulation that takes seriously the intimate connection that religious doctrines establish between revelation, tradition, reason, emotion and experience. It should take into account the psychology of rationality, along with its heuristics and biases, as well as the complex set of positive (v.g. love, joy) and negative (v.g. anger, pride) emotions generated by religion. Religion presents itself as a very thick and loaded phenomenon, giving rise to deeply engrained feelings, in which emotions are caused by religious beliefs and beliefs are caused by religious emotions, reason dominates passions and passions dominate reason. This domain of regulation points to the insufficiency of regulatory models based on human rationality. The existence of emotionally resilient but false beliefs can create regulatory problems on a national or transnational scale.

4.4. Regulatory institutions and actors

When analysing the regulation of religion in Europe, we immediately should consider the role of public power, at a national, supranational and International levels, that is, States, the European Union and the Council of Europe. But we need to go beyond that and research the impact of global and nodal regulation of religion, including the webs of legal, confessional and social structures along with the natural systems of social regulation. At the same time, we must be open to use multiple rather than single policy instruments, and draw from a broader range of regulatory actors, who, by working together, will be able to produce better regulation.

We should also start from the realization that several centuries of secularization and globalisation reconfigured the European religious landscape. This means that the regulation of religion in Europe, be it at the national, supranational and International levels, inevitably takes place within a plural regulatory community comprising different subcultural groups with their own particular values, norms, beliefs and processes. This means that it is particularly important to try to find common objectives and shared values and instruments between states, European institutions, religious communities and civil society, taking into account that through their leaders, religious communities may try to undermine regulatory authority or extend its reach or engage in forum shifting, that is, moving a regulatory agenda from one organisation to another, leaving an organisation and pursuing agendas simultaneously in more than one organisation.

4.4.1. States

Because of its internal and external sovereignty, recognised by constitutional, supranational and International law, States remain at the centre of the regulatory space. Due to the principles of equal sovereignty, non-interference in internal affairs and subsidiarity, the primary regulatory decisions are made and enforced by the State. It is up to its elected officials to set the rules that religious individuals and entities should comply with. The unitary, regional or federal structure of the State may have a direct or indirect impact on the regulation of religion (Torfs & Vrielink, 2019, p. 17ff).

Because of equal freedom and institutional adequacy concerns, when regulating religion, States cannot claim jurisdiction and theological competence to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed. The legitimacy of the exercise of regulatory power is subjected to an aggregate of substantive and procedural constraints concerning the democracy, accountability, authority and legitimacy of its institutions. European

States have a long tradition of regulating religion and interacting with it. Within a constitutional framework of equal dignity and freedom, their regulatory actions should seek to generate a response of support and commitment from the existing religious communities, not of resistance or capitulation. The secular State may recognise God without violating proper religious neutrality, namely through undue favouritism or prejudice against religion in general or a particular religion. It is not supposed to be an agnostic, anti-religious or atheist State. It is neither necessary nor constitutionally required for secular legal systems to reject God.

According to the axioms of smart and responsive regulation, the purpose of these bodies shouldn't be to foster religious unity, to create a national civil religion from various religious communities or to generate a State induced ecumenical dialogue, but simply to encourage mutual understanding and dialogue between different religious communities in the search of regulatory solutions to the political, legal and social problems affecting them. This would mean, for instance, that States, may recognise a transcendent source of law that lies beyond its own positive laws; but should not dictate, define or favour any particular religion, and that even if not formally recognising the existence of religious law, should abstain, to a significant degree, from interfering in the faithful submitting to religious norms. Smart and responsive regulation will help preventing an attitude of disengagement or game-playing, on the part of the regulated religious communities – that could end up undermining State capacity and legitimacy – and harnessing the regulatory capacity of non-state actors.

4.4.2. Council of Europe

Religion has the ability to shape International systems, discourses and relations. Since the Universal Declaration of Human Rights, in 1948, the regulation of religion became intimately connected with International human rights, at universal and regional levels. Created in 1949, in the aftermath of World War II, the Council of Europe aims to promote human rights, democracy and the rule of law. Nowadays it has 47 member States. One of its main achievements has been the enactment of the European Convention of Human Rigths, in 1950, and the institution of the European Court of Human Rights, headquartered in Strasbourg. Article 9.1, of the ECHR protects the right to freedom of thought, conscience and religion, including freedom to change one's religion or belief and freedom, either alone or in community with others and in public or private, to manifest one's religion or belief, in worship, teaching, practice and observance. Article 9.2. admits that interests of public safety, public order, health, morals or the rights and freedoms of others are grounds for regulating religion and limiting the free exercise thereof, provided that these limitations are prescribed

by law and necessary in a democratic society. Article 9 is often relied upon in conjunction with Article 14 of the Convention, which prohibits discrimination based on, among other things, religion and opinions (De Gaetano, 2020, p. 11ff). Collective religious autonomy may also benefit from other provisions, such as article 11, relating to the freedom of freedom of assembly and association, and article 6, concerning the right to a fair trial (De Gaetano, 2020, p. 12ff).

In 1998, through Protocol 11, individuals and religious communities have been granted direct access to the Court, once they have exhausted all national legal means of judicial protection. Its judicial decisions have a binding effect on States, providing for a system of coerced rule compliance. The Court has been instrumental in determining the content and the boundaries of the concept of religion and in balancing competing rights and interests. In doing so, it recognises a reasonable margin of appreciation to the States, allowing them to take into account local historical, political, sociological and cultural realities, as long as essential dimensions of equal liberty and freedom are safeguarded. Europe knows different constitutional models for relations between the State and the religious communities[13]. That means that one cannot find throughout Europe a coherent conception of the meaning or impact of the public expression of a religious belief in society. Rules in this sphere will inevitably vary in time, place and manner from one country to another, taking into account the specific elements of different national history, culture, tradition and constitutional law as well as the requirements imposed by the need to protect the rights and freedoms of others and the public order[14].

Today, the Strasbourg court embodies the transnational dimension of the regulation of religion, influencing the behaviour of national legislators, judges, religious organisations and individuals. Its rich case law constitutes an important framework of the regulation of religion in Europe. In fact, the regulation of religion in Europe is to a large extent determined by the interpretation of the ECHR made by the Strasbourg Court. However, the controversy that surrounded some decisions (v.g. islamic veil, crucifix in schools) seems to show that, from the point of view of the theory of responsive regulation, giving priority to judicial mechanisms as a response to human rights violations overlooks the limited capacity of international courts to create local cultures of mutual tolerance and respect for human rights. The risk of regulatory backlash should always concern the Court. Its judges must be careful not to try to create and enforce a unified set of rules for the regulation of religion in all 47 Council of Europe States, insensitive to the historical and cultural context of each and every one of them. Regulatory interventions at a broad European level need to consider and reflect the context,

13 Sindicatul "Păstorul cel Bun" v. Romania [GC], no. 2330/09, § 138, ECHR 2013.

14 Leyla Şahin v. Turkey [GC], no. 44774/98, § 109, ECHR 2005-XI

values and cultures of the different regulatory communities. The doctrine of *margin of appreciation* plays a very important role in this area, allowing States a reasonable amount of regulatory autonomy, leaving European supervision for clearer, more serious and consensual violations (Witte Jr & Pin, 2021, p. 590ff).

4.4.3. European Union

The European Union (EU) emerged in 1992 as a result of of process of European political, legal and economic integration that started with the Paris Treaty of 1951 and the Rome Treaty of 1957. It is based on the pooling of Member State sovereign powers in order to collectively and democratically address a growing number of crossborder problems and promote European interests. The transfer of powers and areas of jurisdiction from the Member States to the EU is based on the principles of subsidiarity, proportionality and respect for national identities. The nationals of the Member States are endowed with the political and legal status of European Citizenship. The European Union is based on human rights, democracy, separation of powers and the rule of law. It has a rule of law compliance standard: a warning procedure for assessing where there has been 'a systematic breakdown in rule of law' within a Member State of the kind that would trigger the suspension of EU voting rights under Article 7 of the Lisbon Treaty. In the UE, the competence to regulate religion lies largely with the Member States, operating as a regulatory community.

The EU institutions and bodies, along with the Member States when implementing EU law, are subjected to the Charter of Fundamental Rights of the EU, that protects freedom of religion in its article 10º da protects freedom of thought, conscience and religion. According to article 17º of the Treaty on the Functioning of the European Union (TFEU), the EU respects and does not prejudice the status under the national law of churches and religious associations or communities and of philosophical and non-confessional organisations in the Member States. It recognizes their identity and their specific contribution. Based on article 17º, EU institutions hold high-level meetings, or working dialogue seminars, on an annual basis with churches and non-confessional and philosophical organisations. The regulation of religion at an EU level takes place when religious issues interfere with some core areas of EU competence. That has been the case, for instance, when freedom of religion or equality and non-discrimination collide with important aspects of the internal market, such as the protection of freedom of economic freedoms such as the right of establishment and of provision of services or the guarantee of fair competition within a level playing field undistorted by state aid. Religious communities may also be affected by European standards of general scope, as in the case of the General Data Protection Regulation or the rules of regulations and directives on the prevention and repression of money laundering.

The Court of Justice of the European Union, in the context of preliminary references by national courts or in competition lawsuits for non-compliance with European Union law, has developed an increasing case law on conflicts between religious freedom and other rights and interests relevant to the European Union, on topics such as ritual slaughter[15], the display of the Islamic veil[16] or other religious symbols in the workplace[17] or the subsidies and tax benefits to religious institutions[18]. In some cases, these decisions leave national courts to assess certain facts relevant to the decision of the case. In others, they may give national law some leeway. But the Court's pronouncements tend to create valid and binding law across the European Union (Witte Jr & Pin, 2021, p. 591ff).

4.4.4. The Catholic Church

The regulation of religion in Europe should consider the role of the Catholic Church, as a mega-religious actor, having earned, throughout the centuries, and in spite of various periods of severe turbulence, a significant degree of moral, discursive and cultural authority. Although it is a religious community, and thus subjected to religious regulation, it also plays an important part in the regulation of religion. On the one hand, many key regulatory concepts that we now take for granted, such as dignity, equality, solidarity, good, truth, proportionality, infraction, retribution, sanction or justice, have been shaped by centuries of theological discourse and legal and technical experience related to the development of canon law and its application to many concrete situations. On the other hand the Catholic Church proves the regulatory insight according to which informal mechanisms of social control often prove more important than formal ones.

Since the modern theory of regulation asks us to consider transnational nonstate regulatory regimes, the Catholic Church presents itself as an obvious example of a non-state actor settiing and enforcing rules and standards transnationally. Even when it had sovereignty over the Pontifical States, its moral authority was largely extraterritorial, profoundly influencing the religious thought and behavior of individuals and communities in many parts of the world. Considering that "Catholic" literally means "universal", the Church was largely precursory in the development of theories of globalisation – most obviously regulatory globalisation. During centuries it engaged in the making, implementing and enforcing of religious rules and standards across national

15 C-336/19, Centraal Israëlitisch Consistorie van België and Others, 17-12-2020.

16 C157/15, G4S Secure Solutions, 14-03-2017; C188/15, Bougnaoui, 14-03-2021.

17 C804/18 e C341/19, WABE e.V. & MH Müller (Opinion AG A. Rantos), 25-01-2021.

18 C-622/16 P, C-623/16 P, C-624/16 P, Commission v Scuola Elementare Maria Montessori, 06-11.2018; C-74/16, Congregación de Escuelas Pías, 24.06.2017.

borders, that local communities had to comply with in order to be considered part of the Christian Church.

Through its councils and ecclesiastical tribunals, it developed, *de facto*, a kind of private theological certification program, deciding who was in and who should be left out of the Church. A recent example of the regulation of religion by the Catholic Church has been the abolition of the secrecy policy concerning child abuse by catholic priests. Church officials can now share information with secular law enforcement authorities. The regulation of religion also involved, often times, in lobbying for policies that benefit the rights and interests of the institution, the clergy and its members and the conclusion of agreements with various states. In the context of the reaction to COVID-19, the recommendations of liturgical self-control directed by the Pope to the whole Church allowed, in many cases, an anticipation of restrictive measures approved by the State and had an impact even on the behavior of other religious communities.

In order to understand the possibilities and limits of the regulatory role of the Catholic Church, one has to take into account the regulatory concept of motivational postures. These are described in the literature as "composite of values and beliefs about authority that are held by individuals and used by them to enter into a positioning game with regulatory authorities" (Braithwaite V., 2017, p. 33). This concept is important, both internally and externally. First, the history of the Catholic Church is full of regulatory failures, because catholic officials under the authority of the Pope often reacted and rebelled against its regulatory interventions. In fact, we see exactly this happening today. Even within the Catholic Church regulatory compliance is not always assured. Second, those in positions of State regulatory authority might better learn to look for and interpret the signals of defiance towards authority coming from Catholic institutions reacting to regulatory interventions, especially when dealing with controversial issues such as abortion, gay marriage, euthanasia, climate change, universal healthcare or migration.

4.4.5. Non-state regulatory networks

In a free and democratic society, the legitimacy of the regulatory framework depends on its own openness, transparency, intrinsic fairness as well as on the procedural justice on which it is based. Responsive regulation theory has stressed the limits of a State-centered approach to regulation and pointed to the existence of many centres and sources of regulation in the modern world. National, supranational and International public power and law are not always at the centre of regulatory activity. It is important to take into account the existence of broader networked flows of power and regulatory influences and interactions. That's why regulatory theory has been drawing our attention to new, networked,

nodal, polycentric, decentred, plural and collaborative governance or regulation. Network enrolment is crucial to the understanding of the processes and outcomes of regulatory globalisation (Braithwaite J., 2017, p. 122ff).

In the field of the regulation of religion in Europe, it is possible to talk of a 'religion-anchored pluralism', in which the Council of Europe, the European Union and the States have to share regulatory power with the Catholic Church, Orthodox Churches, Protestant Churches, Evangelical Free Churches and other religious communities such as, for example, Muslim, Jews, Hindus or Buddhists. Very often the regulation of religion assumes the substance and form of self-regulation and co-regulation, blurring the distinction between regulators and regulated. In some cases, the State itself organizes public entities in which different religious communities participate in the regulatory processes. In Portugal, for instance, the Religious Freedom Community, within the Ministry of Justice, enrolls representatives of the State and of different religious communities, in order to supervise the regulation of religion.

We also observe the transnational character of the regulation of religion in the existence of many pan-European religious bodies, that form crossborder religious interest group and coalitions of churches. We may think of a few examples, such as the Conference of European Churches, European Evangelical Alliance, European Council for Theological Education, European Jewish Organization or the Federation for Islamic Organizations in Europe. They form 'transnational advocacy networks' and o lobby for policies that benefit the interests of their members. In order to do so, they maintain strong connections and dialogue with the States, the European Union and the Council of Europe, giving rise to a decentred or polycentric governance. By setting doctrinal, performance and corporate governance requirements of membership these transnational religious federations can perform an important regulatory role.

These organizations build networks within the various regulatory communities, at European and State levels, to foster civic virtues, promote work through dialogue, and ensure clear communication, information gathering and exchange of ideas. They enhance religious community-wide coordination. Each of these and other similar organizations may have some ability to control its membership and to sanction members who violate its behavioural standards. They are able to influence the lives of millions of people by engaging in collaborative capacity-building, education and training, thereby regulating, albeit softly and indirectly, the behaviour of its member institutions. These religious networks also exercise a regulatory function over national, European and International politics.

By working together, religious communities engage in private and voluntary, non-legal forms of norm-making and in the creation of networks that form European webs of dialogue, influence and empowerment. They are able to

promote reflection and knowledge about relevant topics such as human rights, religious freedom, religious persecution, hate speech, populism, nationalism and radicalization. As private actors, religious entities may be formally recognised by public authorities of some States and enlisted to assist in the regulatory process and to develop private quality assurance, accreditation and certification programs (v.g. theological education). Influencing the course of global regulation of religion requires multiple capacities and resources at personal, technical, legal and political levels, that no single local religious community possesses. By looking at this reality regulatory theory can focus on both the structure of regulation and the strategic behaviour of different religious communities within regulatory domains and understand the role of public religious interest groups in increasing the regulatory capacity of a society.

4.4.6. Civil society

Regulatory theory emphasises the importance of informal mechanisms of social control, in which third parties operate as surrogate regulators. It takes the role of non-state religious actors as regulators seriously The State centered perspective, while the basis of a positivistic rendering of law, was long recognised as being too limited. In the field of the regulation of religion, civil society plays a key role through a myriad of religious and secular associations and human rights networks, potentially increasing the repertoire of regulatory solutions way beyond formal compliance. Free and democratic societies should create the necessary preconditions for third parties to assume a greater share of the regulatory burden, rather than having public authorities always engaging in direct intervention. Civil society can play an important role in requiring that religious communities are sufficiently open, transparent and accountable, defending the community's right-to-know, freedom of information and proactive public disclosure. Even secular organizations (v.g. human rights activists, humanists, atheists) can be part of a civil society environment that shapes the tendencies of religious communities towards compliance. It is important to acknowledge the decisive role played by religious communities in contributing to regulatory success, while at the same time according to the national, supranational and International public law institutions a decisive function in setting norms, monitoring and enforcement.

4.5. Regulatory mechanisms

The regulation of religion, like any other type of regulation, will try to find an optimal combination of particular regulatory instruments to achieve desired policy goals. These goals revolve around respecting the freedom of religion of

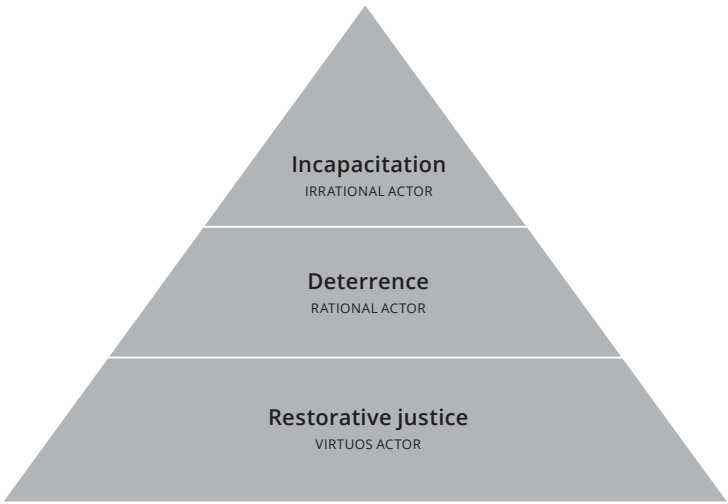
individuals and religious communities as much as possible, without jeopardizing the rights of others and important dimensions of public interest. Regulatory mechanisms or instruments are tools or devices intentionally used by different public and private regulators to bring about their desired ends. Smart regulation tends to prefer complementary instrument mixes and combinations over single instrument approaches. It also assumes a less interventionist mindset (Gunningham & Sinclair, 2017, p. 134). The choice of regulatory instruments is a function not only of the goals pursued, but also of basic constitutional principles, adopted at a national and European level, of equal dignity and freedom, state religious and ideological neutrality, legality and proportionality, along with different kinds of norms, both formal and informal, all with regulatory effect, such as legal, social, moral and customary, that serve as performance and prescriptive standards in the regulatory process.

4.5.1. Informal regulation

Regulation theory points to the importance of informal regulation in all fields of regulation. Informal mechanisms or regulation often prove more important and effective than formal ones (Gunningham & Sinclair, 2017, p. 134). Public criticism, codes of conduct, informal non-binding agreements and peer pressure can also be a significant pressure to change the course of events. Regulation very often takes advantage of third parties as surrogate regulators and of multiple successive combinations of public and private enforcement. As far as the regulation of religion is concerned, it is important not to overlook the role of political, social, economic and psychological pressures over individuals and religious communities. The shared capacity of legal and social regulation can be utilised in developing effective ordering. Informal regulation of religion relies to a large degree on advice, persuasion education to secure compliance with regulatory standards, reserving formal and more severe sanctions to more serious and persistent breaches. Governments should recognise the scope for delegating regulatory tasks to religious communities and their associations and federations, at a national, European and International level. Only when informal options have been considered and rejected should more intrusive regulatory techniques be proposed, involving, for example, civil penalties, criminal sanctions or licensing. Early warnings of instrument failure must be given (Gunningham & Sinclair, 2017, p. 135). However, in some cases, when serious infractions are at stake, publicising abuses that take place within religious communities (v.g. paedophilia; corruption) is as important as legally prosecuting them.

4.5.2. Formal regulation

Responsive and smart regulation theories stress the government's role as a catalyst or facilitator of regulation. The idea here is for public regulators to resort to complementary instrument mixes and combinations of regulatory instruments and techniques. Regulatory pluralism accounts for various regulatory instruments, embracing flexible and innovative forms of social control (Grabosky, 2017, p. 151ff). Currently, the image of a regulatory pyramid is used, with means of different coercive intensity. Regulation begins by resorting to the mildest means, only going up the regulatory pyramid if and as necessary, escalating and de-escalating according to circumstances. According to this view, smart and responsive regulation operates as a dynamic model in which persuasion and/or capacity building are tried before escalation up to increasing levels of enforcement. The regulatory pyramid comprises sequenced interventions that begin with the soft processes of dialogue and persuasion and escalate to harder processes of command and control. The theoretical representation of the regulatory pyramid can be illuminating when dealing with the regulation of religion. When may think, for instance, of a soft approach when dealing with historic peace churches, such as the Mennonites or the Quakers, or with islamist extremism, such as the Taliban or the Islamic State.



Source: Braithwaite J., 2017, p. 120.

As far as regulatory instruments and techniques are concerned, the smart regulation and enforcement pyramid can be also represented as follows:

Source: Gunningham & Sinclair, 2017, p. 136.

Although the application of this regulatory pyramid to the domain of religion may require some adaptations, we easily conclude that its intrinsic logic can be effectively used in this context. Regulators have a range of sanctions available to them, in terms of graduated response and progression of increasing levels of intervention. In the words of Drahe and Krygier, "[a]s one travels up the pyramid, options carrying a greater degree of coerciveness become available to the regulator" (Drahos & Krygier, 2017, p. 5). Responsive regulation will seek to climb and descend the pyramid in a reasonable and prudent way, knowing that in many cases de-escalating may be more effective (Braithwaite J., 2017, p. 118ff).

4.5.2.1. Monitoring

The relationship between regulator and regulated may require resorting to different forms of surveillance, tracking, monitoring, supervising, inspecting, questioning. That is the case when regulating tobacco, aviation, pharmaceutical, financial, media and social media corporations. The regulator must continually monitor the regulated, in order to be able to target potentially suspicious behaviour and select appropriate and effective diagnostic, surveillance and evaluative tools. In Portugal, one of the tasks of the Religious Freedom Commission is to gather information, express opinions and make proposals in all matters related to the application and improvement of the Religious Freedom Act, and to engage in scientific research on the activities of religious communities and movements

in Portugal. Responsive regulation theory stresses that the existence of highly technocratic regimes of oversight and control notwithstanding, regulation and the rule of law continue to be a highly relational field. In the regulation of religion, this may require the blacklisting of extremist religious groups and their monitoring by the national secret services, and, as far as the European Union is concerned, by Frontex, Europol and Eurojust. In doing this, it is important not to engage in the wrongful identification and mass policing of legitimate religious activities and law-abiding religious communities.

4.5.2.2. Soft regulation

Regulation theory stresses the importance of soft law and soft regulation in all domains of regulatory activity. This approach should be tried before escalating to harder regulatory techniques. This same approach makes sense when regulating religion. On the one hand, it is based on the appeal to moral and social responsibility and resorts to persuasion, education and capacity building as the first steps to achieving compliance. On the other hand, it is based on utilitarian considerations of effectiveness and efficiency, assuming that it is always better to give cheaper, more respectful and dialogic-based options a chance to work first. Legal considerations are also relevant, since the soft regulation approach is a requirement of the principles of proportionality, legitimacy and procedural fairness. The basic premise of soft regulation is to avoid escalating to hard (command and control) options without considering all available softer and horizontal regulatory interventions. Regulatory theory points out that a regulator with the capacity to escalate to more severe sanctions will be better able to 'speak softly', because, as Theodore Roosevelt used to say, they 'carry a big stick´. It is always important to have in mind the proverbial regulatory pyramid in which a range of possible responses is arranged in sequential order, with dialogue and persuasion appearing at the base of the pyramid.

4.5.2.2.1. Persuasion

Within a constitutional system premised on freedom, such as those that exist in the Council of Europe and in the European Union, self-regulation, education, influence, advice, recommendation and persuasion should always take precedence over hetero-regulation, sanction and punishment. Dialogue and consultation over standards between public officials and religious communities should play a central role, as a means of promoting and assisting with voluntary compliance and non-domination. In this tone, regulatory authorities should signal but not threaten the possibility of escalation to more formal techniques of regulation if necessary. Informal regulation reduces the risk of public domination of religion (v.g. Constantinism; Erastianism) and promotes religious freedom. It also reduces the risk of ideological polarization and radicalization and political and social confrontation.

4.5.2.2.2. Negotiation and agreement

An important form of *soft regulation*, albeit at a different level, is the possibility of negotiation and agreement between religious communities and the State. This can be a means of securing important regulatory goals at the administrative level. It assumes the desirability of a posive-sum interaction between the States and religious communities and requires discussions, negotiations and agreements between them (Braithwaite J., 2017, p. 124ff). Voluntary commitments are not excluded either. However, negotiation and agreements can evolve to concordat-type relations and be forms of hard-regulation and co-regulation. There is a long history of agreements between the Catholic Church and European States, bearing in mind that the Church preceded most of them. The history of concordats allows us to discern a strong political dimension in the agreements between the religious confessions and the State, with exchange and reinforcement of political and religious legitimacy and the creation of expectations of a future relationship and theological-political harmony. This is a factor that should not be overlooked.

Today, negotiation makes sense when it comes to complex regulatory regimes that require a close, dynamic and flexible interaction between the State and non-state actors. These rule-making agreements may be signed at a national or International level, and may be mostly legislative or administrative. They presuppose the existence of different phases, such as diagnostic, formula, details, 'post-agreement' or 'compliance bargaining'. They are an accepted technique of the regulation of religion, although in some countries (v.g. Italy, Spain) there are serious complaints, levelled by minority religious communities, that essential dimensions of religious freedom and equality are left dependent on the will of the State and the bargaining power of the religious entity, with a clear disadvantage of smaller, more recent, lesser known and less conventional religious communities. Negotiation between the State and religious denominations must be limited to the regulation of specific aspects of common interest, and must not violate the principle of substantive equality.

In order to assess the substantive equality of these agreements it is important to take into account not just the rights that are granted to different religious communities but also the internal connection between rights and obligations[19]. The fundamental dimensions of collective religious freedom should not be dependent on the negotiation and bargaining power of different religious communities, but should result directly from human rights law, the Constitution and general law. Recently it has become clear that EU law also

[19] Iglesia Bautista "El Salvador" and Ortega Moratilla v. Spain, no. 17522/90, Commission decision of 11 January 1992, DR 72.

contrains the celebration of agreements, namely when they create benefits for activities which do not have a strictly religious purpose in violation of State aid rules[20].

4.5.2.2.3. Co-regulation

In some cases, State officials and religious authorities can establish schemes of co-regulation. These can be bilateral, involving the State and a specific religious community, or multilateral, involving several religious communities. This regulatory strategy enhances substantive legitimacy, democratic participation and procedural fairness, while reducing complexity. For instance, prison authorities may need to consult the Chief Rabbi to get approval for the kosher diet that is to be served to Jewish prisoners. Another example is the granting to Jewish Consistorial Association of Paris of exclusive rights to approve and control ritual slaughter, butcher's shops and "glatt" food. In Portugal, the Religious Freedom Commission allows for the inclusion of all main religious communities in the discussion of regulatory issues.

4.5.2.2.4. Peaceful resolution of disputes

The application of conventional, legislative or administrative rules to religious communities will inevitably create practical problems and disputes. It must be also bear in mind that religious communities will want to have a say in many political, economic and social problems, concerning political corruption, poverty, abortion, family and sexuality. On the other hand, the State may have quarrels with church property taxes, feminine genital mutilation, child-marriage, child-abuse, religious corruption or religious extremism. In these disputes, dialogue is a low-cost, respectful and time-efficient strategy for obtaining compliance. The State can and should resort to rational and persuasion, sensitive to emotions. The existence of non-judicial mechanisms to prevent and solve disputes between religious communities and the State can be a valid regulatory tool. On the other hand, sometimes religious communities face internal theological and institutional disputes or they enter into conflicts with other religious communities or civil society groups. In these cases, the State may try to promote the resolution of the conflict, offering its good offices or intervening as a mediator, from a position of neutrality and impartiality. This in itself does not violate individual and collective religious freedom[21]. A peaceful, fair, reasonable and balanced system of resolution of conflicts, based on rigorous fact-finding and due process principles, can indeed function without compromising fundamental

20 C-74/16, Congregación de Escuelas Pías, 24.06.2017.

21 Supreme Holy Council of the Muslim Community v. Bulgaria, § 80. no. 39023/97, 2004, ECHR-I.

rights and interests of pluralism, equal dignity, freedom and integrity that the general law aims at protecting. There may be a room for allowing some internal disputes to be settled by internal forms of negotiation, mediation, conciliation and arbitration.

4.5.2.2.5. Naming, blaming and shaming

Considering that in today's world good reputation and fear of scandal are very important, it is understandable that naming, blaming and shaming play such an important role in current regulatory theory (Harris, 2017, p. 59ff). This strategy draws on the importance of moral emotions and social approval or disapproval. Shaming is sometimes used in the regulation of religion. In the middle ages, calling someone "heretic", "apostate", "schismatic", "infidel", "hussite" or "protestant" was clearly a calculated strategy to promote a sense of guilt and a fear of alienation and social disapproval, rejection and ostracism, in this way trying to enforce religious uniformity. Today, we find the same strategy in secular or religious circles when religion is accused of "sexism", "misogyny", "islamophobia", "homophobia" or "transphobia".

As far as regulating religion is concerned, this strategy can be very effective, generating a sense of universal condemnation on the part of religious authorities and individuals. It is especially used and effective when it comes to confronting the institutions, leaders and members of religious denominations with the inconsistency between their doctrinal and ethical identity and their actions, thus generating a sense of institutional, collective and individual moral failure (Harris, 2017, p. 65ff). This aspect was clearly visible in the repression of sexual abuse of children in the Catholic Church in several European countries.

However, there is always the possibility of moral and emotional pushback (Harris, 2017, p. 60), since religious communities can attempt to stress the sinful nature of mankind and the demonic causes of religious dissent. What's more, a situation of persecution, victimization and martyrdom (real or perceived) can create favorable conditions for the sedimentation of a religious subculture or even a reinforced return of religion. There may be indeed a place for naming, blaming and shaming of religion, in some very limited instances (v.g. child abuse, genital mutilation; widow burning; forced marriage of young girls) although it is important to avoid stigmatizing, humiliating and alienating. The social distancing of religious communities from institutions and the larger populace can have long-term detrimental effects on religious individuals and entities possibly leading to entrenched resentment and systemic problems, including anomie, deviance and radicalization. It is important that the dignity of religious individuals and communities be preserved.

4.5.2.3. Hard regulation

Formal regulation is an indispensable technique in the regulation of religion. It is known as command and control and is based on deterrence and coercion. It may impose sanctions and penalties, of a civil, administrative and criminal legal nature. Even if when a regulatory system is able to run essentially on goodwill, the recalcitrant few will most probably demand a formal and coercive regulatory effort. The responsive regulation of religion should be based on the constitutional principles of equal dignity and freedom, democratic legitimacy, transparency, proportionality and due process. It can reasonably be assumed that when regulatory design follows these fundamental principles, trust, cooperation and voluntary compliance are likely to be higher and fewer parties will need coercive measures to comply.

4.5.2.3.1. General law

General laws are enacted by legislative and administrative authorities in order to pursue some democratically defined social goals. They aim at protecting and balancing multiple and competing fundamental rights and public interests, such as environment, public property, cultural heritage, zoning, order, safety or health. They may contain principles and rules. Principles are open-ended as to the range of actions they prescribe, allowing for weighing and balancing when confronted with competing principles (vg. public interest). Principles are compatible with different solutions, in different times and places, according to the demands of context. Rules prescribe specific actions, having an all-or-nothing structure. Both general principles and rules may protect the individual and collective freedom of religion and belief, by allowing and making possible the public manifestation thereof in various contexts, or by preventing and repressing the actions of third parties that may prevent or disturb the free exercise of religion. Because of their general content they are considered neutral when it comes to religion.

As a matter of principle, freedom of religion and belief does not confer a right to refuse, on the basis of religious convictions, to abide by legislation the operation of which is provided for by the Convention and which applies neutrally and generally. For instance, one cannot object to income taxes just because part of the collected money may be used to fund the military sector or abortion. The same is true about objections to the assignment of taxpayer numbers on the grounds that they are the sign of the antichrist. However, general laws may require the carving of opting out and exceptional solutions when their general enforcement has a disproportionate and discriminatory impact on freedom of conscience and belief. Restrictions on freedom of religion and belief should be made by formal legislative acts and should balance the right of religious freedom

with other rights and interests, according to the constitutional principles of freedom, equality, proportionality, legal certainty and due process of law.

4.5.2.3.2. Criminal and civil law

The regulation of religion can escalate to the "big stick', that is, to formal hard regulation involving civil and criminal law (Torfs & Vrielink, 2019, p. 16ff). Both areas of law can cause serious material and reputational harm to a religious community. One of the main challenges here remains to address legitimate complaints by victims of rights violations by the religious communities, while at the same time protecting the theological autonomy of religious communities and preventing abusive judicial harassment for purely ideological reasons.

Civil law will be used, most of all, when dealing with torts, involving civil liability for damages. It has played a significant role when dealing, for instance, with child abuse by the priests. Civil lawsuits have been filed by victims against catholic churches at a national level (v.g. Ireland, Poland). Civil liability has also been used when addressing cases of alleged manipulation by churches in the collecting of offerings. Criminal law is also an important formal regulatory technique. It has been used, mainly, in criminal prosecutions against members of the clergy. At least for now, a criminal prosecution against the Catholic Church itself has not been leveled in any European State. Especially important, as a regulatory technique, was the filing of a lawsuit for crimes against humanity in the International Criminal Court. So far, the court has declined to investigate.

4.5.2.3.3. Registration suspension and revocation

Another civil-administrative sanction, to be used as a kind of *ultima ratio* measure, would be the denial or the revocation of registration of a religious community, ammounting to its dissolution[22]. It should be used only when there are very serious reasons, such as preventing activities harmful to the population or endangering public security. In practice, however, it would require a smart application, since the same people could reorganize, change the name of the community and come up with another registration request. The revocation of registration should be the result of a reasonable and proportional weighing of competing rights and interests. For instance, the prohibition of blood transfusions in the teaching of the Jehovah's Witnesses cannot serve as justification for dissolving the organisation and prohibiting its activities, since it can be limited to mentally competent and informed adults. The dissolution of a religious community affects not just its collective freedom but also the individual freedom of its members[23].

[22] Biblical Centre of the Chuvash Republic v. Russia, § 54, no. 33203/08, 12, 2014, ECHR.

[23] Metodiev and Others v. Bulgaria, § 24. no. 58088/08, ECHR, 2017-V.

4.5.2.3.4. Expropriation of assets

The nationalization of assets is an extreme measure of the regulation of religion. It was widely used in Europe, sometimes dramatically, successively by defenders of monarchical, liberal and republican causes as a reaction to the political, economic and social problems caused by the excessive concentration, over the centuries, of uncultivated ecclesiastical property. Expropriation for public interest reasons is always admissible, but it requires due compensation. In some countries, it requires the hearing of the affected religious community and the existence of an urgent public interest[24].

4.5.2.4. Taxation and subsidies

Taxation has always been a critical part of the regulation of religion. It was a key aspect of the Magna Carta of 1215, of the XIII century conflicts between Philip the Fair and Pope Boniface VIII or of the French Revolution. In the modern constitutional State, taxation is required in order to pay for the provision of public goods and it is based on the principles of vertical and horizontal equity and ability to pay. The principle of equality and non-discrimination plays a critical role here, although it may allow for reasonable and justified differentiations. Tax systems also have important economic and social functions, related to the creation and redistribution of wealth. They can also be used to encourage and discourage some activities.

In Europe, religious communities cannot claim a tax exemption on religious grounds[25]. The taxation or non-taxation of religious communities depends on a large extent of concrete political, social and historical factors[26]. In some cases, the system of taxation and financing of religious communities can only be correctly understood in light of past events of expropriation and nationalization of their assets (Torfs & Vrielink, 2019, p. 36). However, non-profit entities and activities relating to the religious worship, teaching and communication are generally not subjected to corporate, property or value added tax nor based on the ability to pay. If that is the case, that regime should be extended to all religious communities without discrimination. Taxation should not become a disproportionate restriction on religious freedom[27].

24 Art. 30º, Religious Freedom Act.

25 Iglesia Bautista "El Salvador" and Ortega Moratilla v. Spain, Commission decisión, no. 17522/90, Commission decision of 11 January 1992, DR 72

26 Alujer Fernández and Caballero Garcia v. Spain (dec.), no. 53072/99, ECHR 2001-VI.

27 The Church of Jesus Christ of LatterDay Saints v. the United Kingdom, no. 7552/09, § 30, ECHR, 2014-IV.

Individuals can often deduct their offerings to religious communities in their income tax, in which cases this tax regime should not discriminate individually and collectively[28]. It must be noted that exemptions (income, property and VAT) are generally limited to non-profit activies direcly connected with the the exercise of religion. The ECJ has stated several times that if a religious school is operating in the private education market, is must pay the same taxes as all its competitors in the same relevant market. In some European countries the tax administration helps in the collection of a religious tax[29]. In others, it taxes religious people and gives some money to the religious communities. Still in others it gives the possibility of tax payers to earmark a small percentage ot their income tax to a religious community or to some other scientific, cultural or social entity that ask to be listed. These tax regimes are to be assessed in light of the príncipleS of freedom, equality and privacy[30]. In general, no one can be forced to pay to a religious community to which one doesn´t belong, unless it provides some non-religious public goods from which non members benefit[31]. Besides, none of these techniques should be applied in a way that discloses the tax payer religious affiliation or lack thereof[32].

4.5.3. Compliance

Compliance is currently a very important component of regulatory theory (Haines, 2017, p. 190). Regulators must rely on cooperation. As a regulatory technique, it tries to ensure that the responses that individuals and firms make to regulation are positive and adequate. As a sociological discipline, compliance studies and explains compliant and noncompliant individual and collective intentions attitudes and behaviours. It researches the social-psychological determinants of compliance: values, norms, trust, identity, pride, shame or guilt. It should take into account existing interpretations, social habits, institutional cultures, meanings and practices. It should be acknowleged that compliance is a relational process, built upon good faith, trust and interactions and communications between different actors (*i.e*., regulator, regulated, third parties) in the implementation process (Braithwaite V., 2017, p. 28ff). As a scientific descriptive concept, it describes behaviour that is deemed to be obedient to a regulatory obligation.

28 Association Les Témoins de Jéhovah v. France (Association Cultuelle du Temple Pyramide v. France, no. 8916/05, ECHR, 2011-V.

29 Wasmuth v. Germany, § 55, no. 12884/03, ECHR, 2011-V; Klein and Others v. Germany, § 89, nos. 10138/11 and 3 others, ECHR, 2017.

30 Wasmuth v. Germany, § 55. no. 12884/03, ECHR, 2011-V.

31 Klein and Others v. Germany, § 81 nos. 10138/11 and 3 others, ECHR, 2017; Bruno v. Sweden (dec.) (dec.), no. 32196/96, ECHR, 2001-I.

32 Spampinato v. Italy, (dec.), no. 23123/04, ECHR, 2007-III.

Compliance is important when dealing with individual believers and religious communities. These tend to believe in and promote respect for the law in general. Many fundamental constitutional law and international law principles (v.g. human dignity, equality, freedom of conscience, justice) have had a religious origin or a theological justification. Religious communities tend to comply with the general law and promote compliance by their members even when they don't agree with this or that legal obligation. The regulation of religion requires compliance from individuals and communities. Spontaneous compliance will generally occur if regulatory norms are reasonable and procedurally fair and will most certainly promote the religious communities doctrinal and social objectives, allowing them and their individual members to earn the approval and respect of State officials and the general public.

Cooperation and willingness to comply will most likely occur if the religious communities being regulated see social benefits, believe the regulation is substantively and procedurally fair and feel a sense of obligation to defer to the regulating authority. Religious communities and their representatives are not exempt from having to comply with non-religious legal regimes that target the generality of entities and that may impact their activity (v.g. data protection, anti-money laundering, beneficial owner)[33]. Non-compliance may sometimes result from excessive complexity of the regulatory obligations or the idea that the regulation is illegitimate and violates absolute religious imperatives deemed as such by religious individuals and communities. It is important that the political and religious authorities know each other, have a deep understanding of each other's needs and points of view and respect each other's judgment. Some norms may be disproportionate and too expensive to comply with by small minority religious communities.

4.6. Regulatory domains

The regulation of religion covers different domains. In all of them regulators face the challenge of influencing people and gaining their trust and cooperation, being important to consider objective and subjective concerns. The former relates to topics such as regulatory enforcement and whether or not actors comply. The latter, include, for instance, the meanings attributed to regulation as influenced by participants' religious beliefs or worldviews. In the distinct arenas

[33] Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law: Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

of regulatory activity, it is possible to detect the many ways in which development and expansion of regulation both respond to and reflect globalized changes. In all these areas, the principles of legality, freedom, equality and weighting of competing rights and interests are particularly important, together with the requirements of the adequacy, necessity and proportionality of restrictions.

4.6.1. Recognition and registration

The legal recognition and registration of religious communities is a critical issue in the regulation of religion. The possibility of organizing and conducting religious meetings and ceremonies shouldn't require prior registration of a legal entity[34]. What's more, civil law norms on private law associations can be used to establish religious associations. However, the registration as a religious entity allows for a higher level of institutionalization, autonomy and legal and judicial protection[35]. It brings forth the possibility of acquiring legal personality, which is very important for the practical pursuit of the goals of the religious community, and of performing civil and religious acts that can be recognized by the State[36]. Rules that deal with this matter, including those about re-registration of an already recognised religious community or of associations and federations of existing religious communities, should be bound by the principles of freedom, equality, non-discrimination, prohibition of administrative discretion, social inclusion and integration and by their corollary goal of 'reducing regulatory burdens', especially to new and minority communities. They must not give the State the possibility to decide on the merits of the professed doctrines or to question their legitimacy (De Gaetano, 2020, p. 15ff).

The existence of these rules is justified to the extent that they are necessary to safeguard public interests of transparency and accountability, providing information to the public and preventing confrontation amongst different religious communities[37]. That is especially important when dealing with "schismatic groups" in conflict with an existing religious community[38]. These rules must be sufficiently clear and specific[39]. The careful identification and differentiation of the name and doctrinal tenets of different religious communities is a factor that generates transparency, clarity and trust, thus

34 Krupko and Others v. Russia, no. 26587/07, ECHR, 2014-I.

35 SvyatoMykhaylivska Parafiya v. Ukraine, § 152, no. 77703/01, ECHR, 2007-V; Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria, § 63, no. 27540/05, ECHR, 2012-I.

36 Metodiev and Others v. Bulgaria, § 24, no. 58088/08, ECHR, 2017-V.

37 Metodiev and Others v. Bulgaria, §§ 40 et 45, no. 58088/08, ECHR, 2017-V.

38 *Metropolitan Church of Bessarabia and Othersv. Moldova,* no 45701/99, ECHR 2001-XII.

39 Metodiev and Others v. Bulgaria, no. 58088/08, ECHR, 2017-V.

avoiding confusion and conflict[40]. Registration rules should be designed in ways that respect the identity and autonomy of religious communities and reduce registration bureaucracy and costs (v.g. requirements, certificates, fees)[41]. Their application should not be too complicated, expensive and slow[42].

Denial of registration is liable to cause a series of practical problems and difficulties to a given religious community. Along with the suspension and revocation of registration, it should be reserved for extreme situations, in which Incapacitation is an adequate, necessary and proportional means to secure a public interest goal. The legal regime of registration should not be captured by a theologico-political coalition of dominant forces with the purpose of preventing the rise of new and emerging religious communities. The existence and application of different legal provisions or regimes to different religious entities on the basis of their legal status as "private associations", "registered religious organizations", "recognized religious associations" or "rooted religious communities", must have a sufficient and reasonable normative justification and be proportional to its purported goals[43].

4.6.2. Clerical, doctrinal and institutional autonomy

Collective religious freedom protects the right of religious communities to choose, train, move and remove their own ministers of worship, according to rules and standards based on their doctrinal tenets[44]. In some cases, this means that States must welcome foreign religious leaders according to the principles of freedom and equality[45]. Any restrictions on this right must have a legal basis, be based on the pursuit of a legitimate purpose and be adequate, necessary and proportional to that purpose[46]. It also protects the doctrinal self-image, self-understanding and self-definition of each religious community (Walter, 2016, p. 192ff), and the right to defend its credibility by requiring a reasonable, variable and proportional degree of loyalty from their ministers, workers and representatives, to the extent as that doesn't threaten essential dimensions of

40 Bektashi Community and Others v. the former Yugoslav Republic of Macedonia, nos. 48044/10, 75722/12 and 25176/13, § 71, ECHR, 2018-I; Genov v. Bulgaria, § 43, no. 40524/08, ECHR, 2017-V.

41 Fusu Arcadie and Others v. the Republic of Moldova, no. 22218/06, ECHR, 2012-III.

42 Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria, no. 27540/05, § 79, ECHR, 2012-I.

43 Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria, no. 27540/05, ECHR, 2012-I.

44 Kohn v. Germany (dec.), no. 47021/99, ECHR, 2000; Sotirov v. Bulgaria (dec.), no. 13999/05, ECHR, 2011.

45 Perry v. Latvia no 30273/03, ECHR 2007-III; Cyprus v. Turkey [GC], no. 25781/94, §§ 243-246, ECHR 2014.

46 Nolan and K. v. Russia, no. 2512/04, ECHR, 2009-I.

their rights nor the exercise of the rights of non-members of the community[47]. This requires the right of institutional self-organization, self-government and self-determination, which is a cornerstone of pluralism in a democratic society (De Gaetano, 2020, p. 12 ff; Torfs & Vrielink, 2019, p. 24ff)[48]. Religious communities should remain free to decide about their internal structure and membership, without State interference (Robbers, 2019, p. 114ff)[49]. They must be able to apply their canonical and doctrinal rules to deal with indiscipline and dissent (De Gaetano, 2020, p. 23ff).

Religious communities should be allowed to hold, articulate and defend their own views on subject matters such as religious authority, religious worship and rites, internal organization, abortion, euthanasia, poverty, corruption, gender, sexuality, marriage, family of the burying of the dead[50]. In some cases, this is naturally due to their interpretation of ancient texts that they consider to be sacred and from which they derive principles of natural law, and it is not for the State to subject them to judicial review. States, political parties and civil associations cannot interfere in the internal issues and teachings of any religious communities (Tretera & Horák, 2019, p. 79). For instance, each religious community has the right to decide, according to their understanding of divine imperatives, whether and to what extent they will permit same-sex unions[51]. Doctrinal autonomy may be restricted when it contends with fundamental community interests, namely the protection of public health or the prevention and repression of drug use[52]. On the other hand, treating a religious minister as an ordinary worker – without taking into account the spiritual and vocational dimensions of the ministry – or allowing for the clergy to create a labor union, although not necessarily so, may in some instances pose a threat to the institutional autonomy of a given religious community (Mazzola, 2016, p. 49ff)[53]. Regulation of religion should encourage transparency and public accountability and make some room for non-state dispute solving mechanisms within religious communities, as long as public interests are not significantly affected and the essential nucleus of individual autonomy is not sacrificed.

47 (DE GAETANO, 2020, p. 24ff); Sindicatul "Păstorul cel Bun" v. Romania [GC], no. 2330/09, § 138, ECHR 2013; Jehovah's Witnesses of Moscow and Others v. Russia, no. 302/02, § 118, ECHR 2010-I; Fernández Martínez v. Spain [GC], no. 56030/07, § 131, ECHR 2014; Schüth v. Germany, no. 1620/03, § 69, ECHR 2010-V.

48 Hassan and Tchaouch v. Bulgaria [GC], no. 30985/96, §§ 62 and 91 ECHR 2000; Fernández Martínez v. Spain [GC], no. 56030/07, § 127, ECHR 2014.

49 Svyato-Mykhaylivska Parafiya v. Ukraine, § 150, no. 77703/01, ECHR, 2007-V.

50 *Johannische Kirche and Peters v. Germany* (dec.), no. 41754/98, ECHR 2001-VIII.

51 *Parry v. the United Kingdom* (dec.), no. 42971/05, ECHR 2006-XV.

52 *Fränklin-Beentjes and CEFLU-Luz da Floresta v. the Netherlands* (dec.), no. 28167/07, ECHR 2014-III.

53 *Sindicatul "Păstorul cel Bun" v. Romania* [GC], no. 2330/09, § 138, § 159, ECHR 2013.

4.6.3. Property of religious communities

An important domain of the regulation of religion concerns the holding of property by religious communities. These need places or buildings devoted to religious worship, training, education and social activities. The regulation of religious property should be based on principles of liberty and equality. The right to hold or rent a building or use a meeting room for worship is part of the essential domain of the freedom of religion and belief, since it enables freedom, privacy, communion, stability, security and continuity[54]. That doesn't mean that religious communities have the right to receive public funding to buy or rent a place of worship. The operation of religious buildings has often a significant impact on the collective exercise of religion[55]. The same applies, *mutatis mutandis*, to *cemetery layout*, also an essential aspect of religious practice[56]. Town-planning and zoning laws should reasonably accommodate the property need of religious communities[57]. If the State decides to grant a special status to religious buildings it must do it without discriminating against any religious community[58]. The regulation of religious property must be sensitive to the particular historical context. This is especially important when dealing with property that is part of the cultural heritage of the State and thus conserved by public funding. In some cases, the historical context may justify the regulation of alternate use by different religious communities[59]. Another aspect concerns taxation, being very common, and reasonable, to allow for exemption of taxes for real estate of religious entities, if and to the extent that they are destined to worship and other religious activities, without any economic significance.

4.6.4. Political participation

In a free and democratic society, participation should necessarily be driven from below. Religious communities may not be of this world but they are in this world. There are many topics that are relevant to the world community as a whole (v.g. war, peace, development), to the Europen continent (v.g. cultural pluralism, migration), to the national political community (v.g. corruption,

54 *Association de solidarité avec les témoins de Jéhovah and Others v. Turkey*, § 90, nos. 36915/10 et 8606/13,§ 105, ECHR, 2016-II.

55 *The Church of Jesus Christ of Latter-Day Saints v. the United Kingdom*, no. 7552/09, § 30, ECHR, 2014-IV.

56 *Johannische Kirche and Peters v. Germany* (dec.), no. 41754/98, ECHR 2001-VIII.

57 *Association de solidarité avec les témoins de Jéhovah and Others v. Turkey,* nos. 36915/10 et 8606/13,§ 105, ECHR, 2016-II.

58 Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey, no. 32093/10, §§ 48-49, ECHR 2015.

59 *Gromada Ukrayinskoyi Greko-Katolitskoyi Tserkvy Sela Korshiv v. Ukraine* (dec.), §§ 33-38), no. 9557/04, ECHR 2016.

poverty, abortion, marriage) or for a given religious community and its members (v.g. freedom, equality) about which religious communities may want to speak. As members of civil society, they should be allowed to actively participate in the sphere of public discourse and engage in collective activism and to have some interaction with the political party system (Tretera & Horák, 2019, p. 78ff). Most of them will show their commitment to shared moral norms and social institutions, since their values may have influenced to a significant extent those of the political and legal systems. Political participation is a right of all individuals, and it should not expected that individuals leave behind their religious convictions when they engage in it. Religious beliefs may influence political speech, electoral campaigns, voting and exercise of public office. Sometimes religion will be able to influence other areas of social life through religious professional networks (v.g. politicians, lawyers, doctors, artists, scientists or teachers). This may also lead to a clash of cultures in the public sphere, including lively interactive discussion on social media.

4.6.5. Manifestation of religion

There is a strong link between belief and conduct. People with religious beliefs have the right to manifest one's religion through worship in private and also in the community of believers. They have the right to persuade other of the tenets of their religion, respecting the dignity and liberty of others[60]. They will want to act in different domains of life in a way that is consistent for them. That may include observance of dietary laws (v.g. meat free food, kosher), wear an outfit that is characteristic of a religious identity (v.g. veil, turban, tunic, cross) in public. Regulation of religion should provide the possibility of doing so, in a reasonable way. Restrictions to this right must be necessary and proportionate[61]. The right to manifest religious beliefs, both individually or collectively, is not absolute, since it may impact other rights and interests, such as the possibility of face-to-face social interaction and open interpersonal relationships[62]. That means that not all manifestations of a religious belief should considered legitimate. On the other hand, not all acts that are in any way influenced, motivated or inspired by a religious belief constitute a manifestation of it. In order to be so, they must be intimately, that is (theo)-logically, linked to the given belief. That is the case, for example, of an act of worship or devotion which forms part of the practice of a religion or belief and is generally recognised as such. But the existence of a sufficiently close and direct nexus between the act and the underlying religious

60 *Larissis and Others v. Greece*, no. 23372/94, ECHR 1998.

61 Ahmet Arslan and Others v. Turkey, no. 41135/98, ECHR, 2010-II.

62 *S.A.S. v. France [GC]* no. 43835/11, ECHR 2014; *Dakir v. Belgium*, no. 4619/12, ECHR 2017-II; *Belcacemi et Oussar v. Belgium*, no 37798/13, ECHR, 2017-II.

belief may lead to the consideration of some acts (v.g. wearing a necklace cross; skullcap) as manifestations of religion even if they are not really required by the doctrines and decrees of the religion in question[63]. In these situations, it may be important to consider the public or private nature of the functions and context of the persons concerned, as well as the age and maturity of the people affected by their conduct. Equally important is to take into account the purpose (*e.g.*, public security; public order; public health) that justifies the restrictions. The right to manifest and exercise one's religion may require some accommodation measures when dealing with public structures, such as the army, prisons, schools or hospitals[64].

4.6.6. Religious expression

Religious communities and their members are part of the sphere of public discourse in a free and democratic society. They must, therefore, have access rights to broadcasting and social media. This may vary from country to country (Torfs & Vrielink, 2019, p. 34ff). It can include guaranteeing space in the public radio and television service, under general conditions to be defined by law, and access to private radio and television outlets, namely cable services. Religious communities should enjoy broad access to the public sphere, thus guaranteeing its pluralism and vitality (Vilaça & Oliveira, 2019, p. 21ff). They must be able to freely express their theological, moral and ethical convictions, even in controversial subjects such as abortion, euthanasia, sexuality, family, corruption or inequality, and must do so, content, within the general principles of respect for equal dignity that must be recognized by all individuals as full members of the political community. It is important to emphasize that the free expression of doctrinal, moral and ethical convictions, within the general framework of freedom of critical discussion and disagreement, cannot, in itself, be understood as hate speech, even if it does not please all people or social groups. In exercising this right, religious communities and their members cannot in any way incite to violence or exert wrongful pressure on non-members.

4.6.7. Religious education

Education assumes that human life is plastic and modifiable through human intelligence and reason (Ellwood, 1913, p. 290). That's why religions and secular ideologies generally want to have a saying and leave a mark on education. In Europe it is considered that States are not compelled to allow for and organize religious teaching in public schools, although they must adhere to the principles

63 *Hamidović v. Bosnia and Herzegovina,* no. 57792/15, § 30, ECHR, 2017-IV.

64 *Kovaļkovs v. Latvia,* no. 35021/05, ECHR, 2012-III; J.L. v. Finland, no. 32526/96, ECHR 2000.

of equality and non-discrimination if they decide doing so[65]. Still, in some of them religious denominations still play a very important role in the education system (Torfs & Vrielink, 2019, p. 30ff).

There is no worldview neutral education. Eliminating religion from education is in itself a way of teaching about religion, sending a public message that religion has no real importance in the real world and of excluding it *a priori*, in the name of a secular, naturalistic and materialistic philosophy. What's more, religion is an important part of the history of ideas, of majoritarian and minority cultures, and of contemporary social life. It is impossible to understand politics, law, economics, literature, music, poetry, architecture, sculpture or painting, without a reasonable understanding of the role that religion has played in all these areas. That's why it is important that religion be part of school and university curricula.

This can be accomplished in several ways, such the historical and sociological teaching about various religions, optional confessional teaching in public schools and the existence of private religious schools, from different religious communities. Once the classes are run by religious communities themselves, the teachers are expected to show a significant degree of loyalty towards the religious, moral and ethical doctrines of the religious community they represent[66]. Also very important is the existence of theological studies and science of religion in various university courses at public and private universities, secular or denominational. Religious denominations must be free to form, expose and promote their own view of the world. The public authorities' only concern is to guarantee the fundamental principles of equal individual and collective religious freedom.

4.6.8. Social intervention and welfare

Many religious communities have been engaged in social welfare activities ever since a long time. In Europe, Christian religious orders have developed orphanages, nursing homes or hospitals, to care for the poor and needy. Judeo-Christian religious thought has always emphasized care for orphans, widows, sick and foreigners. For Christianity, social commitment to others is inseparable from religious belief. "Faith by itself, if it does not have works, is dead".[67] The same social concern will be present later in Islam. It is no wonder, therefore, that in Europe, religious convictions have to be understood as inseparable from the social intervention of religious communities and individuals with religious motivations. Religious communities actively intervene in education, health

[65] *Savez crkava "Riječ života" and Others v. Croatia,* no. 7798/08, § 57, ECHR 2010-I.

[66] Fernández Martínez v. Spain no. 56030/07, [GC], §§ 137-138, ECHR, 2014.

[67] James 2:17.

and social security systems. For its part, the State adopts new forms of public management that allow for greater cooperation and partnership with the private sector (Vinding, 2019, p. 94ff). It is important that these public-private partnerships strike a reasonable balance between the values of universal access to public services and respect for the doctrinal and institutional identity of religious communities.

4.7. Socio-cultural and political risks

Human beings need some form of social order for their survival and flourishing. However, social coexistence and interdependence do not prevent significant ideological, worldview and value conflicts within a society. Religious strife can seriously undermine the social fabric, including conflict between religious communities and between religious people and those who hold secular materialistic worldviews. An important part of religious regulation requires dealing with threats to the human collective, the social fabric (Haines, 2017, p. 183). Dealing with socio-cultural risk means precluding religion from harming collective well-being, comprising the social interactions within the political community from which individuals derive their sense of security, identity and belonging. In this sense, "political risks" are risks to human rights, democracy, the rule of law and the open society. States should try to enhance their legitimacy by reasonably integrating the social practices of religious communities and their individual members, being particularly careful with the way they deal with them. The use of pejorative expressions and comments in official documents against a given religious community, may lead to negative consequences for the individual and collective exercise of religion and increase the risk of social discrimination and regulatory backlash. Considerable legislative and regulatory reforms have taken place in some jurisdictions following the terrorist attacks in the United States on 9/11 2001. These changes, including those designed to reduce the impact and likelihood of an attack in a public place, rest on an uncertain and highly politicised risk-assessment process. Priority must be given to rigorous scientific and technical gathering and assessment of evidence (Haines, 2017, p. 181ff). For instance, populist nationalism induced a significant regulatory response to the risk of Islamist terrorism, while letting the actuarial risk of white supremacist terrorism vanquish for lack of attention. In this area, it is important to stick to "evidence-based policy", instead of "policy-based evidence" (Haines, 2017, p. 186ff).

4.8. Regulatory effects

Regulation is aimed at producing some palpable, specific, behavioural and measurable effects. The natural and desired goal of regulation is compliance. However, in a plural and multicultural society, the interpretation and meaning given to regulation by those being regulated may not be the same as that of regulators. What the regulators understand as being a reasonable attempt to balance competing rights and interests may be experienced, by the regulated, as a hostile and evil attempt to impose a particular religious or secular worldview on all society. This can generate a regulatory blowback or backlash, with unintended consequences, leading individuals and groups to adopt an attitude of defiance and even radicalization, forming alliances to confront the regulators. This can give rise to a climate of confusion, conflict and loss of trust in the system and to a search for an alternative regulatory authority. For young disenfranchised Muslims, the Islamic State might seem a good option. Defiance can be understood as a premeditated response when a regulatory authority threatens religious or cultural identity. It may also be the case that the protection of the religious rights of religious minorities is perceived or described by members of the majority religion or secular community, as a left-wing strategy to attack conventional judeo-christian values by promoting pluralism, tolerance, multiculturalism, globalism or islamization of Europe. If this happens, some individuals and religious communities may be tempted to act out their grievances (v.g. populism, nationalism, discrimination and persecution of religious minorities, religious extremist violence). The success of the regulatory system must be measured by its ability to create a sense of equal dignity and freedom, reinforce social inclusion and cohesion, and promote a spirit of mutual understanding and collaboration among all citizens.

4.9. Regulated as regulators

Regulatory theory has been pointing out that regulation is often a two-way street. Civil society actors also play an important regulatory role, regulating the regulators. In the domain of politics and religion this has often been the case and still is to a significant extent. History tells us that religion has always been a very important regulator of political and social authorities. The excommunication of Emperor Theodosius I by Ambrosius of Milan because of the Massacre of Thessalonica (390 AD), or the famous Humiliation of Canossa (1077), in which Pope Gregorius VII forced Holy Roman Emperor Henry IV to humiliate himself on his knees waiting for three days and three nights before the entrance gate of

the castle, while a blizzard raged, are just two impressive and dramatic examples amongst countless possible. The influence of canon law on medieval law, the role of the Church in the regulation of family, sexuality, property, taxation, banking, usury, trade, income redistribution, armed conflict and the rise of the antislavery movement in late eighteenth-century Britain all provide examples of religion as a regulatory force.

Religion is not just one more regulatory domain among others. It also provides a source for those values upon which regulation is based and remains above and beyond the control of any regulatory authority. In other words, religion can serve as the source and a standard for interpreting and regulating the application of political, economic social power (Iannaccone, 1998, p. 1466). During the centuries and today, highly networked religious actors have the capacity to shape state and social behaviour (Jakobsen & Pellegrini, 2004, p. 1ff). Its role is ambivalent, as religion can either foster, shape or hinder human rights, democracy and the rule of law (Arikan & Ben-Nun Bloom, 2019). We have already made some remarks about the role of religious movements at an European level, as they engage in continuous processes of network formation and alliance creation. We can observe the same trend with the Orthodox Church in Russia or with the Evangelicals in the US and Brazil. At the global level we observe as the G20 Interfaith Movement has been trying to promote global regulatory webs of influence integrating a multiplicity of religious groups with religious motivations in order to influence the policymaking priorities of G20. We are speaking about religious communities regulating political and legal authorities through direct contact, participation in the democratic process by religious individuals, indirect moral persuasion and the slow and persistent building of an epistemic community. This phenomenon of decentered regulation confirms that consideration of non-state religious actors is required in any explanatory account of regulatory globalisation. Religion can also work as a regulator of private power, namely by promoting boycotts or engaging in naming, blaming and shaming.

5. Regulating religion in a constitutional democracy

Since there is no doubt that religion is linked to all aspects of social life, its full immunity to state regulation could hardly be sustained. The central problem that must be addressed, therefore, is not whether or not there can be regulation of religion, but rather what are the principles, purposes, and means to which such regulation should be subordinated in the framework of a free and democratic

constitutional order. In Europe, national constitutions, the values and principles of the Council of Europe and the Treaties of the European Union all point in the same direction, towards a rights-based governance and regulation, based in the principles of democracy, separation of powers and the rule of law.

5.1. Freedom as non-domination

An important regulatory meta-principle, which is based on the axiomatic dignity of the human person and individual autonomy, is freedom understood as the absence of domination (Braithwaite V., 2017, p. 29 ff). Regulation should be understood as an instrument to promote socially responsible freedom, minimizing, as far as possible, coercive imposition. Hence the preference for informal regulatory mechanisms and the progression in the regulatory pyramid towards higher and more intense levels of coactivity if and to the extent that this is considered necessary. This means, for example, that the State can communicate with its citizens to inform them of individual and social risks of some religious doctrines and practices, especially in the case of the most impressionable young people[68], but it cannot use physical and psychological coercive means to try to deprogram and reprogram individuals' religious beliefs[69].

5.2. Competing religious communities and world views

The regulation of religion concerns the spiritual and intellectual competition of different worldviews within the political community, something which will inevitably have an impact on the way politics, law, economics, culture, science or sports, are perceived and socially constructed and collectively experienced. This explains the high level of intensity religious discussions may reach, and their tendency to spillover to all areas of social life. Edward O. Wilson (1998) coined the term 'consilience' to describe the generation of new, robust understandings of the human condition that goes on when different experiences and epistemologies come in contact with and learn from one another (Williams, 1998). As a matter of fact, different religions and secular ideologies will seek to offer their own attempts to unify both what we know and what we don't know. This positive assessment of worldview confrontation should not distract us from the fact that this learning process is often sent to the background by an atmosphere of distrust, hostility, antagonism and confrontation.

68 *Leela Förderkreis e.V. and Others v. German,* no. 58911/00, ECHR 2008-V.

69 *Mockutė v. Lithuania,* no. 66490/09, §§ 107-131, ECHR 2018-IV.

5.3. Balancing competing rights and interests

When there is a collision of different rights and interests, there should be a balancing and harmonization procedure, according to the principle of proportionality in a broad sense. Restrictions to religious freedom and belief must be adequate, necessary and proportional, in a strict sense, to the pursuit of a legitimate and compelling interest. This means that regulatory actors must advance serious and compelling reasons for an interference with individual and collective religious freedom. Individuals' interest in not having to act contrary to their conscience, although not absolute, should be respected and protected. If there is the possibility of safeguarding the equal freedom rights of others and public order, safety, security and health interests without infringing on freedom of conscience, that should be the preferred option. For instance, religious freedom may be restricted if that is necessary to prevent polygamous or underage marriage, a flagrant breach of gender equality or the refusal of medical treatment to a minor. Another example, individuals and communities that profess belief in Apocalyptic doctrines that advocate collective suicide or violence, posing a risk to public order and security, may have their rights curtailed.

COVID-19 posed many problems in regulating religion, forcing the imposition of several restrictions on collective freedom of worship. The least individualistic religious communities were naturally the most penalized. Few would question the legitimacy, in the abstract, of restrictions on religious freedom to safeguard public health. The main concrete problems that arose, all over the world, were related to the respect for the constitutional principles of legality, proportionality and equality and non-discrimination of the restrictions made. In some cases, attention has been drawn to the fact that religious experience must be considered essential, so restrictions, being in principle admissible, obey an especially sensitive and rigorous scrutiny[70]. Despite the difficulties inherent in the pandemic, the best regulatory outcomes were obtained with a responsive and smart regulation, based on dialogue, persuasion and negotiation, sensitive to the contextual specificities of the exercise of religion. When regulations are based on the principles of freedom, procedural fairness, participation and dialogue, cooperation and voluntary compliance are likely to be higher and fewer parties are likely to need coercive measures to comply (Braithwaite V., 2017, p. 29).

[70] *Roman Catholic Diocese of Brooklyn, New York v. Cuomo,* 592 U. S. (2020).

5.4. Religious market failure

The analogy of the market should not be taken too far, considering that religion tries to respond to the ultimate existential questions. Religion is not to be commodified. However, the analogy can be useful up to a certain extent in order to represent the regulation of religion, since it assumes that the dissemination and exchange of immaterial goods among individuals can bring about processes of spontaneous ordering (Iannaccone, 1998, p. 1465ff). It posits a reality in which different religious communities coexist in an atmosphere of permanent spiritual confrontation and decentralization of authority, avoiding the dangers of religious monopolies. This confrontation results in a permanent revision of the content and formulation of religious doctrines, in order to make them more understandable and acceptable to individuals and societies. The principle of equal dignity and freedom, which has a religious origin, is, at once, the foundation and the limit of the right to profess, spread and put into practice religious beliefs and to seek to influence the whole society based on them. As religious communities spread their word, individuals are free to accept or reject it. The role of the State's regulatory authorities is to ensure that the exercise of this equal freedom does not represent an effective danger to the rights of others and to other constitutionally protected interests, thus being responsible for correcting the failures of the so-called religious market.

5.5. Meta-regulation

Many factors can prevent regulation from achieving its goals and lead it to produce unintended consequences. The same may happen in the field of the regulation of religion. Good regulatory practice requires open debate and contestation over the purposes, principles and techniques of regulating religion and how to do it best in the context of democratic governance. Meta-regulation refers to the monitoring and regulation of the regulatory process (Grabosky, 2017, p. 149ff). The Council of Europe, the European Union, the States, a variety of institutions in the private sector and public interest groups (v.g. political parties; universities; research centres; human rights organizations) should take part in the meta-regulation debate, thus acknowledging the diversity of regulatory space and its set of characters. These and other organisations should play a constructive role in monitoring the behaviour not only of religious communities, but also of governmental authorities. Although public power still often remains at the centre, we can observe a growing list of intervening actors. Meta-regulation seeks to ensure the adaptability of regulatory regimes. However,

the increasing number of public and private actors in the fields of regulation and meta-regulation, while very interesting from a democratic and regulatory point of view, raises meta-regulation transparency and accountability issues which shouldn't be easily dismissed. In the field of the regulation of religion self-anoited secular prophets and self-appointed moral entrepreneurs may be driven by personal interest, ideology, misconceptions about religion or malice rather than for respect for human dignity, freedom of conscience and religion and the public good.

6. Conclusion

In this article, we tried to apply some conceptual instruments elaborated by the theory of regulation to the domain of relations between religious communities and the State. A brief reference to history highlighted the centrality of the regulation of religion in the development of political ideas and institutions and its impact on constitutional law and human rights. After presenting the concepts of regulation and religion, we tried to analyze the problems raised by the regulation of religion, considering the theory of public interest, the free market of religious ideas and the theory of responsive regulation. This points to the need to build and adapt regulatory instruments based on a deep knowledge of the specific characteristics of the religious phenomenon. Responsive regulation must be context sensitive, going with the flow of events while trying to influence it and steer it towards a socially desired outcome. Our focus was on the European reality, where history and its memories have a decisive impact. We draw attention to the fact that European law sets as regulatory objectives the guarantee of freedom of conscience, religious freedom, equal dignity and freedom, democracy and the rule of law. Fidelity to these values and attention to the intellectual, spiritual, psychological, social, normative and institutional specificities of the religious phenomenon are at the basis of the regulatory response to religion. With regard to the institutions of other regulatory actors, we underlined the reality and need for action and articulation of the role of States, the Council of Europe, the European Union, the religious communities themselves and the regulatory networks of civil society. This aspect is important, among other things, because it draws attention to the complementarity of legal and non-legal factors in the regulation of religion that an exclusively legal approach tends to ignore.

With regard to regulatory tools, we sought to highlight the complementarity between informal and formal regulation techniques and, within the latter, softer and harder techniques, which should be used in a responsive, adequate and proportional way. In this context, we made use of the well-known regulatory

pyramids of the theory of regulation, which seem to us entirely appropriate to the regulation of religion. Responsive regulation will seek to climb and descend the pyramid in a reasonable and prudent way, knowing that in many cases de-escalating may be more effective. We then tried, but very briefly, to apply these conceptual instruments to some of the main domains of regulation. In the final part of our article, we tried to apply to our theme other aspects of the theory of regulation, considering the socio-cultural and political risks of the regulation of religion and the evaluation of the effects of religion. We conclude by drawing attention to the constitutional dimensions of the regulation of religion and underlining the importance of regulating the process of regulating religion itself. In our view, regulation theory can help politicians, jurists, administrators and religious actors to better understand the regulatory challenges posed by religion in a free, open and democratic society, and help the work of academics from various disciplines who focus on this important thematic area.

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