

X-1.-396

**RELIGIOUS PLURALISM AND
HUMAN RIGHTS IN EUROPE:
WHERE TO DRAW THE LINE?**

**M.L.P. LOENEN and J.E. GOLDSCHMIDT
(Editors)**

Distribution for the UK:

Hart Publishing
16C Worcester Place
Oxford OX1 2JW
UK
Tel: + 44 1865 51 75 30
Fax: + 44 1865 51 07 10

Distribution for Switzerland and

Germany:

Schulthess Verlag
Zwingliplatz 2
CH-8022 Zürich
Switzerland
Tel: + 41 1 251 93 36
Fax: + 41 1 261 63 94

Distribution for North America

Gaunt Inc.
Gaunt Building
3011 Gulf Drive
Holmes Beach
Florida 34217-2199
USA
Tel: + 1 941 778 5211
Fax: + 1 941 778 5252

Distribution for other countries:

Intersentia Publishers
Groenstraat 31
BE-2640 Mortsel
Belgium
Tel: + 32 3 680 15 50
Fax: + 32 3 658 71 21

Religious Pluralism and Human Rights in Europe: Where to draw the line?
M.L.P. Loenen and J.E. Goldschmidt (eds.)

© 2007 Intersentia
Antwerpen – Oxford
<http://www.intersentia.be>

ISBN 978-90-5095-642-0
D/2007/7849/34
NUR 828

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.

TABLE OF CONTENTS

INTRODUCTION

TITIA LOBENEN	1
1 Introduction.....	1
2 Citizenship: European Muslims.....	1
3 Religious pluralism and the European Convention of Human Rights	3
4 (Non)selectivity in the treatment of different religions	4
5 Accommodation of religion and its limits	5
6 Religion versus culture.....	8
7 Religion and freedom of expression.....	10

GLOBAL CITIZENSHIP AND HUMAN RIGHTS: FROM MUSLIMS IN EUROPE TO EUROPEAN MUSLIMS

ABDULLAHI AHMED AN-NA'IM.....	13
1 Introduction.....	13
2 Islam, Muslims and human rights	19
3 Rights and citizenship	25
4 The evolution of citizenship.....	29
5 Global citizenship from a historical perspective	33
6 Global citizenship in current discourse	37
7 Demographic profiles and public perceptions of Muslims in Europe	41
8 Muslims in Europe or European Muslims?	50
9 Concluding remarks.....	53

RELIGIOUS PLURALISM, HUMAN RIGHTS AND MUSLIM CITIZENSHIP IN EUROPE: SOME PRELIMINARY REFLECTIONS ON AN EVOLVING METHODOLOGY FOR CONSENSUS

SHAHEEN SARDAR ALI	57
1 Statement of the problem.....	57
2 Pre-requisites for engagement: some critical preliminaries for meaningful dialogue	59

VBO 321659

3	From Makkah to Ethiopia, Medina and beyond? – Application of the concept of hijra in the Islamic legal tradition to voluntary migration of Muslims to Europe	61
4	Classification of Europe as <i>dar-al-harb</i> , <i>dar-al-Islam</i> or <i>dar-al-sulh</i> . What does it mean for European Muslims?	65
5	From divine <i>Sharia</i> to <i>qanun</i> via <i>siyasa Sharia</i> : Creating space for secularity?	69
6	Constructing contemporary <i>dar-al-sulh</i> in Europe: Some possible discursive sites	69
7	'Islamic Institutions' and 'Islamic Authority': A critical analysis	72
8	Muslim Shariah councils, friend or foe: Emerging plural legalities in Europe	73
9	From Muslim migrant to Muslim citizen: Some tentative reflections on the contours of a framework for consensus	76

FREEDOM OF RELIGION AND LEGAL PLURALISM

	JAVID GADIROV	81
1	Introduction	81
2	Discourses of Refah Partisi	82
	2.1 Militant democracy and state exclusivism	82
	2.2 Legal pluralism and religious normative orders	84
3	Religious freedom and Hegel's theory of state	88
4	Legal plurality framework	91
5	Conclusion	93

THE PRACTICAL PRIORITY OF THE SECULAR LEGAL ORDER.

A Response to Javid Gadirov

	HEINER BIELEFELDT	97
1	Introduction	97
2	The State as the guarantor of freedom	98
3	Political versus doctrinal secularism	99
4	Concluding remarks	101

EQUAL TREATMENT OF RELIGIONS? An international and comparative perspective

	SOPHIE VAN BIJSTERVELD	103
1	Introduction: Choosing the starting point	103
2	Church and State relationships	105
	2.1 National models of Church and State relationships	105
	2.2 The international legal dimension	107
3	The subconstitutional level	110
	3.1 Religion and the structures of law	110
	3.2 State neutrality towards religion	111
4	A few examples of tailor-made provisions	113
5	Fundamental rights theory	114
6	And limitations?	115
7	Conclusion	117

RELIGIOUS PLURALISM AND HUMAN RIGHTS IN EUROPE.

Equality in the regulation of religion

	MARCO VENTURA	119
1	Equality is not (simply) a good principle lacking adequate implementation	119
2	Avoiding stereotypes	120
3	Different legal treatment for different religions	121
4	Differentiation can be consistent with equality	122
5	Differentiation can also be discriminatory	123
6	The principle of equality needs an accurate assessment of reality	124
7	Seizing the global turn affecting equality in law and religion	124
8	Interpreting equality by coping with new actors	126
9	Interpreting equality through new tools	126
10	The challenging balance between equal treatment and same treatment	127

HEADSCARVES IN SCHOOLS: EUROPEAN COMPARISONS

	HEGE SKJEIE	129
1	Introduction: 'Hijab vs. Gender Equality'	129
2	Accommodation of religious pluralism	131
3	Multicultural vulnerabilities	134
4	Religious attire in the public classroom: European variations	137

5	Hijab in the workplace: Headscarf bans as illegal gender discrimination	139
6	A new demarcation line: The headscarf versus the face veil	141
7	Soft drawings of the line – A viable policy solution	143

DEALING WITH DIFFERENT RELIGIOUS CONVICTIONS AND PRACTICES

	AART HENDRIKS	147
1	Introduction	147
2	Freedom to believe and to manifest one's belief	148
3	Interpreting the freedom to believe and to manifest one's belief	150
3.1	Preliminary questions	150
3.2	Weighing (potentially) conflicting rights, freedoms and interests	150
4	Conclusions	154

HEADSCARVES AT PUBLIC SCHOOLS. The issue of open neutrality reconsidered

	HANS WERDMÖLDER	155
1	Introduction	155
2	Only a piece of cloth?	156
3	Introduction of headscarves at Dutch schools	159
4	Where should the line be drawn?	163
5	Conclusion	165

TWO CITIES IN CONFLICT

	MATTHIJS DE BLOIS	167
1	Imagine	167
2	Religious freedom: background and justification	170
3	The scope of religious freedom	172
3.1	The nature of the practices	172
3.2	The content of the belief	174
4	Violation of human rights norms	175
5	Three observations	177
5.1	Horizontal effect of human rights	177

5.2	Human rights as instruments of emancipation	179
5.3	Secularised human rights	179
6	Concluding remarks	182

A 'CLASH OF CIVILISATIONS' AND A 'CONFLICT OF CITIES'

	JAVAJD REHMAN	185
1	The inevitability of a conflict	185
2	Western state ideologies as representing a secular outlook – Fallacy of the argument	186
3	Addressing the central question	189

THE ACCOMMODATION OF 'UNCONTROVERSIAL' RELIGIOUS PRACTICES

	PETER CUMPER	195
1	Introduction	195
2	Accommodating 'uncontroversial' religious practices	196
2.1	The accommodation of religious practices in the workplace	197
2.2	The accommodation of core religious practices beyond the workplace	200
2.3	The limits of religious accommodation in a liberal democracy	202
3	Factors relevant to the accommodation of religious practices	205
3.1	The accommodation of religious practices in 'public' life	205
3.2	The 'necessity' of religious practices	206
3.3	The 'choice' principle	208
4	Conclusion	209

EQUALS IN FAITH – FAITH IN EQUALITY. Equality as an additional standard for decisions on the accommodation of religious practices

	MARJOLEIN VAN DEN BRINK	211
1	Introduction	211
2	Equals in faith	212
3	Faith in equality	216

CULTURAL RIGHTS AND RELIGIOUS RIGHTS	
KIRSTEN KETSCHER	219
1 Introduction: Mapping the landscape	219
2 Cultural rights: An underdeveloped and neglected kind of human rights?	221
2.1 'Cultural rights' as a conservation project protecting traditional values	225
2.2 Conclusion on the status of cultural rights	226
3 Religious rights as a specific kind of rights	227
3.1 Male supremacy	229
3.2 Religious hostility against homosexuals	230
3.3 ECHR Article 9 on public religious manifestations	231
3.4 Religious clothing and ethnic discrimination	232
3.5 Praying in public	233
3.6 Concluding remarks on religious protection	234
4 Rethinking religion as a protected legal principle within the notion of cultural rights	234
 PROTECTION OR PROSCRIPTION?	
Cultural practices against the background of religious pluralism	
BAS DE GAAY FORTMAN	239
1 A field of intricate issues	239
2 Human dignity protection in context	242
3 Protection of cultural freedoms and entitlements through cultural rights	245
4 Proscription of cultural rules and practices that violate human dignity	248
 RELIGIOUSLY-MOTIVATED DISCRIMINATORY SPEECH: 'HOMOPHOBIA' AND EQUALITY DENIAL	
IAN LEIGH	251
1 Introduction	251
2 Laws prohibiting homophobic expression	254
3 The status of religiously-motivated speech	257
4 Reconciling the conflicts	262
5 Conclusion	265

FREEDOM OF EXPRESSION AND RELIGIOUSLY-BASED IDEAS ON HOMOSEXUALITY: EUROPEAN AND DUTCH STANDARDS	
JAN-PETER LOOF	267
1 Introduction: The Netherlands and freedom of expression <i>anno</i> 2006 ..	267
2 The broader perspective: Severe incidents related to freedom of expression and diminishing tolerance for religious opinions	269
3 Dutch legislation on discriminatory speech and the ECHR perspective	271
4 Dutch case law on religiously motivated remarks regarding homosexuality	273
5 Some questions and points of discussion regarding the Dutch case law	276
 GLORIFYING TERRORISM	
CHRISJE BRANTS	279
1 Introduction	279
2 Glorifying terrorism or legitimate public debate	281
Glorification in the context of the mass media	283
3 Glorification in the context of Islam	286
The case of The Netherlands	288
The double message of the Dutch proposal to criminalise glorifying terrorism	291
4 Conclusion	293
 TOWARDS THE ABOLITION OF HATE SPEECH BANS: A 'VIEWPOINT ABSOLUTIST' PERSPECTIVE	
ERIC HEINZE	295
1 Introduction	295
2 The western European context	296
3 Viewpoint absolutism	299
4 Common objections	306

**RELIGIOUS PLURALISM AND HUMAN RIGHTS IN EUROPE:
REFLECTIONS FOR FUTURE RESEARCH**

JENNY E. GOLDSCHMIDT and TITIA LOENEN	311
1 Introduction.....	311
2 Position of the state in a religiously pluralist society.....	314
2.1 Separation of Church and State: Different models.....	314
2.2 Neutrality of the State challenged.....	315
3 Accommodation of religious pluralism: Legal obligations & policy considerations	317
3.1 Legal obligations	317
3.2 Policy considerations.....	319
4 Religious pluralism and conflicts between fundamental rights and principles	321
4.1 Freedom of expression versus discrimination.....	322
4.2 Headscarves in public education.....	323
4.3 How to approach conflicting human rights?.....	325
5 Religion, culture and change: Reflections for the future	326
 CONTRIBUTORS	 331

INTRODUCTION

TITIA LOENEN*

1 INTRODUCTION

'How should we deal with religious pluralism in contemporary Europe from a human rights perspective and where should we draw the line, if any?' This was the central question of an expert seminar held in 2006 at Utrecht University to celebrate the inaugural address of Abdullahi An-Na'im, who occupied the G.J. Wiarda Chair at the Law Faculty of Utrecht University for the academic year 2005-2006. His address, as well as the contributions to the seminar, is published in this volume.¹

Though religious pluralism in itself is anything but new in Europe, the influx of large groups of non-Christians, especially Muslims, has profoundly changed the terms of the debate on how to deal with it. This is all the more so since Islam has been linked to the new forms of terrorism which confront the world today and which are epitomised by the 9/11 attacks. On the one hand, the call for limiting manifestations of religion in the public sphere seems to grow louder every year. On the other hand, minority groups often claim better accommodation of their religious beliefs and practices. The question how to approach such issues in Europe from a human rights perspective is complicated and does not lend itself to easy answers. The contributions to the seminar published in this volume show this. They address a wide range of topics.

2 CITIZENSHIP: EUROPEAN MUSLIMS

The inaugural address by Abdullahi An-Na'im contributes to the discussion from the perspective of citizenship. An-Na'im argues for the development of a notion of global citizenship as the basis of universality of human rights. This idea of global

* Professor M.L.P. Loenen, professor of Gender and law at Utrecht University.
¹ The sequence of the contributions in this volume is not alphabetically by author, but follows the thematic structure of the seminar programme. Apart from the lectures by Abdullahi An-Na'im and Shaheen Sardar Ali, the contributions consist both of introductory papers written for the seminar and commentaries on those papers.