

## ***Mapping the legal status of religious minorities in Europe A contribution to the 2018 ECCSR Siena meeting***

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The legal status of religious minorities has been the subject of an international convention in Thessaloniki in November 1993<sup>1</sup>. In this convention, the theme was investigated through the following criteria: 1) legal definitions of religious minorities; 2) legal position and internal organisation; 3) legal rights or religious minorities: protection; 4) employment law: rights of religious observance in work; 5) law and religion education; 6) critique: religious neutrality – a myth?; 7) limitations on the exercise of religious rights. Compared to the outcomes of this methodology, the legal and social processes of last twenty years have created the need for a new reflection on the theme of religious minorities. The concept of a religious minority seems to be changed through: 1) the transformation of national law; 2) the social transformations; 3) the transformation of European law.

From a legal level perspective, new factors coincided with: a) recognition of new human rights (LGBT rights); b) recognition of new minorities; c) increasing the protection of foreigners (migrants, refugees); d) new interpretations of freedom of conscience and religion (equality of believers and non-believers); e) new judicial interpretations of the concept of religious minority; f) new studies in the legal-sociological literature. On the social level, however, the most important phenomena are: a) migrations; b) changes in relations between majorities and minorities; c) the emergence of new minority and new majorities groups; d) transformation of national societies in a pluralistic and multi-confessional direction; e) technology development.

The phenomena described create the need for new reflections on religious minorities both as a phenomenon and as a legal category. This research can be articulated through a thematic grid based on the definition of religious minority. In this perspective, the notion of religious minority can be used as a criterion to investigate the subject: 1) on a legal level; 2) on a social level; 3) on the level of the relationship between legal dimension and social dimension.

In social sciences, the concept has been defined in two main areas: 1) legal; 2) historical-sociological.

In interdisciplinary sense, however, the relationship between law and society has influenced the phenomenon in three perspectives: 1) legal evolution and socio-cultural and political change; 2) links between law and social sciences; 3) links between law, social sciences and minority phenomena.

In the proposed perspective, the notion of religious minority will first be articulated within individual social sciences and then reconstructed in a social-juridical interdisciplinary sense.

### **I. DEFINITION OF RELIGIOUS MINORITY**

#### **The Legal Dimension**

The phenomenon of religious minorities in the legal field can be reconstructed from three indicators: 1) linguistic use of the notion of religious minority in the sources of law and literature; 2) legal rules; 3) legal recognition models.

1) With regard to the first indicator, the right may refer implicitly or explicitly to the notion of a religious minority. In fact, two different definitions of the notion can be distinguished: a) implicit definition; b) explicit definition.

a) In the first case, law does not use the notion of religious minority, but identifies different categories with implicit meaning that includes the discipline of the minority phenomenon.

b) In the second case, the use of the "religious minority" linguistic formula identifies an explicit definition of this notion.

2) With regard to the second indicator, the recognition of religious minorities may be: a) in sources of international or national law; b) in unilateral (state) or bilateral sources (state and minority agreements); d) in case-law; e) in literature.

3) With regard to the third indicator, the legal model can: a) be binding or non-binding for the State; b) affect the protection or limitation; c) recognize individual and / or collective rights; d) impose duties; e)

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<sup>1</sup> AA. VV., *The Legal Status of Religious Minorities in the Countries of the European Union*, Milan, 1994.

derogate or not derogate from general law; f) prescribe criteria for belonging to the minority regardless or in respect of the autonomy of the individual.

The three criteria may overlap according to variable geometry in the concrete normative models of definition of religious minorities. You may have, for example: 1) implicit or explicit definitions contained in international or national law that recognizes rights and / or duties to religious minorities; 2) extensive or restrictive interpretations of implicit or explicit norms contained in judgments of international or national courts; 3) theoretical reflections that comprehensively or restrictively interpret the rights recognized to minority members in international or national law.

The evoked criteria can be traced back to three definitions of religious minority in international and national law: 1) implicit definition of protection; 2) implicit definition of limitation and / or sanction; 3) explicit definition of protection.

1) The implicit definition of religious minority with a protective effect guarantees the rights of the group and emerges on various plans within: a) the provision of specific rights (freedom of conscience, religious freedom, freedom of education, cultural freedom, right to asylum); b) the protection of specific communities (people, religious or social group, national minority, minority); c) the non-discrimination principle.

2) The implicit definition of religious minority with a sanctioning and / or limitation effect oppresses the freedom of minority groups and is associated with six possible normative criteria to distinguish majorities and minorities: a) scientific criteria (race); b) cultural criteria (civilization, ancestry); c) general limits (security, public order and morality); d) protection of human rights; e) general principles (principle of non-discrimination based on gender or sexual orientation); f) specific legal categories to define the group (sect).

3) The explicit definition identifies the category of religious minority, in a perspective of protecting the members of minority groups based on the following possible criteria: a) objective (quantitative, territorial); b) subjective (the will of the group not to be assimilated to the majority); c) historical (traditional religious minorities).

## 1. The implicit notion of a protective effect

### *a) The provision of specific rights*

With regard to specific rights, the legal status of religious minorities emerges in protection of: a.1.) freedom of conscience and religion, a.2.) freedom of education, a.3.) cultural freedom, a.3.) right to asylum, a.4.) LGBT rights

#### a.1.) The freedom of conscience and religion

From a first perspective, the notion of religious freedom was first established in the historical sources of international law (Peace of Westphalia, 1648, Articles 5-44, Treaty of Berlin, 13 July 1878) and national law (Edict of Nantes, 1598), subsequently in UN sources (Article 18, Universal Declaration of Human Rights), then in the sources of the European Union (Article 10, Charter of Fundamental Rights of the European Union, 2000), of the Council of Europe (Article 9, European Convention on Human Rights, 1950), of the Conference on Security and Cooperation in Europe (today OSCE) (Charter of Paris for a new Europe, 1990) and, at different stages, within domestic constitutions. In terms of protection content, in the catalogues of national and international human rights, the protection of freedom of conscience and of religion is recognized to a person not only as individuals per se, but also as social formations where his/her religious or philosophical personality is expressed. In these terms, the recognition of freedom of conscience and of religion implicitly protects religious minorities with regards to: a) individual protections (freedom of the individual to join or not join denominational or philosophical groups<sup>2</sup>, the freedom of the individual to manifest or conceal their religious affiliation<sup>3</sup>, freedom of proselytism<sup>4</sup>); b) collective protections (notion of religious confession<sup>5</sup>; autonomy of religious confessions or philosophical groups to include or exclude their affiliates<sup>6</sup>, autonomy of groups opposed to the State<sup>7</sup>).

Secondly, starting from the Universal Declaration of 1948, freedom of religion is accompanied by the proclamation of freedom of conscience (Article 18). The protection of freedom of conscience in

<sup>2</sup> ECHR, *Mirolubovs et autres c. Lettonie*, 15 septembre 2009, req. no 798/05, § 80.

<sup>3</sup> ECHR, *Buscarini c. S. Marino*, application no. 24645/94, 18.02.1999

<sup>4</sup> ECHR, *Témoins de Jéhovah c. Russie*, 10 juin 2010, req. no 302/02, § 139.

<sup>5</sup> ECHR, GC, *Izzettin Doğan e altri c. Turquie*, 26 avril 2016, Application no. 62649/10, § 68.

<sup>6</sup> ECHR, *Sviato-Mykhailivska Parafiya c. Ukraine*, 14 juin 2007, req. no 77703/01, § 146.

<sup>7</sup> ECHR, GC, *Sindicatul Pastoral Cel Bun c. Roumanie*, 9 juillet 2013, req. No 2330/09, § 137.

international, universal sources (Article 18, paragraph 1, International Covenant on Civil and Political Rights) and regional ones (Article 9, ECHR, Article 10, Charter of Fundamental Rights of the European Union) recognizes the guarantee of subjective autonomy, regardless of the religious nature of the professed doctrine. In this perspective, religious freedom is interpreted as a protection also for atheists, agnostics and indifferentists, as the freedom to disbelieve. This tendency emerges: in the acts of international institutions; in the jurisprudence of supranational courts; in international sources.

In terms of acts, both the High Commissioner for Refugees and EU institutions have broadly interpreted the notion of religion in relation to refugee status. In this notion, in particular, it must also be included atheists, agnostics, indifferentists, pagans and superstitious.

According to jurisprudence, the Court of Strasbourg, for example in the well-known case *Kokkinais vs Greece*, has qualified religious freedom as "a precious good" not only for believers, but also "for atheists, agnostics, skeptics (skeptics in Inglese Brittanico, come appare essere il resto del testo) or indifferentists".

With regard to international sources, in the formulation of art. 9 CEDU, the term "belief" identifies non-religious moral convictions<sup>8</sup> and thus distinguishes the protection of freedom of conscience from the protection of religious freedom<sup>9</sup>. In these terms, in the case *Campbell and Cosans vs United Kingdom*, the Court has defined the notion of non-transcendent belief. Convictions are points of view "that reach a certain degree of strength, of seriousness, of coherence and of importance", thus distinguishing themselves in the protection granted to their manifestation in public or in private, from simple opinions or ideas, protected pursuant to art. 10 ECHR, as forms of manifestation of thought<sup>10</sup>.

The new protection of freedom of conscience is reflected in the meanings of religious freedom in relation, not only to the forms of exercise of this freedom, but also to the concept of religious confession. This notion is no longer limited, in fact, only to historical religions and can be extended to new groups, even non-believers who, in the name of freedom of conscience, claim the same rights as religious confessions. In these terms, the recipients of recognized rights to minority religious confessions may also change. This occurs when a group requests recognition of the same legal status of religious minorities, in relation to the collective exercise of secular doctrines. The religious minorities can, therefore, coincide both with groups carrying transcendent doctrines and with groups of atheists, agnostics, incredulous or indifferentists. In these terms, art. 17 of the Treaty on the Functioning of the European Union, equates religious confessions to philosophical and non-confessional groups, as possible interlocutors of an institutional dialogue with the European Commission.

#### a.2.) The freedom of education

The prediction of the freedom of parents to educate their children in accordance with their beliefs or convictions, is a significant guarantee of religious minorities (art. 13, para. 3, the International Covenant on Economic, Social and Cultural Rights, 1966; Art. 18, International Convention on the Rights of the Child, 1990, Article 2, Additional Protocol to the ECHR, 1952, Article 14, paragraph 3, Charter of Fundamental Rights of the European Union). The members of minority groups are protected, in fact, from the risk of being pressured into educational choices by the majority, for example through educational policies of forced assimilation to the precepts of the dominant religion. In these terms, the right to education is realized in accordance to the freedom of the minority group by establishing schools inspired by the professed doctrine or in a system of neutral public education that respects the moral identity of the learners. From a first point of view, the Court of Strasbourg has stated, pursuant to art. 2, Additional Protocol to the ECHR, the obligation

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<sup>8</sup> The Commission has manifested a certain rigidity in recognizing the behavior referred to in art. 9, considering it a manifestation of personal convictions. The judges have, in fact, made a strict distinction between protectable events and mere behavior motivated by religious or conscientious options, as in the case ECHR, *Arrowsmith vs United Kingdom*, 12 October 1978, application no. 7050/75; cf. C. EVANS, *Freedom of religion under the European Convention on human rights*, Oxford, 2003, 115 ss.

<sup>9</sup> The double terminology used by the conventional legislator, which refers not only to religion but also to belief, seems to distinguish belief from religious faith. In a consistent sense, this distinction is expressed in the anti-discrimination measures, in the matter of religious freedom, elaborated by the UN Sub-Commission. The latter recurs, in fact, to the double term of religion or conviction, due to the difficulty of defining juridically religion, considering that the recourse also to the word conviction includes, in addition to the different religious beliefs, values of different sign, such as agnosticism, free thought, atheism and rationalism. In particular, this interpretation is contained in the Draft International Convention on the Elimination of All Forms of Religious Intolerance, where it is emphasized that "for the purposes of this Convention: a) the expression religion or belief applies to theist beliefs, not theistic and atheists"; cfr. Doc. ONU, E/CN, 4/882, *annexe*, 76.

<sup>10</sup> ECHR, *Campbell and Cosans vs United Kingdom*, 25 February 1982, application nn. 7511/76; 7743/76, § 36.

for States to allow the establishment of separate schools<sup>11</sup>, to respect the religious and philosophical convictions of families. From a second point of view, the Court held that the requirement of attending religious education does not respect the objectivity and pluralism of teaching programs<sup>12</sup>.

#### a.3.) The cultural freedom

The right of a group to have its own culture and to preserve it is foreseen in different sources of international level (Declaration of the principles of international cultural cooperation, UNESCO, 1966, Article 2, paragraph 3, Convention on the protection and promotion of cultural diversity, UNESCO, 2005, Article 3, International Covenant on Economic, Social and Cultural Rights, 1966, Article 22, Charter of Fundamental Rights of the European Union). The link between religion and culture has emerged in international sources on two different occasions: the definition of the notion of culture; the definition of target groups of cultural rights. Regarding the definition of culture, in the preamble of the UNESCO Universal Declaration on Cultural Diversity of 2001, culture has been qualified "as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs". With regard to the recipients of cultural rights, UNESCO in both the Declaration on Cultural Diversity and the Convention on the Protection and Promotion of Cultural Diversity of 2005 identified the main recipients of the guarantee of cultural diversity in indigenous minorities and peoples. Consequently, although there is no explicit reference to religious minorities, the guarantee of cultural rights implicitly intersects the spheres of freedom of minority religions, whose cultural identity must be free to express themselves and develop in the social dynamic. The exercise of the right to culture by the religious minority is achieved through promotion (libraries, museums, exhibitions ...) and dissemination (books, shows, documentaries ...), of the respective traditions. The right to culture also becomes particularly significant if the group possesses, in addition to religion, also ethnic and / or linguistic characteristics, which are officially recognized different from the rest of the population.

#### a.4.) The right to asylum

The right to asylum, as will be seen below, through the international recognition of the status of religious refugee, constitutes a protection guard even for members of persecuted religious minorities (Article 1, letter A), pr. 1, Geneva Convention on the Status of Refugees, 1951; art. 10, pr. 1, l. b). Directive 2011/95 / EU, laying down rules on the attribution, to third country nationals or stateless persons, for qualifying as beneficiaries of international protection, on a uniform status for refugees or for persons entitled to benefit from subsidiary protection and on the content of the recognized protection (recast), 2011). In this sense, the link between the individual and the minority group is protected through the status of a religious refugee, which has a well-founded fear of being persecuted in the country of origin.

#### a.5.) The LGBT rights

The recent recognition of LGBT rights has had an impact on the legal status of religious minorities in relation to the protection of the right of freedom of conscience and religion of homosexual persons<sup>13</sup>. In these terms, the new international standard of human rights protection, based on the principle of non-discrimination of sexual orientation, has been implemented in relation to freedom of thought, conscience and religion within the Yogyakarta Principles of 2007. Principle 21 clarifies that "States shall: a) Take all necessary legislative, administrative and other measures to ensure the right of persons, regardless of sexual orientation or gender identity, to hold and practise religious and non-religious beliefs, alone or in association with others, to be free from interference with their beliefs and to be free from coercion or the imposition of beliefs". In this sense, the religious freedom of LGBT people can be protected from discrimination, also in relation to the link of affiliation or non-affiliation with religious majorities or minorities.

### *b) The protection of specific communities*

<sup>11</sup> The affirmation of the value of pluralism in education, pursuant to art. 2 of the Prot. n. 1, has a definite impact on the right of parents to respect their beliefs in educating their children, which includes, even if implicitly, the right to set up and run private schools, cfr., ECHR, *Joredbo Foundation of Christian School and Joredbo vs Sweden*, application n. 11533/85, 6 march 1987, § 128; ECHR, *Verein Gemeinsames Lernen vs Austria*, 6 september 1995, application no 23419/94.; ECHR, *Kjeldsen, Busk Madsen and Pedersen vs Denmark*, 07 december 1976, Applications no. 5095/71; 5920/72; 5926/72, § 54.

<sup>12</sup> ECHR, G.C., *Folgero and others vs Norway*, 20 march 2007, Application no. 15472/02.

<sup>13</sup> N. BAMFORTH, *Sexual Orientation and Rights*, Abingdon-on-Thames, 2015; D. FERRARI, *Status giuridico ed orientamento sessuale. La condizione giuridica dell'omosessualità dalla sanzione, alla liberazione, alla dignità*, Pavia, 2015.

In term of protection of specific social groups, religious minorities can be included in the concept of: b.1.) people, b.2.) religious or social group, b.3.) national minority, b.4.) minority.

b.1.) The notion of people and indigenous people

In terms of the protection of specific social groups, religious minorities can be included in the concept of *the people* (Article I, International Covenant on Civil and Political Rights, Article I, International Covenant on Economic, Social and Cultural Rights) or of *indigenous population* (ILO, Indigenous and Tribal Peoples Convention, 1989; UN Declaration on the Rights of Indigenous Peoples, 2007). The notions of *people* and *indigenous people*<sup>14</sup>, in relation to the concept of religious minority, can be examined in two different perspectives, concerning: the meaning of religiosity in the definition of these categories<sup>15</sup> and the contents of the right to self-determination<sup>16</sup>.

Firstly, in the absence of a definition of *people* in international sources, UNESCO has qualified it as a group of human beings that have in common many characteristics, among which are also included religious or ideological affinities<sup>17</sup>. The Working Group on Minorities of the Commission on Human Rights has analysed, in terms of recognised rights, the links between the notion of minority and the concept of people, proposing: a general distinction and/or a coincidence, in specific cases, between these two figures. In terms of rights recognized in international sources, minorities must be distinguished from the peoples: the rights of minorities are individual rights, while the right of self-determination of peoples is a collective right. However, the two figures can coincide, when a minority claims a right of self-determination<sup>18</sup>. This happens, for example, if the minority group defends its right not to be excluded from the processes of formation of political decision or aspires, through the request of specific statutes of autonomy or secession processes, to make itself, in a relative or absolute way, independent of the State of belonging.

From a second point of view, the link between indigenous people and religion has emerged in definitions contained both in specific sources of international law and in acts of the UN institutions.

With regard to the sources, in the preamble to the Indigenous and Tribal People Convention, the link between the autochthonous group and religion emerges in recognition of the aspiration of the indigenous people to maintain and develop their own religion. Similarly, the Declaration on the Rights of Indigenous People makes several references to the relationship between religion and indigenous peoples. Among these references, particularly important is art. 12, pr. 1, where it is expected that: "Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies (...)".

In accordance with UN's (o At the UN level) institutional acts, indigenous peoples have been defined by the UN Permanent Instance on the indigenous issues as a group that has a specific link with a given territory, which has its own social, political and economic systems, a language, a culture and specific beliefs<sup>19</sup>. Jose R. Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, further defined indigenous peoples, underlining the importance of the religious element. The rapporteur clarifies that "religion as an element of indigenous culture is always implied"<sup>20</sup>.

Additionally, in relation to the rights of indigenous peoples, the UN Committee on Human Rights has recognized, since 1994, the right of representatives of indigenous peoples to claim the collective rights of the group to which they belong, pursuant to art. 27 of the International Covenant on Civil and Political Rights, which recognizes and protects the rights of religious, ethnic and linguistic minorities. The Committee clarifies, « The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals

<sup>14</sup> A. GUDMUNDUR, *Minorities, Indigenous and Tribal Peoples : Definitions of Terms as a Matter of International Law*, in G. NAZILA – A. XANTHAKI (eds.), *Minorities, Peoples and Self-Determination : Essays in honour of Patrick Thornberry*, Nijhoff, 2005, 163-172.

<sup>15</sup> T. D. MUSGRAVE, *Self-Determination et National Minorities*, Oxford, 1997.

<sup>16</sup> V. A. MEIJKNECHT, *Towards International Personality : The Position of Minorities and Indigenous Peoples in International Law*, Oxford, 2001.

<sup>17</sup> V. UNESCO, Doc. SHS- 89/CONF. 602/7, Paris, 22 february 1990.

<sup>18</sup> V. Commission of Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-seventh session, Working Group on Minorities, *Commentary of the working group on minorities to the United Nations Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities*, E/CN.4/Sub.2/AC.5/2005/2, par. 15, 2005, 5.

<sup>19</sup> Cfr. Office of the United Nations High Commissioner for Human Rights, *Indigenous Peoples and the United Nations Human Rights System*, New York-Geneva, 2013, 3.

<sup>20</sup> Cfr., United Nations, Sub-commission on Prevention of Discrimination and Protection of Minorities, *Study of the problem of discrimination against indigenous populations, Final Report submitted by the Special Rapporteur Mr. José R. Martinez Cobo*, 2. Particular aspects, 1. a) Religion, E/CN.4/Sub.2/1982/2/Add.6, 20 June 1982, 21.

protected under that article - for example, to enjoy a specific culture - may consist in a way of life which is closely associated with territory and use of its resources. 2. This may be particularly true regarding members of indigenous communities constituting a minority»<sup>21</sup>. Native peoples, therefore, can enjoy the rights recognized to religious minorities. This freedom was reiterated (or stressed) by the Office of the United Nations High Commissioner for Human Rights. In fact, the Office claims: «in practical terms, a number of connections and commonalities exist between indigenous peoples and national, ethnic, linguistic and religious minorities. Both groups are usually in a non-dominant position in the society in which they live and their cultures, languages or religious beliefs may be different from the majority or the dominant groups»<sup>22</sup>. though not always, in the minority in the States in which they reside. Minorities and indigenous peoples have some similar rights under international law (...) »<sup>23</sup>.

The content of the rights recognized to the indigenous peoples, however, seems to emphasize the concept of religious minority. In fact, communities that can qualify both as religious minorities and as indigenous peoples, in the perspective of universal sources, often express their religious identity in the relationship between religion, cultural traditions and territory<sup>24</sup>. With reference to the relationship between religion and the indigenous culture, as highlighted by the United Nations, the recognition of religious freedom of indigenous minority groups can be described through the concept of "indigenous spirituality". This model of spirituality « is inherently connected to culture. Adopting policies that promote certain religions or prohibit indigenous spiritual practices, or the failure of laws or other governmental institutions, such as the police and courts, to respect indigenous spiritual practices, can undermine the right to culture»<sup>25</sup>.

The connection between rights linked to land ownership and religious freedom emerges, instead, both in art. 12, pr. 1, of the Declaration on the Rights of Indigenous People, which protects "the right to maintain, protect, and have access in privacy to their religious and cultural sites" both in art. 14, pr. 1, of the Indigenous and Tribal peoples Convention, which guarantees the right of the natives "of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities". The international instruments under examination thus lead to the identity of the indigenous religious minorities to specific local traditions. The guarantee of the continuity of these traditions is one of the tools of protection, to avoid that minority groups are victims of assimilation policies by majorities.

#### b.2.) The notion of religious or social group

The notion of religious or social group can intersect the protection of religious minorities. The notion of "protected group", as will be seen shortly, is based, in fact, on the homogeneity of cultural, religious, ethnic or linguistic aspects within individual communities, when such homogeneity—causes serious violations of human rights. The use of the group category in international sources seems, in particular, to concern significant guarantees for minorities in two distinct perspectives: protection of their existence; prohibition of segregation.

With regard to the first aspect, the right to the existence of religious minorities is protected within international sources that: punish crimes against humanity, war crimes, the crime of genocide; protect the status of a religious refugee.

In relation to crimes against humanity, the link with religious minorities emerges in the definition of acts that can integrate such crimes contained in the Statute of the International Criminal Court<sup>26</sup>. In fact, beyond the genocide case envisaged in art. 6 and which will be analysed in more detail shortly, crimes against humanity can coincide with « persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious (...) or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court » (art. 7, pr. 1, l. h)).

<sup>21</sup> Office of the United Nations High Commissioner for Human Rights, *General Comment 23, Article 27: Compilation of general comments and general recommendations adopted by human rights treaty bodies*, U.N. Doc. HRI/GEN/1/Rev.1, 1994, par. 3.2.

<sup>22</sup> Office of the United Nations High Commissioner for Human Rights, *Minority Rights: International Standards and Guidance for Implementation*, (HR/PUB/10/3), 2011, 3.

<sup>23</sup> Office of the United Nations High Commissioner for Human Rights, *Indigenous Peoples and the United Nations Human Rights System* (...), cit., 3.

<sup>24</sup> *Rights of indigenous peoples*, final report of the Sofia Conference (2012), (Conclusions and Recommendations).

<sup>25</sup> Asia Pacific Forum of National Human Rights, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*, Sidney-Geneva, 2013, 14.

<sup>26</sup> V. Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998.

About war crimes, "directing attacks against buildings dedicated to religion" actions are qualified by the Statute of the Court as war crimes (art. 8, pr. 2, l. b), n. 9). The punishment of these acts will protect the religious freedom of minorities victims of the destruction of their places of worship.

Regarding the crime of genocide, the Convention for the Prevention and Repression of the Crime of Genocide of 1948 qualifies in the art. II religious groups as vulnerable individuals and implicitly protects the right of religious minorities to physical existence. The crime of genocide, in particular, is defined as « acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group ». The interpretation of the Convention, developed in several acts by the UN Office on genocide prevention and the responsibility to protect<sup>27</sup>, has been implemented by the institutions of the European Union. In these terms, the European Parliament, in a resolution of 4 February 2016, referred to the UN Convention as instrument that guarantees protection to religious minorities victims of systemic violence in Syria by the DAESH group. In the text of the resolution, it is reiterated that «‘ISIS/DAESH’ is committing genocide against Christians and Yazidis, and other religious and ethnic minorities, who do not agree with the so-called ‘ISIS/DAESH’ interpretation of Islam, and that this therefore entails action under the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide; underlines the fact that those who intentionally, for ethnic or religious reasons, conspire in, plan, incite, commit or attempt to commit, are complicit in or support atrocities should be brought to justice and prosecuted for violations of international law, notably war crimes, crimes against humanity and genocide»<sup>28</sup>. Considering the second aspect, the right of religious minorities not to be excluded from their respective national societies with measures of segregation is guaranteed through the punishment of the crime of apartheid. In particular, the 1976 International Convention on the Suppression and Punishment of the Crime of Apartheid protects racial groups and groups in general from the risk of being segregated from dominant groups through violent attacks or acts of discrimination or persecution. The aforementioned protection, that is addressed to both racial groups and united by other identifying factors, can also be invoked by religious minorities in two main hypotheses: apartheid on an ethnic and religious basis, apartheid on a religious basis. In the first case, the group is a victim of segregation for ethnic and religious reasons. In the second case, the religious minority is the victim of exclusion policies due to the professed faith. The importance of the Convention on the crime of apartheid with respect to the guarantee of minority rights was also highlighted by the UN Working Group on Minorities. The experts stressed the importance of protecting the right of minorities to access all forms of participation in national society<sup>29</sup>.

With regard to international protection, however, the religious refugee status is recognized by the Geneva Convention (art. 1, para. 2) and the law of the European Union (Art. 10., Directive 2011/95 / EU laying down rules on the attribution, to third country nationals or stateless persons, of the status of beneficiary of international protection ...), to members of particular social groups persecuted because of they share the same fundamental beliefs of conscience or identity of the group. The notion of persecuted religious groups has been defined by international and European institutions on two levels concerning both the definition of a religious group and the concept of religious persecution.

From the first point of view, UNHCR has led the notion in question to “a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights”<sup>30</sup>.

<sup>27</sup> V. <http://www.un.org/en/genocideprevention/crimes-against-humanity.html>.

<sup>28</sup> Cfr. European Parliament resolution of 4 February 2016 on the systematic mass murder of religious minorities by the so-called ‘ISIS/Daesh’ (2016/2529(RSP)).

<sup>29</sup> V. Commission des droits de l’homme, Sous-Commission de la promotion et de la protection des droits de l’homme Cinquante-troisième session, Groupe de travail sur les minorités, Texte final du Commentaire sur la Déclaration sur les droits des personnes appartenant à des minorités nationales ou ethniques, religieuses et linguistiques, Septième session 14-18 mai 2001, 7.

<sup>30</sup> Cfr. UNHCR, Guidelines On International Protection, “Membership of a specific social group” under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, pr. 11.

Religious persecution was defined by the UNHCR, first within the Handbook on procedures and criteria for determining refugee status<sup>31</sup> and then in the guidelines for applicants seeking protection for religious reasons, such as a squeeze of the freedoms of the spirit that exceeds the limits foreseen (?) by the art. 18, co. 3, of the Covenant on civil and political rights. Hence, in the dialectic between authority and freedom, the only limitations established by the law are for reasons of public order and public security, guaranteeing that the rights of others are legitimate and not persecutory, as other types of constraints may integrate illegitimate treatment. The Court of Justice also ruled on this form of persecution in a case involving two members of the Ahmadiyya community, a minority and reformist state of Islam that is persecuted in Pakistan. The European Judge has clarified, in particular, that the inherently serious nature of the violation of the moral freedom, suffered or feared, qualifies, under the Directive, as the persecutory nature of an act<sup>32</sup>.

In light of the aforementioned definitions, religious minorities and persecuted religious groups may, or may not coincide, since refugee status can be recognized to subjects belonging "to a religious minority or majority"<sup>33</sup>.

In particular, a persecuted group coincides with a religious minority when the individual is persecuted: compared to the individual's association with a religious group of cohesive or non-cohesive minority; because the persecutors believes that the person adheres to a minority doctrine different from the one actually professed; because of a conversion occurred *sur place*; through attempts of forced conversion.

In the first case, as explained by the UNHCR, "there is no requirement that the group should be "cohesive"(...) it is not necessary that the followers of a religion or those who express a certain political opinion attend or belong to a "cohesive" group ». From this point of view, therefore, it is possible to recognize the status of religious persecuted both to members of cohesive religious minorities and to members of non-cohesive religious minorities.

In the second case, the High Commissioner clarified that «It may not be necessary, for instance, for an individual (or a group) to declare that he or she belongs to a religion, is of a particular religious faith, or adheres to religious practices, where the persecutor imputes or attributes this religion, faith or practice to the individual or group »<sup>34</sup>. From this point of view, the protection from the risk of persecution can, therefore, concern both links of real affiliation to a religious minority and links of perceived affiliation.

In the third case, the risk of persecution may arise from the choice of the asylum seeker to convert to a new religion in the country of arrival. The conversion of the applicant to a new religion can, in particular, alternatively determine, in the country of origin and in the host country, the transition from a religious majority to a religious minority; from a religious minority to a religious majority; from a religious minority to a new religious minority. With regard to the country of origin, in many cases, conversion exposes the individual to the risk of persecution, when the former religion expressed the doctrine of the dominant group. In these cases, for example, conversion to a new faith can be punished through the prohibition of apostasy. On this point, the European Court of Human Rights ruled on the case of a converted *sur place* and recommended that States carefully evaluate the consequences of conversion in their country of origin, in order not to expose the applicants to the risk of suffering inhuman and degrading treatments through expulsion measures<sup>35</sup>.

In the fourth case, the assimilation of a religious minority to the majority doctrine through actions aimed at the forced conversion represents "Forced conversion to a religion is a serious violation of the fundamental human

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<sup>31</sup> V. UNHCR, September 1979, Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, l. b) Interpretation of some terms, n. 3) For reasons of race, religion, nationality, belonging to a particular social group or for its political opinions, l. c) Religion, n. 71, p. 19

<sup>32</sup> Judgment of the Court, 5 September 2012, brought cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y. Z.*

<sup>33</sup> UNHCR, Guidelines On International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, 28 April 2004, 5.

<sup>34</sup> UNHCR, Guidelines On International Protection: Religion-Based Refugee Claims (...), cit., 4.

<sup>35</sup> The appeal, rejected at first instance by the Court of Strasbourg, which held that there were no elements to suppose that the Iranian authorities were aware of the applicant's conversion to Christianity, was then accepted by the Grand Chamber, cfr. C. edu, G.C., sent., *F.G. vs Sweden*, 23 March 2016.



right to freedom of thought, conscience and religion and would often satisfy the objective component of persecution”<sup>36</sup>.

Regarding the prohibition of segregation, the right of religious minorities not to be excluded from their respective national societies with segregation measures is guaranteed through the punishment of the crime of apartheid. In particular, the 1976 International Convention on the Suppression and Punishment of the Crime of Apartheid protects racial groups and groups as a whole from the risk of being segregated from dominant groups through violent attacks or acts of discrimination or persecutors. The aforementioned guarantee, addressed to both racial groups and united by other identifying factors, can also be invoked by religious minorities in two main hypotheses: apartheid on an ethnic and religious basis, apartheid on a religious basis. In the first case, the group is a victim of segregation for ethnic and religious reasons. In the second case, the religious minority is victim of exclusion policies due to the professed creed. The importance of the Convention on the crime of apartheid with respect to the guarantee of minority rights was also highlighted by the UN Working Group on Minorities. The experts stressed the importance of protecting the right of minorities to access all forms of participation in national society<sup>37</sup>.

### b.3.) The notion of national minority

The concept of national minority appears in two main areas: the definition and recognition of the rights of these minorities (UN, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 2, 2001; Conference on Security and Cooperation in Europe (CSCE), Helsinki Final Act, pr. VII, 1975; Council of Europe, Framework Convention for the Protection of National Minorities, 1 February 1995); the prohibition of discrimination based on nationality.

With regard to the first aspect, the definition of national minority has been elaborated by international institutions starting from the differences between this case and the other types of minority. The defining need has concerned, in particular, the description of cases in which religious, linguistic or ethnic minorities may or may not be qualified as national.

The definition, elaborated by UN institutions, by the Council of Europe<sup>38</sup> and from the OSCE<sup>39</sup>, describes the national minority, depending on the case, coinciding or not coinciding with ethnic, religious or linguistic minorities. In the UN framework, the working group on minorities has supported, in its commentary on the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the view that there are no national minorities that are not also ethnic, linguistic or religious minorities. However, according to the experts, this definition does not exclude the existence of specific cases in which the rights granted to the national minority are distinguished from those recognized to other types of minorities. The two definitions, with specific reference to the religious factor, afford a distinction between national and religious minorities. In this case, as highlighted in the Capotorti Report of 1979<sup>40</sup>, the criterion of distinction between the two cases is the origin of the minority: only historical religious minorities can also qualify as national minorities, while the "new" religious minorities that derive, for example, from migratory processes, whose members are not holders of the nationality or citizenship of the state, cannot be considered national minorities. The fact that these religious groups belong to one or the other category has effect on the rights recognized at international and national level. Indeed: the rights deriving from the national identity of a group can be invoked only by historical religious confessions, as minorities “long established in the territory may have stronger rights than those that have recently arrived”. In accordance with these principles, the UN expert group stresses that « Persons belonging to groups defined solely as religious minorities might be held to have only those special minority rights which relate to the profession and practice of their religion», unlike the national religious minorities that will be recipients of «stronger rights relating not only to their culture but to the preservation and development of their national identity»<sup>41</sup>.

At regional level, the Council of Europe's Committee of Ministers adopted the Framework Convention for the Protection of National Minorities in 1994. The definition of national minority was the subject of the work

<sup>36</sup> UNHCR, Guidelines On International Protection: Religion-Based Refugee Claims (...), cit., 7.

<sup>37</sup> Commission On Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-third session, Working Group on Minorities, Seventh session, 14-18 May 2001, 7.

<sup>38</sup> Conseil de l'Europe, *Rapport du Comité d'experts sur les droits de l'homme au Comité des Ministres*, DH/Exo (73) 47, 9 novembre 1973.

<sup>39</sup> OSCE, High Commissioner on National Minorities, *Information about the mandate and the activities of the OSCE High Commissioner on National Minorities*, 2017, available in <http://www.osce.org/hcnm/33317?download=true>.

<sup>40</sup> F. Capotorti, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities by Francesco Capotorti, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, New York, 1979, 12.

<sup>41</sup> Commission On Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-third session, Working Group on Minorities (...), cit., 3 ss.

of the Committee of Ministers (CAHMIN), the advisory body of the Committee of Ministers, composed of experts in the field of national minorities, established pursuant to art. 26, par. 1. In particular, the Committee identified a specific link between religion and nationality, observing that «in a variety of states parties, the understanding of the term ‘national minority’ is linked to specific characteristics that are often considered as emblematic for identity and for differentiating the minority from the majority, including language, religion, culture, ethnic background, specific traditions or visible features». In this sense, therefore, the Committee continues «the right to manifest one’s religion, for instance, as also stipulated in Article 9 of the European Convention on Human Rights, must be extended to all persons belonging to national minorities»<sup>42</sup>.

In the OSCE context, in 2012 the High Commissioner on National Minorities clarified in «*The Ljubljana Guidelines on Integration of Diverse Societies*» that: «The term “national minority”, as used in the Guidelines, refers to a wide range of minority groups, including ethnic, religious, linguistic and cultural communities»<sup>43</sup>. In these terms, the different areas, in which the right of minorities is realized to be integrated into the societies in which they live (Recognition of diversity and multiple identities; Primacy of voluntary self-identification; Non-isolationist approach to minority issues; Shared public institutions, a sense of belonging and mutual accommodation; Inclusion and effective participation; Rights and duties; Inter-community relations ; Policies targeting both majorities and minorities) also concerns the legal status of religious groups.

With regard to the prohibition of discrimination, this principle is laid down in international sources: with general formulas (Council of Europe, European Convention on Human Rights, Article 14, 1950, EU, Charter of Fundamental Rights of the Union, Article 21, 2000); within individual discriminatory situations (UN, International Convention on the Elimination of All Forms of Racial Discrimination, article 1, paragraph 1, 4 January 1969); in specific sectors (teaching: UNESCO, Convention on the fight against discrimination in the field of education).

#### b.4.) The notion of minority

With reference to the use of the general category of minorities, the law of the European Union has used this category in two main perspectives: procedure for the accession of new States; affirmation of minority rights. In the first case (procedure for the accession of new States), the protection of minorities emerged within the cds. Copenhagen criteria of 1993, which establish the rules for the enlargement of the Union to new States. In the conclusions of the Danish summit, it is stated that: «Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities»<sup>44</sup>. The evaluation of the condition of minority groups within the states that want to join is entrusted to the European Commission which expresses, through regular reports, opinions on the situation of the candidate State (Article 49 of the Treaty on European Union, henceforth TEU)<sup>45</sup>. In particular, in 2016, in the Turkey’s report, the Commission highlighted, with regard to the criterion of accession of respect for human rights and minorities, that the candidate country «is the only member of the Council of Europe that does not recognise the right to conscientious objection for conscripts. Outstanding issues concerning the Alevi community need to be tackled, including the implementation of several ECtHR judgments. The Ecumenical Patriarchate received no indication from the authorities that it may use the ‘ecumenical’ title freely. Venice Commission recommendations on this issue are yet to be implemented. No steps were taken to open the Halki (Heybeliada) Greek Orthodox Seminary. There were reactions triggered by the controversial use of the Hagia Sophia, which is a museum situated within a listed UNESCO world heritage site, for marking religious celebrations. The Armenian Patriarchate’s proposal to open a university department for Armenian language and clergy has been pending for several years. Similar demands have been made by different Christian communities who sought to train clergy. Similar problems exist over the construction of places of worship. Hate speech and hate crimes against Christians and Jews continued to be repeatedly reported (...)»<sup>46</sup>

<sup>42</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, *The Framework Convention: a key tool to managing diversity through minority rights, Thematic Commentary n. 4. The Scope of Application of the Framework Convention for the Protection of National Minorities*, ACFC/56DOC(2016)001, 27 may 2016, 15-17.

<sup>43</sup> High Commissioner on National Minorities, *The Ljubljana Guidelines on Integration of Diverse Societies*, 2012, 4.

<sup>44</sup> European Council, *Copenhagen criteria*, pr. 7 «*Relations with the Countries of Central and Eastern Europe*», I. A) «*The Associated Countries*», p. (iii), 1993.

<sup>45</sup> Art. 49, Consolidated version of the Treaty on European Union (C 362/13), 26 October 2012.

<sup>46</sup> European Commission, Commission Staff Working Document, *Turkey 2016 Report. Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* (COM(2016) 715 final), 71-72.

In the second case (protection of minority rights), Article 2 of the TEU, in enunciating the values on which the European Union is founded and which the Member States must respect (human dignity, freedom, democracy, equality, law), also defines the corresponding social model. European identity, in fact, as established as the result of the meeting between states that respect the dignity of the human person and protects the rights of freedom, is expressed in a pluralist social dynamic, non-discriminatory, tolerant, just, supportive and able to guarantee equality between sexes. Thus, the article contains a precise reference to the pluralism that must characterize the social system, providing that Member States recognize the rights of minorities<sup>47</sup>. In this perspective, the Fundamental Right Agency of Vienna has elaborated several reports addressed to the European institutions on the conditions of minorities in the Member States. In particular, in the "European Union Minorities and Discrimination Survey - Main Results Report" of 2009, the FRA noted that: «Having a non-majority religion was generally considered to be a barrier in the workplace by fewer respondents in each country (compared to ethnic background); though still about six out of 10 respondents in the Netherlands, Denmark and Sweden (Figure 3.1.3) thought it to be a drawback. The rate of those who considered that a non-majority religious background was a disadvantage was lowest in Ireland, Malta (one in three respondents in both countries) and especially in Portugal (14%); but again, the rate of indecisive respondents was also the highest in these three countries (19-23%), which would seem to indicate a lack of knowledge/experience among respondents on which to base their opinion»<sup>48</sup>.

### c) *The non-discrimination principle*

With regard to the general principles, the principle of religious non-discrimination prohibits the link of the individual's affiliation to a confessional minority to constitute grounds for unreasonable differentiation in the exercise of rights, and hence, causes of unfair treatment. This guarantee regarding religious minorities has been formulated in supranational sources implicitly or explicitly: in the first case the principle refers in general to religion or other risk factors; in the second case the object of the prohibition concerns those belonging to minority confessions. For the purpose of this paper, here we will analyse the first model, while the second will be examined among the explicit protections recognized to religious minorities. The first model will be discussed by distinguishing between: religious discrimination, discrimination based on other risk factors.

The principle of non-discrimination on a religious basis protects from direct and indirect discrimination, the right to exercise, in an individual or associated form, freedom of conscience and religion in a general sense (Articles 4-20-24-25, Pact Convention on Civil and Political Rights, Article 14, ECHR, Article 21, Charter of Fundamental Rights of the European Union) and in specific areas (Directive 2000/78 / EC on labour). This principle not only protects religious freedom of minorities, but also, with respect to such social formations, the prohibition of discrimination takes on particular importance. Religious minorities, in fact, are often in a subordinate and vulnerable position compared to a dominant group and, therefore, run a greater risk of being discriminated against other social groups.

When dealing with the general protection from religious discrimination, for example, the European Court of Human Rights, has ruled on several appeal cases by members of religious minorities who complained a violation of Articles. 9 and 14 of the Convention in relation to various areas, concerning, for instance, the exercise of worship<sup>49</sup>; conscientious objection<sup>50</sup>; the right to privacy<sup>51</sup>.

In relation to specific protections, on the other hand, Directive 2000/78 / EC<sup>52</sup> contains two main guarantees concerning: the working rights of individual affiliates to a religious minority (Article 3); the autonomy of minority groups (Article 4, paragraph 2).

On one hand, the explicit guarantee of the prohibition of discrimination on religious grounds in employment implicitly protects those belonging to religious minorities, even if the alleged discriminatory treatment is motivated by the religious identity of the worker. The Court of Justice has clarified, in two preliminary rulings relating to two Islamic workers, that: a) not in all cases the prohibition of wearing religious symbols in the workplace is direct discrimination<sup>53</sup>; b) the willingness of an employer to take into account the desire

<sup>47</sup> Art. 2, Consolidated version of the Treaty on European Union, cit.

<sup>48</sup> FRA, *EU-MIDIS. European Union Minorities and Discrimination Survey. Main Results Report*, 2010, 85.

<sup>49</sup> ECHR, *Austrianu v. Romania*, 15 May 2013, application no. 16117/02.

<sup>50</sup> ECHR, GC, *Thlimmenos v. Greece*, 6 April 2000, application no. 34369/97.

<sup>51</sup> ECHR, *Sinan Işık v. Turkey*, 02 May 2010, application no. 21924/05.

<sup>52</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>53</sup> Judgment of the Court (Grand Chamber), *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, Case C-157/15, 14 March 2017.

of a client or customer, not to receive services from an employee wearing an Islamic headscarf, cannot be considered as an essential and determining requisite in relation to art. 2, par. 2, 1. b) of Directive 2000/78 / EC<sup>54</sup>.

In the first case, the treatment can be, in particular, objectively justified by a legitimate purpose, such as the pursuit, by the employer, of political, philosophical and religious neutrality when relating with clients or customers, providing that the instruments used by the employer are appropriate and necessary<sup>55</sup>.

In the second ruling, the Court distinguished between two possible models of anti-discriminatory judgment: b.1.) in the presence of a prohibition to wear religious symbols, provided by internal rules of the company, it is necessary to check whether the prescription places the Muslim worker in a condition of particular disadvantage and if the aim pursued is legitimate<sup>56</sup>; b.2.) in the absence of any internal provision, on the other hand, only objective requirements inherent to the nature of a work activity or in the context in which it is carried out may justify an unequal treatment, pursuant to art. 2, par. 2, 1. b) of Directive 2000/78 / EC, but not subjective elements, as in case (b), where an employer applies such rule to satisfy the wishes of the customers of a company<sup>57</sup>.

In relation to the subject concerning religious dress codes in the workplace, moreover, the recent report "Religious clothing and symbols in employment" of 2017 was drafted by the European network of legal experts in gender equality and non-discrimination. With regard to the status of religious minorities in the Member States, the report, particularly in the conclusions, highlights that: «The overview of national case law demonstrated that bans on the wearing of religious clothing and symbols have been challenged in the courts in a number of Member States. The case law almost exclusively concerns clothing or symbols of the Islamic religion, although the bans that are in place are all formulated in neutral language and ban all religious clothing or symbols. The fact that the case law overwhelmingly concerns Islamic headscarves and face-covering veils, suggests that the Muslim religion and its clothing and symbols are particularly problematic in many EU Member States»<sup>58</sup>.

On the other hand, there is the right for States to provide exceptions to the right to prohibition of discrimination, for organizations or associations, public or private, whose ethics is based on a religion or belief, and also protects the autonomy of religious minorities. In this case, in the balance between non-discrimination and freedom of the group to organize itself in respect of its own doctrine, the religious freedom of the minority may prevail when the worker is dismissed because in conflict with the values pursued by the organization. Furthermore, on this point the Advocate General at the Court of Justice recently intervened by clarifying that the protection of the right of religious confessions and self-determination of the organization must be evaluated in the workplace on the basis of the link between the tasks of the worker and the values pursued by the organization<sup>59</sup>.

With regard to discrimination based on other risk factors, the rights of religious minorities can be guaranteed: in relation to risk factors other than religion; through the combination of the religious factor and other factors.

In the first case, the group is a minority not only on a religious basis, but also on an ethnic one. International sources have identified a link between the exercise of religious freedom and discrimination on a racial basis in two separate cases concerning: the relationship between religious intolerance, racism and discrimination; the relationship between racial discrimination and the exercise of religious freedom. In the first case, the Declaration on Race and Racial Prejudice of 1978 identifies one of the possible causes of religious intolerance in racism, which is reflected in a discriminatory way on the enjoyment of the rights of the individual or group (Article 3). In these terms, the Declaration qualifies racist behavior motivated by religious intolerance as contrary to international standards for the protection of human rights. Discrimination based on religion can therefore be punished under the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. The prohibition of racial discrimination is defined, in fact, as a condition for the effective enjoyment of rights and in particular freedom of thought, conscience and religion (Article 5, pr 1, 1, d), n. VII)). In this case, therefore, racial discrimination can be reflected as religious

<sup>54</sup> Judgment of the Court (Grand Chamber), *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v. Micropole SA, già Micropole Univers SA*, Case C-188/15, 14 march 2017.

<sup>55</sup> Judgment of the Court (Grand Chamber), *Samira Achbita (...)*, cit., § 34 and 38.

<sup>56</sup> Judgment of the Court (Grand Chamber), *Asma Bougnaoui*, cit., § 32 and 33.

<sup>57</sup> *Ibidem*, § 40.

<sup>58</sup> E. HOWARD, European network of legal experts in gender equality and non-discrimination, *Religious clothing and symbols in Employment. A legal analysis of the situation in the EU Member States*, 2017, 106.

<sup>59</sup> V. Opinion of Advocate Tanchev delivered on 9 November 2017, Case C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.*

freedom of members of a confessional minority. The same interpretation can be applied, with regard to European sources, to Directive 2000/43 / EC, on the subject of ethnic or racial discrimination when accessing to goods and services<sup>60</sup>. Recital no. 3 of the directive, in fact, recalls the UN sources, and in particular the International Convention on the Elimination of All Forms of Racial Discrimination, as a reference model for defining the notion of ethnic or racial discrimination.

In the second case, the religious element is associated with other factors of discrimination (multiple discrimination<sup>61</sup>) such as, for example, gender, race or sexual orientation (Article 21, paragraph 1, EU Charter of Fundamental Rights). This second case is realized when: the group is a minority not only with reference to the professed religion, but also to other characteristics (multi-minority groups); the individual belongs to two or more minorities (multi-minority identities). The relationship between religious discrimination and other risk factors has emerged: in the context of European governance with regard to the link between religious discrimination and discrimination based on sexual orientation; in the acts of the EU institutions in relation to a draft multi-ground directive.

At the level of governance, some religious associations are developing projects on dialogue and solidarity cooperation between LGBT communities and religious communities for joint actions against hate speech and discrimination (European Network of Religion & belief-ILGA Europe, project "Building Communities of Trust – Project 2 - 2016-17").

On the institutional level, in 2009 the European Parliament presented a series of amendments<sup>62</sup> to the 2008 European Commission proposal for the adoption of a multi-ground directive<sup>63</sup>. Multiple discrimination has been defined by the European Parliament as the "combination of factors 'protected' by Directive 2000/78 / EC (religion or belief, disability, age and sexual orientation) or the combination of one or more of these factors (religion or creed, disability, age and sexual orientation) with: gender (within the limits of application of Directive 2004/113 / EC on equality between men and women in access to goods and services and the Proposal for a Directive); the racial or ethnic origin (within the limits of application of Directive 2000/43 / EC and of the Proposal for a Directive); nationality (Article 12 EC Treaty, now Article 18 of the TFEU). The draft directive has not, however, been approved by the European institutions and a mono-discriminatory protection model prevails.

## 2. The implicit notion of sanctions and / or limitation effect

The implicit definition of religious minority with sanctions and / or limitation effect is associated with four possible normative criteria to distinguish majorities and minorities: a) scientific criteria (race); b) cultural criteria (civilization, lineage); c) limits (traditional, specific, new); d) protection of human rights; e) general principles (principle of non-discrimination based on gender or sexual orientation).

### a) *The scientific criteria*

The implicit notion of a sanctioning effect based on race appears in Europe, in the first half of the twentieth century, following the rise of totalitarian regimes. Nationalist ideologies create the juridical criterion of race understood as an element of identity between people and nation as a single race. Legal racism is also reflected on the status of religious minorities. In particular, the Jewish communities are persecuted through laws that identify the creed with the race understood in both cultural and biological sense<sup>64</sup>.

<sup>60</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>61</sup> European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, *Tackling Multiple Discrimination : Practices, policies and laws*, at file:///C:/Users/danie/Downloads/multidis\_en.pdf, 2007.

<sup>62</sup> European Parliament legislative resolution of 2 April 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008)0426 – C6-0291/2008 – 2008/0140(CNS)), accessible at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0211&language=EN&ring=A62009-0149> (20 aprile 2015).

<sup>63</sup> European Commission, 2008. Proposal for a Council Directive on Implementing the Principle of equal Treatment between Persons irrespective of Religion or Belief, Disability, Age or sexual Orientation, SEC(2008) 2180, at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0426:FIN:EN:PDF> (25 aprile 2015).

<sup>64</sup> AA. VV., *Les status des juifs en France en Allemagne et en Italie: texte et analyse des dispositions en vigueur, avec mise à jour périodique*, Lyon, 1942.

### b) *The cultural criteria*

With regard to the principle of civilization, the various international acts concerning sovereignty over the colonies provide, alongside the commitment of the colonizing states to respect the religious freedom of the natives (Article 6, Berlin General Act, 1885), the cultural criterion of civilization. This criterion distinguishes the colonizers from the colonized and also qualifies the religion professed as an element of separation between civil and uncivilized. In this context, the minority standard of the indigenous religious groups (with respect to the religions of the colonial powers) is not based, in all cases, on a quantitative inferiority, but on the cultural subordination of the autochthonous with respect to the colonizer<sup>65</sup>.

### c) *Limits*

With regard to the limits established for religious freedom and applicable to minority religious confessions, one can distinguish between: traditional limits; special limits; new limits.

The traditional limits are, overall, compatible with the sources on universal level (Article 29, paragraph 2, Universal Declaration of Human Rights, Article 18, Paragraph 3, International Covenant on Civil and Political Rights) and Regional level (Art 9, paragraph 2, European Convention on Human Rights, Article 52, paragraph 1, Charter of Fundamental Rights of the European Union) being those of public order, public security, public morality, public health, respect for the rights and freedoms of others, democratic needs. These limits must also be prescribed by law. In these terms, for example, the Court of Strasbourg has clarified the contours of religious freedom with reference to the guarantee of public order<sup>66</sup>; of the principle of public health<sup>67</sup>; of public morality<sup>68</sup>; of public security<sup>69</sup>; of the rights and freedoms of others<sup>70</sup>.

With regard to specific limitations, the fact that the doctrines professed by religious confessions are compatible with democratic needs is specified in international sources on international protection. The existence of links between the applicant and terrorism complements, in particular, under the Geneva Convention<sup>71</sup> and the Qualification Directive<sup>72</sup>, a cause of exclusion of the individual from asylum application in compliance with legislation. As a consequence, members of religious minorities who are carriers of subversive doctrines will not be entitled to the recognition of refugee status. The exclusion clause, however, must be applied prudently by the state authorities, so as not to become an instrument for sanctioning specific confessional affiliations<sup>73</sup> perceived as extraneous in the country where the asylum application is made.

The new limits are linked to: the development of international and European law in the field of protection from discrimination or persecution based on sexual orientation and gender; the principle of gender equality. This guarantee forbids: discriminatory or persecutory behaviour even if they are motivated by beliefs-of an individual or a group<sup>74</sup>; the recognition by European law of religious acts of a discriminatory or persecutory nature.

With reference to discrimination based on sexual orientation, the European Union, commencing from the Treaty of Amsterdam in 1997 and up to the recent Lisbon Treaty of 2009, has placed sexual tendencies among the risk factors that are the object of the institutional policies of contrasting discrimination. This address then emerged in the Charter of Fundamental Rights of the European Union which, in art. 21, pr. 1, places an express prohibition on discrimination based on "sexual tendencies". This prohibition is punctually regulated in several sources of secondary legislation, including, in particular, the well-known directives on employment and international protection.

<sup>65</sup> C. JANNACCONE, *Corso di diritto ecclesiastico coloniale italiano. Parte generale*, Milano, 1939.

<sup>66</sup> ECHR, *Serif c. Grecia*, 14 december 1999, § 55.

<sup>67</sup> Comm. edu, dec., X c. Germania, 10.03.1981.

<sup>68</sup> ECHR, *Wingrove v. U.K.*, 25 november 1996.

<sup>69</sup> ECHR, GC, *Refah Partisi (the Welfare Party) and Others v. Turkey*, 13 february 2003, Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98.

<sup>70</sup> ECHR, GC, *S.A.S. v. France*, 01 July 2014, a. n. 43835/11; ECHR, *Eweida and others v. The United Kingdom*, 15 January 2013.

<sup>71</sup> Art. 1, l. F), Convention Relating to the Status of Refugees, 28 July 1951.

<sup>72</sup> Art. 12, par. 2, l. c), Directive 2011/83/UE.

<sup>73</sup> The Strasbourg Court ruled on the link between terrorism and asylum, v. ECHR, 23 february 2016, *Nasr et Ghali c. Italie*, Application no 44883/09.

<sup>74</sup> W. COLE DURHAM-D. THAYER, *Religion and Equality. Law in conflict*, London-New York, 2016; J. CORVINO-R. T. ANDERSON-S. GIRGIS, *Debating Religious Liberty and Discrimination*, Oxford, 2017; T. F. FARR-J. FRIEDMAN-T. S. SHAH (ed.), *Religious Freedom and Gay Rights. Emerging Conflicts in North America and Europe*, Oxford, 2016.

With reference to persecution, since 2004, two successive directives<sup>75</sup> have qualified, in an innovative way compared to the original text of the Geneva Convention, sexual orientation as a reason of persecution, as a bond of belonging to a particular social group. On this point, the UN Refugee Agency (henceforth UNHCR), in the guidelines on questions of protection for sexual orientation<sup>76</sup>, highlighted the possible interferences between sexual orientation and religion: the religion can, in fact, legitimize the reasons of the persecutors, qualify homosexuality as an abomination or accept LGBT people. Furthermore, UNHCR has clarified, in the context of religious persecution<sup>77</sup>, that homophobic positions expressed within the LGBT asylum seeker's religion can motivate the choice of a conversion to a new religion in the host country. In this perspective, the protection of freedom of sexual orientation has the effect of excluding intolerant and homophobic doctrines professed by majority or minority religious confessions from the protection of freedom of belief.

The principle of gender equality, on the other hand, was recently affirmed in the field of family law in the conclusions of the Advocate General at the Court of Justice of the European Union Henrik Saugmandsgaard in relation to the *Soha Sahyouni case vs Raja Mamisch*<sup>78</sup>. In particular, the lawyer claimed that the guarantee of equal access to divorce between spouses, as per art. 10 of the Regulation (EU) n. 1259/2010<sup>79</sup>, does not allow the recognition of an Islamic divorce registered by a religious court in a third country, when the act was formed solely by the decision of the husband. In this sense, the goal of the European Union to combat gender-based discrimination “would not be achieved if a discriminatory foreign law were allowed to produce its effects in the territory of a participating Member State”<sup>80</sup>. In somewhat different terms, the Court of Justice on 20 December 2017 motivated the non-applicability of the regulation to the Islamic divorce by not pronouncing itself on the discriminatory profile, but arguing that «resulting from a unilateral declaration made by one of the spouses before a religious court, such as that at issue in the main proceedings, does not come within the substantive scope of that regulation»<sup>81</sup>.

### 3. The explicit notion of protection

With regard to the explicit definition, the status of religious minority emerges first in the sources of the League of Nations, then in the UN sources<sup>82</sup> and, finally, in the law of the Council of Europe and of the European Union<sup>83</sup>. This process of definition is identified in two different meanings of the religious element: a) national belonging; b) universal and European protection of human rights.

#### a) Religious minorities and national belonging

At the end of the First World War, the identification of religious, ethnic and linguistic minorities with respect to the majority is based on the principle of nationality: the majority shares the same racial, religious and linguistic affiliation<sup>84</sup>. In the international treaties of the first post-war period, religion is qualified as a factor

<sup>75</sup> Council Directive 2004/83/EC of 29 April 2004 - Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011.

<sup>76</sup> UNHCR, *Guidelines on international protection no. 9, Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012.

<sup>77</sup> UNHCR, “*Guidelines on international protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*”, 28 April 2004, 13.

<sup>78</sup> Opinion of Advocate General Henrik Saugmandsgaard delivered on 14 September 2017, Case C-372/16, *Soha Sahyouni v. Raja Mamisch*.

<sup>79</sup> Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

<sup>80</sup> Opinion of Advocate General Henrik Saugmandsgaard, cit., § 85.

<sup>81</sup> Judgement of the Court (First Chamber), 20 December 2017, Case C-372/16, *Soha Sahyouni v. Raja Mamisch*, § 49.

<sup>82</sup> S. WHEATLEY, *Democracy, Minorities and International Law*, Cambridge, 2005.

<sup>83</sup> J. P. BASTIAN, F. MESSNER (dir.), *Minorités religieuses dans l'espace européen : approches sociologiques et juridiques*, Paris, 2007.

<sup>84</sup> Cf., ex multis, P. AZCARATE, *League of Nations and National Minorities*, Washington, 1945; J. L. BRUN, *Le problème des minorités devant le droit international*, Paris, 1931; R. BRUNET, *De la protection des minorités par la Société des Nations*, Paris, 1925; E. COLBAN, *La Società delle Nazioni e il problema delle minoranze*, Roma, 1925; A. DE BLOG, *La protection internationale des minorités*, Paris, 1930; J. FOUQUES DUPARC, *La protection des minorités de race, de langue et de religion*, Paris, 1922; A. Mandelstam, *La protection des minorités (Cours de l'Académie du droit international de la Haye)*, v. I, Paris, 1923; B. PIRRO, *La protezione delle minoranze per opera della Società delle*

of national identity: religion, together with language and ethnicity, becomes a criterion of distinction between majorities and minorities in a given nation<sup>85</sup>. In this context, the League of Nations drew up a model for the protection of religious minorities within specific treaties<sup>86</sup>, special chapters included in peace treaties or treaties<sup>87</sup>, Statements before the Council of the League of Nations<sup>88</sup>. Minorities are recognized as individual protection content: equality before the law and prohibition of discrimination based on race, language or religion, free use of minority languages, recognition of freedom of religion and worship, freedom of education. In this model, religious minorities have been defined in international law on the basis of an objective element, a subjective element and a relational element: minorities are numerically inferior to the majorities, as they profess a different religion (objective element); the members of the group are united by the faith professed and want to preserve their identity and their traditions (subjective element); religious minorities must be loyal to the majority and not represent a dominant group (relational element).

The subjective and objective element constitute the first definition of minority contained in an advisory opinion on the Greece-Bulgaria treaty elaborated by the International Court of Justice in 1930. In particular, the court defined the concept of minority as «a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other»<sup>89</sup>.

The relational element emerges in the various acts that the internal institutions of the League of Nations adopted with regard to the elaboration of the procedures for guaranteeing the rights of minorities in the event of violation of the treaties. In particular, the Assembly in 1922, affirming the right of minorities not to be oppressed, emphasized the duty of minority groups to behave as loyal citizens towards the nation they belong to<sup>90</sup>.

#### *b) Universal and European protection of human rights of religious minorities*

The international protection of human rights after World War II is reflected in the status of religious minorities on the level of international law at universal and regional level<sup>91</sup>. In this prospective, the explicit notion of protection emerges in: b.1.) Universal legal status; b.2.) Regional legal status.

##### b.1.) The universal legal status

From the first point of view (universal law), the universal proclamation of human rights, as a new presupposition of world order, does not determine the decline of the category of religious minorities. This notion is enriched by a new meaning, which no longer coincides, as had happened in the treaties of the League of Nations, with the specific political problems internal to individual States. In fact, the status of religious minorities is inserted in the wider horizon of universal protection of human rights and in particular of the guarantee of freedom of conscience and religion. The new model of protection of human freedom in morality centred on the value of individual autonomy does not exclude the recognition of the rights of religious minorities. In these terms, even if the United Nations Charter and the Universal Declaration of Human Rights of 1948 contains no reference to minorities, the UN General Assembly on 10 December 1948, in a resolution entitled "Fate of minorities", made it clear that it could not remain indifferent to the fate of minorities, even if it seemed difficult to identify a uniform solution<sup>92</sup>. In these terms, once solved the problem of the existence of the treaties on the minorities of the League of Nations, which were declared no

*Nazioni*, Roma, 1924; A. C. RUDESCO, *Étude sur la question des minorités : de race, de langue et de religion*, Lausanne, 1928; A. P. SERENI, *Il diritto internazionale delle minoranze*, Roma, 1929.

<sup>85</sup> P. STANISLAO MANCINI, *Della nazionalità come fondamento del diritto delle genti*, Torino, 2000.

<sup>86</sup> For example, Treaty of Versailles, 28 June 1919.

<sup>87</sup> Section V, Protection of Minorities, Treaty of Saint-Germain-en-Laye, 10 September 1918.

<sup>88</sup> Finland, 27 June 1921; Albania, 2 October 1921; Lithuania, 12 May 1921.

<sup>89</sup> Permanent Court of International Justice, *Greco-Bulgarian Communities*, Advisory Opinion, 1930 P.C.I.J. (ser. B) No. 17 (July 31), pp. 19-33. Cf. N. FEINBERG, *La juridiction et la jurisprudence de la Cour permanente de justice internationale en matière de mandats et de minorités*, in *Le Recueil des Cours de l'Académie de Droit international de La Haye*, 1, 1937, 591-708.

<sup>90</sup> League of Nations, Assembly, Resolution, 21 September 1922.

<sup>91</sup> F. ROUSSO LENOIR, *Minorités et droits de l'homme : l'Europe et son double*, Paris, 1994; N. LERNER, *The evolution of Minority Rights in International Law*, in BROLMAN et al. (eds), *Peoples and Minorities*, in *International Law*, Cambridge, 1993, 44.

<sup>92</sup> Cfr. General Assembly, resolution 217 C (III), 10 December 1948.



longer in force<sup>93</sup>, the process of defining the status of religious minorities in the institutional dynamics of the UN has developed through: b.1.1.) the establishment of *ad hoc* bodies; b.1.2.) The elaboration of specific documents on the notion of religious minority; b.1.3.) The approval of binding and non-binding acts that have recognized the rights of religious minorities.

b.1.1.) *Ad hoc* bodies

On an institutional level, the *ad hoc* bodies are: the Human Rights Commission in force until 2006, later replaced by the Human Rights Council; the sub-committee for the protection of minorities and against discrimination, which then became the starting point for the 1999 Sub-Commission on the Promotion and Protection of Human Rights.

The Human Rights Commission was elected in 1946 with a mandate in the field of allotment and allotment of the position of the Director-General in the present-day proposal, in line with the Economic and Social Council<sup>94</sup>. Among the areas of intervention of the Commission is also the protection of minorities<sup>95</sup>. The Committee was then authorized by the Economic and Social Council to set up a sub-commission for the protection of minorities and the fight against discrimination<sup>96</sup>. The sub-commission was established in 1947<sup>97</sup>, but its mandate was clarified in 1949<sup>98</sup>. The sub-committee had expertise in the study of human rights and the presentation to the Commission on Human Rights of recommendations for the fight against discrimination and the protection of racial, national, religious and linguistic minorities. This body dealt specifically with the question of minorities from 1947 to 1954 and then again from 1971.

Since 2006, the Human Rights Commission has been replaced by the Human Rights Council<sup>99</sup>. This new body, within the various actions that it carries out for the protection of human rights, presents two organizational bodies dedicated specifically to the minority issue and in particular: the Forum on Minority Issues<sup>100</sup>; the Special Rapporteur on minority issues<sup>101</sup>. Specifically, the rapporteur on minority issues contributes to the development of the protection of the rights of national or ethnic, religious and linguistic minorities in different perspectives concerning: “the implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, including through consultations with Governments, taking into account existing international standards and national legislation concerning minorities”; “ways and means of overcoming existing obstacles to the full and effective realization of the rights of persons belonging to minorities”; “views of and cooperate closely with nongovernmental organizations on matters pertaining to his/her mandate”; “guide the work of the Forum on Minority Issues, prepare its annual meetings, to report on its thematic recommendations and to make recommendations for future thematic subjects, as decided by the Human Rights Council in its resolution 19/23”; “submit an annual report on his/her activities to the Human Rights Council and to the General Assembly, including recommendations for effective strategies for the better implementation of the rights of persons belonging to national or ethnic, religious and linguistic minorities”<sup>102</sup>.

b.1.2.) The elaboration of specific documents on the notion of religious minority

With regard to the second aspect, the process of defining the notion of religious minority can be reconstructed through the acts that the various UN institutions have developed. From the latter, we can draw:

<sup>93</sup> Cfr. Secrétaire général, *Etude sur la validité juridique des engagements relatifs aux minorités*, E/CN.4/367 et Add. 1, chap. XIV, 1950.

<sup>94</sup> Art. 68, Charter of the United Nations.

<sup>95</sup> Economic and Social Council, Resolution 5 (I), 16 february 1946 and Resolution 9 (II), 21 june 1946.

<sup>96</sup> Economic and Social Council, Resolution 9 (II), 21 june 1946.

<sup>97</sup> Commission of human rights, 1st session, 1947.

<sup>98</sup> V. Commission on Human Rights, V session, 1949, in *Documents officiels du Conseil économique et social*, neuvième session, Supplément No 10, par. 13.

<sup>99</sup> The Council was created by the United Nations General Assembly on 15 March 2006 by resolution 60/251.

<sup>100</sup> Established by the HRC in 2007 by resolution 6/15, serves as a platform for dialogue and cooperation on issues relating to persons belonging to national or ethnic, religious and linguistic minorities. It provides thematic input and expertise to the work of the Independent Expert on Minority Issues, which forwards the recommendations for consideration to the Council. The Forum holds an annual two-day session under the guidance of an expert on minority issues, appointed by the President of the Council, on the basis of geographical rotation and in consultation with regional groups.

<sup>101</sup> The mandate of the Special Rapporteur on minority issues was established in resolution 2005/79 by the Commission on Human Rights on 21 April 2005. The mandate was subsequently renewed by the Human Rights Council in its resolutions 7/6 of 27 March 2008, 16/6 of 24 March 2011, 25/5 of 28 March 2014 and 34/6 of 23 March 2017. Resolution 34/6 renews the mandate under the same terms as provided by resolution 25/5.

<sup>102</sup> V. Human Rights Council, Twenty-fifth session Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Resolution adopted by the Human Rights Council 25/5. Mandate of the Independent Expert on minority issues, 11 april 2014.

a general definition concerning ethnic, linguistic and religious minorities; a specific one regarding religious minorities.

According to the general definition, the sub-commission on the Prevention of Discrimination and the Protection of Minorities elaborated three main definitions of the notion of religious minority.

The report of 6 December 1947 defines for the first time minorities as « groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population (...) The characteristics meriting such projection are race, religion and language. In order to qualify for protection a minority must owe undivided allegiance to the Government of the State in which it lives. Its members must also be nationals of that State»<sup>103</sup>.

The second definition of religious minority ~~is~~ was formulated by Francesco Capotorti, Special Rapporteur of the Sub-commission, in 1979, within a very extensive report entitled "Study on the rights of persons belonging to ethnic, religious and linguistic minorities". Capotorti dedicates the first chapter of his study to the notion of *minority*, moving from the observation that « a generally accepted definition of the term "minority" does not exist ». In particular, according to the author, the tension between universality and contingency in determining a general definition of minority emerges with regard to: a) the numerical data (is the quantitative inferiority of the group ~~is~~ an essential element? Is there a minimum threshold?); b) to the subjective data (is the will of the group to preserve its identity ~~is~~ a necessary or accessory data in the legal notion of minority?); c) the causes of the phenomenon (is the origin of minorities ~~is~~ significant for the purposes of the legal definition?); d) the model of belonging of the individual to the group (the link between the individual and the minority must be understood as a choice of the subject or as a fact?). Premises of these observations, according to "Capotorti's definition" for minorities, must be understood "(a) group numerically inferior to the rest of population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious, or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity directed towards preserving their culture, traditions, religion or language".

The third definition was presented in 1985 to the Sub-commission by Jules Deschênes, which describes minorities as "a group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law"<sup>104</sup>.

By comparing the aforementioned definitions, we can highlight similarities and differences. From the point of view of analogies, all three definitions identify religious minorities on the basis of: the objective criterion of numerical inferiority with regard to the professed faith and the possession of nationality or citizenship; of the relationship element given by the non-dominant position. On the level of the most significant differences, however: from a relational point of view, only the first definition prescribes the requirement of the minority's loyalty to the national government, while the second and third definition enhance the solidarity link that must exist between the members of the minority group. With regard to this element, however, the third definition, unlike Capotorti's formulation, lays the principle of solidarity of the group not in relation to the will of the minority to preserve its religion, but with the aspiration to achieve, in the eye of the law, equality with the majority.

The Secretary-General of the United Nations has also drawn up a number of acts concerning minorities on the initiative of the Commission and the Sub-Commission. Among these, the "Definition and classification of minorities" report from 1950 is of particular interest. The report provides three different definitions of minority in relation to three different criteria: recognition of specific rights; principle of non-discrimination; single-minority or multi-minority character of the group.

With regard to the first criterion, « the term "minority" should normally apply to groups whose members have a common ethnic origin, language, culture or religion and seek to preserve either their existence as a national community or the particular characteristics that distinguish them».

Regarding the second criterion, instead, «in the case of minorities who wish to obtain equality only from the point of view of non-discrimination, the question of the quality of citizenship should not be considered». In this case, therefore, «the meaning of the word "minority" was not (...) limited to the groups that constitute the national collectivities».

<sup>103</sup> Cfr. Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, report submitted to the Commission, Document E/CN.4/52, p.13, 6 december 1947.

<sup>104</sup> Jules Deschênes, *Proposal Concerning a Definition of the Term 'Minority'*, UN Document E/CN.4/Sub.2/1985/31, 1985.

According to the third criterion, the notion of minority includes, regardless of the presence of the character of nationality, «groups united by the same religion, or the same language or the same ethnic origin, or by two of these characteristics, or by all three together (...)»<sup>105</sup>.

In 2013, the Secretary General expressed a new definition of ethnic, religious or linguistic minority. In the absence of a shared normative definition, the Secretary claimed that it is preferable «an inclusive approach to the concept of minorities, guided by the principle of self-identification and bearing in mind that there is no internationally agreed definition of the term. Using UN minority rights standards and mechanisms is not conditioned upon the use of the term minority in the domestic context, and the UN Human Rights Committee has stressed that the existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria»<sup>106</sup>.

In 1994, as will be seen in detail shortly, the UN Human Rights Committee defined the notion of religious minority in relation to the interpretation of art. 27 PIDCP. This provision recognises, since 1966, the rights of minority groups. In particular, the definition of minority is formulated in: «The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party»<sup>107</sup>. In this perspective, religious minorities may coincide with both historical groups composed of citizens and new groups coming from migrations<sup>108</sup>.

In relation to the specific definition of religious minority, however, the Office of the United Nations High Commissioner for Human Rights claimed that: «The term “religious minorities” encompasses a broad range of religious communities, traditional and non-traditional, recognized by the State or not, large and small, which seek protection of their rights under minority rights standards. The diversity that exists within minority religious groups must be recognized. Religious minorities may also be national, ethnic or linguistic minorities»<sup>109</sup>. From the reading of such definitions we can identify the presence of different models of religious minority: the origin of the minority (old minorities, new minorities); legal (recognized minorities, unrecognized minorities); quantitative (small minorities, large minorities); single-minority (religious minority) or multi-minority (religious and national minority, religious and linguistic minorities, religious and ethnic minorities, religious minorities, linguistic and ethnic minorities, religious minorities, national and linguistic minorities).

b.1.3.) The approval of binding and non-binding acts that have recognized the rights of religious minorities.

With regard to the previously mentioned third aspect, the UN international sources have defined the status of religious minorities in two main acts: the International Covenant on Civil and Political Rights of 1966; the Declaration on the Rights of Persons Belonging to the National or Ethnic, Religious and Linguistic Minorities of 1992.

The International Covenant on Civil and Political Rights was adopted by the United Nations General Assembly in 1966. The treaty represents a binding legal act for the States that have ratified it in relation to the protection of minority rights. Article 27 provides, in fact, that «In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language». In relation to the interpretation of art. 27, the UN Human Rights Committee drew up a specific commentary and defined: the recipients of the recognised rights; the requisites necessary for the recognition of the status of subject belonging to a religious minority; the contents of protection of religious freedom.

When considering the recipients of recognised rights, the Committee believes that these rights should be interpreted as individual rights held by individual members of the minority group. In these terms, therefore, they are not to be considered as collective rights recognized to the group, but as guaranteed rights to the individual affiliates<sup>110</sup>.

<sup>105</sup> Secretary-General of the United Nations, *Definition et classification des minorités*, Memorandum, 1950, 11. Secretary-General of the United Nations, *Guidance Note of the Secretary-General on Racial Discrimination and Protection of Minorities*, 2014.

<sup>106</sup> Secretary-General of the United Nations, *Guidance note of the Secretary-General on Racial Discrimination and Protection of Minorities*, pr. 8, 2013.

<sup>107</sup> UN Human Rights Committee, *General Comment No. 23: The rights of minorities (Art. 27)*, par. 5.1., 1994.

<sup>108</sup> V. R. WOLFRUM, *The Emergence of “New Minorities” as a Result of “Migration”*, in C. BRÖLMANN – R. LEFEBER – M. ZIECK (ed.), *Peoples and Minorities in International Law*, Amsterdam, 1993, 153-166 ; R. CHOLEWINSKY, *Migrants as Minorities: Integration and Inclusion in the Enlarged European Union*, in *JCMS*, V. 43, n. 4., 2005, pp. 695–716.

<sup>109</sup> United Nations High Commissioner for Human Rights, *The inclusion of religious minorities in consultative and decision-making bodies*, 2014, 1.

<sup>110</sup> UN Human Rights Committee, *General Comment No. 23: The rights of minorities (Art. 27)*, par. 6.2., cit.

In terms of the necessary requirements, the protection of the rights of members of religious minorities does not depend on the requirement of nationality or citizenship, but on the simple condition of existence, even if temporary, of the group on the territory of the State. In these terms: « Article 27 confers rights on persons belonging to minorities which "exist" in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term "exist" connotes »<sup>111</sup>. This approach reiterates the interpretation elaborated by Francesco Capotorti in 1979. Already in the study on the rights of persons belonging to minorities, the Rapporteur had, in fact, argued that «because of the general nature of the rules for the protection of human rights adopted in the framework of the United Nations, it cannot be admitted either that a distinction can be made between "old" and "new" minorities »<sup>112</sup>. In relation to recognized rights, the protection of the freedoms of members of religious minorities coincides: implicitly, with cultural rights; explicitly, with the freedom to profess and practice one's own religion. The described freedoms, as highlighted by the Committee, impose on States not only a duty to abstention, but also of specific interventions that create the favourable conditions in which the members of minorities can effectively exercise their recognized rights. In particular: «The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant. States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end»<sup>113</sup>.

With reference to the instruments for the protection of minority rights, the Optional Protocol to the International Covenant on Civil and Political Rights provides for a verification procedure by the Human Rights Committee in case of violations of the rights guaranteed in the Covenant on civil and political rights<sup>114</sup>. In these terms, the Committee has over time expressed its own jurisprudence on the protection of religious minorities with reference, for example: 1) To acts of worship, when their fulfilment requires exemptions from criminal law<sup>115</sup>; 2) The equality of religious minorities before the law in relation to the autonomy of the group to form a society<sup>116</sup>; 3) the right to asylum of the persecuted religious members of minorities with respect to expulsion procedures<sup>117</sup>.

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992, although not being a binding legal act, represented the first catalogue of the protected rights of for national or ethnic, religious or linguistic minorities. In particular, the Declaration identifies: the rights of religious minorities; the duties to be borne by the States; the recipients of these guarantees.

The rights of religious minorities coincide with: 1) the freedom to demonstrate and profess one's own doctrine, in private or in public, without interference and discrimination (Article 2, paragraph 1); 2) The right

<sup>111</sup> UN Human Rights Committee, *General Comment No. 23: The rights of minorities (Art. 27)*, par. 5.2., cit.

<sup>112</sup> F. Capotorti, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, cit., 37.

<sup>113</sup> UN Human Rights Committee, *General Comment No. 23: The rights of minorities (Art. 27)*, par. 9, cit.

<sup>114</sup> The protocol provides that Member States, who will sign, will recognize the Committee the power to receive and consider communications from individuals who declare themselves victims of violations of rights enshrined in the Covenant.

<sup>115</sup> Human Rights Committee, *Gareth Anver Prince v. South Africa*, Communication No. 1474/2006 (CCPR/C/91/D/1474/2006), 14 November 2007. In this case, the Committee clarified that: «On the author's claim that the failure to provide an exemption for Rastafarians violates his rights under article 27, the Committee notes that it is undisputed that the author is a member of a religious minority and that the use of cannabis is an essential part of the practice of his religion. The State party's legislation therefore constitutes interference with the author's right, as a member of a religious minority, to practice his own religion, in community with the other members of his group. However, the Committee recalls that not every interference can be regarded as a denial of rights within the meaning of article 27. Certain limitations on the right to practice one's religion through the use of drugs are compatible with the exercise of the right under article 27 of the Covenant. The Committee cannot conclude that a general prohibition of possession and use of cannabis constitutes an unreasonable justification for the interference with the author's rights under this article and concludes that the facts do not disclose a violation of article 27 », par. 7.4.

<sup>116</sup> Human Rights Committee, *Sister Immaculate Joseph and 80 Teaching Sisters v. Sri-Lanka*, Communication No. 1249/2004 (CCPR/C/85/D/1249/2004), 18 November 2005.

<sup>117</sup> Human Rights Committee, *J. D. v. Denmark*, communication No. 2204/2012 (CCPR/C/118/D/2204/2012), 30 December 2016. In this case: «The author, who had performed religious activities covered by articles 18 and 27 of the Covenant, was detained and tortured by the Chinese authorities on a number of occasions because of her affiliation with Falun Gong and eventually prevented from exercising her religious freedom when she was forced to sign the declaration that Falun Gong was a harmful movement».

to participate in social, cultural, religious, economic and public life (Article 2, paragraph 2); 3) The right to participate in decision-making procedures concerning their legal status (Article 2, paragraph 2.3); 4) Freedom of association (Article 2, paragraph 2.4); 5) Freedom in relations between members of the same minority or other minorities at national and supranational level.

The duties of States towards religious minorities are identified with: 1) the protection of the existence and identity of denominational minorities, including through the adoption of appropriate legislative measures (Article 1, paragraphs 1-2); 2) The adoption of effective measures to allow these groups to exercise their rights, express their specificities, develop their traditions (Article 4, paragraphs 1-2); 3) The provision of tools for understanding the traditions and culture of minorities in the field of public education (Article 4, paragraph 4); 4) Measures able to guarantee the participation of minorities in the progress and economic development of the country (article 4, paragraph 5); 5) The development of national or supranational policies and programs that include the legitimate interests of minorities (Article 5); 6) Forms of collaboration between States on the theme of minorities (Article 6); 7) Forms of cooperation between States to promote respect for the rights provided for in the Declaration (Article 7).

In relation to the recipients of the guarantees, the Conventions clarify that the envisaged rights are to be considered both individually and collectively (Article 3) and can therefore be exercised by the members of a minority individually or together with the other members of the group.

### *b.2.) Regional legal status*

The process of defining the status of religious minorities at the regional level has developed through: b.2.1.) the establishment of *ad hoc* bodies; b.2.2.) the elaboration of specific documents on the notion of religious minority.

#### *b.2.1.) The establishment of ad hoc bodies*

The institutions of the Council of Europe, the European Union and the CSCE have established specific bodies which, in the general framework of the protection of human rights, have dealt with the rights of minorities. In particular, these bodies are: European Commission of Democracy for the Council of Europe; E.U. Network of Independent Experts on Fundamental Rights for the European Union; Office for Democratic Institutions and Human Rights regarding the CSCE.

#### *b.2.2.) The elaboration of specific documents on the notion of religious minority.*

Firstly, the European Commission for Democracy, an advisory body of the Council of Europe, established in 1990, has developed important reflections on the rights of minorities<sup>118</sup>. In particular, within the 1994 report "The protection of minorities"<sup>119</sup>, the group of experts has published a draft Convention on minority rights drawn up by a working party within the Commission. This proposal contains the following definition of religious minority: «The term "minority" shall mean a group which is smaller in number than the rest of the population of a State, whose members, who are nationals of that State, have ethnical, religious or linguistic features different from the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language»<sup>120</sup>. The definition was partly criticized by the experts, who qualified the definitional issue as "a delicate problem" and considered "one solution might be not to include a specific definition in the text but to rely on the usual meaning of the word"<sup>121</sup>. In these terms, a notion of religious minority linked solely to the criterion of nationality is too specific, as it protects only historical minorities and excludes new minorities.

Secondly, The E.U. Network of Independent Experts on Fundamental Rights, in the exercise of its functions on the protection of fundamental rights in the Member States, drafted in 2005 a "Thematic Comment" on the protection of minorities in the European Union<sup>122</sup>. The Comment, with regard to religious minorities contains: the European definition of ethnic, cultural, religious or linguistic minority; the definition of religious minority within the Member States. With regards to the European definition of minority, the editor clarifies that the prevailing notion in Europe identifies ethnic, cultural, religious or linguistic minorities with «a group of persons who reside on the territory of a State and are citizens thereof, display distinctive ethnic, cultural, religious or linguistic characteristics, are smaller in number than the rest of the population of that

<sup>118</sup> CDL(2011)018-e, Compilation of Venice Commission opinions and reports concerning the protection of national minorities, 6 June 2011 ;

<sup>119</sup> European Commission for Democracy through law, *The Protection of Minorities*, Council of Europe Press, Strasbourg, 1994.

<sup>120</sup> Art. 2, Proposal for a European Convention for the protection of minorities, 1994.

<sup>121</sup> European Commission for Democracy through law, *The Protection of Minorities*, cit., 29.

<sup>122</sup> E.U. Network of Independent Experts on Fundamental Rights, *Thematic Comment n. 3 : The Protection of Minorities in the European Union* (CFR-CDF.ThemComm2005.en), 25 April 2005.

state or of a region of that state, and are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language»<sup>123</sup>.

Within the different Member States, however, a distinction is made between: States that do not recognize any specific status to religious minorities, as in the case of France under the 1905 separation law and the constitutional principle of secularism; States that recognize minority status only to specific groups, as in Greece for the Muslim minority of Thrace. Despite the differences, however, the editor highlights the role that the international and European minority legal notion can play in creating a consensus between Member States. In fact, «the Member States with respect to the definition of minorities call for a clarification of the meaning recognized to that notion in Union law, these approaches do not exclude the identification of such a meaning on which a consensus between the Member States may be found, insofar as it is based on the acquis of international and European human rights law»<sup>124</sup>.

Thirdly, in the CSCE, the Office for Democratic Institutions and Human Rights, in the 2014 "Guidelines on the Legal Personality of Religious or Belief Communities", underlined, reaffirming the principles contained in the Document of the Copenhagen Meeting of the Conference on the Human Dimension of 1990<sup>125</sup>, that «Differential treatment relating to the procedure to be granted legal personality is only compatible with the principle of non-discrimination if there is an objective and reasonable justification for it, if the difference in treatment does not have a disproportionate impact on the exercise of freedom of religion or belief by (minority) communities and their members and if obtaining legal personality for these communities is not excessively burdensome»<sup>126</sup>.

## The Social Dimension

On the historical-phenomenological level the definition of religious minority can be associated with four different interrelated criteria, concerning: 1) The origin of the minority group; 2) the nature of the link between individuals and the minority; 3) the single-minority or multi-minority nature of the group; 4) relations between minorities and majorities.

### 1. The origin of the minority group

With regard to the origin of the group we can distinguish between: a) old minorities; b) new minorities; c) contingent minorities.

#### a) Old minorities

In the traditional sense, the origin of the old minorities coincides with the link (voluntary or imposed) between a group and a given territory in two different perspectives: a.1.) Constitution of new States; a.2.) colonization.

The transfer of parts of territory, following agreements between the States, at the end of the First World War, determined the establishment of new religious minorities coinciding with the communities residing in the territories conferred to the new States.

In the case of indigenous peoples in North America or Australia, it is the conquest of the land that turns natives into minorities. In the same sense, the distinction between metropolitan and colonial territories creates a social hierarchy between dominators and dominates and transforms the religion of the colonizers into an instrument of domination.

#### b) New minorities

The new minorities can be produced at the outcome of four different phenomena: b.1.) Migrations; b.2.) proselytism; b.3.) transformation of old majorities into new minorities; b.4.) birth of minority social formations within minorities or majorities; b.5.) birth of virtual minorities.

The migratory phenomena, although determined by the will of the individual to leave the land of origin in order to migrate, may lead to the formation of religious minorities.

The guarantee of freedom of proselytism can determine the quantitative growth of a group that can become a majority in the minority.

<sup>123</sup> E.U. Network of Independent Experts on Fundamental Rights, *Thematic Comment n. 3 (...)*, cit., 10.

<sup>124</sup> E.U. Network of Independent Experts on Fundamental Rights, *Thematic Comment n. 3 (...)*, cit., 10-11.

<sup>125</sup> CSCE, *Document of the Copenhagen meeting of the conference on the human dimension of the CSCE*, 1990, par. 32.

<sup>126</sup> Office for Democratic Institutions and Human Rights, *Guidelines on the Legal Personality of Religious or Belief Communities, Guidelines on the Legal Personality of Religious or Belief Communities*, 2014,

The evolution of the social system through democratic or authoritarian processes can overturn the relationships between the groups. In this sense, in highly secularized societies, traditional religions, even though they may retain a quantitative majority, have often lost their power to direct the life choices of the faithful. In these terms, Pope Benedict XVI used the category of "creative minorities" to qualify the mission of the Catholic Church in an increasingly secularized Europe<sup>127</sup>.

Within the majorities and religious minorities, groups of believers claim their own visibility in relation to specific personal characteristics that are the subject of spaces for theological reflection (gender, sexual orientation, ethnicity). With regard to sexual orientation, for example, there were several phenomena: associations of LGBT believers have encouraged a reflection on identity of homosexual believers and their role in their respective churches (Gay Christian Europe), LGBT associations have examined the relationship between religion and sexual orientation<sup>128</sup>; religious associations are developing projects on dialogue and cooperation in solidarity between LGBT community and religious communities for joint actions against hate speech and discrimination<sup>129</sup>; some religious LGBT communities of believers have been established (mosquée ultra-progressiste in France) and openly gay clergy groups now exist (the Inclusive Imam Group in Europe; the Sisters of Perpetual Indulgence at an international level)<sup>130</sup>.

Virtual minorities use new technologies as a tool to share religious doctrines or specific practices of worship. In these terms, for example, on February 1st every year Muslim women from all over the world celebrate "World Hijab Day" on social media.

c) Contingent minorities (mono-confessional, inter-professional or philosophical groups) are built in relation to specific phenomena, alternatively to support them (ecological movements for the defence of the environment) or in contrast (movements against LGBT rights). These groups can be defined as contingents, as they relate to specific events (approvals of the same-sex marriage law, international climate conferences) and group units appear to be linked to temporary motivations.

## **2. The bond between the individual and the minority**

The link that binds the individual to the group can be qualified in two perspectives: a) affiliation; b) membership<sup>131</sup>.

a) In the first perspective, minority affiliation is freely chosen by the person. The person claims to the majority its minority identity and asks for recognition of its diversity.

b) In the second perspective, the individuals belonging to the minority is not freely chosen by the person who does not choose to belong to the minority group.

## **3. The mono-minority or multi-minority nature of the group**

Religious minorities can stand out on a social level only in relation to the professed religion or in relation to other factors such as language, ethnicity, gender, or sexual orientation. In these cases, you may then have: a) mono-minority group; b) multi-minority group. In particular, among the multi-minority cases are covered: b.1) religious and linguistic minorities (Jews); b.2) religious and Ethnic Minorities (Drusen Communities); b.3) religious, linguistic and ethnic minorities (Armenians); b.4) religious and gender minorities (Muslim feminists); b.5) religious minorities and sexual orientation (The Inclusive Mosque Initiative).

## **4. The relationship between majorities and minorities**

The comparison between majorities and minorities religious defines minority groups on the objective (number of members) and / or subjective-relational (relationship between minorities and majorities) in the sense of: a) absolute; b) relative. In particular, the intersection between the two planes distinguishes: c.1.) absolute minorities on both levels; c.2.) relative minorities on both levels; c.3.) absolute and quantitative

<sup>127</sup> Interview with Benedict XVI on the occasion of the Apostolic Journey to the Czech Republic, 26-28 september 2009, at <http://chiesa.espresso.repubblica.it/articolo/1340228.html>.

<sup>128</sup> ILGA Europe, project "Gay vs God? Breaking down myths about religion and identities of LGBTI people", 2015.

<sup>129</sup> European Network of Religion and belief-ILGA Europe, project "Building Communities of Trust – Project 2-2016-17".

<sup>130</sup> Cf. K. E. LOVAAS-J. P. ELIA-G. A. YEP, *LGBT Studies and Queer Theory: New Conflicts, Collaborations, and Contested Terrain*, in *Journal of Homosexuality*, v. 52, 1-2, 2006 ; P. S. CHENG, *Radical Love. An Introduction to Queer Theology*, New York, 2011.

<sup>131</sup> Cf. F. MESSNER, *Introduction. L'affiliation religieuse en Europe*, in F. MESSNER (sous la direction de), *L'affiliation religieuse en Europe*, Strasbourg, 2017, 5 ss.

minorities in relation to the subjective-relational level; c.4.) relative and quantitative minorities on a subjective-relational level.

c.1.) In the first case, the group is a minority in all parts of the world and the reduced number of believers is the reason why it does not occupy dominant positions (Druze religion).

c.2.) In the second case, the group is, depending on the different territory considered, a majority or a minority, as it either is; numerically reduced and not dominant or majority strong and dominant (Islam, Judaism).

c.3.) In the third case, the group is always on a low numerical level, but in some cases, it is dominant (Catholicism in colonial territories).

c.4.) In the fourth case, the group is not always quantitatively a minority, but is always dominated by a majority or a minority.

## **II. THE LINK BETWEEN SOCIAL DIMENSION AND LEGAL DIMENSION**

From an interdisciplinary point of view, the relationship between the socio-historical dimension of religious minorities and law can be reflected in three different directions: 1) collaboration; 2) conflict; 3) separation.

### **1) *The collaboration between the socio-historical dimension of religious minorities and law***

Collaboration occurs when the minority group contributes to the definition of its legal status and this can happen when: a) the minority officially participates in the legal procedures for the development of bilateral sources (agreements between the state and the religious minorities in Italy); b) officially intervenes in the procedures of discussion of unilateral sources concerning it (role of the International Movement of Jews at the Paris Peace Conference of 1919); c) resort to jurisdiction to obtain the protection of specific rights (minorities' petitions at the International Court of Justice; individual appeals to the Court of Strasbourg and the European Court of Justice); d) elaborate specific cultural and / or legal reflections to raise awareness of the institutions' needs for freedom (role played by the Conference of European Minorities between 1925 and 1930 at the Society of Nations). In these cases, the minority tries to transfer its social identity to the legal protection (implicit or explicit) and this can lead to a tendency to coincide between the two definitions (sociological and legal).

### **2) *The conflict between the socio-historical dimension of religious minorities and law***

The conflict between religious minorities and the law can be traced to four main assumptions: a) generalised conflict between majorities and minorities (terrorism, secession); b) conflict between minorities and human rights (the minority claims their religious freedom to be discriminated against other individuals or social groups); c) conflict between an individual and a minority group (individual and group dynamics violates the fundamental human rights of the person); d) conflict between legal definition and social dimension (law considers minorities groups that are dominant in social dynamics). In such cases, the social definition of a religious minority may conflict with its homologous implicit or explicit legal definition.

### **3) *The separation between the socio-historical dimension of religious minorities and law***

The separation between the social dimension of the religious minority and the juridical model emerges in three hypothesis: a) the characteristics of the religious groups minority quality are not taken into account by the law that uses different criteria (the law recognizes as minorities only traditional confessions); b) the legal system is based on a principle of separation from the religious phenomenon that is not subject to specific regulations (secular-separatist model for regulating relations between the public sphere and the confessional sphere); c) Religious minorities are not subject to an *ad hoc* legal regime but are equated with the majority (the law does not provide for special recognition and protection for minorities).

In these cases, the social dimension of religious minorities is not subject to legal definitions.